IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

M.T., a minor, by and through her parents MORGAN THOMAS AND DONNA THOMAS, AND JEREMY THOMAS,	:	
Plaintiffs	:	
	:	
vs.	:	**No. 11-0552**
	:	
PANTHER VALLEY SCHOOL DISTRICT,	:	
Defendant	:	

Stephen J. McConnell, Esquire — **Counsel for the Plaintiffs**
William J. McPartland, Esquire — **Counsel for the Defendant**

MEMORANDUM OPINION

Serfass, J. – May 5, 2011

Here before the Court is Plaintiffs' "Motion for Preliminary Injunction," seeking to enjoin Defendant from enforcing the random drug and alcohol testing provisions of Panther Valley School District Policy 227.1. For the reasons that follow, Plaintiffs' "Motion for Preliminary Injunction" is granted.

FACTUAL AND PROCEDURAL BACKGROUND

On August 26, 2010, the Panther Valley School District Board of Education adopted a Drug and Alcohol Testing Policy, known as Policy 227.1 (hereinafter "Policy"; Plaintiffs' Exhibit 1). The Policy implemented three (3) types of drug testing for students in grades 6-12 in the Panther Valley School District (hereinafter "District"); voluntary testing, reasonable

suspicion testing, and random mandatory testing. (Id.) The random mandatory testing portion of the Policy required students who participate in extracurricular activities or athletics, or who use school parking facilities, to submit to random drug testing as a condition of participation therein. (Id.) The student and his or her parent were required to sign a consent form to authorize the random testing. (Id., Plaintiffs' Exhibit 3). The consent form authorizes the District to collect urine samples from the student, and have those samples tested for certain drugs and other substances, and authorizes disclosure of the results, when necessary, to the school principal, athletic director, head coach and/or advisor of any extracurricular activity in which the student participates. (Plaintiffs' Exhibit 3). On August 30, 2010, the District sent a letter to parents/guardians of Panther Valley students, which contained a list of activities affected by the Policy, and included a copy of the consent form to be returned to the school office by September 2, 2010. (Plaintiffs' Exhibit 2). The affected activities included, *inter alia*, Golf, Girls' Basketball, Band, Yearbook, Silks, Recycling Club, and Prom. (Id.).

On March 9, 2011, Plaintiffs Jeremy Thomas and M.T., by and through their parents, Morgan and Donna Thomas, filed a Complaint in Equity against the District, seeking to void Policy

227.1. In the Complaint, Plaintiffs argue that the Policy violates Article I, Section 8 of the Pennsylvania Constitution, as well as Pennsylvania Supreme Court precedent, in particular Theodore v. Delaware Valley School District, 836 A.2d 76 (Pa. 2003). Plaintiffs state that they have been unable to participate in activities such as the golf team, basketball team, recycling club and yearbook staff because they refused to consent to suspicionless drug testing as required by the Policy. As a result, Plaintiffs assert that they have suffered and will continue to suffer irreparable harm due to the Policy. Plaintiffs also assert that the District did not analyze drug and alcohol use by students involved in extracurricular activities, nor whether the Policy would be an effective means to deter any drug problem in the District. They also assert that the Policy is both overinclusive and underinclusive, because it singles out only students who are involved in extracurricular activities. Thus, Plaintiffs requested that the Court issue an Order declaring the Policy unconstitutional pursuant to Article I, Section 8 of the Pennsylvania Constitution, and issue preliminary and permanent injunctive relief enjoining the District from enforcing, implementing or maintaining the Policy.

On March 14, 2011, Plaintiffs filed a "Motion for Preliminary Injunction," seeking to enjoin the District from

enforcing the Policy. The Motion avers that the District has not made a showing of a need to conduct random drug testing in the Panther Valley School District, and has not stated a reasoned belief that testing only the students covered by the Policy would address such a need. For this reason, Plaintiffs aver that they are likely to succeed on the merits in the instant action. The Motion also avers that Plaintiffs are suffering and will continue to suffer immediate and irreparable harm, in that they are facing an ongoing violation of their privacy rights and ongoing exclusion from school activities. It further avers that Plaintiffs will suffer much greater injury if the requested relief is denied than would the District if the requested relief is granted. Accordingly, Plaintiffs request that the Court preliminarily enjoin the District from enforcing the Policy during the pendency of this action, order the District to immediately allow Plaintiffs and other similarly situated students to participate in school activities and obtain parking permits, and order the District to notify all Panther Valley students and parents of the primary injunction.

On March 30, 2011, the District filed Preliminary Objections to the Complaint in the form of a Motion to Strike-Failure to Conform to Law or Rule, and a Motion to Strike-Lack of Subject Matter Jurisdiction. On April 6, 2011, the District

filed Preliminary Objections to the Motion for Preliminary Injunction in the form of a Motion to Strike-Failure to Conform to Law or Rule and a Motion to Strike-Failure to State a Claim-Demurrer. On April 15, 2011, the District filed a Motion for a Protective Order pursuant to Rule 4012(a), seeking to preclude any discovery in this matter until the preliminary objections are resolved. On April 21, 2011, the District filed a Motion in Limine, seeking to preclude Plaintiffs from using a "confidential memorandum" prepared by the District's solicitor, or any testimony as to its contents, in this matter.

On April 21, 2011, this Court issued an Order denying the Districts' Motion for a Protective Order. On April 28, 2011, after considering the District's Motion in Limine, this Court issued an Order excluding the subject memorandum and any testimony regarding its contents at any hearing(s) concerning the Plaintiffs' "Motion for Preliminary Injunction," and scheduling a hearing on the District's Motion as to its applicability to any future proceedings in this matter. On April 29, 2011, following a hearing on the District's Preliminary Objections to the Complaint, and the District's Preliminary Objections to the "Motion for Preliminary Injunction," this Court issued Orders denying both sets of preliminary objections.

On April 29, 2011, this Court held a hearing on Plaintiffs'

"Motion for Preliminary Injunction." At the hearing, Morgan Thomas testified that he and his family moved to this area from Philadelphia to take advantage of the educational opportunities offered in the Panther Valley School District. He also testified that he wants his children to be involved in school activities, because they provide opportunities for social interaction. When the Policy was passed, Mr. Thomas stated that he felt angry and did not sign the consent form because he does not agree with the Policy. Mr. Thomas also testified that his son Jeremy was prohibited from finishing the season with the golf team, and has been prohibited from attending his senior prom, because Mr. Thomas would not sign the consent form. He indicated that his daughter M.T. wanted to try out for the basketball team.

M.T. testified that she is 16 years old, is involved in Silks, the band and J.R.O.T.C. at school, and that she wanted to try out for the basketball team. She testified that she did not try out for the basketball team this year, and that tryouts for the next season will be held in the winter. She also testified that she was permitted to finish Silks this school year, because it was close to ending when the Policy was adopted. She also testified that she was permitted to continue participating in the band. She conceded that she has never been drug tested by the District. M.T. testified that she feels the policy is wrong

because it invades her privacy, and that she is upset that she would have to "pee in a cup" to play basketball.

Jeremy Thomas testified that he is 18 years old, and currently a senior at Panther Valley High School. He testified that he was involved in band and golf at the beginning of the 2010-2011 school year. He indicated that the golf team started practicing during the summer of 2010, and that he was forced to miss the last match and the playoffs because his parents would not sign the consent form. Jeremy also testified that he wanted to become involved with the recycling club during the school year, but that he did not do so because of the Policy. He also testified that he would like to be able to attend his senior prom, which will be held on May 6, 2011. Jeremy further testified that he agrees with his parents that the policy invades his right to privacy, and that he should not have to prove that he is innocent by "peeing in a cup" in order to stay on the golf team. He conceded that the golf team has finished its season for the year, and that he has not been drug tested by the District.

DISCUSSION

"A court shall issue a preliminary or special injunction only after written notice and hearing unless it appears to the satisfaction of the court that immediate and irreparable injury

will be sustained before notice can be given or a hearing held, in which case the court may issue a preliminary or special injunction without a hearing or without notice." Pa. R.C.P. 1531(a). A plaintiff seeking an injunction must establish that:

1) **relief is necessary to prevent immediate and irreparable harm;**

2) **a greater injury will occur from refusing the injunction than from granting it;**

3) **the injunction will restore the parties to the status quo;**

4) **the alleged wrong is manifest and the injunction is reasonably suited to abate it; and**

5) **the plaintiff's right to relief is clear.**

Ambrogi v. Reber, 932 A.2d 969, 976 (Pa. Super. 2007). A party seeking injunctive relief also must show that granting the request will not adversely affect the public interest. Kessler v. Broder, 851 A.2d 944, 947 (Pa. Super. 2004). For a right to be "clear," it must be more than merely "viable" or "plausible." Anglo-American Ins. Co. v. Molin, 691 A.2d 929, 933-934 (Pa. 1997). However, this requirement is not the equivalent of stating that no factual disputes exist between the parties. All-Pak, Inc. v. Johnston, 694 A.2d 347, 350 (Pa. Super. 1997). The proper question is not whether the party seeking the preliminary injunction is guaranteed to prevail, but whether it produced sufficient evidence to show that "substantial legal questions

must be resolved to determine the rights of the respective parties." Id.

Clear Right to Relief

In this case, Plaintiffs have demonstrated a clear right to relief. "[E]quity has jurisdiction to protect by injunction property or personal rights when a fundamental question of legal right is involved and when the interests of justice require relief." City of Easton v. Marra, 862 A.2d 170, 174 (Pa. Cmwlth. 2004). In order to pass constitutional muster, Theodore requires the District to show a specific need for the Policy and provide "an explanation of its basis for believing that the policy would address that need." 836 A.2d at 92. The District's superintendent, Rosemary Porembo, was deposed in this case prior to the hearing. She testified that she first engaged in conversations with School Board members regarding a drug testing policy in the spring of 2008. (N.T., Deposition of Rosemary Porembo, 4/27/11, p. 23). The Policy does not list any data about drug use, or specifically state that there is a drug problem or persistent drug use in Panther Valley. (N.T., Deposition of Rosemary Porembo, 4/27/11, p. 58). Ms. Porembo testified that she and the Board believe that there is a drug problem in the District, based on student surveys and incidents

that have occurred over the past seven (7) years. (N.T., Deposition of Rosemary Porembo, 4/27/11, p. 73).

However, Ms. Porembo's testimony does not provide sufficient evidentiary support for this belief. The District did not select students involved in extracurricular activities and athletics, and those with parking privileges, for testing based on any identifiable need to test those specific students. She testified that the Board decided that the students subject to the Policy should be tested because they constitute the majority of the District's students. (N.T., Deposition of Rosemary Porembo, 4/27/11, pp. 62-63). She also testified that the student surveys she reviewed do not show any special risk for students in athletics or extracurricular activities, or students who drive to school. (N.T., Deposition of Rosemary Porembo, 4/27/11, p. 94). While Ms. Porembo testified that the School Board felt that the golf team, girls' basketball team, yearbook staff, national honor society, and recycling club have a special need for drug testing, she did not know how many students who are members of those groups have been arrested or disciplined for drugs or alcohol. (N.T., Deposition of Rosemary Porembo, 4/27/11, pp. 79-85). For the football team, basketball teams, boys' baseball team, track and field, swimming and cheerleading, band, and possibly the national honor society, she could only

recall one to two students being disciplined for drug or alcohol use over her thirty (30) years in the District. (N.T., Deposition of Rosemary Porembo, 4/27/11, pp. 86-87).

The surveys also do not show any difference as to drug and alcohol use between students who are involved in extracurricular activities and students who are not. (N.T., Deposition of Rosemary Porembo, 4/27/11, pp. 94-95). She could only identify possible drug and alcohol problems with an average of 3-7 students per year who are involved in athletics or extracurricular activities. (N.T., Deposition of Rosemary Porembo, 4/27/11, pp. 63-64). The data provided by the Student Assistance Program (SAP) Team regarding behavioral incidents due to drug and alcohol use, and the violation of drug and alcohol policies, indicated less than forty (40) such incidents from 2003 to the present. (N.T., Deposition of Rosemary Porembo, 4/27/11, pp. 74-76).

While Ms. Porembo testified that she met with the SAP Team, the chief of police and parents, she met with the SAP Team only once, the un-named chief of police did not present her with any hard data, and she met with only two parents concerning drug abuse issues. (N.T., Deposition of Rosemary Porembo, 4/27/11, pp. 67-72). She did not know how many parents the School Board had met with. (N.T., Deposition of Rosemary Porembo, 4/27/11, p.

72). She also indicated that the police chief did not tell her how many students he believed were involved with drugs, and did not tell her that there was a particular problem with student athletes, students involved in extracurricular activities, or students who drive to school. (N.T., Deposition of Rosemary Porembo, 4/27/11, p. 92). Her testimony that the District's goal in enacting the Policy was to maintain the environment that currently exists in the District, which is one where drug use by students is not a problem, further demonstrates that the Policy is not supported by sufficient evidence. (N.T., Deposition of Rosemary Porembo, 4/27/11, pp. 56-57).

There is also no indication that the Policy is an effective method of deterring student drug use. Ms. Porembo testified that she was not aware of and has not reviewed any studies regarding whether random drug testing is effective at reducing student drug use. (N.T., Deposition of Rosemary Porembo, 4/27/11, pp. 65-66). She also testified that the tests administered by the District do not test for alcohol, although she felt that alcohol use is a greater problem in the District (N.T., Deposition of Rosemary Porembo, 4/27/11, pp. 53, 64). Moreover, from October of 2010 to the date of the deposition, there have been no positive test results under the Policy. (N.T., Deposition of Rosemary Porembo, 4/27/11, pp. 42, 55). The District offered no

evidence at the hearing in support of the Policy. Therefore, at this stage of the proceedings, there is insufficient evidence before us to support a conclusion that there is a specific need for the Policy, and that the Policy would address that need. Accordingly, based on the foregoing, Plaintiffs have met their burden to demonstrate a clear right to relief.

Immediate and Irreparable Harm

Plaintiffs have also shown that relief is necessary to prevent immediate and irreparable harm. "An injury is 'irreparable,' as that term is contemplated in the context of a preliminary injunction, if it will cause damage which can be estimated only by conjecture and not by an accurate pecuniary standard." Ambrogi, 932 A.2d at 978 n. 5. In order to satisfy this element, it must also be shown that the alleged harm is reasonably certain to occur. Richman v. Mosites, 704 A.2d 655, 659 (Pa. Super. 1997). "Injunctive relief is not available to eliminate a possible remote future injury or invasion of rights." Id. "Equity will enjoin action when there is substantial threat of injury, without waiting for the injury to be inflicted. Air Products and Chemicals, Inc. v. Johnson, 442 A.2d 1114, 1122 (Pa. Super. 1982).

Irreparable harm is established where an alleged deprivation of a constitutional right is at issue. See Henry v.

Greenville Airport Commission, 284 F.2d 631, 633 (4th Cir. 1960)(holding that "[t]he District Court has no discretion to deny relief by preliminary injunction to a person who clearly establishes by undisputed evidence that he is being denied a constitutional right"); 11A Fed. Prac. & Proc. Civ. § 2948.1 (2d ed.). In Theodore, the Court determined that a similar random drug testing policy implicates the fundamental right of privacy under Article I, Section 8 of the Pennsylvania Constitution, and concluded that the policy "invades the privacy of students who need deterrence least." 836 A.2d at 95-96. See also Elrod v. Burns, 427 U.S. 347, 373-74 (1976)("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury"); and Covino v. Patrissi, 967 F.2d 73, 77 (2d Cir. 1992) (holding that irreparable injury was caused by a violation of the Fourth Amendment right to be free from unreasonable searches).

Therefore, Plaintiffs have shown that they are suffering irreparable harm because the existence of the Policy clearly affects Plaintiffs' constitutional rights. Since Plaintiffs remain subject to the Policy, this harm has not ceased, and, as a result, Plaintiffs have shown that they are suffering the immediate harm necessary in order to grant an injunction. See Elrod, 427 U.S. at 373-74 (holding that "[s]ince such injury was

both threatened and occurring at the time of respondents' motion and since respondents sufficiently demonstrated a probability of success on the merits, the Court of Appeals might properly have held that the District Court abused its discretion in denying preliminary injunctive relief").

While we acknowledge the cases cited by the District in support of its argument that participation in athletics and extracurricular activities is a privilege, and not a right, the harm at issue here is not solely a prohibition on participation. Rather, it is the effect that the Policy has on Plaintiffs' constitutional rights that constitutes the harm upon which the injunction is based. In this case, part of the District's justification for the Policy is the District's belief that students who participate in extracurricular activities or athletics, or who drive to school, "carry a special responsibility to themselves, fellow students, their parents/guardians, the public and their school to exercise prudent judgment." (Plaintiffs' Exhibit 1). Along these same lines, the District attempts to justify the Policy through its belief "that students who participate in extracurricular activities and athletics become role models for younger children and fellow students, and are viewed as special representatives

of the community when they participate in these activities." (Id.).

However, in Theodore, the Court rejected the premise "that it is constitutionally reasonable to target and make an example of some students, not because they have an existing drug or alcohol problem or because they are more likely than others to have or develop one, but because...they have assumed the mantle of 'student leaders' and 'role models.'" 836 A.2d at 95. The Court also held that electing to participate in school activities by itself does not justify "intrusive, suspicionless searches." Id. at 96, citing Board of Education v. Earls, 536 U.S. 822, 846 (2002)(Ginsburg, J., dissenting). Thus, the Court determined that forcing potentially innocent students to choose between school activities and their right to privacy under the Pennsylvania Constitution is not warranted without a strong justification for such a policy. Id. at 95-96.

In this case, as in Theodore, the District is seeking to force an unconstitutional choice on Plaintiffs without a sufficient justification for the Policy. Accordingly, we conclude that Plaintiffs have demonstrated that they are suffering immediate and irreparable harm which justifies the grant of a Preliminary Injunction.

Status Quo & Reasonableness of an Injunction

Granting an injunction enjoining the District from enforcing the Policy as to Plaintiffs will restore the parties to the status quo, and is reasonably suited to abate an allegedly manifest wrong. The status quo in this matter lies prior to the enactment of the Policy, when Panther Valley students could participate in athletics or extracurricular activities without submitting to random drug testing. An injunction enjoining enforcement of the Policy will enable Plaintiffs to freely participate in school activities without signing away their right of privacy in order to do so. As a result, granting an injunction is a reasonable exercise of this Court's equitable powers.

Resulting Injury & Effect on the Public Interest

Finally, the Court finds that greater injury will result from refusing to grant the injunction than from granting it. Based upon the evidence before us, it is clear that Plaintiffs are suffering an ongoing violation of their rights under the Pennsylvania Constitution. They have also lost nearly one entire school year of participation in extracurricular and athletic activities. While such activities are voluntary, "they are part of the school's educational program" and constitute "a key component of school life, essential in reality for students

applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience." Earls, 536 U.S. at 845 (Ginsburg, J., dissenting). By contrast, based upon the lack of sufficient evidence to support the policy, little, if any harm will be borne by the District, which will also be able to work against drug use through other methods. Additionally, the District's ability to function and advance its educational mission will not be hampered as a result of the injunction. Moreover, granting the injunction will preserve the constitutional rights of Plaintiffs and will, in no manner, adversely affect the public interest. See Council of Alternative Political Parties v. Hooks, 121 F.3d 876, 884 (3d Cir. 1997)(holding that "[i]n the absence of legitimate, countervailing concerns, the public interest clearly favors the protection of constitutional rights").

CONCLUSION

In conclusion, based on the foregoing, we find that Plaintiffs have satisfied their burden and are entitled to a preliminary injunction in this matter. Accordingly, Plaintiffs' "Motion for Preliminary Injunction" is granted, and the District is enjoined from enforcing the random mandatory drug testing portion of Panther Valley School District Policy 227.1 against Plaintiffs. The provisions of Policy 227.1 concerning, *inter*

***alia*, voluntary testing and reasonable suspicion testing shall remain in effect.**

BY THE COURT:

Steven R. Serfass, J.

IN THE COURT OF COMMON PLEAS OF CARBON COUNTY, PENNSYLVANIA
CIVIL DIVISION

M.T., a minor, by and through her parents MORGAN THOMAS AND DONNA THOMAS, AND JEREMY THOMAS, Plaintiffs	:	
vs.	:	No. 11-0552
PANTHER VALLEY SCHOOL DISTRICT, Defendant	:	

Stephen J. McConnell, Esquire — Counsel for the Plaintiffs
William J. McPartland, Esquire — Counsel for the Defendant

ORDER OF COURT

AND NOW, to wit, this 5th day of May, 2011, upon consideration of the Plaintiffs' "Motion for Preliminary Injunction," the Plaintiffs' brief in support thereof, the Defendant's response thereto, and following a hearing held thereon and, in accordance with our Memorandum Opinion of this same date, it is hereby **ORDERED and DECREED** as follows:

1. The Defendant, its officials, employees and agents are preliminarily enjoined from enforcing, maintaining or taking steps to further the random drug and alcohol testing provisions of Policy 227.1 as to the Plaintiffs;
2. The Defendant shall immediately allow the Plaintiffs to participate in school extracurricular activities and athletics, and to obtain school parking permits, to the

extent that the Plaintiffs would be eligible for such privileges in the absence of Policy 227.1;

3. In accordance with the provisions of Pennsylvania Rule of Civil Procedure 1531(b), the Plaintiffs are required to file an approved bond or deposit legal tender with the Prothonotary of Carbon County in the amount of one hundred dollars ($100.00). The Preliminary Injunction granted herein shall not become operative until such time as the Plaintiffs post security as set forth hereinabove; and
4. The Plaintiffs or their agents are hereby authorized to serve copies of this Order upon the Defendant and all those acting in concert with them.

IT IS FURTHER ORDERED and DECREED that this Order shall remain in full force and effect until such time as this Court specifically orders otherwise.

BY THE COURT:

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Steven R. Serfass, J.