# LEGAL LIABILITY ISSUES CONCERNING PRE-ADJUDICATORY DRUG TESTING OF DETAINED JUVENILES

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## SUMMARY

When a juvenile is placed in a "secure facility" in Virginia, facility staff must "gather such information from the juvenile ... as is reasonably available and deemed necessary by the facility staff."[1] While there is no explicit statutory authority for a juvenile detention center to perform drug screening urinalysis on entering juveniles,[2] substance abuse information is arguably both "reasonably available" through relatively non-invasive urinalysis and "necessary" to the proper care and treatment of resident juveniles.

In order to compel a juvenile to provide a urine sample for testing, certain common-law, statutory, and constitutional barriers must be overcome. This paper discusses the requirements for obtaining a valid consent to drug screening, the constitutionality of mandatory drug testing without consent, the permissible uses of positive drug test results, and the possible liabilities of a juvenile detention center and other officials for unlawful drug testing or use of test results. The implementation of the Virginia statute allowing post-adjudicatory drug testing is also briefly discussed. Finally, recommendations are provided for implementing legally sound drug testing procedures for juveniles in detention.

It is critical to note one point at the outset. This report and the recommendations contained herein are NOT meant to serve as legal advice or counsel to individuals, detention centers or any other agency, and should not be construed as such. Legal advice can only be provided by local counsel and/or the Virginia Attorney General's Office. For both these reasons, we strongly urge detention centers to consult with their local counsel.

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1 Va. Code Ann. § 16.1-248.2 (Michie 1999).

2 There is explicit statutory authority to test post-adjudicated juveniles for substance abuse. Va. Code Ann. § 16.1-273 (Michie 1999).

## *CONSENT TO BE TESTED*

If proper consent is granted by an authorized party, a juvenile detention center can screen a juvenile for drug use. Under Virginia Code §54.1-2969(D), a minor is considered "an adult for the purpose of consenting to ... [m]edical or health services needed in the case of outpatient care, treatment or rehabilitation for substance abuse...."[3] (Thus, a juvenile would not need parental consent to receive outpatient substance abuse treatment.) While the term "health services" is not defined in the Code, regulations pertaining to health insurance plans define "health care services" as "the furnishing of services to any individual for the purpose of preventing, alleviating, curing, or healing human illness, injury or physical disability."[4] Since drug testing could be considered both a preventive measure (to prevent future addiction) and a necessary step in the diagnosis of an existing substance abuse problem, a urine screen probably fits within the definition of "medical or health services" under Virginia Code §54.1-2969.

It is unclear, however, whether consent to drug testing in detention is analogous to testing in the outpatient treatment context.[5] In fact, urine drug screens have been likened to blood alcohol tests in DUI stops, which are considered searches under the Fourth Amendment, even when conducted outside a law enforcement context.[6] Urine tests also

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3 VA. Code Ann. § 54.1-2969 (D)(3) (Michie 1999).

4 VA Code Ann. § 38.2-5800 (Michie 1999).

5 *See Skinner v. Railway Labor Executives' Ass'n,* 489 U.S. 602 (1989); *National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989).

6 489 U.S. at 616.

can reveal private medical information (such as pregnancy, diabetes or epilepsy), in addition to drug use, and the collection process itself invades privacy.[7]

A warrantless and suspicionless drug test can be lawfully conducted voluntarily if the individual consents to testing. Consent is not invalidated for lack of voluntariness, even if the searching government official fails to inform the party of the legal risks involved or the party's right to refuse consent. Whether consent was voluntary, depends on a case-by-case assessment of the "totality of the circumstances," so the mere fact of custody itself does not make the consent involuntary;[8] nor, apparently, does the age or mental status of the person necessarily render the consent invalid, except to the extent it would make voluntary consent unlikely under the circumstances (though it is certainly debatable whether a juvenile would feel free to refuse a drug test while in detention).

To summarize, under either the "health services" view or the Fourth Amendment view, the juvenile's consent to be tested would probably be sufficient to render a drug test legal. But because voluntariness of the consent is subject to a case-by-case determination, the best drug testing policy would obtain consent from the juvenile as well as from a parent or guardian.

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7 *Id.* at 617.

8 *See, e.g., Reynolds v. Com.,* 388 S.E.2d 659, 665 (Va. App., 1990) (appellant's claim that "[wife] was upset, isolated, and under arrest at the time she signed the consent form" does not make consent involuntary).

## *TESTING IN THE ABSENCE OF CONSENT*

Under the Fourth Amendment, a search may be performed without consent so long as it is reasonable[9] if "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[10] If the search is not conducted to discover evidence of crimes, but for other reasons (e.g., keeping discipline and order in schools[11]), a search need not be based on probable cause and does not require a warrant if such requirements would interfere with the legitimate goals of the search. Such search policies are evaluated by balancing "individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."[12] Here, key questions include: 1) What is the individual's legitimate expectation of privacy in this context? 2) What is the character of the intrusion that is complained of? and 3) What is the nature of the government's interest? The answer to the last question should "describe[ ] an interest that appears important enough to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy."[13]

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9 *See Skinner*, 489 U.S. at 619.

10 *Id.* (citing *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

11 *See New Jersey v. T.L.O.*, 469 U.S. 325 (1985).

12 *Von Raab*, 489 U.S. at 665-666.

13 *Vernonia School District v. Acton*, 515 U.S. 646, 661 (1995).

There is apparently no case directly on point concerning the drug testing of juveniles in detention, but in *Vernonia School District v. Acton*,[14] the Supreme Court held that random drug testing of student athletes at a public school was constitutional. This case informs the constitutionality of drug testing in juvenile detention. In answering the first question (what is the individual's legitimate expectation of privacy?), the Court noted the importance of the fact that the students being tested were school children, so the state stood *in loco parentis* over the children.[15] Because schools often conduct routine medical screenings, "[p]articularly with regard to medical examinations and procedures, ... 'students within the school environment have a lesser expectation of privacy than members of the population generally.'"[16] Turning to the second question (what is the character of the intrusion?), the Court noted that while the collection of urine samples itself invades upon "an excretory function traditionally shielded by great privacy," the degree of intrusion on that privacy depends on the manner of collecting the sample.[17] In this case, a monitor of the same sex stood behind the boys while they produced the sample at a urinal, or stood near the closed stall in the case of girls, to listen for sounds of tampering. "These conditions are nearly identical to those typically encountered in public restrooms," so the privacy interests in the act of urination were "negligible."[18] Another privacy interest concerns the information revealed by the drug screen. The Court considered the following

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14 *Id.*

15 *Id.* at 654.

16 *Id.* at 656 (quoting *T.L.O.*, 469 U.S. at 348).

17 *Id.* at 658 (quoting *Skinner*, 489 U.S. at 626).

18 *Id.*

factors in determining that this invasion of privacy was "not significant":[19] a) the tests only looked for drugs, not other medical conditions; b) the tests performed on the samples did not vary according to the student being tested; c) the results of the tests were disclosed "only to a limited class of school personnel who [had] a need to know; and they [were] not turned over to law enforcement authorities or used for any internal disciplinary function;"[20] and d) the students disclosed medications they were taking only to the medical personnel conducting the test.[21]

The Court then turned to the third inquiry: whether the nature and immediacy of the government's concern was important enough to warrant the search policy, and whether the method of meeting the concern was efficacious. Because "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe," the government's concern in deterring drug use among children was very important, as was the government's interest in preventing athletic competition under the influence of drugs.[22] The Court also refused to find only the least intrusive means (i.e., testing on suspicion of use) to be valid; "accusatory" drug testing "transforms the process into a badge of shame" and depends on a teacher's ability to recognize symptoms of drug use.[23] Teachers may

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19 *Id.* at 660.

20 *Id.* at 658.

21 *Id.* at 659.

22 *Id.* at 661.

23 *Id.* At 663-664.

be inclined to "impose testing arbitrarily upon troublesome but not drug-likely students."[24] Thus, suspicion-based testing might be even worse than random drug testing policies.

Applying the *Vernonia* analysis in the juvenile detention context, the first inquiry concerns the extent of the legitimate expectation of privacy of juveniles in detention. It is clear from *Vernonia* that the mere fact that a detained juvenile is placed under the supervision of the state significantly reduces the legitimate expectation of privacy. But the students being tested in *Vernonia* were voluntarily participating in the school's athletic program, a fact which undoubtedly affected the Court's analysis. In *Bell v. Wolfish*,[25] however, where the Court considered the constitutionality of room and body-cavity searches of adult pretrial detainees, the Court held that "given the realities of institutional confinement, any reasonable expectation of privacy that a detainee retained necessarily would be of a diminished scope," and, the invasion of privacy would be about the same whether conducted in a detention center or a school. Therefore, drug testing in detention is probably not more of an intrusion than it was in *Vernonia*.

The second inquiry involves the nature of the government's interests in testing the juveniles. Many of the concerns in the school context, such as deterring and treating drug abuse among youth and maintaining order and discipline, apply equally (or more so) in the

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*Id.* In fact, the Court's analysis in *Skinner*, *Von Raab*, and *Vernonia* all favor standardized policies over discretionary policies, which increase the potential for misuse or abuse of the testing, a potential which would weigh in favor of requiring a warrant to be issued by a neutral magistrate. *See Von Raab*, 489 U.S. at 667 ("Because the Service does not make a discretionary determination to search based on a judgment that certain conditions are present, there are simply no 'special facts for a neutral magistrate to evaluate.'"); *Skinner*, 489 U.S. at 662 ("Indeed, in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate.").

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441 U.S. 520, 557 (1979).

detention context. Juvenile detention centers in Virginia are required to "ascertain the juvenile's need for a mental health assessment" and enlist the community services board to conduct that assessment if necessary.[26] Virginia's Administrative Code obligates all juvenile facilities "[t]o prevent newly-arrived residents who pose a health or safety threat to themselves or others from being admitted to the general population," to require all residents to "immediately upon admission undergo a preliminary health screening," and to provide needed health care to residents. These legal obligations to provide medical and mental health care suggest a legitimate government interest in testing juvenile detainees for drugs. A recent national study showed that 25 to 30% of juveniles admitted to detention centers tested positive for drug use,[27] so it is clear that drug abuse is a problem among these children. Since drug use correlates with delinquency and discipline problems, the juvenile justice system has a particular interest in intervening if a juvenile in its custody is abusing drugs. In many cases, it may be necessary for the detention center to provide specialized medical or psychiatric care for detainees who experience physical withdrawal symptoms or have difficulty coping emotionally as a result of drug abuse. A juvenile's use of drugs may also be a factor in determining whether the juvenile should remain in detention. (As for the "efficaciousness" prong of the inquiry, because juveniles must already undergo medical and mental health screens at intake, the most practicable means of ascertaining drug use would be to include a urine screen along with the other tests being performed at that time.)

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26 VA Code § 16.1-248.2.

27 Office of Juvenile Justice and Delinquency Programs, Dep't. of Justice, *Drug Identification and Testing in the Juvenile Justice Program* 25 (May 1998).

In summary, based on *Vernonia*, drug testing in detention is probably constitutional, but: 1) the procedure should be standardized, leaving little room for discretion; 2) monitors of the same sex may stand in the bathroom with the test subject to prevent tampering, but should only listen for sounds of tampering and should not actually observe the act of urination;[28] 3) the sample should only be tested for drugs unless other medical tests would ordinarily be justifiable in order to determine health care needs; 4) the results of the tests should only be disclosed to the juvenile and those (such as medical personnel) with a specific need to know the results; 5) the test results should not be used to initiate prosecution nor for internal discipline, but only to determine security issues and health care needs;[29] and 6) the test subject should be required to disclose lawful use of medications only to the medical personnel responsible for his health care and/or to the lab testing the sample.

## *USES OF TEST RESULTS*

Once a drug test has been legally performed, positive results may be used by the juvenile detention center to identify and treat substance abusers. However, cases may arise in which prosecutors seek to use the positive test results in a proceeding against the juvenile. Test results conceivably might be used to impeach the juvenile's testimony (e.g., to contradict a denial of drug use), provide evidence of a relationship to drug distribution

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Other anti-tampering safeguards include tinting the toilet water so it cannot be used to adulterate the sample and testing the temperature of the sample immediately after it is produced.

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If law enforcement authorities plan to use the results for prosecution, they probably will still be required to obtain a warrant for the test in advance or request the judge to order a release of the detention center records under 42 C.F.R. Part 2.

and use (e.g., to establish an association between a juvenile and other criminals or criminal activity), or to argue for the enhancement of a disposition (e.g., that the juvenile undergo substance abuse treatment as a condition of release, or to impose a longer sentence of detention).

Both the release of drug test results without consent and the use of drug test results in a criminal prosecution violates the Federal Drug Abuse, Prevention, Treatment, and Rehabilitation Act (42 C.F.R. Part 2).[30] This regulation prohibits (with few exceptions) the release of any information identifying a "patient" as a substance abuser if that information is obtained by a "federally assisted drug abuse program" for the purpose of treating, diagnosing or making a treatment referral for substance abuse.[31] The term "patient" includes anyone who has been given a substance abuse diagnosis at a federally assisted program, and anyone who, having been arrested on a criminal charge, "is identified as an alcohol or drug abuser in order to determine that individual's eligibility to participate in a program."[32] A "federally assisted" program includes facilities receiving any Federal funds, or any facility which is tax-exempt or qualifies as a charitable organization for the purposes of tax deductions.[33] Thus, these federal regulations likely apply to most juvenile detention facilities in Virginia.

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30 42 C.F.R. § 2.1(c) (1999).

31 42 C.F.R. at § 2.12.

32 42 C.F.R. at § 2.11.

33 42 C.F.R. at § 2.12(b).

Notice of the Federal regulations must be given as soon as possible after the patient (or juvenile) is admitted [see sample form, Appendix 1].[34] Records may be released with the patient's written, informed consent, and the consent form must contain certain elements [see sample form, Appendix 2].[35] A minor patient can consent to release of records under the same circumstances that a minor could consent to mental health treatment under state law, so in Virginia, only the minor's consent is needed to release records.[36] Regardless of whether the records are obtained with or without a patient's consent, they cannot be used as evidence in a criminal proceeding against the patient, nor can they be used to investigate any charges against the patient.[37]

One exception to the disclosure and use requirements is when the diagnosis of substance use is made "solely for the purpose of providing evidence for use by law enforcement authorities."[38] Furthermore, a court may authorize disclosure of confidential communications that indicate a threat to life or serious bodily injury, or are necessary for the investigation or prosecution of an "extremely serious crime," or are in connection with a proceeding (other than a criminal prosecution of the patient) in which the patient offers

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34 42 C.F.R. at § 2.22.

35 42 C.F.R. at § 2.31.

36 42 C.F.R. at § 2.14. *cf.* Va. Code Ann. §54.1-2969(D).

37 42 C.F.R. at § 2.12(d).

38 42 C.F.R. §2.12(e)(4). But note that, based on the discussion of Fourth Amendment searches above, the patient would either have to consent to the test for that purpose, or law enforcement authorities would have to obtain a warrant for performing the test, based on probable cause. Since b eing under the influence of drugs is not itself a crime, a magistrate would probably not be inclined to issue such a warrant unless it were in the context of a DUI prosecution, in which case Virginia's implied consent law controls.

evidence pertaining to the content of the confidential communications.[39] In the case of prosecutions of the patient, however, the court must find that the information is of substantial value to the prosecution, is not otherwise available, and that "potential injury to the patient, to the physician-patient relationship and to the ability of the program to provide services to other patients, is outweighed by the public interest and the need for disclosure."[40] Otherwise, even if the testing was conducted for the purpose of treatment as a condition of the disposition, the patient must provide written consent for release of the test results, and the results can only be disclosed to those officials who need the information, and can only be used for the purpose of either treatment or determining fulfillment of a release condition.[41]

Thus, under the federal regulations, drug testing in juvenile detention facilities exposes juveniles to little or no legal jeopardy. Federal law essentially forbids substance abuse records to be disclosed or used in criminal proceedings against a patient unless the patient has admitted to a very serious crime in the course of being evaluated. While juvenile proceedings are not technically criminal in nature, federal law also provides that non-criminal uses of substance abuse records can only be ordered by a court if the information is not otherwise obtainable and the public interest weighs in favor of disclosure.[42]

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39 42 C.F.R. § 2.63.

40 42 C.F.R. § 2.65.

41 42 C.F.R. § 2.35.

42 42 C.F.R. at § 2.1(a). It is also possible that a court would find that juvenile deli nquency proceedings are considered "criminal proceedings" for the purposes of 42 C.F.R. Part 2

Additionally, under the Virginia Administrative Code, any facility operated by the Virginia Department of Mental Health, Mental Retardation and Substance Abuse Services is required to comply with the regulations in 42 C.F.R. Part 2,[43] so a juvenile being treated at a facility such as Western State Hospital would be similarly protected. Community Services Boards, which under Virginia law are to perform the mental health assessments for juvenile detention facilities, must also comply with the federal regulation.

Finally, Virginia law provides that any statement that a child makes to an intake officer or probation officer in the course of a mental health screening or assessment, or as part of the intake process, is not admissible at any stage of the proceedings against him.[44]

To summarize, properly obtained drug test results may be used to further the care and treatment of juvenile substance abusers held in detention facilities. State and federal laws are sensitive to the use of drug test results against substance abusers. These laws proscribe prosecutorial use of the drug test results and, except in unusual circumstances (as described above), of all other information obtained for the purpose of drug screening and treatment.

### *LIABILITY FOR ILLEGAL TESTING OR USE OF RESULTS*

A juvenile's consent to be tested while in detention can be challenged on the basis of factual circumstances tending to make the consent appear coerced or otherwise invalid. For example, if the consent were solicited in such a way as to mislead the juvenile into

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43 12 Va. Admin. Code 35-110-110 (1999).

44 Va Code § 16.1-261 (Michie 1999). But note that a drug test performed by an intake officer may not be considered a "statement," though it still falls under the Fourth Amendment analysis.

believing the test was only to be used for treatment, a court may also find the consent invalid as to the use of the test against him.[45]

If a court were to find a juvenile's consent invalid, the court would then have to determine whether the testing itself was illegal. The most likely legal recourse for the juvenile would be a federal civil rights suit under 42 U.S.C. §1983, for violation of constitutional rights, namely, the Fourth (and Fourteenth) Amendments.[46] Official immunity may stand as an obstacle to such claims, however. Judges and prosecutors may all assert absolute immunity as a defense against a federal civil rights (§1983) action so long as they were acting within the dictates of their offices, while other officials may assert a defense of qualified immunity if there were "reasonable grounds for the belief formed at the time and in light of all the circumstances, coupled with good-faith belief" that the action was constitutional.[47]

If a plaintiff asserts, however, that "the constitutional right allegedly infringed by [the officials] was clearly established at the time of their challenged conduct, if they knew or should have known of that right, and if they knew or should have known that their conduct

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*See* Kathleen M. Dorr, *Validity, Under Federal Constitution, of Regulations, Rules or Statutes Allowing Drug Testing of Students*, 87 A.L.R. Fed. 148 (1988 & 1998 Supp .) Some state courts have found parental consent in school urinalysis cases to be invalid when the informational letters were more like "selling device s aimed at gaining consent without giving negative information." *Id.* Also, a Georgia court found that an officer's statement that a drug test would only be used to determine bond, when it was used as evidence against him in a cocaine possession prosecution, rendered the consent in fact invalid. *See Beasley v. State,* 419 S.E.2d 92 (Ga. App. 1992).

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The Fifth Amendment right against self-incrimination does not apply since a urine test is "real" evidence, not "testimonial" evidence. *See* W.E. Shipley, *Requiring Submission to Physical Examination or Test as Violation of Constitutional Rights*, 25 A.L.R.2d 1407, §2 (1952 & 1998 Supp.). Courts are also unsympathetic claims of a denial of due process, unless the taking of physical evidence is so violent as to "shock the conscience," in which case it would clearly also be an unreasonable search. *See id.*, § 3.

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*Procunier v. Navarette,* 434 U.S. 555, 562 (1978).

violated the constitutional norm," then the immunity defense will be unavailable.[48] This means that state officials who develop drug testing policies must take care to stay abreast of existing decisions as to the constitutionality of similar policies, and must be sure that the policy is implemented properly so that it does not stray too far from the boundaries of what is at least *arguably* constitutional.[49]

Under the Virginia Tort Claims Act, the Commonwealth may be sued for claims up to $100,000 or the limits of its liability policy, whichever is greater.[50] However, except in egregious cases, such actions (e.g., for assault or battery) would probably lack the necessary legal elements (e.g., fear or intimidation, malice or unlawful intent, and actual or threatened injury)[51] required to sustain such a suit.

If the test results are illegally disclosed or used by unauthorized parties, the possibility of civil and criminal liability and other adverse consequences increases substantially. First, 42 C.F.R. Part 2 violations are punishable by a $500 criminal fine for

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*Id.* at 562-563. It may also be argued that those who operate detention facilities are local officials rather than state officials, and thus do not enjoy qualified immunity. However, a re cent (unreported) federal district case held that "under the Virginia Constitution, ... and various state and federal decisions, counties are generally considered to be 'arms of the state.'" *Reaves v. Peace,* 1996 WL 679396 (E.D. Va. 1996). Furthermore, the opinion noted that since the local social services agencies were insured under a liability policy where 80 percent of the premium was paid by the state, a judgment against an official in his or her official capacity would be satisfied from state coffers, and thus the immunity defense was available.

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For instance, requiring female detainees to disro be from the waist down and squat to urinate into a tube in an open part of the bathroom, rather than allowing them to go into a stall, would apparently be consi dered unreasonable. *See Anable v. Ford,* 653 F. Supp. 22 (W.D. Ark. 1985).

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Va. Code Ann. § 8.01-195.3 (Michie 1999).

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In any event, recovery of damages for humiliation or embarrassment would only be allowed "where a cause of action existed independently of such harm." *Sea-Land Serv., Inc. v. O'Neal,* 297 S.E.2d 647, 653 (1982). That is, one must be able to plead the cause of action *without* relying on the emotional harm as an element of the tort.

the first offense, and a $5,000 fine for each subsequent offense.[52] Secondly, as noted above, if a court finds that a consenting juvenile was misled as to the uses of the test, the consent will probably be deemed invalid for the undisclosed purposes (such as criminal prosecution) for which it was used.

If the consent is invalid and the court *also* finds that the test was performed primarily for law enforcement purposes, officials are more likely to be found liable in a §1983 suit, for example, as the urinalysis cases indicate that drug testing for law enforcement purposes is *not* permissible without a warrant. Furthermore, there could also be liability for violating the right to privacy as to medical records. If it is established that the person disclosing the material has a duty to keep the records confidential, there may be a state tort action (subject to the possible defense of individual official immunity) for breach of confidentiality due to the disclosure to unauthorized parties.[53]

### *POST-ADJUDICATORY, PRE-DISPOSITIONAL TESTING*

Under Virginia law, pre-dispositional drug screenings will be required on all juveniles adjudicated delinquent based upon felonies or drug-related misdemeanors committed on

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42 C.F.R. at § 2.4. Violations of applicable state regulations apparently carry no such fine, though presumably they may be enforced by means of injunctions and administrative actions.

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The Virginia Supreme Court has held that "in the absence of a statutory command to the contrary, or absent a serious danger to the patient or others, a health care provider owes a duty to the patient not to disclose information gained from the patient during the course of treatment without the patient's authorization, and that violation of this duty gives rise to an action in tort." *Fairfax Hosp. By and Through INOVA Health System Hospitals, Inc. v. Curtis,* 492 S.E.2d 642 (Va. 1997). However, the facts of the case were substantially different from those that would be encountered in the present context, so it is unclear whether, for instance, juvenile detention officers conducting the test would have any such duty.

or after January 1, 2000.[54] Therefore, the statutory authority for post-adjudicatory screening is clear. The statute should nevertheless be implemented conservatively to avoid possible legal and constitutional challenges. Advice might be taken from analogous legislation allowing for pretrial services agencies to request a voluntary urine sample from juveniles tried in Circuit Court.[55] The statute specifies the limited types of tests that may be performed on the collected urine (those related to substances likely to be abused) and the limited permissible uses of the test results (only at a hearing to set or reconsider bail).[56] Thus, judges ordering a post-adjudicatory drug screening should specify the limited tests that may be performed and the limited use of the results in the subsequent final disposition hearing.

In cases where judicial discretion is exercised, care should be taken to mandate post-adjudicatory drug screening only in those cases in which some indication of substance abuse is present. While Virginia Code § 16.1-273 does not require there to be a particular relationship between the facts of a case and alleged substance abuse, the provision for mandatory screening for felony cases and drug-related misdemeanors suggests that the legislature has found that juveniles in those cases are reasonably likely to need a drug test. But the statute also suggests that outside of those types of cases, there should be facts supporting either an individualized reason for believing the juvenile has a need for a drug

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54 *Id.* This applies to juveniles adjudicated delinquent on the basis of "a n act committed on or after January 1, 2000, which would be a felony if committed by an adult, or a violat ion under Article 1 (§ 18.2-247 et seq.) [Drugs] or Article 1.1 (§ 18.2-265.1 et s eq.) [Drug Paraphernalia] of Chapter 7 of Title 18.2[, which] offense would be punishable as a Class 1 or Class 2 misdemeanor if committed by an adult."

55 VA Code § 19.2-123.

56 *Id.*

test and substance abuse counseling, or an empirically supported reason for believing the juvenile is of a class (other than race or gender) that is likely to have a drug problem. Absent such a justification, the test may be challenged as violating the Fourth Amendment protection from unreasonable searches, and/or the Fourteenth Amendment protection from arbitrary or discriminatory enforcement of the law. Provided the selection criteria are not based on race or gender, routine testing of all members of a class, selective testing of certain members of a class when selection criteria have a rational basis, or routine selective testing of a random portion of a class (e.g., number three of every ten), are test administration methods that likely will survive legal challenges.

## *RECOMMENDATIONS FOR DRUG TESTING IN DETENTION*

Mandatory drug screening of juvenile offenders can be a valuable method of identifying and treating substance abusers. Drug screening, however, carries with it possible infringements upon the rights of the juveniles the system is designed to protect. But with correct safeguards in place, mandatory drug screening of pre- and post-adjudicatory juveniles for substance abuse identification and treatment purposes, will probably pass legal muster.

*A legally sound drug testing policy should contain the following elements:*

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Attorney General's Office. For both these reasons, we strongly urge detention centers to consult with their local counsel.

1) The procedure should be a standard, nondiscretionary policy. A conservative policy would test only those who present with empirically or clinically supported indicia (not based on race or gender) of substance abuse, although it may be constitutionally permissible to test all juveniles being detained or committed to the Department of Juvenile Justice.

2) Although the goal is to have a policy that is constitutional even without the juvenile's consent, consent should be obtained wherever possible. Though probably not necessary, a conservative policy would also solicit the parent's consent. Consents should be in writing and should explain the potential uses of the test, including potential adverse legal consequences, if any.

3) Judges making case-specific discretionary decisions to order testing should take care to clearly state the facts that support that decision, and should develop their own consistent policy upon which to base such decisions.

4) The collection of the sample should take place as part of the overall health screening. Monitors of the same sex may stand in the bathroom, but should not actually observe the act of urination. Toilet water may be tinted to prevent it from being used to dilute the sample, and the sample's temperature should be measured immediately after the collection. Results may either be evaluated on-site or sent to an independent lab, but chain-of-custody procedures should be carefully followed.

5) The sample should only be tested for drugs, unless other medical tests would ordinarily be justifiable in order to determine health care needs. The drugs being tested for should not vary from subject to subject. Juveniles should be required to disclose their use of lawful medications only to the medical personnel responsible for their health care and/or to the lab testing the sample.

6) Test results should only be disclosed to the juvenile and those (such as the facility's medical personnel) with a specific need to know. All others requesting access to the record should be required to sign the consent forms as suggested by 42 C.F.R. Part 2. Those desiring access without consent, including law enforcement officers, should be advised to seek judicial authorization pursuant to federal regulations, *even if they have a subpoena*. If a consent form to release the results was signed, the results may only be disclosed and used in a manner consistent with the information on that form, or the consent may be deemed invalid.

7) Test results should not be used to initiate prosecution, or for internal discipline, but only to determine security issues (such as might arise with a juvenile in withdrawal) and health care needs. A test indicating substance abuse should lead to an assessment and monitoring as to the need for substance abuse treatment and/or other mental health services.

8) Only qualified personnel should perform tests and handle results. Strictly followed written testing policies and procedures, and routine chain-of-custody documentation, should be implemented to ensure the quality of the results and the maintenance of the dignity of the test subject. Samples testing positive should be retained

for possible verification of results, and multiple tests should be performed in cases of dubious first results.

9) Records of the test, along with records of any treatment, should be stored under lock and key, separate from the juvenile's case record. The urine used for testing may be stored by the testing lab in case a re-test is requested, but should be similarly secured and destroyed after a specified time period.

## Appendix 1

Sample Notice[57]

Confidentiality of Alcohol and Drug Abuse Patient Records

The confidentiality of alcohol and drug abuse patient records maintained by this program is protected by Federal law and regulations. Generally, the program may not say to a person outside the program that a patient attends the program, or disclose any information identifying a patient as an alcohol or drug abuser Unless:

(1) The patient consents in writing:

(2) The disclosure is allowed by a court order; or

(3) The disclosure is made to medical personnel in a medical emergency or to qualified personnel for research, audit, or program evaluation.

Violation of the Federal law and regulations by a program is a crime. Suspected violations may be reported to appropriate authorities in accordance with Federal regulations.

Federal law and regulations do not protect any information about a crime committed by a patient either at the program or against any person who works for the program or about any threat to commit such a crime.

Federal laws and regulations do not protect any information about suspected child abuse or neglect from being reported under State law to appropriate State or local authorities.

(See 42 U.S.C. 290dd-3 and 42 U.S.C. 290ee-3 for Federal laws and 42 C.F.R. Part 2 for Federal regulations.)

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57 42 C.F.R. 2.22 (1999).

## Appendix 2

Sample Consent Form[58]

1. I *(name of patient)* _____ ( ) Request ( ) Authorize

2. (name or general designation of program which is to make the disclosure)

_____

3. To disclose: (kind and amount of information to be disclosed)

_____

4. To: (name or title of the person or organization to which disclosure is to be made)

_____

5. For (purpose of the disclosure)

_____

6. Date (on which this consent is signed)

_____

7. Signature of patient

_____

8. Signature of parent or guardian (where required)

_____

9. Signature of person authorized to sign in lieu of the patient (where required)

_____

10. This consent is subject to revocation at any time except to the extent that the program which is to make the disclosure has already taken action in reliance on it. If not previously revoked, this consent will terminate upon: *(specific date, event, or condition)* _____.

This information has been disclosed to you from records protected by Federal confidentiality rules (42 C.F.R. Part 2). The Federal rules prohibit you from making any further disclosure of this information unless further disclosure is expressly permitted by the written consent of the person to whom it pertains or as otherwise permitted by 42 C.F.R. Part 2. A general authorization for the release of medical or other information is NOT sufficient for this purpose. The Federal rules restrict any use of the information to criminally investigate or prosecute any alcohol or drug abuse patient.

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58 42 C.F.R. §§ 2.31, 2.32 (1999).