

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

BRANDON FAGNANO,	:	DOCKET NO. 11-00,908
Plaintiff,	:	
	:	CIVIL ACTION
vs.	:	
	:	INJUNCTION
LOYALSOCK TOWNSHIP SCHOOL DISTRICT,	:	
Defendant.	:	NON-JURY VERDICT

VERDICT

This matter arises out of a drug testing policy that was implemented by the Loyalsock Township School District (the “District”). The Court held a preliminary injunction hearing in the above-captioned matter on March 27, 2012.¹ Following the injunction hearing, the Court granted Plaintiff a preliminary injunction by Opinion and Order dated April 4, 2012. On April 11-12, 2013, the Court held a non-jury trial in this matter.² Following the trial, the parties requested a supplemental briefing period; this matter is now ripe for review.³ The Court hereby enters a verdict in favor of Defendant and against Plaintiff, along with the following findings of fact and conclusions of law.

I. Findings of Fact

a. Policy 227.1

1. On February 23, 2011, the District adopted a policy entitled “227.1. STUDENT DRUG TESTING” (the “policy”).⁴ Ex. P-1.
2. The purpose of the policy is “to create an alcohol and drug-free setting for Loyalsock Township School District.” *Id.* at 1.

¹ The transcript from March 27, 2012, is hereafter referenced as Hrg. T.

² The transcript from April 11, 2013, is hereafter referenced as N.T.I., while the transcript from April 12, 2013, is hereafter referenced as N.T.II.

³ The Court received its last brief on May 9, 2013.

⁴ In the summer of 2010, the District adopted a reasonable suspicion drug testing policy. Hrg. T., 25: 23 - 26: 10 and 94: 1-4. *See also* Ex. P-5. This policy permits the District to obtain urine or breathalyzer tests from any student who appears to be under the influence of drugs or alcohol at school. Plaintiff is not contesting the legality of the reasonable suspicion testing policy.

3. The policy lists examples of documented drug and alcohol incidents, including “students attending athletic events and school sponsored dances while intoxicated and the discovery of illegal and prescription drugs in student lockers and backpacks.” *Id.*
4. The policy provides that it was “based not only on documented incidents of student alcohol and drug use, but also the longitudinal results of the Pennsylvania Youth Survey [PAYS] completed by students in grades 6, 8, 10, and 12, on a biannual basis.” *Id. See also* Hrg. T., 29: 22 - 34: 24.
5. The policy list four (4) goals:
 1. Prevent disruption to the educational process.
 2. Protect the health and safety of students.
 3. Deter student drug use and provide access to assistance programs.
 4. Enhance communication between students and parents/guardians.

Ex. P-1 at 1.

6. The policy allows the District to conduct random, suspicionless urinalysis up to twelve (12) times throughout the school year and interscholastic season (spanning from July 1 to June 30 of the following year) for up to ten (10) percent of the covered students who have signed the consent form. *Id.* at 4-5.
7. The testing under the policy consists of a ten (10) panel urinalysis. Ex. P-1 at 5; Hrg. T., 28: 18-21. The urinalysis screens for the presence of the following drugs: 1) alcohol⁵; 2) amphetamines/methamphetamines, MDMA (ecstasy), MDA; 3) barbiturates; 4) benzodiazepines; 5) cannabinoids (marijuana); 6) cocaine; 7) opiates; 8) phencyclidine (PCP); 9) methadone; and, 10) propo[x]yphene. Ex. P-1 at 5.

⁵ Despite the inclusion of alcohol within the listed panel, the District adamantly provided that, as imposed, the policy does not test for the presence of alcohol. Hrg. T., 47: 2-4, 100: 1-3.

8. The policy encompasses any District student in grades 6 through 12 who participates in an extracurricular activity or who wishes to obtain a parking permit (hereinafter “covered students”). In order to participate in any activity covered by the policy, a student and his/her parent(s) must sign and submit a Consent for Mandatory Testing and Authorization for Release of Information (the “consent form”). Ex. P-1 at 2; Ex. P-2.
9. The policy defines an extracurricular activity as “all interscholastic athletics, clubs, and other activities in which the student participates on a voluntary basis.” *Id.*
10. Approximately eighty-five (85) percent of District students in grades 6 through 12 either participate in extracurricular activities or have a student parking permit. Hrg. T., 28: 10-14; N.T.II., 24: 21 - 25: 18 (testimony of Superintendent Robert Grantier).
11. The policy requires the covered students and their parents to consent to drug testing. If the covered student and respective parent(s) do not consent to the testing, the student will not be allowed to participate in the extracurricular activity or park on campus. *Id.* at 2.
12. The consent form authorizes the District to collect a sample of “bodily fluid” from the student to test it for the presence of certain drugs and controlled substances. Ex. P-2.
13. The consent form also authorizes that the results of such testing may be released to the District’s Oversight Committee, consisting of the superintendent, the high school principal, and the middle school principal. *See* Ex. P-1 at 5-6; Ex. P-2.
14. The policy also provides for voluntary screenings for those students not encompassed in the mandatory testing population. Ex. P-1 at 2, 6.

b. Violations

15. A student violates the policy if: 1) a sample tests positive for drugs; 2) a student refuses to provide a sample; and/or 3) a student attempts to alter a urine sample. Ex. P-1 at 6.

16. If a student violates the policy, his/her ability to participate in all covered activities are suspended in accordance with a progressive consequences process. Ex. P-1 at 7-10. Violations include suspension from all covered activities for varying lengths of time (depending on the student's prior incidences) in addition to being referred to the District's Student Assistance Program. *Id.*
17. In order for a student to restore his/her ability to participate in covered activities after testing positive, the student must submit to a test and test negative. *Id.* at 8.
18. A student who has committed three offenses under the policy will be permanently suspended from all covered activities. *Id.* at 9.

c. **Student Activities/Athletics Committee (the "committee")**

19. In January 2010, the District's Board of Directors held a retreat; at the retreat, the District discussed a perceived drug problem within the District. Hrg. T., 116: 24 - 17: 9.
20. Following the retreat, the District assigned the Student Activities/Athletics Committee (the "committee") to identify the means by which the District could deter student drug use. Hrg. T., 122: 7 - 23: 25.
21. During the May 2010 school board meeting, board member Shelia Yates was assigned chairperson of the committee. Hrg. T., 122: 13-14.
22. The committee consisted of the District's Board of Directors as well as other non-board members and the District's administrative team; the committee's meetings were regularly attended by Ms. Yates, Superintendent Grantier, Athletic Director Ronald Insinger, Middle School Principal Robert Gaetano, High School Principal Dr. Matthew Reitz, and Administrator of Student Services and Career Development Christina Herman. N.T.I.,

12: 8 - 13: 1, 29: 25 - 30: 3. *See also* Hrg. T., 122: 7 - 23: 25. Supervisor of Special Education Dayne Waller also attended some committee meetings. N.T.I., 29: 19-23.

23. Ms. Yates testified that the committee:

sat down, we made a list. We said okay, we got to get PTO, we need students, we need alumni, we need community members, we need retirees, we need board members. We need - - we tried to think of any and every. We pulled in Susquehanna Drug and Alcohol. We tried to pull in experts from kids who dealt with use. We tried to pull in a church group, Boy Scout groups, Girl Scout groups, anything and everybody in the community we could possibly think of. We had a litany of list of who we felt because we wanted to cover anything that we could.

Hrg. T., 123: 14-25. The committee invited these individuals attend the June 2010 meeting. Hrg. T., 124: 1-3, 124: 16-18.

24. On June 2, 2010, the District held an administrative meeting. Ex. D-7. Hrg. T., 124: 15 - 25: 23. At that meeting, the committee received comments from: Dr. Gallaway from Susquehanna Health; Athletic Director Insinger; students from the District's Students Against Drunk Drivers (SADD) group; and alumni. *Id.* Also at that meeting, Mr. Gaetano discussed a policy that was implemented in the Millersburg School District (the "Millersburg policy"); Mr. Gaetano is a former employee of the Millersburg School District. Mr. Gaetano told the committee he found the Millersburg policy to be effective by giving the covered students a reason to say no to drug use. *Id.*

25. On June 22, 2010, the committee held another meeting. Ex. D-3. At that meeting, Mr. Gaetano again discussed the Millersburg drug testing policy. *Id.*

26. On July 20, 2010, the committee held another meeting. Ex. P-5. At that meeting, Mr. Grantier discussed a drug testing policy that was implemented in the Pine Grove School

District (the “Pine Grove policy”); Mr. Grantier is a former employee of the Pine Grove School District. *Id.*

27. The committee considered several responses for combatting the drug problem within the District; these responses included: 1) increased student education and drug awareness, 2) a reasonable suspicion policy, which was adopted in the summer of 2010, and 3) the mandatory testing policy at issue in this matter. N.T.II., 14: 4-19.
28. On September 16, 2010, the committee held a meeting. Ex. D-4. District students attended this meeting. The students indicated to the committee that *they* were concerned about the drug use of their friends and classmates. Ms. Yates testified that the students *begged* the administrators, teachers, and adults to do something to remedy the drug problem within the District. Ms. Yates testified that this meeting was the impetus behind going forward with the policy. N.T.I., 118: 13 - 121: 1.⁶ *See also* Hrg. T., 98: 12 - 99: 8 (testimony of Dr. Reitz); N.T.II., 26: 21 - 27: 6 (testimony of Coach Insinger).
29. On October 7, 2010, the committee held another meeting. Ex. D-5. At that meeting, the committee reviewed a draft of the policy. *Id.*
30. On December 13, 2010, the committee held another meeting. Ex. D-6. At that meeting, the committee revised the policy. *Id.*
31. The District’s School Board first voted on the policy in January 2011. Hrg. T., 126: 14-19. At the time of the first vote, nobody appeared to voice opposition to the policy. Hrg. T., 126: 20-22. The District approved the policy by a vote of 9 (for) to 0 (against). Hrg. T., 126: 23 - 127: 4.

⁶ The Court notes the following testimony of Ms. Yates in reference to the student meeting: “...it’s what forwarded [the District] into creating the policy. It was those students and their voices and their comments at that meeting, that’s why [the District] moved forward. It was because of them. It was student lead at that point. Those students are the ones who said please get a policy, do something. It wasn’t a recommendation. It’s why [the District] went forward.” N.T.I., 120: 20 - 121: 1.

32. The District adopted the policy on February 23, 2011. Hrg. T., 25: 12-16, 127: 9-14; N.T.I., 121: 11-14. The adoption occurred after a second Board vote of 9 (for) to 0 (against). Hrg. T., 127: 18-22. At the time of the second vote and adoption, nobody appeared to voice opposition to the policy. Hrg. T., 127: 15-17.
33. The committee intended for the policy to help students with drug and alcohol addictions; the committee did not intend for the policy to be punitive. N.T.II., 23: 14 - 24: 2, 28: 13-25, 117: 21 - 18: 8.
34. The committee wrote its own policy because it did not like the punitive effects of the Millersburg and Pine Grove policies. N.T.II., 24: 3-11, 117: 12-20.
35. The committee intended for the policy to cover as many students as possible. N.T.I., 14:20 - 15:11 (testimony of Mr. Grantier); N.T.I., 155: 25 - 156: 6 (testimony of Dr. Reitz); N.T.II., 28: 22 - 29: 9, 30: 5-10 (testimony of Coach Insinger).

d. Supporting Evidence

36. During its meetings, the committee considered any and all information it received from any and all sources. N.T.I., 123: 21 - 124: 25. Ms. Yates testified that the committee considered:

[t]he student statements, administrator statements, the teacher statements, the coaches statements, the athletic director statements, the drug and alcohol - - Dr. Galloway's statement. We brought in - - we read articles, we had a local - - we contacted other school districts, we invited their data to come in. And as far as I say data, it wasn't hand written on a piece of paper. But they came in and all said we have problems too, who can get us some help[,] some how, some way. We considered as much as we could from anybody who was willing. And these meetings, I must tell you, every single one of the meetings was advertised and was open to anybody who wanted to come, pros or cons. We were looking to collect

anything and everything that we possibly could develop this policy for the best of the students of Loyalsock.

N.T.I., 124: 12-25.

37. The committee did not make a definitive list of all of the drug incidents that it received comments on. N.T.I., 127: 3-24, 128: 4-9. However, Ms. Yates testified:

[f]or example, the athletic director came and yes, he could document how many students. Dr. Galloway, she was from Lycoming County, I believe drug and alcohol, she had a list of how many incidents there were in Lycoming County where she had treated or done. We had Mr. Smith, which I can't remember his but he had a list of how many things he had. We had the students at the October [meeting], the students said I had three friends, I had two friends, I had five friends, I had one friend. Everybody had an incident. I wouldn't say did they bring me a list and say here's the names and this is what happened. No. But everybody did bring their own information and they had their own list in their mind, at the very minimum, that they shared.

N.T.I., 127: 9-21.

38. It was the committee's belief that "if the [p]olicy affected one life then the [p]olicy was effective." N.T.I., 128: 7-9, 129: 3-14.

39. During the non-jury trial, the parties characterized information that the committee used when formulating the policy into three categories: i) anecdotal evidence⁷, ii) an incident spreadsheet, and iii) the Pennsylvania Annual Youth Surveys (the "PAYS data"). Hrg. T., 97: 6-25; N.T.I., 123: 21 - 124: 25.

⁷ Anecdotal evidence is "any kind of conversation in which [the District could] attribute a name, a place, and a time responsibly...." N.T.I., 142: 23-24. *See also* N.T.I., 156: 22 - 158: 25.

i. Anecdotal Evidence

40. Students, parents, and community members provided the committee with anecdotal evidence regarding drug use within the District.⁸

41. The Court outlined the anecdotal evidence provided to the committee in the “Trial Testimony” section of these findings.

ii. Incident Spreadsheet⁹

42. High School Principal Dr. Reitz created the incident spreadsheet (the “spreadsheet”). N.T.I., 142: 5-6. Dr. Reitz initially created the spreadsheet for use by the District’s Board of Directors. Dr. Reitz intended the Board to use the spreadsheet in a manner so that punishments would be uniformly assessed upon students, i.e. a similar punishment for a similar infraction. Dr. Reitz intended to use the spreadsheet to document incidents “relative to drugs, alcohol, weapons, [and] significant conduct unbecoming a student” such as violence towards a District administrator or employee. N.T.I., 142: 4-19.

43. The purpose of the spreadsheet has changed since its inception; the District now uses the spreadsheet to record anecdotal evidence as to student drug and alcohol abuse. N.T.I., 142: 20-24. Anecdotal evidence is “any kind of conversation in which [the District could] attribute a name, a place, and a time responsibly....” N.T.I., 142: 23-24. *See also* N.T.I., 156: 22 - 158: 25.

44. District administrators and teachers face a number of difficulties when they try to keep confidential student records for more than one (1) school year. N.T.I., 143: 17-13.

⁸ During trial, the Court admitted this evidence, over Plaintiff’s hearsay objection, because the evidence explains the committee’s state of mind when making the decision to enact the policy, not the truth of the matter asserted. Pa. R.E. 801.

⁹ Ex. P-4.

45. The spreadsheet lists sixty-four (64) drug and alcohol incidents occurring from 2003-12.

Ex. P-4. Forty-four (44) of these incidences are drug incidences; these incidences include:

<i>School Year</i>	<i>Total Incidences</i>	<i>Drug Incidences</i>	<i>Specified Drug</i>	<i>Specified Group</i>
2003-04	3	3	marijuana	
2004-05	8	6	marijuana, pills, paraphernalia	
2005-06	5	5	marijuana, pills, paraphernalia	
2006-07	4	4	marijuana	
2007-08	4	1	paraphernalia	
2008-09	1	1	marijuana, paraphernalia	
2009-10	29	14 ¹⁰	marijuana, pills, possession	soccer, basketball
2010-11	6	6 ¹¹	marijuana, pills	
2011-12	4	4	marijuana, pills	football, golf
<i>Totals</i>	64	44		

Ex. P-4.

46. The Court will consider all of the above-mentioned drug incidences, despite some being anecdotal in nature, because the District made the spreadsheet in good faith.

¹⁰ In these drug-related incidences, the Court included: 1) a report the District received about a pill that some basketball players took before a game; 2) a report that a student was arrested for possession of drugs; and 3) a report that two students were dealing drugs to each other while in school.

¹¹ In these drug-related incidences, the Court included: 1) a report the District received about a student using another's urine to avoid testing positive in a possible urinalysis; and 2) the District's contact with a graduated District student who confessed to dealing drugs on campus while he was a student.

47. To date, approximately fifty (50) more incidences have occurred within the District that do not appear on the spreadsheet. N.T.I., 149: 16-18. *See also* N.T.I., 156: 13-16, 162: 25 - 164: 22.

iii. PAYS Data¹²

48. The PAYS data consists of “a survey that every two years [District] students are - - unless they make an exception as a parent request[s] not to participate in the survey, all 6th, 8th, 10th and 12th grade students will complete a survey, several pages long, a number of questions and all the questions target trying to get an understanding of [students’] attitude, behaviors about their school, their community, their drug and alcohol use, safety issues, violence issues, their perspective and beliefs.” N.T.I., 176: 12-19 (testimony by Ms. Herman). *See also* Hrg. T., 104: 18 - 105: 21.

49. The PAYS data does not separate the student population into students covered under the policy, i.e. students involved in extracurricular activities and athletics and requesting parking privileges, and those students not covered by the policy. Hrg. T., 34: 7-15 (testimony of Mr. Grantier); N.T.I., 188: 5-12 (testimony of Ms. Herman).

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¹² Ex. P-3 (2009 PAYS data).

50. The PAYS data provides that the lifetime use of drugs within the District is:

<i>Substance</i>	<i>6th Graders</i>	<i>8th Graders</i>	<i>10th Graders %</i>	<i>12th Graders %</i>	<i>Overall %</i>
Marijuana	-	-	22.7	31.1	26.5
Inhalants	-	-	11.4	6.8	9.3
Cocaine	-	-	1.1	1.4	1.2
Crack Cocaine	-	-	2.3	1.4	1.9
Heroin	-	-	1.1	1.4	1.2
Hallucinogens	-	-	1.1	10.8	5.6
Methamphetamine	-	-	0.0	0.0	0.0
Ecstasy	-	-	0.0	1.4	0.6
Steroids	-	-	1.1	0.0	0.6
Any Illicit Drug (Not Marijuana)	-	-	12.5	17.6	14.8

Ex. P-3 at 12.

51. The PAYS data provides that the past-30-day use of drugs within the District is:

<i>Substance</i>	<i>6th Graders</i>	<i>8th Graders</i>	<i>10th Graders %</i>	<i>12th Graders %</i>	<i>Overall %</i>
Marijuana	-	-	15.5	17.9	16.6
Inhalants	-	-	2.3	4.1	3.1
Cocaine	-	-	0.0	0.0	0.0
Crack Cocaine	-	-	0.0	0.0	0.0
Heroin	-	-	0.0	0.0	0.0
Hallucinogens	-	-	1.1	5.4	3.1
Methamphetamine	-	-	0.0	0.0	0.0
Ecstasy	-	-	0.0	1.4	.6
Steroids	-	-	1.1	0.0	.6
Any Illicit Drug (Not Marijuana)	-	-	3.4	9.5	6.2

Ex. P-3 at 12.

52. The PAYS data provides that the past-30-day frequency of marijuana use within the

District is:

<i>Number of Occasions</i>	<i>6th Grader %</i>	<i>8th Grader %</i>	<i>10th Grader %</i>	<i>12th Grader %</i>	<i>Overall %</i>
0	-	-	84.5	82.1	83.4
1 or 2	-	-	7.1	4.5	6.0
3 to 5	-	-	2.4	0.0	1.3
6 to 9	-	-	3.6	4.5	4.0
10 to 19	-	-	2.4	3.0	2.6
20 to 39	-	-	0.0	1.5	0.7
40 or more	-	-	0.0	4.5	2.0

Id. at 70.

53. The PAYS data provides that the lifetime use of prescription drugs, without a doctor's

orders, within the District is:

<i>Substance</i>	<i>6th Graders %</i>	<i>8th Graders %</i>	<i>10th Graders %</i>	<i>12th Graders %</i>	<i>Overall %</i>
Pain Relievers	-	-	9.1	21.6	14.8
Tranquilizers	-	-	5.7	6.8	6.2
Stimulants	-	-	2.3	5.4	3.7

Ex. P-3 at 26. *See also id.* at 24.

54. The PAYS data provides that the past-30-day use of prescription drugs, without a

doctor's orders, within the District is:

<i>Substance</i>	<i>6th Graders %</i>	<i>8th Graders %</i>	<i>10th Graders %</i>	<i>12th Graders %</i>	<i>Overall %</i>
Pain Relievers	-	-	10.2	16.2	13.0
Tranquilizers	-	-	3.4	5.4	4.3
Stimulants	-	-	2.3	6.8	4.3

Id.

55. When asked about their perceived availability of drugs, overall the District students received a percentile score of 48; this score was two points lower than the normative average of 50. *Id.* at 55.

e. Plaintiff

56. When the District adopted the policy in February 2011, Plaintiff was an eleventh grade student within the District. *See Compl.*

57. Before the District adopted the policy, Plaintiff participated in extracurricular activities; these activities included his service as the junior class president and the school mascot, as well as his participation on the Scholastic Scrimmage Team and in the Leo Club. Hrg. T., 6: 1-8.

58. After the District adopted the policy, the District informed Plaintiff that he could not participate in extracurricular activities until both he and his parents signed the consent form. Hrg. T., 9: 2-7, 9: 16-23.

59. Plaintiff refused sign the consent form. Hrg. T., 8: 4-5.

60. As a result of Plaintiff's refusal, the District removed Plaintiff from the Scholastic Scrimmage Team and Leo Club. Hrg. T., 9: 16 - 10: 22.

61. Also, the District would not allow Plaintiff to be inducted into the National Honor Society, despite meeting all of the society's admittance criteria.¹³ N.T.I., 34: 6-7.

62. In March 2012, Plaintiff received a driver's license; Plaintiff testified that if the policy was not in place he would have applied for a school parking permit. Hrg. T., 11: 14-22.

¹³ The Court granted Brandon permission to join the National Honor Society. *See Opinion and Order, 4/4/12.*

63. Plaintiff now attends The Pennsylvania State University's Schreyer Honors College, majoring in mechanical engineering; Plaintiff was a freshman at the university at the time of the non-jury trial. N.T.I., 33: 13-14.

64. Throughout college, Plaintiff intends to apply for scholarships and honors that require him to list his high school activities and honors. N.T.I., 33: 15-22.

65. During Plaintiff's tenure within the District, he was never drug tested. N.T., 34: 14-18.

f. Preliminary Injunction

66. On April 4, 2012, the Court issued a preliminary injunction in this matter; the injunction provided that the District could not enforce the policy against Plaintiff. *See* Opinion and Order, 4/4/12.

67. When the injunction was issued, the District voluntarily suspended the policy as to all students. N.T.I., 150: 8-18.

g. Trial Testimony

68. During the non-jury trial, a number of witnesses testified; these witnesses included: statistical experts Dr. Charles Parekh (Plaintiff) and Dr. Alan Salzberg (District); Ms. Yates; High School Principal Dr. Reitz; Superintendent Grantier; Administrator of Student Services and Career Development Herman; Supervisor of Special Education Waller; Coach Insinger; and Middle School Principal Gaetano.

69. In addition to the testimony received by the Court during the non-jury trial, the parties agreed that the Court should consider the testimony received during the preliminary injunction. N.T.II., 5: 13 - 7: 13, 33: 2-3. *See* Ex. J-1. At the preliminary injunction hearing, the following individuals testified: Plaintiff; Brian Fagnano, Plaintiff's father; Superintendent Grantier; Dr. Parekh; Dr. Reitz, Ms. Herman; and Ms. Yates. As

requested, the Court considered the injunction testimony when coming to its instant verdict. *See* Ex. J-1.

70. Upon consideration of the totality of Dr. Parekh and Dr. Salzberg's testimony, the Court finds that no one relevant statistical analysis can be performed on the incident spread sheet or the PAYS data as it pertains to covered students' drug use.
71. Superintendent Grantier testified at both the hearing and trial. Hrg. T., 24: 24 -43: 15, 131: 1 - 134: 10; N.T.I., 10: 11 - 30: 19, 166: 10 - 174: 25. Superintendent testified that student drug users come from all of the student organizations; he provided that the committee did not know of any student organization that did not have at least one (1) student using drugs. N.T.I., 16: 24 - 15: 1, 166: 15-24. Superintendent testified that he could not identify one (1) group within the District that has a greater drug problem than any of the other groups. N.T.I., 174: 17-21. Superintendent has experienced student drug users in student organizations such as the National Honor Society and the cheerleading squad in addition to student drivers. N.T.I., 15: 12-23. Based upon this mindset, Superintendent testified that committee did not identify a group of students that was considered to be at a greater risk for drug abuse. *Id.*, 18: 6-20, 29: 9-13.
72. Superintendent also testified about the Pine Grove policy. Hrg. T., 132: 19 - 133: 16; N.T.I., 167: 3-21. While Superintendent was employed by that school district, he administered its policy; he testified that he believed the Pine Grove policy to be effective. Hrg. T., 133: 2-16; N.T.I., 167: 17-19, 168: 4 - 169: 2, 169: 10-14. Superintendent disclosed this opinion to the committee. N.T.I., 169: 16-22. *See also* N.T.I., 117: 6-11.
73. Superintendent believes that there has been an increase in the drug incidences committed by covered students since the District voluntarily suspended the policy. N.T.I., 169: 23 -

170: 6. Superintendent testified that “[j]ust this week I can tell you that we dealt with an overdose and just this week I found out that a previous person, a friend of mine, his son [a graduated District student] was sent home from college with an addiction to pain killers.” N.T.I., 170: 7-11. Both the student who overdosed and the graduated student were covered students. N.T.I., 173: 17 - 174: 11.

74. The Court finds the totality of Superintendent Grantier’s testimony to be credible.

75. High School Principal Dr. Matthew Reitz also testified. Hrg. T., 93: 15 -103: 6; N.T.I., 137: 19 - 165: 1. Dr. Reitz testified that the committee discussed requests that the District received from parents to implement a drug and alcohol testing policy. N.T.I., 139 : 18 - 140: 13. Dr. Reitz provided that the committee discussed certain groups with students members known to use drugs; these groups included almost every PIAA sport, Key Club, National Honor Society, Scholastic Scrimmage, and Ski Club. N.T.I., 148: 23 - 149: 12.

76. Dr. Reitz testified that drug use within the District has increased since the voluntarily suspension of the policy. N.T.I., 150: 19 - 151: 4. Specifically, he testified that on April 10, 2013, he had a drug-related issue with a covered student. N.T.I., 151: 3-4.

77. The Court finds the totality of Dr. Reitz’s testimony to be credible.

78. Ms. Yates also testified. Hrg. T., 116: 1 - 130: 13; N.T.I., 111: 22 - 137: 10. Ms. Yates provided anecdotal evidence at the committee meetings; particularly, Ms. Yates discussed with the committee and this Court the conversations that she and her husband had with her four (4) daughters and their friends, all former or present District students, regarding drug use within the District. Hrg. T., 117: 12 - 121: 15; N.T.I., 121; 15 - 123: 20.

79. The Court finds the totality of Ms. Yate’s testimony to be credible.

80. Administrator of Student Services and Career Development Herman also testified.¹⁴ Hrg. T., 103: 15 - 115: 17; N.T.I., 175: 7 - 190: 9. Ms. Herman testified about the PAYS data. N.T.I., 176: 5 - 186: 11. Also, Ms. Herman attended most of the committee meetings. N.T.I., 175: 25 - 176: 4. She provided that the committee took into consideration the PAYS data when determining that the District has a drug problem. N.T.I., 179: 21-24, 186: 8-11.
81. Ms. Herman testified that in her opinion the District has a drug problem; Ms. Herman based her belief on both her daily experiences with District student and the PAYS data. Hrg. T., 108: 11 - 109: 7. Ms. Herman testified that within the past five (5) years, she has noticed an increase in the number of students who come to school impaired and/or who use drugs during the school day. Hrg. T., 112: 14-18.
82. The Court finds the totality of Ms. Herman's testimony to be credible.
83. Supervisor of Special Education Waller also testified. N.T.II., 3: 16 - 16: 25. Ms. Waller has worked within the District for approximately twelve (12) years. N.T.II., 3: 19-21. Ms. Waller's husband also works within the District; Mr. Waller teaches health and physical education and wellness at the middle and high schools. N.T.II., 3: 25 - 4: 4. Mr. Waller also coached the District's baseball team from the 2004-2005 school year through 2010. N.T.II., 4: 3-7. Ms. Waller has three (3) students within the District: a ninth, seventh, and sixth grader. N.T.II., 4: 8-12. Ms. Waller attended some of the committee meetings. N.T.II., 4: 13-20. Ms. Waller provided anecdotal evidence at these meetings. N.T.II., 4: 21 - 5: 5. The information that Ms. Waller provided to the committee was

¹⁴ Ms. Herman characterized her duties within the district as supervising "a number of program services and staff related to school counseling, school nursing, school sex services, all related intervention services, intervention programs, summer school, after school" and as developing and implementing the career development program within the District. N.T.I., 175: 19-24.

obtained through her status as the baseball coach's wife and as being the teacher of the mandatory freshman course, Foundations for Success¹⁵. N.T.II., 5: 6-17, 6: 7-15. Ms. Waller told the committee that she believed the student groups covered by the policy had an existing drug problem. N.T.II., 6: 16 - 7: 25. Ms. Waller testified that the committee talked about every athletic group; specifically, Ms. Waller testified that the committee discussed student drug problems with the baseball, football, and soccer teams. N.T.II., 7: 16-24. Ms. Waller testified that the committee discussed that the following non-athletic extracurricular activities had student members using drugs: band, Cultures of the World Club, French Club, Key Club, National Honor Society, Odyssey of the Mind (OM), Spanish Club, and Students Against Drunk Driving (SADD). N.T.II., 7: 25 - 8: 6, 8: 23-24.

84. Ms. Waller testified that she believes more drug and alcohol incidents have occurred within the District than those sixty-four (64) incidences listed on the spreadsheet. N.T.II., 9-10: 9-11.

85. Additionally, Ms. Waller testified that she has noticed an increase in drug use within the District by covered students since the voluntary suspension. N.T.II., 10: 12 - 11: 4, 12: 2-11. Ms. Waller testified that she created a written list of students who came to her and talked about drug problems; however, Ms. Waller testified that she would not produce the list because it would betray her student confidences. N.T.II., 13: 9-16.

86. The Court finds the totality of Ms. Waller's testimony to be credible.

87. Coach Insinger also testified. N.T.II., 17: 11 - 30: 13. Coach Insinger has worked within the District for thirty-seven and one half (37.5) years, initially as teacher within the District and now as the athletic director. N.T.II., 17: 15 - 18: 2. Coach Insinger attended

¹⁵ N.T., 15-16: 4-19.

all of the committee meetings. N.T.II., 18: 6-10. Coach Insinger provided anecdotal evidence at these meetings. N.T.II., 18: 23 - 19: 3. Coach Insinger testified about the changes that have occurred within the District since he began teaching; specifically, Coach Insinger testified that there has been a noticeable increase in drug and alcohol use within the student population generally and within the athletic student population specifically. N.T.II., 19: 4-24. Coach Insinger provided that students, including student athletes, were beginning to experiment with drugs at an earlier age. N.T.II., 19: 18-24. Coach Insinger testified that in his opinion drug use is increasing more rapidly than alcohol use within the District; Coach Insinger provided that in his opinion student use of pain killers and prescription medication is more predominant than student alcohol use. N.T.II., 28: 5-21. Coach Insinger testified that it is common for coaches to come to him in his capacity as athletic director and ask him for help managing student athletes with drug problems. N.T.II., 20: 15 - 21: 17. Coach Insinger also testified that some of the student athletes have told him that they would continue to use drugs regardless of the policy. N.T.II., 27: 12-17. Coach Insinger provided that currently within the District's athletic department he knows of at least one (1) student on each team that has a drug problem. N.T.II., 21: 13-17. Additionally, Coach Insinger testified that in his opinion out of the three hundred students covered by the policy, about seventy-five (75) percent of the students are in multiple activities, including athletics and other extracurricular activities; specifically, Coach Insinger testified that members of the District's athletic teams are involved in the Key Club and the school musical. N.T.II., 29: 10-22. However, Coach Insinger also provided that he has never requested an athlete to be tested pursuant to the District's reasonable suspicion policy. N.T.II., 27: 20 – 28: 4.

88. The Court finds the totality of Coach Insinger’s testimony to be credible.
89. Middle School Principal Gaetano also testified. N.T.II., 30: 22 - 39: 18. Mr. Gaetano has worked within the District for approximately four (4) years. N.T.II., 30: 25 - 31: 4. Prior to working for the District, Mr. Gaetano was employed as the principal of the Millersburg High School. N.T.II., 31: 5-7. While at Millersburg, Mr. Gaetano was directly involved with the administration of the Millersburg policy. N.T.II., 31: 10 - 32: 15. Mr. Gaetano was involved in the committee’s meetings. N.T.II., 32: 16-21. Mr. Gaetano provided anecdotal evidence at the committee meetings in the form of his experiences with the Millersburg policy. N.T.II., 32: 22 - 33: 11. Mr. Gaetano told the committee that, in his opinion, the Millersburg policy was effective in both deterring drug use among the students and rehabilitating students who were using drugs. N.T.II., 34: 14 - 37: 23, 38: 9-11. *See also* N.T.I., 115: 11-16, 116: 8-11 (testimony of Ms. Yates); N.T.I., 140: 14 - 141: 11 (testimony of Dr. Reitz). Mr. Gaetano provided a copy of the Millersburg policy to the committee. N.T.II., 38: 4-8. *See also* N.T.I., 115: 24 - 116: 1 (testimony of Ms. Yates).
90. Mr. Gaetano does not know if drug-related incidents have increased or decreased since the voluntary suspension of the policy. N.T.II., 38: 20-24.
91. The Court finds the totality of Mr. Gaetano’s testimony to be credible.

II. Conclusions of Law

1. Article I, Section 8 of the Pennsylvania Constitution provides privacy protections that are greater than that of the Fourth Amendment of the United States Constitution. *Theodore v. Delaware Valley School District*, 836 A.2d 76, 88 (Pa. 2003). Based upon this

stronger protection, a greater degree of scrutiny is implemented when one invokes the protection of Article I, Section 8 of our State Constitution. *Id.*

2. Our State Constitution “mandates greater scrutiny in the school environment.” 836 A.2d at 88 (citations omitted).
3. When a state constitutional challenge is brought within a school setting, Commonwealth Courts must balance the following four (4) factors:

(1) the students’ privacy interests, (2) the nature of the intrusion created by the search, (3) notice, and (4) the overall purpose to be achieved by the search and the immediate reasons prompting the decision to conduct the actual search.

836 A.2d at 88 (citations omitted) (citing *In the Interest of F.B.*, 726 A.2d 361, 365 (Pa. 1999)). *See also* 836 A.2d at 89 (providing that *In the Interest of F.B.* controls our State inquiry, not *Board of Education v. Earls*, 536 U.S. 822 (2002)).

4. When explaining the greater constitutional scrutiny provided by our State Constitution, the *Theodore* Court also cited to our Supreme Court’s plurality opinion of *Commonwealth v. Cass*, 709 A.2d 350 (Pa. 1998) (plurality). In *Cass*, our Supreme Court upheld a general, suspicionless search of student lockers for drugs; the *Theodore* Court noted that the key factors supporting the search in *Cass* included:

there was *evidence of a specific and increasing drug problem* in the school to which officials were responding; it was *reasonable* for those officials to believe that evidence of drug use could be found in student lockers; ... students were *forewarned* of the possibility of locker searches; [and] the students had only a *limited expectation of privacy* in the school-owned lockers...

Theodore, 836 A.2d at 90 (emphasis added).

5. When analyzing the *F.B.* factors in the context of a suspicionless urinalysis testing policy, the *Theodore* Court provided:

[f]irst, since the students' privacy rights here... have greater meaning under Article 1, Section 8, the testing authorized by the District cannot be viewed as a trivial intrusion on privacy. While students' privacy expectations are lessened by virtue of their presence at school, students may reasonably anticipate that the privacy associated with their excretory functions will be diminished at school only modestly via the need to use public restrooms.... [M]any students could reasonably consider production of a urine sample for testing to involve a greater imposition than the ordinary use of a public restroom....

We recognized, however, that the intrusion is ameliorated somewhat by the fact that the policy states that all tests will be "conducted according to established protocol," and that "urine or blood samples shall be collected by trained medical personnel in a manner that balances the values of privacy and confidentiality with the accuracy of the tests." Other aspects of the policy also help to ensure that there is no arbitrary or oppressive action beyond the search itself: i.e., students are chosen at random for testing; the procedures are not designed to lead to criminal or disciplinary actions; and the results are provided to a limited set of defined school officials.

Turning to the third factor, although the timing of the tests were deliberately made unknowable to the students, the District provided general notice by providing copies of the policy and requiring signatures of parents and students on a contract prior to the students' involvement in any extracurricular activity or obtaining a parking permit.

We are then left with the final consideration of the reasons the District enacted the policy and the efficacy and reasonableness of the policy in

furthering the purpose identified. Any analysis of efficacy obviously must include an inquiry into the *reasonableness* of selecting only the targeted students for testing.

836 A.2d at 90-91 (emphasis added).

6. The *Theodore* Court held that an urinalysis drug testing policy would:

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 the need.

836 A.2d at 92 (emphasis added). Essentially, the *Theodore* Court provided that a school district needs to provide more evidence than the general “need to deter drug use” in order to support its drug testing policy. *Id.* Instantly, the District has established the need for the policy.

7. In *Theodore*, the Court concluded that the District did not show a specific need for the policy; instead, the District based its policy on the general wish to deter drug use within the district. 836 A.2d at 92.

8. The *Theodore* Court provided:

[w]ere the suspicionless drug and alcohol testing in this case confined to student-athletes and students with driving/parking privileges, the question obviously would be closer. [The policy], however, captures students involved in all extracurricular activities. Students in the band, chess club, drama club, or academic clubs simply do not pose the same sort of danger to themselves or others[.]

836 A.2d at 92.

9. In *Theodore*, the Court provided that that policy could not be deemed facially constitutional because there was “*no suspicion at all* that the students targeted are

involved with drugs or alcohol, or even that they are more likely to be involved than the students who are exempt from the policy.” 836 A.2d at 93 (emphasis added).

10. The *Theodore* Court cited to a New Jersey Supreme Court opinion, *Joye v. Hunterdon Central Regional High School Board of Education*, 826 A.2d 624 (N.J. 2003), to illustrate a policy that could be considered facially reasonable. *Theodore*, 836 A.2d at 93-94.

11. The *Joye* Court based its decision on a fully-developed factual record. *Theodore*, 836 A.2d at 94. Instantly, this Court has done likewise.

12. The record in *Joye* consisted of a documented drug problem within the District; specifically;

[t]he district had documented this active substance abuse problem through anonymous but controlled *surveys of students* which indicated that a high percentage of those students had recently used illegal drugs or alcohol, as well as “*certified statements from school personnel* describing first-hand experiences with students using drugs or alcohol” at the high school. The school also produced evidence of, *inter alia*, the *principal’s personal knowledge* of two students snorting heroin on school premises; *expressions of concerns from coaches, teachers and administrators* about what they perceived to be a growing drug problem; *a student assistance counselor’s statement* indicating an increase in the drug-related workload of at least thirty-three percent in a three-year period, mostly involving athletes and students involved in other extracurricular activities; three heroin *overdose deaths* in municipalities served by the school district; and four students who had *ingested drugs while on school premises* in 2002, the very year the challenged policy became effective.

Theodore, 836 A.2d at 93-94 (citations omitted) (emphasis added).

13. In addition, the *Theodore* Court provided the means employed by the *Joye* district when formulating its policy, including a two-year process that involved: 1) appointing a community task force of students, parents, the booster club, school counselors, administration, teachers, coaches, and drug testing experts; 2) evaluating the district's current reasonable-suspicion testing policy; 3) soliciting public input; and 4) holding public meetings. *Theodore*, 836 A.2d at 94.
14. The *Theodore* Court acknowledged that *Theodore* was procedurally only at the preliminary objections phase and that, after a record was developed, the *Theodore* district might be able to produce evidence of an existing problem and the success or failures of other means to combat the problem so to support the constitutionality of the contested policy. 836 A.2d at 94.
15. Ultimately, the *Theodore* Court held that the suspicionless testing policy in its case:
- has not been supported by sufficient proof that there was an actual drug problem in the [district]; by individualized proof that the targeted students are at all likely to be part of what ever drug problem may (or may not exist); or by reasonable proof that the policy actually addresses whatever drug problem may exist.
- 836 A.2d at 96. Instantly, the Court finds that the District's policy has been supported by sufficient proof that there is an actual drug problem in the District; by individualized proof that the targeted students are *likely* to be part of the drug problem that exists; and by reasonable proof that the policy actually addresses the problem that exists. *See Theodore*, 836 A.2d at 96.
16. In this matter, this Court finds that the policy is constitutional.

17. When analyzing the *F.B.* factors in this matter, the Court agrees with the *Theodore*

Court's conclusions that:

- 1) the District students' rights have a greater meaning under our State Constitution than under the United States Constitution, and, therefore, the policy cannot be viewed as a trivial intrusion on the students' privacy;
- 2) this intrusion has been ameliorated by the policy: 1) setting forth a protocol by which the urine samples are collected; 2) requiring the urine samples to be collected by trained and certified personnel employed by a medical vendor so to ensure the privacy and accuracy of the tests; 3) selecting the testing pool through the use of a random, scientifically valid method; 4) requiring that a student cannot be penalized academically for testing positive; 5) refusing to document results in students' academic records; 6) refusing to release results to juvenile and/or criminal authorities; and 7) limiting the release of the results to a set of officials, specifically the Oversight Committee, so to ensure that there is no arbitrary action beyond the search itself. *See* Ex. P-1; and
- 3) although the timing of the tests are deliberately unknown to the students, the District provided a general notice to both the students and parents by requiring their signatures on the consent form; the consent form provides that the policy may be found online and that a paper copy of the policy will be provided by the District upon request. *See* Ex. P-2.

Therefore, here, as in *Theodore*, the case hinges on the Court's analysis of the reasons behind the District's enactment the policy and the efficacy and reasonableness of the policy in furthering its identified purpose. *See* 836 A.2d at 90-91.

18. The Court finds that the District made an *actual showing* of the specific need for the policy and sufficiently explained its basis for believing that the policy would address the need. *See* 836 A.2d at 92.
19. The Court finds that the District produced evidence that there was suspicion by the District that the covered students are involved with drugs. *See* 836 A.2d at 93.
20. The Court finds that the policy reasonably targets students involved in all extracurricular activities, including athletics, as well as those students with driving/parking privileges even though students involved in some extracurricular activities do not pose a danger to themselves or others. 836 A.2d at 92.
21. The Court finds that the fully-developed record in this matter is similar to the factual record in *Joye*; specifically, the Court finds that the record in this matter illustrates a documented drug problem within the District. *See Theodore*, 836 A.2d at 93-94. This documented record consists of: 1) the PAYS data; 2) the incident spreadsheet; 3) *direct testimony* from school personnel describing first-hand experiences with students using drugs at the high school; 4) Superintendent Grantier's personal knowledge of student drug users in extracurricular activities such as the National Honors Society and cheerleading, as well as use by student drivers; 5) Superintendent Grantier's experience with a covered student overdosing the week of trial; 6) Dr. Reitz's experience the day before trial with a covered student using drugs; 7) Ms. Yate's experience with the friends of her daughters; 8) Ms. Herman's experiences with students in her capacity as the administrator of student services and career development; 9) Ms. Waller's experiences as a health and wellness teacher and as the wife of the baseball coach; 10) Coach Insinger's experiences with every athletic team in the District having students abusing drugs; 11)

the expressions to the committee of concerns from coaches, teachers, administrators; and 12) *most importantly student comments* about what they perceived to be a growing drug problem. *See Theodore*, 836 A.2d at 94.

22. The Court finds that the District in good faith completely developed its record of a documented drug problem within the District by embarking in a year-long process that involved: 1) appointing the committee; 2) evaluating the reasonable suspicion policy; 3) soliciting public input; and 4) holding public meetings. *See Theodore*, 836 A.2d at 94.
23. The Court finds that the District's policy has been supported by sufficient proof that there is an actual drug problem in the District; by individualized proof that the targeted students are *likely* to be part of the drug problem that exists; and by reasonable proof that the policy actually addresses the problem that exists. *See Theodore*, 836 A.2d at 96.
24. The Court finds sufficient proof exists that there is an actual drug problem within the District;
25. The Court finds that individualized proof exists of record illustrating that the covered students are likely to be part of the drug problem that exists; and
26. The Court finds that reasonable proof exists that the policy actually addresses the problem that exists; this reasonable proof has been provided through the testimony of Superintendent Grantier and Mr. Gaetano, in their experiences with the policies of the District, Millersburg, and Pine Grove, and through the testimony of Superintendent Grantier, Principal Reitz, and Ms. Waller that, in their opinion, the drug problem has increased since the District's voluntary suspension of the policy.

III. Discussion

This Court is impressed with the meetings, thoughts, and experience utilized by the District in formulating the policy. This Court is fully cognizant of *Theodore*; however, the Court does not believe our Supreme Court requires a scientific study or clear statistical proof to uphold a student drug testing policy. It is clear that a District committee, consisting of a professional group of administrators and teachers, received a great deal of input from medical experts, community members, teachers, parents, and students; only after receiving this abundance of information did the committee recommended the policy to the District's Board. This recommendation was far from arbitrary. The District knows its students better than any court, and it has found both a significant drug problem and a rational way to combat that problem. This Court believes that the District's good faith efforts to protect their students against the dangers associated with consuming drugs passes constitutional muster.

The Court enters the following Order.

ORDER

AND NOW, this 16th day of May, 2013, following a non-jury trial in the above-captioned matter, it is hereby ORDERED and DIRECTED that the relief requested in Plaintiff's complaint is DENIED. VERDICT is entered in favor of Defendant. Plaintiff's complaint is DISMISSED. The preliminary injunction is DISSOLVED.

BY THE COURT,

Date

Richard A. Gray, J.

cc: Jaimee Farrer, Esquire
Dechert LLP
2929 Arch Street, Cira Centre, Philadelphia, PA 19104-2808

Mary Catherine Roper, Esquire

American Civil Liberties Foundation of Pennsylvania

P.O. Box 40008, Philadelphia, PA 19106

William J. McPartland, Esquire and Robin B. Snyder, Esquire

Marshall, Dennehey, Warner, Coleman & Goggin

50 Glenmaura National Boulevard, Suite 301, Moosic, PA 18507-2101

Gary L. Weber, Esquire, Lycoming County Reporter