UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

THE ASSOCIATION OF INDEPENDENT SCHOOLS OF GREATER WASHINGTON, THE RIVER SCHOOL, KATHERINE BREBBIA, LAUREN WALENCE, Plaintiffs, v. DISTRICT OF COLUMBIA, HANSEUL KANG, STATE SUPERINTENDENT OF EDUCATION, Defendants.	Case No.

MEMORANDUM IN SUPPORT OF PLANTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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INTRODUCTION

The Association of Independent Schools of Greater Washington ("AISGW"), the River School, Katherine Brebbia, and Lauren Walence (collectively "Plaintiffs"), respectfully move for a preliminary injunction to block a mandatory drug and alcohol testing program that D.C.'s Office of the State Superintendent of Education ("OSSE") has sought to impose upon nursery preschool teachers in the District of Columbia. In 2013, OSSE declared that D.C.'s preschools, as a condition of renewing their licenses, must implement an ongoing, random, suspicionless drug and alcohol testing program of their teachers and staff (the "random testing requirement"). Under well-established law, however, such a testing regime violates the Fourth Amendment's prohibition against unreasonable searches and seizures. Because OSSE currently requires certain AISGW member schools to conduct such tests on pain of losing their license to operate, Plaintiffs request a preliminary injunction to enjoin the program.

Plaintiffs can readily establish all four of the factors in support of a preliminary injunction. First, controlling D.C. Circuit precedent and a recent decision by the D.C. Office of Administrative Hearings ("OAH") confirm that Plaintiffs are substantially likely to succeed on the merits of their constitutional challenge. In *National Federation of Federal Employees v. Vilsack*, 681 F.3d 483 (D.C. Cir. 2012), the D.C. Circuit held that the Fourth Amendment did not permit the government to implement random drug and alcohol testing of teachers. Indeed, the D.C. Circuit reached that conclusion even though the students in *Vilsack* were at-risk students and were under the 24-hour supervision of the teachers in a residential school program, two factors not present here.

OSSE has already lost the first administrative challenge to its testing policy. After the St. Paul's Lutheran Nursery School challenged OSSE's action to revoke its license for the failure to test its teachers, OAH Principal Administrative Law Judge Paul B. Handy declared that the

requirement "would likely violate the Fourth Amendment constitutional rights" of the affected teachers. *See* Engel Decl., Ex. A, Final Order, *St. Paul's Lutheran Nursery School v. District of Columbia Office of the State Superintendent of Education*, Case No. 2015-OSSE-00011 (May 3, 2016). In order to avoid this constitutional deficiency, the administrative judge determined that D.C. Code § 1-620.36 "must be construed in a manner that would not violate the United States Constitution," and that OSSE could not require the random drug and alcohol testing of preschool teachers. *Id*.

Despite losing the first administrative challenge to its new policy, OSSE continues to require all other preschools licensed as child development facilities in the District to conduct random drug and alcohol tests on their teachers. OSSE has declined to acquiesce in the OAH decision and has specifically confirmed that it will continue to enforce the random testing requirement as a condition of licensure.

Plaintiffs can demonstrate a likelihood of success on the merits because OSSE's random testing requirement falls far short of the "reasonableness" required of government searches under the Fourth Amendment. OSSE has not identified any narrowly-tailored justification for subjecting D.C.'s preschool teachers to a warrantless and suspicionless search. Indeed, OSSE has singled out preschool teachers for testing, even though the District does not require such testing for similarly-situated public school pre-K teachers and pre-K teachers at D.C. charter schools. OSSE has required those AISGW members licensed as child development facilities ("AISGW licensees") to test employees who work with children under age 4. These employees work with many children in the same age group as those enrolled in District's pre-K programs at public schools and charter schools. Yet teachers in public and charter pre-K programs are not required to undergo random testing. OSSE thus seeks to impose a search and seizure on

preschool teachers that the D.C. government has declined to impose on public and charter school teachers, including those teaching children of the same age. OSSE has not identified any compelling or even rational reason why this small subset of educators presents a greater need for random testing, or should have a lesser entitlement to personal privacy, than their public employee and charter school counterparts. Plaintiffs plainly can establish a likelihood of success on the merits.

Second, in the absence of an injunction, Plaintiffs, other AISGW licensees, and teachers employed at AISGW licensees, will suffer irreparable harm. On pain of losing their license, AISGW licensees currently must implement and conduct a random testing program, and the financial, personnel, reputational, and morale costs of those tests will not be reimbursed by the District should the program be declared unconstitutional. In addition, AISGW teachers will suffer a continuing violation of their constitutional rights, as they are subjected to the unconstitutional testing program four times a year.

Third, the harm that these employees will suffer firmly tips the balance of the equities in Plaintiffs' favor. This is especially so because Plaintiffs' request for preliminary relief on their constitutional claim would not disturb Defendants' other testing requirements.[1] Finally, the public interest favors entry of a preliminary injunction, given the likely unconstitutionality of OSSE's random testing requirement and the lack of any demonstrable need for it.

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[1] Plaintiffs' Complaint includes statutory challenges to the mandatory drug and alcohol testing requirement under the D.C. Administrative Procedure Act, but Plaintiffs do not rely on their statutory claims in their current request for preliminary injunctive relief.

FACTUAL BACKGROUND

The Plaintiffs. Plaintiff AISGW is an association of 75 private schools in the national capital region, which covers Washington, D.C. and parts of neighboring states (Maryland, Pennsylvania, and Virginia). Mellon Decl.,¶ 3. AISGW's members include 29 schools in the District that educate children from toddler age through the twelfth grade. Mellon Decl., ¶ 4. Nine AISGW members hold OSSE licenses as childhood development facilities under D.C.'s Childhood Development Facilities Regulation Act of 1998. Mellon Decl., ¶¶ 5-6.

Plaintiff The River School is an AISGW member school and a licensed childhood development facility. It is located in Washington, D.C. and serves children ages 18 months through third grade. Mellon Decl., ¶ 2.

Plaintiffs Katherine Brebbia and Lauren Walence teach children aged 18 months to 2 years at the River School. Brebbia Decl., ¶ 3; Walence Decl., ¶ 3. They teach in the same classroom. Brebbia Decl., ¶ 3; Walence Decl., ¶ 3.

Statutory Background. OSSE has developed the testing regime in purported reliance upon two longstanding District laws: the 2004 Child Youth Safety and Health Act ("CYSHA") and the 1998 Child Development Facilities Regulation Act. Title I of the CYSHA requires D.C. government agencies to conduct random drug and alcohol testing on their employees who occupy "safety sensitive" positions. *See* D.C. Code § 1-620.32.[2] The statute defines "safety-sensitive" to include: "(A) Employment in which the District employee has direct contact with children or youth; (B) Is entrusted with the direct care and custody of children or youth; and

[2] D.C. Code § 1-620.32(b) provides: "The District shall subject District employees in safety-sensitive positions to random testing, unless a District agency has additional requirements for drug and alcohol testing of its employees, in which case the stricter requirements shall apply."

(C) Whose performance of his or her duties in the normal course of employment may affect the health, welfare, or safety of children or youth." *Id.* § 1-620.31(10). The statute also requires "private entit[ies] licensed by the District government [with] employees who work in safety-sensitive positions [to] establish mandatory drug and alcohol testing policies procedures that are consistent with" the statute. *Id.* § 1-620.36. The statute requires the Mayor to "issue rules to implement the provisions" of CYSHA through the notice-and-comment rulemaking provisions of the D.C. Administrative Procedure Act. *Id.* § 1-620.37.

Under the Child Development Facilities Regulation Act, OSSE has the authority to license "child development facilit[ies]," which are defined as "a center, home, or other structure that provides care and other services, supervision, and guidance for children, infants, and toddlers on a regular basis, regardless of its designated name." D.C. Code § 7-2031(3). "Infant[s]" are defined as "individual[s] younger than 12 months of age," *id*. § 7-2031(4); "toddler[s]" are defied as "individual[s] older than 12 months but less than 24 months of age," *id*. § 7-2031(8); and "children" are defied as "individuals from 2 years to 15 years of age," *id*. § 7-2031(2). The statute specifically exempts, however, "public or private elementary or secondary school[s] engaged in legally required educational and related functions or a pre- kindergarten education program licensed pursuant to the Pre-k Act of 2008." D.C. Code § 7-2031(3).

Thus, OSSE's licensing authority applies to facilities serving individuals from birth to 15 years of age other than public or private pre-K programs, elementary schools, or secondary schools. In practice, OSSE's random testing requirement applies to schools and early childhood programs serving children under four, including preschools, but does not apply to private or public schools teaching children ages four and older.

OSSE Announces Drug Testing Requirements in 2013. Although D.C. enacted the CYSHA in 2004, OSSE evidently concluded only recently that preschool teachers hold "safety sensitive" positions under the law and thus should be subjected to random testing. In April 2013, OSSE issued a memo to licensed childcare providers requiring them to conduct random testing of their employees for drug and alcohol use. According to OSSE's memo, "any personnel who work or volunteer in a childcare development facility are required to participate in a drug and alcohol testing program that tests applicants before they begin work and employees periodically and randomly[.]" Engel Decl., Ex. B, OSSE April 2013 memorandum. On April 26, 2013, OSSE issued an Early Childhood Education Bulletin that provided for dates of training sessions regarding compliance. Engel Decl., Ex. C, OSSE Bulletin. OSSE followed by issuing a "Frequently Asked Questions" memorandum stating that "[d]rug/alcohol testing should be conducted during the pre-employment process, randomly, and whenever there is a reasonable suspicion that someone might be using drugs or alcohol." Engel Decl., Ex. D, OSSE FAQs.

AISGW Licensees Are Informed of OSSE's Random Testing Requirement in 2014. Although OSSE issued its memorandum and bulletin in April 2013, The River School did not receive either document. Armstrong Decl., ¶ 4. The River School learned of OSSE's new policy from a January 14, 2014 email from an OSSE employee. Armstrong Decl., ¶ 3. The email forwarded information regarding "the procedure that must be followed to comply with the drug testing policy according to CYSHA." Engel Decl., Ex. E, Email dated 1/14/14 from Yesset Makonnen. OSSE's "policy"—which is not contained in any regulation and was not adopted after any rulemaking procedure—requires the school to establish a drug testing program; notify employees of the policy in writing; hire an outside drug testing vendor to randomly select

employees for testing; set the percentage of employees to be tested each quarter; submit a list of employees to the chosen vendor on a quarterly basis; and conduct pre-employment testing. *Id*.

AISGW Licensees Register Objections to OSSE's Random Testing Requirement. From April 2014 through June 2015, The River School objected to the random testing requirement and engaged in discussions with OSSE about it. Mellon Decl., ¶¶ 19-20. The River School repeatedly requested the agency's statutory and regulatory basis for its new policy and registered its concerns about its implementation. *Id*. In September 2014, OSSE sent The River School a "sample" testing policy, but that policy made no mention of random drug and alcohol testing, only testing upon reasonable suspicion. Engel Decl., Ex. F, Sample Policy.

In November 2014, AISGW's predecessor organization, Independent Education, sent a letter to OSSE objecting to random, ongoing drug and alcohol testing of employees at licensed facilities. Engel Decl., Ex. G, 11/13/2014 Letter to OSSE.

In June 2015, the D.C. State Superintendent of Education, Defendant Hanseul Kang, sent a letter to AISGW providing "an official explanation from [OSSE] regarding drug testing by private institutions and lay[ing] out the requirements for full licensing." Engel Decl., Ex. H, 6/19/15 Kang Letter. Superintendent Kang's letter stated that child development facilities operating in D.C. must be licensed by OSSE, and that drug testing was a requirement of licensure under CYSHA. *Id*. The letter further provided that licensees "must establish a drug testing procedure for all current employees every two years, during the pre-employment process, and whenever there is reasonable suspicion that someone might be using drugs or alcohol." *Id*. The letter defined the employees subject to the drug testing requirement as "employees with direct contact with children or youth, employees entrusted with direct care and custody of children or youth, employees whose performance of his/her duties in the normal course of

employment may affect the health, welfare, or safety of children or youth, [and] volunteers who are not constantly supervised." *Id.*

AISGW responded to Superintendent Kang on June 23, 2015 by requesting immediate relief from the random drug and alcohol testing requirement for three of its member schools, including The River School. Engel Decl., Ex. I, 6/23/15 AISGW Letter to Kang. AISGW noted that its member schools had been previously told they were exempt from testing, and that their licenses would be granted independently of OSSE's drug testing policy. *Id.* The letter further stated that the schools had relied on these assurances and so had not implemented random drug and alcohol testing. *Id.*

Superintendent Kang rejected AISGW's requested relief on August 21, 2015, but offered to extend The River School's license while it developed policies and procedures necessary to come into compliance with OSSE's drug and alcohol testing requirement. Engel Decl., Ex. J, 8/21/15 Kang Letter. Superintendent Kang's letter stated "it is the policy of the District of Columbia that private, licensed child care providers must engage in drug and alcohol testing for employees[.]" *Id.*

OSSE Threatens To Revoke The River School's License. On January 11, 2016, The River School received a Notice of Intent to Revoke Child Development Center License. Engel Decl., Ex. K, 1/11/16 River School Notice of Intent to Revoke. The letter notified The River School that OSSE intended to revoke its license for failure to establish mandatory drug and alcohol testing policies consistent with CYSHA, and noted that D.C.'s Child Development Facility Regulations required compliance with all applicable D.C. laws. *Id.* The Notice set February 24, 2016 as the revocation date. *Id.*

Because the revocation of its license would have forced the school to shut its doors in the middle of the school year, imposing irreparable injury upon its students and staff, The River School adopted a drug and alcohol testing policy that included random testing and sent one employee for testing on January 12, 2016. Mellon Decl., ¶¶ 24-25.

OSSE Informs The River School That The Random Testing Requirement Remains In Effect Despite Adverse Administrative Ruling. On May 3, 2016, D.C. Administrative Law Judge ("ALJ") Paul B. Handy issued a Final Order prohibiting OSSE from revoking the license of St. Paul's Lutheran Nursery School for failure to implement a random drug and alcohol testing program for its employees.[3] Engel Decl., Ex. A. He found that the CYHSA's definition of "safety sensitive" employees was susceptible to more than one meaning, and that it should be construed not to include preschool teachers because the construction favored by OSSE would likely violate the Fourth Amendment rights of affected teachers. *Id*.

On May 9, 2016, The River School asked OSSE whether, in view of the *St. Paul's* decision, OSSE would continue to enforce the random testing requirement. Armstrong Decl., ¶¶ 8-9. OSSE responded that the requirement remained in effect for licensed child development facilities in the District. *Id*.

On May 13, 2016, OSSE filed a motion with OAH seeking reconsideration of the May 3 Final Order. That motion was denied on July 28, 2016. Engel Decl., Ex. L**,** OAH Order of July 28, 2016.

LEGAL STANDARD

This Court weighs four factors in determining whether to issue a preliminary injunction: "(1) the likelihood that plaintiffs will succeed on the merits; (2) the threat of irreparable harm to

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[3] St. Paul's Lutheran Nursery School is not a member of AISGW.

plaintiffs if the injunction is not granted; (3) the possibility that the defendants and others will suffer substantial harm in the event that injunctive relief is issued; and (4) the interest of the public." *Bangert v. Hodel*, 705 F. Supp. 643, 646 (D.D.C. 1989) (explaining that "[c]onsideration of these factors leads the Court to conclude that a preliminary injunction against random drug testing should be issued."). All four factors in the analysis must be balanced against each other. *Davis v. Pension Benefit Guar. Corp.,* 571 F.3d 1288, 1292 (D.C. Cir. 2009). The movant must show that these four factors weigh in favor of the injunction. *American Freedom Def. Initiative v. Washington Metro. Area Transit Auth.*, 898 F. Supp. 2d 73, 78 (D.D.C. 2012) (citing *Davis,* 571 F.3d at 1292 (D.C. Cir. 2009)).[4]

ARGUMENT

A preliminary injunction should be granted because Plaintiffs can readily show that they are substantially likely to succeed on the merits, that the random drug testing policy is causing and will cause irreparable harm, and that the balance of the equities and the public interest favor the injunction. *See Aamer v. Obama*, 742 F.3d 1023, 1043 (D.C. Cir. 2014). Accordingly, Defendants should be enjoined from requiring AISGW's member schools to conduct mandatory random drug and alcohol testing of their employees as a condition of retaining their licenses. *See, e.g., American Freedom Def. Initiative v. Washington Metro. Area Transit Auth.*, 898 F.

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[4] Though there is some tension in this Circuit regarding the showing required for "likely success on the merits," any differences regarding the standard are irrelevant because Plaintiffs meet either standard. *See Pursuing America's Greatness v. FEC*, No. 15-5264, 2016 WL 4087943, at *3 n.1 (D.C. Cir. Aug. 2, 2016) (acknowledging cases that speak of likely success on the merits versus substantial likelihood of success on the merits and finding plaintiff met either standard). Furthermore, the open question in this Circuit on whether the merits factor is an "independent, free-standing requirement" is also not at issue here for the same reason. *Aamer v. Obama,* 742 F.3d 1023, 1043 (D.C. Cir. 2014) (noting the tension between an independent showing of likelihood of success on the merits versus raising a serious legal question on the legal merits where the remaining three factors strongly favor issuing an injunction).

Supp. 2d 73, 78 (D.D.C. 2012) (granting preliminary injunction where all four factors favored movant); *Bangert v. Hodel*, 705 F. Supp. 643, 646 (D.D.C. 1989) (issuing preliminary injunction against random drug testing program upon consideration of the four preliminary injunction factors).

I. Defendants Should Be Preliminarily Enjoined From Enforcing The Random Drug and Alcohol Testing Program.

A. Plaintiffs Will Prevail on the Merits of Their Claim.

Plaintiffs can readily demonstrate a substantial likelihood of success on the merits. As a general matter, the Fourth Amendment prohibits the Government from conducting warrantless searches. Defendants cannot overcome that presumption by showing that OSSE's random testing requirement is reasonable within the meaning of the Fourth Amendment, given that employees at AISGW licensees do not pose a special risk to student safety and similarly-situated public school and charter school employees are not subject to random testing. Recent decisions from the D.C. Circuit and the D.C. Office of Administrative Hearings plainly establish that OSSE's random testing requirement violates the Fourth Amendment.

1. OSSE's Random Testing Requirement Effects a Search Subject to the Fourth Amendment's Balancing Test.

OSSE's random testing requirement effects a search within the meaning of the Fourth Amendment, and therefore is subject to a balancing test to determine its constitutionality. *See Chandler v. Miller*, 520 U.S. 305, 313 (1997); *Vilsack*, 681 F.3d at 488 (noting random drug testing of federal employees effects a search subject to the Fourth Amendment reasonableness requirement). This is so even where, as here, the "search" is conducted by a private employer at the government's behest. *See Transportation Institute v. U.S. Coast Guard*, 727 F. Supp. 648, 653 (D.D.C. 1998) ("[U]rinalysis, if compelled by the Government, is a 'search' subject to the restrictions of the Fourth Amendment."). As a general matter, warrantless searches are

unreasonable under the Fourth Amendment, except when "'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable.'" *Vilsack*, 681 F.3d at 489 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995)). Where the government invokes special needs, the Court must balance the individual's privacy expectations against the government's interest to determine whether the government's interest is sufficiently strong to abandon the usual constitutional standards, and whether it is impractical to require a warrant or some level of individualized suspicion in the particular context. *Vilsack*, 681 F.3d at 489 (citing *Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665-66 (1989)). Even when "special needs" are implicated, a warrantless search is presumptively unreasonable absent "some quantum of individualized suspicion." *Skinner v. Ry. Labor Execs.*, 489 U.S. 602, 624 (1989). "'[A] search may be reasonable despite the absence of such suspicion,' however, 'where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion.'" *Vilsack*, 681 F.3d at 489 (quoting *Skinner*, 489 U.S. at 624).

In this motion, Plaintiffs challenge only the portion of OSSE's testing requirement that is not premised on individualized suspicion. Thus, for a suspicionless random testing requirement to be found reasonable, OSSE must show that the privacy interests of AISGW licensee employees are minimal and that "important government interest[s] furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion." *Skinner*, 489 U.S. at 624. As shown below, any attempt by OSSE to meet this exacting standard would fail.

2. Defendants Lack Any Basis To Argue That Employees At AISGW Licensees Present A "Special Need" For Random Testing.

Defendants cannot credibly argue that employees at AISGW licensees pose a special risk, "beyond the normal need for law enforcement," such that random testing is justified. *See*

Vilsack, 681 F.3d at 489. First, Defendants cannot point to any evidence of drug or alcohol abuse among preschool employees that would justify random testing over and above testing based on reasonable suspicion. Indeed, a recent response by OSSE to a FOIA request by another preschool showed that OSSE has *no* evidence that any child enrolled at any licensed childhood development facility in D.C. has ever been harmed as a result of a preschool staff member's drug or alcohol abuse. *See* Engel Decl., Ex. M, OSSE FOIA Response.

Second, OSSE cannot persuasively argue that the safety of students served by AISGW licensees poses a "special need" justifying random testing, because similarly situated District employees serving children in pre-K programs are not subject to random testing. In stark contrast to the random testing requirement OSSE imposes on AISGW licensees, teachers and staff at pre-K programs at District of Columbia Public Schools ("DCPS") and charter schools do not undergo random drug and alcohol testing, *see* OAH Order (Ex. A) at 16 ("It is undisputed that the District government does not require public school teachers or charter school teachers to submit to random drug and alcohol testing, even those teachers who teach pre-K students."). As OAH recognized, the D.C. Department of Human Resources regulations applicable to all District of Columbia employees differentiate between "safety sensitive" and "protection sensitive" employees, and teachers are defined as "protection sensitive." *Compare* 6-B DCMR 410 *with* 6B DCMR 411. As a result, DCPS teachers are not subject to random testing.

Defendants have not argued, and could not credibly argue, that there is a greater interest in randomly testing preschool teachers at OSSE licensees than other preschool teachers in the District of Columbia. Teachers at OSSE-licensed preschools represent only a small percentage of those teaching three- and four-year olds in the District. While DCPS enrolls over 5,800 three- and four-year olds in its pre-K programs, and D.C. charter schools enroll more than 6,400,

AISGW's licensees enroll just over 1,000 children age 4 and under in the District—less than 9% of the total. *See* District of Columbia Public Schools, "DCPS at a Glance: Enrollment," *available at* http://dcps.dc.gov/node/966292 (last viewed Aug. 30, 2016); https://data.dcpcsb.org/Enrollment-/PCS-Student-Enrollment-by-School-2014-15-/swsy-jrbd (last viewed Aug. 30, 2016); Mellon Decl., ¶ 11.

Indeed, the only difference between DCPS and charter school pre-K teachers and AISGW preschool teachers is that OSSE is the regulatory agency for AISGW licensees, but not for public schools and charter schools.[5] The assignment of licensing authority to different agencies is not a rational basis upon which to justify treating similarly-situated teachers differently with regard to their constitutional rights.

3. Defendants Cannot Demonstrate That A Testing Regime Based on Individualized Suspicion Would Be Impracticable or Would Jeopardize Important Government Interests.

OSSE also cannot plausibly argue that a testing regime based on individualized suspicion would be impracticable and jeopardize important government interests, when DCPS has implemented precisely such a program without adverse consequences. As discussed, DCPS subjects similarly situated teachers and staff to drug and alcohol testing *solely* on the basis of individualized suspicion. Moreover, a suspicion-based testing regime would be easier to administer and to employ at preschools, including AISGW licensees, than at the much larger public schools run by DCPS. For instance, at The River School, each preschool class has two or more teachers in the classroom, and they work in close coordination with others in the school,

[5] The Child Development Facilities Regulation Act specifically exempts from OSSE licensure "public or private elementary or secondary school[s] engaged in legally required educational and related functions or a pre- kindergarten education program licensed pursuant to the Pre-k Act of 2008." D.C. Code § 7-2031(3).

thus ensuring that a suspicion-based regime would be appropriate and effective. *See* Mellon Decl., ¶¶ 13, 26-27.

4. Recent Case Law Makes Clear That OSSE's Random Testing Requirement Is Unconstitutional.

At any rate, controlling precedent in the D.C. Circuit has made clear that OSSE's random testing requirement is unreasonable under the Fourth Amendment. In *Nat'l Fed'n of Fed. Emp. v. Vilsack*, 681 F.3d 483 (D.C. Cir. 2012), the court held that the government had failed to justify a suspicionless, random drug testing policy, even though the program was narrower and the public interest arguably stronger than here. In *Vilsack*, the program randomly tested U.S. Department of Agriculture Jobs Corps employees who worked at specialized residential schools for at-risk youth. *Id.* at 486-88. The students at these schools, aged 16 to 24, were from disadvantaged backgrounds and had turbulent childhoods; many had a history of drug abuse. *Id.* at 501. The program housed them in remote rural locations. *Id.* The government attempted to justify the suspicionless, random drug testing of the employees who lived at these sites on the ground that a drug-using employee could threaten the safety of the students housed there. *Id.* at 495. Despite the public interest in protecting and reforming these at-risk youth, and the greater risk occasioned by the residential setting, the D.C. Circuit held that the government had the burden of showing a particular need, such as "a demonstrated problem of drug abuse," if it were to justify "a suspicionless general search program." *Id.* The government could not make such a showing, and thus the court ruled the program unconstitutional.

Here, Defendants' case for random testing is considerably weaker. The preschool students at issue are not "at risk," lack any history of drug or alcohol abuse, and plainly do not have any reasonable susceptibility to such abuse. The preschool teachers subject to OSSE's testing requirement are in contact with their students for only a fraction of the day, unlike the

employees in *Vilsack*, who lived on-site. And the children here, unlike the job corps trainees, see their parents every day and have unlimited opportunities to talk about any untoward behavior by their teachers to adults who care deeply about their safety and who can make further inquiry. Defendants have not identified any evidence that drug or alcohol abuse among preschool teachers is an existing problem, much less one requiring random testing.

Against this backdrop, Defendants have not offered any distinction from *Vilsack* other than the proposition that preschool students are younger and more vulnerable than older children. Yet such generalized concerns about student safety are demonstrably insufficient to abridge the privacy interests of preschool teachers. Defendants "must demonstrate that the threat to student safety is one that is a concrete, actual danger that permeates the ordinary job performance of each of the relevant positions. The [government] may not abandon the Fourth Amendment for nebulous risks." *Am. Fed'n. of Teachers-W.Va. v. Kanawha Cnty. Bd. of Educ*., 592 F. Supp. 2d 883, 903 (S.D.W.Va. 2009); *see also Transportation Institute*, 727 F. Supp. at 656-69 (enjoining enforcement of Coast Guard regulation requiring random drug testing of crewmembers on commercial vessels where government relied on broad interest in safety to justify random testing). Since AISGW licensees have not been affected by any history of drug abuse, Mellon Decl., ¶ 26, Brebbia Decl., ¶ 6; Walence Decl., ¶ 6, OSSE cannot show "a demonstrated problem of drug abuse" or any other particular need in support of its program. *Vilsack*, 681 F.3d at 499.

Indeed, the complete absence of any evidence to bolster OSSE's stated interest in its random testing requirement recently compelled the D.C. Office of Administrative Hearings to find that OSSE could not revoke the child development facility license of St. Paul's Nursery School for failure to conduct random drug and alcohol testing on school employees. OAH Order, Engel Decl., Ex. A. Like The River School, St. Paul's Nursery School was threatened

with license revocation when it objected to OSSE's random testing requirement. St. Paul's challenged the revocation before the Office of Administrative Hearings, and received a decision in its favor on May 3, 2016. *Id.* In coming to this conclusion, the OAH noted that, as in *Vilsack*, D.C. had no evidence of existing drug and alcohol abuse problems by teachers of young children and that DCPS did not require random testing of teachers. Engel Decl., Ex. A at 20. ALJ Handy thus described OSSE's random testing requirement to be "a 'solution in search of problem,' as articulated in the *Vilsack* opinion." *Id.* Accordingly, when balancing the affected teachers' strong interest in privacy against a government interest not backed by any evidence, ALJ Handy determined that OSSE's random testing requirement would likely violate the Fourth Amendment. To avoid an unconstitutional result, ALJ Handy construed the relevant D.C. statute in the same manner that the D.C. Department of Human Resources construed it with respect to D.C. employees, and accordingly found that St. Paul's employees should not be considered safety-sensitive employees subject to random drug and alcohol testing.

Both *Vilsack* and *St. Paul's* demonstrate the unreasonableness of OSSE's random testing requirement. In light of *Vilsack* and *St. Paul*'s, Plaintiffs are likely to prevail on the merits of their challenge.

B. <u>Plaintiffs Will Suffer Irreparable Harm Without a Preliminary Injunction</u>.

In evaluating the second factor of the preliminary injunction analysis, courts ask whether movants will likely suffer irreparable harm in the absence of an injunction. *See Bonnette v. D.C. Court of Appeals*, 796 F. Supp. 2d 164, 186 (D.D.C. 2011). Because The River School, Ms. Walence, Ms. Brebbia, and other employees of AISGW licensees will suffer many forms of harm that monetary damages cannot cure, the second factor favors AISGW. As strong as the likelihood of success on the merits is in the instant case, even a slight showing of irreparable harm would suffice to tip the balance in favor of granting the preliminary injunction. *See, e.g.*,

CityFed Fin. Corp. v. Office of Thrift Supervision, 58 F.3d 738, 747 (D.C. Cir. 1995) (citation omitted) ("An injunction may be justified, for example, where there is a particularly strong likelihood of success on the merits even if there is a relatively slight showing of irreparable injury.") As it is, Plaintiffs are able to make a very strong showing of irreparable harm. Indeed, the violation of the teachers' constitutional rights, the intrusiveness and mandatory nature of the testing, the opportunity cost of testing, the likely damage to AISGW licensees' reputations, and the deleterious impact on employees' morale all constitute irreparable harm.

1. The Violation of Employees' Constitutional Rights and the Intrusiveness of Mandatory Drug Testing Constitute Irreparable Harm.

As explained above, *see supra* Part I.A.4, the D.C. Circuit unambiguously held in *Vilsack* that the random testing of employees who pose no particular threat to student safety is unconstitutional. 681 F.3d at 483. In disregarding controlling precedent and seeking to institute random drug testing of AISGW licensees' employees, Defendants are violating these employees' rights and violating the schools' rights by compelling them to participate in an unconstitutional search. Brebbia Decl., ¶ 5; Walence Decl., ¶ 5. The violation of constitutional rights constitutes irreparable harm sufficient in and of itself to establish that a preliminary injunction should issue. *See, e.g.*, *id*. at 499 ("We also reverse the denial of the Union's request for a preliminary injunction, because the denial was based solely on the likelihood of the Secretary's success on the merits and the loss of constitutional protections constitutes irreparable injury."); *Mills v. Dist. of Columbia*, 571 F.3d 1304 (D.C. Cir. 2009) (quoting *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality opinion)) ("It has long been established that the loss of constitutional freedoms, 'for even minimal periods of time, unquestionably constitutes irreparable injury.'").

The Court need look no further than the violation of the employees' constitutional rights to rule that this preliminary injunction factor weighs in favor of Plaintiffs. Nonetheless, there is

another form of irreparable harm in play here. It arises out of the intrusiveness of drug testing and the fact that employees may not refuse it. What little guidance OSSE has provided and the policies that AISGW licensees have created under duress from OSSE establish that teachers may not opt out of testing without consequences, including termination. *See, e.g.*, Engel Decl., Ex. N, the River School Drug and Alcohol Policy (explaining that drug testing is a job requirement); Engel Decl., Ex. E, January 14, 2014 e-mail from Yesset Makonnen (forwarding procedure requiring employees to participate in drug testing). Courts have ruled that employees caught between the rock of unconstitutional governmental action and the hard place of disciplinary action are irreparably harmed. *See, e.g.*, *Am. Fedn. of Gov't Employees v. Sullivan*, 744 F. Supp. 294, 298 (D.D.C. 1990). This is especially the case when a bodily function, such as urination, is being policed. *Id.* ("The nature of the injury is especially substantial in a case like this where the government action will result in the supervision and coercion of one of the most basic and private practices of humankind."); *see also id.* (noting that "[m]oreover, the consequences for refusal to urinate on demand are severe. According to the plan, 'an employee who refuses to be tested when so required will be subject to the full range of disciplinary action, including dismissal.'").

2. The Reputational Harm to AISGW Licensees and Negative Impact on Their Resources Constitute Irreparable Harm.

Beyond the irreparable injury to their employees, The River School and other AISGW licensees will also suffer irreparable harm. First, the institution of random drug testing casts a shadow of unjustified suspicion over the entire school and its teachers by suggesting that there is a drug problem that must be addressed. Mellon Decl., ¶ 32. Especially in this age of social media in which innuendo can spread widely and prove near-impossible to address, the impact of such suspicion cannot be understated and is likely to negatively impact licensees' ability to

recruit both teachers and students. Enjoining the drug testing requirement at a later date will be insufficient to alleviate parents' concerns and remove the taint on licensees' reputation. Accordingly, courts have recognized that reputational harm, particularly of the sort that taints business reputation, constitutes irreparable harm. *See, e.g., Patriot v. United States HUD*, 963 F. Supp. 1, 5 (D.D.C. 1997) (concluding that "plaintiffs have demonstrated irreparable harm in damage to their business reputation.")

Second, the opportunity cost of complying with the drug testing policy constitutes irreparable harm inasmuch as the schools cannot recover the costs and time imposed by the burden of complying with OSSE's random testing requirement. Mellon Decl., ¶ 33. Among other things, compliance with the random testing requirement requires:

- Selecting teachers to be drug tested;
- Providing for substitutes to perform these teachers' functions while they are absent;
- Paying drug testing laboratories to perform the tests and report the results;
- Filing and keeping track of the requisite paper work;
- Coordinating with OSSE, a medical review officer, a third-party administrator, and other authorities; and
- Tracking the timing of this entire testing regime to ensure the school does not fall into non-compliance.

Mellon Decl., ¶ 33. The limited nature of the schools' resources and the administrative burden of compliance with the random testing requirement ensure that the schools will have to divert resources to complying with the random testing requirement that could have been used on other functions, including caring for children and actually running the school.

Finally, the random testing requirement threatens AISGW's licensees ability to recruit and retain personnel. Mellon Decl., ¶ 31. Because AISGW licensees must randomly test their employees while DCPS and charter schools need not, AISGW licensees are at a disadvantage with respect to recruiting and retaining early childhood education teachers. Moreover, employees at AISGW licensees will be continually reminded of their special testing status because they face the prospect of testing four times a year, while similarly-situated teachers at DCPS and charter schools remain exempt. These harms further establish irreparable injury justifying preliminary relief.

C. **The Balance of the Equities Favors a Preliminary Injunction.**

The third preliminary injunction factor, the balance of the equities, also weighs in Plaintiffs' favor. Where a preliminary injunction would not have any adverse impact on the government but the absence of an injunction would harm the movant's constitutional rights, the balance of the equities favors entry of a preliminary injunction. *See American Freedom Defense Initiative v. Washington Metropolitan Area Transit Authority*, 898 F. Supp. 2d 73 (D.D.C. 2012). Here, Defendants' would not be harmed by a preliminary injunction but teachers and staff at AISGW licensees would suffer irreparable harm to their Fourth Amendment rights if OSSE is allowed to enforce its random testing requirement. The balance of the equities therefore tips in Plaintiffs' favor.

1. The Preliminary Injunction Will Not Cause Any Harm to Defendants.

Defendants will not suffer any harm upon entry of a preliminary injunction enjoining OSSE from enforcing the random drug and alcohol testing requirement. To the extent that OSSE believes this policy to be required by a 2004 statute, it is clear that OSSE did not seek to enforce it for nearly 10 years. And as noted above, OSSE has no evidence that any child has ever been

harmed by a drug- or alcohol-impaired preschool teacher. Accordingly, there can be no serious harm from a further brief delay in enforcement pending this Court's decision on the merits.

Defendants also cannot credibly argue that "other interested parties" will be harmed by a preliminary injunction. As noted above, Defendants have no evidence that staff at AISGW licensees are abusing drugs and alcohol in a way that endangers students. Furthermore, the students at AISGW licensees are a small fraction of D.C. children who are in "direct contact" with school employees. Many more children are enrolled in similar programs at schools not licensed by OSSE, and teachers and staff at such facilities are not subject to random drug and alcohol testing.

Finally, as noted above, Plaintiffs' motion for a preliminary injunction is narrowly tailored to the random drug and alcohol testing requirement. OSSE's requirement that licensees conduct drug and alcohol testing upon reasonable suspicion would therefore be undisturbed by any preliminary relief awarded by this Court.[6] Defendants therefore would remain assured that if any AISGW employee were abusing drugs or alcohol in a manner that endangered student safety, that employee would have to face consequences for his or her behavior.

2. The Random Testing Requirement Will Harm Plaintiffs' Constitutional Rights.

In the absence of preliminary relief, AISGW licensees will be compelled to conduct unconstitutional searches and their employees will suffer ongoing violations of their Fourth Amendment rights. As discussed above, OSSE has informed AISGW licensees that they must conduct random testing on a quarterly basis, Engel Decl., Ex. B, and licensed facilities must

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[6] As noted in footnote 2, *supra*, Plaintiffs' Complaint also challenges OSSE's drug and alcohol testing requirements under the D.C. Administrative Procedure Act. Plaintiffs therefore reserve the right to challenge the entire testing program with respect to preschool teachers.

renew their licenses every year, 29 DCMR 308.3. The practical effect of such timing means that AISGW licensees must either intrude on their employees' privacy rights four times a year, or face license revocation. And, because OSSE's requirements for compliance are not contained in regulations (as required by the statute on which OSSE relies) and have varied whimsically in the past, AISGW licensees cannot even be certain what it is required to remain in compliance with the policy. Armstrong Decl., ¶ 6. Thus, AISGW licensees are in a continually untenable position: they can comply with an uncertain, ever-evolving random testing regime and thus violate their employees' privacy; protect their employees' privacy interest but lose the schools' license; or comply with OSSE's requirement but lose their license anyway because OSSE found their efforts insufficient.

Plaintiffs Brebbia, Walence, and other employees at AISGW licensees also face the prospect of random testing four times a year, and so will suffer a violation of their Fourth Amendment rights on a continuing basis. Brebbia Decl., ¶ 5; Walence Decl., ¶ 5.

The arbitrary and unconstitutional nature of OSSE's license condition plainly calls for the entry of preliminary relief. In light of the harm that OSSE's random testing requirement poses to AISGW member schools and their teachers, and the fact that a preliminary injunction would pose no harm to OSSE, this Court should find that the balance of the equities favors Plaintiffs.

D. A Preliminary Injunction Serves the Public Interest.

The final preliminary injunction factor also weighs in Plaintiffs' favor. *See Nken v. Holder*, 556 U.S. 418, 435 (2009) (noting that balance of the equities and the public interest "merge when the Government is the opposing party."). A preliminary injunction against OSSE's random testing requirement serves the public interest in two critical ways. First, preliminary relief would allow AISGW licensees to remain in operation without facing the threat of license revocation while this Court resolves the serious constitutional questions raised by OSSE's

random testing requirement. The families who rely on AISGW licensees for early childhood education thus would not have to scramble for a back-up program because OSSE shut down an AISGW licensee for refusing to violate its employees' constitutional rights. Second, preliminary relief would serve the public interest by ensuring that staff at AISGW licensees, including Ms. Walence and Ms. Brebbia, do not suffer a violation of their privacy rights while this case remains pending.

Nor can Defendants credibly argue that a preliminary injunction would be inconsistent with the public's interest in keeping children safe. As noted above, the vast majority of children under age 4 educated in the District are taught by employees who are not subject to random drug and alcohol testing. Nor do Defendants have any evidence that children at AISGW licensees are endangered due to staff members' abuse of drugs or alcohol. Finally, entry of a preliminary injunction against OSSE's random drug and alcohol testing requirement would not disturb its requirement that AISGW licensees conduct testing upon reasonable suspicion.

Because a preliminary injunction against the random drug and alcohol testing requirement would protect the privacy rights of staff at AISGW member schools without jeopardizing student safety, the public interest favors a preliminary injunction.

CONCLUSION

For the reasons set forth above, AISGW respectfully requests the entry of a preliminary injunction prohibiting OSSE from requiring its licensees to implement a program of random drug and alcohol testing as a condition of renewing a child development facility license.

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Respectfully submitted,

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