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# DRUG TESTING OF STUDENTS: A LEGAL AND PUBLIC HEALTH PERSPECTIVE

*Floralynn Einesman\* and Howard Taras\*\**

## I. INTRODUCTION

The George W. Bush administration has strongly supported drug testing of students in this nation's schools. In the last two fiscal years, the Office of Safe and Drug Free Schools (OSDFS) of the Department of Education allocated approximately \$8.8 million in grants to over 350 schools in the United States for their student drug testing programs.<sup>1</sup> In his 2004 State of the Union Address, President George W. Bush advocated the drug testing of students<sup>2</sup> and pledged \$23 million to a national drug testing program.<sup>3</sup> Since that time, the Office of National Drug Control Policy (ONDCP) has held numerous regional summits throughout the United States to teach educators and community leaders how to establish a student drug testing program.<sup>4</sup> President

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1. See Awards—Grants for School-Based Drug-Testing Programs, <http://www.ed.gov/programs/drugtesting/awards.html> (last visited Mar. 21, 2007) (follow the links for “FY 2006 Awards” and “FY 2005 Awards”); Press Release, Office of Nat'l Drug Control Pol'y, White House Drug Czar & Secretary of Education Announce \$7.2 Million in Grants Awarded to Prevent Teen Drug Use (Oct. 19, 2005), available at <http://www.whitehousedrugpolicy.gov/news/press05/101905.html>.

2. Office of Safe and Drug-Free Schools—Grants for School-Based Student Drug-Testing Programs, 70 Fed. Reg. 20,739, 20,740 (Apr. 21, 2005).

3. OFFICE OF NAT'L DRUG CONTROL POL'Y, WHAT YOU NEED TO KNOW ABOUT STARTING A STUDENT DRUG-TESTING PROGRAM at v (2004), available at <http://reform.house.gov/UploadedFiles/Starting%20a%20student%20drug%20testing%20program%20%20ONDCP%20publication.pdf> (foreword by John P. Walters, Director).

4. See OFFICE OF NAT'L DRUG CONTROL POL'Y, NAT'L DRUG CONTROL STRATEGY 9 (2006). See also Press Release, Office of Nat'l Drug Control Pol'y, Schools Across The Nation Adopt Random Student Drug Testing: Drug Czar Announces Series of Summits (Dec. 28, 2005), available at

Bush has recently asked Congress for a significant increase in federal grants for drug testing programs for 2007, bringing the total allocation to this endeavor to \$15 million—an increase of 150% in grant allocations since 2003.

Although the Supreme Court has sanctioned the constitutionality of drug testing public school students engaged in athletics and extra-curricular activities, to date, very little has been written about drug testing as a public health screen. As the Bush administration increases its allocation of resources for these school drug programs and increases the number of institutions that administer such programs, it is important to examine these programs, not only from a legal, but from a public health, perspective as well. Does drug testing in schools constitute a drug screening program? If so, are these programs valid public health screens? Are these programs a deterrent to drug use? Is there any inadvertent harm caused by these drug programs? If so, what harm may result?

This article seeks to address the efficacy of these types of programs. After providing some general background information on the abuse of substances, the article sets forth the Supreme Court decisions on student drug testing. Part III then discusses the extension of the jurisprudence in the state courts to show how the Supreme Court law is being expanded by the states, and is likely to be further expanded in the future. The next section, Part IV, turns to drug screening from a public health perspective, analyzing whether or not drug screening is a valid public health screen. Finally, Part V examines whether student drug testing serves as a deterrent, whether the programs cause any inadvertent harm, and the nature of future research that should be undertaken to determine the value of drug testing in public schools.

## II. BACKGROUND

There is abundant evidence that adolescent substance abuse is a critical public health problem in the United States. Despite a small, but steady, decline in teenage drug use in recent years,<sup>5</sup> overall teen substance abuse continues to be a serious health issue. In a nationwide

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<http://www.whitehousedrugpolicy.gov/NEWS/press05/122805.html> (stating that in 2005 the ONDCP held eight summits in various cities throughout the country and in 2006, the ONDCP sponsored four such summits).

5. See Press Release, Univ. of Mich. & Monitoring the Future, Teen Drug Use Continues Down in 2006, Particularly Among Older Teens; but Use of Prescription -type Drugs Remains High 1 (Dec. 21, 2006), *available at* <http://www.monitoringthefuture.org/pressreleases/06drugpr.pdf> [hereinafter Univ. of Mich Press Release].

survey, when adolescents were asked about their own drug use in the most recent thirty day time period; 44.9% responded that they had at least one alcoholic drink on more than one occasion, 28.3% had consumed more than five consecutive drinks at least once, 22.4% had used marijuana, and 4.1% had tried cocaine, at least once.<sup>6</sup> Further, as students reach higher grade levels, the proportion trying an illicit drug increases. For example, use of marijuana among those in twelfth grade is at thirty-two percent, as opposed to just twelve percent in eighth grade.<sup>7</sup> When asked about lifetime use of these substances, adolescents reported considerably higher rates than these figures.<sup>8</sup>

Other surveys and methodologies find somewhat different, but equally disturbing, rates of substance abuse. A 2005 sampling showed that among youths aged twelve to seventeen, 9.9% were current illicit drug users,<sup>9</sup> with “6.8 percent [using] marijuana, 3.3 percent [using] prescription-type drugs non-medically, 1.2 percent [using] inhalants, 0.8 percent [using] hallucinogens, and 0.6 percent [using] cocaine.<sup>10</sup> Opioid painkillers are becoming the most commonly abused prescription drug.<sup>11</sup> For example, in the preceding one-year period, among twelfth grade students, 9.5% report using Vicodin and 5.5% report using Oxycontin.<sup>12</sup> Although since 2001, there has been a slight decline in the use of some illicit drugs by twelfth graders, between 2001 and 2005, there has been a significant rise in the use of sedatives and barbiturates by this group of adolescents.<sup>13</sup>

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6. Jo Anne Grunbaum et al., *Youth Risk Behavior Surveillance—United States, 2003*, 53 MORBIDITY & MORTALITY WEEKLY REPORT 1, 12-14 (2004).

7. Univ. of Mich Press Release, *supra* note 8, at 2.

8. See Grunbaum et al., *supra* note 9, at 12-14.

9. DEP'T OF HEALTH & HUMAN SERV., SUBSTANCE ABUSE AND MENTAL HEALTH SERV. ADMIN., OFFICE OF APPLIED STUDIES, RESULTS FROM THE 2005 NAT'L SURVEY ON DRUG USE AND HEALTH: NAT'L FINDINGS 2 (2006) (defining “current illicit drug users” as those persons who used an illicit drug during the month prior to the survey interview), available at <http://www.oas.samhsa.gov/nsduh/2k5nsduh/2k5Results.pdf> [hereinafter DHHS, 2005 SURVEY].

10. *Id.* at 17.

11. See *id.* at 46.

12. LLOYD D. JOHNSTON ET AL. NAT'L INST. ON DRUG ABUSE, NAT'L INST. HEALTH, MONITORING THE FUTURE: NAT'L SURVEY RESULTS ON DRUG USE, 1975-2005: VOL. I SECONDARY SCH. STUDENTS 100 tbl. 4-1b (2006). See also *id.* at 20, 83, 103 tbl. 4-2, 120 tbl. 4-6, 148, 196 tbl. 5-2, 206 tbl. 5-5b, 579 tbl. D-45, 581 tbl. D-47.

13. See *id.* at 22. See also *id.* at 42 tbl. 2-1, 49 tbl. 2-2, 55 tbl. 2-3, 191 tbl. 5-1, 196 tbl. 5-2, 199 tbl. 5-3, 204 tbl. 5-5a, 229 fig. 5-4c, 296 fig. 6-17, 592 tbl. D-56.

Concerning the athlete population of our nation's youth: "[n]ationwide, 6.1% of students [have] taken steroid pills or shots without a doctor's prescription one or more times during their lifetime . . . ."<sup>14</sup> A nationwide study of more than 10,000 adolescents aged twelve to eighteen years, revealed that "[a]pproximately 4.7% of boys and 1.6% of girls used protein powder or shakes, creatine, amino acids/[hydroxy methylbutyrate], dehydroepiandrosterone, growth hormone, or anabolic/injectable steroids at least weekly, to improve appearance or strength."<sup>15</sup>

### III. SUPREME COURT DECISIONS ON STUDENT DRUG TESTING

The Supreme Court addressed the serious public health problem of substance abuse among teenagers in two far-reaching decisions on the subject of drug testing in public schools.<sup>16</sup> In *Vernonia v. Acton*, the Court held that a school district policy authorizing random drug testing of student athletes did not violate the Fourth Amendment.<sup>17</sup> Subsequently, the Court extended *Vernonia*, ruling in *Board of Education of Pottawatomie v. Earls* that a school district policy authorizing random drug testing of middle and high school students engaged in extracurricular activities, did not constitute an unreasonable search and seizure under the Fourth Amendment.<sup>18</sup> Together, these two decisions allow school districts throughout the United States to conduct Fourth Amendment searches of a significant number of their students, without any individualized suspicion that the student has engaged in any illicit alcohol or drug use.

#### *Vernonia v. Acton*

In *Vernonia*, an Oregon school district (District) adopted a policy to address the problem of increasing drug use among its students,

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14. Grunbaum et al., *supra* note 9, at 15.

15. Alison E. Field et al., *Exposure to the Mass Media, Body Shape Concerns, and Use of Supplements to Improve Weight and Shape Among Male and Female Adolescents*, 116 PEDIATRICS 214, 214 (2005), available at <http://www.pediatrics.org/cgi/content/full/116/2/e214>. See also *id.* 216 tbl. 1, 217.

16. See *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995); *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottatatomie County v. Earls*, 536 U.S. 822 (2002). See generally Christopher A. Gorman, *Public School Students' Fourth Amendment Rights After Vernonia and Earls: Why Limits Must Be Set on Suspicionless Drug Screening In The Public Schools*, 29 VT. L. REV. 147 (2004) (a detailed analysis of these decisions).

17. See *Vernonia*, 515 U.S. 646.

18. *Earls*, 536 U.S. at 838.

especially its student athletes.<sup>19</sup> Experts had warned that drugs negatively affected a user's "motivation, memory, judgment, reaction, coordination, and performance."<sup>20</sup> School administrators were concerned that these negative effects could lead to serious injuries to the student athletes.<sup>21</sup>

Consequently, the District implemented the Student Athlete Drug Policy (SADP) which applied to every student engaged in interscholastic sports.<sup>22</sup> District students seeking to play interscholastic sports were therefore obliged to undergo urinalysis for drugs and alcohol.<sup>23</sup>

The District's program works as follows: at the initiation of each athletic season, every student athlete involved in a sport is drug tested.<sup>24</sup> Thereafter, ten percent of the athletes are blindly chosen for testing each week.<sup>25</sup> The students produce a urine sample, while a same sex monitor observes the student.<sup>26</sup> Generally, the student athletes are tested for amphetamines, cocaine and marijuana.<sup>27</sup> The tests are 99.94% accurate.<sup>28</sup> If a student's sample tests positive, then another test is conducted immediately to verify the positive result.<sup>29</sup> If this test turns out to be negative, nothing else is done.<sup>30</sup> If the result is positive, however, the school contacts the student's parents and the student has a choice of either entering a drug counseling/testing program, or being banned from sports for the rest of the term, and the season that follows.<sup>31</sup> Additionally, the student undergoes testing again before the beginning of the next athletic term.<sup>32</sup> If the student tests positive at that later time, then he is barred from sports for the rest of

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19. *See Vernonia*, 515 U.S. at 648-50.

20. *Id.* at 649.

21. *See id.*

22. *Id.* at 649-50.

23. *Id.* at 650.

24. *Vernonia*, 515 U.S. at 650.

25. *Id.*

26. *Id.*

27. *Id.* at 650-51

28. *Id.* at 651.

29. *Id.*

30. *Vernonia*, 515 U.S. at 651.

31. *Id.*

32. *Id.*

that term and the following one too.<sup>33</sup> If the student suffers a third offense, he is suspended immediately for the next two sport seasons.<sup>34</sup>

James Acton, a seventh grader in the District, sought to play football at his school.<sup>35</sup> Acton's parents, however, refused consent for their son to be drug tested. Consequently, the District banned Acton from playing football.<sup>36</sup> Acton and his parents filed a lawsuit in federal court, challenging the constitutionality of the SADP under the Fourth Amendment and its counterpart in the Oregon Constitution.<sup>37</sup> The District Court denied the claims and dismissed the action on its merits.<sup>38</sup> The Ninth Circuit Court of Appeals reversed, holding that the SADP violated the Fourth and Fourteenth Amendments.<sup>39</sup> The Supreme Court reversed the Ninth Circuit, finding that the SADP did not violate the Fourth and Fourteenth Amendments.<sup>40</sup>

In a 6-3 decision, Justice Scalia, writing for the majority, determined that the Vernonia drug testing program, although a search under the Fourth Amendment<sup>41</sup> was not an unreasonable one.<sup>42</sup> No warrant based on probable cause was required<sup>43</sup> because the search was not undertaken for the conventional investigatory purpose of discovering evidence of a crime.<sup>44</sup> Instead, because there were "special needs" for the search—i.e., regulating the conduct of student athletes—<sup>45</sup>the Court balanced the interests of the parties to ascertain the reasonableness of the search.

First the Court examined the "nature of the privacy interest" upon which this search intrudes.<sup>46</sup> The Court determined that the students had a reduced expectation of privacy because the search involved

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33. *Id.*

34. *Id.*

35. *Id.*

36. *Vernonia*, 515 U.S. at 651.

37. *Id.* at 651-52.

38. *Id.* at 652.

39. *Id.*

40. *Id.* at 664-65.

41. *Id.* at 652 ("In *Skinner v. Railway Labor Executives' Assn.*, . . . we held that state-compelled collection and testing of urine, such as that required by the [SADP], constitutes a 'search' subject to the demands of the Fourth Amendment.").

42. *Vernonia*, 515 U.S. at 664-65.

43. *See id.* at 653.

44. *See id.*

45. *Id.*

46. *See id.* at 654-57.

children who attend public school.<sup>47</sup> The public schools exercise “custodial and tutelary” responsibility over the children; the schools require students to submit to various regulations, including submission to various physical examinations<sup>48</sup> and vaccinations against diverse communicable diseases.<sup>49</sup>

Moreover, the Court found that student athletes, in particular, should expect even less privacy.<sup>50</sup> Athletes are required to dress and undress together before a practice or a game;<sup>51</sup> they shower together regularly;<sup>52</sup> and locker rooms provide little privacy for them.<sup>53</sup> Furthermore, student athletes must submit to a pre-season physical and obtain insurance coverage, both of which require the disclosure of much personal information.<sup>54</sup> Additionally, student athletes must maintain a certain grade level and must comply with rules of conduct, dress, and training as required by the coach.<sup>55</sup>

Next the Court examined the “character of the intrusion” inflicted on the students and determined it to be “negligible.”<sup>56</sup> Although the Court acknowledged that obtaining urine specimens for testing “intrudes upon ‘an excretory function traditionally shielded by great privacy,’”<sup>57</sup> here, the manner in which the samples were collected did not invade that privacy deeply.<sup>58</sup> Fully clothed male students produced samples while at urinals;<sup>59</sup> they were observed from behind;<sup>60</sup> female students used enclosed toilets to produce samples;<sup>61</sup> and a female observer waited *outside* the stall.<sup>62</sup> The Court found that these

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47. *See id.* at 656-57.

48. *Vernonia*, 515 U.S. at 655-56.

49. *Id.* at 656.

50. *Id.* at 657.

51. *Id.*

52. *Id.*

53. *Id.*

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

55. *Id.*

56. *See id.* at 658-660.

57. *Id.* at 658 (quoting *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 626 (1989)).

58. *See id.*

59. *Id.*

60. *Vernonia*, 515 U.S. at 658.

61. *Id.*

62. *Id.*



conditions were the same as those that students would find in many public restrooms throughout the country.<sup>63</sup>

Finally, the Court considered the “nature and immediacy of the governmental concern at issue here,”<sup>64</sup> and the “efficacy of this means for meeting it.”<sup>65</sup> The Court ruled that the nature of the governmental concern—in this case, deterring substance abuse by students—was compelling.<sup>66</sup> Due to the development and growth of adolescents, the effects of drug use at this time are profound.<sup>67</sup> Moreover, the effects of drug use on the school community are substantial: classes are disrupted and order is difficult to maintain.<sup>68</sup> Here, the school drug policy was specifically aimed at student athletes, a group that was much more likely than other students, to suffer physical harm from the substance abuse.<sup>69</sup>

Concurring with the lower court regarding the immediacy of the concern, the Supreme Court concluded that District schools were plagued by problems of substance abuse and, specifically, that the student athletes were heavily abusing alcohol and drugs.<sup>70</sup> Furthermore, because student athletes served as role models in the schools, their drug use exacerbated the problem of drug abuse among students.<sup>71</sup>

As for the efficacy of the drug-testing program, the Court concluded that because student athletes acted as role models for other students in the schools, coupled with a significant potential danger to the student athletes using drugs, the Vernonia drug testing program was effective.<sup>72</sup> Rejecting the need for a program supported by reasonable suspicion, the Court found such an alternative impracticable, arbitrary and accusatory.<sup>73</sup> Consequently, the Court ruled that the Vernonia drug policy did not violate the Fourth Amendment.<sup>74</sup>

In dissent, Justice O’Connor, joined by Justices Stevens and Souter, strongly urged a prerequisite of individualized suspicion before testing

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63. *Id.*

64. *Id.* at 660.

65. *Id.*

66. *Vernonia*, 515 U.S. at 661.

67. *Id.* at 661.

68. *Id.* at 662.

69. *Id.*

70. *Id.* at 662-63.

71. *Id.* at 663.

72. *Vernonia*, 515 U.S. at 663-64.

73. *Id.* at 663-64.

74. *Id.* at 664-65.

the student athletes.<sup>75</sup> Declaring that searches without suspicion are generally considered unreasonable under the Fourth Amendment,<sup>76</sup> the dissent did recognize that some blanket searches for non-criminal purposes have been permitted, but only after the Court balances the invasion into the individual's privacy against the government's need.<sup>77</sup> Generally, however, those searches were distinguishable from the case before the Court and have only occurred in "closely regulated businesses" or have not been deeply intrusive.<sup>78</sup>

*Board of Education of Pottawatomie County v. Earls*

Seven years later in *Board of Education of Pottawatomie County v. Earls*, the Supreme Court extended *Vernonia* and permitted random drug testing of students participating in extracurricular activities.<sup>79</sup> In *Earls*, the Tecumseh Oklahoma School District (District) implemented the Student Activities Drug Testing Policy (SADTP) mandating drug testing for all middle and high school students engaged in any extracurricular activity.<sup>80</sup> In reality, only students participating in *competitive* extracurricular activities were subjected to testing.<sup>81</sup> Lindsay Earls (a member of the Academic Team, National Honor Society, school choir, and marching band) along with her parents, challenged the constitutionality of the SADTP, arguing that it violated the Fourth Amendment.<sup>82</sup> The District Court rejected their claims and upheld the SADTP.<sup>83</sup> The Court of Appeals reversed, finding that the SADTP did violate the Fourth Amendment.<sup>84</sup>

In a 5-4 decision written by Justice Thomas, the Court again found that the drug testing of students did involve a *search* under the Fourth Amendment, but, to be reasonable, such a search did not require a probable cause warrant or even individualized suspicion.<sup>85</sup> The search was administrative, not criminal, in nature and was conducted in a

75. *Id.* at 667 (O'Connor, J. dissenting).

76. *Id.* (O'Connor, J. dissenting).

77. *Id.* at 673 (O'Connor, J. dissenting).

78. *Vernonia*, 515 U.S. at 673-74 (O'Connor, J. dissenting).

79. *See Earls*, 536 U.S. 822.

80. *Id.* at 826.

81. *E.g.*, Future Farmers of America, Future Homemakers of America, choir, cheerleading, sport teams, etc. *Id.* at 826.

82. The challenge came in the form of a § 1983 civil rights action against the District. *Id.* at 826-27.

83. *Id.* at 827.

84. *Id.* at 827-28.

85. *Earls*, 536 U.S. at 837.

public school context, thus meeting the criteria for “special needs.” Consequently no probable cause was necessary.<sup>86</sup> Following the framework of *Vernonia*, the Court deemed it necessary to balance “the intrusion on the children’s Fourth Amendment rights against the promotion of legitimate governmental interests.”<sup>87</sup> After balancing those interests, the Court decided that the governmental interests outweighed the children’s rights.<sup>88</sup>

Just as it did in *Vernonia*, the Court initially examined the nature of the privacy interest implicated by the SADTP.<sup>89</sup> The Court repeated that the privacy interests of students are reduced because children who are attending public schools are in the custody of the State.<sup>90</sup> Children have a lower expectation of privacy than adults because it is necessary for the State, in the interest of maintaining order, to exercise control and authority over the children while the children attend classes and participate in extracurricular activities.<sup>91</sup>

The character of the intrusion was described as minimally intrusive because the collection process was virtually identical as that in *Vernonia*, which the Court deemed a “negligible” intrusion.<sup>92</sup> Furthermore, the SADTP mandated that any test results be maintained in separate, restricted files.<sup>93</sup> The test results were not provided to the police and did not result in any disciplinary penalties.<sup>94</sup> The result of a positive test was restricted participation in the activity, with the potential of a suspension from the extracurricular activity, parental notification of the incident and drug counseling for any additional positive results.<sup>95</sup>

Finally, the Court reviewed the “nature and immediacy of the government’s concerns and the efficacy of the [SADTP] in meeting them.”<sup>96</sup> The Court reiterated the significance of the ever-increasing drug problem among the country’s school age children<sup>97</sup> and relied on the specific evidence that the District presented about the drug abuse

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86. *See id.* at 829.

87. *Id.* at 830 (citation omitted).

88. *See id.*

89. *Id.*

90. *Id.* at 830-31.

91. *Earls*, 536 U.S. at 831 (citation omitted).

92. *Id.* at 832-33.

93. *Id.* at 833.

94. *Id.* (citation omitted).

95. *Id.* at 833-34.

96. *Id.* at 834. (citation omitted).

97. *Earls*, 536 U.S. at 834.

at Tecumseh schools.<sup>98</sup> The Court refused to “second-guess” the District Court which found that the District was dealing with a serious difficulty with substance abuse when it implemented this Policy.<sup>99</sup>

The Court concluded that this testing program was effective in dealing with the District’s concerns of “preventing, deterring, and detecting drug use.”<sup>100</sup> The Court did note that the “role model” argument fit the Vernonia drug testing policy better than the Tecumseh drug policy because the student athletes were more likely to serve as role models than those students here who merely engaged in extracurricular activities such as band or choir.<sup>101</sup> The Court, nonetheless, concluded that the SADTP was constitutional.<sup>102</sup>

Justice Breyer concurred with the majority but wrote separately to emphasize several points: first, even though the drug problem in this country is serious, the government’s concern with “supply side interdiction” had not led to a reduction in teenage substance abuse.<sup>103</sup> Breyer believed that public schools have the onus to find effective ways to deal with the drug problem.<sup>104</sup> He opined that this program provided an effective means to do so—affording students a response to peer pressure.<sup>105</sup>

Next, Breyer did not believe that everyone would think that the character of the intrusion was “negligible,” but he was satisfied that the District used a democratic process to air differences of opinions on that subject.<sup>106</sup> At the conclusion of this process, there was little opposition to the SADTP.<sup>107</sup> Additionally, the program does not subject all students to testing and allows those who do refuse to be tested to opt out, albeit at the cost of not participating in the extracurricular activity.<sup>108</sup> Lastly, Justice Breyer rejected the requirement of “individualized suspicion” in the school setting because

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98. *Id.* at 834-35.

99. *Id.* at 835 (citation omitted).

100. *Id.* at 837.

101. *See id.* at 837-38.

102. *Id.* at 838.

103. *See Earls*, 536 U.S. at 839 (Breyer, J., concurring).

104. *Id.* at 840 (Breyer, J., concurring).

105. *Id.* at 840-41 (Breyer, J., concurring) (“It offers the adolescent a nonthreatening reason to decline his friend’s drug-use invitations, namely, that he intends to play baseball, participate in debate, join the band, or engage in any one of half a dozen useful, interesting, and important activities.”).

106. *Id.* at 841 (Breyer, J., concurring) (citation omitted).

107. *Id.* (Breyer, J., concurring).

108. *Id.* (Breyer, J., concurring).

it could “unfairly target members of unpopular groups”<sup>109</sup> or “leave those whose behavior is slightly abnormal stigmatized in the minds of others.”<sup>110</sup>

Dissenting, Justice Ginsburg, joined by Justices Stevens, O’Connor and Souter, found the SADTP unreasonable because it was not supported by a “special need,” and if anything, it targeted the students least likely to abuse drugs.<sup>111</sup> When the dissent examined the “nature of the privacy interest” it found the nature to be more substantial than the majority.<sup>112</sup> Unlike the student-athletes in *Vernonia*, the students involved in extracurricular activities do not routinely dress, shower, or change clothes together.<sup>113</sup> When the dissent reviewed the “character of the intrusion,” it concluded that the District Court erred in assuming that the confidentiality provisions of the SADTP would be followed.<sup>114</sup> Ms. Earls and her parents had claimed that the District had mishandled the data amassed under the policy and had compromised the confidentiality of this information.<sup>115</sup> The dissent believed that on the summary judgment motion the District Court should have viewed the facts and inferences in the light most favorable to the Earls, the opponents to the motion.<sup>116</sup>

The dissent also viewed the “nature and immediacy of the governmental concern” differently than the majority.<sup>117</sup> Unlike in *Vernonia*, the District did not report having a significant drug problem.<sup>118</sup> *Vernonia* chose to limit its policy to student athletes, while here *Tecumseh* extended its policy to every student engaged in competitive extracurricular activities, despite the fact that no special risks had been linked to drug use among those engaged in extracurricular activities.<sup>119</sup> Furthermore these students were not shown to be “leaders of the drug culture,” as were the *Vernonia* athletes.<sup>120</sup> To the contrary, the dissent commented that it was much

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109. *Earls*, 536 U.S. at 841 (Breyer, J., concurring) (citing majority opinion, *id.* at 837).

110. *Id.* at 841-42 (Breyer, J., concurring).

111. *Id.* at 843 (Ginsburg, J., dissenting).

112. *Id.* at 847, 848 (Ginsburg, J., dissenting) (citation omitted).

113. *Id.* (Ginsburg, J., dissenting).

114. *Earls*, 536 U.S. at 849 (Ginsburg, J., dissenting).

115. *Id.* at 848 (Ginsburg, J., dissenting).

116. *Id.* at 849 (Ginsburg, J., dissenting).

117. *See id.* at 849-850 (Ginsburg, J., dissenting).

118. *Id.* (Ginsburg, J., dissenting).

119. *Id.* at 851, 852-53 (Ginsburg, J., dissenting).

120. *Earls*, 536 U.S. at 852 (Ginsburg, J., dissenting).

less likely that students engaged in extracurricular activities would be substance abusers.<sup>121</sup> Thus, the Court concluded that the SADTP failed in two ways: “[i]t invades the privacy of students who need deterrence least, and risks steering students at greatest risk for substance abuse away from extracurricular involvement that potentially may palliate drug problems.”<sup>122</sup> Consequently, when balancing these factors, the dissent found that SADTP violated the Fourth Amendment.<sup>123</sup>

#### IV. STATE LAW: AN EXTENSION OF SUPREME COURT JURISPRUDENCE

Relying first on *Vernonia*, and later on *Earls*, local school districts have taken steps to initiate and expand their drug testing programs. Some districts have expanded their programs to include the testing of students not only engaged in school athletics or extra-curricular activities, but also students seeking permits to park on campus and students engaged in co-curricular activities as well.<sup>124</sup>

This Supreme Court jurisprudence has led to divergent state supreme court opinions. In *Joye v. Hunterdon Central Regional High School*, a sharply divided New Jersey Supreme Court (4-3) found that the school’s drug testing program did not violate the New Jersey Constitution,<sup>125</sup> while in *Theodore v. Delaware Valley School District*, the Pennsylvania Supreme Court found that the District’s drug testing policy did violate the Pennsylvania State Constitution.<sup>126</sup> In *Linke v. Northwestern School Corp.*, the Indiana Supreme Court upheld the constitutionality of the District’s drug testing policy under the state constitution.<sup>127</sup>

121. *Id.* at 853 (Ginsburg, J., dissenting).

122. *Id.* at 853 (Ginsburg, J., dissenting) (“Even if students might be deterred from drug use in order to preserve their extracurricular eligibility, it is at least as likely that other students might forgo their extracurricular involvement in order to avoid detection of their drug use.” *Id.*).

123. *Id.* at 854 (Ginsburg, J., dissenting).

124. *See, e.g., Linke v. Northwestern Sch. Corp.*, 763 N.E.2d 972, 975 n.1 (Ind. 2002) (“Co-curricular activities are activities, participation or membership in which are [*sic*] an extension of and outside the normal school day and for which academic credit or grades are earned, such as band and choir.”).

125. *See* 826 A.2d 624, 627 (N.J. 2003).

126. *See* 836 A.2d 76, 78 (Pa. 2003).

127. *See Linke*, 763 N.E. 2d at 986.

*Joye v. Hunterdon Central Regional High School Board of Education*

In *Joye*, the regional school board (Board) amassed a variety of evidence— anecdotal and statistical— regarding student drug use, before implementing a comprehensive testing policy.<sup>128</sup> Like the programs in *Vernonia* and *Earls*, the Hunterdon program applied to all students engaged in school athletics and/or extracurricular activities.<sup>129</sup> Additionally, however, its program also included students who possessed school parking permits.<sup>130</sup> If a student tested positive for drugs, the student faced mandatory counseling as well as suspension from the sport, from the extracurricular activity, and/or from parking privileges.<sup>131</sup> The test results were not provided to the police.<sup>132</sup>

Parents filed suit on behalf of their children, challenging the constitutionality of this Policy under the New Jersey Constitution.<sup>133</sup> The parents argued that this Policy violated Article I, paragraph 7 of the New Jersey Constitution which contains nearly identical language as the Fourth Amendment and, parallel to its federal counterpart, is “designed to ‘prohibit unreasonable searches and seizures by government agents.’”<sup>134</sup>

Similar to the requirements of the Fourth Amendment, a reasonable search under this provision of the New Jersey State Constitution generally requires a probable cause warrant.<sup>135</sup> In certain administrative cases, however, where the Government can establish “special needs” the Court will eliminate the warrant requirement, and will allow the search if the Government’s need outweighs the intrusion on the individual’s privacy.<sup>136</sup>

As in *Vernonia* and *Earls*, the Supreme Court of New Jersey concluded that students have a lower expectation of privacy because during school hours, students are in the custody of school officials.<sup>137</sup> School officials must ensure a safe and orderly school environment and therefore, they are permitted to regulate the actions of the students

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128. *Joye*, 826 A.2d, at 628.

129. *See id.* at 628, 629.

130. *Id.* at 630.

131. *Id.* at 631.

132. *Id.* at 631-32.

133. *See id.* at 632.

134. *Joye*, 826 A.2d, at 637 (quoting *N.J. Transit PBA Local 304 v. N. J. Transit Corp.*, 701 A.2d 1243 (N.J. 1997)).

135. *Id.*

136. *See id.* at 640-41.

137. *Id.* at 642-643.

during the course of the school day.<sup>138</sup> Thus, against this backdrop of the students' reduced expectation of privacy, the schools have a "special need" of maintaining such order and safety.<sup>139</sup> Moreover the drug testing results are not used for criminal prosecution, but for administrative purposes such as suspension from the student activity and student counseling.<sup>140</sup> Consequently the New Jersey Supreme Court found that this drug program met the "special needs" test.<sup>141</sup>

Following the framework set out in *Vernonia* and *Earls*, the New Jersey Supreme Court weighed the students' expectation of privacy, the search's degree of obtrusiveness, and the strength of the government need in conducting the testing.<sup>142</sup> After weighing all these factors, the Court found that the policy did not violate the New Jersey Constitution.<sup>143</sup>

The Court first examined the students' expectation of privacy and found it reduced at school because school officials are obliged to maintain order in the schools.<sup>144</sup> As the Supreme Court ruled in *Vernonia*, student athletes in particular have a lesser expectation of privacy because they share locker rooms, shower and change clothes together.<sup>145</sup> As in *Earls*, this Court mentioned that those who undertake extracurricular activities also subject themselves to additional regulations that are inapplicable to other students.<sup>146</sup> Similarly, the New Jersey Supreme Court concluded that a student who parks on school property needs a school-issued parking permit, a permit which is not required by those who do not wish to park on school grounds.<sup>147</sup>

Next the Court evaluated the obtrusiveness of the search—the urine collection process, and found that the Policy was minimally obtrusive.<sup>148</sup> Unlike the process in *Vernonia*, students in Hunterdon were not observed when they provide their urine samples,<sup>149</sup> and unlike the collection process in *Earls*, no one waited for the student outside

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138. *See id.* at 641.

139. *See id.*

140. *Joye*, 826 A.2d, at 631-32.

141. *See id.* at 641.

142. *Id.* at 642-48.

143. *Id.* at 648.

144. *Id.* at 642.

145. *Id.* (citing *Vernonia*, 515 U.S. at 657).

146. *Joye*, 826 A.2d at 642 (citing *Earls*, 536 U.S. at 832).

147. *Id.*

148. *Id.* at 643-44.

149. *Id.* at 643 (citing *Vernonia*, 515 U.S. at 650).



the restroom.<sup>150</sup> Additionally, this policy had provisions to prevent false positive results, specifically, the drug testing was conducted randomly, the test results were kept confidential, and only medical personnel reviewed positive results with the student and his parents to determine whether the student was taking any authorized drugs.<sup>151</sup> Based on these features and the fact that students must undergo medical exams both to enter New Jersey schools and at periodic intervals, the Court concluded that the policy was not highly intrusive.<sup>152</sup>

Lastly, the Court evaluated the government's need for this search.<sup>153</sup> The Court accepted the fact that the public school population in this country faces a serious drug and alcohol problem.<sup>154</sup> With respect to Hunterdon in particular, the Court concluded that a "sizable portion of the student population" used illicit drugs and alcohol.<sup>155</sup> Due to this problem, the Court was "satisfied that the Board was faced with a significant drug and alcohol problem when it expanded the random testing program to its present form."<sup>156</sup>

The Court concluded that the program was reasonably tailored to meet the "scope and nature" of the District's existing drug and alcohol problem.<sup>157</sup> To meet this reasonableness standard, a drug testing program must seek to deter drug and alcohol use and to encourage the students who test positive to abandon their use of drugs and alcohol.<sup>158</sup> The Court reviewed data which indicated that a student would be deterred from using drugs due to parental disapproval, and relied on the Board's representation that the testing program would prevent substance abuse because "students would want to avoid the negative consequences associated with that conduct, such as having their parents know and disapprove of it or losing the ability to participate in desired extracurricular activities."<sup>159</sup> The Court also examined three studies which suggested that drug testing may limit student drug use.<sup>160</sup> Although the results of these studies were incomplete and mixed, the Court concluded that, for the most part, they suggested that random

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150. *Id.* (citing *Earls*, 536 U.S. at 832).

151. *See id.* at 643.

152. *Joye*, 826 A.2d at 643-44.

153. *See id.* at 645-46.

154. *See id.* at 645.

155. *Id.* at 646.

156. *Id.*

157. *Id.*

158. *Joye*, 826 A.2d at 646.

159. *Id.* at 648.

160. *Id.* at 646-47.

drug testing can deter student drug and alcohol use.<sup>161</sup> Further, the Court found that the Board's goal of rehabilitation is accomplished because students with positive results must undergo counseling before they may resume participation in their extracurricular activity.<sup>162</sup> Finally, it was particularly important to this court that the student who tested positive was not referred for criminal prosecution but was referred for counseling in the hopes of rehabilitating the student.<sup>163</sup>

Weighing these three factors (the students' expectation of privacy, the search's degree of obtrusiveness, and the government's interest), the Court concluded that the program met the "special needs" framework established by the United States Supreme Court.<sup>164</sup> Consequently, this Court concluded that this program did not violate the Search and Seizure Clause of the New Jersey State Constitution.<sup>165</sup>

The dissent found that this policy did violate the state constitution because the Board presented no evidence of a "special need" for it.<sup>166</sup> The Court noted that it has provided greater protection to its citizens under the State Constitution than the United States Supreme Court has provided under the United States Constitution.<sup>167</sup> Generally, the New Jersey Court prohibits suspicionless searches unless they are supported by "special needs."<sup>168</sup> When there is a "special need" for that search, then the Court may balance the interest against the reasonableness of the intrusion.<sup>169</sup> The dissent concluded that the Board did not demonstrate the "special need" for this intrusion which would allow for such a balancing test.<sup>170</sup> There was no "justification for singling out these students for required drug testing" because there was insufficient information on which to conclude that students engaged in extracurricular activities used illicit drugs or alcohol.<sup>171</sup> Additionally there was no reliable or persuasive data to support the

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161. *Id.* at 646.

162. *Id.*

163. *Id.* at 653.

164. *Joye*, 826 A.2d at 648.

165. *Id.*

166. *See id.* at 655-56 (LaVecchia, J., dissenting).

167. *See id.* at 664-65 (LaVecchia, J., dissenting).

168. *Id.* at 666 (LaVecchia, J., dissenting).

169. *Id.* (LaVecchia, J., dissenting).

170. *Joye*, 826 A.2d at 666-67 (LaVecchia, J., dissenting).

171. *Id.* at 667 (LaVecchia, J., dissenting).

conclusion that drug testing discouraged illicit drug use by students.<sup>172</sup> The dissent believed no study in the record was competent.<sup>173</sup>

But even if the balancing of interests was permitted, the dissent believed that the Board had not met its burden because the Board had not established its need to undertake this testing program.<sup>174</sup> The Board could provide no evidence of an “overwhelming problem in this school, or among this subset of students.”<sup>175</sup> Against this weak to non-existent need, the dissent weighed the students’ privacy expectation in, and collection and testing of, their bodily fluids.<sup>176</sup> The dissent declared that this interest was substantial and the intrusion upon it had not been justified.<sup>177</sup>

In sum, because the dissent found that there was no “special need for” this policy, and if there was a “special need” the students’ interest in privacy outweighed the District’s need to undertake this testing program, the dissent found that this policy violated the New Jersey Constitution.<sup>178</sup>

#### *Theodore v. Delaware Valley School District*

In *Theodore*, the Supreme Court of Pennsylvania reached a different result than its counterpart in New Jersey. In 2003, that Court examined Policy 227 adopted by the Delaware Valley School District (District) which sanctioned suspicionless drug and alcohol testing of middle and high school students who voluntarily engage in extracurricular activities or who hold school parking permits.<sup>179</sup> Under this program, if a student receives a positive test result for drugs or alcohol, the student must: participate in drug counseling, undergo weekly drug or alcohol screening for several weeks, and be barred from extracurricular activities, sports and/or parking on campus for some time.<sup>180</sup> If the student receives a second positive test result, the student is banned from extracurricular activity for one year and if the

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172. *Id.* (LaVecchia, J., dissenting).

173. *Cf. id.* (LaVecchia, J., dissenting) (The dissent quoted its own, larger study denying the effects of drug testing programs as a deterrent.).

174. *Id.* at 668-69 (LaVecchia, J., dissenting).

175. *Id.* at 668 (LaVecchia, J., dissenting).

176. *Joye*, 826 A.2d at 669 (LaVecchia, J., dissenting).

177. *Id.* (LaVecchia, J., dissenting).

178. *See id.* at 672 (LaVecchia, J., dissenting).

179. *See Theodore*, 836 A.2d at 78.

180. *Id.* at 80.

student tests positive a third time, the suspension is permanent.<sup>181</sup> The positive result is not provided to law enforcement, and generally does not result in suspension or expulsion from school.<sup>182</sup>

Mr. and Mrs. Theodore filed a lawsuit on behalf of their daughters, Jennifer and Kimberly, high school students who were subjected to mandatory drug testing, arguing that Policy 227 violated Article 1, Section 8 of the Pennsylvania Constitution which prohibits unreasonable searches and seizures.<sup>183</sup>

Just as in *Vernonia* and in *Earls*, this Court acknowledged that under the Fourth Amendment of the U.S. Constitution, a search, that lacks probable cause may be conducted if “special needs” exist.<sup>184</sup> “Special needs” exist in public schools because schools not only educate and care for students, but they also maintain order and discipline over the children.<sup>185</sup> Consequently, school officials occasionally must intrude on the privacy of the students.<sup>186</sup> The Court determined the reasonableness of these intrusions by balancing the government’s need for the search against the invasion on the student’s privacy interest.<sup>187</sup>

The Court found, much like the New Jersey Supreme Court, that its constitution provides even greater privacy protection than the Fourth Amendment.<sup>188</sup> To determine the reasonableness of a school search under this state constitutional provision, a court must balance four factors: “(1) the students’ privacy interests, (2) the nature of the intrusion created by the search, (3) notice, and (4) ‘the overall purpose to be achieved by the search and the immediate reasons prompting the decision to conduct the actual search.’”<sup>189</sup> The Court recognized that this test resembled the one in *Vernonia*, with the added facet of a notice prong.<sup>190</sup>

The Court first examined the students’ privacy interests and found them to be significant.<sup>191</sup> Although the students enjoy a lesser expectation of privacy while at school, they still should expect “privacy

181. *Id.*

182. *Id.*

183. *Id.*

184. *See id.* at 84.

185. *Theodore*, 836 A.2d at 84 (citing *Vernonia*, 515 U.S., at 653).

186. *See id.* at 84-85.

187. *Id.* at 85 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 337 (1985)).

188. *Id.* at 88 (quoting *Commonwealth v. Glass*, 754 A.2d 655, 662 (Pa. 2000)).

189. *Id.* (quoting *In re F.B.*, 726 A.2d 361, 365 (Pa. 1999)).

190. *Id.*

191. *Theodore*, 836 A.2d at 90.

associated with their excretory functions.”<sup>192</sup> Moreover the “students could reasonably consider production of a urine sample for testing to involve a greater imposition than the ordinary use of a public restroom.”<sup>193</sup>

Next the Court reviewed the nature of the intrusion caused by the drug testing and found that it was mitigated by the testing procedures—the specimens were collected by medical staff in a way in which accuracy and confidentiality would be protected.<sup>194</sup> Additionally, the students were randomly chosen for testing, the results were provided to only select school officials, and the results of the test were not forwarded to the police for criminal prosecution.<sup>195</sup>

With respect to notice, the Court found that, for obvious reasons, the students were not notified of the timing of the tests but the District did provide notice of the drug testing procedures to the students and their parents.<sup>196</sup> Parental and student consent was a prerequisite to students participating in athletics, extracurricular activities or obtaining a parking permit.<sup>197</sup>

Finally, the Court examined the purpose for, and reasons behind, Policy 227.<sup>198</sup> The Court concluded that the District had not provided any proof that a substance abuse problem pervaded its schools and that the targeted students were drug users.<sup>199</sup> Moreover, Policy 227 was aimed not only at students who were engaged in activities where substance abuse could be dangerous (e.g., athletics or driving), but also at students involved in activities where no such danger existed (e.g., extracurricular activities such as the Scholastic Bowl or the National Honor Society).<sup>200</sup> Furthermore, Policy 227 was not aimed at another portion of the student population who were actually more likely to be using drugs: students *not* engaged in student athletics or extracurricular activities.<sup>201</sup> Quoting Justice Ginsburg’s dissent in *Earls*, the Court noted that “students who participate in extracurricular activities are

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192. *Id.*

193. *Id.* (citing *Earls*, 536 U.S. at 841 (Breyer, J., concurring)).

194. *Id.*

195. *Id.*

196. *Id.* at 90-91.

197. *Theodore*, 836 A.2d 76 at 90-91.

198. *See id.* at 91-92.

199. *Id.*

200. *Id.* at 92.

201. *Id.*

significantly less likely to develop substance abuse problems than are their less-involved peers.”<sup>202</sup>

Due to the District’s under, and over, inclusive measures, the Court found that Policy 227 was ineffective at addressing the problem.<sup>203</sup> The Court held that Policy 227 could only be found constitutional “if the District [made] some actual showing of the specific need for the policy and an explanation of its basis for believing that the policy would address that need.”<sup>204</sup> Because the District did not make such a showing and instead merely argued a general need to deter drug use, the policy was unconstitutional.<sup>205</sup> The Court conceded that had Policy 227 been directed only at students involved in athletics or those with driving/parking privileges, Policy 227 would have been more reasonable; however, the addition of students engaged in all extracurricular activities rendered the policy unreasonable.<sup>206</sup> Consequently the court held that Policy 227 was unconstitutional because it permitted

a direct invasion of student privacy, with no suspicion that the students targeted [were] involved with alcohol or drugs, or even that they are more likely to be involved than the students who are exempted from the policy. The policy stands in stark contrast to the policy approved in *Vernonia*, where a drug culture led by the targeted student athletes, who already had a lesser expectation of privacy, was proven to exist in the school.<sup>207</sup>

This Court compared its conclusion to the one reached in *Joye*.<sup>208</sup> The Pennsylvania Court noted that the program in *Joye* was targeted at an acknowledged substance abuse problem in the school and was adopted as an “incremental and inclusive approach the district had taken to address [the drug] problem.”<sup>209</sup> On the other hand, in *Theodore*, there was no record of either a drug problem within the school or alternative measures taken to deal with any perceived drug problems.<sup>210</sup> Consequently, Policy 227’s suspicionless search could not pass constitutional muster.<sup>211</sup>

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202. *Id.* (citing *Earls*, 536 U.S., at 853 (Ginsburg, J., dissenting)).

203. *Theodore*, 836 A.2d 76 at 92.

204. *Id.*

205. *Id.*

206. *Id.* at 92-93.

207. *Id.* at 93.

208. *Id.* at 93-95.

209. *See Theodore*, 836 A.2d 76 at 94.

210. *Id.* at 94-95.

211. *Id.* at 95.

*Linke v. Northwestern School Corporation*

In *Linke v. Northwestern School Corp.*,<sup>212</sup> the Supreme Court of Indiana examined the constitutionality of the Northwestern School Corporation Extra Curricular Activities and Student Driver Drug Testing Policy, which authorizes the drug testing of middle and high school students engaged in school athletics, extra-curricular or co-curricular activities,<sup>213</sup> or those parking their cars on campus.<sup>214</sup> Rosa and Reena Linke, students at Northwestern High School in Indiana, challenged the constitutionality of the policy, arguing that it violated the search and seizure clause of the state constitution.<sup>215</sup> The Indiana Supreme Court disagreed.<sup>216</sup>

Again, just like all the previously mentioned courts, the Indiana Supreme Court concluded that the drug testing of the students constituted a “search” under its state constitution.<sup>217</sup> The issue to be determined was the reasonableness of this search.<sup>218</sup> The Linkes argued that in order to be reasonable the search had to be supported by a reasonable and individualized suspicion.<sup>219</sup> The Northwestern school system (school system) contended that to determine reasonableness here, the court need only balance the degree of “the intrusion . . . on the individual[] with [the] promotion of legitimate governmental interests.”<sup>220</sup>

The Indiana Supreme Court rejected the need for individualized suspicion, declaring that a search undertaken by school officials differs from one performed by law enforcement officers.<sup>221</sup> While the latter are adversaries of criminal suspects, seeking to investigate criminal activity and arrest those responsible for such activity, school authorities rarely have such a relationship with their students.<sup>222</sup> Furthermore, the test results are not voluntarily provided to the police

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212. 763 N.E.2d 972 (Ind. 2002).

213. *See supra* note 136.

214. *Linke*, 763 N.E.2d at 975. Although decided three months before *Earls*, the Court followed the legal framework set forth in *Vernonia* and, later, used in *Earls*.

215. *Id.* at 976.

216. *Id.* at 974.

217. *Id.* at 977.

218. *See id.*

219. *Id.*

220. *Linke*, 763 N.E.2d at 975 at 977-78.

221. *See id.* at 978.

222. *Id.* (quoting *T.L.O.*, 469 U.S. at 349-50).

and they do not lead to any disciplinary consequence; instead, a positive drug test usually results only in the suspension of the student from the relevant activity.<sup>223</sup>

Consequently, to determine the reasonableness of the policy, the Court adopted the *Vernonia* approach and weighed “the nature of the privacy interest upon which the search intrudes, the character of the intrusion that is complained of, and the nature of the immediacy of the governmental concern . . . .”<sup>224</sup>

With respect to the nature of the privacy interest, the Court found that students enjoy less privacy while in school because they are heavily supervised while in this environment.<sup>225</sup> Moreover, students consent to random drug testing when they volunteer for these activities.<sup>226</sup> Furthermore, the Court found that the activities for which the students have volunteered are already regulated—athletics are highly regulated and non-athletic extracurricular activities are somewhat regulated.<sup>227</sup>

Next, the Court examined the character of the intrusion involved. Under this policy, students are permitted to visit the testing facility one at a time, and are accorded privacy by being allowed to close the facility door and by not being viewed by anyone else as they provide the urine sample.<sup>228</sup> The court, therefore, found that this policy was much less intrusive than the policy that was sanctioned in *Vernonia*.<sup>229</sup> Moreover, the test is limited to an advertised list of prohibited substances; no adolescent is required to reveal any further information regarding any prescription medicine being taken.<sup>230</sup>

The Court also noted that the school system was motivated by a desire to prevent harm to students, or to rehabilitate those who had a drug problem.<sup>231</sup> Consistent with these objectives, the district did not provide law enforcement with the results of the drug tests and did not use the results to discipline the students.<sup>232</sup> Instead, a positive result merely led to the suspension of the student from the relevant activity.<sup>233</sup>

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223. *See id.* at 975, 976.

224. *Id.* at 979.

225. *Id.* at 979-80.

226. *See Linke*, 763 N.E.2d at 980, 981.

227. *Id.* at 981.

228. *Id.* at 981-82.

229. *Id.* at 982.

230. *Id.* at 982.

231. *See id.*

232. *Linke*, 763 N.E.2d at 982.

233. *Id.*



Consequently, the Court found that this policy was “carefully crafted” and did not intrude significantly on students’ privacy.<sup>234</sup>

Lastly, the Court looked at the nature and immediacy of the school system’s concerns.<sup>235</sup> The court declared that dissuading students from abusing drugs is “an important and legitimate concern” for schools.<sup>236</sup> This interest is enhanced by the fact that many of the activities involved have “off campus components” which require a “broader range of tools to insure compliance with its rules.”<sup>237</sup> The potential for danger or injury rises when students travel off campus to pursue their activity, and thus are subjected to less supervision and less control by their teachers and coaches.<sup>238</sup>

The risk of harm to student athletes and drivers increases dramatically with the use of drugs.<sup>239</sup> The Court found that the risk of increased physical harm to those involved in extra and co-curricular activities was remote; yet the school system held all these students out as role models by subjecting them to extra regulations.<sup>240</sup> Drug testing gives all the students involved in targeted activities a non-threatening alternative—a legitimate way to decline drugs by relying on the possibility of a random drug test<sup>241</sup> The policy was adopted due to evidence of substance abuse by the school system’s students and drug testing is just one facet of a greater interdiction effort by school officials.<sup>242</sup> In sum, the state’s concern in student drug use was deemed significant and immediate. Balancing all the interests, the Court found that the policy does not violate the search and seizure clause of the Indiana Constitution.<sup>243</sup>

The dissent found that “special needs” doctrine inapplicable to the analysis of this policy because the factors leading to a “special need” were lacking in this case.<sup>244</sup> Unlike those tested in *Vernonia*, there was no evidence that those who used drugs were also those who participated in the activities covered by this testing program.<sup>245</sup>

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234. *Id.*

235. *Id.* at 983.

236. *Id.*

237. *Id.* at 984.

238. *Linke*, 763 N.E.2d at 984.

239. *Id.* at 984.

240. *Id.*

241. *Id.* at 984-85.

242. *See id.* at 985.

243. *Id.*

244. *Linke*, 763 N.E.2d at 989-90 (Boehm, J., dissenting).

245. *Id.* (Boehm, J., dissenting).

Furthermore those targeted for testing—students participating in extra and co-curricular activities, such as the school band or the Future Farmers of America—should not expect any less privacy than a student who did not participate in such activities.<sup>246</sup>

Despite its rejection of the “special needs” doctrine, the dissent proceeded to analyze the issue under its own approach. The dissent followed the test used by the majority which balanced “the nature of the privacy interest; the character of the intrusion; and the nature and immediacy of the governmental concern.”<sup>247</sup> First, the dissent examined the students’ privacy interest.<sup>248</sup> The dissent disagreed with the majority which had found that schools “stand in the relation of parents and guardians to its students in matters of conduct and discipline.”<sup>249</sup> In contrast, the dissent found that the school system was exercising public, rather than parental, authority when conducting drug testing because “[i]n carrying out searches and other disciplinary functions pursuant to such policies, school officials act as representatives of the State, not merely as surrogates for the parents.”<sup>250</sup> As such, in the context of drug testing, schools should be treated as state actors, not as parents, and its intrusion on students’ privacy interest should be examined through that lens.

The students’ “consent” to drug-testing was illusive. Students who reject testing do not enjoy the same benefits of the co-curricular activities, as do those students who agree to the procedure. Even though students who refuse to be tested are given other “for credit” work to substitute for the part of the course that demands testing, the non-testing students still miss out on a valuable facet of the course.<sup>251</sup> Moreover, there is no rational relationship between testing certain co-curricular student activities (e.g., choir, band, National Honor Society) and potential harm to the student.<sup>252</sup> Unlike student athletes, students participating in choir, band, or the National Honor Society are not likely to suffer harm by participating in these activities if they are simultaneously abusing drugs.<sup>253</sup> With respect to the “role model” theory, the dissent stressed that the majority could not offer any

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246. *Id.* (Boehm, J., dissenting).

247. *Id.* at 990 (Boehm, J., dissenting).

248. *See id.* at 990-92 (Boehm, J., dissenting).

249. *Id.* at 990 (Boehm, J., dissenting).

250. *Linke*, 763 N.E.2d at 991 (quoting *T.L.O.*, 469 U.S. at 336) (Boehm, J., dissenting).

251. *Id.* (Boehm, J., dissenting).

252. *Id.* at 991 (Boehm, J., dissenting).

253. *Id.* (Boehm, J., dissenting).

evidence that the student population viewed those involved in extra-curricular or co-curricular activities as role models.<sup>254</sup>

Regarding the character of the intrusion, the dissent opined that a search is just as invasive if it is undertaken by school officials rather than law enforcement.<sup>255</sup> School officials are agents of the state just like police officers and searches undertaken by school personnel should be analyzed just like those conducted by law enforcement.<sup>256</sup> Furthermore, the school system had not presented sufficient evidence to support such a pervasive drug testing program.<sup>257</sup> There was insufficient evidence to support a finding that a drug problem existed among those involved in extra or co-curricular activities to allow for their drug testing.<sup>258</sup>

As for the state's concern and efficacy of its program, the school system failed to establish that there was an issue with discipline as a result of substance abuse.<sup>259</sup> Moreover, the school system could not prove a relationship between substance abuse and those students who participate in the targeted activities.<sup>260</sup> As such, the policy is too expansive and ineffective. In contrast, a program based on individualized suspicion would be feasible and reasonable.<sup>261</sup>

As the preceding discussion indicates, courts throughout this country have examined the constitutionality of policies that authorize drug testing of public middle and high school students engaged in a wide variety of activities. Most courts have sanctioned these tests. There are, however, numerous public health issues related to drug testing which deserve attention, but have not yet been analyzed. The next section of this article, however, will raise and address those issues.

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254. *Id.* at 992 (Boehm, J., dissenting) (“But even a casual reviewer of pop culture must view with extreme skepticism the undocumented claim that participants in this broad list of activities are all, or even predominantly, viewed by their peers as role models.” (footnote omitted)).

255. *Id.* (Boehm, J., dissenting).

256. *Linke*, 763 N.E.2d at 993 (Boehm, J., dissenting)

257. *Id.* (Boehm, J., dissenting).

258. *Id.* (Boehm, J., dissenting).

259. *Id.* at 994 (Boehm, J., dissenting).

260. *Id.* at 995 (Boehm, J., dissenting).

261. *See id.* at 995-96 (Boehm, J., dissenting).

## V. DRUG SCREENING IN SCHOOLS: IS IT A VALID PUBLIC HEALTH SCREEN?

Although the terms “screening” and “testing” are often used interchangeably in the course of lay conversation, these terms have different meanings in the area of public health, specifically in the context of drug abuse. “Screening” is a process used to evaluate a group of individuals in order to separate those who are well from those who have an undiagnosed disease or defect, or those who are at high risk for that disease or defect.<sup>262</sup> A program that sets out to test all middle-aged women for signs of breast cancer is one example of a screen. “Testing,” on the other hand, is one component of a screening program. When the term “testing” is used outside the context of a screening program, it may mean that there is clinical suspicion for that disease (e.g., evaluating for breast cancer after detecting a lump).<sup>263</sup>

For substance abuse, the word “testing” may be referring to the process of determining the presence in the body of an illicit substance based on clinical suspicion of drug use,<sup>264</sup> or it may mean testing that is done as part of a population screening program. There are recommended criteria for implementing a screening program, based on fundamental public health principles, such as, (1) the nature of the disease, (2) the type of screening test and screener, (3) the target population(s), (4) the treatment, (5) the referral and receipt of treatment, and (6) the cost/benefit ratio.<sup>265</sup>

Since students’ urine or other body samples are being collected for reasons not based on suspicion of use, but because these students belong to a defined population group—i.e. student athletes and/or students engaged in extracurricular activities—it is reasonable to view it as a screening program and evaluate its validity as such.

### *Disease*

Under these criteria, the initiation of a health screening program for a screened disease “must be associated with adverse consequences, either physical or psychological.”<sup>266</sup> Additionally, it is recommended

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262. DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 1672 (30th ed. 2003).

263. See John W. Kulig & Comm. on Substance Abuse, *Tobacco, Alcohol, and Other Drugs: The Role of the Pediatrician in Prevention, Identification, and Management of Substance Abuse*, 115 PEDIATRICS 816, 819 (2005).

264. *Id.*

265. See AM. ACAD. OF PEDIATRICS, COMM. ON SCH. HEALTH, SCHOOL HEALTH: POLICY AND PRACTICE 89 tbl. 30 (Philip R. Nader ed., 5th ed., 1993).

266. *Id.*

that undetected cases of the disease should be either “common (high prevalence) or new cases must occur frequently (high incidence).”<sup>267</sup> For example, eyesight screening in schools for poor visual acuity may be warranted as a worthwhile screen, as long as it can be demonstrated that undetected poor vision has adverse consequences, and that either a high prevalence of undetected poor vision exists among the screened population or that many new cases of poor vision occur each year.

When these principles are applied to the issue of substance abuse, a problem arises as to the question: what constitutes “the disease?” Consider a student who experiments with using marijuana once or twice and then stops experimenting. Can one argue persuasively that this experimentation is a “disease” that requires identification by the health system? Does this degree of marijuana use have health and social consequences?

The answer to these questions will determine whether or not this student’s experimentation with marijuana is classified as a “disease.” If routine screening and identification of drugs and alcohol among athletes could detect the occasional user and subsequently prevent athletic injury among those users, then even this degree of “disease” could be considered worthy of a screening program. Adolescents who use alcohol and other drugs tend to suffer a high number of physical injuries of such severity that require medical care.<sup>268</sup> This increased rate of injuries, however, is caused by gunshots, physical fights and pedestrian mishaps while intoxicated,<sup>269</sup> not by participation in sports or extra-curricular activities.

Yet another possible definition of “disease,” other than one or two brief periods of intoxication, is the *chronic*, on-going use of such substances that are concomitant with detrimental effects on one’s social, educational or health outcomes. There is evidence to suggest that adolescents who abuse substances and whose use is sustained or even leads to dependence, have characteristics that are distinct from those whose use is limited in severity and/or duration of time.<sup>270</sup> A

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267. *Id.*

268. See Anthony Spirito et al., *Relationship Between Substance Use and Self-Reported Injuries Among Adolescents*, 21 J. ADOLESCENT HEALTH 221, 221, 222 tbl. 1, 224 (1997) (“There was a relatively high incidence of self-reported alcohol or other drug use at the time of injury . . . such as falls and cuts, and . . . gun and assault injuries.” *Id.* at 224.).

269. See *id.* at 222 tbl. 1.

270. See generally Jie Guo et al., *Childhood and Adolescent Predictors of Alcohol Abuse and Dependence in Young Adulthood*, 62 J. STUDIES ON ALCOHOL 754 (2001) (discussing impact of childhood alcohol abuse and its affect on

relatively low proportion (3.8%) of youths aged twelve or thirteen are “current” drug users (defined as use within preceding thirty days).<sup>271</sup> Drug use then peaks at age eighteen to twenty years, at which time 22.3% of youth are current illicit drug-users.<sup>272</sup> After age twenty, there is a general decline in drug use so that at age twenty-six years, illicit drug use has declined to 5.8%.<sup>273</sup> These findings demonstrate that a majority of adolescent antisocial behavior, in terms of drug-use, is only temporary. Usage begins and ends in adolescence without necessarily meeting this proposed second definition of “disease.” Pre-existing childhood problems can distinguish those who do, and who do not, go on to have antisocial behavior problems as adults.<sup>274</sup>

### *Screening Test and Screener*

An ideal screen “detects all subjects who have the disease (high sensitivity) and correctly identifies all who do not (high specificity).”<sup>275</sup> A test with low sensitivity would be one where positive cases were missed.<sup>276</sup> A test with good reliability is one where one finds the same result when the test is repeated.<sup>277</sup> No test is perfect, and scientists usually look for tests that have sensitivity, specificity and reliability data that are acceptable to their needs.<sup>278</sup> The screeners “must be well trained; experience is important, particularly if judgments are to be made.”<sup>279</sup>

For many commonly abused substances, drug screening has reasonably good sensitivity and specificity. Drug screening tests and methodologies are continuously improving. Substance abuse screening in schools, however, has an inherent lack of sensitivity (i.e., lack of

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behavior); Maury Nation & Craig Anne Heflinger, *Risk Factors for Serious Alcohol and Drug Use: The Role of Psychosocial Variables in Predicting the Frequency of Substance Use Among Adolescents*, 32 AM. J. DRUG & ALCOHOL ABUSE 415 (2006) (analyzing psychosocial risk factors as predictors of substance use).

271. DHHS, 2005 SURVEY, *supra* note 10, at 16.

272. *Id.*

273. *Id.* at 20.

274. See Terrie E. Moffitt, *Adolescence-Limited and Life-Course-Persistent Antisocial Behavior: A Developmental Taxonomy*, 100 PSYCHOLOGICAL REV. 674, 674-79 (1993).

275. AM. ACAD. OF PEDIATRICS, *supra* note 279, at 89 tbl. 30.

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

ability to detect all subjects with the “disease”) because schools cannot reasonably screen for all substances. For example, the drug screening programs promoted by the White House are “random” drug screening, not screening of the entire eligible student population.<sup>280</sup> Furthermore alcohol, the most widely abused illicit substance by adolescents, is evanescent and is, therefore, not traceable in body samples by the time a student is tested the day after a binge-drinking episode.

Moreover, most public school drug screening programs use economical urine tests, which typically run between \$20 and \$40 per test.<sup>281</sup> This test has many shortcomings “and often is not sensitive enough to accomplish [its] goals . . . .”<sup>282</sup> School districts can optimize their screening procedures by taking precautions. The American Academy of Pediatrics advises that “it is critical that accidental or purposeful contamination, dilution, or substitution be avoided. Office policies should be developed to preserve the chain of custody in processing urine specimens for testing.”<sup>283</sup> Consequently, schools may need to choose more than one test so that they identify all substances that are apt to be abused in their communities, contract with laboratories that have the capability to identify specific substances that are at highest risk, and use the proper technologies with optimal levels of sensitivity. Taking such extra precautions, however, may result in additional costs.

Gas chromatograph mass spectrometry is a very accurate follow-up test to a positive screen. It can identify drugs and masking agents, and if performed accurately, false positive results are rare.<sup>284</sup> These tests, however, require “highly trained staff and [a] sophisticated laboratory.”<sup>285</sup> They are expensive, but necessary, tests to confirm suspected “positive” screens that many schools use.

Even if some schools do not choose to use the most appropriate screening test for their student population or do not adequately guard the integrity of specimen collection procedures, these faults are relatively easy to correct. It can be easily argued that most schools

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280. See Alexandra Gekas, *No Child Left Untested?*, NEWSWEEK, Jan. 30, 2007, <http://www.msnbc.msn.com/id/16893833/site/newsweek/> (“The White House wants more schools to adopt random student drug-testing programs.”).

281. John W. Kulig, *Tobacco, Alcohol, and Other Drugs: The Role of the Pediatrician in Prevention, Identification, and Management of Substance Abuse*, 115 PEDIATRICS 816, 819 (2005).

282. *Id.*

283. *Id.*

284. *Id.*

285. *Id.*

have the potential to reach levels of sensitivity and specificity for their drug screening programs that are not inconsistent with screening programs for other diseases and health conditions.

### *Target Population*

Focusing on populations that have the highest level of undetected disease or on groups for whom treatment would be most beneficial are ways to maximize the efficiency of the testing program.<sup>286</sup>

Adolescents, who use drugs (i.e., marijuana) frequently, are more likely to use drugs (i.e., marijuana and cocaine) as adults than those who never, or infrequently, use such drugs.<sup>287</sup> But do school drug screening programs target these students? Current federal jurisprudence limits screening populations to those who are enrolled in school athletics and/or extracurricular activities.<sup>288</sup> Yet, scientific studies have shown that most adolescents participating in athletics are less likely to be engaged in cigarette smoking, cocaine, and other illegal drug use, than those who do not participate.<sup>289</sup> Furthermore, students participating in athletics, alone or in addition to other activities, are significantly less likely to smoke cigarettes or abuse illegal substances.<sup>290</sup> These findings suggest that schools are legally permitted to target the population least likely to have undetected disease and least likely to have one that evolves into a health problem. As such, schools in this country are specifically, if unwittingly, prevented from screening those student populations whose drug use is most prevalent and most likely to contribute toward poor educational, social and health outcomes in the future.

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286. AM. ACAD. OF PEDIATRICS, *supra* note 279, at 89, tbl. 30.

287. Margaret E. Ensminger, Hee Soon Juon & Kate E. Fothergill, *Childhood and Adolescent Antecedents of Substance Use In Adulthood*, 97 ADDICTION 833, 840 (2002).

288. *See supra* Parts III.A, III.B..

289. *See* Russell R. Pate et al., *Sports Participation and Health-Related Behaviors Among US Youth*, 154 ARCHIVES PEDIATRICS & ADOLESCENT MED. 904, 907 (2000).

290. Patricia A. Harrison & Gopalakrishnan Narayan, *Differences in Behavior, Psychological Factors, and Environmental Factors Associated with Participation in School Sports and Other Activities in Adolescence*, 73 J. SCH. HEALTH 113, 113-14, 117-18 (2003).



### Treatment

Focusing on populations that have the highest level of undetected disease or on groups for whom treatment would be most beneficial are ways to maximize the efficiency of the testing program.<sup>291</sup> In other words, there must be an early intervention benefit.

Drug screening can meet this criterion given the right circumstances. There are treatments for substance abuse and they have been met with varying levels of success. Rates of success for treating substance abuse and preventing future abuse vary because they are based on many other factors in individuals' lives: associated mental health disorders, social circumstances, personality, presence, and degree of addiction, as well as the type of drugs used.<sup>292</sup> For substance abuse treatment programs to be successful for some substance abusers, the abuser must make a lifelong commitment to preventive practices. Equally important, the health care system (i.e., health insurers and providers) must make a lifelong commitment to providing these services. This is not dissimilar from management of chronic diseases such as diabetes. As with other chronic health conditions, many people predisposed to drug dependence require continuity of care and medical management models that are tailored to their ongoing needs.<sup>293</sup>

In the future, there may be new and alternative treatment options, such as immunopharmacotherapy which requires administering antibodies that bind the targeted drug before it reaches the brain.<sup>294</sup> “[D]ata . . . has been gathered on the effects of active and passive immunization against cocaine, nicotine, PCP and methamphetamine in animal models, suggesting potential efficacy of these treatments in humans, and clinical trials are currently underway for vaccines against cocaine and nicotine.”<sup>295</sup> When and if treatments like these are developed, and if they are shown to be both effective and widely available, then there is a more compelling argument for early detection of students who have a predilection to addiction.

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291. AM. ACAD. OF PEDIATRICS, *supra* note 279, at 89, tbl. 30.

292. See John M. Roll et al., *Identifying Predictors of Treatment Outcome in a Drug Court Program*, 31 AM. J. DRUG & ALCOHOL ABUSE 641, 648-54 (2005).

293. See James McKay, *Continuing Care in the Treatment of Addictive Disorders*, 8 CURRENT PSYCHIATRY REP. 355 (2006).

294. Michael M. Meijler, et al., *Development of Immunopharmacotherapy Against Drugs of Abuse*, 1 CURRENT DRUG DISCOVERY TECH. 77, 77 (2004) (“Immunopharmacotherapy is based on the generation or administration of antibodies that are capable of binding the targeted drug before it can reach the brain . . .”).

295. *Id.* at 86.

### *Referral and Receipt of Treatment*

As stated by the American Academy of Pediatrics, “[a]ll those with a positive screening test must receive a more definitive evaluation and, if indicated, appropriate treatment. The ultimate measure of effectiveness is the reduction in morbidity that results from early intervention among those with positive screening test results.”<sup>296</sup>

For substance abuse among high-school aged students, the record is not encouraging. In 2005, of the 23.2 million American youths aged twelve or older (9.5% of the U.S. population at this age) who required treatment for alcohol or drug abuse, only 0.9% received treatment at a specialty facility.<sup>297</sup> This means over twenty million were left without treatment from a specialty facility.<sup>298</sup>

The reasons for this lack of proper treatment are unclear. The most often reported reasons for not receiving treatment, for people of all ages are: “(a) not ready to stop using [drugs] (37.9 percent), (b) cost or insurance barriers (35.1 percent), stigma . . . (23.9 percent), (d) did not know where to go for treatment (14.3 percent), and (e) access barriers [such as no transportation or inconvenience] (13.4 percent).”<sup>299</sup> There is no evidence that the proportion of youth who test positive for substance abuse as part of school screening programs have significantly different characteristics than those reflected in these data. More rigorous evaluations of student populations for such outcomes are necessary.

### *Cost/Benefit Ratio*

As stated by the American Academy of Pediatrics, “[c]ost includes all expenses of screening, referral, and treatment, including administrative costs and the cost plus anxiety that result from false-positive results. The benefit is the reduction in morbidity from early intervention among those with true-positive results who are in need of treatment.”<sup>300</sup>

At this stage of research, it can be concluded that student drug screening programs fail to meet several key criteria as a justifiable public health screen. Consequently, they should not be continued if that is their only, or primary, justification. We now turn to an alternative justification.

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296. AM. ACAD. OF PEDIATRICS, *supra* note 279, at 89, tbl. 30.

297. DHHS, 2005 SURVEY, *supra* note 10, at 6.

298. *Id.*

299. *Id.* at 77.

300. AM. ACAD. OF PEDIATRICS, *supra* note 279, at 89, tbl. 30.

## VI. STUDENT DRUG SCREENING AS A DETERRENT

Many who advocate or administer student drug screening programs, may never have intended these programs to be regarded as a public health screen designed to identify undetected cases of substance abuse. As will be discussed, school districts may view the primary, or even sole, purpose of drug screening as a deterrent—a way to dissuade students from using drugs, at least during the school year. If this is the case, three factors must be assessed to evaluate the success of using student drug screening for this purpose: (1) the program must actually be acting as a deterrent (2) it must not be causing excessive unintended harm and (3) if it is a deterrent and is causing some harm, community dialogue must ensue so that the magnitude of harm and benefits are understood and weighed. Both scientific studies and case law address these factors.

### *Is Student Drug Screening Serving as a Deterrent?*

The intent of many schools' drug screening programs and the reason the program is often supported by parents and judges, is to allow students to avoid peer pressure and provide a socially acceptable reason to reject drug use, at least during school months.<sup>301</sup>

Preliminary studies of the deterrent effects of drug screening are not yet convincing. In a survey of seventy-one high school principals in the state of Indiana, principals were requested to compare alcohol and drug activity over a period of three years.<sup>302</sup> The investigator, Dr. Joseph McKinney, found that 58% of responding principals reported a decrease in either student alcohol or drug use, following the introduction or re-introduction of a screening program.<sup>303</sup> These findings would seem to support the effectiveness of drug screening as a deterrent. Unfortunately, it is this author's opinion that the study

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301. See Raquel Rutledge, *Mom-and-Pop Drug Testing*, SEATTLE TIMES, Apr. 12, 2006, [http://seattletimes.nwsourc.com/html/living/2002924874\\_healthteendrugtests12.html](http://seattletimes.nwsourc.com/html/living/2002924874_healthteendrugtests12.html). See also *Earls*, 536 U.S. at 840-41 (Breyer, J., concurring) ("It offers the adolescent a nonthreatening reason to decline his friend's drug use invitations, namely, that he intends to play baseball, participate in debate, join the band, or engage in any one of half a dozen useful, interesting, and important activities.").

302. Joseph R. McKinney, *The Effectiveness and Legality of Random Drug Testing Programs Revisited*, 205 ED. LAW REP. 19, 21 (2006).

303. *Id.*

design was weak<sup>304</sup> making the validity of McKinney's conclusions suspect and in want of a balanced and transparent methodology. McKinney reported that drug usage rates were based on impressions of students and principals.<sup>305</sup> Students were not surveyed directly. There is no evidence that principals' perceptions of substance abuse among their student populations have any validity as a measure of actual use.

Dr. Ryoko Yamaguchi and colleagues performed a published epidemiological study between 1998 and 2001 on schools that do drug screening.<sup>306</sup> In this study, the perceptions of principals regarding students' drug use were not the basis of the study. Rather, it was the self-reporting of 76,000 students in grades eight, ten, and twelve who attended these schools that provided the data.<sup>307</sup> Thus, this study design was considerably stronger.

Yamaguchi found no relationship between drug screening and illicit drug use—more specifically, drug screening did not appear to be a deterrent.<sup>308</sup> For certain populations of the student bodies at these schools, specifically athletes and experienced marijuana users, drug testing was not a significant predictor as to whether or not they used marijuana.<sup>309</sup> A drawback to this study is that schools that did or did not do drug screening, may not be equal. For instance, it is possible that schools that chose drug screening may have had higher rates of substance abuse than schools that did not choose drug screening. If drug screening lowered substance abuse rates among those schools that chose screening, in contrast to the levels of those schools that did not choose screening, this would not be detected in Yamaguchi's results.

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304. E.g., as only administrators choosing to have drug screening programs were surveyed, giving this study a sampling bias; most measures were the principal's impressions; the methodology for students' written self-reporting on drug use was not described

305. See *id.* at 21-23.

306. Ryoko Yamaguchi, Lloyd D. Johnston & Patrick M. O'Malley, *Relationship Between Student Illicit Drug Use and School Drug-Testing Policies*, 73 J. SCH. HEALTH 159, 159-64 (2003).

307. See *id.* at 159-60.

308. See *id.* at 164 (“[R]esults suggest that drug testing in schools may not provide a panacea for reducing student drug use that some (including some on the Supreme Court) had hoped.” (footnote omitted)).

309. See *id.* at 161-63.

Dr. Linn Goldberg, in his 2003 study, did use a control group as well as direct student input to get at some of these answers.<sup>310</sup> Dr. Goldberg worked with two Oregon high schools, one with, and one without, mandatory drug screening for athletes.<sup>311</sup> Athletes and non-athletes at each school completed questionnaires at the initiation and the culmination of the academic year.<sup>312</sup> Dr. Goldberg and his colleagues found that use of athletic-enhancing substances (e.g., steroids) was less likely among athletes who were drug-tested, as compared to athletes who were not.<sup>313</sup> But there was no difference in alcohol use between these two groups.<sup>314</sup> Among the non-athletes at these two schools, there was no statistically significant difference between illicit drug use.<sup>315</sup> Dr. Goldberg also found that drug use risk factors (i.e., student belief that drug use was not risky and poor attitudes towards their school) were higher among those athletes who were in the school that did drug screening.<sup>316</sup> Goldberg's findings demonstrate that there are likely some benefits from, as well as drawbacks to, random student drug screening programs. Most importantly, the quality and rigor of Goldberg's methodology represent the quality of research that needs to be expanded as well as repeated in both similar and dissimilar populations of students, if we are to fully understand the true impact of these programs.

### *Inadvertent Harm Caused by Student Drug Screening Programs*

Published studies, to date, have focused primarily on whether there are potential benefits, rather than potential harms, of drug screening. The following constitute potential harm, or unintended consequences,

Drug screening may lead to decreased enrollment in extracurricular activities by students who once used, now use, or may want to try a drug, or those students who simply do not want to be tested.<sup>317</sup> Studies

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310. See Linn Goldberg et al., *Drug Testing Athletes to Prevent Substance Abuse: Background and Pilot Study Results of the SATURN (Student Athlete Testing Using Random Notification) Study*, 32 J. ADOLESCENT HEALTH 16, 16-17 (2003).

311. See *id.* at 17.

312. *Id.* at 17-18.

313. *Id.* at 21.

314. *Id.* at 23.

315. *Id.*

316. *Id.* at 22.

317. See *Earls*, 536 U.S. at 853 (Ginsburg, J., dissenting)(“Even if students might be deterred from drug use in order to preserve their extracurricular

have shown that involvement in extracurricular activities is associated with lesser likelihood to use drugs.<sup>318</sup> This means drug screening may inadvertently increase drug use among those who do not join an extracurricular activity because of the screening program.

It is worthwhile to point out that one must not draw conclusions from statistical associations. An association between drug use and another social or lifestyle factor, no matter how precise and true that association is, does not in and of itself constitute proof of cause and effect. For example, there is a statistical association between educational status and the use of illicit substances.<sup>319</sup> “Among adults aged 18 or older, the rate of current illicit drug use [is] lower among college graduates (5.0 percent) compared with those who did not graduate from high school (9.8 percent) . . . .”<sup>320</sup> It is tempting to conclude that by pursuing an education, one reduces one’s chances of using drugs. In the same study, however, it was also found that “adults who had graduated from college [are] more likely to have tried illicit drugs in their lifetime when compared with adults who had not completed high school (51.7 vs. 37.7 percent).”<sup>321</sup> Using the same flawed logic, one could conclude that trying an illicit drug is an excellent way of increasing one’s chances of graduating from college. Yet such a conclusion is preposterous and ignores various obvious factors that may affect college students and their chances of using illicit drugs. Understanding this point helps to explain why more research is required to determine whether drug screening programs encourage non-participation in extracurricular activities, and if so, to what extent such programs exert this influence.

A positive test may dangerously deteriorate an unstable home situation for a student. There is evidence that adolescents who witness

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eligibility, it is at least as likely that other students might forgo their extracurricular involvement in order to avoid detection of their drug use.”).

318. See NICHOLAS ZILL, CHRISTINE W. NORD & LAURA S. LOOMIS, WESTAT, ADOLESCENT TIME USE, RISKY BEHAVIOR, AND OUTCOMES: AN ANALYSIS OF NATIONAL DATA (1995), <http://aspe.hhs.gov/hsp/cyp/xstimuse.htm> (an executive summary written for the Dep’t of Health and Human Serv.)

[C]ompared to those who reported spending 1-4 hours per week in extracurricular activities, students who reported spending no time in school-sponsored activities were 57 percent more likely to have dropped out by the time they would have been seniors; 49 percent more likely to have used drugs; . . . 35 percent more likely to have smoked cigarettes; and 27 percent more likely to have been arrested.

319. DHHS, 2005 SURVEY, *supra* note 10, at 23.

320. *Id.*

321. *Id.*

violence are more likely to abuse drugs.<sup>322</sup> Disclosure of a student's positive drug test to parents in a violence-prone home may reignite or exacerbate such violence, thereby worsening the very same environmental conditions that may have led to substance abuse.

Testing adolescents at a developmental stage, when many feel estranged from their ever-changing bodies, may traumatize some students. This would be especially likely if urine sampling required some form of direct observation. Certainly, the students who challenged the school systems in the notable legal cases may have been the sort of teens who fit this description. It is known that adults sense a variable degree of humiliation when submitting to the very same drug test.<sup>323</sup> For some adults, provision of urine for analysis is a "search" of something personal which, when conducted without reason for suspicion, constitutes an assault and for them constitutes unwarranted control.<sup>324</sup> Although there is little published evidence that indicates that a segment of the adolescent population feels excessively sensitive about their body and collected specimens used for screening,, the lack of published evidence may be a result of a paucity of studies, rather than the absence of this phenomenon.

The monetary costs of unproven drug screening may be taken from other school curricula that have been found to be successful in reducing the substance abuse by students. School-based educational programs to prevent the use of tobacco, alcohol, and other illicit substances are generally designed to be delivered to all students at a both the elementary, middle and junior levels of school.<sup>325</sup> These types of programs have been shown to work very well for the sub-population

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322. See Kathleen E. Albus, Mark D. Weist & Alina M. Perez-Smith, *Associations Between Youth Risk Behavior and Exposure to Violence: Implications for the Provision of Mental Health Services in Urban Schools*, 28 BEHAVIOR MODIFICATION 548, 555, 559 (2004).

323. See C. Raskin, *Drug and Alcohol Testing in the Workplace: Moral, Ethical and Legal Issues*, 45 BULLETIN ON NARCOTICS 45, 45, 50 (1993).

324. See *id.* at 50.

325. See Cheryl L. Perry et al., *A Randomized Controlled Trial of the Middle and Junior High School D.A.R.E. and D.A.R.E. Plus Programs*, 157 ARCHIVES PEDIATRICS & ADOLESCENT MED. 178, 179 (2003) (discussing the Drug Abuse Resistance Education program); Marvin Eisen et al., *Evaluating the Lions-Quest "Skills for Adolescence" Drug Education Program: Second-Year Behavior Outcomes*, 28 ADDICTIVE BEHAVIOR 883, 884, 887 (2003) (discussing the Skills for Adolescence program).

of students at high risk for drug abuse.<sup>326</sup> Middle and high school drug abuse prevention programs “produce meaningful and durable reductions in tobacco, alcohol, and marijuana use . . . .”<sup>327</sup> These programs basically teach social resistance skills and several curricula include annual booster sessions in subsequent school years.<sup>328</sup> Additionally, many of the programs work well among students of multiple ethnicities and community backgrounds.<sup>329</sup>

It must be determined whether health education programs that have been researched and documented to work are operating in schools with drug screening programs. Perhaps resources that could be allocated to these effective educational programs have been or will be used to pay for drug screening programs.

Drug screening may send youths a message that they are not trusted by teachers, coaches, and counselors, potentially damaging a climate conducive to learning. Dr. Goldberg found that those athletes who attended schools with drug screening programs had poorer attitudes toward schools than those who attended schools without such programs.<sup>330</sup> Although there are currently no additional studies to support the validity of this unintended harmful outcome, this is a potentially serious adverse consequence, and as such further research needs to be done using similar and dissimilar populations (e.g., ethnic groups, regions of the country).

Drug screening may be harmful if students try to outsmart the test. For example, students may turn to drugs not being tested (e.g., ecstasy, inhalants, alcohol), or drugs that exit the body quickly (e.g., cocaine, methamphetamine).

Most school-based drug urine screens are preliminary tools and “[a]ny sample that tests “positive” using this [preliminary] test should always be confirmed using a more sensitive test . . . before relying upon the results for any purpose that might have serious consequences for

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326. See Kenneth W. Griffin et al., *Effectiveness of a Universal Drug Abuse Prevention Approach for Youth at High Risk for Substance Use Initiation*, 36 PREVENTATIVE MED. 1, 5 (2003) (discussing the Life Skills Training program).

327. Gilbert J. Botvin et al., *Long-term Follow-up Results of a Randomized Drug Abuse Prevention Trial in a White Middle-class Population*, 273 JAMA 1106, 1006 (1995).

328. See Eisen et al., *supra* note 332, at 887; Perry et al., *supra* note 332, at 179.

329. See, e.g., Phyllis L. Ellickson et al., *New Inroads in Preventing Adolescent Drug Use: Results From a Large-Scale Trial of Project ALERT in Middle Schools*, 93 AM. J. PUB. HEALTH 1830, 1835 (2003) (discussing the Project ALERT program in rural and urban environments).

330. Goldberg et al., *supra* note 324, at 22.



the person being tested.”<sup>331</sup> During the interval of time between a false positive result and the follow-up test that proves the false result, the life of an innocent adolescent may be deeply damaged by skepticism of parents, friends, teachers, or coaches. Such a consideration should be noted for the sake of the child involved.

### *Community Dialogue*

Due to the presence of these aforementioned detrimental effects, it is necessary that a community dialogue occurs. There are serious health, safety, social and educational ramifications from substance abuse, but, as has been demonstrated, the effectiveness of school-based drug screening programs to alleviate this problem is unknown. Drug screening programs do not meet basic criteria yet to justify using these programs as a proper public health screen. Drug screening programs may be useful as a deterrent, but this is not proven. Moreover, very few studies on inadvertent harms of drug screening have been conducted, yet many more plausibly exist. Before additional resources are allocated to drug screening programs and before drug screening is pervasively adopted in schools throughout this country more information is required. Further research is required and community dialogue<sup>332</sup> is necessary so that the magnitude of harm and benefits are understood and weighed.

Such dialogue should also ascertain whether schools that adopt drug-screening programs use them to strengthen effective health education programs, or use them to supplant effective health screening programs. Research must be conducted as to whether schools with drug screening programs assess those students who, as a result of these programs, may be deterred from participating in athletics, extra or co-curricular activities. The community should ascertain the prevalence of substance abuse prevention programs with evidence of effectiveness that is operating in schools with, and without, drug screening programs. Relevant questions include: do drug screening programs shift resources at the federal or state level away from substance abuse education? Are schools with drug screening programs currently studying potential benefits and potential harms to students being tested? If so, what are their results? Do schools have the proper evaluation tools and methods to conduct a competent evaluation of the potential benefits and harms of their drug screening programs? All these questions should be examined and analyzed before substantial

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331. Bailey, *supra* note 294, at 5.

332. Whether between the community members itself or the community and the local/state/federal government.

resources are allocated to drug screening programs in this country's schools.

## VII. CONCLUSION

Substance abuse is a serious problem among teenagers in this country. Schools throughout the United States have adopted various programs to deal with this public health issue. Moreover, the Supreme Court has sanctioned random drug testing of those middle and high school students engaged in athletics and extra curricular activities. Various state courts have extended these decisions to permit drug testing of students engaged in co-curricular activities and students with school-issued parking permits. Some schools are going even further and authorizing drug testing of students who seek to act in school plays, attend school dances and/or go on field trips.<sup>333</sup>

Complementing these decisions, the federal government has allocated substantial resources to drug testing students in this nation's schools. Not only does the government award grants to schools that seek to implement drug testing programs, but it also holds summits throughout the country encouraging additional educational institutions to implement random drug testing of students.

Yet all of these actions are undertaken with very little information as to whether testing is really fulfilling the government's intention of deterring students from using drugs. Moreover, even less is known about whether testing is causing any inadvertent harm or unintended consequences such as decreased enrollment in athletics or extra-curricular activities, diversion of funds from effective school-based drug and alcohol abuse programs, or an increase in alcohol or substance use that are not tested by these programs.

This article has examined the drug testing problem as a public health screening issue, and in doing so, has raised appropriate inquiries for future academic work. There remains much to be researched and analyzed regarding the effectiveness of random drug testing programs in schools. Before even greater allocations of time and money are spent on this endeavor, it is critical that researchers conduct an evaluation of both the potential benefits and the potential harms of such programs.

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333. Associated Press, *Kansas Schools Take Drug Testing to Extreme*, MSNBC.COM, September 13, 2006, <http://www.msnbc.msn.com/id/14819494>. See also KAN. UNIFIED SCH. DIST. 214, QUESTIONS AND ANSWERS REGARDING THE ULYSSES SCH. DIST. RANDOM DRUG POL'Y 1 (2005), <http://kep1.pld.com/District/Q%20%20A%20on%20RDP.pdf>.