Random Drug-Testing of Public School Student Athletes: A Permissible Search under the Fourth Amendment

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I. INTRODUCTION

The United States is in an illicit drug use crisis. The social and economic costs of illicit drugs have forced America to declare "war on drugs." In strictly business terms, the sale and consumption of illicit drugs comprises the fastest growing "industry" in the United States collecting huge profits from $110 billion in annual sales. More than ten million Americans abuse prescription drugs, about thirteen million are alcoholics, another twenty-two million have consumed cocaine, and at least twenty-three million smoke marijuana on a regular basis. The harms and costs of illicit drug use touch every sector of American society. The most visible social and economic costs of illicit drug use are those associated with drug-related crime and crime prevention efforts.

The workplace is another area which suffers significant social and economic costs. A recent survey of industrial relations executives indicates substance abuse is the top workplace concern. This response was motivated because substance abuse costs employers $100 billion annually in lost productivity, increased absenteeism, and drug related injuries. The American Management Association and Arizona State University recently conducted a survey that reveals one out of every ten workers in the United States uses illicit drugs at work.

Illicit drug use is particularly pervasive in school-aged children. Recent studies demonstrate that 58% of high school se-

2. Id.
niors had used drugs and 13% of high school seniors had used cocaine in the past year, more than double the figures in 1975. One-half of all young people entering the work force for the first time had used an illicit drug at least once within the previous year. Almost one-fourth, or approximately five million, among those aged twelve to seventeen, had used drugs one or more times in their lives and almost one in ten, or 1.9 million had used a drug illicitly in the past month. Among eighteen to twenty-five year-olds, 17.5 million, constituting 59%, had used drugs illicitly one or more times in their lives. Approximately 18%, or 5.3 million, had used drugs illicitly in the month before the survey.

Despite size, geographic location and socio-economic variables, survey data reveal that no high schools are drug-free. One-hundred percent of the seniors surveyed attended high schools where illicit drug use was reported, and 75% attended schools where more than half of their classmates had tried an illegal or controlled substance within the previous month.

These statistics significantly understate the true picture of drug use in school-aged children. A large number of young drug users either drop out or are pushed out of school during their high school years. Simply stated, school-age children who are most heavily involved in drugs are not in school and are not counted in "student" drug use surveys.

Recreational drug use is not the only problem facing public schools. Student athletes in public schools, like all professional and amateur athletes, are motivated and encouraged to be the strongest and fastest competitors. Unfortunately, many student athletes resort to "doping"—the use of illicit performance-enhancing drugs. Statistics are not available to demonstrate

7. Hunter, supra note 1 at 266.
9. DRUG ABUSE STATISTICS, supra note 8, at 9.
11. Id. at 10-11.
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the use of many types of illicit performance-enhancing drugs. However, some studies demonstrate that the use of anabolic steroids is prevalent. A high school paper in Florida reported that 18% of the male students attending school used steroids and a nation-wide study estimates that nearly 7%, or as many as 500,000, male high school seniors have used anabolic steroids. In response to both recreational and performance enhancing illicit drug use, many professional and amateur athletic associations and federations have adopted drug testing as a method of protecting the health and safety of individual participants and a means of preserving the integrity of competition and promoting societal "drug-free" interests.

A detailed examination of the harms related to illicit drug use in public schools is beyond the scope of this article. However, the U.S. Supreme Court defined illicit drug use in public schools as a major social problem and has taken judicial notice that use of illicit drugs is detrimental to the effectiveness and safety of public schools. The Court also stated that public schools may conduct reasonable searches in attempts to control and eliminate substance abuse. However, the Court has not directly examined the issue of drug testing in public schools. The lack of direction from the Court may be why few public schools have initiated any type of drug-testing program despite the fact that most public schools have written substance abuse policies and some type of substance abuse education.

In Schall v. Tippecanoe County School Corp. (Schall I)
an Indiana district court denied the declaratory and injunctive relief sought by two student athletes alleging that the implementation of Tippecanoe County School Corporation's (TSC's) random drug testing program: (1) violated their Fourth Amendment rights by subjecting them to unreasonable searches and seizures; (2) interfered with their legitimate expectation of privacy; (3) violated the equal protection clause of the Fourteenth Amendment, and (4) violated their constitutional rights by predicking participation in interscholastic athletics upon the waiver of these rights. In *Schaill II*, the Seventh Circuit Court of Appeals affirmed the district court decision concluding that individualized suspicion is not required for searches of student athletes in public schools. This article focuses on random urinalysis testing of public school athletes and examines the Fourth Amendment issues involved.

II. TSC'S STUDENT ATHLETE DRUG EDUCATION AND TESTING PROGRAM

TSC's Drug Education and Testing Program begins with a review of the seriousness of illicit drug and alcohol abuse in public schools and reference to information indicating significant illicit drug use among TSC interscholastic athletes. The TSC program requires each student athlete to submit a consent form signed and dated by the student and his custodial parent or guardian prior to participating in any interscholastic sport. The program "involve[s] all participants in interscho-
lastic sports teams, both male and female, as well as members of cheerleading teams, all of whom are collectively denominated student athletes. The purposes of the TSC's program are:

to prevent drug and alcohol usage, to educate student athletes as to the serious physical, mental and emotional harm caused by drug and alcohol abuse, to alert student athletes with possible drug problems to the potential harms, to prevent injury, illness and harm as a result of drug and alcohol abuse, and to maintain at TSC high schools an athletic environment free of alcohol and drug abuse.

TSC's program also states that student athletes hold positions of respect with the general student body and are therefore expected to be "good examples of conduct, sportsmanship and training, which includes avoiding drug and alcohol use."

The athletic director and the head coach of each team are authorized to initiate and select an unlimited number of student athletes to test. Students are assigned selection numbers which were drawn randomly from a box. Each athlete selected is required to "provide a sample of urine in a verifiable manner, but the collection of the sample is not physically observed." A bottle containing the student's urine sample is labeled with his assigned number, not his name. His assigned number is indexed to his name on a master list. The student athlete and the athletic director consult the master list to protect against errors in the assignment of numbers. They initial the master list to evidence that the procedure is followed.

Toxicologists at a "competent laboratory" use a variety of testing techniques to find "alcohol, street drugs . . . and performance-enhancing drugs (such as steroids)" in the urine sample. Once a sample tests positive, it is retested to confirm the results. A sample tests positive if, after using at least two type of analyses, drug-residue substances are present in the system. The student athletes and their parents or guard-

22. Id. at 836-37.
23. Id. at 837.
24. Id.
25. Id.
26. Id.
27. Id.
28. Id.
29. Id. at 838-39.
ians are given a chance for additional testing or other means of explaining the positive test result. Any student athlete testing positive without proper explanation would thereafter be subject to testing any time they choose to participate in interscholastic athletic activity. In addition to random testing, TSC retained the right to test any student at any time that reasonable suspicion of illicit drug or alcohol use exists.

Student athletes who test positive are not academically disciplined, suspended or expelled. Rather, they incrementally lose the privilege to participate in interscholastic athletic activities. The first time a student athlete tests positive for alcohol, he or she cannot participate in one out of five athletic contests (20% suspension). The first time he or she tests positive for drugs, he or she cannot participate in approximately one out of three athletic events (30% suspension). The second, third and fourth occurrences of either alcohol or drug result in a 50% suspension, a full calendar-year suspension, and an interscholastic career suspension, respectively. The first and second suspensions can be reduced by participation in approved counseling.

III. FOURTH AMENDMENT

The principles of the Fourth Amendment are paramount in determining the legality of any drug testing program in public schools. The Fourth Amendment provides in relevant part:

[the] right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated but upon probable cause, supported by Oath or affirmations, and particularly describing the place to be searched, and the persons or things to be seized.

To successfully challenge a drug and alcohol testing program under the Fourth Amendment, litigants must establish first, that the testing constitutes a search under the Amendment.

30. Id. at 837.
31. Id.
32. Id.
33. Id. at 837-38.
34. U.S. CONST. amend. IV (emphasis added).
and second, that the search is unreasonable. 36

A. Urinalysis Testing of Student Athletes by TSC Constitutes a Search Under the Fourth Amendment

Relying on Supreme Court precedent, the district and appellate court in Schail I and Schail II found that activities of public school officials have long been considered state actions subject to the Fourth Amendment through the Due Process Clause of the Fourteenth Amendment. 37

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. 38

In New Jersey v. T.L.O., 39 the Court rejected notions that school officials act as parental surrogates and denied Fourth Amendment immunity based on the doctrine of in loco parentis. The Court stated that "in 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, and they cannot claim the parent’s immunity from the stricture of the Fourth Amendment." 40 Urinalysis testing by public school officials is state action and is therefore a Fourth Amendment search subject to scrutiny by the Due Process Clause of the Fourteenth Amendment. 41

36. Id. at 337.
40. Id. at 336-37.
41. See Mapp v. Ohio, 367 U.S. 643, 655 (1961); Wolf v. Colorado, 338 U.S. 25, 27-28 (1949). The Fourteenth Amendment provides, in relevant part, that "no State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. CONST. amend. XIV, §1. See also Ker v. California, 374 U.S. 23, 30-31 (1963) (reaffirming that "the Fourth Amendment ‘is enforceable against . . . [the states] by the same sanction of exclusion as is used against the Federal Government,’ by the application of the same constitutional standard prohibiting ‘unreasonable searches and seizures.’") (quoting Mapp, 367 U.S. at 655).
The appellate court also found urinalysis testing to be a "search" under the Fourth Amendment. The U.S. Supreme Court has held that a "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed.42 Since Schail I and Schail II were decided in 1988, the U.S. Supreme Court has specifically held that collecting and testing urine intrudes upon reasonable expectations of privacy and must be deemed a search under the Fourth Amendment.43

B. Urinalysis Testing of Student Athletes by TSC is a Reasonable Search Under The Fourth Amendment

In Schail I, the district court acknowledged that students do not "shed their constitutional rights . . . at the schoolhouse gates," but also recognized a narrowing of that concept in recent years.44 Relying on the Supreme Court's ruling in T.L.O., both the district and appellate courts found urinalysis testing of student athletes to be a reasonable search under the Fourth Amendment without a demonstration of individualized suspicion.45

1. Traditional reasonable suspicion requirements

Generally, federal courts have held that searches without a warrant are "per se" unreasonable and therefore unlawful.46 However, the Supreme Court has allowed "a few specifically established and well delineated exceptions."47 In T.L.O., the Court analogized searches in a school setting to those in both administrative settings and those requiring "reasonable suspicion" concluding that:

[T]he accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on

42. Schail II, 864 F.2d at 1311-12 (quoting United States v. Jackson, 466 U.S. 109, 113 (1984)).
45. Id. at 855-58; Schail II, 864 F.2d at 1322.
47. Id.
probable cause . . . .

Applying this analysis, the T.L.O. Court upheld as "reasonable" the warrantless search of a school girl's purse based on a reasonable suspicion that the student had been smoking on school grounds in violation of school rules. After noting that the opening of the student's purse was "undoubtedly a severe violation of subjective expectations of privacy," the Court canvassed the legitimate governmental interests which were furthered by the search. The Court observed that "events calling for discipline are frequent occurrences and sometimes require immediate, effective action." Further, the particular demands of the school environment require teachers to use "swift and informal disciplinary procedures."

In determining the level of suspicion required before a search may be conducted, the appellate court in Schall II sought to "balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." The appellate court recognized that the U.S. Supreme Court, in T.L.O., had already struck the balance in the context of school searches, and had determined that probable cause and warrant requirements did not apply. The test announced in T.L.O., which is specific to searches of students in public schools by school authorities, states that "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances of the search." The T.L.O. Court emphasized that:

48. T.L.O., 469 U.S. at 341; See also id. at 340 (Powell, J. concurring) ("The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although both the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search . . . in certain limited circumstances neither is required.") (quoting Almedia-Sanchez v. United States, 413 U.S. 266, 277 (1973)).
49. Id. at 346.
50. Schall II, 864 F.2d at 1314 (quoting 469 U.S. at 338).
51. Id. (quoting 469 U.S. at 339).
52. Id. (quoting 469 U.S. at 340).
53. Id. at 1313 (quoting United States v. Place, 462 U.S. 696, 703 (1983); See also Bell v. Wolfish, 441 U.S. 520, 559 (1979) (In balancing the competing interests under the Fourth Amendment, "[c]ourts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.")
54. Schall II, 864 F. 2d at 1314.
55. 469 U.S. at 341.
The determination of the standard of reasonableness governing any specific class of searches requires "balancing the need to search against the invasion which the search entails." On one side of the balance are arrayed the individual's legitimate expectations of privacy and personal security; on the other, the government's need for effective methods to deal with breaches of public order. 56

The T.L.O. Court found that a public school's interests in detecting drug use will outweigh intrusion upon the athlete's privacy expectations if the school can establish that first, the search was "justified at its inception" and second, the search "was reasonably related in scope to the circumstances which justified the interference in the first place." 57 The first prong of the two-part test announced in T.L.O. appears to imply that reasonable individualized suspicion is required for a search to be justified.

Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction. 58

2. Administrative search exception to individualized suspicion

Despite the language of the two-part test, "[t]he T.L.O. Court expressly left open" the requirement of individualized suspicion. 59 The T.L.O. Court stated:

We do not decide whether individualized suspicion is an essential element of the reasonableness standard we adopt for searches by school authorities. In other contexts, however, we have held that although "some quantum of individualized suspicion is usually a prerequisite to a constitutional search

56. Id. at 337 (citation omitted) (quoting Camara v. Municipal Court, 387 U.S. 523, 536-37 (1967)).
57. Id. at 341 (quoting Terry v. Ohio, 392 U.S. 1, 20 (1968)).
58. Id. at 341-42 (footnotes omitted).
or seizure[,] ... the Fourth Amendment imposes no irreducible requirement of such suspicion.60

The T.L.O. Court continued:

Exceptions to the requirement of individualized suspicion are generally appropriate only where the privacy interests implicated by a search are minimal and where "other safeguards" are available "to assure that the individual's reasonable expectations of privacy is not 'subject to the discretion of the official in the field.'"61

The appellate court in Schaill II reported "several carefully defined situations where the Court has recognized that searches may be conducted in the absence of any grounds to believe that the individual searched has violated the law."62 These situations include suspicionless searches of private dwellings, automobiles, airline passengers, travelers at borders and checkpoints and persons subject to searches in the administrative context.63

The most relevant of the exceptions reported is the administrative search exception. The appellate court's examination of U.S. Supreme Court cases revealed that four important factors are considered in "approving [warrantless, suspicionless] searches in [the administrative search] context."64 First, an industry of pervasive regulation where search participants have diminished expectations of privacy and have implicitly or explicitly consented to searches through voluntary decisions to enter regulated industries.65 Second, the regulatory scheme which authorizes the search must further substantial governmental interests and the search must be necessary to further the regulatory scheme. Generally, the imposition of a warrant or reasonable suspicion standard must frustrate the purposes of the regulatory scheme and an alternate, less intrusive means of detection would not sufficiently serve the government's

61. Id. at 342 n.8 (quoting Delaware v. Prouse, 440 U.S. 648, 655 (1979) (citation omitted)).
62. Schaill II, 864 F.2d at 1315-16.
63. Id. at 1316-17 (footnotes and citations omitted).
64. Id.
65. Id.
inspections, including urinalysis testing, through their voluntary decision to participate. Mandatory physical examinations, which include providing urine samples, are integral to almost all athletic programs and have long been required by TSC's program. Moreover, the Indiana High School Athletic Association requirements included minimum grades, residency, eligibility and submission to training rules, including prohibitions on smoking, drinking and drug use both on and off school premises. Finally, the pervasiveness and visibility of drug testing of professional, collegiate and Olympic athletes seriously diminishes student athletes' expectations of privacy. The court observed that “[t]he suspension and disqualification of prominent athletes on the basis of positive urinalysis results has been the subject of intense publicity all over the world.”

2. Urinalysis testing of student athletes is an appropriate means to promote substantial interests

The appellate court in Schaill II affirmed the trial court's finding that TSC had made a reasonable decision in implementing its urinalysis program and held “that alternative methods of investigation would not adequately serve the school's interest in detection and deterrence of [illicit] drug use.” TSC's urinalysis testing of student athletes is an appropriate means to combat illicit drug use among school-aged children and student athletes.

In affirming the trial court's decision, the appellate court agreed that TSC's student athlete urinalysis testing program would: protect the health and safety of student athletes; preserve the integrity of interscholastic competition; promote student and community support for interscholastic athletics; and promote “drug-free” interests among all school-aged children throughout the public school system.

73. Id.
74. Id.
75. Id.
76. Id. at 1321.
77. Id.
78. Id.
3. TSC's urinalysis testing program provides adequate safeguards against harassment and intimidation by limiting the discretion of the inspecting school officials

As previously described, TSC's urinalysis testing program is not subject to the discretion of school officials in the field.79 Student athletes are on notice that they may be randomly selected for testing through a procedure which prohibits discretion as to who will be chosen. Student athletes are also aware of specific procedures governing the manner in which the sample is obtained, handled, tested and how test results may be challenged. These provisions of TSC's testing program provide adequate safeguards against school officials using testing for the purpose of harassment or intimidation.

4. TSC's urinalysis testing is not intended to discover evidence of criminal activity

After reviewing the basis for the Supreme Court's decisions in T.L.O. and O'Connor v. Ortega,80 the appellate court in Schail II concluded that searches conducted for civil or non-punitive purposes may be valid in circumstances where searches conducted as part of a criminal investigation would not be permissible. The court also stated that reasonable suspicion requirements "traditionally (though not exclusively) applied to law enforcement investigations, would unnecessarily intrude upon the purposes of the classroom or workplace."81 The distinction between law enforcement investigations and the enforcement of school rules is "that a school official's primary mission is not to ferret out crime, but is instead to teach students in a safe and secure learning environment."82

TSC's urinalysis testing program was instituted to address the negative consequences of illicit drug use and to enforce school and interscholastic athletic rules. The program used progressive sanctions that could be reduced through voluntary participation in approved drug counseling.83 The program is "educational, diagnostic, and preventative, as opposed to puni-

79. See supra notes 21-33 and accompanying text.
81. Schail II, 864 F.2d at 1314.
82. Id.
83. Id. at 1322.
tive or disciplinary" and was not intended to discover evidence of unlawful activity for use in criminal prosecutions.

IV. CONCLUSION

Illicit drug use is a major problem throughout all sectors of American society, particularly among school-aged children and interscholastic athletes. The U.S. District Court for the Northern District of Indiana and the U.S. Court of Appeals for the Seventh Circuit found that TSC's random drug testing program did not violate privacy rights guaranteed by the Fourth Amendment. Individual suspicion of drug use is not required in order to test students in the public schools for drugs. Although the U.S. Supreme Court has not yet specifically addressed random drug testing in public schools, recent Court decisions upholding random drug testing in the workplace support both Schaill decisions. Public school officials should be allowed and encouraged to adopt urinalysis testing programs similar to TSC's Student Athlete Drug Education and Testing Program for the purpose of detecting and deterring drug use among school-aged children.

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85. Schaill II, 864 F.2d at 1322.
86. In Skinner, the U.S. Supreme Court defined the standard of reasonableness stating:

[W]hen the balance of interests precludes insistent on a showing of probable cause, we have usually required 'some quantum of individualized suspicion' before concluding that a search is reasonable. We made it clear, however, that a showing of individualized suspicion is not a constitutional floor, below which a search must be presumed unreasonable. In limited circumstances, where the privacy interests are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonably despite the absence of such suspicion.