



A bold voice for transportation workers

November 9, 2020

Substance Abuse and Mental Health Services Administration
Center for Substance Abuse Prevention
Division of Workplace Programs
5600 Fishers Lane, Room 16N02
Rockville, MD 20857

**RE: Mandatory Guidelines for Federal Workplace Drug Testing Programs
Docket No. SAMHSA-2020-0001**

On behalf of the Transportation Trades Department, AFL-CIO (TTD), I am pleased to respond to the Department of Health and Human Services (HHS) and Substance Abuse and Mental Health Services Administration's (SAMHSA) notification of proposed Mandatory Guidelines for Federal Workplace Drug Testing Programs using Hair (HMG). TTD consists of 33 affiliate unions representing workers in all modes of transportation who are subject to federally mandated drug tests due to their employment. We therefore have a vested interest in the proposal.¹

Through the publication of these guidelines, HHS seeks to include hair specimens in the Mandatory Guidelines for Federal Workplace Drug Testing Programs. If adopted, employers would be able to conduct hair testing in concert with, or in lieu of, urine or oral fluid tests that have been previously approved by the Department. In issuing these proposed guidelines, HHS is acting to comply with Sec. 5402(b) of the Fixing America's Surface Transportation (FAST) Act, Pub L. 114-94.

As HHS notes, transportation employees by far would be the workforce most impacted by the deployment of hair testing. While HHS projects approximately 275,000 total annual drug tests among federal agencies, and 150,000 annual tests by the Nuclear Regulatory Commission, its estimates for the transportation workforce surpass six million tests, if adopted by the Department

¹ Attached is a list of TTD's 33 affiliated unions.

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of Transportation. Drug and alcohol testing plays a critical role in the careers of the employees we represent — pre-employment testing is a determinate factor in hiring, and the results of each random, reasonable suspicion, post-accident, and return to work test could dictate the future of an employee’s career. Effective testing also improves safety across all modes for both employees and the public. It is for these reasons that the federal drug testing program must be held to the highest standards of accuracy and validity.

[TTD](#), other labor unions, and racial and social justice advocacy organizations have long expressed serious concerns regarding the accuracy of hair tests, the subjectivity of hair tests to external contaminants, and inherent biases including potential racially disparate impacts.

Congress also spoke to these concerns when it passed the 2018 SUPPORT for Patients and Communities Act, Pub L. 115-271 wherein it mandated that “to the extent practicable and consistent with the objective of the hair testing...the final notice of scientific and technical guidelines...shall eliminate the risk of positive test results, of the individual being tested, caused solely by the drug use of others and not caused by the drug use of the individual being tested”.²

Given these well-documented issues and the critical role that fair testing must play for transportation workers, HHS must not promulgate hair specimen testing procedures until the scientific basis for these tests is unquestionably established, and the foundational concerns raised by TTD and others sufficiently answered.

HHS’ proposal falls far short of satisfying these requirements, including the 2018 statutory mandate. As discussed below, HHS’ proposal of an HMG that cannot be used in the same manner as existing specimen tests is indicative of the Department’s determination that hair follicle testing fails to achieve the reliability and validity standards of current testing methods. Further, while HHS does discuss some of the key issues at play, throughout the document the Department requests information and scientific literature from the public on a disturbingly broad array of essential questions. As it discusses in the notice, HHS, as well as SAMHSA and the Drug Testing Advisory Board (DTAB) have contemplated this issue for 20 years, and have operated under a statutory mandate to complete a proposal since 2015. If at this date HHS still requires substantive technical feedback from the public on almost every component of its proposal, it should be clear the Department is not in a position to move forward. We call on HHS to withdraw its proposal in light of overwhelming and self-admitted evidence that hair follicle testing is not an acceptable specimen for federally impelled drug testing.

Confirmatory Testing

Most glaringly, HHS’s proposal for the testing under the HMG process makes clear that it does not believe hair testing is reliable. As proposed, following a positive hair follicle test a Medical Review Officer (MRO) will ask the employee if they have consumed a prohibited substance

² Pub L. 115-271 Section 8108(b)

without a legitimate medical explanation. If the employee does not admit to doing so, the hair test is immediately invalidated. At this point, the MRO would authorize testing of an alternative specimen, either urine or oral fluids, both of which HHS has previously approved. If confirmatory testing is to be required in most circumstances, it is unclear what the practical benefit of allowing hair tests is. Further, given that the window in which to detect a positive is longer for hair samples than urine or oral fluids, the reliance on a secondary test would seem to eliminate the purported value of hair testing (longer detection periods). Instead, the proposal adds ambiguity and confusion to the drug and alcohol testing process that will have negative consequences for transportation workers. If HHS does not believe that its data and research are strong enough to develop guidelines that allow hair specimens to be used in the same manner as urine and oral fluids, then it should cease progress on the promulgation of this HMG until it is prepared to do so.

HHS also provides flexibility for confirmatory samples to be “simultaneously collected or collected and tested at the direction of the MRO after verification of a positive hair test result.” This proposal is impractical and if HHS proceeds, it should mandate that specimens be collected simultaneously. Recalling an employee for a second test creates practical difficulties for both the employee and employer, who now have to adjust the employee’s schedule to accommodate a second test. Additionally, requiring the second test to be conducted simultaneously will reduce the risk of an employee being falsely identified as a drug user when they are contacted to re-test, delays in intervention when an employee has illicitly used prohibited substances, and the need to reexamine existing CBA terms on drug testing events.

HHS also asks if hair tests that are positive for the marijuana analyte, delta-9-tetrahydrocannabinol-9-carboxylic acid (THCA), should be excluded from the requirement to test an alternate specimen. HHS suggests the presence of this analyte of marijuana may provide overwhelming evidence of consumption (as opposed to external contamination) because the body produces THCA as it breaks down THC. The Department also asks if there are further unique drug metabolites that unequivocally demonstrate ingestion as opposed to external contact and contamination. We express deep concern with HHS’s intentions to include any “unique metabolites” in the HMG given the unsettled nature of core questions simply relating to the validity of hair follicle testing itself. Now is not the time for HHS to introduce further unproven variables into the testing process.

It is also unclear that science on THCA or other marijuana analytes is as established as HHS claims. HHS acknowledges that it is not aware of any controlled dosing studies that demonstrate the lack of a hair color impact on THCA results, and does not provide any discussion on interactions between THCA results and other factors it discusses elsewhere, like cosmetic treatments. Additionally, while we are unconvinced that adequate evidence exists to adopt THCA as a unique marijuana metabolite for the purposes of the HMG, it is also unclear that “unique metabolites” are as definitive as HHS believes them to be. A recent study on the topic of marijuana analytes in hair concludes that even if the analytes function the way HHS suggests, that “considering the presence of THC-COOH in sebum/sweat, a transfer to other persons’ hair is possible. Not over-interpreting THC or THC-COOH findings in hair is of utmost importance in child protection cases, but also in

the context of workplace drug testing and any forensic application.”³ As both the validity of hair testing writ large and of the concept of unique metabolites within hair testing are unclear and unproven, any HHS proposal must mandate simultaneous, confirmatory testing of an alternate specimen for all hair follicle tests.

Collection Procedures

While we urge HHS to withdraw its proposal, in the event the Department proceeds, we concur with its decision to limit the use of hair testing to employment and random testing purposes, and a prohibition on use for reasonable suspicion/cause, post accident, return to duty, or follow-up testing purposes (Sec. 2.2). Given the longer length of time required for drug metabolites to appear in hair (in contrast to urine, oral fluids, or blood), the agency believes that hair testing is not appropriate for reasonable suspicion or post-accident tests.

TTD also concurs with HHS’s proposal to only use head hair (Sec. 8.5) and to not consider an employee’s inability to provide head hair as a refusal to test (Sec. 8.6). This proposal prohibits an unnecessary invasion of privacy by a collector, and ensures that employees who do not possess head hair for physiological or aesthetic reasons are not discriminated against. However, the flexibility of HHS’s proposal suggests that the Department holds no belief that proceeding to an alternate specimen has a negative impact on safety. If this is the case, then there is no demonstrable benefit to adopting the HMG, particularly in the clearly incomplete manner in which it has been published.

As discussed below, external contaminants remain a substantial concern to TTD. For this reason, we oppose Section 8.4(b)(2), which would allow collectors to use the same pair of scissors or clippers on multiple employees, provided that “the collector cleans such items in the presence of the donor with an isopropyl alcohol wipe prior to use in the hair collection.” It is impossible to standardize how a collector wipes the item, and it cannot be incumbent on an employee to determine if the collector has adequately cleaned it. This reuse of equipment introduces unacceptable risk of cross-contamination between samples and must not be permitted. DOT’s regulations are careful to avoid this scenario; 49 CFR § 40.243(a) requires a mouth piece for a breath alcohol test to be individually wrapped or sealed, and DOT’s Appendix A to Part 40 specifies that urine samples be collected in a single use container. Any minor cost benefit to reusing critical testing equipment is far outweighed by its subjectivity to contamination, and we urge the Department to eliminate Section 8.4(b)(2).

We also have substantial concerns with the effective function of Sec 14.1, regarding split specimen tests. As with other testing methods, employees have the right to request the testing of a “B” sample. HHS proposes that an employee may make such a request when a specimen is determined by the MRO to be adulterated or substituted. However, as DOT explains in its guidance, the

³ Moosmann, B., Roth, N. & Auwärter, V. Finding cannabinoids in hair does not prove cannabis consumption. (2015).

determination of who pays for a split specimen test is up to the employer.⁴ While some employers may cover or share costs per the terms of a CBA, TTD is aware of employees being quoted a 1,000% cost markup on urine B samples. Given that HHS estimates that hair tests are 4-7 times more costly than urine, requesting a test of a hair B sample may be financially impossible for many employees. HHS should ensure that labs are not permitted to set prices for hair B tests that are so egregious as to discourage or prevent employees from exercising their right to do so.

Finally, we do note that an employee on medical leave has the right to use medical marijuana under the direction of a physician, if permitted in their state of residence. While it is generally understood that an employee would have to test negative or be prepared to test negative before returning to work,⁵ the consequences of such a treatment decision would be more severe with the use of hair testing and a 60-day detection window. These consequences could include lost wages, extended disability claims and unnecessary erosion of FMLA time while an employee waits for marijuana metabolites to drop below established cutoff levels. If the HMG is adopted, HHS should ensure that employees are aware of this possibility.

Validity, Accuracy, and Disparate Impact

TTD has previously raised significant concerns for the scientific validity of hair testing, including the impact of external contamination, cosmetic treatments, and hair color/texture.⁶ A failure to account for these conditions will inherently result in an unfair and unequal testing regime, including the possibility of racially disparate impacts on tested workers of color.

With regards to external contamination, HHS takes a truly puzzling position. The Department discusses a variety of literature that speaks to the effects of external contaminants, noting that "...it has been shown that some externally deposited drug may remain, even after extensive washing", and "one published study concludes that drug-contaminated hair when washed with water and methanol is indistinguishable from drug user hair."^{7 8} Additional studies also speak to risks regarding external contamination. To date, TTD is not convinced that the issue of external contamination has been satisfactorily resolved, an opinion shared by, and central to, decisions in both *Thompson v. Civil Service Com'n*, 90 Mass.App.Ct. 462 (Oct. 7, 2016), and *Jones v. City of*

⁴What Employers Need To Know About DOT Drug and Alcohol Testing [Guidance and Best Practices], U.S. Department of Transportation Office of the Secretary, 2008.

⁵ 49 CFR§ 382.301 requires an FMCSA-regulated employee to take a pre-employment test after being out of an FMCSA testing pool for 30 consecutive days, 14 CFR§ 120.109(a)(4) requires an FAA regulated entity to perform a drug test before returning an employee to the testing pool who was previously removed.

⁶ Petition of JB. Hunt Transport, Inc., Schneider National Carriers, Inc., Werner Enterprises, Inc., Knight Transportation, Inc., Dupre Logistics, Inc. and Maveric Transportation, LLC, Docket No. FMCSA-2017-0002, April 25th, 2107,

⁷ Mantiniaks D, Gerostamoulos D, Wright P, Drummer, 2018. The effectiveness of decontamination procedures used in forensic hair analysis

⁸ Cuyper E, Flinders B, Boone CM, Bosman IJ, Lusthof KL, Van Asten AC, Tygat J Heeren, 2016. Consequences of Decontamination Procedures in Forensic Hair Analysis Using Metal-Assisted Secondary Ion Mass Spectrometry

Boston, 845 F.3d 28 (1st Cir. 2016), that held that largely due to external contamination concerns (and interconnected questions of racially disparate impacts), hair testing could not be solely used for the purpose of employment decisions.

Nearly all the scientific literature, including from hair testing labs and the Society of Hair Testing, explicitly state that the most important tool in eliminating false positives in hair follicle testing is a rigorous wash and decontamination procedure. DTAB included this in its 2015 recommendations to the Department stating that its HMG proposal should contain “performance standards that sufficiently address external contamination and hair color impact”. TTD has been clear that decontamination procedures must be standardized, lest the outcome of tests be determined solely by the commercial wash procedure of a particular lab. Incredibly, HHS has failed to adopt any sort of requirement in its proposal, stating in regard to standardized decontamination procedures that:

“...more time and research are needed for the development of performance standards that address this and other issues. The Department is currently in the process of developing performance standards for decontamination of hair and is seeking public comment on what such standards should be and how performance test samples could be developed to assess these standards. When the decontamination performance standards are fully developed, it is the Department's intention to add them to the HMG through the notice and comment process rather than delay publishing of the proposed HMG until such standards are developed”.

It is unconscionable that HHS would roll out a proposed HMG without adequately addressing how it plans to regulate decontamination. Without said performance standards and supporting literature, it is impossible to make judgements on the broad function and viability of the guidelines. If HHS requires additional time for research before it can determine if labs are capable of decontaminating specimens, and how it may quantify that, then the Department should pursue that endeavor before it publishes woefully incomplete guidelines.

HHS also discusses how hair color, and therefore in some instances race, may affect the results of a hair follicle test, a related and key consideration of the *Thompson* decision. HHS cites a number of studies that report differences in drug absorption across hair colors and textures, noting that there is “scientific evidence that melanin pigments may influence the amount of drug incorporated into hair. However, it is unclear whether this influence would lead to significant bias in different populations of workers undergoing drug tests.” To this point, HHS goes on to cite a prepublication University of Arkansas study that “suggest[s] that [testing results of] ethnic groups are significantly different irrespective of testing procedure.” The Department then requests further scientific literature from the public on the question of the impacts of hair color and the possibility for racially disparate impacts.

Putting aside the impossibility of responding to a study which has been distributed to HHS on a non-public basis, addressing the question of whether or not hair follicle testing has a disparate impact on workers of color is too foundational to the legitimacy of the proposal for HHS to so

flippantly punt the matter to the responding public. While we appreciate that the Department has done some modicum of literature review on the topic, ensuring that workers are not treated unfairly by federal drug testing programs due to their race requires far greater attention and analysis than HHS had conducted. Additionally, in the event that HHS ultimately determines, as numerous studies have, that hair testing can result in racially disparate impacts, moving forward with a hair testing standard simply because it can be written to be potentially compliant with *Thompson* is not an acceptable remedy. Put another way, while the presence of a confirmatory test may satisfy the requirements of *Thompson* with regard to the weight of a hair test in employment decisions, this does not justify the use of a biased test. This determination would be particularly acute in the event that HHS proceeds with the use of unique metabolites that would explicitly circumvent the proposed protections of a confirmatory test.

As with external contamination and hair color, HHS's notice considers the impacts of cosmetic products and treatments. Uniquely, a number of studies point to the possibility of certain products or treatments resulting in increased drug absorption.⁹ It is in HHS' interest to ensure that the use of personal care products does not result in the generation of positives from contaminated hair that would otherwise fall below established cutoff levels. To curb this possibility, the Department proposes that "each laboratory have a scientifically validated method to identify hair that has been damaged to the extent a drug test may be affected" and asks how frequently said testing should be performed. Given that each test conducted by HHS or another federal agency can be determinative of a worker's livelihood, we encourage HHS to require tests for damage on all specimens, as opposed to when a lab unilaterally determines it is appropriate.

However, we are similarly unable to provide meaningful and holistic comments on this aspect of the HMG, as HHS has neglected to include an actual proposal for the framework of a specimen validity test. Once again, the Department requests information from the public on what this test might look like instead of requesting comment on a proposal it has developed internally, leaving another critical gap in the proposed guidelines.

Further, as noted above, HHS has it under a statutory mandate to eliminate false positives from external contamination or otherwise. The Department makes no reference to this requirement in its proposal, and proposes no mechanisms to reduce false positives as directed. While the promulgation of these hair testing standards is required by the FAST Act, HHS does not have the authority to ignore additional statutory requirements on the topic. The Department's failure to address this directive violates the hair testing requirements contained in the SUPPORT for Patients and Communities Act, which in turn makes this proposal fatally deficient.

In a welcome contrast, the Department does make an attempt to provide cutoff levels for drugs or drug metabolite concentrations, basing them on cutoffs proposed by the Department in 2004, with the addition of drugs that have since been added to the panel. While most of the proposed initial

⁹ Kidwell DA, Smith FP, Shepherd AR. 2015. Ethnic hair care products may increase false positives in hair drug testing

and confirmatory cutoffs are consistent with those recommended by the European Workplace Drug Testing Society and the Society of Hair Testing, HHS has chosen a cutoff for marijuana that is four times lower, and therefore substantially more sensitive, than the recommendations of those organizations. It is unclear from the proposal why the Department has done so. This is of particular concern given that employees may be at the highest risk of marijuana false positives. Increasing state-level legalization of marijuana, abundant opportunities for external contamination, and risks from contamination of legal uses of hemp or CBD products all increase the possibility of marijuana false positives. HHS should not proceed with such a cutoff level without providing further justification. If HHS does proceed with the selection of such a sensitive cutoff level, it should ensure that employees always have the opportunity to provide a second, confirmatory specimen, regardless of HHS' determination on THCA, in order to avoid false positive tests.

Through this notice, HHS has issued a deeply flawed and incomplete proposal that fails to answer basic questions of scientific validity and fairness, and makes no attempt to establish key components of a hair testing program, such as decontamination performance standards or a specimen validity test. Perhaps this is unsurprising.

In addition to the aforementioned language on validity and contamination, Pub L. 115-271 (2018) also required SAMHSA to report its progress on completing its hair testing proposal. At the time, [TTD stated our belief](#) that this reporting requirement was born out of an effort to put pressure on the agency to release the rule, regardless of the state of the scientific backing. In June 2019, SAMHSA released its first mandated report, blaming the delay on “unresolved scientific issues” and legal considerations, while also announcing that it had forwarded its proposed guidelines to OMB. We note that of the 43 studies cited in the proposal, only five were published in 2018 or 2019 and it is difficult to believe that these five studies resolved all scientific issues under consideration. Instead, the content of the proposal makes clear that the issues that were previously unresolved remain so, and HHS is not in a position to impose these guidelines on workers.

TTD calls on HHS to withdraw this proposal until such a time as it is prepared to issue complete and scientifically validated guidelines. Efforts to move forward on this proposal as written will have severe and unjust impacts on millions of transportation workers across the nation, who face loss of their livelihoods over undeveloped science. We thank the Department for its consideration.

Sincerely,



Larry I. Willis
President



Transportation Trades Department, AFL-CIO
A bold voice for transportation workers

TTD MEMBER UNIONS

Air Line Pilots Association (ALPA)
Amalgamated Transit Union (ATU)
American Federation of Government Employees (AFGE)
American Federation of State, County and Municipal Employees (AFSCME)
American Federation of Teachers (AFT)
Association of Flight Attendants-CWA (AFA-CWA)
American Train Dispatchers Association (ATDA)
Brotherhood of Railroad Signalmen (BRS)
Communications Workers of America (CWA)
International Association of Fire Fighters (IAFF)
International Association of Machinists and Aerospace Workers (IAM)
International Brotherhood of Boilermakers, Iron Ship Builders,
Blacksmiths, Forgers and Helpers (IBB)
International Brotherhood of Electrical Workers (IBEW)
International Longshoremen's Association (ILA)
International Organization of Masters, Mates & Pilots (MM&P)
International Union of Operating Engineers (IUOE)
Laborers' International Union of North America (LIUNA)
Marine Engineers' Beneficial Association (MEBA)
National Air Traffic Controllers Association (NATCA)
National Association of Letter Carriers (NALC)
National Conference of Firemen and Oilers, SEIU (NCFO, SEIU)
National Federation of Public and Private Employees (NFOPAPE)
Office and Professional Employees International Union (OPEIU)
Professional Aviation Safety Specialists (PASS)
Sailors' Union of the Pacific (SUP)
Sheet Metal, Air, Rail and Transportation Workers (SMART)
SMART-Transportation Division
Transportation Communications Union/ IAM (TCU)
Transport Workers Union of America (TWU)
UNITE HERE!
United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)
United Mine Workers of America (UMWA)
United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service
Workers International Union (USW)

These 33 labor organizations are members of and represented by the TTD

