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TESTIMONY OF DAVID G. EVANS, ESQ., EXECUTIVE DIRECTOR  
DRUG FREE SCHOOLS COALITION  
BEFORE  
THE NEW JERSEY DEPARTMENT OF EDUCATION  
STATE BOARD OF EDUCATION  
PUBLIC HEARING JULY 18, 2007

I am Executive Director of the Drug Free Schools Coalition. <sup>1</sup> I have been involved with student drug testing for over 12 years. I chaired the Student Drug Testing Task Force at Hunterdon Central High School in Flemington that created their student random testing program. I was also on the similar task force that created programs at North Hunterdon and Voorhees high schools. My daughter went to Hunterdon Central and my son went to North Hunterdon. These programs protected my children and the children of my friends. I saw first hand how well they worked. I have been involved in creating student random drug testing programs across the United States and in Europe and Australia. I have written two books on drug testing for the Thomson-West law book company and have been involved in drug testing through my law practice.

Student random drug testing has been upheld twice by the US Supreme Court and every state supreme court that has considered it including New Jersey. <sup>2</sup>

The program at Hunterdon Central is now the national and international model on how to do it right. The New Jersey Supreme Court upheld the program after a detailed analysis of how the program operates. The Hunterdon Central program was also cited by the Pennsylvania Supreme Court as an example of how to do it right. New Jersey has been the leader in student drug testing. We were the first state to pass comprehensive legislation for student random testing and to mandate steroids testing. Student random drug testing is working well in New Jersey and there is no problem that needs fixing here. Our leadership in student random drug testing will slip away if the proposed rules are implemented.

#### **The problem with the proposed rules**

The major problem with the proposed rules is that they require that student random testing programs comply with the requirements for clinical laboratories in New Jersey under the Department of Health. Under N.J.S.A. 45:9-42.27 a "clinical laboratory" is:

any facility used for the performance of chemical, bacteriologic, virologic, parasitologic, serologic, hematologic, immunohematologic, biophysical, cytologic or other examinations of materials derived from the human body for the purpose of yielding information for the diagnosis, prevention or treatment of disease or the assessment of medical condition. Anatomic pathology is not considered to be within the scope of this definition. Any facility used for the collection, processing and transmission of specimens to another facility for the performance of clinical tests falls within the purview of this act.

We assume that the Department of Health was consulted and they think that student random tests are a clinical laboratory function because students could possibly be sent to

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<sup>1</sup> The Drug Free Schools Coalition is an organization of school administrators, teachers, parents, and student assistance programs dedicated to helping schools become drug-free. The Coalition provides practical guidance on how to create legally sound drug and alcohol-free school programs. We have members in over 21 states.

<sup>2</sup> As examples see: *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, 122 S. Ct. 2559 (U.S. 2002); *Joye ex rel. Joye v. Hunterdon Central Regional High School Bd. of Educ.*, 176 N.J. 568 (2003); *Linke v. Northwestern School Corp.*, 763 N.E.2d 972 (Ind. 2002); *Trinidad School Dist. No. 1 v. Lopez By and Through Lopez*, 963 P.2d 1095 (Colo. 1998); *York v. Wahkiakum School Dist. No. 200*, 110 Wash. App. 383 (Div. 2 2002), review denied, 147 Wash. 2d 1010 (2002)

treatment as a result of testing positive. For example, if a student tests positive they may be evaluated for a drug problem and sent to treatment. However, if the Department of Health's rationale is true, then why do they not seek to regulate employment testing and probation and parole testing all of which can result in persons being referred to treatment?<sup>3</sup> In fact, probation and parole in New Jersey use on-site tests and they buy them through a state contract.

### **The Department of Health has no jurisdiction here**

The law states that:

The State Board of Education, in consultation with the Department of Human Services, shall adopt pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.), the rules and regulations necessary to carry out the provisions of this act. (Senate Bill 500 attached)

The Legislature did not provide jurisdiction to the Department of Health to write these rules. Had they intended these tests to be clinical laboratory tests they would have done so.

### **Drug tests do not diagnose a drug problem**

There have been claims made by some individuals who tested positive on drug tests that the drug test "diagnoses" them as drug abusers. The courts have carefully reviewed numerous claims such as these, and do not agree that drug tests provide any basis for a medical evaluation of disability or illness.<sup>4</sup> Congress has also studied this issue and has been very explicit in its view on this matter in the Americans With Disabilities Act of 1990 where it states that "a test to determine the illegal use of drugs shall not be considered a medical examination." 42 U.S.C. 12114(d)(1)

The New Jersey statute only intended drug testing to be a "means for the early detection of students with drug problems." It did not mandate that the test result is a diagnosis. A positive drug test does not diagnose drug addiction it merely provides the basis for a referral for an evaluation. The evaluation creates the diagnosis. Only a licensed medical or treatment professional can diagnose a patient. All a drug test shows is that at some point a student ingested a drug. It does not show proof of addiction nor is it proof of any medical problem.

The approach of the Department of Health, while well intentioned, applies to medical testing such as pap smears that are used for making a medical diagnosis. That is not the intent of student random testing. The Department of Health approach will significantly increase the costs of drug testing without improving the overall accuracy and effectiveness of the program.

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<sup>3</sup> The federal government has exempted such testing from clinical laboratory requirements. 58 FR 5215

<sup>4</sup> Copeiand v. Philadelphia Police Dept., 840 F.2d 1139 (3rd Cir. 1988), cert denied 109 S.Ct. 1636 (1989); McCleod v. Detroit, 39 FEP Cases (BNA) 225 (E.D. Mich. 1985).

**The use of clinical laboratories for the screening tests will outlaw the use of on-site tests by schools.**

On-site drug tests utilize competitive binding immunoassays, the same scientific principle as the initial tests conducted in certified laboratories. No detailed knowledge of biology and chemistry is needed to administer the tests or to ascertain if it is positive or negative. Neither laboratory apparatus nor expertise in analysis is necessary to perform the tests. All of the chemistry and the expertise to make the test work have been built into the test device. A person performing one of these tests need not be versed in the biochemical detail and scientific basis of the test any more than a person using an instant camera needs to be versed in the intricacies of photography and film developing in order to take and have instant photographs.

The federal Substance Abuse and Mental Health Services Administration (SAMHSA) has evaluated on-site tests (they call them point of care tests POCT). Here's what they have to say:

Non-instrumented POCT for urine testing have been subjected to evaluations by investigators independent of the manufacturers and found to perform similar to that of the instrumented immunoassay tests in certified laboratories. These tests were conducted on both spiked and donor specimens with and without drug analytes. Little difference in the performance of these devices was observed between tests conducted by laboratory technicians and laymen who had been trained in the proper procedures for conducting and reading the tests." Proposed Revisions to Mandatory Guidelines for Federal Workplace Drug Testing Programs, 69 Federal Register 19673, 19677 (April 13, 2004).<sup>5</sup>

This means that:

1. On-site drug screening tests are technically equivalent to laboratory drug screening tests.
2. Non-laboratorians can perform and correctly interpret on-site drug screening tests

We are troubled that the DOE action will have the unintended effect of disrupting the use of these tests, which are necessary to deter student drug use. Hunterdon Central High School has become the national model for student random testing. They have used on-site drug and alcohol tests for years without any problems. Their program was approved by the New Jersey Supreme

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<sup>5</sup> Studies cited include:

Crouch D.J., Hersch R.K., Cook R.F., Frank J.F., and Walsh J.M. (2002). A field evaluation of five on-site drug-testing devices. *J Anal Toxicol*, 26:493.

Kadehjian L.J. (2001). Performance of five non-instrumented urine drug-testing devices with challenging near-cutoff specimens. *J Anal Toxicol*, 25:670.

Peace M.R., Tarnai L.D., Poklis A. (2000). Performance evaluation of four on-site drug-testing devices for detection of drugs of abuse in urine. *J Anal Toxicol*, 24:589.

SAMHSA study entitled "On-site Testing: An Evaluation of Non-Instrumented Drug Test Devices," dated January 29, 1999, available on the Internet at <http://www.workplace.samhsa.gov/ResourceCenter/r409.htm>.

Court. The proposed rules will make testing expensive and difficult to use and will cause this school and others to forgo the use of this valuable tool to deter drug use by our children.

### **Student random testing is not medical testing**

Student random drug testing is used with the intent of furthering school discipline or to monitor athletes or other purposes that do not relate to diagnosis of a medical disease. The availability of these non-diagnostic drug and alcohol tests is essential to the freedom that schools must have to keep cost down.

Various non-medical and/or non-diagnostic reasons have been given by schools for drug testing of students.

1. To promote an orderly learning environment.
2. Reducing school costs associated with drug abuse.
3. Discouraging illegal or immoral conduct by students.
4. To promote a drug free school.
5. To promote school and athletic safety.
6. To prevent vandalism.
7. To keep students off drugs so they can learn.
8. Provide an educational and shaping tool for good citizenship
9. Provide an invaluable deterrent for the child encouraged by peers to experiment with drugs and timely moral support at a critical time giving the student yet another reason to say no to drugs.

### **The medical diagnosis rationale for testing is not accurate.**

At Hunterdon Central each kid who is positive is given a 5 session evaluation by a certified drug counselor and then has to do 5 education sessions. Hardly any, if any, have been referred to drug treatment beyond that. The "health" rationale claims that testing detects kids with drug problems - but the reality is different. Student drug testing is not useful in detecting drug addiction. It is effective in deterring drug use.

Use of the "health" rationale causes other problems for schools such as:

1. If drug tests are "health" tests then they may be covered under the federal HIPAA medical records laws which will mean a big paperwork burden for schools and severe penalties if

they violate HIPAA.

2. If they are "health" tests then schools may have to pay for drug treatment.

3. If they are "health" tests then do the schools have a right to intervene in any health problem a student has? This just invites opposition from parents.

### **On-site testing is accurate**

The DOE rule does not appear to address the current state of on-site testing technology. The DOE rule appears to presume or imply that all on-site tests deliver inferior performance to initial lab tests, an implication which is unfounded. Many on-site tests produce results equal to the results obtained from initial lab testing.

On-site drug tests are currently in use throughout the United States, for use in the workplace, for sports testing, for schools, for insurance analysis, and numerous other non-medical applications. These tests are safe, accurate, cost effective, and easy to use.

This type of testing has been, and is being, employed effectively and satisfactorily throughout the United States. Examples abound of schools and employers and national organizations that have used this type of on-site drug testing (without any apparent deficiencies resulting from the absence of regulation) (see attached).

### **On-site testing is far less expensive**

The most immediate result of the implementation of the proposed rules will be the significant increase in the cost of the testing at every level. The real weight of any cost increases will most greatly impact those smaller schools that have only marginal ability to fund optional implementation. These smaller schools will be forced to confront the elimination or the scaling back of testing, and those schools that are considering implementation will be dissuaded from testing. Very often cost is the controlling factor in deciding to implement student drug testing.

The cost of a laboratory based drug test, including the cost of collection, testing, confirmation and medical review is approximately \$35 per test. The cost of testing 100 students is about \$3,500.

On-site testing can be accomplished at a much lower cost, with greater effectiveness and efficiency. If a school screens with an on-site test, and sends only the positives to a laboratory for confirmation and medical review, the cost of the process is significantly less expensive. An on-site screening test averages \$10 per test or less. For testing 100 students the cost is \$1,000. The cost of the confirmation and medical review is about \$40. Thus, for the 4% positives in the workplace (published annually by Quest Diagnostics) and an average of 3% positives in the schools (estimate based the school drug test model for ONDCP - Hunterdon Central Regional High School, Flemington, New Jersey) is an additional \$120 to \$160. Thus, with an on-site test the expense for 100 students is less than \$1,200 almost 1/3 of a laboratory test program. On-site

testing is about \$12 per test compared to \$35 for a laboratory based test - but the result is the same. On-site testing provides the same information, immediately, at 66% savings. For schools that is more money for books and teachers.

There are other indirect costs as well. There will be the costs of drug use in the schools that decide not test due to the costs and complications. This will result in drug problems in those schools such as increased absenteeism, decreased student productivity, accidents, disciplinary matters and violence

### **The rules appear to limit testing to high schools**

Middle school kids also deserve protection. Many kids start drug use in middle school. They should be allowed to test.

### **Conclusion**

The biggest concern is that unnecessary regulation will result in the schools reducing drug testing or stopping testing altogether as the costs become too high and the process becomes too complicated. Testing has been proven in many studies, both in the workplace and in schools, to be the most effective deterrent to drug use.

Our goals are to give students the opportunity to remain drug free until they are old enough to fully understand the consequences of drug use and why they must avoid drug use. The Legislature did not limit testing to high schools.

### **Recommendation**

1. Appoint a task force made up of representatives from the schools that have random testing programs and seek their advice on how to write the rules. This task force can have a quick turn around time of 60 days.
2. Permit testing for all students not just high school students.

## USERS OF ON-SITE TESTS

The New Jersey courts and probation and parole  
The United States Postal Service (hundreds of thousands of tests per year)  
The United States Administrative Office of the Courts  
A & P Stores  
Ford Motor Co.  
Conagra  
Tyson Chicken  
Iowa Beef Packers  
Oscar Mayer  
Florida Dept. of Law  
Coca-Cola  
Hershey Chocolates  
Family Dollar Stores  
Walmart  
K-Mart  
Supervalu Stores  
Brown and Root Construction Co.  
Snelling Personnel Services  
Healthcare Security Services  
C.G. Financial Services  
U.S. Navy Drug Screening Lab  
Naval Hospital Camp Pendleton, CA  
American University-Justice Program Office  
US Dept of Justice  
Sarasota Drug Court  
The Salvation Army  
Vanguard Security  
Union Carbide Corp  
Armour General Offices  
Laclede Steel Company  
Swift & Company  
Initial Security  
McDonalds Food Center  
Total Risk Management  
Proctor&Gamble  
Georgia Pacific  
American Sub Contractors Assoc.  
Manpower, Inc.  
Ingalls Shipbuilding  
Fire Control Systems, Inc  
Holiday Inn & Casino  
Worldwide Protection Group  
Suffolk District Court

Russell Stover Candies  
U.S. Marine Corp. Recruiters  
Kohler Co.  
Oscar Mayer  
Toys R Us, CA  
Kids R Us, CA  
Disaster Recovery Service  
Raytheon Engineers and Construction  
Navy Recruiting

CHAPTER 209  
SENATE No. 500  
SUBSTANCE ABUSE--PUBLIC SCHOOL TESTING POLICIES

AN ACT authorizing the adoption of substance abuse testing policies in public school districts and supplementing chapter 40A of Title 18A of the New Jersey Statutes.

Be It Enacted by the Senate and General Assembly of the State of  
New Jersey:

<< NJ ST 18A:40A-22 >>

1. [FN1] The Legislature finds and declares that there are many school districts within the State with a growing problem of drug abuse among their students. The Legislature further finds that federal and State courts have held that it may be appropriate for school districts to combat this problem through the random drug testing of students participating in extracurricular activities, including interscholastic athletics, and students who possess school parking permits. The Legislature also finds that a random drug testing program may have a positive effect on attaining the important objectives of deterring drug use and providing a means for the early detection of students with drug problems so that counseling and rehabilitative treatment may be offered.

<< NJ ST 18A:40A-23 >>

2. [FN2] A board of education may adopt a policy, pursuant to rules and regulations adopted by the State Board of Education in consultation with the Department of Human Services, which are consistent with the New Jersey Constitution and the federal Constitution, for the random testing of the district's students in grades 9-12 who participate in extracurricular activities, including interscholastic athletics, or who possess school parking permits, for the use of controlled dangerous substances as defined in N.J.S.2C:35-2 and anabolic steroids. The testing shall be conducted by the school physician, school nurse or a physician, laboratory or health care facility designated by the board of education and the cost shall be paid by the board. Any disciplinary action taken against a student who tests positive for drug use or who refuses to consent to testing shall be limited to the student's suspension from or prohibition against participation in extracurricular activities, or revocation of the student's parking permits.

<< NJ ST 18A:40A-24 >>

3. [FN3] Each board of education shall hold a public hearing prior to the adoption of its drug testing policy. The policy shall be in written form and shall be distributed to students and their parents or guardians at the beginning of each school year. The policy shall include, but need not be limited to, the following:

a. notice that the consent of the student and his parent or guardian for random student drug testing is required for the student to participate in extracurricular activities and to possess a school parking permit;

b. the procedures for collecting and testing specimens;

c. the manner in which students shall be randomly selected for drug testing;

d. the procedures for a student or his parent or guardian to challenge a positive test result;

e. the standards for ensuring the confidentiality of test results;

f. the specific disciplinary action to be imposed upon a student who tests positive for drug use or refuses to consent to testing;

g. the guidelines for the referral of a student who tests positive for drug use to drug counseling or rehabilitative treatment; and

h. the scope of authorized disclosure of test results.

<< NJ ST 18A:40A-25 >>

4. [FN4] The State Board of Education, in consultation with the Department of Human Services, shall adopt pursuant to the "Administrative Procedure Act," P.L.1968, c. 410 (C.52:14B-1 et seq.), the rules and regulations necessary to carry out the provisions of this act.

5. This act shall take effect immediately.

Approved August 29, 2005.

Effective August 29, 2005.

Authorizes school boards to adopt policy for drug testing certain students.

[FN1] N.J.S.A. 18A:40A-22.

[FN2] N.J.S.A. 18A:40A-23.

[FN3] N.J.S.A. 18A:40A-24.

[FN4] N.J.S.A. 18A:40A-25.

NJ LEGIS 209 (2005)

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