AMERICAN CIVIL LIBERTIES UNION of HAWAI'I FOUNDATION

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October 4, 2007

Hon. Governor Linda Lingle
Executive Chambers
State Capitol
Honolulu, HI 96813

Dear Governor Lingle:

On behalf of more than one hundred and fifty Hawaii educators who have requested our assistance, we are writing to demand withdrawal of the State's proposed plan for random, suspicionless drug testing of Hawaii educators. Unless you rescind the suspicionless drug testing plan on or before November 15, 2007, a group of teachers, librarians, and other educators will bring suit to put a stop to this misguided policy.

The State's plan to cast a wide dragnet of mandatory drug testing is wrong on every front: it violates clearly established law; it is ineffective; it misdirects scarce educational funds; and it insults and alienates teachers by treating them as common criminals, rather than role models and mentors deserving our respect.

The Drug Testing Policy is Illegal

The policy is plainly illegal. Drug testing of government employees who are actually suspected of drug use is relatively uncontroversial and widespread. The State has long had procedures to drug test employees specifically suspected of impairment due to drug use. Over the course of many months, the State negotiated with the teachers' union about detailed procedures for testing for drugs and alcohol for teachers only *upon reasonable suspicion* of such use. With only days before negotiations were finalized, however, you imposed a new, non-negotiable demand that the teachers' contract include a provision requiring *random, suspicionless* drug testing of all public school teachers and school employees in the teachers' bargaining unit.

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Recognizing that your demand was non-negotiable, the drug testing provision was incorporated into the proposed contract. On May 2, 2007, a majority of the voting members of the union ratified the contract. A significant number of members boycotted the election or otherwise failed to cast a ballot; thus votes in favor of the CBA were actually a minority of HSTA members. Failure to ratify the provision would have resulted in missing a deadline for legislative appropriations necessary for the pay raise, thus delaying for at least one year any possibility of a salary increase.

The drug testing provision violates educators' Fourth Amendment rights. Random, suspicionless drug testing of public employees is generally unconstitutional, unless the employee holds a position that directly imperils public safety or involves law enforcement. Teachers do not fall within this category.

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. A government-imposed drug test is a search, thereby implicating Fourth Amendment protections. *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616 (1989). The Fourth Amendment generally requires the government to have individualized suspicion of wrongdoing before conducting a search, and searches lacking such suspicion are generally unconstitutional. *See Chandler v. Miller*, 520 U.S. 305 (1997).

The Supreme Court has recognized an exception to the requirement of individualized suspicion where a public employer has a "special need" to conduct drug testing of employees whose functions, if done improperly, would cause specific, significant threats to the public safety. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665-66 (1989). Such positions include nuclear power plant operators, air traffic controllers, and law enforcement officers who carry firearms during work hours. *See Int'l Bhd. of Elec. Workers, Local 1245 v. United States Nuclear Regulatory Comm'n*, 966 F.2d 521, 525 (9th Cir. 1992) (nuclear power plant operators); *Bluestein v. Skinner*, 908 F.2d 451, 456 (9th Cir. 1990) (airline personnel including air traffic controllers); *Von Raab*, 489 U.S. at 665-66 (law enforcement officers who carry firearms).

The majority of courts to have considered the issue have concluded that the government interest in ensuring the general school safety does not justify subjecting teachers to various forms of suspicionless drug testing – and no court has ever upheld the kind of sweeping, on-going drug testing imposed here. *See, e.g., United Teachers of New Orleans v. Orleans Parish Sch. Bd.*, 142 F.3d 853, 857 (5th Cir. 1998) (striking down pre-employment teacher drug

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testing); *Georgia Ass'n of Educators v. Harris*, 749 F. Supp. 1110, 1115 (N.D. Ga. 1990) (enjoining pre-employment drug testing of all state employees, including teachers). That Hawaii's no-cause testing is more expansive and supported by a less sufficient government interest than the drug test program in New Orleans gives us strong reason to believe that the drug testing provision subjects Hawaii's public-school teachers to unconstitutional searches. The only contrary holding came in a Tennessee case that accepted the broad proposition that the mere fact of being in contact with children made a position safety-sensitive, upholding one-time drug testing for job applicants or following an accident. *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361, 384 (6th Cir. 1998). It seems unlikely that the courts in Hawaii would accept this position, much less extend it to sweeping drug tests for all teachers, given the decision's lack of grounding in the broader case law and the slippery slope it invites for broad drug testing.

Unlike employers of nuclear power plant operators, for instance, where the government is legitimately concerned about "potentially catastrophic consequences" should the employee be impaired by a controlled substance, school districts do not have a special need to drug test all of their teachers with no individualized suspicion of drug use. While there might be symbolic value to drug test teachers, as with political candidates, this value is insufficient to override the Fourth Amendment. *See Chandler*, 520 U.S. at 322 (holding that the symbolic value of drug testing political candidates is not a special need that would render drug testing of politicians constitutional); *see also Georgia Ass'n of Educators*, 749 F. Supp. at 1115 (enjoining pre-employment drug testing of all state employees, including teachers); *Baron v. City of Hollywood*, 93 F. Supp. 2d 1337, 1342 (S.D. Fla. 2000) (striking down city ordinance that required suspicionless drug testing of all city employees).

Participation in collective bargaining does not relieve a government employer of its obligation to comply with the state and federal constitutions. When functioning properly, collective bargaining facilitates fair negotiation of wages, hours, and terms and conditions of employment through a give-and-take process. This is not what happened in the recent negotiations with the teachers' union. Rather, by presenting drug testing as a last-minute, non-negotiable demand, the State forced the union into a corner and extracted its purported consent to an illegal program.

Virtually every "special needs" case (including most drug testing cases) involve a plaintiff who was offered a putative choice between some desired option (a job, a promotion, participation in a program, etc.) or foregoing the desired option and thereby avoiding drug testing. The teachers here occupy

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the same position as our previous clients, like Lindsey Earls, who have signed a drug test consent form in exchange for access to services or benefits. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 826 (2002). Just as those plaintiffs were not legally barred from challenging the constitutionality of the government's actions, neither are the teachers here.

The Drug Testing Proposal is Ineffective and Costly

Random drug testing simply does not work. As the National Academy of Sciences concluded following a thorough analysis of the evidence, "Despite beliefs to the contrary, the preventive effects of drug-testing programs have never been adequately demonstrated." There already exists a provision for drug testing those who arouse suspicion. It is clearly illogical, not to mention wasteful and likely illegal, to conduct random tests absent any cause, rather than limit testing to individuals who arouse suspicion.

Drug testing is exceedingly costly, adding unnecessary expense to already strained school budgets. A study of the federal government's drug testing program, for example, estimated that it cost $77,000 to find a single drug user. With school budgets strained to the breaking point, educators throughout the state have emphasized their need for financial support for basic classroom necessities. Any reliable form of drug testing will cost well over $200 per test. Meanwhile, most teachers are allocated less than $200 for a year's worth of classroom supplies. Librarians are being laid off due to lack of funding, yet the State can find money to impose illegal, ineffective drug testing.

Drug Testing is Disrespectful to Teachers

Teachers occupy a position of respect and dignity in their communities. They resent being treated as suspects, having to prove their innocence, even after years of service and unblemished records. Numerous teachers have complained to us of the humiliation they will face if called out of the classroom to provide a urine sample, while their students look on. They also worry about the lesson this will teach their students – a lesson that the democratic and constitutional values taught in the classroom are meaningless in the real world.

Imposing random drug tests could very well result in the loss of quality educators, who are always in short supply, unwilling to abandon their principles and relinquish their constitutional rights.

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This misguided drug testing program has placed Hawaii's educators in an untenable position, forced to sign away the most basic of constitutional rights in exchange for a living wage. Thankfully, the Constitution does not allow us to put a price tag on our right to privacy. Many educators are determined to preserve their rights and are committed to challenge this unconstitutional politicization of public education. We urge you to reconsider your plan and to avoid costly, protracted litigation necessary to vindicate educators' rights.

Respectfully yours,

Graham Boyd
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