



May 1, 2014

Superintendent Mitch Anderson
Perham-Dent Public Schools
200 5th St. SE
Perham, MN 56573
FAX: 218.346.6504

VIA FACSIMILE, E-MAIL AND U.S. MAIL

Dear Superintendent Anderson,

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The ACLU-MN was disappointed to learn that the Perham-Dent School District has decided to require, suspicionless breathalyzer testing of students for alcohol consumption as a condition of attending Prom. We respectfully urge you to reject the plan because it is likely unconstitutional and ineffective and likely violates the District's own policies on student searches. Moreover, it will be harmful to students by driving them away from organized school activities, encouraging them to use other, more harmful substances that cannot be detected by a breathalyzer, and undermining their trust of school officials.

By implementing a suspicionless, breathalyzer testing program, the Perham-Dent School District would expose itself to potentially costly litigation challenging the District's actions under both the U.S. and Minnesota Constitutions. Although the U.S. Supreme Court has upheld the use of mandatory random drug testing of student athletes, the Court determined that such drug testing schemes pass constitutional muster only for a small category of students. Specifically, those who participate in athletics and competitive extra-curricular activities. See *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 826 (2002).

A key element of the plan upheld in *Earls* was the Court's finding that students in competitive activities have a diminished expectation of privacy given the fact that students voluntarily subject themselves to privacy intrusions including communal undress and off-campus travel, and the fact that competitive activities are highly regulated and governed by significant rules that do not apply to the student body as a whole. *Id.* at 831-32. The Perham High School plan to subject all students who attend prom to a breathalyzer search would sweep much more broadly than the program upheld in *Earls*. Another key element for the *Earls* Court was the fact that the district did not turn test results over to law enforcement. *Id.* at 833. In sharp contrast, the Perham High School plan is to actually use law enforcement to conduct the warrantless, suspicionless searches. Finally, the Supreme Court noted that the drug testing program was implemented in response to a documented



problem with increased drug use at the school. *Id.* at 834-5. In contrast, Perham High School Principal was quoted in an April 25th Perham Focus news article about the breath tests, stating, “[i]t’s not like it’s been a huge problem. It really isn’t.”

Even if the breathalyzer plan could be considered constitutional under the Fourth Amendment, the plan would still have to pass muster under the Minnesota Constitution. State Supreme Courts in both Washington and Pennsylvania, have held that suspicionless random drug testing of students violate their state Constitutions. See *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wash. 2d 297, 178 P.3d 995 (2008); and *Theodore v. Delaware Valley Sch. Dist.*, 575 Pa. 321, 836 A.2d 76 (2003). Like those courts, the Minnesota Supreme Court has recognized that the Minnesota Constitution provides greater protection from unreasonable searches and seizures than the Fourth Amendment. See *Ascher v. Comm’r of Public Safety*, 519 N.W.2d 183 (Minn. 1994) (invalidating suspicionless roadblocks to identify drunk drivers and rejecting U.S. Supreme Court decision to the contrary); *State v. Carter*, 697 N.W.2d 199, 211–12 (Minn. 2005) (holding that drug-detection dog sniff outside a storage unit is a search under the Minnesota Constitution and requires a reasonable, articulable suspicion); *State v. Davis*, 732 N.W.2d 173, 182 (Minn. 2007) (requiring reasonable, articulable suspicion of illegal activity for a warrantless dog sniff outside the door of an apartment).

In addition to being likely unconstitutional, breathalyzing students before Prom will do little to address any problem with underage drinking. The fact that students who attend Prom may pass the test does not mean that students there are drinking less. Social problems like underage drinking are not so easily solved. More likely, the plan will have the ironic effect of encouraging students to “beat the system.” Some students may simply decide to wait until after Prom to drink alcohol. Some might ingest drugs that will not be detected. Some may forgo the opportunity to attend the Prom in order to consume alcohol elsewhere undetected. In short, adopting a policy that merely diverts student drinking to other locations (or worse, converts student drinking to student illicit drug use) does not adequately address underage drinking.

It is paradoxical that the District is considering suspicionless alcohol testing of students in light of the fact that there are proven alternatives that have been shown to effectively reduce students’ alcohol and drug use. Alternatives include ensuring access to after-school extracurricular programs for at-risk students (not banning these students from these activities), providing access to an on-site school counselor with training and experience in recognizing the symptoms or risk factors for substance abuse and, most importantly, creating a school environment

that supports relationships of trust between students and mentors, coaches and teachers – not requiring that these adult figures act as police by testing and punishing students who may test positive.

The breathalyzer plan likely violates the District's policies regarding searches of students. Although we have been unable to locate the District policy manual, the 2012-13 student handbook describes the circumstances in which searches may occur. Those circumstances do not include suspicionless searches of students for alcohol consumption. The Minnesota School Board's Association Model Policy 502, "Search of Student Lockers, Desks, Personal Possessions, and Student's Person," only allows for searches of a student's person when there exists reasonable suspicion that the search will uncover a violation of the law or school rules.

By requiring breathalyzer tests, the District would be teaching students the wrong civics lesson: that they can't expect to have their bodily integrity and privacy respected, even if they are innocent of any wrongdoing. Instead, the District should be instilling the fundamental American values of right to privacy and respect for constitutional principles. Yet, through this breathalyzer plan, the District would be teaching their students to simply accept random and unnecessary surveillance tactics and extreme invasions of their privacy, even in the absence of suspicion.

We respectfully urge you to reject the plan to require breathalyzer tests of all students attending Prom.

Sincerely,

A handwritten signature in cursive script that reads "Charles Samuelson". The signature is written in dark ink and has a long, sweeping horizontal line extending to the right.

Charles Samuelson
Executive Director

CC: Perham-Dent School Board
Perham Police Chief Jason Hoaby