IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

BRIAN FAGNANO, Parent and Natural Guardian of B.F., a Minor, Plaintiff	:	DOCKET NO. 11-00908
vs.	:	CIVIL ACTION – IN LAW AND IN EQUITY
LOYALSOCK TOWNSHIP SCHOOL DISTRICT, Defendant	:	PRELIMINARY INJUNCTION

O P I N I O N AND O R D E R

AND NOW, this 4th day of April, 2012, upon consideration of Plaintiff's Motion for Preliminary Injunction to enjoin Defendant from enforcing its student drug testing policy (Loyalsock Township School District Policy 227.1), briefs in support and in opposition thereof, and following a hearing held thereon, it is hereby ORDERED and DIRECTED that Plaintiff's motion is GRANTED. Accordingly, in regard to B.F., the District, its officials, employees, and agents are preliminarily enjoined from implementing, maintaining, or enforcing the drug testing policy against B.F.

I. Factual Background

On February 23, 2011, the Loyalsock Township School District (herein "District") adopted Loyalsock Township School District Policy 227.1 (herein "drug testing policy" or "policy"). The District implemented this policy for the purpose of creating "an alcohol and drug-free setting for Loyalsock Township School District." Pl. Ex. 1, 1. The policy's goals include: preventing disruptions of the educational process, protecting the students' health and safety, deterring students' use of drugs, providing students access to assistance programs, and enhancing students' communications with their parents or guardians. All of those students from grades 6 through 12 participating in any extracurricular activity or those students meeting the District's

guidelines for driving on campus and wishing to park on campus automatically come into the policy's purview. Also, students may elect to participate in the program with the consent of their parent or guardian.[1] The District requires both the student and their parent or natural guardian to consent to the drug testing. If these consents are not obtained, students may not participate in any extracurricular activity or park on campus.

At the time when the drug testing policy was implemented, B.F. was a sixteen-year-old, eleventh grade student at Loyalsock Township High School. On March 18, 2011, the District notified B.F. that he was suspended from the Leo club, a student volunteer organization, because he refused to sign the randomized drug testing consent form. B.F. testified that soon thereafter he was suspended from participating in the Scholastic Scrimmage group and that he was not permitted to be inducted into the National Honor Society, despite meeting all of the society's eligibility requirements, because he refused to sign the drug testing consent form. B.F. also testified that he now has a driver's license and would be otherwise eligible to park on campus if he signed the drug testing consent from.

II. Procedural Background

On June 1, 2011, Plaintiff Brian Fagnano, parent and natural guardian of B.F., filed on behalf of B.F., a complaint in equity against the District. Plaintiff alleged that the policy requiring random drug testing of all students involved in any extracurricular activities, as well as those students who meet the District's guidelines to drive on campus and wish to obtain a parking permit, violates B.F.'s rights under Article I, Section 8 of the Constitution of the Commonwealth of Pennsylvania. In that complaint, Plaintiff requested: 1) an order declaring the drug testing policy unconstitutional; 2) a preliminary and permanent injunction enjoining the

[1] The voluntary aspect of this drug testing policy is not being contested by Plaintiff, and this Court will not address voluntary student drug testing by the District.

District from implementing, maintaining, or enforcing the drug testing policy; 3) a preliminary injunction permitting B.F. to be a candidate for student body president in the June 3, 2011 election; and 4) other relief that this Court deemed proper.

On June 1, 2011, Plaintiff filed on behalf of B.F. a Motion for Injunction regarding the June 3, 2011 election for student body president. On June 2, 2011, upon agreement of the parties, this Court entered an order permitting B.F. to run for the position of class president during the June 3, 2011 election. B.F. testified that he was not elected senior class president.

A hearing on Plaintiff's request for a preliminary injunction was originally scheduled for July 25, 2011. On July 21, 2011, this Court received an Application for Continuance from Plaintiff stating that he was seeking alternative representation. On that date, this Court granted Plaintiff's continuance request; this Court ordered Plaintiff to request a hearing once new counsel was obtained. After another application for continuance was received and granted by this Court, this Court held a hearing on the request for preliminary injunction on March 27, 2012.

III. Discussion

In this matter, Plaintiff is entitled to a preliminary injunction. In order to obtain a preliminary injunction within the Commonwealth, the party requesting the injunctive relief must establish six "essential prerequisites." *Warehime v. Warehime*, 860 A.2d 41, 46 (Pa. 2004). *See also Brayman Constr. Corp. v. Dep't of Transp.*, 13 A.3d 925, 935 (Pa. 2011); *Summit Towne Ctr., Inc. v. Shoe Snow of Rocky Mount, Inc*., 828 A.2d 995, 1001 (Pa. 2003). In particular, the requesting party must establish:

> (1) relief is necessary to prevent immediate and irreparable harm that cannot be adequately compensated by money damages; (2) greater injury will occur from refusing to grant the injunction than from granting it; (3) the injunction will restore the parties to their status quo as it existed before the alleged wrongful conduct; (4) the petitioner is

> likely to prevail in the merits; (5) the injunction is reasonably situated to abate the offending activity; and (6) the public interest will not be harmed if the injunction is granted.

Brayman Constr. Corp., 13 A.3d at 935. *See also Warehime*, 860 A.2d at 46-47; *Summit Towne Centre, Inc.*., 828 A.2d at 1002. When considering a party's likelihood of success on the merits, in *Ambrogi v. Reber*, 932 A.2d 969 (Pa. Super. Ct. 2007), our Superior Court held that "the party seeking an injunction is not required to prove that he will prevail on his theory of liability, but only that there are substantial legal questions that the trial court must resolve to determine the rights of the party." *Id*. at 976. In this matter, the burden of proof is placed on Plaintiff because he is the party requesting the injunctive relief. *Warehime*, 860 A.2d at 47.

This Court will address each of the six prerequisites in turn. However, this Court notes that the parties agreed during the injunction hearing that two of the prerequisites are almost dispositive of this matter; these prerequisites include Plaintiff's likelihood of success on the merits of his claim and the immediate and irreparable harm to Plaintiff. *See Warehime*, 860 A.2d 46-47. Therefore, the crux of this Court's analysis will be placed on these two factors, and they will be addressed first.

1. **<u>Plaintiff's Likelihood of Success on the Merits of his Claim</u>**

Plaintiff is likely to succeed on the merits of his claim based upon our Supreme Court's decision in *Theodore v. Delaware Valley School District*, 836 A.2d 75 (Pa. 2003). In *Theodore*, the Supreme Court of the Commonwealth of Pennsylvania held that a randomized drug testing program, such as the one at issue, will "pass constitutional scrutiny *only* if the District makes some *actual showing of the specific need* for the policy and an *explanation* of its basis for believing that the policy would address that need." *Theodore*, 836 A.2d at 92 (emphasis added). In this matter, the District has failed to show: 1) that there is a drug or alcohol problem within the

District requiring a randomized drug testing policy, and 2) that the policy that the District has chosen will address that problem.

In *Theodore*, our Supreme Court affirmed our Commonwealth Court's reinstatement of a complaint on behalf of the students affected by the Delaware Valley School District's drug testing policy. 836 A.2d at 96. That Court held that the Delaware Valley policy was not constitutional on its face because "the suspicionless search policy at issue has not been supported by sufficient proof that there is an *actual drug problem* in the Delaware Valley School District; by *individualized proof* that the *targeted students* are at all likely to be part of whatever drug problem may (or may not) exist; or by *reasonable proof* that the policy *actually addresses* whatever drug problem may exist." *Id*. (emphasis added).

In holding so, our Supreme Court upheld the Commonwealth's strict standard of protection for individual privacy rights. In *Theodore*, our Supreme Court noted that the Delaware Valley School District's drug testing policy would pass constitutional scrutiny if it was challenged only under the Fourth Amendment of the Constitution of the United States. 836 A.2d at 88. However, *individual privacy rights within the Commonwealth are afforded greater protection* by Article I, Section 8 of the Constitution of the Commonwealth than by the Fourth Amendment of the Constitution of the United States. *Id*. Particularly, our Supreme Court noted that:

> 'the unique policy concerns safeguarding the individual right to privacy in Pennsylvania bring a greater degree of scrutiny to all searches where the protection of Article I, Section 8 is invoked.' … Article I, Section 8 '*mandates greater scrutiny* in the school environment.'

Id. at 88 (citing *In the Interest of F.B.*, 726 A.2d 361, 365 (Pa. 1999) (emphasis added)).

Turning to the drug testing policy at question in this matter, the policy states that its implementation was based upon documented drug and alcohol incidents occuring within the

District; these incidents include "students attending athletic events and school sponsored dances while intoxicated and the discovery of illegal and prescription drugs in student lockers and backpacks." Pl. Ex. 1, 1. Additionally, the policy was based upon "the longitudinal results of the Pennsylvania Youth Survey." *Id.* The District's drug and alcohol incident data spreadsheet provides information on the total number of drug and alcohol related incidents that were reported to school officials from 2003 through 2012. Pl. Ex. 4. It is uncontested that some of the incidents on this spreadsheet were verified as actually occurring, while other incidents were "anecdotal," i.e. unconfirmed events. On this spreadsheet, when taking to account only the non-anecdotal incidents, the number of reported incidents per school year range from one (1) incident reported in the 2008-09 school year to eight (8) incidents reported in the 2004-05 school year; the District's Superintendent testified to the accuracy of these figures. Pl. Ex. 4.

Plaintiff's expert in statistics and econometrics testified that the drug and alcohol incident data spreadsheet and the Pennsylvania Youth Survey do not show any increase of drug use in the student population within the District. Additionally, the expert testified that his opinion was that *those students who are not covered* by the drug testing policy *are 4.7 times more likely to be involved in* a drug and alcohol related incident. In short, the targeted group is much less likely to have a significant drug issue than the untargeted students.

This Court notes the District's Superintendent's testimony that he had no information about a drug or alcohol problem regarding those students participating in extracurricular activities or those students driving to school, i.e. those students targeted by the drug testing policy. Additionally, a District School Board member testified that, while formulating the policy, she did not remember seeing any information that stated randomized drug testing would

decrease drug and alcohol use within the District. This Court did not receive any evidence that this policy would likely deter drug use among the targeted students.

Based on this evidence, this Court cannot conclude that the District can prove an actual need for the drug testing policy or an explanation of the basis for believing the policy would address the District's need. Under *Theodore*, these two factors must be presented to this Court by the District in order for this Court to uphold the District's drug testing policy.

In this case, it is apparent to this Court that the District's policy violates the constitutional mandates set forth by our Supreme Court in *Theodore*. Therefore, based upon this analysis, this Court believes that Plaintiff has met his burden in proving that he will likely succeed on the merits of his claim.[2]

2. <u>Immediate and Irreparable Harm to Plaintiff</u>

Plaintiff has satisfied his burden in showing that immediate and irreparable harm that cannot be adequately compensated by money damages will fall upon B.F. without the grant of this preliminary injunction. Irreparable harm causes "damage which can be estimated only by conjecture and not by an accurate pecuniary standard." *Ambrogi*, 932 A.2d at 978 n.5.

Irreparable harm may occur upon the violation of one's constitutional rights. *See Lewis v. Kugler*, 446 F.2d 1343, 1350 (3d Cir. 1971). In *Lewis*, the Third Circuit held that "[p]ersons who can establish that they are being denied their constitutional rights are entitled to relief, and it can no longer be seriously contended that an action for money damages will serve adequately to remedy unconstitutional searches and seizures." *Id*. In that decision, the Third Circuit Court cited to the Supreme Court of the United States' decision in *Mapp v. Ohio*, 367 U.S. 643 (1961), when stating that "[t]he Supreme Court has characterized the prospect of pecuniary redress for

[2] Two other Courts of Common Pleas have made similar analyses. *See M.T. v. Panther Valley School District*, No. 11-0552, Carbon County (May 5, 2011); *M.K. v. Delaware Valley School District*, No. 434-2011, Pike County (July 21, 2011).

the harm suffered as a result of unconstitutional searches and seizures as 'worthless and futile.'" *Lewis*, 446 F.2d at 1343 (citing *Mapp*, 367 U.S. at 652). Therefore, equitable relief is appropriate in those cases. *See Lewis*, 446 F.2d at 1353.

This case involves the fundamental right to privacy. In this matter, the District forced B.F. to forego this right in order to participate in extracurricular activities and to park at school. When B.F. refused to consent to the randomized drug testing policy, the District placed B.F. in the position to choose between his constitutional rights and his participation in extracurricular activities. Nothing in the record suggests that B.F. has a drug or alcohol problem, and B.F. testified as such.

Although the participation in athletics and extracurricular activities is a privilege and not a right, this Court cannot overlook the underlying value that participation in extracurricular activities provides to students. As stated in *Board of Education v. Earls*, 536 U.S. 822, 845 (2002) (Ginsburg, J., dissenting):

> [p]articipation in such activities is a key component of school life, essential in reality for student applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience. Students "volunteer" for extracurricular pursuits in the same way they might volunteer for honors classes: They subject themselves to additional requirements, but they do so in order to take full advantage of the education offered to them.

Id. (citations omitted). The District's Superintendent testified that the policy was implemented against all extracurricular activities because participation in these activities is a privilege and not a right. However, enrollment in these extracurricular activities, in and of itself, does not justify the drug testing policy that has been implemented within the District. *See Theodore*, 836 A.2d at 96. The District cannot target and make an example this group of students because they are considered to be role models or leaders; the District must base the drug testing policy on an existing drug or alcohol problem among the targeted students. *See* 836 A.2d at 95.

In this matter, as in *Theodore*, the District is forcing B.F. to make an unconstitutional choice without a sufficient justification for the drug testing policy. During the preliminary injunction hearing, the District's Superintendent testified that he had no information that supported the conclusion that students involved in extracurricular activities or students who wished to park on campus were more likely to use drugs or alcohol. Therefore, Plaintiff has proved that immediate and irreparable harm, in the form of a violation of B.F.'s constitutional right to privacy, will occur if a preliminary injunction is not granted in this matter.

3. Injury Resulting

Granting a preliminary injunction in this matter is appropriate because greater injury will result from denying the injunction than granting it. Plaintiff will likely succeed on his claim under *Theodore*'s precedent. Plaintiff's right to relief is clear; denying this injunction would support the District's violation of B.F.'s constitutional rights within the Commonwealth. Therefore, greater injury will result from denying the injunction than from granting it.

4. Restoration of the Status Quo

Granting a preliminary injunction in this matter will restore the parties to the status quo prior to the adoption of the student drug testing policy. A preliminary injunction should maintain the status quo of the parties that immediately preceded the pending controversy. *York Group, Inc. v. Yorktowne Caskets, Inc.*, 924 A.2d 1234, 1244 (Pa. Super. Ct. 2007). The District adopted the drug testing policy on February 23, 2011. Therefore, the status quo of the parties in this case is that time prior to the enactment of the drug testing policy, i.e. when B.F. could participate in extracurricular activities without submitting to the randomized drug testing. Therefore, the granting of a preliminary injunction in this case would restore B.F. and the District to the status quo prior to the enactment of the policy.

5. Reasonableness of the Preliminary Injunction

Granting a preliminary injunction in this case will reasonably abate the offending activity. The District has not provided this Court with sufficient information regarding an actual need for this policy pursuant to our Supreme Court's ruling in *Theodore*. Therefore, the District is currently infringing on the constitutional privacy rights of B.F. The grant of a preliminary injunction in this case would prevent the District from implementing and maintaining this policy against B.F., and, therefore, the injunction would abate the current infringement of B.F.'s constitutional rights.

6. Protecting the Public Interest

Lastly, granting a preliminary injunction in this matter will protect the public interest. In this matter, it is apparent that the District is infringing on B.F.'s rights as provided for by the Constitution of the Commonwealth of Pennsylvania. Therefore, the public interest will be enhanced through the grant of this preliminary injunction because this Court will protect B.F.'s right to privacy. The constitutional rights of B.F. outweigh the drug testing policy in this matter because the policy is not based on *Theodore*'s requisite statistical data. Therefore, the public interest will be protected through the grant of this preliminary injunction.

IV. Conclusion

In short, this Court finds that Plaintiff has satisfied his burden and is entitled to a preliminary injunction in this matter. This Court commends the Loyalsock Township School Board for the laudable goal of trying to address drug and alcohol problems in its public schools. However, this Court and the District are constrained by our Supreme Court and the Constitution of the Commonwealth of Pennsylvania when implementing drug testing policies within the District. Our Supreme Court requires more than a generalized concern about drug or alcohol

problems within a school district in order to support a drug testing policy similar to the type that this District attempted to implement.

O R D E R

AND NOW, this 4th day of April, 2012, pursuant to this Opinion, it is hereby ORDERED and DIRECTED that Plaintiff's Motion for a Preliminary Injunction is GRANTED. Defendant Loyalsock Township School District, its officials, employees, and agents are preliminarily enjoined from enforcing, maintaining, or taking steps to further the random drug testing provisions of Policy 227.1 against B.F. Defendant shall allow B.F. to resume participating in any extracurricular activity that has accepted his membership. Defendant shall allow B.F. to obtain a permit to park on campus provided that he meets all of the other eligibility requirements

Pursuant to the provisions of Pa. R.C.P. 1513(b), Plaintiff shall post an approved bond or deposit legal tender with the Prothonotary of Lycoming County in the amount of one hundred dollars ($100.00). This injunction will not be operative until Plaintiff posts such bond.

BY THE COURT,

_____ _____

Date Richard A. Gray, J.

RAG/abn

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