IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF WAHKIAKUM

HANS YORK and KATHERINE YORK Parents of AARON E. YORK and ABRAHAM P. YORK, and SHARON A. SCHNEIDER and PAUL A. SCHNEIDER, parents of TRISTAN S. SCHNEIDER Plaintiffs,	)	NO. 99-2-00075-6
vs.	)	COURT'S MEMORANDUM DECISION
WAHKIAKUM SCHOOL DISTRICT NO. 200, et al., Defendants.	)	

THIS MATTER came before the Court upon cross motions for summary judgment. The only issue to be determined is whether Wahkiakum County School District Policy #3515 is constitutional. From the record, the Court has gleaned the following undisputed facts:

UNDISPUTED FACTS

1. Under Wahkiakum County School District #200 Board of Directors' Policy #3515:

a) All athletes involved in extracurricular athletics at Wahkiakum Middle

School and Wahkiakum High School are subject to random drug and alcohol testing;

b) Failure to participate in said drug and alcohol testing results in ineligibility to participate in extracurricular activities;

c) The testing is done by urinalysis;

d) The collection is done while the student is in a closed-in bathroom stall;

e) A Health Department employee is stationed outside the doorway of the bathroom and does not directly observe the student urinate. *("Marnee Davis affidavit")*;

f) The sample is mailed from the Health Department to Comprehensive Toxicology Services in Tacoma, Washington;

g) The results are then mailed back to the Superintendent of the school district. If the result of a particular urinalysis is positive for illegal drugs or alcohol, the Superintendent contacts the Medical Review Officer in order to make a determination as to whether a prescription medication or something other than an illegal drug could have produced the positive result;

h) Under the policy, students are not required to furnish information regarding prescription medications or past medical history to the Health

Department employee, but a student has the option of providing the information in order to explain positive test results;

i) If a student tested positive for illegal drugs, the results are not sent to the Sheriff's Office, nor is the student suspended from school;

j) The results of drug tests are not included in a student's academic record;

k) A first violation of the policy results in ineligibility for extracurricular athletic participation for the remainder of the season or 30 calendar days, whichever is longer. A second violation results in ineligibility for a period of one year from the date of the second violation. A third violation results in permanent ineligibility for extracurricular athletic participation. The school provides assistance in obtaining drug and alcohol counseling. If the student tested positive for alcohol, the first violation results in a 14 day suspension from all extracurricular athletic activities with parent conference, pre-assessment or formal assessment (as determined by a counselor), and completion of phase 1 or phase 2 alcohol and other drug education program or a 28 day suspension from all extracurricular athletics activities. A second violation results in a 21 day suspension from all extracurricular athletic activities with parent conference and participation in an alcohol and drug education program or a 45 day

suspension from all extracurricular athletic activities. Third and subsequent violations result in a 45 day suspension;

2. Prior to 1994, the School District developed training rules for student athletes which required that they abstain from use and possession of alcohol and illegal drugs.

3. The DARE program was also implemented at the K-6 level. From 1994 through 1996, K-12 staff received training on substance abuse and violence prevention, including how to detect and report it.

4. A K-12 Substance Abuse Preventionist position was created in 1995 and funded through 2000. The Preventionist used the "Here's Looking at You – 2000" program. Student support groups were also established.

5. In the 1996-1997 school year a high school Natural Helpers program was established. Natural Helpers are students who are elected by their peers to assist at-risk students with accessing appropriate services for help.

6. In the 1997-1998 school year, the CrossLinks program was established. The program pairs high school students with at-risk elementary students to work on building self esteem, academic success, anger management, creating friendships, and making positive life choices. As part of the program, the high school students pledged to remain free of substances.

7. In 1994 the Wahkiakum Community Network was formed pursuant to RCW 70.190.060 as a community public health and safety network.

8. Acting independently of the School District, the Network surveyed students in the Wahkiakum School District. The results of the survey indicated that 45% of 10th graders and 65% of 12th graders had used illegal drugs rather than alcohol.

9. The Network ranked teen substance abuse as the number one problem in Wahkiakum County.

10. From 1994 to 2002, students in the middle school and the high school participated in yearly surveys conducted by the Wahkiakum School District regarding the use of alcohol and/or illegal drugs. The surveys revealed the following:

a) In 1995, 51 of 150 high school students reported that they had used marijuana during the last 30 days. This represented approximately 34% of the student body;

b) In 1997, 50 of 160 high school students (31%) reported that they had used marijuana during the last 30 days;

c) In the spring of 1998, 40% of the 10th graders reported some prior use of illegal drugs and 19% of those 10th graders reported illegal drug use within the last 30 days;

d) In the spring of 1998, 42% of the high school seniors identified themselves as illegal drug users and 12.5% reported illegal drug use within the last 30 days;

e) In a survey conducted in the spring of 2000, approximately 50% (53 of 102) of athletes self-identified as drug and or alcohol users.

11. During the 1997-1998 school year, there were nine known alcohol violations and one known drug violation disciplined at the high school.

12. During the 1998-1999 school year there were seven known alcohol violations at the high school and four known drug violations at the middle school.

13. In the 1999-2000 school year, there were four alcohol violations, one drug violation, one alcohol and drug violation and three positive urinalysis tests for drugs at the high school.

14. Six middle school students received disciplinary action for drug violations.

15. The Drug and Alcohol Advisory Committee (now the "Safe and Drug Free Schools Advisory Committee") was formed by the School District in 1994 to address the problem of student alcohol and drug use.

16. The committee is open to any community member and includes parents of students. Meetings are open to the public. *(Garrett Dec., 63-65.)* The Committee's focus is to develop and implement a program designed to delay the first use of drugs

or alcohol among pre-teens and teens and to assist children who had already started to use alcohol and/or drugs. The Committee collected the survey information, evaluated the substance abuse programs that were in place, and held public discussions over a two to three year period regarding effectiveness of current programs and adoption of the Policy. Based upon the evidence of substantial alcohol and drug use among students and pursuant to the School District's statutory authority and responsibility to maintain order and discipline in its schools, to protect the health and safety of its students, and to control, supervise and regulate interschool athletics, the Board of Directors adopted the Policy. *(Garrett Dec., 3-4.)*

17. During the 1999-2000 school year, 184 out of 280 students (65.7%) in grades 7-12 participated in at least one sport. All of the students signed consent forms which required the signer to abide by Policy #3515 and six forms were signed under protest by a student or a parent. *(Garrett Dec., 3.)*

18. In the Wahkiakum School District, athletes are involved in the use of illegal drugs and alcohol at least to the same level as are non-athletes. *(Wolf Dec., 2.)*

19. Aaron York was a senior at Wahkiakum High School during the 1999-2000 school year and was tested for drugs and alcohol under the Policy. *(Declaration of Aaron York, 1.)*

20. Abraham York graduated from Wahkiakum High School in 2003. Abraham was tested once under the Policy and did not personally mind being tested, was not embarrassed by the process, nor did he feel punished by the Policy. *(Abraham York Deposition, 10-13.)* Abraham did not experience any anxiety because of the drug testing policy. *(Id., 14.)*

21. Tristan Schneider attended Wahkiakum High School from 1999-2003. She was a 10th grade student at Wahkiakum High School during the 2000-2001 school year. Tristan was tested once under the Policy. *(Tristan Schneider Deposition, 5.)*

DISPUTED FACTS

1. Student athletes are at a greater risk of injury if they participate in a sport while under the influence of drugs. Drugs impair reaction time and coordination and they can mask the true status of an injury due to false signs or symptoms. *(Declaration of Andy Wolf, hereinafter referred to as "Wolf".)*

2. Policy #3515 requires a student reveal all medications.

Neither of these disputed facts are material to the decision of the Court. Furthermore, with respect to the second disputed fact, the policy clearly does not require disclosure of other medications in the first instance. It is only if a positive result is obtained that a student must decide whether or not to reveal other medications or forfeit

his or her right to participate in extracurricular activities.

RULING

Policy 3015 of the Wahkiakum School District is not unconstitutional because "special needs" exist that overcome the clear privacy rights of student athletes. The District's motion for summary judgment is granted. The Plaintiff's motion for summary judgment is denied.

REASONING

Constitutions are not static documents. Federal and State framers of these cornerstones of our democracy recognized the need to create some flexibility to address inevitable, profound, and unforeseeable changes in a dynamic society. On the other hand, Courts cannot succumb to the temptation to find such change in every clash of individual liberty and state action. The hallmark of proper judicial decision-making is careful and considerate deference to the reasoned deliberation of higher courts coupled with an application of that precedent to current facts and societal evolution.

Policy 3015 authorizes searches without a warrant of students who are not suspected of any wrong-doing. *Ferguson v. City of Charleston, 121 S.Ct.1281 (2001).* As such, it is the District's burden to prove beyond a reasonable doubt that the policy is constitutional. *State v. Parker 139 Wn. 2d (1999), State v. Johnson 128 Wn. 2d (1996).* The presumption of constitutionality accorded a regularly enacted ordinance does not

apply to ordinances which implicate fundamental rights. Weden v. San Juan County, *135 Wn. 2d 678 (1998).*

Policy 3015 is a valid execution of School Board authority under the Fourth Amendment of the U.S. Constitution. Board of Education v. Earls, *536 U.S. 822 (2002),* Vernonia School District v. Acton, *515 U.S. 646 (1995).*

The only issue before the Court then is whether the Policy can withstand scrutiny under Article I, Section 7 of the Washington State Constitution. The section reads as follows:

> *"No person shall be disturbed in his private affairs, or his home invaded without authority of law."*

It is well established that these 17 words provide greater protection of individual privacy rights than the Fourth Amendment of the U.S. Constitution. Stated another way, Article I, Section 7 provides greater protection against search and seizures performed in Washington State then the Fourth Amendment does in any other jurisdiction. State v. Parker, *139 Wn. 2d 486 (1999);* State v. Ladsen, *138 Wn 2d (1999);* Seattle v. Mesiani, *110 Wn. 2d 454 (1988);* State v. Myrick, *102 Wn. 2d 506 (1984);* State v. Jackson *102 Wn. 2d 432 (1984).*

Even though Article I, Section 7 generally protects all citizens from State intrusion into their private affairs to a greater degree then the Fourth Amendment of the

U.S. Constitution, our courts have carved out certain "narrow and jealously guarded exceptions." *State vs. Olivas, 122 Wn. 2d 72 (1993)* allowed the drawing of blood from juvenile offenders sentenced to an institution even though they were not suspected of any wrong-doing. In *State vs. Wadsworth, 139 Wn. 2d 724 (2000)* the Supreme Court allowed warrantless, suspicionless searches of people entering a county courthouse. In *State vs. Brooks, 43 Wn. App. 560 (1986)* the Court of Appeals allowed a warrantless search of a student locker for mushrooms. In the course of its ruling, the Court ruled that Article I, Section 7 affords students no greater protection from searches by school authorities than the U.S. Constitution Fourth Amendment. This statement made in 1986 is of questionable authority in light of the authorities cited above. The Court concludes the only exception to the requirements of 1) individual suspicion and 2) a validly issued warrant available to the District is the "special needs" exception recognized under the Fourth Amendment by the U.S. Supreme Court in *Board of Education v. Earls, 536 WS 822 122 Sup. Ct. 2559 153 L. Ed. 2d 735 (2002)* and *Vernonia, Supra*.

The Court finds the "special needs" exception applicable to cases arising under Article 1, Section 7 of the Washington State Constitution.

The District relies on *State vs. Brooks, 43 Wn. App. 560 (1986)* and *State vs. Slattery, 56 Wn. App. 820 (1990)* for the proposition that these courts have recognized a "special needs" exception to Article I, Section 7. The Court believes this reliance is

unfounded. Both of these cases cite *New Jersey vs. T.L.O., 469 U.S. 325 (1985)* and in that case the Supreme Court introduced the term "special needs". However the "special needs" in *T.L.O.* is not of the same nature as the "special needs" recognized in *Earls* and *Vernonia*. The special needs in *T.L.O.* relates to the "special needs" of school authorities to act quickly engendered by the school environment. The 'special needs" exception in *Earls* and *Vernonia*, while applied in school settings, is not a creature born exclusively of school environments. Rather the conditions existing in any environment can justify a finding of "special needs" where under the circumstances the governments needs to discover latent or hidden conditions or to prevent their development and this need is compelling enough to justify the intrusion on protected privacy without a warrant. In both *Brooke* and *Slattery* individual suspicion existed. Furthermore, the "special needs" recognized in *T.L.O.* does not include in its justification the State interest in presenting the development of harmful conditions which is approved in both *Earls* and *Vernonia*.

The Plaintiff relies primarily upon *Kuehn vs. Renton School District, 103 Wn. App. 594 (1985)* for the proposition that any policy allowing searches of students without individualized suspicion is unconstitutional. But *Kuehn* was decided in 1985 and was predominately a Fourth Amendment case and as such is of little precedential value in light of *Earls* and *Vernonia*. While the Court made reference to Article I, Section 7, the case was clearly resolved on Fourth Amendment grounds and this may in turn have led to the Court of Appeals' comment in *Brooks* in 1986 that the protection of the Fourth Amendment and Article I, Section 7 as applied to students is co-extensive. The only case

applying the "special needs" exemption to Article I, Section 7 is Robinson vs. Seattle, *102 Wn. App. 795*. In Robinson, Division One found that, under proper circumstances, "compelling needs" could justify searches without individual suspicion. The Court held requiring drug testing of firefighters and police officers without a warrant and individualized suspicion can survive judicial scrutiny:

> *"Government can have few obligations greater than protection of the safety of its citizens; public safety is clearly a compelling interest that justifies intrusion on the autonomy branch of privacy under article I, section 7. Suspicionless preemployment drug testing is therefore justified under article I, section 7 where the duties of a particular position genuinely implicate public safety, such that there is potential jeopardy to members of the public if such duties are performed by a person who abuses drugs.*
>
> *'The City describes its entire program as "narrowly restricted to outside applicants for vacancies in safety-sensitive positions[.]" Since half the City's jobs are deemed to fall in this "safety sensitive" category, however, this claim requires examination. The City says the identification of safety-sensitive jobs under the ESD guidelines "is reasonable because it is restricted to dangerous work involving public safety, use of electricity, life guarding, . . . operating motor vehicles, heavy equipment, bridges and machinery and working with toxic substances."*

Robinson v. City of Seattle, *102 Wn. App. 795, 823-824 (Wash. Ct. App. 2000).*

If government can have few obligations greater than protection of the safety of its citizens, then one of those "few" obligations must be the protection of its children from

the effects of illegal drugs in schools.

> *"Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children. For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases. According to the American Academy of Pediatrics, most public schools "provide vision and hearing screening and dental and dermatological checks....Others also mandate scoliosis screening at appropriate grade levels." Committee on School Health, American Academy of Pediatrics, School Health: A Guide for Health Professionals 2 (1987). In the 1991-1992 school year, all 50 states required public school students to be vaccinated against diphtheria, measles, rubella, and polio. U.S. Dept. of Health & Human Services, Public Health Service, Centers for Disease Control, State Immunization Requirements 1991-1992, p. 1., particularly with regard to medical examinations and procedures, therefore, 'students within the school environment have a lesser expectation of privacy than members of the population generally'."*

T.L.O., Supra, at 348 (Powell, J., concurring).

Vernonia Sch. Dist. 47j v. Acton, 515 U.S. 646, 656-658 (U.S. 1995).

In its decision in this case, the Court of Appeals held:

> *"To determine whether the special needs exception applies, a court examines the nature of the privacy interest and the character and degree of the intrusion. Then the court determines whether a compelling state interest justifies the intrusion and whether the intrusion is a narrowly tailored means of serving the interest."*

Vernonia, 515 U.S. at 660-64.

York v. Wahkiakum School District, 100 Wn. App. 383 (2002).

<u>NATURE OF PRIVACY INTENT</u>

The privacy interest sought to be protected by the Plaintiff is the content of the urine of an anonymously selected student athlete who is participating in school sponsored athletics. Courts have held this interest is limited.

> *"A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. School children are routinely required to submit to physical examinations and vaccinations against disease. See id., at 656. Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults. See <u>T. L. O.,</u> Supra, 469 U.S. at 350 (Powell, J., concurring). ("Without first establishing discipline and maintaining order, teachers cannot begin to educate their students. And apart from education, the school has the obligation to protect pupils from mistreatment by other children, and also to protect teachers themselves from violence by the few students whose conduct in recent years has prompted national concern").*
>
> *'Respondents argue that because children participating in nonathletic extracurricular activities are not subject to regular physicals and communal undress, they have a stronger expectation of privacy than the athletes tested in <u>Vernonia</u>. See Brief for Respondents 18-20. This distinction, however, was not essential to our decision in <u>Vernonia</u>, which depended primarily upon the school's custodial responsibility and authority.".*
>
> <u>*Bd. of Educ. v. Earls, 536 U.S. 822, 830-831 (U.S. 2002)*</u>

In <u>*Vernonia*</u> the Court held:

> *"Fourth Amendment rights, no less than First and Fourteenth Amendment rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children. For their own good and that of their classmates, public school children are routinely required to*

submit to various physical examinations and to be vaccinated against various diseases. According to the American Academy of Pediatrics, most public schools 'provide vision and hearing screening and dental and dermatological checks. . . . Others also mandate scoliosis screening at appropriate grade levels.' Committee on School Health, American Academy of Pediatrics, School Health: A Guide for Health Professionals 2 (1987). In the 1991-1992 school year, all 50 States required public school students to be vaccinated against diphtheria, measles, rubella, and polio (U.S. Dept. of Health & Human Services, Public Health Service, Centers for Disease Control, State Immunization Requirements 1991-1992, p. 1) particularly with regard to medical examinations and procedures, therefore, 'students within the school environment have a lesser expectation of privacy than members of the population generally." *<u>T.L.O.,</u> Supra, at 358 (Powell, J., concurring).*

'Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful. They require 'suiting up' before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. The locker rooms in <u>Vernonia</u> are typical: No individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors. As the United States Court of Appeals for the Seventh Circuit has noted, there is "an element of 'communal undress' inherent in athletic participation". <u>Schaill by Kross v. Tippecanoe County School Corp.</u>, 864 F. 2d 1309, 1318 (1988).

'There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to 'go out for the team', they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. In <u>Vernonia's</u> public schools, they must submit to a preseason physical exam (James testified that his included the giving of a urine sample, App. 17), they must acquire adequate insurance coverage or sign an insurance waiver, maintain a minimum grade point average, and comply with any 'rules of conduct,

dress, training hours and related matters as may be established for each sport by the head coach and athletic director with the principal's approval.' Record, Exh. 2, p. 30, P 8. Somewhat like adults who choose to participate in a 'closely regulated industry', students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy. See Skinner, 489 U.S. at 627; United States v. Biswell, 406 U.S. 311, 316, 32 L. Ed. 2d 87, 92 S. Ct. 1593 (1972)."

Vernonia Sch. Dist. 47j v. Acton, 515 U.S. 646, 656-658 (U.S. 1995).

These cases establish that under Federal constitutional law the privacy interest at issue here is not significant. It does not follow that State constitutional provisions (Article I, Section 7) allow a court to so categorize that interest. Indeed it seems certain that the historic value placed on bodily secretions by the Washington Supreme Court would compel a more protected classification then recognized by Federal Courts.

However the Court is convinced that while the right to privacy of the content of one's urine deserves more protection under the State Constitution then given under the U.S. Constitution, under the correct circumstances a "special need" exists that outweighs even that elevated standard. *Robinson v. Seattle, Supra*. The need to discover student use of illegal drugs and prevent its impact on the Wahkiakum Schools is sufficient justification to allow the District to compromise individual privacy rights.

CHARACTER AND DEGREE OF INTRUSION

The character of the intrusion in this case is troubling. Federal Courts are not concerned with the indignity of the *Vernonia* and *Earls* urine collection, however

Washington State Courts take a different view. Robinson, *Supra*. Be that as it may, the process is not so flawed as to overcome the compelling need to control drugs in schools. The degree and type of intrusion is less than blood testing and is clearly allowed under both Washington and Federal decisions.

In York, *supra* the Court of Appeals directs this Court to evaluate the means used by the State to satisfy its compelling interest. To pass muster under Article I, Section 7, Policy #3015 must be narrowly tailored to meet a legitimate and compelling need.

Clearly the District has complied with this requirement. First, the policy applies only to student athletes. Second, the test is random. Not all athletes are tested. The urine is tested only for a limited number of drugs and alcohol. The person tested needs to provide information about other drugs being taken if there is a positive result and then only if further participation in athletics is desired. The results and testing are not done for law enforcement purposes and the results are subject only to disclosure by a subpoena to a court.

By its adoption of Policy #3015, the District has approached the tolerance limit of Article I, Section 7 to government mandated warrantless intrusion without individual suspicion. It well may be that there are better ways to accomplish the result sought by the District but it is not a Court's prerogative to second guess the decisions of another

branch of government as to the proper way to carry out a legitimate goal so long as constitutional rights are not violated, nor is it the Court's function to determine exactly the exact extent of the problem faced by the District.

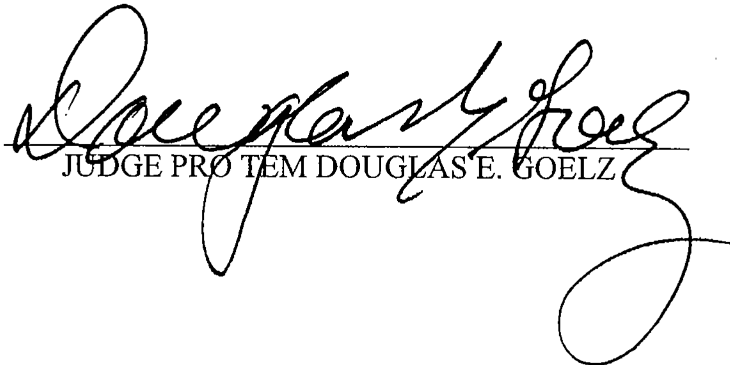
> *"...this Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing. For instance, in* Von Raab *the Court upheld the drug testing of customs officials on a purely preventive basis, without any documented history of drug use by such officials. See* 489 U.S. at 673*. In response to the lack of evidence relating to drug use, the Court noted generally that 'drug abuse is one of the most serious problems confronting our society today' and that programs to prevent and detect drug use among customs officials could not be deemed unreasonable.* Id. At 674;cf. Skinner*, 489 U.S. at 607, and n. (noting nationwide studies that identified on-the-job alcohol and drug use by railroad employees). Likewise, the need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy. Indeed, it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.*
>
> *'Given the nationwide epidemic of drug use, and the evidence of increased drug use in Tecumseth schools, it was entirely reasonable for the School District to enact this particular drug testing policy. We reject the Court of Appeals' novel test that 'any district seeking to impose a random suspicion-less drug testing policy as a condition of participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem.'* 242 F.3d at 1278*. Among other problems, it would be difficult to administer such a test. As we cannot articulate a threshold level of drug use that would suffice to justify a drug testing problem for school children, we refuse to fashion what would in effect be a constitutional quantum of drug use necessary to show a 'drug problem'.*

'Respondents are correct that safety factors into the special needs analysis, but the safety interest furthered by drug testing is undoubtedly substantial for all children, athletes, and non- athletes alike. We all know too well that drug use carries a variety of health risks for children, including death from overdose."

From the foregoing undisputed facts, it is beyond question that the Wahkiakum School District engaged in a comprehensive investigation of the extent of drug use among its students. It was reasonable to conclude from that investigation that such drug use was an existing problem of a very serious nature. Moreover, it was also reasonable to conclude that increased drug use posed a real and serious threat to its educational and in loco parentis obligations. Finally, it resorted to drug testing only after less intrusive methods of addressing the threat failed.

The Court finds Policy #3015 is constitutional beyond a reasonable doubt and the District's motion for summary judgment is granted.

Dated this the 9 day of June 2006.



JUDGE PRO TEM DOUGLAS E. GOELZ