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COMMENTARY

Better options exist in drug-testing issue

By Kim Coco Iwamoto

The recent editorial on random drug testing of teachers conveyed frustration with government operations in contrast to the efficacy of the private sector.

Herein lies the rub.

The governor, the Board of Education and the Department of Education are all state actors. Private companies and private associations may freely conduct warrantless searches of their employees or members without any showing of cause or due process. However, the U.S. and Hawai'i Constitutions prohibit the government — including the DOE — from drug-testing its employees without reasonable suspicion. By proceeding with random drug testing, the governor and the DOE will be violating teachers' constitutional rights.

The only party in this whole drama that is not a "state actor" is the Hawaii State Teachers Association. The HSTA has sufficient resources to randomly drug-test 100 members a year, (complying with the governor's request). As long as a "state actor" is not paying for, conducting, selecting, or mandating the random drug testing, we can get back to more legitimate concerns and solutions.

The only time the government can test an employee without any cause is when the employee "performs a safety-sensitive function." As a federal appeals court recently ruled: "Jobs are considered safety-sensitive if they involve work that may pose a great danger to the public, such as: the operation of railway cars, the armed interdiction of illegal drugs, work in a nuclear power facility, work involving matters of national security, work involving the operation of natural gas and liquefied natural gas pipelines, work in the aviation industry and work involving the operation of dangerous instrumentalities, such as trucks that weigh more than 26,000 pounds, that are used to transport hazardous materials, or that carry more than 14 passengers at a time." This court holding reflects the protections of the U.S. Constitution; the state Constitution has language that is even more protective of privacy.

Although teachers perform one of the most important functions in society, this does not make an elementary school teacher "safety-sensitive" in the same way as a nuclear power plant operator.

If we continue to insist that the DOE conduct the random drug testing of employees, instead of the unions, the costs of defending the state against an ACLU lawsuit will cost 10 times the amount of all the drug testing combined.

If the governor really cared about improving public schools, wouldn't she have swept in at the eleventh hour and insisted that the DOE be allowed to evaluate teacher performance more often

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than "once in every five years," as the bargaining agreement she signed currently limits? Ironically, a random annual performance evaluation of public school teachers would be permissible under the constitutions of the United States and Hawai'i.

Another option would be for the DOE to conduct drug tests based on reasonable suspicion. For example, the DOE could drug-test just those employees who are absent or tardy at a rate well above the national average. A recent audit conducted by the accounting firm Accuity LLP revealed that an average of 9 percent of Hawai'i's public school teachers are absent from work on any given school day; that is almost double the 5 percent national average. This means that 1,100 DOE teachers are absent from school every day. I have proposed that the DOE comply with the constitutional prohibition against random drug testing by limiting it to those employees who have an excessive number of absences and/or tardies without physician clearance. When I asked the ACLU if they would challenge this form of drug testing, the ACLU said that it considered this to be within the reasonable suspicion permissible standard.

The bottom line is that there are more productive, proactive solutions to this dilemma. We should not sell ourselves short with simple-minded, ineffective, unconstitutional, Band-Aid approaches to improving our public schools.

Kim Coco Iwamoto is an attorney and a member of the state Board of Education. She wrote this commentary for The Advertiser.

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