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IN THE COURT OF APPEALS OF INDIANA

ROSA J. LINKE, REENA M. LINKE,)

(By their next friends and parents),)
SCOTT L. LINKE and NOREEN L. LINKE,)

)
Appellants-Plaintiffs,)

)
vs.) No. 34A05-9910-CV-467

)
NORTHWESTERN SCHOOL CORP.,)

)
Appellee-Defendant.)

APPEAL FROM THE HOWARD CIRCUIT COURT

The Honorable Lynn Murray, Judge
Cause No. 34C01-9902-CP-131

October 6, 2000

OPINION UPON PETITION FOR REHEARING – FOR PUBLICATION

SULLIVAN, Judge

Appellee, Northwestern School Corporation (School) files its Petition for Rehearing addressed to our opinion of August 21, 2000, as reported at 734 N.E.2d 252. In that opinion we held that a random drug testing program conducted upon students engaged in certain select activities was contrary to the provisions of Indiana Constitution, Article 1, Section 11.

It is the position of the School that our opinion conflicts with six Indiana Court of Appeals cases in that those cases “hold that in the school search context the requirements of Article I, Section 11 are coextensive with those of the Fourth Amendment and apply the Fourth Amendment framework to

searches challenged under Article I, Section 11.” The School is in error in its reading of those cases and we issue this opinion upon rehearing for the sole purpose of clarification.

The cases relied upon by the School are inapplicable to the random drug testing program here involved because this drug testing program wholly lacks the “general requirement of individualized suspicion” implicit in Article 1, Section 11. 734 N.E.2d at 259.

In *Berry v. State* (1990) Ind.App., 561 N.E.2d 832, only the Federal Constitution was argued but nevertheless reasonable individualized suspicion existed. In *S.A. v. State* (1995) Ind.App., 654 N.E.2d 791, trans. denied, the court, applying the Indiana Constitution, held that the seizure was valid because there existed individualized suspicion of the particular student. In *D.I.R. v. State* (1997) Ind.App., 683 N.E.2d 251, both the U.S. and state constitutional prohibitions were argued but the court reversed the delinquency determination because the search was not justified upon good cause individualized suspicion. In *G. J. v. State* (1999) Ind.App., 716 N.E.2d 475, the court held that the constitutional argument had been waived but that in any event there had not been a search at all. In *D. B. v. State* (2000) Ind.App., 728 N.E.2d 179, the juvenile relied upon a Fourth Amendment argument but the search was factually based upon a good cause individualized suspicion and was therefore valid. Finally, in *C.S. v. State*, No. 49A05-9912-JV-567 (September 8, 2000) Ind.App., ___ N.E.2d ___, although the student’s challenge to a pat down was premised upon both the U.S. and the Indiana Constitutions, the court discussed only the Fourth Amendment and the pat down discovery of a gun was validated in light of a reasonable individualized suspicion as to the student involved.

Additionally, the School asserts that we misstated the record as to any “direct correlation between drug use and [the School’s] need to randomly test the majority of the students for drugs.” 734 N.E.2d at 260. Our observation in this regard was intended to acknowledge, as we must, that a Fourth Amendment federal analysis contains exceptions for situations involving “special needs,” e.g. railroad engineers and airline pilots. Its implication was that even if a “special needs” analysis were to be made under Article 1, Section 11 of the Indiana Constitution, the School had not established the basis for such an exception in the case before us.

The School’s argument in this respect focuses upon two exhibits. The first is a survey taken with regard to a totally different school corporation located in St. Joseph County. We fail to see any correlation between that study and any problem which may have been perceived as to the Northwestern School Corporation.

The second exhibit alluded to by the School is a summary of a survey taken in March and April 1995. The summary purportedly shows that drug use in the Northwestern system for four of the six grades was somewhat higher than statewide use of the same substances as reflected by a different study taken during the same time frame. The exhibit dealing with the survey of Northwestern students was introduced through the deposition testimony of the Superintendent of the School Corporation. He stated that he was only generally, rather than specifically, aware that the study contained “a statistically significant finding from the 1995 survey” relative to drug use among Northwestern 7th, 8th, 9th and 10th grade students vis-a-vis prevalence of use statewide. Record at 87.

This 1995 study is insufficient basis, statistical or otherwise, to demonstrate a “specific need” for a 1999 program for random drug testing of arbitrarily designated student activity groups.

In light of our disagreement with the arguments made by the School upon rehearing, we hereby reaffirm our opinion and holding as previously enunciated.

BAILEY, J., and VAIDIK, J., concur.