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PUBLIC SCHOOLS AND URINALYSIS: ASSESSING THE VALIDITY OF INDIANA PUBLIC SCHOOLS' STUDENT DRUG TESTING POLICIES AFTER *VERNONIA**

The challenge to our liberties comes frequently not from those who consciously seek to destroy our system of government, but from men of goodwill— good men who allow their proper concerns to blind them to the fact that what they propose to accomplish involves an impairment of liberty The motives of these men are often commendable. What we must remember, however, is that preservation of liberties does not depend on motives The only protection against misguided zeal is constant alertness to infractions of the guarantees of liberty contained in our Constitution. Each surrender of liberty to the demands of the moment makes easier another, larger surrender. The battle over the Bill of Rights is a never ending one.¹

Leaders of Indiana's public schools are concerned. Recent surveys by the U.S. Department of Health and Human Services indicate "that drug use among 12- to 17-year-olds has doubled since 1992."² A University of Michigan study also shows rising rates of teen substance abuse.³ Studies of Indiana students like-

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1. WILLIAM O. DOUGLAS, A LIVING BILL OF RIGHTS 61 (1961).

2. Jan Ferris, *Drug Crackdown vs. Student Rights*, SACRAMENTO BEE, Oct. 24, 1996, at A1. See also Gordon Witkin, *Why This Country Is Losing the Drug War*, U.S. NEWS & WORLD REP., Sept. 16, 1996, at 60.

3. JET, Jan. 9, 1995, at 24. The study also noted that "teenagers' objection to and concern over negative effects of illegal drugs decreased . . ." *Id.* It should, however, be acknowledged that even with such a rise, teen usage rates still fall well below the highs reported in the 1970's. Eugene C. Bjorklund, *Drug Testing High School Athletes and the Fourth Amendment*, 83 ED. LAW REP. 913, 914 (1993). See also, *Household and Student Surveys Show Drug Use Down from Peaks Reached during the 70s*, CESARFAX (Center for Substance Abuse Research, University of Maryland at College Park, College Park, Md.) Feb. 12, 1996, at 1.

wise show an increase in use of marijuana and other drugs.⁴ Local school leaders have every reason to be dismayed by these reports, since many educational researchers find a correlation between drug use and destructive school behavior.⁵

Notwithstanding that professional educational organizations often take no official stance on the matter,⁶ local public schools are, in increasing numbers, jumping into the drug testing fray.⁷ The increase in testing could be based on increased levels of student drug use, school officials' concerns for student safety, or parental concerns about confronting their children about drugs.⁸ Unfortunately, less supportable although equally plausible rationales for the rise in student drug testing policies exist. They could be the result of increased levels of testing in private employment⁹ or over-generalization by the press of the Supreme

4. William J. Bailey et al., *Alcohol, Tobacco, and Other Drug Use by Indiana Children and Adolescents*, Indiana Prevention Resource Center Survey-1995, (Indiana Prevention Resource Center, Institute for Drug Abuse Prevention, Bloomington, Ind.) (last modified June 11, 1996) <http://www.drugs.indiana.edu/drug_stats/prc95/highs95.html>. The study reported that Indiana high school seniors who indicated daily use of marijuana increased between 1992 and 1995 from 3.9% to 7.4%. *Id.* Likewise, those seniors indicating monthly use of the drug increased from 14.4% in 1992 to 24.0% in 1995. *Id.*

5. See e.g., GARY L. ANDERSON, *WHEN CHEMICALS COME TO SCHOOL* 137 (1993) (noting studies which show a positive correlation between adolescent drug abuse and "negative attitudes toward school," "dropping out of school," "low achievement in school," and "disciplinary problems in school").

6. For example, in 1996 the National School Board Association ("NSBA"), a leader in American educational issues, took no official stance on such testing. *NSBA Resolutions, Beliefs & Policies* (Nat'l Sch. Board Ass'n, Alexandria, Va.) adopted Apr. 12 & 15, 1996. In their 1997 policy statement, the NSBA indicated that it "supports efforts to ensure that schools and school-related activities are free from alcohol, tobacco and [other] . . . substances," but it did not specifically endorse random urinalysis testing. *NSBA Resolutions, Beliefs & Policies* 13 (Nat'l Sch. Bd. Ass'n, Alexandria, Va.) adopted Apr. 25 & 28, 1997. Neither does the California Interscholastic Federation, the governing body of one of the nation's largest school markets, take a position on the issue. Joe Lago, *Dixon a Guinea Pig for Tests*, OAKLAND (CAL.) TRIBUNE, Sept. 13, 1996, at B-8.

7. In 1995, one researcher noted that at least 16 schools in 11 states were using some form of drug testing on their students. Eugene C. Bjorklun, *Drug Testing in Public Schools: A Legal Memorandum* (Nat'l Ass'n Secondary Sch. Principals, Reston, Va.), Sept. 1995, at 2. However, during the 1996-97 school year in Indiana alone at least seven schools subjected at least some of their students to drug testing. See *infra* notes 122-31 and accompanying text.

8. Witkin, *supra* note 2; see also, John Leland, *Parents' Dilemma*, NEWSWEEK, Feb. 12, 1996, at 68-69.

9. While surveys indicate that only 21.5% of companies were conducting drug testing in 1987, 74.5% were doing so in 1992. Kevin B. Zeese, *DRUG TESTING LEGAL MANUAL* (1990) at 1.11; see also Lois Yurow, *Alternative Challenges to Drug Testing of*

Court holding in *Vernonia School District 47J v. Acton*.¹⁰ The promotion of such plans by commercial organizations¹¹ might play a role as well. Finally, competitiveness of school corporations which, in the light of media criticism of public schools in general, wish to be perceived as being on the cutting edge in dealing with society's ill, could be the basis for this increase.¹²

Government Employees: Options after Von Raab and Skinner, 58 GEO. WASH. L. REV. 148, 148 (1989). Parents who themselves are required to take mandatory random drug tests to retain their jobs might be more likely to view such tests as not being invasive of their children's rights. Such a philosophy, similar to the "misery loves company" viewpoint to which Justice Rehnquist objected in *Delaware v. Prouse*, would espouse the belief that a governmental invasion becomes less offensive as the number of those who are similarly invaded increases. 440 U.S. 638, 664 (1979) (Rehnquist, J., dissenting).

10. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995). While the breadth of the holding remains to be defined by subsequent rulings, the *Vernonia* decision was widely reported as wholesale approval for mandatory random school drug testing of athletes. See e.g., *Murray Calls Wrong Play*, [Opinion], SALT LAKE TRIBUNE, Sept. 3, 1996, at A6; Robert Bryson, *School Drug Testing May Spread Across the State*, SALT LAKE TRIBUNE, Sept. 8, 1996, at B5; Tom Fuller, *Drug Testing Enters High School*, SEATTLE TIMES, Oct. 31, 1996, at A1; and Bill Graves, *Vernonia Boy Loses Appeal on Drug Test*, PORTLAND OREGONIAN, May 21, 1996, at B4. But see Perry A. Zirkel, *Drug Test Passes Court Test*, PHI DELTA KAPPAN, Oct. 1995, at 187-88 (a more complete summary). Other authors have noted the media's trend toward over-generalization of the *Vernonia* decision as well. See e.g., Wayne R. LaFave, *Computers, Urinals and the Fourth Amendment: Confessions of a Patron Saint*, 94 MICH. L. REV. 2553, 2586-87 (1996).

11. At Murray (Utah) H.S., the corporation took bids for the school's drug-testing business. Six companies competed for the job of training school personnel to recognize potential drug use and of conducting the tests. Robert Bryson, *Murray Prepares School Drug Tests*, SALT LAKE TRIBUNE, Jan. 30, 1997, at D4. A wide array of sources have a commercial interest on the drug testing phenomenon. Some advertise testing services catering to families and businesses. See e.g., *Parents' Resource Institute for Drug Free Education (PRIDE) Offers 'The Pride Tool Box: Building a Drug-Free Home'*, PR NEWSWIRE, Oct. 28, 1997, available in Westlaw at 10/28/97 PRWIRE 13:16:00. Others promote methods of avoiding positive urine tests. *Schemes to Beat Drug Tests on the Rise*, NOBLESVILLE (IND.) DAILY LEDGER, Feb. 28, 1997, at A2.

12. Adopting drug testing or other popular innovations can bring school corporations a great deal of positive publicity. Randall Aultman, a school administrator at Vernonia and author of its policy, has been featured on "national television shows such as 'Nightline' and 'Good Morning America' to speak about the Supreme Court case." Rachel Bachman, *After Winning, Schools Lax on Test*, PORTLAND OREGONIAN, Feb. 12, 1997, at B01. Additionally, he spoke in November, 1996, in Sacramento and in Los Angeles in April, 1997, to address the program he wrote. *Id.* Representatives of Noblesville (Ind.) schools spoke at the 1997 annual conference of the National School Boards' Association, presenting their student drug testing program. NATIONAL SCHOOL BOARDS ASSOCIATION, 57TH ANNUAL CONFERENCE PROGRAM 59 (1997). The Center for Substance Abuse Research co-sponsored a telephone survey which found that 76% of Marylanders supported random testing for high school athletes and 61% supported tests for all high school students. *Majority of Marylanders Support Requiring Random Drug Testing of All High School Students*, CESARFAX (Center for Substance Abuse Research, University of Maryland at College Park, College Park, Md.) Feb. 26, 1996, at 1.

Some "[s]chool administrators clearly view testing student-athletes as a stepping stone to global testing"¹³ and for this reason or others implement programs that exceed the boundaries of the program approved in *Vernonia*.¹⁴ Nonetheless, professional education organizations caution schools about matters to be contemplated prior to implementation of urinalysis testing.¹⁵

In Section I, this note will examine the historical background of students' rights regarding drug testing within the schools, emphasizing the holding in *Vernonia School District 47J v. Acton*. Section II will investigate the wide array of urinalysis programs currently in place throughout the United States. Section III will closely examine three testing programs currently implemented by Indiana schools: those of Noblesville Schools, Noblesville; Carmel Clay Schools, Carmel; and Hamilton South-eastern Schools, Fishers. It will also discuss each policy's susceptibility to a successful Fourth Amendment challenge. Finally, Section IV of the note will draw conclusions about a practical course of action for schools considering implementation of a random drug testing program for their students.

13. Rhett Traband, *The Acton Case: The Supreme Court's Gradual Sacrifice of Privacy Rights on the Altar of the War on Drugs*, 100 DICK. L. REV. 1, 25 (1995). See also, John J. Bursch, *The 4R's of Drug Testing in Public Schools: Random is Reasonable and Rights are Reduced*, 80 MINN. L. REV. 1221, 1224 (1996) (contending that the *Vernonia* decision authorizes random drug testing of entire student bodies).

14. One such example is that of Rush County Schools, which implemented a mandatory random testing program of all students involved in extracurricular activities, including both athletics and student clubs and organizations, as well as student drivers. The Rush County program was challenged in a suit brought by two families; each has children who were, prior to the policy, involved in extracurricular activities. *Suit Challenges Drug Tests by Rush County Schools*, INDIANAPOLIS STAR, Oct. 4, 1996, at B03 See *infra* note 126. Another Indiana corporation, Anderson Community Schools, "has a policy that any student suspended for three days or more must submit to a urine drug test before being readmitted." Ken de la Bastide, *Judge Sides with Schools in Test Dispute*, ANDERSON (IND.) HERALD BULLETIN, Jan. 10, 1998, at A1. The Indiana Court of Appeals, after initially ordering that a student challenging the policy be readmitted without testing pending a hearing before that court, rescinded the injunction against the school. Michael McCormack, *Appeals Court to Student: Take the Test*, ANDERSON (IND.) HERALD BULLETIN, Jan. 24, 1998, at A1.

15. J. Patrick Mahon, *Vernonia v. Acton: Should Schools Conduct Random Drug Tests of Student Athletes?*, NASSP BULL., Oct. 1995, at 52-55 (emphasizing consideration of the needs of the local community, the overall impact of a testing program on students, and the drug-prevention curriculum currently in use prior to implementation of a mandatory drug testing program). See also, Alan T. Sraga et al., *Random Drug Testing? Caution Advised*, ILL. ASS'N. SCH. BOARDS JOURNAL, Nov/Dec 1995 & Jan/Feb 1996, at 26.

I. HISTORICAL BACKGROUND OF STUDENT SEARCH AND SEIZURE RIGHTS IN PUBLIC SCHOOLS

More than 50 years ago, the United States Supreme Court held that “[t]he Fourteenth Amendment, as . . . applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education are not excepted.”¹⁶ While acknowledging that judges need to give educational institutions wide latitude to effectively carry out their mission, the Court indicated that school officials’ decisions were still bound by “the limits of the Bill of Rights.”¹⁷ In *West Virginia State Bd. Of Educ. v. Barnette*, addressing mandatory flag salutes in public schools, the Court noted the public schools’ role in teaching American students about the importance of the Constitution and its role in our democracy. To reinforce those lessons, the local school board must provide “scrupulous protection of Constitutional freedoms of the individual, if we are not to . . . teach youth to discount important principles of our government as mere platitudes.”¹⁸

However, the Fourteenth Amendment did not cause the entire Bill of Rights to become immediately applicable to the individual States. Instead, the Supreme Court has taken a selective approach to drawing individual liberties under the protection of the Fourteenth Amendment. The Fourth Amendment,¹⁹ dealing with restrictions on searches and seizures, was not specifically declared applicable to the States until 1961, when the Supreme Court decided *Mapp v. Ohio*. Since that decision, “[s]chool officials . . . [have been deemed] officers of the state and, therefore, are bound by the constraints of the Fourth Amendment as applied to the states through the Fourteenth Amendment.”²⁰

Although the courts have frequently insisted that the Fourth Amendment applies to the States, it was not until the Supreme

16. 319 U.S. 624, 637 (1943).

17. *Id.*

18. *Id.*

19. The Fourth Amendment reads “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.” U.S. CONST. amend. IV.

20. Robert C. Farley, Jr., *Constitutional Law—Suspicionless, Random Urinalysis: The Unreasonable Search of the Student Athlete*, 68 TEMP. L. REV. 439, 440 (1995).

Court heard *New Jersey v. T.L.O.* that it had the opportunity to decide to what extent the restrictions and protections provided therein would be applied to public schools.²¹ In *T.L.O.*, one of two girls found smoking in a school restroom²² challenged a prosecutor's attempt to admit evidence of a school official's search of T.L.O.'s belongings and of T.L.O.'s later admission to dealing in marijuana at the school at a subsequent delinquency hearing.²³ The assistant vice-principal had searched T.L.O.'s purse, after she denied smoking, to determine if she had cigarettes in her possession.²⁴ When the administrator opened the purse to look for cigarettes, he also found rolling papers, which, in his mind, indicated the possibility of marijuana use.²⁵ The assistant vice principal continued his search of T.L.O.'s purse; as a result, he encountered the evidence the prosecutor sought to use, including a small amount of marijuana.²⁶

The Court specifically rejected the State's argument that searches conducted by school officials were not subject to the provisions of the Fourth Amendment.²⁷ However, the Court was concerned about placing undue burdens on the efficiency of the schools.²⁸ For that reason, and because "students within the school environment have a lesser expectation of privacy than members of the population generally,"²⁹ the Court determined that warrants were not needed.³⁰ The Court held that reasonable suspicion, rather than probable cause, was the level of evidence necessary for searches of public school students.³¹ The Court noted that the "determination of the standard of reasonableness governing any specific classes of searches requires 'balancing the need to search against the invasion which the search entails.'"³² Specifically, the Justices indicated that a search must be "justified at its inception" by "reasonable grounds for suspecting that the search will turn up evidence that the student has

21. 469 U.S. 325 (1985).

22. *Id.* at 328.

23. *Id.* at 328-29.

24. 469 U.S. 325 (1985).

25. *Id.*

26. *New Jersey*, 469 U.S. at 328.

27. *Id.* at 334, 336-37.

28. *Id.* at 340.

29. *Id.* at 348 (Powell, J., concurring).

30. *Id.* at 340.

31. *New Jersey*, 469 U.S. at 340.

32. *Id.* at 337 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967)).

violated or is violating either the law or the rules of the school."³³ Also, the scope of the search must be "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."³⁴ To the majority, a search based on the reasonable inferences drawn from materials within plain sight during a search conducted because the student was suspected of violating school rules was sufficient. As a result, T.L.O.'s effort to have the search of her belongings declared an unconstitutional violation of the Fourth Amendment failed.

In December of the same year, a New Jersey court heard *Odenheim v. Carlstadt-East Rutherford Regional School District*.³⁵ Relying in part on the T.L.O. holding, the *Odenheim* court ruled that a school policy which required students to complete, under compulsion of not being enrolled in school for the year,³⁶ a urinalysis test as part of a "comprehensive medical examination," was a violation of the Fourth Amendment. Included in the urinalysis test was a procedure screening for alcohol and other chemicals.³⁷

If a student were to test positive, he or she would not be allowed to enroll without the authorization of the district's medical officer.³⁸ The authorization could only be granted if the Superintendent's recommendations, as spelled out in the policy, were followed.³⁹ The guidelines specifically authorized the Superintendent to recommend periodic parental conferences between the Superintendent, the school physician, the parents, and the student involved; referral to the district's alcohol and drug student assistance program; or referral to the District Division of Youth and Family Services.⁴⁰

The *Odenheim* court found the policy was "an attempt to control student discipline under the guise of a medical examination, thereby circumventing strict due process requirements."⁴¹ The court based its ruling on the fact that the school district

33. *New Jersey*, 469 U.S. at 342.

34. *Id.*

35. 510 A.2d 709 (N.J. Super. Ct. Ch. Div. 1985).

36. *Id.* at 711.

37. *Id.*

38. *New Jersey*, 510 A.2d at 716.

39. *Odenheim*, 510 A.2d at 717.

40. *Odenheim*, 510 A.2d at 711.

41. *Id.* at 713.

made no particularized showing of need for the drug testing and that only five percent of the student body made inquiry of or was referred to the corporation's student assistance counselor while the policy was in force.⁴² Noting that school policy already provided a means for "exclusion and/or suspension of students who are involved with drug activity,"⁴³ the *Odenheim* court held the testing was not "reasonably related in scope to the circumstances which justified the interference . . . in the first place."⁴⁴

Four years later, another opportunity to address the issue of random, mandatory, suspicionless drug testing arose in *Brooks v. East Chambers Consolidated Independent School District*.⁴⁵ The East Chambers school board implemented a policy which provided for random mandatory drug testing of all "students in grades 6-12 who wish[ed] to participate in school sponsored extra-curricular activities."⁴⁶ The policy was instituted as a result of complaints by "a small group of parents and students."⁴⁷ The school's investigation of its drug concerns "primarily consisted of having the three students who had appeared before the school board go through a high school yearbook . . . and answer four questions the principal posed to them."⁴⁸ After its cursory study, the board adopted urinalysis testing and it did so without reflecting in the minutes of the board meeting "any particular rationale for the Board's choosing urinalysis over any of the counseling alternatives."⁴⁹

Rejecting the arguments that athletes are role models for the rest of the community and that students who use drugs are a danger to themselves and others, the *Brooks* court noted that "there is no evidence in the record that the use of drugs or alcohol at [the school] . . . creates some particular problem in the school's extra-curricular program."⁵⁰ In fact, the court observed that there was "little evidence that drug or alcohol abuse by students constituted a major problem in the operation of the

42. *Odenheim*, 510 A.2d at 710.

43. *Id.*

44. *Id.*

45. 730 F.Supp. 759 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991).

46. *Id.* at 760.

47. *Brooks*, 730 F.Supp. at 760.

48. *Id.*

49. *Id.* at 761.

50. *Id.*

schools.”⁵¹ The court noted that the school canceled its drug sniffing dog program “because the dogs did not find enough drugs to justify the program.”⁵²

The court indicated that “[r]equiring that the school official have ‘reasonable cause’ for his actions is a less stringent standard than that applicable to law enforcement officers, yet requires more of the school official than good faith or minimal restraint.”⁵³ The court found that no extraordinary circumstances existed at the school to substantiate the program.⁵⁴ While stating that “the urinalysis program could exist . . . if it were shown that participants in extra-curricular activities are much more likely to use drugs than non-participants, or that drug use by participants interfered with the school’s education much more seriously than does drug use by non-participants,”⁵⁵ the *Brooks* court found neither potential justification to be supported by the evidence.⁵⁶

In striking down the policy, the court said the urinalysis testing was “an across-the-board, eagle eye examination of personal information of almost every child in the school district.”⁵⁷ Further, the *Brooks* court found the policy unreasonable “because it is not likely to accomplish its ostensible goals.”⁵⁸ The court commented that the time delay between initial testing and a student’s participation in an extra-curricular activity did virtually nothing to assess a student’s chemical impairment at the time of participation.⁵⁹

Finally, the *Brooks* court found that a school system cannot justify student urinalysis testing “by the global goal of prevention of substance abuse.”⁶⁰ The *Brooks* court granted permanent injunctive relief after holding the urinalysis program unsupported “by the compelling interest the school authorities must have before they can implement the warrantless searches of the

51. *Brooks*, 730 F.Supp. at 761.

52. *Id.*

53. *Id.* at 764.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Brooks*, 730 F.Supp. at 765.

58. *Id.*

59. *Brooks*, 730 F.Supp. at 765.

60. *Id.* at 766.

pupils."⁶¹ The injunction was upheld by the 5th Circuit Court of Appeals.⁶²

Less than 15 years after *T.L.O.*, and following several lower courts' rulings on the constitutionality of urinalysis testing, the Supreme Court was once again called upon to address search and seizure issues involving public schools. The Supreme Court granted certiorari to hear *Vernonia School District 47J v. Acton*, a case revolving around random testing of student athletes in a public school, in order to resolve differences between the courts on that and similar issues.⁶³

James Acton, a student at Vernonia, challenged the local school board's implementation of a policy that required all student athletes to agree to subject themselves to urinalysis testing at the inception of the athletic season and, on a random basis, throughout the season.⁶⁴ The school implemented the testing program after other efforts failed to curb a "sharp increase in

61. 730 F. Supp. at 766.

62. The 5th Circuit Court of Appeals affirmed without comment the lower court's ruling. *Brooks v. East Chambers County Sch.*, 930 F.2d 915 (5th Cir. 1991).

63. 515 U.S. 646 (1995). When the 9th Circuit Court of Appeals heard the case, it agreed with Acton that the Vernonia policy violated both the Fourth and Fourteenth Amendments. *Acton v. Vernonia Sch. Dist. 47J*, 23 F.3d 1514 (1994). The ruling contradicted that of the 7th Circuit Court of Appeals, which had previously upheld a random drug testing program of student athletes at an Indiana high school. *Schall v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 (7th Cir. 1989). The disparity between the holdings of the 7th and 9th Circuit Courts of Appeal may have influenced the U.S. Supreme Court's decision to grant certiorari to hear the *Vernonia* case. Prior to the Supreme Court's review of *Vernonia*, most courts hearing student search and seizure cases required at least some level of individualized suspicion to uphold a school search. See e.g., *Odenheim v. Odenheim v. Carlstadt-East Rutherford Reg'l Sch. Dist.*, 510 A.2d 709 (N.J. Super. Ct. Ch. Div. 1985) (policy requiring all students to submit results of drug screen as part of school's mandatory "comprehensive medical examination" violates 4th Amendment); *Moule by Moule v. Paradise Valley Unified Sch. Dist. No. 69*, 863 F. Supp. 1098 (D. Ariz. 1994) (mandatory random drug testing of athletes violates State & Federal constitution and policy predicating athletic participation on "voluntary" enrollment in drug testing program was not truly voluntary); *Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991) (school's testing program mandating random suspicionless urinalysis of all students involved in extracurricular activities violates 4th Amendment); *Kuehn v. Renton Sch. Dist. No. 403*, 694 P.2d 1078 (Wash. 1985) (blanket search of student luggage prior to school trip did not meet reasonable belief standard requiring individualized suspicion). But see *Desilets v. Clearview Reg'l Bd. of Educ.*, 627 A.2d 667 (N.J. Super. Ct. App. Div. 1993) (blanket search of student luggage prior to voluntary school trip was warranted given children's propensity to impulsive but dangerous acts).

64. 515 U.S. at 650. Also noted in Respondent's Brief, U.S.S. Ct., available in 1995 WL 89313 at *10.

drug use,"⁶⁵ which the Vernonia officials believed centered on the athletes themselves.⁶⁶ Acton, who wanted to participate in the local athletic program, challenged the policy as violative of the Fourth and Fourteenth Amendments to the U.S. Constitution and of Article I, § 9 of the Oregon Constitution.⁶⁷ The U.S. Supreme Court, overturning the decision of the 9th Circuit Court of Appeals, ruled that the testing program Vernonia implemented had not abridged Acton's right to be free of unreasonable searches and seizures as guaranteed by the Fourth Amendment.⁶⁸

The Court determined that two levels of analysis were required by the case Acton presented. It must first determine if urinalysis of students was indeed a search.⁶⁹ If so, then a second analysis was required to decide whether such a search was violative of the Fourth Amendment.⁷⁰ Relying on its holding in *Skinner v. Railway Labor Executives' Association*,⁷¹ the Court found that "state-compelled collection and testing of urine, such

65. *Vernonia*, at 648.

66. *Id.* at 649.

67. *Id.* at 651. Article I, § 9 of the Oregon Constitution states: "No law shall violate the right of the people to be sure in their persons, houses, papers and effects, against unreasonable search, or seizure; and no warrant shall issue but upon probable cause, supported by oath, or affirmation, and particularly describing the place to be searched, and the person or thing to be seized." OR. CONST. Art 1, § 9. While a discussion of the viability of urinalysis testing under State constitutional law is outside the scope of this note, it is a consideration for any public school addressing the issue. See e.g., Kristi L. Helgeson, *To Test or Not to Test: Article 1, Section 7 and Random Drug-Testing of Washington's Public School Student-Athletes*, 71 WASH. L. REV. 797 (1996); Alexander C. Black, Annotation, *Search Conducted by School Official or Teacher as Violation of Fourth Amendment or Equivalent State Constitutional Provision*, 31 A.L.R. 5TH 229 (1995); Robert M. Pitler, *Independent State Search and Seizure Constitutionalism: The New York State Court of Appeals' Quest for Principled Decisionmaking*, 62 BROOK. L. REV. 1 (1996).

68. 515 U.S. at 666. The Court remanded the claim on the Oregon constitution to the 9th Circuit Court of Appeals for further proceedings. *Id.* The 9th Circuit, by a vote of 2 to 1, refused to certify the question to the Oregon Supreme Court, indicating that they believed the Oregon Supreme Court would find that Article 1, § 9 of the Oregon Constitution was coextensive with the Fourth Amendment. *Acton v. Vernonia Sch. Dist.* 47J, 66 F.3d 217, 218 (1995). To date, the Oregon Supreme Court has not been heard on the issue of suspicionless drug testing of students in relation to the Oregon constitution.

69. *Acton*, 515 U.S. at 652.

70. *Acton*, 515 U.S. at 652.

71. 489 U.S. 602 (1989) (holding that mandatory random suspicionless drug testing of employees in highly-regulated industries wherein a single drug-related incident could jeopardize countless lives did not violate the 4th Amendment).

as that required by the Student Athlete Drug Policy, constitutes a 'search.'⁷²

Next, the Court noted that "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'⁷³ While the Justices affirmed that reasonableness usually requires law enforcement officials to acquire a warrant prior to carrying out a search,⁷⁴ they reiterated their holding from *T.L.O.* that to require warrants for searches conducted by public school officials would undermine their ability to "maintain order in the schools."⁷⁵

The Court balanced four factors in determining the reasonableness of Vernonia's program: 1) "the scope of the legitimate expectation of privacy,"⁷⁶ 2) "the degree of intrusion,"⁷⁷ 3) "the nature and immediacy of the governmental concern at issue, . . . and (4) the efficacy of this means for meeting it."⁷⁸ Although the majority reiterated that students do not "'shed their constitutional rights. . . at the schoolhouse gate,'"⁷⁹ they found that student athletes had little legitimate expectation of privacy.

The majority noted that student athletes are commonly subjected to regulation beyond that of other students.⁸⁰ Athletic regulation typically includes more rigorous health checks than those normally conducted by the schools on the rest of the student population.⁸¹ The Court also observed that student athletes have a lesser expectation of privacy since athletic locker rooms require relatively public undress and are "not for the bashful."⁸²

Once again referencing *Skinner*, the Court indicated that "the degree of intrusion depends upon the manner in which production of the urine sample is monitored."⁸³ The policy provided conditions which, in the Court's view, were substantially

72. 515 U.S. at 652.

73. *Id.*

74. *Id.* at 653.

75. *New Jersey v. T.L.O.*, 469 U.S. 325, 340-41 (1985).

76. 515 U.S. at 658.

77. *Id.*

78. *Id.* at 660.

79. *Acton*, 515 U.S. at 656-57 (quoting *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969)).

80. *Id.* at 657.

81. *Id.* at 656-57.

82. *Id.* at 657.

83. *Acton*, 515 U.S. at 658.

similar to the conditions found in public restrooms.⁸⁴ The sample production occurred in standard restroom facilities.⁸⁵ While the test proctor, a person of the student's gender, could auditorially monitor the sample's production, no visual observation of a student's act of urination was conducted; as such, the majority did not perceive a high level of intrusiveness of the manner of the policy's implementation.

Neither did the Court see high levels of intrusiveness in the type of information which the urinalysis provided. While given pause by Vernonia's practice of requiring students to indicate medical information regarding legitimate chemical use prior to the production of the urine sample,⁸⁶ the majority swept aside their concern by postulating that, had he objected, the school might "have permitted [Acton] to provide the requested information in a confidential manner"⁸⁷ The Court determined "that the invasion of privacy was not significant" because the tests conducted were limited to those identifying use of commonly abused chemicals and because test results were "disclosed only to a limited class of school personnel who have a need to know . . . and they are not turned over to law enforcement authorities or used for any internal disciplinary function."⁸⁸

Because students in general, and student athletes in particular, have lesser expectations of privacy, and because the use and availability of testing results was strictly controlled, the Supreme Court found that students had little legitimate expectation of privacy in the urinalysis testing.

In examining its final consideration, the type of governmental concern at issue, the Court cautioned against a blanket interpretation of the "compelling state interest" test expressed in *Skinner* and *Von Raab*.⁸⁹ The Court indicated the term should be read to mean "an interest which appears important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy."⁹⁰

84. *Acton*, 515 U.S. at 658.

85. *Id.*

86. *Acton*, 515 U.S. at 659.

87. *Id.* at 660. Neither did the dissent consider this a preeminent concern about Vernonia's testing program. *Id.* at 685, n. 2 (O'Connor, J., dissenting).

88. *Id.* at 658.

89. *Acton*, 515 U.S. at 660-61.

90. *Id.* at 661.

The Court proceeded from this nebulous standard to find that the concern addressed by the Vernonia School Board was compelling.⁹¹ The Court noted that "the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted."⁹² The Court found that the schools had a heightened compulsion to act because these threats were visited "upon children for whom [the school] has undertaken a special responsibility of care and direction."⁹³

The Court relied on the District Court's finding that student athletes were at the core of Vernonia's drug problems⁹⁴ to conclude that testing of athletes was both reasonable and likely to be effective.⁹⁵ The Court brushed aside Acton's argument that the same goal could be met by a more narrow testing program based on reasonable suspicion. The majority found that such testing was neither required by the Court's previous rulings nor practical in public school settings.⁹⁶

The Court summarized its findings by stating that, "[t]aking into account all the factors . . . the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search . . . Vernonia's Policy is reasonable and hence constitutional."⁹⁷

The *Vernonia* decision is asserted by critics to raise as many questions about school drug testing schemes as it answered. It

91. Perhaps Vernonia's problems were overestimated by both the school corporation and the Court. Less than two years after the district won its precedent-setting ruling, the school only tested the girls' basketball team and the cheerleading squads by the beginning of the spring semester of the school year. No random testing was done during the fall semester. Rachel Backman, *After Winning, Schools Lax on Test*, PORTLAND OREGONIAN, Feb. 12, 1997, at B01.

92. *Acton* 515 U.S. at 662.

93. *Id.*

94. *Acton v. Vernonia Sch. Dist.* 47J, 796 F. Supp. 1354, 1357 (D. Or. 1992).

95. 515 U.S. at 663. The Court's reasoning on this point is conclusory. A better view is that expressed by the Southern District of Texas: urine tests do not measure present impairment; therefore, they do little to curb the school's valid concern about student impairment while on school grounds. *Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F. Supp. 759, 765 (S.D. Texas, 1989). If, however, one were to accept urinalysis as a means for identification of drug-impairment, Justice O'Connor aptly pointed out that the very disruption the school indicated it saw should be the basis of a more reasonable testing policy—one in which perpetrators of the disruption would find themselves the candidates for the drug testing. 515 U.S. at 679-80 (O'Connor, J., dissenting).

96. 515 U.S. at 663-64.

97. *Id.* at 664-65.

remains to be seen whether each of the factors noted in *Vernonia* is necessary to support a mandatory drug testing program. Perhaps a single factor, or even a combination of some but not all of the factors noted, will be sufficient to support the implementation of mandatory drug testing of students in public schools in the future.⁹⁸

For example, the courts will have to determine whether drug testing programs can be administered to students participating in other "voluntary activities" at a school and which school-based activities should be considered "voluntary."⁹⁹ Additionally, the courts will need to decide what level of justification is necessary to substantiate a school's claim of compelling interest based on maintenance of the educational environment. Will it be sufficient to show that drug use among students nationwide has caused an increase in disciplinary problems in the public schools,¹⁰⁰ or will a more direct problem in the individual school,

98. The District Court which heard *Vernonia* required all factors to be present. It indicated that the "holding . . . is limited to the unique circumstances which confronted the Vernonia School staff." 796 F. Supp. at 1364. That court emphasized that "whether a similar program could withstand constitutional scrutiny in large metropolitan schools or in other small rural schools will necessarily depend, at a minimum, upon evidence of drug related problems, attempts to address the problems in less intrusive ways, and establishing a connection between the stated objectives and the means chosen to achieve those objectives." *Id.* at 1364-65.

99. See, e.g., Darrel Jackson, Note, *The Constitution Expelled: What Remains of Students' Fourth Amendment Rights?*, 28 ARIZ. ST. L.J. 673, 693-95 (1996) (criticizing the decision and predicting expansion of the scope of random searches in light of the *Vernonia* decision); Denise E. Joubert, *Message in a Bottle: The United States Supreme Court Decision in Vernonia School District 47J v. Acton*, 56 LA. L. REV. 959, 978. (arguing that *Vernonia's* emphasis on athletes' role-modeling does not lend itself to an extension to testing of an entire student body). This debate has already begun. *Todd v. Rush County Sch.*, based on both federal and state constitutional grounds, challenged Rush County (Ind.) Schools' random testing of student extra-curricular participants and student drivers. The district court's ruling on the dispute is available at 1997 WL 710661. The 7th Circuit Court of Appeals recently upheld testing of the extra-curricular participants but found the issue of suspicionless urinalysis testing of student drivers unripe for review. *Appeals Court Upholds Drug Testing of Non-Athletes*, ANDERSON (IND.) HERALD-BULLETIN, Jan. 15, 1998, at A5.

100. The District Court first hearing *Vernonia* suggested not. It indicated that, "a school may not justify a random urinalysis program upon amorphous statistics or generalized notions about the national drug problem." 796 F. Supp. at 1363. This view is supported by Justice Scalia's dissent in *Von Raab*. He took exception to the urinalysis testing in *Von Raab* because "the Government's justifications [were] notably absent, revealingly absent, . . . and dispositively absent [of] . . . the recitation of even a single instance" of the problems for which the government indicated it had instituted the testing program. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 682 (1989) (Scalia, J., dissenting). Scalia, the author of the *Vernonia* opinion, indicated in his dissent to *Von Raab* that "impairment of individual liberties cannot be the means

or a particular identifiable group within the school, need to be shown?¹⁰¹

Finally, the courts will need to determine whether a school's interest, once found to be compelling and therefore supportive of the suspicionless searches, can ever diminish sufficiently so that continuation of testing would be found inherently unreasonable.

The Court's "caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts"¹⁰² may be interpreted in subsequent cases to mean that *Vernonia* should be read narrowly on its facts, thus not subjecting large segments of this nation's teenagers to "the national frenzy over the war-on-drugs."¹⁰³ Notwithstanding this caution, however, many schools are adopting drug testing policies which exceed the facts of *Vernonia* in an attempt to determine the breadth of drug-testing license which the Court will permit for public schools.¹⁰⁴

II. STUDENT DRUG TESTING PROGRAMS AFTER *VERNONIA*

As was foreseen by many of those who commented on the *Vernonia* decision, school-based student drug testing has greatly increased after the Supreme Court issued its ruling. In Utah, several schools are considering the drug testing option, and a few have recently adopted it. One district, Murray, is testing

of making a point; . . . symbolism, even symbolism for so worthy a cause as the abolition of unlawful drugs, cannot validate an otherwise unreasonable search." *Id.* at 687.

101. Jacqueline A. Stefkovich & G. Michael O'Brien, *Drug Testing of Students in Public Schools: Implications of Vernonia School District v. Acton for Other Types of School Related Drug Searches*, 113 ED. LAW REP. 521, 534-35 (1996). School officials often seek to substantiate a testing program on the generalized argument that "[t]here is a drug problem everywhere." T.J. Wilham, *Schools Ready to Start Random Drug Testing Policy*, INDIANAPOLIS STAR, May 30, 1997, at W04. See also T.J. Wilham, *Tri-West Ponders Drug Testing for Athletes, Drivers*, INDIANAPOLIS STAR, Apr. 16, 1997 at W01.

102. 515 U.S. at 664.

103. *Acton v. Vernonia Sch. Dist.* 47J, 66 F.3d 217, 220 (9th Cir. 1995) (Reinhardt, J., dissenting). For a criticism of the *Vernonia* reasoning, see Jason S. Marks, *Mission Impossible? Rescuing the Fourth Amendment from the War on Drugs*, CRIMINAL JUSTICE, Spring 1996, at 16.

104. Some school officials make no secret of their desire to "get as many kids . . . eligible to be tested as possible." John Masson, *School Board Orders Drug Policy Prepared*, INDIANAPOLIS STAR, Apr. 10, 1997, at S01. Among the means being investigated is the potential for construing "riding a bus to school . . . as an extracurricular activity," which at least one district interprets as having met with acceptance by the high Court. *Id.*

athletes as well as students who are suspected of chemical abuse.¹⁰⁵ Mountain High School requires tests for poor attendance or grades, as well as fighting, drug possession and other misbehavior, such as bringing pagers or drug paraphernalia to school.¹⁰⁶ Another school, Carbon Elder School District,¹⁰⁷ has a testing policy also. While Box Elder discontinued the voluntary testing program it had until 1993 out of fear of court action,¹⁰⁸ Weber School District is considering the adoption of its own student drug testing policy.¹⁰⁹

In Washington State, four high schools drug tested some or all of their students during the 1996-97 school year. Burlington-Edison High School conducted random testing of its extra-curricular participants but had no academic penalty for positive test results.¹¹⁰ Taholah High School conducted blanket testing of athletes during the preseason and random testing of them throughout the season.¹¹¹ Lewis & Clark High School conducted voluntary testing of its football players,¹¹² and Orcas Island High School conducted urinalysis on athletes suspected of drug use but only after a meeting between the school administration, the student, and his or her parents.¹¹³

California's Dixon High School became the first school in its state to implement a testing policy.¹¹⁴ There, during the 1996-97 school year, the school conducted random testing of students involved in the school's athletic program.¹¹⁵ The program has

105. Robert Bryson, *School Drug Testing May Spread Across the State*, SALT LAKE TRIBUNE, Sept. 8, 1996, at B5.

106. Hilary Groutage, *Davis School May Require Drug-Test Consent*, SALT LAKE TRIBUNE, Aug. 21, 1996, at B5. Critics of the program warn that drug testing could chase away the very students most in need of the alternative school's help. Katherine Kapos, *Alternative School Adopts Drug-Testing Plan*, SALT LAKE TRIBUNE, Sept. 4, 1996, at B2.

107. Bryson, *supra* note 108.

108. Bryson, *supra* note 108.

109. *Id.*

110. Tom Fuller, *Burlington One of Four Schools in the State to Employ Drug Tests*, SEATTLE TIMES, Oct. 31, 1996 (visited Mar. 18, 1998) <<http://www.seattletimes.com/sbin/farecord?NS-search-set=/35107/aaaa002Hh107d35&NS-doc-offset=8&>>. In the fall of 1996, Burlington spent almost \$13,000 for 424 tests. The result was a single student who tested positive. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. Jan Ferris, *Drug Crackdown vs. Student Rights*, SACRAMENTO BEE, Oct. 24, 1996, at A1.

115. *Id.*

"been copied by . . . the eight-campus Nevada Union High School District in Grass Valley (Cal.)."¹¹⁶ In Alabama, the state's attorney general has promoted state-wide random testing of high school athletes,¹¹⁷ while in Tulia, Texas, a senior who is president of the local National Honor Society is suing the Tulia School Board, of which his father is a member, for enacting a policy mandating "consent to a random drug testing in order for students to take part in athletics and other extracurricular activities."¹¹⁸

Indiana schools have been equally active in the area of student drug testing. At least seven Indiana districts drug tested some portion of their student populations during the 1996-97 term. Schools involved included Adams Central Community Schools,¹¹⁹ Noblesville Schools,¹²⁰ Hamilton Southeastern Schools,¹²¹ Carmel Clay Schools,¹²² Rush County Schools,¹²³ Tippecanoe School Corporation,¹²⁴ and Greenwood Community

116. Jan Ferris, *Drug Crackdown vs. Student Rights*, SACRAMENTO BEE, Oct. 24, 1996, at A1.

117. Joe Lago, *Dixon a Guinea Pig for Tests*, OAKLAND (CAL.) TRIBUNE, Sept. 13, 1996, at B-1.

118. Kerry A. White, *Drug-Test Policy Spurs Student to Sue Board*, EDUCATION WEEK, Feb. 19, 1997, at 5.

119. Adams Central High School Student Handbook 1996-1997 at 27-28 (on file with the *Journal of Education and Law*). Adams Central Community Schools enrolls approximately 1200 students. Indiana Dep't of Educ., 1997 INDIANA SCHOOL DIRECTORY 61 (Mar. 1997). The school is directed by Superintendent Larry Rausch, 222 W. Washington St., Monroe, IN 46772. *Id.*

120. *Infra* notes 132-46 and accompanying text. Noblesville Schools is a district enrolling approximately 5850 students. Indiana Dep't of Educ., 1997 INDIANA SCHOOL DIRECTORY 72 (Mar. 1997). Contact with the school can be made via Dr. John Ellis, 1775 Field Dr., Noblesville, IN 46060. *Id.*

121. *Infra* notes 161-88 and accompanying text. Hamilton Southeastern Schools has an approximate enrollment of 6050 students. Indiana Dep't of Educ., 1997 INDIANA SCHOOL DIRECTORY 71 (Mar. 1997). For further information, contact Dr. Charles Leonard, Superintendent, 13485 Cumberland Rd., Fishers, IN 46038. *Id.*

122. *Infra* notes 148-60 and accompanying text. Carmel Clay Schools has a student enrollment of approximately 10,400. Indiana Dep't of Educ., 1997 INDIANA SCHOOL DIRECTORY 71-72 (Mar. 1997). The school is directed by Dr. Stephen Tegarden, 5201 E. 131st St., Carmel, IN 46033. *Id.*

123. *See supra* notes 15 and 102. Rush County School has a student enrollment of approximately 2900. Indiana Dep't of Educ., 1997 INDIANA SCHOOL DIRECTORY 92 (Mar. 1997). Contact with the school can be made via Dr. Edwin Lyskowinski, 330 W. 8th St., Rushville, IN 46173. *Id.*

124. Board of School Trustees, Tippecanoe School Corporation, Policy 5531 (on file with the *Journal of Education and Law*). Tippecanoe School Corporation is a rural district enrolling approximately 8800 students. Indiana Dep't of Educ., 1997 INDIANA SCHOOL DIRECTORY 96 (Mar. 1997). Further inquiries about the school or its policy can be made via Dr. Richard Wood, 21 Elston Rd., Lafayette, IN 47905. *Id.*

Schools.¹²⁵ Additionally, the Metropolitan School District of Lawrence Township¹²⁶ and North Daviess Community Schools¹²⁷ are in the process of creating student drug testing policies, and the South Bend Community School Corporation¹²⁸ is investigating the advisability of such a program.

III. ASSESSMENT OF TESTING POLICIES ADOPTED BY THREE INDIANA SCHOOL CORPORATIONS

In this section, three policies, those of Noblesville Schools (III, A), Carmel-Clay Schools (III, B) and Hamilton Southeastern Schools (III, C), will be analyzed. The policy implemented by each school, in some ways similar to those of other districts, is unique to the individual community the school corporation serves. As a result, the susceptibility to a Fourth Amendment challenge varies among them.

A. Noblesville Schools

The Board of School Trustees of Noblesville Schools has adopted a voluntary testing program offered to students enrolled at Noblesville High School.¹²⁹ The policy,¹³⁰ the need for which

125. (Greenwood Community Schools) Procedures & Protocols for Drug Testing Program Implementation (Sept. 27, 1996) (on file with the *Journal of Education and Law*). Greenwood Community School Corporation is a district enrolling approximately 3550 students. Indiana Dep't of Educ., 1997 INDIANA SCHOOL DIRECTORY 76 (Mar. 1997). To contact the school, write to Dr. Robert Brenton, Superintendent, P.O. Box 218, Greenwood, IN 46142. *Id.*

126. M.S.D. of Lawrence Township Proposed Student Drug Testing Policy (revised Feb. 17, 1997) (on file with the *Journal of Education and Law*). M.S.D. of Lawrence Township has an approximate enrollment of 14,300. Indiana Dep't of Educ., 1997 INDIANA SCHOOL DIRECTORY 83 (Mar. 1997). The school can be contacted via the Office of the Superintendent, 7601 E. 56th St., Indianapolis, IN 46226. *Id.*

127. Letter from Wayne B. Pearl, Superintendent, North Daviess Community Schools to the author (Feb. 21, 1997) (on file with the *Journal of Education and Law*). North Daviess Community Schools is a district enrolling approximately 1250 students. Indiana Dep't of Educ., 1997 INDIANA SCHOOL DIRECTORY 65 (Mar. 1997). The school can be contacted via Superintendent Wayne Pearl, Rt. 1 Box 110, El Nora, IN 47529. *Id.*

128. Letter from Sgt. William L. Bernhardt, Safety & Security Coordinator, South Bend Community School Corporation to the author (Feb. 11, 1997) (on file with the *Journal of Education and Law*). South Bend Community School Corporation has an enrollment of approximately 21,000. Indiana Dep't of Educ., 1997 INDIANA SCHOOL DIRECTORY 93-94 (Mar. 1997). For further information, contact Dr. Virginia Calvin, Superintendent, 635 South Main St., South Bend, IN 46601. *Id.*

129. For examples of articles detailing the lively community debate over the Noblesville, Ind. drug testing plan, see, Matt Youmans, *Drug-Testing Proposal OK'd at Noblesville*, INDIANAPOLIS NEWS, May 18, 1994, at B3; Glenna Miller, *Vote "No" on Drug*

the school supports by statistics from the Indiana Prevention Resource Center showing above state and national average use of some chemicals by Noblesville students,¹³¹ provides for the student's enrollment in a random testing pool upon the written consent of both the student and his/her parents.¹³² Students selected for testing by the random process are required to report to a testing site where the urine sample is provided without visual monitoring to collection personnel who are not members of the local school staff.¹³³ Test samples are "turned over to a NIDA approved testing laboratory,"¹³⁴ where the school policy authorizes testing solely for a limited list of chemicals commonly abused by teenagers.¹³⁵ Samples testing positive are retained for a limited time for retesting based on a parental/student challenge of the results, and students may, at their option, provide

Testing, [letter to the editor], NOBLESVILLE (IND.) DAILY LEDGER, May 17, 1994, at A4; Matt Keating, *Drug Tests: Students Disagree with Proposal*, NOBLESVILLE (IND.) DAILY LEDGER, Mar. 25, 1994, at A1; Matt Keating, *Drug Testing for All Pupils?*, NOBLESVILLE (IND.) DAILY LEDGER, Mar. 16, 1994, at A1; Julie N. Lynem, *Noblesville to Start Drug Test Program*, NOBLESVILLE (IND.) DAILY LEDGER, Mar. 29, 1995, at A1; Laura Musall, *Will Drug Testing Change Attitudes?*, NOBLESVILLE (IND.) DAILY LEDGER, Sept. 26, 1994, at A1; Matt Keating, *Drug Tests to Come?* NOBLESVILLE (IND.) DAILY LEDGER, Jan. 27, 1994, at A1; *On the School Bus* [editorial], NOBLESVILLE (IND.) DAILY LEDGER, Sept. 19, 1994, at A4; and Jane Marciniak, *Proceed with Great Caution*, [letter to the editor], NOBLESVILLE (IND.) DAILY LEDGER, May 9, 1994, at A4.

130. Board of School Trustees, Noblesville (Ind.) Schools, Policy 5530.01 [hereinafter Noblesville Policy] (on file with the *Journal of Education and Law*).

131. *Id.* at 1. The school "also used data from the 1993-1994 HAMILTON COUNTY COUNCIL ON ALCOHOL AND OTHER DRUGS: STRATEGIC PLAN TO REDUCE THE IMPACT OF ALCOHOL AND DRUGS" to support the rationale of the policy. Electronic mail from Dr. John G. Ellis, Superintendent of Noblesville Schools, to the author (May 9, 1997) (on file with the *Journal of Education and Law*). Prior to implementation of the policy, Noblesville had used "dog searches in the parking areas, SAP (Student Assistance Program) teams and process, [and] locker searches" to quell the perceived drug problem. Electronic mail from Dr. John G. Ellis, Superintendent of Noblesville Schools, to the author (Mar. 5, 1997) (on file with the *Journal of Education and Law*).

132. While the formal policy does not require both parent and student signatures, in practice, the corporation does. (Noblesville Schools) Volunteer Drug Testing Procedure, 1996-97 [hereinafter Noblesville Procedure], § 2 (on file with the *Journal of Education and Law*). I.C. § 31-6-7-3 (a)(2) provides in part that "(a) Any rights guaranteed to the child under the Constitution of the United States, the Constitution of Indiana, or any other law may be waived only: . . . (2) By the child's custodial parent, guardian, custodian, or guardian ad litem if: (A) That person knowingly and voluntarily waives the right; (B) That person has no interest adverse to the child; (C) Meaningful consultation has occurred between that person and the child; and (D) The child knowingly and voluntarily joins with the waiver."

133. Noblesville Policy, *supra* note 133, at 3.

134. *Id.*

135. *Id.*

explanatory medical information to the agency conducting the test following a positive test result.¹³⁶ While "[t]he fact of testing and results of testing of any student shall not be made known to any school official,"¹³⁷ thus implying that test results will not be used in an academically or legally punitive manner, the policy also states that "[c]ustodial parents/guardians and students must also realize the responsibility of school officials to cooperate with the appropriate medical, health, juvenile and police agencies."¹³⁸

It is very likely that this policy would withstand review under the Fourth Amendment. The program's voluntariness is of overwhelming import. It conditions no important school benefits, curricular or extra-curricular, on participation.¹³⁹ Each of the procedural considerations indicated in *Vernonia* is also met by the design of the Noblesville policy. The policy presents the testing as a medical procedure, not as an effort to cull evidence upon which to base disciplinary action.¹⁴⁰

While the policy creates confusion by including commentary about school cooperation with other agencies, this is not, given the design of the program, a serious drawback. Since the policy precludes any school official being notified of the individual test results of any test participant, the school has no means to garner information that could be passed along to other agencies. While critics questioning the inclusion of the statement of cooperation might suggest that a school whose policy contained such contradictions did not intend to fulfill its announced limitation on disclosure of individual test results, it is unlikely the courts will entertain allegations of abuse absent specific proof of wrongdoing on the part of the school district.¹⁴¹

136. Noblesville Policy, *supra* note 133, at 4.

137. *Id.* at 5.

138. Noblesville Policy, *supra* note 133, at 5.

139. Even the dissent in *Vernonia* spoke with approval of Vernonia's voluntary testing program. 515 U.S. at 680 (O'Connor, J., dissenting).

140. Noblesville Policy, *supra* note 133, at 1.

141. Dr. John G. Ellis, Superintendent of Noblesville Schools, indicates that the section was included on the advice of the school board's attorney and "refers to action outside of the program," for example testing of students believed to be under the influence of chemicals while on school grounds or those who are dealing in illegal substances on campus. Electronic mail from John G. Ellis, Superintendent, Noblesville Schools, to the author (Mar. 5, 1997) (on file with the *Journal of Education and Law*). Another section of the corporation's policy, Board Policy 5771, provides for testing in such circumstances, based on reasonable suspicion. Approximately 15 students have

Additionally, this policy does not require testing of any student. Instead, it induces volunteering for the program by use of incentives, such as open campus privileges,¹⁴² which are very popular with students but are likely to be viewed by the courts as well-within the school's authority and of insufficient importance to be addressed via court review of the program.

Further, the testing procedures themselves are even more protective than those validated in *Vernonia*. The school not only disallows visual monitoring of the provision of the sample,¹⁴³ but also disallows school personnel from serving as the test site monitor and provides for student disclosure of medical information only to an independent third party provider, and then only when the teen has received a positive test result.¹⁴⁴ Finally, since the policy does not permit disclosure of individual student results to school officials, no concern arises about where, by whom, and for how long records of student test results will be maintained. While parents and their students might be concerned about disclosure of the results to outside agencies by the third-party testing personnel, they can easily avoid such a concern merely by choosing not to participate in the voluntary program.

Although critics to the program might assert that it is without utility because no school sanctions attach to a positive test result, the policy meets its design intent by providing drug use information directly to parents of participating students. Therefore, any consequence of a positive test, as much as the student's enrollment in the program itself, is placed directly in the hands of the parents.

B. Carmel Clay Schools

The student drug testing program adopted by Carmel Clay Schools, unlike that of Noblesville, provides for mandatory drug testing when a student "[v]iolates the school's tobacco policy, [i]s suspended from school for three or more days for fighting, or [v]iolates any other school rule which results in the student

been tested under the guidelines of 5771, with between 60 and 80 percent resulting in a positive test report. *Id.*

142. Noblesville Procedure, *supra* note 135, § 6.

143. See *supra* note 136 and accompanying text.

144. See *supra* note 139 and accompanying text.

being suspended from school for three or more days."¹⁴⁵ Further, any student who "exhibits behavior which lead[s] school authorities to suspect the student is under the influence of a controlled substance" may be tested.¹⁴⁶ The school's policy is based on the rationale that professional literature indicates that a student involved in any of the incidents leading to the testing has a heightened probability of being under the influence of chemicals.¹⁴⁷

School officials indicate that "[t]he results of the test are for parental use only and will not result in any additional punishment by school officials."¹⁴⁸ The policy provides that the school's student assistance coordinator "will work with the parents to provide evaluation and/or treatment as indicated."¹⁴⁹ However, it does not indicate to whom the drug test results will be originally reported. Furthermore, it does not indicate that access to the information will be restricted to a limited group of individuals within the school. Finally, it does not preclude provision of the information to law enforcement or other agencies, at either the initiation of the school or of the law enforcement agency.¹⁵⁰

The Carmel policy does not designate who will conduct the test or under what conditions the testing will occur and does not mention whether the tested student and his or her family will have the opportunity to have privately tested samples which

145. (Carmel Clay Schools) Drug Testing Policy for Students [hereinafter Carmel Policy], effective Jan. 27, 1997 (on file with the *Journal of Education and Law*).

146. *Id.*

147. (Carmel Clay Schools) Drug Testing Policy Rationale [hereinafter Carmel Rationale] (on file with the *Journal of Education and Law*). Of the 47 students tested during the first two months of the program, almost half screened positive for marijuana metabolites. Michelle Barbercheck, *More than 40 Students Test Positive in Drug Screens*, INDIANAPOLIS STAR, Mar. 26, 1997, at 01. For a sample of newspaper coverage of the public response to the Carmel policy, see e.g., John M. Flora, *Under New Policy, Students Who Light Up Face Drug Test*, INDIANAPOLIS STAR, Jan. 18, 1997, at E3; Kristy Meyer, *New Drug Policy Pleases Carmel Parents*, NOBLESVILLE (IND.) DAILY LEDGER, Jan. 24, 1997, at A3; Dan McFeely, *Schools Will Implement Tough Anti-Smoking Policy*, INDIANAPOLIS STAR, Nov. 27, 1996, at B02; John M. Flora, *Board Could Link Drug Tests to Tobacco Use*, INDIANAPOLIS STAR, Oct. 30, 1996, at C01; John M. Flora, *Drug Fight May Mean Change in Policy*, INDIANAPOLIS STAR, Oct. 1, 1996, at B01; and Michelle Barbercheck, *School Board Seeks New Anti-Drug Strategy*, INDIANAPOLIS STAR, Aug. 1, 1996, at E01.

148. Memorandum from Samuel B. Robinson, Carmel Clay Schools, to (Carmel Clay) Board of Education [hereinafter Carmel Memorandum] (Oct. 23, 1996) (on file with the *Journal of Education and Law*).

149. Carmel Policy, *supra* note 148.

150. See generally, Carmel Policy, *supra* note 148.

result in a disputed testing report.¹⁵¹ Finally, it does not provide any avenue for individuals to report legitimate chemical use to the testing laboratory—either before or after the sample is procured.¹⁵²

This policy, if adopted on a random, suspicionless basis, would probably not meet the standard set forth in *Vernonia*. However, the Carmel policy would likely survive a Fourth Amendment challenge. The school has documented in advance the link between student smoking, fighting and serious violation of school rules and student use of controlled substances.¹⁵³ Therefore, the district has reasonable suspicion to believe a student who commits one of the mentioned offenses is under the influence of a controlled substance. As such, the test would be “justified at its inception.”¹⁵⁴ The test would also be “reasonably related in scope to the circumstances which justified the interference in the first place,”¹⁵⁵ since it is designed to make parents aware of and offer help for potential chemical abuse by their teen which may have led to the school violation.¹⁵⁶ While the test must not be “excessively intrusive in light of the age and sex of the student,”¹⁵⁷ *Vernonia* found that urinalysis testing conducted by test administrators of the same gender as the student and without direct visual supervision was not excessively intrusive for junior high or high school aged students. Although the Carmel policy does not indicate that the testing will be administered in this manner, in the absence of specific examples of a school failing to do so, it is unlikely that courts would use this rationale to strike down the policy. The Court in *Vernonia* postulated that even established and published school policies might be altered to provide the student with additional privacy upon the student’s request. As such, it is unlikely the Supreme Court would find a school’s testing program invalid because it failed to produce in writing an advance guarantee of standards now common to drug-testing regimes.

151. Carmel Policy, *supra* note 148.

152. *Id.*

153. See Carmel Rationale, *supra* note 150.

154. Terry v. Ohio, 392 U.S. 1, 20 (1968).

155. *Id.*

156. See Carmel Memorandum, *supra* note 151.

157. New Jersey v. T.L.O., 469 U.S. at 342.

C. *Hamilton Southeastern Schools*¹⁵⁸

The Hamilton Southeastern¹⁵⁹ policy is one which requires enrollment in a random, mandatory drug testing program in order to participate in athletics or to drive to or from school or school-related activities.¹⁶⁰ The school indicates that the program's purpose is to heighten safety efforts, thereby "protect[ing] student athletes and drivers and those around them."¹⁶¹

Students whose names are selected via the random process¹⁶² are required to report to the testing site and to produce a urine sample.¹⁶³ The school does not indicate specifically for what substances the sample can or may be tested.¹⁶⁴ While the policy calls for the test administrator to "utilize appropriate procedures to collect the sample, ensure that it has not been tampered with, and to [sic] transport it to the testing laboratory,"¹⁶⁵ the policy does not delineate what specific procedures it considers appropriate.

158. For examples of news coverage of the debate about Hamilton Southeastern's policy, see John M. Flora, *Officials in Schools Have a New Weapon for Fighting Drug Use*, INDIANAPOLIS NEWS, Nov. 23, 1996, at C3; Kristy Meyer, *Board Passes Drug-Testing Policy*, NOBLESVILLE (IND.) DAILY LEDGER, Jan. 21, 1997, at A1; Kathy Mangold, *No Drug Test, No Parking*, NOBLESVILLE (IND.) DAILY LEDGER, Aug. 15, 1995, at A1; *HSE Drug Policy under Review*, NOBLESVILLE (IND.) DAILY LEDGER, Jan. 14, 1997, at A3; Kristy Meyer, *New Drug Policy Would Get Tough on HSE Drivers*, NOBLESVILLE (IND.) DAILY LEDGER, Dec. 17, 1996, at A3; Elizabeth Sprague, *Proposed Hamilton Southeastern Drug Policy Inflames Students*, INDIANAPOLIS STAR, Jan. 25, 1996, at B03; Mary Wade Atteberry, *School Board Delays Action on Drug Policy*, INDIANAPOLIS STAR, Jan. 15, 1997, at E03; Mary Wade Atteberry, *Details of Drug Testing Explained*, INDIANAPOLIS STAR, Jan. 31, 1997, at B03; Michelle Barbercheck, *Some Students Face Drug Tests if School Board Passes Policy*, INDIANAPOLIS STAR, Jan. 17, 1996, at 4; and Spencer F. Goodson, *Drug Testing Interferes with HSE Students' Rights*, [letter to the editor], NOBLESVILLE (IND.) DAILY LEDGER, Mar. 19, 1997, at A5.

159. Hereinafter "Southeastern".

160. Hamilton Southeastern High School Student Athlete and Student Driver Drug and Alcohol Random Testing Policy [hereinafter HSE Policy], adopted Jan. 20, 1997, at 1 (on file with the *Journal of Education and Law*).

161. *Id.* While the policy itself declares its rationale as based on "safety" and "protect[ion]," its statement of the results of a positive test are couched in punitive language . . . discussing "consequences" for a positive test and three levels of "offenses." *Id.*

162. Hamilton Southeastern High School Student Athlete and Student Driver Drug and Alcohol Random Testing Procedures [hereinafter HSE Procedure], § 2 (on file with the *Journal of Education and Law*).

163. *Id.* § 3.

164. See generally, HSE Procedure, *supra* note 162 and HSE Policy, *supra* note 160.

165. HSE Procedure, *supra* note 162, § 3.

The test results under the policy are reported to a "specified member of the school administration."¹⁶⁶ While the policy provides for the specified member to disclose the results to the athletic director (in the case of a student athlete)¹⁶⁷ or the school administrator (in the case of a student driver),¹⁶⁸ it does not preclude the disclosure of the results to other individuals or agencies.¹⁶⁹ Student athletes who test positive will be barred from athletic participation for varying lengths of time, dependent upon the number of previous positive test samples the individual may have produced.¹⁷⁰ Student drivers who test positive have driving privileges withdrawn for the same lengths of time, also dependent upon the number of previous positive tests.¹⁷¹ Any student athlete who refuses to submit to the test or who is unable to complete the test after two hours is subject to suspension of athletic privileges "for a period of one calendar year." A student driver, in the same circumstances, "will lose all driving privileges for a period of one calendar year."¹⁷²

The policy gives the student an opportunity to provide the test administrator with any relevant medical information which might have resulted in a positive test within twenty-four hours of being informed of a positive test result.¹⁷³ Further, it provides parents and their student the opportunity to have the remainder of the sample tested, at the student's expense, at an appropriately licensed facility of the family's choice.¹⁷⁴ Should the independent analysis provide a negative result, "the student's record will reflect that result and the suspension imposed will be revoked."¹⁷⁵

Under a reasonable reading of *Vernonia*, the policy would almost certainly fail to meet a constitutional challenge based on the Fourth Amendment. While the policy is presented as a safety procedure, its application has not been limited to groups which have been historically subjected to heightened regulation.

166. HSE Procedure, *supra* note 162, § 4.

167. HSE Procedure, *supra* note 162, § 4.

168. *Id.*

169. *Id.*

170. HSE Policy, *supra* note 160, at 1.

171. *Id.*

172. *Id.* at 2.

173. *Id.*

174. HSE Policy, *supra* note 160, at 2.

175. HSE Policy, *supra* note 160, at 2.

Further, the response to a positive test is couched in punitive terminology.¹⁷⁶ Schools do not regularly require medical testing in order to assure the readiness of student drivers; even the State of Indiana has no such provisions for testing applicants for drivers' licenses. While athletes have routinely been required to undress and undergo medical exams to prepare to participate in their chosen activity, the same cannot be said of student drivers. The school has not provided a particular rationale disclosing a drug problem at the schools, involving either the student body as a whole or the particular groups subject to testing, with which the school has attempted, unsuccessfully, to deal in other ways.¹⁷⁷

Even the voluntary nature of the students' participation is questionable. By including student drivers, and thereby exceeding *Vernonia* on its face, the school has drawn into its drug testing program the curricular day that the State of Indiana compels students to attend.¹⁷⁸ Because at least one curricular program requires students to provide their own transportation to and from the program site and because many parents are unavailable during the school day and must rely on their teens to drive to and from the class setting, Southeastern is arguably requiring students to submit to random suspicionless testing in order to gain a high school diploma. In the alternative, the school corporation is forcing students to "voluntarily" waive their Fourth Amendment rights in order to participate fully in the school's course offerings available to other students.

For example, as a participant in the J. Everett Light cooperative school program, the school affords juniors and seniors the opportunity to participate in vocational training unavailable on the Southeastern campus.¹⁷⁹ School officials, however, require participating students to provide their own transportation to and from the Indianapolis-based program.¹⁸⁰ This policy would

176. See *supra* note 161.

177. In fact, school officials acknowledge that the corporation does not "have much of a problem during school hours or at school activities." Sprague, *supra* note 158.

178. Indiana, as early as 1865, compelled school attendance. JOSEPH R. MCKINNEY, INDIANA SCHOOL LAW 17 (1992). "Every child in Indiana ages seven to sixteen must attend either a public school or some other school which is taught in the English language." *Id.* citing I.C. 20-8.1-3-17.

179. Letter from Gary Wiersema, Principal, Hamilton Southeastern High School, to the author (Mar. 31, 1997) (on file with the *Journal of Law and Education*).

180. *Id.*

preclude students from participating in the program unless the student either agreed to be involved in the testing program and was found drug-free if tested, or was provided alternate transportation by his parents. Since in a sizeable number of families the parent works during the school day, the program leaves students who wish to participate in this area of the school's curriculum with little option but to "voluntarily" submit to testing.

Further, the Southeastern testing policy, while limiting the number of school personnel who "know the identities of the students being tested,"¹⁸¹ does not limit the disclosure of testing results once they are received. Nothing in the policy prohibits the school from disclosing the results to law enforcement, child welfare, or other community officials. The school could, under this policy, publish a weekly list to all school personnel of the names of all students testing positive. Although the policy indicates that a positive test "will not become part of a student's permanent record,"¹⁸² it does not otherwise indicate where, by whom, and for how long the records will be maintained. Under this policy and related procedures, it is possible for Southeastern to maintain a drug testing file on its current and former students in perpetuity.

Finally, the Southeastern policy provides that driving privileges for those students who are unable to provide a specimen within the two hour time slot "*will be*" suspended.¹⁸³ Yet the parallel athletic provision notes that students "*shall be subject to suspension . . . for a period of one calendar year*" for the same offense. While some might see this distinction as being de minimis, it is unlikely that the parents of a drug-free student driver who is unable to urinate on command would perceive it in the same light. The distinction in language, even within the same section of the policy, leads to the impression that the difference is intentional. The language allows for differing treatment of failures to test by student athletes and student drivers, thus providing, at least for student athletes who fail to test, individualized action on the part of school authorities.

Although the policy may have been written to provide school officials a way out of the dilemma caused by a student athlete

181. HSE Procedure, *supra* note 162, § 2.

182. HSE Procedure, *supra* note 162, § 4.

183. HSE Policy, *supra* note 160, at 2. "The student *will lose* all driving privileges for a period of one calendar year." *Id.*, emphasis added.

being unable to provide the sample within the required time, it provides leeway for differing policy enforcement in similar circumstances, both between athletes and drivers and among athletes themselves. It provides the window for arbitrary action which the majority in *Vernonia* criticized in its discussion of less intrusive testing schemes.¹⁸⁴ Further, because of the policy's deterrent potential, which the *Vernonia* majority emphasized, is diminished by less than absolutely consistent response to a positive test or a refusal to produce a sample, this is a significant problem in the Southeastern program.

The Southeastern policy does not indicate a serious drug problem at its schools with which it has been dealing with previously. Neither does the policy limit its requirements for blanket testing to groups which have traditionally been subjected to heightened supervision. Nor does it clearly enunciate for what, by whom, and by what means the testing will be conducted. Finally, it does not limit the results to an identifiable class of parties which need to know the information provided and does not insure similar treatment of all members of the testing group. Therefore, it is unlikely that the school's policy could withstand a challenge under the Fourth Amendment.

IV. CONCLUSION

Given the current political climate and school officials' increasing concerns about student chemical use, it is to be expected that more schools will investigate the possibility of student drug testing as a method for encouraging teens to stay drug-free and for identifying students who might be in need of

184. 515 U.S. at 663-64. While admittedly the concerns about arbitrariness expressed in *Vernonia* were about selection of test candidates, differential responses to failure to provide a sample can be equally problematic. Given that the policy as written allows for differing responses among three categories of students who might fail to test (those who are only student drivers, those who are only student athletes, and those who are both athletes and drivers) and since two of the categories involve student athletes and thus only *may* be subject to withdrawal of athletic privileges, little predictability of result for failure to test, at least for student athletes, exists. The potential for arbitrariness in punishing failure to test is harmful since it could result in parents' decreased willingness to have their students involved in the testing program and in increased court challenges to administrative action taken as a response of a student's failure to test. Down-playing parental concerns about arbitrariness and diminishing the likelihood of expensive court challenges were among the rationales the *Vernonia* court enunciated as making the random mandatory testing preferable to a more restrictive one based on individualized suspicion.

professional services to overcome a drug problem. However, schools should be conscientious in their efforts to promote healthy life-styles and not look for a quick fix to drug problems. Districts have the option of adopting policies such as those implemented at Noblesville or Carmel without significant risk of losing a court challenge under the Fourth Amendment.

If they elect to begin a mandatory random suspicionless testing program, it would be advisable that they adhere as closely as possible to the facts which led the U.S. Supreme Court to validate the program adopted by the Vernonia School District. Specifically, they should indicate as clearly as possible what led the school to determine that a student drug problem existed in their particular corporation. Further, they should limit the blanket testing program to those individuals constituting the group about which the school has the specific concern. They must also clearly denote the testing procedures to be used, for what substances the sample is to be analyzed, to whom testing results can be disclosed, and for what purposes the testing results can be used. Finally, the policy should limit the discretion of school officials about all aspects of the program by spelling out whom to test, which type of testing or procedures to use, and what response to any positive test or failure to test will occur. By doing so, the corporation's policy is likely to withstand a challenge based on the Fourth Amendment.

While all acknowledge that the threat of drugs to our nation's youth is of great concern, the schools must limit themselves to providing an education. They must resist the temptation to act as judicial enforcers or medical providers. It should concern every American to hear teenagers indicate that they are not concerned about mass suspicionless drug testing in their schools because they do not use drugs and have nothing to hide. This attitude shows that our schools have a long way to go in helping students understand the basic premises of our Bill of Rights and the long-standing abuses that led to their development. Without this understanding, we are raising a group of individuals who may, when they are the chief defenders of our liberties, have little respect not only for the Fourth Amendment, but also for the other freedoms secured by the Bill of Rights.

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