

2002-217

Implications for Confidentiality of Random Drug Testing of Student Athletes

PHIA – Privacy (collection, use, disclosure, retention, security) – Garden Valley School Division
s. 13, 15(1), 20(1)(2), 21(b)(c)(a), 60(e), 22(2)(a)(b)(c)(d)(e)(f)(g), 7(1), 17(3)(4), 18,19, and s. 2, 3,
4, 5, 6, 7, 8 of PHIA Regulation 245/97

Introduction: Rarely, if ever, has a matter investigated by our office garnered so much local, national and international attention as this case. In November 2002, the media reported on a proposed policy of the Garden Valley School Division to randomly drug-test high school student athletes. This raised public concerns about the intended collection of students' personal health information and possible issues surrounding the use, disclosure, retention and security of that information.

The Personal Health Information Act (PHIA) provides that the Manitoba Ombudsman may conduct investigations to ensure compliance with the Act and may comment on the implications for the confidentiality of personal health information of proposed programs or practices of personal health information trustees. A file was opened and our report on the matter, including a discussion of the School Division's response, is reproduced in its entirety, below.

The crux of the Ombudsman's decision is that the proposed collection of personal health information would not be lawful and necessary or effective. This is based on the lack of evidence that safety is at risk or that random drug testing would deter drug use, and the availability of other measures to address student conduct during school hours and activities. The Board of Trustees of the School Division responded that, after careful consideration of the Ombudsman's report, it was decided at the Board's regular meeting on October 14, 2003, not to approve at this time a drug testing policy for its high school.

It should be underscored that the Ombudsman is of the opinion that the proposed collection of personal health information was not compliant with the provisions of PHIA. On that basis, in the Ombudsman's view, all other elements of the draft policy would be contrary to the law or unnecessary. Our review nevertheless considered the implications of the proposed use, disclosure, retention and destruction of personal health information in order to provide a complete and considered discussion of the privacy issues. The report, therefore, includes our comments on these concepts as well as on notice and consent.

We note that the Garden Valley School Division was very cooperative throughout our review of this matter.

**Manitoba Ombudsman's Report into
Garden Valley School Division's
Proposed Policy "Drug Testing for Student Athletes"**

Issued to the School Division: September 16, 2003
Reissued noting the Division's response: October 16, 2003

In response to concerns raised publicly, the Ombudsman's Office initiated a review under *The Personal Health Information Act* (PHIA) concerning the Garden Valley School Division's proposed policy "Drug Testing for Student Athletes".

As defined under s.1 of PHIA, personal health information includes recorded identifying information that is collected in the course of, and is incidental to, the provision of health care. The definition of health care includes any service or procedure provided to diagnose an individual's physical condition.

In our view, the names of students selected for drug testing, as well as the results of those procedures, would be personal health information under PHIA.

The following is our report into the proposed collection, use, disclosure, retention and security of personal health information under the draft policy.

During our review of this matter, a meeting was held with the Superintendent of the Garden Valley School Division and the Chair of the School Board, as well as the Principal and Vice-Principal of Garden Valley Collegiate. The following documents provided by the Division were also reviewed:

- Response letter to our inquiries under PHIA (November 26, 2002);
- Legal opinion regarding the proposed drug testing policy (November 20, 2002);
- Existing Garden Valley School Division "Drug Policy" [Appendix 1];
- Draft policy "Drug Testing for Student Athletes" (March 2002) [Appendix 2], including a checklist for signs of drug use and consent form [Appendix 3];
- Response letter to our request for further information under PHIA (March 21, 2003);
- Relevant provisions under *The Public Schools Act* [Appendix 4], *The Education Administration Miscellaneous Provisions Regulation 468/88* [Appendix 5], and "The Manitoba Education and Training Administrative Handbook for Schools";
- Two Parent Resource Institute for Drug Education (PRIDE) surveys concerning drug use by Garden Valley School Division students (1995 and 2002);
- Surveys from the Alcoholism Foundation of Manitoba (AFM) concerning the use of drugs and alcohol by students (1997 and 2001);
- Studies and research from the United States supporting random drug testing (2002);
- Urinalysis testing information from a drug testing company (March 2003).

The Division was very cooperative with our investigation, providing comprehensive documentation for the development of the proposed drug testing policy and timely responses to our inquiries concerning its compliance with PHIA. It was evident that the Division devoted considerable time and effort to developing the draft policy.

EXISTING DRUG POLICY

Garden Valley School Division has an existing drug policy [Appendix 1] that applies to all of the approximately 927 students attending Garden Valley Collegiate. It prohibits students from using, possessing, selling or having any involvement with alcohol or illicit drugs on school property or at any school-sponsored activity.

The policy authorizes the Principal to discipline students who possess, sell or are under the influence of alcohol or illicit drugs. To establish a reasonable suspicion that a student is under the influence of prohibited substances, the policy states that the checklist for signs of drug use will be used as a guide. These signs include a decline in school performance, problems with law enforcement, problems with finances, personality changes, emotional problems, physical problems, chemical-specific indicators and disruption in family relationships.

The drug policy sets out a range of disciplinary measures that may be imposed by the Principal, including the withdrawal of school privileges, suspension or expulsion from school, and making a report to police.

The purpose of the policy is to create a school environment that is alcohol and drug free, as well as to assist students involved detrimentally with alcohol and other drugs. To do so, the policy relies on prevention through education, intervention through confrontation, and treatment through counseling and rehabilitation.

The Division advised our office that most students using drugs are very reluctant to admit it and seek help. As a result, the Division found that it could sometimes take months or years to accumulate sufficient evidence to confront students about their drug use. In its view, drug testing would provide clear and convincing evidence that could be used to support earlier intervention and treatment. Consequently, the Division developed a draft drug testing policy.

PROPOSED STUDENT ATHLETE DRUG TESTING POLICY

The draft policy “Student Athlete Drug Testing” [Appendix 2] is intended to apply to approximately 300 students who are athletes at Garden Valley Collegiate. Students would not be allowed to participate in athletic activities unless they consented to drug testing throughout the sports season [Article V-A and “Consent to Student Athlete Drug Testing”].

The proposed policy identifies the harm that may be caused by drugs and alcohol [Article I]:

The illegal use of drugs and alcohol by students during school hours, and at other times, has a direct detrimental impact upon students’ behavior, academic performance and safety, and it may cause permanent physical and mental harm. The illegal use of drugs and alcohol by our student athletes is a further concern because these students tend to be popular role models among their peers at school.

The policy explains that student athletes are subject to additional harmful effects, including decreased athletic performance and increased risk of injury to themselves and others. In the Division’s view, these factors create a “...compelling need to initiate a testing program and procedure to deter and reduce the illegal use of drugs and alcohol...”[Article II]. Although the proposed policy is currently limited to student athletes, the Division advised our office that drug testing might be extended to other voluntary student activities and programs in the future.

Under the proposed program, student athletes could be subjected to “random” or “reasonable suspicion” drug testing procedures during the sports season. Students would be “...selected at random...using a numerical selection process where each student athlete’s name and identity remain unknown.” [Article V-C]. Potentially, every student athlete could be selected for random drug testing.

In addition, the Division would be able to select student athletes who were suspected of using drugs or alcohol for drug testing based on reasonable suspicion. The policy explains that “reasonable suspicion” must be [Article IV-H]:

...based on specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. Among other things, such facts and inferences may be based upon:

- *Observable phenomena while at school, athletic practice, athletic competition, or other times, such as direct observation of drug use or the physical symptoms or manifestations of being under the influence of a drug.*
- *Abnormal conduct or erratic behavior while at school, athletic practice, athletic competition, or other times.*
- *A significant deterioration in athletic performance.*
- *A report of drug use, provided by a reliable and credible source.*
- *Evidence that a student athlete has tampered with his/her drug test.*
- *Evidence that a student athlete has used, possessed, sold, solicited, or transferred drugs.*
- *“Signs of Problem Use of Chemicals” checklist...[The checklist details signs that may indicate serious chemical involvement, including a decline in school performance, problems with law enforcement, problems with finances, personality changes or emotional problems, physical problems, drug-specific indicators and a disruption of family relationships.]*

The Division would decide when and how often drug testing would occur [Article V-C]. It estimates that about 300 of the 927 students attending Garden Valley Collegiate participate in sports and would be subject to the proposed random drug testing. Since most students participate in more than one sport, the Division estimated that approximately 250 athletes would be subject to several cycles of random drug testing per season. It projected that about one quarter of the student athletes (60 to 65 students) would be tested during each cycle.

The Division would pay for the drug-testing program [Article V-A]. Since it estimated that urinalysis would cost approximately \$75 to \$80 per test and that each testing cycle would likely involve testing 60 to 65 students, every batch of random tests would cost the Division \$4500 to \$5200.

The Division would hire a "Vendor" (drug-testing company) to randomly select students, collect urine samples, and perform split specimen drug tests [Articles IV-J and IV-E]. Selected students would be called to the school's main office and directed to the Vendor's collection site (a local medical clinic) for same-day testing [Article V-D]. Apparently the students would have to attend the clinic on their own time, during lunch or after school.

Selected students would have to disclose whether they had taken prescription or non-prescription medication [Article V-B].

The clinic would collect urine samples "*...in a manner which minimizes intrusiveness and embarrassment to the student athlete while also ensuring that there is no tampering with the urine specimen by the student athlete*" [Article V-D]. The Division assured us that students would not be watched while providing urine samples. Information from the drug-testing company, however, suggests that the Vendor would "directly observe" students providing urine samples if it appeared that they intended or attempted to alter the initial samples.

After the urine samples were collected, "chain of custody" forms would be filled in and sent with the specimens [Article V-D]. The Vendor would have all the samples tested for specified illicit or banned substances outlined in the policy [Article V-E]. A qualified laboratory would perform split specimen drug tests on each sample. If an initial test were positive, a second confirmatory test would be conducted [Article IV-E].

The Division advised our office that it would conduct random tests for five to nine drugs selected from the following: marijuana, cocaine, amphetamine, methamphetamine, ecstasy, barbiturates, benzodiazepines, PCP, LSD, heroin, methadone, morphine and tricyclic antidepressants. Parents and students would be made aware of the specific drugs subject to random testing [Article IV-D].

The Division informed us that alcohol, inhalants and anabolic steroids would not be included in the random drug tests, due to the limitations of urinalysis. It is our understanding that inhalants and steroids are not readily detectable by this test, while alcohol is generally metabolized (broken down and excreted from the body) too quickly for the test to be effective.

If a drug test result were positive, the Vendor would telephone the Principal to obtain contact information for the student. The Vendor would report the findings to the parents and the student, then to the Principal. The Principal would meet with the student and parents to inform them of the consequences of the policy violation and their right to appeal [Article VI].

If students tampered with a urine sample or had a positive drug test result, they could face a range of disciplinary measures under the existing Garden Valley Collegiate "Promoting Learning and Teaching Policy" and "Drug Policy". Under the "Drug Policy", discipline may include informing parents or guardians, withdrawal of school privileges, in-school suspension, community service, counseling, suspension or expulsion from school, and making a report to the police.

The proposed policy sets out an additional set of consequences [Article VIII-C]. For the first violation, students would be suspended from sports for a minimum of six weeks and referred to AFM for assessment and counseling. If students successfully completed treatment or were

co-operating with ongoing treatment, they could be placed on probation for one year. During probation, they could participate in sports, but would be required to submit to additional periodic testing. For subsequent violations, students would be suspended from sports for one year.

The Principal would retain the drug test results for up to one year. The Superintendent would receive regular reports showing the number of tests performed, the rate of positive and negative tests, and the substances found in the positive urine samples. According to the proposed policy, "*No statistics on the rate of positive drug tests will be released to any person, organization, news publication or media without expressed written consent of the Garden Valley School Division (GVSD) Board.*" [Article VI]

Test results would not appear on a student's permanent record. Rather, the test result would be used to enforce the drug testing policy within the school, and would not be disclosed to any other agency. Individual student records related to drug test results would be kept in the Principal's office, separate from other files. When the student graduated (or at the expected date of graduation), the records would be destroyed. A record of the destruction would be kept [Article VII].

Students and their parents or guardians would be able to appeal the test results by requesting that the other half of the split urine sample be tested by another laboratory [Article IX]. In addition, they could request a hearing before the Principal and if necessary, they could appeal the Principal's decision to the Superintendent and the Board. All relevant materials would be disclosed to the Superintendent and the Board for appeals [Article X].

DRUG USE SURVEYS

We asked whether the Division had any data to support the need for random drug testing. The Division provided us with copies of two surveys conducted in the Garden Valley School Division from the Parent Resource Institute for Drug Education (PRIDE). The first survey was administered to 1074 students attending Junior and Senior High in the Garden Valley School Division during November 1995. The second survey was given to 1292 students attending Junior and Senior High in the Division during November 2002.

The surveys questioned students about their use of drugs, alcohol and cigarettes within the past year. As noted above, the Division informed us that it would not be randomly testing for cigarettes, alcohol, inhalants or anabolic steroids. Accordingly, of the drugs described in the PRIDE survey, the Division would be testing for marijuana, cocaine, uppers (amphetamines, methamphetamine, ecstasy), downers (barbiturates, benzodiazepines), hallucinogens (PCP, LSD) and heroin (methadone, morphine).

We have compiled some of the survey results in charts attached to this report [Appendix 6]. The statistics in our charts do not distinguish between those students who used drugs once in the past year from those who used drugs on a more frequent basis.

We note that while the 1995 survey compared rates of drug use in the Division to rates in other Canadian schools, it would appear that the 2002 survey compared the rates of drug use in the Division to rates in schools in the United States, not Canada.

According to the 2002 survey, less than 1% of Junior High students in the Division reported using any of the drugs subject to the proposed testing program during the previous 12 months. These rates are below comparable rates in the United States [Appendix 6, Chart 1]. In addition, there was a decline in the number of Division students using drugs between 1995 and 2002: 20% drop for uppers, 50% decrease for downers, 73% reduction for cocaine, 74% drop for marijuana, and 100% decline in the use of hallucinogens [Appendix 6, Charts 2 and 3].

The 2002 survey also indicated that 7% of Senior High students reported using marijuana and 2% or less reported using any of the other drugs subject to the proposed testing program during the previous 12 months. Again, these rates are below comparable rates in the United States [Appendix 6, Chart 4]. As well, there was a decline in the number of Division students using drugs between 1995 and 2002: 31% reduction for marijuana, 42% drop for cocaine, 65% decrease for downers, 67% drop for hallucinogens, and 72% decline in the use of uppers [Appendix 6, Charts 5 and 6].

COMMENTS

There are times when the privacy rights of individuals may appear to compete with the rights and interests of others. In 1986, the Supreme Court of Canada articulated certain principles to determine whether a limit on a right is reasonable and demonstrably justified in a free and democratic society. In the context of federal privacy legislation, the Privacy Commissioner of Canada has incorporated these principles into a “reasonable person test”. Under this test, personal information may be collected, used, and disclosed for purposes that a reasonable person would consider appropriate in the circumstances [Appendix 7].

The underlying principles of these tests are reflected in our consideration of collection, use, and disclosure practices under provincial privacy legislation. In reviewing this case, we considered the privacy and security implications of the Division’s proposed policy of random drug testing. Our analysis of the Division’s proposed collection, use and disclosure of personal health information under PHIA has been based on the following:

1. the measure must have a lawful purpose connected to the trustee’s function or activity;
2. it must be necessary and effective to achieve the intended purpose;
3. it must limit the information to the minimum amount reasonably necessary to accomplish the intended purpose, and include consideration of other less privacy-invasive measures.

In our view, the collection, use and disclosure measures under the proposed random drug-testing program should be lawful, necessary, effective and limited.

COLLECTION

The collection of personal information by the Division must be authorized [s.13(1) of PHIA] and limited to the minimum amount reasonably necessary [s.13(2) of PHIA]. Relevant sections of the legislation are attached [Appendix 8].

Authorized collection

The Division would be authorized to collect students' drug test results if:

- the test results were collected for a lawful purpose connected with a function or activity of the trustee [s.13(1)(a)], and
- the collection of the test results was necessary for that purpose [s.13(1)(b)].

The Division advised us that “...*the policy is being established for the health and safety of student athletes, and in furtherance of the school's obligation to provide a responsible environment and to maintain discipline and order.*”

As described in the proposed policy, it is the Division's view that the use of drugs during school hours and at other times has a detrimental impact on student behaviour, academic performance and safety. The Division believes that drug testing will deter students from using drugs, resulting in enhanced student health and safety.

The 2002 PRIDE survey asked Junior and Senior High students to indicate when they used drugs and alcohol. According to the survey results, less than 2% of all students reported using marijuana before or during school hours and less than 1% reported using alcohol, cocaine, uppers, downers, hallucinogens, or heroin before or during school hours. The Division confirmed that almost none of the reported drug use is taking place at school or during school activities, and that the proposed policy would be aimed at student behaviour outside of school hours and activities.

Urinalysis does not measure the voluntariness, frequency, or timing of consumption. A positive drug test confirms only that a student ingested (perhaps unwittingly) an unknown quantity of a particular drug in the relatively recent past. Since urinalysis cannot pinpoint where and when drugs were used, a positive drug test will not prove that a student consumed or was under the influence of drugs during school hours or activities.

Principals and teachers are responsible for maintaining discipline and order in the school [s.96(c) of *The Public Schools Act* and s.28(1) of *The Education Administration Miscellaneous Provisions Regulation* (regulation)]. Principals have disciplinary authority over the conduct of pupils during school hours [s.32 of the regulation], on their way to and from school [s.33(1) of the regulation], and during extracurricular activities [s.39(c) of the regulation]. In our opinion, the legislation does not contemplate the exercise of disciplinary authority beyond these limits. This does not mean, of course, that the Division should not continue disciplining students for their behaviour during school hours and activities, or providing education and awareness about the potential harms of drug and alcohol use.

The Division advised us that the proposed policy would also be directed at student behaviour outside school hours and activities. It is our view that the collection of drug test results for that purpose would not be lawful.

Our office also considered whether the collection of drug test results would be necessary and effective to promoting order, discipline and safety.

The Division advised our office that student athletes who consumed drugs would become impaired (with slower reflexes, higher pain threshold, and decreased judgement) and pose a safety risk to themselves and others. Although we understand its genuine concern for student safety, the Division could not identify any instance where students had been injured as a result of using drugs. This would make sense in light of the information provided by the Division that most students reportedly are not using or under the influence of drugs during school hours or activities.

In our view, there is also a distinction to be drawn between the use of drugs and impairment. Since urinalysis cannot measure the amount of drugs that have been consumed, the test cannot provide substantive information concerning impairment. If immediate safety risks are related to the degree of impairment, but drug test results cannot reveal past or present impairment, then the information would not seem to be necessary or effective in ensuring safety during school hours or activities.

As described previously, the use of drugs by students in the Division is significantly below the national average in the United States. The use of drugs to be randomly tested has clearly declined over the past eight years without a random drug-testing program. It would appear that there are factors in the school and community that successfully promote abstinence. Accordingly, it is difficult for us to conclude that there is a compelling purpose for additional deterrence measures that are so intrusive on students' privacy.

Even if additional deterrence were necessary, however, it is not certain that the proposed drug-testing program would be effective. Since the testing would be limited to students in sports or extracurricular activities, it may be argued that students who wanted to take drugs would simply drop out of those activities. This would further deprive these students of positive influences and activities. If the Division views drug testing as necessary for deterrence, it is hard to see how the program would deter students who were not subject to testing.

It has been suggested that the proposed drug-testing program could potentially cause more harm than good through the "substitution effect". According to an article written by Eugene O'Connell for the Privacy Commissioner of Canada [p.17 "Drug Testing and Privacy", 1990]:

Persons likely to be tested for the use of one substance (for example, marijuana) may simply switch to an equally harmful drug that is not being tested for....Users of illicit drugs may simply switch to alcohol....[If] the object is to reduce impairment by any drug or to reduce safety or health risks, the substitution effect may create a more serious problem than existed before testing began.

According to the PRIDE surveys, more Junior High students (27%) and Senior High students (51%) consume alcohol than all other drugs combined [Appendix 6, Charts 1 and 4]. Despite the sharp decline in the use of all other drugs, the number of Senior High students drinking alcohol increased by 11% between 1995 and 2002 [Appendix 6, Chart 6]. Since alcohol would not be subject to random testing, there may be a risk that students would switch from drugs to alcohol, potentially causing a further rise in the rate of alcohol consumption.

Even for drugs that would be subject to random testing, students might simply switch to those that were less likely to be detected by urinalysis. As drugs are “metabolized” or broken down into chemical compounds or “metabolites”, they are excreted through urine. The faster a drug is metabolized and excreted, the less likely it will be detected through random drug testing.

According to an article on the Canadian Health Network (CHN) website “How long do alcohol and other drugs such as marijuana, heroin, or cocaine stay in the body?”, drugs are metabolized at different rates:

Substance	Length of time in the body	Proposed for Random Test?
Alcohol (one standard drink)	1-2 hours (If more than one drink per hour is consumed, it will take longer)	No
Tetrahydrocannabinol (THC from cannabis, including marijuana)	If you use it once in awhile: 1-7 days If you use it all the time: 1-4 weeks	Yes
Benzoyllecgonine (from cocaine)	2-4 days	Yes
Stimulants (uppers) such as ecstasy, amphetamines, and methamphetamine	1-2 days	Yes
Depressants (downers) such as barbiturates and benzodiazepines	If you use them once in awhile: 3 days If you use them all the time: 4-6 weeks	Yes
Hallucinogens such as phencyclidine (PCP) and lysergic acid diethylamide (LSD)	Not available	Yes
Opiates such as methadone and morphine	1-2 days	Yes
Tricyclic antidepressants	Not available	Yes

Students might switch from drugs that take a relatively long time to metabolize (such as marijuana) to drugs that metabolize more quickly (such as cocaine, ecstasy, amphetamines or heroin). Accordingly, the policy could perversely encourage the use of different drugs rather than abstinence.

The Division indicated that there are alternative means to deal with students it suspects are using drugs. If coaches or teachers suspect a student is impaired, they can suspend the student from any sport or activity for that day or longer, without obtaining a positive drug test result. This would reduce safety risks to the student and others.

If a student is having problems (such as with attendance, academic performance, or behaviour) or creating an unsafe environment for others, the Division already has a range of disciplinary measures at its disposal. If teachers or Principals believe that drug use is causing problems for a student, they may intervene under the current drug policy without a positive drug test result.

Based on the lack of evidence that safety is at risk or that random drug testing would deter consumption, and the availability of other measures to address student conduct during school hours and activities, we cannot conclude that the collection of drug test results would be lawful, necessary and effective. In our view, the proposed collection would not be authorized and necessary under the provisions of PHIA.

Limited to the minimum amount reasonably necessary

The collection of personal information must not only be authorized, it must also be limited to the amount reasonably necessary to accomplish the collection purpose [s.13(2) of PHIA].

The Division indicated that it would be collecting the minimum amount of personal health information necessary to accomplish its purpose because it would only collect the drug test results. The drug test results were viewed as necessary to deter students from using drugs or identify students for treatment or discipline. In the Division's opinion, these measures would maintain discipline, order and safety.

We considered the amount of information the Division proposed to collect through random and reasonable-suspicion drug testing. Student athletes would be required to disclose all prescription and over-the-counter medications. This could potentially divulge other personal health information, including information that students may regard as intensely personal and private. For example, the disclosure could reveal whether students were taking medication for asthma, diabetes, depression, schizophrenia, birth control, or sexually transmitted diseases.

We compared the number of students who would be tested with the scope of the problem. It would appear that almost all student athletes would likely be tested over the course of the year. Yet the surveys seem to suggest that only a small fraction of the students consume drugs. Unlike reasonable-suspicion testing, we note that random testing presumes everyone is guilty and forces every selected student to "prove" his or her innocence by urinating into a container, perhaps while being watched.

As noted previously, the Division already has a range of disciplinary measures that can be implemented without a positive drug test result and without collecting additional personal health information. To "catch" a few students who are taking drugs, probably outside of school hours and activities, the Division is proposing to intrude in practice or in principle on the dignity and privacy of almost every student in sports or extracurricular activities by implementing a random drug-testing program.

Based on our review, the Division has not demonstrated a compelling purpose for random testing that justifies the degree or scope of intrusion on students. The Division has not demonstrated that the program would sufficiently limit the collection of information, as less privacy-invasive disciplinary measures can effectively promote safety, discipline and order.

Accordingly, it is our view that the proposed collection of personal health information would not be authorized or limited to the amount reasonably necessary to accomplish the intended purpose under PHIA.

No CONSENT TO COLLECTION

The Division indicated that it would be seeking consent to collect drug test results from students. Under s. 13 of PHIA, the collection of personal health information must be necessary for a lawful purpose connected with a function or activity of the trustee. Consent is not an exception to this requirement under PHIA. Accordingly, if the requirements of s.13 were not met, the collection of personal health information would remain unauthorized, even if the Division obtained the consent of the students it proposes to test for drugs.

NOTICE OF COLLECTION

The Division would be deemed to be collecting personal health information directly from students since its agent is testing samples of urine provided by students. Accordingly, it would have to inform students of the:

- purpose of collection [s.15(1)(a) of PHIA]; and
- how to contact an officer or employee of the trustee who can answer students' questions about the collection [s.15(1)(b) of PHIA].

This information would be provided in an attachment to the proposed policy "GVC Student Athlete Drug Testing Information". In our view, the question-and-answer format made the information very clear and understandable for students and parents.

USE OR DISCLOSURE

It is our opinion that the Division cannot collect urine samples and drug test results under s.13 of PHIA. Accordingly, it would not have information to use or disclose. Nevertheless, since a future drug testing policy might be developed that complied with the collection requirements under PHIA, we reviewed the policy provisions concerning the use and disclosure of drug test results and considered some of the issues that might arise under such a program.

As with collection, the use and disclosure of personal health information would also have to be authorized [s.20(1) of PHIA] and limited to the minimum amount necessary [s.20(2) of PHIA].

The Division advised us that it would use students' test results only for the purpose of maintaining discipline, order and safety. If the information could have been collected for these purposes under s.13 of PHIA, the Division would have been authorized to use it for the same purposes [s.21 of PHIA] or with the consent of students [s.21(b) of PHIA].

The Division informed us that it would disclose students' test results to the student, his or her parents or guardians, the athletic director, the Principal and the Superintendent. If the Division had been authorized to collect the information, it seems clear that it would have been authorized to disclose the results to the student [s.22(1)(a)].

It is less clear that the Division could always disclose the results to the parents or guardians of students under the age of 18. While the Division may disclose information to a representative [s.22(1)(a) of PHIA], this does not necessarily include parents and guardians. A student's privacy rights may be exercised by the parent or guardian only if the student is a minor without the capacity to make health care decisions [s.60(e) of PHIA]. We understand that some individuals as young as 12 or 14 have been deemed to have the capacity to make their own health care decisions.

Any other disclosure would be authorized only if the Division had the student's consent [s.22(1)(b) of PHIA] or the disclosure was required under one of the specific and limited exceptions under s.22(2) of PHIA.

CONSENT TO USE OR DISCLOSURE

In our view, consent should be clear, specific, informed and time-limited. The following elements should be considered:

- (a) the specific personal health information to be used or disclosed;*
- (b) the identity of the person or public body that the personal health information may be used by or disclosed to;*
- (c) all the purposes for the use or disclosure;*
- (d) a statement from the public body:*
 - *affirming that a third-party recipient will be instructed not to use or disclose the personal health information provided by the public body, except for a purpose specified in the consent, and*
 - *specifying the subsequent disclosures, if any, that a third party recipient will be instructed it is permitted to make;*
- (e) an acknowledgement that the consenting individual has been made aware of:*
 - *why the personal (health) information is needed, and*
 - *the risks and benefits to the individual of consenting or refusing to consent to the use or disclosure;*
- (f) the date the consent is effective, and the date the consent expires;*
- (g) a statement that the consent may be revoked or amended at any time.*

STATISTICS

The proposed policy indicated that statistics concerning the rates of positive results would not be released without the express written consent of the Board. Statistical information that does not identify individuals would not be defined as personal health information under PHIA or personal information under *The Freedom of Information and Protection of Privacy Act* (FIPPA).

If someone requested access to the statistical information under FIPPA, the Division would be obliged to consider granting access to the documents. Under s.7(1) of FIPPA, an applicant has a right of access to any record in the custody or control of the Division, unless one of the limited and specific exceptions under Division 3 applies. The Division would have to consider whether to grant access to information based on the provisions of FIPPA rather than on the approval of the Board.

RETENTION AND DESTRUCTION

The Division currently collects and maintains personal health information from students. Accordingly, it must establish a written policy concerning the retention and destruction of personal health information [s.17 of PHIA]. Under the draft "Procedures for Managing Student Files", student information will be retained for 10 to 30 years. Once the retention periods have expired, the information will be destroyed in a manner that protects the privacy of students [s.17(3) of PHIA]. The Division will keep records of personal health information that is destroyed [s.17(4) of PHIA].

If the Division developed a policy on drug testing that complied with the collection principles under PHIA, it would have to ensure that the personal health information met the retention and destruction requirements as well. The proposed drug testing policy would separate the drug test results from other student files, and would limit retention to the date of normal graduation. In our view, this would appear to be a reasonable limitation period.

SECURITY

Since the Division currently collects and maintains personal health information from students, it must adopt the security safeguards that are outlined in the legislation and regulations [s.18 and 19 of PHIA, as well as s.2, 3, 4, 5, 6, 7 and 8 of *The Personal Health Information Regulation*]. We understand that these safeguards are currently under development by the Division. The proposed policy on drug testing did not set out specific security safeguards for drug test results or disciplinary measures taken as a result of positive tests.

CONCLUSIONS

The privacy of every individual's personal health information is protected under PHIA. Although others may sometimes exercise their rights for them, students are entitled to the same level of protection under PHIA as everyone else.

In our opinion, the collection of drug testing information under the proposed policy would not be authorized or limited to the amount reasonably necessary to enhance student athlete's safety under PHIA. It is our view that the collection of personal health information would not be lawful, necessary, effective or sufficiently limited. Accordingly, it is also our view that the use and disclosure of drug testing information would not be authorized under PHIA.

Based on our review, it is our opinion that the random drug-testing program under the proposed policy would result in serious and unnecessary violations of students' privacy, contrary to the provisions of PHIA.

RESPONSE TO COMMENTS

On September 16, 2003, the Ombudsman's Office provided a copy of this report to the Division. We also provided the Division with an opportunity to make representations regarding the report, if it wished.

On October 14, 2003, the Board issued the following response in a press release:

After careful consideration of the Ombudsman's report, the board decided in its regular meeting on October 14, 2003, not to approve at this time a drug testing policy for its high school.

Excerpts from the Garden Valley School Division Existing Drug Policy

The purposes of this policy are to create a school environment which is alcohol and drug free and to provide assistance to students involved detrimentally with alcohol and other drugs. This policy recognizes and is sensitive to the legal rights of all students.

The major components of our approach to alcohol and other drug use and their attendant problems are:

Prevention – an educational process that develops student knowledge, attitudes and responsible behaviour concerning alcohol and other drugs.

Counseling and Rehabilitation – an organized support system for students involved with alcohol and other drugs, including referrals to appropriate agencies.

Staff Development – a process through which employees acquire the knowledge and skills required to constructively respond to the problems of alcohol and other drugs.

Intervention – an established process to confront individuals with data regarding their alcohol/other drug use behaviours.

Possession, Use, Sale, or Any Involvement With

- a) *The use, possession, sale, or any involvement with alcohol or illicit drugs on school property or at any school-sponsored activity is strictly prohibited.*
- b) *When a student is found to be in possession of, and/or under the influence of, and/or selling alcohol or illicit drugs, the Principal (or designate) shall impose disciplinary measures.*
- c) *The Addictions Foundation of Manitoba checklist shall be used as a guide in establishing a reasonable suspicion that a student is under the influence of alcohol or illicit drugs. [The checklist details signs that may indicate serious chemical involvement, including a decline in school performance, problems with law enforcement, problems with finances, personality changes or emotional problems, physical problems, drug-specific indicators and a disruption of family relationships].*

Disciplinary Measures

- b) *The Principal (or designate) is authorized to invoke disciplinary measures as deemed appropriate to each transgression, selecting from, but not limited to, the following actions:*
 - informing the parents/guardians
 - withdrawal of school privileges
 - in-school suspension
 - community service
 - counselling sessions
 - suspension or expulsion from school as per Board policy
 - reporting the incident and known details to the Superintendent and to the police

**Excerpts from the Draft “Drug Testing for Student Athletes”
(as of March 21, 2003)**

I. Rationale:

The Public Schools Act, The Education Administration Act, and The Manitoba Education and Training Administrative Handbook for Schools charge schools with the responsibility to ensure the health and safety of students. Furthermore, “discipline issues rest within the authority and purview of local school division officials.” (Administrative Handbook for Schools)

We recognize that there are students in Garden Valley Collegiate who are involved in the illegal use of drugs and alcohol. The illegal use of drugs and alcohol by students during school hours, and at other times, has a direct detrimental impact upon students’ behavior, academic performance and safety, and it may cause permanent physical and mental harm. The illegal use of drugs and alcohol by our student athletes is a further concern because these students tend to be popular role models among their peers at school.

II. Purpose:

Student athletes involved in the illegal use of drugs and alcohol are subject to the harmful effects that any student would experience. Additional harmful effects for student athletes include the following:

- *interference with their athletic performance*
- *interference with their academic performance (which may affect their athletic eligibility)*
- *an increase in the risk of injury to themselves and to their teammates, athletic opponents, and others with whom they participate in athletic events*
- *impairment of their judgement*
- *slowing of their reaction time and reflexes*
- *inability to adequately perceive pain*
- *reduction in motivation*
- *level of discipline necessary to any athletic program*

These factors indicate a compelling need to initiate a testing program and procedure to deter and reduce the illegal use of drugs and alcohol by student athletes. With this program we will:

- *educate student athletes concerning the problems and detrimental affects of drug and alcohol use*
- *identify those student athletes who may be using drugs and alcohol*
- *identify the substances being used*
- *encourage and facilitate appropriate counseling and treatment for any identified drug and alcohol dependency*
- *provide reasonable assurances that students wishing to participate in interscholastic athletics are medically and physically competent to do so*

IV. Definitions:

C. Alcohol – shall mean any beverage, mixture or preparation, including any medications or other products, containing alcohol or ethanol.

D. Drug – may include, but shall not be limited to: Amphetamine (AMP), Barbiturates (bar), Benzodiazepines (BZO), Benzoyllecgonine (COC), Methamphetamine (M-AMP), Methadone (MTD), Morphine (MOR), Phencyclidine (PCP), Tricyclic antidepressants (TCA), 11-nor-L⁹-THC-9-COOH (THC), Ecstasy (MDMA), Anabolic Steroids, LSD. The principal may specify specific classes or

substances to be tested. Students and parents/guardians will be made aware of the drugs for which we are testing.

E. Drug test – The laboratory will perform a split specimen drug test. The initial test of the sample will use a technique called immunoassay testing. If the initial test is positive, the laboratory will perform a second confirmatory test using a technique called gas chromatography/mass spectrometry.

As new methods of drug testing are developed, alternative testing methods may be considered.

F. Medical Review Officer (MRO) – is a Medical Physician with a certification as MRO and verifies every result. He/she has a background in toxicology and the legalities surrounding drug testing.

G. Prescription or nonprescription medication – means a drug or medication obtained pursuant to a medical doctor’s prescription, or medication authorized for general distribution and use without a prescription in the treatment of human disease, ailments or injuries.

H. Reasonable suspicion drug testing – means drug testing based on a suspicion, that a student athlete is using, or has used, drugs in violation of school policy, based on specific objective and articulable facts and reasonable inferences drawn from those facts in light of experience. Among other things, such facts and inferences may be based upon:

- *Observable phenomena while at school, athletic practice, athletic competition, or other times, such as direct observation of drug use or the physical symptoms or manifestations of being under the influence of a drug.*
- *Abnormal conduct or erratic behavior while at school, athletic practice, athletic competition, or other times.*
- *A significant deterioration in athletic performance.*
- *A report of drug use, provided by a reliable and credible source.*
- *Evidence that a student athlete has tampered with his/her drug test.*
- *Evidence that a student athlete has used, possessed, sold, solicited, or transferred drugs.*
- *“Signs of Problem Use of Chemicals” checklist*

I. Sport season – encompasses any activity related to a given sport, including dry-land training, tryouts, and exhibition, regular season, playoff, and provincial play.

J. Vendor – is the medical office or company selected by the school board to carry out the policy and procedure.

V. Drug Testing Procedures:

A. Consent -- each student athlete and his/her parent/guardian are required to sign a written consent for drug testing form prior to any participation in interscholastic athletics.... Students who choose not to sign the consent form will not be permitted to participate in interscholastic athletics.

Any random drug testing or reasonable suspicion drug testing done throughout the course of the school year will be paid for by GVC. Any refusal by a student athlete to be tested shall constitute a violation of this policy.

B. Medication – Student athletes who have been selected for drug testing, and who are or have been taking prescription or nonprescription medication, should disclose that fact at the time of drug testing and upon request, provide verification.

C. Selection Process – Student athletes shall be subject to random drug testing during their season in any school sport. Individuals will be selected at random, by the Vendor, using a numerical selection process where each student athlete’s name and identity remain unknown. Only in the event of a preliminary positive test result, which requires the MRO to contact the student/parent/guardian, will the required contact information be made available by the school principal. The times and frequency for drug testing will be determined by the athletic director/school principal.

Reasonable suspicion drug testing will occur, following consultation with the school principal, based on a belief that a student athlete is using, or has used, drugs in violation of athletic department policy (As per paragraph IV-H above.)

Retesting of student athletes following a first offense or first positive drug test result shall occur as specified in paragraph VII-C-1.

D. Sample Collection Procedure -- Those student athletes who are selected for drug testing will be called to the main office where arrangements will be made for same-day testing at the Vendor collection site... [physician’s office]. A urine sample will be collected in a manner which minimizes intrusiveness and embarrassment to the student athlete while also ensuring that there is no tampering with the urine specimen by the student athlete. Each urine sample will be checked for appropriate temperature and for any signs of adulteration.

The Vendor will oversee the collection of urine specimens. The actual testing of the specimen will be carried out as per paragraph IV-E. A Chain of Custody form shall accompany the specimen to ensure the integrity of the process.

Student athletes will receive an information pamphlet outlining collection procedures... Students/parents/ guardians may contact the school principal or school athletic director to answer any questions.

E. Sample Analysis Procedures – The Vendor will have all specimens tested for the specified illicit or banned substances, as outlined in IV-D above, by a qualified laboratory. This list may be modified by the Board at any time to include other drugs.

VI. Reporting Procedures:

A certified drug testing laboratory will interpret and evaluate all drug test results. The MRO will certify all urine drug screens and report, by telephone, positive findings in a confidential manner, first to the parent/guardian and student, and then to the principal. In the event of a preliminary positive test result, which requires the MRO to contact the student/parent/guardian, the required contact information will be made available by the school principal.

The principal shall meet with the student athlete and his/her parent/guardian to inform them of the consequences resulting from the policy violation. The principal shall further advise the student athlete and his/her parent/guardian of their right to a Test Result Appeal and/or a Procedural Appeal. (As per IX and X below)

No statistics on the rate of positive drug tests will be released to any person, organization, news publication or media without expressed written consent of the Garden Valley School Division (GVSD)

Board. The principal may keep all test result records for a period of up to one year.

The GVSD Superintendent will receive regular reports showing the number of tests performed, rate of positive and negative tests, and what substances were found in the positive urine specimens.

VII. Retention of Records:

No test result, either positive or negative, will appear on any student's permanent transcript or any other permanent record.

Test results will be used exclusively to enforce this policy within GVC and will not be shared with any other agency. Files related to student drug test results will be held in the GVC principal's office, independent of any other records.

Individual student records related to drug test results will be kept on file, in the principal's office, until the normal graduation date of that student, at which time they will be destroyed. This action will be recorded on a Record of Destruction form, also filed in the principal's office.

VIII. General Prohibitions and Penalties:

All GVC students are expected to adhere to the 'Promoting Learning and Teaching' and 'Drug' Policies included in the GVC Student Handbook. Nothing contained in this policy for drug testing for student athletes shall be construed to limit the application and enforcement of the above general policies.

A. Standard of Conduct for Student Athletes – the use or possession of a drug, as defined herein, by a student athlete, at any time, is both illegal and detrimental to that student athlete's ability to participate in interscholastic athletics and is hereby prohibited. Any student athlete determined to be violation of this policy is subject to disciplinary action related to his/her participating in interscholastic athletics and will be suspended from participation.

B. Policy violation – when a student athlete in the testing program has a test result that indicates the presence of illegal drugs, or banned substances, or the MRO rules the specimen adulterated, then he/she will be deemed to be in violation of this policy.

C. Penalties – In addition to any disciplinary action that may be applicable pursuant to the GVC 'Promoting Learning and Teaching' and 'Drug' Policies, any student athlete whose drug test, administered pursuant to this policy, renders a positive test result, or whose specimen is ruled by the MRO to have been adulterated, or who otherwise violates this policy, shall face the following consequences:

1. *First Violation:*

The student athlete shall be suspended from participation in all interscholastic athletics for a minimum six week period and shall be referred to AFM for assessment and counseling. The student athlete will attend his/her normal classes at GVC while undergoing counseling, unless under disciplinary action set forth by other GVC policies referenced above. A student who has completed the suspension period and who has successfully completed

counseling, or is cooperating in an on-going counseling program, may resume participation in interscholastic athletics under a probationary status with the following conditions.

- *The student athlete may be required to comply with any recommendations resulting from the assessment/counseling conducted by AFM...*
- *The student athlete will be retested at appropriate intervals to ensure that he/she remains drug-free.*
- *The student athlete shall remain on probation for one calendar year after resuming participation in interscholastic athletics. After this time period the student shall be considered to have a clean slate.*

2. Subsequent Violation:

A student athlete, guilty of a subsequent violation of this policy or who has a subsequent positive drug test result during the probation year, shall be prohibited from participation in all interscholastic athletics for one full calendar year following the end of the athletic season during which the subsequent offense or subsequent positive drug test occurred.

In order for reinstatement to occur, such as student must demonstrate that further counseling has occurred and that he/she is drug free as indicated by a negative drug test.

IX. Appeal of Test Results:

If the drug test result is positive, the student/parent/guardian may request, within 72 hours, that the MRO direct the laboratory to forward the other (untested) split specimen container to another approved laboratory which will test the sample. This will be done at parent/guardian expense.

X. Procedural Appeal:

An initial opportunity shall be given for the student athlete and his/her parents/guardians to discuss, with the athletic director, the student athlete's confirmed positive drug test result.

A student athlete facing disciplinary actions, provided herein, as a result of a positive drug test or other alleged violations of this policy, shall be entitled to procedural due process as follows:

- *Hearing – If requested by the student athlete or his/her parent/guardian, the principal shall conduct a hearing within a reasonable period of time following the initial notification. The student athlete and parent/guardian must attend the hearing and may provide evidence and call upon witnesses or submit written statements as they deem appropriate. The principal shall render a decision and provide the student athlete and parent/guardian with a written record of that decision within three (3) days following the hearing.*
- *Appeal to Superintendent/Board – If requested by the student athlete or his/her parent/guardian, the principal's decision may be appealed to the Superintendent/Board. At this point, all relevant information related to this appeal will be forwarded to the Superintendent's office. The Superintendent, together with the Education Committee of the Board, shall conduct a hearing within a reasonable period of time following the initial notification. The Superintendent shall render a decision and provide the student athlete and parent/guardian with a written record of that decision within three (3) days following the hearing.*

**Excerpts from the Garden Valley Collegiate Consent to Student Athlete Drug Testing
(as of April 8, 2003)**

I understand that submission to testing for the presence of drugs and alcohol is a condition of participation in interscholastic athletics at Garden Valley Collegiate. I further understand that if I refuse to take the test, fail to report for the test, or if the test establishes a violation of the drug testing policy, I will face disciplinary action set forth by the drug testing policy.

By signing and dating this form, I agree to submit to random testing by draw, and to reasonable suspicion testing throughout my sport's season. The draw for random testing will be done by the Vendor, and the student athletes will be notified on the day they are to report for urinalysis.

I understand that all drug testing will be paid for by Garden Valley Collegiate. The cost of an Appeal of Test Results will be borne by the student/parent/guardian.

I hereby consent to the administration of the drug test and to the conditions listed in this consent form. I hereby also consent to the release of test results to the school principal by the Medical Review Officer after the MRO has shared these results with me.

Excerpts from The Public Schools Act

General powers of school boards

48(1) Subject to the regulations, a school board may
(n) establish and administer, with the consent of the minister, a system of medical and dental inspection of pupils and employees and subject to The Public Health Act and the regulations made thereunder, make such arrangements as may be approved by the minister for attending to the health, cleanliness and physical condition of the pupils and employees of the schools under the jurisdiction of the school board;

Rights of parents

58.6 Subject to the provisions of this Act and the regulations, a person who is resident in Manitoba is entitled to enroll his or her child in a program in any school in Manitoba and to
(a) be informed regularly of the attendance, behaviour and academic achievement of his or her child in school;
(c) have access to his or her child's pupil file;
(d) receive information about programs available to his or her child;

Responsibilities of pupils

58.10 A pupil is responsible for
(b) complying with the student discipline and behaviour management policies of the school;

Duties of teacher

96 Every teacher shall
(c) maintain order and discipline in the school;

Education Administration Miscellaneous Provisions Regulation (468/88)

Principal's general authority

28(1) *Subject to The Public Schools Act and the instructions of the school board, the principal is in charge of the school in respect of all matters of organization, management, instruction and discipline.*

Discipline during school hours

32 *The principal has disciplinary authority over the conduct of each pupil of the school from the time the pupil arrives at school until the pupil departs for the day, except during any period that the pupil is absent from school at the request of his or her parent or guardian.*

Discipline outside school hours

33(1) *The principal has disciplinary authority over all pupils of the school*
(a) on their way to and from school, in terms of their conduct towards one another; and
(b) while they are being conveyed to or from school, in a division or district that provides transportation.

Supplementary curriculum and extracurricular activities

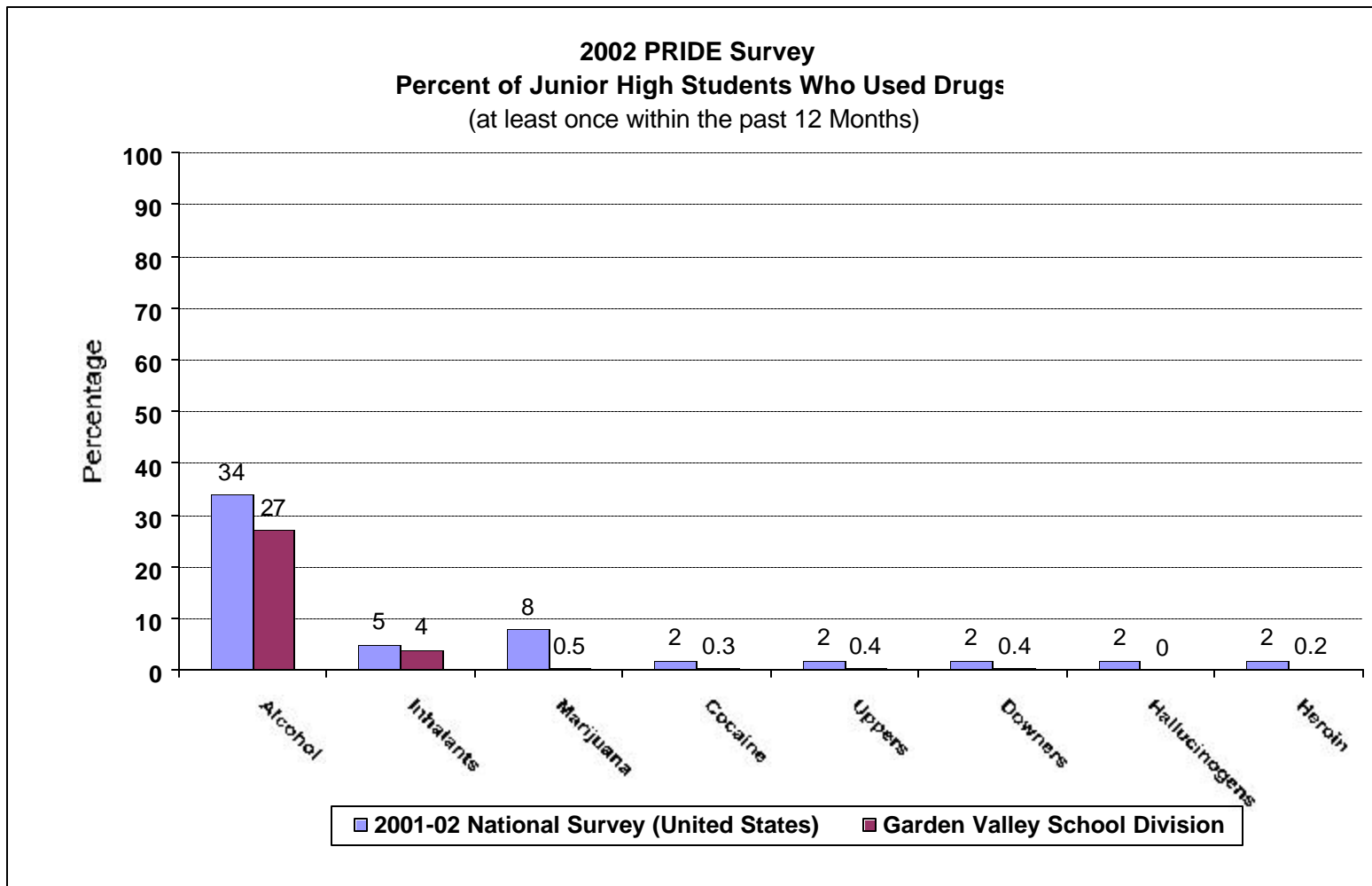
34 *A principal is responsible for implementing*
(c) extracurricular activities, subject to the approval of the school board.

General responsibilities

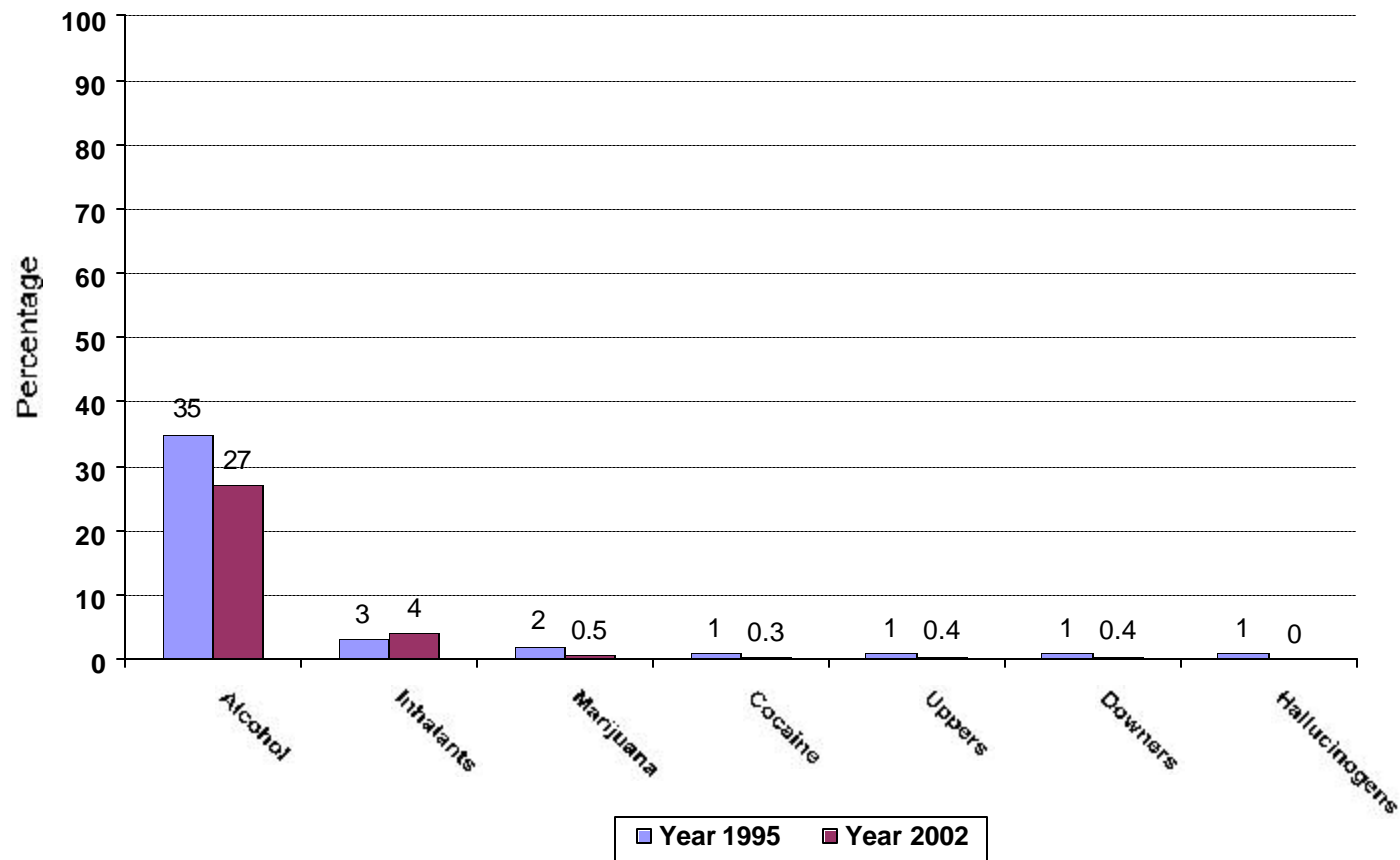
39 *A teacher is responsible for*
(b) providing an effective classroom learning environment;
(c) maintaining order and discipline among pupils attending or participating in activities that are sponsored or approved by the school, whether inside or outside the school;

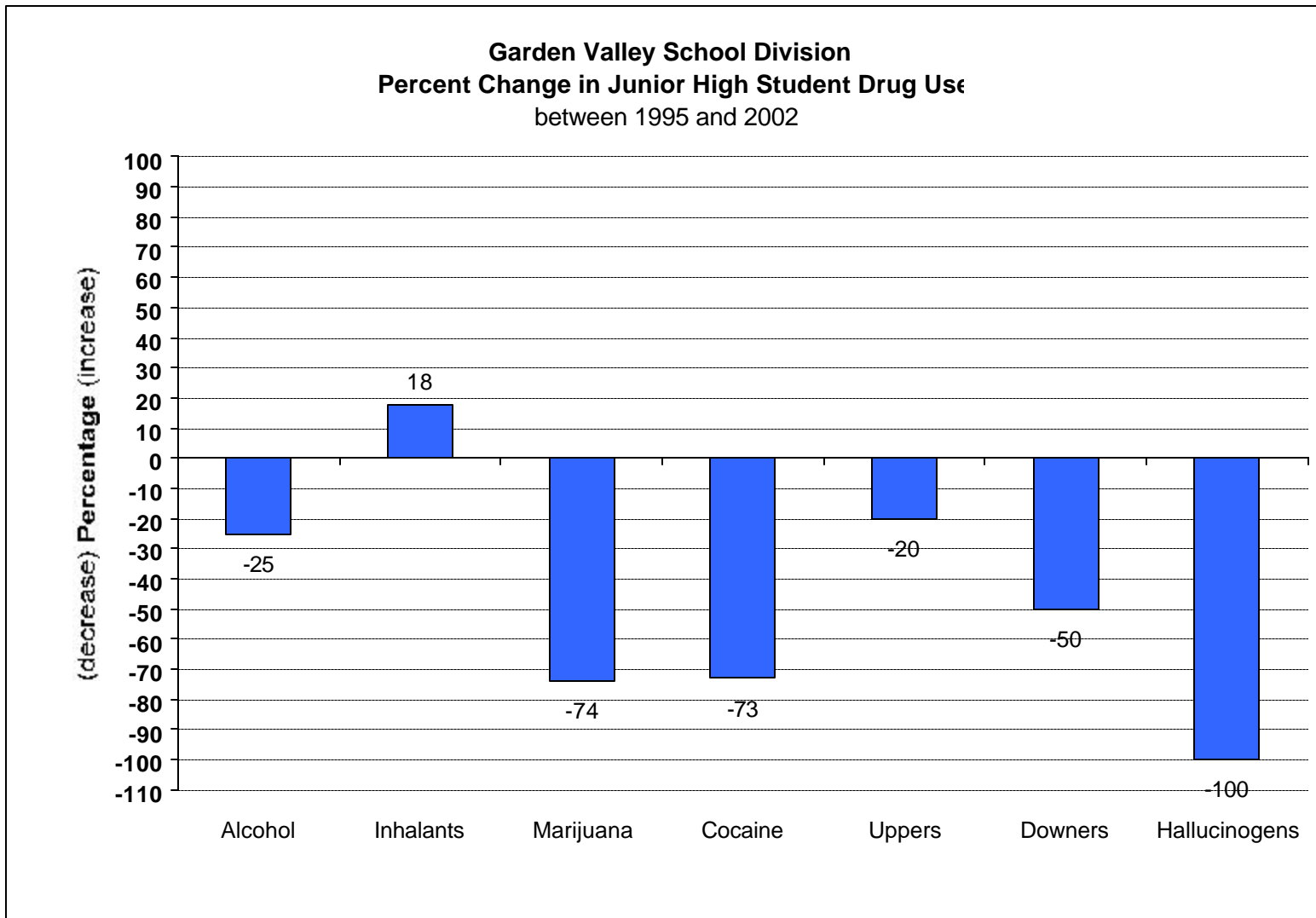
Principal may suspend from school

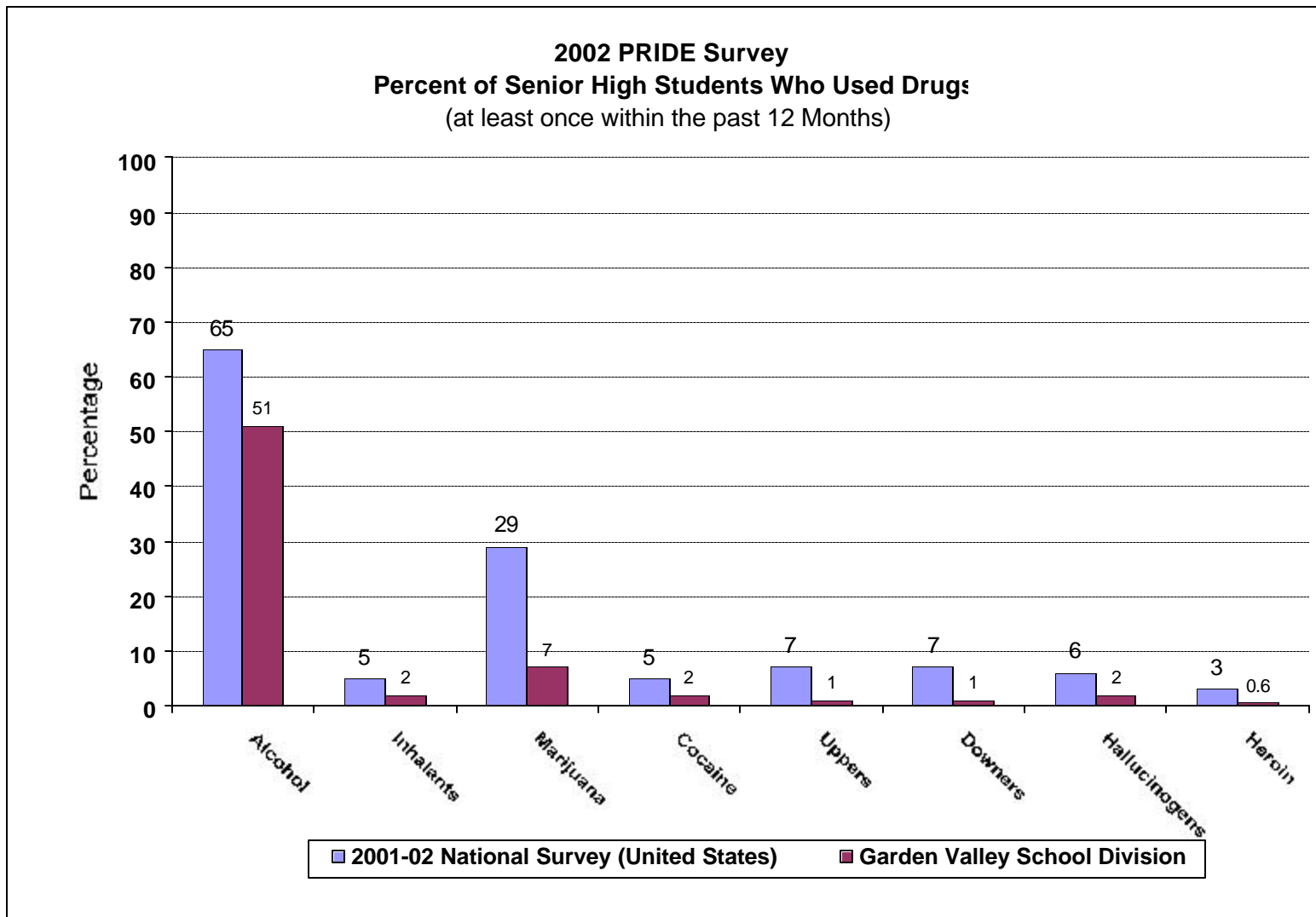
40.5(1) *A principal may suspend from school a pupil who engages in conduct that the principal considers injurious to the school's welfare or educational purpose.*



Garden Valley School Division
Percent of Junior High Students Who Used Drugs
1995 and 2002

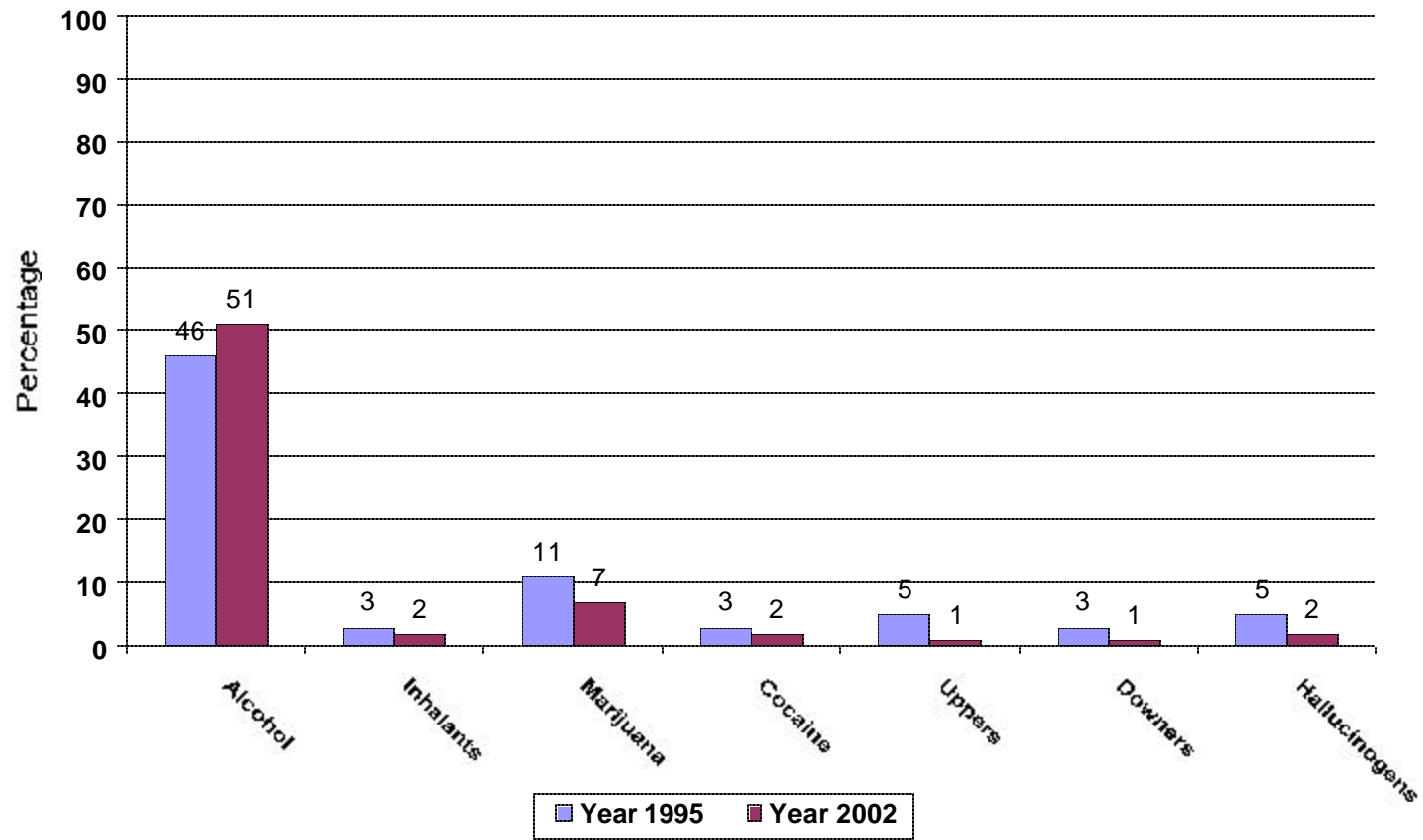


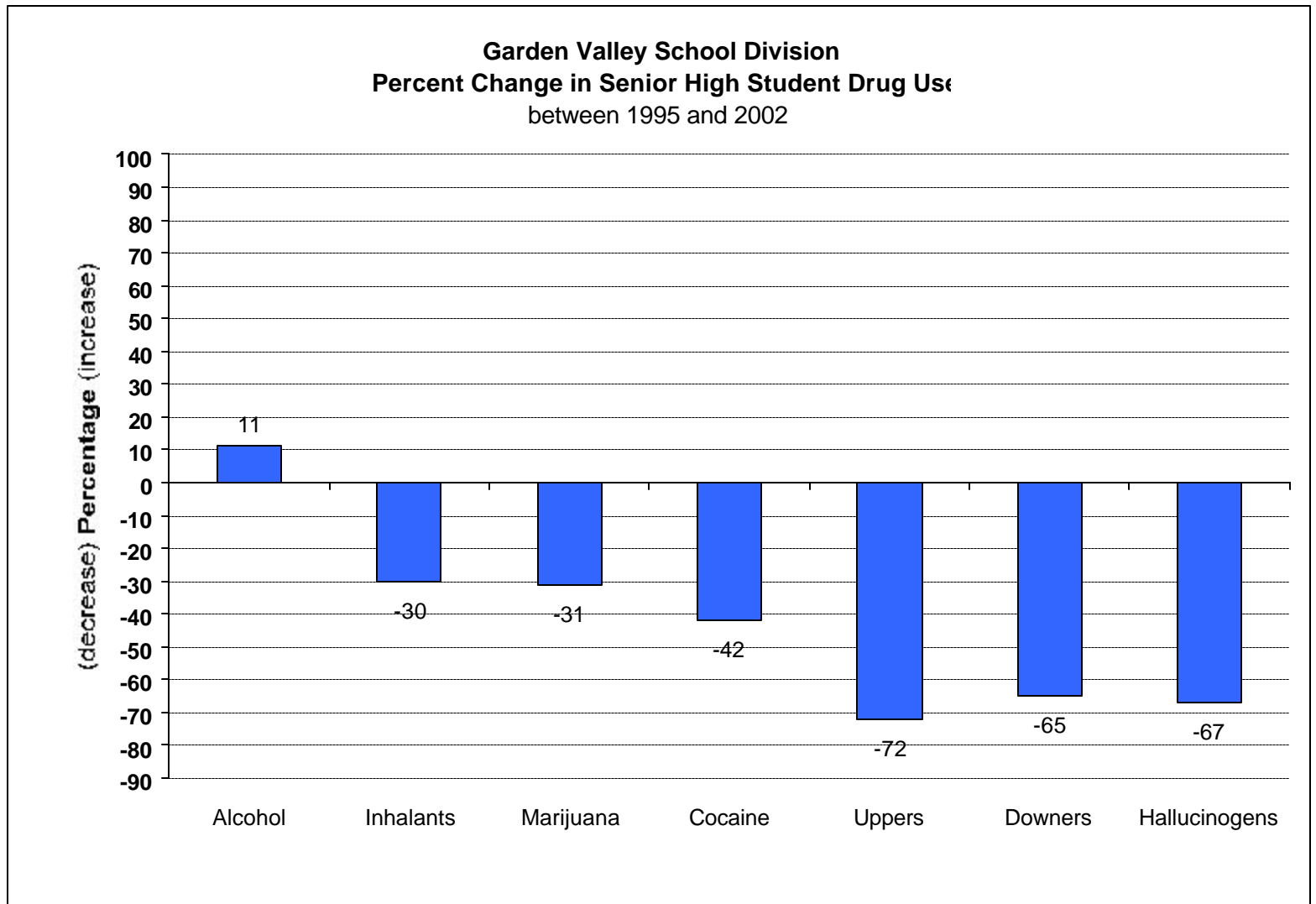




Appendix 6
Chart 5

Garden Valley School Division 2002 PRIDE Survey
Percent of Senior High Students Who Used Drugs
1995 and 2002





Reasonable Person Test

In *R. v. Oakes* [1986] 1 S.C.R. 103, the Supreme Court of Canada set out a test that may be used to determine whether a limit on any right under *The Charter of Rights and Freedoms* is reasonable and demonstrably justified in a free and democratic society. The test was summarized in *R. v. Morgentaler* [1988] 1 S.C.R. 30 as:

A statutory provision which infringes any section of the Charter can only be saved under s.1 if the party seeking to uphold the provision can demonstrate first, that the objective of the provision is 'of sufficient importance to warrant overriding a constitutionally protected right or freedom' (R. v. Big M Drug Mart Ltd., at p.352) and second, that the means chosen in overriding the right or freedom are reasonable and demonstrably justified in a free and democratic society. This second aspect ensures that the legislative means are proportional to the legislative ends (Oakes, at pp. 139-40). In Oakes, at p. 139, the Court referred to three considerations which are typically useful in assessing the proportionality of means to ends. First, the means chosen to achieve an important objective should be rational, fair and not arbitrary. Second, the legislative means should impair as little as possible the right or freedom under consideration. Third, the effects of the limitation upon the relevant right or freedom should not be out of proportion to the objective sought to be achieved.

In the context of the federal *Personal Information Protection and Electronic Documents Act*, the Privacy Commissioner of Canada has incorporated these principles into a "reasonable person test". Under this test, personal information may be collected, used, and disclosed for purposes that a reasonable person would consider appropriate in the circumstances:

1. the measure must be demonstrably necessary to meet some specific need;
2. it must be demonstrably likely to be effective in achieving its intended purpose;
3. the intrusion on privacy must be proportional to the benefit to be derived; and,
4. it must be demonstrable that no other less privacy-intrusive measure would suffice to achieve the same purpose.

Excerpts from *The Personal Health Information Act*

Definitions

- 1(1)** In this Act,
"personal health information" means recorded information about an identifiable individual that relates to
- (a) the individual's health, or health care history, including genetic information about the individual, [or]
 - (b) the provision of health care to the individual, and includes
 - (d) the PHIN and any other identifying number, symbol or particular assigned to an individual, and
 - (e) any identifying information about the individual that is collected in the course of, and is incidental to, the provision of health care or payment for health care;

Restrictions on collection

- 13(1)** A trustee shall not collect personal health information about an individual unless
- (a) the information is collected for a lawful purpose connected with a function or activity of the trustee; and
 - (b) the collection of the information is necessary for that purpose.

Limit on amount of information collected

- 13(2)** A trustee shall collect only as much personal health information about an individual as is reasonably necessary to accomplish the purpose for which it is collected.

Notice of collection practices

- 15(1)** A trustee who collects personal health information directly from the individual the information is about shall, before it is collected or as soon as practicable afterwards, take reasonable steps to inform the individual
- (a) of the purpose for which the information is being collected; and
 - (b) if the trustee is not a health professional, how to contact an officer or employee of the trustee who can answer the individual's questions about the collection.

Retention and destruction policy

- 17(1)** A trustee shall establish a written policy concerning the retention and destruction of personal health information and shall comply with that policy.

Compliance with regulations

- 17(2)** A policy under subsection (1) must conform with any requirements of the regulations.

Method of destruction must protect privacy

- 17(3)** In accordance with any requirements of the regulations, a trustee shall ensure that personal health information is destroyed in a manner that protects the privacy of the individual the information is about.

Record of destruction

- 17(4)** A trustee who destroys personal health information shall keep a record of
- (a) the individual whose personal health information is destroyed and the time period to which the information relates; and
 - (b) the method of destruction and the person responsible for supervising the destruction.

Duty to adopt security safeguards

18(1) In accordance with any requirements of the regulations, a trustee shall protect personal health information by adopting reasonable administrative, technical and physical safeguards that ensure the confidentiality, security, accuracy and integrity of the information.

Specific safeguards

- 18(2)** Without limiting subsection (1), a trustee shall
- (a) implement controls that limit the persons who may use personal health information maintained by the trustee to those specifically authorized by the trustee to do so;
 - (b) implement controls to ensure that personal health information maintained by the trustee cannot be used unless
 - (i) the identity of the person seeking to use the information is verified as a person the trustee has authorized to use it, and
 - (ii) the proposed use is verified as being authorized under this Act;
 - (c) if the trustee uses electronic means to request disclosure of personal health information or to respond to requests for disclosure, implement procedures to prevent the interception of the information by unauthorized persons; and
 - (d) when responding to requests for disclosure of personal health information, ensure that the request contains sufficient detail to uniquely identify the individual the information is about.

Additional safeguards for information in electronic form

18(3) A trustee who maintains personal health information in electronic form shall implement any additional safeguards for such information required by the regulations.

Safeguards for sensitive information

19 In determining the reasonableness of security safeguards required under section 18, a trustee shall take into account the degree of sensitivity of the personal health information to be protected.

General duty of trustees re use and disclosure

20(1) A trustee shall not use or disclose personal health information except as authorized under this Division.

Limit on amount of information used or disclosed

20(2) Every use and disclosure by a trustee of personal health information must be limited to the minimum amount of information necessary to accomplish the purpose for which it is used or disclosed.

Limit on the trustee's employees

20(3) A trustee shall limit the use and disclosure of personal health information it maintains to those of its employees and agents who need to know the information to carry out the purpose for which the information was collected or received or to carry out a purpose authorized under section 21.

Restrictions on use of information

- 21** A trustee may use personal health information only for the purpose for which it was collected or received, and shall not use it for any other purpose, unless
- (a) the other purpose is directly related to the purpose for which the personal health information was collected or received;
 - (b) the individual the personal health information is about has consented to the use;
 - (c) use of the information is necessary to prevent or lessen a serious and immediate threat to
 - (i) the mental or physical health or the safety of the individual the information is about or

- another individual, or
- (ii) public health or public safety;
- (e) the purpose is one for which the information may be disclosed to the trustee under section 22;
- or
- (f) use of the information is authorized by an enactment of Manitoba or Canada.

Individual's consent to disclosure

22(1) Except as permitted by subsection (2), a trustee may disclose personal health information only if

- (a) the disclosure is to the individual the personal health information is about or his or her representative; or
- (b) the individual the information is about has consented to the disclosure.

Disclosure without individual's consent

22(2) A trustee may disclose personal health information without the consent of the individual the information is about if the disclosure is

- (a) to a person who is providing or has provided health care to the individual, to the extent necessary to provide health care to the individual, unless the individual has instructed the trustee not to make the disclosure;
- (b) to any person if the trustee reasonably believes that the disclosure is necessary to prevent or lessen a serious and immediate threat to
 - (i) the mental or physical health or the safety of the individual the information is about or another individual, or
 - (ii) public health or public safety;
- (c) for the purpose of
 - (i) contacting a relative or friend of an individual who is injured, incapacitated or ill,
- (f) in accordance with section 23 (disclosure to patient's family), 24 (disclosure for health research) or 25 (disclosure to an information manager);
- (j) to a person who requires the personal health information to carry out an audit for or provide legal services to a trustee, if the trustee reasonably believes that the person will not use or disclose the personal health information for any other purpose and will take appropriate steps to protect it;
- (k) required in anticipation of or for use in a civil or quasi-judicial proceeding to which the trustee is a party, or the prosecution of an offence;
- (l) required to comply with a subpoena, warrant or order issued or made by a court, person or body with jurisdiction to compel the production of the personal health information, or with a rule of court concerning the production of the personal health information;
- (o) authorized or required by an enactment of Manitoba or Canada.

Exercising rights of another person

60 *The rights of an individual under this Act may be exercised*

(e) by the parent or guardian of an individual who is a minor, if the minor does not have the capacity to make health care decisions...

Excerpts from *The Personal Health Information Act Regulation*

Written security policy and procedures

- 2** A trustee shall establish and comply with a written policy and procedures containing the following:
- (a) provisions for the security of personal health information during its collection, use, disclosure, storage, and destruction, including measures
 - (i) to ensure the security of the personal health information when a record of the information is removed from a secure designated area, and
 - (ii) to ensure the security of personal health information in electronic form when the computer hardware or removable electronic storage media on which it has been recorded is being disposed of or used for another purpose;
 - (b) provisions for the recording of security breaches;
 - (c) corrective procedures to address security breaches.

Access restrictions and other precautions

- 3** A trustee shall
- (a) ensure that personal health information is maintained in a designated area or areas and is subject to appropriate security safeguards;
 - (b) limit physical access to designated areas containing personal health information to authorized persons;
 - (c) take reasonable precautions to protect personal health information from fire, theft, vandalism, deterioration, accidental destruction or loss and other hazards; and
 - (d) ensure that removable media used to record personal health information is stored securely when not in use.

Safeguards for electronic information

- 4** A trustee who maintains personal health information in electronic form shall also
- (a) keep an electronic record of every successful or unsuccessful attempt to gain access to personal health information maintained in electronic form;
 - (b) keep an electronic record of every addition to, deletion or modification of personal health information maintained in electronic form;
 - (c) ensure that every transmission of personal health information maintained in electronic form is recorded; and
 - (d) regularly review the electronic record to detect any security breaches.

Authorized access for employees and agents

- 5** A trustee shall, for each of its employees and agents, determine the personal health information that he or she is authorized to access.

Orientation and training for employees

- 6** A trustee shall provide orientation and ongoing training for its employees and agents about the trustee's policy and procedures referred to in section 2.

Pledge of confidentiality

- 7** A trustee shall ensure that each employee and agent signs a pledge of confidentiality that includes an acknowledgement that he or she is bound by the policy and procedures referred to in section 2 and is aware of the consequences of breaching them.

Audit

8(1) *A trustee shall conduct an audit of its security safeguards at least every two years.*

8(2) *If an audit identifies deficiencies in the trustee's security safeguards, the trustee shall take steps to correct the deficiencies as soon as practicable.*

Excerpts from *The Freedom of Information and Protection of Privacy Act*

Right of access

7(1) *Subject to this Act, an applicant has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.*

Severing information

7(2) *The right of access to a record does not extend to information that is excepted from disclosure under Division 3 or 4 of this Part, but if that information can reasonably be severed from the record, an applicant has a right of access to the remainder of the record.*