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Student Drug Testing: Constitutional Issues

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Summary

Issues of personal privacy and application of Fourth Amendment safeguards against "unreasonable" governmental searches and seizures are the focus of judicial rulings on the constitutionality of "suspicionless" random drug testing of public school students. Generally speaking, governmental actors are required by the Fourth Amendment to obtain warrants based on probable cause in order to effectuate constitutional searches and seizure. An exception to ordinary warrant requirements has gradually evolved, however, for cases where a "special need" of the government, not related to criminal law enforcement, is found by the courts to outweigh any "diminished expectation" of privacy invaded by the search. The special needs analysis, first applied to administrative searches to enforce municipal health and safety regulations, has been extended by the Supreme Court to uphold suspicionless drug testing of employees in federally regulated industries, and random testing of high school student athletes. Revisiting the issue last term, in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, the U.S. Supreme Court upheld a drug testing program of students participating in non-athletic extracurricular activities, even though negligible evidence of a drug use problem among such students was shown.

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industries,[1] and random testing of high school student athletes. Revisiting the issue last term, in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, the U.S. Supreme Court upheld a drug testing program of students participating in non-athletic extracurricular activities, even though negligible evidence of a drug use problem among such students was shown.

Several terms ago, in *Vernonia School District 47J v. Acton*,[2] the High Court first considered the constitutionality of student drug testing in the public schools. At issue there was a school district program for random drug testing of high school student athletes, which had been implemented in response to a perceived increase in student drug activity. All student athletes and their parents had to sign forms consenting to testing, which occurred at the season's beginning and randomly thereafter on a weekly basis for the season's duration. Students testing a confirmed positive were given the option of participating in a drug assistance program or a suspension from athletics for the current and following season. A 6 to 3 majority of the Court, led by Justice Scalia, upheld the program against Fourth Amendment challenge. Central to the majority's rationale was the "custodial and tutelary" relationship that is created when children are "committed to the temporary custody of the State as school master," in effect "permitting a degree of supervision and control that could not be exercised over free adults." Students had diminished expectations of privacy by virtue of routinely required medical examinations, a factor compounded in the case of student athletes by insurance requirements, minimum academic standards, and the general lack of privacy in the locker room and "communal undress" that is "inherent in athletic participation. Moreover, because "school sports are not for the bashful," student athletes were found to have a lower expectation of privacy than other students.

Balanced against this diminished privacy interest was the nature of the intrusion and importance of the governmental interest at stake. First, the school district had mitigated actual intrusion by implementing urine collection procedures that simulated conditions "nearly identical to those typically encountered in public restrooms"; by analyzing the urine sample only for presence of illegal drugs – not for other medical information, such as disease conditions, diabetes, or pregnancy; and by insuring that positive test results were not turned over to law enforcement officials. School officials unquestionably had an interest in deterring student drug use as part of their "special responsibility of care and direction" toward students. That interest was magnified in *Vernonia* by judicial findings that, prior to implementation of the program, "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion . . . fueled by drug and alcohol abuse." School officials' interest became "perhaps compelling" in the case of student athletes due to "the risk of physical harm to the drug user or those with whom he is playing his sport." Consequently, the Court dismissed Acton's argument for a less intrusive policy of suspicion-based testing, reasoning that the Fourth Amendment only requires that government officials adopt reasonable policies, not the least intrusive ones available. The majority in *Vernonia* cautioned "against the assumption that suspicionless drug-testing will readily pass muster in other constitutional contexts." Justice Ginsburg's brief concurrence also emphasized her understanding that

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[1] See Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989); National Treasury Employee's Union v. Von Raab, 489 U.S. 656 (1989).

[2] 515 U.S. 646 (1995).

the decision applied only to testing of student athletes, expressly reserving the issue of whether such programs could be constitutionally extended to other segments of the student population. Justice O'Connor's dissent distinguished public employee and student drug testing, arguing that suspicion-based testing would be entirely effective in the high school setting.

A division of opinion soon emerged among the lower courts as to how broadly *Vernonia* could be applied to permit "suspicionless" drug testing that included student groups beyond athletes. The question was first confronted by the Seventh and Eighth Circuits in nearly identical cases, *Todd v. Rush County Schools*[3] and *Miller v. Wilkes*,[4] involving random drug testing policies that applied not only to student athletes, but also to students participating in any other extracurricular activity. While no actual or imminent drug problem was identified among the affected student populations in either case, the policies were upheld. The school policy in *Todd* applied not only to participation in extracurricular activities but also to students who drove to and from school, all of whom were subject to random drug testing.[5] In a sequel to *Todd*, *Joy v. Penn-Harris-Madison School Corp.*,[6] 212 F. 3d 1052 (7th Cir. 2000), the Seventh Circuit reconsidered a policy mandating random drug testing of students who drive to school, as well as those who participate in extracurricular activities. Conceding that the *Todd* outcome was not compelled by *Vernonia*, and that *Todd* was crucial to *Joy*, the court resorted to *stare decisis* as a basis for upholding the policy, finding that *Vernonia* allowed the testing of student drivers. Expressing concern, however, that "[t]he danger of slippery slope continues to haunt our jurisprudence,"[7] the appeals court emphasized that it was not sanctioning drug testing of an entire student population, tacitly encouraging the Supreme Court to revisit the issue and provide the lower courts with additional guidance.

Parting company with the *Todd* line of decisions was *Trinadad School District No. 1 v. Lopez*,[8] where the Colorado Supreme Court disapproved of a policy for drug testing all students in extracurricular activities where there was no convincing evidence of higher drug usage rates by students participating in extracurricular activities, or that the reasonable privacy expectations of such students had been so diminished by constraints of the sports culture, or otherwise, as those imposed on student athletes in *Vernonia*. Instead of targeting students in formal school activities, the policy in *Willis v. Anderson School Corp.*[9] mandated testing for any student who "possesses or uses tobacco products; is suspended for three or more days for fighting; is habitually truant; or violates any other

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[3] 133 F.3d 984 (7th Cir.), cert. denied, 525 U.S. 824 (1998).

[4] 172 F.3d 574 (8th Cir.), vacated as moot, 172 F.3d 582 (8th Cir. 1999).

[5] In practice, the policy affected nearly the entire student body, with 728 of 950 high school students consenting to random tests in the 1996-97 academic year.

[6] 212 F.3d 1052 (7th Cir. 2000).

[7] Id. at 1066.

[8] 963 P.2d 1095 (Colo. 1998).

[9] 158 F.3d 415 (7th Cir. 1998).

school rule that results in at least a three-day suspension."[10] Because Indiana law required one-on-one meetings with such students prior to suspension, in effect permitting observation of any suspicious drug-related behavior, the drug testing policy was rejected since the "benefits of deterrence" alone did not warrant departure from traditional "reasonable suspicion" standards.

A conflict among the circuits was created when the Tenth Circuit refused to permit the random testing of students participating in extracurricular activities outside of the sports arena. In 1998 the Tecumseh Public School District adopted a "Student Activities Drug Testing Policy," which required "suspicionless drug testing" of students wishing to participate "in any extracurricular activity." Such activities included Future Farmers of America, Future Homemakers of America, academic teams, band, chorus, cheerleading, and athletics. Any student who refused to submit to random testing for illegal drugs was barred from all such activities, but was not otherwise subject to penalty or academic sanction. Lindsay Earls challenged the district's policy "as a condition" to her membership in the high school's show choir, marching band, and academic team, but did not protest the policy as applied to student athletics. The district court granted the school district summary judgment, but was reversed on appeal. The Tenth Circuit panel found that any "special need" that the school district had for suspicionless testing of students in these circumstances was less immediate than the risk of injury posed to student athletes in *Vernonia*, particularly "given the paucity of evidence of an actual drug abuse problem among those subject to the Policy" in the *Earls* case.

On June 27, 2002, by a 5 to 4 vote, the U.S. Supreme Court reversed the decision of the Tenth Circuit and held that the Tecumseh school district's random drug testing program was a "reasonable means" of preventing and deterring student drug use and did not violate the Fourth Amendment.. The Court's decision, written by Justice Thomas was joined by Chief Justice Rehnquist and Justices Scalia, Kennedy, and Breyer. In its role as "guardian and tutor," the majority reasoned, the state has responsibility for the discipline, health, and safety of students whose privacy interests are correspondingly limited and subject to "greater control than those for adults." Moreover, students who participate in extracurricular activities "have a limited expectation of privacy" as they participate in the activities and clubs on a voluntary basis, subject themselves to other intrusions of privacy, and meet official rules for participation. The fact that student athletes in the *Vernonia* case were regularly subject to physical exams and communal undress was not deemed "essential" to the outcome there. Instead, that decision "depended primarily upon the school's custodial responsibility and authority," which was equally applicable to athletic and nonathletic activities.

The testing procedure itself – involving collection of urine samples, chain of custody, and confidentiality of results – was found by Justice Thomas to be "minimally intrusive and "virtually identical" to that approved by the Court in *Vernonia*. In particular, the opinion notes, test results are kept in separate confidential files only available to school personnel with a "need to know"; they may not be disclosed to law enforcement authorities; and they carry no disciplinary or academic consequences other than limiting extracurricular participation. "Given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of student's privacy is not significant."

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[10] Id at 417.

Finally, the majority ruled that the school district had an "important interest " in the health and safety of its students – including prevention and deterrence of drug use – which was "reasonably" served by its drug testing program. Citing several anecdotal instances of drug use at Tecumseh schools, Justice Thomas nonetheless concluded that neither "individualized suspicion" nor a "demonstrated problem of drug abuse" were necessary predicates for a student drug testing program, and there is no "threshold level" of drug use that need be satisfied. Similarly, in a separate concurrence, Justice Breyer emphasized the national scope of the "drug problem" in education and the inefficacy of "supply side interdiction" efforts by government as factors supporting the reasonableness of the school's drug testing program, even in the absence of "individualized suspicion."

Justice Ginsburg, joined in dissent by three other Justices, offered a point by point rebuttal of the majority rationale. First, the dissenters objected, a generalized "concern" for student health and safety, while "basic to the school's caretaking," was not so "immediate" as to constitute a "special need" satisfying the *Vernonia* analysis. Nor were they persuaded that drug use by students engaged in extracurricular activities other than athletics – such as band and choir – exposed them to any greater safety risk than nonparticipants who use drugs in the general student population. Thus, the "special susceptibility to drug-related injury" of student athletes apparent in *Vernonia* was not a factor in this case. While "voluntary" participation in extracurricular activities necessarily entailed some additional regulation of student conduct, Justice Ginsburg would not equate the situation to student athletics. "Interscholastic athletics . . . require close safety and health regulation; a school's choir, band, and academic team do not." More importantly, conceding evidence of some drug use among students at the Tecumseh schools, the problem was "not . . .major" as compared to the "explosive drug abuse problem sparked by members of athletic teams" described in *Vernonia*. Absent a drug abuse problem among students participating in extracurricular activities, Justice Ginsburg concluded, the intrusion on students' privacy was constitutionally impermissible. Unlike student athletes, whose reasonable expectations of privacy are diminished by the communal nature of the sports locker room, participants in other extracurricular activities do not relinquish all sense of personal privacy to the realities of the school environment.

Student drug-testing proliferated in public schools across the nation after the 1995 *Vernonia* decision. Application of the "special needs" analysis to programs of increasing scope and variety had largely confounded the lower federal courts, which as illustrated above, failed to achieve consistent results even as to tests administered in virtually identical circumstances. Beyond resolving this judicial conflict, the majority interpretation of the Fourth Amendment in *Pottowatomie County* may significantly broaden the discretion of public school officials to perform student searches in the academic setting. Despite a relatively scant record of prior student drug abuse, Justice Thomas' opinion emphasizes a fairly general concern of the state for student health and safety – and an "important" deterrence interest – as justification for a broadly based drug testing program. Absent from the equation seems to be the risk of serious injury and pervasive history of drug abuse by student athletes that actuated the Court's deliberations in *Vernonia*. As such, the latest opinion may set a new constitutional mark, blurring any real distinctions for drug testing purposes between "high risk" students groups and the general school population . Prior to the Tenth Circuit decision in *Tecumseh*, for example, a federal district court in Texas invalidated a universal drug testing requirement by one school district, which made passing a drug test a condition to public school attendance by

all students.[11] Also implicated may be other "special needs" searches in the schools involving, for example, metal detectors, drug-sniffing dogs, and random-locker inspections, implemented by many school district as a response to school violence.[12] Only once has the Supreme Court found that the government failed to find a special need for the particular search at issue – a Georgia state requirement that candidates for certain public offices submit to a drug test prior to election.[13] Whatever outer limits there may be to the "special needs doctrine," however, whether as applied to universal student drug testing or to other alleged invasions of student privacy in the academic setting, will have to await further High Court action.

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[11] Tannahill ex rel. Tannahill v. Lockney Independent School District, 133 F. Supp.2d 919 (N.D.Tex. 2001). The school district policy in Lockney essentially made random testing a prerequisite to attending the public schools. Any refusal to submit a consent form for urine testing subjected the student to the same punishment as a positive result: a twenty-one day suspension from all extracurricular activities, three days of in-school suspension and three sessions of substance abuse counseling. All 388 of the secondary school students in the district, except for the plaintiff, had taken the drug tests.

[12] See B.C. v. Plumas Unified School District, 192 F.3d 1260 (9th Cir. 1999).

[13] Chandler v. Miller, 520 U.S. 305 (1997).