

DEPARTMENT OF SERVICES FOR CHILDREN, YOUTH AND THEIR FAMILIES
DIVISION OF MANAGEMENT AND SUPPORT SERVICES
Statutory Authority: 29 Delaware Code, Section 9020 (29 Del.C. §9020)

FINAL

REGULATORY IMPLEMENTING ORDER

501 Procedures for Drug Testing Certain Employees

NATURE OF THE PROCEEDINGS:

In compliance with the State's Administrative Procedures Act (APA - Title 29, Chapter 101 of the Delaware Code) and as required by HB 190 of the 145th General Assembly the Department initiated proceedings to establish an employee drug testing program.

The Department published its notice of proposed regulation changes in the April, 2011 Delaware *Register of Regulations*, requiring written materials and suggestions from the public concerning the proposed regulations to be produced by April 30, 2011 at which time the Department would receive information, factual evidence and public comment to the said proposed changes to the regulations.

SUMMARY OF PROPOSAL

The proposed regulation establishes guidelines by which the Department of Services for Children, Youth and their Families (DSCYF) will develop a policy requiring all employees in a safety, security sensitive or childcare position to undergo testing for illegal drugs and commonly abused controlled substances and to establish procedures for the Department's drug testing program in order to detect and deter the use of illegal drugs and illegally held controlled substances by employees.

SUMMARY OF COMMENTS RECEIVED WITH AGENCY RESPONSE

After reviewing comments from employees pursuant to the April, 2011 publication, the Department reviewed its internal policies and has determined that all employees fall under the definition of "safety, secure sensitive or childcare" positions. The regulation has been amended to reflect the change from "certain" employees to all employees of the Department.

In addition, the final order reflects that all employees will be provided with a copy of the Department's drug testing policy, and will be required to sign an acknowledgement form confirming that they received and read the policy.

ADDITIONAL AMENDMENTS TO THE PROPOSED REGULATIONS

In addition to amendments made in response to comments received, the agency has incorporated technical amendments into the final regulations, including clarification of incident triggered testing; testing procedures; procedures on receipt of non-negative test results, and federal testing standards comparison.

FINDINGS OF FACT:

The Department finds that Department Drug Testing Regulations as amended to reflect comments received in the proposed regulation in the April 2011 *Register of Regulations* should be adopted.

THEREFORE, IT IS ORDERED, that the proposed regulation to establish an employee drug testing program shall be final and effective January 1, 2012.

Vivian L. Rapposelli, Secretary, DSCY

501 Procedures for Drug Testing Certain Employees

1.0 Authority
29 Del.C., §9020

2.0 Purpose

The purpose of this policy is to affirm the commitment of the Department of Services for Children, Youth and Their Families (DSCYF) to the protection of children/youth in our care by requiring all employees in a safety, security sensitive or childcare position to undergo testing for commonly abused controlled substances and to establish procedures for the department's drug testing program in order to detect and deter the [illegal] use of [illegal] drugs by employees.

3.0 Applicability

This policy applies to all employees in a safety, security sensitive or childcare position including merit, merit exempt and casual/seasonals. [Since all positions within the Department are considered safety, security sensitive or childcare positions this policy is applicable to all employees.] If there are any conflicts between this policy and the merit rules, the merit rules shall prevail unless superseded by a collective bargaining agreement (CBA).

[All employees will receive a copy of this policy and will sign and return the attached receipt to Human Resources. This policy will act as an official notice for periodic drug testing. No other announcement will be made.]

4.0 Definitions

"Chain of custody": the method of tracing each urine specimen to maintain control from initial collection to final disposition.

"Collection sites": the designated locations where employees present themselves to provide urine specimens.

"Confirmation test": an analytical procedure to identify the presence of a specific drug or metabolite, which is independent of the initial test, performed on the same specimen and which uses a different chemical principle from that of the initial test to ensure reliability and accuracy.

"Confirmed positive result": the presence of a controlled substance in the pure form or its metabolites, at or above the cutoff level, as identified in two consecutive tests on the same sample which employ different test methods, and which is determined not to have been caused by an alternative medical explanation.

"Contractor": entity paid on a contractual basis to maintain a list of employees in the random testing pool, select employees for random testing, collect specimens, conduct reasonable suspicion and [post-incident triggered] testing, safeguard specimens, interpret results, notify DSCYF of positive tests and provide training to supervisors regarding bases for reasonable suspicion testing.

"Employee": any person occupying a safety, security sensitive or childcare position and receiving compensation as an employee of the DSCYF.

"Employee Assistance Program (EAP)": the state of delaware's employee assistance program that provides services to a benefit covered employee who has tested positive for the use of prohibited drugs.

"Employee testing number": the employee id (EMPLID) number assigned to each employee by the Payroll Human Resource Statewide Technology (PHRST) system.

["Incident Triggered Testing": Any incident involving death or serious injury to a DSCYF employee, resident or client, loss or significant damage to department property, including any accident involving a motor vehicle transporting DSCYF clients or residents, or the escape or runaway of a resident where the security sensitive employee was involved in the incident.

"Non-negative test result": Test results that indicate a positive, diluted, adulterated, substituted or similar result. All non-negative test results are reviewed by a Medical Review Officer (MRO).

"Random Testing": Tests based upon an appropriate random sampling technique, with significant samples of DSCYF employees in safety, security sensitive or childcare positions being selected on a periodic basis with all such employees having an equal chance of being selected.

"Reasonable Suspicion Testing": Includes, but is not limited to, observing the employee(s) either using or possessing a drug, displaying physical symptoms of being under the influence of a drug, or finding drug paraphernalia in the workplace.

~~"Security sensitive positions": all positions within DSCYF residential facilities including Ferris School, Stevenson House Detention Center, New Castle County Detention Center, Grace Cottage, Snowden Cottage, Mowlds Cottage, Terry Children's Psychiatric Center, Brenford Residential Treatment Center, Middletown Residential Treatment Center and Silver Lake Consortium.~~

In addition to positions assigned to the locations listed above, see addendum a for other positions/classifications covered under this policy.]

5.0 Policy

- [5.1 ~~It is the policy of the DSCYF~~ The department is committed] to maintain[ing] a drug free environment through the use of a reasonable suspicion, [post-incident triggered] and random [and return to duty] drug testing program. The DSCYF personnel hold positions of public trust and must not place themselves in a position where client safety may be compromised as a result of an employee's drug [dependency use]. Such misconduct conflicts with their duties, poses a risk to the safety and security of residents, clients, other employees, and the public and jeopardizes the public's confidence.
- [5.2 Employees on initial probation and casual/seasonal employees who have not satisfied the merit comparable initial probation requirement will be terminated if they receive a positive test result without recourse to the grievance procedure.
- Casual/seasonal employees who have satisfied the merit comparable initial probation requirement may enter into an accredited drug abuse assistance or rehabilitation program at their own expense. Refer to section X. G. for returning to duty.
- 5.3 Employees who seek assistance, prior to being randomly selected for testing, may enter into an accredited drug abuse assistance or rehabilitation program. The employee may not return to work until they have complied with section X. G. for returning to duty.]

6.0 Procedures

6.1 Notice of testing:

- ~~6.1.1 [This policy will act as an official notice for periodic drug testing. No other announcement will be made. All employees will receive a copy of this policy and will sign and return the attached receipt to Human Resources.~~

Upon arrival at the worksite, selected employees will be given and acknowledge receipt of a Chain of Custody form. The employee must report to a designated collection site and provide a sample within twenty-four (24) hours of notification.

- 6.1.2 Employees notified to report must report for testing to the designated collection site. No requests to be excused or rescheduled shall be granted. Any failure to report, refusal to be tested or refusal to cooperate with the testing procedure will result in the removal from the workplace without pay and will be considered as a positive result.]

6.2 Random testing:

- 6.2.1 All employees [in a safety, security sensitive or childcare position] are subject to random testing.
- 6.2.2 Selection is to be based on a computerized random selection of employee testing numbers, not names.
- 6.2.3 Monthly, the drug testing contractor will randomly select EMPLIDs equivalent to 25% of the random testing population per quarter. Because the selection process is random, some employees may not be tested within a year, while others may be tested more than once.
- ~~[6.2.4 Employees will be given and acknowledge receipt of a chain of custody form upon selection and must report to a designated collection site within twenty-four (24) hours of notification.~~
- ~~6.2.5 Employees notified to report must report for testing to the site specified. No requests to be excused or rescheduled shall be granted. Any failure to report, refusal to be tested or refusal to cooperate with the testing procedure will result in the removal from the workplace without pay and will be considered as a positive result. Employees on initial probation will be terminated from employment.]~~

6.3 Reasonable suspicion testing

- 6.3.1 In the event of reasonable suspicion, the facility head will contact human resources, who will make a determination and contact the contractor if a decision is made to test.
- ~~[6.3.2 Evidence of reasonable suspicion includes, but is not limited to, observing the employee(s) either using or possessing a drug, displaying physical symptoms of being under the influence of a drug, or finding drug paraphernalia in the workplace.]~~

6.4 Incident triggered testing

- 6.4.1 In the event of an incident triggered event, the facility head will contact human resources, who will make a determination and contact the contractor if a decision is made to test.
- ~~[6.4.2 Incident triggered testing is based on any incident involving death or serious injury to a DSCYF employee, resident or client, loss or significant damage to department property, including any accident involving a motor vehicle transporting DSCYF clients or residents, or the escape or runaway of a resident where the security sensitive employee was involved in the incident.]~~

6.5 [Specimen collection procedures Return to Duty Testing]

- ~~6.5.1 [Urine specimens will be collected in accordance with current federal department of health and human service standards. Every effort will be made to assure the dignity and privacy of employees being tested.~~

Before any employee is allowed to return to duty, the employee must have a verified negative drug screen performed by the Contractor.

~~6.5.2 If the contractor determines that the employee is attempting to substitute or adulterate the specimen, the contractor shall document the fact and direct the employee to provide another specimen. Both specimens shall be forwarded to the laboratory.~~

6.6 Laboratory procedures

~~6.6.1 The laboratory will test for marijuana, cocaine, opiates, phencyclidine and amphetamines. The initial procedure employed will be the enzyme multiplied immunoassay testing (emit). Cutoff levels will be consistent with current federal department of health and human service standards.~~

~~6.6.2 All positive specimens shall be confirmed using the gas chromatography/mass spectrometry (gc/ms), which shall be conducted from the same specimen.~~

6.7 Preservation procedures

~~6.7.1 Specimens determined to contain drugs will be preserved at the laboratory for a minimum of twelve (12) months. Employees testing positive may, upon written request to human resources, arrange to have their specimen retested. All costs, including lab fees and transportation shall be paid by the employee requesting the retest.~~

6.8 Post testing procedures

~~6.8.1 If the lab results are negative, the sample shall be destroyed.~~

~~6.8.2 If the lab results are positive, the report will be forwarded to human resources by the laboratory.~~

~~6.8.3 The human resource office will then notify the appropriate division director or designee. They will, in turn, notify the employee and immediately remove him/her from the workplace without pay until the employee contacts an accredited drug rehabilitation program, and provides documentation of same.~~

~~6.8.4 The employee is then directed to participate in an accredited drug abuse assistance or rehabilitation program. Refusal to do so may result in dismissal. All benefit covered employees will be referred to the state's EAP program for assistance in enrollment.~~

~~6.8.4 Before being allowed to return to duty, the employee must provide documentation to human resources showing that the drug abuse assistance or rehabilitation program was successfully completed and the employee has been released to return to work. "Successful completion" means the employee has achieved a drug free state as determined by the program counselor and received a negative result from an authorized drug test. The employee will then be required to pass a "return to duty" drug test paid for by the DSCYF before being cleared to return to work.~~

~~6.8.5 Any employee who tests positive on a drug test for a second time within five (5) years from the date of program completion will be separated from employment without the option to participate in a treatment program.~~

~~6.8.6 Employees on initial probation and casual/seasonal employees who have not satisfied the merit comparable initial probation requirement will be terminated if they fail a drug test without recourse to the grievance procedure.~~

~~6.8.7 Casual/seasonal employees who have satisfied the merit comparable initial probation requirement may enter into an accredited drug abuse assistance or rehabilitation program at their own expense. Refer to Section X. E. For returning to duty.~~

7.0 Specimen Collection Procedures

7.1 The State will have a federally certified collector who will be responsible for conducting all urine collections.

7.2 Urine specimens will be collected in accordance with current Federal Department of Transportation standards. Every effort will be made to assure the dignity and privacy of employees being tested.

7.3 If the Contractor determines that the employee is attempting to substitute or adulterate the specimen, the Contractor shall document the fact and direct the employee to provide another specimen. Both specimens shall be forwarded to the laboratory. Confirmation of a substituted or adulterated specimen will be considered as a positive test result.

8.0 Laboratory Procedures

8.1 The laboratory will test for marijuana, cocaine, opiates, phencyclidine and amphetamines. The initial procedure employed will be the Enzyme Multiplied Immunoassay Testing (EMIT) or similar federally approved procedure. Cutoff levels will be consistent with current Federal Department of Transportation standards, which are subject to change.

- 8.2 All positive specimens shall be confirmed using the Gas Chromatography/Mass Spectrometry (GC/MS), which shall be conducted from the same specimen.
- 8.3 The confirmation test results are reviewed and interpreted by a Medical Review Officer (MRO) before they are reported to the employer. If the laboratory reports a non-negative result to the MRO, the MRO contacts the employee and conducts an interview to determine if there is an alternative explanation for the. If the employee provides appropriate documentation and the MRO determines that it is legitimate explanation and/or medical documentation, the drug test result is reported as negative to the employer.
- 8.4 The MRO will contact the DSCYF Designated Employer Representative (DER) within the Human Resource Office.

9.0 Preservation Procedures

Specimens determined to contain drugs will be preserved at the laboratory for a minimum of twelve (12) months. Employees testing positive may, upon written request to Human Resources, arrange to have their specimen retested. All costs, including lab fees and transportation shall be paid by the employee requesting the retest.

10.0 Post Testing Procedures

- 10.1 If the lab results are negative, the sample shall be destroyed.
- 10.2 If the lab results are positive, the report will be forwarded to Human Resources by the MRO.
- 10.3 The Human Resource Office will then notify the appropriate Division Director or designee. They will, in turn, notify the employee and immediately remove him/her from the workplace without pay.
- 10.4 The employee is then directed to participate in an accredited drug abuse assistance or rehabilitation program. Refusal to do so may result in dismissal. All benefit covered employees will be referred to the State's EAP program for assistance in enrollment.
- 10.5 Once the employee makes contact with an accredited drug abuse assistance or rehabilitation program, and provides documentation of same, the employee will be allowed to use accrued leave, rescheduled holidays or compensatory time previously earned.
- 10.6 Before being allowed to return to duty, the employee must:
 - 10.6.1 Provide documentation to Human Resources showing that the drug abuse assistance or rehabilitation program was successfully completed and the employee has been released to return to work. "Successful completion" means the employee has achieved a drug-free state as determined by the program counselor, and
 - 10.6.2 The employee will then be required to pass a "return to duty" drug test paid for by the DSCYF before being cleared to return to work.
- 10.7 Any employee who tests positive on a drug test for a second time within five (5) years from the date of program completion will be terminated without the option to participate in a treatment program.

~~CONFIRMATION OF RECEIPT ACKNOWLEDGEMENT~~

~~I have received a copy of the Department of Services for Children Youth and Their Families Drug Testing Policy.~~

 Employee Signature Date

Please sign and return this page to:

Human Resources
 1825 Faulkland Road
 Wilmington, DE 19805

[ADDENDUM A

~~In addition to Section IV, Subsection I, security sensitive positions shall include, but are not limited to, the following positions/classifications within the DSCYF:~~

- ~~• Senior Probation and Parole Officer and Probation and Parole Officer Supervisor~~

- ~~Family Service Specialist, Senior Family Service Specialist, Master Family Service Specialist and Family Service Supervisor~~
- ~~Adolescent Treatment Services Coordinators~~
- ~~Psychiatric Social Worker I, II, III~~
- ~~Psychologists and Psychologist Supervisors~~
- ~~Teacher's Aides, Teachers, Principals~~
- ~~Family crisis therapists and family crisis therapist supervisors~~
- ~~Family Service Assistant I and Family Service Assistant II~~
- ~~Child Care Licensing Specialist and Child Care Licensing Supervisor~~
- ~~Social Service Technician]~~

15 DE Reg. 1047 (01/01/12) (Final)