The Evolution of Drug Testing of Interscholastic Athletes

Diane Heckman

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THE EVOLUTION OF DRUG TESTING OF INTERSCHOLASTIC ATHLETES

DIANE HECKMAN*

TABLE OF CONTENTS

I. INTRODUCTION ................................... 210
II. FOURTH AMENDMENT CONSIDERATIONS ....... 214
III. TESTING OF EDUCATIONAL EMPLOYEES ........ 217
IV. SEARCHES OF STUDENTS GENERALLY ........... 221
V. DRUG-TESTING PROCEDURES .................... 224
   A. Methods of Detection ........................... 225
   B. Substances Tested and Methods Used .......... 226
      1. Anabolic-Androgenic Steroids ................. 227
      2. Other Substances and Methods ............... 228
VI. DRUG-TESTING CONSIDERATIONS INVOLVING
    INTERSCHOLASTIC STUDENT-ATHLETES .......... 229
VII. PRE-VERNONIA DECISIONS ........................ 232
   A. Seventh Circuit: Pro ............................ 232
VIII. SUPREME COURT DECISION IN VERNONIA
      SCHOOL DISTRICT 47J v. ACTON ................. 235
     A. Ninth Circuit: Con ............................ 235
     B. Supreme Court Decision ....................... 238
     C. On Remand ..................................... 243
IX. POST-VERNONIA DECISIONS ........................ 244
   A. Circuit Court Decisions .................... 244
   B. Other Decisions ............................... 248
X. TENTH CIRCUIT DECISION IN EARLS v. BOARD
    OF EDUCATION OF TECUMSEH PUBLIC SCHOOL ... 252
    A. Tenth Circuit Rejects Drug-testing of All
       Extracurricular Students ...................... 252
    B. Supreme Court Agrees to Hear the Appeal .... 255
XI. CONCLUSION ...................................... 256

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(209)
Appendix A: Chart: Cases Involving Drug-testing of Secondary Students .................................. 260

I. INTRODUCTION

During 1995, the Supreme Court in *Vernonia School District 47J v. Acton*,¹ addressed whether drug-testing of interscholastic athletes was constitutional. A mere six years later, the Supreme Court has again agreed to review the appeal in *Earls v. Board of Education*,² as to whether drug-testing of students involved in any extracurricular activities, including athletes, is constitutional. This Article will showcase the path leading to the *Vernonia* decision and its aftermath.

The destructive wake left by the improper and illegal drug use in this country is a national tragedy. During the 1980's, active and retired professional and Olympic-caliber athletes were repeatedly covered in the news, not for their sports accomplishments, but their problems with drugs and alcohol. Seeking to preserve the integrity of professional athletic activities and those governed by the United States Olympic Committee, comprehensive drug-testing policies for these elite athletes were put into place during this decade. Concurrently, the 1980’s saw the emergence of the use and abuse of non-prescription drugs, such as performance-enhancing or recreational drugs, by student-athletes. Responding to this problem and operating from laudable concerns to stem the use of drugs having the potential of creating devastating effects on the health, safety and welfare of students, and while recognizing the high profile nature of their interscholastic and intercollegiate athletes, administrators across the country introduced consent forms requiring students seeking participation in extracurricular athletic activities to submit to random drug-testing through urinalysis for certain drugs or performance-enhancing methods.

The reasons behind academic drug-testing are: (1) maintaining the health and safety of the student-athlete; (2) maintaining the health and safety of other athletes; (3) maintaining fair play and integrity of the academic institution, conference or athletic association; and (4) maintaining the public’s trust. The mechanics for academic drug-testing include: (a) what triggers the right to conduct drug-testing, specifically, whether the right to conduct such testing

is based on individual suspicion versus random suspicionless testing, which may be done at announced or unannounced times; (b) the testing procedure and procedural safeguards; (c) maintaining the chain of custody of the sample; (d) the due process elements of notice and opportunity to be heard;\(^3\) (e) confidentiality aspects; and (f) the severity of the penalty which can be featured in escalating order: athletic sanctions, academic sanctions, or criminal sanctions.\(^4\)

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures.\(^5\) It provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."\(^6\) In the drug-testing paradigm, urine collection and testing constitute a

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3. For additional information regarding the due process element, see infra note 4.

4. The severity of the sanction would also influence the level of procedural due process required. The Fourteenth Amendment to the U.S. Constitution mandates in part:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV. The Fourteenth Amendment incorporates substantive and procedural due process. See id. Procedural due process concerns whether notice and hearing must be conducted by the government official before the imposition of an action. See id. The sanctions imposed by the educational institutions generally concern only athletic eligibility. The courts have consistently found that there is no Fourteenth Amendment constitutional right to participate in interscholastic or intercollegiate athletics. See, e.g., Palmer v. Merluzzi, 689 F. Supp. 400, 412, 415 (D.N.J. 1988) (rejecting Fourteenth Amendment equal protection and due process arguments by student-athlete whose athletic suspension was elongated after initial ten-day athletic suspension was imposed, and where the student admitted violating school's anti-drug and alcohol policy); Diane Heckman, Women & Athletics: A Twenty Year Retrospective on Title IX, 9 U. MIAMI ENT. & SPORTS L. REV. 1, nn.115-24 (1992) (listing cases that discuss Fourteenth Amendment's right to participate in intercollegiate activities). But see Dennin v. Conn. Interscholastic Athletic Conf., Inc., 913 F. Supp. 663, 671 (D. Conn. 1996) (holding interscholastic athletics participation was included within individualized educational plan mandated by Individuals with Disabilities Education Act, 20 U.S.C. § 1401(20), which district court held raised it to federally protected right), vacated as moot, 94 F.3d 633 (1st Cir. 1996).

5. See U.S. CONST. amend. IV. The Fourth Amendment has been deemed to apply to state actors pursuant to the Fourteenth Amendment.

6. Id.
search. Thus, the underlying issue presented is the constitutionality of the random acquisition and analysis of a urine sample, not authorized by warrant, probable cause or individualized suspicion. Ultimately, the key determination is whether the search was reasonable.

A party, seeking to challenge the drug test, would assert a section 1983 action, alleging there was a violation of the Fourth Amendment and possible transgression of Fourteenth Amendment due process protections. In order to proceed, an aggrieved party must establish that a governmental entity, also known as a state actor, is involved. In relation to interscholastic athletes, some circuit courts have held that a "local government entity, such as a school district, may be held liable under section 1983 for constitutional violations committed pursuant to a governmental policy or custom." State high school athletic associations may also be deemed state actors. On the interscholastic level, it is not customary for the state high school athletic association to require random drug-testing, as the school districts on their own volition have mandated such policies. There is no case law exploring the constitutionality of a drug-testing policy implemented by a state interscholastic athletic association.

On the intercollegiate level, however, the drug-testing policy of the National Collegiate Athletic Association ("NCAA") regulates student-athletes with the individual member universities or colleges merely being the conduits. The Supreme Court held in NCAA v. Tarkanian that the NCAA was not a state actor and, therefore, not

8. 42 U.S.C. § 1983 (1996). The law, known as the Civil Action for Deprivation of Rights, states: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privilege, or immunity secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or the proper proceeding for redress.  
Id.  
9. See id.  
12. The present NCAA policy is presented in the NCAA Drug-Testing Program 2001-02, which is revised annually.  
required to provide Fourteenth Amendment due process to the men's basketball coach employed by a state university, the University of Nevada at Las Vegas.\textsuperscript{14} This decision has presently shielded the NCAA's drug-testing paradigm from Fourth Amendment entanglement. In \textit{O'Halloran v. University of Washington},\textsuperscript{15} student-athletes challenged the constitutionality of the then NCAA drug-testing program based on violating the Fourth Amendment to the Constitution.\textsuperscript{16} The district court determined that the NCAA was not engaging in state action.\textsuperscript{17} What is interesting is that this case did not even produce a substantive federal circuit court of appeals decision.\textsuperscript{18} And yet, this decision has been the linchpin for eschewing state involvement to envelop federal Fourth Amendment protection over the NCAA.\textsuperscript{19} Colleges and universities, therefore, may also have their own institutional programs.\textsuperscript{20}

Moreover, when an individual seeks to sue a state entity or state actor, the issue of sovereign or governmental immunity may come

\footnotesize{\textsuperscript{14} See id. at 199.}

\footnotesize{\textsuperscript{15} 679 F. Supp. 997, 997-999 (W.D. Wash. 1988) (student-athletes unsuccessfully sued their state university challenging that the university's utilization of the NCAA drug-testing policy violated the Fourth Amendment), rev'd and remanded, 856 F.2d 1375 (9th Cir. 1988) (on procedural grounds), dismissed, No. 97-2-08775-1, sub. 65 (Kings Co. Super Cot. 1989).}

\footnotesize{\textsuperscript{16} See id.}

\footnotesize{\textsuperscript{17} See id. at 1002-03.}

\footnotesize{\textsuperscript{18} See O'Halloran v. Univ. of Wash., 856 F. 2d 1375, 1381 (W.D. Wash. 1988) (reversing on procedural grounds).}


\footnotesize{\textsuperscript{20} See Univ. of Colo. v. Derdeyn, 863 P.2d 929, 967 (Colo. 1995) (en banc), \textit{cert. denied}, 511 U.S. 1070 (1994). University students successfully sued their university in state court challenging the university's own drug-testing policy pursuant to the Fourth Amendment and the Colorado Constitution, \textit{Colo. Const. Art. II, \S 7}, which was based on "reasonable suspicion" which was defined to include random rapid eye examinations. See \textit{Derdeyn}, 863 P.2d at 930, 934. A failed drug test could result in a permanent athletic suspension. See \textit{id. at} 931. The Colorado Supreme Court found the consent provided by students was not voluntary. See \textit{id. at} 930.}
into play. Even assuming there is a valid basis for asserting a cause
of action against the state, the issue of qualified immunity for cer-
tain state employees, such as teachers, may arise. Accordingly, to
establish a prima facie case the plaintiff must prove that: (1) the
entity engaged in state action that was not privileged; (2) a search
occurred; and (3) the search was not reasonable. The defendant
would then be required to prove that the search was reasonable in
order to meet the requirements of the Constitution.

Part II of this article introduces Fourth Amendment con-
cerns. Part III looks at drug-testing of educational employees to
juxtapose the issue as it concerns adults vis-à-vis minors. Part IV
discusses educational searches of students generally, while Part V
investigates the methods and substances tested. Part VI examines
drug-testing considerations involving students, while Part VII traces
initial drug-testing decisions involving student-athletes. Part VIII
addresses the seminal Supreme Court decision in this area, Vernonia
School District 47J v. Acton, whereas Part IX reviews significant post-
Vernonia decisions, and Part X presents the latest Supreme Court’s
appeal in Earls v. Board of Education Tecumseh Public School.

II. Fourth Amendment Considerations

The right to privacy is balanced against the reasons for and the
need for drug-testing of athletes. "The heart of the controversy . . .
is whether the particular test infringes on an expectation of privacy
that society considers reasonable." The Supreme Court referred
to the essence of the Fourth Amendment, by stating that its "over-
riding function . . . is to protect personal privacy and dignity against
unwarranted intrusion by the State." Sol Wachler, former Chief

21. See generally Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982); Jenkins v. Tal-
ladega City Bd. of Educ., 115 F.3d 821 (11th Cir. 1997); B.C. v. Plumas Unified
Sch. Dist., 192 F.3d 1260 (9th Cir. 1997) (finding random suspicionless search
conducted by trained dog was unconstitutional).
22. See infra notes 29-38 and accompanying text.
23. See infra notes 39-66 and accompanying text.
24. See infra notes 67-87 and accompanying text.
25. See infra notes 88-109 and accompanying text.
26. 515 U.S. 646 (1995); see infra notes 110-161 and accompanying text.
27. See infra notes 162-228 and accompanying text.
28. 242 F.3d 1264 (10th Cir. 2001), cert. granted, sub nom. Bd. of Educ. of In-
dep. Sch. Dist. No. 92 v. Earls, 122 S. Ct. 509 (Nov. 8, 2001) (oral argument sched-
uled for March 19, 2002); see infra notes 229-250 and accompanying text.
(1987) (finding privacy expectations of public employees required examination of
both Federal and State Constitutions).
Justice of the New York Court of Appeals, summarized this problem:

The guarantee against unreasonable search and seizures found in both the State and Federal Constitutions . . . is designed to protect the personal privacy and dignity of the individual against unwarranted intrusions by the State . . . . It protects not only the individual's home and property but also one's person and bodily integrity. 31

The construct for examining the constitutionality of searches is a three-step analysis. The first issue is whether a search and seizure was conducted by a government entity or a private entity. The courts have uniformly determined that the collection and testing of urine constitutes a search and seizure. 32 Blood tests would also be considered a search and seizure. Initially, no American athletic governing body used blood tests; however, the resistance is beginning to waiver as concerns about the testing of Olympic athletes is limited by urinalysis testing. The second issue is whether the officials involved have the authority to conduct the search pursuant to the designated scheme. This issue, however, is generally contested. The third issue is whether the search was reasonable depending upon the type of search. "By restricting the government to reasonable searches, the State and Federal Constitutions recognize that there comes a point at which searches intended to serve the public interest, however effective, may themselves undermine the public's interest in maintaining the privacy, dignity and security of its members." 33

31. Patchogue-Medford, 70 N.Y.2d at 66 (identifying protection is primarily aimed at limiting scope of criminal investigations by police, but it also places restrictions on conduct of government officials generally, including state employers and school authorities).

32. See, e.g., Chandler v. Miller, 520 U.S. 305, 313 (1997) (holding urine tests constitute search); Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616 (1989) (establishing urine collection as search and seizure); Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989) (citing Skinner decision on constitutionality of urine testing); Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1313 (7th Cir. 1988) (determining urine testing constitutes search); O'Halloran v. Univ. of Wash., 679 F. Supp. 997, 1002 (W.D. Wash. 1988) (holding NCAA's drug-testing using urine collection as Fourth Amendment search); Patchogue-Medford, 70 N.Y.2d at 67 (recognizing although urine is waste product, "[t]he act of discharging urine is a private, indeed intimate, one and the product may contain revealing information concerning an individual's personal life and habits for those capable of analyzing it").

33. Patchogue-Medford, 70 N.Y.2d at 70 (concluding random searches conducted by state without reasonable suspicion are closely scrutinized, and generally only permitted when privacy interests implicated are minimal, government's inter-
The Fourth Amendment, which requires that searches and seizures be based upon probable cause, has dramatically evolved and allows for five types of searches. These general types of searches are:

1. voluntary consensual searches;  
2. searches conducted pursuant to warrant;  
3. exceptions to warrant searches, or warrantless searches;  
4. authorized searches based upon reasonable suspicion or individual suspicion; and  
5. qualified limited systematic searches, which are suspicionless.

The searches fall into two general categories: "criminal" searches (search types two and three) and "administrative" searches (search types four and five), except for the first type, which may fall into...
either category. "Criminal" searches are those, which may result in
criminal penalties, including prison sentences. "Administrative"
searches are those with an absence of criminal penalties. In gen-
eral, active elite or professional athletes are rarely subject to crimi-
nal trials or imprisonment.

III. TESTING OF EDUCATIONAL EMPLOYEES

The identity of the targeted class for random drug-testing
should be identified. To place this issue in context, this article
reviews drug-testing of general employees and drug-testing of
school employees. The Supreme Court first addressed the issue of
governmental administrative searches of employees in Skinner v.
Railway Labor Executives' Ass'n. The Court ruled that the Federal
Railroad Administration's drug-testing, including blood and urine
tests, of railroad conductors involved in major train accidents, con-
stituted a reasonable search. The Court also found "the expecta-
tions of privacy of covered employees are diminished by reason of
their participation in an industry that is regulated pervasively to en-
sure safety, a goal dependent in substantial part, on the health and
fitness of covered employees." The Court introduced the "special
needs" exception to searches based on individual suspicion; this
concept runs throughout the judicial decisions. The Court stated

SPORTS L.J. 175, 187 (1992) (analyzing "targeted" class).

40. 489 U.S. 602 (1989). Federal regulations containing "Mandatory Guide-
lines for Federal Workplace Drug-testing Programs" were introduced in April
1988. See 53 Fed. Reg. 11978-89 (Apr. 11, 1988); see also Federal Omnibus Trans-
inter alia, drug-testing of municipal employees with commercial drivers' licenses
operating vehicles which can reach thirty-five miles per hour, commencing in January 1996).
The legislation was initiated in response to train accidents where con-
ductors were found to have marijuana in their systems. The regulations apply to
any employee who operates a "commercial vehicle" and who is required to have a
commercial driver's license. See Controlled Substances and Alcohol Use and Test-
ing, 49 C.F.R. § 382.103(a)(1) (2001) (indicating applicability of commercial
driver's license requirements).

41. See Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 634 (1989) (ex-
plaining it was reasonable search even though there was no requirement of war-
rant or reasonable suspicion that any particular employee might be impaired due
to compelling government interest served by regulations which outweighed em-
ployee's privacy concerns).

42. Id. at 627.

43. See id. at 624. The Court further elaborated:
We made it clear, however, that a showing of individualized suspicion is
not a constitutional floor, below which a search must be presumed unreas-
sonable. In limited circumstances, where the privacy interests implicated
by the search are minimal, and where an important governmental inter-
est furthered by the intrusion would be placed in jeopardy by a require-
it had “recognized exceptions to . . . [the warrant requirement] when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impractica-
ble.”44 “[W]hen faced with such special needs, [it had] not hesi-
tated to balance the governmental and privacy interests to assess the practicability of the warrant and probable-cause requirements in a particular context.”45 In contrast, Justice Marshall, author of the dissent, argued that “because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great.”46

On the same day it decided Skinner, the Supreme Court de-
cided National Treasury Employees Union v. Von Raab,47 a five to four
decision, in which it upheld the United States Department of Customs’ “drug-testing program of employees who play a direct role in interdiction, [or] carry a firearm, . . . as a reasonable search be-
cause minimal intrusions on privacy [are] outweighed by govern-
ment’s compelling interest in promoting safety and deterring abuse.”48 Because urine tests are searches, these tests must satisfy

44. Id. at 619 (explicating that except in certain well-defined circumstances, search or seizure in such case is not reasonable unless it is accomplished pursuant to judicial warrant issued upon probable cause).

45. Id. (listing cases that balance governmental and privacy interests dealing with searches of homes, business premises, employees’ desks and offices, students’ property carried out by school officials and body cavity searches of prison inmates) (citations omitted).

46. Skinner, 489 U.S. at 635 (Marshall, J., dissenting) (“[I]ssue is not whether declaring war on illegal drugs is good public policy . . . . Rather the issue here is whether the Government’s development in that war of a particularly Draconian weapon — the compulsory collection and chemical testing of railroad workers’ blood and urine — comports with [the] Fourth Amendment.”).

47. 489 U.S. 656 (1989) (exploring suit filed by railway labor organizations to enjoin regulations promulgated by Federal Railroad Administration governing drug and alcohol testing of railroad employees).

48. Id. at 679 (finding federal government has compelling interest in ensuring that front-line interdiction personnel are physically fit and have unimpeacha-
ble integrity and judgment). “It also has a compelling interest in preventing the risk to the life of the citizenry posed by the potential use of deadly force by persons suffering from impaired perception and judgment.” Id. “The touchstone of the Fourth Amendment is reasonableness, and the reasonableness of a search is deter-
mined ‘by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other hand, the degree to which it is needed for the promotion of legitimate governmental interests.’ ” United States v. Knight, 122 S. Ct. 587, 591 (2001). Query, whether “compelling interest” is equivalent to “legitimate governmental interests,” as the terminology has differing results de-
pending of the level of equal protection required when dealing with the Four-
teenth Amendment three-tier analysis of the: strict scrutiny test reserved for fundamental rights and suspect classes; intermediate standard reserved for classifi-
the reasonableness requirement of the Fourth Amendment. Justice Kennedy elaborated on the “special needs” requirement: “Our cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual’s privacy expectation against the Government’s interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context.” The role that certain employees in the Customs Department perform in protecting and guarding the country’s borders and the need for their integrity was obviously a significant factor. While agreeing with the majority in *Skinner*, Justice Scalia issued a stinging dissent in *Von Raab*. Based on the evidence submitted, he concluded there was no indication that the reasons for the drug-testing were related to drug use. Visual monitoring of the employees during the actual urine test was absent in both *Skinner* and *Von Raab*.

In *Patchogue-Medford v. Board of Education*, a Long Island school district required that all probationary teachers seeking a permanent position undergo urinalysis testing for drug use. There was no prior drug use by any of the teachers in this “targeted” class. In 1987, the highest court in New York, the Court of App
peals, found that the action constituted an unreasonable search and seizure in violation of both federal and state constitutional protections.\footnote{57}

More recently, the Sixth Circuit in \textit{Knox County Education Ass'n v. Knox County Board of Education},\footnote{58} upheld random drug-testing of school employees.\footnote{59} Despite the fact that there was no history of drug use by the teachers, the court found that teachers constituted "safety sensitive" employees, and were involved in a heavily regulated industry.\footnote{60} The Sixth Circuit rationalized that important governmental and community interests were at stake in requiring this testing of teachers.\footnote{61} The Sixth Circuit also sanctioned a plan that tested for many more substances than customary.\footnote{62}

\footnote{57. See id. at 69-71.}
\footnote{58. 158 F.3d 361 (6th Cir. 1998), cert. denied, 528 U.S. 812 (1999). In this case, drug-testing was allowed even though the school board had presented no evidence that the inattentiveness or negligence of a teacher ever contributed to, or was related in any way, to any student assaults or any security incident, or that a teacher ever failed to report a student for the use or possession of drugs, alcohol, or weapons. See id. at 365; see also \textit{English v. Talladega County Bd. of Educ.}, 938 F. Supp. 775, 779-83 (N.D. Ala. 1996) (upholding as constitutional drug-testing of mechanic, employed by school district, who had commercial driver's license and worked on and drove school buses, pursuant to Omnibus Transportation Employee Testing Act, 49 U.S.C. § 31306 (1991)). The regulations required the operation of a "split sample method," wherein the urinalysis sample would be split into two samples, and upon a positive finding of the first sample, the individual could have the second sample tested. See \textit{English}, 938 F. Supp. at 779. Herein, the court sanctioned the testing even though the testing authority had not allocated a split sample, in finding no violation of the Fourth Amendment, nor a section 1983 due process violation. See id.}
\footnote{59. See \textit{Knox}, 158 F.3d at 375.}
\footnote{60. See id. ("In short, although the record evidence does not reflect that the school teachers and other such officials have a track record or a pronounced drug problem the suspicionless testing regime is justified by the unique role they play in the lives of school children and the in loco parentis obligations imposed upon them."). The Sixth Circuit found that "teachers legitimate expectation of privacy is diminished by their participation in a heavily regulated industry and by the nature of their job . . . ". Id. The court clarified that prior cases demonstrated "that the entire focus of the regulations need not be on the employees themselves, or relate to safety per se, in order for the industry to be considered heavily regulated." Id. at 383.}
\footnote{61. See id. at 374-75. The Sixth Circuit stated: We can imagine few governmental interests more important to a community than that of insuring the safety and security of its children while they are entrusted to the care of teachers and administrators. Concomitant with this governmental interest is the community's interest in reasonably insuring that those who are entrusted with the care of our children will not be induced to influence children—either directly or by example—in the direction of illegal and dangerous activities which undermine values which parents attempt to instill in children in the home. \textit{Id.}

\footnote{62. See id. at 380. This plan exceeded the Department of Transportation's scheme that only tested for five substances (marijuana, cocaine, opiates, amphet-}
The Fifth Circuit in *United Teachers v. Orleans Parish School Board*, on the other hand, did not sanction the drug-testing of all teachers; however, this appellate court in *Aubrey v. School Board of Lafayette Parish*, ultimately upheld the drug-testing of school custodians predicated on their use of dangerous chemicals. While these decisions involved adults, the next section will review cases involving minors.

IV. Searches of Students Generally

In 1969, the Supreme Court announced that public school students do not "shed their constitutional rights ... at the schoolhouse gate." While this language has been the linchpin, educators, nevertheless, can conduct warrantless searches of students, as the Court concluded in *New Jersey v. T.L.O.* In *T.L.O.*, the Supreme Court determined that

the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search in-
volves a twofold inquiry: first, one must consider "whether the . . . action was justified at its *inception*," second, one
must determine whether the search as actually conducted "was *reasonably related in scope* to the circumstances which
justified the interference in the first place." Under ordinary circumstances, a search of a student by a teacher or
other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the
search will turn up evidence that the student has violated or is violating *either the law or the rules* of the school.69

In *T.L.O.*, a school administrator had reasonable suspicion that a female student was smoking on the school grounds, in violation of
school rules. When the principal searched the coed's pocketbook for the alleged cigarettes, he came upon marijuana cigarettes and
other drug-related paraphernalia. The Court noted: "[T]he preservation of order and a proper educational environment requires
close supervision of schoolchildren, as well as the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult."70 The Court mentioned the special needs that arise when involved with a school setting:

It is evident that the school setting requires some easing of the restrictions to which searches by public authorities are ordinarily subject. The warrant requirement, in particular, is unsuited to the school environment: requiring a teacher to obtain a warrant before searching a child suspected of an infraction of school rules (or of the criminal law) would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools.71

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69. Id. at 341-42 (emphasis added); see also Jenkins v. Talladega City Bd. of Educ., 115 F.3d 821, 824 (11th Cir. 1997) (proffering Supreme Court in *T.L.O.* did not apply its own enunciated two-part test); Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1361 (D. Or. 1992); Patchogue-Medford Cong. of Teachers v. Bd. of Educ., 70 N.Y.2d 57, 68 (N.Y. 1987) (underscoring in dicta, "[w]e noted that given the special responsibility of school teachers in the control of the school precincts and the grave threat, even lethal threat, of drug abuse among school children, the basis for finding sufficient cause for a school search *will be less* than that required outside the school precincts.") (emphasis added). Furthermore, the Court found "[s]uch a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." *T.L.O.*, 469 U.S. at 342.

70. *T.L.O.*, 469 U.S. at 339 (recognizing that maintaining security and order in schools requires certain degree of flexibility in school disciplinary procedures).

71. See id. at 338.
The Court stressed, however, that "[e]xceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where 'other safeguards' are available to assure that the individual's reasonable expectation of privacy is not 'subject to the discretion of the official in the field.'"\textsuperscript{72} Nonetheless, the Court upheld the constitutionality of the search.\textsuperscript{73} The Court stated: "The school setting

\textsuperscript{72} Id. at 342 (finding it was not necessary to consider circumstances that might justify school authorities in conducting searches unsupported by individualized suspicion since the Court concluded search of student's purse was based upon individualized suspicion).

\textsuperscript{73} For cases dealing with searches of students for weapons, stolen property, alcohol and drugs (not involving drug-testing mechanisms), see Jenkins v. Talladega City Bd. of Educ., 95 F.3d 1036, 1036 (11th Cir. 1996) (ruling strip search of two eight-year-old students for seven dollars was improper), reh'g en banc rev'g prior Circuit Court decision & aff'g district court's granting of summary judgment to all defendants, 115 F.3d 821, 822, 828 (11th Cir. 1997) (finding teacher and school guidance counselor involved would be entitled to qualified immunity due to their role in conducting searches of student for stolen money), cert. denied, sub nom. Jenkins v. Herring, 522 U.S. 966 (1997). "In the absence of detailed guidance, no reasonable school official could glean from these broadly-worded phrases whether the search of a younger or older student might be deemed more or less intrusive . . . . Similarly, school officials cannot be required to construe general legal formulations that have not once been applied to a specific set of facts by any binding judicial authority." Id. at 825-27; State v. J.A., 679 So. 2d 316, 317-18 (Fla. 1996) (upholding random, suspicionless pat-down search of student for weapon in classroom conducted by deputy sheriff at request of assistant principal, in a post-Vernonia decision). The Florida state court stated: "However, because of the state's custodial and tutorial authority over the student, public school students are subject to a greater degree of control and administrative supervision than is permitted over a free adult." Id. at 319; DesRoches v. Caprio, 156 F.3d 571, 572-73 (4th Cir. 1998) (analyzing school's attempted search of contents of male ninth grade student's backpack concerning missing pair of female student's tennis sneakers). Upon student's refusal, he was suspended for ten days and commenced a Section 1983 action. See DesRouches, 156 F.3d at 573. The Fourth Circuit found the proposed search was reasonable pursuant to Fourth Amendment stating: "Whether any given search was justified at its inception must be adjudged according to the circumstances existing at the moment that particular search began, rather than, as the district court believed, the circumstances existing when the first student in the class was searched." Id. at 577; see also Higginbottom v. Keithly, 103 F. Supp. 2d 1075, 1078, 1088 (S.D. Ind. 2000) (holding strip search did not violate students' equal protection rights); Rhodes v. Guaricino, 54 F. Supp. 2d 186, 189, 195 (S.D.N.Y. 1999) (upholding search of students' hotel room during class trip at request of school principal; which revealed alcohol and marijuana); Rasmus v. Arizona, 939 F. Supp. 709, 712-13 (D. Ariz. 1996) (determining detention of emotionally handicapped student, with attention-deficit disorder, briefly confined in a windowless "time-out" room, which was former closet, constituted question of fact as to whether Fourth Amendment was violated); Juran v. Indep. Cent. Sch. Dist. 13J, 898 F. Supp. 728, 732-33 (D. Or. 1995) (upholding detention and administration of breathalyzer test to male student without a warrant); Singleton v. Bd. of Educ., 894 F. Supp. 386, 388-89 (D. Kan. 1995) (upholding constitutionality of warrantless school search of middle school student's personal locker, accused of stealing $150, as well as search of student's locker, applying two-prong test contained in \textit{T.L.O.}; People v. Pruitt, 662 N.E.2d 540, 551 (Ill. App. Ct. 1996) (con-
requires some ‘easing’ of the restrictions to enable school administrators to preserve order and maintain an adequate educational environment.”^{74} It added: “Furthermore, the school official’s primary reason was not to ferret out crime, but to instead teach students in a safe and secure environment.”^{75}

V. Drug-Testing Procedures

In crafting a drug-testing program, by identifying who or what will trigger the right to be tested and whether the program requires

including random metal detector screening of students in public school did not constitute unreasonable search), appeal denied, 667 N.E.2d 1061 (Ill. 1996); S.A. v. Indiana, 654 N.E.2d 791, 797 (Ind. App. 1995) (holding search of student’s book bag was justified); State v. Burroughs, 926 S.W.2d 243, 246 (Tenn. 1996) (determining no Fourth Amendment violation occurred when private college dormitory director found drugs during search of student’s room).

Contra B.C. v. Plumas Unified Sch. Dist., 192 F.3d 1260, 1269 (9th Cir. 1999) (ruling canine sniffing of student and his property constituted unreasonable search); Oliver v. McClung, 919 F. Supp. 1206, 1218-19 (N.D. Ind. 1995) (finding strip-search of seventh-grade female student to ascertain whether she had stolen $4.50 from another student was an unreasonable search. Furthermore, the two teachers involved with the search were not entitled to qualified immunity).


^{74} T.L.O., 469 U.S. at 341.

^{75} Id.
mandatory random testing, the following two aspects must be addressed: (1) the testing procedure, including procedural safeguards; and (2) what substances or methods will be tested.

A. Methods of Detection

"Clearance time" refers to the time it takes for the human body to clear itself of a drug so as not to trigger a positive drug test. An athlete may use prohibited substances, and thus violate the rules, but if the test is not administered within a certain period of its use, the test will be negative. Drug-testing methods include breathalyzer testing, hair (radioimmunoassay) testing, saliva testing, urinalysis testing, blood testing, or use of endocrine profiles. Blood testing is considered grossly invasive, but yields the broadest and most telling results. Nonetheless, the universal type of testing presently used in athletics is urinalysis testing, although use of blood tests is now being used for certain Olympic athletes and professional cyclists involved with the Tour de France.

Urinalysis testing is the prevalent modality used for interscholastic athletics. The first urinalysis test utilized was the enzyme multiplied immunoassay technique ("EMIT"). Then, urinalysis testing entered the modern age of detection in 1983 with the introduction of the gas chromatography/mass spectrometry ("GC/MS") method, which is generally more accurate and more expensive. More recently, carbon isotope ratio ("CIR") testing has entered the pantheon.

The collection process is straightforward. First, the athlete receives notification of his selection for a urinalysis test. Next, a urine sample is obtained from the athlete at a certain location. Before the sample is obtained, however, the athlete may be asked to identify whether he is taking any medications, which could influence the results. This initial mandated disclosure is also an attempt to circumvent post-positive test theories that explain away the results.

When the athlete delivers the sample, some regimes allow for visual monitoring of the urination by the athlete to prevent tamper-

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76. "Endocrine function is assessed by accurately measuring the concentration of hormones present in the blood. Even though circulating concentrations are low... precise assays based on competitive protein binding are widely available." 2 CECIL BOOK OF MEDICINE 1201 (Claude Bennett et al. eds., 19th ed. 1992). Endocrine profiles can also be developed through urinalysis testing.

77. For a detailed explanation of the collection process, see BOB GOLDMAN, M.D. & RONALD KLATZ, M.D., DEATH IN THE LOCKER ROOM II: DRUGS AND SPORTS 228-29 (1995).
ing. All contemporary urinalysis-testing methods use a split sample method, whereby the urine sample is divided into two sub-samples, generally designated “A” and “B.” The “B” sample is used for the confirmation test. Generally, the athlete is given a control number, so that the testing laboratory would not know the name of the athlete involved to insure the integrity of the results.

The sample is then sent to the testing laboratory, generally an accredited laboratory for this type of specialized testing. First, the “A” sample is tested. If it tests positive, then the “B” sample is likewise tested. An athlete may be notified upon a positive determination of the “A” sample. If the “B” sample tests positive, then the positive test of the “A” sample and the confirmation of the “B” sample will generally result in an overall positive test. Some protocols test the “A” sample through the EMIT process or thin-layer chromatography, and the “B” sample through the mass spectrometer process. The tester will generally use the gas chromatography or mass spectrometry method for the second test. This action may be undertaken due to the cost factor involved. Drug-testing is an expensive proposition. The initial test can run between $10-$60 per sample, whereas, the confirmation test can cost $100 or more per test.\textsuperscript{78} It should be noted, however, that even the GC/MS method has its limitations, as it can detect only for substances programmed into it. Additionally, the sanctity of the chain of custody must be maintained.

B. Substances Tested and Methods Used

In general, there are twenty major classifications of drugs by use and effect, including narcotics, anesthetics, vitamins (diet supplements), central nervous system stimulants and depressants. Historically, athletes have tried different substances for a competitive edge.\textsuperscript{79} Generally, the athletic-based drug-testing inquiry focuses on two types of drugs: performance-enhancing drugs, also known as ergogenic aids, and recreational “street” drugs or psychoactive drugs. In addition to using drugs for the alleged performance-enhancing qualities, “a number of athletes abuse drugs to prevent fa-

\textsuperscript{78} See Ken Liska, The Pharmacist’s Guide to the Most Misused & Abused Drugs in America 102 (1988) (discussing confirmation can be accomplished by gas chromatography, high-performance liquid chromatography, or through utilization of gas chromatography-mass spectroscopy).

tigue, mask pain, cope with increased stress, and deal with heightened emotional confusion."80

The testing is for exogenous (outside the body) substances; that is, substances that the body did not naturally provide or produce. Exogenous substances generally involve alteration of the: (1) endocrine (hormonal) system to promote muscles or tissue growth and repair; or (2) the circulatory system by increasing oxygen in the blood. While these substances may enhance athletic performance, they may also have possible side effects. Remarkably, most interscholastic testing regimes do not test for standard performance-enhancing drugs (such as anabolic-androgenic steroids), but rather concentrate on the identification of the use of recreational drugs or alcohol.

1. Anabolic-Androgenic Steroids

Anabolic (tissue-building)-androgenic (masculizing) steroids ("anabolic steroids") are chemical compounds that promote tissue growth by creating protein and other new substances.81 The main anabolic steroids are compounds derived from testosterone or synthetic forms of testosterone, which is the chief male sex hormone, although women's bodies also contain trace amounts of testosterone.82 Steroids may be used in a multitude of ways, including: stacking, or using more than one anabolic steroid; using a shotgun approach, whereby multiple drugs are taken by multiple routes; cycling the drugs; staggering the drugs; and using the steroids with other substances.83 Dangers of using anabolic steroids depend on the sex, age and physical condition of the men, women and young children who use them.84 Anabolic steroid use may have physical,
sexual and psychological effects, including: biochemical abnormalities of the liver function; fluid retention properties that may lead to hypertension or heart disease; oligospermia (decreased production of sperm); gynecomastia (enlargement of breast tissue); and psychosocial damage, also known as “roid rage.” This use also affects pre-adolescents and early adolescents, whereby premature fusion of long bones can result in stunted growth. Steroid use is being supplanted by an assortment of other legal and illegal substances.

2. Other Substances and Methods

Other performance-enhancing substances include peptide hormones and analogues such as human chorionic gonatrophin (“HCG”), human growth hormones (“HGH”), and recombinant erythropoietin (“EPO”). Misuse of HGH can lead to the Frankenstein syndrome, medically known as acromegaly, which is an enlargement of the extremities, including the hands, feet, forehead and nose. HGH has been available in synthetic form since 1982. It has the same anabolic effects as steroids, but it is currently only detectable through blood testing, although a new test is imminent. EPO, a synthetic hormone that stimulates red blood cell production in bone marrow, has been available since 1988.

Other categories and substances include: narcotics; insulin growth factor (“IGF”); stimulants, such as amphetamines and cocaine; beta-blockers, which can calm the nerves of athletes; “braking” drugs, which are used by females to stop the onset of their menstrual cycle (which may aid in sports such as gymnastics and figure skating where smaller body types are more desirable); diuretics and masking agents; and more recently legal substances, such as herbal supplements (for example, androstenedione or “andro,” an adrenal hormone that increases the body’s ability to produce testosterone; creatine; and Ephedra, which is also known as Ma Huang).

Use of street or recreational drugs may also be prohibited even when it may not be clear that they have any performance-enhancing quality. These street drugs include heroin, marijuana and THC. Cocaine is generally placed in the stimulant category. Alcohol is

85. See id. at 379-80.
86. See id. at 380-81.
87. Mike Freeman, N.F.L. Is Uneasy About Diet Supplements’ Use, N.Y. TIMES, May 24, 1998, § 8, at 7. “Creatine is a powdery, synthetic version of a substance created in the liver and kidneys.” Id. Thousands of athletes, including college and high school athletes, use it to increase muscle mass. See id.
the most accessible substance for student-athletes, which can have deleterious effects.

VI. **Drug-Testing Considerations Involving Interscholastic Student-Athletes**

There are a number of issues involved with random suspicionless urinalysis drug-testing of interscholastic athletes, including: (1) "voluntary" consent of the minors, or their parents or legal guardians; (2) efficacy of the governmental interest; (3) Fourth Amendment parameters; (4) privacy concerns; and (5) examination of the substance being tested: drugs versus alcohol use. The first issue is the alleged voluntary consent of minors, which is generally given a perfunctory review. This consideration includes:

(a) The captive audience problem: Since, in general, the students are required to attend school (at least until a certain age) and the school requires a signed consent form, the query is whether a student who wants to participate in interscholastic athletics voluntarily consents. This situation clearly differs from the employment situation or pursuing a post-secondary education where an individual has a multitude of choices, as opposed to the K-12 academic situation where the choice in attending a particular public school is clearly restricted for the student.

(b) The consent form or actual consent: What is the exact language utilized and does the alleged informed consent balance with the waiving of a fundamental constitutional right?

The second issue concerns the government's rationale and what standard will be applied, including:

(a) An inquiry as to whether there really is a drug problem in the athletics department must be conducted.

(b) What level of governmental interest is required? Must a "compelling" governmental interest be established versus a "substantial" governmental interest, or some other level of government interest be proven by the educational institution?

(c) Assuming *arguendo* a compelling governmental interest standard, does the school's articulated or purported compelling governmental interest rise to the level required? While the benefits of targeting protection of national se-
curity or significant national safety of citizens are properly rationalized, the reasoning of targeting only interscholastic athletes is less so.
(d) Efficacy in achieving the purported goal: Has the drug-testing program in fact resulted in alleviating the alleged drug problem?
(e) Another troubling aspect, which is routinely given short-shrift, is that the drug-testing programs operate with no expiration date; rather they are routinely open-ended, and as such can continue theoretically in perpetuity.

The third area centers on the Fourth Amendment:
(a) Whether such warrantless searches are beyond the scope and intention of our forefathers.
(b) Since dealing with minors, the courts should endeavor to impose a greater scrutiny as to its sanctity (although the courts have deemed to impose a lesser scrutiny).
(c) Is there overreaching by encompassing all interscholastic athletes for the actions of a few?
(d) Additionally, a common denominator is that uniformly the individuals credited for needing a drug-testing program are based solely on the actions of males. No gender-based argument to exclude females has been raised in any of the cases.
(e) Regardless of the lack of criminal penalties imposed when a positive test is established, there is still a criminal taint of using controlled substances.

The fourth area concerns the privacy aspect:
(a) For example, the logic of the syllogism that undressing in a public locker room equates to an implied consent by students to allow non-medical personnel to possibly view and collect urine specimens, and have bodily excretions tested.
(b) Should visual monitoring during the specimen gathering process be permitted?
(c) Should physicians or medically-trained personnel, and not coaches or teachers, be responsible for the specimen gathering process?
(d) Are a student’s privacy protections violated when, as part of the drug testing process, they must also reveal all other medications they are taking?
(e) Should any type of testing of student-athletes be restricted to urinalysis testing and not blood testing?

The fifth area centers on whether the program concerns only selected drugs, or both the use of drugs and alcohol, which is a more readily available substance with equally damaging effects.  

(a) Are both performance-enhancing and recreational drugs prohibited? What about the prohibition of legal substances?

(b) Regardless, schools accord discipline by virtue of curtailing or restricting a student-athlete's athletic eligibility when there is a transgression of the drug and alcohol policies.

88. The appeal the Supreme Court will hear in March 2002 concerns a testing policy that does not test for alcohol. See Earls v. Bd. of Educ., 242 F.3d 1264, 1278 (10th Cir. 2001). For a discussion of Earls, see infra notes 229-50 and accompanying text.

89. See Schul v. Sherard, 102 F. Supp. 2d 877, 881 (S.D. Ohio 2000) (addressing coach's alleged remarks about benefits of caffeine and First Amendment freedom of speech and freedom of assembly and Fifth and Fourteenth Amendment due process rights). In Schul, a high school track coach was placed on administrative leave after advocating the use of caffeine as a performance-enhancer. See id. at 881-82. The defendant school administrators filed a motion for summary judgment after the coach brought suit, and the district court granted the motion dismissing all claims. See id. at 891. The court found, among other things, that the coach's statements to an athlete regarding the use of caffeine were not that of a citizen speaking on a matter of public concern, which would be necessary for the court to review a governmental employer's personnel decision for protection pursuant to freedom of speech. See id. at 885-86.

90. See Butler v. Oak Creek-Franklin Sch. Dist., 116 F. Supp. 2d 1038, 1041 (E.D. Wis. 2000) (expounding upon school's athletic code of conduct providing that student athletes be suspended for at least one game or meet for violations involving use of alcohol, tobacco, or use, possession, or sale of controlled substances); Farver v. Bd. of Educ., 40 F. Supp. 2d 323, 325 (D. Md. 1999) (concluding no First Amendment freedom of assembly right nor Fourteenth Amendment due process rights were transgressed where students attended party off school grounds where alcohol was served in violation of school's anti-alcohol policy pertaining to extracurricular participants including interscholastic athletes); Pirschel v. Sorrell, 2 F. Supp. 2d 950, 932-33 (E.D. Ky. 1998) (addressing student's unsuccessful Section 1983 action challenging violation of school's anti-alcohol policy based on alcohol found in parking lot at basketball tournament held at another high school); Palmer v. Merluzzi, 689 F. Supp. 400, 416 (D.N.J. 1988) (finding no Fourteenth Amendment equal protection or procedural due process violation in case brought by male student-athlete, who challenged termination of his athletic eligibility for sixty-day period based on his alleged violation of school's anti-drug and alcohol policy); Jordan ex rel. Edwards v. O'Fallon Township High Sch. Dist., 706 N.E.2d 137, 138-39 (Ill. App. Ct. 1999) (examining claim of high school football player who violated zero tolerance drug and alcohol policy for alleged use of alcohol); see also Stearns v. Bd. of Educ., 1999 WL 1044832, at *3 (N.D. Ill. Nov. 16, 1999) (male student, recovering alcoholic, unsuccessfully challenged his suspension from boys' varsity high school basketball team for violating school's anti-alcohol policy, based on two federal disability statutes, Section 504 of the Rehabilitation Act, 29 U.S.C.
While the Supreme Court took an intrusive view into the rights of minors at educational institutions, other courts have been reluctant to allow the abridgment of students' rights simply because of that designation, especially when there is no evidence of drug use in the designated class subject to drug-testing. For example, in 1985, the Western District of Arkansas found the results of an EMIT urinalysis examination of public high school students suspected of marijuana use unconstitutional. While the results could arguably detect marijuana use, they could not pinpoint whether the alleged use of the prohibited substances was done during school hours to trigger the school policy involved; additionally, there was insufficient evidence to justify the intrusive measures utilized, including visual monitoring during the urinalysis testing. The district court stated: "Schools may not expel students merely because they may have ingested an unknown quantity of a marijuana-like substance of unknown quality, producing an unknown pharmacological effect, at some unascertained point in time within the preceding weeks." Also in 1985, the New Jersey Supreme Court found that a high school’s policy of requiring all students to undergo an annual physical examination, which included urine tests to determine the presence of controlled substances, was unreasonable.

A. Seventh Circuit: Pro

In 1988, the Seventh Circuit became the first federal circuit to examine the constitutionality of a drug-testing program of interscholastic student-athletes and cheerleaders when it decided Schaill § 794 (1994), and the Americans with Disabilities Act, 42 U.S.C. § 12101-12213 (1994)). See generally Diane Heckman, Athletic Associations and Disabled Student-Athletes in the 1990’s, 143 EDUC. L. REP. 1, 17-18 (2000) (discussing filing of Stern lawsuit).


92. See id. at 39-41 (explaining nature of EMIT test).

93. Id. at 40. In citing T.L.O., the court stated: “T.L.O. made clear that the permissible regulatory scope of school officials extends only to ‘maintaining discipline in the classroom and on school grounds and during school functions.” Id. (quoting New Jersey v. T.L.O., 469 U.S. 325, 339 (1985)).

The court found that the testing program constituted a reasonable search under the Fourth Amendment and did not negate due process protections afforded by the Fourteenth Amendment. The court explained that "[p]articipation in interscholastic athletics is a benefit carrying with it enhanced prestige and status in the student community. It is not unreasonable to couple these benefits with an obligation to undergo drug-testing." Ultimately, the court concluded that "the school's interest in preserving a drug-free athletic program is substantial, and cannot adequately be furthered by less intrusive measures . . . ."

The record established that at least three student injuries were caused or exacerbated by drug impairment. Previously, five out of sixteen members of the spring 1986 boys' baseball team at the Indiana high school had tested positive for marijuana. The drug-testing provided for the collection of the specimen while in a closed bathroom stall with no visual monitoring. The program provided for confidentiality and allowed students to challenge the first positive tests by submitting the sample to another test routinely found in most drug-testing programs. The only penalty imposed was the loss of athletic eligibility for a certain period.

The court focused on the athletes' diminished expectation of privacy because of the communal undress and the nature of the phys-
ceptual examinations, which required a urine sample as part of the mandatory physical examination.\textsuperscript{103} The court pointed out that the affected students were highly regulated.\textsuperscript{104} Consequently, the court underscored that “sports are quite distinguishable from almost any other activity.”\textsuperscript{105} The Seventh Circuit relied on this rationale for describing the school’s action, which included specific prior evidence of drug related injuries, disciplinary concerns engendered by the improper drug use and the non-punitive nature of the penalties.\textsuperscript{106} Also, the mechanics of the drug-testing program resembled a model program. However, justifying the across-the-board testing of all student-athletes and cheerleaders based on only eight incidents while satisfying the defendant’s burden to establish a record certainly seems overreaching on the part of the appellate court, especially in light of the significant constitutional protection these students impliedly waived. There was no judicial discussion to limit the testing to members of the boys’ baseball team.

The Seventh Circuit also stressed that the athletes were accustomed to communal undressing. However, the logic that someone implicitly consents to having a private function like urination viewed or tested or collected simply because one happens to occasionally undress does not seem to be a foundation upon which constitutional rights may be eroded. The logic also seems strained as to the academic institution that provides the locker room facilities, which routinely do not allow for private undressing rooms even if an athlete or cheerleader so desired (the absence of private locker stalls saves space and money in the construction of the locker rooms). The court also highly considered the fact that the athletes were the role models of the community. While certain student-athletes may be popular, that status does not necessarily equate being role models. Regardless, the reason for subjecting the cheerleaders to drug-testing stands on even slimmer grounds, considering there was no evidence of drug use by them. The cheerleaders were also

\textsuperscript{103} See id. at 1318.

\textsuperscript{104} See id. As evidence, the court pointed to the minimum grade requirement, as well as residency and eligibility requirements, levied by the Indiana High School Athletic Association. \textit{See id.} Moreover, the court stressed, “[r]andom testing of athletes does not necessarily imply random testing of band member or the chess team.” \textit{Id.} at 1319. It further elaborated: “Our decision today should not be read as endorsing urine testing of all students attending a school.” \textit{Id.} at 1319 n.10.

\textsuperscript{105} Schaill, 864 F.2d at 1319 (remarking monitored collection and subsequent testing of urine samples can hardly come as shock or surprise under present-day circumstances).

\textsuperscript{106} See id. at 1322. The court stated that “[t]he program is not intended to discover evidence of unlawful activity for use in criminal prosecution.” \textit{Id.}
not subject to the range and extent of regulations and tangible benefits that cover interscholastic athletes, such as access to a multitude of collegiate athletic scholarships and media coverage.

Conversely, in 1989, a Texas federal district court found that a school district policy, which required all junior and high school students seeking to engage in any extracurricular activities to undergo drug-testing, constituted an unreasonable search. A Michigan state trial court also concluded that drug-testing of interscholastic student-athletes was an unreasonable search. The Michigan court found no proof of "drug or alcohol abuse by any segment of the student population, including athletes."

VIII. SUPREME COURT DECISION IN VERNONIA SCHOOL DISTRICT
47J v. ACTON

A. Ninth Circuit: Con

In 1992, the Oregon federal district court in Acton v. Vernonia School District ruled that the school district's drug-testing program targeting only interscholastic athletes was a reasonable search under the Fourth Amendment. The drug-testing policy was instituted in 1989 after incidents of drug use by both athletes and students at the grade school and high school levels increased. All interscholastic student-athletes would be subject to drug-testing at the beginning of the athletic season in which they competed, and


109. See Vernonia, 796 F. Supp. at 1358 (informing drug-testing program was instituted to correct behavior and deter future unlawful conduct, it was not designed to punish students for past conduct and did not expose students to possible criminal sanctions or investigation).
then throughout the season. Monitors could observe the urination process of the males behind the boys' back from a distance of at least twelve feet, while the females were allowed to use closed bathroom stalls. Parents for a seventh-grade male student, who wanted to participate on the football team, commenced this action on his behalf.

The Ninth Circuit reversed the district court's decision in 1994. The Ninth Circuit decided the issue of the program's constitutionality under the Oregon Constitution, because it provided greater constitutional protection when compared to the Fourth Amendment; but it did refer to the Fourth Amendment and applicable case law. The Ninth Circuit also recognized that suspicionless administrative searches may withstand a state constitutional challenge. The Ninth Circuit recited four factors to be reviewed:

1. the importance of the governmental interests;
2. the degree of physical and psychological intrusion on the citizen's rights;
3. the amount of discretion the procedure vests in individual officials; and
4. the efficacy of the procedure—that is how well it contributes to the reaching of its purported goals and how necessary it is.

The Ninth Circuit then found two factors weighing in favor of the district's drug-testing policy. First, the court analyzed the efficacy factor, because it contributed to reaching the desired goals of an

113. See id. at 1358 (requiring all students who desire to participate in interscholastic athletics to sign form authorizing district to conduct tests on urine specimen provided by students as prerequisite to participation in athletic program). All students participating in sports that season are placed in a “pool” and each week ten percent of the names were drawn to be tested throughout the day. See id.

114. See id. (describing samples are sent for testing to laboratories under security procedures designed to protect chain of possession). The test screens for amphetamines, cocaine, marijuana and alcohol and has an accuracy of approximately 99.94%. See id. Test results were reported to the school district. See id.

115. See id. at 1359 (explaining parents and son objected to drug-testing policy because it required son to submit to urinalysis in absence of any individualized evidence that he had used drugs or alcohol).

116. See Vernonia, 23 F.3d at 1516.

117. See id. at 1523 (pursuant to Oregon Constitution, warrant is always sufficient authority for search).

118. See id. at 1521 (explaining that criminal search is not permissible unless it conforms with warrant clause or falls within recognized exception to warrant requirement).

119. Id. (quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979), finding these are factors that Oregon Supreme Court identified and adopted and determining that random search procedure which passed muster under these factors were not unreasonable under either Fourth Amendment or Oregon Constitution).

120. See id. at 1522.
improvement in discipline, a reduction in disciplinary referrals, and a decrease in drug use and its glorification; although, the court acknowledged that the exact nature of the policy's goals was not entirely clear. Second, the court examined the discretionary factor, because the policy vested no discretion in the school district officials.

While the Ninth Circuit recognized a number of federal decisions that allowed drug-testing of certain employees, it stated: "It can, therefore, be readily seen that although the courts have been willing — perhaps too willing — to allow employee drug-testing, they have done so in cases fraught with danger where the interests of the person to be tested were attenuated." The court underscored that while, "[c]hildren are compelled to attend school . . . nothing suggests that they lose their right to privacy in their excretory functions when they do so." The court added that "[t]here simply is no sufficient basis for saying that the privacy interests of students are much less robust than the interests of people in general." The court also refused to say "that the privacy interests of athletes are substantially lower than those of students in general." As such, "[t]raining rules and grade point average requirements are not the sort of extensive government regulation that has been found to diminish the expectation of privacy of workers in high risk industries or high security areas of the government." Furthermore, the court rejected the school district's argument that school locker room conditions reduce an athlete's privacy expectations.

The school district filed an appeal, which was accepted by the Supreme Court because of the conflict between federal circuit

121. See id. (exhibiting that every teacher who testified noticed improvement in discipline, reduction in discipline referrals, and decrease in drug use and glorification of drug culture since policy was implemented).

122. See Vernonia, 23 F.3d at 1522 (reporting testing is conducted on random lottery basis throughout athletic season).

123. Id. at 1524-25 (stressing efficacy of policy must be considered with all principles in mind).

124. Id. at 1525 (recognizing while students must attend classes and follow school rules, that does not indicate they have given up their basic privacy rights).

125. Id. (holding student's interest in privacy is not of minimal kind that had been found to justify random searches in past).

126. Id.

127. Vernonia, 23 F.3d at 1522.

128. See id. at 1525. The court stated: "Normal locker room or restroom activities are a far cry from having an authority figure watch, listen to, and gather the results of one's urination." Id.
The arguments advanced by the petitioner, Vernonia School District, in support of the district's position that the district's drug-testing program was a constitutionally reasonable search, provided the road map for the Court's decision. The district argued:

(A) [the Supreme Court] has long recognized qualitative differences between the constitutional remedies to which students and adults are entitled. In the school setting, students' constitutional rights are diminished; (B) this Court also treats the school setting differently for purposes of searches under the Fourth Amendment, and holds that searches in the school setting are reasonable in the absence of a warrant or probable cause . . . .

B. Supreme Court Decision

In upholding the urinalysis testing in Skinner, the Supreme Court stated: "The regulations do not require that samples be furnished under the direct observation of a monitor . . . . The sample is also collected in a medical environment, by personnel unrelated to the railroad employer, and is thus not unlike similar procedures encountered often in the context of a regular physical examination." On June 26, 1995, in a six to three decision, the Supreme Court upheld the constitutionality of urinalysis random drug-testing of interscholastic athletes pursuant to the Fourth and Fourteenth Amendments in Vernonia. Justice Scalia wrote the
majority opinion; he had previously written the stinging dissent in *Von Raab*, which disagreed with the majority decision upholding the constitutionality of drug-testing of Customs Department employees. The operative factor in *Vernonia* was the age and identity of the individuals involved. Interscholastic athletes are not entitled to the same constitutional protection as adults. Overall, the majority opinion appeared to reflect the application of ends justifying the means.

First, the Court explained that the Fourteenth Amendment extends Fourth Amendment protection by state officers to public school officials. Second, the Fourth Amendment requires a "reasonableness" standard, which may take into account the locus of the search. The Court stated that "[a]s the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is 'reasonableness'... which 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" However, a warrant is not required in every circumstance. Indeed, the Court stated: "We have found such 'special needs' to exist in the public school context."

Third, the compelling state interest was also employed. In expounding upon the compelling state interest, the Court stated that it "describes an interest which appears important enough to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy." Furthermore, the Court concluded that "[d]eterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the

135. See *Vernonia*, 515 U.S. at 652 (citations omitted).
136. See id. at 654-55.
137. Id. at 652-53 (quoting Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 619 (1989)).
138. Id. at 653 (citing New Jersey v. T.L.O., 469 U.S. 325, 338 (1985)). For further discussion of the "special needs" exception, see supra notes 43-44 and accompanying text.
139. See *Vernonia*, 515 U.S. at 661 (explicating that district court held that because district's program also called for drug-testing in absence of individualized suspicion, district must demonstrate compelling need for program).
140. Id. (emphasis added) (holding high degree of governmental concern is met and nature of concern is important and compelling).
importation of drugs... [s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe."

Fourth, "[t]he legitimacy of certain privacy expectations vis-à-vis the state may depend upon the individuals' legal relationship with the state." The Court stressed the in loco parentis relationship between the school and the student-athletes, and in citing Tinker v. Des Moines Independent County School District, stated, "the nature of those rights is what is appropriate for children in school."

Fifth, privacy interests are reduced for interscholastic student-athletes. "Legitimate privacy expectations are even less with regard to student athletes." Justice Scalia continued: "School sports are not for the bashful. They require “suiting up” before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford."

141. *Id.* (decreeing effects of drug-infested school are visited not just upon users, but upon entire student body and faculty, as educational process is disrupted).

142. *Id.* at 654 (stating what expectations are legitimate varies with context depending upon whether individual asserting privacy interest is at home, at work, in car, or in public park).

143. *Id.* at 656 (citing Tinker v. Des Moines Indep. County Sch. Dist., 393 U.S. 503, 506 (1969)).

144. *See Vernonia,* 515 U.S. at 657.

145. *Id.*

146. *Id.* First, the Court’s phraseology, “[s]chool sports are not for the bashful,” was rather unusual, as it is certainly not a description associated with athletes or their endeavors. Second, that the Supreme Court would contemplate justifying the abridgment of this significant constitutional right based in part on this so-called locker-room communality is rather shocking. The reliance of the incidental changing of attire by student-athletes into athletic uniforms or practice attire remains curious, as it is not as if the interscholastic athletes engage in athletic events without wearing some article or articles of clothing. It did not appear that the school district offered evidence that the athletes did undress, or actually shower or use toilet facilities, respectively, without stalls or urinal separations. Should constitutional rights be taken away based on assumptions or surmises rather than specific proof? Requiring individual proof as to each athlete’s hygiene-related behavior just shows how ludicrous this is (which was probably why it was easier to just skate over this aspect). Moreover, if a particular school did provide enclosed showers as well as enclosed toilets, or conversely, the school provided no shower facilities, would those student-athletes be exempt?

Third, the Court’s language smacks of machismo bravado associated with male athletes, and one wonders whether female athletes were contemplated — especially where they were swept into this drug-testing oversight regardless of whether their numbers indicated that female student-athletes were also involved with disciplinary problems and improper drug use. The majority opinion identified the coach of men’s football and wrestling with observing injuries, which this coach attributed (presumably without confirmation, as it would have been identified) to drug use. No coaches of women’s teams were mentioned as having any problem, whether perceived or real, with their athletes. In all of the interscholastic student-athlete drug-testing cases, when drug problems are alleged within the
The Court further explained that "[b]y choosing to ‘go out for the team,’ [student-athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."\(^{147}\) For example, student-athletes are subject to minimum scholastic grades, insurance requirements, pre-season physical exams and rules of conduct. "Somewhat like adults who choose to participate in a ‘closely regulated industry,’ students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."\(^{148}\)

Sixth, the aspect of student-athletes possibly using any prescription drugs was given little consideration. The court surmised that the school was looking only for drugs, "and not for whether the student is, for example, epileptic, pregnant, or diabetic."\(^{149}\)


Aside from the broad brush inclusion, the court then went on to identify: "The locker rooms in Vernonia are typical: No individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors." *Vernonia*, 515 U.S. at 657. The Court did not specify if the aforementioned description fit both the males and females locker rooms. While this may be typical of boys’ high school locker rooms, it is quite unusual for interscholastic girls’ locker rooms to have an open shower area and doorless toilet stalls. Even the policy herein allowed the female student-athletes to provide a urine sample within a closed bathroom stall.

Later on in the opinion, the Court noted the restriction of this drug-testing to only school athletes, "[w]here the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." *Id.* at 661 (emphasis added). It is not known if the use of only male pronouns was intentional or a matter of style.

\(^{147}\) *Vernonia*, 515 U.S. at 657.

\(^{148}\) *Id.*

\(^{149}\) *Id.* at 658. "The Court also assumed that information about prescription medications the student was compelled to reveal was kept confidential." Earls v. Bd. of Educ., of Tecumseh Pub. Sch. Dist., 242 F.3d 1264, 1272 (10th Cir. 2001), *cert. granted, sub nom.* Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 122 S. Ct. 509 (Nov. 8, 2001).
problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs.'\textsuperscript{150} Thus, the Court concluded the search was reasonable and constitutional.\textsuperscript{151} A caveat was issued that this case involved a public school system, with the government acting "as guardian and tutor of children entrusted to its care."\textsuperscript{152}

Justice Ginsburg filed a concurring opinion stressing that the only penalty imposed was a suspension from an extracurricular athletic program.\textsuperscript{153} Justice O’Connor, a conservative jurist, authored the dissent with Justices Stevens and Souter in agreement. She argued that the majority disregarded constitutional history by upholding a broad search not based on a warrant or suspicion of wrongdoing.\textsuperscript{154} The dissent specifically stated that "[i]n justifying this result, the Court dispenses with a requirement of individualized suspicion on considered policy grounds."\textsuperscript{155} The dissent distinguished past precedent by arguing that an individualized requirement of suspicion in past cases was impractical because those cases dealt with situations where one occurrence of wrongdoing could injure a great number of people.\textsuperscript{156}

\begin{itemize}
\item \textsuperscript{150} Vernonia, 515 U.S. at 663. See generally Andrew T. Pittman & Mark R. Slough, Commentary, Drug-testing of High School Student Athletics After Vernonia, 104 Edu. L. Rep. 15 (Dec. 14, 1995) (delineating twelve criteria to be examined in formulating drug-testing policy for interscholastic athletes).
\item \textsuperscript{151} See Vernonia, 515 U.S. at 665 (taking into account all factors considered: decreasing expectation of privacy, relative unobtrusiveness of search, and severity of need met by search).
\item \textsuperscript{152} Id. (noting just as when government conducts search in its capacity as employer, relevant question is whether that intrusion upon privacy is one that reasonable employer might engage in, so also when government acts as guardian and tutor, relevant question is whether search is one that reasonable guardian and tutor might undertake).
\item \textsuperscript{153} See id. at 666 (Ginsburg, J., concurring).
\item \textsuperscript{154} See id. at 667-68 (O’Connor, J., dissenting). Justice O’Connor pointed to the Court’s viewpoint in Carroll v. United States that “blanket searches are ‘intolerable and unreasonable.’” Id. at 669 (citing Carroll v. United States, 267 U.S. 132, 147-54 (1925)). She further agreed that the “[p]rotection of privacy, not evenhandedness, was then and is now the touchstone of the Fourth Amendment.” Id. at 671. She also pointed to Justice Scalia’s dissent in Von Raab, by stating that “state-compelled, state-monitored collection and testing of urine, while perhaps not the most intrusive of searches . . . is still ‘particularly destructive of privacy and offensive to personal dignity.’” Id. at 672 (citing Nat’l Treasury Employees Union v. Von Raab, 489 U.S. 566, 680 (1989) (Scalia, J., dissenting)).
\item \textsuperscript{155} Id. at 667 (O’Connor, J., dissenting).
\item \textsuperscript{156} See id. at 675-76 (O’Connor, J., dissenting). Subsequently, in Chandler v. Miller, the Supreme Court used Vernonia to determine whether a Georgia statute, requiring individuals running for state office to certify that he or she has tested negative for illegal drugs, violated the Fourth Amendment. See 503 U.S. 305, 314-17, 322 (1997). The Court stated:
\end{itemize}
C. On Remand

On remand the Ninth Circuit, in a split decision, determined the final issue whether the Oregon State Constitution would provide a differing search and seizure standard, because the Supreme Court only dealt with the federal constitutional issue. On September 15, 1995, this court affirmed the judgment of the district court in finding “the Oregon Supreme Court would not offer greater protection under the provisions of the Oregon Constitution . . . .” Judge Reinhardt issued a strong dissent, criticizing the cursory majority opinion and highlighting his views in this area. The dissent summarized the three options the court had: (a) “conduct a serious analysis of the question of whether or not random, suspicionless drug tests violate Article I, Section 9 of the Oregon Constitution[;]” (b) “certify [the] question to the Oregon Supreme Court[;]” or, (c) “throw up [the court’s] hands and simply proclaim that random, suspicionless drug tests are consistent with the Oregon Constitution as well.” The dissent believed the majority had chosen the least desirable alternative.

In Vernonia, the Court sustained a random drug-testing program for high school students engaged in interscholastic athletic competitions. The program’s context was critical, for a local government bears large “responsibilities, under a public school system, as guardian and tutor of children entrusted to its care” . . . . We emphasized the importance of deterring drug use by schoolchildren and the risk of injury a drug-using student athlete cast on himself and those engaged with him on the playing field.

Id. at 316-17 (quoting Vernonia, 515 U.S. at 665).

157. See Acton v. Vernonia Sch. Dist. 47J, 66 F.3d 217, 218 (9th Cir. 1995).
158. Id. at 218.
159. See id. at 218-20 (Reinhardt, J., dissenting).
160. Id. at 219 (Reinhardt, J., dissenting).
161. See id. The dissent noted in the court’s earlier opinion that “[i]t is highly likely that it will be found to offer more protection” and, “[t]he majority cite[d] no intervening Oregon case law to explain its swift and total capitulation on this issue, nor does it explain what, if any, reasoning underlie[d] its conclusion.” Vernonia, 66 F.3d at 219 (Reinhardt, J., dissenting). The dissent concluded, “I see no reason to presume that Oregon courts will follow our recent federal practice of shrinking constitutional rights or to assume that Oregon’s courts will not continue vigilantly to protect Oregonians’ rights under the state constitution . . . . I am not prepared to say that the Oregon Supreme Court will decide that the rights of its school children must be shaped by the national frenzy over the war-on-drugs. To the contrary, given its history of rugged individualism and its concern for constitutional rights, Oregon might well opt for a more generous and enlightened reading of its constitution.” Id. at 219-20 (Reinhardt, J., dissenting).
IX. POST-VERNONIA DECISIONS

A. Circuit Court Decisions

In recent years, the Third, Seventh, Eighth, Ninth and Tenth Circuits have addressed the general issue of student searches, with mixed results. In Moule v. Paradise Valley Unified School District No. 69,162 for example, an Arizona federal district court ruled in 1994 that the random drug-testing of interscholastic athletes violated the Fourth Amendment. The court noted that while certain administrative searches of employees are warranted, testing student athletes is "not a case 'fraught with danger' involving persons with attenuated interests in privacy."163 The court also noted that under the totality of the circumstances, the consent was not truly voluntary.164 On appeal, in a decision rendered after the Supreme Court's in Vernonia, the Ninth Circuit reversed the lower court's determination.165

Additionally, the Seventh Circuit Court in Todd v. Rush County Schools166 upheld an Indiana school district's random, suspicionless

163. Moule, 863 F. Supp. at 1102 (recognizing student athletes not subject to extensive government regulation and not dependent on role as athlete).
164. Id. at 1103 (finding student barred from participation without signed consent form is coercion for constitutional purposes).
165. See Moule, 66 F.3d 335 (listing Ninth Circuit decisions issued without published opinions).
166. 983 F. Supp. 799 (S.D. Ind. 1997), aff'd, 133 F.3d 984 (7th Cir. 1998), reh'g en banc denied, 139 F.3d 571 (7th Cir. 1998), cert. denied, 525 U.S. 824 (1998); see also Joy v. Penn-Harris Madison Sch. Corp., 212 F.3d 1052, 1067 (7th Cir. 2000) (upholding random drug-testing for drugs, alcohol and tobacco for all students driving to school and those involved in extracurricular activities including interscholastic athletics). Herein, the school district's goal was to subject all students to random testing. See Joy, 212 F.3d at 1055. The Seventh Circuit highlighted: "The danger of the slippery slope continues to haunt our jurisprudence." Id. at 1066. Interestingly, the policy called for all students involved with extracurricular activities to attend at least one drug education session before beginning the activity. See id. at 1055. The court recognized that "[t]he district is attempting to do what this court in Willis admonished against: dividing the students into broad categories and drug-testing on a category-by-category basis, which allows for drug-testing for all but the most uninvolved and isolated students." Id. at 1064. "With the mass exit of students after classes into the relatively close confines of a student parking lot, one student under the influence of drugs or alcohol could cause serious injury or death." Id. However, the court was less comfortable with the testing of eighteen-year-old students for tobacco, which the district court allowed. See id. at 1064. This panel felt constrained to follow the earlier Seventh Circuit decision in Todd. See id. at 1066. However "[t]he court made it clear that, were it not so bound, it would find the policy unconstitutional under a careful and thorough application of the Vernonia factors." Id.
drug-testing policy for students seeking to participate in any extracurricular activity. "This was a change from its precatory language used in *Schaill.*" After the *Vernonia* and *Chandler* decisions, the Indiana district court upheld a random drug-testing program of all students who wanted to participate in any extracurricular activities. The program was modeled after the one in *Vernonia,* although the empirical data used to substantiate the need for the program in the first instance was demonstrably weak. Under the program, students were required to obtain parental consent to conduct random testing for drugs, alcohol or tobacco. The drugs included "amphetamines, barbiturates, benzodiazepines (such as Valium and Librium), cocaine, opiates, PCP, marijuana, alcohol and nicotine." Steroids were not included. The high school contracted a private company to do the testing. Two tests were applied: first the EMIT test, and if positive, then the sample was retested using the gas chromatography test. There was no visual observation during the actual providing of the urine sample. Instead of issuing a specific time-frame penalty, the policy detailed that any student found positive would be barred from extracurricular activities until they passed a retest. A student barred from extracurricular activities, however, would have to wait to be tested until that private company came back to the school, which could be

167. *See Todd,* 133 F.3d at 984; *see also* *Schaill* v. Tippecanoe County Sch. Corp., 864 F.2d 1309 (7th Cir. 1988).
169. *See id.* at 804-05. The high school had 950 students. *See id.* at 801. During the 1996-97 academic year, before implementation of the drug-testing policy, thirty students were suspended for improper use of alcohol, tobacco or drugs or for being arrested. *See id.* However, most of these suspensions were due to tobacco or alcohol. *See id.* The exact figure attributed to drug use was not identified. *See id.* The athletic director believed there was a growing problem with drugs at the school. *See id.*
170. *See id.* at 801.
171. *Id.* at 802 (detailing testing is done on EMIT instrument which has accuracy rate of greater than ninety five percent). "The tested-for substances all have different detection periods, ranging from alcohol, which leaves the body in a matter of hours, to marijuana, which may take up to thirty days." *Id.*
172. *See id.*
174. *See id.* at 802 (recognizing use of gas chromatography test has better than ninety-nine percent accuracy).
175. *See id.* (conveying that students are supervised at all times except for time they are in private area).
176. *See id.* (communicating that if test result is positive, student and family are informed and given opportunity to explain the result to school principal; but without sanctioned explanation, student is barred from extracurricular activities).
a year later.\textsuperscript{177} The court emphasized the fact that there was "minimal" public opposition to the plan for drug-testing.\textsuperscript{178} The district court cited the "special needs" allowance the Supreme Court established in \textit{Chandler}\.\textsuperscript{179} The court also distinguished the program in \textit{Vernonia} from this one.\textsuperscript{180} Ultimately, the court validated the program.\textsuperscript{181}

The Seventh Circuit upheld the constitutionality of the program in 1998, finding that the drug-testing program was consistent with the Fourth Amendment.\textsuperscript{182} It noted that "[c]ertainly successful extracurricular activities requires healthy students."\textsuperscript{183} Of course, the next step is to require random drug-testing of all students, under the guise that healthy children certainly make successful students. In the en banc hearing, the dissenting opinion, concerning the denial of the students' request, stated that "[b]ecause of the broad-brushed reading of \textit{Vernonia} embraced by the panel, its decision takes us a long way toward condoning drug-

\textsuperscript{177.} See id. (explaining retest is at school's expense, while any subsequent testing would be charged to student; however, positive result on retest results in continuing prohibition from participation in extracurricular activities until student tests negative).

\textsuperscript{178.} See Todd, 983 F. Supp. at 801.

\textsuperscript{179.} See id. at 804.

\textsuperscript{180.} See id. at 805. The court stated: "The Program in this case is essentially identical to the one in \textit{Vernonia}, with one key difference: the program applies to all extracurricular activities, not just athletics." \textit{Id}.

\textsuperscript{181.} See id. at 806. The court found "[t]here is no minimum triggering point of substance abuse (such as ten percent or fifty percent of the student population) that must be met to justify the 'important enough' interest on the part of the school system discussed in \textit{Vernonia}." \textit{Id} at 806. The court concluded: "In the end, however, any perceived differences between the student athletes in \textit{Vernonia} and the non-athlete extracurricular participants in this case turn out to be more ethereal than real . . . extracurricular activities, like sports, are voluntary activities which submit the students to extra rules and regulations." \textit{Id}.

\textsuperscript{182.} See Todd, 133 F.3d at 986; see also Bridgman v. New Trier High Sch. Dist. No. 203, 128 F.3d 1146, 1149 (7th Cir. 1997) (relying on \textit{T.L.O.} standard and holding school officials not required to establish probable cause to justify search of student suspected of using marijuana). While attending an after-school smoking cessation program, a female classroom teacher observed that the student had bloodshot eyes and diluted pupils. See Bridgman, 128 F.3d at 1147. The teacher ordered the male freshman student to the nurse's office for a medical assessment. See id. at 1148. The nurse took the student's pulse and blood pressure and he was told to remove his jersey and hat, which he did. See id. The Seventh Circuit stated: "Because of the special circumstances of the school context, however, school officials need not demonstrate the existence of probable cause in order to justify a search of a student's person or property." \textit{Id} at 1149. "[T]he question is whether the [teacher's] actions in ordering the medical assessment and then searching [the student's] clothing were reasonable . . . . The symptoms were sufficient to ground [the teacher's] suspicion, and the medical assessment was reasonably calculated to uncover further evidence of the suspected drug use." \textit{Id} at 1149.

\textsuperscript{183.} Todd, 133 F.3d at 986.
testing in the general school population."\(^{184}\) The dissent added: "The principal reason given for permitting this program – that the demands of extracurricular activities require healthy students – is as true for scholastic matters as it is for extracurricular activities."\(^{185}\) The dissent felt that the panel opinion left the jurisprudence without a guiding principle to protect against these general searches.\(^{186}\)

However, the Seventh Circuit in \textit{Willis v. Anderson Community School Corp.}\(^{187}\) found that where there was no individual suspicion, a drug-testing policy requiring students involved in fights to undergo urinalysis when they returned to school transgressed permissible searches.\(^{188}\) The court rejected the conclusive presumption that fighting alone rendered reasonable suspicion of drug use.\(^{189}\) The court cited \textit{Vernonia}, which "explained that the reasonableness of a suspicionless search depends upon the balance between (A) the nature of the individual's privacy interest and the character of the intrusion, and (B) the nature and immediacy of the government's concern, as well as the efficacy of the means for meeting that concern."\(^{190}\) Then, the court distinguished fighting from voluntarily engaging in extracurricular athletic activities.\(^{191}\)

In \textit{Miller v. Wilkes},\(^{192}\) the Eighth Circuit upheld the random drug-testing of all students in grades seven through twelve, even where there was no history of drug use.\(^{193}\) Failure to execute a consent form would result in the student being disallowed from participating in any extracurricular activity.\(^{194}\) A new wrinkle was introduced, whereby any positive test results were to be destroyed upon a student's graduation or two years after the termination of enrollment in the school.\(^{195}\) The Eighth Circuit emphasized that "[t]he Supreme Court has held that the public school environment
provides the requisite 'special needs' so that a school district may dispense with those Fourth Amendment protections."\(^{196}\) This court jumped from the presumptively minimal privacy aspects for athletes accustomed to communal undress in locker rooms, to extending the syllogism that because all public students are subject to requirements for physical examinations, vaccinations against disease, and screenings for hearing and vision loss, that such routine physical examinations open the door to unfettered searches.\(^{197}\) This appellate court underscored: "We see no reason that a school district should be compelled to wait until there is a demonstrable problem with substance abuse among its own students before the district is constitutionally permitted to take measures that will help protect its schools against the sort of 'rebellion' proven in *Vernonia* . . . ."\(^{198}\)

The Third Circuit in *Hedges v. Musco*\(^{199}\) upheld a drug test of a student subject to individual suspicion of drug use, who was first ushered to the nurse's office and then subject to blood and urine tests at a doctor's office.\(^{200}\) The court underscored the mere fact that there are less intrusive means of ascertaining whether a student has consumed alcohol, and though perhaps probative, it is not dispositive of the reasonableness of the search.\(^{201}\) Students filed an appeal during 2000 seeking a decision by the Fifth Circuit.\(^{202}\)

**B. Other Decisions**

On March 1, 2001, a Texas federal district court in *Tannahill v. Lockney Independent School District*\(^{203}\) found that a school district's

196. *Id.* at 578 (indicating in certain limited circumstances, government's need to discover hidden and hazardous conditions, or to prevent their development, is sufficiently compelling to justify intrusion on privacy by conducting searches without any measure of individualized suspicion).

197. *See Wilkes*, 172 F.3d at 579.

198. *Id.* at 581.

199. 204 F.3d 109 (3d Cir. 2000).

200. *See id.* at 113-14, 117.

201. *See id.* at 120.


203. 133 F. Supp. 2d 919 (N.D. Tex. 2001). The court relied on *Brooks*, which concerned random drug-testing without any degree of suspicion of those students participating in extracurricular activities. *But see Stockton v. City of Freeport*, 147
policy allowing mandatory suspicionless drug-testing of all students reaching down into the sixth grade violated the students' Fourth Amendment rights. In this case, the failure of a parent to consent to the test on behalf of the child would be deemed a positive test, which would result in exclusion from participation in any extracurricular activities for a period of twenty-one days and a school suspension of three days. Additionally, the policy called for escalating punishment. All parents signed the consent forms, except for the plaintiff's parents. Eleven of 400 students tested positive for marijuana use. After the completion of the first academic year of the policy's existence, the school district amended the policy to exclude sixth-grade students, who were part of the junior high school. Specifically, the court found that the school district failed to establish that "special needs" warranted the broad intrusion, and that there was no "immediate crisis" as found by the Supreme Court in Vernonia. The court further indicated that the privacy expectations of these students were higher, compared to interscholastic athletes, who were at the center of the Vernonia opinion. While the court noted that the intrusion of urinalysis testing

F. Supp. 2d 642, 646 (S.D. Tex. 2001) (giving "little heed" to Tannahill decision due to dissimilarities between the cases).

204. See id. at 924-31.

205. See Tannahill, 133 F. Supp. 2d at 922 (identifying continued refusal of parent to consent to child's being tested for drugs would, as with continued positive test results, result in escalation of punishments, up to placing child in alternative school and disqualifying him from participating in any activity or receiving any honors for year-period).

206. See id. at 923.

207. See id.

208. See id. (identifying no students have tested positive for alcohol or any other drugs).

209. See id. (noting that rather than treating refusal to consent to drug test same as positive test result, consequence for refusing to consent to drug test results in removal from participation in all extracurricular activities until participation in drug-testing program).

210. See Tannahill, 133 F. Supp. 2d at 924.

This court finds that two methods of establishing "special needs" have evolved. On the one hand, special needs can be shown in instances, as in Skinner, Von Raab and Aubrey, when the individual subject to the test performs highly regulated functions concerning the public safety or special governmental roles. On the other hand, a school district can prove the existence of a special need by showing exigent circumstances and continued failure in attempts to alleviate the probe. Furthermore, numerous cases have also made it clear that general concerns about maintaining drug-free schools or desires to detect legal conduct are insufficient as a matter of law to demonstrate the existence of special needs.

Id. at 928 (internal citations omitted).

211. See id. at 929.
was minimal; the school district failed to show a compelling state interest.\textsuperscript{212}

In \textit{Trinidad School District No. 1 v. Lopez},\textsuperscript{213} the Colorado Supreme Court struck down a drug-testing program for all sixth through twelfth grade students participating in extracurricular activities.\textsuperscript{214} This case involved a member of the marching band who refused to execute a consent form.\textsuperscript{215} The high school senior could not pass a for-credit music course without also participating in the school marching band.\textsuperscript{216} The policy at issue required the student to successfully complete an annual drug test before participating in the first event of that extracurricular activity.\textsuperscript{217} The student was also required to disclose to school officials the use of any prescription medication.\textsuperscript{218} Although students were required to attend physical education classes, they were not required to shower; thus, there was no evidence of diminished expectations of privacy among the student body at-large based on participation in physical education classes.\textsuperscript{219}

Conversely, on March 5, 2002, the Indiana Supreme Court in \textit{Linke v. Northwestern School Corp.},\textsuperscript{220} upheld, pursuant to the Indiana Constitution, the drug-testing program of interscholastic athletes, certain extracurricular participants and students who drive to school.\textsuperscript{221} In two more recent cases, student-athletes lost their athletic eligibility for violating drug and alcohol policies based on in-

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\textsuperscript{212.} See id. "Attending school is not akin to participation in a highly regulated industry as is the work place for railway employees, customs agents, residents who practice medicine or even elementary school custodians. Moreover, the academic studies of a student, while very important, do not embody the immediate and severe life and death repercussions as do the decisions of these employees." \textit{Id.} at 930.

\textsuperscript{213.} 963 P.2d 1095 (Colo. 1998) (concerning student suspended from high school marching band for refusal to submit to suspicionless drug test who sued school district and various district employees for injunctive and declaratory relief on ground that testing policy violated Fourth Amendment).

\textsuperscript{214.} See \textit{id.} at 1110 (holding school policy unconstitutional in light of \textit{Vernonia}).

\textsuperscript{215.} See \textit{id.} at 1097.

\textsuperscript{216.} See \textit{id.} (describing student’s suspension from band classes and marching band).

\textsuperscript{217.} See \textit{id.}

\textsuperscript{218.} See \textit{Lopez}, 963 P.2d at 1098.

\textsuperscript{219.} See \textit{id.} at 1103. "[W]e view the absence of voluntariness and the qualitatively different type of undressing in this case as significant." \textit{Id.}

\textsuperscript{220.} 734 N.E.2d 252 (Ind. Ct. App. 2000) (finding unconstitutional random suspicionless drug-testing policies of students involved with extracurricular activities, and referring to the “special needs” analysis), \textit{rev’d}, 763 N.E.2d 972 (Ind. 2002).

\textsuperscript{221.} See \textit{id.} at 260.
\end{flushright}
formation reported by the police to school officials.222 Additionally, in United States v. Salmiento,223 a federal district court upheld the constitutionality of the Drug Free School Zones Act of 1984.224

As of 1996, it was reported that "[n]o state has instituted state-wide random drug-testing of high school athletes, according to the National Federation of State High School Associations."225 However, the Attorney General for the State of Alabama proposed that certain funds received from a settlement in an unrelated case be allocated for random drug tests for steroids and other drugs in the state's high schools.226 During his second presidential campaign, President William J. Clinton issued a proposal calling for drug-testing of all teenagers in order to receive a driver's license, which

222. See Butler v. Oak Creek-Franklin Sch. Dist., 116 F. Supp. 2d 1038, 1041 (E.D. Wis. 2000) (noting school issued one-year suspension from interscholastic athletics where school district relied on confidential police report); see also Jordan ex rel. Edwards v. O'Fallon Township High Sch. Dist. No. 203 Bd. of Educ., 706 N.E.2d 137, 138 (Ill. 1999) (explaining school district withheld athletic eligibility of high school football player as punishment for violating school's zero tolerance alcohol and drug policy). Police reported student's alleged use of alcohol to the school. See Edwards, 706 N.E.2d at 139. The student was found at three a.m. one morning standing in a parking lot. See id. The lack of a formal hearing did not violate Fourteenth Amendment procedural due process. See id. at 143. Moreover, the possibility of a college scholarship did not rise to a property interest. See id. at 141.


226. See id.
would have been an announced test.\textsuperscript{227} No action was taken on
this measure during the second term of the Clinton administration. However, in 1998, an Arizona bill was introduced to permit "school
districts to adopt drug-testing guidelines for high school students
who participate in interscholastic athletics."\textsuperscript{228}

X. TENTH CIRCUIT DECISION IN EARLS V. BOARD OF EDUCATION
OF TECUMSEH PUBLIC SCHOOL

A. Tenth Circuit Rejects Drug-testing of All
Extracurricular Students

Approximately ten percent of all United States residents, or
23.7 million students, are at risk for random suspicionless drug-test-
ing based on the Supreme Court’s determination of the next
case.\textsuperscript{229} On March 21, 2001, the Tenth Circuit in \textit{Earls v. Board of
Education}\textsuperscript{230} rejected a drug-testing policy for all students participat-
ing in all extracurricular activities (including choir, band, color
guard, Future Farmers of America, Future Homemakers of
America, interscholastic athletics and cheerleading). The court
found that illegal drug use at an Oklahoma high school in a rela-
tively small town was negligible and the policy did not effectively
address the school’s claimed safety and supervision concerns.\textsuperscript{231}
The policy tested for amphetamines, marijuana, cocaine, opiates,
barbiturates and benzodiazepines, but not for steroids, alcohol or
nicotine.\textsuperscript{232} While the policy pertained to students engaged in all
extracurricular activities, it was applied only to those engaged in

1, 18.

\textsuperscript{228} \textit{State Legislation Relating to Student-Athletes}, \textit{NCAA News}, June 1, 1998, at 5.
The bill “[r]equires the drug test be used only to detect illegal drug use and not
medical conditions.” \textit{Id.} Also, it “[a]llows for the release of drug test results to
school personnel and the parent or guardian of the student.” \textit{Id.}

\textsuperscript{229} Brief of Respondent (Feb. 6, 2002), Summary of Argument, at 8; http://

\textsuperscript{230} 242 F.3d 1264, 1278 (10th Cir. 2001), \textit{cert. granted, sub nom. Bd. of Educ.
of Indep. Sch. Dist. No. 92 v. Earls, 92 S. Ct. 122 (Nov. 8, 2001) (Solicitor General
for George W. Bush Administration has filed an amicus brief supporting the broad
drug-testing regime).

\textsuperscript{231} See \textit{id.; see also Theodore v. Del. Valley Sch. Dist.}, 761 A.2d 652, 653 (Pa.
Commw. Ct. 2000) (covering those involved with extracurricular activities and stu-
dents who drove motor vehicles to school). This \textit{Theodore} state court stated: “[W]e
disagree that just by exercising a privilege in any activity that is part of the educa-
tional process, a student’s privacy interests are lessened and that a school district
can, without more, condition participation in that activity on agreeing to testing
just because those activities are optional.” \textit{Id.} at 660.

\textsuperscript{232} See \textit{Earls}, 242 F.3d at 1267 (describing detection of substances through
drug-testing).
competitive activities that were sanctioned by the Oklahoma Secondary Schools Activity Association. The students were also required to disclose any medication being taken, which was not subject to review by the teacher-monitors at the time of the testing. This disclosure form was then to be placed in a sealed envelope. Lindsey Earls, a member of the high school choir and participant in an academic quiz team, responded to the undertaking of an urinalysis test that came back negative: "It was horrible. Someone would stand outside the bathroom stall and listen." The actual collection process was handled by school teachers, with whom the students could be coming in daily contact with, as opposed to a medically trained individual.

The Tenth Circuit discussed the "special needs" test and its interpretation in prior Supreme Court decisions, and determined that "special needs" required a two-step analysis: (1) whether the government has established the existence of a special need to require the drug-testing; and, (2) whether the government interest outweighs the citizen's privacy interest. As to the first prong, the inquiry would be "whether the testing program was adopted in response to a documented drug abuse problem or whether drug abuse among the target group would pose a serious danger to the

233. See id.

234. See id. at 1268 (explaining results of drug tests were placed in confidential files separate from students' other educational files and were disclosed only to those school personnel who have need to know, and would not be turned over to any law enforcement authorities). The respondents also questioned the protection by the school of privacy concerns. "For example, the Choir teacher looked at students' prescription drug lists and left them where other students could see them .... The results of a positive drug test, too, were disseminated to as many as thirteen faculty members at a time, .... and these test results generally became known to other students [when] suddenly [a student] was suspended from his or her activities shortly after administration of a drug test." Brief of Respondent (Feb. 6, 2002) (statement of the case), at http://www.aclu.org/court/earls.pdf.


236. "When [Earls] emerged from the stall, Lindsay was required to watch as one of her teachers took the vial in hand, feeling Lindsay's urine sample to ensure that it was the proper temperature and holding Lindsay's urine up in the light to inspect its color and clarity .... This collection and close examination of bodily fluid by a teacher whom Lindsay would regularly see at school is hardly equivalent, as the School maintains, to the normal process of using a public restroom." Brief of Respondent (Feb. 6, 2002) (statement of the case) http://www.aclu.org/court/earls.pdf.

237. See Earls, 242 F.3d at 1269 (identifying development of "special needs" doctrine).
public." 238 In this case, the court found "that the evidence of drug use among those subject to the Policy [was] far from the ‘epidemic’ and ‘immediate crisis’ faced by the Vernonia schools and emphasized by the Supreme Court’s opinion . . . . Rather, the evidence of actual drug usage, particularly among the tested students, [was] minimal . . . ." 239 The court expressed "that [it doubted] the Court intend[ed] that the level of privacy expectation depends upon the degree to which particular students, or groups of students, dress or shower together or, on occasion, share sleeping or bathroom facilities while on occasional out-of-town trips." 240

Moreover, the Tenth Circuit emphasized that it did not believe "voluntary participation in an activity, without more, should reduce a student’s expectation of privacy in his or her body." 241 Nonetheless, the court found that privacy interests were lessened. 242 However, when the court considered the efficacy of the solution, by featuring across-the-board testing, the balance tipped in the student’s favor. The court discussed that "safety cannot be the sole justification for testing all students in competitive extracurricular activities, because the Policy, from a safety perspective, tests both too many students and too few. In essence, it too often simply tests the wrong students." 243 The court also questioned the validity of the school’s supervision claims. 244 In conclusion, the court announced that "any district seeking to impose a random suspicionless drug-testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem." 245

238. Id. at 1270 n.4 (acknowledging even without documented drug abuse problem, potential danger of drug abuse among target group may be sufficient to establish existence of special need).

239. Id. at 1272.

240. Id. at 1275.

241. Id. at 1276. “Moreover, while participation in extracurricular activities is voluntary, such participation has become an integral part of the educational experience for most students . . . . Thus, the voluntariness of the participation, without more, does not reduce a student’s expectation of privacy.” Id.

242. See Earls, 242 F.3d at 1276.

243. Id. at 1277.

244. Id.

245. Id. at 1278.
B. Supreme Court Agrees to Hear the Appeal

On August 24, 2001, the school district filed a petition for a writ of certiorari seeking review by the Supreme Court, which the Supreme Court granted during November 2001.246 The brief submitted on behalf of the students, who are being represented by the ACLU, set forth three main arguments:

(1) searches in the school context, including urinalysis drug-testing, must presumptively be based upon individualized reasonable suspicion of wrongdoing; (2) the district's drug-testing policy, which imposes an intrusive search and seizure of urine upon non-athletes with no history of drug use who engage in no dangerous activities, does not meet the Vernonia special needs exception to the Fourth Amendment's standard of individualized reasonable suspicion; and (3) the school's call for clear guidance in designing drug-testing regimes does not justify abandoning the Fourth Amendment protection against general searches.247

The respondents identified the significant role that participation in extracurricular activities yields, not only the benefits incurred by the actual participation, but also the significant role such participation plays in the college admission process. The respondents commented on the attempt by the school district to envelope possible tumbling off stages by choir members and colliding on the marching fields by band members as safety concerns to trump their constitutional rights as "contrived and speculative,"248 as opposed to "dangerous sports like football."249 The respondents stressed: "If forfeiting one's constitutional rights becomes the price for particip-

247. Brief of Respondent (Feb. 6, 2002) (argument); http://www.aclu.org/court/earls.pdf. The respondents argued: “Given the careful line drawn by the Court in Vernonia, the School is simply wrong to assume that a broader license was implied. This is not a case about student athletes. It is a case about students who engage in extracurricular activities that do not present any special risk of physical injury in a school district that has consistently denied any significant drug problem.”
248. Id. Summary of argument, at 8.
249. Id. (Statement of the case). Interestingly, the brief seems to concede the propriety of drug-testing of interscholastic athletes, rather than raising concerns at the underlying rationale used to prop up drug-testing of this segment of students. Equally disturbing is
participating in any activity beyond legally compelled classroom attendance, then only the most withdrawn and uninvolved students will enjoy the protection of the Bill of Rights."\textsuperscript{250}

The strongest factor favoring the school is the Supreme Court's prior willingness to condone drug-testing of certain public students; albeit herein the entire group are arguably not role models (since that designation has been relegated to the student-athletes). These students, however, do not engage in communal undress and showering or it is incidental; and any "regulations" imposed by the schools toward them while important to the parties involved, are incidental. The Supreme Court's decision should be rendered by the conclusion of the current term.

XI. CONCLUSION

In June 1995, the Supreme Court issued its ruling in \textit{Vernonia}, upholding random urinalysis drug-testing of high school interscholastic athletes where evidence of drug use had been assigned to the targeted class. Ironically, drug-testing policies for professional athletes — who may receive millions of dollars and whose owners desire them to be in optimal condition to perform — are circumspect when testing may occur, especially for veterans, and especially as it concerns random suspicionless testing as opposed to announced tests. While concerned with the health and safety of student-athletes, the choice of drugs selected on the interscholastic level is also curious as none of the policies reviewed herein prohibited steroids or other illegal performance-enhancing drugs or procedures, as opposed to those deemed recreational drugs. Additionally, alcohol is perhaps the most serious problem confronting high school students nationally; however, urinalysis is an ineffective procedure for detecting alcohol use.\textsuperscript{251} Recreational drugs, such as marijuana, are included routinely. This issue becomes more complex if public schools start prohibiting legal substances that are being used as performance-enhancers. Urinalysis is deemed a minimal invasion of privacy; however, perhaps courts will approve blood tests, which clearly are more accurate but more invasive. At least one court allowed such a blood test, albeit in a case where there was individual suspicion and where only alcohol was involved.

\textsuperscript{250} Id. (Statement of the case) at n.2.

\textsuperscript{251} See Schaill v. Tippecanoe County Sch. Corp., 864 F.3d 1309, 1321 n.17 (7th Cir. 1988).
The use of random suspicionless drug-testing of interscholastic athletes may have a profound effect on preventing or reducing drug use by this group, and thus, the net result is clearly favorable. It is significant to see if the policies, such as tracking the results of the drug-testing in *Vernonia*, have had the intended effect. Moreover, once these plans are in place, there appears to be no end date. When does the evidence used to justify these policies become stale? May these policies continue in perpetuity? In addition, are the courts scrutinizing the evidence offered, by the proponent school officials who claim a drug problem exists, to judically mandate such drug-testing? Should interscholastic female student-athletes automatically be covered where there is no foundation of their drug use?

Two factors used by the Supreme Court stand out: (a) the rationale that incidental communal undress or showering can be equated with diminished privacy so as to uphold urinalysis, although it is irrelevant to the essence of athletics, and no foundation was established that all of the athletes targeted had in fact engaged in such activity; and (b) the reasoning that interscholastic athletes are subject to greater regulations, and thus, urinalysis could be sanctioned. Remarkably, one state court distinguished that because students were not subject to mandatory showering in conjunction with their physical education classes, band members would be excluded from drug-testing, demonstrating the absurdity of the first aspect. The latter aspect can be used to condone drug-testing of practically all educational activities. In fact, this element was used to extend drug-testing of interscholastic athletes (and sometimes cheerleaders) to participants in all extracurricular activities. The next step was of course to extend the border further by testing all students in high schools and even junior high schools or middle schools as low as the sixth grade. The first aspect that was emphasized by the Supreme Court has been omitted altogether by other courts allowing testing of all extracurricular students (where clearly all these students were not engaging in communal undress and showering in conjunction with their after-school activities). Thus, if the essential element is only that the individual be involved in a highly regulated enterprise — such as the Court condoned with interscholastic athletics — it could be argued that there are few endeavors in this country outside those parameters. Minor-age students, who may be subject to certain academic and athletic criteria to participate in interscholastic athletics, are far afield from those adult employees who are involved with ensuring national defense,
or the national, state and local safety of the citizens, or involved with atomic or nuclear-related concerns. The two factors employed seem disingenuous, in an attempt to reach a desired societal goal as opposed to a sound legal conclusion pertaining to abridgment of Fourth Amendment rights.

As the Twentieth Century ended, overall the circuit courts were willing to dramatically push the envelope on approving drug-testing of an overwhelming number of minors in this country. This was not only for interscholastic athletes as found by the Ninth Circuit in *Moule*; but also for participants of all extracurricular activities as indicated by the Seventh Circuit in *Todd*; or of all students in grades seven to twelve even where there was no evidence of drug use as demonstrated by the Eighth Circuit in *Miller*; or of students who drive to school as shown by the Seventh Circuit in *Joy*; or allowing a blood test for suspected alcohol use as shown by the Third Circuit in *Hedges*. Conversely, as the Twenty-first Century has commenced, there has been a pendulum swing restricting such broad policies as evidenced by the Tenth Circuit in *Earls*. As the appellate court stated in *Earls*, "[u]nless a [school] district is required to demonstrate such a problem, there is no limit on what students a school may randomly and without suspicion test. Without any limitation, schools could test all of their students simply as a condition of attending school."252

The Supreme Court decision in *Earls* will either stop the hemorrhaging of student's constitutional rights based on participation in extracurricular activities or signal that they are fair game for drug-testing for any number of substances, and opening the floodgates to universal drug-testing of any public school students. Of course, when the Supreme Court articulated its influential 1969 *Tinker* decision that students do not shed their rights at the school doors, it is doubtful that the Court contemplated that students would be literally forced to partially disrobe and urinate in front of viewing teachers and coaches, that they may come in daily contact with during their school days, as opposed to medically-trained individuals. It is equally doubtful that our forefathers ever envisioned their children being subject to such activity when forming this country. As Justice Brandeis, in the oft-repeated sentiment recorded in his dissent in *Olmstead v. United States*,253 stated: "[t]he makers of our Constitution . . . conferred, as against the Government, the right to be let alone - the most comprehensive of rights

and the right most valued by civilized men."\textsuperscript{254} Thus, the boundaries for drug-testing of the nation's students remains inconclusive—all emanating from the premise that interscholastic athletes are role models.

\textsuperscript{254} \textit{Id.} at 478.
## DECISIONS INVOLVING DRUG TESTING OF SECONDARY STUDENTS

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<table>
<thead>
<tr>
<th>Court</th>
<th>Year</th>
<th>Case</th>
<th>Students Involved</th>
<th>Court Conclusion</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arkansas district court</td>
<td>1985</td>
<td><em>Anable v. Ford</em>&lt;sup&gt;255&lt;/sup&gt;</td>
<td>high school students</td>
<td>unconstitutional</td>
</tr>
<tr>
<td>New Jersey Supreme Court</td>
<td>1985</td>
<td><em>Odenheim v. Carlstadt-East Rutherford Regional School District</em>&lt;sup&gt;256&lt;/sup&gt;</td>
<td>high school students</td>
<td>unconstitutional</td>
</tr>
<tr>
<td>Seventh Circuit Court</td>
<td>1988</td>
<td><em>Schall v. Tippecanoe County School Corp.</em>&lt;sup&gt;257&lt;/sup&gt;</td>
<td>interscholastic athletes &amp; cheerleaders</td>
<td>constitutional</td>
</tr>
<tr>
<td>Texas district court</td>
<td>1989</td>
<td><em>Brooks v. East Chambers Consolidated Indep. Sch.</em>&lt;sup&gt;258&lt;/sup&gt;</td>
<td>junior high and high school extracurricular activities</td>
<td>constitutional</td>
</tr>
<tr>
<td>Ninth Circuit Court</td>
<td>1994</td>
<td><em>Acton v. Vernonia School District No. 47</em>&lt;sup&gt;260&lt;/sup&gt;</td>
<td>interscholastic athletes (7-12)</td>
<td>constitutional</td>
</tr>
<tr>
<td>Supreme Court</td>
<td>1995</td>
<td><em>Vernonia School District No. 47 v. Acton</em>&lt;sup&gt;261&lt;/sup&gt;</td>
<td>interscholastic athletes (7-12)</td>
<td>constitutional</td>
</tr>
<tr>
<td>Ninth Circuit Court</td>
<td>1995</td>
<td><em>Moule v. Paradise Valley Unified School District No. 6</em>&lt;sup&gt;262&lt;/sup&gt;</td>
<td>interscholastic athletes</td>
<td>unconstitutional</td>
</tr>
<tr>
<td>Seventh Circuit Court</td>
<td>1998</td>
<td><em>Todd v. Rush County Schools</em>&lt;sup&gt;263&lt;/sup&gt;</td>
<td>all extracurricular activities &amp; students who drive to school</td>
<td>constitutional</td>
</tr>
<tr>
<td>Seventh Circuit Court</td>
<td>1998</td>
<td><em>Willis v. Anderson Community Sch. Corp.</em>&lt;sup&gt;264&lt;/sup&gt;</td>
<td>school fights — no individual suspicion</td>
<td>unconstitutional</td>
</tr>
</tbody>
</table>

257. 864 F.2d 1309 (7th Cir. 1988).
263. 133 F.3d 984 (7th Cir. 1998), *reh'g en banc denied*, 139 F.3d 571 (7th Cir. 1998), *cert. denied*, 525 U.S. 824 (1998).
Colorado Supreme Court 1998 *Trinidad School Dist. No.1 v. Lopez*. 265

Eighth Circuit Court 1999 *Miller v. Wilkes*. 266

Third Circuit Court 2000 *Hedges v. Musco*. 267

Seventh Circuit Court 2000 *Joy v. Penn-Harris-Madison Sch. Corp.* 268


Indiana Supreme Court 2002 *Linke v. Northwestern School Corp.* 273

extracurricular activities (6-12) constitutional

all extracurricular activities (7-12) (no history of drug use) constitutional

individual suspicion — blood test re: alcohol use constitutional

students who drive to school & extracurricular activities constitutional

all extracurricular activities unconstitutional

all students (6-12) unconstitutional

extracurricular activities & students who drive to school unconstitutional

all extracurricular activities (7-12) unconstitutional

all extracurricular activities & students who drive to school constitutional pursuant to Indiana Constitution

265. 963 P.2d 1095 (Colo. 1998).

266. 172 F.3d 574 (8th Cir. 1999).

267. 204 F.3d 109 (3d Cir. 2000).

268. 212 F.3d 1052 (7th Cir. 2000).


