

Student Drug Testing Policies: What Districts Should Know

The subject of student drug testing has recently become a hot topic in the education world. Faced with reports of increasing rates of drug use by teenagers, frequent media coverage regarding the national substance abuse epidemic, and instances of student drug use in their own districts, it is easy to see why school administrators would consider implementing policies for drug testing their students.

Many school districts already have policies that allow for suspicion-based drug testing of students, and that allow for discipline of any student who tests positive under the district's disciplinary code. Such suspicion-based testing is drug testing performed when school personnel have evidence or "reasonable suspicion" to believe that a student is under the influence of a prohibited substance while at school or during a school-sponsored event. Reasonable suspicion that a student has consumed prohibited substances might include an admission of substance use by the student, odors of intoxicants, slurred speech, uncoordinated movement, or other physical symptoms. Suspicion-based drug testing of students is permissible under the law, so long as school personnel have reasonable cause to suspect a student's drug use.

Additionally, some school districts are now also considering, or have already adopted, policies that allow for random drug testing of students without reasonable suspicion of drug use. Although the law regarding random student drug testing in school districts is not well-settled, random drug testing of students can be legally permissible when specific criteria are met.



By: Danielle McAfee

**For questions regarding
Student Drug Testing:**



**Danielle McAfee
Attorney**

**2401 Bernadette Drive
Suite 117
Columbia, MO 65203**

573.777.9645

dmcafee@edcounsel.law



The most relevant guidance from a legal standpoint is from a 2002 U.S. Supreme Court case, *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*. In that case, the Court found that suspicionless, random drug testing of students participating in competitive extracurricular activities with a safety component did not violate the constitution. The Court added that because the students voluntarily participated in these activities, they voluntarily subjected themselves to intrusions upon their normal rights and privileges, including privacy. Essentially, student drug-testing is subject to a reasonableness standard. Thus, the school district in *Earls* was able to drug test its students because: (1) their participation in activities meant that they had a reduced expectation of privacy; (2) the school had a reasonable belief that it had a drug problem; and (3) the drug testing was needed for the students' safety during extracurricular activities.

Applying this standard from *Earls*, the least-legally risky approach for a school district wishing to drug test its students would be to only randomly drug test students participating in MSHSAA-regulated activities in which the students do not receive academic credit for participation. Although it is legally permissible to expand the student drug-testing pool to include all MSHSAA-regulated activities, including those where academic credit is awarded, it has generally been our recommendation that any district conducting random drug testing of students limit the drug-testing pool in this manner, to best minimize the legal risks to the district. This way, the “voluntary participation” requirement set forth in *Earls* is met, in that the activity is not something that students are required to do in order to earn academic credit.

That said, we have also worked with districts who have chosen to expand their student drug-testing pool beyond non-academic MSHSAA-regulated activities, and beyond the suggested limitations discussed above. However, we do caution that any time a district widens their pool of students subject to drug testing, the district is opening itself up for additional potential legal challenges. For example, in a 2016 U.S. Court of Appeals case, *Kittle-Aikeley v. Strong et al*, the Eighth Circuit Court held that a state technical college's mandatory, suspicionless drug testing policy was constitutional as it applied to students engaged in programs that posed a significant safety risk to others, but that the college's interest in providing a safe, healthy, and productive environment by detecting, preventing, and deterring drug use and abuse among students did not establish a special need for suspicionless drug testing of all students. For that reason, the Court held that this mandatory, suspicionless drug testing program was unconstitutional as it applied to students enrolled in academic programs that did not include tasks that posed a significant safety risk to others.

As drug testing students for purposes and activities beyond non-academic extracurricular activities has not otherwise been extensively reviewed by the courts, we cannot with certainty estimate how a court may rule on a challenge to such policies. Consequently, widening a student drug-testing pool beyond non-academic extracurricular activities and activities that pose a significant safety risk to others could expose a district to additional legal risks. For this reason, we do recommend that districts consult with their legal counsel for specific guidance when considering the implementation of any student drug testing policy.

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