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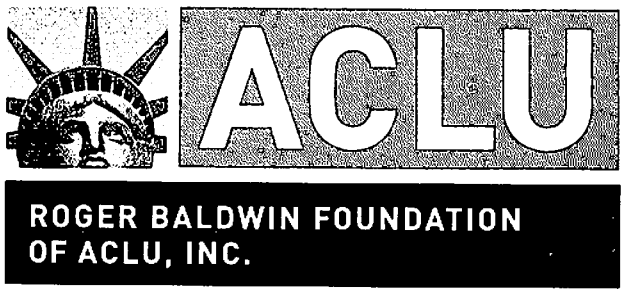


June 3, 2011

BY U.S. MAIL, EMAIL, AND FACSIMILE

Chicago Housing Authority
Planning and Reporting Department
Attn: FY2011 Amended ACOP, Lease and Amendment to the FY2011 MTW Annual Plan
60 E. Van Buren, 10th Floor
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**Re: Drug testing as a condition of CHA residency**

To the Chicago Housing Authority:

I write on behalf of the ACLU of Illinois, including our 10,000 members and supporters in Chicago. We respectfully request that the Chicago Housing Authority ("CHA") remove, from the proposed FY2001 Amended Admissions and Continued Occupancy Policy ("ACOP"), those provisions that would mandate suspicionless drug testing for all CHA applicants and residents, and all of their household members who are at least 18 years old. *See* proposed FY11 ACOP at Part IX. We make this request for several reasons.

**A. Policy reasons**

First, drug testing invades privacy and bodily autonomy. Drug testing by means of urinalysis is humiliating for many people, and embarrassing or unpleasant for many others. Drug testing in the absence of individualized suspicion is stigmatizing: it creates a presumption of guilt that can only be rebutted by a negative test result.

Second, drug testing as a condition of residency in public housing would create an unfair double standard. People from all across Chicago who rent their residences in the private sector, most of whom are middle and upper income, are not required to take a drug test. On the other hand, poor people in Chicago who rent public housing from the CHA would be required to take a drug test. Yet social science research shows that low income persons do not use or abuse illegal drugs at rates significantly higher than persons in other income groups. *See, e.g.*, U.S. National Institutes of Health, *NIAAA Researchers estimate alcohol and drug use, abuse, and dependence among welfare recipients* (Oct. 23, 1996) ("Proportions of welfare recipients using, abusing, or

dependent on alcohol or illicit drugs are consistent with proportions of both the adult U.S. population and adults who do not receive welfare . . . .").[1]

Third, suspicionless drug testing would misallocate scarce CHA resources. Suspicionless drug testing would cost $1 million per year (assuming a cost of $50 per test, and assuming 20,000 adult CHA residents and applicants). That money would be better spent on building security or drug treatment.

Fourth, there are more effective and direct alternative methods to advance the CHA's objectives. Drug dealing on or about CHA property can be remedied with traditional law enforcement techniques such as controlled purchase stings. Disruptive or destructive residents can be evicted based on their conduct.

**B. Legal reasons**

Suspicionless drug testing as a condition of CHA residency would violate the privacy guaranty of the Fourth Amendment to the U.S. Constitution. Under that guaranty, drug tests are searches. *See, e.g., Chandler v. Miller*, 520 U.S. 305, 313 (1997). "To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing. . . . But particularized exceptions to the main rule are sometimes warranted based on special needs, beyond the normal need for law enforcement. . . . When such special needs . . . are alleged . . . , courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties." *Id.*

In the particular context here – suspicionless drug testing as a condition of residency in public housing – the relevant factors to be balanced weigh heavily against testing.

First, suspicionless drug testing by means of urinalysis is a significant intrusion on privacy. *Pottawatomie Sch. Dist. v. Earls*, 536 U.S. 822, 841 (2002) (Breyer, J., concurring) (for some people monitored urination is "seriously embarrass[ing]" and not a "negligible" privacy invasion); *Taylor v. O'Grady*, 888 F.2d 1189, 1197-98 (7th Cir. 1989) ("[a]ll urinalysis programs implicate serious privacy concerns," because monitored urination "is intrusive and often embarrassing and uncomfortable").

Second, CHA residents do not have a diminished expectation of privacy, in comparison to the general population. They are just like the tens of millions of other people who live in rental property in exchange for paying rent and behaving lawfully. They are adults, they have broken no laws, and they are not engaged in dangerous activities that can directly harm other people. In this regard, public housing residents are fundamentally unlike the narrow classes of people that have been found by courts to have a diminished expectation of privacy for purposes of suspicionless drug testing. *See Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602, 627 (1989) (train operators); *NTEU v. Von Raab*, 489 U.S. 656, 672 (1989) (armed drug interdiction personnel); *Pottawatomie Sch. Dist. v. Earls*, 536 U.S. 822, 829-30 & n.3 (2002) (children in

[1] Available at: http://www.niaaa.nih.gov/NewsEvents/NewsReleases/Pages/welfare.aspx.

public school custody); *Bates v. Davis*, 116 Fed. Appx. 756, 757-58 (7th Cir. 2004) (inmates in prison custody).

Third, there is at best only an attenuated, indirect nexus between public safety and suspicionless drug testing of CHA residents. It appears that the CHA is considering this policy as a means to reduce illegal drug dealing on and about CHA property. *See* Maudlyne Ihejirika, *CHA plan for required drug testing of residents called 'a slap in the face,'* Chi. Sun-Times (May 27, 2011) (a CHA spokesperson stated: "Drug dealers won't come where there are no buyers. If you remove the folks who are interested in drugs, hopefully it will remove some of the problems."). No doubt, public safety is an important government interest, and the presence of drug dealers can diminish public safety. The question, however, is whether suspicionless drug testing will actually advance public safety. *See Chandler*, 520 U.S. at 323 ("Where . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged."). *See, e.g., Taylor*, 888 F.2d at 1197 (because jail safety was "not furthered by" suspicionless drug testing of jail employees who lacked access to inmates or firearms, such testing was unlawful).

Here, it is highly doubtful that suspicionless drug testing of CHA residents would meaningfully advance public safety at CHA developments. Unfortunately, drug dealers operate in many Chicago neighborhoods, and cater to many different kinds of people. Even if the proposed CHA policy succeeded at diminishing drug demand by CHA residents, it would do nothing to reduce drug demand by residents of adjacent properties, and thus it would not necessarily reduce the presence of drug dealers in the vicinity of CHA properties.

Moreover, other methods can much more directly and effectively advance the CHA's public safety interests. Drug dealers can be removed from CHA property pursuant to trespass rules. They can be arrested and prosecuted by means of traditional police techniques like controlled purchase stings. Destructive or disruptive residents can be evicted for cause. Drug testing of residents might be required where there is individualized suspicion of illegal drug use. The availability of workable alternatives, as here, weighs against suspicionless drug testing. *See, e.g., Willis v. Anderson Sch. Corp.*, 158 F.3d 415, 420-21, 423-24 (7th Cir. 1998) (striking down suspicionless drug testing of public school students based on a suspension for fighting, in part because of the workability of suspicion-based testing in this context).

While the "special needs" balancing of government and privacy interests is highly fact specific, it bears emphasis that courts have struck down suspicionless drug testing in many contexts. *See, e.g., Chandler*, 520 U.S. 305 (candidates for elected office); *Taylor v. O'Grady*, 888 F.2d 1189 (7th Cir. 1989) (jail employees without access to inmates or firearms); *Marchwinski v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000) (poor persons seeking cash public aid), *aff'd*, 60 Fed. Appx. 601 (6th Cir. 2003) (en banc).[2]

[2] Notably, in *Marchwinski*, more than a dozen leading drug research and treatment organizations filed an *amici curiae* brief that opposed suspionless drug testing of public aid beneficiaries. These organizations are: the American Public Health Association, the National Association of Social Workers, Inc., the National Association of Alcoholism and Drug Abuse Counselors, the American College of Obstetricians and Gynecologists, the National Council on Alcoholism and

Finally, suspicionless drug testing as a condition of CHA residency would also violate the Privacy Clause of the Illinois Constitution. *See* Ill. Const. Art. I, sec. 6. That liberty guaranty "goes beyond" the protections of the U.S. Constitution. *In re May 1991 Will County Grand Jury*, 152 Ill. 2d 381, 391 (1992) (requiring probable cause for a grand jury to seize head or pubic hair, and individualized suspicion for it to seize thumb prints).

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Thank you for considering the ACLU of Illinois' reasons for opposing suspicionless drug testing as a condition of CHA residency. We respectfully request that the CHA remove Part IX of the proposed FY2011 Amended ACOP. If you have any questions, please do not hesitate to contact me at (312) 201-9740, extension 321, or at hgrossman@aclu-il.org.

Sincerely,

Harvey Grossman
Legal Director
ACLU of Illinois

cc: James Reynolds, CHA Chairman
Scott Ammarell, CHA General Counsel

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Drug Dependence, the Association of Maternal and Child Health Programs, the National Health Law Project, the National Association on Alcohol, Drugs and Disability, Inc., the National Advocates for Pregnant Women, the National Black Women's Health Project, the Legal Action Center, the National Welfare Rights Union, the Youth Law Center, the Juvenile Law Center, and the National Coalition for Child Protection Reform. This *amici* brief is available at: http://www.aclu.org/files/FilesPDFs/marchwinskiamicusbrief1_22_01.pdf