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M.K. and A.K., minors, by and through their
parents, Glenn and Kathy Kiederer,

Plaintiffs,

v.

THE DELAWARE VALLEY SCHOOL
DISTRICT,

Defendant.

:
: IN THE COURT OF COMMON PLEAS OF
: PIKE COUNTY
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: DOCKET No. _____
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: CIVIL ACTION
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COMPLAINT IN EQUITY

1. Plaintiffs bring this suit to void the provisions of a school district policy that require students as young as seventh grade to submit to random, suspicionless urinalysis drug testing and mandatory initial testing as a condition of participating in co-curricular activities or driving to school, in direct contravention of Pennsylvania Supreme Court precedent and the

privacy protections of the Constitution of the Commonwealth of Pennsylvania. Indeed, in 2003, the Pennsylvania Supreme Court declared that this particular policy was, absent additional compelling evidence to support it, unconstitutional. Yet the defendant school district has essentially ignored that ruling and continued to enforce the drug testing policy. Last Fall, the District's solicitor admitted that the District had not "followed the Supreme Court mandate." It has not produced studies to demonstrate that the group of students being tested is characterized by a high rate of drug use, that less intrusive alternatives have been tried and were unsuccessful, and that drug testing is likely to be effective. Consequently, Plaintiffs—two current students enrolled in the District who wish to participate in co-curricular activities, and their parents—are entitled to an injunction against the District's continued enforcement of its unconstitutional drug testing policy.

VENUE

2. Venue is proper in this Court pursuant to Pa. R. Civ. P. 2103(b).

PARTIES

3. M.K. is 13 years old and in seventh grade at Delaware Valley Middle School, which is part of the Delaware Valley School District. M.K. dreams of being an actress and would love to be in the drama club at school. In fact, before entering seventh grade M.K. acted in several elementary school plays, including Alice in Wonderland and Babes in Toyland. But now, to be in drama club, M.K. would have to consent to the District's drug testing policy, which would require that M.K. submit a mandatory urine sample at the time she joins the drama club and then subject herself to random, suspicionless drug testing while she participates in the club. M.K. also wishes to participate in volleyball, basketball, soccer, softball, and ironically, Junior

SASA (Students Against Substance Abuse). Each of these activities would also require M.K. to consent to random, suspicionless urine testing.

4. A.K., M.K.'s sister, is 14 years old and in ninth grade at Delaware Valley High School in the Delaware Valley School District. A.K. would like to participate in after-school activities because she thinks that will help her to get into college where she may study to be a veterinarian. A.K. wanted to join the art club at school, but to do so she would have to consent to the District's drug-testing policy, which would require that A.K. submit a mandatory urine sample at the time she joins the art club and then subject herself to random, suspicionless drug testing while she participates in the club. A.K. also wants to join the scrapbooking club and the tennis and softball teams.

5. Defendant Delaware Valley School District ("Delaware Valley" or "the District") is, and at all times relevant was, a political subdivision of the Commonwealth of Pennsylvania, located within Pike County. Its business office is located at 236 Route 6 & 209, Milford, PA 18337-9454.

FACTS

The Policy

6. The District initially adopted its drug and alcohol policy, Policy 227.1 ("the Policy"), on May 14, 1998. *See Theodore v. Delaware Valley School District*, 575 Pa. 321, 836 A.2d 76 (2003). The version of this policy presently in force was adopted on June 20, 2006. A copy of this policy is attached as Exhibit P-1. By its terms, Policy 227.1 applies to "students participating in co-curricular programs in the district's secondary schools, middle schools and high schools, and those who have been given permission by school officials to drive to school and/or have been issued a parking permit. Co-curricular participation shall include all

interscholastic athletics, clubs, and other activities in which students participate on a voluntary basis and for which credit is not awarded toward meeting graduation requirements.”

7. The Policy states there are five (5) types of tests: initial testing; random testing; reasonable-suspicion testing; return-to-activity testing; and follow-up testing. This complaint concerns the initial testing and random testing provisions and related procedures.

8. Under the Policy, “[i]nitial testing shall occur when the student registers for the co-curricular activity, driving privilege and/or upon application of a school parking permit. Random testing shall be conducted on a monthly basis for five percent (5%) of the co-curricular and driving students.”

9. The initial testing and random testing provisions of the Policy apply to all Delaware Valley students in seventh through twelfth grades participating in “co-curricular” programs or wishing to obtain a school parking pass. “Co-curricular” programs are defined in the Policy to include “all interscholastic athletics, clubs, and other activities in which students participate on a voluntary basis and for which credit is not awarded toward meeting graduation requirements.” The Policy requires the school principal to make available a list of the school’s qualifying co-curricular activities.

10. In order to enjoy any co-curricular programs, the Policy requires students and their parents to sign and submit a consent form, which remains in effect for the entire school year. This consent form represents an agreement to accept all the provisions of Policy 227.1, including agreement to random drug testing, and it authorizes the District to collect urine or breath samples from the student for drug and alcohol testing. A copy of this consent form is attached as Exhibit P-2 to this complaint.

Plaintiffs Have Suffered and Will Continue to Suffer Irreparable Harm Because of Policy 227.1

11. As students at Delaware Valley Middle School and Delaware Valley High School, Plaintiffs M.K. and A.K. are each subject to the Policy, which places conditions on their participation in school athletics, ability to obtain a parking pass, and participation in extracurricular activities.

12. Plaintiffs M.K. and A.K. have suffered direct harm as a result of the Policy. Each of the extracurricular activities in which M.K. or A.K. wish to participate is covered by Policy 227.1. In other words, if they do not submit to urine drug tests, M.K. and A.K. cannot participate in drama, art club, scrapbooking, softball, volleyball, tennis, basketball, soccer, or Junior SASA (Students Against Substance Abuse).

13. While M.K. and A.K. would like to participate in after-school clubs and sports with their friends, they do not wish to enter the drug testing pool because they and their parents believe that Policy 227.1 is an unreasonable invasion of their right to privacy.

14. The District's enforcement of the Policy violates M.K.'s and A.K.'s constitutional right to privacy by attaching these serious consequences to their choice not to allow their school to test their urine pursuant to a baseless, constitutionally deficient drug policy.

The Law

15. In Theodore v. Delaware Valley School District, 575 Pa. 321, 836 A.2d 76 (2003) —a case that involved the same school district as this lawsuit—the Pennsylvania Supreme Court held that the balancing of students' privacy rights under Article I, Section 8 of the Pennsylvania Constitution and school districts' concern for student safety requires that public school drug testing policies be supported by sufficient evidence of need in order to pass constitutional

muster. Under Theodore, any Pennsylvania school enacting a drug testing policy must “make[] 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, 575 Pa. at 348, 836 A.2d at 92 (Castille, J.).

16. The school board of Delaware Valley was repeatedly made aware of the Theodore case and its holding by its solicitor, Michael Weinstein, and District parents, including Glenn and Kathy Kiederer, the parents of M.K. and A.K..

17. At no point prior to the passage of Policy 227.1 did Delaware Valley conduct a formal analysis that examined the relationship between a drug or alcohol problem in the District and students involved in school activities, or the efficacy of a policy of randomly testing active and involved students as a way to address an identified drug or alcohol problem.

18. The District’s own solicitor, Michael Weinstein, admitted that Policy 227.1 was not properly grounded during an August 19, 2010 board meeting, stating, “What we didn’t do, because we didn’t know we would have needed it by a later Supreme Court in Pennsylvania [sic], is we didn’t quantify the data that we received at that town meeting and therefore we didn’t incorporate it into our policy as a basis for our policy, to explain the need for the policy, other than a concern, other than what we had was a concerned citizen group.”¹

19. Despite seven years having passed since the Pennsylvania Supreme Court’s ruling in Theodore, Delaware Valley—according to the statements of its own solicitor at the August 19, 2010 board meeting—had not “followed the Supreme Court mandate” to support the need for its drug testing policy. The solicitor stated to the Board, “The Supreme Court has sent us back a mandate to (a) determine a need for policy and then look at our policy. Now I understand that in

¹ A transcript of the discussion of the Policy at the August 19, 2010 meeting of the Delaware Valley School Board is attached to Plaintiffs’ Motion for Preliminary Injunction.

theory everybody, many many people believe that there's a need for a policy, just because of drugs themselves, but the Supreme Court gave us some pretty specific guidelines as to what they think a need is. And I think that's what we have, what Bill and I have to, in the end we all on this Committee have to address. So question number one is going to be, assuming we follow that Supreme Court mandate which I recommend we should, number one, determine whether or not this district has a need and then two, if it has a need, looking at the policy and formulating it or modifying it, so that it addresses the need." (See supra n.1.)

20. According to the District's solicitor, Policy 227.1 violates the Pennsylvania Constitution. At the same August 19, 2010 board meeting he stated, "assuming those [Common Pleas] judges do their job, they have been doing their job, so I assume they'll continue, they'll follow the mandate of the Supreme Court and that policy will probably be knocked out at the Common Pleas level. I mean it just wasn't declared unconstitutional but it will be when a Common Pleas judge looks at it now based upon that [Theodore] mandate. That's my prediction." (See supra n.1.)

21. When asked by a Board member, "What needs to change in our policy to be in compliance?" The Solicitor replied, "In all candor? [Policy 227.1] needs to be ended and the process has to begin, the analytical process has to begin to determine whether or not there is a need for a policy. There may very well be a need. And that, that, there's no definition as to what that process is." (See supra n.1.)

22. Even were there evidence of drug and alcohol problems among seventh through twelfth graders in the Delaware Valley School District, Policy 227.1 is overinclusive and underinclusive because it singles out only students who are involved in school activities and parking privileges without tying that participation to an increased risk of danger from drug or

alcohol use, or to a greater likelihood of drug or alcohol use. In fact, extracurricular involvement typically serves as a protective factor, decreasing the likelihood that participants will abuse drugs or alcohol.

23. Since 1998, the Delaware Valley School District has been subjecting students in its secondary schools to drug testing under Policy 227.1. At no time in this 13-year time period has the District attempted to compile data that would support *or refute* a need for the Policy. The District has enforced Policy 227.1 despite the fact that it was party to the very lawsuit in which the Pennsylvania Supreme Court explained that a testing policy like Policy 227.1 must be born out of a true and documented need for random testing of the student population affected by the policy.

24. Delaware Valley School District's drug testing policy violates Plaintiffs' right to privacy under Article I, Section 8 of the Constitution of the Commonwealth of Pennsylvania.

CLAIMS FOR RELIEF

25. At all times relevant to this action, the Delaware Valley School District has subjected Plaintiffs, and its other most active and involved students, to drug and alcohol testing with no constitutionally permissible basis.

26. Delaware Valley School District's drug and alcohol testing policy violates Plaintiffs' right to privacy under Article I, Section 8 of the Constitution of the Commonwealth of Pennsylvania.

WHEREFORE, Plaintiffs pray that this Honorable Court:

1. Issue an order judging and declaring that Delaware Valley School District Policy 227.1 violates Plaintiffs' rights under Article I, Section 8 of the Constitution of the Commonwealth of Pennsylvania;
2. Issue preliminary and permanent injunctive relief enjoining and restraining Defendant Delaware Valley School District from implementing, maintaining, or enforcing Policy 227.1; and
3. Grant Plaintiffs such other and further relief as may be just and proper.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION

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Dated: March _____, 2011

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**IN THE COURT OF COMMON PLEAS OF PIKE COUNTY, PENNSYLVANIA
CIVIL DIVISION**

M.K and A.K., minors, by and through their
parents, Glenn and Kathy Kiederer,

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THE DELAWARE VALLEY SCHOOL
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· DOCKET No. _____
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VERIFICATION

We verify that the statements in the foregoing complaint, attached hereto, are true and correct to the best of our knowledge, information, and belief. We understand that our statements are made subject to the penalties of 18 Pa. Cons. Stat. § 4904, which relates to unsworn falsification to authorities.

Date

M.K.

Date

A.K.

Date

Glenn Kiederer

Date

Kathy Kiederer