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Random Drug Testing for Extracurricular Activities: Has the Supreme Court Opened Pandora's Box for Public Schools?

Ralph D. Mawdsley*

I. Introduction

Statistics suggest high rates of drug use among junior high and public high school students. Even more alarming figures from the Department of Health and Human Services reveal that one-third of all students have used illegal drugs before completing the eighth grade and more than half before completing high school. Apart from illicit drugs, 50.5% of youth reported having tried alcohol (more than a few sips) by the eighth grade, and 23.4% said they had already been drunk at least once. Moreover, students who smoked cigarettes were more likely to use illicit drugs. With the number of teens expected to increase from 23.6 million in 2000 to 25 million in 2010, the number of students participating in drug use can be expected to increase even if the percentage of use does not.

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1. See Earls v. Bd. of Educ., 242 F.3d 1264, 1280 (10th Cir. 2001) (Ebel, J., dissenting) (18.4% of twelve to seventeen-year-olds have used marijuana or hashish in their lifetimes; 10.9% of twelve to seventeen-year-olds currently use illegal drugs; and over half of marijuana first-time users and cocaine first-time users are between the ages of twelve and seventeen).


4. Id.

Beyond the general statistics of drugs among school-age young people is the perception of drugs on school campuses. The National Center on Addiction and Substance Abuse (CASA) reported in its 1997 survey that 76% of high school students and 46% of middle school students said that drugs were kept, used, or sold on school grounds. The CASA survey revealed a dramatic difference between the perceptions of students and teachers. While 18% of middle school and 41% of high school students reported seeing drugs sold at school, only 8% of middle school teachers, 12% of high school teachers, and 14% of principals saw drug sales. The challenge for school officials is how to address a problem that national statistics indicate is widespread among junior and senior high school students but which may not be apparent to school officials.

One way to address drug use in schools is drug testing of students. The Supreme Court, in Board of Education v. Earls (Earls), opened the door to allow public schools to engage in suspicionless random drug testing of students participating in extracurricular activities. Whether drug testing will be a panacea or a Pandora’s Box for public schools is not clear. Any school expecting that the use of random drug testing will deter or excise student drug use needs to consider a number of legal issues. The purposes of this article are to review the various drug testing approaches that school districts have taken to address drug use, examine the legal challenges that have resulted, and consider legal issues related to the design and implementation of a drug testing policy.

II. SUSPICIONLESS DRUG TESTING

Assuming that states do not mandate or prohibit random drug testing, the decision to randomly drug test is one that will be left to individual school districts. However, such a decision requires consideration of a minefield of legal problems.

Suspicionless drug testing can involve testing all or a random sample of students. In Vernonia School District v.

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7. Id.
8. Id.
9. 122 S. Ct. 2559.
Acton (Vernonia), the Supreme Court addressed a school district policy that included both kinds of testing for students participating in interscholastic sports. All students were tested at the beginning of their sport's season, and thereafter, ten percent of the students were selected randomly to be tested each week of the season.

It is debatable whether the purpose of the district's policy in Vernonia of deglamorizing drug use was consistent with the policy's implementation. Despite widespread evidence of drug abuse throughout the student body, the district's policy was directed narrowly at only athletes "where the risk of immediate physical harm to the drug user and those with whom he is playing his sport is particularly high." The list of drugs for which student athletes were tested (amphetamines, marijuana, and cocaine), while harmful to athletes, did not include anabolic steroids, which pose a higher risk of harm to athletes than the drugs included in the test. While questionable, the omission of anabolic steroids from a drug test of athletes might still be reasonable if the purpose of the drug testing was to prevent drug use among the student body in general. Its absence in the Vernonia School District's drug testing policy suggests that athletics was only a convenient vehicle to attempt to address a broader school-wide problem.

Arguably, the Vernonia School District's decision to randomly test athletes because they were "the leaders of the drug culture" was more strategically formulated than policy-driven. Given an earlier Supreme Court decision, New Jersey v. T.L.O. (T.L.O.), that required individualized reasonable suspicion for searches of students, selection of a group limited

11. Id. at 650.
12. See Acton v. Vernonia Sch. Dist., 796 F. Supp. 1354, 1357 (D. Or. 1992) (students "glamorizing drug and alcohol use" was perceived as the cause of student rebellion and led to the district's drug testing policy).
13. See id. at 1367 ("the glamorization and use of drugs and alcohol became more blatant" and resulted in increasing frequency of classroom discipline problems).
15. Id.
16. See William N. Taylor, Anabolic Steroids and the Athlete (McFarland & Co., Inc. 1982) (greatest danger of anabolic steroids is to the liver with other side-effects including possible heart attacks, sexual changes, and mental disturbance).
to those participating in extracurricular sporting events presented a new, and more defensible fact situation for suspicionless drug testing than was addressed in T.L.O. Had the School District in Vernonia chosen to require suspicionless drug testing for all students, the district would have placed itself in the untenable position of having to persuade the Court that a suspicionless exception to T.L.O.'s individualized reasonable suspicion was needed for all students.

Despite permitting suspicionless drug testing for athletes, Vernonia left an unclear message concerning random drug testing, in general. How much evidence of drug use must a school have before it can use suspicionless random drug testing? And, can a school's desire to deter drug use be a sufficient basis to justify suspicionless testing?

The recent Supreme Court decision in Earls v. Board of Education (Earls) addressed these questions for school districts. Following Vernonia, some school districts had extended random testing to a variety of other student settings, including non-athletic extracurricular activities, students fighting, students driving a car to school, and to include other substances, particularly alcohol and nicotine.

19. See Bush v. Bd. of Educ., 745 F. Supp. 562 (D. Minn. 1990) (example of judicial support for discipline of athletes because athletics represents a privilege, not a right; mere presence of athlete at an off-campus function where alcohol was served could result in revocation of letter and suspension from competitions).

20. That the T.L.O. majority required a reasonableness standard for student searches is highlighted by the dissenting opinion that views this standard as an unauthorized departure from the Fourth Amendment's probable cause standard. T.L.O., 469 U.S. at 341-43, 357-58 (Brennan, J., dissenting).

21. 242 F.3d 1264 (10th Cir. 2001), rev'd, 122 S. Ct. 2559.

22. See Gardner v. Tulsa Indep. Sch. Dist., 183 F. Supp. 2d 854 (N.D. Tex. 2000) (drug testing policy for all extracurricular activities that included 80% of students struck down because no evidence of drug-related referrals, increased use of drugs on campus, or rising tide of student drug use); but see Linke v. N.W. Sch. Corp., 763 N.E.2d 972 (Ind. 2002) (extracurricular drug testing for students driving to school, and students participating in athletics, academic teams, student government, musical performances, drama, FFA, National Honor Society, and SADD upheld where survey of drug use in grades seven through twelve was higher than average; nine middle/high school suspensions and expulsions for drug use had occurred in the first year of the policy, and three high school students had died of drug abuse in the ten years prior to the policy).

23. See Willis v. Anderson Community Sch. Corp., 158 F.3d 415 (7th Cir. 1998) (court struck down policy requiring drug test for all student suspended for three or more days for fighting).

Prior to the Supreme Court's decision in Earls, three federal circuits had rendered decisions involving suspicionless random drug testing of all extracurricular activities.\(^\text{25}\) In two post-Vernonia decisions,\(^\text{26}\) Todd v. Rush County Schools (Todd)\(^\text{27}\) and Joy v. Penn-Harris-Madison School Corporation (Joy),\(^\text{28}\) the Seventh Circuit upheld extracurricular suspicionless drug testing policies. However, in Joy the court had second thoughts about its earlier decision in Todd because Todd had not utilized the three-part methodology of Vernonia that considered the nature of the students' privacy interest, the character of the intrusion, and the nature and immediacy of the governmental concern at issue.\(^\text{29}\) Nonetheless, the Seventh Circuit felt compelled to follow the precedent of its earlier decision.\(^\text{30}\) The Eighth Circuit also upheld random testing in Miller v. Wilkes (Miller),\(^\text{31}\) but its decision was later vacated for mootness.\(^\text{32}\) In contrast, the Tenth Circuit, in a 2-1 decision in Earls v. Board of Education,\(^\text{33}\) declared random testing unconstitutional.

2002) (policy was challenged under state constitution and state appeals court upheld testing policy as to drugs and alcohol, but not as to tobacco).

25. See Gardner, 183 F. Supp. 2d 854 (federal district court ruled unconstitutional a random suspicionless drug testing policy of all students participating in extracurricular activities because there was no evidence of a major or widespread drug problem among students in general); Brooks v. E. Chambers Consol. Indep. Sch. Dist., 730 F. Supp. 759 (S.D. Tex. 1989), affd, 930 F.2d 915 (5th Cir. 1991) (pre-Vernonia decision wherein the Fifth Circuit upheld, without opinion, a district court decision holding unconstitutional suspicionless drug testing of students wishing to participate in extracurricular activities).

26. The Seventh Circuit upheld random urinalysis testing of athletes in interscholastic sports in a pre-Vernonia decision. Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309 (7th Cir. 1988). The facts in Schaill mirror those later litigated in Vernonia. A high percentage of high school students were using drugs, athletes had diminished privacy, the school district had a legitimate interest in finding unlawful conduct, and the procedures established by the district minimized intrusion into the students' privacy.

27. 133 F.3d 984 (7th Cir. 1998).
28. 212 F.3d 1052 (7th Cir. 2000).
30. Joy, 212 F.3d at 1066 ("the judges of this panel believe that students involved in extracurricular activities should not be subject to random, suspicionless drug testing as a condition of participation in the activity. Nevertheless, we are bound by this court's recent precedent in Todd.").
31. 172 F.3d 574 (8th Cir. 1999).
33. 242 F.3d 1264, rev'd, 122 S. Ct. 2559.
Although the Supreme Court frequently grants certiorari to resolve disputes among circuits, it would be a strain to suggest that this was the reason for the Court's decision in *Earls*. The Seventh Circuit's limited support for drug testing and the Eighth Circuit's vacated judgment standing in stark contrast to the Tenth Circuit's strident opposition to drug testing\textsuperscript{34} hardly represents clearly divided circuits. Arguably, the Supreme Court's decision in *Earls* has much more to do with the Court's support for the authority of states and their local school boards to determine educational policy for public schools than with resolving differences among federal circuits.

**A. Earls: Tenth Circuit Decision**

In *Earls*, the Tenth Circuit struck down a school district policy that was framed to allow performing random drug testing of students in all extracurricular activities\textsuperscript{35} but was actually limited in application only to those involving some aspect of competition and sanctioned by the Oklahoma Secondary Schools Activity Association.\textsuperscript{36} At the federal district court level, the court did not find evidence of "a drug problem of epidemic proportions, or a student body in a state of rebellion" (as in *Vernonia*),\textsuperscript{37} but it did find "legitimate cause for concern," which, when combined with judicial notice of "the prevalence of illegal drugs in our society, including our schools" and the attendant "discipline problems, inattentiveness, and an atmosphere of disruption in the classroom," created a "special need" justifying random drug testing.\textsuperscript{38} The Tenth Circuit,

\textsuperscript{34} The strident nature of the Tenth Circuit's decision is best reflected in that court's dissenting opinion that presaged the Supreme Court's opinion. The dissenting judge would have justified the random drug testing policy because when young people are more susceptible to peer pressure to use drugs, probable cause is not required in school settings under *T.L.O.*, drug use by some students in a public school closed environment interferes with the rights of other students, and the Supreme Court in *Vernonia* vested in public schools the responsibility to protect the children entrusted to them. *Earls*, 242 F.3d at 1279–80 (Ebel, J., dissenting).

\textsuperscript{35} *Id.* at 1275 (the substances tested for were amphetamines, marijuana, cocaine, opiates, barbiturates, and benzodiazepines).

\textsuperscript{36} *Id.* Although the district's policy was not limited to competitive extracurricular activities, the district applied the policy only to such activities. One of the plaintiffs in the case was a member of the show choir, the marching band, and the academic team, and the other plaintiff desired to participate on the academic team. *Id.* at 1288.


\textsuperscript{38} *Id.* at 1287-88.
however, rejected the district court’s finding of special need, and instead found that although some evidence of drug use existed in Tecumseh public schools, “use among students subject to the testing Policy was negligible.”

In balancing the school district’s interest in deterring drug use with the students’ expectation of privacy, the court opined that the voluntary nature of extracurricular participation did not translate into diminished expectation of privacy where “participation in extracurricular activities . . . has become an integral part of the educational experience for most students.” However, extracurricular participants did have “a somewhat lesser privacy expectation than other students” because they “agree to follow the directives and adhere to the rules set out by the coach or other director of the activity.” With regard to the health and safety issue that played a prominent part in Vernonia, the court found the district’s argument inapposite for three reasons. First, only some of the extracurricular activities involved a safety issue comparable to athletics. Second, some students who were involved in activities that did represent a safety risk, “such as working with shop equipment or laboratories,” were not tested at all. As the court observed, if the school district is concerned about safety, “it too often simply tests the wrong students.” Third, the court disagreed with the district’s argument that students in extracurricular activities were supervised less than students in the classroom because “there is an imperfect match between the need to test and the group tested.” On a regular basis, students not involved in extracurricular activities had less supervision “in the hallways between classes, at lunch, [and] immediately before and after school while they are entering and leaving school premises,” but they were not randomly tested.

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39. Id. at 1275 (much of the evidence was hearsay and anecdotal, but of 484 students tested under the policy for the school years, 1989–90 and 1999–2000, there were only 4 positive tests recorded); see id. at 1273–75 for a recounting of the evidence.
40. Id. at 1276.
41. Id.
42. See id. at 1277 (“It is difficult to imagine how participants in vocal choir, or the academic team, of even the FHA are in physical danger if they compete in activities while using drugs, any more than any student is at risk simply from using the drugs.”).
43. Id.
44. Id.
45. Id.
46. Id.
The Tenth Circuit majority, in applying the Supreme Court's balancing test in *Vernonia*, held that the school's interest in safety was outweighed by the students' privacy interest because there was no evidence of drug abuse among the group to be tested and the majority "[saw] little efficacy in a drug policy which tests students among whom there is no measurable drug problem."\(^{47}\) The dissenting justice in *Earls* vigorously disagreed with the majority's application of the *Vernonia* balancing test, arguing that, since students have diminished privacy expectations and have experienced only minimal intrusion on their privacy in providing a urine sample, the school's interest can be outweighed only if it is "truly insignificant," which was "clearly not the case."\(^{48}\) Nonetheless, the majority cast a sop to public school districts by noting that they do not need to "wait until [they] can identify a drug abuse problem of epidemic proportions before [they] may drug test groups of [their] students."\(^{49}\) However, the majority disavowed "any bright line mark concerning the magnitude at which a drug problem becomes severe enough to warrant a suspicionless drug testing policy,"\(^{50}\) thus leaving public schools with little practical guidance.

### B. Earls: Supreme Court Decision

In a 5-4 decision, the Supreme Court reversed the Tenth Circuit. Writing for the majority,\(^{51}\) Justice Thomas concluded that the school's drug testing policy was "a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use."\(^{52}\)

1. **Majority Opinion**

   The majority relied heavily on the Court's decision in *Vernonia*, and rejected plaintiffs' claim that "drug testing must

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47. *Id.*
48. *Id.* at 1283.
49. *Id.*
50. *Id.*
51. In addition to Justice Thomas who wrote the majority opinion, the other members of the majority were Chief Justice Rehnquist and Justices Scalia, Kennedy, and Breyer. Justice Breyer wrote a concurring opinion. Justice O'Connor dissented in an opinion joined by Justice Souter. Justice Ginsburg filed a dissenting opinion in which Justices Stevens, O'Connor and Souter joined.
be based at least on some level of individualized suspicion.”53 The Court’s threefold analysis considered the students’ expectation of privacy, the “character of the intrusion” on student privacy, and “the nature and immediacy of the government’s concerns.”54

First, with respect to the students’ expectation of privacy, the Court found a diminished expectation of privacy for students in question, because, like the athletes in Vernonia, students in all extracurricular activities “voluntarily subject themselves to many of the same intrusions on their privacy.”55 Although some of the clubs and activities involved “off-campus travel and communal undress,” similar to Vernonia, the Court found more dispositive the presence of “rules and requirements for participating students that do not apply to the student body as a whole.”56

Second, considering the character of intrusion on student privacy, the majority found the district’s intrusion to be minimal in this case. The majority relied on several factors to support this finding. First, the method of collection was virtually identical to Vernonia with the added privacy element that male students could produce their samples behind a closed stall.57 Second, drug test results were kept in confidential files separate from a student’s other educational records and were available only to school personnel on a “need-to-know” basis. Evidence that a choir teacher had looked at a student’s medication list was not considered intrusive because the teacher would have had access to this kind of information prior to the drug testing policy, and, in any case, the teacher needed to know this information with regard to choir performances off-campus.58 Third, test results were not released to law enforcement authority and negative test results did not lead to school discipline or academic consequences. Finally, even the limitation on a student’s “privilege of participating in extracurricular activities” was softened by a progressive penalty system.59

53. Id. at 2564.
54. Id. at 2566–67.
55. Id. at 2566.
56. Id.
57. Id.
58. Id.
59. Id. at 2567 (after a first positive test, the student could continue participating
Finally, the Court addressed the nature and immediacy of the government's concerns and found that it was based on the importance "in preventing drug abuse by schoolchildren . . . [as reflected by a] drug abuse problem among our Nation's youth [that] has hardly abated since Vernonia was decided in 1995."  

A "particularized or pervasive drug problem" is not necessary to justify a suspicionless drug testing policy. Because of "the nationwide epidemic of drug use," the Court considered that it made 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."  

The Court rejected plaintiffs' claim that reasonable suspicion of wrongdoing should be required for drug testing, finding a number of problems that might be associated with such a standard. Not only would such a standard "place an additional burden on public school teachers," but it "might unfairly target members of unpopular groups." In addition, individualized suspicion could lead to the fear of lawsuits that "may chill enforcement of the program."  

The Court instead stated that drug testing of students under the Fourth Amendment need only be reasonable and "does not require employing the least intrusive means." Vernonia did not require that schools test the group of students most likely to use drugs, but instead evaluated drug testing "in the context of public school's custodial responsibilities."  

if, within five days of meeting with parents, the student shows proof of receiving drug counseling and submits to a drug test within two weeks. After a second test, a student is suspended from participation for fourteen days and can return to participation after completing 4 hours of substance abuse counseling. Only after the third offense will a student be suspended from participation for the balance of the school year or eighty-eight days, whichever is longer).

60. Id.
61. Id. at 2568 (citing Natl. Treasury Employees v. Von Raub, 489 U.S. 656 (1989), in which the Court upheld drug testing for customs employees because government had a legitimate interest in testing employees in safety sensitive positions, namely those persons checking for drug trafficking).
62. Id. at 2568.
63. Id. at 2568-69.
64. Id. at 2569.
65. Id.
66. Id.
2. Breyer Concurring

As the fifth vote for the majority, Justice Breyer's opinion does nothing to qualify the constitutional position of the majority. Although he noted that there is no way of knowing whether the school district's drug testing program will work, he declared unequivocally that "the Constitution does not prohibit the effort." He underscored the reasoning of Justice Thomas by observing that the drug problem in schools is serious, emphasizing that supply side interdiction of drugs has not reduced teenage drug use. Accordingly, he emphasized that schools must find new and effective ways to fulfill their in loco parentis responsibilities, and the random drug testing policy in dispute provides students a non-threatening reason to decline drug-use invitations, namely, in order to participate in extracurricular activities.

For Justice Breyer, the counterargument to alleged intrusion into student privacy is the democratic process that the school board engaged in that was designed to give the entire community the opportunity to develop the drug policy. The policy, as formulated, preserved the status of a "conscientious objector" for the student who does not want to participate in drug testing. While the student exercising this status pays a price in nonparticipation, that price is "less severe than [would be] expulsion from the school."

3. Dissenting Opinions

In her two-line dissent, Justice O'Connor dissented for the same reason that she did in Vernonia, namely that that case had been wrongly decided. And, even if Vernonia had been decided correctly, stated O'Connor, Earls did not meet the balancing test in that case.

In her dissenting opinion, Justice Ginsburg provided the rationale for the four dissenters. She concurred in Vernonia, but with the caveat that "I comprehend the Court's opinion as

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67. Id. at 2571.
68. Id. at 2570.
69. Id. at 2571.
70. See Vernonia, 515 U.S. at 646 (O'Connor, J., dissenting) (O'Connor's argument is that, like Vernonia, suspicionless searches for students do not fit within "allowed exceptions...where it has been clear that a suspicion-based regime would be ineffectual.").
reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school.”71 In her dissent in Earls, Justice Ginsburg opines that the Court has stepped over the limit.

Essentially, Justice Ginsburg’s position is that Vernonia established a reasonableness test in determining appropriateness of intrusion into student privacy and the argument on behalf of the school district in Earls does not rise to that level. Students’ presence in public schools and their voluntary participation in extracurricular activities are “factors relevant to reasonableness, but they do not on their own justify intrusive, suspicionless searches.”72

Justice Ginsburg found the school district’s policy provided no effort to tailor the testing to the population affected by the drug use, as had been the case in Vernonia where “sports team members faced special health risks and they ‘were the leaders in the drug culture.’”73 School district efforts to suggest safety problems with marching band members carrying heavy instruments, Future Farmers of America wrestling animals, and Future Homemakers of America working with sharp cutlery were met with Justice Ginsburg’s whimsical references to “out-of-control flatware, livestock run amok, and colliding tubas.”74

At the heart of the dissent was a concern that extracurricular activities, although voluntary, are “a key component of school life, essential in reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience.”75 However, the result of the Earls drug testing policy would be that, “[e]ven if students might be deterred from drug use in order to preserve their extracurricular eligibility, it is at least as likely that other students might forego their extracurricular involvement in order to avoid detection of their drug use.”76 Thus, pressed to its logical conclusion, the policy,

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71. Id. (Ginsburg, J., concurring).
73. Id. at 2577 (citing Vernonia, 515 U.S. at 649).
74. Id. at 2576.
75. Id. at 2573.
76. Id. at 2577.
according to the dissent, not only intrudes unreasonably upon student privacy, but also fails to deter drug use.77

4. Analysis and Implications

The Supreme Court in *Earls*, as it had done in its earlier decision in the session in *Owasso Independent School District v. Falvo* (*Falvo*),78 stopped short of making educational policy. Just as the Court in *Falvo* did not rule that school districts should adopt peer-grading as a pedagogical strategy to enhance student learning,79 so also the Court in *Earls* did not decide that schools should adopt random drug testing to deter or extirpate student drug use. In both cases, the Court simply removed potential federal statutory (*Falvo* — FERPA)80 and constitutional (*Earls* — Fourth Amendment) barriers to the creation of educational policy by school boards.

*Earls* opens the door for more school districts to impose random drug testing on students participating in extracurricular activities. The case extended the class of students who can be randomly tested for drugs. In *Earls*, the Court upheld random drug testing for those students in extracurricular activities that are part of a state's interscholastic competition. Thus, drug testing in *Earls* includes not only the athletes who were approved for testing in Vernonia, but also the Future Farmers of America (FFA) and Future Homemakers of America (FHA), and, in addition, the show choir, the marching band, and the academic team in which the plaintiffs in *Earls* were interested.81

In the aftermath of *Earls*, what other refinements in the application of random drug testing could be made? *Earls* does not distinguish between curriculum and non-curriculum

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77. Id.


79. Id. at 939 ("Correcting a classmate's work can be as much a part of the assignment as taking the test itself. It is a way to teach material again in a new context, and it helps show students how to assist and respect fellow pupils. By explaining the answers to the class as the students correct the papers, the teacher not only reinforces the lesson but also discovers whether the students have understood the material and are ready to move on.").

80. 20 U.S.C. § 1232g (2000) (FERPA provides students protection from authorized disclosure of personally identifiable information and provides parents access to a child's education records).

81. *Earls*, 242 F.3d at 1268.
related groups of students, but presumably, this distinction, so vital in determining applicability of the Equal Access Act (EAA), could also apply to drug testing. Could a school district decide to limit random drug testing only to non-curriculum-related groups? For example, could students who want to participate in a Bible club be required to submit to a drug test? Earls addresses only the issue of whether non-athletic, extracurricular groups can be drug tested, not which groups can be tested thus leaving open the question of how schools might choose to define such groups.

Presumably, in addition to curriculum-relatedness, other categories for random testing might include students who drive to school or students belonging to groups that have off-campus components. Earls appears to give schools freedom in defining the student groups to be tested as long as those groups are voluntary and governed by rules not applicable to the student body at large. Additionally, these groups would have to be chosen by criteria that are neutral, generally applicable, and not based on the expressive content of the student group. These criteria, in part, reflect Justice Thomas' concern about not "target[ing] members of unpopular groups." The requirement that a school district demonstrate a special need to support its drug testing policy, as had been done in Vernonia, seems to have dissipated in Earls. Evidence in Vernonia based on student drug use surveys and disciplinary referrals reaching "epidemic proportions" indicated not only a drug culture, but also that the athletes, the

82. 20 U.S.C. § 4071 (2000) (EAA prohibits public schools from preventing student-initiated meetings in limited open forums "on the basis of the religious, political, philosophical, or other content of the speech" where any non-curriculum-related student clubs are permitted to meet during non-instructional time).

83. Preventing public schools from singling out particular viewpoints for different treatment has a recent history in the Supreme Court beginning with Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993), through Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001). In a series of cases bordered by these two, the Court held that, under free speech, schools cannot treat groups differently based on the content of their message. In essence, the notion that categories must be neutral and generally applicable would apply to any objection based on discriminatory treatment.

84. Earls, 122 S. Ct. at 2567.

85. The use of surveys has met with differing results. See e.g. Tannahill v. Lockney Indep. Sch. Dist., 133 F. Supp. 2d 919, 921 (N.D. Tex. 2001) (a survey of students revealed that student drug use of drugs in the school was lower than stateside); Earls, 242 F.3d at 1272–74 (perceptions of faculty were not considered persuasive).

86. Vernonia, 515 U.S. at 663.
groups eventually tested, were the leaders of that culture. In *Earls* this level of evidence was reduced to teacher testimony that “they had seen students who appeared to be under the influence of drugs and that they had heard students speaking openly of using drugs.”87 Although the Court stated that this was “sufficient evidence to shore up the need for [the district’s] drug testing program,”88 the Court’s refusal “to fashion . . . a constitutional quantum of drug use necessary to show a drug problem”89 suggests that the meaning of special needs was not the same in *Earls* as it had been in *Vernonia*. What is not clear is whether the new test in *Earls* provides a lower floor or simply eliminates the floor altogether.

Arguably, *Earls* creates a new lower floor of evidence necessary to justify drug testing based solely on anecdotal evidence and teacher observations. However, it is equally arguable that the Court’s reasoning suggests that no evidence is required at all. On one hand the Court defines its test as not requiring “a particularized or pervasive drug problem” before allowing suspicionless drug testing,90 but on the other hand the court finds support for drug testing in *National Treasury Employees v. Van Raub (Van Raub).*91 In *Van Raub*, the Court upheld random drug testing for customs inspectors, not because there was particularized or pervasive evidence of drug use, but because custom inspectors, as those persons charged with preventing the flow of drugs into the country, can reasonably constitute a safety sensitive group that can be required to submit to suspicionless drug tests.92 More importantly, the Court in *Earls* cites *Van Raub* for the principle that drug testing can be done “on a purely preventive basis.”93 Thus, it is unclear whether the Court’s standard for

88. *Id.* at 2568.
89. *Id.*
90. *Id.*
91. 489 U.S. 656.
92. *Id.* at 674. (“[T]he almost unique mission of the [Treasury] Service gives the Government a compelling interest in ensuring that many of these covered employees do not use drugs even off duty, for such use creates risks of bribery and blackmail against which the Government is entitled to guard. In light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances, the Service’s policy of deterring drug users from seeking such promotions cannot be deemed unreasonable.”).
use of a random drug test lowers the floor whereby schools must provide some evidence of student drug use (less than particularized and pervasive) or eliminates the floor altogether since the basis for testing can be purely preventive.

Another question that *Earls* leaves unanswered is whether random drug testing could be extended to all students enrolled in a public school. In an earlier post-*Vernonia* but pre-*Earls* decision, *Tannahill v. Lockney Independent School District*, a federal district court struck down both a mandatory and random drug test policy for all students in grades six through twelve. The district court reasoned that "students subject to drug testing in the Lockney School District comprise a much broader segment of the student population than the group of student athletes in *Vernonia*. Their expectations of privacy are higher." If the Supreme Court were to decide a *Tannahill* set of facts now, it is likely that it would come to the same conclusion but for a different reason. The Court would probably defer to its earlier decision in *T.L.O.*, where it upheld an individualized reasonable suspicion standard for conducting student searches.

Beyond the question of the appropriate standard for determining when drug testing is justified lies the consideration of how the results of drug testing should be used. Justice Thomas thought significant a part of the *Earls* policy that limited the results of testing to participation in extracurricular activities. Students in extracurricular activities who tested positive for drugs were not removed from school or reported to law enforcement authorities. Does *Earls* stand for the principle that the results of a suspicionless search cannot be used to remove students from academic classes or be reported to law enforcement? If so, does *Earls* apply only to drug testing or does it also include other forms of suspicionless searches, particularly metal detectors and canine sniffs?

Even though evidence obtained in searches stemming from the use of metal detectors and sniffing dogs frequently leads to school discipline and law enforcement reporting, there is no

94. 133 F. Supp. 2d at 919
95. Id. at 929.
96. 469 U.S. 325.
reason to expect that \textit{Earls} would be applied broadly to all suspicionless searches. While drug testing produces evidence of wrongdoing itself, a positive response to a metal detector or a sniffing dog forms the basis for a search based on individualized reasonable suspicion. It is this intervening individualized reasonable suspicion that differentiates the suspicionless use of metal detectors and sniffing dogs from suspicionless drug testing.

A more serious effect of \textit{Earls} is the use of state constitutions to challenge drug testing. Although \textit{Earls} found random drug testing constitutional under the United States Constitution, there is no assurance that states will find the practice valid under their own constitutions.\textsuperscript{98} Since the effect of the \textit{Earls} decision is permissive only in terms of determining whether schools can use drug testing, states would still be free to interpret the practice in light of their own constitutions, in much the same manner that cases can be addressed under the Establishment Clause.\textsuperscript{99} The fact that some state courts have already found random drug testing to be a violation of their state constitutions probably suggests that this will be a litigation wave of the future.\textsuperscript{100} Thus, after \textit{Earls}, school

denied for marijuana discovered in student's locker as result of reasonable suspicion search following an alert by a dog); \textit{People v. Pruitt}, 662 N.E.2d 540 (Ill. App. 1996) (motion to suppress denied for guns found on two students following alert by metal detector).

98. \textit{See Penn-Harris-Madison}, 768 N.E.2d 940 (court upheld testing policy as to drugs and alcohol, but struck down testing for nicotine under the state's constitution protecting liberty interests); \textit{York v. Wahkiakum Sch. Dist.}, 40 P.3d 1198 (Wash. App. 2002) (drug testing policy for athletes violated Fourth Amendment and state constitution where there was no state compelling interest); \textit{Tannahill}, 133 F. Supp. 2d 919 (random drug testing policy for students in interscholastic athletics violated state constitution where no evidence of student drug use and injury to athletes); \textit{Theodore v. Del. Valley Sch. Dist.}, 761 A.2d 652 (Pa. 2000) (random drug testing policy for extracurricular activities and driving to school invalidated under federal constitution); \textit{Trinidad Sch. Dist. v. Lopez}, 963 P.2d 1095 (Colo. 1998) (random drug testing policy for extracurricular activities unconstitutional under federal constitution as applied to marching band).


100. In cases where the constitutionality of random drug testing has been addressed only under the federal constitution, litigants may well revisit the issue under state constitutions. \textit{See Theodore}, 761 A.2d 652 (random drug testing of students involved in extracurricular activities and driving to school invalidated under federal constitution); \textit{Trinidad}, 963 P.2d 1095 (random drug testing policy for extracurricular
districts spared the time and expense of defending their random drug testing policies under the federal constitution may find that they have to make the same investment under their state's constitution.

Two practical implementation questions left after Earls concern the relationship between school's authority to test versus parental control over their children and the cost of testing. In his concurring opinion, Justice Breyer references the *in loco parentis* doctrine as providing diminished privacy rights to students and authorizing school officials to protect students. He concludes that, if public school officials do not carry out their responsibilities appropriately, "parents [may] send their children to private and parochial school [sic] instead — with the help from the State."101

The assumption that parents will remove their children if schools do not test for drugs overlooks the argument that parents may choose to remove their children *because* the public school is randomly testing. *In loco parentis* can be a convenient legal fiction for public schools,102 but school officials may find that they have exceeded the limits of that fiction by implementing a policy that some parents neither favor nor would authorize for application to their children. Justice Breyer's comments about the importance of a democratic process involving parents in designing a drug testing policy to the contrary, parents, as was evident in both Vernonia and Earls, are not likely to acquiesce in a policy that is fundamentally opposed to their views of child rearing or their views on drug use. As a result, as Justice Breyer pointedly notes, the possibility of voucher money from states may facilitate and accelerate the departure of students from public

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102. See generally Ralph Mawdsley, In Loco Parentis: A Balancing of Interests, Ill. B.J. (Aug. 1973) (*in loco parentis* qualifies as a legal fiction because, while it purports to grant school officials the authority of parents to deal with students, the match between the two is not perfect. For example, parents do not have the authority to suspend or expel students that schools have, nor do schools share the immunity from civil lawsuits that parents enjoy). That *in loco parentis* is not sufficient to justify public school authority is reflected in *T.L.O.*: "Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies." *T.L.O.*, 469 U.S. at 336.
schools, presumably to private schools that do not test for drugs.

The second question, cost, may create even more of a limitation on the drug testing policies that can be realistically implemented without harming a school's ability to effectively operate. With public school districts struggling to meet operating expenses, how many could afford the cost of testing 10% of their students per week, as was the case in Vernonia? If the average cost per test were $30, the cost of simply administering weekly drug tests would amount to $3,000 per week in a school of 1,000 students and approximately $108,000 per year.\(^\text{104}\)

Of course, the school could lower the percentage or number of students tested each week, but at some point the number would become so low as to lose its deterrent value. In addition, students who may not feel singled out when they are part of a larger group selected for testing, may feel more vulnerable and isolated when they are part of a very small number. Consequently, school districts now permitted to randomly drug test must decide whether they will do so at the cost of lost dollars and the possible loss of students.

Justice Ginsburg's concern about the relationship between the educational program of drug testing and student's resulting decisions to not participate in extracurricular activities is one that schools that choose to randomly test will also have to face. Will students, even if they know that extracurricular participation may be important to college admission, refuse to participate if they (and, presumably, their parents) object to random drug testing? If there can be a widespread acceptance among students of a drug culture, as had been the case in Vernonia, it seems just as possible that there could be a widespread rejection of extracurricular participation if drug testing is required.

Whether excluding or discouraging students from participating in extracurricular activities results in harmful

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103. See Zelman, 122 S.Ct. 2460 (Court upheld a state voucher plan that provided low income families with tuition money to attend other public and nonpublic, including religious, schools).

104. Drug testing typically costs $70,000 per year for weekly random tests of 75 students. Dana Hawkins, Trial by Vial, U.S. News & World Rep. 73 (May 31, 1999). See also George Dohrman, War on Drugs Only a Skirmish, L.A. Times C-6 (Jan. 25, 1996) (in part discussing the cost of drug testing).
effects for students is a matter of dispute. Some studies have suggested that, among certain student populations, participation in extracurricular activities may diminish the drop-out rate and criminal behavior of high-risk students, while other studies have found no connection. Even if students do not participate in public school activities, they may find alternatives to make themselves attractive to colleges and universities by participating in community service activities. In any event, Justice Breyer's idea of a democratic process in formulating a drug testing policy will probably go a long way in building community support; however, schools may find that this process will need to be ongoing to address the concerns of evolving groups of parents.

C. Drug Testing Policies: Procedures and Rationale

Although one cannot predict how many public schools will begin drug testing now that it is constitutionally permissible, school boards that want to use random testing need to consider carefully the policy they develop and follow. A drug testing policy developed by a school district should account for ten separate elements that have been addressed in federal and state cases addressing random testing: (1) rationale for testing; (2) statement of the substance(s) for which students will be

105. See Joseph Mahoney, School Extracurricular Activity Participation as a Moderator in the Development of Antisocial Patterns, 71 Child Dev. 502 (2002) (in a long-term longitudinal study of 695 boys and girls interviewed from childhood through high school and again at ages twenty to twenty-four, participation in extracurricular activities was associated with reduced rates of early dropout and criminal arrest among high risk boys and girls, but the decline in antisocial behavior was dependent on whether the students' social network also participated in extracurricular activities). However, the conclusion of the author is somewhat ambivalent: "The issue seems to be what the adolescent is participating in and with whom. The success of extracurricular activity participation may lie in its emphasis on structured, progressive skill development that is inherently interesting to the participant and directly related to conventional values." Id. at 514. For an article suggesting higher retention rates among Hispanic students involved in extracurricular activities, see Deanna B. Davalos et al., The Effects of Extracurricular Activity, Ethnic Identification, and Perception of School on Student Dropout Rates, 21 Hispanic J. of Behavioral Sci. 61 (1999).

tested; (3) designation of school activities covered by drug testing; (4) requirement of a consent form; (5) procedure for determining how students are to be selected randomly; (6) procedure to be followed in collecting the sample for the substance(s) prohibited by the policy; (7) the tests to be used as determined by the substances to be tested; (8) report of positive test results to appropriate school officials; (9) defenses available to students testing positive; and, (10) and penalties for students testing positive.

1. Rationale for Random Testing

Even though the Supreme Court in *Earls* suggests that deterrence of drug use among students is a sufficient basis for a random drug testing policy, school boards are probably better served to assert additional reasons in support of their drug testing policies. Hopefully, not many schools will have to declare, as the school did in *Vernonia*, that a crisis situation exists with some or all students in extracurricular activities involved in the drug culture. Since *Vernonia*, courts have struggled with the nature of a "special need" that must be shown to justify testing a portion of the student population. This struggle has been lessened by the decision in *Earls* that lowered the degree of need from what *Vernonia* previously held must be demonstrated.

The kinds of statements that will probably suffice after *Earls* may include assertions of student involvement with prohibited substances based on teacher observations and surveys as well as the effect of those substances on student

107. *Vernonia*, 515 U.S. at 649 ("athletes were the leaders of the drug culture... [and] disciplinary actions had reached epidemic proportions").

108. See *e.g.* *Theodore*, 761 A.2d at 661 (court found no "special need" to test only extracurricular activity students and compared the school's approach to concern for the health of those students as "offering a polio vaccine only to those students engaged in extracurricular activities").

109. See *e.g.* *Schaill*, 864 F.2d at 1310 (pre-*Vernonia* random testing policy tests of athletes indicated that 5 of 16 produced positive results of marijuana); *Todd*, 133 F.3d at 985 (pre-random testing policy survey indicated that student use of alcohol and cigarettes was higher than state average; although marijuana use was lower, school had witness testimony that drug use was increasing); *Joy*, 212 F.3d at 1064 (school had no evidence of a correlation between drug use and extracurricular activities or driving to school). *See also* Penn-Harris-Madison, 768 N.E.2d 940 (statewide survey of sixth, eighth, tenth and twelfth grade students in 1993, 1995, and 1997 indicated that the school system was "much more likely" than the national average to use "gateway drugs," defined as alcohol and tobacco, and had a "higher than average use" of "most
performance. Such evidence may include not only statements about the obvious risk to athletes of “impairment of judgment, slow reaction time, and a lessening of the perception of pain”\textsuperscript{110} and the risk to those driving to school,\textsuperscript{111} but also less obvious statements, as in \textit{Earls}, about “band members perform[ing] routines with heavy instruments and FFA members . . . wrestl[ing] animals.”\textsuperscript{112} However, this discussion of participation and risk level will necessarily be limited since the risk levels in some extracurricular activities may be highly attenuated.\textsuperscript{113}

Generally, students in extracurricular activities have been considered leaders with high visibility in their schools, an argument that clearly applies to athletes with lesser application to other student organizations, and, as the argument goes, with that leadership comes a need for “undermining the effects of peer pressure by providing a legitimate reason for students to refuse to use illegal drugs . . .”.\textsuperscript{114} In addition, as the Supreme Court of Indiana reflected in upholding random drug testing in \textit{Linke}, most of the extracurricular activities have off-campus components and school officials “need a broader range of tools to insure compliance with its rules when activities occur off campus.”\textsuperscript{115} an argument that may be deceptively simplistic since most academic classes may also have field trip components.\textsuperscript{116} In any event, the main support for applying testing to all extracurricular activities relies on the voluntary nature of participation and, thus, a voluntary subjection by students to rules and a measure of control that extends beyond that in

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other types of drugs\textsuperscript{”).}

\textsuperscript{110} \textit{Vernonia}, 515 U.S. at 662.
\textsuperscript{111} See \textit{Linke}, 763 N.E.2d at 984.
\textsuperscript{112} \textit{Earls}, 242 F.3d at 1277.
\textsuperscript{113} As the Tenth Circuit points out in \textit{Earls}, some extracurricular activities, such as vocal choir and the academic team represent no more risk of injury than in regular academic classes. \textit{Id.}
\textsuperscript{114} \textit{Linke}, 763 N.E.2d at 986.
\textsuperscript{115} \textit{Id.} at 984.
\textsuperscript{116} See \textit{Earls}, 242 F.3d at 1277.
\textsuperscript{117} See \textit{Earls}, 122 S. Ct. at 2566; \textit{Vernonia}, 515 U.S. at 658.
2. Statement of Substances Tested

Generally, drug testing policies test for illegal drugs and misused prescription drugs, such as "amphetamines, barbiturates, benzodiazepines (such as Valium and Librium), cocaine, opiates, PCP, and marijuana."\(^{118}\) Included in the testing could be the metabolites\(^{119}\) of these drugs.\(^{120}\) Several school district policies have provided for the testing of tobacco and/or alcohol as well.\(^{121}\) None of the reported policies have identified anabolic steroids even though the policy includes athletic as well as non-athletic participants.\(^{122}\)

Cost is a factor in determining the substances to be tested for, and school boards will need to consider carefully at the outset what kind of investment they are willing to make. Boards would be free to reduce the numbers of students if cost becomes an issue, but they need to be aware that reducing numbers may be viewed by parents and students as a reduction in priority.

The two general methods of testing are the enzyme multiplied immunoassay technique (EMIT) and Gas Chromatography (CG-MS). EMIT is the usual test for many drugs such as amphetamines, marijuana, cocaine, opiates and phencyclidine (PCP). The cost for screening these drugs is $20 to $50. Testing for alcohol, nicotine (tobacco), and LSD normally adds another $10 per substance per screening test. Including anabolic steroids increases the cost of the test to $80 to $120 per test.\(^{123}\) Using EMIT to test for these substances increases the cost of the test package because it requires separate analysis of individual additives in each of the

118. *See Earls*, 242 F.3d at 1267; *Todd*, 983 F. Supp. at 802. To this list, the district policy in *Linke*, 763 N.E.2d 972, added methadone, methaqualone, and propoxyphene.

119. Metabolites are waste products of the metabolic process that are toxic to the body. *Merriam–Webster's Medical Dictionary* 413 (1995).

120. *See Miller*, 172 F.3d at 576.

121. *See Penn-Harris-Madison*, 768 N.E.2d at 942; *Joy*, 212 F.3d at 1054; *Todd*, 133 F.3d at 984 (tested for both alcohol and tobacco/nicotine); *Miller*, 172 F.3d at 576 (alcohol only).

122. Athletics may involve testing for performance enhancing substances that do not apply to the general student population. *See e.g. Schul v. Sherard*, 102 F. Supp. 2d 877 (S.D. Ohio 2000) (a coach was suspended for recommending to a track athlete that he consume caffeine prior to a meet in order to increase performance).

particular drugs. For example, tobacco requires a separate test for the additive nicotine.

3. Designation of Activities Covered

Although the policy in *Earls* addressed only competitive extracurricular activities,¹²⁴ there is no reason to believe that school districts could not extend testing to all extracurricular activities.¹²⁵ The only caveat is that application of random testing to all students will probably fail if it does not also satisfy the individualized reasonable suspicion test of *Vernonia*.¹²⁶ In *Todd, Joy,* and *Linke,* school districts extended their drug testing policy to students who drove to school and there is nothing in *Earls* to suggest that such an application of a policy would be unconstitutional.

Under *Earls,* defining the groups to be tested does not appear to require a direct relationship between the students using drugs and the students selected for testing. If evidence of drug use is required, it need only be general anecdotal evidence of drug use within the school at large.

4. Requirement of Consent Form

In order to participate in extracurricular activities, each student and their parents should be required to sign a consent form. Failure to sign the form renders the student ineligible to participate until the form is signed. In *Joy,* the court recognized the consent form as serving three purposes: (1) it provided notice that random drug testing would occur; (2) it authorized the school to administer random drug tests; and (3)

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¹²⁴. *See Earls,* 242 F.3d at 1267 (the policy included such extracurricular activities as FFA, FHA, and Pom Pom, but the school applied the policy only to state athletic association sanctioned activities). In *Linke,* the district's policy included co-curricular activities that were extensions of curricular classes and involved credits or grades. *Linke,* 763 N.E.2d at 975.

¹²⁵. *See Penn-Harris-Madison,* 768 N.E.2d 940 (all extracurricular activities were covered); *Linke,* 763 N.E.2d at 975 (all athletics and certain specified extracurricular and co-curricular activities were covered). In *Todd,* 133 F.3d at 984, besides athletics, the school district defined certain extracurricular activities to include "Student Council, Foreign Language Clubs, Fellowship of Christian Athletes, Future Farmers of America [FFA] and the Library Club." One of the plaintiffs in *Todd* was prohibited from videotaping the football game because he refused to sign the consent form. *Id.* at 985. In *Miller,* 172 F.3d at 577, the policy extended to such activities as "Radio Club, prom committees, the quiz bowl, and school dances."

it was written indicia of the student’s voluntary choice to participate in activities covered by the drug testing policy.\textsuperscript{127}

While school policies in case law require both the student’s and parent’s signatures, they do not address whether a student’s signature without a parent’s is sufficient to require that the school permit the student to participate in extracurricular activities. Although an argument can be made in certain contexts that a student may have rights in school settings independent from the parent,\textsuperscript{128} such should not be the case where participation in school activities may subject the student to the possibility of injury and the school to the possibility of parental litigation for permitting the student to participate without parental consent.\textsuperscript{129}

The absence of a consent form would normally keep students from participating in extracurricular activities. However, the school district policy in \textit{Linke} struck an interesting balance for students in co-curricular activities — those activities outside the normal school day that were extensions of classes for which credit or grades were earned. Those students who chose not to participate in the testing program were given alternative assignments for academic credit in lieu of participating in public performances.\textsuperscript{130}

\textit{Linke} reflects the delicate balance addressed by Justice Thomas in \textit{Earls}, namely that enforcement of the school district’s policy did not affect attendance at school. Assuming \textit{Earls} will be read broadly to say that evidence of suspicionless searches cannot be used to suspend or expel from school, will that prohibition apply to academic penalties, as those in \textit{Linke}, flowing from removal from extracurricular activities? The uncertainty in \textit{Earls} regarding the application of suspicionless searches to non-extracurricular participation suggests that schools may need to adjust penalties, as was done in \textit{Linke}, where both extracurricular participation and grades in courses are connected.

\begin{itemize}
\item \textsuperscript{127} The consent form generally refers to the school activities covered by the testing policy as privileges, not rights. \textit{See Joy}, 212 F.3d at 1055.
\item \textsuperscript{128} \textit{See Baker v. Owen}, 395 F. Supp. 294 (M.D.N.C. 1975), aff’d without opinion, 423 U.S. 907 (1975) (parent did not have a liberty clause right to prohibit use of corporal punishment in her son’s school but her son had a liberty clause in his own right to challenge the use of corporal punishment against him).
\item \textsuperscript{129} \textit{See generally Ralph Mawdsley, Parents’ Rights to Direct Their Children’s Education}, 162 Ed. L. Rep. 659 (2002).
\item \textsuperscript{130} 763 N.E.2d at 975.
\end{itemize}
5. Procedure for Selecting Students

An important part of the drug testing process is the procedure by which students are selected. Unfortunately, this procedure is not elaborated upon in most of the reported cases. However, a few cases indicate that the procedure for randomly selecting students is accomplished according to criteria related to the frequency of testing and the number of students to be selected. In Linke, the school district contracted with a private testing firm that used a computer program to randomly select individuals for testing and then provided those names to the school principals. Students were not provided advance notice of the testing.

All suspicionless drug testing policies would have to determine a random basis for the testing consistent with their purpose of deterring drug use and drug-related injuries. Without a system for determining randomness, schools would run the risk that drug testing might lose its suspicionless character and appear to be targeting specific individuals. Once specific students are targeted for testing, school officials would lose the basis for suspicionless testing and would have to demonstrate a reasonable suspicion for their testing.

6. Collecting Samples

Collection of urine samples for testing follows specific steps set forth in each school district's policy. Although the steps may vary somewhat among policies, the following summary of the three important steps of collecting samples represents a collage

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131. See Vernonia, 515 U.S. at 650 (ten percent of athletes per week during the sport's season); Theodore, 261 A.2d at 654 (test administered monthly to five percent of participating students).

132. See Schaid, 864 F.2d at 1311 (athletes were assigned numbers and one student was selected for testing); Earls, 242 F.3d at 1267 (students called out of classrooms in groups of two and three).

133. 763 F.2d at 975.

134. See Todd, 133 F.3d at 985 (student survey indicated drug use had increased prior to the implementation of a random drug testing policy and drug use had caused death and injury to several students); Joy, 212 F.3d at 1055 (drug testing of students driving to school relied on studies and newspaper articles on students under the influence of alcohol involved in automobile accidents).

135. See Willis, 158 F.3d 415 (school policy requiring students suspended to not be readmitted without a drug test failed under special needs test, the basis for random testing, because school officials had a basis for determining reasonable suspicion when they met with the student in a disciplinary hearing).
of various policies. First, prior to taking the sample, the person responsible for collecting the sample accompanies the student to a stall in a restroom, flushes the toilet, and applies a dye to the water in the toilet. This person of the same gender as the student may provide the student an opportunity, either prior to or just after the sample has been provided, to list all medications taken by the student. Second, the school official waits outside the stall while the student provides the sample and then may test the temperature of the urine. Either the student, or the school official in the presence of the student, seals the container. Both the student and official sign a form attached to the sample to begin the chain of custody. Third, assuming that the test is not being administered by a representative of the testing agency, the sample is carried to an appropriate school official responsible for transmitting it to the testing agency. This official signs the custody form and transmits the sample to the designated testing agency where the persons receiving the sample and performing the test sign the form.

Collecting information about a student’s medications raises a privacy interest for students because this information may be

136. The most comprehensive test administration is found in Schaill, 864 F.2d at 1311.

137. This person can be a faculty member (Earls), a representative of a private testing agency (Linke), a health paraprofessional (Penn-Harris-Madison), or a school nurse (Theodore).

138. In Joy, the student leaves all outer garments, bags and purses outside the collection facility. Joy, 212 F.3d at 1057. See also Linke, 763 N.E.2d at 976.

139. Earls, 242 F.3d at 1268; Penn-Harris-Madison, 768 N.E.2d 940 (in both cases a student is given the opportunity to list medications on a form to be transmitted to the testing agency that is placed in a sealed envelope and not viewed by school district employees). Another option to providing the information at the time of testing is to wait until a positive test is reported and then allow the student to submit documentation that would justify a positive result. Linke, 763 N.E.2d at 975.

140. See Trinidad, 963 P.2d at 1099.

141. Compare Linke, 763 N.E.2d at 976 (testing agency employee takes charge of sample and carries it to the laboratory), with Penn-Harris-Madison, 768 N.E.2d 940 (sample is temporarily stored at school until transmitted to laboratory).

142. Identification of the persons who must be called as witnesses to provide appropriate foundation to introduce the results of drug testing into evidence at a school board hearing depends on the qualifications of the person taking the sample and the employment relationship between the person performing the test and the testing facility. See Arriola v. Orleans Parish Sch. Bd., 809 So. 2d 232 (La. 2002) (testimony of phlebotomist who took urine sample was sufficient to form basis for foundation to introduce testing results where that person was also employed by the testing laboratory).
indicative of a disease or medical condition.\textsuperscript{143} In \textit{Vernonia}, the school district's random drug testing policy was silent as to who was to receive the medication lists. The Supreme Court interpreted the district's policy as implying that medication lists would be sent by sealed envelope to the testing service,\textsuperscript{144} under the principle that "disclosure to teachers and coaches — persons who personally know the student — is a greater invasion of privacy."\textsuperscript{145} Justice Thomas in \textit{Earls} considered this matter of privacy differently and found a choir teacher's examination of a choir member's drug list not to be a problem because the teacher would need to know that information when the students are performing off-campus, and, in any case, the teacher would have had access to this kind of information before the policy was developed. If a reconciliation of \textit{Vernonia} and \textit{Earls} is possible, it would seem to be that \textit{Earls} prevents whatever privacy rights a student may have had under \textit{Vernonia} from limiting access by those persons in a public school who have "a legitimate educational interest" in knowing about the student.\textsuperscript{146} Presumably, access to school personnel who have a "need to know" is not a problem, as long as the information is not revealed to those who do not have this need to know.\textsuperscript{147}

What \textit{Earls} and \textit{Vernonia} do not address is the remedy that a student might have where confidential information regarding the medication list (or drug testing results) is revealed to persons, such as other students, who have no need-to-know. In light of the Supreme Court's decision in \textit{Gonzaga University v. Doe},\textsuperscript{148} whereby FERPA does not give rise to a private cause of action, aggrieved students would seem to be left only with a common law invasion of privacy action.

\begin{footnotesize}
\textsuperscript{143} See \textit{Vernonia}, 515 U.S. at 658 (Court observed that the test is looking only for drugs, "not for whether the student is, for example, epileptic, pregnant, or diabetic").
\textsuperscript{144} See \textit{id.} at 660.
\textsuperscript{145} \textit{Id.} at 659 (emphasis in original).
\textsuperscript{147} In \textit{Earls}, Justice Thomas addressed an allegation that a student might have seen another student's medication list with the observation that "one example of alleged carelessness hardly increases the character of the intrusion." 122 S. Ct. at 2566.
\textsuperscript{148} 122 S. Ct. 2268 (2002) (the Court also abrogated the Tenth Circuit's decision in \textit{Falvo v. Owasso Indep. Sch. Dist.}, 233 F.3d 1203 (10th Cir. 2000), determining that a private cause of action existed under FERPA for damages; the Supreme Court in reversing the Tenth Circuit in \textit{Falvo} had addressed only the issue as to whether education records under FERPA included student grades in a classroom).
\end{footnotesize}
7. Testing Samples

The agency with whom the school board has contracted performs the test for the substances identified in the school’s policy. The policy generally provides that the agency’s test will be performed only on a portion of the sample, saving the rest for a retest in the event of a positive result. Policies can vary as to the tests to be performed at the expense of the school district. Generally, the EMIT is the one performed because it identifies the largest number of drugs at the least expensive cost. In the event of a positive result, the policy can provide for a retest at school expense with the same test or the more expensive gas chromatography/mass spectrometry (GC/MS) method. However, a policy may provide instead that students with a positive EMIT test can request a GC/MS test at their own expense.

Consent to test for a specific group of substances does not authorize school officials to request a test for a substance not identified in its drug testing policy. Even if a student has a diminished constitutional privacy right that permits random drug testing, that privacy does not exceed the consent granted. A student whose sample has been tested for a substance not designated in the policy may still retain a state invasion of privacy claim for unauthorized testing.

8. Report of Positive Test Results

Positive test results are reported to a designated school official and are shared with other school personnel on a need-to-know basis. Although cases are vague as to who has a need-to-know, the list would presumably include the school official responsible for arranging a meeting with the student’s parents. The school official responsible for discipline may be

149. See e.g. Theodore, 761 A.2d at 654, n. 6.
150. See Linke, 763 N.E.2d at 975; Penn-Harris-Madison, 768 N.E.2d at 943.
151. Schaill, 864 F.2d at 1311; Theodore, 761 A.2d at 654.
152. Miller, 172 F.3d at 577 n. 3.
153. See Doe v. High-Tech Inst., Inc., 972 P.2d 1060 (Colo. App. 1998) (student who gave consent for rubella test had invasion of privacy claim where school official had instructed testing agency to test for HIV as well).
154. See e.g. Theodore, 761 A.2d at 988, n. 12 (results for tests of athletes were provided to “the athletic director, student assessment team, substance abuse professional, guidance counselor, coach and/or advisor”); Penn-Harris-Madison, 768 N.E.2d at 943 (school staff is provided information only on a need-to-know basis).
included in those who need-to-know where that person must coordinate penalties in the school policy. In instances where a student will be removed from programs in which they have been participating, appropriate coaches and advisors could be included in the category of those who need-to-know.\textsuperscript{155} Clearly, if the student affected is a special education student whose participation in an activity is part of an IEP, the IEP team members will need to know if student discipline is contemplated, removal from an activity is required, or a manifestation hearing needs to be conducted.\textsuperscript{156}

The basic issue to be considered in determining who should be informed of the test results is one of student expectation of privacy. In addition to a student's expectation of privacy in the medications taken which were mentioned earlier, the student probably has an expectation of privacy regarding disclosure of test results.\textsuperscript{157} In \textit{Vernonia}, the Court was comfortable with a standard that permitted disclosure of results "only to a limited class of school personnel who have a need to know...,"\textsuperscript{158} a standard not significantly different from disclosure of education records under the Family Education Rights and Privacy Act (FERPA) to a person "with legitimate educational interests."\textsuperscript{159}

9. \textbf{Defenses to a Positive Test}

Drug testing policies need to provide that parents of students testing positive for prohibited substances will be notified and that at a parent conference with a designated school official they will have an opportunity to explain the positive results. If they have not previously done so, students

\begin{itemize}
  \item \textsuperscript{155} See Earls, 122 S. Ct. at 2566 (if a choir director had a "need-to-know" a student's medication list, presumably that same director could know the results of a drug test).
  \item \textsuperscript{156} Athletics can have unique protected status for students with disabilities. For an example of a case where a court ordered an IEP permitting athletic participation even though the student had reached the age of 19 and state athletic association rules prohibited 19-year-old students from participating, see \textit{Kling v. Mentor Pub. Sch. Dist.}, 136 F. Supp. 2d 744 (N.D. Ohio 2001). For an example of a case where a manifestation hearing must be held to determine whether an IEP can be rewritten, see \textit{Parent v. Osceola County Sch. Bd.}, 59 F. Supp. 2d 1243 (M.D. Fla. 1999).
  \item \textsuperscript{157} See \textit{Penn-Harris-Madison}, 768 N.E.2d at 943 (policy provides that school officials with access to the test results are specifically prohibited from divulging those results to anyone other than the student, except under court order).
  \item \textsuperscript{158} \textit{Vernonia}, 515 U.S. at 658.
  \item \textsuperscript{159} 20 U.S.C. § 1232(g)(b)(I)(A).
\end{itemize}
can provide a list of medications (or an amended list) that they are taking, or a statement of activities that might account for the positive result. This list of medications and/or explanations would then be submitted to the testing agency to determine whether any of them could account for the positive result. A policy may also permit parents to have the remaining portion of the urine sample tested at an agency of their choice or permit the student to be retested within 24 hours of receiving a positive result.

10. Penalties for Positive Test Results

The standard penalty for a positive test is removal from extracurricular activities. Policies differ regarding student reinstatement with the time ranging from as soon as the student tests negative on a subsequent test to the end of a prescribed period of time or a specified number of activities. In addition to removal, a student could also be required to participate in a drug assessment program. In Todd, a student who tested positive twice was deemed to have given the school reasonable suspicion justifying further drug testing even though the student was no longer permitted to engage in extracurricular activities. With the exception of Joy, penalties are limited to suspension from activities covered by the policy and do not include exclusion from school attendance.

160. See Todd, 133 F.3d at 984.
161. For an interesting higher education case involving an attempted explanation for a positive test for anabolic steroid testosterone, see Brennan v. Bd. of Trustees for U. of La. Sys., 691 So. 2d 324 (La. App. 1997) (student unsuccessfully alleged that his high testosterone level had been due to sexual activity the night before the test).
162. See Schaill, 864 F.2d at 1311; Joy, 212 F.3d at 1057.
163. See Miller, 172 F.3d at 577, n. 3.
164. See Linke, 763 N.E.2d at 976.
165. Miller, 172 F.3d at 577 (a student is placed on probation for 20 days, and then if tested positive again, is banned for one year).
166. Schaill, 864 F.2d at 1311 (the first positive test results in suspension from 30% of athletic contests, a second test results in a 50% suspension, a third results in suspicion for a full calendar year, and a fourth positive results in the student being barred from all interscholastic activities for his/her high school career).
167. Theodore, 761 A.2d at 655.
168. Todd, 133 F.3d at 985.
169. See Schaill, 864 F.2d at 1319 ("No student will be suspended or expelled from school."); Earls, 242 F.3d at 1268 ("There are no academic sanctions imposed."); but see Joy, 212 F.3d at 1056 n. 4 (where a positive test can be treated as a disciplinary offense
Discipline that is considered preventative and rehabilitative, as opposed to punitive, has a better chance of surviving constitutional challenge. In *Linke*, the court determined that a policy that removed students from extracurricular activities for varying periods of time was "preventative or rehabilitative," while a policy (not at issue in the case) that would remove a student from school would be considered punitive.\footnote{763 N.E.2d at 982.} The implication is that non-punitive policies mitigate more against a student's privacy interest.

Whether the results of a positive test are reported to law enforcement authorities varies. In *Earls*, the testing policy provided that test results "shall be disclosed only to those school personnel who have a need to know and will not be turned over to any law enforcement authorities."\footnote{Earls, 242 F.3d at 1268. For cases with policies in agreement with *Earls*, see also *Theodore*, 761 A.2d at 662; *Trinidad*, 963 P.2d at 1100 (results disbursed to designated school officials only).} However, in *Joy*, the Student Handbook required a report to be made to law enforcement authorities\footnote{Joy, 212 F.3d at 1056 n. 4.} and, in *Linke*, results were not revealed to juvenile authorities "absent binding legal compulsion."\footnote{763 N.E.2d at 975.}

Of the three kinds of penalties, exclusion from the school extracurricular activity, exclusion from attendance at school, and exposure to criminal prosecution, the first is the easiest to defend. If the drug testing policy states a nexus between student health/safety and drug use, removing the student from participation seems to satisfy the purpose of the policy.\footnote{Generally, students do not have property interests in extracurricular activities. However, such a property interest might exist where school documents establishing the programs create an entitlement. See *Butler v. Oak Creek-Franklin Sch. Dist.*, 172 F. Supp. 2d 1102 (E.D. Wis. 2001).} Removing a student from school, however, presents the issue of a student's property interest in education\footnote{See *Goss v. Lopez*, 419 U.S. 565, 574 (1975) (Court held that a state's compulsory attendance law created "a student's legitimate entitlement to a public education as a property interest which is protected by the Due Process Clause and which may not be taken away for misconduct without adherence to the minimum procedures required by that Clause").} and raises the question whether removing a student from an activity for the
purpose of safety/health protection also applies to the general academic setting.

In Trinidad School District v. Lopez, the Colorado Supreme Court invalidated a random drug testing policy that would have resulted in a student being suspended from an extracurricular activity (marching band) as well as receiving a failing grade in a for-credit instrumental class that required participation in the marching band. For the court, the suspicionless drug testing policy failed because it "swept within its reach students participating in an extracurricular activity who were not demonstrated to play a role in promoting drugs and for whom there was no demonstrated risk of physical injury, [as well as]... includ[ing] students enrolled in a for-credit class offered by the District." In essence, removing a student from an academic course and awarding a failing grade takes the justification for random testing out of the arena of voluntary participation.

Once the student has been removed from an activity because of health/safety reasons or because of failure to be a role model, one can argue that the school has taken the results of suspicionless testing as far as it can go without additional information, such as that the continued presence of the student in school represents a risk to other students. However, such a risk is not a conclusion that school officials can make based on suspicionless testing; for that, they must look to individualized suspicion of the student's behavior in the classroom setting. To use evidence from a suspicionless search of a student involved in an extracurricular activity, justified because extracurricular activities are privileges, as the basis for removing a student from attendance at school, grounded in a state-created right of compulsory attendance, seems not only inappropriate, but also a violation of a student's property right in school attendance.

Reporting students with positive tests to law enforcement officials assumes that the positive result reflects a violation of state or local law. Clearly, school officials can turn over evidence secured from reasonable suspicion searches to law enforcement. One can argue that, assuming a suspicionless

176. 963 P.2d 1095.
177. Id. at 1110.
178. See e.g. F.S.E. v. State, 993 P.2d 771 (Okla. Crim. App. 1999) (marijuana found in student's car as a result of reasonable suspicion search could be used in juvenile proceeding).
search is lawful, the same result should apply. However, the Supreme Court in Vernonia pointedly noted that test results in that case "[were] not turned over to law enforcement authorities..." and a similar observation was made in Earls. Both decisions appear to suggest that disclosure to law enforcement goes to the privacy interest of students and that school officials need more evidence in a suspicionless search than just positive test results before being permitted to turn evidence over to law enforcement. Because a suspicionless search represents a lower search standard than individualized reasonable suspicion, school officials may need evidence that the student is more than just a drug testing policy violator and represents, in addition, a risk to other students.

III. CONCLUSION

Prior to Earls, courts had been reluctant to support random drug testing where there was no evidence of a serious drug problem and where those being tested were not the persons contributing to the drug problem. Some courts refused to find a basis to support suspicionless testing where the students being tested did not have the same health and safety risks of physical injury as did athletes. Earls has made clear under the Fourth Amendment that schools do not have to wait until they have evidence of a drug problem in order to institute a random drug testing policy. However, whether states will apply that standard in interpreting their own constitutions remains to be seen.

Judicial concern for the privacy rights of students has a troubling side. Public school officials are charged with maintaining a safe school environment. Suspicionless random drug testing, which involves minimal inconvenience to

179. Vernonia, 515 U.S. at 658.
180. See Earls, 122 S. Ct. at 2566.
181. In a non-education case, Kyllo v. U.S., 533 U.S. 27 (2001), the Supreme Court refused to lower the level of privacy protection for home occupants from police use of infrared scanners. The notion that law enforcement officers must have probable cause to scan a person's house may have implications for privacy generally. Arguably, school law enforcement officials should not have access to information that is normally protected by confidentiality without meeting the standard of individualized reasonable suspicion. Attempting to access this information through the suspicionless testing or language in a consent form may be challengeable as an invasion of privacy.
students, provides an easily administered process with both specific and general outcomes. Specifically, the school, by tying extracurricular activity participation to testing, has a mechanism both for discouraging drug use and penalizing those who do use drugs without removing them from academic programs. In general, a random drug testing policy sends a message to parents and taxpayers that the school district is genuinely concerned with preventing drug use. Indeed, parents may demand drug testing for their school district, perhaps placing school officials who may not want to address legal issues associated with testing in a difficult position. How can school officials be opposed to student drug use and not use a legal remedy in drug testing that is available to them?

Drug testing may not be the only remedy available to school officials in deterring drug use, but schools do not have an infinite continuum of alternatives. Even with the legal issues associated with random testing, development of a random testing policy represents action against drug use. A random testing policy that succeeds in preventing drug use would appear to be more effective in promoting the well-being of a school, its students, and teachers than a drug use crisis that may take years to resolve.

182. *E.g. Linke*, N.E.2d at 984 (the court remarks that "parents may be reluctant to allow their children to participate in voluntary school activities if schools are not permitted to take the reasonable steps taken [by the school district in the case] to prevent drug use").