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THE CONSTITUTIONAL AND CONTRACTUAL CONTROVERSY OF SUSPICIONLESS DRUG TESTING OF PUBLIC SCHOOL TEACHERS

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& GWENDOLYN MCFADDEN-WADE***

*Precisely because the need for action against the drug scourge is manifest, the need for vigilance against unconstitutional excess is great.*¹

*[These suspicionless drug testing policies are] one more step we have to go to keep children safe, to make sure they're secure in the classroom when [the teachers] have your daughter or your grandchild . . . for the majority of the day behind closed doors.*²

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1. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting).

2. *Am. Fed'n of Teachers-W. Va. v. Kanawha Cnty. Bd. of Educ.*, 592 F. Supp. 2d 883, 890 (S.D. W. Va. 2009) (quoting a county school superintendent on the need for the implementation of a suspicionless drug testing policy for teachers).

I. Introduction

Throughout the United States, vastly divergent school boards and districts have struggled with the potential implementation and enforcement of policies that would require the random, suspicionless, mandatory drug testing of their teachers.³ At the center of many of these discussions are important policy considerations that include the protection of children in schools with teachers who act *in loco parentis*,⁴ the attempt to limit exposure of children to drugs,⁵ and the provision of a safe, orderly environment within the public schools.⁶ The magnitude of these considerations has been reiterated by school districts⁷ and by the Supreme Court.⁸ Counterbalanced with these issues are the equally important fundamental privacy rights of teachers, as guaranteed under federal and state constitutions, and the perils that accompany a violation of these rights.⁹

3. See, e.g., David Hunn, *Teacher Drug Testing Takes Root in Elk Hills*, BAKERSFIELD CALIFORNIAN, Feb. 4, 2005, at A1 (discussing the consideration of “a one-school, four-teacher district” in California to require mandatory suspicionless drug testing); Rhonda Simmons, *Culpeper Looks at Drug Testing for New Teachers: Issues May Include Cost, Scheduling and Legal Ramifications*, RICHMOND TIMES-DISPATCH, June 20, 2008, at B-5 (discussing a Virginia school board’s consideration of a policy that would require a suspicionless drug test of all teachers as a condition for employment).

4. See, e.g., *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995) (“[F]or many purposes, ‘school authorities act *in loco parentis*,’ with the power and indeed the duty to ‘inculcate the habits and manners of civility.’” (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681, 684 (1986) (citation omitted))).

5. See *Safford Unified Sch. Dist. # 1 v. Redding*, 129 S. Ct. 2633, 2646 (2009) (Thomas, J., concurring in judgment in part and dissenting in part) (“[I]n more recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems.” (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985))).

6. See *id.* (“For nearly 25 years this Court has understood that ‘[m]aintaining order in the classroom has never been easy.’” (quoting *T.L.O.*, 469 U.S. at 339)).

7. See, e.g., Vaishali Honawar, *Random Drug Tests Test Teacher Privacy Rights: Schools Adopt Policy for Safety*, WASH. TIMES, Mar. 12, 2009, at A1 (“A growing number of school districts and states are trying to give teachers random drug tests, citing student safety concerns . . .”).

8. See, e.g., *Morse v. Frederick*, 551 U.S. 393, 407 (2007) (noting the serious problem of drug use by the youth of America and the importance of deterrence of drug use in a school setting).

9. See, e.g., *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 635 (1989) (Marshall, J., dissenting) (“[W]hen we allow fundamental freedoms to be sacrificed in the name of real or perceived exigency, we invariably come to regret it.”); *Jones v. Graham Cnty. Bd. of Educ.*, 677 S.E.2d 171, 182 (N.C. Ct. App. 2009) (“Constitutional rights are not lightly cast aside.”).

The issues in this debate are by no means new ones.¹⁰ As early as 1985, a public school district in New York required its teachers, as a condition for tenure consideration, to submit to a suspicionless urinalysis in order to detect illegal drug use.¹¹ After the state teachers' union brought a state and federal constitutional challenge to this policy in *Patchogue-Medford Congress of Teachers v. Board of Education*, the Court of Appeals of New York ultimately held that the school district had violated both state and federal constitutional guarantees against unreasonable searches and seizures.¹²

Despite this early ruling, questions of the propriety and constitutionality of suspicionless drug testing of teachers policies are far from resolved.¹³ Indeed, in the 1998 case of *Knox County Education Ass'n v. Knox County Board of Education*, the Sixth Circuit determined that a one-time suspicionless drug testing requirement for teachers did not violate the Fourth Amendment.¹⁴ In that same year, the Fifth Circuit, in *United Teachers v. Orleans Parish School Board*, overturned the denial of a motion for preliminary injunction of a policy that required the suspicionless drug testing of teachers who were in accidents during the course of their employment.¹⁵ The court based its decision on a finding that such a policy violated the Fourth Amendment.¹⁶ After *Knox County* and *United Teachers*, court rulings on challenges to these policies have been far from consistent.¹⁷ Additionally, the presence of these policies has not disappeared from state educational contract negotiations.¹⁸

10. See, e.g., Elizabeth Kolbert, *Test of Teachers For Use of Drugs Is Ruled Illegal*, N.Y. TIMES, June 10, 1987, at A1 (stating that, by 1987, “[c]ourts in more than a dozen states have been asked to rule on the subject [of suspicionless drug testing of teachers or other public employees]”).

11. See *Patchogue-Medford Cong. of Teachers v. Bd. of Educ.*, 510 N.E.2d 325, 326-27 (N.Y. 1987).

12. See *id.* at 329-30.

13. Compare Ginger Orr, *The Knox v. Knox Decision and Drug Testing for Public School Employees: Why Educators Do Not Shed Their Rights at the Schoolhouse Gate*, 29 J.L. & EDUC. 547, 552 (2000) (“Mandatory drug testing for educators [will not infringe] . . . on [their] constitutional rights.”) with Karin Schmidt, *Suspicionless Drug Urinalysis of Public School Teachers: The Concern for Student Safety Cannot Outweigh Teachers’ Legitimate Privacy Interests*, 34 COLUM. J.L. & SOC. PROBS. 253, 276 (2001) (“[W]e cannot allow our desire to attain drug-free schools to amount to . . . a ‘cavalier disregard of the text of the Constitution.’” (quoting *Skinner*, 489 U.S. at 641 (Marshall, J., dissenting))).

14. See 158 F.3d 361, 384 (6th Cir. 1998).

15. See 142 F.3d 853, 856-57 (5th Cir. 1998).

16. See *id.*

17. See *infra* notes 76-235 and accompanying text.

18. Since 2007, Hawaii has been wrestling with these policies in its collective bargaining agreements with its teachers. See Alexandre Da Silva, *Rejection of Drug Test Draws Threat*

The purpose of this paper is to conduct a legal analysis of the current trend of the implementation and enforcement of policies that require random, suspicionless drug testing of public school teachers. It will take a critical approach to the federal constitutional implications of these policies by analyzing two model cases: *Crager v. Board of Education*¹⁹ and *American Federation of Teachers-West Virginia v. Kanawha County Board of Education*.²⁰ In the 2004 *Crager* case, the United States District Court for the Eastern District of Kentucky, relying heavily upon *Knox*,²¹ upheld the constitutionality of a random, suspicionless drug testing policy for teachers.²² Conversely, in August 2009, the United States District Court for the Southern District of West Virginia in *Kanawha County* ordered a permanent injunction barring the enforcement of a random suspicionless drug testing policy for teachers,²³ premised on a preliminary injunction finding that such testing was not consistent with the constitutional protections of the Fourth Amendment.²⁴

Additionally, the paper will address the state constitutional considerations in these types of cases through the lens of *Jones v. Graham County Board of Education*, which involved a state constitutional challenge to another random, suspicionless drug testing policy for teachers.²⁵ In *Jones*, the North Carolina Court of Appeals reversed the trial court's summary judgment decision in favor of the Board of Education and found that the policy violated the State's constitutional provision on unreasonable searches.²⁶

from Lingle, HONOLULU STAR-BULL., Jan. 26, 2008, at A6 ("In May [2007], despite resistance from some teachers concerning [a requirement for suspicionless drug tests], the 13,000-member Hawaii State Teachers Association ratified a nearly \$120 million, two-year contract awarding them 4 percent raises in the current and next school years."); Gary T. Kubota, *Teachers Approve Contract: The Vote is 81 Percent in Favor of a Two-Year Deal that Cuts 17 Days from the School Year*, HONOLULU STAR-BULL., Sept. 23, 2009, at 5 (stating that the 2009 ratified collective bargaining agreement did not contain provisions on suspicionless drug testing of teachers as the union and the state are awaiting guidance from the courts on the matter).

19. *Crager v. Bd. of Educ.*, 313 F. Supp. 2d 690 (E.D. Ky. 2004) (docket report and selected case documents on file with authors).

20. *Am. Fed'n of Teachers-W. Va. v. Kanawha Cnty. Bd. of Educ.*, 592 F. Supp. 2d 883 (S.D. W. Va. 2008) (docket report and selected case documents on file with authors).

21. *Knox Cnty. Educ. Ass'n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361 (6th Cir. 1998).

22. See *Crager*, 313 F. Supp. 2d at 702; see also Memorandum Opinion and Order at 25, *Crager*, 313 F. Supp. 2d 690 (No. 7:04-155-DCR) [hereinafter *Crager* Memorandum Opinion] (on file with authors).

23. See Consent Decree at 2, *Kanawha Cnty.*, 592 F. Supp. 2d 883 (No. 2:08-cv-1406) [hereinafter *Kanawha Cnty. Consent Decree*] (on file with authors).

24. See *Kanawha Cnty.*, 592 F. Supp. 2d at 891.

25. See *Jones v. Graham Cnty. Bd. of Educ.*, 677 S.E.2d 171, 173 (N.C. Ct. App. 2009); see also Complaint at 2, *Jones*, 677 S.E.2d 171 (No. 07 CVS 81) [hereinafter *Jones* Complaint] (on file with authors).

26. See *Jones*, 677 S.E.2d at 173.

Using these model cases as a foundation for analysis, this paper will provide a discussion of the key legal considerations for future litigation in this area. Specifically, this paper will consider the viability of these policies in public school systems in the future and will call for guidance from the United States Supreme Court, as well as from state appellate courts. Such guidance is crucial for the realms of education, business, and government, in that these policies have been at the crux of state educational labor negotiations;²⁷ their implementation carries with them a lucrative result for the private entities that provide the testing services;²⁸ and they involve the contentious issue of who will bear the costs of this implementation.²⁹ In touching on all of these considerations, the intent of this paper is to serve as a reference for school districts, states, and their counsel in their contemplation of whether or not to adopt policies that mandate the random, suspicionless drug testing of their teachers.

II. The United States Constitution and Policies That Require the Random, Suspicionless Drug Testing of Teachers

A. Background

The Fourth Amendment to the United States Constitution provides that

[t]he 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.³⁰

27. See, e.g., Ken Kobayashi, *Legal Limbo Stalls Teacher Drug Tests: Court Challenges Likely Will Delay Teacher Drug Checks for Months or Even Years*, HONOLULU STAR-BULL., Feb. 1, 2009, at A1 (discussing the contentious inclusion of suspicionless drug testing of teachers policies within the state's education collective bargaining negotiation and contract, as well as the aftermath of such inclusion).

28. See, e.g., *Brunswick County Teachers to Face Random Drug Testing*, WWAY (June 6, 2007), http://www.wwaytv3.com/brunswick_county_teachers_to_face_random_drug_testing/06/2007 (stating that the yearly cost of a proposed drug testing policy for a North Carolina county would be \$25,000).

29. See, e.g., Linda Jacobson, *Teacher Drug-Testing Program in Hawaii Stalls Over Who Will Pay*, EDUC. WK., July 30, 2008, at 16 ("Random drug testing of Hawaii's public school teachers was supposed to begin a month ago, but a stalemate [between the governor and the state board of education] over who will ultimately pay for the program has prevented the process from getting started.").

30. U.S. CONST. amend. IV.

On multiple occasions, the Supreme Court has acknowledged that the essential “purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.”³¹ The Court has also stated that Fourth Amendment rights are “basic to our free society”³² and cannot be sacrificed merely “for a symbol’s sake.”³³ Despite a general judicial consensus on the ideological purpose of the fundamental privacy protections contained within the Fourth Amendment, courts have often struggled with formulating a “translation of the abstract prohibition against ‘unreasonable searches and seizures’ into workable guidelines for the decision of particular cases.”³⁴ Despite varying conclusions, courts that have addressed the issue of the federal constitutionality of random, suspicionless drug testing of teachers have taken a relatively consistent approach in their analytical processes.³⁵ At the outset, the courts typically state three basic undisputed premises: 1) the protections of the Fourth Amendment apply to the states through the incorporation of the Fourteenth Amendment;³⁶ 2) school districts, school boards, and states are considered state actors, which prohibits them from violating the Fourth Amendment;³⁷ and 3) drug testing qualifies as a search for Fourth Amendment analysis purposes.³⁸

After outlining these foundational understandings, courts have employed a “special needs” analysis and balancing test to determine the constitutionality of random, suspicionless drug testing policies for teachers.³⁹ This approach

31. *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967).

32. *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), *overruled on other grounds by Mapp v. Ohio*, 367 U.S. 643 (1961).

33. *Chandler v. Miller*, 520 U.S. 305, 307 (1997).

34. *Camara*, 387 U.S. at 528 (noting that this translation “is a difficult task which has for many years divided the members of this Court”).

35. *Compare Am. Fed’n of Teachers-W. Va. v. Kanawha Cnty. Bd. of Educ.*, 592 F. Supp. 2d 883, 891-99 (S.D. W. Va. 2009) (providing a detailed discussion to the process of analysis that the court would apply in determining the constitutionality of a suspicionless drug testing policy for teachers) *with Crager* Memorandum Opinion, *supra* note 22, at 25 (summarizing its analytical approach, which is similar to the approach in *Kanawha County*, to the constitutionality of a suspicionless drug testing of teachers policy).

36. *See, e.g., Knox Cnty. Educ. Ass’n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 371 n.9 (6th Cir. 1998) (“The Fourth Amendment, although initially applicable only to the federal government, is now applicable to states as well by virtue of selective incorporation through the Fourteenth Amendment.”).

37. *See, e.g., Kanawha Cnty.*, 592 F. Supp. 2d at 892 (noting that a public school board “is an arm of the government, and as such may not conduct unreasonable searches of its employees in violation of the Fourth Amendment”).

38. *See Crager* Memorandum Opinion, *supra* note 22, at 5 (“A urinalysis drug test by a state agency qualifies as a government search, thus implicating the Fourth Amendment”).

39. *See, e.g., Kanawha Cnty.*, 592 F. Supp. 2d at 892-93 (signifying its use of the special

hinges on the recognition that “a valid search must ordinarily be based on an ‘individualized suspicion of wrongdoing.’”⁴⁰ The analysis then proceeds to acknowledge that a suspicionless search may still be constitutional when it is conducted for “special needs, beyond the normal need for law enforcement.”⁴¹ When the justification for a suspicionless search is that of special needs, a “context-specific inquiry” is required.⁴² Specifically, “[t]o determine whether a special need exists, a court must ask whether there is a safety concern that is substantial enough to override the individual’s privacy interest and to suppress the Fourth Amendment’s requirement of individualized suspicion.”⁴³ Quite simply, “the Court must balance the individual’s privacy interests against the government’s interest.”⁴⁴

This special needs approach is not limited to questions of suspicionless drug testing in schools. Federal courts have applied the special needs analysis to find suspicionless drug testing to be justified and constitutionally reasonable in the cases of railway workers involved in train accidents;⁴⁵ U.S. Customs Service employees who carry firearms or are involved in the interdiction of illegal drugs;⁴⁶ firefighters;⁴⁷ police officers;⁴⁸ correctional officers;⁴⁹ clerical workers in a nuclear plant;⁵⁰ engineers with high-level safety clearances;⁵¹ and municipal and commercial truck drivers.⁵²

Yet not all cases involving suspicionless drug testing have arrived at a conclusion of a sufficient constitutional special need. In *Chandler v. Miller*, the Supreme Court held that a Georgia statute that required all “candidates for state office [to] pass a drug test . . . [did] not fit within the closely guarded

needs approach to determine the constitutionality of a suspicionless drug testing policy for teachers); *Crager v. Bd. of Educ.*, 313 F. Supp. 2d 690, 693 (E.D. Ky. 2004) (same); *Knox Cnty.*, 158 F.3d at 373 (same).

40. *Knox Cnty.*, 158 F.3d at 373 (quoting *Chandler v. Miller*, 520 U.S. 305, 313 (1997)).

41. *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619 (1989) (internal quotations omitted).

42. *Chandler*, 520 U.S. at 314.

43. *Kanawha Cnty.*, 592 F. Supp. 2d at 893.

44. *Baron v. City of Hollywood*, 93 F. Supp. 2d 1337, 1340 (S.D. Fla. 2000).

45. *See Skinner*, 489 U.S. at 620.

46. *See Nat’l Treasury Emps. Union v. Von Raab*, 489 U.S. 656, 665-66, 677 (1989).

47. *See Wilcher v. City of Wilmington*, 139 F.3d 366, 374-78 (3d Cir. 1998); *Saavedra v. City of Albuquerque*, 73 F.3d 1525, 1531-32 (10th Cir. 1996).

48. *See Guiney v. Roache*, 873 F.2d 1557, 1558 (1st Cir. 1989).

49. *See Booker v. City of St. Louis*, 309 F.3d 464, 467 (8th Cir. 2002).

50. *See Int’l Bhd. of Elec. Workers v. U.S. Nuclear Reg. Comm’n*, 966 F.2d 521, 526 (9th Cir. 1992).

51. *See AFGE Local 1533 v. Cheney*, 944 F.2d 503, 506 (9th Cir. 1991).

52. *See Krieg v. Seybold*, 481 F.3d 512, 518-19 (7th Cir. 2007); *Int’l Bhd. of Teamsters, Chauffeurs, W. Conference of Teamsters v. DOT*, 932 F.2d 1292, 1304 (9th Cir. 1991).

category of constitutionally permissible suspicionless searches.”⁵³ Relying on *Chandler*, the United States District Court for the Southern District of Florida invalidated a policy that required the pre-employment suspicionless drug testing of all city employees.⁵⁴ A similar case was brought in *Lanier v. City of Woodburn*, where an applicant for a part-time library page position challenged a policy that required suspicionless drug testing of all prospective city employees.⁵⁵ The Ninth Circuit refused to facially invalidate the policy because the applicant did not demonstrate that it could “never be applied . . . constitutional[ly].”⁵⁶ However, the court did find that the policy was unconstitutional as applied, because the city had “not articulated any special need to screen [the applicant] without suspicion” and had not shown a “substantial risk to public safety posed by [the applicant’s] prospective position.”⁵⁷

The special needs approach to examining the constitutionality of suspicionless drug testing is firmly established in federal jurisprudence and has been applied to a range of situations. However, in examining the constitutionality of suspicionless drug testing of teachers, courts have relied on cases involving other types of suspicionless drug testing within the schoolhouse gate. It is in this context-specific balancing that courts have reached starkly different conclusions on the legality of these policies for teachers. Before analyzing the divergent holdings of the federal courts in this area, it is first important to look at the environment that has resulted from courts’ consideration of requirements for suspicionless drug testing for students.

In 1995, the Supreme Court decided *Vernonia School District 47J v. Acton*, an important case in the overall context of schools, the Fourth Amendment, and random suspicionless drug testing.⁵⁸ In *Vernonia*, the court analyzed the constitutionality of an Oregon school district’s policy that “authorize[d] random urinalysis drug testing of students who participate[d] in the District’s school athletics programs.”⁵⁹ In a 6-3 decision, the Court found a special need that supported the policy’s lack of individualized suspicion for these searches: the maintenance of order in the public school.⁶⁰ The Court also found that students have diminished privacy interests given the *in loco parentis*

53. 520 U.S. 305, 309 (1997).

54. See *Baron v. City of Hollywood*, 93 F. Supp. 2d 1337, 1342 (S.D. Fla. 2000).

55. See 518 F.3d 1147, 1149 (9th Cir. 2008).

56. See *id.* at 1150.

57. *Id.* at 1152.

58. See 515 U.S. 646 (1995).

59. *Id.* at 648.

60. See *id.* at 653.

relationship that schools have over them.⁶¹ Further, the Court stated that “[s]omewhat like adults who choose to participate in a ‘closely regulated industry,’ students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.”⁶² In examining the procedures for testing, the Court determined that their level of intrusion was not significant.⁶³ Finally, the Court found that the need to deter drug use among students was an important governmental need.⁶⁴ As such, based on all of these factors, “the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search, [the Court] conclude[d] Vernonia’s Policy is reasonable and hence constitutional.”⁶⁵ However, immediately after its holding, the Court warned against the use of the case as a panacea for constitutional challenges against suspicionless drug testing in all other contexts:

We caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is . . . that the Policy was undertaken in furtherance of the government’s responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.⁶⁶

In the 2002 decision of *Board of Education v. Earls*, the Supreme Court had an opportunity to analyze the constitutionality of a suspicionless drug testing policy as applied to another population of public school students.⁶⁷ At issue in this case was a Fourth Amendment challenge to an Oklahoma school district’s policy that “require[d] all students who participate in competitive extracurricular activities to submit to [random suspicionless] drug testing.”⁶⁸ Building upon the *Vernonia* foundation in this 5-4 decision, the Court swiftly concluded that the policy was constitutional as the students who participated in regulated extracurricular activities had a diminished expectation of privacy;⁶⁹ the testing was minimally intrusive;⁷⁰ “the nationwide drug epidemic makes the war against drugs a pressing concern in every school”;⁷¹ and this

61. *See id.* at 654-56.

62. *Id.* at 657.

63. *See id.* at 660-61.

64. *See id.* at 661.

65. *Id.* at 664-65.

66. *Id.* at 665.

67. *See* 536 U.S. 822 (2002).

68. *Id.* at 825.

69. *See id.* at 832.

70. *See id.* at 834.

71. *Id.*

drug testing was “a reasonably effective means of addressing the School District’s legitimate concerns in preventing, deterring, and detecting drug use.”⁷² The *Earls* case demonstrates that the Court is not afraid to dramatically extend the scope of its definition of “special needs.”⁷³

Given this background, it is now important to examine the federal constitutional concerns at play in two model cases that involved random suspicionless drug testing of teachers: *Crager v. Board of Education*⁷⁴ and *American Federation of Teachers-West Virginia v. Kanawha County Board of Education*.⁷⁵

B. *Crager v. Board of Education*

Crager was filed in the United States District Court for the Eastern District of Kentucky on March 25, 2004.⁷⁶ The plaintiff, Carol Crager, a tenured elementary school teacher, sought to enjoin the Knott County Board of Education’s drug and alcohol testing policy, which required the random, suspicionless testing of its teachers.⁷⁷ The lawsuit was filed against the Board and its Superintendent, Harold Combs.⁷⁸ Specifically, Crager alleged in her complaint that the defendants’ drug testing policy violated her Fourth Amendment rights against unreasonable searches and seizures.⁷⁹

72. *Id.* at 837.

73. This is a concern articulated in Justice Ginsburg’s dissent:

Vernonia cannot be read to endorse invasive and suspicionless drug testing of all students upon any evidence of drug use, solely because drugs jeopardize the life and health of those who use them. Many children, like many adults, engage in dangerous activities on their own time; that the children are enrolled in school scarcely allows government to monitor all such activities. . . . Had the *Vernonia* Court agreed that public school attendance, in and of itself, permitted the State to test each student’s blood or urine for drugs, the opinion . . . could have saved many words.

Id. at 844-45 (Ginsburg, J., dissenting).

74. 313 F. Supp. 2d 690 (E.D. Ky. 2004); *see also* Civil Docket, *Crager*, 313 F. Supp. 2d 690 (No. 7:04-155-DCR) (docket report and selected case documents on file with authors).

75. 592 F. Supp. 2d 883 (S.D. W. Va. 2008); *see also* Civil Docket, *Kanawha Cnty.*, 592 F. Supp. 2d 883 (No. 2:08-cv-1406) (docket report and selected case documents on file with authors).

76. *See Crager*, 313 F. Supp. 2d at 691.

77. *See id.*; *see also* Complaint at 2-4, *Crager*, 313 F. Supp. 2d 690 (No. 7:04-155-DCR) [hereinafter *Crager* Complaint] (on file with the authors).

78. *See also Crager* Complaint, *supra* note 77, at 1-2.

79. *See Crager*, 313 F. Supp. 2d at 691-92; *see also Crager* Complaint, *supra* note 77, at 4. Crager also claimed that the drug and alcohol testing policy and the Board’s “actions violate[d] the medical privacy provisions of the Americans with Disabilities Act” (ADA). *See Crager* Complaint, *supra* note 77, at 4. On this issue, the court held that “[d]rug testing is not a ‘medical exam’ and [that] the ADA explicitly states that it does not prohibit the use of drug

1. Background of the Case

At the commencement of her lawsuit, Crager had fourteen years of experience with the Knott County school system and was teaching at an elementary school, which was one of nine public schools in the county.⁸⁰ This county was in an area of Eastern Kentucky that had encountered a severe problem with illegal and prescription drug abuse.⁸¹ Before January 2004, the Board had “adopted a suspicion-based method of drug testing for its teachers.”⁸² However, because of the area’s drug epidemic, the Board decided to take another “approach to meet its [objective] of having a drug-free school system.”⁸³

Consequently, the Board adopted a policy (“the Knott policy”) on January 15, 2004, which mandated the “random suspicionless drug testing of employees in ‘safety sensitive’ positions,” including teachers.⁸⁴ Under this policy, “25% of all employees considered to be in ‘safety sensitive’ positions [were to] be randomly-selected for testing without regard to suspicion of illegal drug use.”⁸⁵ Additionally, this policy required “all applicants for ‘safety sensitive’ positions to submit to a urinalysis test to detect illegal drug use as part of a pre-employment physical,” and it required “all staff currently employed in a safety sensitive position . . . be given the initial drug testing required for pre-employment.”⁸⁶ The consequences of violating this policy included suspension, non-renewal of employment, or termination.⁸⁷ Nevertheless, the Superintendent could choose as an alternative for an

testing programs.” See *Crager*, 313 F. Supp. 2d at 702-03. Therefore, the court determined that Crager’s ADA claim lacked merit. *Id.* at 703; see also *Crager* Memorandum Opinion, *supra* note 22, at 26.

80. See *Crager*, 313 F. Supp. 2d at 691; see also *Crager* Memorandum Opinion, *supra* note 22, at 1-2.

81. See *Crager*, 313 F. Supp. 2d at 691; see also *Crager* Memorandum Opinion, *supra* note 22, at 1.

82. *Crager*, 313 F. Supp. 2d at 691.

83. *Id.*; see also Valarie Honeycutt Spears, *Drug Tests on Knott Teachers are Halted, Suit Challenges Board Policy*, LEXINGTON HERALD-LEADER, Apr. 2, 2004, at B1 (quoting Superintendent Combs as stating “[w]e feel like there are so many drugs controlling our society’ and Knott County that a remedy should begin with the schools”).

84. *Crager*, 313 F. Supp. 2d at 692; see also *Crager* Memorandum Opinion, *supra* note 22, at 2.

85. *Crager*, 313 F. Supp. 2d at 691; see also *Crager* Memorandum Opinion, *supra* note 22, at 2.

86. *Crager* Complaint, *supra* note 77, at 2-3.

87. See *id.* at 3.

employee to participate in a Board-approved drug abuse rehabilitation program.⁸⁸

In conjunction with the Knott Policy, the county “entered into an agreement . . . with On-Site Drug Screens (OSDS), outsourcing the testing duties to OSDS and setting forth the relevant policies and procedures for testing.”⁸⁹ Specifically, OSDS utilized a Medical Review Officer (MRO) who was trained to analyze urinalysis drug testing results.⁹⁰ To protect privacy, collection was conducted in a private room, unless there was a suspicion of tampering.⁹¹ An initial test was then completed; if that “test [was] negative, no further action [was] taken.”⁹² With a positive result, the sample was sent to a lab.⁹³ Thereafter,

if the lab confirm[ed] the positive result, the MRO consult[ed] the test subject. If the subject claim[ed] to have a valid prescription for the substance the MRO . . . confirm[ed] that fact with the employee’s pharmacist or physician. The MRO then made a determination as to whether the positive test was due to a legitimate, medical reason. [If it was not], the result was reported as “positive.” If the MRO determine[d] that the drug was used for a legitimate purpose, [the Superintendent] was . . . notified that the result was “negative.”⁹⁴

Although testing was scheduled to take place at Crager’s school in March 2004,⁹⁵ the Board agreed to a temporary restraining order ceasing drug testing “until a hearing could be held” on Crager’s motion for a preliminary injunction.⁹⁶ This motion was heard on April 6, 2004.⁹⁷ After considering the evidence, the district court found that Crager had little likelihood of succeeding on her claim that the Knott Policy and procedures violated her

88. *See id.* at 3-4.

89. *Crager*, 313 F. Supp. 2d at 692.

90. *See id.* at 699; *see also Crager Memorandum Opinion, supra* note 22, at 17-18.

91. *See Crager Memorandum Opinion, supra* note 22, at 18.

92. *Id.*

93. *See id.*

94. *Id.* at 18-19.

95. *See Crager Complaint, supra* note 77, at 4.

96. *See Crager v. Bd. of Educ.*, 313 F. Supp. 2d 690, 691-92 (E.D. Ky. 2004); *see also* Agreed Temporary Restraining Order at 1, *Crager*, 313 F. Supp. 2d 690 (No. 7:04-155-DCR) (on file with the authors); *Drug Testing Policy*, KENTUCKY POST, Apr. 3, 2004, at A12 (noting the County’s agreement “to briefly stop mandatory drug testing of teachers” after the filing of the *Crager* lawsuit).

97. *See Crager*, 313 F. Supp. 2d at 692.

Fourth Amendment rights.⁹⁸ Consequently, the court denied Crager's motion for a preliminary injunction and vacated the agreed upon temporary restraining order.⁹⁹ Thereafter, on November 15, 2004, Crager and the defendants filed cross-motions for summary judgment.¹⁰⁰

2. *The Parties' Arguments*

In her motion for summary judgment, Crager argued that the Knott Policy was unconstitutional because it was not supported by a "special need," which is required to justify infringing upon a teacher's right to privacy.¹⁰¹ To support this argument, Crager claimed that: (1) the Board's testing interests were already met by the suspicion-based testing policy in place¹⁰² and (2) the suspicionless testing procedures violated teachers' privacy rights.¹⁰³ In contrast, the defendants contended that (1) the Knott Policy was constitutional because it was supported by a special need;¹⁰⁴ (2) the constitutionality of the suspicionless drug testing policy was not related to the previously established testing policy;¹⁰⁵ and (3) the suspicionless testing procedures were narrowly tailored and consistently applied.¹⁰⁶

3. *Court's Analysis of the Constitutionality of the Drug Testing Policy*

The court began its analysis on the cross-motions for summary judgment by discussing Sixth Circuit case law that had been decided since the "[c]ourt's denial of Crager's motion for a preliminary injunction."¹⁰⁷ These cases included *International Union v. Winters*, which "held that Michigan's random, suspicionless drug tests" of civil service employees who provided services to parolees, prisoners, and occupants of state hospitals "did not violate the Fourth Amendment's prohibition against unreasonable searches and seizures."¹⁰⁸ This

98. *See id.* at 703.

99. *See id.*

100. *See* Plaintiff's Motion for Summary Judgment at 1, *Crager*, 313 F. Supp. 2d 690 (No. 7:04-155-DCR) (on file with the authors); Defendants' Motion for Summary Judgment at 1, *Crager*, 313 F. Supp. 2d 690 (No. 7:04-155-DCR) (on file with the authors).

101. *See* Plaintiff's Memorandum in Support of Motion for Summary Judgment at 2, *Crager*, 313 F. Supp. 2d 690 (No. 7:04-155-DCR) (on file with the authors).

102. *See id.* at 9.

103. *See id.* at 11.

104. *See* Response and Objection to Plaintiff's Motion for Summary Judgment at 4, *Crager*, 313 F. Supp. 2d 690 (No. 7:04-155-DCR) (on file with the authors).

105. *Id.* at 12.

106. *Id.* at 17.

107. *See Crager* Memorandum Opinion, *supra* note 22, at 4-5.

108. *Id.*; *see Int'l Union v. Winters*, 385 F.3d 1003, 1005, 1012-13 (6th Cir. 2004) (affirming the district court's finding that the policy did not violate the Fourth Amendment, as

initial nod to *Winters* was the court's first step towards ultimately finding that the Knott Policy was constitutional.¹⁰⁹

After discussing *Winters*, the court began its specific constitutional analysis of the suspicionless drug testing policy.¹¹⁰ First, the court emphasized that an exception to the general rule against suspicionless government searches arises when the search requires "a 'special need' of the state, unrelated to crime detection, in which 'the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion.'"¹¹¹ The court then stated that "[s]pecial needs can arise when the job being tested is 'safety sensitive,' meaning that the job involves 'discharge of duties fraught with risks of injury to others such that even a momentary lapse of attention can have disastrous consequences.'"¹¹²

The court next determined that it would have to apply a balancing test, weighing the plaintiff's privacy interest against the Board's "special needs."¹¹³ In applying this balancing test, the court relied heavily upon *Knox County Education Ass'n v. Knox County Board of Education*.¹¹⁴ In *Knox County*, the Sixth Circuit held that the Knox County, Tennessee, school system's one-time, non-random suspicionless drug and alcohol testing policy for individuals who applied for, transferred to, or were promoted to "safety sensitive" positions was constitutional.¹¹⁵ Under the Knox Policy, the "safety sensitive" positions of principals, teachers, and bus drivers were those "where a single mistake by such employee [could] create an immediate threat of serious harm to students and fellow employees."¹¹⁶ Ultimately, the *Knox County* court determined that the public interest in suspicionless testing of teachers—that of directly influencing and supervising children on a daily basis¹¹⁷—outweighed these teachers' diminished privacy interests, given "their participation in a heavily regulated industry."¹¹⁸

The *Crager* court compared the facts of its case to those present in *Knox County* to determine whether teachers in Kentucky, like Tennessee, were

it was premised on a "special need" of "substantial public safety concerns" that outweighed the employees' diminished privacy interests, due to their work in a heavily regulated industry).

109. See *Crager* Memorandum Opinion, *supra* note 22, at 25-27.

110. See *id.* at 5.

111. *Id.* at 6 (quoting *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 624 (1989)).

112. *Id.*

113. See *id.*

114. See 158 F.3d 361 (6th Cir. 1998).

115. See *id.* at 366-67.

116. *Id.* at 367.

117. See *id.* at 374-75.

118. *Id.* at 379.

“heavily regulated” such that there is a diminished expectation of privacy.¹¹⁹ On this issue, the *Crager* court explained that although Kentucky had not enacted an *in loco parentis* statute like the one in Tennessee, Kentucky courts had recognized teachers’ *in loco parentis* status.¹²⁰ Moreover, the court looked at the fact that Kentucky required teachers to supervise student conduct at school and on school-sponsored trips.¹²¹ Based on these factors, the *Crager* court held that

teachers in Kentucky are “heavily regulated,” as in Tennessee and, therefore, “when people enter the education profession [in Kentucky,] they do so with the understanding that the profession is heavily regulated as to the conduct expected of people in that field, as well as the responsibilities that they undertake toward students and colleagues in the schools,” thus lessening their expectation of privacy.¹²²

Next, the court addressed *Crager*’s argument that Knott County had to demonstrate a drug problem among county teachers to justify a suspicionless testing policy.¹²³ In response to this argument, the court explained that a finding of an existent area drug problem “was *not* a prerequisite to establishing a [constitutional] suspicionless [drug] testing policy.”¹²⁴ In support of this finding, the court quoted *Winters*, stating that “the existence of a pronounced drug problem is not an essential element to the finding of a special need.”¹²⁵ Interestingly, despite the court’s disagreement with *Crager*’s assertion that the Board was required to demonstrate a pronounced drug problem, it did find evidence of such a “problem in the Knott County area and, to a more limited extent, in the [Knott County] school system.”¹²⁶

119. See *Crager* Memorandum Opinion, *supra* note 22, at 8. Factors relied upon by the *Knox County* court in finding that teachers are part of a heavily regulated industry included (1) the fact that Tennessee’s School Security Act of 1981 recognized schools’ *in loco parentis* status and “the responsibility this places on . . . teachers within each school to secure order and to protect students from harm while in their custody” and (2) Tennessee’s legal requirements that teachers report student actions that “endanger[], life, health or safety,” such as drug use. See *Knox Cnty.*, 158 F.3d at 383.

120. See *id.* Memorandum Opinion, *supra* note 22, at 8.

121. See *id.*

122. *Id.* at 9.

123. See *id.*

124. See *id.*

125. *Id.* at 10 (emphasis omitted) (quoting *Int’l Union v. Winters*, 385 F.3d 1003, 1012 (6th Cir. 2004)).

126. *Id.*

Specifically, the court noted Combs' deposition testimony regarding "six incidents of suspected drug abuse among the staff and faculty during his eight-year tenure as superintendent."¹²⁷ Also, the court referenced Combs' testimony "that the community believed there was a drug problem among Knott County educators."¹²⁸ Additional evidence of this drug problem was the fact that Knott County was located in a part of Kentucky deemed "the prescription-painkiller capital of the United States."¹²⁹ Further, the court took judicial notice that Knott County was "designated as part of the federal government's 'High-Intensity Drug Trafficking Area' program, established 'in areas where major drug production, manufacturing, importation, or distribution flourish.'"¹³⁰ Finally, the court noted the substantial volume of drug cases that comprised its own criminal docket.¹³¹ Thus, the court found that the Board had established the existence of an area drug problem, which posed "an imminent threat to the students and faculty in the Knott County school district."¹³²

Subsequently, the court focused its analysis on Crager's claims that the case was different from *Knox County* because Knott County teachers were "more likely to be observed by other teachers, students, and administrators" and were less isolated than the *Knox County* teachers.¹³³ The court was not persuaded by Crager's argument.¹³⁴ It stated that "simply because a teacher works with multiple groups of students does not make it more likely that students will be able to detect (or will [feel] safe reporting) drug use by teachers."¹³⁵

After finding the facts in the case to be analogous to those in *Knox County*, the *Crager* court concentrated on Crager's argument that Knott County could accomplish its goals by maintaining the previously established, less intrusive suspicion-based testing.¹³⁶ Here, the court determined that suspicion-based testing was insufficient because of "the autonomy of teachers, [who] often work[ed] in isolated classrooms."¹³⁷ According to the court, it put "too heavy

127. *See id.*

128. *Id.*

129. *Id.*

130. *Id.* at 11 (quoting *The High-Intensity Drug Trafficking Area Program: An Overview*, OFFICE OF NAT'L DRUG CONTROL POLICY, www.whitehousedrugpolicy.gov/hidta/). Judicial notice was also taken "that a joint state-federal task force, named 'Operation UNITE,' [which had] approximately \$16 million in federal funding, [had] been established to combat the drug problem in Eastern Kentucky." *Id.*

131. *See id.*

132. *See id.*

133. *See id.* at 12.

134. *See id.* at 12-13.

135. *Id.*

136. *See id.* at 13.

137. *Id.*

a burden on students and teachers to not only [*detect*] teachers who are operating under the effect of drugs, but also to *report* those teachers.”¹³⁸ The court explained that this burden for children meant “turning in their authority figure and mentor” and that this burden for teachers meant turning in a coworker, “with possibly disastrous personal consequences if the teacher end[ed] up testing negative.”¹³⁹ Consequently, relying heavily on the *Knox County* precedent, the court determined that “the benefits of suspicionless testing to the state [in conjunction with] the significant drug problem facing Knott County, and the decreased expectation of privacy for teachers, support[ed] the Board’s” right to use suspicionless testing.¹⁴⁰

To address Crager’s allegations that the testing procedures were unconstitutional because they violated the teachers’ privacy rights, the court explained that “courts have traditionally required those policies to set forth adequate safeguards to ensure reliability, privacy during testing, and confidentiality of results.”¹⁴¹ Throughout this portion of the analysis, the court stated that the Knott Policy contained significant similarities with the *Knox County* policy,¹⁴² and with Chapter 49 of the Code of Federal Regulations, which promulgates a drug testing policy for Department of Transportation employees.¹⁴³ The court focused on the fact that Knott County “outsourced their testing to OSDS,” and testing was overseen by a Medical Review Officer with strict procedures.¹⁴⁴ From its review of these procedures, the court found that the Knott Policy, as it comported with testing policies that were upheld in *Knox County* and the federal regulatory policy, was constitutional.¹⁴⁵

Finally, in examining the constitutionality of the random component of the Knott Policy, the court noted that “the Sixth Circuit upheld the use of random suspicionless testing” in *Winters*.¹⁴⁶ The *Crager* court could not rely on the *Knox County* precedent because the suspicionless policy in that case was a one-time, targeted test.¹⁴⁷ However, the court supported the propriety of random drug tests by explaining that the Supreme Court has upheld the constitutionality of this type of testing of students.¹⁴⁸ While the court

138. *Id.* at 13-14.

139. *Id.* at 14.

140. *Id.* at 15.

141. *Id.*

142. *See id.* at 17.

143. *See id.*

144. *See id.* at 17-18.

145. *See id.* at 20.

146. *Id.* at 22.

147. *See Knox Cnty. Educ. Ass’n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 384 (6th Cir. 1998).

148. *See Crager Memorandum Opinion, supra* note 22, at 22.

acknowledged that “the Supreme Court has only upheld random testing in the context of *student* testing,” it noted that nothing in the language of other cases involving drug testing of employees provided “an explicit prohibition against random drug testing of adults” and that “the Supreme Court has never struck down a testing regime simply because it provided for random tests.”¹⁴⁹ Given this foundational dicta, the court determined that “[r]andom testing would significantly enhance the ability of the Board to ensure that its teachers, involved in an extremely important and ‘safety-sensitive’ position, are drug-free.”¹⁵⁰ Also, the court found the random component of the drug testing policy provided a “significant deterrent effect and a practical method for catching drug users.”¹⁵¹ Consequently, the court stated that “[w]hile random testing may slightly increase the intrusiveness of a drug test, such a minimal increase in intrusiveness is overcome by the significantly greater effectiveness of random testing.”¹⁵²

Ultimately, the court found that the random and suspicionless components of the Knott Policy were constitutional and the testing procedures did not violate teachers’ privacy rights.¹⁵³ The court, on December 29, 2004, denied Crager’s motion for summary judgment, granted the defendants’ motion for summary judgment, and entered judgment in favor of the defendants, thereby dismissing Crager’s lawsuit.¹⁵⁴

C. American Federation of Teachers-West Virginia v. Kanawha County Board of Education

Approximately four years later, on November 26, 2008, *Kanawha County* was filed in the circuit court of Kanawha County, West Virginia.¹⁵⁵ The petitioners, teachers in the Kanawha County school system and members of the American Federation of Teachers (AFT), filed a petition for writ of mandamus, declaratory judgment, and injunctive relief against the Kanawha County Board of Education, Kanawha County Schools, and Superintendent Ronald Duerring.¹⁵⁶ The lawsuit was filed on the basis that the Board’s revised drug testing policy, which was to implement a random, suspicionless drug

149. *Id.*

150. *Id.* at 24.

151. *Id.*

152. *Id.* at 25 (citing *Int’l Union v. Winters*, 385 F.3d 1003, 1013 (6th Cir. 2004)).

153. *See id.* at 26-27.

154. *See id.*

155. *See Am. Fed’n of Teachers-W. Va. v. Kanawha Cnty. Bd. of Educ.*, 592 F. Supp. 2d 883, 887-88 (S.D. W. Va. 2009).

156. *See id.*

testing scheme on January 1, 2009, violated their Fourth Amendment rights against unreasonable searches and seizures.¹⁵⁷

1. Background of the Case

The lawsuit originated from the Board's adoption of a revised drug testing policy called the Employee Drug Use Prevention Policy ("Revised Policy") on October 15, 2008.¹⁵⁸ The Revised Policy was aimed at addressing "the problem of drug abuse in the workplace by" mandating random, suspicionless testing for all "safety sensitive positions," which included teachers.¹⁵⁹ The Revised Policy defined "safety sensitive" positions as those "which involve the care and supervision of students or where a single mistake by such employee can create an immediate threat of serious harm to students, to him or herself or to fellow employees."¹⁶⁰ Forty-seven positions were deemed "safety sensitive" under the Revised Policy.¹⁶¹ A policy statement was released concerning the random, suspicionless drug testing program, stating that "the job functions associated with these [safety sensitive] positions directly and immediately relate to public health and safety, the protection of life and property security. These positions are identified for random testing because they require the highest degree of trust and confidence."¹⁶²

In addition to their petition, the petitioners filed a motion for a preliminary injunction, and a hearing for the motion was scheduled.¹⁶³ Prior to this hearing, however, the respondents removed the case to the United States District Court for the Southern District of West Virginia on the basis of federal question jurisdiction.¹⁶⁴ Thereafter, the petitioners filed a motion for preliminary injunction, and a motion hearing was scheduled for December 29,

157. *See id.* In addition to their Fourth Amendment claim, the petitioners argued that the drug testing policy violated West Virginia public policy and their privacy rights under West Virginia's Constitution. *Id.* at 888. Since the court determined that the petitioners had demonstrated a likelihood of success on the merits of their Fourth Amendment claims and accordingly granted their preliminary injunction on this basis, the court did not address the petitioners' arguments under West Virginia state law. *See id.* at 891.

158. *See id.* at 886.

159. *See id.* at 886-87. The original policy adopted by the Board on December 13, 2007, provided for drug testing of Kanawha County Schools' employees in only the following situations: "pre-employment; for cause or reasonable suspicion; missing substances; fitness for duty; promotion and transfer; and return to duty." *Id.* at 886 (citations omitted).

160. *Id.* at 887 (internal quotation marks omitted).

161. *See id.*

162. *Id.*

163. *See id.* at 888.

164. *See id.*; *see also* Notice of Removal at 1-2, *Kanawha Cnty.*, 592 F. Supp. 2d 883 (No. 2:08-cv-1406) (on file with the authors).

2008.¹⁶⁵ On December 17, 2008, the West Virginia Education Association (WVEA) and Dale Lee, its president, moved to intervene and filed a motion for preliminary injunction.¹⁶⁶ WVEA's motion to intervene was granted, and its other motion was held in abeyance until the December 29, 2008, motions hearing.¹⁶⁷ The respondents filed their responses to the pending motions on December 22, 2008, and they filed their answer to the verified petition on December 24, 2008.¹⁶⁸

At the December motions hearing, the petitioners' evidence included the testimony of Petitioner Frederick Albert, a middle school teacher, who opined that it would be doubtful that "a teacher's impairment due to drugs would go unnoticed" because "his school ha[d] cameras in the hallways, policemen who [were] regularly in the building, sometimes accompanied by drug dogs,"¹⁶⁹ and a soon-to-be-in-place keyless entry system that would "track the comings and goings of teachers."¹⁷⁰ On cross-examination Albert stated that the safety responsibilities of teachers included halting fights between students, assisting with fire drills, and working to provide a safe environment for students and employees.¹⁷¹ Despite this testimony, Albert also testified that the Revised Policy was "unnecessary . . . intrusive . . . demeaning . . . [and] demoralizing."¹⁷²

Respondent Ronald Duerring, a thirty-four-year employee of the school system and its current superintendent, also testified during this hearing.¹⁷³ He explained that the Board had adopted a suspicion-based testing program for teachers in 2008, had considered whether to implement the suspicionless policy for approximately two years, and had made the Revised Policy "available for public comment before its passage."¹⁷⁴ According to Duerring, the Board devised the Revised Policy in response "to six to nine employees

165. See *Kanawha Cnty.*, 592 F. Supp. 2d at 888; see also Docket Rep., Entries 3, 8, 9, *Kanawha Cnty.*, 592 F. Supp. 2d 883 (No. 2:08-cv-1406) [hereinafter *Kanawha County Docket Report*] (on file with authors).

166. See *Kanawha Cnty.*, 592 F. Supp. 2d at 888; see also *Kanawha County Docket Report*, *supra* note 165, at Entries 10-13.

167. See *Kanawha Cnty.*, 592 F. Supp. 2d at 888; see also *Kanawha County Docket Report*, *supra* note 165, at Entry 17.

168. See *Kanawha Cnty.*, 592 F. Supp. 2d at 888; see also *Kanawha County Docket Report*, *supra* note 165, at Entries 18-20.

169. See *Kanawha Cnty.*, 592 F. Supp. 2d at 888.

170. *Id.* at 888-89.

171. See *id.* at 889.

172. *Id.*

173. See *id.* at 889.

174. See *id.*

who tested positive under the suspicion-based testing program”¹⁷⁵ and a 2006 case of a Kanawha County principal who was charged with cocaine possession.¹⁷⁶ Although this principal was later acquitted and reinstated, these events caused the Board to believe that drug use was becoming more widespread among school employees.¹⁷⁷ Duerring also testified that the Board decided to implement the Revised Policy because of its concern for student safety.¹⁷⁸ Further, Duerring stressed that teachers were in safety sensitive positions due to their dealings with children; that teachers had the legal obligation in West Virginia to act *in loco parentis* to students; and that teachers played vital “roles in ensuring the safety of children during fire drills and bomb threats”—roles which could be impacted by a teacher’s impairment.¹⁷⁹ However, when the court inquired as to whether Duerring had knowledge of any student “in Kanawha County Schools or anywhere in the country [who had] ever suffered an injury due to a drug or alcohol impaired teacher,” the superintendent answered in the negative.¹⁸⁰

2. The Parties’ Arguments

To support their motion for preliminary injunction, the petitioners argued that the random, suspicionless drug testing policy violated the Fourth Amendment because the teachers were not “safety sensitive” employees and the Board had not established a “special need” to justify this random, suspicionless search.¹⁸¹ Conversely, the respondents, citing *Knox County* and *Crager*,¹⁸² argued that this policy was constitutional since teachers were in “safety sensitive” positions and the Board’s “special need” for maintaining safety in the schools outweighed the teachers’ privacy rights.¹⁸³

175. *Id.* at 890.

176. *See id.*

177. *See id.*

178. *See id.*

179. *See id.*

180. *See id.*

181. *See* Memorandum of Law in Support of Petitioners’ Motion for a Preliminary Injunction at 3, 8-15, *Kanawha Cnty.*, 592 F. Supp. 2d 883 (No. 2:08-cv-1406) (on file with the authors).

182. *See* Response to Verified Petition for Writ of Mandamus, Declaratory Judgment and Injunctive Relief at 3-4, 6, *Kanawha Cnty.*, 592 F. Supp. 2d 883 (No. 2:08-cv-1406) (on file with the authors).

183. *See id.* at 2, 5-9.

3. Court's Analysis of the Constitutionality of the Drug Testing Policy

The court began its analysis by setting forth the standard for granting a motion for preliminary injunction.¹⁸⁴ First, the court would determine whether the petitioners had made a clear showing that they would suffer irreparable harm if the court denied the motion.¹⁸⁵ Second, the court would “balance the likelihood of irreparable harm to [the petitioners] if the court [denied] preliminary relief” against the likelihood of harm to the respondents if the court granted the motion.¹⁸⁶ Third, the court would “determine whether [the petitioners] [had] made a sufficient showing of a probability of success on the merits.”¹⁸⁷ Finally, the court would “consider whether the public interest favor[ed] granting [the motion].”¹⁸⁸

In addressing whether the petitioners made a clear showing of irreparable harm, the court noted that the alleged harm was “inseparably linked” to the petitioners’ constitutional claim.¹⁸⁹ As such, the Revised Policy had to comply with the Fourth Amendment,¹⁹⁰ given that drug testing is “a particularly invasive [search] because [it], especially by urinalysis, intimately involves an individual’s privacy and bodily integrity.”¹⁹¹ Further, the court explained that governmental searches typically must be based on an “individualized suspicion of wrongdoing” to satisfy the Fourth Amendment.¹⁹² The court stated, however, “individualized suspicion” is not required when a search is “conducted for ‘special needs, beyond the normal need for law enforcement.’”¹⁹³ The court made it clear that in determining whether a “special need” exists to justify a suspicionless drug testing policy, a court must inquire as to “whether there is a [requisite] safety concern that is substantial enough to override the individual’s privacy interest and to suppress the Fourth Amendment’s requirement of individualized suspicion.”¹⁹⁴ After analyzing relevant Supreme Court cases,¹⁹⁵ the court determined that a “special need” would exist to support a suspicionless search when there was a

184. *See Kanawha Cnty.*, 592 F. Supp. 2d at 891.

185. *See id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *See id.* at 891-92.

190. *See id.* at 892.

191. *Id.*

192. *Id.* (quoting *Chandler v. Miller*, 520 U.S. 305, 308, 313-14 (1997)).

193. *Id.* at 892-93 (quoting *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 619 (1989)).

194. *Id.* at 893.

195. *See id.* at 893-96 (discussing *Skinner*, 489 U.S. 602).

major safety concern[] such as the great harm to people and property that could result from a railroad accident, the threat to national security posed by the failed interdiction of illegal drugs smuggled across our borders, and the risk to safety created by the potential use of deadly force by a drug-addled Customs employee equipped with a firearm.¹⁹⁶

Although the *Kanawha County* court did acknowledge that the Supreme Court had determined “that a lesser safety concern can qualify as a special need, it noted that this was only when the persons to be tested possess[ed] a greatly diminished privacy interest.”¹⁹⁷ Consequently, the court found that “the special needs exception to a suspicion-based search was . . . a very narrow one,” which was only applicable “when the government is faced with a safety concern of sufficiently great magnitude to outweigh the privacy interests of the group to be searched.”¹⁹⁸ Moreover, the court made clear that the danger underlying this identified safety interest must be “concrete,” meaning “an actual, threatened danger and not some perceived potential danger.”¹⁹⁹

Given this background, the court proceeded to balance the employees’ privacy interests against the Board’s “special needs” asserted for the adoption and implementation of the drug testing policy.²⁰⁰ In considering the employees’ privacy concerns, the court addressed the question of whether the Revised Policy’s testing procedures were overly intrusive and violative of the employees’ privacy rights.²⁰¹ Regarding the intrusiveness of this random, suspicionless drug testing, the court explained that it must consider “the manner in which production of the urine sample is monitored” and the potential for revelation of the employees’ personal information.²⁰²

Pursuant to the Revised Policy, the urinalysis testing was to be conducted by Health Research Systems/EMSI, which would collect and test the samples provided by the employees at their work sites.²⁰³ These collections would not be observed without a reasonable basis to believe that “the donor [had or would] attempt to substitute or adulterate a sample.”²⁰⁴ Then, the test results “[would] be transmitted to a certified Medical Review Officer, who [would]

196. *Id.* at 896.

197. *Id.* at 896-97 (citing *Vernonia*, 515 U.S. at 654-56, 661-62).

198. *Id.* at 897.

199. *Id.*

200. *See id.* at 898-905.

201. *See id.* at 899.

202. *Id.* at 899 (quoting *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 617 (1989)).

203. *See id.*

204. *Id.*

provide the final results determination.”²⁰⁵ When an employee was selected for testing, the Medical Review Officer (“MRO”) was required to notify Human Resources of all negative tests within 48 hours and of all positive tests as soon as confirmation results became available.²⁰⁶ However, with a positive test result, the MRO was required to first contact the employee “to ascertain whether there [was] an acceptable medical reason for the positive result.”²⁰⁷ Unlike the policy at issue in *Crager*, the Revised Policy did not specify what type of action would be taken against an employee who tested positive or who refused to take the test.²⁰⁸

After reviewing the required procedures, the court determined that the Board’s drug testing policy was not overly intrusive.²⁰⁹ The determination was based on the findings that “[t]he vast majority of the collections will not be monitored;”²¹⁰ the MRO was required to keep the medical information obtained confidential;²¹¹ and the testing was limited to the presence of certain drugs.²¹²

After determining that the testing procedures were not overly intrusive, the court focused on whether the employees subject to the Revised Policy had a reduced privacy interest, thereby supporting a random, suspicionless search.²¹³ Here, the court acknowledged that “[p]ublic employees may have a reduced expectation of privacy by virtue of their employment if the employment carries with it safety concerns for which the employees are heavily regulated.”²¹⁴ In determining whether the teachers were part of a profession that is heavily regulated for safety, the court scrutinized the respondents’ evidence presented in support of this argument of heavy regulation.²¹⁵ This evidence included the Board’s policy that described the duties of teachers in their *in loco parentis* role and the county schools’ employee identification badge and key card policy that was established “to provide a safe environment for employees, students and visitors on the premises in all buildings owned by Kanawha County Schools.”²¹⁶

205. *Id.*

206. *See id.* at 900.

207. *Id.*

208. *See id.*

209. *See id.* at 900.

210. *Id.*

211. *See id.*

212. *See id.* at 900-01.

213. *See id.* at 901.

214. *Id.* (citations omitted).

215. *See id.*

216. *Id.*

After reviewing this evidence, the court “[found] that the record [did] not demonstrate that any of the school teachers or other employees [were] heavily regulated for safety.”²¹⁷ Further, the court “question[ed] whether the respondents *could* offer evidence to show that teachers . . . are heavily regulated for safety.”²¹⁸ As a result, the court concluded that the petitioners did not “have a reduced privacy interest by virtue of their employment in the public school system.”²¹⁹

After considering the petitioners’ privacy concerns, the court addressed the issue of whether the Board had a “special need” to justify the random, suspicionless testing under the Revised Policy.²²⁰ Here, the court reiterated its finding that the petitioners did not occupy “safety sensitive” positions.²²¹ Importantly, the court noted its disagreement with the findings of *Knox County*,²²² a case heavily relied upon by the respondents.²²³ Specifically, the court claimed that the *Knox County* court was incorrect when it “found that teachers occupied safety sensitive positions simply because they were entrusted with the care of young children.”²²⁴ Although the Kanawha County teachers did perform some duties that relate to safety arising from their *in loco parentis* role, the court indicated that there was no evidence that these duties were “‘fraught with such risk of injury to others that even a momentary lapse of attention [could] have disastrous consequences.’”²²⁵ Further, the court explained that the respondents failed to provide any evidence that “the unspecified danger that teachers . . . pose to students is one that is inherent in . . . their day-to-day job performance.”²²⁶ Moreover, the court noted the lack of evidence regarding a widespread drug problem among employees subject to the Revised Policy.²²⁷ Finally, the court made it clear that although the respondents were not required to wait for an actual injury to occur, they did have to show that “the threat to student safety is one that is a concrete, actual danger that permeates [the employees’] ordinary job performance.”²²⁸ Without such a showing, the court found that the safety interest enunciated by the respondents to support the Revised Policy did not outweigh the petitioners’

217. *Id.* at 902.

218. *Id.* at 901 (emphasis in original) (citations omitted).

219. *Id.* at 902.

220. *See id.*

221. *See id.*

222. *Knox Cnty. Educ. Ass’n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361 (6th Cir. 1998).

223. *See Kanawha Cnty.*, 592 F. Supp. 2d at 903.

224. *Id.* (citing *Knox Cnty.*, 158 F.3d at 378).

225. *Id.* at 902 (quoting *Skinner v. Ry. Labor Execs.’ Ass’n*, 489 U.S. 602, 628 (1989)).

226. *Id.* at 903.

227. *See id.* at 904.

228. *Id.* at 903.

privacy interests.²²⁹

Accordingly, the court “found that the petitioners were likely to succeed in their Fourth Amendment challenge to the random, suspicionless drug testing provisions of the Revised Policy.”²³⁰ As such, the court determined that the petitioners had “made a clear showing that they [would] suffer irreparable harm [if the court declined] to issue an injunction,”²³¹ whereas the respondents would not be “harmed in any legally cognizable sense by being enjoined from committing an alleged constitutional violation.”²³² Finally, the court determined that granting the injunction served the public interest.²³³ Therefore, on January 8, 2009, the court entered an order granting the petitioners’ motion for a preliminary injunction.²³⁴ Subsequently, on August 21, 2009, the parties entered into a consent decree converting the court’s preliminary injunction into a permanent injunction, which permanently enjoined the respondents from enforcing the Revised Policy.²³⁵

D. Key Federal Constitutional Considerations

The case analyses of *Crager* and *Kanawha County* illustrate the judicial split on the constitutionality of random, suspicionless drug testing of teachers.²³⁶ Based on the expansion of the Fourth Amendment analysis for suspicionless drug testing of students in *Earls*,²³⁷ the Supreme Court might uphold a suspicionless drug testing policy for teachers, should the issue come before it.²³⁸ This prognostication is implicit in the conclusions of *Crager*:

229. *See id.* at 904-06.

230. *Id.* at 905.

231. *See id.*

232. *Id.*

233. *See id.* at 905-06.

234. *See id.* at 906.

235. *See Kanawha Cnty. Consent Decree, supra* note 23, at 1-3.

236. *Compare Crager v. Bd. of Educ.*, 313 F. Supp. 2d 690, 702-03 (E.D. Ky. 2004) (upholding the constitutionality of the suspicionless drug testing policy at issue in the case), *with Kanawha Cnty.*, 592 F. Supp. 2d at 905 (finding that the petitioners would likely succeed on the merits of showing that the suspicionless drug testing policy at issue in the case violated their Fourth Amendment rights).

237. *See supra* notes 67-73 and accompanying text.

238. *See, e.g.*, Crystal A. Garcia & Sheila Suess Kennedy, *Back to School: Technology, School Safety and the Disappearing Fourth Amendment*, 12 KAN. J.L. & PUB. POL’Y 273, n. 23 (2003) (questioning whether the *Earls* reasoning—“responsibility for the welfare of children—wouldn’t justify subjecting teachers and coaches to drug testing”). *But see* Karen C. Daly, *Balancing Act: Teachers’ Classroom Speech and the First Amendment*, 30 J.L. & EDUC. 1, 13 (2001) (arguing that “[a]lthough teachers, because of their potential to influence or even harm students, may be subject to more restrictions than adults employed in other occupations, it is difficult to justify treating them like ‘tall children’” for constitutional purposes).

“While the Supreme Court has only upheld random testing in the context of student testing, nothing in the language of the cases provides an explicit prohibition against random testing of adults.”²³⁹

Before the *Crager* court can be credited with an absolute forecast of the future of constitutional interpretation in this area, however, three important issues must be noted. First, *Crager*, which heavily relied on the Sixth Circuit’s *Knox County* decision,²⁴⁰ actually featured a much expanded scope in its search.²⁴¹ Whereas the *Knox County* policy mandated a one-time, non-random search,²⁴² the policy at issue in *Crager* was a completely random, suspicionless search.²⁴³ Second, *Knox County* is not the only federal appellate decision regarding this issue. In 1998, the Fifth Circuit, in an admittedly abbreviated opinion in *United Teachers v. Orleans Parish School Board*, expressly determined that a suspicionless drug testing policy of public school teachers violated the Fourth Amendment.²⁴⁴ Third, the Supreme Court denied the petition for writ of certiorari that was filed in the *Knox County* case.²⁴⁵ Given these considerations and the lower federal court split on the constitutionality of suspicionless drug testing of teachers policies, it is now time for the Supreme Court to rule on this issue so that school districts can make decisions in this area based on an unequivocal determination of the nation’s highest court.²⁴⁶ Based on a review of the model cases of *Crager* and *Kanawha County*, when the Court does take up this issue, several key findings will provide the foundation for its decision.

First, the Court will have to consider whether public school teachers have a diminution in their expected privacy rights.²⁴⁷ Central to this inquiry will be whether teachers are considered to occupy employment positions in a highly regulated industry.²⁴⁸ In other words, the Court will determine whether

239. *Crager*, 313 F. Supp. 2d at 701.

240. *See id.* at 701-04.

241. *See id.*; *see also Crager* Memorandum Opinion, *supra* note 22, at 22.

242. *See Knox Cnty. Educ. Ass'n v. Knox Cnty. Bd. Of Educ.*, 158 F.3d 361, 384 (6th Cir. 1998).

243. *See Crager*, 313 F. Supp. 2d at 701; *see also Crager* Memorandum Opinion, *supra* note 22, at 22.

244. *See* 142 F.3d 853 (5th Cir. 1998).

245. *See* 528 U.S. 812 (1999).

246. *See Schmidt*, *supra* note 13, at 277 (discussing how “it will be impossible to determine where a line should be drawn going forward” without a resolution as to the federal constitutionality of suspicionless drug testing of teachers policies).

247. *See, e.g., Am. Fed’n of Teachers-W. Va. v. Kanawha Cnty. Bd. of Educ.*, 592 F. Supp. 2d 883, 896-97 (S.D. W. Va. 2009) (discussing how special needs will only justify a suspicionless search when the individuals possess diminished privacy rights).

248. *See, e.g., Crager*, 313 F. Supp. 2d at 694 (finding that teachers in Kentucky are heavily regulated); *see also Crager* Memorandum Opinion, *supra* note 22, at 9.

teachers are in safety sensitive positions.²⁴⁹ Second, the Court will need to decide whether or not the special needs asserted by school boards—typically, the deterrence and prevention of drug use in public schools—are merely symbolic²⁵⁰ or are concrete problems that overcome the general requirement for individualized suspicion in government searches.²⁵¹

If the Court, like that in *Crager*, determines that teachers are in “safety sensitive” positions and are heavily regulated, it is very probable that it will find that these teachers have a reduced expectation of privacy based on the nature of their employment.²⁵² This reduced expectation of privacy would make it considerably easier for the Court to find the school’s “special need” for implementing a random, suspicionless drug testing policy outweighs the teachers’ privacy interests.²⁵³ As a result, the Court may be more willing to hold that this type of policy is constitutional and does not violate teachers’ Fourth Amendment rights.²⁵⁴

If, however, the Court, following *Kanawha County*, determines that teachers are not in “safety sensitive positions,” then it is very likely that the teachers will not be held to have a reduced expectation of privacy.²⁵⁵ Without this reduced expectation of privacy, it would be difficult for the Court to hold that the school’s “special need” for implementing a random, suspicionless drug testing policy outweighs teachers’ privacy interests.²⁵⁶ Thus, with these findings, the Court may be more inclined to hold that a random, suspicionless

249. See, e.g., *Knox Cnty. Educ. Ass’n v. Knox Cnty. Bd. of Educ.*, 158 F.3d 361, 378-79 (6th Cir. 1998) (determining that teachers occupy safety sensitive positions).

250. See, e.g., *Chandler v. Miller*, 520 U.S. 305, 321-22 (1997) (determining that a state’s asserted need to “struggle against drug abuse,” where used to justify the suspicionless drug testing of candidates for public office is “symbolic, not ‘special’”).

251. See, e.g., *Crager*, 313 F. Supp. 2d at 693-97 (finding that the benefits of suspicionless testing to the state, in conjunction with the significant drug problem facing Knott County and the decreased expectation of privacy for teachers, supports the Board’s right to use suspicionless testing procedures).

252. See *id.* at 693-94; see also *Crager* Memorandum Opinion, *supra* note 22, at 24.

253. See, e.g., *Crager*, 313 F. Supp. 2d at 693-97; see also *Crager* Memorandum Opinion, *supra* note 22, at 24; Ralph D. Mawdsley, *School Board Control over Education and a Teacher’s Right to Privacy*, 23 ST. LOUIS U. PUB. L. REV. 609, 632 (2004) (“The privacy rights of teachers in public schools are affected by the diminished expectation of privacy that comes with working with minors who are required to attend school.”).

254. See e.g., *Crager*, 313 F. Supp. 2d at 693-97 (finding that the suspicionless drug testing policy for teachers does not violate the Fourth Amendment); see also *Crager* Memorandum Opinion, *supra* note 22, at 25.

255. See *Am. Fed’n of Teachers-W. Va. v. Kanawha Cnty. Bd. of Educ.*, 592 F. Supp. 2d 883, 903 (S.D. W. Va. 2009) (finding that teachers do not occupy safety sensitive positions).

256. See, e.g., *id.* at 902 (finding no evidence that teachers are highly regulated).

drug testing policy is unconstitutional as a violation of the teachers' Fourth Amendment rights.²⁵⁷

Yet this analysis alone demonstrates how the Court could easily make a fact-specific determination, as it did in *Safford*,²⁵⁸ which would leave school districts in a continued state of uncertainty as to whether or not to adopt suspicionless drug testing policies for teachers. Such a fact-specific holding is not what educators and school boards need. Rather, the Supreme Court should provide the country with determinative direction as to the federal constitutionality of these policies.

However, a clear ruling from the Court, standing alone, will not resolve all of these legal issues. School districts are also going to be in need of guidance from their presiding state appellate courts in terms of the ultimate direction they should take in the adoption and implementation of policies that require suspicionless drug testing of teachers.

III. State Constitutions and Policies That Require the Random, Suspicionless Drug Testing of Teachers

A. Background

Many of the cases regarding the implementation and enforcement of policies for the suspicionless drug testing of teachers have involved both federal *and* state constitutional challenges.²⁵⁹ Various federal and state courts have elected different strategies in the disposition of these cases. Some courts have considered the totality of the challenges and have deemed the policies constitutional or unconstitutional under both the state and United States constitutions.²⁶⁰ While some decisions have hinged solely on federal constitutional grounds and have not broached the matter of state constitutional

257. See, e.g., *id.* at 905 (finding that the teacher “petitioners are likely to succeed in their Fourth Amendment challenge to the suspicionless random drug testing provisions” of the policy).

258. See *Safford Unified Sch. Dist. v. Redding*, 129 S. Ct. 2633 (2009) (finding that the specific strip search of a public school student in search of illegal drugs at issue in the case, but *not* all strip searches of students in search of illegal drugs, was violative of the Fourth Amendment).

259. See, e.g., *Kanawha Cnty.*, 592 F. Supp. 2d 883, 888 (S.D. W. Va. 2009) (describing the state and federal constitutional challenges to the school district’s requirement for the suspicionless drug testing of teachers); *Patchogue-Medford Cong. of Teachers v. Bd. of Educ.*, 510 N.E.2d 325, 329 (N.Y. 1987) (holding that a school district’s policy mandating suspicionless drug testing of teachers violated both the state and federal constitutional guarantees against unreasonable searches and seizures).

260. See, e.g., *Patchogue-Medford*, 510 N.E.2d at 329 (finding state and federal constitutional violations in the suspicionless drug testing of teachers policy).

claims,²⁶¹ other cases have involved only state constitutional challenges.²⁶² *Jones v. Graham County Board of Education*²⁶³ is an important model case for a state challenge alone.

B. Jones v. Graham County Board of Education

In a case of first impression²⁶⁴ filed in the North Carolina Superior Court of Graham County on April 20, 2007,²⁶⁵ Susan Jones and the North Carolina Association of Educators (NCAE) challenged the suspicionless, random drug testing policy adopted by the Graham County Board of Education.²⁶⁶ The plaintiffs alleged that the policy violated the North Carolina Constitution's prohibitions against unreasonable searches and seizures.²⁶⁷

1. Background of the Case

At the commencement of her lawsuit, Jones was a member of NCAE,²⁶⁸ a sixteen-year employee of the North Carolina public schools,²⁶⁹ and a Spanish teacher at a Graham County²⁷⁰ high school.²⁷¹ Jones' co-plaintiff, NCAE, is an educational association organization whose mission is "[t]o be the voice of

261. See, e.g., *Kanawha Cnty.*, 592 F. Supp. 2d at 891 (finding that the "petitioners have demonstrated that each of the *Blackwelder* factors weighs in their favor based on a violation of the Fourth Amendment and that a preliminary injunction should issue" and, consequently, finding that the court "need not address the petitioners' arguments under West Virginia law").

262. See, e.g., *Jones v. Graham Cnty. Bd. Of Educ.*, 677 S.E.2d 171, 177-82 (N.C. Ct. App. 2009) (analyzing the permissibility of suspicionless drug testing of teachers under the North Carolina Constitution); see also *Jones* Complaint, *supra* note 25, at 2 (alleging that the policy of suspicionless drug testing of teachers violates the North Carolina Constitution and containing no allegations of federal constitutional violations). Conversely, other cases have asserted only federal constitutional challenges. See, e.g., *Crager v. Bd. of Educ.*, 313 F. Supp. 2d 690, 691 (E.D. Ky. 2004) (discussing how claims were limited to allegations of violations of the Fourth Amendment and the Americans with Disabilities Act).

263. *Jones v. Graham Cnty. Bd. of Educ.*, No. 07CVS81 (N.C. Super. Ct. Graham Co. 2007) (selected case documents on file with authors), *rev'd*, 677 S.E.2d 171 (N.C. Ct. App. 2009).

264. See Jordan Schrader, *Judge Hears Drug Test Case*, ASHEVILLE CITIZEN-TIMES, Aug. 8, 2007, at A2.

265. See *Jones*, 677 S.E.2d at 173; see also *Jones* Complaint, *supra* note 25, at 1.

266. See *Jones*, 677 S.E.2d at 173; see also *Jones* Complaint, *supra* note 25, at 1-3.

267. See *Jones*, 677 S.E.2d at 173; see also *Jones* Complaint, *supra* note 25, at 1-3.

268. See Affidavit of Susan Jones at 2, *Jones*, 677 S.E.2d 171 (No. 07CVS81) [hereinafter *Jones* Affidavit] (on file with authors).

269. See *id.* at 1. In her affidavit, Susan Jones swore that she believed that random drug testing showed "disrespect for the professional integrity of teachers." *Id.*

270. Graham County is located in the southwestern tip of North Carolina bordering the Great Smoky Mountains National Park and Tennessee. See 1 BEVERLY TETTERTON & GLEN TETTERTON, NORTH CAROLINA COUNTY FACT BOOK 103-04 (1998).

271. See *Jones*, 677 S.E.2d at 173; see also *Jones* Affidavit, *supra* note 268, at 1.

educators in North Carolina that unites, organizes and empowers members to be advocates for public education and children.”²⁷² Fifty-three of the Board’s employees were members of NCAE.²⁷³ The defendant Board oversaw the operation of three public schools—which educated about 1300 students²⁷⁴—and employed a staff of 250 individuals—which included 110 teachers and administrators.²⁷⁵ The school system was described as “small” and “close knit,” with a low turnover rate of “about three percent annually among certified personnel, usually to replace retiring veteran teachers.”²⁷⁶ As in many rural areas, this was a school system where “everybody [knew] everybody.”²⁷⁷ A suspicion-based drug and alcohol testing policy for teachers had been in place in the school district since 1994.²⁷⁸ In 2005, this policy was revised to require suspicionless drug testing for all individuals seeking employment with the school district.²⁷⁹

On December 5, 2006, the Board, under the leadership of Chairman Mitch Colvard,²⁸⁰ enacted a new policy (“the Graham Policy”) that “required all employees to submit to drug or alcohol testing upon the policy’s implementation and required all employees to submit to random, suspicionless testing thereafter.”²⁸¹ With the adoption of the Graham Policy, Graham County became the first school system in North Carolina to enact a random, suspicionless drug and alcohol testing policy for every employee.²⁸² Board members claimed that the new policy reflected concerns about the safety of students and employees and demonstrated the Board’s role in maintaining a safe, drug-free work and school environment.²⁸³ Further, since safety was the overriding concern, the Board relied upon a separate 2005 policy that declared

272. N.C. Ass’n of Educ., *Mission and Vision*, <http://www.ncae.org/cms/Mission+and+Vision/16.html> (last visited Mar. 11, 2011).

273. Affidavit of Rick Davis at 1, *Jones*, 677 S.E.2d 171 (No. 07CVS81) [hereinafter Davis Affidavit] (on file with authors).

274. *See Jones*, 677 S.E.2d at 173.

275. Brief of Plaintiff-Appellants at 3, *Jones*, 677 S.E. 2d 171 (No. COA08-477) [hereinafter *Jones* Appellants Brief] (on file with authors).

276. *Id.* at 3-4.

277. *Id.* at 4.

278. Brief of Defendant-Appellee at 2, *Jones*, 677 S.E. 2d 171 (No. COA08-477) [hereinafter *Jones* Appellee Brief] (on file with authors).

279. *See id.*

280. *See* Affidavit of Mitch Colvard at 1, *Jones*, 677 S.E.2d 171 (No. 07CVS81) [hereinafter Colvard Affidavit] (on file with authors).

281. *Jones*, 677 S.E.2d at 173.

282. *See Jones* Appellants Brief, *supra* note 275, at 6.

283. *See* Defendant’s Answer, Motions to Dismiss, and Motion for Judgment on the Pleadings at 2, *Jones*, 677 S.E.2d 171 (No. 07CVS81) [hereinafter *Jones* Answer] (on file with authors).

that all Graham County school employees held safety sensitive positions,²⁸⁴ “meaning that every position within the . . . system [was] one in which children’s safety or the safety of others [was] an overriding concern.”²⁸⁵

The Graham Policy broadly defined “[d]rug testing [to mean] the scientific analysis of urine, blood, breath, saliva, hair, tissue, and other specimens of the human body for the purpose of detecting a drug or alcohol.”²⁸⁶ Employees who violated the policy were “subject to . . . personnel action by the Board which could result in termination of employment . . . or the requirement that the employee participate satisfactorily in [an approved] drug abuse assistance or rehabilitation program.”²⁸⁷ The Board contracted with Keystone Laboratories to collect specimens, conduct the testing, and employ a procedure to randomly select employees.²⁸⁸ Pursuant to Keystone’s procedure, urinalysis was the mode of collection for drug testing, which was not observed unless “extraordinary circumstances existed.”²⁸⁹ “In the event of a positive test, an employee [could] submit the written test result to an independent medical review officer and [could] obtain and independently test the . . . specimen that yielded the positive result.”²⁹⁰ Further, a person who tested positive would be allowed the opportunity to meet with the Board to offer an alternate explanation as to the cause of the positive result.²⁹¹

The parties consented that the matter should be heard on August 7, 2007, before the Buncombe County, North Carolina Superior Court, on the plaintiffs’ motion for declaratory judgment, the defendant’s motion for judgment on the pleadings, and the cross-motions for summary judgment.²⁹² After consideration, the court granted the defendant’s motion for summary judgment and denied the plaintiffs’ motion for summary judgment on January 18, 2008.²⁹³ In an amended February 6, 2008, order, the court reaffirmed its January 18 holding, denied the defendant’s motion for judgment on the

284. See *Jones* Appellee Brief, *supra* note 278, at 2.

285. Colvard Affidavit, *supra* note 280, at 2.

286. *Jones* Answer, *supra* note 283, at Ex. A, Drug-Free Workplace Environment Policy, § 4.4.

287. See *id.* § 1.4.

288. See *Jones* Appellee Brief, *supra* note 278, at 5-6.

289. *Jones v. Graham County Bd. of Educ.*, 677 S.E.2d 171, 174 (N.C. Ct. App. 2009).

290. *Id.* at 174-75 (internal quotations omitted).

291. See *id.* at 175.

292. See *id.* at 175; see also Defendant’s Notice of Hearing at 1, *Jones*, 677 S.E. 2d 171 (No. 07CVS81) (on file with authors); Plaintiffs’ Notice of Hearing at 1, *Jones*, 677 S.E. 2d 171 (No. 07CVS81) (on file with authors).

293. See Order Granting Defendant’s Motion for Summary Judgment at 1, *Jones*, 677 S.E. 2d 171 (No. 07CVS81) (on file with authors).

pleadings, and denied the plaintiffs' motion for declaratory judgment.²⁹⁴ The plaintiffs filed a timely appeal to the North Carolina Court of Appeals on March 6, 2008.²⁹⁵

2. *The Parties' Arguments*

On appeal, the plaintiffs argued that the lower court erred in granting the defendant's motion for summary judgment and in denying the plaintiffs' motion for summary judgment.²⁹⁶ The plaintiffs claimed that the Graham Policy violated Article 1, Section 19 of the North Carolina Constitution, which "prohibits the seizure of any person 'but by the law of the land.'"²⁹⁷ The plaintiffs also asserted that the policy violated Article 1, Section 20 of the North Carolina Constitution,²⁹⁸ which provides that "[g]eneral warrants, whereby any officer or other person may be commanded to search suspected places without evidence of the act committed, or to seize any person or persons not named, whose offense is not particularly described and supported by evidence, are dangerous to liberty and shall not be granted."²⁹⁹ Specifically, the plaintiffs argued that the Board failed to meet its burden to prove a special need for the random drug testing policy.³⁰⁰

In response, the defendant argued that school employees held safety sensitive positions,³⁰¹ that the deterrence of drug use in public schools is a special need,³⁰² and that the Graham Policy had safeguards that resulted in "minimal intrusion on the employee's privacy."³⁰³ To support the claim that teachers held safety sensitive positions, the defendant cited both *Knox County* and *Crager*.³⁰⁴

3. *Court's Analysis of the Constitutionality of the Drug Testing Policy*

In its decision, the court focused its analysis on the guarantee of Article I, § 20 of the North Carolina Constitution against unreasonable searches.³⁰⁵ The

294. See Amended Order Granting Defendant's Motion for Summary Judgment at 1, *Jones*, 677 S.E. 2d 171 (No. 07CVS81) (on file with authors).

295. See Notice of Appeal at 1, *Jones*, 677 S.E.2d 171 (No. 07CVS81) (on file with authors).

296. See *Jones* Appellants Brief, *supra* note 275, at 12.

297. See *id.* (quoting N.C. CONST. art. I, § 19).

298. See *id.*

299. N.C. CONST. art. I, § 20.

300. See *Jones* Appellants Brief, *supra* note 275, at 18-22.

301. See *Jones*, 677 S.E.2d at 173; see also *Jones* Appellee Brief, *supra* note 278, at 13.

302. See *Jones* Appellee Brief, *supra* note 278, at 27; see also *Jones*, 677 S.E.2d at 179.

303. *Jones* Appellee Brief, *supra* note 278, at 37.

304. See *id.* at 22-25.

305. See *Jones*, 677 S.E.2d at 177. Because the court found that this constitutional provision was violated, it did not reach the question of the other alleged state constitutional violation. See

court first noted that the state constitution provides at least as much protection against unreasonable searches and seizures as the Fourth Amendment does.³⁰⁶ It then applied a balancing test to compare “the nature of the intrusion on the individual’s privacy against the promotion of legitimate governmental interests.”³⁰⁷ In doing so, the court made note of the general requirement for individualized suspicion to support a constitutional search³⁰⁸ and the “context-specific inquiry” that is needed when a special needs justification is alleged for a suspicionless search.³⁰⁹

Consequently, the court “beg[an] [its] inquiry by . . . examin[ing] the intrusiveness of the . . . testing procedure.”³¹⁰ It noted that, while it appeared that only urine would be tested, the Graham Policy “[did] not specify the ‘bodily specimen’ employees [would] be required to produce.”³¹¹ Because the policy allowed testing of a broad range of bodily specimens and provided for the suspension of any employee with any “detectable amount of an illegal drug or of alcohol,” the court found “that the policy [was] remarkably intrusive.”³¹²

The court next considered whether teachers “have a reduced expectation of privacy by virtue of their employment in a public school system.”³¹³ Here, the court found “no evidence . . . that [these] employees [were highly] regulated for safety.”³¹⁴ Stressing the Supreme Court’s finding that “[the schools’ power] permit[s] a degree of supervision and control [over schoolchildren] that could not be exercised over free adults,”³¹⁵ the court determined that the teachers did not have a reduced privacy interest due to their employment.³¹⁶ Subsequently, the court decided that it could not find “evidence in the record of any drug problem among [Graham County’s school personnel]”—the special need that the new policy was allegedly designed to prevent.³¹⁷ As such, it concluded that the policy was merely symbolic and not a special need.³¹⁸

id. at 182 n.4.

306. *See id.* at 177-78.

307. *See id.* at 178 (quoting *Bd. of Educ. v. Earls*, 536 U.S. 822, 829 (2002)).

308. *See id.* at 178-79 (citing *Samson v. California*, 547 U.S. 843, 855 n.4 (2006)).

309. *See id.* at 179 (citing *Chandler v. Miller*, 520 U.S. 305, 314 (1997)).

310. *Id.*

311. *Id.*

312. *See id.* at 179-80 (emphasis omitted).

313. *Id.* at 180.

314. *Id.* (emphasis omitted).

315. *Id.* (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995)) (emphasis in original).

316. *See id.*

317. *See id.*

318. *See id.*

The court “conclud[ed] that the employees’ acknowledged privacy interests outweigh[ed] the Board’s interest in conducting random, suspicionless testing.”³¹⁹ Based on this conclusion, the court found that the Graham Policy “violates [the North Carolina Constitution’s] guarantee against unreasonable searches,”³²⁰ reversing the decision of the lower court.³²¹ After the decision, the Board opted not to appeal to the North Carolina Supreme Court.³²²

C. Key State Constitutional Considerations

In several cases involving the question of the constitutionality of suspicionless drug testing within the schoolhouse gate, judges have expressly acknowledged that the state constitutional guarantees against unreasonable searches may provide more protection to their citizens than federal guarantees.³²³ The *Jones* decision is replete with this dicta, providing that “[o]ur Constitution is more detailed and specific than the federal Constitution”;³²⁴ the court “may not construe provisions of the North Carolina Constitution as according lesser rights than are guaranteed by the federal Constitution”;³²⁵ and, if the policy violated the Fourth Amendment, then it commensurately violated the state constitution.³²⁶ North Carolina is not alone in its perspective that “the United States Constitution provides a constitutional floor of fundamental rights guaranteed all citizens of the United States, while the state constitutions frequently give citizens of individual states basic rights in addition to those guaranteed by the United States Constitution.”³²⁷ Courts

319. *Id.*

320. *Id.*

321. *See id.* at 182.

322. *See* Jordan Schrader, *Graham Board Won’t Contest Drug-Testing Overturn*, ASHEVILLE CITIZEN-TIMES, June 18, 2009, at A1.

323. *See, e.g.,* *Joye v. Hunterdon Cent. Reg’l High Sch. Bd. of Educ.*, 826 A.2d 624, 672 (2003) (LaVecchia, J., dissenting) (“We have not hesitated in the past to conclude that the State Constitution affords New Jerseyans greater protection against unreasonable searches than that which is afforded under the United States Constitution.”). *But see id.* at 654-55 (majority opinion) (finding that New Jersey constitutional protections against unreasonable searches and seizures are “nearly identical” to the Fourth Amendment, and, thereafter, finding that because a requirement for random suspicionless drug testing of students engaged in extracurricular activities was constitutional under the Fourth Amendment, it was also constitutional under the state constitution).

324. *Jones*, 677 S.E.2d at 177-78 (quoting *Corum v. Univ. of N.C.*, 413 S.E.2d 276, 290 (N.C. 1992)).

325. *Id.* at 178 (citing *Virmani v. Presbyterian Health Servs. Corp.*, 515 S.E.2d 675 (N.C. 1999)).

326. *See id.*

327. *Virmani*, 515 S.E.2d at 692 (quoting *State v. Jackson*, 503 S.E.2d 101, 103 (N.C. 1998)).

in Washington,³²⁸ Hawaii,³²⁹ and Montana³³⁰ have deemed their state constitutional protections against unreasonable searches and seizures to be more expansive than Fourth Amendment protections.

Given the constitutional language and the developing case law, it appears that state constitutional challenges to policies allowing random, suspicionless drug testing of teachers may be a more effective foundation upon which teachers might bring a lawsuit. This may explain why some litigants³³¹ and potential litigants³³² in this general area are solely positing their claims of the lack of constitutionality of educational random suspicionless drug testing policies on state constitutional grounds. This developing case law also demonstrates how certain federal court litigants might have a second bite at the apple if the Supreme Court or the controlling federal circuit court determines that these policies *are* constitutional under the Fourth Amendment. For example, the *Kanawha County* Consent Decree, in which the parties agreed to the conversion of the court's preliminary injunction into a permanent injunction,³³³ expressly provides that "if the United States Supreme Court or the United States Court of Appeals for the Fourth Circuit were to rule that such drug-testing provisions are constitutional, Defendants may move this Court to dissolve or amend this Decree, consistent with such ruling."³³⁴ Although this caveat may seem like a boon to the defendants in this case, it is important to

328. *See* *Robinson v. City of Seattle*, 10 P.3d 452, 459-60 (Wash. Ct. App. 2000) (stating in the context of a state constitutional challenge to a city employee suspicionless drug testing program that Washington's Constitution "clearly recognizes an individual's right to privacy with no express limitations and places greater emphasis on privacy than does the Fourth Amendment") (internal quotations omitted).

329. *See* *State v. Mariano*, 160 P.3d 1258, 1268 (Haw. Ct. App. 2007) ("[W]e are free to give broader privacy protection than that given by the federal constitution and have often extended the protections of the Hawaii Constitution beyond those of the United States Constitution, particularly in the search-and-seizure context.") (internal quotations and citations omitted).

330. *See* *State v. Goetz*, 2008 MT 296, ¶ 23, 345 Mont. 421, 191 P.3d 489, 496-97 (reiterating that Montana's constitution provides heightened privacy rights in the search and seizure context as compared to those rights provided pursuant to the Fourth Amendment to the United States Constitution).

331. *See, e.g., Jones* Complaint, *supra* note 25, at 2 (alleging solely that the suspicionless drug testing of teachers policy at issue in the case violates the North Carolina Constitution).

332. *See, e.g., J.J. Stambaugh, ACLU Protests Random Drug Tests of Student Athletes in Roane County*, KNOXNEWS.COM, (Sept. 10, 2008), <http://www.knoxnews.com/news/2008/sep/10/aclu-protests-random-drug-tests-student-athletes-r/> (on file with authors) (quoting the executive director of the ACLU of Tennessee as stating "[r]andom drug testing is not only patently illegal under state law, but demonstrably ineffective and frequently counterproductive").

333. *See Kanawha Cnty. Consent Decree*, *supra* note 23, at 2.

334. *Id.*

keep in mind that the court never made a determination as to whether or not the West Virginia Constitution was violated by the policy, which would preclude a collateral estoppel argument to a subsequent state litigation.³³⁵

As such, even if the United States Supreme Court were to make a determination on the federal constitutionality of random, suspicionless drug testing of teachers (which is a vitally important decision), the litigation in this area might just transform to a question of whether or not state constitutional rights have been infringed. Consequently, it will be equally important for state appellate courts to provide guidance on whether or not these policies meet the search and seizure requirements of state constitutions.

With the precedent of *Jones*³³⁶ and *Patchogue*,³³⁷ teachers may stand a better opportunity to prevail in this potential second round of litigation, after a federal determination or on appeal to the state's higher courts. This likelihood is enhanced by at least one state court case that invalidated the type of student drug testing policy³³⁸ that had been deemed expressly constitutional under the U.S. Constitution in *Vernonia*³³⁹ and *Earls*.³⁴⁰ School boards and districts might wisely choose to avoid this type of constitutional inquiry in the context of teachers. Finally, given the exponential costs of extended litigations and appeals, school boards and districts may opt out of this type of protracted litigation based on financial and public policy constraints.³⁴¹ However, the ultimate remedy to stave off the potential of extensive litigation and sacrifices on all sides would be rulings from state appellate courts providing the guidance that school districts need in determining whether or not the implementation of such policies would pass constitutional muster.

335. See *Am. Fed'n of Teachers-W. Va. v. Kanawha Cnty. Bd. of Educ.*, 592 F. Supp. 2d 883, 888, 891 (S.D. W. Va. 2009).

336. *Jones v. Graham Cnty. Bd. of Educ.*, 677 S.E.2d 171, 177-78 (N.C. Ct. App. 2009).

337. *Patchogue-Medford Cong. of Teachers v. Bd. of Educ.*, 510 N.E.2d 325, 327-28 (N.Y. 1987).

338. In 2008, the Washington Supreme Court found that a policy mandating random, suspicionless drug testing of student athletes, which the court acknowledged was not violative of the Fourth Amendment per *Vernonia*, violated the state's constitution. See *York v. Wahkiakum Sch. Dist. No. 200*, 178 P.3d 995, 999, 1006 (Wash. 2008) (finding that a suspicionless drug testing policy of student athletes was violative of the state constitution's protections against unreasonable searches and seizures).

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

340. See *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

341. See, e.g., *Schrader*, *supra* note 322, at A1 (noting that, after the North Carolina Court of Appeals decision, the Graham County Board of Education would not file an appeal to the Supreme Court).

IV. Conclusion

It is imperative that the United States Supreme Court and state appellate courts take up cases on the constitutionality of policies that allow or require suspicionless drug testing of teachers as schools throughout the country are in significant need of such determinations. The majority of cases involving these types of policies are reflective of how powerful and how divisive these issues can be in collective bargaining situations and the resulting contracts. In many states, educational unions and associations “play[] a substantial role in the implementation of random drug testing” as they stand “in a position to demand benefits in exchange for such testing”³⁴² or in a position to fight such policies if they are implemented by a state outside³⁴³ (or even inside)³⁴⁴ the collective bargaining process. Court decisions on the constitutionality of these policies will provide needed direction for these contractual negotiation processes, especially as these cases illustrate that educational unions and associations will continue to take a strong stance against suspicionless drug testing as a condition of contractual employment until courts make their determinations.

Finally, judicial determinations of these cases will be useful in dealing with the vested interests that public officials,³⁴⁵ partisan advocacy groups,³⁴⁶ taxpayers, teachers, unions, and private business entities all have in the nature and future existence of these policies as a contractual requirement for public

342. Maureen McLeer Morin, Comment, *Balancing Public Safety and the Right to Privacy: The New Jersey Supreme Court Affirms Random Drug Testing for Employees Holding Safety-Sensitive Positions*, 10 SETON HALL CONST. L.J. 455, 487 (2000).

343. See, e.g., *Jones Complaint*, *supra* note 25, at 1 (identifying the plaintiffs as a Graham County teacher and a professional education association). The Graham County Board of Education adopted its suspicionless drug testing policy outside of any type of collective bargaining process. See Davis Affidavit, *supra* note 273, at 2. Collective bargaining between North Carolina governmental bodies and public employee labor unions is prohibited under North Carolina law. See N.C. Gen. Stat. §§ 95-98 (2009).

344. See, e.g., Mark Niese, *Despite Agreement, Hawaii Teachers Resist Drug Testing*, WASH. POST, Dec. 21, 2008, at A11 (noting that since the Hawaii teachers’ union agreed in 2007 to a collective bargaining agreement that required a “first-in-the-nation statewide random drug testing in exchange for pay raises,” teachers and the union “have accepted the 11 percent boost in pay while fighting the random tests as an illegal violation of their privacy rights”).

345. See, e.g., Kelly Holleran, *New Board Member Says Drug-Testing Teachers Could Wind Up as a Court Battle*, CHARLESTON DAILY MAIL, July 21, 2008 (on file with authors) (quoting a Kanawha County School Board member as stating that “she would rather use taxpayers’ dollars somewhere else than on a lawsuit. ‘These kinds of cases are extremely expensive,’ she said. ‘We’re talking a lot of money. Let’s take this time and be learners and not be leaders in this.’”).

346. See, e.g., ACLU, *Drug Testing*, <http://www.aclu.org/drug-law-reform/drug-testing> (last visited Mar. 11, 2011).

school teachers. The litigation and debate surrounding suspicionless drug testing of teachers reveal the number of stakeholders existing within the consideration, implementation, and contesting of these policies. In addition to the significant considerations of protecting school children against the harms of drugs and protecting the individual liberties of teachers, the other tangible costs are important considerations for school districts considering these types of policies. For example, a Kanawha County school board member, prior to litigation, quoted an approximate cost of \$44 for each drug test; here, “[i]f half the county’s 3,200 employees were tested [in a year] . . . it would cost more than \$70,000.”³⁴⁷ Given how tight school districts’ budgets are, especially in light of the recent recession,³⁴⁸ this is not an insignificant monetary cost.³⁴⁹ Further, these costs must be acknowledged in considering the vested interest that private businesses, like research laboratories and other drug testing firms, have in the continuation of these types of policies.³⁵⁰ As such, judicial guidance on the constitutionality of these policies is crucial not only to teachers but also to stakeholders outside of public education. However, until the Supreme Court and the state appellate courts make these complicated decisions, school districts and their counsel will be left to examine the findings in *Crager, Kanawha County*, and *Jones* to make the best choice for their students and for their teachers.

347. Davin White, *Kanawha School Board OKs Random Drug Tests*, CHARLESTON GAZETTE, Oct. 16, 2008, at P1A.

348. See, e.g., D.D. Bixby, *Funding Hurts Oregon Schools, Budget Shortcomings, Administrator Has to Oversee 2 Districts*, SEATTLE TIMES, Nov. 27, 2009, at B8 (discussing the harmful impact of the recession and resulting budget cuts on the public schools of Oregon).

349. See Charles J. Russo & David L. Gregory, *Legal and Ethical Issues Surrounding Drug Testing in Schools*, 1999 L. REV. M.S.U.-D.C.L. 611, 638-39 (“Considering the cost of [teacher drug] testing, let alone litigation . . . one wonders if there are not other projects where the Board might better spend its limited resources.”).

350. The company that screens potential employees for Kanawha County conducts “about 20,000 drug tests a year for area school systems . . . [and] other government agencies.” Ry Rivard, *Drug Policy for Teachers Likely to Be a Battle Tonight*, TIMES W. VIRGINIAN (Fairmont, WV), Nov. 20, 2008, at A1.

