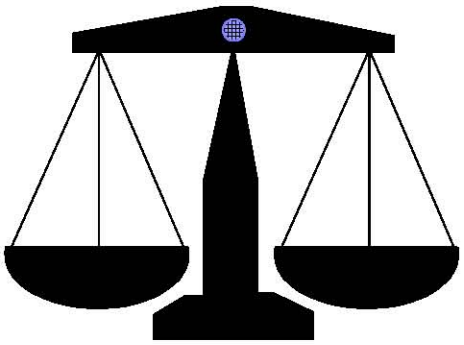
CURRENT LEGAL ISSUES IN STUDENT SAFETY TRAINING MANUAL



Search & Seizure **Cyberbullying** **Drug Testing**

Discipline for On-Campus & Off-Campus Conduct

Materials and training funded by the
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CURRENT LEGAL ISSUES IN STUDENT SAFETY TRAINING MANUAL

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Preface

This manual is provided to Idaho school districts, along with training, so that school administrators have a better understanding of how the principles of due process and discipline are applied to the ever-changing face in our public schools of electronic devices and the use of such devices by students and staff. Additionally, student and employee drug testing is addressed in this manual. The reader will be up-to-date on such issues as:

- **Search and seizure of electronic devices relating to students and employees—**This topic includes a discussion of the "reasonable suspicion" standard, the process for conducting searches on student electronic devices, when such searches can occur, and what can be done with the information found in the search.

- **Cyberbullying—**A review of the Idaho bullying statutes, including cyberbullying, is discussed, along with the First Amendment pertaining to free speech.

- **Appropriate discipline for on-campus and off-campus conduct of students and employees relating to electronic devices—**A discussion is provided regarding student use of computers to develop an "unofficial" webpage of a school, or other information relating to a school and/or its employees, along with whether discipline can occur for particular student or staff actions.

- **Student and employee drug testing—**An overview of the two United States Supreme Court cases specifically addressing student drug testing is provided, as well as a discussion regarding what school districts may do with the positive results of a drug test. Additionally, employee drug testing is discussed.

- **Electronic records—**This manual discusses the use of surveillance cameras, the status of videotapes as public records or educational records, retention issues, use of cell phones and other communication devices, video, still photography, and audiotaping with electronic devices by students and employees.

In addition to the topics listed above, pertinent case law is discussed and hypotheticals are included, as well as sample policies that may be utilized by Idaho school districts and relevant Idaho statutes pertaining to the topics covered in this manual.

About the Authors

Elaine Eberharter-Maki received her law degree in 1984 from the University of Idaho. She is a partner with EBERHARTER-MAKI & TAPPEN, PA and practices in all areas of education law. Elaine has represented school districts throughout Idaho since 1995 and has particular interest in special education, student discipline, and employment issues. Elaine teaches graduate-level courses in education law and special education administration for the University of Idaho and the University of Phoenix, and has been a speaker at the *University of Washington's Pacific Northwest Institute on Special Education and the Law* annually since 1996. She is also frequently invited to speak to educators, administrators, and board members relative to various legal issues. Prior to private practice, Elaine served as the Deputy Attorney General for the Idaho State Department of Education from 1988 to 1995.

Diane M. Tappen received her law degree from the University of Idaho in 1984, and has practiced law in both the private and public sectors. As a partner in EBERHARTER-MAKI & TAPPEN, PA, Diane represents school districts in all aspects of litigation, providing research and consultation, and appearing at civil and administrative hearings. She also has extensive hearing officer experience for various state agencies. In addition, Diane earned a teaching certificate in secondary education from Portland State University in 1997.

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Section I: Search and Seizure

A. General Concepts

1. A fundamental right in the United States is for all individuals to be free from the fear that the government may arbitrarily search the person and/or his property, and seize items found during the search. As a result, there are constitutional prohibitions against unlawful "search and seizure" by any government official, including public school employees.

2. The legal restrictions surrounding search and seizure involve a balancing of the rights of an individual to privacy and personal security versus the school district's rights to maintain order, discipline, and protect the security and safety of all students.

3. The rights of both students and employees against unreasonable search and seizure are protected by federal and state law.

   a. The Fourth Amendment to the U.S. Constitution protects "the right of people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures."

   b. The Idaho Constitution at Article I, Section 17, states:

      > The rights of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue without probable cause shown by affidavit, particularly describing the place to be searched and the person or thing to be seized.

   c. Relating to the presence of weapons at school, Idaho Code Section 18-3302D(3) states:

      > Right to search students or minors. *For purposes of enforcing the provisions of this section, employees of a school district* shall have the right to search all students or minors, including their belongings and lockers, *that are reasonably believed to be in violation of the provisions of this section, or applicable school rule or district policy, regarding the possessing of a firearm or other deadly or dangerous weapon.* (Emphasis added.)

B. Searches – Fourth Amendment

1. U.S. Supreme Court Case: *New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

   a. A student, T.L.O., and another student were discovered smoking in a school lavatory in violation of a school regulation. During questioning by a vice principal, T.L.O. denied that she had been smoking and claimed she did not smoke at all.

   b. The vice principal demanded to see T.L.O.'s purse, which he then opened. Inside the purse, he found a pack of cigarettes, as well as a package of cigarette rolling papers, marijuana, a pipe, plastic bags, a substantial amount of money, an index card listing students who owed her money, and two letters implicating her in marijuana dealing.

   c. The evidence of marijuana dealing was turned over to the police, and delinquency charges were brought against T.L.O. Alleging that her purse was seized in violation of the Fourth Amendment, T.L.O. moved to suppress the evidence found in her purse.

   d. The U.S. Supreme Court held that the Fourth Amendment's prohibition against reasonable searches and seizures *does* apply to searches conducted by public school officials. However, the court also held that the search of T.L.O.'s purse was not unreasonable and did not violate the Fourth Amendment.

   e. The U.S. Supreme Court set forth the definition of "search," as it relates to students, to be any police action that intrudes upon and invades a student's justifiable expectation of privacy. Each student has a sphere of privacy that he or she may justifiably expect government officials not to invade.

   f. A two-part "reasonableness" test was adopted for school officials (it does not apply to law enforcement persons on school property):

      (1) Was the search justified at its inception? Did reasonable grounds exist for suspecting that the search would turn up evidence that the student had violated or was violating either the law or the rules of the school?

      (2) Was the search reasonably related in scope to the circumstances justifying the search?

   g. For a search to be reasonable under the Fourth Amendment, suspicion must be particularized with respect to each individual searched. In other words, while there are notable exceptions, sweep searches (searches without particularized suspicion of individual misconduct) are *generally*

found by the courts to be unreasonable and in violation of the Fourth Amendment.[1]

h. If police are involved in a search on school grounds, the higher legal standard of "probable cause"[2] must be present before the search may occur.

C. What is a Search?

1. A search is an examination or viewing of a person's body or property, that a person would reasonably expect to be private, for the purpose of discovery of evidence of contraband or something that the possession of is in violation of school policy or in violation of the law.

2. A "search" entails conduct by a government official (including a public school employee) that involves an intrusion into a person's protected privacy interests.

   a. Includes "peeking," "poking," or "prying" into a place or item shielded from public view.

   b. Includes such things as a locker, desk, purse/handbag, backpack, book bag, briefcase, folder, book, journal, cell phone, blackberry, day planner, or article of clothing.

   c. The act of reading material in a student's cell phone, book, journal, diary, letters, notes, or appointment calendar is also a search.

3. The reasonableness standard, set forth in *T.L.O.*, applies to school district personnel. All valid searches must relate to the belief a student has or is violating either school policy or law and that the search will reveal evidence of that violation. A specific violation must reasonably be believed to have occurred. A prior violation is not evidence or reasonable suspicion that a current violation has occurred.

4. A reasonably grounded suspicion is more than a mere hunch. The components of reasonable suspicion include:

   a. Was the search justified at its inception—did the school official have reasonable grounds to believe that a law or school policy had been broken?

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[1] *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207, 103 S. Ct. 3536, 77 L. Ed. 2d 1387 (1983); *Bellnier v. Lund*, 438 F. Supp. 47 (N.D.N.Y. 1977); *Burnham v. West*, 681 F. Supp. 1160 (E.D. Va. 1988).

[2] "Under the Fourth Amendment, probable cause—which amounts to more than a bare suspicion but less than evidence that would justify a conviction—must be shown before an arrest warrant or search warrant may be issued." BLACK'S LAW DICTIONARY 1219 (7th ed. 1999).

b. The school official must have reason to believe that a particular student (or group of students whose identities are known) has committed the violation or infraction.

c. The search must be reasonably related in scope to the circumstances justifying the search. The school official must have a reasonable belief that the search will reveal physical evidence, and that the evidence will be found in a particular place associated with the student(s) suspected of committing the violation or infraction.

d. Courts do not require "absolute certainty" of a rule violation in order to justify a search based on reasonable suspicion.

5. A different standard applies to law enforcement personnel, including police officers on school grounds:

a. Law enforcement personnel must have probable cause to initiate a search. "Probable cause" means having more evidence for than against.

b. Generally, a search warrant is required, unless the search falls into an exception, such as the "automobile exception," "plain view," "consent," or "exigent circumstances."

D. What is ***Not*** a Search?

1. Looking at anything with the consent of the individual—consider age of the student to give consent.

2. Observing something that is in plain view and exposed to the public.

3. Examining an object after a student has denied ownership.

4. Examining an object after a student has abandoned it (*e.g.*, thrown away).

5. Detecting something with any of your senses that is in plain view/exposed to the public.

6. Use of flashlight or binoculars to enhance the viewing of an object in plain sight.

E. What is Consent?

1. A valid, legal consent must be voluntary and knowing, not coerced; the student must have a rudimentary understanding of what is being agreed to.

2. Can a student give consent?

a. Yes, but consider whether the student understands what is being asked of him or her. If the student is developmentally not able to understand what

is being asked and cannot understand the consequences, the student cannot provide knowing consent.

b. The student must understand that he or she has an ability to say "no" even if that will result in consequences of some sort, and he or she must understand whether there are alternatives to consenting and what the alternatives are.

c. Acquiescence is not voluntarily giving consent.

3. Consent may also be in the form of a written agreement to submit to a search randomly or on a schedule as a result of prior disciplinary action or a conditional return to school participation.

F. Absent Consent, in What Circumstances Can School Officials Search?

1. "Reasonable suspicion" is required in school searches of a student, or a student's possessions, by school personnel, and the search must be "reasonable in scope."

2. What is a "reasonable suspicion"? Reasonable suspicion must be based on facts that are specific to the individual student or a small group of students, rather than to the whole school or community.

a. The general definition for "reasonable suspicion" is: grounds that go beyond a hunch or supposition and are reasonable not only at the inception of the search based on the totality of the circumstances but reasonable in scope of the search. A search is justified in the school setting when based on the totality of the circumstances; the search is reasonable also in its scope.

(1) A prior violation of a school regulation or law is not sufficient to establish reasonable suspicion.

(2) Likewise, being a "known" drug user does not create reasonable suspicion.

b. Reasonable suspicion for drug or alcohol use: Idaho Code Section 33-210 defines "reasonable suspicion" as an act of judgment by a school employee or independent contractor of an educational institution which leads to a reasonable and prudent belief that a student is in violation of school board or charter school governing board policy regarding alcohol or controlled substance use, or the "use" or "under the influence" provisions of Idaho Code Section 37-2732C. For a further discussion, see Section III: Drug Testing.

G. Suspicionless Searches

1. Suspicionless searches may occur in very limited circumstances when the school's interest in preserving a safe environment outweighs a student's expectation of privacy. School personnel may use metal detectors for suspicionless searches when they can establish that weapons or violence is a significant problem in the school.[3] Likewise, a reliable report that a gun is present in the school would justify a suspicionless search.[4]

2. Dogs trained to detect drugs or weapons may be used to sniff lockers, school premises, or vehicles parked on school property on a random, suspicionless basis.[5] A positive response by a dog to a particular locker, backpack, or vehicle will provide the necessary reasonable suspicion for a search of that locker, backpack, or vehicle. Students should not be present when a dog is being used because, if the dog "hits" on a student's person, it may be deemed excessively intrusive in the absence of exigent circumstances involving safety.[6]

3. The Little Rock School District had a practice of regularly conducting random searches of student possessions, including pocket contents, backpacks, and purses. This practice was reviewed by the Eighth Circuit Court of Appeals in *Doe v. Little Rock School District*.[7]

   a. The court determined that the district's policy violated the Fourth Amendment, "[b]ecause subjecting students to full-scale, suspicionless searches eliminates virtually all of their privacy in their belongings, and there is no evidence in the record of special circumstances that would justify so considerable an intrusion."[8]

   b. The Eighth Circuit recognized that:

> Students in public school do indeed have lesser expectations of privacy than people generally have in public situations, due in large part to the government's responsibilities "as guardian and tutor of children entrusted to its care." Public school students' privacy interests are not nonexistent. We think it is clear that school children

[3] *Florida v. J.A.*, 679 So. 2d 316 (Fla. App. 3 Dist. 1996); *People v. Dukes*, 580 N.Y.S.2d 850 (N.Y. Crim. Ct. 1992); *In re F.B.*, 658 A.2d 1378 (Pa. Super. 1995).

[4] *Thompson v. Carthage School Distr.*, 87 F.3d 979 (8th Cir. 1996).

[5] *See, e.g., Commonwealth v. Cass*, 709 A.2d 350 (Pa. Super. 1988).

[6] *Doe v. Renfrow*, 475 F. Supp. 1012 (N.D. Ind. 1979), *modified*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022, 101 S. Ct. 3015 (1981); *B.C. v. Plumas Unified School Dist.*, 192 F.3d 1260 (9th Cir. 1999) (determined use of dogs to sniff student's person is excessively intrusive).

[7] 380 F.3d 349 (8th Cir. 2004).

[8] *Id.* at 353.

> are entitled to expect some degree of privacy in the personal items that they bring to school.[9]

c. The searches performed by school administrators were found to be highly intrusive and without individualized suspicion, consent, or waiver of privacy interest. Further, no extenuating circumstances were found to exist.

> Full-scale searches that involve people rummaging through personal belongings concealed within a container are manifestly more intrusive than searches effected by using metal detectors or dogs. Indeed, dogs and magnetometers are often employed in conducting constitutionally reasonable large-scale "administrative" searches precisely because they are minimally intrusive, and provide an effective means for adducing the requisite degree of individualized suspicion to conduct further, more intrusive searches. The type of search that the LRSD has decided to employ, in contrast, is highly intrusive, and we are not aware of any cases indicating that such searches in schools pass constitutional muster absent individualized suspicion, consent or waiver of privacy interests by those searched, or extenuating circumstances that pose a grave security threat.[10]

d. The court also reviewed *Board of Education of Independent School District No. 92 of Pottawatomie Cty. v. Earls*[11] and *Vernonia School District 47J v. Acton,*[12] where drug testing results were used for limited purposes and were not provided to law enforcement. In this case, however, the results of the searches were regularly turned over to law enforcement officials and used in criminal proceedings against students. The court found that the school officials were not acting *in loco parentis*, with the goal of promoting the students' welfare, but were involved in a law enforcement role "with the goal of ferreting out crime and collecting evidence to be used in prosecuting students."[13]

e. The court recognized the need to minimize harm to students, and blanket searches may be upheld by the courts when school officials receive specific information giving them reasonable grounds to believe that

[9] *Id.*
[10] *Id.* at 355.
[11] 536 U.S. 822 (2002).
[12] 515 U.S. 646, 115 S. Ct. 2386 (1995).
[13] 380 F.3d at 355.

students' safety is in jeopardy. However, "mere apprehension" is not sufficient for full-scale searches of students' personal belongs.[14]

H. Strip Searches

1. School personnel are strongly advised against conducting strip searches of students in which the student's person is searched after being required to remove his or her clothing for the purpose of determining whether the student is hiding contraband. Generally, such a search is deemed to be excessively intrusive into the student's privacy. However, the Ninth Circuit Court of Appeals recently determined that the strip search of a middle school student was valid.

2. Ninth Circuit Court of Appeals Case: *Redding v. Safford Unified School Dist. #1*, 504 F.3d 828 (9th Cir. 2007):

   a. The Safford Middle School in Safford, Arizona, adopted a policy prohibiting the "nonmedical" use, possession, or sale of drugs on school property or at school events. The term "drugs" is defined by the policy as including, but not limited to:

      (1) "All dangerous controlled substances prohibited by law";

      (2) "All alcoholic beverages"; and

      (3) "Any prescription or over-the-counter drug, except those for which permission to use in school has been granted."[15]

   b. This policy was implemented in response to a prior incident where a student brought a prescription drug to school and distributed it to other classmates. One student became seriously ill after taking the prescription drug and was hospitalized.

   c. Savanna was a 13-year-old student at Stafford Middle School. Staff members observed some students, including Savanna and Marissa, behaving in an "unusually rowdy manner" at a school dance. Staff detected the odor of alcohol from the girls and, later that evening, a bottle of alcohol and a pack of cigarettes were found in the girls' restroom. No disciplinary action was taken.

   d. Approximately one month later, another middle school student, Jordan, and his mother met with administrators and told them that Savanna and Marissa were distributing prescription drugs at school, and that Jordan had taken a pill and had become violent toward his mother and sick to his stomach. Jordan later gave school officials a pill that he said he had

[14] *Id.* at 356.
[15] *Id.* at 829.

received from Marissa, and further said that a group of students were planning on taking the pills at lunch. The school nurse identified the pill as "Ibuprofen 400mg," a pill available only by prescription.

e. Marissa was called to the office and asked to empty the contents of her pockets and open her wallet. This "search" revealed a blue pill, several white pills that Marissa said she had gotten from Savanna, and a razor blade. Additionally, on the desk next to Marissa was a black planner. Marissa denied ownership. The planner contained knives, lighters, a cigarette, and a permanent marker. Marissa agreed to submit to a strip search where she was asked to "(1) remove her shoes and socks, (2) lift up her shirt and pull out her bra band, and (3) take off her pants and pull out the elastic of her underwear."[16] The search did not reveal any pills.

f. When the principal confronted Savanna, she denied the allegations regarding knowledge, possession, or distribution of pills. Savanna admitted that the black planner was hers but claimed she lent it to Marissa several days earlier to help Marissa hide some things from her parents. Savanna denied having any knowledge of the planner's content.

g. Savanna indicated she didn't mind being searched. Her backpack was searched and nothing was found. Savanna was then asked to "(1) remove her jacket, shoes and socks, (2) remove her pants and shirt, (3) pull her bra out and to the side and shake it, exposing her breasts, and (4) pull her underwear out at the crotch and shake it, exposing her pelvic area."[17] No pills were found during the search.

h. Savanna and her parents sued the school district alleging an illegal search of her person violating the Fourth Amendment.

i. Utilizing the *T.L.O.* analysis, the Ninth Circuit Court of Appeals found that the school officials had "reasonable grounds" to suspect Savanna was violating school district policy or the law, or both. The court determined that, while the uncorroborated "tips" from Jordan and Marissa would not be reasonable grounds justifying the strip search, it was determined that the school officials made diligent efforts to "investigate, corroborate, or otherwise substantiate"[18] the tips before ordering the search.

> He interviewed Marissa, asked her a number of in-depth questions regarding the pills, and conducted a search of her person and belongings. After Wilson discovered the pills, Marissa immediately attributed them to Redding [Savanna]. Even then, Wilson still refrained from immediately

[16] *Id.* at 830.
[17] *Id.* at 831.
[18] *Id.* at 833.

> conducting a search of Redding's person. To the contrary, he questioned Redding about her knowledge of the pills and her ownership of the black planner. It was only after Redding had acknowledged ownership of the planner, acknowledged her friendship with Marissa, and conceded that she had, in fact, lent her planner to Marissa with the express purpose of helping Marissa hide contraband from her parents, that Wilson proceeded to order the challenged search.[19]

j. The court determined there was evidence to support the veracity of both Jordan and Marissa, and independent evidence to support the suspicion that Savanna was involved with the pills.

k. The court considered the permissibility of the scope of the search. Based on the critical interest in keeping students from the potential harm of misuse of prescription drugs, the small size of the pills, and the search being conducted in a reasonable manner, the court found that a "personally intrusive" search of the student's person was not unreasonable. The search was conducted in the privacy of the nurse's locked office, the student was not touched, and she was permitted to keep her undergarments on while visually searched, although directed to pull her bra and panties from her body, exposing her breasts and pelvic area, to allow any contraband objects to fall free from the garments.

l. The dissent noted that Savanna was a 13-year-old honor roll student with no prior history of disciplinary problems, and that the pills searched for were Ibuprofen 400mg and Motrin and Advil 200. "As we have said '[i]t does not require a constitutional scholar to conclude that a nude search of a thirteen year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human dignity."[20]

3. All search cases, including strip searches, are reviewed by the courts on a case-by-case basis, taking into account the individual facts presented.[21]

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[19] *Id.* at 833-34.

[20] *Id.* at 836, citing *Calabretta v. Floyd*, 189 F.3d 808, 819 (9th Cir. 1999).

[21] *Phaneuf v. Fraikin*, 448 F.3d 591 (2nd Cir. 2006) (A student informant's allegation regarding another student's marijuana possession warranted "additional inquiry and investigation" and failed to justify the search of the suspected student's person.); *Williams v. Ellington*, 936 F.2d 881, 888 (6th Cir. 1991) ("We can correlate the allegations of a student implicating a fellow student in unlawful activity, to the case of an informant's tip." School personnel had "carefully questioned [the student informant] about any improper motive for making the allegations, and was satisfied none existed.").

I. Surveillance Cameras

1. Because the use of surveillance cameras in the public schools is a relatively new phenomenon, there is little case law on the issue. The use of surveillance cameras is being advocated to increase safety and provide better monitoring of student activities.

2. However, concerns have been raised that the use of such cameras violates a student's constitutional rights to privacy and against unreasonable search and seizure.

   a. At a Tennessee middle school, 34 students sued the Overton County School Board and various officials in *Brannum v. Overton County School Board*.[22] The students alleged that their constitutional rights to privacy were violated when school officials installed and operated video surveillance equipment in the boys' and girls' locker rooms, and by viewing and retaining the recorded images.

   b. The school board approved the installation of video surveillance equipment throughout the middle school in an effort to improve security. The assistant principal and the Edutech representative, the company providing the surveillance cameras, decided to install the cameras throughout the school in areas facing the exterior doors, in hallways leading to exterior doors, and in the boys' and girls' locker rooms.

   c. The images from the cameras were transmitted to a computer terminal in the assistant principal's office, where they were displayed and were stored on the computer's hard drive. The assistant principal discovered that the locker room cameras were videotaping areas where students routinely dressed for athletic activities. He immediately notified the principal and suggested that the placement of the cameras be changed. However, no action was taken.

   d. The images from the surveillance cameras were also accessible by remote Internet connection. Any person with access to the software username, password, and Internet protocol address could access the stored images. Further, no one ever changed the system password or username from its default setting. The system was accessed 98 different times in several different states during a six-month period.

   e. A visiting girls' basketball team noticed the camera in the girls' locker room and brought it to the attention of their coach. The coach questioned the principal, who assured her that the cameras were not activated. However, the camera was activated and had recorded images of the girls' basketball team members in their undergarments when they changed their

[22] 516 F.3d 489 (6th Cir. 2008).

clothes. After the game, the coach reported the camera incident to her high school principal, who contacted another school administrator who immediately accessed the security system from his home and viewed the recorded images. The following morning, the images were again viewed by various administrators. The videotapes revealed 10- to 14-year-old girls in their bras and panties. The cameras were removed from the locker rooms later that same day.

f. The Sixth Circuit Court of Appeals held that the use of video cameras for surveillance in schools is governed by the Fourth Amendment and it is clear that the videotaping of students in a school locker room constitutes a search. In this case, the search was excessive in its scope.

> While at a hypothetical level there might exist a heightened concern for student safety in the "privacy" of student locker rooms, that does not render any and all means of detection and deterrence reasonable. As the commonly understood expectation for privacy increases, the range and nature of permissible government intrusion decreases.
>
> Given the universal understanding among middle school age children in this country that a school locker room is a place of heightened privacy, we believe placing cameras in such a way as to view the children dressing and undressing in a locker room is incongruent to any demonstrated necessity, and wholly disproportionate to the claimed policy goal of assuring increased school security, especially when there is no history of any threat to security in the locker rooms.
>
> We are satisfied that both the students' expectation of privacy and the character of the intrusion are greater in this case than those at issue in *Vernonia* and *T.L.O.* We conclude that the locker room videotaping was a search, unreasonable in its scope, and violated the students' Fourth Amendment privacy rights.[23]

g. The Court rejected a qualified immunity for the school administrators involved in the placement decision and monitoring of the surveillance cameras in the locker rooms under the following rationale:

> Some personal liberties are so fundamental to human dignity as to need no specific explication in our Constitution in order to ensure their protection against

[23] *Id.* at 498.

> government invasion. Surreptitiously videotaping the plaintiffs in various states of undress is plainly among them. [Citations omitted.] Stated differently, and more specifically, a person of ordinary common sense, to say nothing of professional school administrators, would know without need for specific instruction from a federal court, that teenagers have an inherent personal dignity, a sense of decency and self-respect, and a sensitivity about their bodily privacy that are at the core of their personal liberty and that are grossly offended by their being surreptitiously videotaped while changing their clothes in a school locker room. These notions of personal privacy are "clearly established" in that they inhere in all of us, particularly middle school teenagers, and are inherent in the privacy component of the Fourth Amendment's proscription against unreasonable searches. But even if that were not self-evident, the cases we have discussed, *supra*, would lead a reasonable school administrator to conclude that the students' constitutionally protected privacy right not to be surreptitiously videotaped while changing their clothes is judicially clearly established.[24]

3. A district should assess the need for surveillance cameras in the schools. If it is determined that a need exists, uniform procedures should be adopted. Specifically, the district should develop the parameters for the use of surveillance cameras, addressing the issues set forth below:

   a. Determine which schools. Make an initial determination as to whether all schools in the district, elementary, junior high, and high school, will be allowed to install surveillance cameras, or whether only certain schools will be authorized to install cameras.

   b. Identification of where the cameras may be located. Cameras should be installed to reasonably meet an identified need, such as theft, vandalism, or fighting. Commonly, cameras are utilized in school buses, hallways, building entrances, computer labs, student stores, and other common areas such as the lunch room and school parking lots. School personnel may wish to involve staff, students, and school security personnel in identifying areas in and around the school setting that are appropriate for cameras. Additionally, school personnel may wish to speak with administrators in other schools or school districts regarding their experience with cameras, including the placement of the cameras, as well as the impact the cameras had on vandalism, fighting, and crime.

[24] *Id.* at 499.

c. Violation of privacy. Use of surveillance equipment would be deemed an unreasonable invasion of privacy if installed in private offices (unless consent by the office occupant is given), restrooms, locker rooms, nurses' offices, or other locations where students, staff, and visitors have a legitimate expectation of privacy. In addition, schools rarely install surveillance cameras in classrooms because of the negative impact on the teacher and students. On the other hand, a teacher may request a surveillance camera in the classroom to assist in curtailing disruptive behavior.

d. Conversations should not be taped. The surveillance equipment should not include the ability to tape record conversations. Idaho Code Section 18-6702 provides that it is unlawful to record the oral communications between parties without first having the prior permission of at least one party to the communication.

e. A determination of the hours the cameras will be utilized. Not only have cameras been used to help keep schools safe during school hours, but also when the buildings are empty by detecting theft or vandalism.

f. Notice of the use of surveillance cameras. Students should be notified, in the student handbook or other district publication, that surveillance cameras are being installed and that the videos may be used in disciplinary hearings and/or provided to law enforcement in the event of misconduct. In addition, notices should be posted in the building, such as at the school entrances, that surveillance cameras might be in use to give reasonable notice of such use to visitors. For example, a sample notice may state: "WARNING: This facility employs video surveillance equipment for security purposes. This equipment may or may not be monitored at any time." It is important that students and staff understand that the surveillance equipment is not being monitored and reviewed at all times; thus, preventing an individual from having a false sense of security.

g. Review and use of videotapes. The district should identify when the tapes will be reviewed; *e.g.*, upon report of an incident, random reviews, etc. If the district intends to monitor the tapes, there should be some method for ensuring the randomness of such reviews.

h. Misuse, tampering, or vandalism of videotapes. The policy dealing with surveillance cameras should address the issue of vandalism, tampering, or misuse of videotapes from surveillance cameras and the disciplinary action that can be taken for such actions.

i. Use in disciplinary proceedings. The pictures/videos from the surveillance cameras are frequently used as evidence in disciplinary actions. The district should, therefore, address who has access to the cameras/videos,

the timeframe for which they will be kept, and whether a relevant video will be maintained as part of the student's record.

j. Retention. The district should determine a minimum timeframe for retention of the videotapes. For example, every two weeks the tapes are reused if they are not needed to clarify facts. Additionally, the tapes should be kept in a secure location.

k. Requests to view videotapes. A procedure should be implemented allowing for viewing of a certain videotape upon request. The videotape may constitute a public record. However, the provisions of the Family Educational Rights and Privacy Act (FERPA), pertaining to the confidentiality of student records, must be taken into account in determining whether a request will be granted or denied.

l. School buses. The district may wish to incorporate into its policy and procedure the use of video cameras on school buses.

4. A good resource discussing surveillance equipment in public schools is entitled *The Appropriate and Effective Use of Security Technologies in U.S. Schools*, published by the National Institute of Justice, U.S. Department of Justice (Sept. 1999).[25]

[25] *See* http://www.ncjrs.org/school/home.html.

Section II: Harassment, Intimidation and Bullying

A. Harassment

1. Idaho Law

a. Idaho Code Section 18-917A:

> STUDENT HARASSMENT – INTIMIDATION – BULLYING. (1) No student shall intentionally commit, or conspire to commit, an act of harassment, intimidation or bullying against another student.
>
> (2) As used in this section, "harassment, intimidation or bullying" means any intentional gesture, or any intentional written, verbal or physical act or threat by a student that:
>
> (a) A reasonable person under the circumstances should know will have the effect of:
>
> (i) Harming a student; or
>
> (ii) Damaging a student's property; or
>
> (iii) Placing a student in reasonable fear of harm to his or her person; or
>
> (iv) Placing a student in reasonable fear of damage to his or her property; or
>
> (b) Is sufficiently severe, persistent or pervasive that it creates an intimidating, threatening or abusive educational environment for a student.
>
> An act of harassment, intimidation or bullying may also be committed through the use of a land line, car phone or wireless telephone or through the use of data or computer software that is accessed through a computer, computer system, or computer network.
>
> (3) A student who personally violates any provision of this section may be guilty of an infraction.

b. Idaho Code Section 33-205:

> The superintendent of any district or the principal of any school may temporarily suspend any pupil for disciplinary reasons, *including student harassment, intimidation or bullying*, or for other conduct disruptive of good order or of the instructional effectiveness of the school. (Emphasis added.)

2. Peer Harassment

Harassment involves any conduct by a student—whether verbal, written, graphic, or physical—relating to another student's race, national origin, religion, color, disability, or sex that is sufficiently severe, pervasive, or persistent as to:

a. Interfere with or limit the ability of a student to participate in or benefit from the district's programs or activities;

b. Create an intimidating, threatening, or abusive educational environment;

c. Substantially or unreasonably interfere with a student's academic performance; or

d. Otherwise adversely affect a student's educational opportunities.

e. Harassment also includes an act of retaliation taken against:

(1) Any person bringing a complaint of harassment;

(2) Any person assisting another person in bringing a complaint of harassment;

(3) Any person participating in an investigation of an act of harassment.

f. School districts' responsibilities regarding peer harassment include:

(1) Adopting school district policy, including:

(a) Prohibit harassing conduct by students;

(b) Explain what conduct may constitute harassment;

(c) Provide for a system of reporting and investigating alleged harassment; and

(d) Outline the consequences for harassing conduct.

(2) Training, consisting of:

(a) Age-appropriate education to students regarding tolerance and the inappropriateness of harassment; and

(b) Education for staff members to assist in recognizing and addressing harassing conduct, and policy review to inform staff of the district's expectations regarding reporting incidents of harassment.

(3) Investigation of allegations of harassment.

(4) Intervention and discipline. The age of the harasser may be an important element in determining whether or not peer harassment has occurred, and the appropriate remedial action to be taken.

3. Racial, Color, and National Origin Harassment

Title VII of the Civil Rights Act of 1964 prohibits harassment based on an individual's race, color, or national origin. "Natural origin" is defined as "the country in which a person was born, or from which the person's ancestors came."[26]

a. Determined by two standards:

(1) *Different Treatment* - Unwanted behavior based on a student's race, color, or national origin that is sufficiently severe so as to interfere with or limit the individual's ability to participate in or benefit from services, activities, or privileges;

(2) *Hostile Environment* - Behavior based on race, color, or national origin that is unwelcome, repeated, and causes harm, and which has the purpose or effect of creating an intimidating, hostile/offensive working or learning environment. Such behavior includes:

(a) Intimidation and implied/overt threats of physical violence;

(b) Physical acts of aggression or assault, or damage to property;

(c) Demeaning racial jokes, taunting, racial slurs, derogatory racial nicknames, or racial innuendos;

(d) Graffiti, slogans, visual displays, cartoons, or posters depicting racial/ethnic slurs or racial/ethnical sentiments;

[26] BLACK'S LAW DICTIONARY 1047 (7th ed. 1999).

(e) Criminal offenses directed at people because of their race or national origin;

(f) Use of language and symbols of ethnic hate, such as swastikas and burning crosses or racial and ethnic slurs;

(g) Harassment because of an individual's association with others of a particular national origin.

4. Religious Harassment

Harassment based on an individual's ethnicity, national origin, and religious beliefs. Examples of religious harassment include:

a. Slurs, jokes, or demeaning comments directed against an individual related to his or her religious affiliation or practices (Jewish, Muslim, Christian, etc.);

b. Physical assault related to an individual's religion;

c. Flyers or leaflets left on cars or in mailboxes denouncing a religion, whether or not it is intended to intimidate individuals;

d. Anti-Jewish/Holocaust denying letters to the editor;

e. Anti-Muslim advertisements in newspapers; and

f. Verbal/written threats (including death and bomb threats) directed against individuals or institutions based on religious affiliation.

5. Disability Harassment

"Disability harassment under Section 504 and Title II [ADA] is intimidation or abusive behavior toward a student based on disability that creates a hostile environment by interfering with or denying a student's participation in or receipt of benefits, services or opportunities in the institution's program." Joint letter issued by OCR and OSERS dated July 25, 2000.

a. Hostile environment is created by unwanted behavior directed at the individual with a disability including:

(1) Jokes, derogatory remarks, imitating an individual's manner of speech or movement, or interfering with necessary equipment;

(2) Involving or attempting to involve an individual with limited comprehension in dangerous or criminal activity.

6. Sexual Harassment

Sexual harassment is prohibited by Title IX of the Education Amendments of 1972 (Title IX) and includes unwelcome sexual advances, requests for sexual favors, sexually-motivated physical conduct, or other verbal or physical conduct of a sexual nature when such misconduct has the purpose or effect of:

a. Unreasonably interfering with an individual's ability to study or participate in school activities; or

b. Creating an intimidating, hostile, or offensive educational environment.

c. Examples of sexual harassment include, but are not limited to, the following:

(1) Unwelcome verbal statements of a sexual or abusive nature, including requests or demands for sexual activity, sexual jokes, obscene comments, etc.;

(2) Unwelcome, sexually-motivated, or inappropriate touching, pinching, or other physical contact;

(3) Unwelcome sexual behavior or communications accompanied by implied or overt threats concerning an individual's education;

(4) Unwelcome behavior or communications directed at an individual because of his or her gender; and

(5) Stalking or unwelcome sexually-motivated attention.

7. Case Law Regarding Harassment

a. Sexual harassment of students by employees:

(1) U.S. Supreme Court Case: *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028 (1992).

(a) A former student who was repeatedly harassed and sexually assaulted by a male teacher sought $6 million in damages.

(b) The student contended that the teacher repeatedly used sexually-oriented conversation, forcibly kissed her, and subjected her to coercive sexual intercourse. Although the student reported these actions to the district administration and teachers, no action was taken to protect the student and end the improper conduct.

(c) U.S. Supreme Court ruled that schools and colleges may be ordered to pay money awards for gender discrimination, holding Congress "did not intend to limit the remedies available" under Title IX.

(d) The court also held that damages as a remedy were available for an action brought under Title IX and, in *Franklin*, equitable remedy of prospective relief was inadequate because the teacher no longer taught at the school and the student no longer attended that school.

(2) U.S. Supreme Court Case: *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989 (1998).

(a) In 1991, an 8th grade student, Alice Gebser, joined a school book club led by Frank Waldrop, a high school teacher. During the book discussion sessions, Waldrop often made sexually-suggestive comments to students.

(b) In 9th grade, Gebser was assigned two classes taught by Waldrop. He continued to make inappropriate remarks to students, directing some of his suggestive comments toward Gebser.

(c) In spring 1992, Waldrop initiated sexual contact with Gebser, while visiting her home ostensibly to give her a book. He kissed and fondled her.

(d) Waldrop and Gebser had sexual intercourse on numerous occasions during the remainder of the school year, and their relationship continued into the 1992-1993 school year. They often had intercourse during class time, but never on school property.

(e) Gebser never reported her relationship with Waldrop to school officials, and testified that she knew Waldrop's conduct was improper, but she was uncertain how to react and she wanted to continue having him as a teacher.

(f) In October 1992, parents of two other students complained to the high school principal about Waldrop's comments in class. Although Waldrop indicated that he did not believe he had made offensive remarks, he apologized to the parents and said it would not happen again. The principal advised Waldrop to be careful about his classroom comments and told the school guidance counselor about the meeting.

(g) The principal did not report the incident to the superintendent, who was the Title IX coordinator.

(h) In January 1993, a police officer discovered Waldrop and Gebser engaging in sexual intercourse, and arrested Waldrop.

(i) Waldrop's employment with the district was terminated, and his teaching certificate was revoked.

(j) The district did not have any promulgated or distributed official grievance procedure for lodging sexual harassment complaints; nor had it issued a formal anti-harassment policy.

(k) Gebser filed against the district and Waldrop seeking compensatory and punitive damages under Section 1983, Title IX, and state negligence law. The issue on appeal to the U.S. Supreme Court was whether the school district violated Title IX. Gebser sought not only to establish a Title IX violation, but to also recover damages based on theories of *respondeat superior* (vicarious or imputed liability) and constructive notice (where the district knew, or should have known).

(l) The U.S. Supreme Court reviewed its decision in *Franklin*, that a district can be held liable for a teacher's sexual harassment of a student; however, the court concluded "that it would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of *respondeat superior* or constructive notice, *i.e.*, without actual notice to a school district official."

(m) The Supreme Court also stated that "in cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's [School District] behalf has actual knowledge of discrimination in the recipient's programs and fails adequately to respond. We think, moreover, that the response must amount to deliberate indifference to discrimination."

(n) The Court also held that the school district's failure to have adopted policies did not establish the requisite actual notice

and deliberate indifference. "[T]he failure to promulgate a grievance procedure does not itself constitute 'discrimination' under Title IX."

b. Sexual harassment of students by students:

(1) U.S. Supreme Court Case: *Davis v. Monroe County Bd. of Education,* 119 S. Ct. 166 (1999).

(a) During the 1992-93 school year, LaShonda Davis was a 5th grade student. A classmate, G.F., sat next to LaShonda and, on December 17, 1992, G.F. allegedly tried to touch LaShonda's breasts and vaginal area. He also allegedly stated "I want to get in bed with you" and "I want to feel your boobs." LaShonda complained to her teacher, as well as her mother. In January 1993, G.F. engaged in similar behavior, which LaShonda again reported to her teacher and her mother.

(b) In February 1993, LaShonda reported that G.F. allegedly placed a doorstop in his pants and behaved in a sexually-suggestive manner toward LaShonda during P.E. class. Further misbehavior occurred, and LaShonda reported each incident.

(c) In March, LaShonda's teacher allowed her to change assigned seats away from G.F., but the unwelcome attentions continued. On April 12, 1993, G.F. rubbed his body against LaShonda in a manner she considered sexually suggestive; she complained to her teacher.

(d) On May 19, 1993, LaShonda and her teacher visited the principal to discuss G.F.'s conduct. The principal asked why no other students had complained about G.F. and also stated "I guess I'll have to threaten [G.F.] a little bit harder." G.F. was charged with sexual battery, a charge which he did not deny. The school did not take disciplinary action against G.F.

(e) Asserting a Title IX violation, LaShonda argued that a school employee intentionally discriminates on the basis of sex when he fails to prevent one student from sexually harassing another.

(f) The U.S. Supreme Court reviewed the facts presented and held "[w]e thus conclude that funding recipients [under Title IX] are properly held liable for damages *where they*

> *are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.*" (Emphasis added.)

(g) The standard set by the U.S. Supreme Court is one of reasonableness, stating that *the school "must merely respond in a manner that is not clearly unreasonable in light of the known circumstances."* The school is not expected to prevent harassment when they do not have knowledge of the situation. Of course, actual knowledge by any employee, whether a result of witnessing the conduct or having it reported to him/her, may be imputed to the district. Upon receiving the knowledge, the district has a responsibility to determine whether the allegation is valid and take appropriate action to prevent repetition of harassment. Such action may consist of suspension and/or expulsion. (Emphasis added.)

B. Cyberbullying

1. Definition

a. "Cyberbullying" has been defined in similar ways by various organizations:

(1) StopCyberbullying.org, an organization with a mission to inform the public on Internet safety, security, and privacy, defines cyberbullying as:

> "Cyberbullying" is when a child, preteen or teen is tormented, threatened, harassed, humiliated, embarrassed or otherwise targeted by another child, preteen or teen using the Internet, interactive and digital technologies or mobile phones. It has to have a minor on both sides, or at least have been instigated by a minor against another minor. Once adults become involved, it is plain and simple cyber-harassment or cyberstalking. Adult cyber-harassment or cyberstalking is NEVER called cyberbullying.[27]

(2) MindOH, an online company providing education tools, defines "cyberbullying" as "harassing, humiliating, intimidating and/or

[27] *See* http://stopcyberbullying.org.

threatening others on the Internet or using other technology such as cell phones or PDAs." [28]

(3) The United States Computer Emergency Readiness Team (US-CERT), a partnership between the Department of Homeland Security and public and private sectors, issued Cyber Security Tip ST06-005, which defined cyberbullying as:

> Cyberbullying refers to the new, and growing, practice of using technology to harass, or bully, someone else. Bullies used to be restricted to methods such as physical intimidation, postal mail, or the telephone. Now, developments in electronic media offer forums such as email, instant messaging, web pages, and digital photos to add to the arsenal. Computers, cell phones, and PDAs are new tools that can be applied to an old practice.
>
> Forms of cyberbullying can range in severity from cruel or embarrassing rumors to threats, harassment, or stalking. It can affect any age group; however, teenagers and young adults are common victims, and cyberbullying is a growing problem in schools.[29]

b. Cyberbullying is different than face-to-face bullying for various reasons, including:

> Firstly, electronic bullies can remain virtually anonymous using temporary email accounts, pseudonyms in chat rooms, instant messaging programs, cell-phone text messaging, and other Internet venues to mask their identity; this perhaps frees them from normative and social constraints on their behavior. Furthermore, cyber-bullies might be emboldened when using electronic means to carry out their antagonistic agenda because it takes less energy and courage to express hurtful comments using a keypad or a keyboard than with one's voice.
>
> Second, electronic forums can often lack supervision. While chat hosts regularly observe the dialog in some chat rooms in an effort to police conversations and evict offensive individuals, personal messages sent between users (such as electronic mail or text messages) are

[28] *See* http://www.mindoh.com/Cyberbullying.aspx.
[29] *See* http://www.us-cert.gov/cas/tips/ST06-005.html.

viewable only by the sender and the recipient, and therefore outside the regulatory reach of such authorities. In addition, teenagers often know more about computers and cellular phones than their parents or guardians and are therefore able to operate the technologies without worry or concern that a probing parent will discover their experience with bullying (whether as a victim or offender).

Thirdly, the inseparability of a cellular phone from its owner makes that person a perpetual target for victimization. Users often need to keep their phone turned on for legitimate purposes, which provides the opportunity for those with malicious intentions to engage in persistent unwelcome behavior such as harassing telephone calls or threatening and insulting statements via the cellular phone's text messaging capabilities. Cyber-bullying thus penetrates the walls of a home, traditionally a place where victims could seek refuge from other forms of bullying.[30]

2. Freedom of Speech

a. Cyberbullying is a free speech issue. While students are protected by the First Amendment, they may be disciplined for speech or other expressions that are:

(1) Vulgar, lewd, obscene, or plainly offensive;

(2) Violate reasonable restriction on school-sponsored websites; or

(3) Substantially disrupt or interfere with the work of the school (or are likely to do so) or violate the rights of others.

b. The court cases upon which these restrictions rest are described below:

(1) U.S. Supreme Court Case: *Tinker v. Des Moines Community School Dist.*, 393 U.S. 503, 89 S. Ct. 733 (1969):

(a) With regard to political and/or social statements, the U.S. Supreme Court stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." [31]

(b) Accordingly, the U.S. Supreme Court held that public school students could not be suspended for wearing black

[30] *See* http://en.wikipedia.org/wiki/Cyber-bullying.
[31] *Id.* at 506.

armbands to protest the Vietnam War because their protest was expressive activity and was being suppressed solely because school officials disagreed with the message.

(c) But, the U.S. Supreme Court did not leave the school powerless. It held that speech or expressive conduct "which for any reason—whether it stems from time, place, or type of behavior—materially disrupts class work or involves substantial disorder or invasion of the rights of others" is not protected by the First Amendment.[32]

(2) U.S. Supreme Court Case: *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 106 S. Ct. 3159 (1986):

(a) With regard to vulgar and obscene language, in *Fraser*, decided 17 years after *Tinker*, the U.S. Supreme Court gave school officials even greater discretion in controlling offensive student expression.

(b) The U.S. Supreme Court upheld the disciplinary actions taken against a high school student who gave a sexually-suggestive speech during a school assembly. The student had been suspended for three days and was informed his name would be removed from the list of candidates for graduation speaker.

(c) The U.S. Supreme Court noted that the speech provoked raucous behavior by some students and embarrassment in others, and concluded that "vulgar and offensive" language need not be tolerated in the public schools whether it is disruptive or not.[33]

(d) The U.S. Supreme Court also noted that setting the boundaries of appropriate expression should be left to the school district's discretion: "The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."[34]

(e) The school acted within its permissible authority in imposing sanctions on the student in response to his offensively lewd and indecent speech.

[32] *Id.* at 513.
[33] *Id.* at 683.
[34] *Id.* at 685.

(3) U.S. Supreme Court Case: *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S. Ct. 562 (1988):

(a) With regard to a school newspaper or official publication, in *Hazelwood*, decided shortly after the *Bethel* decision, the U.S. Supreme Court further expanded the right of school officials to control student expression when the expression can be viewed as school sponsored.

(b) The U.S. Supreme Court upheld the decision of a high school principal to delete from the school newspaper articles on student pregnancies and the impact of divorce on students. Noting that the newspaper was an official school publication, the U.S. Supreme Court authorized censorship by school officials "so long as their actions are reasonably related to legitimate pedagogical concerns."[35]

(4) Ninth Circuit Court of Appeals Case: *Chandler v. McMinnville School Dist.*, 978 F.2d 524 (9th Cir. 1992):

(a) The Ninth Circuit analyzed the U.S. Supreme Court decisions previously discussed—*Tinker*, *Bethel*, and *Hazelwood*.

(b) The Ninth Circuit found that these cases established three categories that may be controlled by school officials, with a different standard applying to each.

(c) The following lists each category:

i. Expression that is vulgar, lewd, obscene, or plainly offensive under district standards. The school may discipline students for speech in this category without showing that the speech may be seen by others as school-sponsored speech (*e.g.*, a school play or the official school newspaper), is disruptive, or violates the rights of others.

ii. Expression that others may see as school-sponsored speech. The school may exercise extensive control over and "disassociate itself" from a wide range of student expression in this category so long as the decision is reasonably related to "legitimate pedagogical concerns."

[35] *Id.* at 273.

iii. Expression that is disruptive or violates the rights of others. School officials may suppress speech they have reason to believe will substantially disrupt or interfere with school activities or infringe upon the rights of others. It is not enough that school officials are offended by the expression;[36] there must be a reasonable basis for believing that the expression will be disruptive or will violate the rights of others. For example, a federal court in Kansas upheld the suspension of a student for displaying a Confederate flag. The school district had argued that display of the Confederate flag violated its policy on racial harassment and intimidation—which specifically prohibited display of the flag.[37] The court found that the district could reasonably conclude, based on a history of racial incidents in the district, that display of the Confederate flag would likely lead to substantial disruption of school discipline.

(5) U.S. Supreme Court Case: *Morse v. Frederick*, 127 S. Ct. 2618 (2007):

(a) The U.S. Supreme Court overturned the Ninth Circuit Court of Appeals findings and held that a high school principal (Morse), at an off-campus, school-approved activity, did not violate a student's right to free speech by suspending the student (Frederick) for ten days and confiscating a banner.

(b) The students were allowed by the principal to observe the Olympic Torch Relay as it passed through Juneau, Alaska, on its way to the winter games in Salt Lake City, Utah. As the torchbearers and camera crews passed by, the student and his friends unfurled a 14-foot banner stating "BONG HiTS 4 JESUS," which was easily readable by the students on the other side of the street.

(c) The principal regarded the banner as promoting illegal drug use. The U.S. Supreme Court agreed with the principal that the banner could be read as advocating the use of illegal

[36] *See, e.g., Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998) (disapproving discipline of a student who posted unflattering comments about the school administration on a personal web page where the discipline was based on the principal's objection to the content, not on fear of disruption or interference with school discipline).

[37] *West v. Derby Unified Sch. Dist.*, 23 F. Supp. 2d 1223 (D. Kan. 1998).

drugs and held that, because schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use, the school officials did not violate the First Amendment by confiscating the pro-drug banner and suspending the student. The U.S. Supreme Court concluded that:

> School principals have a difficult job, and a vitally important one. When Frederick suddenly and unexpectedly unfurled his banner, Morse had to decide to act—or not act—on the spot. It was reasonable for her to conclude that the banner promoted illegal drug use—in violation of established school policy—and that failing to act would send a powerful message to the students in her charge, including Frederick, about how serious the school was about the dangers of illegal drug use. The First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers.[38]

3. Cell Phones

   a. Students do not have a right to have cell phones in school.

   b. New York State Supreme Court Case: *Price v. New York City Bd. of Educ.*, 2008 N.Y. Slip Op. 03512, 51 A.D.3d 277 (N.Y. App. Div. 1st Dept. 2008):

      (1) The parents of students attending New York City schools argued that the prohibition of cell phones in the school setting violated their fundamental right to provide for the care, custody, and control of their children.

      (2) The United Federation of Teachers supported the ban of cell phone use by students while on school grounds, but called for an end to the ban on possession. It felt that cell phones are a "lifeline for many parents and students."[39] The only exception to the ban is if a student has a medical need for a cell phone.

      (3) The New York Supreme Court, Appellate Division, First Department, recognized that it was required to balance the interests

[38] *Id.* at 2629.
[39] 51 A.D.3d at 279.

of the New York City Department of Education in maintaining order and discipline in its schools, with the concerns of parents and guardians for their children's well-being.

(4) Parents argued that their children often had lengthy commutes to and from school and after-school activities by public transportation. At times, students are required to walk in the dark through dangerous neighborhoods, where working pay phones are scarce. The cell phones allow parents to track their children's locations and coordinate meeting their children at the bus or subway stop.

(5) The school department argued it was justified in implementing the ban because cell phones threaten order in its schools. During the 2005-06 school year, the school department had 2,168 incidents involving cell phones on school property. Students have used the camera function of cell phones to take and exhibit pictures with inappropriate sexual content and use such pictures to harass others, including school personnel. Cell phones have also been used to facilitate cheating on exams.

> The Department detailed how cell phones have been abused by students. For example, students have called friends to rally them for assistance in a fight. They have used them to call other students to threaten and intimidate them. They have placed crank calls to teachers and called 911 as a practical joke.[40]

(6) The school department demonstrated that a ban on possession of cell phones was necessary because a ban on use was not easily enforced. Further, the cell phone activity by students threatened discipline in schools:

> Of course, the cell phone activity identified by the Department as threatening discipline in the schools goes far beyond the occasional errant ring. The very nature of cell phones, especially with regard to their text messaging capability, permits much of that activity to be performed surreptitiously, which the Chancellor rationally concluded presents significant challenges to enforcing a use ban. Certainly the Department has a rational interest in having its teachers and staff

[40] *Id.* at 282.

devote their time to educating students and not waging a "war" against cell phones.[41]

4. Discipline for Off-Campus Behavior

a. Courts have been hearing more cases dealing with cyberbullying and review the cases with the following principles in mind:

(1) The origin of the expression—when it occurs off school grounds the district must demonstrate the expression had a disruptive impact on school operations.

(2) The nature and quality of the expression—key factors to consider are:

(a) The level of specificity of the expression ("I hate the world" versus "I hate the principal, Mrs. Smith");

(b) The impact of the expression on the recipient (upset or threatened versus dismissive or unconcerned);

(c) The directness of the expression (relayed directly to the recipient versus relayed by a third party to the recipient);

(d) Violation of state or federal laws, including antidiscrimination, prohibition against bullying or criminal laws prohibiting intimidation or threats;

(e) The school district's perception that the expression was a direct threat to the health or safety of students or staff ("true threat" versus unrealistic or no threat);

(f) School district's policy prohibiting certain expression;

(g) School district's documented experience with, and response to, similar forms of expression.[42]

b. Discipline Upheld:

(1) Second Circuit Court of Appeals Case: *Wisniewski v. Board of Education of the Weedsport Central School District,* 494 F.3d 34 (2nd Cir. 2007):

[41] *Id.* at 287.

[42] Maureen A. MacFarlane, *Misbehavior in Cyberspace*, The School Administrator, Oct. 2007, *see* http://www.aasa.org/publications/saarticledetail.cfm?ItemNumber=9423&snItemNumber=950.

(a) An 8th grade student, Aaron, was suspended for a small drawing that crudely, but clearly, suggested that a named teacher should be shot and killed, which he shared with 15 members of his "buddy list" by using AOL Instant Messaging software. The picture, attached as an icon, was of a pistol firing a bullet at a person's head, above which were dots representing splattered blood, and beneath appeared the words "Kill Mr. VanderMolen," his English teacher. Aaron created the icon a couple of weeks after his class had been instructed that threats would not be tolerated and would be treated as acts of violence by the school.

(b) The icon was available for viewing for three weeks by Aaron's "buddies," some of whom were classmates at Weedsport Middle School. Another classmate learned of the icon, informed Mr. VanderMolen of the icon, and provided him with a copy. Mr. VanderMolen forwarded the information to the principals, who brought the matter to the attention of the local police, the superintendent, and Aaron's parents.

(c) Aaron was questioned about the matter by the school principals and acknowledged that he had created the icon. He also expressed regret. He was suspended for five days and allowed back into school pending a superintendent's hearing.

(d) A police investigator concluded that the icon was meant as a joke and that Aaron posed no real threat to his English teacher or any other school official. The pending criminal case was closed. Aaron was also evaluated by a psychologist who found that Aaron had no violent intent, posed no actual threat, and made the icon as a joke.

(e) At the superintendent's hearing, Aaron was charged under New York law with endangering the health and welfare of other students and staff at school. The hearing officer assigned to the case concluded that the icon was threatening and was not simply a joke. The hearing officer found that Aaron admitted sending a threatening message to his buddies, in violation to the student handbook, and created an environment "threatening the health, safety and welfare of others, and his actions created a disruption in the

school environment."[43] The hearing officer recommended suspension for one semester.

(f) The Board approved the hearing officer's recommendation and Aaron was suspended for a semester. During that time, he was afforded alternative education. Because of school and community hostility, the family moved from Weedsport.

(g) The student and his parents argued that the icon was not a "true threat," but was protected speech under the First Amendment and that Aaron's suspension was a retaliatory action in violation of his First Amendment rights.

(h) The Second Circuit Court of Appeals reviewed the *Tinker* case and held that:

> Even if Aaron's transmission of an icon depicting and calling for the killing of his teacher could be viewed as an expression of opinion within the meaning of *Tinker*, we conclude that it crosses the boundary of protected speech and constitutes student conduct that poses a reasonably foreseeable risk that the icon would come to the attention of school authorities and that it would "materially and substantially disrupt the work and discipline of the school." [Citation omitted.] For such conduct, *Tinker* affords no protection against school discipline."[44]

(i) Further, "[t]he fact that Aaron's creation and transmission of the IM icon occurred away from school property does not necessarily insulate him from school discipline. [Citation omitted.] We have recognized that off-campus conduct can create a foreseeable risk of substantial disruption within a school. [Citation omitted.]"[45] Aaron's discipline was upheld by the Second Circuit Court of Appeals.

[43] *Id.* at 37.
[44] *Id.* at 38-39.
[45] *Id.* at 39.

c. Discipline Not Upheld:

(1) Indiana Court of Appeals Case: *A.B. v. State*, 863 N.E.2d 1212 (Ct. App. Ind. 2007):

(a) A middle school principal, Mr. Gobert, was informed by some of his students that a derogatory webpage concerning the assistant principal, Mr. Taylor, had been created on the Internet. Upon investigating this allegation, the administrators found the web posting concerning Mr. Taylor, but also found a webpage on MySpace.com that was purported to have been created by Mr. Gobert. Mr. Gobert was unable to access the webpage, as only persons accepted as friends by the creator had full access to the page and its contents.

(b) It was determined that R.B. had created the Gobert MySpace webpage and had invited several of her friends, including A.B., to access the page. A.B., knowing that R.B. was the creator of the webpage, made several derogatory postings on the site, including:

> Hey you piece of greencastle shit.
>
> What the fuck do you think of me [now] that you can['t] control me? Hug? Ha ha ha guess what I'll wear my fucking piercings all day long and to school and you can['t] do shit about it? Ha ha fucking ha? Stupid bastard? Oh and kudos to whomever made this ([I'm] pretty sure I know who). Get a background.
>
> "die . . . gobert . . . die."

(c) Additionally, A.B. created a publicly accessible group on myspace.com under the group name "Fuck Mr. Gobert and GC Schools."

(d) The State filed a delinquency petition alleging that A.B. committed acts, that if committed by an adult, would constitute identity deception, a felony, and harassment, a misdemeanor. The identity deception charge was later dropped.

(e) The court reviewed the *T.L.O.* and *Tinker* cases and held that:

> viewing A.B.'s posted comments objectively, A.B. openly criticizes Gobert's imposed school policy on decorative body piercings and forcefully indicates her displeasure with it. While we have little regard for A.B.'s use of vulgar epithets, we conclude that her overall message constitutes political speech. Addressing a state actor, the thrust of A.B.'s expression focuses on explicitly opposing Gobert's action in enforcing a certain school policy."[46]

(f) Further, "the State failed to produce any evidence that A.B.'s expression inflicted particularized harm analogous to tortuous injury on readily identifiable private interests as required to rebut A.B.'s claim of political speech."[47] The State's delinquency petition was dismissed.

d. Discipline Upheld on Other Grounds:

(1) Washington Federal Court Case: *Requa v. Kent School District No. 415*, 492 F. Supp. 2d 1272 (W.D. Wash. 2007):

(a) A student brought an action seeking a temporary restraining order that would overturn his suspension and require his reinstatement to school.

(b) Greg was a senior at Kentridge High School, and had surreptitiously taken motion picture footage during his junior year on at least two separate occasions of his teacher, Ms. M., and her classroom. The raw video and audio footage was edited together, graphics and a musical soundtrack were added, and the results were posted on YouTube.com. The posting on YouTube consisted of:

> The completed product includes commentary on the teacher's hygiene and organization habits, and also features footage of a student standing behind the teacher making faces, putting two fingers up at the back of her head and making pelvic thrusts in her general direction. Additionally, in a section preceded by a

[46] 863 N.E.2d at 1218.
[47] *Id.*

> graphic announcing "Caution Booty Ahead," there are several shots of Ms. M's buttocks as she walks away from the videographer and as she bends over; the music accompanying this segment is a song titled "Ms. New Booty." The Court takes judicial notice that "booty" is a common slang term for buttocks.[48]

(c) The student admitted posting a link to the YouTube.com location at his own personal webpage on MySpace.com. The video presented no disruption to the educational process at Kentridge. However, eight months after the video was placed on the Internet, a local Seattle news channel discovered the video while investigating a story about YouTube student postings critical of high school teachers. The school administration was contacted by a reporter for comment and a news segment was aired featuring, in part, the Ms. M. video. The student allegedly removed the link to the video from his MySpace.com page due to the possibility that the video could be viewed as harassment.

(d) School administration investigated the matter to discover the persons responsible for the video. Greg was identified by other students as being involved in making the video. Greg denied any involvement in the filming, editing, or posting of the video; he admitted only to putting a link to the video on his MySpace.com page.

(e) All students determined to be involved in the video were given the same discipline—a 40-day suspension, with 20 days "held in abeyance" if the students completed a research paper while on suspension.

(f) Greg requested a hearing and an appellate review occurred by the district's board of directors. The board determined that Greg's denial of his involvement was not credible, that the video was done surreptitiously in an embarrassing and offensive manner with the obvious intent to humiliate, and the district's sexual harassment policy was violated.

[48] *Id.* at 1274.

(g) The board rejected the First Amendment challenge[49] and concluded that the discipline was appropriate based on the conduct of the students involved—secretly recording the teacher in at least two ways that constitute sexual harassment. The conduct occurred on school grounds during class. Thus, the punishment was not for the purpose of regulating "speech" created off-campus.

(h) The court upheld the board's determination. Of the three students involved, Greg was the only one who created a link to the YouTube video posting. The evidence also indicated that Greg was responsible for filming, editing, and posting the footage. However, all three of the students involved received the same punishment for the secret, in-class filming of the teacher. The court denied the temporary restraining order.

5. Social Network Sites and Employees

a. Social networking sites allow employees the opportunity to:

(1) Construct a public or semi-public profile or webpage within a bounded system;

(2) Articulate and maintain a list of other users with whom they share a connection; and

(3) View their list of connections and connections made by others within the system.[50]

b. Teachers have freedom to express themselves on blogs and social networking sites. Teachers are also role models for students.

c. The ability to discipline a teacher for off-duty, online conduct depends on the following:

(1) Whether the teacher has a continuing contract right;

(2) The nature of the offending conduct, which may be prohibited by statute, board policy, or code of ethics;

[49] All parties involved in the case were in agreement that the student's posting of the link to the YouTube video constituted protected speech.

[50] Inquiry and Analysis, National School Boards Association's Council of School Attorneys (January 2008), citing to Danah M. Boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, Journal of Computer-Mediated Communication (Oct. 2007), http//jcmcindiana.edu/vol 13/issue 1/boyd.ellison.html.

(3) The nexus between the conduct and job performance—whether the teacher's expression online has a significant connection to the teacher's professional responsibilities, is disruptive to the teaching environment, and negatively affects the teacher's ability to perform his or her job;

(4) The terms and conditions of a collective bargaining agreement; and

(5) First Amendment considerations.[51]

d. In reviewing the nexus between the conduct and job performance, it must be determined whether the teacher's expressions online have a significant connection to the teacher's professional responsibilities, is disruptive to the teaching environment, and negatively affects the teacher's ability to perform his or her job.

(1) The competing interests of the teacher and the district must be balanced, while also taking into consideration the community's relevant standards.[52]

e. First Amendment considerations:

(1) If a teacher's speech is made as a citizen, and is about a matter of public concern, then the teacher's speech may be constitutionally protected.[53] On the other hand, if the speech is not about a matter of public concern, the speech is unprotected and discipline may be imposed.

(a) Where the speech is not about a matter of public concern, the speech is unprotected and discipline may be imposed.[54]

(b) Where the speech touches upon a matter of public concern and results in no potential disruption to the school environment or the teacher's abilities to perform his or her duties, the speech is protected.

(c) Where the speech touches on a matter of public concern, but is disruptive to the school environment or the teacher's

[51] *Id.*
[52] *Younge v. Bd. of Educ. of City of Chicago*, 788 N.E.2d (Ill. App. Ct. 2003).
[53] *Pickering v. Board of Education*, 391 U.S. 563 (1968); *Connick v. Myers*, 461 U.S. 138 (1983).
[54] *See City of San Diego, Cal. v. Roe*, 543 U.S. 77 (2004) (the termination of a police officer for offering explicit videos for sale online did not violate the First Amendment because the officer's speech did not qualify as a matter of "public concern, and the speech was detrimental to the mission and function of the police department."); *Dible v. City of Chandler*, 502 F.3d 1040 (9th Cir. 2007) (the termination of a police officer for maintaining a sexually explicit website showing himself and his wife was not speech on a matter of "public concern.").

abilities to perform his or her duties, the speech may not be protected and discipline may be imposed.[55]

(2) If a teacher's speech is made pursuant to his or her official duties, the employee is not speaking as a citizen for First Amendment purposes and the Constitution does not insulate the employee's communications from employer discipline.[56]

[55] Inquiry and Analysis, National School Boards Association's Council of School Attorneys (January 2008); *Melzer v. Bd. of Educ. of City Sch. Dist. of City of New York*, 336 F.3d 185 (2nd Cir. 2003).

[56] *Garcetti v. Ceballos*, 126 S. Ct. 1951 (2006).

Section III: Drug Testing

A. Student Drug Testing

1. Overview

   a. School districts continually struggle to address drug and alcohol use by students. In recent years, many school districts have attempted to eradicate drug and alcohol use by adopting policies that allow the district to "search" the student, via urinalysis or a similar test.

   b. Policies that mandate students undergo urinalysis testing for the purpose of determining whether the student has used drugs or alcohol constitute a search and require an analysis of the Fourth Amendment protection against unreasonable search and seizure. *See* Section I—Search and Seizure, subsection B, above. Recent case law has dealt primarily with allegations that policies that require mandatory testing for all students, whether or not in a particular category, and random drug testing ("suspicionless testing") are in violation of the Fourth Amendment.

   c. In *Vernonia School District 47J v. Acton,*[57] the U.S. Supreme Court held that suspicionless testing of student athletes for drug use is constitutionally permissible in some situations. In the 2002 U.S. Supreme Court case of *Board of Education of Independent School District No. 92 of Pottawatomie Cty. v. Earls,*[58] the court broadened its *Vernonia* holding to apply similar criteria to all students wishing to participate in extracurricular activities, finding such a requirement constituted "a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use."

2. Drug Testing of Student Athletes

   a. In *Vernonia v. Acton,* the U.S. Supreme Court held that the drug testing policy of a rural Oregon school district was constitutional, in response to one student's allegation that the drug testing policy violated his Fourth Amendment right against unreasonable search and seizure.

      (1) Rationale for policy. The district implemented the drug testing policy for student athletes in an attempt to combat the high incidence of drug use by students. The concerns that led to the district's adoption of the policy were:

[57] 515 U.S. 646, 115 S. Ct. 2386 (1995).
[58] 536 U.S. 822 (2002).

(a) Student drug use had escalated over several years;

(b) Disciplinary problems had increased;

(c) Drug use appeared to be glamorized;

(d) Students were increasingly defiant toward school officials;

(e) Student athletes were known to be leaders in the drug culture; and

(f) Coaches noted an increased risk of injury as a result of the drug use.

Additionally, the school district asserted that there was parental support for the drug testing and the district implemented a policy of drug testing for student athletes, only after educational efforts and the use of drug detection dogs did not alleviate the problems.

(2) Policy. The school district's policy required that:

(a) Students and parents consent to random drug testing as a condition of eligibility for interscholastic athletics;

(b) Students who refused to be tested would be barred from participation; and

(c) Students who tested positive would be suspended from sports for specified periods unless they participated in a drug assistance program.

(3) Balancing test. The U.S. Supreme Court held that the reasonableness of a search of a student is determined by balancing the intrusion on the student's privacy against the promotion of legitimate governmental interests.

(4) Expectation of privacy.

(a) In this case, the U.S. Supreme Court found that any legitimate privacy expectations that would be compromised by collecting urine samples were diminished with regard to student athletes. Student athletes can expect intrusions upon their normal rights and privileges, including privacy, for the following reasons:

i. Public school locker rooms are not noted for their privacy.

ii. Student athletes, by choosing to "go out for the team," voluntarily subject themselves to a higher degree of regulation by the schools than that imposed on students generally.

(b) The U.S. Supreme Court also noted that the procedure by which the district collected samples provided a relative degree of privacy for the students:

i. Students were not directly observed while providing samples. Although same-sex adults monitored the collection process, female students had the privacy of a bathroom stall and male students stood at a urinal with their back to the monitor.

ii. Samples were screened only for specified illegal drugs and not other conditions.

iii. The process for sample analysis, including chain of custody and protecting anonymity of the student, was performed by an independent laboratory and followed recognized standards.

iv. Test results were disclosed only to school personnel who had a legitimate need to know the results.

v. Results were not turned over to law enforcement authorities or used by the school district for any disciplinary action.

(5) Promotion of legitimate governmental interest. In reviewing the facts, the U.S. Supreme Court determined that the school had a legitimate governmental interest in deterring drug use, noting:

(a) That the physical, physiological, and addictive effects of drugs are most severe for school-age students and that the entire school body and faculty feel the effects of a drug-infested school in that the educational process is disrupted.

(b) The school's policy was directed only at student athletes, where the risk of immediate harm to the drug user and to other athletes participating in contact sports was particularly high.

(c) Also, the policy effectively addressed the fact that the drug problem in the school was largely fueled by the "role model" effect of the athletes' drug use.

(6) The U.S. Supreme Court therefore concluded, upon balancing the privacy interest of the student and the school's interest in deterring drug use, that the policy was reasonable and not in violation of the Fourth Amendment prohibition against unreasonable search and seizure.

3. Drug Testing of Students Participating in Other Extracurricular Activities

a. In 2002, the U.S. Supreme Court revisited the issue of student drug testing in *Board of Education of Independent School District No. 92 of Pottawatomie Cty. v. Earls*.[59] In that district, the board adopted a policy that required drug testing of all middle and high school students participating in extracurricular activities.

(1) Rationale for policy. The school district cited the following issues in support of adopting the policy:

(a) Teachers saw students who appeared to be under the influence of drugs and heard students openly discussing using drugs.

(b) Marijuana cigarettes were found near the school parking lot.

(c) On one occasion, law enforcement found drugs and paraphernalia in an FFA member's car.

(d) The school board received phone calls asking what they were doing regarding the drug problem.

(2) Policy. The policy specified that the students would be subjected to drug testing:

(a) Prior to participating in any extracurricular activity;

(b) At random, while participating; and

(c) Whenever suspicion of drug use exists.

(3) Policy protections. The policy provided that the tests were limited to detecting the presence of illegal drugs. The tests were to be used for the sole purpose of determining whether the student was eligible to participate in extracurricular activities. The tests were not to be used for disciplinary actions or referral to law

[59] 122 S. Ct. 2559 (2002).

enforcement. The test results were kept in confidential files with access on a "need to know" basis.

(4) Allegations. Two students filed a 1983 action against the district, alleging that the policy violated their Fourth Amendment rights. They asserted that the school district failed to identify a special need for testing students who participate in extracurricular activities, and that the "Drug Testing Policy neither addresses a proven problem nor promises to bring any benefit to students or the school."[60]

(5) U.S. Supreme Court's analysis.

(a) *Balancing test:* In response to the students' assertion that drug testing of students must be based on some level of individualized suspicion, the Court recognized that the reasonableness of a search is determined by "balancing the nature of the intrusion on the individual's privacy against the promotion of legitimate governmental interests."[61]

(b) *Special needs:* However, the Court relied on the school's "custodial" role in concluding that there are exceptions for requiring individualized suspicion in drug testing students. "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the school's custodial and tutelary responsibility for children. In particular, a finding of individualized suspicion may not be necessary when a school conducts drug testing."[62]

(c) *Nature of privacy interest:*

i. The Court noted that students are subject to greater controls than adults because of the school's responsibility to maintain discipline, health, and safety.

ii. The students alleged that, unlike student athletes, those students participating in other extracurricular activities are not subject to regular physicals and communal undress. The Court rejected the argument, concluding that such students voluntarily subject themselves to many of the same intrusions

[60] *Id.* at 2563.
[61] *Id.* at 2564.
[62] *Id.* at 2565.

on their privacy as do athletes, including occasional off-campus travel and communal undress, the students are subject to rules for the activity that are not generally applicable to the student body, and the activities have faculty sponsors who monitor the students.

(d) *Character of intrusion*:

i. The Court concluded that the intrusion in obtaining urine samples was not problematic. The sample was collected by a faculty monitor who waited outside the closed restroom stall and listened for "normal sounds of urination."[63]

ii. The Court relied on the fact that the policy specified that the test results were to be confidential, kept separate from the student's other educational files, and available to faculty only on a "need to know" basis. Further, the test results were not used for taking discipline against the student and were not turned over to law enforcement.

iii. The Court held, "Given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students' privacy is not significant."[64]

(e) *Nature and immediacy of the school district's concerns and efficacy of the policy*:

i. In assessing the school's reasoning for the policy, the Court relied on the general need in our society to fight drug use. "[N]ationwide drug epidemic makes the war against drugs a pressing concern in every school."[65]

ii. Responding to the students' assertion that there is no real and immediate interest to justify the policy, the Court stated, "We have recognized, however, that "[a] demonstrated problem of drug abuse . . . [is] not in all cases necessary to the validity of a

[63] *Id.* at 2566.
[64] *Id.* at 2567.
[65] *Id.* at 2567.

testing regime," but that some showing does "shore up an assertion of special need for a suspicionless general search program."[66]

iii. "Furthermore, this Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing. . . . 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."[67]

iv. The Court concluded that the policy was reasonable. "Given the nationwide epidemic of drug use, and the evidence of increased drug use in Tecumseh schools, it was entirely reasonable for the school district to enact this particular drug testing policy."[68]

v. The Court rejected the need for individualized suspicion, noting that it tends to place greater burden on staff members, may unfairly target members of unpopular groups, and may have a chilling effect on the enforcement of the program. However, the Court did not conclude that all suspicionless drug testing was constitutional. Rather, it held that the district is obligated to conduct a fact-specific balancing of the intrusion on the student's Fourth Amendment rights against the school district's legitimate interests.

4. Drug Testing of the General Student Population

a. Overview. Typically, policies that provide for drug testing of students who do not participate in extracurricular activities are found to be unconstitutional. Some districts have attempted to implement drug testing policies for certain classifications of students other than students who participate in extracurricular activities. However, the courts have generally found that such testing is problematic because it:

(1) Violates a student's Fourth Amendment right, which prohibits unlawful searches; and

[66] *Id.* at 2567-68 (citation omitted).
[67] *Id.* at 2568.
[68] *Id.* at 2568.

(2) Fails to meet the criteria for random drug testing established in *Vernonia*. Both of the cases discussed below were decided before *Earls*.

b. Drug testing for students engaging in misconduct:

(1) In *Willis v. Anderson Community School Corporation*,[69] the Seventh Circuit Court of Appeals dealt with the issue of whether a school district policy could mandate drug and alcohol testing for any student who:

(a) Possesses or uses tobacco products;

(b) Is suspended for three or more days for fighting or is habitually truant; or

(c) Violates any other school rules that result in at least a three-day suspension.

(2) Willis, who had been suspended for fighting, refused to submit to a drug and alcohol test required as a condition of returning to school. Willis was not suspected of being under the influence of drugs or alcohol. However, the policy required that the test be conducted solely because he had been suspended and, if the student refused to be tested, he would be treated as if he had admitted unlawful drug usage.

(3) *Reasonable suspicion analysis:*

(a) The Seventh Circuit Court of Appeals struck down the policy, concluding that there was not a sufficient "causal nexus"[70] between substance abuse and disruptive behavior so as to justify reasonable suspicion.

(b) Relying on the Fourth Amendment analysis set forth in *T.L.O.*, the court held that the school district did not have reasonable suspicion to conduct a search.

(c) The court reasoned that the presumed relationship between fighting and drug use was not a basis for concluding that reasonable suspicion existed for drug testing.

[69] 158 F.3d 415 (7th Cir. 1998).

[70] "Causal" is defined as being "related to." BLACK'S LAW DICTIONARY 212 (7th ed. 1999). "Nexus" is defined as a "connection or link." BLACK'S LAW DICTIONARY 1066 (7th ed. 1999).

(4) *Criteria for random drug testing*:

(a) Reviewing the policy from the standpoint of random drug testing, the court determined that the factors required in *Vernonia* were not present. Specifically, unlike student athletes, students who have been disciplined (1) do not have a decreased expectation of privacy because there is no communal undress and (2) were not engaged in "voluntary" conduct (extracurricular activities).

(b) Although the court found that the district was targeting a group that it believed to be most at risk for substance abuse, the district failed to demonstrate why it would be unable to accomplish the same purpose via suspicion-based searches. While the court in *Vernonia* found that requiring suspicion-based searches of all athletes was impractical, the court in this case noted that the dean of students met with each student prior to suspension and was in a position to determine whether reasonable suspicion existed on an individual basis.

c. Mandatory drug testing for all secondary students:

(1) A federal appellate court concluded that the school district's drug testing policy was unconstitutional in *Tannahill v. Lockney Indep. Sch. Dist.*[71] In 2000, Lockney School District adopted a mandatory drug testing policy for all secondary students.

(2) *Rationale for policy*:

(a) In 1998, surveys relative to drug use (including drugs, alcohol, and tobacco) were administered to students and indicated that there was drug use in the schools; however, it was lower than the average use in other schools in the state.

(b) There were also arrests of nine Lockney residents on drug charges in 1998, none of which were students.

(c) The school district concluded that, based on input from students, teachers, parents, and law enforcement, there was support for mandatory drug testing.

[71] 133 F. Supp. 2d 919, 152 Educ. L. R. 549 (N.D. Tex 2001).

(3) *Policy:*

(a) The policy required that students and their parents consent to an initial mandatory drug test, followed by random drug testing of 10% of the students each month.

(b) Students were required to produce a urine sample in two bottles. Parents were allowed to be present when the specimen was collected and to provide information regarding any prescriptions.

(c) If tested positive, a student could choose to request a second test on the second bottle. If the results of the second test were also positive, the parents were responsible for such costs, and could select the lab for the second test.

(d) The policy also provided that the parent's refusal to consent to the testing was construed as a "positive" test.

(4) *Consequences for testing positive:*

(a) For a first offense, the student was removed to in-school suspension for a minimum of three days and suspended from all extracurricular activities for 21 days.

(b) For subsequent offenses, the policy provided for placing a student in an alternative school and disqualifying him or her from participating in any activity or receiving any honors for the year.

(5) Subsequent to the implementation of the initial policy, the district modified the policy and provided that a parent's refusal to consent to the testing resulted in the student being prohibited from participating in activities, rather than considering the parent's refusal as a positive test.

(6) The school district argued that the need for such policy was consistent with the conclusions in various courts that high-risk employment, such as those operating heavy machinery, warranted suspicionless drug testing.

(7) The court rejected the school district's position that there was a "special need" for suspicionless drug testing in this case, concluding that:

> attending school is not akin to participating in a highly regulated industry as is the work place for

> railway employees, customs agents, residents who practice medicine, or even elementary school custodians. Moreover, the academic studies of a student, while very important, do not embody the immediate and severe life and death repercussions as do the decisions of these employees. A student's tools of pens, notebook paper, and protractors have never been equated with locomotives, the hazardous chemicals and equipment of a custodian, the firearms or interdiction efforts of a customs agent, or the prescription pads and EKG machines used by a physician.[72]

(8) The court further concluded that the suspicionless testing program was not specifically targeted to the special needs of a drug crisis in the school. The court found the policy to be unreasonable and, therefore, unconstitutional.

5. Idaho Code § 33-210—Students Using or Under the Influence of Alcohol or Controlled Substances

a. Idaho school districts are required to have policies specifying how personnel will respond when a student voluntarily discloses, or is reasonably suspected of, using or being under the influence of alcohol or any controlled substance.[73]

b. Whether school officials must inform law enforcement officials about a student's use, or suspected use, of alcohol or a controlled substance depends on whether the student volunteered that he or she was using alcohol or drugs before being suspected of such activity.

(1) <u>Student volunteers that he or she is using drugs or alcohol</u>:

(a) Students who voluntarily disclose using or being under the influence of alcohol or controlled substances, *before* reasonably suspected of such activity, must be provided anonymity to the extent that:

i. The disclosure will be held confidential on a faculty need-to-know basis;

ii. The student's parents are notified; and

[72] *Id.* at 930.

[73] "Controlled substance" is defined by Idaho Code §§ 37-2701(e), 37-2705, 37-2707, 37-2709, 37-2711, and 37-2713.

iii. The school offers counseling.

(b) The method by which the district notifies parents and the nature of the counseling offered by the district is not specified in the statute. These items should be specifically addressed in district policy.[74]

(2) Student is suspected of using or being under the influence of drugs or alcohol:

(a) Once a student is reasonably suspected of using or being under the influence of drugs or alcohol, regardless of any previous voluntary disclosure, school administrators are required to:

i. Contact the student's parent; and

ii. Report the incident to law enforcement.[75]

(b) The district is responsible for developing a process for referring a reasonably-suspected student to law enforcement.

i. Reasonable suspicion alone is not sufficient to justify a law enforcement search of a student or the student's possessions, or a breath or blood test for presence of alcohol or a controlled substance, as probable cause is required.

ii. Because the referral requires cooperation from the local law enforcement agency, the process will vary depending on what role that agency takes in evaluating the student and in taking him or her into custody.[76]

6. Disciplinary Action for Using or Being Under the Influence

a. Regardless of whether the student voluntarily discloses or is reasonably suspected of using or being under the influence of drugs or alcohol, a student of an Idaho school district may be subject to other disciplinary or safety policies, as determined by its board of trustees.[77]

[74] Idaho Code § 33-210(1).
[75] Idaho Code § 33-210.
[76] Idaho Code § 33-210(1).
[77] Idaho Code § 33-210(2).

7. Reasonable Suspicion

a. For purposes of reporting a student to law enforcement, "reasonable suspicion" is defined as:

> an act of judgment by a school employee or independent contractor of an educational institution which leads to a reasonable and prudent belief that a student is in violation of school board or charter school governing board policy regarding alcohol or controlled substance use, or the "use" or "under the influence" provisions of section 37-2732C, Idaho Code. Said judgment shall be based on training in recognizing the signs and symptoms of alcohol and controlled substance use.[78]

b. A student's prior disclosure of use of drugs or alcohol may not be used as a basis for determining reasonable suspicion at a later date.

c. Prohibition against intentional harassment:

(1) School employees and/or independent contractors are prohibited from finding reasonable suspicion solely for the purpose of intentional harassment of a difficult student.

(2) "Intentional harassment"[79] is a knowing and willful course of conduct directed at a specific student that seriously alarms, annoys, threatens, or intimidates the student and which serves no legitimate purpose.

(3) To constitute intentional harassment, the course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress.

d. Good faith immunity:

(1) Persons who, in good faith and with appropriate foundation, exercise the authority granted in Idaho Code Section 33-210 are immune from civil liability arising from the exercise of that authority.

(2) However, if it is determined that the person is intentionally harassing a student through the misuse of such authority, he or she

[78] Idaho Code § 33-210(5)(a).
[79] Idaho Code § 33-210(5)(b).

is not immune from civil liability and may be found guilty of a misdemeanor punishable by a fine not to exceed $300.[80]

e. Notice requirement:

(1) The district must notify each student and parent of its policy by providing them with a copy of its drug and alcohol policy, including:

(a) The conditions under which law enforcement will be notified;

(b) The process by which law enforcement may assume custodial responsibility of a reasonably-suspected student; and

(c) The procedure for notification of the parent at the time of original registration in the district.

(2) The district may also want to include its drug and alcohol policy in the student handbook.[81]

B. Employee Drug Testing

1. Overview

a. Generally, school districts have the right to manage employee behavior, including setting and enforcing expectations prohibiting the employee's use of illegal drugs.

b. Pursuant to the federal requirement to establish a "drug free workplace," school districts prohibit employees from manufacturing, dispensing, using, possessing, or distributing illegal drugs or alcohol on school property.

c. Idaho Code Section 72-1701, *et seq.*, authorizes private employers in Idaho to adopt policies that mandate drug testing of employees. Idaho Code Section 72-1715 specifies "[t]he state of Idaho and any political subdivision thereof may conduct drug and alcohol testing of employees under the provisions of this chapter and as otherwise constitutionally permitted."

d. Generally, school districts do not impose pre-employment, random, or post-accident drug testing.[82] An exception exists for school bus drivers, who are subject to such drug tests, pursuant to federal law.[83]

[80] Idaho Code § 33-210(4).
[81] Idaho Code § 33-210(3).

2. Reasonable Suspicion Testing

a. School districts may adopt policies which require that employees undergo drug testing when there exists a reasonable suspicion that the employee is using and/or under the influence of illegal drugs or alcohol while at work, on school district property, or at school-sponsored event.

b. Definition:

(1) "Reasonable suspicion" is defined as "a particularized and objective basis, supported by specific and articulable facts, for suspecting a person of criminal activity."[84]

(2) Therefore, in the instance of employee drug testing, reasonable suspicion can be characterized as a good faith suspicion, based on objective facts, which is sufficient for a reasonable, prudent person to believe that the employee is using and/or appears to be presently under the influence of alcohol and/or drugs.

c. Factors to consider. Factors that may be considered in determining that a reasonable suspicion exists include, but are not limited to, the following:

(1) Observed use, possession, or sale of illegal drugs/alcohol or the illegal use or sale of prescription drugs.

(2) Marked decrease in work productivity, either in quantity or quality, not reasonably attributable to other causes.

(3) Apparent impairment of psychomotor functions, reasoning, judgment, or concentration, not reasonably attributable to other causes.

(4) Erratic or marked changes in behavior, not reasonably attributable to other causes.

(5) Involvement in an accident or deviations from safe working practices, whether the incident involves actual or potential injury to person(s) or property.

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[82] In *Knox County Educ. Ass'n v. Knox County Bd. of Educ.*, 158 F.3d 361 (6th Cir. 1998), the Sixth Circuit Court of Appeals upheld the school district's policy of mandatory and random drug testing of employees on the basis that the employees, by the nature of their professional relationships with students, held safety-sensitive positions and such drug testing was reasonable.

[83] The Omnibus Transportation Employee Testing Act of 1991.

[84] BLACK'S LAW DICTIONARY 1273 (7th ed. 1999).

(6) Physical indicators, including a disheveled appearance; odor of alcohol; bleary and/or dilated eyes; difficulty walking; or slurred, slow, or erratic speech.

d. The circumstances under which reasonable suspicion testing may be considered are strictly limited to employee conduct on duty or during work hours, on district property, or at district-approved or school-related functions.

e. A school official may rely on report(s) from persons who report suspected drug or alcohol use by an employee, if the individual is determined to be reliable and has based such reports upon specific, contemporaneous, articulable observations concerning the employee's physical appearance or other factors that may be a basis for reasonable suspicion.

3. Disciplinary Action

a. In the event the employee refuses to submit to the drug test, or tests positive, the school district may take appropriate disciplinary action.

b. In most districts, the policy allows the district to terminate the employee.

c. In some situations (usually first offenses), the district's policy may require that the employee obtain a drug assessment and comply with the recommendations thereof, and agree to submit to random drug testing for a specified period of time.

4. Policy Development and Implementation

a. School districts that adopt policies requiring reasonable suspicion drug testing of employees must ensure that the policy provides:

(1) Minimally-intrusive sample collection;

(2) Testing protocols;

(3) An opportunity for the employee to challenge positive test results; and

(4) Notice to employees.

Section IV: Electronic Records

A. Electronic Records on District Computers and Networks

1. Use of District Computer Equipment

   a. Employees and students have no reasonable expectation of privacy regarding the use of district computer equipment and networks.

      (1) District policy should contain language to the effect that "employees and students do not have a reasonable expectation of privacy." Inclusion of such language in policy and in the user agreement may serve as a deterrent from inappropriate usage of the computer system by some persons.

      (2) The district should have the capacity to review usage to assure compliance with policies prohibiting misuse, including limiting personal usage, commercial or for-profit use, or accessing inappropriate sites of all types, including pornography, although the knowledge that fellow employees may search to detect misuse and the warning that there is no reasonable expectation of privacy are not adequate to prevent all persons from misuse of district electronic equipment on school premises, or in the case of laptops in other locations.

      (3) All district equipment may be subject to search by school district administration at any time, and administration has the authority to consent to such search of district equipment by law enforcement without a warrant.

2. Public Records

   a. In *Cowles Publishing Co. v. The Kootenai County Bd. of County Commissioners*,[85] the Idaho Supreme Court addressed the issue of e-mails in the public employment sector.

      (1) The Idaho Supreme Court determined that over 1,000 e-mails between the prosecuting attorney of Kootenai County and an employee were public records, as the communication related to job performance by a county employee <u>and</u> the e-mails were prepared, owned, used, or retained by a government agency.

[85] 144 Idaho 259, 159 P.3d 896 (2007).

(2) Idaho Code Section 9-338(1) provides that "Every person has a right to examine and take a copy of any public record of this state and there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute." Additionally, a public record "includes, but is not limited to, any writing containing information relating to the conduct or administration of the public's business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency regardless of physical form or characteristics."[86]

(3) The e-mails were prepared by county employees, sent between county employees, subsequently used in an investigation by county personnel, and the e-mail software used by the persons was owned by the county.

(4) Therefore, the e-mails were determined by the court to be public records. "The e-mail's contents relate to the public's business because the public's business includes job performance by a county employee, the spending policies of a county program, the issues surrounding that program's demise, other employment related claims, and the validity and circumstances surrounding the defamation claim."[87]

(5) Further, the court analysis reveals that the e-mails were between two employees, created and sent using government resources, and the conduct of the individuals put the content of the e-mails within the purview of public business.

(6) The court determined that the e-mails were "informal communications between an employee and her supervisor, unrelated to personnel administration. Therefore, under the narrow definition for exemptions in I.C. § 9-340C(1) we hold that these emails are not statutorily exempt from disclosure."[88]

(7) Additionally, the court rejected an argument that the e-mails were within a "zone of privacy" created by the federal Constitution, by stating:

> The policy [of the county] also made it clear that the emails were considered a public record and were subject to disclosure, that the use of the internet would be logged, and that the County could monitor

[86] Idaho Code § 9-337(13).
[87] 159 P.3d at 900.
[88] *Id.* at 902.

> emails. Therefore, under the clear wording of the County's emails policy, Kalani [the employee] had no legitimate expectation of privacy in the emails.
>
> Thus, because the emails at issue are public records subject to neither a statutory or constitutional exemption from disclosure, we affirm the district court order finding that the emails are public records.[89]

b. E-mails between district employees relating to students, and between district employees and parents, if retained by the network, are part of the individual student's educational record under FERPA, and are excluded from disclosure. *See* Section 3, below.

3. Education Records

a. "Education records" are defined by FERPA as:

(1) Records, files, documents, and other materials which contain information directly related to a student; and

(2) Are maintained by an educational institution or by a person acting on behalf of the institution.[90]

b. FERPA does not set forth what a school district must or must not retain as education records, nor does it list, identify, or single out any particular type of materials or documents as "education records."[91]

c. While the definition of "education records" appears to be all-inclusive,[92] it does not include student work that is created, used, or kept in the classroom and does not become part of the student's institutional record.[93]

(1) For example, homework, artwork, or student projects are typically not considered education records.

(2) PR[94] – 34 C.F.R. § 99.3: Education records do not include grades on peer-graded papers before they are collected and recorded by a teacher.

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[89] *Id.*

[90] 34 C.F.R. § 99.3.

[91] "FERPA does not require or forbid a school to maintain particular information as part of an educational record." *Letter to Upper St. Clair Sch. Dist.* (FPCO, 10/27/99).

[92] *Warner v. St. Bernard Parish School Board*, E.D. Louisiana, 99 F. Supp. 2d 748, 145 Educ. L. Rep. (E.D. La. 2000).

[93] *Letter re: Fairfield Public Schools* (FPCO, 12/28/01); *Owasso Independent School District No. I-011 v. Falvo*, 534 U.S. 327 (2002).

d. "Sole possession" records, also known as "memory joggers" are not education records.

(1) "Sole possession" records refer to personal notes or memory aids that are kept in the sole possession of the maker of the record.

(2) In order to meet the "sole possession" definition, a document must meet all of the following conditions:

(a) It must be made by instructional, supervisory, or administrative personnel ancillary to those persons (i.e., teacher's aide);

(b) It must not be accessible or revealed to any other person except for a temporary substitute for the maker of the record.[95]

e. PR – 34 C.F.R. § 99.3: Education records do not include records created or received by a school district after an individual is no longer a student and they are not directly related to the individual's attendance as a student.

f. Education records include any record directly related to a student and maintained by the school district or a school.

(1) Based on this definition, education records include information about a student, including but not limited to:

(a) Family information, such as name and address of the student, parent or guardian, emergency contact information, number of siblings, date and place of birth;

(b) Personal information, such as an identification code, social security number, picture, or list of personal characteristics;

(c) Grades, test scores, academic specializations and activities, official letters regarding a student's status in school;

(d) Test records, answer sheets, records of individual education programs;

(e) Special education records;

(f) Disciplinary records established and maintained by school officials;

[94] "PR" refers to proposed regulations as published in the Federal Register on March 24, 2008 (Vol. 73, No. 57), at pages 15573-602.

[95] 34 C.F.R. § 99.3.

(g) Medical and health records;

(h) Documentation of schools attended, courses taken, attendance, awards received, and degrees earned; and

(i) Videotape recordings of individuals or groups of students.[96]

g. An education record need not be in writing, but it must be a tangible record.

(1) Education records directly related to a student can be in any format, including, but not limited to:

(a) Handwritten or printed documents;

(b) Computer media (including e-mails);

(c) Videotape or audiotape; and

(d) Film, microfilm, microfiche, and photographs.[97]

[96] National Center for Education Statistics, U.S. Dep't of Education, NCES 97-527, *Protecting the Privacy of Student Records: Guidelines for Educational Agencies*, pp. 15-16 (Oona Cheung, Barbara Clements & Ellen Pechman; Washington, D.C. 1997).

[97] 20 U.S.C. § 1232g; 34 C.F.R. § 99.3.

Section V: Scenarios

A. Justifiable Search?[98]

On June 7, 2002, the seniors were scheduled to attend their senior class picnic off-campus. Prior to their departure, school officials performed a pre-announced search of all students' bags for security purposes. This search revealed a package of cigarettes in Kelly's purse. She was legally entitled to possess them since she was over the age of 18, but school regulations prohibited the possession of cigarettes by students on school grounds.

A student named Michele reported to the P.E. teacher that Kelly told her and other students that she possessed marijuana. According to Michele, Kelly told her that she planned to hide the marijuana "down her pants" during the mandatory bag check. After receiving this information from Michele, the P.E. teacher reported the statement to the principal. The P.E. teacher believed Michele to be trustworthy and reliable. Michele was the only student who reported Kelly's statement to a teacher or administrator.

The principal boarded the bus and asked Kelly to disembark. The principal and P.E. teacher led Kelly to the nurse's office, explaining to her that a fellow classmate had informed them that she possessed marijuana. Kelly denied the allegation; both the P.E. teacher and the principal believed that she was lying. Kelly had a history of disciplinary problems, though none involved drug possession.

In the nurse's office, the principal instructed the nurse to conduct a search of Kelly's underpants. The nurse expressed apprehension about conducting the strip search herself, and Kelly's mother was called and asked to come to the school to conduct the search. While waiting for Kelly's mother to arrive, the principal searched Kelly's purse and found cigarettes and a lighter.

When Kelly's mother arrived at the school, she objected to the search but was told that, if she refused to participate in the search, school officials would call the police. At that point, the mother, school nurse, and Kelly went into a small room within the nurse's office. Kelly's mother conducted the search while the school nurse stood behind her. A closed curtain separated the doorway of the room from the common area of the nurse's office. Kelly first raised her shirt and pulled down her bra to show that nothing was concealed there. Kelly then dropped her skirt to the floor, around her ankles. Kelly's mother asked the nurse whether the search was sufficient, and the nurse answered that it was not. Kelly then pulled her underpants away from her body and turned around so that her mother could view her buttocks. No drugs were located.

Kelly stated that she was "extremely upset and anxious before, during, and after the search, to the point of being hysterical." Kelly did participate in the senior class picnic.

[98] Hypothetical based on the case of *Phaneuf v. Fraikin*, 448 F.3d 591 (2nd Cir. 2006).

DISCUSSION QUESTIONS:

1. Did the school staff have reasonable suspicion to conduct the search?
2. Was the search justified at its inception?
3. Was the search reasonable in scope?
4. Was the student tip sufficient information to rely on for the search?
5. Does it matter that the mother conducted the search, not a school employee?

B. Does "Reasonable Suspicion" Exist?[99]

Nazareth Area School District has a policy that permits students to carry, but not use or display, cell phones during school hours. On March 17, 2005, at approximately 10:15 a.m., Christopher's cell phone fell out of his pocket and came to rest on his leg. Upon seeing Christopher's cell phone, Ms. Kocher, a teacher at the high school, enforced the school policy prohibiting use or display of cell phones by confiscating the phone.

Subsequently, Ms. Kocher, along with assistant principal, Ms. Grube, began making phone calls with Christopher's cell phone. Ms. Kocher and Ms. Grube called nine other high school students listed in Christopher's phone number directory to determine whether they, too, were in violation of the school's cell phone policy.

Ms. Kocher and Ms. Grube also accessed Christopher's text messages and voicemail. They also held an America Online Instant Messaging conversation with Christopher's younger brother without identifying themselves as being anyone other than the primary user of the cell phone, Christopher.

On March 22, Christopher's parents met with Ms. Kocher, Ms. Grube, and the assistant superintendent, Ms. Dautrich, regarding the events of March 17. During that meeting, Ms. Grube told Christopher's parents that, while she was in possession of their son's phone, Christopher received a text message from his girlfriend requesting that he get her a "f***in' tampon." Ms. Grube believed that the term "tampon" was in reference to a large marijuana cigarette and it prompted her subsequent use of the phone to investigate possible drug use at the school.

The matter was picked up by the local newspaper and the superintendent is alleged to have confirmed that an investigation of Christopher for drug dealing and drug use was ongoing. Shortly thereafter, the parents sued the school district and alleged, among other things, that school personnel had violated Christopher's Fourth Amendment right to be free from unreasonable searches and seizures.

DISCUSSION QUESTIONS:

1. Was Ms. Kocher justified in seizing the cell phone from Christopher?

2. Were Ms. Kocher and Ms. Gruber justified in calling nine other students using Christopher's cell phone's phone number directory?

3. Did school officials have justification to search Christopher's phone for evidence of drug activity?

[99] Hypothetical based on the case of *Klump v. Nazareth Area School District*, 425 F. Supp. 2d 622 (E.D. Pa. 2006).

C. Was the School Board Justified in its Actions?[100]

In the spring of 1998, J.S. was an 8th grade student at Nitschmann Middle School. Sometime prior to May 1998, J.S. created a website on his home computer and posted it on the Internet. The website was compiled on his own time; the website was not created as part of a school project and was not sponsored by the school district.

The website was entitled "Teacher Sux." It consisted of a number of webpages that made derogatory, profane, offensive, and threatening comments, primarily about the student's algebra teacher, Mrs. Fulmer, and the Nitschmann Middle School principal, Mr. Kartsotis. The comments took the form of written words, pictures, animation, and sound clips.

At the outset, the website contained a disclaimer. The disclaimer stated that:

> By "clicking," i.e., entering, the site, the visitor agreed that, inter alia, the visitor would not tell any employees of the School District about the site, that the visitor was not a member of the School District's "Staff," and that the visitor would not disclose the website to School District employees or administration, disclose the identity of the website creator or intend to cause trouble for that individual.

The disclaimer, however, did not prevent access to the website and the website was not protected by a password. Thus, any visitor could access the website.

Within the website were a number of webpages. Several of the webpages made reference to Principal Kartsotis. Among other pages was a webpage with the greeting "Welcome to Kartsotis Sux." Another webpage indicated, in profane terms, that Mr. Kartsotis engaged in sexual relations with Mrs. Derrico, a principal from another school.

The website also contained webpages dedicated to Mrs. Fulmer. One page was entitled "Why Fulmer Should be Fired." This page set forth, again in degrading terms, that, because of her physique and her disposition, Mrs. Fulmer should be terminated from her employment. Another animated webpage contained a picture of Mrs. Fulmer with images from the cartoon "South Park" with the statement "That's right Kyle [a South Park character]. She's a bigger b_ _ _ _ than your mom." Yet another webpage morphed a picture of Mrs. Fulmer's face into that of Adolph Hitler and stated "The new Fulmer Hitler movie. The similarities astound me." Furthermore, there was a hand-drawn picture of Mrs. Fulmer in a witch's costume. There was also a page, with sound, that stated "Mrs. Fulmer Is a B_ _ _ _, In D Minor." Finally, along with the criticism of Mrs. Fulmer, a webpage provided answers for certain math lessons.

The most striking webpage regarding Mrs. Fulmer was captioned, "Why Should She Die?" Immediately below this heading, the page requested the reader to "Take a look at the diagram and the reasons I gave, then give me $20 to help pay for the hit man." The diagram consisted of a photograph of Mrs. Fulmer with various physical attributes highlighted to attract the viewers' attention. Below the statement questioning why Mrs. Fulmer should die, the page offered "Some Words from the writer" and listed 136 times "F_ _ _ You Mrs. Fulmer. You Are A B_ _ _ _.

[100] Hypothetical based on the case of *J.S. v. Bethlehem Area School District*, 807 A.2d 847 (Pa. 2002).

You Are A Stupid B_ _ _ _." Another page set forth a diminutive drawing of Mrs. Fulmer with her head cut off and blood dripping from her neck.

Ultimately, students, faculty, and administrators of the school district viewed the website. J.S. told other students about the website and showed it to another student at school. Other students viewed the website. A Nitschmann Middle School instructor learned of the website and reported its existence to Mr. Kartsotis. Mr. Kartsotis proceeded to view portions of the website.

Believing the threats to be serious, Mr. Kartsotis convened a faculty meeting. The members of the faculty were informed that there was a problem at the school. However, the teachers were not told of the specific nature of the situation.

Mr. Kartsotis contacted local police authorities as well as the FBI. After investigating the matter, both agencies identified J.S. as the creator of the website. However, no charges were filed against J.S.

Also upon viewing the website, Mr. Kartsotis, taking the threats seriously, informed Mrs. Fulmer of the existence of the website. After viewing the website, Mrs. Fulmer testified that she was frightened, fearing someone would try to kill her. Mrs. Fulmer suffered stress, anxiety, loss of appetite, loss of sleep, loss of weight, and a general sense of loss of well-being as a result of viewing the website. She suffered from short-term memory loss and an inability to go out of the house and mingle with crowds. Mrs. Fulmer suffered headaches and was required to take anti-anxiety/anti-depressant medication.

After viewing the website, Mrs. Fulmer was unable to return to school to finish the school year. She applied for, and was granted, a medical leave for the 1998-99 school year because of her inability to return to teaching. As a result of Mrs. Fulmer's inability to return to work, three substitute teachers were required to be utilized.

The website also had a demoralizing impact on the school community. Mr. Kartsotis explained, *inter alia*, that the effect of the website on Nitschmann Middle School caused the school to be at a low point that was worse than anything that he had encountered in his 40 years in education. Furthermore, the effect on the morale of the students and staff at Nitschmann Middle School was comparable to the death of a student or staff member.

During this time, J.S. continued to attend classes and participate in extra-curricular activities, including a band trip. The school district did not request that J.S. remove the website. Evidently, J.S., on his own, removed the website approximately one week after Mr. Kartsotis became aware of the website. Moreover, the school district took no action to confront or to punish J.S. in any manner during the remainder of the school year. Finally, the school district did not refer J.S. for any type of psychological evaluation and did not request that his parents have any such evaluation conducted.

After the end of the school year, on July 30, 1998, the school district sent a letter to J.S. and his parents informing them that it was aware of the website and that it intended to suspend the student for three days. The letter asserted that J.S. violated school district policy by: threat to a teacher, harassment of a teacher and principal, and disrespect to a teacher and principal, each

resulting in actual harm to the health, safety, and welfare of the school community. J.S. was expelled for his actions.

DISCUSSION QUESTIONS:

1. Discuss J.S.'s free speech rights. Did the school district violate J.S.'s First Amendment rights when it expelled him for the creation of his website?

2. Was the speech purely off-campus speech?

3. Did the website contain a "true threat"? Does it matter that there was no address provided to forward $20 to help hire a hit man?

4. Was the website disruptive to the educational process?

5. Was the school district justified in disciplining J.S. for the website he created?

D. Is Discipline Appropriate?[101]

Nick was an 18-year-old senior at Kentlake High School. He had a grade point average of 3.95, was co-captain of the basketball team, and had no disciplinary history. On February 13, 2000, he posted a website on the Internet that was created from his home without using school resources or time. The website was entitled the "Unofficial Kentlake High Home Page," and included disclaimers warning a visitor that the website was not sponsored by the school and was for entertainment purposes only. It contained some commentary on the school administration and faculty.

Two aspects of the website are at issue. The site posted mock "obituaries" of at least two of Nick's friends. The obituaries were written tongue-in- cheek, inspired, apparently, by a creative writing class the previous year in which students were assigned to write their own obituary. The mock obituaries became a topic of discussion at the high school among students, faculty, and administrators. In addition, Nick allowed visitors to the website to vote on who would "die" next—that is, who would be the subject of the next mock obituary.

On February 16, an evening television news story characterized Nick's website as featuring a "hit list" of people to be killed, although the words "hit list" appear nowhere on the website. That night, Nick removed his website from the Internet.

The next day, Nick was summoned to the school principal's office, and eventually told that he was placed on emergency expulsion for intimidation, harassment, disruption to the educational process, and violation of Kentlake School District copyright. The emergency expulsion was subsequently modified to a five-day short-term suspension, beginning February 18.

Nick and his parents filed for a restraining order against the school district to prohibit it from imposing the discipline.

DISCUSSION QUESTIONS:

1. Are additional facts needed to determine whether the board was justified in disciplining Nick? If so, what is needed?

2. What free speech issues come into play?

3. Was the school board justified in disciplining Nick?

[101] Hypothetical based on the case of *Emmett v. Kent School District No. 415*, 92 F. Supp. 2d 1088 (W.D. Wash. 2000).

E. Use of Electronic Devices

A family has recently moved into the neighborhood and two of the children are enrolled in the middle school. Justin is in the 8th grade and is a good athlete, but not very academically inclined. He seems to have a short attention span and is generally behind in his assigned class work.

His sister, Melinda, is in the 6th grade. She is an excellent student, and emphasizes this with fellow students by bragging/whining that she has to help Justin with his homework. Justin is aware of this talk, but doesn't seem to mind.

A group of the popular kids like Justin, but not Melinda. They determine that they should "shut Melinda up" by sending text messages on their cell phones during and after school, as well as "posting" information regarding what a "nerd" she is on their MySpace pages. They make sure Melinda will know about the information by sending the messages to students who will mention it to Justin. Some of the postings are pretty graphic, describing Melinda in very negative terms and saying that they "should shut her up permanently."

Justin learns about the text messages and, in fact, reads one of them on a classmate's phone. One of the other classmates accessed the MySpace pages in the school computer lab and showed it to Justin. Upon seeing the MySpace pages, Justin becomes very angry that kids would say such things about his sister and threatens to "beat up" the kids who are doing this. The teacher for the computer lab also saw the MySpace pages, heard about the text messages, and observed Justin becoming very upset.

The school district's policy bans the use of cell phones and other electronic devices in class. The district also has a zero tolerance policy regarding threats made by students.

The teacher for the computer lab informs the principal about the MySpace pages, the text messages, and Justin's threats to "beat up" the other kids involved. The principal is unsure what to do with the information received, and whether he can discipline Justin or the other students for their involvement in the MySpace pages and the text messages.

DISCUSSION QUESTIONS:

1. As the principal, what actions should you take?

2. What policies have been violated, if any?

3. Has there been any bullying or harassment?

4. Is discipline appropriate, and, if so, what action would you recommend?

5. Is there sufficient information to make informed decisions?

6. Should law enforcement be involved? If so, what should its role be?

F. Employee Accessing Social Networking Sites

You are a principal and have a concern about a teacher on a renewable contract who is allegedly using her class time to look at and enter information into her social networking site. Students have complained she is always on the site and is not available to answer their questions.

You call your computer tech to check the teacher's use of her computer, and he finds that there is a lot of Internet activity and accessing of her social networking sites. The computer tech reports that the teacher has a lot of Internet activity and that she is presenting herself in a suggestive manner. Additionally, she is referencing fellow teachers and students in a manner that thinly veils the identity of the persons involved and is definitely not flattering. Further, there are numerous pictures of the teacher in non-work situations that involve alcohol consumption and drug use, and invitations for students and other underage persons to join her in her escapades.

DISCUSSION QUESTIONS:

1. How do you investigate such circumstances?

2. What are your options to curtail this behavior?

3. Are there disciplinary actions that should be considered? If so, what?

G. Use of Cell Phones in School[102]

Victoria was in the 8th grade at West Wilson Middle School. On September 16, 2005, her cell phone began to ring during class. Victoria's teacher seized the phone and delivered it to the school's principal, Jim Farley, along with a partially completed Disciplinary Office Referral form.

The district's Code of Conduct prohibits students' personal communication devices such as cellular telephones on school property during school hours. It requires that violations be reported to the principal, and that the device be confiscated and returned only to the parent/guardian of the student. The Code of Conduct states that, for a first offense, such a violation will result in "Confiscation of device and return to parent ONLY after 30 days and 1 day of in-school suspension." The Code of Conduct further provides:

> DUE PROCESS—before imposing consequences, the teacher or principal shall be guided by the principle of fundamental fairness and make at least rudimentary inquiry into the incident to assure that the offense is accurately identified, that the student understands the nature of the offense, and that the student is given an opportunity to present his/her views. Before a student is removed from the school setting, he/she shall be given a complete due process hearing by the principal of said school and/or the Wilson County Schools Discipline Hearing Authority.

On the morning of Monday, September 19, Victoria's father went to the middle school and spoke with the principal, seeking the return of the cell phone. The principal refused to return the phone until the expiration of 30 days. That same day, the vice principal completed the Disciplinary Office Referral form stating that Victoria was to serve one day of in-school suspension on September 20 and that the phone was "to be held in the vault for 30 days. Parent may pick up on October 17, 2005, in the main office." The vice principal further checked boxes on the form that stated a conference had been held with the student and a letter had been sent home.

On September 19, Victoria was sick from school. When she reported to school for class on Tuesday, September 20, she served her one day of in-school suspension in the school office. She did not confer with anyone at school regarding the cell phone incident, its seizure, or notice of the in-school suspension. Victoria did not receive the suspension note to take to her parents until after she had served the suspension. Her parents only learned about the suspension from their daughter.

On September 28, Victoria's father brought a suit seeking $500,000 in compensatory damages and $300,000 in punitive damages, alleging violations of due process rights related to the 30-day retention of the phone and the imposition of the in-school suspension, among other allegations.

DISCUSSION QUESTIONS:

1. Was the teacher justified in taking the cell phone away from Victoria?

[102] Hypothetical based on the case of *Laney v. Farley*, 501 F.3d 577 (6th Cir. 2007).

2. Did the principal have grounds to deny the father's request to immediately return the cell phone?

3. Was the father's due process rights violated when the phone was not immediately returned to him?

4. Was the administration justified in ordering Victoria to one day of in-school suspension?

5. Was Victoria's due process rights violated when she was not informed about the in-school suspension until after she had completed it?

6. Do the administration's actions justify an award of damages to Victoria and her father?

H. Bullying and Harassment[103]

Casey was a high school student with peer relationship issues; she did not get along well with many students and often used profanity when referring to other students. Casey was overheard saying on her cell phone that she would kick another student's "ass."

After her mother took a "joke" snapshot of Casey kissing a female friend, students got even with Casey by posting the photo on the Internet and spreading rumors that she was a lesbian. Students called her names, avoided her, and would not undress for basketball games when she was in the locker room. Casey dropped off the basketball team and opted to be home-schooled.

Casey played on her high school basketball team and competed with the cheerleading squad. Casey quit the cheerleading squad because she did not want to perform a certain dance. She voluntarily moved from a science class to an independent study, and threatened to quit the basketball team because of alleged sexual harassment.

The Court reviewed the deposition testimony of Casey. With regard to basketball she stated:

> After basketball? Basketball was hell. We [Casey and her friend Gretchen] tried – we both want to quit basketball because of it [the alleged harassment by teammates]. And we told the coaches that we were going to quit, and we talked to the – I think we might have even talked to the principal. But then we were walking down the hall after – I think it was the very end of basketball season. And Leann Gallinger called us fucking lesbian whores.

Casey and her parents alleged that the school district was deliberately indifferent to the harassment. They brought suit alleging claims, not of cyberbullying but of school district violations of Casey's Title IX rights, her civil rights, and her privacy rights under the Family Educational Rights and Privacy Act (FERPA), as well as other state and constitutional claims.

DISCUSSION QUESTIONS:

1. As an administrator, what actions would you take regarding the alleged harassment?

2. Could a claim of cyberbullying be made on Casey's behalf?

3. What liability does the school district have?

[103] Hypothetical is based on the United States District Court case of *Drews v. Joint School District No. 393*, Case No. CV04-388-N-EJL (D. Idaho, May 11, 2006), which can be viewed on the Internet at http://www.websupp.org/data/DID/2:04-cv-00388-60-DID.pdf.

I. Surveillance Cameras[104]

In a case that could have broad repercussions for schools that use video cameras to monitor student activities, a former Berks County, Pennsylvania, student has sued her former school district, saying that her privacy was violated when an audio-equipped school bus camera recorded her conversation.

Morgan Keppley, 20, filed a lawsuit in Berks County Court seeking more than $50,000 in damages and requesting class-action status to represent all students in the Twin Valley School District who rode camera-equipped buses.

The suit claims that the school district used bus surveillance cameras to record actions and conversations of students, including Keppley.

"It is our understanding that [audio recording] is going on without anyone's knowledge," said Keppley's attorney.

The suit did not reveal the nature of the recorded conversation, and Keppley's attorney declined to discuss the matter. School officials said they were not immediately aware of the exact events that prompted the suit.

An Eschelman Transportation representative said the district is in charge of the camera videotapes, which also capture audio. The bus companies install the boxes in the buses, but the school district is solely responsible for owning, operating, and monitoring the cameras.

According to the district's operations director, every bus in the district is fitted with an opaque camera box. The cameras themselves are rotated from bus to bus, but children and drivers are not made aware of whether their bus is currently fitted with a camera.

All school buses have a posted sign saying that a surveillance camera might be on the bus at any time.

DISCUSSION QUESTIONS:

1. Was the use of surveillance cameras on school buses a valid use?

2. Can surveillance cameras record audio as well as video?

3. What legal issues are present?

[104] Hypothetical is based on a newspaper article dated November 19, 2001, reprinted at: http://www.eschoolnews.com/news/top-news/index.cfm?i=34057&CFID=11141606&CFTOKEN=78765744.

J. Student Drug Testing

Central School District adopted a drug testing policy for participation in extra-curricular activities. The policy called for random drug testing of students for illegal drugs. Tim Ward, a senior football player, was randomly selected for testing. He was taking a number of medications for his allergies, as well as antibiotics, when he was tested. One of the antibiotics can cause a false positive for cocaine; the pharmacist provided the Wards with literature to identify the problem with the false positive.

Although the policy specifies that the school official will ask students for a list of prescriptions they are taking at the time of the testing, the school failed to ask Tim for the prescriptions he was taking. At the time, he did not realize that his medications might compromise the test and did not tell anyone about them. The lab that tested the urine sample maintained that its results were 100% accurate, and that it would not produce a false positive.

Because Tim tested positive for cocaine, he was immediately suspended from the team and would not be allowed to play in the district championship in the coming week. Tim's parents had him immediately re-tested by a lab at the local hospital. That test revealed that he was not using cocaine and the lab verified that they had used universal procedures for ensuring the sample collection and chain of possession were not compromised.

The parents attempted to share the information with the school but were not listened to. The school maintained that, even if the second test is negative, they will not change their decision regarding participation in athletics because they are unable to control the sample collection process and the athletic director, who thinks that Tim is "cocky" and suspended him from government class last spring for mouthing off, stated that he knows that people will take inordinate measures to "beat the test." Desperate to see Tim play in the championship game, the Wards filed a lawsuit in district court, alleging that the policy is unconstitutional and is unfairly implemented.

DISCUSSION QUESTIONS:

1. Will the Wards prevail on the issue of unconstitutionality?

2. Does Tim have any due process rights?

3. Will the Wards prevail on their assertion that the policy is being implemented unfairly against Tim?

K. Employee Drug Testing

George Connors was an annual contract employee with East County School District. He had been employed by the school district for two years when the district adopted an employee drug testing policy. The policy required that employees submit to drug testing upon determination that reasonable suspicion existed that the employee was using and/or under the influence of illegal drugs or alcohol.

George was going through a divorce and was struggling with the related issues in his personal life. For a period of about three months, he stayed with a friend while his wife continued to live in their home. George was unable to sleep for longer than three to four hours per night and did not keep up his personal appearance. In fact, on several Monday mornings, he appeared to not have showered and was described by one co-worker as "slovenly." The staff was not aware of the disaster in George's personal life and thought that he was having mental health issues.

Toward the end of the three months, George was called into Principal Cook's office and told that she had reasonable suspicion that George was under the influence of drugs and/or alcohol, and he was being required to immediately take a drug test at the local hospital. George questioned the basis for her conclusion that she had reasonable suspicion. Ms. Cook refused to name the staff members who had complained, but indicated that several were offended that he was not dressing appropriately for work. Further, she pointed out that she had concerns about his work, stating that he was not performing at the level at which she would expect of a second-year teacher. When pressed, she could not articulate her concerns regarding his performance; George had not been evaluated yet that spring and Ms. Cook had only been in his classroom for approximately five minutes during the prior week.

George was very upset about the allegations and denied that he was using drugs or alcohol. He refused to take the test, for the reason that he did not believe that Ms. Cook had reasonable suspicion that he was using drugs. As a result, Ms. Cook sent George a memo stating that she would be recommending that he not be rehired next year, because he had violated the district's policy. In response, George filed a grievance.

DISCUSSION QUESTIONS:

1. Did Ms. Cook have reasonable suspicion to require drug testing?

2. Can the school district elect not to reemploy George based on these allegations?

3. What should be the outcome of the grievance?

Section VI: Policies/Procedures

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POLICY TITLE: Employee Drug and Alcohol Use **POLICY NO: 403**
PAGE 1 of 3

This district recognizes the federal requirements to establish a "drug free workplace" and it does not tolerate drug or alcohol abuse by its employees. Employees are prohibited from manufacturing, dispensing, using, possessing, or distributing illegal drugs or alcohol on any school premises or at any school activity. Employees are further prohibited from being under the influence of illegal drugs or alcohol on any school premises or at any school activity.

The drug free workplace requirements extend to all property owned by the district, all activities sponsored by the district, and include any vehicle owned by this district.

DEFINITIONS

Illegal Drug Use: The use, possession or distribution of illegal drugs, or the abusive use of other drugs, or the use of alcohol on any school premises or at any school activity.

Illegal Drugs: Any controlled substances defined by Idaho Code Section 37-2701, or any other substance which is used to alter or change the mood of an individual, or anabolic steroids. The term "illegal drugs" does not include over the counter drugs or prescriptions prescribed by a doctor or dentist specifically for the person in possession of those drugs.

Under the Influence: This definition covers not only all well-known and easily recognized conditions and degrees of intoxication but any abnormal mental or physical condition which is the result of indulging to any degree in unlawful alcohol or illegal drugs, and which tends to deprive one of that clearness of intellect and control of himself or herself which he or she would otherwise possess.

Unlawful Alcohol: Any alcoholic beverage as defined by Idaho Code Sections 23-105 and 23-1001.

Unlawful Alcohol Use: The use, possession, or distribution of alcohol on any school premises or at any school activity.

Violations: The commission of an act of illegal drug use or unlawful alcohol use by a district employee.

DRUG-FREE AWARENESS PROGRAM

The district will establish a drug-free awareness program to inform employees about: 1) the dangers of drug abuse in the workplace; 2) the district's policy of maintaining a drug-free workplace; 3) any available drug counseling, rehabilitation, and employee assistance programs; and 4) the penalties that may be imposed upon employees for drug use violations.

Upon adoption of this policy or initial employment with the district, all employees will receive a copy of this policy.

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EMPLOYEES WORKING IN FEDERAL GRANT PROGRAMS

Any employee working in the department or program responsible for the performance of a federal grant will, as a condition of employment, agree to abide by the terms of this policy and to notify the district of any criminal drug statute conviction for a violation occurring in the workplace. The employee must notify the district no later than five (5) days after such conviction.

Pursuant to the Drug-Free Workplace Act, the district will report, in writing, to the federal contracting or granting agency, within ten (10) days of receiving notice, that an employee has been convicted of a criminal drug statute for a violation occurring in the workplace.

A signed statement acknowledging receipt and understanding of, and agreement to abide by, this policy will be placed in the employee's personnel file.

DISCIPLINARY ACTION

1. Any employee who violates the terms of the district's drug and alcohol policy may be subject to disciplinary action, including, but not limited to, discharge, suspension, and/or referral for drug and alcohol abuse evaluation and rehabilitation, at the discretion of the board.

2. Notwithstanding the above paragraph, a district bus driver will be suspended from all duties pending investigation when reasonable suspicion exists that the driver may be under the influence of illegal drugs or alcohol. If a bus driver is found to have violated this policy, he or she will be immediately terminated from district employment and the incident will be reported to the State Department of Education. The board or designee will recommend license revocation to the Idaho Department of Transportation.

3. If reasonable suspicion exists that federal, state, or local laws have been violated, the district will notify the appropriate law enforcement agencies.

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♦ ♦ ♦ ♦ ♦ ♦ ♦

LEGAL REFERENCE:
Idaho Code Sections
23-105
23-1001
33-513
33-517
37-2701
41 USC Section 702, *et seq.*
BLACK'S LAW DICTIONARY 1527 (6th ed. 1990)

ADOPTED:

AMENDED:

**Language in text set forth in italics is optional.*

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POLICY TITLE: Employee Drug and Alcohol Testing **POLICY NO: 403.50**
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It is the intent of the board of trustees of this district to promote an alcohol and drug-free workplace, thereby enhancing workplace safety and increased productivity. Chapter 17, Title 72, Idaho Code, allows employers, including school districts, to adopt policies to test employees or prospective employees for the presence of drugs or alcohol as a condition of hiring or continued employment, provided the testing requirements and procedures are in compliance with 42 U.S.C. 12101.

It is the policy of this district to require drug/alcohol testing of any employee reasonably suspected to be under the influence of illegal drugs and/or alcohol while on duty. Illegal drugs include any controlled substances as defined by Idaho Code Section 37-2701, any other substance which is used to alter or change the individual's mood, and anabolic steroids. Alcohol includes any alcoholic beverage as defined by Idaho Code Sections 23-105 and 23-1001.

REASONABLE SUSPICION TESTING

Whenever the superintendent or designee reasonably suspects that an employee's work performance or on-the-job behavior may have been affected in any way by the use of illegal drugs or alcohol or that an employee has otherwise violated the district's Employee Drug and Alcohol Use policy 403, the employee may be required to undergo drug and/or alcohol testing. The circumstances under which reasonable suspicion testing may be considered are strictly limited to employee conduct on duty or during work hours, on district property, or at district-approved or school-related functions.

Reasonable suspicion is defined as a good faith suspicion, based on objective facts, which is sufficient for a prudent person to conclude that the employee is using and/or appears to be presently under the influence of alcohol and/or drugs. Factors which may be considered in determining that a reasonable suspicion exists include, but are not limited to, the following:

1. *Observed use, possession, or sale of illegal drugs/alcohol or the illegal use or sale of prescription drugs.*

2. *Marked decrease in work productivity, either in quantity or quality, not reasonably attributable to other causes.*

3. *Apparent impairment of psychomotor functions, reasoning, judgment or concentration not reasonably attributable to other causes.*

4. *Erratic or marked changes in behavior not reasonably attributable to other causes.*

5. *Involvement in an accident or deviations from safe working practices, whether the incident involves actual or potential injury to person(s) or property.*

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The superintendent or designee may rely on report(s) from persons who report suspected drug or alcohol use by an employee if the individual is determined to be specifically reliable and has based such reports upon specific, contemporaneous, articulable observations concerning the appearance, behavior, speech, or body odors of the employee.

REQUIREMENTS FOR SAMPLE COLLECTION AND TESTING

The superintendent or designee shall designate entities to provide the collection and testing services necessary to implement this policy. Prior to such designation, the entities must demonstrate a thorough understanding of, and compliance with, the testing requirements and procedures as set forth in 42 U.S.C. 12101.

The entity which collects the samples may be a medical facility or laboratory. A trained individual will explain the drug and/or alcohol screening procedure to the employee, obtain authorization for the testing, assist the employee in completing any necessary forms, and monitor the sample collection, documentation, and storage for transportation. All employees subject to testing are required to sign any documents necessary to authorize the testing and disclose information to the Medical Review Officer and the superintendent or designee. The collection site will notify the superintendent or designee if the employee refused to be tested, alters or attempts to alter the sample, or otherwise obstructs the collection of the sample.

The laboratory will be responsible for proper handling of samples and performing the required drug test, including, preparation for testing, chain of custody, security, privacy, integrity, and identify of specimen, specimen retention, and any necessary transportation to a laboratory, in accordance with applicable Federal Department of Transportation (DOT) Procedures for Transportation Workplace Testing Programs, 49 CFR, Part 40, which are incorporated herein by reference, and this policy. The laboratory must be a Substance Abuse and Mental Health Services Administration (SAMHSA) certified lab approved for DOT drug testing.

Further, the superintendent or designee is responsible for ensuring that all procedures for collection and testing comply with the following requirements:

1. *The collection of samples shall be performed under reasonable and sanitary conditions;*

2. *The individual employed by the collection site or laboratory who is responsible for collecting the sample will be instructed as to the proper methods of collection;*

3. *Samples shall be collected and tested with due regard to the privacy of the individual being tested and in a manner reasonably calculated to prevent substitutions or interference with the collection or testing of reliable samples;*

4. *Sample collection shall be documented and the documentation procedure shall include: a) labeling of samples so as to reasonably preclude the possibility of misidentification of the person tested in relation to the test result provided; and b) handling of samples in accordance with reasonable chain-of-custody and confidentiality procedures;*

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5. *Sample collection, storage, and transportation to the testing laboratory shall be performed so as to reasonably preclude the possibility of sample contamination and/or adulteration;*

6. *Sample testing shall conform to scientifically accepted analytical methods and procedures;*

7. *Drug testing shall include a confirmatory test before the result of any test is used as a basis for disciplinary action by the district. A confirmatory test refers to the mandatory second or additional test of the same sample that is conducted by a laboratory utilizing a chromatographic technique such as gas chromatography-mass spectrometry or another comparable reliable analytical method;*

8. *Positive alcohol tests resulting from the use of an initial screen saliva test must include a confirmatory test that utilizes a different testing methodology meant to demonstrate a higher degree of reliability, such as a gas chromatography test. The test will be considered positive if the BAC results are .04 or more.*

9. *Positive alcohol tests resulting from the use of a breath test must include a confirmatory breath test conducted no earlier than fifteen (15) minutes after the initial test; or the use of any other confirmatory test meant to demonstrate a higher degree of reliability, such as a gas chromatography test. The test will be considered positive if the BAC results are .04 or more.*

DESIGNATION OF MEDICAL REVIEW OFFICER

The superintendent or designee shall designate a Medical Review Officer (MRO). The MRO is responsible for reviewing the results of drug tests before they are reported to the superintendent; reviewing and interpreting each confirmed positive test to determine if there is an alternative medical explanation for the positive test; conducting interview(s) with the individual testing positive; reviewing the individual's medical history and available medical records to determine if the positive result was caused by legally prescribed medication; requiring a retest of the original specimen if the MRO deems it necessary; and verifying that the laboratory report and the specimen are correct. The MRO is expected to follow the Medical Review Officer Manual published by the U.S. Department of Health and Human Services for tests conducted under this Policy.

If the MRO determines that a particular test is scientifically insufficient or there is a legitimate medical explanation for the positive test other than the use of a prohibited drug, the MRO will conclude that the test is negative and will not take any further action. If the MRO determines that there is no legitimate explanation for the positive test other than the use of a prohibited drug, the MRO will communicate the test results as positive to the superintendent or designee. All negative tests will also be communicated by the MRO to the superintendent or designee.

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RIGHT TO EXPLAIN POSITIVE TEST RESULT AND REQUEST RETEST

Any employee who tests positive for drugs or alcohol must be given written notice of that test result, specifically identifying the substance for which he/she tested positive. The employee must be given an opportunity to discuss and explain the positive test result with a medical review officer.

Any employee who has a positive test result may request that the same sample be retested by a mutually agreed upon laboratory. A request for retest must be made within seven (7) working days from the date of the first confirmed positive test notification and will be paid for by the employee requesting the test. If the retest results are negative, the district will reimburse the cost of the retest and compensate the employee for lost pay, if suspended without pay. If terminated solely because of the positive test, the employee shall be reinstated with back pay.

VIOLATIONS OF THIS POLICY

An employee is in violation of this policy, and will be subject to disciplinary actions, under the following circumstances:

1. *The employee tests positive for illegal drugs, and the positive test is confirmed;*
2. *The employee tests positive for alcohol, as indicated by a test result of not less than .04 blood alcohol content (BAC), and the positive test is confirmed;*
3. *The employee refuses to provide a sample for testing;*
4. *The employee alters or attempts to alter a test sample by adding a foreign substance for the purpose of making the sample more difficult to analyze;*
5. *The employee submits a sample that is not his or her own; or*
6. *The employee otherwise attempts to obstruct the testing process.*

DISCIPLINARY OR REHABILITATIVE ACTIONS

If the district determines that an employee has violated this policy, the district may take disciplinary action, up to and including, suspension and/or discharge from employment. The district is not precluded from entering into an agreement with the employee wherein the employee is required to successfully participate in a district-approved rehabilitation, treatment, or counseling program, as a condition of continued employment. The fact that an employee has been referred for assistance and his/her willingness to enroll in a rehabilitation program are appropriate considerations as to what, if any, personnel action will be taken.

For employees enrolled in a formal treatment/rehabilitation program, the district may grant sick and personal leave until the same are exhausted and then may grant leave without pay for a period not to exceed one (1) year. The district will not pay the cost of medical or rehabilitation

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services for the employee. Such costs are the sole responsibility of the employee and/or the employee's insurance provider.

NOTIFICATION OF POLICY

The district shall provide a copy of this policy to each employee upon its adoption, and to future employees at the time of hire. Employees will be required to sign a statement acknowledging receipt of the policy. Additionally, a copy of the policy shall be available for review at the district office.

CONFIDENTIALITY

The district, laboratory, MRO, employee assistance program, drug or alcohol rehabilitation program, and their agents, who receive or have access to information concerning an employee's drug/alcohol test results shall keep the information confidential. Such information includes, but is not limited to, interviews, reports, statements, memoranda, or test results, written or otherwise.

Such information shall be used only for the purposes of maintaining a drug-free workplace, in a proceeding related to any disciplinary action taken by the district as a result of the drug/alcohol test, any other dispute between the district and the employee, as required to be disclosed by the United States department of transportation law or regulation or other federal law, or as required by service of legal process. The district will not provide information regarding drug/alcohol testing to prospective employers without the written consent of the employee.

All personnel records and information regarding referral, evaluation, substance screen results, and treatment will be maintained in a confidential manner. Only information pertaining to an employee testing positive will be placed in an employee's personnel file.

Records showing an employee tested negative will be kept for at least one (1) year. Records showing that an employee tested positive, including the reason for the test, identification of the substance(s) used by the employee, and the disposition of each employee will be kept for at least five (5) years. Such records will be kept confidential and will not be considered part of an employee's personnel records.

TESTING COSTS

The district will pay all costs of drug and alcohol testing, unless the test is a retest requested by the employee. If the retest establishes a negative test result, the district will reimburse the employee for the cost of such test.

District employees will be compensated at their regular rate of pay for the time during which they are undergoing any drug or alcohol testing, including transportation time.

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UNEMPLOYMENT CLAIMS

If an employee is found to have violated this policy and is, therefore, terminated from employment and subsequently applies for unemployment benefits, the district will provide the following information to the Department of Commerce and Labor:

1. *The statement signed by employee indicating receipt of this policy.*

2. *A statement signed by the individual administering the test, certifying compliance with the provisions of this policy, the requirements of Idaho Code Sections 72-1701, et seq. The statement will also certify that the results of the test administered to the employee exceeded the threshold stated in the policy requirements for a positive test regarding alcohol (not less than .04 blood alcohol content (BAC)) or the presence of a prohibited drug as defined in this policy.*

3. *A statement signed by an administrator, specifying whether the test was administered as a random test or as a result of reasonable suspicion.*

4. *In the event the violation of this policy is based on misconduct other than testing positive (i.e., altering or attempting to alter a test sample), a statement signed by the administrator or other knowledgeable individual, specifying the nature of the violation of the policy and the evidence in support thereof.*

5. *A statement signed by the employee indicating receipt of the testing results.*

SCHOOL BUS DRIVERS

Testing of school bus drivers employed by the district is addressed in Bus Driver Drug and Alcohol Testing Program, policy 744. The district shall comply with this policy as well as policy 744 regarding bus drivers.

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LEGAL REFERENCE:
Idaho Code Sections
72-1701, *et seq.*
37-2701
23-105
23-1001
42 U.S.C. 12101
49 CFR, Part 40

ADOPTED:

AMENDED:

**Language in text set forth in italics is optional.*

Note: This policy is optional, insofar as Idaho school districts are not required to adopt a drug and alcohol testing program (with the exception of bus drivers, which is addressed in Policy 744). However, if the school district elects to implement a drug and alcohol testing program for other employees, it must adopt a policy which is consistent with the requirements of Idaho Code Section 72-1701, *et seq.* The provisions of Policy 403.50, as drafted, meet the statutory requirements.

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POLICY TITLE: Student Harassment **POLICY NO: 506**
PAGE 1 of 5

It is the policy of this district to maintain a learning environment that is free from harassment. Each student has the right to attend school in an atmosphere that promotes equal opportunities and that is free from all forms of discrimination and conduct that can be considered harassing, coercive, or disruptive.

Students attending district schools are:

1. *Prohibited from engaging in any conduct which could reasonably be construed as constituting harassment on the basis of sex (including sexual orientation), race, color, national origin, age, religious beliefs, ethnic background, or disability;*

2. *Prohibited from sexually harassing other students; and*

3. *Required to report, to the school principal or designee, harassment of which the student becomes aware.*

This policy applies to all conduct on the district's premises and at school-sponsored events, conduct during transportation to and from school and school-sponsored events, and to conduct off the district's premises that has an adverse affect upon a student's educational environment.

DEFINITION OF HARASSMENT

Harassment is defined to include verbal, written, graphic, or physical conduct relating to an individual's sex or sexual orientation, race, color, national origin, age, religious beliefs, ethnic background, or disability that is sufficiently severe, pervasive, or persistent so as to interfere with or limit the ability of an individual to participate in or benefit from the district's programs that:

1. Has the purpose or effect of creating an intimidating or hostile environment.

2. Unreasonably interferes with an individual's educational performance.

3. Otherwise adversely affects an individual's educational opportunities.

Harassment includes, but is not limited to:

1. Physical acts of aggression or assault, damage to property, or intimidation and implied or overt threats of violence motivated by the victim's sex or sexual orientation, race, color, national origin, age, religious beliefs, ethnic background, or disability;

2. Demeaning jokes, taunting, slurs, and derogatory "nicknames," innuendos, or other negative remarks relating to the victim's sex or sexual orientation, race, color, national origin, age, religious beliefs, ethnic background, or disability;

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3. Graffiti and/or slogans or visual displays such as cartoons or posters depicting slurs or derogatory sentiments related to the victim's sex or sexual orientation, race, color, national origin, age, religious beliefs, ethnic background, or disability; and

4. Criminal offenses directed at persons because of their sex or sexual orientation, race, color, national origin, age, religious beliefs, ethnic background, or disability;

Harassment also includes an act of retaliation taken against (1) any person bringing a complaint of harassment, (2) any person assisting another person in bringing a complaint of harassment, or (3) any person participating in an investigation of an act of harassment.

DEFINITION OF SEXUAL HARASSMENT

Sexual harassment is a form of misconduct that undermines the student's relationship with educators and with other students. No student, male or female, should be subject to unasked for and unwelcome sexual overtures or conduct, either verbal or physical. Sexual harassment refers to sexual overtures or conduct, including those that relate to the student's sexual orientation, that is unwelcome, personally offensive, and affecting morale, thereby interfering with a student's ability to study or participate in school activities.

Sexual harassment is a form of misconduct that includes unwelcome sexual advances, requests for sexual favors, sexually motivated physical conduct, or other verbal or physical conduct of a sexual nature when:

1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's participation in the educational process;

2. Submission to or rejection of such conduct by an individual is used as a factor for educational decisions affecting the individual; or

3. Such conduct has the purpose or effect of unreasonably interfering with an individual's education, or creating an intimidating, hostile, or offensive educational environment.

Examples of sexual harassment include, but are not limited to, the following:

1. *Unwelcome verbal statements of a sexual or abusive nature, including requests or demands for sexual activity, sexual jokes, and obscene comments, etc.;*

2. *Unwelcome, sexually motivated or inappropriate touching, pinching, or other physical contact;*

3. *Unwelcome sexual behavior or communications, accompanied by implied or overt threats concerning an individual's education;*

4. *Unwelcome behavior or communications directed at an individual because of his/her gender; and*

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5. *Stalking or unwelcome, sexually motivated attention.*

REPORTING PROCEDURES

1. *Any student, and/or parents of a student, who believe the student is being harassed should immediately report the situation to school personnel.*

2. *Any district employee who receives a report of harassment from a student, becomes aware that a student is being subjected to harassment, or in good faith believes that a student is being subjected to harassment, is required to report the matter to the building principal immediately. In the event the complaint involves the principal, the matter must be immediately reported to the superintendent.*

3. *Any district employee who witnesses harassment of a student should take immediate, appropriate action to intervene to stop the harassment.*

4. *Any student who becomes aware that a fellow student is being subjected to harassment should immediately report the incident to a counselor, teacher, or the principal.*

INVESTIGATION AND REPORT

[Option A—the board must choose either Option A or Option B.]

When a report of harassment is received by the principal or the superintendent, immediate steps will be taken to follow the policy entitled "Civil Rights Grievance Procedure," Policy No. ___ (294).

[Option B—the board must choose either Option A or Option B.]

When a report of harassment is received by the principal or the superintendent, immediate steps will be taken to do the following:

1. *Obtain a written statement from the complainant regarding the allegations;*

2. *Obtain a written statement from the accused;*

3. *Obtain written statements from witnesses, if any; and*

4. *Prepare a written report detailing the investigation.*

An investigator may be appointed to conduct the investigation, or the principal or superintendent may conduct the investigation. The investigation should be completed within ten (10) workdays.

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DISCIPLINARY ACTION

If the allegation of harassment involves a teacher or other school employee, the principal will submit the report of the investigation to the superintendent. If there is sufficient evidence to support the allegation, disciplinary action, up to and including dismissal, may be taken against the offender.

If the allegation of harassment is against a student and there is sufficient evidence to support the allegation, disciplinary action, up to and including suspension or expulsion, may be taken against the offender.

If there is insufficient evidence to support the allegation, no record will be made of the allegation in the complaining student's permanent record. No record of the allegation will be placed in the accused employee's personnel record or in an accused student's permanent record if insufficient evidence supports the allegation.

In the event the investigation discloses that the complaining student has falsely accused another individual of harassment knowingly or in a malicious manner, the complaining student may be subject to disciplinary action, up to and including expulsion.

In the event the harassment involves violent or other conduct which could be reasonably considered to be criminal in nature, the principal/superintendent will refer the matter to the local law enforcement agency.

PROTECTION AGAINST RETALIATION

No retaliation will be taken by this district or by any of its employees or students against a student who reports harassment in good faith. Any person found to have retaliated against another individual for reporting an incident of harassment may be subject to the same disciplinary action provided for harassment offenders. Those persons who assist or participate in an investigation of harassment are also protected from retaliation under this policy.

CONFIDENTIALITY

Any investigation will be conducted, to the maximum extent possible, in a manner that protects the privacy of both the complainant and the accused. However, if it is suspected that child abuse has occurred, such abuse will be reported to the proper authorities as required by state law.

RECORD OF ALLEGATIONS

This district will keep and maintain a written record, including, but not limited to, witness statements, investigative reports, and correspondence, from the date any allegation of harassment is reported to district personnel. The information in the written record will also include the action taken by the district in response to each allegation. The written record will be kept in the district's administrative offices and will not, at any time, be purged by district personnel.

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LEGAL REFERENCE:

Idaho Code Sections
- 16-1619
- 18-917A
- 33-205
- 33-512(6)

Title IX of the Education Amendments of 1972
Franklin v. Gwinnett Co. Pubic Schools, 112 S. Ct. 1028 (1992)
Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998)
Davis v. Monroe County Board of Education, 119 S. Ct. 1661 (1999)
Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (U.S. Dept. of Education Office of Civil Rights, January 2001)

ADOPTED:

AMENDED:

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POLICY TITLE: Prohibition Against Harassment, Intimidation and Bullying	POLICY NO: 506.50 PAGE 1 of 2

It is the policy of this district to maintain a safe school environment for all students while attending school, riding the school bus, and attending district-sponsored activities on school premises or at other locations. Harassment, intimidation, and/or bullying, regardless of the specific nature of the students' behavior, is disruptive to a safe school environment and will not be tolerated. This district shall observe the week of September 10 through September 16, 2006, as Bullying Awareness Week.

DEFINITION

Harassment, intimidation, and/or bullying is defined as misconduct by a student(s), which is characterized by the aggressor(s) repeatedly engaging in negative actions against another student(s) in an attempt to exercise control over the victim. Harassment, intimidation, and/or bullying is generally characterized by aggressive or intentionally harmful behavior, which is carried out repeatedly over time.

PROHIBITED BEHAVIOR

Students attending district schools are prohibited from engaging in the following behaviors:

1. *Physical abuse against a student, including, but not limited to, hitting, pushing, tripping, kicking, blocking, or restraining another's movement; sexual misconduct; causing damage to another's clothing or possessions; and taking another's belongings.*

2. *Verbal abuse against a student, including, but not limited to, name calling, threatening, sexual misconduct, taunting, and malicious teasing.*

3. *Psychological abuse against a student, including, but not limited to, spreading harmful or inappropriate rumors regarding another, drawing inappropriate pictures or writing inappropriate statements regarding another, and intentionally excluding another from groups, or similar activities.*

4. Harassment, intimidation, and/or bullying, including any intentional gesture or any intentional written, verbal, or physical acts or threats, against another student that:

    a. A reasonable person under the circumstances should know will have the effect of:

        (1) Harming a student; or

        (2) Damaging a student's property; or

        (3) Placing a student in reasonable fear of harm to his or her person; or

        (4) Placing a student in reasonable fear of damage to his or her property; or

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Prohibition Against Harassment, Intimidation and Bullying—*continued* Page 2 of 2

b. Is sufficiently severe, persistent, or pervasive that it creates an intimidating, threatening, or abusive educational environment for a student.

The prohibition extends not only to actions taking place on school grounds but also actions originating at a remote location and carried out via any technology, including, but not limited to, the use of a landline, car phone, or wireless telephone, or through the use of data or computer software that is accessed through a computer, computer system, or computer network.

INVESTIGATION

The school administrator or designee will investigate any allegations of misconduct that are reasonably characterized as harassment, intimidation, or bullying. At the discretion of the school principal and/or superintendent, the alleged perpetrator(s) may be suspended pending the outcome of the investigation.

DISCIPLINARY ACTION

Students who engage in harassment, intimidation, or bullying will be disciplined as determined to be appropriate, up to and including suspension and/or expulsion.

REPORT TO LAW ENFORCEMENT

The school administrator will refer allegations of bullying to law enforcement if he/she reasonably believes that the student has engaged in conduct, including harassment, intimidation, and/or bullying, in violation of Idaho Code Section 18-917A.

♦ ♦ ♦ ♦ ♦ ♦ ♦

LEGAL REFERENCE:
Idaho Code Sections
18-917A
33-512

ADOPTED:

AMENDED:

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SECTION 500: STUDENTS

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POLICY TITLE: Searches by School Officials **POLICY NO: 542**
PAGE 1 of 4

The constitutional rights of students do not stop at the schoolhouse gates. Therefore, students have a right to be protected from ***unreasonable*** searches by school officials. However, it is the intent of the board of trustees to provide a safe and orderly environment for all students, conducive to the pursuit of educational goals. As a result, it may be necessary for school officials to search a student, his/her personal belongings, locker, desk, or vehicle, when it is in the interest of the overall welfare of other students or is necessary to preserve the good order and discipline of the school.

Only district personnel authorized by the superintendent may conduct a search pursuant to this policy. This policy applies to only those searches conducted by school officials; it does not apply to searches by law enforcement officers.

DEFINITIONS

"Contraband" means all substances or materials which students are prohibited from possessing by district policy. Examples include, but are not limited to, cell phones, beepers, and articles containing gang symbols.

"Reasonable suspicion" means that the school official initiating the search has a well-founded suspicion—based on objective facts that can be articulated—of either criminal activity or a violation of district policy by a particular student(s). Reasonable suspicion is more than a mere hunch or supposition.

RANDOM SEARCHES

In the interest of maintaining safe and drug-free schools, school officials may conduct random or "blanket" searches of student lockers, student belongings, desks, and the school parking lot. School officials will conduct such searches in a random and systematic manner that is minimally intrusive, and it is not required that reasonable suspicion exist.

The superintendent or designee will develop and implement a "lottery" system by which lockers, desks, student belongings, and vehicles will be randomly selected to be searched. Random searches may be conducted for any reason at any time without notice, without student consent, and without a search warrant. Random searches may involve the use of drug dogs, metal detectors, or surveillance cameras.

REASONABLE SUSPICION SEARCHES

To initiate a reasonable suspicion search, the school official must have a reasonable suspicion as to all of the following:

1. A crime or violation of school policy has been or is being committed;

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2. A particular student has committed a crime or violated district policy;

3. Physical evidence of the suspected crime or violation of district policy is likely to exist; and

4. Such physical evidence would likely be found in a particular place associated with the student suspected of committing the crime or district policy violation.

The search based on reasonable suspicion must be reasonable in its scope. The areas or items to be searched and the methods utilized must be reasonably related to finding physical evidence of the crime or violation of district policy. The search must not be excessively intrusive, given the age and gender of the student and the circumstance of the search.

School officials will make a reasonable effort to obtain the consent of a student before initiating a reasonable suspicion search, unless the circumstances constitute an emergency.

STUDENT'S PERSON OR POSSESSIONS

At any time when the student is on school property or at a school-sponsored event, school officials may search the student's person or possessions (backpack, purse, etc.) if the school official has reasonable suspicion to believe that the student is in possession of illegal or contraband materials or is otherwise secreting evidence of a crime or violation of district policy.

Such searches shall be conducted in an appropriate manner, in private and witnessed by another adult. Students may be required to remove outer clothing (jacket, shoes, etc.) and empty pockets as part of the search. If the search is of the student's person ("pat-down" search), the school official conducting the search and the witness must be of the same sex as the student. Under no circumstances is a school official authorized to conduct a "strip search" of a student.

LOCKERS

Lockers assigned to students are the property of the school district and remain under the control of the district at all times. The student will be responsible for the proper care and use of the locker assigned for his or her use. Students are prohibited from using a locker for the storage of illegal, contraband, or potentially harmful items, including, but not limited to, weapons, drugs, and alcohol.

School officials may randomly open and inspect lockers for any reason at any time. If the random search produces evidence of criminal activity or violation of district policy, it may serve as a basis for a reasonable suspicion search of the locker's contents, including the student's property.

School officials may open and inspect lockers when there is reasonable suspicion that the lockers may contain illegal or contraband materials, other evidence of a crime or violation of district policy, or items which may be a threat to safety or security. Searches of lockers, whether

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random or reasonable suspicion, may be conducted without notice, without consent, and without a search warrant.

AUTOMOBILES

Students are permitted to park on school premises as a matter of privilege, not of right. School officials are authorized to conduct routine patrols of school parking lots, inspecting the exteriors of vehicles parked on school property. The interiors of vehicles on school property may be searched whenever an authorized school official has reasonable suspicion to believe that illegal or contraband materials, other evidence of a crime or violation of district policy, or items which may be a threat to safety or security, are contained inside. Such patrols and searches may be conducted without notice, without consent, and without a search warrant.

USE OF DRUG DOGS

The district may elect to use specially trained drug dogs to alert the dog's handler to the presence of controlled substances, at the discretion of the superintendent or designee. The use of a drug dog shall comply with district policy and applicable law.

The drug dogs will be present for the purpose of detecting controlled substances in lockers, personal items or vehicles on district property only when there are no students or employees present. Only the trained dog's handler will determine what constitutes an alert by the dog.

A drug dog's alert constitutes reasonable suspicion for the district officials to search the lockers, personal items or vehicles. Such a search by district officials may be conducted without notice or consent, and without a search warrant.

SEIZURE OF CONTRABAND OR ILLEGAL MATERIALS

School officials may seize and retain, or turn over to law enforcement officials, any contraband or illegal items, or evidence of a crime or violation of district policy, found as a result of any search conducted pursuant to this policy.

NOTICE

Students and parents/guardians shall be informed of this policy at the beginning of each school year through publication of the policy or an age-appropriate summary in the student handbook.

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♦♦♦♦♦♦♦

LEGAL REFERENCE:
Idaho Code Section 18-3302D
New Jersey v. TLO, 469 U.S. 325 (1985)
Tinker v. Des Moines, 393 U.S. 503 (1969)

ADOPTED:

AMENDED:

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POLICY TITLE: Student Drug, Alcohol and Tobacco Use **POLICY NO: 551**
PAGE 1 of 5

PHILOSOPHY

It is the Idaho Legislature's intent that parental involvement in all aspects of a child's education in Idaho public schools be part of each school district's policy. Drug prevention programs and counseling for students under the custody and care of the public schools are included in this intent.

The board of trustees recognizes that student use of chemical substances, including alcohol, is a serious problem of utmost concern in our society. Drug, alcohol, and tobacco use is detrimental to a state of well-being and undermines the aim of education, which is to enable individuals to develop to their full potential. The district seeks to ensure the highest standards of learning in the classroom and recognizes that use of chemical substances—including alcohol, tobacco, and controlled substances—creates educational, economic, and legal problems.

DEFINITIONS

"Controlled substances" include, but are not limited to, opiates, opium derivatives, hallucinogenic substances, including cocaine, and cannabis and synthetic equivalents of the substances contained in the plant, any material, compound, mixture or preparation with substances having a depressant effect on the central nervous system, and stimulants.

"Course of conduct" involves a pattern or series of acts over a period of time, however short, evidencing a continuity of purpose. Course of conduct does not include constitutionally and statutorily protected activity.

"Drug" includes any alcohol or malt beverage, any tobacco product, any controlled substance, any illegal substance, any abused substance, any substance which is intended to alter mood, and any medication not prescribed by a physician for the student in possession of the medication.

"Intentionally harass" means a knowing and willful course of conduct directed at a specific student which seriously alarms, annoys, threatens, or intimidates the student and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress.

"Reasonable suspicion" means an act of judgment by a district employee or independent contractor that leads to a reasonable and prudent belief that a student is in violation of this policy or the "use" or "under the influence" provisions of Idaho Code Section 37-2732C, which defines controlled substances. Such act of judgment is based on the employee's or independent contractor's training in recognizing the signs and symptoms of alcohol and controlled substance use. The fact that a student has previously disclosed use of a controlled substance will not be deemed a factor in determining reasonable suspicion at a later date.

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"School premises" includes all buildings, facilities, and property owned or leased by the district, school buses and other school vehicles, and the location of any school-sponsored activity or function.

POLICY

Students attending school in this district will not use, possess, sell, buy, or distribute drugs, including alcohol, tobacco, controlled substances, or related paraphernalia, on school premises.

Any student will violate the district's drug, alcohol, and tobacco use policy when:

1. *He or she is on school premises, evidencing behavior that creates a reasonable suspicion that he or she may be illegally under the influence of drugs;*

2. *He or she admits to using, possessing, selling, buying, or distributing drugs on school premises;*

3. *He or she is found to use, possess, sell, buy, or distribute drugs, or related paraphernalia, on school premises;*

4. *He or she is found to possess drugs, or related paraphernalia, or to have such substances on his or her person, or in his or her locker, vehicle, or other property on school premises;*

5. *He or she is found to knowingly attempt to use, sell, buy, or distribute drugs or related paraphernalia on school premises;*

6. *He or she is found to knowingly be present when drugs or related paraphernalia are being used, sold, bought, or distributed on school premises.*

ALCOHOL OR CONTROLLED SUBSTANCES: VOLUNTARY DISCLOSURE

Any student who voluntarily discloses using or being under the influence of alcohol or any controlled substances before he or she is reasonably suspected to be in violation of the law and this policy will be provided anonymity to the extent that:

1. Disclosure is held confidential on a faculty need-to-know basis; and

2. Notification of the disclosure and availability of counseling is provided to the student's parent/guardian.

ALCOHOL OR CONTROLLED SUBSTANCES: REFERRAL TO LAW ENFORCEMENT

Once a student is reasonably suspected of being in violation of the law and this policy regarding alcohol or controlled substances, regardless of any previous voluntary disclosure, the building

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principal or designee will immediately notify the student's parent or guardian and report the incident to the local law enforcement agency.

Any student exhibiting inappropriate behavior that suggests "using" or "being under the influence" of alcohol or controlled substances will be immediately escorted by a district employee to an administrative office for interviewing and observation by the principal or designee. Except in the case of an emergency, the student will not be left unattended and will not be allowed to leave the school premises.

The principal or designee will refer the student to the law enforcement agency if, upon observing and/or interviewing the student, he or she reasonably suspects that the student is using or under the influence of alcohol or a controlled substance. District employees will cooperate fully with any law enforcement investigation of a violation of this policy, including, but not limited to, providing access to lockers, desks, and other school property, and providing oral and/or written statements regarding the relevant events.

The principal or designee, and/or any other employee having observed the student's behavior will document his or her observations of the student; the documentation will be provided to the law enforcement agent, and a copy will be placed in the student's discipline record.

ENFORCEMENT PROCEDURES

The procedures to enforce this policy are as follows:

1. ***Suspension/Expulsion:*** *Students who violate this policy will be suspended by the principal. Suspension for the first offense of this policy will be for three to five (3-5) days, unless extraordinary circumstances exist. The time period for suspension for the second or third offense will be determined at the discretion of the principal and/or superintendent. The principal and/or superintendent will determine whether or not the suspension will be served in school or out of school.*

   If deemed appropriate by the superintendent, he or she may request that the board expel a student who has violated this policy for a second or third offense.

2. ***Referral to Law Enforcement:*** *The student will be referred to the law enforcement agency, if appropriate. If the incident involves using or being under the influence of alcohol or a controlled substance, the student will be referred to the local law enforcement agency. In all other situations, referral to law enforcement will be at the discretion of the building principal or designee.*

3. ***Search and Seizure:*** *A student's person and/or personal effects (e.g., purse, book bag, etc.) may be searched whenever a school official has reasonable cause to believe that the student is in possession of drugs or drug paraphernalia. Any evidence that a student has violated the law and this policy may be seized by the principal or designee.*

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Lockers and desks are school property and remain at all times under the control of the school; however, students are expected to assume full responsibility for the security of their lockers and desks. Authorized school officials may open and inspect lockers and desks when there is reasonable cause to believe that the locker or desk may contain items which may be a threat to safety and security. Such a search may be conducted without a search warrant, and without notice or consent.

Students are permitted to park on school premises as a matter of privilege, not right. The district retains the authority to conduct routine patrols of school parking lots and to inspect the exteriors of automobiles on school premises. The interiors of vehicles on school premises may be inspected whenever an authorized school official has reasonable cause to believe that illegal materials are contained inside. Such patrols and inspections may be conducted without notice, consent, or a search warrant.

4. ***Parent Contact**: The student's parent/guardian will be contacted as soon as possible following any alleged violation of this policy.*

5. ***Conduct Contract:** Any student violating this policy must sign a conduct contract before returning to school. Violation of the conduct contract may result in additional disciplinary measures.*

6. ***Drug, Alcohol, and Tobacco Assessment/Treatment:** The terms of the suspension and/or conduct contract may be modified, at the discretion of the principal or superintendent, if a student who has violated this policy voluntarily completes a drug, alcohol, and tobacco education course and/or undergoes assessment and treatment for drug, alcohol, and tobacco abuse.*

STUDENTS WITH DISABILITIES

Suspensions and expulsions of students with disabilities as defined by Public Law 94-142 and subsequent amendments (Individuals with Disabilities Education Act), Section 504 of the 1973 Rehabilitation Act, and the Americans with Disabilities Act will follow federal guidelines as well as the provisions of this policy.

IMMUNITY FOR GOOD FAITH IMPLEMENTATION

District employees and independent contractors of the district who implement this policy in good faith and with appropriate foundation are immune from civil liability.

INTENTIONAL HARASSMENT

District employees and independent contractors of the district are prohibited from using their authority to determine reasonable suspicion solely for the purpose of intentionally harassing a student. Using the authority in such a manner may result in disciplinary action against the employee or may be considered a breach of the district's contract with the independent contractor.

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NOTICE

Upon adoption of this policy, the board will provide notice of the policy to each student, parent/guardian, or custodian *by publishing such notice in a newspaper of general circulation in the district.* Subsequently, a copy of the policy will be provided to each new student, as well as to the parent/guardian or custodian, at the time of initial registration in a district school.

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LEGAL REFERENCE:

Idaho Code Sections
- 33-205
- 20-516
- 33-210
- 37-2705
- 37-2732C

Drug-Free Schools and Communities Act of 1988
- PL 100-690 and all subsequent amendments

Individuals with Disabilities Education Act
- PL 94-142 and subsequent amendments

Section 504 of the 1973 Rehabilitation Act
Americans with Disabilities Act

ADOPTED:

AMENDED:

**Language in text set forth in italics is optional.*

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POLICY TITLE: Student Use of Electronic Communication and Entertainment Devices	POLICY NO: 553 PAGE 1 of 1

Student use of portable media players and other electronic devices for communication and/or entertainment during school hours is disruptive to the educational process.

Students are prohibited from using electronic communication and entertainment devices on the school grounds during school hours, unless expressly authorized to do so by the principal or designee. Any student found using such a device in any classroom, hallway, or while participating in any school activity, unless so authorized, will have the device confiscated. The principal or designees will confiscate any such device being used by a student in violation of this policy.

For the first violation, the device will be confiscated until the end of the school day and the student may reclaim it.

If a subsequent use of such a device occurs in violation of this policy, the principal or designee may confiscate the device for any period of time until the end of the semester. Devices confiscated on two (2) or more occasions must be reclaimed by the student with his/her parent or guardian present.

The district will use reasonable care to safeguard confiscated devices by designating a locked storage area, but does not assume liability in the event such confiscated device is lost, stolen, or damaged.

DEFINITION

"Electronic communication and entertainment devices" shall include, but not be limited to, personal cell phones, iPODs, Blackberries, pagers, MP3 players, and other similar devices or media players, without regard to the commercial name or manufacturer of the device.

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LEGAL REFERENCE:
Idaho Code Section 33-512

ADOPTED:

AMENDED:

**Language in text set forth in italics is optional.*

SECTION 500: STUDENTS © 2008 Eberharter-Maki & Tappen, PA
D8/3/08

POLICY TITLE: Drug and Alcohol Testing of Students Participating in Extracurricular Activities	POLICY NO: 578 PAGE 1 of 5

Students participating in extracurricular activities, including interscholastic competitions, represent the community, the school, and their peers. When participating students use illegal substances and/or alcohol, such use impinges upon the individual student's performance, and his or her ability to be a cohesive member of the student group. As a result, the well-being of the individual, the activity group, and the general school community is diminished by a student's use of illegal substances and/or alcohol.

As participation in extracurricular activities is a privilege, not a right, participating students voluntarily subject themselves to a degree of regulation higher than that imposed on students generally. Students who voluntarily participate in extracurricular activities have reason to expect intrusions upon normal rights and privileges, including privacy.

The board recognizes, based on reports from administrators, teacher-advisors, coaches, parents, and students, that there is a significant level of drug use by high school students in this district. This policy is adopted to provide the district personnel with tools to provide a safe environment for all students who participate in the identified extracurricular activities.

This district will test students who participate in extracurricular activities for illegal substance and/or alcohol use by administering urine analysis tests. This policy applies to all students participating in any district-sponsored interscholastic activity that is regulated by the Idaho High School Activities Association (IHSAA), as well as students participating in the following extracurricular activities: _____
_____.

DEFINITIONS

"Controlled substances" include, but are not limited to, opiates, opium derivatives, hallucinogenic substances, including cocaine, and cannabis and synthetic equivalents of the substances contained in the plant, any material, compound, mixture, or preparation with substances having a depressant effect on the central nervous system, and stimulants.

"Drug" includes any alcohol or malt beverage, any tobacco product, any controlled substance, any illegal substance, any abused substance, any substance which is intended to alter mood, and any medication not prescribed by a physician for the student in possession of the medication.

CONSENT FORM

A participating student and his or her parent/guardian must sign a form consenting to urine analysis testing as described in this policy (see attachment). If the student or parent/guardian refuses to sign the consent form, or if the student refuses to submit to testing, he or she will not be allowed to participate in extracurricular activities.

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VERIFICATION OF LEGAL DRUG USE

Participants who are drug tested under this policy will be given a reasonable opportunity to submit verification of prescription drug use. At the time of testing, each student will be given written notice that he or she has seventy-two (72) hours to submit verification of any prescription drug use by providing a copy of the prescription to the building principal in a sealed envelope. The principal will submit the sealed envelope, unopened, to the testing laboratory for consideration in making an analysis. The information regarding the use of prescription drugs is confidential and will not be shared with any school official. If the student fails to provide timely verification of legal drug use, and tests positive, he or she will be subject to retesting.

FREQUENCY OF TESTING

The following provisions apply to frequency of testing:

1. *All participants in extracurricular activities may be tested at the beginning of each school year or relevant sports season.*

2. *Random testing may occur once each week during a school year or relevant sports season, and ten (10) percent of all student participants, regardless of the activity, may be tested each week.*

SCOPE OF TESTS

The independent laboratory receiving the samples will routinely test for alcohol, amphetamines, cocaine, ecstasy (MDMA-3, 4-methylenedioxymethanphetamine), and marijuana. Other drugs, such as LSD, may be screened at the request of this school district, but the identity of a particular student will not determine which drugs will be screened. The laboratory will be authorized to report test results only to the superintendent or designee.

SAMPLE COLLECTION

Samples will be collected on the same day the student is selected for testing or, if the student is absent on that day, on the day of the student's return to school. If a student is unable to produce a sample at any particular time, the student will be allowed to return later that same school day to provide the sample.

Any student who willfully provides a false urine sample or who otherwise tampers with a urine sample or undertakes any effort to obstruct, evaluate, or impair the accuracy of the drug test will be suspended from participation all extracurricular activities that the student currently participates in for a period of twelve (12) months from the date of the test.

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CONFIRMING A TEST RESULT

Whenever a test result indicates the presence of an illegal substance, the student will be retested. The school will not be obligated to give the student advance notice of the retesting. The following procedure will be used to confirm a test result:

1. *A second sample will be gathered from the student as soon as possible to confirm the test result. If the student refuses to provide a second sample, or unduly delays in providing such sample, the results of the first sample will be accepted as accurate.*

2. *The second sample will be submitted to the laboratory for testing.*

3. *If the second test is negative, the student will be notified and no further action will be taken. If the second test is positive, the procedures identified in the section "Confirmed Positive Test Results" will be followed.*

CONFIRMED POSITIVE TEST RESULTS

A test is considered "confirmed positive" when a retest also yields a positive result. See the preceding section titled "Confirming a Test Result."

First Confirmed Positive Test:

The first time a student's test results are confirmed positive, the student's parent/guardian will be notified, and the principal will convene a meeting with the student and parent/guardian. At that meeting, the student will be required to choose one of the following options:

1. *Suspension from the team and/or other extracurricular activities for a period of six (6) weeks and participation for a minimum of six (6) weeks in a district approved substance and alcohol abuse assistance program, including weekly urine analysis (the cost of the assistance program and urine analysis will not be paid by the district); or*

2. *Suspension from participation in any extracurricular activities for a period of six (6) months from the date of the confirmed drug test.*

If the student fails to select an option within seventy-two (72) hours after notification of the test results, he or she will be deemed to have selected option number two (2).

Second Confirmed Positive Test:

A participating student's second confirmed positive test within two (2) calendar years will result in automatic suspension from all extracurricular activities for a period of twelve (12) months from the date of the second confirmed positive test. The suspension applies to student participants who have tested positive in this school district's drug testing program and to student participants enrolled in this district who have previously tested positive in another district with a similar drug testing program.

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Third Confirmed Positive Test:

A student participant's third confirmed positive test within two (2) calendar years will result in automatic suspension from all extracurricular activities for the remainder of the current school year and the next two (2) school years. The suspension applies to student participants who have tested positive in this district's drug testing program and to student participants enrolled in this district who have previously tested positive in another district with a similar drug testing program.

POST-SUSPENSION ELIGIBILITY

Students who test positive and are suspended from extracurricular activities must be retested and test negative prior to being allowed to participate in any extracurricular activities. If the suspension terminates during a sports season, or after an enrollment period for any other extracurricular activity has expired, the student is not eligible to participate until the next enrollment or try-out period occurs.

DUTIES OF SUPERINTENDENT OR DESIGNEE

The superintendent or designee will implement and oversee appropriate procedures for a lottery drawing for random urine analysis testing. Selection for random testing will be by lottery drawing from a "pool" of all participating students in the district at the time of the drawing. The superintendent will take all reasonable steps to accomplish the following:

1. *Assure the integrity, confidentiality and random nature of the selection process including, but not necessarily limited to, assuring that the names of all participating students are in the pool;*

2. *Assure that the person drawing names has no way of knowingly choosing or failing to choose particular students for the testing;*

3. *Assure that the identity of students drawn for testing is not known to those involved in the selection process;*

4. *Assure direct observation of the selection process by at least two (2) adults.*

The superintendent or designee will also implement and oversee appropriate procedures for gathering specimens and approving illegal substance and alcohol abuse assistance programs.

GENERAL PROVISIONS

1. *The results of the tests will be disclosed only to the student and parent/guardian, and those school personnel who have a need to know.*

2. *The test results will be kept for only one (1) year.*

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Drug and Alcohol Testing of Students—*continued* Page 5 of 5

3. *If it is reasonably suspected that a student participant is using drugs or alcohol, this district's policy on student drug and alcohol use will be followed.*

4. *The district will pay any costs associated with gathering samples and testing by an independent laboratory, as well as all administrative fees necessary to implement this policy. The district will not pay the costs of any substance and alcohol abuse program or ongoing urinalysis testing for a student who has a confirmed positive test.*

NON-PUNITIVE NATURE OF POLICY

Detection of illegal substance or alcohol use obtained pursuant to this policy will not be used as a basis to discipline a student or penalize him or her academically. Such detection will not be made a part of a student's permanent record, and does not constitute reasonable suspicion, pursuant to Idaho Code Section 33-210. Information regarding the results of drug tests will not be disclosed to criminal or juvenile authorities absent legal compulsion by valid and binding subpoena or other legal process, which the district will not solicit.

♦ ♦ ♦ ♦ ♦ ♦ ♦

LEGAL REFERENCE:
Idaho Code Section 33-512(12)
Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 115 S. Ct. 2386 (1995)
Todd v. Rush County Schools, 133 F.3d 984 (7th Cir. 1998), *reh'g en banc denied,* 139 F.3d 571 (1998)
Board of Ed. of Independent School Dist. v. Earls, 536 U.S. 822, 122 S. Ct. 2559 (2002)

ADOPTED:

AMENDED:

ATTACHMENT: Drug Testing Policy General Authorization and Consent Form

**Language in text set forth in italics is optional.*

Note: This policy is based on the drug testing policy at issue in *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 115 S. Ct. 2386 (1995), and *Board of Ed. of Independent School Dist. v. Earls*, 536 U.S. 822, 139 F.3d 571 (2002). The U.S. Supreme Court ruled that the policy dealing with drug and alcohol testing of students participating in extracurricular activities in *Earls* and student athletes in *Vernonia* did not violate students' rights. The *Vernonia* case dealt only with testing student athletes. The U.S. Supreme Court determined in the *Earls* case that a like analysis applied to all extracurricular activities of students if there are any indicia of substance abuse issues in the school community.

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DRUG TESTING POLICY GENERAL AUTHORIZATION AND CONSENT FORM

I understand that my performance in Idaho High School Activities Association (IHSAA) sponsored events and other competitive extracurricular events, and the reputation of my school are dependent, in part, on my conduct as an individual. I hereby agree to accept and abide by the standards and regulations set forth by _____ School District Board and the sponsors for the activity in which I participate.

I also authorize _____ School District to conduct a test on a urine specimen, which I provide, to test for drugs and/or alcohol use. I also authorize the release of information concerning the result of such a test to the _____ School District and to the parent/legal guardians of the student.

Pursuant to the Family Education Right of Privacy Act 34, C.F.R. Part 99, this form will be deemed a consent for the release of the above information to the parties named above.

_____ _____
Student Signature Date

_____ _____
Parent/Guardian Signature Date

Section VII: Idaho Statutes

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TITLE 9
EVIDENCE
CHAPTER 3
PUBLIC WRITINGS

9-338. PUBLIC RECORDS—RIGHT TO EXAMINE. (1) Every person has a right to examine and take a copy of any public record of this state and there is a presumption that all public records in Idaho are open at all reasonable times for inspection except as otherwise expressly provided by statute.

(2) The right to copy public records shall include the right to make photographs or photographic or other copies while the records are in the possession of the custodian of the records using equipment provided by the public agency or independent public body corporate and politic or using equipment designated by the custodian.

(3) Additionally, the custodian of any public record shall give the person, on demand, a certified copy of it if the record is of a nature permitting such copying or shall furnish reasonable opportunity to inspect or copy such record.

(4) The custodian shall make no inquiry of any person who applies for a public record, except to verify the identity of a person requesting a record in accordance with section 9-342, Idaho Code, to ensure that the requested record or information will not be used for purposes of a mailing or telephone list prohibited by section 9-348, Idaho Code, or as otherwise provided by law, and except as required for purposes of protecting personal information from disclosure under chapter 2, title 49, Idaho Code, and federal law. The person may be required to make a written request and provide their name, a mailing address and telephone number.

(5) The custodian shall not review, examine or scrutinize any copy, photograph or memoranda in the possession of any such person and shall extend to the person all reasonable comfort and facility for the full exercise of the right granted under this act.

(6) Nothing herein contained shall prevent the custodian from maintaining such vigilance as is required to prevent alteration of any public record while it is being examined.

(7) Examination of public records under the authority of this section must be conducted during regular office or working hours unless the custodian shall authorize examination of records in other than regular office or working hours. In this event, the persons designated to represent the custodian during such examination shall be entitled to reasonable compensation to be paid to them by the public agency or independent public body corporate and politic having custody of such records, out of funds provided in advance by the person examining such records, at other than regular office or working hours.

(8) (a) A public agency or independent public body corporate and politic or public official may establish a copying fee schedule. The fee may not exceed the actual cost to the agency of copying the record if another fee is not otherwise provided by law. The actual cost shall not include any administrative or labor costs resulting from locating and providing a copy of the public record; provided however, that a public agency or independent public body corporate and politic or public official may establish a fee to recover the actual labor cost associated with locating and copying documents if:

(i) The request is for more than one hundred (100) pages of paper records; or

(ii) The request includes records from which nonpublic information must be deleted; or

(iii) The actual labor associated with locating and copying documents for a request exceeds two (2) person hours.

(b) For providing a duplicate of a computer tape, computer disc, microfilm or similar or analogous record system containing public record information, a public agency or independent public body corporate and politic or public official may charge a fee, uniform to all persons that does not exceed the sum of the following:

(i) The agency's direct cost of copying the information in that form;

(ii) The standard cost, if any, for selling the same information in the form of a publication;

(iii) The agency's cost of conversion, or the cost of conversion charged by a third party, if the existing electronic record is converted to another electronic form.

The custodian may require advance payment of the cost of copying. Any money received by the public agency or independent public body corporate and politic shall be credited to the account for which the expense being reimbursed was or will be charged, and such funds may be expended by the agency as part of its appropriation from that fund.

(c) The public agency or independent public body corporate and politic may not charge any cost or fee for copies or labor when the requester demonstrates either:

(i) The inability to pay; or

(ii) That the public's interest or the public's understanding of the operations or activities of government or its records would suffer by the assessment or collection of any fee.

(9) A public agency or independent public body corporate and politic shall not prevent the examination or copying of a public record by contracting with a nongovernmental body to perform any of its duties or functions.

(10) Nothing contained herein shall prevent a public agency or independent public body corporate and politic from disclosing statistical information that is descriptive of an identifiable person or persons, unless prohibited by law.

(11) Nothing contained herein shall prevent a public agency or independent public body corporate and politic from providing a copy of a public record in electronic form if the record is available in electronic form and if the person specifically requests an electronic copy. A request for a public record and delivery of the public record may be conducted by electronic mail.

TITLE 18
CRIMES AND PUNISHMENTS
CHAPTER 9
ASSAULT AND BATTERY

18-917A. STUDENT HARASSMENT—INTIMIDATION—BULLYING. (1) No student shall intentionally commit, or conspire to commit, an act of harassment, intimidation or bullying against another student.

(2) As used in this section, "harassment, intimidation or bullying" means any intentional gesture, or any intentional written, verbal or physical act or threat by a student that:

(a) A reasonable person under the circumstances should know will have the effect of:

(i) Harming a student; or

(ii) Damaging a student's property; or

(iii) Placing a student in reasonable fear of harm to his or her person; or

(iv) Placing a student in reasonable fear of damage to his or her property; or

(b) Is sufficiently severe, persistent or pervasive that it creates an intimidating, threatening or abusive educational environment for a student.

An act of harassment, intimidation or bullying may also be committed through the use of a land line, car phone or wireless telephone or through the use of data or computer software that is accessed through a computer, computer system, or computer network.

(3) A student who personally violates any provision of this section may be guilty of an infraction.

TITLE 18
CRIMES AND PUNISHMENTS
CHAPTER 33
FIREARMS, EXPLOSIVES AND OTHER DEADLY WEAPONS

18-3302D. POSSESSING WEAPONS OR FIREARMS ON SCHOOL PROPERTY.

(1) (a) It shall be unlawful and is a misdemeanor for any person to possess a firearm or other deadly or dangerous weapon while on the property of a school or in those portions of any building, stadium or other structure on school grounds which, at the time of the violation, were being used for an activity sponsored by or through a school in this state or while riding school provided transportation.

(b) The provisions of this section regarding the possession of a firearm or other deadly or dangerous weapon on school property shall also apply to students of schools while attending or participating in any school sponsored activity, program or event regardless of location.

(2) Definitions. As used in this section:

(a) "Deadly or dangerous weapon" means any weapon as defined in 18 U.S.C. section 930;

(b) "Firearm" means any firearm as defined in 18 U.S.C. section 921;

(c) "Minor" means a person under the age of eighteen (18) years;

(d) "Possess" means to bring an object, or to cause it to be brought, onto the property of a public or private elementary or secondary school, or onto a vehicle being used for school provided transportation, or to exercise dominion and control over an object located anywhere on such property or vehicle. For purposes of subsection (1)(b) of this section, "possess" shall also mean to bring an object onto the site of a school sponsored activity, program or event, regardless of location, or to exercise dominion and control over an object located anywhere on such a site;

(e) "School" means a private or public elementary or secondary school.

(3) Right to search students or minors. For purposes of enforcing the provisions of this section, employees of a school district shall have the right to search all students or minors, including their belongings and lockers, that are reasonably believed to be in violation of the provisions of this section, or applicable school rule or district policy, regarding the possessing of a firearm or other deadly or dangerous weapon.

(4) The provisions of this section shall not apply to the following persons:

(a) A peace officer;

(b) A person who lawfully possesses a firearm or deadly or dangerous weapon as an appropriate part of a program, an event, activity or other circumstance approved by the board of trustees or governing board;

(c) A person or persons complying with the provisions of section 19-202A, Idaho Code;

(d) Any adult over eighteen (18) years of age and not enrolled in a public or private elementary or secondary school who has lawful possession of a firearm or other deadly or dangerous weapon, secured and locked in his vehicle in an unobtrusive, nonthreatening manner;

(e) A person who lawfully possesses a firearm or other deadly or dangerous weapon in a private vehicle while delivering minor children, students or school employees to and from school or a school activity;

(f) Notwithstanding the provisions of section 18-3302C, Idaho Code, a person or an employee of the school or school district who is authorized to carry a firearm with the permission of the board of trustees of the school district or the governing board.

(5) Penalties. Persons who are found guilty of violating the provisions of this section may be sentenced to a jail term of not more than one (1) year or fined an amount not in excess of one thousand dollars ($1,000) or both. If a violator is a student and under the age of eighteen (18) years, the court may place the violator on probation and suspend the juvenile detention or fine or both as long as the violator is enrolled in a program of study recognized by the court that, upon successful completion, will grant the violator a general equivalency diploma (GED) or a high school diploma or other educational program authorized by the court. Upon successful completion of the terms imposed by the court, the court shall discharge the offender from serving the remainder of the sentence. If the violator does not complete, is suspended from, or otherwise withdraws from the program of study imposed by the court, the court, upon receiving such information, shall order the violator to commence serving the sentence provided for in this section.

TITLE 18
CRIMES AND PUNISHMENTS
CHAPTER 67
COMMUNICATIONS SECURITY

18-6702. INTERCEPTION AND DISCLOSURE OF WIRE, ELECTRONIC OR ORAL COMMUNICATIONS PROHIBITED. (1) Except as otherwise specifically provided in this chapter, any person shall be guilty of a felony and is punishable by imprisonment in the state prison for a term not to exceed five (5) years or by a fine not to exceed five thousand dollars ($5,000), or by both fine and imprisonment if that person:

(a) Willfully intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept any wire, electronic or oral communication; or

(b) Willfully uses, endeavors to use, or procures any other person to use or endeavor to use any electronic, mechanical, or other device to intercept any oral communication when:

1. Such device is affixed to, or otherwise transmits a signal through, a wire, cable, or other like connection used in wire communication; or

2. Such device transmits communications by radio or interferes with the transmission of such communication; or

(c) Willfully discloses, or endeavors to disclose, to any other person the contents of any wire, electronic or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication in violation of this subsection; or

(d) Willfully uses, or endeavors to use, the contents of any wire, electronic or oral communication, knowing or having reason to know that the information was obtained through the interception of a wire, electronic or oral communication in violation of this subsection; or

(e) Intentionally discloses or endeavors to disclose to any other person the contents of any wire, electronic or oral communication, intercepted by means authorized by subsection (2)(b), (c), (f) or (g) of this section or by section 18-6708, Idaho Code, if that person:

(i) Knows or has reason to know that the information was obtained through the interception of such communication in connection with a criminal investigation; and

(ii) Has obtained or received the information in connection with a criminal investigation with the intent to improperly obstruct, impede or interfere with a duly authorized criminal investigation.

(2) (a) It is lawful under this chapter for an operator of a switchboard, or an officer, employee, or agent of a provider of wire or electronic communication service whose facilities are used in the transmission of a wire or electronic communication to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident to the rendition of his service or to the protection of the rights or property of the provider of that service, except that a provider of wire communication service to the public shall not utilize service observing or random monitoring except for mechanical or service quality control checks.

(b) It is lawful under this chapter for an officer, employee, or agent of the federal communications commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the commission in the enforcement of 47 U.S.C. ch. 5, to intercept a wire, electronic or oral communication transmitted by radio or to disclose or use the information thereby obtained.

(c) It is lawful under this chapter for a law enforcement officer or a person acting under the direction of a law enforcement officer to intercept a wire, electronic or oral communication when such person is a party to the communication or one (1) of the parties to the communication has given prior consent to such interception.

(d) It is lawful under this chapter for a person to intercept a wire, electronic or oral communication when one (1) of the parties to the communication has given prior consent to such interception.

(e) It is unlawful to intercept any communication for the purpose of committing any criminal act.

(f) It is lawful under this chapter for an employee of a telephone company to intercept a wire communication for the sole purpose of tracing the origin of such communication when the interception is requested by an appropriate law enforcement agency or the recipient of the communication and the recipient alleges that the communication is obscene, harassing, or threatening in nature.

(g) It is lawful under this chapter for an employee of a law enforcement agency, fire department or ambulance service, while acting in the scope of his employment, and while a party to the communication, to intercept and record incoming wire or electronic communications.

(h) It shall not be unlawful under this chapter for any person:

(i) To intercept or access an electronic communication made through an electronic communication system that is configured so that such electronic communication is readily accessible to the general public;

(ii) To intercept any radio communication that is transmitted:

(A) By any station for the use of the general public, or that relates to ships, aircraft, vehicles or persons in distress;

(B) By any governmental, law enforcement, civil defense, private land mobile or public safety communications system, including police and fire, readily accessible to the public;

(C) By a station operating on an authorized frequency within the bands allocated to the amateur, citizens band or general mobile radio services; or

(D) By any marine or aeronautical communication system;

(iii) To engage in any conduct that:

(A) Is prohibited by 47 U.S.C. section 553 (federal communications act of 1934); or

(B) Is excepted from the application of 47 U.S.C. section 605 (federal communications act of 1934);

(iv) To intercept any wire or electronic communication, the transmission of which is causing harmful interference to any lawfully operating station or consumer electronic equipment to the extent it is necessary to identify the source of such interference; or

(v) For other users of the same frequency to intercept any radio communication, if such communication is not scrambled or encrypted, made through a system that utilizes frequencies monitored by individuals engaged in the provision or the use of such system.

(i) It shall be lawful under this chapter for a provider of electronic communication service to record the fact that a wire or electronic communication was initiated or completed in order to protect such provider, another provider furnishing service toward the completion of the wire or electronic communication or a user of that service from the fraudulent, unlawful or abusive use of such service.

(3) (a) Except as provided in subsection (3)(b) of this section, a person or entity providing an electronic communication service to the public shall not intentionally divulge the contents of any communication other than to such person or entity or an agent thereof while in transmission on that service, to any person or entity other than an addressee or intended recipient of such communication or an agent of such addressee or intended recipient.

(b) A person or entity providing electronic communication service to the public may divulge the contents of any such communication:

(i) As otherwise authorized in section 18-6707, Idaho Code, or subsection (2)(a) of this section;

(ii) With the lawful consent of the originator or any addressee or intended recipient of such communication;

(iii) To a person employed or authorized, or whose facilities are used, to forward such communication to its destination; or

(iv) If such contents were inadvertently obtained by the service provider and appear to pertain to the commission of a crime, if such divulgence is made to a law enforcement agency.

TITLE 33
EDUCATION
CHAPTER 2
ATTENDANCE AT SCHOOLS

33-205. DENIAL OF SCHOOL ATTENDANCE. The board of trustees may deny enrollment, or may deny attendance at any of its schools by expulsion, to any pupil who is an habitual truant, or who is incorrigible, or whose conduct, in the judgment of the board, is such as to be continuously disruptive of school discipline, or of the instructional effectiveness of the school, or whose presence in a public school is detrimental to the health and safety of other pupils, or who has been expelled from another school district in this state or any other state. Any pupil having been denied enrollment or expelled may be enrolled or readmitted to the school by the board of trustees upon such reasonable conditions as may be prescribed by the board; but such enrollment or readmission shall not prevent the board from again expelling such pupil for cause.

Provided however, the board shall expel from school for a period of not less than one (1) year, twelve (12) calendar months, or may deny enrollment to, a student who has been found to have carried a weapon or firearm on school property in this state or any other state, except that the board may modify the expulsion or denial of enrollment order on a case-by-case basis. Discipline of students with disabilities shall be in accordance with the requirements of federal law part B of the individuals with disabilities education act and section 504 of the rehabilitation act. An authorized representative of the board shall report such student and incident to the appropriate law enforcement agency.

No pupil shall be expelled nor denied enrollment without the board of trustees having first given written notice to the parent or guardian of the pupil, which notice shall state the grounds for the proposed expulsion or denial of enrollment and the time and place where such parent or guardian may appear to contest the action of the board to deny school attendance, and which notice shall also state the rights of the pupil to be represented by counsel, to produce witnesses and submit evidence on his own behalf, and to cross-examine any adult witnesses who may appear against him. Within a reasonable period of time following such notification, the board of trustees shall grant the pupil and his parents or guardian a full and fair hearing on the proposed expulsion or denial of enrollment. However, the board shall allow a reasonable period of time between such notification and the holding of such hearing to allow the pupil and his parents or guardian to prepare their response to the charge. Any pupil who is within the age of compulsory attendance, who is expelled or denied enrollment as herein provided, shall come under the purview of the juvenile corrections act, and an authorized representative of the board shall, within five (5) days, give written notice of the pupil's expulsion to the prosecuting attorney of the county of the pupil's residence.

The superintendent of any district or the principal of any school may temporarily suspend any pupil for disciplinary reasons, including student harassment, intimidation or bullying, or for other conduct disruptive of good order or of the instructional effectiveness of the school. A temporary suspension by the principal shall not exceed five (5) school days in length; and the school superintendent may extend the temporary suspension an additional ten (10) school days. Provided, that on a finding by the board of trustees that immediate return to school attendance by the temporarily suspended student would be detrimental to other pupils' health, welfare or safety,

the board of trustees may extend the temporary suspension for an additional five (5) school days. Prior to suspending any student, the superintendent or principal shall grant an informal hearing on the reasons for the suspension and the opportunity to challenge those reasons. Any pupil who has been suspended may be readmitted to the school by the superintendent or principal who suspended him upon such reasonable conditions as said superintendent or principal may prescribe. The board of trustees shall be notified of any temporary suspensions, the reasons therefor, and the response, if any, thereto.

The board of trustees of each school district shall establish the procedure to be followed by the superintendent and principals under its jurisdiction for the purpose of effecting a temporary suspension, which procedure must conform to the minimal requirements of due process.

33-210. STUDENTS USING OR UNDER THE INFLUENCE OF ALCOHOL OR CONTROLLED SUBSTANCES. (1) It is legislative intent that parental involvement in all aspects of a child's education in the public school system remain a priority. Substance abuse prevention programs and counseling for students attending public schools are no exception. Consequently, it is the duty of the board of trustees of each school district, including specially chartered school districts, and governing boards of charter schools, to adopt and implement policies specifying how personnel shall respond when a student discloses or is reasonably suspected of using or being under the influence of alcohol or any controlled substance defined by section 37-2732C, Idaho Code. Such policies shall include provisions that anonymity will be provided to the student on a faculty “need to know” basis, when a student voluntarily discloses using or being under the influence of alcohol or any controlled substance while on school property or at a school function, except as deemed reasonably necessary to protect the health and safety of others. Notification of the disclosure and availability of counseling for students shall be provided to parents, the legal guardian or child's custodian. However, once a student is reasonably suspected of using or being under the influence of alcohol or a controlled substance in violation of section 37-2732C, Idaho Code, regardless of any previous voluntary disclosure, the school administrator or designee shall contact the student's parent, legal guardian or custodian, and report the incident to law enforcement. The fact that a student has previously disclosed use of alcohol or a controlled substance shall not be deemed a factor in determining reasonable suspicion at a later date.

(2) In addition to policies adopted pursuant to this section, students may, at the discretion of the district board of trustees or governing board of a charter school, be subject to other disciplinary or safety policies, regardless whether the student voluntarily discloses or is reasonably suspected of using or being under the influence of alcohol or a controlled substance in violation of district or charter school policy or section 37-2732C, Idaho Code.

(3) The district board of trustees or the governing board of the charter school shall ensure that procedures are developed for contacting law enforcement and the student's parents, legal guardian or custodian regarding a student reasonably suspected of using or being under the influence of alcohol or a controlled substance. District and charter school policies formulated to meet the provisions of section 37-2732C, Idaho Code, and this section shall be made available to each student, parent, guardian or custodian by August 31, 2002, and thereafter as provided by section 33-512(6), Idaho Code.

(4) Any school district employee or independent contractor of an educational institution who has a reasonable suspicion that a student is using or is under the influence of alcohol or a controlled substance and, acting upon that suspicion, reports that suspicion to a school administrator or initiates procedures adopted by the board of trustees or governing board of the charter school pursuant to this section, shall have immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. Any such participant shall have the same immunity with respect to participation in any judicial proceeding resulting from such report. Any person who reports in bad faith or with malice shall not be protected by this section. Employees and independent contractors of educational institutions who intentionally harass a student through the misuse of the authority provided in this section shall not be immune from civil liability arising from the wrongful exercise of that authority and shall be guilty of a misdemeanor punishable by a fine not to exceed three hundred dollars ($300).

(5) For the purposes of this section, the following definitions shall apply:

(a) "Reasonable suspicion" means an act of judgment by a school employee or independent contractor of an educational institution which leads to a reasonable and prudent belief that a student is in violation of school board or charter school governing board policy regarding alcohol or controlled substance use, or the "use" or "under the influence" provisions of section 37-2732C, Idaho Code. Said judgment shall be based on training in recognizing the signs and symptoms of alcohol and controlled substance use.

(b) "Intentionally harass" means a knowing and willful course of conduct directed at a specific student which seriously alarms, annoys, threatens or intimidates the student and which serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress.

(c) "Course of conduct" means a pattern or series of acts over a period of time, however short, evidencing a continuity of purpose. Constitutionally and statutorily protected activity is not included within the meaning of "course of conduct."

TITLE 37
FOOD, DRUGS, AND OIL
CHAPTER 27
UNIFORM CONTROLLED SUBSTANCES

37-2701. DEFINITIONS. As used in this act:

(a) "Administer" means the direct application of a controlled substance whether by injection, inhalation, ingestion, or any other means, to the body of a patient or research subject by:

(1) A practitioner (or, in his presence, by his authorized agent), or

(2) The patient or research subject at the direction and in the presence of the practitioner.

(b) "Agent" means an authorized person who acts on behalf of or at the direction of a manufacturer, distributor, or dispenser. It does not include a common or contract carrier, public warehouseman, or employee of the carrier or warehouseman.

(c) "Board" means the state board of pharmacy created in chapter 17, title 54, Idaho Code, or its successor agency.

(d) "Bureau" means the Bureau of Narcotic and Dangerous Drugs, United States Department of Justice, or its successor agency.

(e) "Controlled substance" means a drug, substance, or immediate precursor in schedules I through V of article II of this act.

(f) "Counterfeit substance" means a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person who in fact manufactured, distributed, or dispensed the substance.

(g) "Deliver" or "delivery" means the actual, constructive, or attempted transfer from one (1) person to another of a controlled substance, whether or not there is an agency relationship.

(h) "Director" means the director of the Idaho state police.

(i) "Dispense" means to deliver a controlled substance to an ultimate user or research subject by or pursuant to the lawful order of a practitioner, including the prescribing, administering, packaging, labeling, or compounding necessary to prepare the substance for that delivery.

(j) "Dispenser" means a practitioner who dispenses.

(k) "Distribute" means to deliver other than by administering or dispensing a controlled substance.

(l) "Distributor" means a person who distributes.

(m) "Drug" means (1) substances recognized as drugs in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them; (2) substances intended for use in the diagnosis, cure, mitigation, treatment or prevention of disease in man or animals; (3) substances (other than food) intended to affect the structure or any function of the body of man or animals; and (4) substances intended for use as a component of any article specified in clause (1), (2), or (3) of this subsection. It does not include devices or their components, parts, or accessories.

(n) "Drug paraphernalia" means all equipment, products and materials of any kind which are used, intended for use, or designed for use, in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance in violation of this act. It includes, but is not limited to:

(1) Kits used, intended for use, or designed for use in planting, propagating, cultivating, growing or harvesting of any species of plant which is a controlled substance or from which a controlled substance can be derived;

(2) Kits used, intended for use, or designed for use in manufacturing, compounding, converting, producing, processing, or preparing controlled substances;

(3) Isomerization devices used, intended for use, or designed for use in increasing the potency of any species of plant which is a controlled substance;

(4) Testing equipment used, intended for use, or designed for use in identifying, or in analyzing the strength, effectiveness or purity of controlled substances;

(5) Scales and balances used, intended for use, or designed for use in weighing or measuring controlled substances;

(6) Diluents and adulterants, such as quinine hydrochloride, mannitol, mannite, dextrose and lactose, used, intended for use, or designed for use in cutting controlled substances;

(7) Separation gins and sifters used, intended for use, or designed for use in removing twigs and seeds from, or in otherwise cleaning or refining, marijuana;

(8) Blenders, bowls, containers, spoons and mixing devices used, intended for use, or designed for use in compounding controlled substances;

(9) Capsules, balloons, envelopes and other containers used, intended for use, or designed for use in packaging small quantities of controlled substances;

(10) Containers and other objects used, intended for use, or designed for use in storing or concealing controlled substances;

(11) Hypodermic syringes, needles and other objects used, intended for use, or designed for use in parenterally injecting controlled substances into the human body;

(12) Objects used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing marijuana, cocaine, hashish, or hashish oil into the human body, such as:

(a) Metal, wooden, acrylic, glass, stone, plastic, or ceramic pipes with or without screens, permanent screens, hashish heads, or punctured metal bowls;

(b) Water pipes;

(c) Carburetion tubes and devices;

(d) Smoking and carburetion masks;

(e) Roach clips: meaning objects used to hold burning material, such as a marijuana cigarette, that has become too small or too short to be held in the hand;

(f) Miniature cocaine spoons, and cocaine vials;

(g) Chamber pipes;

(h) Carburetor pipes;

(i) Electric pipes;

(j) Air-driven pipes;

(k) Chillums;

(l) Bongs;

(m) Ice pipes or chillers;

In determining whether an object is drug paraphernalia, a court or other authority should consider, in addition to all other logically relevant factors, the following:

1. Statements by an owner or by anyone in control of the object concerning its use;
2. Prior convictions, if any, of an owner, or of anyone in control of the object, under any state or federal law relating to any controlled substance;
3. The proximity of the object, in time and space, to a direct violation of this act;
4. The proximity of the object to controlled substances;
5. The existence of any residue of controlled substances on the object;
6. Direct or circumstantial evidence of the intent of an owner, or of anyone in control of the object, to deliver it to persons whom he knows, or should reasonably know, intend to use the object to facilitate a violation of this act; the innocence of an owner, or of anyone in control of the object, as to a direct violation of this act shall not prevent a finding that the object is intended for use, or designed for use as drug paraphernalia;
7. Instructions, oral or written, provided with the object concerning its use;
8. Descriptive materials accompanying the object which explain or depict its use;
9. National and local advertising concerning its use;
10. The manner in which the object is displayed for sale;
11. Whether the owner, or anyone in control of the object, is a legitimate supplier of like or related items to the community, such as a licensed distributor or dealer of tobacco products;
12. Direct or circumstantial evidence of the ratio of sales of the object(s) to the total sales of the business enterprise;
13. The existence and scope of legitimate uses for the object in the community;
14. Expert testimony concerning its use.

(o) "Financial institution" means any bank, trust company, savings and loan association, savings bank, mutual savings bank, credit union, or loan company under the jurisdiction of the state or under the jurisdiction of an agency of the United States.

(p) "Immediate precursor" means a substance which the board has found to be and by rule designates as being the principal compound commonly used or produced primarily for use, and which is an immediate chemical intermediary used or likely to be used in the manufacture of a controlled substance, the control of which is necessary to prevent, curtail, or limit manufacture.

(q) "Law enforcement agency" means a governmental unit of one (1) or more persons employed full-time or part-time by the state or a political subdivision of the state for the purpose of preventing and detecting crime and enforcing state laws or local ordinances, employees of which unit are authorized to make arrests for crimes while acting within the scope of their authority.

(r) "Manufacture" means the production, preparation, propagation, compounding, conversion or processing of a controlled substance, and includes extraction, directly or indirectly, from substances of natural origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis, and includes any packaging or repackaging of the substance or labeling or relabeling of its container, except that this term does not include the preparation or compounding of a controlled substance:

(1) By a practitioner as an incident to his administering or dispensing of a controlled substance in the course of his professional practice, or

(2) By a practitioner, or by his authorized agent under his supervision, for the purpose of, or as an incident to, research, teaching, or chemical analysis and not for delivery.

(s) "Marijuana" means all parts of the plant of the genus Cannabis, regardless of species, and whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. It does not include the mature stalks of the plant unless the same are intermixed with prohibited parts thereof, fiber produced from the stalks, oil or cake made from the seeds or the achene of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of the mature stalks (except the resin extracted therefrom or where the same are intermixed with prohibited parts of such plant), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination. Evidence that any plant material or the resin or any derivative thereof, regardless of form, contains any of the chemical substances classified as tetrahydrocannabinols shall create a presumption that such material is "marijuana" as defined and prohibited herein.

(t) "Narcotic drug" means any of the following, whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:

(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate.

(2) Any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in clause 1, but not including the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, isomer, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions of coca leaves which do not contain cocaine or ecgonine.

(u) "Opiate" means any substance having an addiction-forming or addiction-sustaining liability similar to morphine or being capable of conversion into a drug having addiction-forming or addiction-sustaining liability. It does not include, unless specifically designated as controlled under section 37-2702, Idaho Code, the dextrorotatory isomer of 3-methoxy-n-methylmorphinan and its salts (dextromethorphan). It does include its racemic and levorotatory forms.

(v) "Opium poppy" means the plant of the species Papaver somniferum L., except its seeds.

(w) "Peace officer" means any duly appointed officer or agent of a law enforcement agency, as defined herein, including, but not limited to, a duly appointed investigator or agent of the Idaho state police, an officer or employee of the board of pharmacy, who is authorized by the board to enforce this act, an officer of the Idaho state police, a sheriff or deputy sheriff of a county, or a marshal or policeman of any city.

(x) "Person" means individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership or association, or any other legal entity.

(y) "Poppy straw" means all parts, except the seeds, of the opium poppy, after mowing.

(z) "Practitioner" means:

(1) A physician, dentist, veterinarian, scientific investigator, or other person licensed, registered or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of his professional practice or research in this state;

(2) A pharmacy, hospital, or other institution licensed, registered, or otherwise permitted to distribute, dispense, conduct research with respect to or to administer a controlled substance in the course of their professional practice or research in this state.

(aa) "Production" includes the manufacture, planting, cultivation, growing, or harvesting of a controlled substance.

(bb) "Simulated controlled substance" means a substance that is not a controlled substance, but which by appearance or representation would lead a reasonable person to believe that the substance is a controlled substance. Appearance includes, but is not limited to, color, shape, size, and markings of the dosage unit. Representation includes, but is not limited to, representations or factors of the following nature:

(1) Statements made by an owner or by anyone else in control of the substance concerning the nature of the substance, or its use or effect;

(2) Statements made to the recipient that the substance may be resold for inordinate profit; or

(3) Whether the substance is packaged in a manner normally used for illicit controlled substances.

(cc) "State," when applied to a part of the United States, includes any state, district, commonwealth, territory, insular possession thereof, and any area subject to the legal authority of the United States of America.

(dd) "Ultimate user" means a person who lawfully possesses a controlled substance for his own use or for the use of a member of his household or for administering to an animal owned by him or by a member of his household.

(ee) "Utility" means any person, association, partnership or corporation providing telephone and/or communication services, electricity, natural gas or water to the public.

37-2705. SCHEDULE I. (a) The controlled substances listed in this section are included in schedule I.

(b) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, unless specifically excepted, whenever the existence of these isomers, esters, ethers and salts is possible within the specific chemical designation:

(1) Acetyl-alpha-methylfentanyl (N-[1-(1-methyl-2-phenethyl)-4-piperidinyl]-N-phenylacetamide);

(2) Acetylmethadol;

(3) Allylprodine;

(4) Alphacetylmethadol (except levo-alphacetylmethadol also known as levo-alpha-acetylmethadol, levomethadyl acetate or LAAM);

(5) Alphameprodine;

(6) Alphamethadol;

(7) Alpha-methylfentanyl;

(8) Alpha-methylthiofentanyl (N-[1-methyl-2-(2-thienyl)ethyl-4-piperidinyl]-N-phenylpropanamide);

(9) Benzethidine;
(10) Betacetylmethadol;
(11) Beta-hydroxyfentanyl (N-[1-(2-hydroxy-2-phenethyl)-4-piperidinyl]-N-phenylpropanamide);
(12) Beta-hydroxy-3-methylfentanyl (N-(1-(2-hydroxy-2-phenethyl)-3-methyl-4-piperidinyl)-N-phenylpropanamide);
(13) Betameprodine;
(14) Betamethadol;
(15) Betaprodine;
(16) Clonitazene;
(17) Dextromoramide;
(18) Diampromide;
(19) Diethylthiambutene;
(20) Difenoxin;
(21) Dimenoxadol;
(22) Dimepheptanol;
(23) Dimethylthiambutene;
(24) Dioxaphetyl butyrate;
(25) Dipipanone;
(26) Ethylmethylthiambutene;
(27) Etonitazene;
(28) Etoxeridine;
(29) Furethidine;
(30) Hydroxypethidine;
(31) Ketobemidone;
(32) Levomoramide;
(33) Levophenacylmorphan;
(34) 3-Methylfentanyl;
(35) 3-methylthiofentanyl (N-[(3-methyl-1-(2-thienyl)ethyl-4-piperidinyl]-N-phenylpropanamide);
(36) Morpheridine;
(37) MPPP (1-methyl-4-phenyl-4-propionoxypiperidine);
(38) Noracymethadol;
(39) Norlevorphanol;
(40) Normethadone;
(41) Norpipanone;
(42) Para-fluorofentanyl (N-(4-fluorophenyl)-N-[1-(2-phenethyl)-4-piperidinyl] propanamide);
(43) PEPAP (1-(-2-phenethyl)-4-phenyl-4-acetoxypiperidine);
(44) Phenadoxone;
(45) Phenampromide;
(46) Phenomorphan;
(47) Phenoperidine;
(48) Piritramide;
(49) Proheptazine;
(50) Properidine;

(51) Propiram;
(52) Racemoramide;
(53) Thiofentanyl (N-phenyl-N-[1-(2-thienyl)ethyl-4-piperidinyl]-propanamide);
(54) Tilidine;
(55) Trimeperidine.

(c) Any of the following opium derivatives, their salts, isomers and salts of isomers, unless specifically excepted, whenever the existence of these salts, isomers and salts of isomers is possible within the specific chemical designation:

(1) Acetorphine;
(2) Acetyldihydrocodeine;
(3) Benzylmorphine;
(4) Codeine methylbromide;
(5) Codeine-N-Oxide;
(6) Cyprenorphine;
(7) Desomorphine;
(8) Dihydromorphine;
(9) Drotebanol;
(10) Etorphine (except hydrochloride salt);
(11) Heroin;
(12) Hydromorphinol;
(13) Methyldesorphine;
(14) Methyldihydromorphine;
(15) Morphine methylbromide;
(16) Morphine methylsulfonate;
(17) Morphine-N-Oxide;
(18) Myrophine;
(19) Nicocodeine;
(20) Nicomorphine;
(21) Normorphine;
(22) Pholcodine;
(23) Thebacon.

(d) Hallucinogenic substances. Any material, compound, mixture or preparation which contains any quantity of the following hallucinogenic substances, their salts, isomers and salts of isomers, unless specifically excepted, whenever the existence of these salts, isomers, and salts of isomers is possible within the specific chemical designation (for purposes of this paragraph only, the term “isomer” includes the optical, position and geometric isomers):

(1) 4-bromo-2,5-dimethoxy amphetamine;
(2) 2,5-dimethoxyamphetamine;
(3) 4-bromo-2,5-dimethoxyphenethylamine (some other names: alpha-desmethyl DOB, 2C-B);
(4) 2,5-dimethoxy-4-ethylamphetamine (another name: DOET);
(5) 4-methoxyamphetamine (PMA);
(6) 5-methoxy-3,4-methylenedioxy-amphetamine;
(7) 4-methyl-2,5-dimethoxy-amphetamine (DOM, STP);
(8) 3,4-methylenedioxy amphetamine;
(9) 3,4-methylenedioxymethamphetamine (MDMA);

(10) 3,4-methylenedioxy-N-ethylamphetamine (also known as N-ethyl-alpha-methyl-3,4 (methylenedioxy) phenethylamine, and N-ethyl MDA, MDE, MDEA);
(11) N-hydroxy-3,4-methylenedioxyamphetamine (also known as N-hydroxy-alpha-methyl-3,4(methylenedioxy) phenethylamine, and N-hydroxy MDA);
(12) 3,4,5-trimethoxy amphetamine;
(13) Alpha-ethyltryptamine (some other names: etryptamine, 3-(2-aminobutyl) indole);
(14) Bufotenine;
(15) Diethyltryptamine (DET);
(16) Dimethyltryptamine (DMT);
(17) Ibogaine;
(18) Lysergic acid diethylamide;
(19) Marihuana;
(20) Mescaline;
(21) Parahexyl;
(22) Peyote;
(23) N-ethyl-3-piperidyl benzilate;
(24) N-methyl-3-piperidyl benzilate;
(25) Psilocybin;
(26) Psilocyn;
(27) Tetrahydrocannabinols. Synthetic equivalents of the substances contained in the plant, or in the resinous extractives of Cannabis, sp. and/or synthetic substances, derivatives, and their isomers with similar chemical structure and pharmacological activity such as the following:

cis or trans tetrahydrocannabinol, and their optical isomers, excluding dronabinol in sesame oil and encapsulated in a soft gelatin capsule in a drug product approved by the U.S. Food and Drug Administration.

cis or trans tetrahydrocannabinol, and their optical isomers.

cis or trans tetrahydrocannabinol, and its optical isomers. (Since nomenclature of these substances is not internationally standardized, compounds of these structures, regardless of numerical designation of atomic positions are covered.)

(28) Ethylamine analog of phencyclidine (N-ethyl-1-phenylcyclohexylamine (1-phenylcyclohexyl) ethylamine; N-(1-phenylcyclohexyl) ethylamine, cyclohexamine, PCE;
(29) Pyrrolidine analog of phencyclidine: 1-(phenylcyclohexyl)-pyrrolidine, PCPy, PHP;
(30) Thiophene analog of phencyclidine 1-[1-(2-thienyl)-cyclohexyl]-piperidine, 2-thienylanalog of phencyclidine, TPCP, TCP;
(31) 1-[1-(2-thienyl) cyclohexyl] pyrrolidine another name: TCPy;
(32) Spores or mycelium capable of producing mushrooms that contain psilocybin or psilocin.

(e) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Gamma hydroxybutyric acid (some other names include GHB; gamma-hydroxybutyrate, 4-hydroxybutyrate; 4-hyroxybutanoic acid; sodium oxybate; sodium oxybutyrate);
(2) Flunitrazepam (also known as "R2", "Rohypnol");
(3) Mecloqualone;
(4) Methaqualone.

(f) Stimulants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers, and salts of isomers:
(1) Aminorex (some other names: aminoxaphen, 2-amino-5-phenyl-2-oxazoline, or 4,5-dihydro-5-phenyl-2-oxazolamine);
(2) Cathinone (some other names: alpha-aminopropiophenone, 2-aminopropiophenone and norephedrone);
(3) Fenethylline;
(4) Methcathinone (some other names: 2-(methyl-amino)-propiophenone, alpha-(methylamino)-propiophenone, N-methylcathinone, AL-464, AL-422, AL-463 and UR1423);
(5) (t)cis-4-methylaminorex [(+/-)cis-4,5-dihydro-4-methyl-5-phenyl-2-oxazolamine];
(6) N-ethylamphetamine;
(7) N,N-dimethylamphetamine (also known as: N,N-alpha-trimethyl-benzeneethanamine).

(g) Temporary listing of substances subject to emergency scheduling. Any material, compound, mixture or preparation which contains any quantity of the following substances:
(1) N-[1-benzyl-4-piperidyl]-N-phenylpropanamide (benzylfentanyl), its optical isomers, salts and salts of isomers.
(2) N-[1-(2-thienyl)methyl-4-piperidyl]-N-phenylpropanamide (thenylfentanyl), its optical isomers, salts and salts of isomers.
(3) 4-methylaminorex (also known as 2-amino-4-methyl-5-phenyl-2-oxazoline).

37-2707. SCHEDULE II. (a) Schedule II shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section.

(b) Substances, vegetable origin or chemical synthesis. Unless specifically excepted or unless listed in another schedule, any of the following substances whether produced directly or indirectly by extraction from substances of vegetable origin, or independently by means of chemical synthesis, or by a combination of extraction and chemical synthesis:
(1) Opium and opiate, and any salt, compound, derivative, or preparation of opium or opiate, excluding apomorphine, dextrorphan, nalbuphine, nalmefene, naloxone, naltrexone and their respective salts, but including the following:
1. Raw opium;
2. Opium extracts;
3. Opium fluid extracts;
4. Powdered opium;
5. Granulated opium;

6. Tincture of opium;
7. Codeine;
8. Ethylmorphine;
9. Etorphine hydrochloride;
10. Hydrocodone;
11. Hydromorphone;
12. Metopon;
13. Morphine;
14. Oxycodone;
15. Oxymorphone;
16. Thebaine.

(2) Any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of the substances referred to in paragraph (b) (1) of this section, except that these substances shall not include the isoquinoline alkaloids of opium.

(3) Opium poppy and poppy straw.

(4) Coca leaves and any salt, compound, derivative, or preparation of coca leaves, and any salt, compound, derivative, or preparation thereof which is chemically equivalent or identical with any of these substances, but not including decocainized coca leaves or extractions which do not contain cocaine or ecgonine.

(5) Methylbenzoylecgonine (Cocaine - its salts, optical isomers, and salts of optical isomers).

(6) Concentrate of poppy straw (the crude extract of poppy straw in either liquid, solid or powder form which contains the phenanthrine alkaloids of the opium poppy).

(c) Any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, whenever the existence of these isomers, esters, ethers and salts is possible within the specific chemical designation, unless specifically excepted or unless listed in another schedule:

(1) Alfentanil;
(2) Alphaprodine;
(3) Anileridine;
(4) Bezitramide;
(5) Bulk Dextropropoxyphene (nondosage forms);
(6) Carfentanil;
(7) Dihydrocodeine;
(8) Diphenoxylate;
(9) Fentanyl;
(10) Isomethadone;
(11) Levo-alphacetylmethadol (also known as levo-alpha-acetylmethadol, levomethadyl acetate, LAAM);
(12) Levomethorphan;
(13) Levorphanol;
(14) Metazocine;
(15) Methadone;
(16) Methadone -- Intermediate, 4-cyano-2-dimethylamino-4, 4-diphenyl butane;
(17) Moramide -- Intermediate, 2-methyl-3-morpholino-1, 1-diphenyl propane-carboxylic acid;

(18) Pethidine (meperidine);
(19) Pethidine -- Intermediate -- A, 4-cyano-1-methyl-4-phenylpiperidine;
(20) Pethidine -- Intermediate -- B, ethyl-4-phenylpiperidine-4-carboxylate;
(21) Pethidine -- Intermediate -- C, 1-methyl-4-phenylpiperidine-4-carboxylic acid;
(22) Phenazocine;
(23) Piminodine;
(24) Racemethorphan;
(25) Racemorphan;
(26) Sufentanil.

(d) Stimulants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system:

(1) Amphetamine, its salts, optical isomers, and salts of its optical isomers;
(2) Methamphetamine, its salts, isomers, and salts of its isomers;
(3) Phenmetrazine and its salts;
(4) Methylphenidate.

(e) Depressants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a depressant effect on the central nervous system, including its salts, isomers, and salts of isomers, whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Amobarbital;
(2) Glutethimide;
(3) Pentobarbital;
(4) Phencyclidine;
(5) Secobarbital.

(f) Hallucinogenic substances.

(1) Nabiline (another name for nabilone: (+)-trans-3-(1,1-dimethylheptyl)-6,6a,7,8,10,10a-hexahydro-1-hydroxy-6,6-dimethyl-9H-dibenzo[b,d]pyran-9-one) (21 C.F.R. 1308.12 (f)).

(g) Immediate precursors. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances:

(1) Immediate precursor to amphetamine and methamphetamine:
    (a) Anthranilic acid;
    (b) Ephedrine;
    (c) Lead acetate;
    (d) Methylamine;
    (e) Methyl formamide;
    (f) N-methylephedrine;
    (g) Phenylacetic acid;
    (h) Phenylacetone;
    (i) Phenylpropanolamine;
    (j) Pseudoephedrine.

Except that any combination or compound containing ephedrine, or any of its salts and isomers, or phenylpropanolamine or its salts and isomers, or pseudoephedrine, or any of

its salts and isomers which is prepared for dispensing or over-the-counter distribution is not a controlled substance for the purpose of this section, unless such substance is possessed, delivered, or possessed with intent to deliver to another with the intent to manufacture methamphetamine, amphetamine or any other controlled substance in violation of section 37-2732, Idaho Code. For purposes of this provision, the requirements of the uniform controlled substances act shall not apply to a manufacturer, wholesaler or retailer of over-the-counter products containing the listed substances unless such person possesses, delivers, or possesses with intent to deliver to another the over-the-counter product with intent to manufacture a controlled substance.

(2) Immediate precursors to phencyclidine (PCP):

(a) 1-phenylcyclohexylamine;

(b) 1-piperidinocyclohexanecarbonitrile (PCC).

37-2709. SCHEDULE III. (a) Schedule III shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section.

(b) Stimulants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers, (whether optical or geometric), and salts of such isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Those compounds, mixtures, or preparations in dosage unit form containing any stimulant substances listed in schedule II which compounds, mixtures, or preparations were listed on August 25, 1971, as excepted compounds under C.F.R. Sec. 308.32, and any other drug of the quantitative composition shown in that list for those drugs or which is the same except that it contains a lesser quantity of controlled substances.

(2) Benzphetamine;

(3) Chlorphentermine;

(4) Clortermine;

(5) Phendimetrazine.

(c) Depressants. Unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a potential for abuse associated with a depressant effect on the central nervous system:

(1) Any compound, mixture or preparation containing:

i. Amobarbital;

ii. Secobarbital;

iii. Pentobarbital or any salt thereof and one (1) or more other active medicinal ingredients which are not listed in any schedule.

(2) Any suppository dosage form containing:

i. Amobarbital;

ii. Secobarbital;

iii. Pentobarbital or any salt of any of these drugs and approved by the Food and Drug Administration for marketing only as a suppository.

(3) Any substance which contains any quantity of a derivative of barbituric acid or any salt thereof;

(4) Chlorhexadol;
(5) Any drug product containing gamma hydroxybutyric acid, including its salts, isomers, and salts of isomers, for which an application is approved under section 505 of the federal food, drug, and cosmetic act;
(6) Ketamine, its salts, isomers, and salts of isomers - 7285. (Some other names for ketamine: (+/-)-2-(2-chlorophenyl)-2-(methylamino)-cyclohexanone).
(7) Lysergic acid;
(8) Lysergic acid amide;
(9) Methyprylon;
(10) Sulfondiethylmethane;
(11) Sulfonethylmethane;
(12) Sulfonmethane;
(13) Tiletamine and zolazepam or any salt thereof.
(d) Nalorphine.
(e) Narcotic drugs.
(1) Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing limited quantities of any of the following narcotic drugs, or any salts thereof:

(i) Not more than 1.8 grams of codeine, or any of its salts, per 100 milliliters or not more than 90 milligrams per dosage unit, with an equal or greater quantity of an isoquinoline alkaloid of opium;
(ii) Not more than 1.8 grams of codeine, or any of its salts, per 100 milliliters or not more than 90 milligrams per dosage unit, with one (1) or more active, nonnarcotic ingredients in recognized therapeutic amounts;
(iii) Not more than 300 milligrams of dihydrocodeinone, commonly known as hydrocodone, or any of its salts, per 100 milliliters or not more than 15 milligrams per dosage unit, with a fourfold or greater quantity of an isoquinoline alkaloid of opium;
(iv) Not more than 300 milligrams of dihydrocodeinone, commonly known as hydrocodone, or any of its salts, per 100 milliliters or not more than 15 milligrams per dosage unit, with one (1) or more active, nonnarcotic ingredients in recognized therapeutic amounts;
(v) Not more than 1.8 grams of dihydrocodeine, or any of its salts, per 100 milliliters or not more than 90 milligrams per dosage unit, with one (1) or more active, nonnarcotic ingredients in recognized therapeutic amounts;
(vi) Not more than 300 milligrams of ethylmorphine, or any of its salts, per 100 milliliters or not more than 15 milligrams per dosage unit, with one (1) or more ingredients in recognized therapeutic amounts;
(vii) Not more than 500 milligrams of opium per 100 milliliters or per 100 grams, or not more than 25 milligrams per dosage unit, with one (1) or more active, nonnarcotic ingredients in recognized therapeutic amounts;
(viii) Not more than 50 milligrams of morphine, or any of its salts, per 100 milliliters or per 100 grams with one (1) or more active, nonnarcotic ingredients in recognized therapeutic amounts.

(2) Any material, compound, mixture, or preparation containing any of the following narcotic drugs or their salts, as set forth below:

(i) Buprenorphine.
(ii) [Reserved].

(f) Anabolic steroids and human growth hormones. Any drug or hormonal substance, chemically and pharmacologically related to testosterone (other than estrogens, progestins and corticosteroids) that promotes muscle growth including any salt, ester or isomer of a drug or substance listed in this paragraph, if that salt, ester or isomer promotes muscle growth.

(1) Boldenone;
(2) Chlorotestosterone (4-chlorotestosterone);
(3) Chorionic gonadotropin;
(4) Clostebol;
(5) Dehydrochlormethyltestosterone;
(6) Dihydrotestosterone (4-dihydrotestosterone);
(7) Drostanolone;
(8) Ethylestrenol;
(9) Fluoxymesterone;
(10) Formebulone;
(11) Human growth hormones;
(12) Mesterolone;
(13) Methandienone;
(14) Methandranone;
(15) Methandriol;
(16) Methandrostenolone;
(17) Methenolone;
(18) Methyltestosterone;
(19) Mibolerone;
(20) Nandrolone;
(21) Norethandrolone;
(22) Oxandrolone;
(23) Oxymesterone;
(24) Oxymetholone;
(25) Stanolone;
(26) Stanozolol;
(27) Testolactone;
(28) Testosterone;
(29) Testosterone cypionate;
(30) Testosterone enanthate;
(31) Testosterone propionate;
(32) Trenbolone.

Anabolic steroids that are expressly intended for administration through implants to cattle or other nonhuman species, and that are approved by the federal Food and Drug Administration for such use, shall not be classified as controlled substances under this act and shall not be governed by its provisions.

In addition to the penalties prescribed in article IV of the uniform controlled substances act, any person shall be guilty of a felony who prescribes, dispenses, supplies, sells, delivers, manufactures or possesses with the intent to prescribe, dispense, supply, sell, deliver or manufacture anabolic steroids or any other human growth hormone for purposes of enhancing

performance in an exercise, sport or game or hormonal manipulation intended to increase muscle mass, strength or weight without a medical necessity as determined by a physician.

(g) Hallucinogenic substances.

(1) Dronabinol (synthetic) in sesame oil and encapsulated in a soft gelatin capsule in the federal Food and Drug Administration approved product - 7369. (Some other names for dronabinol: (6aR-trans)-6a,7,8,10a-tetrahydro-6,6,9-trimethyl-3-pentyl-6H-dibenzo [b,d]pyran-1-ol or (-)-delta-9-(trans)-tetrahydrocannabinol).

(h) Other substances. Unless specifically excepted, or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substance, including its salts:

(1) Butorphanol.

(i) The board may except by rule any compound, mixture, or preparation containing any stimulant or depressant substance listed in subsections (b) and (c) of this section from the application of all or any part of this act if the compound, mixture, or preparation contains one (1) or more active medicinal ingredients not having a stimulant or depressant effect on the central nervous system, and if the admixtures are included therein in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances which have a stimulant or depressant effect on the central nervous system.

37-2711. SCHEDULE IV. (a) Schedule IV shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section.

(b) Narcotic drugs. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing any of the following narcotic drugs, or their salts calculated as the free anhydrous base or alkaloid, in limited quantities as set forth below:

(1) No more than 1 milligram of difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit;

(2) Dextropropoxyphene (alpha-(+)-4-dimethylamino-1, 2-diphenyl-3-methyl-2-propionoxybutane).

(c) Depressants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers, and salts of isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1 Alprazolam;
(2 Barbital;
(3) Bromazepam;
(4) Camazepam;
(5) Chloral betaine;
(6) Chloral hydrate;
(7) Chlordiazepoxide;
(8) Clobazam;
(9) Clonazepam;
(10) Clorazepate;
(11) Clotiazepam;

(12) Cloxazolam;
(13) Delorazepam;
(14) Diazepam;
(15) Estazolam;
(16) Ethchlorvynol;
(17) Ethinamate;
(18) Ethyl loflazepate;
(19) Fludiazepam;
(20) Flurazepam;
(21) Halazepam;
(22) Haloxazolam;
(23) Ketazolam;
(24) Loprazolam;
(25) Lorazepam;
(26) Lormetazepam;
(27) Mebutamate;
(28) Medazepam;
(29) Meprobamate;
(30) Methohexital;
(31) Methylphenobarbital (mephobarbital);
(32) Midazolam;
(33) Nimetazepam;
(34) Nitrazepam;
(35) Nordiazepam;
(36) Oxazepam;
(37) Oxazolam;
(38) Paraldehyde;
(39) Petrichloral;
(40) Phenobarbital;
(41) Pinazepam;
(42) Prazepam;
(43) Temazepam;
(44) Tetrazepam;
(45) Triazolam;
(46) Quazepam;
(47) Zolpidem.

(d) Fenfluramine - Any material, compound, mixture, or preparation which contains any quantity of the following substances, including its salts, isomers (whether optical, position, or geometric), and salts of such isomers, whenever the existence of such salts, isomers, and salts of isomers is possible:

(1) Fenfluramine.

(e) Stimulants. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation which contains any quantity of the following substances having a stimulant effect on the central nervous system, including its salts, isomers (whether optical, position, or geometric), and salts of such isomers whenever the existence of such salts, isomers, and salts of isomers is possible within the specific chemical designation:

(1) Cathine ((+)-norpseudoephedrine);
(2) Diethylpropion;
(3) Fencamfamin;
(4) Fenproporex;
(5) Mazindol;
(6) Mefenorex;
(7) Pemoline (including organometallic complexes and chelates thereof);
(8) Phentermine;
(9) Pipradrol;
(10) Sibutramine;
(11) SPA ((-)-1-dimethylamino-1,2-diphenylethane).

(f) Other substances. Unless specifically excepted, or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substance, including its salts:

(1) Pentazocine.

(g) The board may except by rule any compound, mixture, or preparation containing any depressant substance listed in subsection (c) of this section from the application of all or any part of this act if the compound, mixture, or preparation contains one (1) or more active medicinal ingredients not having a depressant effect on the central nervous system, and if the admixtures are included therein in combinations, quantity, proportion, or concentration that vitiate the potential for abuse of the substances which have a depressant effect on the central nervous system.

37-2713. SCHEDULE V. (a) Schedule V shall consist of the drugs and other substances, by whatever official name, common or usual name, chemical name, or brand name designated, listed in this section.

(b) Narcotic drugs. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture, or preparation containing any of the following narcotic drugs and their salts, as set forth below.

(c) Narcotic drugs containing nonnarcotic active medicinal ingredients. Any compound, mixture, or preparation containing any of the following limited quantities of narcotic drugs or salts thereof, which shall include one (1) or more nonnarcotic active medicinal ingredients in sufficient proportion to confer upon the compound, mixture, or preparation, valuable medicinal qualities other than those possessed by the narcotic drug alone:

(1) Not more than 200 milligrams of codeine per 100 milliliters or per 100 grams;
(2) Not more than 100 milligrams of dihydrocodeine per 100 milliliters or per 100 grams;
(3) Not more than 100 milligrams of ethylmorphine per 100 milliliters or per 100 grams;
(4) Not more than 2.5 milligrams of diphenoxylate and not less than 25 micrograms of atropine sulfate per dosage unit;
(5) Not more than 100 milligrams of opium per 100 milliliters or per 100 grams;
(6) Not more than 0.5 milligrams difenoxin and not less than 25 micrograms of atropine sulfate per dosage unit.

(d) Other substances. Unless specifically excepted or unless listed in another schedule, any material, compound, mixture or preparation which contains any quantity of the following substances, including its salts:

(1) Propylhexedrine (except as Benzedrex [TM] inhaler);

(2) Pyrovalerone.

37-2732C. USING OR BEING UNDER THE INFLUENCE—PENALTIES. (a) Except as authorized in this chapter, it is unlawful for any person on a public roadway, on a public conveyance, on public property or on private property open to the public, to use or be under the influence of any controlled substance specified in subsection (b), (c), (d), (e) and (f) of section 37-2705, Idaho Code, or subsection (b), (c) and (d) of section 37-2707, Idaho Code, or subsection (c)(5) of section 37-2709, Idaho Code, or any narcotic drug classified in schedule III, IV or V, except when administered by or under the direction of a person licensed by the state to dispense, prescribe, or administer controlled substances. It shall be the burden of the defense to show that it comes within this exception.

(b) Any person convicted of violating the provisions of subsection (a) of this section is guilty of a misdemeanor and is punishable by imprisonment in a county jail for not more than six (6) months, or by a fine not exceeding one thousand dollars ($1,000) or by both.

(c) Any person who is convicted of violating subsection (a) of this section, when the offense occurred within five (5) years of that person being convicted of two (2) or more separate violations of that subsection and who refuses to complete a licensed drug rehabilitation program offered by the court pursuant to subsection (d) shall be punished by imprisonment in the county jail for a mandatory minimum period of time of not less than one hundred twenty (120) days, nor more than one (1) year. The court may not reduce the mandatory minimum period of incarceration provided in this subsection.

(d) The court may, when it would be in the interest of justice, permit any person convicted of a violation of subsection (a) of this section, punishable under subsection (b) or (c) of this section, to complete a licensed drug rehabilitation program in lieu of part or all of the imprisonment in the county jail. As a condition of sentencing, the court may require the offender to pay all or a portion of the drug rehabilitation program. In order to alleviate jail overcrowding and to provide recidivist offenders with a reasonable opportunity to seek rehabilitation pursuant to this subsection, counties are encouraged to include provisions to augment licensed drug rehabilitation programs in their substance abuse proposals and applications submitted to the state for federal and state drug abuse funds.

(e) Notwithstanding subsection (a), (b) or (c) of this section, or any other provision of law to the contrary, any person who is unlawfully under the influence of cocaine, cocaine base, methamphetamine, heroin, or phencyclidine while in the immediate personal possession of a loaded, operable firearm is guilty of a public offense and is punishable by imprisonment in the county jail or the state prison for not more than one (1) year. As used in this subsection, “immediate possession” includes, but is not limited to, the interior passenger compartment of a motor vehicle.

(f) Every person who violates subsection (e) of this section is punishable upon the second and each subsequent conviction by imprisonment in the state prison for a period of time not in excess of four (4) years.

(g) In addition to any fine assessed under this section and notwithstanding the provisions of section 19-4705, Idaho Code, the court may, upon conviction, assess an additional cost to the defendant in the way of restitution, an amount not to exceed two hundred dollars ($200) to the arresting and/or prosecuting agency or entity. These funds shall be remitted to the appropriate fund to offset the expense of toxicology testing.

TITLE 72
WORKER'S COMPENSATION AND RELATED LAWS —INDUSTRIAL COMMISSION
CHAPTER 17
IDAHO EMPLOYER ALCOHOL AND DRUG-FREE WORKPLACE ACT

72-1701. PURPOSE AND INTENT OF ACT. (1) The purpose of this act is to promote alcohol and drug-free workplaces and otherwise support employers in their efforts to eliminate substance abuse in the workplace, and thereby enhance workplace safety and increase productivity. This act establishes voluntary drug and alcohol testing guidelines for employers that, when complied with, will find an employee who tests positive for drugs or alcohol at fault, and will constitute misconduct under the employment security law as provided in section 72-1366, Idaho Code, thus resulting in the denial of unemployment benefits.

(2) It is the further purpose of this act to promote alcohol and drug-free workplaces in order that employers in this state be afforded the opportunity to maximize their levels of productivity, enhance their competitive positions in the marketplace and reach their desired levels of success without experiencing the cost delays and tragedies associated with work-related accidents resulting from substance abuse by employees.

72-1702. TESTING FOR DRUGS AND/OR ALCOHOL. (1) It is lawful for a private employer to test employees or prospective employees for the presence of drugs or alcohol as a condition of hiring or continued employment, provided the testing requirements and procedures are in compliance with 42 U.S.C. section 12101.

(2) Nothing herein prohibits an employer from using the results of a drug or alcohol test conducted by a third party including, but not limited to, law enforcement agencies, hospitals, etc., as the basis for determining whether an employee has committed misconduct.

(3) This act does not change the at-will status of any employee.

72-1703. COST OF TESTING OF CURRENT EMPLOYEES. (1) Any drug or alcohol testing by an employer of current employees shall be deemed work time for purposes of compensation.

(2) All costs of drug and alcohol testing for current employees conducted under the provisions of this act, unless otherwise specified in section 72-1706(2), Idaho Code, shall be paid by the employer.

72-1704. REQUIREMENTS FOR SAMPLE COLLECTION AND TESTING. All sample collection and testing for drugs and alcohol under this act shall be performed in accordance with the following conditions:

(1) The collection of samples shall be performed under reasonable and sanitary conditions;

(2) The employer or employer's agent who is responsible for collecting the sample will be instructed as to the proper methods of collection;

(3) Samples shall be collected and tested with due regard to the privacy of the individual being tested and in a manner reasonably calculated to prevent substitutions or interference with the collection or testing of reliable samples;

(4) Sample collection shall be documented and the documentation procedures shall include:

(a) Labeling of samples so as reasonably to preclude the possibility of misidentification of the person tested in relation to the test result provided; and

(b) Handling of samples in accordance with reasonable chain-of-custody and confidentiality procedures;

(5) Sample collection, storage and transportation to the place of testing shall be performed so as reasonably to preclude the possibility of sample contamination and/or adulteration;

(6) Sample testing shall conform to scientifically accepted analytical methods and procedures;

(7) Drug testing shall include a confirmatory test before the result of any test can be used as a basis for action by an employer under sections 72-1707 and 72-1708, Idaho Code. A confirmatory test refers to the mandatory second or additional test of the same sample that is conducted by a laboratory utilizing a chromatographic technique such as gas chromatography-mass spectrometry or another comparable reliable analytical method;

(8) Positive alcohol tests resulting from the use of an initial screen saliva test, must include a confirmatory test that utilizes a different testing methodology meant to demonstrate a higher degree of reliability;

(9) Positive alcohol tests resulting from the use of a breath test must include a confirmatory breath test conducted no earlier than fifteen (15) minutes after the initial test; or the use of any other confirmatory test meant to demonstrate a higher degree of reliability.

72-1705. EMPLOYER'S WRITTEN TESTING POLICY—PURPOSES AND REQUIREMENTS FOR COLLECTION AND TESTING. (1) An employer must have a written policy on drug and/or alcohol testing that is consistent with the requirements of this act, including a statement that violation of the policy may result in termination due to misconduct.

(2) An employer will receive the full benefits of this act, even if its drug and alcohol testing policy does not conform to all of the statutory provisions, if it follows a drug or alcohol testing policy that was negotiated with its employees' collective bargaining representative or that is consistent with the terms of the collective bargaining agreement.

(3) Testing for the presence of drugs or alcohol by an employer shall be carried out within the terms of a written policy that has been communicated to affected employees, and is available for review by prospective employees.

(4) The employer must list the types of tests an employee may be subject to in their written policy, which may include, but are not limited to, the following:

(a) Baseline;

(b) Preemployment;

(c) Post-accident;

(d) Random;

(e) Return to duty;

(f) Follow-up;
(g) Reasonable suspicion.

72-1706. RIGHT OF EMPLOYEE OR PROSPECTIVE EMPLOYEE TO EXPLAIN POSITIVE TEST RESULT AND REQUEST FOR RETEST. (1) Any employee or prospective employee who tests positive for drugs or alcohol must be given written notice of that test result, including the type of substance involved, by the employer. The employee must be given an opportunity to discuss and explain the positive test result with a medical review officer or other qualified person.

(2) Any employee or prospective employee who has a positive test result may request that the same sample be retested by a mutually agreed upon laboratory. A request for retest must be done within seven (7) working days from the date of the first confirmed positive test notification and may be paid for by the employee or prospective employee requesting the test. If the retest results in a negative test outcome, the employer will reimburse the cost of the retest, compensate the employee for his time if suspended without pay, or if terminated solely because of the positive test, the employee shall be reinstated with back pay.

72-1707. DISCHARGE FOR WORK-RELATED MISCONDUCT—FAILURE OR REFUSAL OF TESTING. An employer establishes that an employee was discharged for work-related misconduct, as provided in section 72-1366, Idaho Code, upon a showing that the employer has complied with the requirements of this chapter and that the discharge was based on:

(1) A confirmed positive drug test or a positive alcohol test, as indicated by a test result of not less than .02 blood alcohol content (BAC), but greater than the level specified in the employer's substance abuse policy;

(2) The employee's refusal to provide a sample for testing; or

(3) The employee's alteration or attempt to alter a test sample by adding a foreign substance for the purpose of making the sample more difficult to analyze; or

(4) The employee's submission of a sample that is not his or her own.

72-1708. EMPLOYER'S DISCIPLINARY OR REHABILITATIVE ACTIONS BASED ON TESTING—CLAIMANT INELIGIBLE FOR BENEFITS. (1) Unless otherwise prohibited, upon receipt of a confirmed positive drug or alcohol test result or other proof which indicates a violation of an employer's written policy, or upon the refusal of an employee to provide a test sample, or upon an employee's alteration of or attempt to alter a test sample, an employer may use that test result or the employee's conduct as the basis for disciplinary or refusal-to-hire action that will result in a claimant's ineligibility to receive benefits under the provisions of section 72-1366(4), (5), (6) or (7), Idaho Code. Actions by the employer may include, but are not limited to, the following:

(a) A requirement that the employee enroll in an employer-approved rehabilitation, treatment, or counseling program, which may include additional drug or alcohol testing, as a condition of continued employment;

(b) Suspension of the employee with or without pay for a period of time;

(c Termination of the employee;

(d) Other disciplinary measures in conformance with the employer's usual procedures, including any collective bargaining agreement.

(2) Action taken pursuant to this section shall not create any cause of action against the employer.

72-1709. FAILURE OF CLAIMANT TO ACCEPT SUITABLE WORK. If a claimant for unemployment benefits does not accept otherwise suitable work, as contemplated in section 72-1366(4), (6) or (7), Idaho Code, because he is required to take a preemployment drug or alcohol test, the claimant has failed to accept suitable work, unless the claimant is required to pay for costs associated with a negative drug or alcohol test result.

72-1710. LIMITATIONS OF EMPLOYER LIABILITY. (1) No cause of action arises in favor of any person based upon the absence of an employer established program or policy of drug or alcohol testing in accordance with this chapter.

(2) No cause or action arises in favor of any person against an employer for any of the following:

(a) Failure to test for drugs or alcohol, or failure to test for a specific drug or other substance;

(b) Failure to test for, or if tested, a failure to detect, any specific drug or other physical abnormality, problem or defect of any kind; or

(c) Termination or suspension of any drug or alcohol testing program or policy.

72-1711. FALSE TEST RESULT—PRESUMPTION AND LIMITATION OF DAMAGES IN CLAIM AGAINST EMPLOYER. (1) No cause of action arises in favor of any person against an employer who has established a program of drug and alcohol testing in accordance with this chapter, and who has taken any action based on its established substance abuse and/or disciplinary policies, unless the employer's action was based on a false test result, and the employer knew or clearly should have known that the result was in error.

(2) In any claim where it is alleged that an employer's action was based on a false test result:

(a) There is a rebuttable presumption that the test result was valid if the employer complied with the provisions of section 72-1704, Idaho Code;

(b) The employer is not liable for monetary damages if his reliance on a false test result was reasonable and in good faith; and

(c) There is no employer liability for any action taken related to a "false negative" drug or alcohol test.

72-1712. CONFIDENTIALITY OF INFORMATION. (1) All information, interviews, reports, statements, memoranda or test results, written or otherwise, received through a substance abuse testing program shall be kept confidential, and are intended to be used only for an employer's internal business use; or in a proceeding related to any action taken by or against an

employer under section 72-1707, 72-1708 or 72-1711, Idaho Code, or other dispute between the employer and the employee or applicant; or as required to be disclosed by the United States department of transportation law or regulation or other federal law; or as required by service of legal process.

(2) The information described in subsection (1) of this section shall be the property of the employer.

(3) An employer, laboratory, medical review officer, employee assistance program, drug or alcohol rehabilitation program and their agents, who receive or have access to information concerning test results shall keep the information confidential, except as provided in subsection (4) of this section.

(4) Nothing in this chapter prohibits an employer from using information concerning an employee or job applicant's substance abuse test results in a lawful manner with respect to that employee or applicant as provided in chapter 2, title 44, Idaho Code.

72-1713. EMPLOYEE NOT "DISABLED." An employee or prospective employee whose drug or alcohol test results are verified or confirmed as positive in accordance with the provisions of this act shall not, by virtue of those results alone, be defined as a person with a "disability" for purposes of chapter 59, title 67, Idaho Code.

72-1714. NO PHYSICIAN-PATIENT RELATIONSHIP CREATED. A physician-patient relationship is not created between an employee or prospective employee, and the employer or any person performing a drug or alcohol test, solely by the establishment of a drug or alcohol testing program in the workplace.

72-1715. PUBLIC ENTITIES MAY CONDUCT PROGRAMS. The state of Idaho and any political subdivision thereof may conduct drug and alcohol testing of employees under the provisions of this chapter and as otherwise constitutionally permitted.

72-1716. IMPLEMENTATION OF ALCOHOL AND DRUG-FREE WORKPLACE PROGRAM—QUALIFICATION OF EMPLOYER PREMIUM REDUCTION. (1) For each policy of worker's compensation insurance issued or renewed in the state on or after July 1, 1999, a reduction in the premium for the policy may be granted if the insurer determines the insured has established and maintains an alcohol and drug-free workplace program that complies with the requirements of sections 72-1701 through 72-1715, Idaho Code.

(2) The state of Idaho or any political subdivision thereof that conducts drug and alcohol testing of all those employees and prospective employees for whom such testing is not constitutionally prohibited shall qualify for, and may be granted, the employer premium reduction set forth in subsection (1) of this section.

72-1717. STATE CONSTRUCTION CONTRACTS. (1) In order to be eligible for the award of any state contract for the construction or improvement of any public property or publicly owned buildings, contractors shall meet the following requirements:

(a) Provide a drug-free workplace program that complies with the provisions of this chapter and as otherwise constitutionally permitted for employees, including temporary employees, and maintain such program throughout the duration of the contract;

(b) Subcontract work under state construction contracts only to those subcontractors meeting the requirements of subsection (1)(a) of this section.

(2) Any contractor submitting a bid for a state construction contract, required to comply with the provisions of this section, shall submit an affidavit along with its bid on the project verifying its compliance with the provisions of this section.