

Drug Testing of Students

David Evans, J.D.

Abstract

This article contains a legal overview of some issues surrounding student drug testing, a recounting of the benefits of testing, and a description of the testing process that protects the integrity of the procedure and the validity of the results.

The Law

Drug testing of students has been upheld by the courts or authorized by state statute when there was some "reasonable suspicion" of drug use. "Reasonable suspicion" means that the school believes the actions or appearance or conduct of a student are indicative of the use of a controlled substance or alcohol.(1)

In addition, the United States Supreme Court decided that random testing of high school athletes and students in extracurricular activities was constitutional in the cases of *Vernonia School District v. Acton* (athletes) and more recently in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (extracurriculars).(2)

The primary legal concerns in student drug testing are the constitutional search and seizure protections. Drug testing is considered a search because a drug test "searches" a bodily fluid. Generally, courts have held that the educational setting may justify a search in order for the school administration to provide an orderly learning atmosphere. In addition, there is the concept of "in loco parentis" that enables the school to act in the role of a parent in supervising and protecting the child.

There have also been several cases arising under state law. The courts have generally upheld student random drug testing, and there are state statutes that provide for drug testing of students. (3)

The Studies Support Student Drug Testing

Several studies have supported the effectiveness of student drug testing. (4) These studies were discussed at some length by the New Jersey Supreme Court in the case of *Joye v. Hunterdon Central Regional High School* and elsewhere.

The Checks and Balances in the Drug Testing Process

Drug testing in schools is usually done by a three step process:

1. an initial immunoassay screening test that if positive, 2. is confirmed by an alternate technology, then 3. the final results are reviewed by a Medical Review Officer who reports the test result.

Specimen Collection

Drug testing begins with the collection of a urine or saliva specimen. Hair can also be used for testing. There are well-established procedures for collecting specimens. The chain of custody of the specimen must be protected. Chain of custody is the documentation of the specimen collection and then safe handling of the specimen from collection to analysis. Urine and saliva testing can be done on-site or in a laboratory. Hair testing requires use of a laboratory.

Confirmation of Tests

Initial immunoassay drug tests are generally confirmed by a process called gas chromatography/mass spectrometry (GC/MS). This process meets legal accuracy standards.

Medical Review Officer (MRO)

Positive results should be reviewed by a Medical Review Officer, a physician trained in evaluating drug test results who will consult with the student if the test is positive to determine if the drug use was legitimate due to a doctor's prescription or was illegitimate.

The results should be kept confidential and only released on a need to know basis. Confirmed positive drug test results can then be used to deny privileges and/or to initiate further evaluation of the student.

Drug Testing Is Cost Effective

Only a small percentage of the students needs to be tested in order to make it effective. Deterring drug use in the school by drug testing also saves a lot of hidden costs such as staff time, medical costs due to staff being assaulted by students, damage to school property due to vandalism, and insurance costs.

Any concern schools had about being able to pay for testing has now been solved because the recent federal *Leave No Child Behind Act of 2001* permits schools to use federal education funds for student drug testing. Student drug testing is a specific program initiative listed in this landmark law. See sections 4002 and 4115 of H.R.1.

Student Confidentiality Is Protected Under Federal Law

Student confidentiality is protected by two important federal laws. The first is the *Family Educational Rights and Privacy Act* which prohibits student records from being released, including drug and alcohol testing results, without the consent of the parents or if the student is 18, without the student's consent (20 U.S.C. 1232g). In addition, student treatment records are protected by the federal *Confidentiality of Alcohol and Drug Abuse Patient Records* regulations that carry federal criminal penalties for improperly releasing information (42 CFR Part 2. Section 2.1(f)).

Student Attitudes

The ACLU has criticized student drug testing because they claim that giving drug tests to students who participate in extracurricular activities will make the activities less attractive to students. They claim that by having less participation in extracurricular activities students will choose to participate in drug related behavior. While it is true that extracurricular activities help students to lead a positive life, there is no evidence that there is a drop off in participation because of drug testing. The ACLU could not present any such evidence to the U. S. Supreme Court. In fact, students report that drug testing gives them a reason to say 'no' to drugs and still be 'cool' with the other students. In a recent *Seventeen Magazine* poll, 54 percent of young people said they would take a drug test "no problem." (5) A *USA Today* poll showed that 70 percent of adults support testing of students in athletics and extracurricular activities. (6) Many schools find great value in using random drug and alcohol testing as part of their anti-drug programs. The goal of testing is to deter drug and alcohol use. Students who know they may be detected are less likely to use drugs or alcohol.

Drug and alcohol testing are effective and extremely accurate if properly administered and student dignity and privacy are preserved. Some parents have concerns about testing. In most cases they do not understand how testing works and how accurate it is. Once it is explained to them and they understand the protections built into a good testing process, their concerns are relieved. Most parents support testing. They recognize that student drug and alcohol use is often difficult to detect from observation alone.

Author Information

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David Evans is a Special Advisor to Drug Free America Foundation. Mr. Evans practices law in Flemington, New Jersey. He is admitted to practice before the United States Supreme Court and has written several amicus briefs for the US Supreme Court on student drug testing, "medical" marijuana, and drug testing.

Mr. Evans has written several books dealing with substance abuse and the law, including books on designing effective drug testing programs and on kids, drugs and the law. His books on drug testing are: *Drug Testing Law Technology and Practice* and *Designing an Effective Drug-free Workplace Compliance Program* published by Thomson/West.

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