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ST. PAUL'S LUTHERAN NURSERY SCHOOL Petitioner v. DISTRICT OF COLUMBIA OFFICE OF THE STATE SUPERINTENDENT OF EDUCATION Respondent	Case No.: 2015-OSSE-00011

FINAL ORDER

I. Introduction

In this case, the Office of the State Superintendent of Education (OSSE) seeks to revoke the child development facility license of Petitioner St. Paul's Lutheran Nursery School, for failure to implement a required drug and alcohol testing program. This Order grants summary decision in favor of Petitioner and reverses the notice of revocation, because the imposition of a requirement of random drug and alcohol testing would likely violate the Fourth Amendment constitutional rights of Petitioner's affected teachers or child care workers (hereinafter, teachers), and therefore the statute in question, D.C. Official Code § 1-620.36, must be construed in a manner that would not violate the United States Constitution.

This Order does not preclude OSSE from issuing a new adverse notice of action to Petitioner, if OSSE contends that Petitioner violated any other duties under this statute.

II. Procedural History

On December 17, 2015, Petitioner St. Paul's Lutheran Nursery School filed a hearing request to challenge the Notice of Intent to Revoke the license (Notice) issued to Petitioner by OSSE on December 14, 2015. In the Notice, OSSE seeks to revoke Petitioner's child facility development license for noncompliance with drug-testing requirements. OSSE proposed to revoke the license on January 29, 2016.

OSSE filed a motion to dismiss this case because it contended the dispute was not yet ripe for decision. That motion was denied.

Petitioner filed a motion for a stay of the proposed revocation while this case is pending. That motion was granted.

At a status conference held on January 29, 2016, the parties agreed that the issues in this case could be resolved through prehearing motions. They further agreed to schedule deadlines for prehearing motions and responses, and to schedule a hearing for April 22, 2016. On February 2, 2016, I issued an Order scheduling these procedures.

On February 22, 2016, Petitioner filed a consent motion to extend the deadlines for all motions and responses, and this request was granted.

The Association of Independent Schools of Greater Washington (AISGW) requested permission to file an *amicus curiae* brief on behalf of its member child care development facilities licensed by OSSE and potentially affected by the ruling in this case. OSSE objected to

this request, but Petitioner consented. On March 10, 2016, I issued an Order granting AISGW's request, accepting its brief for filing, and granting OSSE a deadline to respond to this brief.

Pursuant to the amended deadlines, both parties filed timely motions for summary adjudication and responses to the opposing party's motion. Although OSSE entitled its brief, Respondent's Brief and Response to Petitioner's Prehearing Dispositive Motion, OSSE affirmatively requested a final decision in its favor, so I deem that OSSE has also moved for summary adjudication. OSSE also requested leave to submit its amended brief, which I have granted.

The hearing was held as scheduled on April 22, 2016. Arthur Spitzer, Esq., American Civil Liberties Union of the Nation's Capital, appeared for Petitioner. Assistant General Counsel Hillary Hoffman-Peak and Tiffany Oates, Esq.,[1] appeared for OSSE. May Chiang, Esq., attended the hearing on behalf of the AISGW.

AISGW requested leave to present oral argument in support of its amicus brief. I granted this request over OSSE's objection.

The hearing proceeded with oral arguments from both parties and from AISGW, on the pending motions for summary adjudication.

In the next several sections, I will first discuss the standard for summary adjudication, then set forth the uncontested material facts, then summarize the arguments of the parties, then analyze the issues in this case, and issue my order.

[1] Ms. Oates, who is not licensed to practice law in the District of Columbia, appeared under OAH Rule 2833.1 and District of Columbia Court of Appeals Rule 49(c).

III. Standard for Summary Adjudication

OAH Rule 2819.1 permits a party to file a motion for summary adjudication, requesting that the administrative law judge decide the case summarily, without a hearing. Such a motion must include sufficient evidence of undisputed facts and citation of controlling legal authority.

OAH Rule 2801.1 provides that where a procedural issue is not specifically addressed in the OAH Rules of Procedure, an administrative law judge may be guided by the Superior Court of the District of Columbia Rules of Civil Procedure.

Each party has moved for a decision in its favor, and has relied upon exhibits attached to the respective motions. Therefore, each motion is akin to a motion for summary judgment.[2]

Under Superior Court Rule 56, the burden is on the moving party to show: (1) that there are no issues of material fact; and (2) that the moving party is entitled to judgment as a matter of law.[3]

In ruling on a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party, resolving any ambiguities against the moving party.[4]

IV. Undisputed Material Facts

The parties do not dispute the following material facts, except where noted:

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[2] *Compare* D.C. Superior Court Rules 12-I(k) and 56 [summary judgment] *with* D.C. Superior Court Rule 12(b)(6) [dismissal for failure to state a claim].
[3] *See, e.g., Kissi v. Hardesty,* 3 A.3d 1125, 1128 (D.C. 2010).
[4] *E.g., Young v. Delany,* 647 A.2d 784, 788 (D.C. 1994).

Petitioner operates a child development facility in the District of Columbia that is licensed by OSSE. Dr. Kate Johnson is the Director of Petitioner's program. Petitioner serves up to 26 children between the ages of two and one-half years and four and one-half years, with current enrollment (as of the filing of Petitioner's Brief) of 24 children. The children are in two classes, younger and older, and Petitioner assigns two teachers per class. The ratio of children to teachers is 6:1.

In April 2013, OSSE sent a memorandum to all licensed child development facilities, including Petitioner, that the facilities were required to comply with the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 (CYSHA) which, OSSE stated, mandated criminal background checks and drug and alcohol testing. Respondent's Exhibit (RX) A. This memorandum stated in part: "any personnel who work or volunteer in a child development facility are required to participate in a drug and alcohol testing program that tests applicants before they begin to work and employees periodically and randomly as well as criminal background checks every two years." OSSE also included other materials to assist facilities in complying with this mandate.

OSSE interprets the CYSHA as defining teachers who come into direct contact with children (ages two and one-half to four and one-half years) as "safety-sensitive" employees who are subject to a requirement of four protocols: (1) drug and alcohol testing at the time of application; (2) criminal background checks at the time of application and each two years after starting employment; (3) drug and alcohol testing based on a reasonable suspicion of use; and (4) random drug and alcohol testing.

For over two years after OSSE issued this interpretation, OSSE made numerous attempts to obtain compliance with this policy from Petitioner. In September 2014, OSSE sent a model drug and alcohol testing policy to Petitioner. RX E. On numerous occasions, OSSE republished its April 2013 Memorandum to Petitioner's Director. During an annual license renewal inspection visit on October 26, 2015, OSSE's inspector reminded Petitioner of this policy. RX D. Initially, OSSE failed Petitioner during the inspection for failure to implement a policy consistent with the April 2013 Memorandum. Ultimately, OSSE did renew Petitioner's license for an additional year.

There is a factual dispute as to whether Petitioner has implemented policies for criminal background checks, drug and alcohol testing at the time of application, and drug and alcohol testing based on reasonable suspicion of use.

It is undisputed that Petitioner has consistently refused to implement a policy of random drug and alcohol testing of its teachers. Petitioner argued to OSSE that such testing was not necessary, that it would infringe on the constitutional rights of Petitioner's employees under the Fourth Amendment to the United States Constitution, that it would be costly and disruptive to the program, and that teachers or child care workers are not deemed to be "safe-sensitive" employees subject to random testing under CYSHA.

On December 14, 2015, OSSE issued the Notice to Petitioner that OSSE proposed to revoke Petitioner's child development facility license, effective January 29, 2016, unless Petitioner came into compliance with its obligations to implement drug and alcohol testing programs in accordance with D.C. Office Code § 1-620.36 and 29 DCMR 333.2. Petitioner's Exhibit (PX) A. The Notice stated in significant part:

> One of those requirements [for a child development facility license] is that private entities licensed by the District Government shall establish mandatory drug and alcohol testing policies and procedures that are consistent with the requirements of District law for safety-sensitive employees. The definition of which includes all persons who are entrusted with the direct care and custody of children or youth; and whose performance of his or her duties in the normal course of employment may affect the health, welfare, or safety of children or youth. District law requires drug and alcohol testing for safety for safety sensitive employees (1) at the time of employment; (2) if there is a reasonable suspicion referral; (3) following an accident and (4) ongoing random testing.

PX A, p. 1 [parenthetical information added].

The Notice did not specify which of the four program requirements Petitioner had allegedly failed to obey.

The District of Columbia Public Schools (DCPS) does not require pre-K teachers, who supervise children of ages 3 and 4, to submit to random drug or alcohol testing.

OSSE has posted its proposed regulations on licensing of child development facilities, including those implementing the CYSHA, on OSSE's website, osse.dc.gov (last visited April 29, 2016). OSSE has not published the proposed regulations in the D.C. Register.

On December 18, 2015, Mr. Spitzer, on behalf of the ACLU, filed a Freedom of Information Act (FOIA) request with OSSE seeking, among other things, "[c]opies of all records showing that children at entities licensed by OSSE (or by any sub-unit of OSSE) have been harmed because of drug and/or alcohol use by teachers or staff at such entities." PX E. OSSE replied, "We do not have responsive records for this section." PX F.

V. Summary of Arguments

OSSE argues in essence that it is entitled to a decision in its favor, because: (1) the CYSHA, in pertinent part, requires child development facilities to implement four testing programs of their teachers, including random drug and alcohol testing, but Petitioner has failed to implement such a program; and (2) OSSE has authority to enforce these provisions by revoking the licenses of facilities that do not comply with these requirements. OSSE contends that these are the only two pertinent issues in the case. Specifically, OAH lacks power, or it is inappropriate, to find the applicable laws unconstitutional. However, proceeding to the constitutional or quasi-constitutional issues raised by Petitioner, OSSE urges that the governmental interest in protecting children is compelling, and that teachers in these facilities are "safety-sensitive employees" who are highly regulated, and therefore the balancing test weighing the government's interest in protecting the safety of children versus the privacy rights of the tested individuals weighs heavily in favor of the government. Finally, OSSE maintains that the CYSHA is self-implementing, and applies regardless of whether OSSE has promulgated supporting regulations.

Petitioner argues that it is entitled to a decision in its favor for a series of alternative reasons: (1) the CYSHA can only be implemented through regulations, and OSSE has failed to promulgate such regulations; (2) Petitioner's teachers are not "safety-sensitive" employees subject to random drug and alcohol testing under the statute; (3) the statute must be construed to exclude the teachers or child care workers from being "safety-sensitive" employees, in order to avoid an unconstitutional result; or (4) if the prior arguments fail, the statute requiring random

testing of these teachers is facially unconstitutional because it violates the teachers' Fourth Amendment rights.

AISGW presents arguments consistent with Petitioner's position. In its brief, AISGW notes that the District of Columbia Department of Human Resources (DCHR) issued regulations in 2015 that differentiate between "safety-sensitive" employees who engage in work that is physically dangerous and "protection-sensitive" employees, including teachers; "safety-sensitive" employees are subject to random drug and alcohol testing, but "protection-sensitive" employees are not. Thus, the DCHR interpretation of the teachers' status differs from OSSE's interpretation. AISGW asserts that an inconsistent result would occur if child care development facilities are required to impose random testing of their teachers, while DCPS does not impose this requirement on teachers of similar-aged children in public or charter schools. AISGW also urges that OSSE's interpretation of the CYSHA would violate the constitutional rights of the teachers, as Petitioner argues.

VI. Analysis

The dispositive issue in this case is whether the CYSHA, specifically D.C. Official Code § 1-620.36, must be construed in such a manner that teachers and others who come into contact with children are not considered "safety-sensitive" employees subject to random drug and alcohol testing, in order to avoid an unconstitutional result. For the reasons that follow, I conclude that the answer is, Yes.

Before I can reach this dispositive issue, I must address two preliminary issues raised by the parties.

Preliminary Issue No. 1 – The Statute Applies Regardless of Lack of Regulations

Petitioner contends that the statutory requirement of random drug and alcohol testing cannot apply until OSSE has promulgated regulations implementing the CYSHA. I disagree.

Petitioner relies upon D.C. Official Code § 1-620.37, which states, "The Mayor, pursuant to subchapter 1 of Chapter 5 of Title 2, shall issue rules to implement the provisions of this sub-chapter." Petitioner interprets this clause to mean that the statutes of the CYSHA have no effect until regulations are issued. Petitioner notes the use of the mandatory "shall," rather than the permissive "may," in this statute.

However, § 1-620.37 does not state that the statutes do not take effect until regulations are promulgated. Contrast this language with that of the recently enacted "Public Space Amendment Enforcement Act of 2014."[2] Section 12(c) of this Act states: "Section 5 shall apply upon the effective date of rules promulgated pursuant to section 9j of the Department of Transportation Establishment Act of 2002…" This language in the Public Space law clearly conditions the applicability of the statutes upon the promulgation of regulations. By contrast, the language in the CYSHA does not contain this condition. Consequently, the CYSHA applies even if the Mayor has not met the obligation to issue regulations.

The question remains whether OSSE's construction of the CYSHA is an interpretive rule or one that creates new substantive requirements, given the ambiguity in the statute and its

[2] *See* 61 D.C. Register 12690 (December 19, 2014).

disparate application to District employees versus private licensed facility employees, as I will discuss in the section on the dispositive issue.[6]

The D.C Administrative Procedure Act (DCAPA) requires agencies to publish rules in the D.C. Register prior to adoption, unless persons subject to the rules are either personally served or have actual notice of the rules.[7] The DCAPA further provides that, except in an emergency, a rule of general applicability and legal effect cannot become effective until after its publication in the D.C. Register.[8]

If the rule merely clarifies or explains an existing law, however, publication in the D.C. Register and notice-and-comment rulemaking would not be required. The District of Columbia Court of Appeals has held that the procedural formalities of the notice-and-comment rulemaking are not required for such rules, called interpretive rules, which simply explain the meaning given by an agency to a word or phrase in a statute it administers. "But when an agency supplements a statute, such as by adopting new requirements or limits or imposing new obligations, the rule is invalid unless it has been adopted through notice-and-comment rulemaking and published in compliance with the DCAPA."[9]

It is unclear whether OSSE's construction of the CYSHA is interpretive or substantive. I decline to rule on whether this construction triggers a need for notice-and-comment rulemaking because there is a clearer basis for reversing OSSE's construction.

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[6] *See* D.C. Official Code § 2-505(a) (a rule is designed to implement, interpret, or prescribe law or policy).
[7] D.C. Official Code § 2-505(a).
[8] D.C. Official Code § 2-558(b).
[9] *Andrews v. D.C. Police and Firefighters Retirement and Relief Bd.*,991 A.2d 763, 771 (D.C. 2010).

Preliminary Issue No. 2 – OAH's Review is Not Limited to Whether OSSE Has Authority to Enforce the CYSHA

OSSE contends that the only appropriate issues in the case are whether Petitioner complied with an obligation under the CYSHA to implement criminal background checks and drug testing programs, and whether OSSE has authority to enforce the CYSHA. OSSE specifically maintains that OAH has no authority to review the constitutionality of the random drug testing provisions. I disagree.

OSSE is correct that it has authority to enforce this law. But this does not end the inquiry. I must resolve the issues raised by Petitioners concerning the applicability of random drug and alcohol searches.

Nor do I agree with OSSE's assertion that OAH lacks jurisdiction to decide any constitutional questions. In *Archer v. District of Columbia Dep't of Human Resources,*[7] the D.C. Court of Appeals ruled that an agency lacks authority to declare a statute unconstitutional. However, in that case, a hearing examiner, who was employed directly by the agency which administered the program in question, refused to declare the enabling statute unconstitutional, and that decision was upheld. OAH was established in order to grant independent hearings to individuals aggrieved by agency actions. There is no provision in the Administrative Procedure Act, D.C. Official Code § 2-509, or in the OAH Establishment Act, D.C. Official Code § 2-1831.09(b), that prohibit administrative law judges from ruling on constitutional questions that are presented as part of the contested case or adjudicated case. In *Thunder Basin Coal Co. v.*

[7] 375 A.2d 523, 526 (D.C. 1977).

Reich,[8] the U.S. Supreme Court cast doubt on any rule barring administrative agencies from holding legislation unconstitutional and noted it is "perhaps of less consequence" when an independent agency is adjudicating the issue.[9]

Even assuming that such a bar exists, there are many instances where an ALJ is called upon to rule on constitutional matters that are intertwined with issues of statutory construction. For example, in a D.C. corporate income tax case,[10] this administrative court was required to determine whether a D.C. corporation filing a franchise tax return was required to apply only its own apportionment factors for a joint venture located outside the District. In order to resolve this issue, it was necessary to analyze issues of whether the D.C. taxing authority violated the corporation's rights under the Due Process and Commerce Clauses of the United States Constitution.[11]

Similarly, in this case, the resolution of the issue whether teachers at Petitioner's facility are "safety-sensitive" workers, requires at least an analysis of the Fourth Amendment decisions creating a special exception to the requirements of a warrant and probable cause for random drug and alcohol testing for "safety-sensitive" workers.

As Petitioner noted, even an agency that is prohibited from ruling on constitutional questions is nevertheless permitted to take into account the uncertain constitutionality of a statute

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[8] 510 U.S. 200, 215 (1994)
[9] *Id.*
[10] *Office of Tax & Revenue v. Alenia N. America,* 2014 D.C. Off. Adj. Hear. LEXIS 25 (Final Order Granting Summary Decision, March 11, 2014)
[11] *See id.*, at pp. 17-35.

as interpreted one way but not another.[12] When an ALJ is called upon to interpret a statute in one of two ways, one of which may be unconstitutional, the ALJ may choose the interpretation that avoids the possible unconstitutional result.[13] The Internal Revenue Service, for example, interpreted the terms, "husband" and "wife," in the tax laws, to include persons married to a person of the same sex, in order to avoid an unconstitutional result.[14]

Based on this analysis, I will address the dispositive issue.

Dispositive Issue – Petitioner's Teachers Must be Construed as Not Being "Safety-Sensitive" Employees Subject to Random Drug and Alcohol Testing, to Avoid Unconstitutional Result

OSSE interprets the CYSHA as requiring licensed child development facilities to implement a program of random drug and alcohol testing of their teachers, because the teachers are deemed to be "safety-sensitive" employees.

As I will explain in this section, OSSE's interpretation cannot be upheld because it would lead to an unconstitutional result.

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[12] *Nat'l Treasury Employees Union v. Federal Labor Relations Authority,* 986 F.2d 537, 540 (D.C. Cir. 1993).
[13] *Id.*
[14] *Revenue Ruling* 2013-17, I.R.B. 201 (2013).

A. The CYSHA Requirements Are Unclear and Inconsistently Applied, and Can Be Interpreted in Two Different Ways

The CYSHA requires District agencies to subject District employees who are in "safety-sensitive" positions to random drug and alcohol testing.[15] The CYSHA further states:

> [E]ach private entity licensed by the District government that has employees who work in safety-sensitive positions shall establish mandatory drug and alcohol testing policies and procedures **that are consistent with the requirements of this subchapter.**[16] [emphasis added]

The term, "safety-sensitive position," is defined in the CYSHA:

(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

(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.[17]

OSSE looks at this definition and concludes that it means that District teachers (or other employees) who interact with children and who meet this three-prong test are deemed to be "safety-sensitive." Therefore, since the licensed child development facility must establish drug and alcohol testing programs for its "safety-sensitive" employees "consistent with the

[15] D.C. Official Code §§ 1-620.32(a)(1) and (b).
[16] D.C. Official Code § 1-620.36.
[17] D.C. Official Code § 1-620.31(10).

requirements of this subchapter,"[18] the licensee must implement random drug and alcohol testing for its teachers, or any other employee who meets the three-prong test.

But there is another way to interpret the language, "consistent with the requirements of this subchapter," which is to look at how the District government actually implements the testing program as to the District employees and to apply the same standard to the employees of the licensed child development facility.

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. The District of Columbia Department of Human Resources (DCHR) has issued employee regulations that differentiate between "safety-sensitive" employees and "protection-sensitive" employees; those in the former category are subject to random testing, and those in the latter category are not. These regulations define teachers as, "protection-sensitive."[19] As a result, District teachers are not subject to random testing. The same rule applies to charter school teachers.

If one applies the CYSHA drug and alcohol testing requirements in the same manner that DCPS applies them to public school teachers and charter school teachers, then the licensed child development facility teachers are not subject to random drug or alcohol testing.

In assessing whether teachers of young children are "safety-sensitive" employees, one must consider that this term is not just a creature of statutory definition, but this term has been

[18] *Id.*
[19] *Compare* 6B DCMR 410 ("safety-sensitive") *with* 6B DCMR 411 ("protection-sensitive).

addressed repeatedly by courts in determining whether a class of employees can be subjected to random drug and alcohol testing consistent with the requirements of the U.S. Constitution, as I will discuss in the next section.

In choosing which interpretation should be applied, it is necessary to analyze the constitutional implications of each interpretation so as to avoid an unconstitutional result. Indeed, the doctrine requiring this tribunal to construe the statutes in a manner that avoids an unconstitutional result overrides any requirement of deference to an agency's interpretation of the statutes.[20]

B. Imposing a Requirement of Random Testing on Petitioner's Teachers Would Likely Be Determined a Violation of Their Fourth Amendment Rights

The U.S. Supreme Court has held that a governmental requirement of random drug and alcohol testing of employees constitutes a search of the human body and implicates the employees' rights under the Fourth Amendment to the U.S. Constitution.[21] A warrantless search that is not supported by probable cause is *per se* unconstitutional.[22]

However, in such cases, the government may show that "special exceptions" apply for dispensing with the requirements of warrants and probable cause. One of those exceptions applies to "safety-sensitive" employees who engage in dangerous and hazardous duties. The Court reasoned that such employees, for example a train operator, are highly regulated, have a

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[20] *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council,* 484 U.S. 568, 574-77 (1988).
[21] *Skinner v. Railway Labor Executives' Assoc.,* 489 U.S. 602, 614-617 (1989).
[22] *Id.,* 489 U.S. at 618-19.

lowered expectation of privacy, and are subject to a high degree of supervision because an error can lead to catastrophic consequences.[23]

In supporting the reasonableness of a random drug and alcohol testing program, the government must show that "the privacy interests implicated by the search are minimal, and [that] an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion."[24]

Courts have struck down various random drug-testing programs that applied to employees and others that the Court deemed were not "safety-sensitive," such as: candidates for elective office;[25] student athletes;[26] and state employees generally.[27] Examples of employees deemed to be "safety-sensitive" include: customs officials;[28] aircraft pilots and mechanics;[29] law enforcement officers who carry firearms;[30] and firefighters.[31] Clearly, workers who perform hazardous duties are included, while those who do not are not included.

The Supreme Court has not ruled on the question whether teachers or day care workers constitute "safety-sensitive" employees who meet the special exceptions standard. But various federal circuits and state courts have addressed this question.

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[23] *Id. at* 627-28.
[24] *Id. at* 624.
[25] *Chandler v. Miller,* 520 U.S. 305 (1997).
[26] *Veronia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995).
[27] *AFSCME Council 79 v. Scott,* 717 F.3d 851, 880 (11th Cir. 2013), *cert. denied,* 134 U.S. 1877 (2014).
[28] *Nat'l Treasury Employees Union v. Van Raab,* 489 U.S. 656 (1989).
[29] *Bluestein v. Skinner,* 908 F.2d 451 (9th Cir. 1990).
[30] *Carroll v. City of Westminster,* 233 F.3d 208 (4th Cir. 2000).
[31] *Hatley v. Dep't of the Navy,* 164 F.3d 602 (Fed. Cir. 1998).

Although Petitioner and AISGW do not cite to any cases that upheld random drug and alcohol testing for teachers, there is authority to this effect. In a Federal Sixth Circuit case arising from Kentucky, the Court held that school teachers were "safety-sensitive" employees who could reasonably be subjected to random drug and alcohol testing, because: (1) the teachers stood in *loco parentis* to the children they supervised; (2) the teachers acted alone and were not directly supervised in the classroom; (3) the teachers were highly regulated and had a lowered expectation of privacy; and (4) while there was no evidence of a history of drug use among the teachers, the areas in Kentucky where they worked had evidenced a scourge of illegal drug use, especially methamphetamine.[32] In Louisiana, courts have upheld random drug testing for custodians but not for teachers.[33]

But other courts have held that teachers may not be subjected to random testing without violating their constitutional rights. In a West Virginia federal case, the Court enjoined enforcement of a program of random testing for teachers on the basis that they were not "safety-sensitive" employees and therefore the random search of their bodies for drugs constituted an unreasonable search.[34]

Particularly instructive is the *Vilsack* case which was decided by the United States Circuit Court of Appeals for the D.C. Circuit.[35] In that case, the federal employer sought to impose random testing of Job Corps Center employees who worked with troubled teens, many of whom

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[32] *Knox County Educ. Assoc. v. Knox County Bd. of Educ.*, 158 F.3d 361, 373-75 and 378 (6th Cir. 1998). *See, also, Crager v. Bd. of Educ. of Knox County,* 313 F.Supp. 690 (E.D. Ky. 2004) [denying preliminary injunction to a teacher seeking to enjoin Knox County's random drug testing program].
[33] *Compare Aubrey v. Sch. Bd. of Lafayette Parish,* 148 F.3d 559 (5th Cir. 1998) [custodian] *with United Teachers of New Orleans v. Orleans Parish Sch. Bd.,* 142 F.3d 853 (5th Cir. 1998) [teacher].
[34] *American Federation of Teachers – West Virginia, AFL-CIO v. Kanawha County Bd. of Educ.,* 592 F.Supp. 883, 900-04 (S.D. W.Va. 2009).
[35] *Nat'l Federation of Federal Employees-IAM v. Vilsack*, 681 F.3d 483 (D.C. Cir. 2012).

had histories of substance abuse. The Court determined that the government failed to show that a special exception applied to dispense with the individualized suspicion requirement mandated by the Fourth Amendment.[36]

The government asserted that two important interests were served by random testing: enforcement of its zero tolerance toward substance abuse policy, and protection of the students' safety. But the Court found these interests to be attenuated because there was no showing that the employees had exhibited a history of substance abuse.[37]

Applying this case law to the present case, in balancing the interest of the government against that of the affected teachers, OSSE asserts that there is a compelling governmental interest in protecting young children, who are vulnerable and who rely on the diligence of the teachers who supervise them. OSSE makes a strong point here. But as in *Vilsack*, this interest is attenuated by the fact that OSSE cites to no existing problem with teachers of young children abusing drugs or alcohol. OSSE argues that it does not have to wait for a catastrophe to occur before it protects the children. But OSSE's position is inconsistent with the practice of DCPS, which does not require random testing of its teachers. I agree with Petitioner that this appears to be a "solution in search of a problem," as articulated in the *Vilsack* opinion.[38]

Turning to the interests of the teachers, it remains that urine testing is intrusive to the affected individuals and also disruptive to the facility. Compliance with random testing would require that teachers be pulled out of classrooms, and that substitute teachers be employed during the testing, as articulated by Dr. Johnson in her affidavit. PX B.

[36] *Id.*, 681 F.3d at 499.
[37] *Id. at* 495.
[38] *Id. at* 486.

Since the *Vilsack* decision is case law from this federal circuit, and since arguably the governmental interest was stronger in *Vilsack* than it is in this case, it is likely that a court reviewing the random testing requirement for child development facility teachers would find the requirement unconstitutional.

C. The Interpretation that Petitioner's Teachers Are Not "Safety-Sensitive" Renders the Statutes Free from Constitutional Doubt

For the reasons stated above, it is likely that a court would declare the requirement of random drug and alcohol testing of a licensed child development facility's teachers to be unconstitutional. Given that the District government inconsistently applies the CYSHA to District teachers versus licensed private facility teachers, it is appropriate to deem that Petitioner's teachers are not "safety-sensitive employees," but that they are "protection-sensitive" employees, consistent with 6B DCMR 411.2, and therefore are not required to submit to random drug and alcohol testing.

Consequently, there are no disputes of material fact, and Petitioner is entitled to a decision in its favor. OSSE's proposed revocation of Petitioner's license for failure to impose a program of random drug and alcohol testing of its teachers, must be reversed.

D. Other Issues

In the oral arguments, OSSE asserted that Petitioner has also failed to implement background checks, and drug and alcohol testing both at application and on individualized suspicion. The Notice was unclear as to the nature of Petitioner's noncompliance with CYSHA,

as the Notice cited to all four requirements without specifying which one(s) Petitioner allegedly violated. During these proceedings, the parties have focused on the issue of random testing, and that is the scope of the subject matter of this Order.

If OSSE contends that Petitioner failed to comply with other requirements, nothing in this Order precludes OSSE from issuing a new notice of action specifying any other violations.

VII. Order

Based on the foregoing, it is this 3rd day of May, 2016:

ORDERED, that Petitioner St. Paul's Lutheran Nursery School's Prehearing Dispositive Motion is **GRANTED**; and it is further

ORDERED, Respondent Office of the State Superintendent of Education's Brief and Response to Petitioner's Prehearing Dispositive Motion is **DENIED**; and it is further

ORDERED, that OSSE's Notice of Intent to Revoke the child development facility license issued to Petitioner St. Paul's Lutheran Nursery School on December 14, 2015, is **REVERSED**; and it is further

ORDERED, that any party may seek to change the Final Order or to appeal the Final Order as stated below.

Paul B. Handy
Principal Administrative Law Judge

After an administrative law judge has issued a Final Order, a party may ask the judge to change the Final Order and ask the District of Columbia Court of Appeals to change the Final Order. There are important time limitations described below for doing so.

HOW TO REQUEST THE ADMINISTRATIVE LAW JUDGE TO CHANGE THE FINAL ORDER

Under certain limited circumstances and within certain time limits, a party may file a written request asking the administrative law judge to change a final order. OAH Rule 2828 explains the circumstances under which such a request may be made. Rule 2828 and other OAH rules are available at www.oah.dc.gov and at OAH's office.

A request to change a final order does not affect the party's obligation to comply with the final order and to pay any fine or penalty. If a request to change a final order is received at OAH **within 10 calendar days** of the date the Final Order was filed (**15 calendar days** if OAH mailed the final order to you), the period for filing an appeal with the District of Columbia Court of Appeals does not begin to run until the Administrative Law Judge rules on the request. **A request for a change in a final order will not be considered if it is received at OAH more than 120 calendar days of the date the Final Order was filed (125 calendar days** if OAH mailed the Final Order to you).

HOW TO APPEAL THE FINAL ORDER TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

Pursuant to D.C. Official Code § 2-1831.16(c)-(e), any party suffering a legal wrong or adversely affected or aggrieved by this Order may seek judicial review by filing a Petition for Review and six copies with the District of Columbia Court of Appeals at the following address:

Clerk
District of Columbia Court of Appeals
430 E Street, NW, Room 115
Washington, DC 20001

The Petition for Review (and required copies) may be mailed or delivered to the Court of Appeals, and must be received there within 30 calendar days of the mailing date of this Order, pursuant to D.C. App. R. 15(a)(2). There is a $100 fee for filing a Petition for Review. Persons who are unable to pay the filing fee may file a motion and affidavit to proceed without the payment of the fee when they file the Petition for Review. Information on petitions for review can be found in Title III of the Court of Appeals' Rules, which are available from the Clerk of the Court of Appeals, or at www.dcappeals.gov.

Certificate of Service:

By First-Class Mail (Postage Paid) & Email:

Kate Johnson, Psy.D, Director
St. Paul's Lutheran Nursery School
3600 Everett Street, NW
Washington, DC 20008

Arthur B. Spitzer, Esq.
American Civil Liberties Union of the Nation's Capital
4301 Connecticut Avenue, NW, Ste. 434
Washington, DC 20008
artspitzer@aclu-nca.org

By First-Class Mail (Postage Paid) & Email:

Hillary Hoffman-Peak
Assistant General Counsel
Division of Early Childhood Education
Office of the State Superintendent of Education
810 First Street, N.E., 4TH Floor
Washington, DC 20002
Hillary.hoffman-peak@dc.gov

I hereby certify that on 5-3, 2016, this document was caused to be served upon the above-named parties at the addresses listed and by the means stated.

Clerk / Deputy Clerk