



By Email Only

May 5, 2017

Board of Education
Nickerson-South Hutchinson USD 309
4501 West Fourth Street
Hutchinson, KS 67501

Re: Open Letter Opposing USD 309's Proposed Drug Testing Policy

Dear Board Members:

Based on recent press reports, the American Civil Liberties Union of Kansas (ACLU-KS) has learned that the members of the Nickerson-South Hutchinson USD 309 Board of Education are considering the adoption of a random drug testing policy under which students in grades 7 through 12 who participate in any extra-curricular or co-curricular activities would be subject to random drug testing. I have reviewed the proposed policy, and – although the goals of the proposed policy are laudable – the ACLU-KS strongly believes that a random drug testing policy would be counter-productive to the district's objectives. Thus, I write this open letter to the Board of Education in order to highlight the problems with school drug testing policies like the one the Board is now considering.

General Problems with School Drug Testing Programs

- No scientific evidence supports the efficacy of school drug testing programs, according to the American Academy of Pediatrics;ⁱ
- Drug use among high school students has dropped significantly since 2001;ⁱⁱ
- Drug testing does not deter drug use among young people;ⁱⁱⁱ
- Drug testing is expensive, taking away scarce dollars from other, more effective programs that keep young people out of trouble with drugs;^{iv}
 - According to the American Academy of Pediatrics, drug testing programs that target students involved in extracurricular activities typically result in 1 positive test result for every 125 students tested at an average cost of approximately \$3,000 per positive test result;^v

- Students subject to drug testing under programs like USD 309's proposed policy are the least likely to use drugs;^{vi}
- Drug testing policies like USD 309's proposed policy ignore the drug most often used and abused by high school and middle school students – alcohol;^{vii}
- Drug testing programs – over the mid-to-long-term – actually push students involved in extracurricular activities toward drug use, according to the American Academy of Pediatrics;^{viii}
- Drug testing can undermine relationships of trust between students and teachers and between parents and their children;^{ix}
- Drug testing can result in false positives, leading to the punishment of innocent students;^x
- Drug testing does not effectively identify students who have serious problems with drugs;^{xi} and
- Drug testing may lead to unintended consequences, such as students using drugs that are more dangerous but less detectable or not tested for by a drug screen.^{xii}

Technical Problems with School Drug Testing Programs

In addition to these issues, drug testing is fraught with a wide-array of technical problems and concerns. The federal government has developed a rigorous technical protocol for employment-based drug testing of safety-sensitive workers like airline pilots, truck drivers, and railroad engineers.^{xiii} Those regulations set standards for sample collection and chain of custody protections, and they require confirmation testing by GC/MS because initial screening tests are prone to false results. Those regulations also require that a doctor (known as a Medical Review Officer or MRO) review the test data and speak to the tested employee to rule out spurious results.

With respect to these technical issues, Indiana University's School of Public Health recently advised school districts as follows:

If a school is to implement this strategy it is imperative that the school follow all federal guidelines including: obtaining and securing medical history, following strict collection procedures, employing secondary testing of positive results, providing access to nonpunitive actions for positive results, maintaining separation of academic, behavioral, and

results records, and destroying results and related files upon student leaving the school under any circumstance.^{xiv}

The proposed USD 309 drug testing policy fails to address many of these technical concerns at all and only briefly addresses others such as confirmation testing. But three specific technical issues in USD 309's draft policy jumps out.

First, the draft policy does not state how urine specimens will be collected or whether a student's production of a urine specimen will be observed and, if so, how such observation will be accomplished. Direct observation of specimen collection is inherently invasive of protected privacy interests of students in ways that can violate the Fourth Amendment.^{xv} Leaving this issue undefined opens the policy to constitutional challenge.

Second, Section 7, "Process for Appeals," states that "the parent has the right to visit with the medical review officer (MRO) to communicate any medically authorized substances that might have resulted in a non-negative test. The MRO will determine whether the information provided by the parent could account for the non-negative result." In a federally-required safety-sensitive employment drug testing program, the MRO must contact the test subject and inquire about other possible causes of a positive test result *before* certifying a test result as positive. Here, the draft policy omits that step and leaves it to the parents to request this critical inquiry after-the-fact. This omission will compromise the process by saddling students with positive drug test results in the face of a benign explanation.

Third, it is unclear which drugs the district's vendor will screen students for because the draft policy is vague and merely includes a long list of drugs for which the vendor *may* test students. Although the list includes alcohol, the drug most commonly used by USD 309's students, urine drug testing is not an effective means of testing for alcohol use because alcohol metabolites remain in a subject's system for only 12 to 24 hours.^{xvi} The same problem exists for the vast majority of the other drugs on the list, which are typically detectable by urinalysis for at most a few days after use.^{xvii} This significantly undermines the effectiveness of the proposed drug testing program.

Additional Problems Specific to USD 309's Draft Policy

USD 309's draft drug testing policy would subject to random urinalysis drug testing all students who participate in any "extra-curricular and co-curricular activities and school-sponsored events." The list of activities covered by the drug testing program makes it clear that this would include students involved

in academic activities and clubs (including National Honors Society) as well as those students who merely attend school dances, performances, and sporting events. Although the Supreme Court has upheld random drug testing policies that target students who participate in athletics and extra-curricular activities like band,^{xviii} we have found no cases upholding a drug testing program that requires testing of students who passively attend school events, and the ACLU of Kansas is actively considering filing suit to challenge such an overbroad drug testing policy. To justify such a broad drug testing program, it would be incumbent upon the district to come forward with specific and clear evidence that USD 309's schools face a serious drug problem.^{xix} Here, USD 309 has made no effort to justify its proposed drug testing policy based on any statistical or other evidence that the district faces a significant drug problem.

In addition, Section 6, "Procedures in the Event of a Non-Negative Result," would require parents to pay for all follow-up drug tests, chemical analyses, and drug treatment programs that the draft policy requires students to comply with after a positive test result. If the students fail to comply with these requirements, they would apparently be barred from all further participation in school activities. Because a significant percentage of USD 309's students in grades 7 through 12 qualify for free and reduced lunch,^{xx} this economic requirement would be an unconscionable and unaffordable burden on the district's poorer parents.

Other Approaches are More Effective

According to Daniel Romer, director of the Annenberg Public Policy Center at the University of Pennsylvania, "[t]he bad news is that a policy of drug testing has no effect on students starting to use alcohol, cigarettes or marijuana. There's also no effect on escalating the use of those substances."^{xxi} In contrast, however, effective alternatives to drug testing *do exist*. Those alternatives emphasize education, discussion, counseling, extracurricular activities, and building trust between students and adults.

According to a 2013 study, students in schools with positive climates were 15 percent less likely to start smoking cigarettes and 20 percent less likely to start using marijuana than students at schools without positive climates.^{xxii} In an issue brief released in September 2013, Dr. Romer summarized the scholarly research showing that the most effective way to address drug use in schools is to foster a positive school environment:

If schools are concerned about students going down a dysfunctional path of drug use, they should consider other approaches that have been found to be effective in preventing the initiation of drug use or

identifying students in need of treatment. Those include the training of life skills, drug education, universal confidential screening using self-reporting, better school climates that encourage the norms of drug avoidance, and greater involvement of parents and teachers to help recognize the signs of drug use so that they can intervene and refer youth for treatment, if necessary. Looking for those cases by randomly testing students is less effective, does little to educate students about the hazards of drug use, and misses the ones more likely to be at risk.^{xxiii}

Similarly, the Indiana University School of Public Health recently released a brief report that buttressed Dr. Romer's recommendations:

It is strongly advised that schools allocate their resources to an evidence-based prevention strategy to mitigate risk factors, drug use, and associated outcomes. Some evidence-based programs for the middle or high school settings are Lifeskills Training, Positive Action, and Project Towards No Drug Abuse (blueprintsprograms.com). Communities are advised to intentionally choose evidence based programming that is intended both for the populations and desired outcomes. Research and third party counsel may be helpful in choosing the appropriate programming.^{xxiv}

Although the district's proposed policy states that "[t]he objective is to provide a system of assistance for students, as well as a purpose for opting out of the peer pressures associated with using drugs/alcohol," drug testing appears to be only tool in the program. But that focus is ineffective and ignores better and more economically efficient options.

Conclusion

If the Board were to adopt the proposed random drug testing policy, it would be a major mistake because it would invest the district's precious fiscal resources in a less effective, more problematic approach to student drug use and because it would target the students who are least likely to use drugs in the first place.

In summary, a drug testing program would pour scarce district resources into the pockets of a testing laboratory and would do nothing to serve the students who are most likely to use drugs – the students who are not involved in extracurricular activities. Rather than waste the taxpayers' money on a feel-good drug testing program, the district should research and implement an evidence-based program that will bring a positive climate to all of the district's schools. The district's students would be much better served by investing that

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money in developing programs to insure that Nickerson-South Hutchinson's schools have a positive climate. That emphasis would help all students, not just those involved in extracurricular activities.

Thank you for considering these points as you decide on this important policy issue.

Sincerely,



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ⁱ Sharon Levy, MD, MPH, FAAP, Miriam Schizer, MD, MPH, FAAP, "Adolescent Drug Testing Policies in Schools," 135 Pediatrics 782-783 (Apr. 2015), <http://pediatrics.aappublications.org/content/early/2015/03/25/peds.2015-0054?sid=e82c4718-4c72-4eef-ac99-cc7784d93b32>.

ⁱⁱ National Institute of Drug Abuse, 2013 Monitoring the Future study of 8th, 10th, and 12th graders, <https://www.drugabuse.gov/related-topics/drug-testing/faq-drug-testing-in-schools>.

ⁱⁱⁱ The results of a 2010 study by the U.S. Department of Education's Institute for Education Sciences showed that a random student drug testing "program's effect appeared to be limited to those students who were subject to testing, for the drugs that were likely to be detected, and only during the 30-day period prior to taking the survey" and that such drug testing had no effect on student drug usage in the longer term, specifically over a time frame of six or twelve months. Daniel Romer, Ph.D., "Issue Brief on Drug Prevention in Schools," p. 3, Annenberg Public Policy Center, Univ. of Pennsylvania (Sept. 2013), <http://www.annenbergpublicpolicycenter.org/school-drug-tests-ineffective-but-a-positive-climate-might-work/>. See also Ryoko Yamaguchi, Lloyd D. Johnston, and Patrick M. O'Malley, "Drug Testing in Schools: Policies, Practices, and Association With Student Drug Use," The University of Michigan, Youth Education and Society Study, 4-5 (2003), http://www.drugpolicy.org/docUploads/Johnston_sdt_study.pdf; Sharon R Sznitman, Ph.D., and Daniel Romer, Ph.D., "Student Drug Testing and Positive School Climates: Testing the Relation Between Two School Characteristics and Drug Use Behavior in a Longitudinal Study," Journal of Studies on Alcohol and

Drugs, 75(1), 65–73 (2014),
<http://www.jsad.com/doi/abs/10.15288/jsad.2014.75.65?journalCode=jsad>

^{iv} Christopher Ingraham, “School drug tests: Costly, ineffective, and more common than you think,” *The Washington Post*, Apr. 27, 2015,
https://www.washingtonpost.com/news/wonk/wp/2015/04/27/schools-drug-tests-costly-ineffective-and-more-common-than-you-think/?utm_term=.6cb091c4d7f6.

^v *Supra*, n.v, Christopher Ingraham, “School drug tests: Costly, ineffective, and more common than you think,” *The Washington Post*, Apr. 27, 2015.

^{vi} Van E. Cooley, “A Study To Determine the Effect of Extracurricular Participation on Student Alcohol and Drug Use in Secondary Schools,” Midwestern Educational Research Association (Oct. 1992),
<http://files.eric.ed.gov/fulltext/ED350551.pdf>.

^{vii} “School Based Student Drug Testing Programs,” Indiana University School of Public Health, 6 Prevention Resource Center 1 <http://drugs.indiana.edu/spf/docs/School%20Based%20Student%20Drug%20Testing%20Programs.pdf>. See also “Testing for Drugs of Abuse in Children and Adolescents: Addendum – Testing in Schools and at Home,” American Academy of Pediatrics, Committee on Substance Abuse and Council on School Health, 119 Pediatrics 627, 629 (2007), <http://pediatrics.aappublications.org/content/pediatrics/119/3/627.full.pdf>.

^{viii} “[A]thletes who were drug tested experienced an increase in known risk factors for drug use, including an increase in normative views of use, belief in lower risk of use, and poorer attitudes toward the school.” “Testing for Drugs of Abuse in Children and Adolescents: Addendum – Testing in Schools and at Home,” American Academy of Pediatrics, Committee on Substance Abuse and Council on School Health, 119 Pediatrics at 628 (2007),
<http://pediatrics.aappublications.org/content/pediatrics/119/3/627.full.pdf>.

^{ix} Clea A. McNelly, James M. Nonnemaker, and Robert W. Blum, “Promoting School Connectedness: Evidence from the National Longitudinal Study of Adolescent Health,” *Journal of School Health* 72(4), 138-140 (2002),
<http://www2.gsu.edu/~wwwche/Promoting%20School%20Connectedness%20Evidence%20from%20the%20Nat%20Longitudinal%20Study%20of%20Adolescent%20Health.pdf>

^x For example, food containing poppy seeds can result in positive test results for opiates, while codeine can result in positive results for heroin. F. Leland McClure, “Poppy Seeds and the Interpretation of Opiates Drug Testing,”

Clinical Education Center (Oct. 26, 2015),
<http://education.questdiagnostics.com/insights/88>. See also “Indiana University, *supra* note vi, at 1.

^{xi} Sharon Levy, MD, MPH, FAAP, Miriam Schizer, MD, MPH, FAAP, “Adolescent Drug Testing Policies in Schools,” 135 *Pediatrics* 782 (Apr. 2015),
<http://pediatrics.aappublications.org/content/early/2015/03/25/peds.2015-0054?sid=e82c4718-4c72-4eef-ac99-cc7784d93b32>.

^{xii} Indiana University, *supra* note vi, at 1.

^{xiii} See, e.g., U.S. Dept. of Transportation, Office of Drug & Alcohol Policy & Compliance, “What Employees Need to Know about DOT Drug & Alcohol Testing,” <https://www.transportation.gov/sites/dot.dev/files/docs/ODAPC%20EmployeeHandbook%20En.pdf>.

^{xiv} “School Based Student Drug Testing Programs,” Indiana University School of Public Health, Prevention Resource Center 1(6), 1, <http://drugs.indiana.edu/spf/docs/School%20Based%20Student%20Drug%20Testing%20Programs.pdf>

^{xv} *Byrne v. Mass. Bay Transp. Auth.*, 196 F. Supp. 2d 77, 81-82 (D. Mass. 2002) (distinguishing direct and indirect forms of observation and holding that direct or close observation of genitalia raises serious constitutional questions).

^{xvi} Substance Abuse and Mental Health Services Administration (SAMHSA), *Substance Abuse: Clinical Issues in Intensive Outpatient Treatment* (2006), Appendix B, Exhibit B-1, <https://www.ncbi.nlm.nih.gov/books/NBK64092/>.

^{xvii} SAMHSA, *supra*, note xvi.

^{xviii} *Veronia v. Acton*, 515 U.S. 646 (1995) & *Board of Educ. v. Earls*, 536 U.S. 822 (2002).

^{xix} *Board of Educ. v. Earls*, 536 U.S. at 835.

^{xx} 51.35% of students enrolled at Nickerson High School are economically disadvantaged, and 55.4% of students enrolled at Reno Valley Middle School are economically disadvantaged. http://ksreportcard.ksde.org/demographics.aspx?org_no=D0309&bldg_no=3166&rptType=1.

^{xxi} Daniel Romer, Ph.D., “Issue Brief on Drug Prevention in Schools,” p. 3, Annenberg Public Policy Center, Univ. of Pennsylvania (Sept. 2013), <http://www.annenbergpublicpolicycenter.org/school-drug-tests-ineffective-but-a-positive-climate-might-work/>.

^{xxii} “School drug tests don't work, but ‘positive climate’ might.” Science Daily, 13 January 2014, <https://www.sciencedaily.com/releases/2014/01/140113100612.htm>.

^{xxiii} Daniel Romer, Ph.D., “Issue Brief on Drug Prevention in Schools,” p. 3, Annenberg Public Policy Center, Univ. of Pennsylvania (Sept. 2013), <http://www.annenbergpublicpolicycenter.org/school-drug-tests-ineffective-but-a-positive-climate-might-work/>.

^{xxiv} <http://drugs.indiana.edu/spf/docs/School%20Based%20Student%20Drug%20Testing%20Programs.pdf> (copy attached).