

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Inspector General

Inspector General



May 24, 2012

The Honorable Vincent C. Gray
Mayor
District of Columbia
Mayor's Correspondence Unit, Suite 316
1350 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Dear Mayor Gray:

Enclosed please find a copy of a Management Alert Report (MAR 12-I-002), entitled *District of Columbia Public Schools Does Not Conduct Mandatory Drug and Alcohol Testing of Employees In Safety-Sensitive Positions As Required by Law*, that the Office of the Inspector General (OIG) issued on April 27, 2012, to the District of Columbia Public Schools (DCPS), the Department of Human Resources, and the Office of the Attorney General. DCPS's response to the MAR, dated May 15, 2012, also is enclosed.

The MAR addresses our finding that DCPS does not test appointees or employees in safety-sensitive positions¹ as required by the Child and Youth, Safety and Health Omnibus Amendment Act of 2004. In its response, DCPS stated that it is "on schedule to implement the [mandatory drug and alcohol testing] program for applicants to safety-sensitive positions this summer and to begin reasonable suspicion and random testing for employees in safety-sensitive positions in the fall."

The OIG is conducting an ongoing special evaluation of mandatory drug and alcohol testing of District employees in safety-sensitive positions in 15 agencies, and a report will be completed later this year. We are providing this information to you now, however, so that you are aware of the importance of the issues we address and the corrective actions proposed by DCPS.

¹ Safety-sensitive positions are jobs in which District employees have direct contact with children (individuals 12 years of age and under) or youths (individuals between 13 and 17 years of age); are entrusted with the direct care and custody of children or youths; and whose performance of their duties in the normal course of employment may affect the health, welfare, or safety of children or youths.

Letter to Mayor Gray
May 24, 2012
Page 2 of 4

If you have questions, please contact Alvin Wright, Jr., Assistant Inspector General for Inspections and Evaluations, at (202) 727-2540.

Sincerely,


Charles J. Willoughby
Inspector General

CJW/ebs

Enclosures

cc: See distribution list

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DISTRICT OF COLUMBIA
OFFICE OF THE INSPECTOR GENERAL
CHARLES J. WILLOUGHBY
INSPECTOR GENERAL

INSPECTIONS AND EVALUATIONS DIVISION
MANAGEMENT ALERT REPORT

**DISTRICT OF COLUMBIA PUBLIC SCHOOLS,
D.C. DEPARTMENT OF HUMAN RESOURCES,
AND
ATTORNEY GENERAL FOR THE DISTRICT OF
COLUMBIA**

**DISTRICT OF COLUMBIA PUBLIC SCHOOLS
DOES NOT CONDUCT MANDATORY DRUG AND
ALCOHOL TESTING OF EMPLOYEES IN
SAFETY-SENSITIVE POSITIONS
AS REQUIRED BY LAW**

MAR 12-I-002
APRIL 27, 2012

Inspections and Evaluations Division
Mission Statement

The Inspections and Evaluations (I&E) Division of the Office of the Inspector General is dedicated to providing District of Columbia (D.C.) government decision makers with objective, thorough, and timely evaluations and recommendations that will assist them in achieving efficiency, effectiveness, and economy in operations and programs. I&E goals are to help ensure compliance with applicable laws, regulations, and policies, to identify accountability, recognize excellence, and promote continuous improvement in the delivery of services to D.C. residents and others who have a vested interest in the success of the city.

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Office of the Inspector General

Inspector General



April 27, 2012

Via Email and Hand Delivery

Kaya Henderson
Chancellor
District of Columbia Public Schools
1200 First Street, N.E., 12th Floor
Washington, D.C. 20002

Shawn Stokes
Director
D.C. Department of Human Resources
441 4th Street, N.W., Suite 330 South
Washington, D.C. 20001

Irvin B. Nathan
Attorney General for the District of Columbia
Office of the Attorney General
441 4th Street, N.W., Suite 1100 South
Washington, D.C. 20001

Dear Chancellor Henderson, Ms. Stokes, and Mr. Nathan:

This is a Management Alert Report (MAR 12-I-002) to inform you that during our special evaluation of District government agencies' implementation and administration of mandatory drug and alcohol testing (MDAT) programs for employees who serve children and youth in "safety-sensitive" positions, the Office of the Inspector General (OIG) learned that the District of Columbia Public Schools (DCPS) does not test appointees or employees in safety-sensitive positions as required by law. Accidents, negligence, and incidents of impaired judgment resulting from drug- or alcohol-influenced behavior of a DCPS employee while at work could adversely affect the safety and well-being of students, parents, other DCPS employees, as well as the integrity of DCPS operations. Failing to implement statutorily-required safeguards to detect and prevent such on-the-job behavior would expose the District to the risk of significant fiscal liability and public condemnation.

Background

Title I of the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 (Act) (CYSHA)¹ requires the establishment of a mandatory drug² and alcohol testing program for District government applicants for employment and employees in safety-sensitive positions. According to D.C. Code § 1-620.31(10), “safety-sensitive positions” are jobs in which District employees have direct contact with children³ or youth;⁴ are entrusted with the direct care and custody of children or youth; and whose performance of their duties in the normal course of employment may affect the health, welfare, or safety of children or youth.

In June 2008, the D.C. Department of Human Resources (DCHR) issued E-DPM Instruction No. 39-1, “Mandatory Drug and Alcohol Testing of Employees who Serve Children and Youth Policy (Policy),”⁵ to inform District government employees who have direct contact with children and youth of the requirements of the District’s drug and alcohol testing program. The Policy identifies each District government agency covered under the program and includes DCPS.⁶ To standardize the identification of safety-sensitive positions, the Policy lists over 20 duties and responsibilities, citing among others: recreational activities; educational activities; childhood development services; therapeutic services, prevention and intervention services; mentoring services; youth care services; and driving a motor vehicle to transport children or youth.⁷

DCPS is a cabinet-level agency subordinate to the Mayor that provides educational resources and activities to an average of 45,000 students annually.⁸ According to a senior official, DCPS currently has 8,243 safety-sensitive employees.

Observation

DCPS has not implemented a mandatory drug and alcohol testing policy or program for employees working in safety-sensitive positions.

In January 2012, the OIG team asked DCHR for a point-of-contact who oversees MDAT for safety-sensitive positions at each District agency covered under its Policy. DCHR provided contact information for every covered agency except DCPS. After the OIG inquired about DCPS, a DCHR official informed the OIG that DCPS does not have a MDAT program in place, and identified a DCPS official who was working to implement one. The OIG inspector tried to contact the named DCPS official and learned that he/she was no longer employed there. The OIG inspector then spoke with another DCPS official who stated that DCPS was not testing

¹ D.C. Law 15-353 (Apr. 13, 2005), codified, as amended, at D.C. Code §§ 1-620.31 - .37 (2006).

² D.C. Code § 1-620.31(4) defines “drug” as “an unlawful drug and does not include over-the-counter prescription medications.”

³ D.C. Code § 1-620.31(2) defines “child” as an individual 12 years of age and under.

⁴ D.C. Code § 1-620.31(11) defines “youth” as an individual between 13 and 17 years of age.

⁵ In April 2010, DCHR amended this policy via E-DPM Instruction No. 39-2.

⁶ *Id.* § VI.

⁷ *Id.* § VII.

⁸ D.C. Code § 38-171. See <http://dcps.dc.gov/DCPS/About+DCPS/Who+We+Are> (last visited Apr. 9, 2012).

employees and that the contact identified by DCHR had been developing a program prior to separating from DCPS the previous month.

An official from the DCPS Office of the General Counsel confirmed in March 2012 that DCPS is not subjecting its safety-sensitive employees to MDAT. He/she added that DCPS is in the process of developing a “fully compliant” policy and program under CYSHA and intends to have a policy in place prior to the end of this school year. The official noted that its 2013 budget includes “adequate funding” for a MDAT program and that DCPS has a purchase order in place with a laboratory to perform the drug testing. He/she stated that DCPS once had a drug testing program that focused on school bus drivers and attendants but discontinued it when responsibility for these employees was transferred from DCPS to the Office of the State Superintendent of Education in 2008. Thereafter, DCPS did not have the budget to test other DCPS personnel in safety-sensitive positions, and did not create a policy compliant with CYSHA.

The OIG inspector asked a DCHR official why DCPS did not have a MDAT program and to describe efforts DCHR has made to address this issue with DCPS. The official responded that DCHR has had discussions with DCPS⁹ to assist in implementing a program that will “identify, notify, and test the most sensitive groups of employees at DCPS” as well as subject new applicants to testing. The DCHR official added that funding will be budgeted in fiscal year 2013 for full implementation of the MDAT program at DCPS.

Analysis and Conclusion

The OIG acknowledges that state and local entities’ efforts to implement random drug testing programs for teachers have faced considerable resistance from labor organizations and privacy rights advocates. Some jurisdictions have succeeded in implementing testing, while others have been forced to withdraw proposed programs. A March 2009 *Washington Times* article, entitled “Teacher Reps Fight Random Drug Tests,” provides a valuable perspective:

A growing number of school districts and states are trying to give teachers random drug tests, citing student safety concerns, but their efforts are running afoul of unions who say such tests violate teacher privacy rights....

* * *

“Folks who go into teaching are not the kind who use drugs,” said [the] assistant general counsel for the National Education Association (NEA), the nation’s largest teachers union with 3.2 million members. He said the NEA supports testing of teachers when an administrator trained to detect drug abuse has reasonable

⁹ The DCHR official noted that these discussions had transpired over the last week of March 2012, and that there may have been discussions between DCPS and DCHR that predated his/her tenure.

suspicion that a teacher could be under the influence. Most districts now require such testing. But policies testing teachers for drugs at random force districts and states to spend precious education dollars, [he] said.

* * *

Court rulings on the issue of testing teachers for drug use have gone both ways. While judges have sided with the teachers on privacy rights in some districts, others have agreed that districts can indeed test teachers.^[10]

In 2007, West Virginia's largest school district adopted a drug testing policy for testing in six situations, including pre-employment and for reasonable cause, and revised it the following year to include random drug testing.¹¹ The state's chapter of the American Federation of Teachers filed a lawsuit, and in 2009 a federal judge "blocked the random testing provision as 'an unconstitutional excess that threatens the fundamental freedom from unreasonable searches.'"¹² In the wake of that ruling, the school board unanimously voted to repeal the provision.¹³ According to a March 2011 *Charleston Gazette* article, there have been challenges to random testing in other states as well:

Other states have wrestled with the random testing issue. Hawaii, which has allowed reasonable suspicion testing since 2007, dropped an attempt [in 2011] to require random testing. Teachers in an Illinois district held a strike [in August 2011] to oppose a random testing policy proposed there. A North Carolina appeals court struck down a random testing policy adopted by one county in 2009.^[14]

Regardless of what has transpired in other jurisdictions regarding drug testing of school employees, the District's requirement is clear and has not been implemented. The D.C. Code requires that DCPS employees who work in safety-sensitive positions undergo mandatory drug and alcohol testing. This requirement is not being enforced at DCPS, and the policy and procedures necessary to implement testing of DCPS appointees and employees have not been finalized. Neither DCPS nor DCHR officials indicated that the absence of a MDAT program in DCPS was due to resistance from labor organizations or privacy right advocates. In April 2012, an official from the DCPS Office of the General Counsel stated that DCPS has been in contact with the District's Office of Labor Relations and Collective Bargaining to discuss this issue and

¹⁰ *Teacher Reps Fight Random Drug Tests*, WASHINGTON TIMES, Mar. 12, 2009, available at <http://www.washingtontimes.com/news/2009/mar/12/random-drug-tests-test-teacher-privacy-rights/print/> (last visited Apr. 12, 2012).

¹¹ Lawrence Messina, *Governor's Race Revisits Drug Testing Debate*, CHARLESTON GAZETTE, Sept. 11, 2011, available at <http://www.wvgazette.com/News/201109110165> (last visited Apr. 12, 2012).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.*

a meeting should be set up in the next few weeks. He/she added that based on their preliminary analysis, the "MDAT requirement is statutorily mandated, and none of the affected employees' collective bargaining agreements will impede DCPS' [s] requirement to implement MDAT."

Recommendations

The OIG recommends placing high priority on the following actions:

1. That the DCPS Chancellor provide the OIG with a written summary of all actions DCPS has taken to comply with the Act and subsequent E-DPM instructions, including a description of any collaboration or communication with DCHR;
2. That the DCPS Chancellor develop a detailed MDAT program implementation plan that defines major milestones (e.g., conduct collective bargaining with the Washington Teachers Union, if necessary; finalize DCPS's MDAT policy; disseminate the MDAT policy to DCPS employees who occupy safety-sensitive positions; and institute comprehensive testing procedures) and assign deadlines and responsibility for meeting those milestones; and
3. That DCPS collaborate regularly with DCHR and the Office of Attorney General (OAG) to implement a mandatory drug and alcohol testing program at DCPS and provide regular progress updates to the OIG.

Please provide your comments to this MAR by May 15, 2012. Your response should include actions taken or planned, dates for completion of planned actions, and reasons for any disagreement with the concerns and recommendations presented. Please distribute this MAR only to those who will be directly involved in preparing your response.

Should you have any questions prior to preparing your response, please contact [REDACTED], Director of Planning and Inspections, on [REDACTED]

Sincerely,


Charles J. Willoughby
Inspector General

CJW/mg

cc: Mr. Allen Y. Lew, City Administrator, District of Columbia
The Honorable Kwame R. Brown, Chairman, Council of the District of Columbia
The Honorable Yvette Alexander, Councilmember, Committee of the Whole
The Honorable Marion Barry, Councilmember, Committee of the Whole
The Honorable Muriel Bowser, Councilmember, Committee of the Whole
The Honorable Michael A. Brown, Councilmember, Committee of the Whole

The Honorable David A. Catania, Councilmember, Committee of the Whole
The Honorable Mary M. Cheh, Councilmember, Committee of the Whole
The Honorable Jack Evans, Councilmember, Committee of the Whole
The Honorable Jim Graham, Councilmember, Committee of the Whole
The Honorable Phil Mendelson, Councilmember, Committee of the Whole
The Honorable Vincent B. Orange, Sr., Councilmember, Committee of the Whole
The Honorable Tommy Wells, Councilmember, Committee of the Whole



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District of Columbia**

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DISTRICT OF COLUMBIA
PUBLIC SCHOOLS

Via Electronic Mail

May 15, 2012

District of Columbia
Office of the Inspector General
Charles J. Willoughby, Inspector General
717 14th Street, NW
Washington, D.C. 20005

Dear Inspector General Willoughby:

Kaya Henderson, Chancellor of the District of Columbia Public Schools (DCPS), has provided this office with a copy of the Management Alert Report (MAR 12-I-002) of April 27, 2012, regarding DCPS' progress toward preparing a mandatory alcohol and drug testing (MDAT) program in compliance with the Child and Youth, Safety and Health Omnibus Amendment Act of 2004 (CYSHA). Please accept this letter as a response to your inquiries.

Per your request, below we distill DCPS' progress toward instituting a MDAT program and proposed timeline for DCPS' future actions. As detailed in the chart shown below, DCPS is on schedule to implement the MDAT program for applicants to safety-sensitive positions this summer and to begin reasonable suspicion and random testing for employees in safety-sensitive positions in the fall. As DCPS continues to progress toward completing this goal, we will provide periodic updates regarding the actions taken by DCPS and those planned for the future.

DCPS fully appreciates the importance of instituting an alcohol and drug testing program as quickly as possible, while fulfilling its obligation to discuss its plans with its union partners.

Please let us know if you have any questions or concerns regarding DCPS' proposed plan and progress to date.

Sincerely,

TASK	(PROPOSED) COMPLETION DATE
DCPS obtained purchase order for drug testing services to be provided by Quest Laboratories	Approximately December, 2011
DCPS met with officials in D.C. Office of Human Resources to discuss the process for establishing a policy and program	April 4, 2012
DCPS identified three potential Medical Review Officers to verify drug test results and obtained initial service quotes	April – May 2012
DCPS drafted policy for Mandatory Drug and Alcohol Testing and distributed for review by legal counsel	April 25, 2012
DCPS discussed the proper protocol for engaging/negotiating with unions representing safety-sensitive positions regarding the policy with the Office of Labor Relations and Collective Bargaining	May 10 and 11, 2012
DCPS edited policy and drafted presentation on the Mandatory Drug and Alcohol Testing with feedback from the Office of the General Counsel and Office of Labor Relations and Collective Bargaining	May 14, 2012
DCPS will finalize policy	Week of May 28, 2012
DCPS will distribute policy to unions	Week of June 4, 2012
DCPS will engage in impacts and effects bargaining with unions regarding policy, as requested	June 4, 2012 to July 20, 2012
DCPS will finalize contracts with vendors for drug testing, alcohol testing and Medical Review Officer services	June 15, 2012
DCPS will hire MDAT program staff (depends on hiring freeze exception being granted)	Week of July 9, 2012
DCPS will distribute policy to employees	August 20, 2012
DCPS will host manager trainings on reasonable suspicion	July 2, 2012 - August 20, 2012
Applicant Testing Begins	Week of July 16, 2012
Employee Testing Begins	September 24, 2012