OPINION NO. 83-012

Syllabus:

Pursuant to R.C. 3313.20, a board of education is authorized to adopt rules or regulations providing for the administration of breathalyzer tests to students suspected of having consumed alcoholic beverages when the board reasonably finds that such rules or regulations are necessary to the effective management of the schools. The reasonableness and constitutionality of such rules or regulations are, however, subject to judicial review.

To: Thomas R. Spellerberg, Seneca County Prosecuting Attorney, Tiffin, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, March 25, 1983

I have before me your request for an opinion of the Attorney General as to whether it is legally permissible for a board of education to institute a policy whereby alcohol breathalyzer tests are administered to students suspected of having consumed alcoholic beverages. There is no express statutory authorization specifically directed at policing alcohol consumption in schools. However, the authority of a board of education to regulate the conduct of students in its school district has been well established by statute. Pursuant to R.C. 3313.47 a board of education "shall have the management and control of all of the public schools. . .in its respective district." Further, R.C. 3313.20 empowers boards of education to "make such rules and regulations as are necessary for. . .the government of. . .pupils of its schools."

These statutes confer wide discretion on a board of education to adopt such rules and regulations as it deems necessary for the conduct of its schools. Greco v. Roper, 145 Ohio St. 243, 61 N.E.2d 307 (1945); Holroyd v. Eibling, 116 Ohio App. 440, 188 N.E.2d 797 (Franklin County 1962), dismissed for want of debatable question, 174 Ohio St. 27, 186 N.E.2d 200 (1962); State ex rel. Evans v. Fry, 11 Ohio Misc. 231, 230 N.E.2d 363 (C.P. Stark County 1967). In the absence of abuse of discretion, arbitrariness, or unreasonableness, the courts will not interfere with the authority of a board of education to make such rules and regulations. State ex rel. Ohio High School Athletic Association v. Judges, 173 Ohio St. 239, 181 N.E.2d 261 (1962); Brannon v. Board of Education, 99 Ohio St. 369, 124 N.E. 235 (1919); Board of Education of Sycamore v. State ex rel. Wickham, 80 Ohio St. 133, 88 N.E. 412 (1909). Neither will a court substitute its judgment for that of a board of education on matters the board is authorized by law to decide in conducting the affairs of the schools. Brannon v. Board of Education. Thus, the authority of boards of education to enact rules and regulations reasonably designed to preserve discipline, as well as to protect the morals, health and physical safety of students, has been frequently recognized in prior opinions. See, e.g., 1982 Op. Att'y Gen. No. 82-030; 1982 Op. Att'y Gen. No. 82-029; 1974 Op. Att'y Gen. No. 74-095; 1971 Op. Att'y Gen. No. 71-046; 1963 Op. Att'y Gen. No. 120, p. 198.

You have described the action which the board of education proposes to take as adoption of a "policy." It is my understanding that the "policy" will constitute part of the body of rules and regulations governing the schools.

With respect to the question you pose, the initial consideration is whether the use of alcoholic beverages by students is a proper matter to be regulated by boards

of education. The purchase or consumption of alcoholic beverages by minors within the State of Ohio is, with limited exceptions, expressly prohibited by statute. See R.C. 4301.63 (prohibiting the purchase of intoxicating liquor by persons under the age of twenty-one years and the purchase of beer by persons under the age of nineteen years); R.C. 4301.631 (prohibiting the purchase or consumption of beer or intoxicating liquor in a public place by persons under the age of nineteen years); R.C. 4301.632 (prohibiting the purchase or consumption of intoxicating liquor by persons under the age of twenty-one years); R.C. 4301.633 (prohibiting any person from furnishing false information for the purpose of obtaining beer or intoxicating liquor for a person who is under the legal drinking age); R.C. 4301.634 (prohibiting persons under the age of nineteen years from furnishing false information for the purpose of obtaining beer or intoxicating liquor); R.C. 4301.635 (prohibiting persons under the age of twenty-one years from furnishing false information for the purpose of obtaining intoxicating liquor); R.C. 4301.69 (providing an exception from R.C. 4301.631 and 4301.632 for beer or intoxicating liquor given by a physician in the course of his practice or by a parent or legal guardian). R.C. 4301.99 imposes penalties for violations of certain of these provisions, and R.C. 2151.02 provides that any person under the age of eighteen years who violates a law of the state which would be a crime if committed by an adult is a delinquent child and subject to the judicial procedures set forth in R.C. Chapter 2151. In addition, the well-known dangers of alcohol addiction and other maladies attributable to alcohol abuse support the need of boards of education to guard against its use among students. Clearly, a board of education might reasonably conclude that the use of alcoholic beverages by students would have a detrimental effect on the morals of the student body, substantially disrupt the proper discipline and government of the students, and endanger the physical health and well-being of the students. Thus, I would consider the use of intoxicating beverages by students a proper concern of a board of education and a matter which the board might reasonably regulate.

The principal issue raised by your question is whether the administration of alcohol breathalyzer tests to students suspected of having consumed alcoholic beverages is an unreasonable means of regulation or an abuse of discretion. Whether a particular rule or regulation is unreasonable or an abuse of discretion is, of course, a question which only a court may ultimately determine. In cases where the courts have been called upon to determine whether a particular rule or regulation is unreasonable or an abuse of discretion such determinations have been made on a case-by-case basis; the courts have required only a rational connection between the interest sought to be protected and the measures adopted to safeguard that interest. See, e.g., Holroyd v. Eibling, 25 Ohio Op. 2d 231, 188 N.E.2d 208 (C.P. Franklin County 1961), aff'd, 116 Ohio App. 440, 188 N.E.2d 797 (1962), dismissed for want of debatable question, 174 Ohio St. 27, 186 N.E.2d 200 (1962); State ex rel. Idle v. Chamberlain, 12 Ohio Misc. 44, 175 N.E.2d 539 (C.P. Butler County 1961); Board of Education of Sycamore v. State ex rel. Wickham. In determining the reasonableness of breathalyzer tests as a means of regulating alcohol use, consideration must be given to their effectiveness in measuring alcohol content in the body and the permissibility of their use.

Regarding the use of breathalyzer tests in schools, it is my understanding that there are no statutes, Ohio court decisions, or decisions in other jurisdictions on the precise question. There is, however, statutory authority for the use of breathalyzer tests to determine the alcohol content in the blood of Ohio motorists. In criminal proceedings for driving while intoxicated, R.C. 4511.19 provides for the admission of evidence of the alcohol content in a "defendant's blood at the time of the alleged violation as shown by chemical analysis of the defendant's. . .breath . . .withdrawn within two hours of the time of such alleged violation." The breathalyzer test has been held to constitute a "chemical test" within the meaning of R.C. 4511.19, and the Director of Health's exercise of discretion in approving it as a reliable test for the alcoholic content of the blood has been upheld. City of Dayton v. Schenck, 63 Ohio Misc. 14, 409 N.E.2d 284 (Dayton Mun. Ct. 1980). It is clear that the use of the breathalyzer test to measure the alcohol content in the blood of one whose intoxication is suspected is permitted in Ohio.

Finally, I take note that, in adopting a policy for the use of breathalyzer tests in schools, there are certain constitutional considerations to keep in mind. "The authority possessed by the State to prescribe and enforce standards of conduct in

its schools, although concededly very broad, must be exercised consistently with constitutional safeguards." Goss v. Lopez, 419 U.S. 565 at 574 (1975).

It has been held that the administration of a breathalyzer test and use of its results to determine blood alcohol content constitutes a search and seizure within the meaning of the fourth and fourteenth amendments of the Constitution of the United States. Piqua v. Hinger, 15 Ohio St. 2d 110, 238 N.E.2d 766 (1968), cert. denied, 393 U.S. 1001 (1969), motion for reh. denied, 394 U.S. 994 (1969); Schmerber v. California, 384 U.S. 757 (1966) (concerning extraction of blood sample to establish alcohol level). Similarly, it has been held that rights of students against unreasonable searches and seizures under the fourth and fourteenth amendments are to be balanced against the authority of school officials to prescribe and enforce standards of conduct in the schools.[1] See, e.g., Bilrey v. Brown, 981 F.Supp. 26 (D. Or. 1979); State v. Baccino, 282 A.2d 869 (Del. 1971); 49 A.L.R. 3d 978 (1973).

The question to be determined in deciding whether a particular search and seizure is constitutional is whether it is reasonable in light of all the circumstances. Ker v. California, 374 U.S. 23 (1963). In somewhat analogous cases involving the use of trained dogs to sniff students or their property to prevent abuse of drugs and alcohol, such searches have, at least in some circumstances, been found permissible. See Zamora v. Pomeroy, 639 F.2d 662 (10th. Cir. 1981) (holding that general sniff-search of lockers was permissible); Doe v. Renfrow, 475 F.Supp. 1012 (N.D. Ind. 1979), rev'd on other grounds, 631 F.2d 91 (7th Cir. 1980), cert. denied, 451 U.S. 1022 (1981) (holding that general sniff-search of students was permissible). In Horton v. Goose Creek Independent School District, 677 F.2d 471 (5th Cir. 1982), the Court of Appeals concluded that dragnet sniff-searches of lockers and cars were permissible, but that dragnet sniff-searches of the students' persons constituted significant intrusions and were unconstitutional. With respect to searches of students themselves the court stated:

> That aspect of the [Goose Creek Independent School District] program entails too great an intrusion on the privacy of the students to be justified by the need to prevent abuse of drugs and alcohol when there is no individualized suspicion, and we hold it unconstitutional.

Id. at 485. The reasonable interpretation of the decision in Horton is that searches of students' persons are permissible conduct if based on an individualized suspicion as opposed to being a general preventive measure. See Jones v. Latexo Independent School District, 499 F.Supp. 223 (E.D. Tex. 1980) (holding that general sniff-search of students and their vehicles, without reasonable suspicion regarding specific individuals, was unconstitutional).

It is, of course, impossible for me to predict the conclusions which a court would reach in considering a particular school board policy for the use of breathalyzer tests. An analysis of the authorities discussed above suggests, however, that the use of breathalyzer tests to determine whether students had consumed alcoholic beverages would not violate constitutional safeguards against unreasonable searches and seizures, at least if such tests were used only in instances where individual students were reasonably suspected of having consumed alcoholic beverages. The policy about which you have inquired indicates that breathalyzer tests would be administered only to individual students suspected of having consumed alcohol, and thus would seem to be reasonable. However, the ultimate permissibility of such a policy is in the province of the courts, in which authority to pass upon the constitutionality of such matters rests. See, e.g., Holroyd v. Eibling.

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[1]It has been held in Ohio that a school teacher stands in loco parentis to his pupils. State v. Lutz, 65 Ohio L. Abs. 402, 113 N.E.2d 757 (C.P. Stark County 1953). The doctrine in loco parentis factitiously places the teacher in the place of the parent, bestowing on him the parent's rights, duties, and responsibilities during the period that the school is charged with custody of the pupil. See generally 1973 Op. Att'y Gen. No. 73-129.

In conclusion, it is my opinion, and you are advised, that pursuant to R.C. 3313.20, a board of education is authorized to adopt rules or regulations providing for the administration of breathalyzer tests to students suspected of having consumed alcoholic beverages when the board reasonably finds that such rules or regulations are necessary to the effective management of the schools. The reasonableness and constitutionality of such rules or regulations are, however, subject to judicial review.