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August 1, 2008

The Honorable Donna R. Ikeda
Chairperson, Board of Education
State of Hawaii
P.O. Box 2360
Honolulu, Hawaii 96804

Dear Chairperson Ikeda:

RE: Random Drug Testing of Teachers

We received your letter dated July 11, 2008, seeking legal advice regarding the following:

1. Cite the legal authority and analysis that overrules the U.S. Court of Appeals for the Ninth Circuit's holding in *Lanier v. City of Woodburn* prohibiting state actors from drug testing employees without reasonable suspicion, except when state employees are performing safety-sensitive functions.

2. Since the Hawaii State Constitution provides greater privacy protections than the U.S. Constitution, provide the relevant law and analysis that supports the constitutionality of randomly drug testing all Hawaii state employees.

3. Is suspicionless random drug testing violative of the U.S. Constitution's privacy protection?

4. Is suspicionless random drug testing violative of the Fourth Amendment of the U.S. Constitution?

5. Is suspicionless random drug testing violative of Article I, Section 6 of the Hawaii State Constitution?

6. If suspicionless random drug testing is violative of the above-stated U.S. Constitutional provisions (Questions 3 and 4) and/or the Hawaii State Constitutional provision (Question

5), would such a violation by a state official render the state official personally liable under 42 U.S.C. § 1983?

7. If a state official is found liable under 42 U.S.C. § 1983, would the State of Hawaii cover any monetary or other liability?

8. May an individual's privacy and Fourth Amendment protections be waived by any collective bargaining agreement where such waiver was agreed to by the union but not specifically consented to by the individual member?

Although your questions are phrased broadly in terms of the legality of random drug testing for public employees, we will respond in terms of the more specific issue of random drug testing for public school teachers. We do so because it is that particular context involving school teachers that is at issue here, and because analysis of random drug testing is very much situation-dependent, and turns upon precisely whom is being tested. Because questions 1 through 5 and 8, all deal specifically with the question of the constitutionality of random drug testing, we will address them together in one main section.

**SHORT ANSWERS:**

In specific answer to your questions 3, 4, and 5, we believe that in this case, implementation of bargained for suspicionless random drug testing of public school teachers is constitutional and would not violate the federal or state constitutional provisions you cite, if adequate and appropriate procedural protections are put in place. We note that the teacher's union agreed to such random drug testing in the collective bargaining agreement. Because of the importance of the collective bargaining process, and considering the fact that the agreement was both bargained and ratified by a vote of the full membership, the drug testing ought to be upheld as not violative of either the United States Constitution or the Hawaii Constitution, without regard to other factors.[1]

Even if the collective bargaining agreement did not *ipso facto* validate the testing, consideration of all relevant

[1] Again, this assumes adequate and appropriate procedural safeguards are in place.

factors also supports our opinion that bargained for suspicionless random drug testing of public school teachers is constitutional. In addition, Hawaii state courts have independent strong grounds to uphold such testing against state constitutional challenges given the state constitutional significance of the collective bargaining process.

We note that to our knowledge, no United States Supreme Court, United States Court of Appeals for the Ninth Circuit, or Hawaii appellate court ruling has struck down such testing of teachers, and the United States Court of Appeals for the Sixth Circuit has explicitly upheld suspicionless drug testing of public school teachers.

As to question 6, we believe that if adequate and appropriate procedural protections are in place, but a court nevertheless finds the random drug testing to violate the United States Constitution, or the Hawaii Constitution, the doctrines of qualified immunity (both federal and state) will shield state officials from personal liability.

As to question 7, the decision of whether to pay a judgment entered against a state official or employee is a decision that rests with the Legislature. Based upon past history and practice, we believe that the State Legislature would appropriate money to cover any judgment against any state officials found personally liable for putting into effect a program of random drug testing for public school teachers. As noted, however, we believe that with adequate procedural protections with regard to the testing, there would be no such liability.[2]

**DISCUSSION:**

**A. The constitutionality of random drug testing of public school teachers.**

Because the collective bargaining agreement (CBA) signed by the Board of Education and the Hawaii State Teachers Association (HSTA) provides for random drug testing of Bargaining Unit 5 employees, and the teachers ratified that agreement, there is significant caselaw to support the conclusion that that fact

[2] We also note that State employees generally operate under the exact same parameters with regard to expectations of funding by the Legislature of judgments entered against them.

alone removes any constitutional problem with random drug testing of public school teachers.

**1. The effect of the collective bargaining agreement in which the parties agree to random drug testing of Bargaining Unit 5 employees.**

Under the "Memorandum of Understanding Between State of Hawaii, Board of Education and Hawaii State Teachers Association (Drug and Alcohol Testing)" (MOU), which is Appendix II to the collective bargaining agreement (which was approved by the teachers as a whole), the parties agreed as follows:

> This Memorandum of Understanding is entered into this 1st day of July 2007, by and between the State of Hawaii, Board of Education and the Hawaii State Teachers Association.
>
> The Federal Drug-Free Workplace Act of 1988, and the Drug-Free Schools and Communities Act Amendments of 1989, require that the Department of Education maintains a drug-free and alcohol-free school environment. In addition, teachers should be aware that the unlawful manufacture, distribution, dispensation, possession or use of illicit substances is prohibited on school premises or as part of any school activity.
>
> The Association and the Board of Education agree that the most conducive environment for learning is in a place free from the hazards of the use of controlled substances and alcohol.
>
> Therefore, the Association and the Board of Education shall establish a reasonable suspicion and **random** Drug and Alcohol Testing (DAT) procedures applicable to all Bargaining Unit 5 employees that are intended to keep the workplace free from the hazards of the use of alcohol and controlled substances.
>
> In addition, the Association and the Board of Education agree to negotiate reasonable suspicion and **random** Drug and Alcohol Testing procedures which shall comply with the U.S. Department of Transportation Rules on Drug and Alcohol Testing and/or State Department of Health Rules on Substance Abuse Testing, and implement such a plan no later than June 30, 2008.

> This Memorandum of Understanding shall expire on June 30, 2009. (Emphasis added).

Because the HSTA has agreed to the establishment of "random Drug and Alcohol Testing," there is a strong argument that individual teachers within Bargaining Unit 5 are constitutionally deemed to have agreed to random drug testing, and that therefore any constitutional search and seizure or privacy concerns are no longer valid, at least as applied to a random drug testing program that fits within the language of the MOU.[3]

The leading cases on this point come from the United States Court of Appeals for the Third Circuit. In Bolden v. Southeastern Pennsylvania Transportation Authority, 953 F.2d 807 (3d Cir. 1991) (*en banc*), cert. denied, 504 U.S. 943 (1992), the United States Court of Appeals ruled (in an opinion by then Judge Alito) as follows:

> [W]e believe that a union such as Bolden's may validly consent to terms and conditions of employment, such as submission to drug testing, that implicate employees' Fourth Amendment rights.
>
> The authority of Bolden's union to make binding contractual commitments regarding terms and conditions of employment is well established. Under the Pennsylvania Public Employee Relations Act, . . . a union is the exclusive collective bargaining representative for all of the employees in the unit,[4] and therefore the union, in entering into a

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[3] Because the MOU does specify that the random drug testing program shall establish "procedures . . . that are intended to keep the workplace free from the hazards of the use of alcohol and controlled substances," the program should be geared solely to that purpose, and not for any other purpose. In addition, the MOU requires that the "procedures . . . comply with the U.S. Department of Transportation Rules on Drug and Alcohol Testing and/or State Department of Health Rules on Substance Abuse Testing . . . ."

[4] Cf. Haw. Rev. Stat. § 89-8 ("The employee organization which has been certified by the board as representing the majority of [public] employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit. As

> collective bargaining agreement, may agree to terms and conditions of employment that are contractually binding on all of the employees.
>
> The Supreme Court has recognized, most notably in Abood v. Detroit Board of Education, 431 U.S. 209, and its progeny, that a union's authority as exclusive bargaining agent necessarily entails some restrictions on constitutional rights that individual employees would otherwise enjoy. . . .
>
> The Court has permitted such interference with First Amendment interests when necessary or reasonable "for the purpose of performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues." On the other hand, the Court has not permitted such interference for other purposes, such as support for political candidates or ideological causes. We see no reason why similar principles should not be employed in determining whether a union, in its capacity as exclusive bargaining representative, may consent to terms and conditions of employment implicating Fourth Amendment interests.
>
> Several courts of appeals in recent years have suggested that unions, in negotiating collective bargaining agreements, may consent to drug testing or analogous searches on behalf of employees. . . .
>
> . . . . The National Labor Relations Board has held that drug testing is a mandatory subject of bargaining. Through collective bargaining, a public employer and union can reach agreement on detailed factual questions (such as whether particular jobs are safety-sensitive) that may have important implications under the Fourth Amendment. If individual public employees may litigate such questions despite the resolution reached through collective bargaining, the utility of collective bargaining with respect to drug testing in the public sector would be greatly diminished. In sum, we conclude that a public employee union acting as exclusive bargaining agent may

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exclusive representative, it shall have the right to act for and negotiate agreements covering all employees in the unit . . . .").

consent to drug testing on behalf of the employees it represents.

Such consent may be manifested in several different contexts. The simplest example occurs when a union expressly agrees to drug testing during the negotiation of a collective bargaining agreement. As previously explained, individual employees are bound by such express consent.

Essentially the same analysis applies when a collective bargaining agreement implicitly authorizes drug testing. . . .

. . . . If the agreement contains provisions specifying mandatory grievance and arbitration proceedings, those procedures must be followed and exhausted before an employee may sue under the agreement. The result of this process may be a settlement or arbitration decision that the collective bargaining agreement implicitly or explicitly permits drug testing of some or all employees. The courts must defer to this interpretation of the agreement unless the employee can show that the union has breached its duty of fair representation in agreeing to the drug testing. . . .

Here, Bolden's union, acting as his exclusive bargaining agent, pressed a grievance on his behalf and eventually entered into a voluntary settlement under which Bolden was to be reinstated with partial back pay on condition that he submit to future drug testing. In effect, the union and SEPTA agreed at that time that the collective bargaining agreement permitted future drug testing of Bolden in accordance with the settlement terms. Thus, unless the union breached its duty of fair representation, this settlement had the same effect under labor law and under the Fourth Amendment as if Bolden himself had consented to such future drug testing.

Bolden, however, has neither claimed nor shown that the union breached its duty of fair representation in its handling of his second grievance. As noted earlier, the claim asserted against the union in Bolden's amended complaint was not for breach of the duty of fair representation but for conspiring with SEPTA to violate his

> constitutional rights. The jury rejected this claim, and Bolden has not contested that verdict on appeal. Consequently, we conclude that Bolden was bound by the terms of the settlement and that Bolden's rejection of reemployment on these terms cut off his right to damages for lost wages following that date.

953 F.2d at 826-29 (citations omitted, emphases added). In Dykes v. Southeastern Pennsylvania Transp. Authority, 68 F.3d 1564, 1570 (3d Cir. 1995), cert. denied, 517 U.S. 1142 (1996), the Court stated:

> Our holding in Bolden establishes that even where a drug testing policy has been held to be constitutionally infirm, a public employee may not pursue a civil rights suit based upon that infirmity where his union and his employer agree to operate under that policy.

Cases from other federal circuits also provide support for the same conclusion -- that union agreement or consent in CBAs can bind individual employees and obviate a constitutional problem. In American Postal Workers Union v. USPS, 871 F.2d 556, 560 (6th Cir. 1989), for example, the United States Court of Appeals for the Sixth Circuit held that even if there had been no cause to search the employees' lockers, the searches would have been acceptable because they had been conducted in the presence of union stewards, a "procedure [which] was in accord with the terms of the collective bargaining agreement." The court held that "in light of the clearly expressed provisions [of the CBA] permitting random and unannounced locker inspections under the conditions described above, the collective class of plaintiffs had no reasonable expectation of privacy in their respective lockers that was protected by the Fourth Amendment." Id.

The United States Court of Appeals for the Seventh Circuit in Chaney v. Suburban Bus Div. of Regional Transp., 52 F.3d 623, 630 (7th Cir. 1995), stated that "[a] union might bargain away its members' pre-deprivation rights for something else or waive them for some reason." But because in that case there was no "statement in the CBA to that effect," the court would "not assume a waiver unless it is more explicit." Id. While Chaney involved Due Process, rather than the Fourth Amendment, the Seventh Circuit in Krieg v. Seybold, 481 F.3d 512, 516-17 (7th Cir. 2007), appeared to extend Chaney to the Fourth Amendment

context where the City contended that "Krieg cannot challenge the constitutionality of the drug testing policy because the Union consented to drug testing in the . . . CBA." Because, however, the CBA did not apparently include in the drug testing policy workers of plaintiffs' type, the court rejected waiver, stating "waiver of a constitutional right must be clear and unmistakable, [see] Chaney (waiver will not be assumed by a CBA where it is not explicit), and it is not under these facts." 481 F.3d at 517. It appears from these cases, however, that where a CBA clearly authorizes a particular drug testing program, the Seventh Circuit could validate the program for that reason alone.

In Romano v. Canuteson, 11 F.3d 1140 (2d Cir. 1993), the United States Court of Appeals for the Second Circuit rejected a public employee's claim that "recent federal law clearly established that, as a public employee, he had a right to be heard prior to suspension without pay and that this right could not be waived in a collective bargaining agreement." Id. at 1141. The court ruled that "where, as here, the challenged procedure accorded with the provisions of the employees' collective bargaining agreement, the due process right that Romano asserts was not clearly established at the time of Romano's suspension." Id.

Finally, a United States District Court from within the Eighth Circuit specifically upheld a random drug testing program of employees based on the sole fact that their union had agreed to the random testing program. See Geffre v. Metropolitan Council, 174 F. Supp. 2d 962, 965-66 (D. Minn. 2001) ("A union, acting as an exclusive bargaining agent, may validly consent to drug testing on behalf of the employees it represents. . . . [T]hey are bound by Local 35's consent regardless of the reasonableness of the drug testing.").

Significantly, the United States Court of Appeals for the **Ninth Circuit**, which governs federal law interpretation in Hawaii, has also provided support for the same conclusion reached by the United States Court of Appeals for the Third Circuit -- that a union's agreeing to subjecting its members to certain procedures in a CBA may extinguish an employee's individual constitutional right (including a Fourth Amendment right) to otherwise avoid the procedure. In Utility Workers of America v. Southern California Edison, 852 F.2d 1083 (9th Cir. 1988), the Ninth Circuit stated that:

> [A]n employer's decision to institute a drug-testing program is a proper subject for collective bargaining. The question of drug testing obviously implicates important personal rights. To the best of our knowledge, however, no court has held that the right to be free from drug testing is one that cannot be negotiated away, and we decline to make such a ruling here.

852 F.2d at 1086.[5]

A subsequent decision of the Ninth Circuit directly supports the view that public employees can be deemed to have consented to searches if such searches are agreed to in the employees' collective bargaining agreement. The Ninth Circuit in Yin v. State of California, 95 F.3d 864 (9th Cir. 1996), cert. denied, 519 U.S. 1114 (1997), stated the following:

> The collective bargaining agreement covering state employees such as Yin also provides for independent medical examinations "[w]henever the State believes that an employee, due to illness or injury, is unable to perform his/her normal work duties." It is clear that a contract may under appropriate circumstances **diminish (if not extinguish)** legitimate expectations of privacy. While Yin was not actually a signatory to the collective bargaining agreement, the agreement nonetheless lessens her privacy expectation because it was negotiated by the union on behalf of all employees, including Yin, and represents the contractual agreement governing their working conditions.

95 F.3d at 872 (emphasis added).[6]

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[5] The court further noted "the prevalence of collective bargaining agreements authorizing searches of employees' possessions strongly suggests that drug-testing provisions would be negotiable." Utility Workers, 839 F.2d at 1086 n.3. The Court also explained that other Ninth Circuit cases "do not hold that nonnegotiable constitutional rights preclude unions from bargaining over employer drug-testing programs." Id.

[6] Moreover, in footnote 18, the Ninth Circuit cited, with approval, Zap v. United States, 328 U.S. 624 (1946), *vacated on other grounds*, 330 U.S. 800 (1947), which stated: "when petitioner, in order to obtain the government's business,

In conclusion, we believe that the HSTA's agreeing to random drug testing in the CBA avoids federal Fourth Amendment or privacy[7] constitutional problems. We also believe, however, that a federal court could decide to look at the CBA as one factor, as opposed to the dispositive factor. If it did so, it would likely examine other factors such as the privacy expectations of teachers, safeguards put into place, and the need for the testing itself (see discussion in next section). We believe, however, that given the above caselaw, a random testing program with appropriate safeguards is constitutional *solely* on the basis of the CBA.[8]

It is unclear whether the Hawaii state courts would follow the federal courts' interpretation of the Fourth Amendment as to waiver or consent via CBA, with regard to interpreting state constitutional search and seizure and privacy rights under Hawaii Constitution article I, sections 6 and 7. We found no Hawaii appellate cases directly on point, but do note that the Hawaii appellate courts have made clear in both the search and seizure and privacy area, that they "are free to give broader protection than that given by the federal constitution." State

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specifically agreed to permit inspection of his accounts and records, he voluntarily waived such claim to privacy which he otherwise might have had as respects business documents related to those contracts." 328 U.S. at 628 (emphasis added).

[7] See Doe v. City & County of Honolulu, 8 Haw. App. 571, 592, 816 P.2d 306, 318 (1991) (emphasis added) ("We are unaware of any reported case holding that the suspicionless drug testing of a urine specimen contravenes a person's 'right of personal privacy' as protected by the United States Constitution. Rather, the cases involve a Fourth Amendment analysis of urine drug testing programs.").

[8] The Ninth Circuit's decision in Lanier v. City of Woodburn, 518 F.3d 1147 (9th Cir. 2008), which you cite in your letter, did not involve an employee under a CBA that agreed to drug testing. It therefore has no bearing upon the above conclusion. On a separate matter, and as discussed in the next section, Lanier involved testing of a library page, a position the court distinguished from teachers as not being "safety-sensitive." 518 F.3d at 1151.

v. Cuntapay, 104 Haw. 109, 117, 85 P.3d 634, 642 (2004) (search and seizure context); State v. Kam, 69 Haw. 483, 491, 748 P.2d 372, 377 (1988) (right of privacy context).

On the other hand, the Hawaii Supreme Court has given strong weight to the state constitutional right in Hawaii Constitution article XIII, section 2 (formerly part of article XII), of public employees to engage in collective bargaining. In UPW v. Yogi, 101 Haw. 46, 62 P.3d 189 (2002), the Supreme Court held that the public employee's constitutional right to collectively bargain required invalidating a statute disallowing collective bargaining over cost items. The Supreme Court ruled:

> [I]t is clear that, when the people ratified article [XIII], section 2, they understood the phrase to entail the ability to engage in negotiations concerning core subjects such as wages, hours, and other conditions of employment. [The challenged statute] violates article [XIII], section 2, because it withdraws from the bargaining process these core subjects of bargaining that the voters contemplated.

101 Haw. at 53, 62 P.3d at 196 (emphases added). See also 101 Haw. at 56, 62 P.3d at 199 (three-judge concurring opinion of Nakayama, J.) (taking away the ability to negotiate over "core subjects of collective bargaining" "abrogat[es] the right of public employees to 'organize for the purpose of collective bargaining.'"). In light of the strong weight the Hawaii Supreme Court has given to public employees' constitutional right to collectively bargain over "core subjects such as . . . conditions of employment," it would be somewhat anomalous for the Hawaii Supreme Court to adopt a more restrictive view of CBA waiver/consent, as least as to "core subjects such as . . . conditions of employment." Random drug testing of public school teachers would seem to be a core condition of employment. Thus, limiting the effectiveness of CBA consent as to random drug testing of teachers would effectively undermine the ability of the teachers to collectively bargain over a core subject.

**2. Constitutionality of random drug testing of public school teachers in general, considering all factors (beyond just CBA waiver or consent) bearing upon the issue.**

If the courts were to give dispositive effect to HSTA's agreeing to random drug testing in the CBA, then no further analysis would be necessary. However, in the event the federal

or state courts were to decline to hold that the CBA agreement to random drug testing in and of itself eliminates all constitutional questions, and were to instead give the CBA merely some weight in the constitutional calculus, we now address the additional factors relevant to the constitutional analysis of random drug testing of public school teachers.

The case from the United States Supreme Court that may provide the most helpful and controlling guidance on the issue is Bd. of Educ. of Independent School Dist. v. Earls, 536 U.S. 822 (2002). And although it involves random drug testing of students, rather than teachers, much of its rationale applies by analogy. Indeed, the Sixth Circuit case of Knox County Educ. Ass'n v. Knox County Bd. of Educ., 158 F.3d 361 (6th Cir. 1998), cert. denied, 528 U.S. 812 (1999), although it was decided before Earls, upheld the constitutionality of one-time suspicionless drug testing of public school teachers for analogous reasons. The Supreme Court in Earls upheld the constitutionality of random drug testing of students participating in extracurricular activities under the facts of the case. The Court began with the preliminary observation that "[s]earches by public school officials, such as the collection of urine samples, implicate Fourth Amendment interests[, and thus the Court] must . . . review the . . . Policy for 'reasonableness,' which is the touchstone of the constitutionality of a governmental search." 536 U.S. at 828.

The Court noted that while in the "criminal context, reasonableness usually requires a showing of probable cause," "a warrant and finding of probable cause are unnecessary in the public school context because such requirements 'would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed.'" Id. at 828-29 (emphasis added). "Given that the School District's Policy is not in any way related to the conduct of criminal investigations, respondents do not contend that the School District requires probable cause before testing students for drug use." Id. (emphasis added). The Court continued:

> [I]n the context of safety and administrative regulations, a search unsupported by probable cause may be reasonable "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" Significantly, this Court has previously held that "special needs" inhere in the public

> school context. While schoolchildren do not shed their constitutional rights when they enter the schoolhouse, "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children." In particular, a finding of individualized suspicion may not be necessary when a school conducts drug testing.

Id. at 829-30 (emphases added). The Court then went on to apply a four-part test as follows.

> **i. The nature of the privacy interest allegedly compromised**
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> We first consider **the nature of the privacy interest allegedly compromised** by the drug testing. [T]he context of the public school environment serves as the backdrop for the analysis of the privacy interest at stake and the reasonableness of the drug testing policy in general. See [*Vernonia*, 515 U.S. 646 (1995)] at 665 ("The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, **as guardian and tutor of children entrusted to its care**").

Earls, 536 U.S. at 830 (emphasis added). The fact that the most significant element, in upholding the drug testing policy, was the fact that the testing was "in furtherance of the government's responsibilities . . . as guardian and tutor of children entrusted to its care" would appear to apply just as strongly to drug testing of public school teachers, as it does to the drug testing of students. After all, if teachers are impaired by drugs, their ability to be effective guardians and tutors of their students is obviously severely hindered. See Knox County Educ. Ass'n v. Knox County Bd. of Educ., 158 F.3d 361, 379 (6th Cir. 1998) ("a local school district has a strong and abiding interest in requiring that teachers and other school officials be drug-free so that they can satisfy their statutory obligation to insure the safety and welfare of the children").

Indeed, public schools in Hawaii "share[] a 'special relationship' -- i.e., a quasi-parental or ***in loco parentis*** custodial relationship -- with students, which obligates the DOE to exert reasonable care in ensuring each student's safety and

welfare." Doe Parents No. 1 v. State of Hawaii, Dep't of Educ., 100 Haw. 34, 80, 58 P.3d 545, 591 (2002). Given this *in loco parentis* obligation on the schools to protect student safety and welfare, teachers should have a significantly diminished expectation of privacy with regard to investigations into their ability to carry out this crucial protective role. See Knox, 158 F.3d at 383-84 (concluding that school's "in loco parentis . . . responsibility . . . to protect students from harm," along with other regulations of schools, mean that "teachers should not be surprised if their own use of drugs is subject to regulation and testing and, as such, their expectation of privacy, at least with respect to drugs and drug usage, might be diminished."); Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 655-56 (1995) ("for many purposes 'school authorities ac[t] *in loco parentis*'" and "the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children"); cf. Lanier v. City of Woodburn, 518 F.3d at 1151 (9th Cir. 2008) (distinguishing library pages from teachers in large part because of the latter's *in loco parentis* responsibilities).

The Supreme Court in Earls continued:

> A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease. Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults. See *T.L.O.* [469 U.S. 325 (1985)] at 350 ("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").

536 U.S. at 830-31. Because of the key protective function public school teachers have (as explained above), "[s]ecuring order in the school environment" and fulfilling "the school['s] . . . obligation to protect pupils from mistreatment by other children," also requires teachers to be "subjected to greater controls than those appropriate for [other] adults." And although teachers may not be "routinely required to submit to

physical examinations," neither were the students in Earls, the Court finding subjection to regular physicals "not essential" to upholding a testing program. 536 U.S. at 831 (fact that "children participating in nonathletic extracurricular activities are not subject to regular physicals" is not dispositive; "school's custodial responsibility" is more important).

Indeed, teachers should expect even less privacy as to improper drug use than their students (and most other occupations), because not only are teachers responsible for protecting the safety of their young students during a large portion of their waking lives, but they are also responsible for providing students with a critical basic education that significantly impacts the rest of the students' lives, as responsible, knowledgeable, and productive citizens. A teacher's ability to provide this education, however, is significantly impaired by improper drug use. See Vernonia, 515 U.S. at 655 (school authorities have "the power and indeed the duty to 'inculcate the habits and manners of civility.'"); Knox, 158 F.3d at 384 (in part because teachers "are entrusted with the . . . education of children during their most impressionable and formative years," teachers "must expect that with this extraordinary responsibility, they will be subject to scrutiny to which other civil servants or professionals might not be subjected, including drug testing.").

In addition, teachers also serve as role models as well, making drug use by teachers especially harmful to the students they influence on a day to day basis, and in light of the substantial nationwide drug problem afflicting this country's children.

> [T]he community[] [has an] interest in reasonably insuring that [teachers] will not be inclined to influence children -- either directly or by example -- in the direction of illegal and dangerous activities which undermine values which parents attempt to instill in children in the home. Indeed, teachers occupy a singularly critical and unique role in our society in that for a great portion of a child's life, they occupy a position of immense direct influence on a child . . . . Teachers and administrators are not simply role models for children (although we would certainly hope they would be that). Through their own conduct and daily direct interaction with children, they influence and mold the perceptions, and thoughts and values

> of children. . . . Indeed, directly influencing children is their job.

Knox, 158 F.3d at 375; cf. Vernonia, 515 U.S. at 663 (noting the "'role-model' effect" of drug use by student athletes on fellow students). For this reason, too, therefore, teachers should expect less privacy with respect to matters, like their potential drug use, that are likely to have a detrimental influence upon their students.

The Supreme Court in Earls also attached strong significance to the fact that extracurricular activities (whose participants were required to submit to random drug testing) were subject to substantial regulation, diminishing even further the student participants' expectations of privacy, analogizing their situation to "adults who choose to participate in a closely regulated industry." 536 U.S. at 832. As explained below, public school teachers in Hawaii, too, are subject to a wide-ranging host of regulations not applicable to other professionals, and public schools in general are surely a "closely regulated industry."

As to regulation of the teachers themselves, the Hawaii Teacher Standards Board is given the authority to "suspend or revoke the teacher's license" if it "determines that a licensee poses a risk to student safety or wellbeing." Hawaii Administrative Rules (HAR) § 8-54-9(d). Moreover, the Board of Education has long had in place rules requiring "Employees . . . who work in close proximity to children," which teachers surely are, to "be of reputable and responsible character." HAR § 8-7-2(a). Significantly, those rules authorize the DOE to "refuse to employ, . . . terminate the employment of, or . . . revoke the teaching certificate of any employee or applicant who has a criminal history record, . . . **or background involving . . . alcohol or drug abuse**, . . . or any other circumstance which indicates that the applicant or employee may pose a risk to the health, safety, or well-being of children." HAR § 8-7-2(b) (emphasis added). Indeed, termination may be based upon "Failure to declare, [or] concealing . . . background information to the department." Id. Because, therefore, teachers have always been subject to termination for having a "background involving alcohol or drug abuse," and indeed must self-report such information, their expectation of privacy with respect to alcohol and drug testing is extremely low.

Similarly, by way of statute, teachers are subject to criminal history background checks because they are "employed . . . in any position . . . that places them in close proximity to children," and can be terminated for conviction of crimes that "pose[] a risk to the health, safety, or well-being of children." Haw. Rev. Stat. § 302A-601.5 (2007). Teachers may also be discharged because of "immorality." Haw. Rev. Stat. § 302A-609 (2007).[9]

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[9] In addition, teachers must obtain a license from the Hawaii Teacher Standards Board before being allowed to teach, Haw. Rev. Stat. § 302A-602 (2007); HAR § 8-54-4, and meet that board's licensing standards, Haw. Rev. Stat. § 302A-802 (2007), which are quite comprehensive. See HAR § 8-54-1 et seq. and Teacher Performance Standards (Appendix A) attached thereto. With some exceptions, teachers cannot be licensed unless they have "satisfactorily completed a State-approved teacher . . . education program that shows the applicant is likely to satisfy the performance standards established by the board as specified in Appendix A." HAR § 8-54-9. Appendix A sets forth ten detailed performance standards for teachers. Although all of the standards demonstrate the degree to which teachers are highly regulated, a few stand out in particular as to the issue before us. Standard II requires teachers to "create[] and maintain a safe and positive learning environment," an obligation likely to be unfulfilled by a drug-impaired teacher. In addition, a "performance criteria" under Standard II specifically instructs teachers to "use[] effective classroom management techniques that foster self-control, self-discipline and responsibility to others." A teacher abusing alcohol or illegal drugs would hardly be the most effective at conveying to students "self-control" or "self-discipline." Standard IX states that the "effective teacher continually evaluates the effects of his or her choices and actions," and "conducts self ethically in professional matters," and "models . . . respect . . . for the laws of society," all goals thwarted by teacher drug or alcohol abuse.

Furthermore, Hawaii public school teachers are required to "report to appropriate authorities" when they "know[] or [have] reason to believe that an act has been committed or will be committed, which: (A) Occurred or will occur on school property during school hours or during activities supervised by the school; and (B) Involves crimes relating to arson, assault, burglary, disorderly conduct, dangerous weapons, dangerous

As to the public schools themselves (as opposed to their teachers in particular), public education in Hawaii is one of the most heavily regulated industries of all. An entire chapter of the Hawaii Revised Statutes, chapter 302A, is devoted to Hawaii public schools, and consists of ninety-seven pages of statutes regulating all aspects of Hawaii's public schools, from student performance standards, curriculum, and sports, to teacher employment conditions and compensation, teacher development and incentives, school system structure, financial structure, and facilities. And, of course, there are many more pages of regulations enacted pursuant to the above statutes. See Haw. Rev. Stat. § 302A-1112 (2007) (authorizing the Board of Education to "adopt rules for the government of all teachers, educational officers, other personnel, and pupils, and for carrying out the transaction of its business.").

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drugs, harmful drugs, extortion, firearms, gambling, harassment, intoxicating drugs, marijuana or marijuana concentrate, murder, attempted murder, sexual offenses, . . . criminal property damage, robbery, terroristic threatening, theft, or trespass." Haw. Rev. Stat. § 302A-1002 (2007); see also HAR § 8-19-19. A teacher who fails to make the report is subject to "disciplinary action . . . including . . . suspension . . . and discharge." Haw. Rev. Stat. § 302A-1002 (2007); see also HAR § 8-19-21. This reporting mandate on teachers, which includes reporting events that endanger the safety of children, as well as those involving illegal drugs, diminishes teachers' expectations of privacy with respect to drug testing in two ways. First, it emphasizes the importance of student safety, including student avoidance of illegal or harmful drugs, and therefore suggests to teachers that anything that could negatively impact student safety and avoidance of illegal drugs, including improper drug use by teachers themselves, is of great concern to the people of this state. Second, the reporting mandate tells teachers that they should expect that information about themselves that would affect their ability to make these reports -- including their own improper drug use -- is also of concern to the public. See Knox, 158 F.3d at 383 (concluding that state legislative "requirement for teachers . . . to report student offenses" significantly diminishes teacher's privacy expectations because "the state legislature has acknowledged the role of the teacher . . . as front-line observer[] in providing for a safe school environment, and, in fact, has imposed on them a duty to report matters that endanger life, health, or safety").

Significantly, Hawaii public schools have a "zero tolerance policy" as to illegal drugs, authorizing suspension of students "who reasonably appear[] to have consumed or used intoxicating liquor or illegal drugs prior to attending school." Haw. Rev. Stat. § 302A-1134.6(c) (2007); see also HAR § 8-19-6(c) (authorizing suspension for students "found to be in possession of . . . intoxicating liquor, or illicit drugs while attending school"). Teachers, as role models, should therefore expect that their own use of illegal drugs would be of grave concern to the State.

In addition, there is much **federal** law heavily regulating public education as well. One law having a particularly pervasive impact is the No Child Left Behind Act, 20 U.S.C. § 6301 et seq., which provides comprehensive regulation of the nation's schools, imposing significant achievement requirements on the schools, and greatly impacting the administration, and even the existence of individual schools. Of special significance is the Drug-Free Workplace Act of 1988, 41 U.S.C. § 701 et seq., which requires entities receiving grants from any federal agency (including the Hawaii Department of Education) to "agree[] to provide a drug-free workplace" and to make special efforts to achieve that goal. See 41 U.S.C. § 701(a)(1).[10]

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[10] This law requires covered entities to provide a drug-free workplace by "(A) publishing a statement notifying employees that the unlawful . . . use of a controlled substance is prohibited in the person's workplace and specifying the actions that will be taken against employees for violations of such prohibition; (B) establishing a drug-free awareness program to inform employees about -- (i) the dangers of drug abuse in the workplace; (ii) the person's policy of maintaining a drug-free workplace; (iii) any available drug counseling, rehabilitation, and employee assistance programs; and (iv) the penalties that may be imposed upon employees for drug abuse violations; (C) making it a requirement that each employee to be engaged in the performance of such contract be given a copy of the statement required by subparagraph (A); (D) notifying the employee in the statement required by subparagraph (A), that as a condition of employment on such contract, the employee will -- (i) abide by the terms of the statement; . . . (G) making a good faith effort to continue to maintain a drug-free workplace through implementation of [the prior] subparagraphs . . . ." 41 U.S.C. § 701(a)(1).

Finally, under the federal Safe and Drug-Free Schools and Communities Act, 20 U.S.C. § 7101 et seq., educational institutions, in order to receive federal funds, must have "a plan for keeping schools safe and drug-free that includes . . . prevention activities that are designed to create and maintain safe, disciplined, and drug-free environments." 20 U.S.C. § 7114(d)(7)(C).[11]

In sum, this very extensive regulation, both federal and state, of public education as a whole, and of teachers in particular (including regulations specifically disapproving teacher drug and alcohol abuse) substantially diminishes any privacy expectation teachers may have in general as to matters affecting their ability to carry out their crucial safety and teaching role with respect to the children of this state, and in particular in avoiding random drug testing.

Last, but certainly not least, the fact that the teachers, through their exclusive bargaining representative, the HSTA, agreed to random drug testing in the CBA diminishes public school teacher's expectation of privacy even further, if not eliminating it entirely. See Yin, 95 F.3d at 872 ("a contract may under appropriate circumstances diminish (if not extinguish) legitimate expectations of privacy"). Although as explained in the prior section, this CBA waiver or consent likely by itself eliminates any constitutional problem with the random drug testing here, even if it were not singularly dispositive, at the very least it would substantially weaken the privacy interests

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[11] The purpose of this Act is:

> to support programs . . . that prevent the illegal use of alcohol, tobacco, and drugs; . . . that are coordinated with related Federal, State, school, and community efforts and resources to foster a safe and drug-free learning environment that supports student academic achievement, through the provision of Federal assistance to . . . States for grants to local educational agencies, [community-based organizations, and public and private entities], . . . to establish, operate, and improve local programs of school drug and violence prevention and early intervention.

20 U.S.C. § 7102.

of the teachers, thereby tilting the balance even more in favor of constitutionality.

**ii. The character of the intrusion imposed by the policy.**

Moving on to the second factor, "the character **of the intrusion imposed by the Policy**," Earls, 536 U.S. at 832, the Supreme Court has already ruled that "the 'degree of intrusion' on one's privacy caused by collecting a urine sample 'depends upon the manner in which production of the urine sample is monitored.'" Id. The Court held that where the monitor "waits outside the closed restroom stall" "listen[ing] for . . . normal sounds . . . to guard against tampered specimens and to insure an accurate chain of custody," the policy "requires that the test results be kept in confidential files separate from a student's other educational records and released to school personnel only on a 'need to know' basis," the "test results are not turned over to any law enforcement authority," and "the test results [do not] lead to the imposition of discipline or have any academic consequences" (the only consequence was restricting, and barring after a third positive test, participation in extracurricular activities), the "invasion of students' privacy is not significant." 536 U.S. at 832-34.

Assuming that comparable safeguards are put into effect -- indeed, the CBA calls for "procedures which shall comply with the U.S. Department of Transportation Rules on Drug and Alcohol Testing and/or State Department of Health Rules on Substance Abuse Testing"[12] -- then the policy would similarly pose no

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[12] In fact, the Hawaii Department of Health Rules on Substance Abuse Testing, HAR § 11-113-1 et seq., provide more than ample procedural protections to minimize the intrusiveness of any drug testing, and to ensure reliability of the results. See, e.g., HAR § 11-113-6(a)(1) and (7) (privacy in the giving of a urine specimen); HAR §§ 11-113-5(j), -6(d), -18(j), -25(f), -29(d), -30, and -32 (confidentiality of the test results); HAR § 11-113-32(a) (results not turned over to police or law enforcement authorities); HAR §§ 11-113-8 through -15 (licensing and qualification of laboratories); HAR §§ 11-113-16, -17, -18(d), (g), (h) and (i), and -19 (reliability and accuracy assurance); HAR § 11-113-25(b) (elimination of alternative causes for positive test); HAR §§ 11-113-5(d), -5(h), -6(a)(19), (21), (22)

significant intrusion into teacher privacy. Although it is unclear at this point what the effect of a positive drug test upon a teacher's job would be, as procedures have not yet been formulated, it cannot be that some adverse "discipline" designed solely to protect students cannot be imposed. Otherwise, if teachers could not be relieved, at least temporarily, from their teaching duties despite repeated positive drug tests, the primary purposes of the testing -- protecting student safety, and ensuring their proper education -- would be thwarted. See Knox, 158 F.3d at 380 (finding no problem with the fact that the test results, though otherwise confidential, "may be released and relied upon by the [school board] in . . . any discipline resulting from a violation of this policy, including employment"); McCloskey v. HPD, 71 Haw. 568, 571, 799 P.2d 953, 955 (1990) (upholding random testing of police officers even though "second positive test results in termination proceedings").

**iii. The nature and immediacy of the government's concerns.**

Moving on to the third factor, "the nature and immediacy of the government's concerns," Earls, 536 U.S. at 834, as already explained above, the government's interest in protecting the health and safety of school children under the tutelage of school teachers is great. See Knox, 158 F.3d at 374-75 ("We can imagine few governmental interests more important to a community that that of insuring the safety and security of its children while they are entrusted to the care of teachers and administrators."); cf. Earls, 536 U.S. at 834 ("the necessity for the State to act is magnified by the fact that [the potential harms are] visited not just upon individuals at large, but upon children for whom [the state] has undertaken a special responsibility of care and direction"). And there can be no serious doubt that illegal drug use by teachers threatens that interest. As the Sixth Circuit in Knox explained:

> Simple common sense and experience with life tells us "that even a momentary lapse of attention can have disastrous consequences," *Skinner*, 489 U.S. at 628, particularly if

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& (27), -6(b) and (c), -18, -26, and -27 (chain of custody requirements); HAR §§ 11-113-5(h), -6(a)(26), -6(b), -18, and -26 (tampering protections); HAR §§ 11-113-5(a)(1) and -18(e) (specimen is tested only for pre-warned substances).

> that inattention or lapse were to come at an inopportune moment. For example, young children could cause harm to themselves or others while playing at recess, eating lunch in the cafeteria (if for example, they began choking), or simply while horsing around with each other. Children . . . are active, unpredictable, and in need of constant attention and supervision. Even momentary inattention or delay in dealing with a potentially dangerous or emergency situation could have grievous consequences.

Knox, 158 F.3d at 378; see also id. at 378-79 n.23 ("we do not have to search beyond recent local and national media headlines to understand that schools are, unfortunately, too often turned into places . . . [of] grave and even life-threatening dangers wherein the split-second vigilance of teachers and administrators, and the need for clear-headed thinking, is absolutely critical to the safety of the school children").

In addition to safety, the state's strong interest in the effective education of its children, both directly and indirectly (through teacher's role model position), is also put at risk, if the teachers tasked with providing that education and "inculcat[ing] the habits and manners of civility," Vernonia, 515 U.S. at 655, are impaired by illicit drug use. Cf. Vernonia, 515 U.S. at 662 ("the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted").[13]

Although evidence that drug abuse exists among Hawaii school teachers would buttress the state's concern, the Supreme Court does not require such a showing:

> "[a] demonstrated problem of drug abuse . . . [is] not in all cases necessary to the validity of a testing regime." . . . . [T]his Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing. For instance, in *Von*

[13] Although we do not rely upon this point, it should be noted, of course, that there is an additional governmental interest: Preventing or deterring drug use by teachers for the teacher's own benefit of being a healthy individual, as well as being better able to care for oneself, and any dependent family members.

> *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. . . . . 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.

Earls, 536 U.S. at 835-36. By analogy, it would make little sense to require the Hawaii Department of Education to wait for a substantial portion of its teachers to begin using drugs before instituting a drug testing program to deter teacher drug use. The potential irreparable harm to students' safety and education from even a single drug-impaired teacher makes waiting unnecessary. See Knox, 158 F.3d at 374 (upholding testing despite "little, if any, evidence of a pronounced drug or alcohol abuse problem among . . . Knox County's teachers," and stating that "the existence of a pronounced drug problem is not a *sine qua non* for a constitutional suspicionless drug testing program").[14]

**iv. the efficacy of the policy in meeting the government's concerns.**

Finally, consideration of the last factor, "the efficacy of the Policy in meeting" the government's concerns, see Earls, 536 U.S. at 834, 837, also cuts strongly in favor of upholding random drug testing of teachers. For a random testing program

[14] The Supreme Court went on to "reject [the notion] that drug testing must presumptively be based upon an individualized reasonable suspicion of wrongdoing because such a testing regime would be less intrusive," because "the Fourth Amendment does not require employing the least intrusive means." 536 U.S. at 837. The Court even "question[ed] whether testing based on individualized suspicion in fact would be less intrusive," noting that "[s]uch a regime would place an additional burden on public school teachers who are already tasked with the difficult job of maintaining order and discipline," and "might unfairly target members of unpopular groups." Id. Finally, the Court worried that the "fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use." Id.

for teachers will provide deterrence to teacher drug use[15] -- or result in, for teachers unable to overcome their drug problem, removal of drug-impaired teachers -- thereby directly promoting student safety and their effective education. The Supreme Court in Earls stressed "the context of the public school's custodial responsibilities" in finding drug testing to "effectively serve[] the School District's interest in protecting the safety and health of its students." 536 U.S. at 838.

**v. Balancing the above four factors.**

Given that all four of the factors weigh in favor of the constitutionality of random drug and alcohol testing of Hawaii's public school teachers (assuming, of course, that comparable privacy safeguards are built into the drug testing procedures, see, e.g., the Hawaii Department of Health Rules on Substance Abuse Testing, discussed in footnote 12, supra), combined with the particularly significant fact that the HSTA agreed to such testing in the CBA (which was approved by the teachers), we believe the testing program is constitutional and would not violate any federal constitutional right, including those embodied in the Fourth Amendment.[16]

The case identified in your letter, Lanier v. City of Woodburn, 518 F.3d 1147 (9th Cir. 2008), which struck down a pre-employment drug test for a library page position, does not in any way contradict the above conclusion. The Ninth Circuit specifically distinguished library pages from teachers, saying:

> A page may staff a youth services desk for an hour or so when needed, and children may be in the library unattended, but there is no indication that the library has any *in loco parentis* responsibility for those children, that children's

[15] Indeed, the Supreme Court in both Earls and Vernonia simply assumed, without discussion, that drug testing would deter drug use in the group subject to testing. Earls, 536 U.S. at 837-38 (simply stating as a matter of fact that "testing students . . . is a reasonably effective means of . . . preventing, deterring, and detecting drug use"); Vernonia, 515 U.S. at 663 (simply assuming that testing athletes helps to ensure "that athletes do not use drugs.")

[16] See footnote 7, supra (suspicionless drug testing is analyzed under Fourth Amendment).

> safety and security is entrusted to a page, or that a page is in a position to exert influence over children by virtue of continuous interaction or supervision. For these reasons, Woodburn's reliance on *Knox County* is misplaced. In *Knox*, the . . . Sixth Circuit upheld Knox County's program of conducting suspicionless drug testing of teachers and administrators because of the unique role that teachers play in the lives of school children; the *in loco parentis* obligations imposed upon them; and the fact that by statute, teachers in Tennessee were charged with securing order such that they were "on the 'frontline' of school security, including drug interdiction." It is evident (at least on this record) that a part-time page, who could be a high school student herself, has no such role in the City of Woodburn.
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> . . . . [N]or is there any evidence that . . . a page position *is* safety-sensitive. As we have explained, it does not appear to be in the same sense that, for instance, a teaching position was thought to be safety-sensitive in *Knox County*.

Lanier, 518 F.3d at 1151. In sum, Lanier does not alter our conclusion.[17]

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[17] We note that the United States Court of Appeals for the Fifth Circuit struck down the part of a drug testing scheme for teachers injured during the course of employment. See United Teachers of New Orleans v. New Orleans Parish School Bd., 142 F.3d 853 (5th Cir. 1998). It relied in part on the notion that such testing was both underinclusive -- because only persons injured in the course of employment are to be tested -- and overinclusive -- because all persons injured are tested, not just persons injured under circumstances suggesting their fault. Id. at 856. The underinclusive aspect, of course, is inapplicable to our case, although the overinclusive concern would arguably apply to our situation, as all teachers are subject to testing regardless of suspicion or other indicator. The Court acknowledged that teachers "are entrusted with this nation's most precious asset -- its children," and that "the role model function of teachers . . . adds heavy weight to the state interest side of the ledger in justifying random testing without individualized suspicion," but found that insufficient because "the testing here does not respond to any identified problem of drug use by teachers . . . ." Id. at 856. We note,

**vi. Hawaii state courts and Hawaii state constitutional law.**

The Hawaii courts have upheld drug testing of firefighters (as part of annual physical) and police officers (random), relying heavily upon the fact that public safety (and the safety of fellow workers) -- along with the need to effectively carry out the mission -- would be threatened by police or firefighters under the influence of drugs. See McCloskey v. HPD, 71 Haw. 568, 576-77, 579, 799 P.2d 953, 958, 959 (1990) (emphasizing how drug use by police threatens public and fellow officer safety, as well as HPD's integrity and thus its ability to carry out its mission); Doe v. City & County of Honolulu, 8 Haw. App. 571, 587-88, 816 P.2d 306, 316 (1991) ("the City's interest in the safety of its fire fighters, their coworkers, and the public they serve," and in firefighters having "unimpeachable integrity and judgment" is "of a compelling nature"). By perfect analogy, teachers under the influence of drugs would also pose a serious safety risk to their students, and would also jeopardize teacher's educational mission to the detriment of their students' learning, both directly (by lessening, if not destroying, a teacher's teaching skills) and indirectly (through the role model effect). As already explained, a teacher on drugs may not be effective in protecting students from

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however, that this case was decided prior to Earls, in which the Supreme Court specifically rejected the notion, in the school context no less, that a "demonstrated problem of drug abuse [is] in all cases necessary to the validity of a testing regime," noting that 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." 536 U.S. at 835-36. Although Earls involved the testing of students, not teachers, as noted above, it would make equally little sense to wait for a substantial number of drug-impaired teachers to materialize, potentially leading to irreparable student injury or educational deficit.

The New Orleans Court also expressed concern that the real goal in that particular case might have been to avoid paying worker's compensation claims, which were prohibited to those injured because of their own intoxication. Id. at 857. There is no such ulterior motive in our situation. Finally, also unlike our situation, the New Orleans case did not involve *bargained for* suspicionless drug testing.

misbehaving and/or violent fellow students, or in preventing other safety hazards from harming students, who are under teachers' custody and watch for a large part of their daily lives. See discussion, supra at 14-16. And a drug-impaired teacher obviously is less capable of teaching effectively, and also provides a poor role model to his or her students. See discussion, supra at 16-17.

The Hawaii courts also relied upon the diminished expectations of privacy of firefighters and police officers because they are subject to regulations affecting their non-professional lives, including rules prohibiting illegal use of drugs when off-duty, or mandated physicals which include urine samples. See McCloskey, 71 Haw. at 579, 799 P.2d at 959 (police officers have "a diminished expectation of privacy" because "HPD's rules prohibit the illegal use of drugs even when off-duty, and all police officers know they are subject to regulations which affect their private non-professional lives"); Doe, 8 Haw. App. at 584, 588, 816 P.2d at 314, 316 (urine collection process not intrusive because regulations require all fire fighters to undergo annual physical examination, which generally include collection of urine samples, and because "HFD directly and indirectly regulates the fire fighters' private lives"). Although teachers are not generally required to undergo annual physicals, teachers have long been subject to similar regulations prohibiting illegal drug use even off-duty, and other regulation of their private lives. See discussion, supra at 17-18 & footnote 9 (e.g., state Board of Education rule subjects public school teachers to termination for "alcohol or drug abuse," HAR § 8-7-2(b); statutes authorize discharge of teachers for "immorality," Haw. Rev. Stat. § 302A-609 (2007), or for conviction of crimes that "pose[] a risk to the health, safety or well-being of children," Haw. Rev. Stat. § 302A-601.5 (2007); to obtain a teaching license, teachers may be required to "conduct[] self ethically in professional matters," and "model[] . . . respect . . . for the laws of society," HAR § 8-54-9, Appendix A, Standard IX; employees working "in close proximity to children," including teachers, are required to "be of reputable and responsible character," HAR § 8-7-2(a)). Therefore, this regulatory factor also cuts in favor of upholding a suspicionless teacher testing program.

In addition, the Doe Court found firefighters' privacy interests diminished even further because given that "a fire fighter must possess 'strength, stamina, . . . fitness,

judgment, mental alertness, memory and the ability to work with people,'" firefighters "should expect 'effective inquiry into their fitness and probity.'" 8 Haw. App. at 584-85, 816 P.2d at 315. Although it is true that teachers may not be required on a daily basis to exert particular physical strength or stamina, they must always be mentally alert if they are to prevent students from being harmed by fellow students or by other safety hazards, as well as to carry out their educational mission effectively (both directly, and indirectly as role models). Teachers, too, therefore, "should expect 'effective inquiry into their fitness and probity.'"

Of course, adequate safeguards in the testing process were also important to the police and firefighter programs' constitutionality. See McCloskey, 71 Haw. at 575, 579, 799 P.2d at 957, 959 (noting the production of specimen "in the privacy of a bathroom stall," "no overbroad or unnecessary information gathering," "sufficient protection against improper disclosure," and a "prohibi[tion] on the[] test results . . . being used for criminal charges"). If Hawaii Department of Health Rules for substance abuse testing are followed, see footnote 12, supra (indeed, the CBA requires procedures in compliance with Hawaii Department of Health or U.S. DOT drug testing rules), there will be more than adequate safeguards.

The Hawaii appellate courts in the above two cases rejected state constitutional challenges to the drug testing schemes as well. See McCloskey, 71 Haw. at 573-79, 799 P.2d at 956-59 (rejecting state privacy and search and seizure objections); Doe, 8 Haw. App. at 589-91, 592-93, 816 P.2d at 317-18, 318-19 (same). And although, as noted in the prior section, state courts may sometimes interpret state constitutional provisions more broadly than their federal counterparts, the Hawaii Supreme Court in McCloskey specifically followed federal precedents, and concluded that "[o]ur interpretation of the state guaranty of freedom from unreasonable searches [Hawaii Constitution article I, section 7] therefore conforms to the interpretation of the analogous federal guaranty." 71 Haw. at 578-79, 799 P.2d at 958-59. Similarly, in Doe, the ICA followed McCloskey's instruction and found Hawaii Constitution article I, section 7 satisfied for the same reason that the Fourth Amendment was satisfied. Doe, 8 Haw. App. at 589-91, 816 P.2d at 317-18.

Both the Supreme Court in McCloskey and the ICA in Doe, also rejected state privacy objections rooted in Haw. Const.

Art. I, Section 6 (as distinguished from Section 7, discussed in the previous paragraph), finding the city drug testing regimes "the necessary means to a compelling state interest," based upon the government's strong interests in public and officer safety, and department "integrity and ability to perform its job effectively." McCloskey, 71 Haw. at 575-77, 799 P.2d at 957-58; Doe, 8 Haw. App. at 592-93, 816 P.2d at 318-19. Here, of course, the analogous governmental interests in ensuring student safety on a daily basis, and in preserving the integrity and ability of teachers to effectively educate their students, provide the compelling state interest.[18]

We also note that both McCloskey and Doe upheld suspicionless drug testing programs even though neither case clearly involved employees who had approved a collective bargaining agreement that agreed to the suspicionless drug testing. Because, as discussed in section A.1, supra, the HSTA agreed to random drug testing in the CBA, and the teachers approved that agreement, the case for upholding the teacher testing program is even stronger than in the Hawaii cases discussed above. Thus, we believe that bargained for random drug testing of public school teachers is constitutional and does not violate any provision of the Hawaii Constitution.

**B. State officials would not be personally liable.**

For the reasons given above, we believe that a random drug testing program for public school teachers with appropriate procedural protections in place is constitutional and would not be found to violate either the federal or Hawaii constitutions. In the event, however, a state or federal court were to disagree, we are confident that the doctrines of qualified immunity, both federal and state, would shield state officials from any personal liability.

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[18] The ICA in Doe also repeated the proposition in National Treasury Employees Union v. Von Raab, 489 U.S. 656, 674 (1989), that "the fact that 'all but a few of the employees tested are entirely innocent of wrongdoing does not impugn [a] program's validity.'" 8 Haw. App. at 589, 816 P.2d at 316-17; see also McCloskey, 71 Haw. at 577, 799 P.2d at 958 ("Although the evidence does not indicate a large number of HPD officers take drugs, the testing program is the only effective way to deal with the problem.").

Because the case law, as demonstrated above, provides substantial support for upholding a teacher testing program, and neither the United States Supreme Court, the Ninth Circuit, nor any Hawaii appellate courts has, to our knowledge, struck down a suspicionless drug testing program for public school teachers, neither federal nor state courts could reasonably find a teacher random drug testing program with appropriate procedural safeguards to violate "clearly established law," the qualified immunity standard for federal claims, or to have been motivated by "malice and not by an otherwise proper purpose," the qualified immunity standard for Hawaii state law claims. See Wilson v. Layne, 526 U.S. 603, 614 (1999) (citing Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982)) (emphasis added) ("government officials performing discretionary functions generally are granted a qualified immunity and are 'shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.'"); Towse v. State, 64 Haw. 624, 631-32, 647 P.2d 696, 702 (1982) (emphasis added) ("non-judicial governmental officials, when acting in the performance of their public duty, enjoy the protection of what has been termed a qualified or conditional privilege. This privilege effectively shields the official from liability . . . [unless] the official had been motivated by malice and not by an otherwise proper purpose."). This conclusion is even more secure given the member-approved CBA in which HSTA agreed to random drug testing. We see absolutely no support in any case for any possible finding of personal liability.

**C. The Legislature would likely appropriate money to cover state officials in the unlikely event they were found personally liable for putting into effect the drug testing program.**

Although we believe that a bargained for teacher random drug testing program with appropriate safeguards would be upheld by the courts, and would, in any event, not result in personal liability for state officials given the doctrines of qualified immunity, it is the Legislature's prerogative to decide whether to fund and pay the judgment for any state official found personally liable. However, based upon our experience in the past, we believe that if liability were found here, the administration would recommend payment of such claims, and the Legislature would fund and pay such claims.

*** *** ***

In conclusion, we believe that a bargained for random drug testing program of public school teachers with appropriate procedural protections is constitutional and would not violate either the federal or state Constitutions. If a court were nevertheless to find such a program to violate either the federal or state Constitution, we believe the doctrine of qualified immunity would bar personal liability for any state official. Finally, in the extremely unlikely event a court were to impose personal liability, we believe the Legislature would fund payment of such claims.

Sincerely,

Girard D. Lau
Deputy Attorney General

APPROVED:

Mark J. Bennett
Attorney General