

KIDS, DRUGS, AND SCHOOL INTERVENTION: HOW FAR CAN A PUBLIC SCHOOL GO IN DRUG TESTING ITS STUDENTS?

I. INTRODUCTION

In 1995, the United States Supreme Court determined that school districts could constitutionally require student-athletes to submit to suspicionless drug testing.¹ During the summer of 2002, the Supreme Court decided *Board of Education v. Earls* and widened the scope of student drug testing by holding that high school students participating in extracurricular activities such as Future Farmers of America, show choir, concert band, and student government could also be required to submit to drug tests.² After the *Earls* decision, many school board members, administrators, and parents have been left questioning how far a school can go in drug testing its students.³

1. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995). The Court held Vernonia School District's policy of drug testing all student-athletes reasonable and constitutional because of the students' "decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search." *Id.* at 664-65.

2. 536 U.S. 822 (2002). The Supreme Court found that Tecumseh Public School's drug-testing policy, which applies to all students participating in extracurricular activities, is "a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren." *Id.* at 838.

3. See Tamar Lewin, *With Court Nod, Parents Debate School Drug Tests*, N.Y. TIMES, Sept. 29, 2002, at 1. The author here notes "[w]hile the court ruling resolved some of the legal questions, it did nothing to end the controversy about whether drug testing programs make sense as educational policy." *Id.* at 34. The author claims schools are debating about whether to implement voluntary programs with incentives for encouraging students to participate, or programs involving mandatory testing of all students. *Id.* There also appears to be division as to whether programs should focus on punishment or counseling and treatment. *Id.*

See also Linda Cagnetti, Editorial, *Drug Testing: Should Schools Screen Students?: Pragmatism Trumps Idealism in Crises*, CINC. ENQ., Aug. 25, 2002, at F1; Ray Cooklis, Editorial, *Drug Testing: Should Schools Screen Students?: Court Ruling Gives Kids Awful Civics Lesson*, CINC. ENQ., Aug. 25, 2002, at F1. The two authors debate whether the *Earls* court made the correct decision. Cagnetti argues that rather than singling out those students who participate in extracurricular activities, schools should implement mandatory testing for "all middle- and high-school students." *Id.* She states, "[w]e already require students to have physical exams and vaccinations against disease. We use vision and hearing tests to alert us to problems. Drug use is a serious problem." *Id.* Cooklis, on the other hand, argues that "[s]uch invasive, arbitrary and fallible tests and the threat of sanctions they inherently carry could drive students away from extracurricular activities, leaving them more vulnerable to unsavory activities such as, oh, let's see, drug use." *Id.* Cooklis argues "this clumsy, overbroad ruling opens the door wide to further diminishing the constitutional protection against unreasonable search and seizure that all of us should enjoy." *Id.*

Governmentally-mandated drug testing constitutes a search and seizure for the purposes of the Fourth Amendment,⁴ so in analyzing school drug testing,⁵ the Court must decide whether such searches are reasonable.⁶ The Court makes this determination by balancing the government's need to search against the nature of the privacy interests involved.⁷ The Supreme Court has held that schools may constitutionally drug test students participating in extracurricular activities because the schools' interest in preventing and/or deterring drug use, and the efficacy of suspicionless drug testing in furthering those interests, outweighs students' low expectations of privacy.⁸

This Note is intended to provide a practical guide for schools that wish to implement drug testing policies but remain uncertain as to what is constitutionally permissible in the wake of the Supreme Court's recent

4. The Fourth Amendment secures the "[t]he right of the people to be secure in their persons . . . against unreasonable searches and seizures." U.S. CONST. amend. IV.

See *Schmerber v. California*, 384 U.S. 757, 767 (1966); *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989). In these two cases, the Supreme Court held that drug testing mandated by the government constitutes a search for the purposes of the Fourth Amendment. In *Schmerber*, the defendant was taken to the hospital for injuries sustained after a car accident. *Schmerber*, 384 U.S. at 758. He was arrested there for driving under the influence of alcohol and a sample of his blood was drawn, without his consent, for chemical analysis. *Id.* Evidence of the blood alcohol content of his blood was introduced as evidence at his trial and he was subsequently convicted. *Id.* at 758-59. The Court found "[i]t could not reasonably be argued . . . that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment." *Id.* at 767.

In *Skinner*, the Court faced the issue of whether, pursuant to regulations promulgated by the Federal Railroad Administration, drug testing of railroad employees involved in train accidents violated the Fourth Amendment. *Skinner*, 489 U.S. at 606. The Court considered whether the testing amounted to a search or seizure (and therefore implicated the Fourth Amendment) and concluded "[b]ecause it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment." *Id.* at 617.

5. Public school officials are state actors for constitutional purposes. "In carrying out searches and other disciplinary functions . . . school officials act as representatives of the State . . . and they cannot claim . . . immunity from the strictures of the Fourth Amendment." *New Jersey v. T.L.O.*, 469 U.S. 325, 336-37 (1985).

6. U.S. CONST. amend. IV (protecting against *unreasonable* searches and seizures).

7. *Terry v. Ohio*, 392 U.S. 1, 20-21 (1968). The defendants in this case were confronted by a police officer on the street who, pursuant to his suspicions of unlawful conduct, stopped the defendants and conducted a pat-down search for weapons. *Id.* at 5-7. The Court determined that employing a balancing test between the state's interest in the search, evidenced by an officer's reasonable and articulable suspicion, and the individual's privacy interests was the only way to analyze whether the search met the reasonableness requirement of the Fourth Amendment. *Id.* at 20-21. The Court found that a "stop and frisk," when supported by an officer's reasonable and articulable suspicion, is constitutional. *Id.* at 30-31.

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

decisions. In Part II, this Note will outline the Fourth Amendment jurisprudence leading up to the validation of suspicionless drug testing in public schools and will discuss at length the two cases in which the Supreme Court has approved drug testing of public school students. Part III will then explain and attempt to answer some of the constitutional questions with which schools are still grappling. Part IV will include practical suggestions for schools wishing to implement constitutionally-sound drug testing policies.

II. HISTORY

The Supreme Court continues to expand the boundaries of constitutional school drug testing.⁹ Because of this evolving jurisprudence, determining whether a school's drug testing policy passes constitutional muster can pose difficulties. Any analysis of a school's drug testing policy must begin with the Fourth Amendment.

A. *The Fourth Amendment and "Reasonableness"*

The Fourth Amendment protects "[t]he right of the people to be secure . . . against unreasonable searches and seizures."¹⁰ To determine whether the Fourth Amendment is implicated, a court must first decide whether a search has occurred.¹¹ This involves assessing whether the individual had a reasonable expectation of privacy in the place searched.¹² Intuitively, one would assume individuals have a reasonable expectation of privacy with regard to their bodily fluids and functions and indeed, the Supreme Court has held as much.¹³ Therefore, the collection and testing of bodily fluids for the presence of drugs is clearly a search for Fourth Amendment purposes.¹⁴

9. Originally limited to student-athletes, school drug-testing policies may now provide for the testing of any students participating in extracurricular activities. *See supra* note 1 and accompanying text; *see also supra* note 2 and accompanying text.

10. U.S. CONST. amend. IV.

11. *See* John J. Bursch, Note, *The 4 R's of Drug Testing in Public Schools: Random is Reasonable and Rights are Reduced*, 80 MINN. L. REV. 1221, 1225 (May 1996). The author explains "[b]efore deciding whether a particular action violates an individual's Fourth Amendment rights, a court must find a government action resulting in a 'search or seizure'." *Id.* at 1225 (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989)).

12. *Terry*, 392 U.S. at 9 (finding "wherever an individual may harbor a reasonable 'expectation of privacy,' . . . he is entitled to be free from unreasonable governmental intrusion" (citing *Katz v. United States*, 389 U.S. 347, 361 (Harlan, J., concurring) (1967))).

13. *See Schmerber*, *supra* note 4.

14. *Id.*; *see also Skinner*, *supra* note 4.

Once a court has determined that a search has occurred, it must next analyze whether the search was reasonable.¹⁵ To determine the reasonableness of a search, a court must first assess whether the government acted pursuant to a warrant; if not, the search is per se unreasonable unless it fits into one of the “few specifically established and well-delineated exceptions,”¹⁶ or meets the “reasonableness” requirement even without a warrant and without a showing of probable cause.¹⁷

The “few specifically established exceptions” together may be referred to as situations in which exigent circumstances are present; when such circumstances exist, searches conducted without a warrant but with probable cause may be found to be reasonable.¹⁸ In *Warden v. Hayden*, the Court found that the police officers’ warrantless search for a robbery suspect in a private home was reasonable because the exigencies of that situation, including both the officers’ and the general public’s safety, made an immediate search imperative.¹⁹ Courts have also found that the destruction or removal of evidence²⁰ and the inherent mobility of automobiles²¹ could create exigent circumstances.²²

15. U.S. CONST. amend. IV.

16. *Katz*, 389 U.S. at 357. The defendant was convicted of transmitting wagering information by telephone. FBI agents had recorded phone calls the defendant made from a public phone booth by attaching electronic listening and recording devices to the outside of the booth. *Id.* at 348. The Supreme Court overturned his conviction, holding the search unconstitutional because the agents failed to obtain a warrant and because the circumstances surrounding the search did not fit into any established exception from the warrant requirement. *Id.* at 356-58. The Court reaffirmed that “searches conducted outside the judicial process . . . are *per se* unreasonable under the Fourth Amendment” unless they fit into one of the established exceptions. *Id.* at 357.

17. *See infra* notes 23-29 and accompanying text.

18. *Warden v. Hayden*, 387 U.S. 294, 298-300 (1967).

19. *Id.* at 298-99 (citing *McDonald v. United States*, 335 U.S. 451, 456 (1948)). In this case, the police believed an armed robber entered a private home “less than five minutes before they reached it,” and the court stated “[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others.” *Id.* at 298-99.

20. *See* 2 WAYNE R. LAFAYE, *SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT* § 6.5(b), at 659 (2d ed. 1987), *cited in* ALLEN ET AL., *CONSTITUTIONAL CRIMINAL PROCEDURE: AN EXAMINATION OF THE FOURTH, FIFTH, AND SIXTH AMENDMENTS AND RELATED AREAS*, 676 (3d ed. 1995); *but see* *Vale v. Louisiana*, 399 U.S. 30, 34-35 (1970). In *Vale*, the Court found the warrantless search of the defendant’s home unconstitutional. After arresting the defendant for possessing narcotics, the police searched the home when the defendant’s mother and brother arrived and attempted to enter the home. The state argued that the possibility that the mother and brother would destroy the narcotics in the home before the police could obtain a warrant justified the search. The Court decided otherwise, stating that the circumstances present in the case did not fit into any of the exceptions to the warrant requirement: “The officers were not responding to an emergency. They were not in hot pursuit of a fleeing felon. The goods ultimately seized were not *in the process of destruction.*” *Id.* at 35 (emphasis added; internal citations omitted).

Despite the language in *Vale*, Professor LaFave asserts that lower courts have stated the “destruction of evidence” exception in broader terms, such as “a great likelihood that the evidence will be destroyed or removed” or that police have “reasonably conclude[d] that the evidence will be

Despite the lack of a warrant or a showing of probable cause, some searches have still been deemed reasonable by the Court.²³ The Supreme Court has traditionally employed a balancing test in analyzing these searches for reasonableness, stating “there is ‘no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails.’”²⁴ In order to make use of this exception to the warrant requirement, the government “must be able to point to specific and articulable facts, which . . . reasonably warrant that intrusion.”²⁵ Searches that have been deemed “reasonable” under this balancing test include “stop and frisk” searches,²⁶ searches incident to arrest,²⁷ inventory searches,²⁸ and border patrol searches.²⁹

destroyed or removed.” 2 LAFAVE, *supra*, at 658, *quoted in* ALLEN, KUHN, AND STUNTZ, CONSTITUTIONAL CRIMINAL PROCEDURE: AN EXAMINATION OF THE FOURTH, FIFTH, AND SIXTH AMENDMENTS AND RELATED AREAS, 676 (3d ed. 1995).

21. *See* Carroll v. United States, 267 U.S. 132, 153-56 (1925); *see also* Pennsylvania v. Labron, 518 U.S. 938 (1996); United States v. McClinton, 135 F.3d 1178 (7th Cir. 1998); United States v. Patterson, 65 F.3d 68 (7th Cir. 1995); United States v. Markling, 7 F.3d 1309 (7th Cir. 1993). The “moving vehicle exception” is based upon (1) the mobility of vehicles, and (2) the reduced expectation of privacy of those in vehicles. *Carroll*, 267 U.S. at 153-56. The court in *Markling* held that the exception applies when vehicles are used on highways or found stationary in places not normally used as residences. *Markling*, 7 F.3d at 1319 (citing California v. Carney, 471 U.S. 386, 391 (1985)). The exception requires officers to show probable cause that the vehicle in question may contain contraband. *Carroll*, 267 U.S. at 156. Probable cause can be established in many ways; for example, the Court in *McClinton* held probable cause was established by an informant’s tip and police work corroborating that tip. *McClinton*, 135 F.3d at 1184. In *Labron*, probable cause was established by a police officer’s visual confirmation that the suspect loaded drugs into the trunk of the car and by the officer’s observation that a second suspect behaved as though he had drugs in his truck. *Labron*, 518 U.S. at 940. Finally, the *Patterson* court found probable cause exists when there is a “fair probability” that contraband or other evidence of criminal activity exists. *Patterson*, 65 F.3d at 71.

22. Exigent circumstances may also justify warrantless seizures under the “plain view” doctrine, which allows police officers to seize items that are in plain view when those officers are acting lawfully (i.e., pursuant to a warrant or under a valid exigency exception) in conducting a search. *See* Horton v. California, 496 U.S. 128, 136-37 (1990) (holding so long as officers did not violate Fourth Amendment by presence in place from which item seized was in “plain view,” incriminating character of item is immediately apparent, and officer has right to access item, warrantless seizure of incriminating evidence is valid); *see also* Arizona v. Hicks, 480 U.S. 321, 326-27 (1987). *See generally* ALLEN ET AL., CONSTITUTIONAL CRIMINAL PROCEDURE: AN EXAMINATION OF THE FOURTH, FIFTH, AND SIXTH AMENDMENTS AND RELATED AREAS 703-06 (Little, Brown and Co., ed., 3d ed. 1995).

23. *See, e.g.,* Terry, *supra* note 7 (finding officer’s “stop and frisk” of individuals on a sidewalk was reasonable).

24. Terry, 392 U.S. at 21 (quoting Camara v. Municipal Court, 387 U.S. 523, 534-35, 536-37 (1967)).

25. *Id.*

26. *See* Terry, *supra* note 7.

27. *See* Chimel v. California, 395 U.S. 752 (1969). The police arrived at the defendant’s home with an arrest warrant authorizing the arrest of the defendant for burglary. *Id.* at 753. Upon presenting the defendant with the warrant, the officers asked if they might look around the house; the defendant

Over the years, Supreme Court justices have disagreed about whether a balancing test for determining “reasonableness” may be employed to allow for suspicionless searches that do not fit into one of the above-mentioned exceptions.³⁰ Recently, the Court has used a balancing test³¹ to justify suspicionless searches of the workplaces of public employees³² and the

objected, but the police claimed that incident to his arrest they had a right to search the home. *Id.* at 753-54. The police searched every room of the house, even opening drawers and moving belongings around in order to find evidence. *Id.* at 754. The Court reversed the defendant’s conviction, holding searches incident to arrest are reasonable only when limited in scope to the arrestee and area within his/her immediate control. *Id.* at 768.

28. *See Colorado v. Bertine*, 479 U.S. 367 (1987). Officers arrested the defendant for driving under the influence of alcohol. *Id.* at 368. While waiting for a tow truck to arrive and transport the defendant’s car to an impoundment lot, one of the officers “inventoried” the contents of the vehicle. *Id.* at 368-69. The officer found both drugs and drug paraphernalia, and the defendant was subsequently charged with driving under the influence as well as possession of drugs with intent to distribute. *Id.* at 369. The Supreme Court held inventory procedures administered when a vehicle is impounded, if administered in good faith pursuant to police regulations, are reasonable searches under the Fourth Amendment. *Id.* at 374.

29. *See United States v. Montoya de Hernandez*, 473 U.S. 531 (1985). The defendant arrived in Los Angeles on a flight from Columbia and was detained at the customs desk. *Id.* at 533. Customs officials suspected the defendant was a “balloon swallower,” a drug smuggler who transports drugs in balloons that are swallowed and then passed through bowel movements. *Id.* at 534. The defendant was detained for nearly 16 hours while officials waited for her to agree to an X-ray or have a bowel movement that they could inspect. *Id.* at 535. The Court held “the detention of a traveler at the border, beyond the scope of a routine customs search and inspection, is justified at its inception if customs agents, considering all the facts surrounding the traveler and her trip, reasonably suspect that the traveler is smuggling contraband in her alimentary canal.” *Id.* at 541.

30. *See ALLEN ET AL.*, *supra* note 22. The authors discuss the disagreements that have arisen occasionally amongst various Supreme Court justices as to the propriety of employing a balancing test in considering possible exceptions to the probable cause requirement. The authors frame the issue as follows: “Does one start with the premise . . . that probable cause defines the appropriate balance except in a few narrowly defined situations? Or does one start with the premise . . . that at least if the intrusion is relatively minor, it is appropriate to evaluate the reasonableness of the activity in terms of a *Camara-Terry* type balancing test?” *Id.*

31. The balancing test referred to here was first set out in *Terry*. *See supra* note 7 and accompanying text. The test took on its current form in *Delaware v. Prouse*, 440 U.S. 648, 658-59 (1979). One scholar explains the test set out in *Prouse* as adding “two prongs to the *Camara* test,” [upon which the *Terry* test was based], so that the Court should not only weigh the governmental interest in the search against the individual’s interest in privacy but should also examine the nature of the intrusion and the efficacy of the search in achieving the state’s goals. Joanna Raby, Note, *Reclaiming Our Public Schools: A Proposal for School-Wide Drug Testing*, 21 *CARDOZO L. REV.* 999, 1007 (1999).

32. *See O’Connor v. Ortega*, 480 U.S. 709 (1987) (holding warrant and probable cause not required when a search of an employee workplace has a noninvestigatory work-related purpose or the investigatory purpose of searching for evidence of employee misconduct).

drug testing of employees pursuant to federal regulations³³ based upon the “special needs”³⁴ of the government to regulate these areas.

As stated by Justice Blackmun in *New Jersey v. T.L.O.*, “[o]nly in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers.”³⁵ Therefore, a finding of special needs gives the Court permission to employ the “reasonableness” balancing test.³⁶

The “special needs” doctrine undoubtedly applies in public school settings, for in schools “the special need for an immediate response to behavior that threatens either the safety of schoolchildren and teachers or the education process itself” warrants the relaxation of traditional Fourth Amendment requirements.³⁷

The Court employed the special needs doctrine and the balancing test in both *Vernonia School District v. Acton*³⁸ and *Board of Education v. Earls*³⁹ to justify school-sponsored drug testing of certain segments of high school student populations as constitutional.⁴⁰

33. See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989); *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989). In these companion cases, the Court found suspicionless drug testing of railway employees subject to federal regulations and of customs agents reasonable and constitutional under the Fourth Amendment.

34. The “special needs doctrine” was first mentioned in *New Jersey v. T.L.O.*, 469 U.S. 325, 351-53 (1985) (Blackmun, J., concurring). Justice Blackmun argued that the balancing test used to validate searches based upon less than probable cause had been used only in cases where the government exhibited “a special law enforcement need for greater flexibility.” *Id.* at 351 (quoting *Florida v. Royer*, 460 U.S. 491, 514 (1983) (Blackmun, J., dissenting)). This “special needs doctrine,” in addition to the majority opinion in *T.L.O.*, “has laid the groundwork for an entire body of case law.” Jennifer E. Smiley, Comment, *Rethinking the “Special Needs” Doctrine: Suspicionless Drug Testing of High School Students and the Narrowing of Fourth Amendment Protections*, 95 NW. U.L. REV. 811, 817 (Winter 2001).

35. *T.L.O.*, 469 U.S. at 351 (Blackmun, J., concurring).

36. *Id.*

37. *Id.* at 353 (Blackmun, J., concurring). See generally Roseann Kitson, Note, *High School Students, You're in Trouble: How the Seventh Circuit has Expanded the Scope of Permissible Suspicionless Searches in Public Schools*, 1999 WIS. L. REV. 851, 856 (1999) (explaining that the Court has found “special needs” in public school settings). See also *Vernonia Sch. Dist.*, 515 U.S. at 653 (“We have found . . . ‘special needs’ to exist in the public school context.”).

38. 515 U.S. 646 (1995).

39. 536 U.S. 822 (2002).

40. *Vernonia Sch. Dist.*, 515 U.S. 646; *Earls*, 536 U.S. 822.

B. The Reasonableness Requirement and Suspicionless Drug Testing in Public Schools

In *Vernonia* and *Earls*, the Supreme Court applied the reasonableness balancing test and found that suspicionless drug testing of both student-athletes and those participating in extracurricular activities is constitutional.⁴¹

The Vernonia School District implemented its drug-testing policy in the fall of 1989 for the expressed purposes of preventing drug use by student-athletes, protecting student-athletes' health and safety, and providing student-athlete drug users with assistance programs.⁴² A Vernonia student-athlete and his parents challenged the policy on Fourth and Fourteenth Amendment grounds,⁴³ and the Supreme Court upheld the constitutionality of the policy.⁴⁴

In analyzing the constitutionality of this suspicionless testing, the Court began by stating that the reasonableness of the search for Fourth Amendment purposes would be determined by "balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."⁴⁵ According to the Court, this balancing test is appropriate because, within schools, there exist "special needs, beyond the normal need for law enforcement," that make the traditional Fourth Amendment requirements "impracticable."⁴⁶

In applying the first prong of the balancing test, the Court considered the nature of the privacy interests upon which suspicionless drug testing intrudes.⁴⁷ Central to the Court's analysis was that the subjects of the policy were "children, who . . . have been committed to the temporary custody of the State as schoolmaster."⁴⁸ The Court found that in many instances school officials act *in loco parentis* and that "the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."⁴⁹ But the Court did not stop at its

41. See *infra* note 68 and accompanying text.

42. *Vernonia Sch. Dist.*, 515 U.S. at 650.

43. *Id.* at 651-52. The Fourteenth Amendment "extends this constitutional guarantee" of the Fourth Amendment "to searches and seizures by state officers." *Id.* at 652. School officials are considered state actors for the purposes of the Fourth Amendment. *Id.*

44. *Vernonia Sch. Dist.*, 515 U.S. at 664-65.

45. *Id.* at 652-53 (quoting *Skinner*, 489 U.S. at 619).

46. *Id.* at 653 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)); see also *supra* notes 34-37 and accompanying text.

47. *Id.* at 654.

48. *Id.*

49. *Id.* at 656-57. The Court acknowledged that it has previously rejected the notion that school

finding that students generally have low privacy expectations; it determined that the legitimate privacy expectations of student-athletes are even lower.⁵⁰ The Court noted that student-athletes are required to use communal changing and shower rooms, “not notable for the privacy they afford.”⁵¹ In addition, the Court discussed the voluntary nature of participation in high school athletics, stating “[b]y choosing to ‘go out for the team,’ they [student-athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally.”⁵² The Court asserted that student-athletes should reasonably expect intrusions upon their usual rights and privileges as part of the price of participating in high school sports.⁵³

The Court next considered the second prong of the balancing test: the nature of the intrusion by the school pursuant to the testing policy.⁵⁴ Here, the Court considered both the process of collecting the students’ urine samples⁵⁵ as well as the information disclosed by those samples.⁵⁶ It found that the privacy interests compromised by the testing policy were insignificant,⁵⁷ especially considering that the samples were collected under conditions that were, according to the Court, comparable to those

officials “exercise only parental power over their students” but stated that this rejection actually emphasized the custodial and tutelary power exercised by school administrators. *Id.* at 655; *see also T.L.O.*, 469 U.S. at 336. The *Vernonia* court stated

while denying that the State’s power over school children is formally no more than the delegated power of their parents, *T.L.O.* did not deny, but indeed emphasized, that the nature of that power is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults.

Id. at 655.

The *Vernonia* court also noted that public schoolchildren are required to submit to various physical examinations and vaccinations, and that at least regarding such medical procedures, “students within the school environment have a lesser expectation of privacy than members of the population generally.” *Id.* at 657 (quoting *T.L.O.*, 469 U.S. at 348 (Powell, J., concurring)). These requirements are seen by some as support for the proposition that drug testing should be mandated for all students. *See Cagnetti, supra* note 3.

50. *Vernonia Sch. Dist.*, 515 U.S. at 657.

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 658.

55. *Id.* Under *Vernonia*’s policy, male students chosen for drug testing produced samples at urinals along the restroom wall, remaining fully clothed and observed only from behind (if at all). *Id.* The female students chosen for testing produced samples from behind the door of a closed restroom stall, monitored aurally by a female (presumably some sort of school administrator) standing outside the stall. *Id.*

56. As for the information disclosed by the tests, the Court noted that the tests are designed to identify only the presence of drugs and not any medical conditions or other health information. *Id.*

57. *Id.* at 658-60. With regard to the collection of samples, the Court stated that the intrusion upon students’ privacy interest was “negligible.” *Id.* at 658.

encountered in public restrooms.⁵⁸ The Court also noted that the tests were designed solely to identify the presence of drugs and not other medical conditions such as pregnancy or epilepsy⁵⁹ and that the results were distributed only amongst those who needed the information.⁶⁰ Finally, the Court found that the policy did not carry with it any criminal sanctions or academic consequences for violations.⁶¹

After determining that student-athletes have reduced expectations of privacy and that drug testing is an insignificant intrusion upon that privacy, the Court turned to the third prong of the balancing test: “the nature and immediacy of the governmental concern . . . and the efficacy of this means [the drug testing program] for meeting it.”⁶² The Court found that the school’s interest in deterring drug use was “important—indeed, perhaps compelling,”⁶³ and that this interest was augmented by an additional interest in the health and safety of student-athletes.⁶⁴ As Justice Scalia stated: “it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.”⁶⁵ The Court also found that the school’s concern was immediate based upon the lower court’s conclusion that the disciplinary problems resulting from drug abuse in the Vernonia School District had reached “epidemic proportions,” especially with regard to student-athletes, believed to be the leaders of the drug culture.⁶⁶ Finally, the Court found it “self-evident that a drug problem largely fueled by the ‘role model’ effect of athletes’ drug use” would be addressed effectively by a drug-testing policy that focused upon those students.⁶⁷

After taking into account the student-athletes’ lowered expectations of privacy, the minimal intrusion upon that privacy, the seriousness of the drug problem, and the effectiveness of the testing policy in addressing that

58. *Id.* at 658; *see supra* note 55 and accompanying text.

59. *See supra* note 56. The challengers to the policy also suggested that the testing procedures were intrusive because of the necessity of disclosing prescription drug use in order to avoid false positives. *Id.* at 659. The Court concluded, however, that the policy may have permitted such disclosure in a “confidential manner” and therefore the Court would not “assume the worst,” i.e., that a student’s general health information would be publicly disclosed. *Id.* at 660.

60. *Id.* at 658.

61. *Id.*

62. *Id.* at 660.

63. *Id.* at 661.

64. *Id.* at 662.

65. *Id.*

66. *Id.* at 662-63 (quoting *Acton v. Vernonia Sch. Dist.*, 796 F. Supp. 1354, 1357 (D. Or. 1992)).

67. *Id.* at 663.

problem, the Court concluded that Vernonia's drug-testing policy was reasonable, "and hence constitutional."⁶⁸

In June 2002, the Supreme Court again considered a school's suspicionless drug-testing policy; in *Board of Education v. Earls*,⁶⁹ the Supreme Court held constitutional a school drug-testing policy aimed not just at student-athletes but at all students participating in athletics and/or extracurricular activities.⁷⁰

In *Earls*, the Court employed the same "special needs" doctrine⁷¹ and the same three-part balancing test that it utilized in *Vernonia*.⁷² Turning first to the nature of the students' privacy interests, the Court focused on the diminished privacy interests of all schoolchildren.⁷³ The policy's challengers, two Tecumseh High School students and their parents,⁷⁴ argued that even though all students have lowered expectations of privacy, the expectations of those participating in extracurricular activities are greater than those of student-athletes because participation in extracurricular activities does not require a medical exam or involve communal undress, factors on which the *Vernonia* court focused.⁷⁵ The Court responded by stating that those factors were "not essential to our decision in *Vernonia*, which depended primarily upon the school's custodial responsibility and authority."⁷⁶ The Court went on to state that students participating in extracurricular activities volunteered for many of the same types of privacy intrusions as student-athletes,⁷⁷ and concluded that students participating in extracurricular activities have a "limited expectation of privacy."⁷⁸

Analyzing prong two, the nature of the intrusion posed by the policy, the Court noted that the procedures for collecting the urine samples were

68. *Id.* at 665.

69. 536 U.S. 822 (2002).

70. *Id.* at 838.

71. *Id.* at 829 (finding "'special needs' inhere in the public school context").

72. The *Earls* Court characterized the *Vernonia* test as a "fact-specific balancing of the intrusion on the children's Fourth Amendment rights against the promotion of legitimate governmental interests." *Id.* at 830 (citing *Vernonia Sch. Dist.*, 515 U.S. at 652-53).

73. *Id.*

74. *Id.* at 826-27.

75. *Id.* at 831; see *Vernonia Sch. Dist.*, *supra* notes 49-50 and accompanying text.

76. *Earls*, 536 U.S. at 831. The Court stated that the communal undress and medical exam factors in *Vernonia* were supplemental in nature and that the school context itself was "central" and "the most significant element." *Id.* at n.3 (quoting *Vernonia Sch. Dist.*, 515 U.S. at 654, 665).

77. *Id.* at 831-32. The Court noted that some extracurricular clubs and activities require communal undress and that the activities are, like high school sports, regulated, which "further diminishes the expectation of privacy among schoolchildren." *Id.* at 832.

78. *Id.* at 832.

“even less problematic” than the methods employed by the Vernonia School District, intrusions which the *Vernonia* court considered negligible.⁷⁹ In addition, the Court determined that the test results were distributed only on a “need-to-know” basis⁸⁰ and were not used for law enforcement purposes or for the imposition of academic consequences or discipline.⁸¹ Ultimately, the Court concluded that the invasion of students’ privacy under the policy was insignificant.⁸²

Finally, the Court considered the third prong of the balancing test: the nature and immediacy of the governmental concern and the effectiveness of the policy in addressing that concern.⁸³ The Court first reiterated its *Vernonia* findings regarding every school’s important interest in preventing drug use.⁸⁴ Additionally, the Court discussed a few specific instances of drug use at Tecumseh High School, but emphasized that “a demonstrated problem of drug abuse . . . is not in all cases necessary to the validity of a testing regime,”⁸⁵ and stated “it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.”⁸⁶ The Court, citing *Vernonia*, conceded that “there might have been a closer fit between the testing of athletes and the

79. *Id.* at 833 (quoting *Vernonia*, 515 U.S. at 658). The Court found the testing procedures employed by the Vernonia School District and Tecumseh Public Schools to be “virtually identical,” except the Tecumseh policy provided additional protection for students’ privacy because males were allowed to produce samples behind closed stall doors rather than at urinals. *Id.* at 832-33; *see also supra* note 55.

80. *Id.* at 833; *see also supra* note 61 and accompanying text.

81. *Earls*, 536 U.S. at 833. The Court noted that “the only consequence of a failed drug test is to limit the student’s privilege of participating in extracurricular activities.” *Id.* at 833.

The Tecumseh Public Schools Activity Student Drug Testing Policy, the policy at issue in *Earls*, contains consequences for three levels of offense. TECUMSEH, OKLA., TECUMSEH PUBLIC SCHOOLS ACTIVITY STUDENT DRUG TESTING POLICY (Oct. 1998) [hereinafter “Tecumseh Policy”], *available at* <http://www.tecumseh.k12.ok.us/DRUGTEN1.htm>. For the first failed drug test, the student’s parent or guardian is contacted and must meet with the student, athletic director, and principal. *Id.* The student may continue participating in his or her activity so long as the student and the parent or guardian show proof that the student has received drug counseling and the student submits to a second drug test administered within two weeks. *Id.* For the second offense under the policy, the student is suspended from participation in all activities for 14 calendar days and must complete four hours of substance abuse education and counseling; the student is also randomly tested monthly for the remainder of the school year. *Id.* For the third offense in the same school year, the student is completely suspended from participation in all extracurricular activities for the remainder of the school year or 88 school days, whichever is longer. *Id.*

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

83. *Id.*

84. *Id.* (citing *Vernonia*, 515 U.S. at 661-62).

85. *Id.* at 835 (quoting *Chandler v. Miller*, 520 U.S. 305, 319 (1997)) (holding state statute requiring suspicionless drug testing for political candidates unconstitutional).

86. *Id.* at 836.

trial court's finding that the drug problem was "fueled by the "role model" effect of athletes' drug use,"⁸⁷ but stated that "such a finding was not essential to the holding."⁸⁸ The Court concluded that the testing of students participating in extracurricular activities effectively served the legitimate governmental purpose of "preventing and deterring drug use."⁸⁹

Based upon its analysis of the three factors explained above, the *Earls* Court determined the policy of drug testing all students participating in sports or extracurricular activities was constitutional.⁹⁰ In dissent, Justice Ginsburg argued that a proper application of the *Vernonia* balancing test would have resulted in a different holding by the majority.⁹¹ She found that while "[t]he *Vernonia* district sought to test a subpopulation of students distinguished by their reduced expectation of privacy, their special susceptibility to drug-related injury, and their heavy involvement with drug use," the Tecumseh School District sought to test a larger group of students indistinguishable, by any of those factors, from the general student body.⁹²

III. ANALYSIS

After *Vernonia* and *Earls*, the potential coverage of school drug testing policies is unclear. Consider, for example, some hypothetical questions with which schools might be grappling: First, who can be tested?⁹³ Can

87. *Id.* at 837-38 (citing *Vernonia*, 515 U.S. at 663).

88. *Id.* at 838.

89. *Id.*

90. *Id.*

91. *Id.* at 847 (Ginsburg, J., dissenting).

92. *Id.* at 853-54 (Ginsburg, J., dissenting).

93. Some scholars, writing after *Vernonia*, concluded that the testing of student-athletes would be the outer limit of constitutional drug-testing policies. See W. Bradley Colwell, Commentary, *Beyond Vernonia: When has a School District Drug Testing Policy Gone Too Far?*, 131 EDUC. L. REP. 547, 557 (Mar. 1999). The author bases his conclusions upon several important factors. He argues, first, "[t]he three tier *Vernonia* test . . . cannot legally sustain drug testing policies beyond the scope of athletes." *Id.* The author focuses on the nature of students' privacy interests as the most important aspect of the test and asserts that "very few activities other than athletics have an expectation of total communal undress." *Id.* He also claims that "essential differences exist between athletic and non-athletic expectations of privacy, many of which strike at the heart of *Vernonia*. As a result, districts should only randomly test students voluntarily participating in activities that have a lessened expectation of privacy and should not broaden the scope beyond athletics." *Id.* at 559. He also asserts that "every policy must be in response to a substance abuse problem that exists for the specified population being tested, not based on the overall drug use in the district." *Id.* at 558 (citing *Trinidad Sch. Dist. v. Lopez*, 963 P.2d 1095, 1103 (Colo. 1998)).

See also Tamara A. Dugan, Note, *Putting the Glee Club to the Test: Reconsidering Mandatory Suspicionless Drug Testing of Students Participating in Extracurricular Activities*, 28 J. LEGIS. 147 (2002). The author, writing before the Supreme Court handed down its decision in *Earls*, predicted that

based upon the Court's reasoning in *Vernonia*, the application of that decision by various federal courts to the testing of students as a condition of participation in non-athletic extracurricular activities, and the Court's analysis in *Chandler*, it seems likely that the Supreme Court will rule in *Earls* that suspicionless drug testing of students who desire to participate in non-athletic extracurricular activities is unconstitutional.

Id. at 174. Her prediction was based upon the "notable differences" in the privacy interests of student-athletes and those of students participating in extracurricular activities. *Id.* She states "[e]xtracurricular clubs and activities do not require communal undress and showering, a preseason physical exam, or the procurement of health insurance—factors that the *Vernonia* Court cited as evidence of an athlete's diminished expectation of privacy." *Id.* at 175 (citing *Vernonia*, 515 U.S. at 657). In addition, the author cites differences between testing student-athletes and testing those involved in extracurricular activities with regard to the efficacy of the testing program in addressing the nature of the state's concern. *Id.* She asserts that while the Court in *Vernonia* found that drug use posed a greater physical safety risk for student-athletes and that the student-athletes were the leaders of the drug problem at the high school, "drug use by members of the math club or the glee club does not carry with it any danger to the user or to others greater than that involved with drug use by a student not participating in extracurricular activities." *Id.* at 175-76.

Clearly, the above-mentioned authors were proven wrong when the Supreme Court decided *Earls*. *See supra* notes 70-89 and accompanying text. Other scholars, however, writing post-*Vernonia*, correctly predicted that *Vernonia* alone opened the door to drug testing many more groups of students. Some of these authors asserted that *Vernonia* may have paved the way for testing entire student populations. *See Bursch, supra* note 11. The author correctly predicted that *Vernonia* would allow a finding that "students in athletics and students in extracurricular activities hold essentially the same privacy expectations." *Id.* at 1245. He also discusses the possibility of drug testing by random selection from an entire student body, and asserts that although the lack of voluntariness in mere school attendance could prove problematic,

[a] judicial finding that the absence of voluntary participation does not make a significant difference in determining students' reasonable expectation of privacy . . . would be consistent with recent Supreme Court precedent . . . In addition, past Supreme Court cases justifying Fourth Amendment intrusions based on the voluntariness of participants included several cases where the "choice" may have been illusory because the alternatives were impractical or infeasible.

Id. at 1260 (citing *Skinner*, 489 U.S. 602; *Von Raab*, 489 U.S. 656). Bursch believes that because students already have lowered expectations of privacy based upon the requirements that all students have physical exams and vaccinations, combined with the "custodial character of the school environment," a finding of "a severely reduced expectation of privacy for *any* student . . . would be consistent with [*Vernonia*]." *Id.* at 1246-47.

Bursch also discusses whether schools must show a specific drug abuse problem before implementing drug testing. *Id.* at 1249. He states, "[t]he Supreme Court . . . has not hesitated to uphold drug testing in nonschool contexts where an employer could not show an increase in, or even a problem with, drug use." *Id.* (citing *Von Raab*, 489 U.S. at 668-69). He argues that a school's lack of a specific drug problem "should not prohibit the court from finding that a school has a legitimate interest in deterring student drug use." *Id.* at 1250. These predictions were proven accurate by the *Earls* Court. *See supra* notes 85-86 and accompanying text. The author concludes by stating "[a]lthough the constitutionality of a random drug testing program for an entire student body is a closer call than testing solely for student athletes, the state's important interest and the test's minimal intrusiveness still should outweigh the students' expectation of privacy." *Id.* at 1251.

Bursch was not alone in his belief that *Vernonia* might be used to allow testing of entire student populations. *See also* Bill O. Heder, *The Development of Search and Seizure Law in Public Schools*, 1999 BYU EDUC. & L.J. 71 (Winter 1999). The author here, writing post-*Vernonia*, states that "[a]s the drug problem is recognized as more inclusive than merely an athletic dilemma, it is foreseeable that school-wide drug testing could be introduced, coinciding with school-wide bag searches and metal detectors." *Id.* at 115. He suggests that schools might start testing students in extracurricular clubs

schools test all students who want to drive to school and park on school property, since they voluntarily do so?⁹⁴ Can schools test students who have been suspended for fighting, or students who are truant?⁹⁵ Could a

based upon findings of drug problems in those clubs or might randomly test or search students attending school dances or athletic events. *Id.* The author asserts that “[a]fter the liberal application of the T.L.O. reasonableness test in *Vernonia*, few courts will question a school official’s increased regulation as long as there exists some statistical or testimonial evidence of an increased problem with discipline, drugs or violence.” *Id.*

94. The Supreme Court has not yet considered a drug-testing policy applicable to student drivers. However, the Indiana Court of Appeals assessed such a policy in *Penn-Harris-Madison School Corp. v. Joy*, 768 N.E.2d 940 (Ind. Ct. App. 2002). In discussing the third prong of the balancing test, the nature and immediacy of the governmental interest, the court in *Penn-Harris-Madison* found that while the school had a “strong interest in preventing impaired students from driving while under the influence of ‘intoxicants,’” the interest did not encompass testing student drivers for nicotine. *Id.* at 950-51. The court found a lack of any evidence that the use of nicotine while driving poses any serious risks, and therefore decided that while student drivers could be tested for alcohol and other drugs, the school could not constitutionally test student drivers for nicotine. *Id.* at 951. The special nicotine holding applied only to student drivers and not to students tested because of their participation in extracurricular activities. *Id.*

This holding by the Indiana Court of Appeals was based in part on the Seventh Circuit’s analysis of a similar policy in *Joy v. Penn-Harris-Madison School Corp.*, 212 F.3d 1052 (7th Cir. 2000). The court in that case found that “this expansive view of the School’s interest goes too far,” and held random drug testing of student drivers for the presence of nicotine unconstitutional. *Id.* at 1064, 1067.

Based on these cases, one could argue that a school district could impose testing upon students who drive to school, provided that the tests are designed to discover only alcohol and other drugs excluding nicotine.

95. See *Willis v. Anderson Cmty. Sch. Corp.*, 158 F.3d 415 (7th Cir. 1998). The court found, first, that there was no evidence of any reasonable suspicion to justify drug testing students suspended for fighting. *Id.* at 419-20. The court based this portion of its holding on a strict *Terry* balancing test. See *supra* note 7 (state interest in search must be supported by reasonable and articulable suspicion). Next, the court held that drug testing suspended students could not be justified under a special needs analysis. *Id.* at 423. The court analyzed the policy using the test set out in *Vernonia*: the nature of the students’ privacy interests, the state’s concern, and the efficacy of the policy in furthering state interests. *Id.* at 421. Under the first prong, the court determined that while the nature of the privacy interests was similar to that of the *Vernonia* students, it differed in two important respects: First, “given the ‘element of “communal undress” inherent in athletic participation,’ athletes have an even lesser privacy expectation than the general student population.” *Id.* at 421-22 (quoting *Scheill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1998)). Second, the court determined that the *Vernonia* holding emphasized the voluntariness of participation that led to drug testing, and that the students suspended for fighting could not be considered as having volunteered for any activity which might lead to drug testing. *Id.* at 422.

Under prong two of the balancing test, the court found that the nature of the state’s interests in the case at bar was substantially similar to those in *Vernonia*. *Id.* at 423.

The court found the testing program at issue deficient under the final prong of the test, the efficacy of the testing program in furthering state interests. *Id.* at 423-24. The court determined the *Vernonia* holding was based in part upon the fact that a drug-testing program focused on student-athletes but based upon individualized suspicion would “entail[] substantial difficulties—if it were indeed practicable at all.” *Id.* at 423 (citing *Vernonia Sch. Dist.*, 515 U.S. at 663). According to the court, the same could not be found in this case. The school failed to provide evidence that a program of individualized suspicion, the constitutionally preferable type of program, would not work for drug testing students who were suspended from school. *Id.* at 424-25.

The court’s analysis in *Willis* illuminates the factors that the Seventh Circuit found to be most

school test any student who volunteered for any non-mandatory activity: a school dance, a field trip, an honors class, a service project?

In addition, for which drugs may schools test? Can schools test for nicotine use, a drug that is legal once the user reaches a certain age?⁹⁶

As for the punishment aspects of drug-testing policies, must a school's policy mandate counseling as pre-requisite to regaining participation privileges after a student is suspended from activities for failing a drug test?⁹⁷ Does it matter whether the consequences of one failed drug test

crucial to the *Vernonia* decision: the lack of voluntary participation in an activity leading to drug testing and a finding that a program based upon individualized suspicion would not be feasible. Arguably, were the Supreme Court faced with a similar fact scenario, it might conclude in accordance with the Seventh Circuit.

However, the Supreme Court might find that students who misbehave have voluntarily placed themselves in the position to be drug tested due to their failure to behave appropriately. If a school could provide compelling evidence of a link between poor behavior and drug use, the Court might be persuaded that the school's compelling interests override the need for individualized suspicion. The Court had already found that programs based upon individualized suspicion are difficult to implement. The *Vernonia* Court stated, "testing based on 'suspicion' of drug use would not be better, but worse." 515 U.S. at 664.

96. See *Todd v. Rush County Sch.*, 133 F.3d 984 (7th Cir. 1998) (holding drug testing policy designed to discover alcohol, drugs, and nicotine constitutional, even in the case of student drivers). *But see Joy, supra* note 94 (finding drug testing of student drivers for the presence of nicotine unconstitutional). Based upon these two decisions, it appears that testing extracurricular participants and athletes for the presence of nicotine would be constitutionally acceptable, and that testing student drivers for substances other than nicotine would be constitutionally acceptable, but testing student drivers for nicotine would not be acceptable. However, the Supreme Court has not considered this issue. Neither the *Vernonia* nor the *Earls* policies applied to student drivers and neither policy tested for the presence of nicotine. VERNONIA SCHOOL DISTRICT NO. 47J, STUDENT DRUG TESTING POLICY (Sept. 14, 1989) [hereinafter "*Vernonia Policy*"].

97. See BREMEN PUBLIC SCHOOLS, BREMEN PUBLIC SCHOOLS EXTRACURRICULAR ACTIVITIES DRUG TESTING POLICY (Aug. 2002) [hereinafter "*Bremen Policy*"]. This policy provides that when a student tests positive for the presence of drugs, the school nurse or athletic director will meet with the student and his parent or guardian and provide the names of counseling or assistance agencies that the family may want to contact for help with drug problems. *Id.* However, counseling is not mandated in the "punishment" section of the policy as a pre-requisite to regaining participation privileges. *Id.*

Bremen's policy, effective October 1, 2002, was implemented in response to both the U.S. Supreme Court's decision in *Earls* and the Indiana Court of Appeals' decision in *Penn-Harris-Madison School Corp. v. Joy*, 768 N.E.2d 940 (Ind. Ct. App. 2002). Telephone Interview with Mark Wagner, Attorney, Bremen Public School Corporation (Jan. 26, 2003). Though many Indiana schools had drug-testing policies in place prior to 2000, most testing was suspended due to a state appellate court decision holding that the Indiana Constitution required a showing of individualized suspicion before schools could drug test students. *Id.* That decision was overruled, however, by the Supreme Court of Indiana in *Linke v. Northwestern School Corp.*, 763 N.E.2d 972 (Ind. 2002). In *Penn-Harris-Madison*, the Indiana Court of Appeals assessed the drug-testing policy at issue according to the test and findings set out by that court in *Linke*. The *Penn-Harris-Madison* policy mandated testing for all student-athletes, participants in extracurricular activities, and students wishing to drive to school and park their cars on school property. The court found that the policy was constitutional under the Indiana Constitution's search and seizure provisions.

Whether drug testing policies are constitutional under various state constitutions is not within the scope of this Note. It is important to recognize, however, that the Supreme Court's decision in *Earls*

involve mandatory parent-administrator meetings and counseling, or suspension from participation in extracurricular activities for a period of time?⁹⁸

To answer these questions, one must understand the facts that were essential to the decisions in *Vernonia* and *Earls*. Turning to the first prong of the three-part test employed by the Court in both cases,⁹⁹ the key factor appears to be the reduced expectations of privacy among students generally rather than the reduced expectations of privacy resulting from communal undress and/or the necessity of physical examinations.¹⁰⁰ In *Vernonia*, the Court seemed to limit its holding to situations in which students had particularly low expectations of privacy,¹⁰¹ emphasizing, “[s]chool sports are not for the bashful,” and noting the lack of privacy afforded by school locker rooms.¹⁰² However, when forced to consider the privacy interests of those participating not in locker room scenes but in academic competitions and after-school clubs, the Court recanted its limiting language focusing on communal undress and instead devoted its discussion to the reduced privacy interests of students generally.¹⁰³ In response to the students’ argument that because they were not subject to communal undress and physical exams they had higher expectations of privacy than did student-athletes, the Court stated, “[t]his distinction . . .

may not remove all barriers to drug testing students involved in extracurricular activities. School districts must ensure that proposed policies comply with both federal and state constitutional provisions.

98. See Bremen Policy, *supra* note 97. The policy contains three levels of punishment for positive drug tests. *Id.* For the first offense, a student is suspended for 25% of the scheduled contests or 25% of the extracurricular season; for the second offense, the student is suspended from participation in activities for one calendar year; for the third offense, the student is suspended from participation in all activities for the remainder of the student’s school career. *Id.* See also Tecumseh Policy, *supra* note 81. This policy contains three levels of punishment as well, but they are much less harsh than Bremen’s punishments. *Id.*

99. See *supra* notes 48-53; see also *supra* notes 73-78 and accompanying text.

100. *Id.*

101. Indeed, commentators have noted the lack of privacy involved in athletics as central to the Court’s approval of drug testing for student-athletes. See *supra* note 93.

102. *Vernonia*, 515 U.S. at 657; see also *supra* note 51 and accompanying text.

103. *Earls*, 536 U.S. at 831-32. Justice Ginsburg, writing in dissent, noted that unlike student-athletes, “the modest and shy along with the bold and uninhibited” can all take advantage of non-athletic extracurricular opportunities. *Id.* at 847. The Court responded in its opinion by pointing out that “[s]ome . . . clubs and activities require occasional off-campus travel and communal undress.” *Id.* at 832. However, Justice Ginsburg countered this fairly transparent argument by explaining, “those situations are hardly equivalent to the routine communal undress associated with athletics . . .” *Id.* at 848. Regarding this prong as well as the balancing test generally, Justice Ginsburg argued that had the Court properly applied its own balancing test, as set forth in *Vernonia*, it would have found in favor of the students. *Id.* at 847.

was not essential to our decision in *Vernonia*, which depended primarily upon the school's custodial responsibility and authority."¹⁰⁴

In assessing students' privacy interests, the Court in both *Vernonia* and *Earls* also focused on the voluntary nature of the activities in which students subject to drug testing participated.¹⁰⁵ The *Vernonia* Court emphasized that the choice to "go out for the team" carried with it a lower expectation of privacy and an acceptance of increased governmental intrusion.¹⁰⁶ The *Earls* Court agreed, stating that the nature of extracurricular activities "further diminishes the expectation of privacy among schoolchildren."¹⁰⁷

Another crucial factor in analyzing the governmental interest in *Vernonia* was the increased risk of physical injury that student-athletes face when they abuse drugs.¹⁰⁸ Justice Ginsburg's dissent in *Earls* corroborates this finding; she states, "[w]e have since confirmed that these special risks were necessary to our decision in *Vernonia*."¹⁰⁹ However, the majority in *Earls* seemed to discount the importance of this factor.¹¹⁰ When the students argued that the testing of non-athletes did not implicate safety issues,¹¹¹ the Court responded by stating "safety factors into the special needs analysis, but the safety interest furthered by drug testing is undoubtedly substantial for all children"¹¹² Justice Ginsburg disagreed with the majority's dismissal of increased safety risks as a key part of *Vernonia*. She points out that "[n]otwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumseh, the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree."¹¹³ Justice Ginsburg argued that the two reasons the Vernonia School District used to justify suspicionless drug testing, the facts that student-athletes faced special health risks and that student-athletes were the leaders of the drug problem at the school,

104. *Earls*, 536 U.S. at 831. The Court stated further that in deciding *Vernonia*, "we considered the school context 'central' and 'the most significant element.'" *Id.* at note 3 (citing *Vernonia*, 515 U.S. at 654, 665); see also *supra* note 76 and accompanying text.

105. See *Vernonia*, *supra* notes 50-53; see also *Earls*, *supra* note 77.

106. See *Vernonia*, *supra* notes 50-53.

107. See *supra* note 77.

108. See *supra* notes 64-65.

109. *Earls*, 536 U.S. at 851 (Ginsburg, J., dissenting) (citing *Chandler*, 520 U.S. at 317); *Ferguson v. Charleston*, 532 U.S. 67, 87 (2001) (Kennedy, J., concurring).

110. *Id.* at 836-37.

111. *Id.*

112. *Id.* at 836.

113. *Id.* at 852 (Ginsburg, J., dissenting).

were not present in the Tecumseh School District, and that “no other tenable justification” validated Tecumseh’s testing of every extracurricular participant.¹¹⁴

The pervasiveness of the drug problem in the Vernonia School District was also crucial to the Court’s decision in that case.¹¹⁵ The *Vernonia* Court found it important that the testing focused on student-athletes because they were the leaders of the drug problem—the role models to whom other students looked.¹¹⁶ In *Earls*, the Court noted “specific evidence of drug use at Tecumseh schools”; however, the drug problem there did not appear to have reached the epidemic proportions of the problem at Vernonia schools.¹¹⁷ The *Earls* Court mentioned a few specific instances of conduct involving drugs but went on to state: “a demonstrated problem of drug abuse is not in all cases necessary to the validity of a testing regime.”¹¹⁸

In light of *Earls*, the standards set out by the Court in *Vernonia* are not as clear as they first appeared. Does all of the confusion surrounding the Court’s holdings mean that schools should simply stick with the “safe” policy used by the Tecumseh School District and not attempt to create anything even remotely different?¹¹⁹ Though this is one approach schools may be taking,¹²⁰ it is not the only option.

In fact, the Court’s opinions provide schools with great flexibility to implement different drug-testing policies. Obviously, schools can constitutionally implement suspicionless drug-testing policies focusing on

114. *Id.* at 852-53.

115. *See supra* note 66 and accompanying text.

116. *See supra* notes 66-67 and accompanying text.

117. *Earls*, 536 U.S. at 834-35; *Vernonia*, 515 U.S. at 663. *See also Earls*, 536 U.S. at 849 (Ginsbury, J., dissenting) (stating “the nature and immediacy of the governmental concern; . . . faced by the Vernonia School District dwarfed that confronting Tecumseh administrators”).

118. *Earls*, 536 U.S. at 835 (quoting *Chandler*, 520 U.S. at 319). The Court went on to state that a showing of a specific drug abuse problem does “shore up an assertion of special need for a suspicionless general search program” and found that Tecumseh had provided sufficient evidence for such a “shoring up.” *Id.* (quoting *Chandler*, 520 U.S. at 319). The Court actually seems to admit that it has held Tecumseh to a lower standard than it first appeared would be required after the *Vernonia* decision; the Court states “it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.” *Id.* at 836. Though this statement may in fact be true, this language is contrary to the standard that appeared to come out of the *Vernonia* decision. *See Vernonia*, 515 U.S. at 662-63.

119. *See Lewin, supra* note 3. The author quotes Paul Lyle, a lawyer who represents a large number of school districts in west Texas: “I tell districts that if they adopt the same verbatim policy as Tecumseh [the *Earls* policy], that would be safe . . . But I tell them, if you change a comma, it could open the door to something.” *Id.*

120. *See Lewin, supra* note 3. The author quotes a Texas lawyer who represents school districts. *Id.* He states, “I tell districts that if they adopt the same verbatim policy as Tecumseh, that would be safe . . . But I tell them, if you change a comma, it could open the door to something.” *Id.*

athletes and students participating in extracurricular activities, but it appears that policies testing students who voluntarily participate in other school activities would also be constitutional.¹²¹ Consider, for example, a drug-testing policy that mandates testing for all students who choose to attend a week-long school bus trip to Washington, D.C. Students volunteering for such an excursion are clearly in the care and custody of the school officials accompanying them.¹²² In addition, the students have clearly “volunteered” for the activity within the meaning of the word as construed in *Vernonia*.¹²³ There are certainly major safety risks inherent in students traveling and spending the night in a distant city while under the influence of drugs,¹²⁴ and students on an overnight trip, spending hours on buses together and sleeping four or five students per hotel room, certainly have lower expectations of privacy, perhaps even akin to those of student-athletes.¹²⁵ It appears that testing these students would comport with all of the crucial factors set out by the Court in *Vernonia* and *Earls*. In short, students “volunteer” for many types of activities, including field trips, school dances, honors classes, and even driving privileges, and courts will likely find that they therefore have “volunteered” for increased intrusions into their privacy.

Schools also retain significant discretion when it comes to deciding which drugs their testing policies will cover. Policies mandating testing for

121. See *infra* notes 124-28 and accompanying text.

122. See *supra* note 49. The chaperones on such a trip are certainly acting, at least in some respects, *in loco parentis*. The court in *T.L.O.* limited the scope of this doctrine. See *T.L.O.*, 469 U.S. at 336-37. However, when children are sent off with teachers to live in a hotel for a week, parents have certainly delegated some of their power to the school.

See also Stuart C. Berman, Note, *Student Fourth Amendment Rights: Defining the Scope of the T.L.O. School-Search Exception*, 66 N.Y.U. L. REV. 1077 (1991). The author discusses a Sixth Circuit decision, *Webb v. McCullough*, 828 F.2d 1151 (1987), in which the court assessed the validity of a search that took place off of school grounds, in a hotel, during an overnight band trip. *Webb*, 828 F.2d at 1153-54. In that case, the court distinguished school officials' roles during overnight school trips from the normal day-to-day activities of school administrators. *Id.* at 1157. Despite the Supreme Court's holding in *T.L.O.* rejecting the theory that school officials act only *in loco parentis*, the *Webb* court found that during overnight school trips, school officials act in part as state actors and in part *in loco parentis*. *Id.* The court focused on the fact that parental permission was required for the trip and that it was a voluntary activity as opposed to normal, mandatory attendance at school. *Id.*

123. See *supra* note 52. The choice to “go out for the team” is clearly akin to the choice to go out on a fieldtrip. *Id.*

124. See *supra* notes 65, 77. Safety risks, as stated by the Court in *Earls*, are factors in the special needs analysis. See *Earls*, 536 U.S. at 834-36. Even if courts take the position of Justice Ginsburg, dissenting in *Earls*, that drug testing should be based upon more than just a general safety risk to all children who abuse drugs, in the case of children on an overnight fieldtrip, additional safety risks are clearly present. See *id.* at 844-45 (Ginsburg, J., dissenting).

125. It may be noted here that while high school student-athletes travel on buses, it is unlikely that they travel overnight. Students traveling on overnight trips would arguably have even less of an expectation of privacy than student-athletes.

the presence of nicotine and alcohol have been accepted by some lower courts as constitutional,¹²⁶ even though these drugs are not illegal once students are of age.

A wide range of punishments for positive drug tests is also constitutionally acceptable. The policies at issue in *Vernonia* and *Earls* contain very different punishment provisions.¹²⁷ For example, one failed drug test at Vernonia High School results in an option of either participating in a drug assistance program and submitting to weekly drug testing for six weeks or suspension from participation in activities for the remainder of the current season and the next athletic season.¹²⁸ One failed drug test at Tecumseh High School results in a meeting between parents, student, and school administrators; drug counseling; and voluntary submission to a second drug test.¹²⁹ No suspension from participation in activities is involved.¹³⁰ The only “punishment” provision found in both policies that the Court emphasized as necessary was that students were not criminally punished or academically disciplined for positive drug tests.¹³¹ Beyond that, whether a policy focuses more on counseling or on suspension from participation is not a factor essential to its constitutionality.¹³²

IV. PROPOSAL

Based on *Vernonia* and *Earls*, it is clear that schools need not implement drug-testing policies identical to the policies involved in those cases. There are, however, several important characteristics crucial to the constitutionality of any policy.¹³³ First, schools should include a statement of need and purpose, introducing the evidence that the school claims supports its concern with, and interest in, drug testing.¹³⁴ This will provide a basis for courts, in assessing prongs two and three of the balancing test,

126. *See supra* note 96.

127. *See infra* notes 129-31 and accompanying text.

128. *See Vernonia Policy, supra* note 96.

129. *See Tecumseh Policy, supra* note 96.

130. *Id.*

131. *See Earls*, 536 U.S. at 833-34; *see also Vernonia*, 515 U.S. at 658.

132. *See supra* note 95.

133. Schools should ensure that these provisions are included in order to pass constitutional muster. A discussion of whether schools *should* implement drug testing at all—that is, whether drug testing is sound educational policy—is outside the scope of this Note.

134. Such a statement is included in Tecumseh’s policy. Tecumseh Policy, *supra* note 96. Another example of such a statement may be found in Bremen’s policy. Bremen Policy, *supra* note 97. Vernonia Policy, *supra* note 96.

to hold that the school has an interest in implementing random drug-testing policies and that the policy furthers that interest.¹³⁵

Next, policies should include provisions emphasizing the non-punitive nature of the testing; the policies should not include criminal penalties or academic sanctions.¹³⁶ Neither the Tecumseh nor the Vernonia policies provide for academic penalties.¹³⁷ The Court in both *Earls* and *Vernonia* agreed that the non-criminal nature of the penalties rendered the intrusion into students' privacy insignificant.¹³⁸ However, as long as the sanctions are not criminal, schools have wide latitude in determining the severity of punishments for failed tests.¹³⁹ Suspension from participation, mandatory counseling, and/or parent-administrator meetings are all acceptable options.¹⁴⁰

Schools should not implement policies that include provisions requiring testing for all students. The Court has continually emphasized the voluntary nature of the activities for which students are tested, and this is a key factor in the policies' constitutionality.¹⁴¹ However, schools could reach much larger groups of students than the Vernonia and Tecumseh policies do; testing simply needs to be limited to groups of students defined by set criteria.¹⁴²

Furthermore, a constitutionally-sound policy need not respond to specific concerns about student safety.¹⁴³ As discussed in *Earls*, the safety of children generally is sufficient evidence of the state's interest in preventing and deterring drug use.¹⁴⁴

The Court's opinions make clear that schools have much wider latitude to impose drug testing on students than one might have thought after reading *Vernonia*. So long as schools show that students subject to drug

135. See *supra* notes 62-63 and accompanying text. Though the Court stated that Tecumseh High School need not have shown a substantial drug problem in order to justify its policy, it would be wise to include a statement of need and purpose since the Court does require that the school have some interest that supports implementation of the policy. *Id.*

136. See *infra* notes 138-39 and accompanying text.

137. See Tecumseh Policy and Vernonia Policy, *supra* note 96.

138. See *supra* note 131.

139. See *supra* note 132.

140. See *supra* 128-32.

141. See *supra* notes 52-53, 78.

142. A school could probably manage to reach nearly every student by implementing a policy that mandates testing for all participants in extracurricular activities, all drivers, and even all students who volunteer for field trips or other off-campus activities.

143. Though such provisions are not constitutionally required they certainly would do no harm. See *supra* note 112. Erring on the side of caution, schools could include these provisions to provide additional support for their expressed concerns.

144. See *supra* note 112.

testing have lower expectations of privacy, they will satisfy the first prong of the balancing test, and so long as they implement standard procedures for collecting and testing samples and for disseminating the results, the nature of the intrusion will be minimal. Schools do not even need to show a specific drug problem in their districts before initiating a testing program, for the severity of the nation-wide drug program warrants drug testing in most circumstances.

V. CONCLUSION

The Supreme Court's decisions in *Vernonia* and *Earls* have left many school districts wondering how far they can go in drug testing their students. Schools should not assume that the only "safe" policies are those that the Supreme Court has specifically ruled upon. It is clear, in analyzing the Court's two opinions, that schools can implement policies unique to their specific needs while maintaining the policies' constitutionality.

*Katrin Miller Rothgery**

* B.A. (2001), University of Notre Dame; J.D. Candidate (2004) Washington University School of Law. I would like to thank Lauren Lofton for all of her help in making this Note worthy of publication. I would also like to thank Bruce Jennings and Mark Wagner for providing Bremen Public Schools drug-testing policy and information.