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# PIAC (Pee in a Cup) – The New Standardized Test for Student-Athletes

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# PIAC (PEE IN A CUP) – THE NEW STANDARDIZED TEST FOR STUDENT-ATHLETES

If you are a student-athlete in the United States, the SAT[1] might not be the only standardized test you take this spring. Throughout the country, public school student-athletes are also subject to random drug testing programs, even in the absence of actual suspicions. Despite United States Supreme Court precedent in *Vernonia School District 47J v. Acton*[2] allowing drug testing of students participating in extracurricular activities, parents and students continue to challenge the constitutionality of drug testing. This paper examines cases and constitutional challenges to student-athlete drug testing programs since the Supreme Court's decision in *Vernonia*.[3] It considers cases influencing the court decisions, and examines the analysis used by the courts in these cases determining the constitutionality of drug testing in schools.

## I. I'M POPULAR, I'M HIP. OF COURSE I'VE USED DRUGS!

In 2007, a news story reported that students who considered themselves popular were **more likely** to use drugs, drink, or smoke, than their peers who did not view themselves as popular.[4] Very often, student-athletes are considered some of the most popular students in high school. This fact alone should cause concern among casual readers as well as school officials regarding the potentially prevalent use of drugs by the average high school student-athlete.

The controversy surrounding drug use permeates the professional sports field today,[5] but this concern is not limited

1. Scholastic Achievement Test.

2. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

3. *Id.*

4. *Study: Teen Drug Use at Schools Worsens*, NEWSMAX.COM, Aug. 16, 2007, http://archive.newsmax.com/archives/ic/2007/8/16/111443.shtml.

5. Watching ESPN's Sports Center during the months of January and February 2009, a viewer is bombarded with stories about steroid use among professional baseball players. *See* Mike Wise, *One Name is Not Enough in this Case*, WASH. POST, Feb. 10, 2009, at E01.

to the professional arena. In 1993, more than 250,000 adolescents admitted to steroid use.[6] Later, in 1999 the American Medical Association reported that 2% of high school students admitted using steroids. That percentage rose to 4% in 2002 and 6% in 2003.[7] Today, that percentage realistically is even higher as more than 50% of high school students admit to having tried an illicit drug of some sort, and three out of ten have used a drug other than marijuana by the end of high school.[8] Of particular concern is the rise in use of anabolic steroids, tranquilizers, and barbiturates by students, along with the dramatic rise in illegal, non-medical use of Oxycontin and Vicodin.[9]

To combat the drug problem among students, many schools have initiated random drug testing programs aimed at students, and more specifically at student-athletes. In fact, according to a nationwide study published in the May 2008 American Journal of Public Health, one in seven public school districts randomly drug test their students, up nearly 50% from five years earlier.[10] By randomly singling out some of the most visible and popular students—student-athletes—these programs are designed to catch and punish offenders, as well as to deter general drug use. Despite growing prevalence of drug testing, nonetheless, the American Academy of Pediatrics warns that school-based drug testing may "decrease student involvement in extracurricular activities and undermine trust

6. Eugene C. Bjorklun, *Drug Testing High School Athletes and the Fourth Amendment*, 83 EDUC. L. REP. 913, 914 (1993).

7. Christopher Lawlor, *New Jersey Institutes Statewide Steroid-Testing for High School Athletes*, USA TODAY, June 15, 2006, http://www.usatoday.com/sports/preps/2006-06-07-nj-steroid-testing_x.htm; Cynthia Sysol, *Constitutional and Indispensable Legislation: Mandatory Random Steroid Testing for High School Athletes*, 37 J.L. & EDUC. 597, 597 (Oct. 2008).

8. Joseph R. McKinney, *The Effectiveness and Legality of Random Student Drug Testing Policies*, 184 EDUC. L. REP. 669, 669 (2004).

9. *Id.*; *see also* U.S. Dep't of Health and Human Servs., *Monitoring the Future Survey Shows Decrease in Use of Marijuana, Club Drugs, Cigarettes and Tobacco, Dec. 2002*, http://www.nida.nih.gov/Newsroom/02/NR12-16.html; U.S. Dep't of Health and Human Servs., *Monitoring the Future Survey Shows Continued Decline in Drug Use by Students*, Dec. 2005, http://www.nida.nih.gov/newsroom/05/NR12-19a.html; see *also* Charles Feeney Knapp, *Drug Testing and the Student-Athlete: Meeting the Constitutional Challenge*, 76 IOWA L. REV. 107, 107-08 (Oct. 1990) (comprehensively explaining that drug use by athletes has a greater probability of reaching epidemic proportions than non-athletic drug abuse).

10. KEVIN ZEESE, DRUG TESTING LEGAL MANUAL, § 8:4 (West 2d ed. 2008).

between pupils and educators."[11] Additionally, physicians warn that there is little evidence of the effectiveness of these types of drug testing regimes.[12]

## II. STUDENT RIGHTS AGAINST SEARCHES IN SCHOOL: A PRIMER

Students do not have full constitutional rights while at school, but they are not stripped of all of their rights, either. So where on this spectrum of rights do students fall? In the past the United States Supreme Court observed, "[i]t can hardly be argued that either students or teachers shed their constitutional rights . . . at the schoolhouse gate."[13] More recently, however, the Court state,

> Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination--including even the right of liberty in its narrow sense, *i.e.*, the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians. . . When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that status.[14]

### *A. Constitutional Protections Against Unreasonable Search and Seizure*

Searches by public school officials, such as the collection of urine samples, implicate constitutional interests and protections. While there are possible Fourteenth Amendment considerations concerning due process, the primary constitutional concern centers on the Fourth Amendment considerations.[15] The Fourth Amendment of the United States Constitution protects "[t]he right of the people to be secure in

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11. *Id.*

12. *Id.*; *see also* Robert Taylor, *Compensating Behavior and the Drug Testing of High School Athletes*, 16 THE CATO J. 351, 351-52 (Winter 1997), *available at* http://www.cato.org/pubs/journal/cj16n3-5.html (providing an example of an empirical study regarding the effectiveness of drug testing).

13. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

14. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654-55 (1995).

15. Bjorklun, *supra* note 6, at 915.

their persons, houses, papers and effects, against unreasonable searches and seizures. . . . ."[16]

Application of the Fourth Amendment search and seizure protection to the public school setting has a history beyond the immediate realm of drug testing. *New Jersey v. T.L.O.*, sets the standard for searches of students and student property in schools.[17] In *T.L.O.* the Supreme Court upheld the school official's physical search of a student and her possessions, where the official incidentally discovered marijuana, because the school had a "reasonable suspicion" that the student had been smoking at school.[18] The current law for school searches of students and student property calls for school personnel to perform searches upon "reasonable,"[19] "individualized suspicion;"[20] the search must be both justified at inception,[21] and reasonable in scope.[22]

### *B. Drug Testing in the Courts, pre-Vernonia School District 47J v. Acton*

One of the earliest cases, occurring in the 1980s, dealt with the legality of the National Collegiate Athletic Association (NCAA) drug testing college athletes.[23] In this case the Supreme Court found no Fourth Amendment implications because it viewed the NCAA as a private party, at odds with the state, and therefore not a state actor.[24] This precedent does little to shed light on the drug testing situation in public schools because a public school district is clearly not a private party, but rather a state actor obligated to act within Fourth Amendment restrictions. In another 1980s case the Supreme

16. U.S. CONST. amend. IV.

17. N.J. v. T.L.O., 469 U.S. 325 (1985).

18. *Id.* at 347–48.

19. Phaneuf v. Fraikin, 448 F.3d 591, 600 (2d Cir. 2006) (overruling a district court decision permitting a strip search based on facts, reports, and observations, but finding that reasonable belief is less than probable cause).

20. DesRoches v. Caprio, 156 F.3d 571, 574 (4th Cir. 1998) (recognizing that to avoid sweeping searches reasonable suspicion should exist, however, this does not apply in random searches).

21. That is, did reasonable and individualized suspicion exist to warrant the search at the time the search began?

22. Based on the reasonable suspicion and inception of the search was the search reasonable for what the administrator was searching for? Did it fit the need?

23. Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179 (1988).

24. *Id.* at 196.

Court considered drug testing in the employment context. The Court stated, "Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable . . . these intrusions must be deemed searches under the Fourth Amendment."[25]

In *T.L.O.*, the landmark school search and seizure case, the Supreme Court observed in a footnote, "[A]lthough 'some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure[,] . . . the Fourth Amendment imposes no irreducible requirement of such suspicion.'"[26] It seems reasonably clear that under *T.L.O.* and other student search cases that searches of individual students for drugs, based on reasonable suspicion, would most likely be justified.[27]

Even after understanding the law regarding searches in schools generally, other questions remain. For example, may schools indiscriminately and randomly test all students for drugs? Lower courts originally reviewed early drug testing policies in schools. In *Odenheim v. Carlstadt-East Rutherford Regional School District*, a New Jersey court struck down a school policy requiring all students to consent and submit to urinalysis as a condition of enrollment.[28] This was followed by *Brooks v. East Chambers Consolidated Independent School District*, a case in which a Texas court struck down a policy requiring drug testing for all students enrolled in extracurricular activities, due to lack of evidence that drugs and drug abuse were problems.[29]

### *C. Vernonia School District 47J v. Acton, Establishing the Constitutionality of Random Drug Testing of Students*

In 1995, the Supreme Court of the United States granted *certiorari* to decide whether a school district's random

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25. Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 617 (1989).

26. N.J. v. T.L.O., 469 U.S. 325, 342 n.8 (1985) (citing United States v. Martinez-Fuerte, 428 U.S. 543, 560-61 (1976)).

27. *See* Nancy J. Flatt-Moore, *Public Schools and Urinalysis: Assessing the Validity of Indiana Public Schools' Student Drug Testing Policies After Vernonia*, 1998 BYU EDUC. & L.J. 239, (discussing student rights in school, and the early search cases).

28. Odenheim v. Carlstadt-East Rutherford Reg'l Sch. Dist., 510 A.2d 709, 711-13 (N.J. Super. Ct. Ch. Div. 1985).

29. Brooks v. E. Chambers Consol. Indep. Sch. Dist., 730 F. Supp. 759, 766 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991).

urinalysis drug testing of student-athletes violated the Fourth and Fourteenth Amendments.[30] The district court had dismissed the student's complaint, yet the Ninth Circuit reversed and held that the policy was unconstitutional.[31] In a six to three decision, the Supreme Court reversed the Ninth Circuit and found the policy constitutional.[32] The Court balanced the intrusion on the student's Fourth Amendment interests against the school district's legitimate interests in preventing drug use and reasoned that this narrowly directed policy was permissible.[33]

In Vernonia, a logging community in Oregon, school sports play a prominent role.[34] In the 1980s, drug use increased, and "athletes were the leaders of the drug culture."[35] This rise in drug use caused countless problems, including: increases in the number of disciplinary referrals and suspensions,[36] severe sports-related injuries,[37] as well as overlooked safety precautions at sporting events.[38] To combat drug use, the district added educational courses on drugs and drug use and used drug-sniffing dogs on campus, but by then the problems had reached "epidemic proportions."[39]

The policy implemented by the school district in *Vernonia* required all student-athletes and their parents to sign a release form granting consent for the testing of the student-athlete.[40] All students were tested at the beginning of their sport's season. Throughout the season, 10% of the athletes were selected randomly for testing each week.[41] The urine samples were collected individually from each student and monitored by a same gendered adult in the student locker room.[42] The school sent samples to an independent lab and tested for presence of

30. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 648 (1995).
31. *Id.* at 652.
32. *Id.* (O'Connor dissenting, joined by Stevens and Souter).
33. *Id.* at 646.
34. *Id.* at 648.
35. *Id.* at 649.
36. *Id.* at 648.
37. *Id.* at 649.
38. *Id.*
39. *Id.*
40. *Id.* at 650.
41. *Id.*
42. *Id.*

illegal drugs.[43] "Only the superintendent, principals, vice-principals, and athletic directors ha[d] access to test results."[44] Students who failed were immediately tested again. Upon a second failed test, the students received the option to either participate in "an assistance program that includes weekly urinalysis," or face suspension from "the current season and the next athletic season."[45] The policy specifically targeted athletes who played sports "where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high."[46] The stated purpose of the policy was to de-glamorize drug use.[47]

James Acton, a seventh-grade football player, and his parents, refused to sign the testing consent forms.[48] The school subsequently denied him participation on the school football team.[49] The Acton family requested declaratory and injunctive relief from enforcement of the policy, arguing it violated the United States Constitution and the Oregon Constitution.[50]

Since a urine drug test administered by a public school is a search of a student by a state official, students have Fourth Amendment protections; these protections are tempered, however by the student's unique standing as a child enrolled in a public school.[51] The ultimate measure of constitutionality of a governmental search is "reasonableness;" to determine reasonableness, the Court balanced the intrusion on the student's Fourth Amendment interests against the legitimate governmental interests promoted by the random drug test.[52] In determining "reasonableness," the Court realized that it could not "disregard the schools' custodial and tutelary responsibility for children."[53]

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43. *Id.*

44. *Id.* at 651.

45. *Id.*

46. *Id.* at 662.

47. *Id.* at 650 (stating that one of the purposes of the policy was "to prevent student athletes from using drugs").

48. *Id.* at 651.

49. *Id.*

50. *Id.* at 651–52.

51. *Id.*at 652, 654 ("Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster.").

52. *Id.* at 652–53.

53. *Id.* at 656 (Recognizing the importance of considering the search in light of the

While engaged in balancing the student-athlete's expectation of privacy with the school's legitimate interest in drug testing, the Court analyzed the unique position of student-athletes. Due to factors like "suiting up" before practices and communal locker rooms, student-athletes enjoy less privacy interests than other students.[54] The Court also found the fact that students who participate in athletics "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally highly instructive."[55]

One issue of potential privacy troubled the Court to some degree, but not enough to change the outcome. The Court noted that students were required to identify *in advance* any medications they were taking, otherwise risking a false positive test.[56] While this requirement made the test more intrusive, the Court found that the limited personnel with access to the information made the policy not such an invasion of privacy as to invalidate the entire scheme.[57]

The Court determined that the school district had an interest "*important enough* to justify" the drug testing policy in light of the level of privacy interest of the student-athletes.[58] In considering the nature of the school district's interest, the Court stated, "Deterring drug use by our Nation's schoolchildren is at least as important as enhancing efficient enforcement of the Nation's laws against the importation of drugs."[59] The Court also reasoned that the "physical, psychological, and addictive effects of drugs are most severe" during school years.[60] The opinion recognized and approved of the narrow tailoring of this drug testing program, finding it was directed at deterring drug use by student-athletes "where

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school environment and unique role of the public school, the court cited *N.J. v. T.L.O.*, 469 U.S. at 339, "[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."). *Vernonia*, 515 U.S. at 655.

54. *Vernonia*, 515 U.S. at 657.

55. *Id.* (noting that in Vernonia, like in many districts, students participating in athletics have to submit to preseason physical exams).

56. *Id.* at 659.

57. *Id.*

58. *Id.* at 661.

59. *Id.*

60. *Id.*

the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high."[61]

The drug problem in *Vernonia* was of special importance to the Court, which called it an "immediate crisis" and reasoned that it was "self-evident that a drug problem largely fueled by the 'role model' effect of athletes' drug use . . . is effectively addressed by making sure that athletes do not use drugs."[62] While the student's parents in this case argued for a less intrusive method, such as "testing on suspicion of use" only,[63] the Court noted: "We have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment." [64] Thus, in light of the students' "decreased expectation of privacy, the relative unobtrusiveness of the search," and the legitimate interests shown by the school district, the random drug testing policy was reasonable and constitutional.[65]

*Vernonia* was not, however, a unanimous decision by the Supreme Court. While Justice Ginsburg joined the opinion, she also wrote her own short concurrence.[66] Justice Ginsburg noted a relationship between the students being tested—those who voluntarily participate in extracurricular athletics—and the most severe punishment—suspension from extracurricular athletics.[67] Justice Ginsburg also used her concurrence to clarify her understanding that the majority opinion reserved the question of whether districts could perform mandatory testing on all students for another day.

Justice O'Connor penned the dissent, joined by Justices Stevens and Souter.[68] She dissented because the Court's decision did not require individualized suspicion, and she felt the majority failed to adequately explain why individualized suspicion was unnecessary in the context of student-athlete

61. *Id.* at 662.

62. *Id.* at 663.

63. *Id.* at 665 (noting that the majority of Vernonia parents overwhelmingly supported the plan, and that the record showed no objection to the program by any other parents other than the Acton family).

64. *Id.* at 663.

65. *Id.* at 664-65.

66. *Id.* at 666.

67. *Id.*

68. *Id.*

testing.[69] In summary, Justice O'Connor argued that because the school district already had in place a discipline system based on individualized suspicion,[70] and the district had "first- or second-hand stories of particular, identifiable students acting in ways that plainly gave rise to reasonable suspicion of in-school drug use," the district could easily impose a suspicion-based drug testing program that would not intrude on any student's Fourth Amendment rights.[71]

## III. VERNONIA SCHOOL DISTRICT 47J V. ACTON: THE FINAL WORD IN SCHOOL DRUG TESTING? I THINK NOT. A LOOK AT THE CASES THAT HAVE FURTHER DEFINED THE LIMITS OF DRUG TESTING IN SCHOOLS

Following *Vernonia*, litigation regarding random drug testing in schools has continued at all levels.[72] Student and parent plaintiffs have argued that state constitutions provide greater protections than the Federal Constitution, and that schools lack the "special need" to invade student privacy. As demonstrated in this section, when balancing student privacy rights and school interests in maintaining healthy and safe environments, state and federal courts have not arrived at consistent decisions regarding these issues.

### *A. The United States Supreme Court Overturns a Tenth Circuit Holding that Drug Testing Violates Student's Fourth Amendment Rights*

In June 2002, the United States Supreme Court held as constitutional a policy requiring drug testing of all students participating in extracurricular activities at the middle school and high school levels.[73] Initially, a federal district court held that while the school district did not demonstrate that the drug

69. *Id.* at 668–86. Justice O'Conner notes specifically in her dissent that "[o]ne searches today's majority opinion in vain for recognition that history and precedent establish that individualized suspicion is 'usually required' under the Fourth Amendment. . . ."*Id.* at 676.

70. *Id.* at 677–79.

71. *Id.* at 679.

72. Since *Vernonia*, there have been decisions at all levels regarding drug testing in schools: the U.S. Supreme Court, U.S. Court of Appeals, and State Supreme Courts.

73. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 825 (2002).

problem had reached epidemic levels, "special needs" existed in the public school setting that supported the policy.[74] The Tenth Circuit reversed the decision, reasoning that the school district failed to show an identifiable drug abuse problem among a sufficient number of the extracurricular students to justify testing as a remedial measure.[75]

In the fall of 1998, a school district in Tecumseh, Oklahoma adopted a Student Activities Drug Testing Policy.[76] The policy required all middle and high school students to consent to urinalysis testing for drugs before participating in any extracurricular activity.[77] Students were also required to permit random drug testing while participating in that activity.[78] Additionally, to the policy required students to agree to be tested at any time upon "reasonable suspicion."[79] The drug testing was designed to detect only the use of illegal drugs, not medical conditions or authorized prescription medications.[80] Students and their parents sued the district, claiming that the policy violated the Fourth Amendment.[81] The Supreme Court reviewed the district's policy for "reasonableness."[82] The Court noted that it had previously held that "'special needs' inhere in the public school context," lessening the burden the government must show in justifying a

74. Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 115 F. Supp. 2d 1281, 1286-87 (2000), *rev'd*, 242 F.3d 1264 (10th Cir. 2001), *rev'd*, 536 U.S. 822 (2002) (holding that there was a history of drug abuse starting in 1970 presenting a legitimate cause for concern).

75. Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 242 F.3d 1264, 1270 (2001), *rev'd*, 536 U.S. 822 (2002) (holding that the School District failed to demonstrate a sufficient drug problem among students participating in extracurricular activities to justify the policy).

76. Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist., 536 U.S. at 826.

77. *Id.* In practice, however, the policy was only applied to students' participation in competitive extracurricular activities sanctioned by the Oklahoma Secondary Schools Activities Association.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 826–27.

82. *Id.* at 828. Normally, the Court determines reasonableness by balancing the nature of the intrusion on the individual's privacy against the promotion of a legitimate governmental interest, but, in the context of safety, a search may be reasonable when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable." *Id.* at 829 (quoting Griffin v. Wisconsin, 483 U.S 868 (1987)).

search of students.[83] The first factor the Court considered was "the nature of the privacy interest" of the students, balanced against the school's interest in maintaining the discipline, health, and safety of students. The Court concluded that the students affected by this policy had a limited expectation of privacy because students who voluntarily participate in school extracurricular activities have reason to expect intrusions upon their rights and privileges.[84]

As a second factor, the Court analyzed the "character of the intrusion imposed by the Policy," requiring a fact-specific inquiry into "the manner in which production of the urine sample is monitored."[85] The Court found that the policy was "minimally intrusive" and limited in its uses, concluding "that the invasion of the students' privacy [was] not significant."[86] Finally, as a third factor, the Court addressed the "nature and immediacy" of the district's concerns and the "efficacy of the Policy in meeting [those concerns]."[87] The Court held that testing of "students who participate in extracurricular activities is a reasonably effective means of addressing the school district's legitimate concerns in preventing, deterring, and detecting drug use." For these reasons, the policy satisfied this third and final prong.[88]

### *B. The Seventh Circuit Upholds Suspicionless Drug Testing for Students Participating in Extracurricular Activities and Student Drivers*

In 2000, the Seventh Circuit Court affirmed an Indiana District Court decision that students participating in extracurricular activities or driving to school may be subject to random, suspicionless drug and alcohol testing. Five students initially brought suit alleging that the drug testing policy

83. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottowatomie County v. Earls, 536 U.S. 822, 829 (2002).

84. *Id.* at 830–32.

85. *Id.* at 832.

86. *Id.* at 833-34 (describing protocol where the monitor waits outside the restroom stall listening for urination sounds, the results are kept confidential and separate from other educational records, results are not turned over to law enforcement, and the only consequence of a failed test is *limiting* the student's privilege of participating in extracurricular activities).

87. *Id.* at 834.

88. *Id.* at 837.

passed by the Penn-Harris-Madison School Corporation in 1998 violated their Fourth Amendment rights against unreasonable search and seizure.[89] The Indiana District Court held that the policy was constitutional.[90] The Seventh Circuit determined that it was bound by the principle of *stare decisis* to follow its 1997 ruling in *Todd v. Rush County Schools* upholding a similar policy.[91] Following this decision, the court ruled this policy was constitutional as well.

In 1998, Penn-Harris-Madison instituted a drug testing policy for its students.[92] The policy focused on five groups of students, including: student drivers, students who participate in extracurricular activities, students who volunteer to be tested, students who have been suspended for three or more consecutive days, and students for which there is a reasonable suspicion.[93] To justify the implementation of its policy, Penn-Harris-Madison relied on *Todd.*[94] In *Todd*, the district demonstrated that drug use was a problem on the rise on the rise within the district.[95] The disputed policy in *Todd* tested students in extracurricular activities because they act as role models and because of serious health risks associated with drug use.[96] Unlike the school district in *Todd*, however, Penn-Harris-Madison did not show evidence of a pervasive drug problem or prove any correlation between drug use and student involvement in extracurricular activities.[97]

The Seventh Circuit applied *Todd* and noted that Penn-Harris-Madison failed to show a "special need" justifying the testing of students.[98] Nevertheless, the court determined it was bound by principles of *stare decisis* to follow its ruling in *Todd* upholding a similar policy.[99] The court ruled the Penn-Harris-

89. Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052 (7th Cir. 2000).

90. *Id.* at 1054.

91. Todd v. Rush County Sch., 139 F.3d 571 (7th Cir. 1998) (The court in *Todd* relied on *Vernonia*, the court held that the school district established a "special need" justifying the intrusiveness of the drug policy).

92. *Joy*, 212 F.3d at 1053–54.

93. *Id.* at 1055.

94. *Id.* at 1062.

95. *Id.* at 1061.

96. *Id.*

97. *Id.* at 1066 (Penn-Harris-Madison admitted that the ultimate goal was to prevent drug use by testing all students on a random suspicionless basis).

98. *Id.* at 1067.

99. *Id.* at 1066.

Madison policy also constitutional.[100] The court did not, however, explain its ruling in *Todd,* and acknowledged no factual differences between the two cases.

### *C. The Indiana Supreme Court Reverses the Court of Appeals and holds a Drug Testing Policy Constitutional under the Indiana State Constitution*

In 2002, the Indiana Supreme Court reversed a court of appeals decision in *Linke v. Northwestern School Corp.*, and reinstated the decision of the trial court upholding a random drug testing policy.[101] The trial court originally upheld the policy, ruling that the drug testing policy was reasonable.[102] The Indiana Court of Appeals reversed this decision, holding that because the state constitution provides greater protection against unwarranted drug testing than the Federal Fourth Amendment, drug testing students without individualized suspicion violated the Indiana Constitution.[103] On petition to transfer, the Indiana Supreme Court reversed the decision back to the original district court holding.[104]

In *Linke*, the Northwestern School Corporation (NSC) instituted a drug testing policy in January 1999. The random urinalysis testing policy was designed to protect the health and safety of the students, and to improve the image of NSC in the community. The drug testing policy resulted from a task force designed to examine the district's approach to drugs in the school.[105] The drug testing policy applied to all middle school and high school students participating in school athletics, specified extracurricular and co-curricular activities, as well as student drivers who parked on campus.[106] A computer selected students to be tested and students received no advance

100. *Id.* at 1067.

101. Linke v. Nw. Sch. Corp., 763 N.E.2d 972 (Ind. 2002).

102. *Id.* at 976–77.

103. Linke v. Nw. Sch. Corp., 734 N.E.2d 252 (Ind. Ct. App. 2000) *rev'd,* 763 N.E.2d 972 (Ind. 2002).

104. *Id.*

105. *Linke*, 763 N.E.2d at 975. In 1998-1999, two suspensions and two expulsions at high school, five suspensions and five expulsions at the middle school, and a 1996 death by drug overdose by a student who bought drugs at school from a fellow student.

106. *Id.* Students who did not want to be tested would have to skip public performances in their co/extracurricular activities, but could complete alternative assignments for credit.

warning; they were then taken to a separate trailer, one at a time, and were able to complete the test alone.[107] The specimen was tested only for substances banned by the district.[108]

In upholding the policy, the Indiana Supreme Court considered the policy under both the Federal Fourth Amendment and the Indiana Constitution. The lower court had relied on a prior case requiring "individualized suspicion" before a police officer could stop a motorist for a seatbelt violation.[109] Despite this precedent, the Indiana Supreme Court distinguished a search conducted to enforce the law from one conducted by a school, noting the different roles played by law enforcement and teachers.[110] The court also noted that the results of the drug tests were not volunteered to law enforcement and not used for internal disciplinary functions.[111] The court found that "balancing the students' interests against the school corporation's [interests], better comport[ed] with [a] totality of circumstances framework than with a per se requirement of individualized suspicion."[112]

In evaluating this policy, the court found persuasive the lessened student privacy interests, school custodial and protective interests in their students, and the fact that the policy was created with parent involvement as an element of a comprehensive interdiction program.[113] The higher than average rate of drug use at these schools, the drug related death, and the continued presence of drugs also strongly influenced the court's decision.[114] Thus, in light of the totality of the circumstances, the court stated that the policy did not violate the Fourth Amendment or the Indiana Constitution.[115]

107. *Linke*, 734 N.E.2d at 254.
108. *Id.*
109. Baldwin v. Reagan, 715 N.E.2d 332, 337 (Ind. 1999).
110. *Linke*, 763 N.E.2d at 978.
111. *Id.*
112. *Id.*
113. *Id.* at 985.
114. *Id.*
115. *Id.*

### *D. The Pennsylvania Supreme Court holds Drug Testing of Students in Extracurricular Activities and Student Drivers as Violating the Pennsylvania Constitution*

In 2003, the Pennsylvania Supreme Court struck down a Delaware Valley School District's random, suspicionless drug testing policy.[116] The policy tested not only student-athletes, but also students participating in any extracurricular activity and students applying for parking permits.[117] In 1999, parents brought suit alleging the policy violated the students' state constitutional right against search and seizure, and the parents' fundamental right to make health care decisions for their children.[118] The trial court ruled that since comparable intrusions were upheld by Pennsylvania courts in the past, the students' claim failed as a matter of law.[119] The court also rejected the parental rights claim.[120] The state appellate court affirmed the dismissal of the parental rights claim, but vacated and remanded the claim brought on behalf of the students' rights against search and seizure.[121] After cross-petition for allocator, the Pennsylvania Supreme Court considered the case.[122] The Pennsylvania Supreme Court struck down the policy and considered the parental claim moot because no parental rights had been impacted in the facts of the case.[123]

In 1998, the Delaware Valley School District adopted a drug-testing policy which authorized random, suspicionless drug and alcohol testing of students who held parking permits or participated in voluntary extracurricular activities.[124] Students or parents of students participating in extracurricular activities or applying for parking permits had to sign a contract

116. Theodore v. Del. Valley Sch. Dist., 836 A.2d 76 (Pa. 2003) In striking down the policy, the court articulated its reasoning, stating that students were forced to "Choose one: your Pennsylvania constitutional right to privacy or the chess club." *Id.* at 95.

117. *Id.* at 78.

118. *Id.* at 80.

119. *Id.* at 82.

120. *Id.*

121. Theodore v. Del. Valley Sch. Dist., 761 A.2d 652 (Pa. Commw. 2000) (en banc), *aff'd*, 836 A.2d 76 (Pa. 2003).

122. Theodore v. Del. Valley Sch. Dist., 836 A.2d 78 (Pa. 2003). The State Supreme Court delayed ruling on the case until the United States Supreme Court resolved the *Earls* case.

123. *Id.* at 96.

124. *Id.* at 78.

consenting to testing for alcohol and controlled substances.[125] The one-year contract authorized school officials to collect breath, urine, and blood samples from students, which could only be used to test for a specific list of drugs. The policy required testing in five different circumstances: (1) initial testing, (2) random testing, (3) reasonable suspicion testing, (4) return-to-activity testing, and (5) follow-up testing.[126]

In rejecting the policy, the Pennsylvania Supreme Court considered both the Supreme Court precedent under a Fourth Amendment analysis, and state specific analysis under article I, section 8 of the Pennsylvania Constitution.[127] The Pennsylvania Court had previously held that challenges to article I, section 8 mandated "greater scrutiny in the school environment" and the appropriate test was a four-factor test. The test evaluated the students' privacy interests, the nature of the intrusion, notice, and the overall purpose to be achieved, including the immediate reasons prompting the decision to conduct the search.[128] The court reviewed the first three factors and did not find any of them determinative, and instead based its decision, on the fourth factor.[129] Here, the court found that the district failed to prove that a drug problem actually existed, or that the means chosen to address the problem would actually tend to address it.[130] Despite striking down the policy, the court, in dicta, left open the potential that had the policy been confined to student-athletes and student drivers, it would have been upheld.[131]

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125. *Id.*

126. *Id.* at 79.

127. *Id.* at 88. Article I, section 8 states "[t]he people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person of things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant." PA. CONST. ART. I, § 8.

128. 836 A.2d at 88.

129. *Id.* at 90-91.

130. *Id.* This is "in stark contrast to *Vernonia*," where the Supreme Court viewed the drug testing as a last-ditch effort to address a pervasive and disruptive drug culture where other methods had failed.

131. *Id.* at 92 ("In addition, while the policy targeted some students who were involved in activities where drug or alcohol use presents an inherent danger (e.g. student-athletes and drivers), it included others involved in activities where no such inherent physical danger exists (e.g. other extracurricular programs . . . such as the National Honor Society) . . . Were the suspicionless drug and alcohol testing in this case confined to student-athletes and students with driving/parking privileges, the question would obviously be closer.").

### *E. The Washington Supreme Court holds Random, Suspicionless Drug Testing of Student-Athletes Violates the Washington Constitution*

In 2008, the Washington Supreme Court, *en banc*, held that a random, suspicionless drug testing policy, testing student-athletes, violated article I, section 7 of the Washington State Constitution.[132] Parents of high school student-athletes, who had consented to the testing, filed suit against the school district.[133] The trial court held that drug testing, despite the lack of any individualized suspicion, was constitutional.[134] The Washington Supreme Court accepted direct review, and held that there is no "special needs" exception to the warrant requirement that would allow random, suspicionless drug testing. For this reason, the district policy was unconstitutional.[135]

As a result of drug and alcohol use in the school community, the school district implemented random drug testing, requiring testing of student-athletes at the beginning of the sport season, and then subjected students to random drug testing during the remainder of the season.[136] Students were tested by urinalysis, and the sample was mailed to an independent lab.[137] If a student tested positive for illegal drugs, the student was suspended from extracurricular activities.[138] The results were not sent to law enforcement or made part of the academic record.[139] After the students in this case consented to the testing, and were tested, their parents filed suit.[140]

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132. York v. Wahkiakum Sch. Dist. No. 200, 178 P.3d 995 (2008). Article I, section 7 of the Washington State Constitution states, "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." WASH. CONST. art I, § 7.

133. *York*, 178 P.3d at 997.

134. *Id.* at 999 (holding "that while that school district's policy 'approached the tolerance limit' of our constitution, the policy was, nevertheless, constitutional and narrowly tailored to reach a compelling government end.").

135. *Id.* at 997.

136. *Id.* at 998 (undisputed facts from the trial show that in 2000, 50% of student-athletes self-identified as drug and/or alcohol users).

137. *Id.*

138. *Id.* (the length of suspension depended on the number of infractions and whether the student tested positive for drugs or for alcohol).

139. *Id.*

140. *Id.*

The Washington Supreme Court expressed substantial deference to the school district, stating that it "loath[es] to disturb the decisions of local school board," but ultimately observed that it "will not hesitate to intervene when constitutional protections are implicated."[141] Initially, the Washington Supreme Court distinguished the federal analysis under the Fourth Amendment from its own analysis under the Washington State Constitution that affords greater protection than the U.S. Constitution.[142] The test for determining the constitutionality of a search under the Washington Constitution has two prongs; first, the court considers if a privacy interest is implicated, and then determines if the intrusion is satisfied by a valid warrant or meets one of the few exceptions.[143] The court in the case at hand held that because a "student athlete has a genuine and fundamental privacy interest in controlling his or her own bodily functions" the first prong was satisfied, thus forcing the court to consider the second prong.[144] The court found that unlike the "special needs" exception used to permit suspicionless searches in federal cases, Washington had a more limited group of exceptions including "exigent circumstances, consent, searches incident to a valid arrest, inventory searches, the plain view doctrine, and *Terry* investigate stops."[145]

In rejecting the Supreme Court's Fourth Amendment analysis and its "special need exception" in the school setting, the Washington court went so far as to say, "If we were to allow random drug testing here, what prevents school districts from either later drug testing students participating in any extracurricular activities, as federal courts now allow, or testing the entire student population?"[146]

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141. *Id.* at 999.

142. *Id.* at 1000–01 ("[S]imply passing muster under the federal constitution does not ensure the survival of the school district's policy under our state constitution.").

143. *Id.* at 1001.

144. *Id.* at 1001–02.

145. *Id.* at 1003 (Washington has a long judicial history of striking down suspicionless searches, and found no exception applied here.).

146. *Id.* at 1006.

## IV. DRUG TESTING BY SCHOOL DISTRICTS: CONSTITUTIONAL CONCERNS AND CONSIDERATIONS

Analysis of school drug testing programs varies by state. *Vernonia* and *Earls* have made it clear that a properly designed random drug testing program of student-athletes will pass Fourth Amendment challenges. Despite the strong precedent of *Vernonia* and *Earls*, nonetheless, not all random drug testing programs will survive state constitutional challenges. Because each state has unique constitutional protection, programs that pass federal constitutional muster are possibly impermissible under stricter state constitutional requirements.

*Vernonia* introduced the requirement of "special need," and subsequently, some courts struggled with what "special need" the district must demonstrate to justify testing student athletes.[147] *Earls* broadened the concept of "special need," making it clear that under the Fourth Amendment, schools need not wait until they have evidence of a drug "epidemic" in order to institute a random drug policy under the Federal Constitution.[148] Notwithstanding *Earls'* broadening of the concept of "special need," some state courts still require a showing of some
specialized need before permitting a random, suspicionless drug test of student-athletes under the state constitution.[149]

While states evaluate testing programs under their own constitutions differently than the Supreme Court evaluates programs under the Federal Constitution, review of Supreme Court analysis is helpful. Lower courts often turn to standards articulated by the Supreme Court in a series of Fourth Amendment cases. These criteria to be considered when evaluating drug testing programs in schools include: the rationale behind the policy and whether the policy is tailored in a way to meet that rationale;[150] which substances are tested

147. Ralph Mawdsley, *Random Drug Testing for Extracurricular Activities: Has the Supreme Court Opened Pandora's Box for Public Schools?*, 2003 B.Y.U. EDUC. & L.J. 587, 607.

148. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 835 (2002) (evidence of the drug problem in *Earls* was slight, when compared with the extreme epidemic present in *Vernonia*).

149. Mawdsley, *supra* note 147, at 620.

150. Bjorklun, *supra* note 6, at 920 (citing Acton v. Vernonia Sch. Dist. 47J, 796 F.

and how students inform the district of prescription medication they are taking;[151] the intrusiveness of actual testing procedure;[152] and finally, the punishment administered upon a failed drug test.[153]

### *A. Analysis of School District Random Drug Testing Policies in Light of the Fourth Amendment*

In determining whether random drug testing programs of student-athletes are legal, courts have used criteria drawn from several Supreme Court decisions. While reasonableness is the touchstone of constitutionality of a governmental search, the Supreme Court has used an extended list of criteria when considering random urinalysis drug testing of students. Due to its scope, this paper will only consider a few key criteria considered in a court's analysis of random, suspicionless drug testing programs.

#### *1. The nature of the school district's interest and the district's compelling need for testing*

School districts carry a burden of demonstrating the need for testing within their district. Even when the test results show drug use percentages comparable to the national average, schools may still have a compelling need in light of the impact of drug use on athletes.[154] In *Schaill v. Tippecanoe County*, 31% of the baseball team tested positive for drug use, a percentage roughly comparable to the use by the public as a whole.[155] However, the school argued that it had a compelling need for drug testing and presented evidence that drugs alter mood, motor coordination, and one's pain perception, thus supporting the school's claim that the health and safety of athletes and cheerleaders is a concern closely associated with drug use.[156]

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Supp. 1354, 1363 (Dist. Or. 1992), *rev'd*, 23 F.3d 1514 (9th Cir. 1994), *vacated*, 515 U.S. 646 (1995)).

151. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 659 (1995).

152. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 832 (2002).

153. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 664 (1995).

154. Bjorklun, *supra* note 6, at 918.

155. Schaill v. Tippecanoe County, 864 F.2d 1309 (7th Cir. 1988).

156. *Id.* at 1320.

While it appears easy for a district to design a compelling need, in *Brooks,* the court found no compelling need.[157] There, the court stated that the district could justify the urinalysis program if it provided evidence that participants in extracurricular activities were more likely to use drugs than non-participants, or that drug use interfered with the educational mission more if those students were using.[158] The court stated, "The justification for the . . . drug testing program in essence is that their students would be safer in everything they did if they did not use drugs or alcohol. That rationale does not meet the compelling need criteria necessary to undertake a search without reasonable suspicion."[159]

*2. Limiting the scope of the drug testing program, and tailoring it to achieve the stated goals*

Courts consider whether programs are limited in scope and tailored to achieve their stated goals. They appear to generally "uphold drug testing programs limited in scope and designed to achieve specific goals as opposed to general efforts to test large numbers of students in the hope that such massive testing will deter students from drug use generally."[160] Another factor that may come into play in future challenges is the actual impact. For example, if a policy is designed to deter drug use among that student population—as opposed to decreased injuries among athletes caused by drug abuse— and drug use is climbing, students may have a good argument that the program, as designed, is not tailored to achieve its goals.[161]

In *Brooks*, the court held a policy that tested over half of the student body during the first half of the school year, and potentially all but thirteen students who ultimately would have been tested if the program had been permitted to continue,[162]

157. Brooks v. E. Chambers Consol. Indep. Sch. Dist., 730 F. Supp. 759, 761 (S. Dist. Tex 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991).

158. *Id.* at 764.

159. *Id.* at 764–65.

160. Bjorklun *supra* note 6, at 920.

161. Policies vary in goals, from deterrence of general drug use, to preventing impaired students from participating, to decreasing problematic behavior at school caused by drug use.

162. *Brooks,* 730 F. Supp. at 765. Only thirteen students did not participate in some sort of extracurricular activity. *Id.* at 761.

was highly intrusive and unlikely to achieve its stated goals.[163] In contrast, the court in *Schaill* held that a drug testing policy that only tested participants in athletics was sufficiently limited in scope. The *Schaill* court also found the policy was designed to enforce its goals regarding the safety and health of participants.[164] In *Acton*, the court compared the policy with that in *Brooks* and found that "[u]nlike the policy. . .in *Brooks*, which applied random drug testing to all extra-curricular activities, the *Vernonia* policy is limited. . ." to athletics.[165] This correlated with the purpose of the policy, addressing student safety in athletic programs. From this analysis, it appears that courts will uphold testing programs limited in scope, but reject those that are "fishing expedition[s]" designed to identify "drug and alcohol use to carry on a moral crusade."[166]

*3. The diminished expectation of privacy of a student-athlete*

Generally, urinalysis testing is considered more than "minimally intrusive." In fact, the United States Supreme Court stated that the "excretory function is traditionally shielded by great privacy" and there are few activities in life more personal or private.[167] Despite this precedent, in *Vernonia*, the Supreme Court determined that random urinalysis testing *may* be a negligible privacy invasion depending on the manner in which the sample is collected.[168] This holding in *Vernonia*—that drug tests of students using urinalysis was minimally invasive—conflicts with their previous holding that urinalysis of adults is invasive.[169]

When this "minimal intrusion" is paired with a student's diminished expectation of privacy, drug tests in schools are permitted. In *Vernonia*, the Court noted that because students are "routinely required to submit to various physical examinations and to be vaccinated against various diseases,"

163. *Id.* at 765. One of the stated goals was to prevent impaired students from taking part in after school activities.

164. Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1320 (7th Cir. 1988).

165. Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1363 (Dist. Or. 1992), *rev'd,* 23 F.3d 1514 (9th Cir. 1994), *vacated,* 515 U.S. 646 (1995).

166. Bjorklun, *supra* note 6, at 920 (citing *Vernonia*, 796 F.Supp. at 1363).

167. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 604 (1989).

168. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 657–58 (1995).

169. This is likely related to the concept that students, while in school, have more relaxed constitutional rights than the normal citizen.

students cannot reasonably expect normal Fourth Amendment protections from invasions like urinalysis testing.[170] Student-athletes have even fewer privacy expectations, since they voluntarily choose to participate in school sports and subject themselves to physical exams and additional regulations.[171] The Court also found it significant that drug tests were kept confidential, did not become part of a student's academic record, were not turned over to law enforcement, and were destroyed after a short period of time.[172]

Critics of drug testing in schools highlight that a similar testing of adults would be unconstitutional. Additionally, testing only students in sports, presuming their guilt and that they are more likely to use to drugs, is unfair.[173] One critic noted that students are faced with a catch-22 of sorts, because "[i]nvolvement in sports is sometimes an important way for students to counteract the negative influences that may surround them. . . . [t]herefore, it is unfair to compel students to choose between athletics on one hand and all vestiges of privacy on the other."[174]

*4. The character of the intrusion; are there less intrusive alternatives?*

Courts may also consider whether school districts have tried less intrusive methods to discourage drug use; however, the Supreme Court has upheld instances of random suspicionless drug testing even though less restrictive alternatives were available.[175] In *Acton*, the district had tried several educational programs designed to discourage drug use, but "the 'subtle' approach not only failed, but seemed to cause further disruptions."[176] In *Acton*, the court concluded that "random drug urinalysis testing was . . . the next logical step in

170. *Vernonia*, 515 U.S. at 656.

171. *Id.* at 657.

172. Sysol, *supra* note 7, at 600.

173. Darrel Jackson, *The Constitution Expelled: What Remains of Students' Fourth Amendment Rights?* 28 ARIZ. ST. L.J. 673 (Summer 1996).

174. *Id.* at 673, 685–86.

175. *Vernonia*, 515 U.S. at 663.

176. Acton v. Vernonia Sch. Dist. 47J, 796 F. Supp. 1354, 1363 (Dist. Or. 1992), *rev'd*, 23 F.3d 1514 (9th Cir. 1994), *vacated*, 515 U.S. 646 (1995).

a progressive attempt to address the drug and alcohol problems."[177]

Critics of drug testing policies have argued for suspicion-based testing. Some fear exists that suspicion-based testing may impair relationships between teachers and students, as well as students and other students, because testing relies on someone "tattling" on another. One critic of current drug testing policies argues that a suspicion-based system will not create adversarial relationships because "where drug impaired students are concerned, those relationships are *already* adversarial."[178]

In addition to considering alternatives, courts have also considered the method of collecting the test sample itself when determining the reasonableness of the policy. In *Earls,* the court noted that the student was alone during the testing, while the faculty member listened outside the stall for the "normal sounds of urination."[179]

*5. Policy limitations on school district officials' discretion*

An article outlining case law and drug testing policies highlighted the discretion of school officials as a key factor in evaluating the constitutionality of the random drug testing policy.[180] Intuitively, it would seem that the less discretion school officials have, the more likely the policy is to stand as constitutional. When students are not picked at random using a computer or similar method, there may be a presumption that the test was in bad faith. To survive court scrutiny, it is important to outline and follow testing procedures to ensure "that any particular search was not motivated by a desire to harass or intimidate."[181]

*6. The penalties for failed drug test, criminal or otherwise*

In all the policies reviewed and upheld by the various courts, the penalties for a failed drug test were related why

177. *Vernonia*, 796 F. Supp. at 1364.

178. Jackson, *supra* note 173, at 693.

179. Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 831 (2002).

180. Bjorklun, *supra* note 6, at 922.

181. *Id.* at 921.

reason students were tested in the first place. For example, in *Vernonia*, students were suspended from the current season, and potentially also from the next season.[182] None of the policies appear to involve punishment more severe than suspension from extracurricular activities. Students were never suspended from school, nor law enforcement ever notified. One can assume that if the penalty involved criminal action, or a permanent mark on a student's academic record, courts might require that the drug testing be based on individualized suspicion.[183]

### *B. The Future of Drug Testing in Schools*

As the Washington case *York v. Wahkiakum* demonstrates, even if a school district drug testing policy passes federal constitutional challenges, there may still be state constitutional bars to the program.[184] Some states are more welcoming to drug testing policies. New Jersey was the first state to mandate random steroid testing for high school student-athletes through statewide legislation.[185] Other states, like Texas, Florida, and Illinois have either considered or passed similar legislation.[186]

### *C. Conclusion*

Today, controversy in the drug testing arena continues. Even the federal government has become involved through administrative policies.[187] At the state level, regulation

182. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 666 (1995).

183. One critic of drug testing notes that suspicionless drug testing tells students that they are guilty until proven innocent, and some students "may feel that they are treated as second-class citizens" because the courts allow suspicionless testing of students when they would not allow it of adults. Jackson, *supra* note 173, at 695.

184. York v. Wahkiakum Sch. Dist. No. 200, 178 P.3d 995 (2008).

185. Lawlor, *supra* note 7.

186. Sysol, *supra* note 7, at 597–98.

187. Despite questions about the actual effectiveness of random drug testing policies and the prevalence of drug problems among high school athletes, the Bush administration was supportive of school drug testing. In fact, the "No Child Left Behind Act" provides that federal money may be used for school drug testing programs. For a report on the prevalence of drug use, and effectiveness of random drug testing policies. See ZEESE, *supra* note 10, § 8:4. To read more about "No Child Left Behind," *see* 20 U.S.C. §4115. As with many facets of education, the federal government provides funding and may be able to limit the law that governs. If the funding for the program is purely federal, courts may be required to apply federal law.

continues, despite mixed results. In 2009, the Texas University Interscholastic League released results that they found only seven positive results in nearly 19,000 tests of high school athletes for steroid use.[188] A Texas state senator was quoted as criticizing the drug testing program as a "colossal waste of taxpayer money."[189] While this particular program was designed only to identify steroid use, it highlights a familiar public complaint—if student drug use is the same as the national average, even among athletes, then the money might be better spent on other programs. But, as a parent of a student who committed suicide while battling depression potentially related to steroid use observed, "They don't stop testing Olympic athletes just because most of them don't test positive."[190]

Other arguments show that while student-athlete drug use mirrors the national average, there is a greater abuse of performance enhancing drugs.[191] Student-athletes do not only use drugs to enhance their performances, but also use them to fight fatigue, mask pain, and cope with the increased stress of being a student-athlete.[192] Also, when compared to the drugs used by the general student population, drugs used by student-athletes are more harmful and have a greater probability of reaching epidemic proportions.[193]

Drug testing is perhaps not the only remedy available to school officials in deterring drug use and protecting student safety, but schools lack an infinite continuum of alternatives.[194] Courts have emphasized that schools should try alternative policies first, and resort to drug testing as a last resort. At this point, the case law seems clear that due to the volunteer nature of high school athletics, the physical nature of sports and the need for mental sharpness to ensure safety during sporting

188. Jim Vertuno, *Few Texas High School Athletes Fail Steroid Test* (Feb. 20, 2009), http://abcnews.go.com/US/wireStory?id=6923792.

189. *Id.*

190. *Id.*

191. Knapp, *supra* note 9, at 107.

192. *Id.* at 113.

193. *Id.* at 107–08.

194. Mawdsley *supra* note 147, at 622.

competitions, random drug testing of student-athletes by school districts is permitted.

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