

January 2004

## Constitutional Law - Suspicionless Drug Testing of Students Participating in Non-Athletic Competitive School Activities: Are All Students Next

Jacob L. Brooks

Follow this and additional works at: <https://scholarship.law.uwyo.edu/wlr>

---

### Recommended Citation

Brooks, Jacob L. (2004) "Constitutional Law - Suspicionless Drug Testing of Students Participating in Non-Athletic Competitive School Activities: Are All Students Next," *Wyoming Law Review*. Vol. 4: No. 1, Article 8.

Available at: <https://scholarship.law.uwyo.edu/wlr/vol4/iss1/8>

This Case Notes is brought to you for free and open access by the UW College of Law Reviews at Law Archive of Wyoming Scholarship. It has been accepted for inclusion in Wyoming Law Review by an authorized editor of Law Archive of Wyoming Scholarship.

## CASE NOTES

### CONSTITUTIONAL LAW – Suspicionless Drug Testing of Students Participating in Non-athletic Competitive School Activities: Are All Students Next? *Board of Education v. Earls*, 536 U.S. 822 (2002).

#### INTRODUCTION

In 1998, Lindsay Earls was one among many students at Tecumseh High School in rural Oklahoma who would be affected by the school district's new "Student Activities Drug Testing Policy."<sup>1</sup> This policy applied to all students in the middle and high school who participated in competitive extracurricular activities, calling for drug testing as a prerequisite to competition.<sup>2</sup> To be expected, athletic teams were covered by this policy.<sup>3</sup> However, this policy extended testing to non-athletic participants who competed outside the school.<sup>4</sup> Among the activities subject to testing were those Lindsay Earls was actively involved in, including show choir, marching band, academic team, and the National Honor Society.<sup>5</sup> The Future Farmers of America, Future Homemakers of America, and cheerleaders were to be tested as well.<sup>6</sup>

Under the policy, students were tested in several situations.<sup>7</sup> All middle and high school students participating in designated activities were required to be tested prior to any participation in an activity.<sup>8</sup> A student was also subject to drug testing if school officials had a "reasonable suspicion" of drug use by that particular student.<sup>9</sup> Finally, the policy called for testing of students who were randomly selected throughout the course of their participation.<sup>10</sup> The drug testing was carried out through urinalysis.<sup>11</sup> When tested, students were taken to the restroom with a same-sex faculty monitor "who waits outside the closed restroom stall for the student to produce a sample

---

1. *Bd. of Educ. v. Earls*, 536 U.S. 822, 825 (2002).

2. *Id.* at 826.

3. *Id.* at 827 n.2.

4. *Id.* at 826.

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* The policy covered all competitive extracurricular activities which were regulated by the Oklahoma Secondary Schools Activities Association, but it did not cover all extracurricular activities. *Earls v. Bd. of Educ.*, 115 F. Supp. 2d 1281, 1283 n.5 (W.D. Okla. 2000). Those which were not competitive nor sanctioned by the Oklahoma Secondary Schools Activities Association were not subject to the policy. *Id.*

9. *Earls*, 536 U.S. at 826.

10. *Id.* The test detected illegal drugs, but not alcohol, tobacco, or prescription medications. *Id.* However, part of the policy itself required students to disclose what prescription medications they were taking, regardless of whether a prescription medication first triggered a false-positive result. *Id.* at 833.

11. *Id.* at 832.

and must listen for the normal sounds of urination in order to guard against tampered specimens and to insure an accurate chain of custody.”<sup>12</sup> Once collected, the samples were sent to an independent lab to be tested.<sup>13</sup> The results were kept separate from the students’ records and accessible on a “need to know” basis.<sup>14</sup>

Should a student test positive, school officials met with the student and the student’s parents.<sup>15</sup> The student was not immediately removed from the activity if he or she obtained drug counseling within five days of the meeting and passed a second drug test in two weeks.<sup>16</sup> If the student failed the second test, a fourteen-day suspension from participation in the activity went into effect.<sup>17</sup> To be allowed to return to the activity, the student was required to take four hours of drug counseling and submit to monthly drug tests thereafter.<sup>18</sup> Upon a third positive test, the student would be suspended from all extracurricular competitive activities for the longer of the remainder of the school year or eighty-eight days.<sup>19</sup>

Through her parents and along with another student, Daniel James, Earls challenged the policy of drug testing non-athletic participants.<sup>20</sup> The suit was brought under 42 U.S.C. § 1983, which authorizes civil suits when a state action results in the “deprivation of any rights, privileges, or immunities secured by the Constitution.”<sup>21</sup> Earls accused the school of violating the Fourth Amendment of the Constitution as applied to the states by the Fourteenth Amendment.<sup>22</sup>

---

12. *Id.*

13. *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1267-68 (10th Cir. 2001).

14. *Earls*, 536 U.S. at 833. The results were not used for discipline, nor did the students testing positive face academic consequences or criminal prosecution. *Id.* Students failing the drug tests were merely subject to the restrictions on participation in extracurricular activities. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 833-34.

18. *Id.*

19. *Id.* at 833.

20. *Id.* at 826-27. Daniel James’s standing was called into question at the outset of this case as his eligibility to participate was unclear due to low grades. *Id.* at 827 n.1. However, Earls’s eligibility was unchallenged, and her standing to bring this case made it unnecessary to evaluate James’s standing. *Id.* Lacey Earls, Lindsay Earls’s sister, was later made a party to this case. *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1266 n.1 (10th Cir. 2001).

21. 42 U.S.C. § 1983 (2000). The public school is an entity of the state. *See West Virginia Bd. of Educ. v. Burnette*, 319 U.S. 624, 637 (1943) (“The Fourteenth Amendment, as now applied to the States, protects the citizens against the State itself and all of its creatures—Boards of Education not excepted.”).

22. *Earls*, 536 U.S. at 827. The Fourteenth Amendment provides, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process

The United States District Court for the Western District of Oklahoma upheld the school district's drug testing policy, citing "a special need to justify the warrantless, suspicionless drug testing at issue here."<sup>23</sup> The court reasoned that special needs exist even without epidemic drug use among the student population.<sup>24</sup>

The United States Court of Appeals for the Tenth Circuit subsequently reversed the District Court's ruling, holding that the district failed to demonstrate a sufficient drug use problem among the students targeted by this policy.<sup>25</sup> The court rejected the contention of the District Court that the absence of a serious drug problem was not fatal to the policy.<sup>26</sup> Instead, the court articulated a new test, requiring that the school district "must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem."<sup>27</sup>

Eventually, the United States Supreme Court granted *certiorari* to hear the case.<sup>28</sup> The issue before the Court was whether the policy of randomly drug testing participants in non-athletic competitive activities constituted an unreasonable search and seizure in violation of the Fourth Amendment.<sup>29</sup> The suit did not challenge the constitutionality of the part of the policy which mandated the testing of athletic participants nor the part calling for testing upon individualized suspicion.<sup>30</sup> It challenged only the portion of the policy which called for random, suspicionless testing of students participating in non-athletic competitive extracurricular activities.<sup>31</sup> On June 27, 2002, the United States Supreme Court, in a five to four decision, reversed the holding of the Court of Appeals for the Tenth Circuit, upholding.<sup>32</sup> The Court held that the "[p]olicy is a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren."<sup>33</sup>

---

of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

23. *Earls v. Bd. of Educ.*, 115 F. Supp. 2d 1281, 1296 (W.D. Okla. 2000).

24. *Id.* at 1285-86.

25. *Earls*, 242 F.3d at 1277 ("[W]ithout a demonstrated drug abuse problem among the group being tested, the efficacy of the District's solution to its perceived problem is similarly greatly diminished.").

26. *Id.* at 1278.

27. *Id.*

28. *Bd. of Educ. v. Earls*, 534 U.S. 1015 (2001).

29. *Bd. of Educ. v. Earls*, 536 U.S. 822, 828 (2002) ("We must therefore review the School District's Policy for 'reasonableness,' which is the touchstone of the constitutionality of a governmental search.").

30. *Id.* at 827 n.2.

31. *Id.* at 827.

32. *Id.* at 824, 838.

33. *Id.* at 838.

Initially, this case note will discuss the relevant Fourth Amendment law as it relates to the "special needs" environment, particularly with respect to public school. Second, this case note will discuss the United States Supreme Court's decision in *Board of Education v. Earls*. Third, this case note will analyze the "fact-specific balancing test" as applied in *Earls*. This case note will argue that the majority in *Earls* paradoxically disregards several key facts, and that the Court's justification for the policy lies less in specifics of this case and more in the general policy of combating drug use nationwide, relegating the "special needs" doctrine to serve general concerns for student safety rather than a specific, identifiable problem. Finally, this case note will explore the potential implications of *Earls* and the possibility of using the precedent set to test all students.

#### BACKGROUND

The Fourth Amendment declares:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>34</sup>

Yet, applying the protections of the Fourth Amendment in the public school environment has posed unique challenges for the courts. On one end, the public school acts in place of the parent—*in loco parentis*.<sup>35</sup> Parents are not bound to adhere to the protections of the United States Constitution in dealing with their children; they are free to control the speech of their children and conduct searches without being held to the standard of reasonableness.<sup>36</sup> For approximately seven hours a day, five days a week, school officials are the adults charged with the care of children—not only teaching, but providing the discipline, support, and assistance a parent provides outside school.<sup>37</sup> However, public school officials are state agents, and although they may act *in loco parentis* in some respects, they are nonetheless carrying out the du-

---

34. U.S. CONST. amend. IV.

35. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 654-55 (1995) (quoting 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 441 (1769)) (pointing out that teachers assume the "power of the parent" and act as such in teaching and disciplining the students in their care).

36. See *New Jersey v. T.L.O.* 469 U.S. 325, 336-37 (1984) (pointing out parents are not "subject to the limits of the Fourth Amendment"). See also *Vernonia*, 515 U.S. at 655 (commenting that the close supervision and discipline of students "permits a degree of supervision and control that could not be exercised over free adults").

37. See *Vernonia*, 515 U.S. at 654-55.

ties of the state to provide education which is mandated by the law.<sup>38</sup> It is with this backdrop that courts analyze the extent of Constitutional protections afforded students, noting that "while children assuredly do not shed their constitutional rights . . . at the school house gate . . . the nature of those rights is what is appropriate for children in school."<sup>39</sup>

The Court has had several opportunities to explain how the protections of the Constitution are harmonized with the responsibilities of public school officials to act *in loco parentis*. In 1969, citing the First Amendment's protections of free speech, the Supreme Court reversed the suspension of students who wore black arm bands in protest of the war in Vietnam.<sup>40</sup> However, the Court has upheld the right of school officials to restrain student expression when such action was "reasonably related to legitimate pedagogical concerns" or deemed to be vulgar or offensive.<sup>41</sup>

The Court has also examined the role of due process in public schools. In *Goss v. Lopez*, the Court observed that "the State is constrained to recognize 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."<sup>42</sup>

---

38. See *T.L.O.*, 469 U.S. at 336. The Court pointed out that with the compulsory nature of public education, parents are not delegating authority to school officials as much as complying with the law in sending their children to school. *Id.* Similarly, in carrying out certain duties, e.g. searches, the Court noted school officials are acting as representatives of the state and not as parents. *Id.*

39. *Vernonia*, 515 U.S. at 655-56 (internal quotations omitted) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

40. *Tinker*, 393 U.S. at 512-13 (1969). The *Tinker* Court noted:

A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others.

*Id.* (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

41. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 263, 266 (1988) (upholding right of school principal to remove two articles that dealt with teenage pregnancy and divorce from the school sponsored newspaper); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986) ("The First Amendment does not prevent school officials from determining that to permit a vulgar or lewd speech . . . would undermine the school's basic educational mission.").

42. *Goss v. Lopez*, 419 U.S. 565, 584 (1975) (requiring students facing suspension to be provided minimum procedures of due process, such as notice and opportunity to be heard). However, the Supreme Court held in *Ingraham v. Wright* that procedural due process was not violated when students were subjected to corporal punishment without first having even an informal hearing. 430 U.S. 651, 682 (1977).

The Supreme Court has only relatively recently addressed the issue of the Fourth Amendment in public schools. In *New Jersey v. T.L.O.*, the Supreme Court examined the issue of searches of students conducted by school officials.<sup>43</sup> In *T.L.O.*, a student was found smoking in the girls' restroom.<sup>44</sup> An assistant principal searched the student's purse after the student denied that she was smoking.<sup>45</sup> The search yielded a pack of cigarettes, cigarette rolling paper, marijuana, a pipe, and other drug-associated items.<sup>46</sup> The Court recited the standard by which searches in schools were to be measured: "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.'" <sup>47</sup> The Court observed that students do indeed have a legitimate expectation of privacy in the school.<sup>48</sup> Students often bring to school items which are far from being considered "contraband" but are nonetheless private and personal, such as keys, wallets, or personal hygiene items.<sup>49</sup>

However, a student's expectation of privacy is tempered by the legitimate need of a public school official to maintain order and discipline in the classroom.<sup>50</sup> The requirements law enforcement officials must adhere to, such as probable cause and obtaining warrants, are "unsuited to the school environment" where the "swift and informal disciplinary procedures" of schools would be hindered.<sup>51</sup> The Court pointed out that the benchmark of the Fourth Amendment is reasonableness, which is often met when probable cause exists.<sup>52</sup> However, in certain "special needs" environments the reasonableness standard can be met even without probable cause or a warrant.<sup>53</sup> The Court held that schools are such an environment.<sup>54</sup>

Considering the totality of the circumstances, the *T.L.O.* Court held that a search is reasonable if it is justified at its inception and the search conducted is "reasonably related in scope to the circumstances which justified

---

43. *New Jersey v. T.L.O.*, 469 U.S. 325 (1984). Justice White, writing for the majority, explained the issue before the Court: "[W]e here address only the questions of the proper standard for assessing the legality of searches conducted by public school officials and the application of that standard to the facts of this case." *Id.* at 328.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 337 (quoting *Camera v. Municipal Court*, 387 U.S. 523, 536-37 (1967)).

48. *Id.* at 338-39.

49. *Id.* at 339. The State argued school children had no legitimate expectation of privacy in the school environment, to which the Court observed, "We are not ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment." *Id.* at 338-39.

50. *Id.* at 339.

51. *Id.* at 340.

52. *Id.* at 340-41.

53. *Id.*

54. *Id.* at 341.

the interference in the first place.”<sup>55</sup> The first prong of the test will almost always be met if the school official conducting the search has reasonable grounds to suspect the search will evince a violation of the law or school policies.<sup>56</sup> The second prong is satisfied “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.”<sup>57</sup> Applying this standard, the Court held that the search of a purse of a student who was suspected of smoking was reasonable under the circumstances.<sup>58</sup>

Although the Supreme Court has declined to address the issue of school officials who in conjunction with the police conduct blanket suspicionless searches of lockers and cars, numerous lower federal courts and state supreme courts have relied on *T.L.O.* in deciding on the legitimacy of these searches.<sup>59</sup> However, a particular type of search that the Supreme Court has addressed is drug testing of student athletes as a condition of participation.<sup>60</sup>

In 1995, in *Vernonia School District 47J v. Acton*, the Court upheld a public school’s policy of random, suspicionless drug testing of all athletic participants.<sup>61</sup> The policy was similar to the *Earls* policy in that it called for testing of all participants at the beginning of the season and of those athletes randomly selected throughout the season.<sup>62</sup> Students provided urine samples in the bathroom while being monitored by a same-sex faculty monitor who stood behind the student to ensure the integrity of the sample.<sup>63</sup> Similarly, the test results were only kept for one year, were not turned over to the police, and, in order to be entirely suspended from participation, an athlete

---

55. *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1967)).

56. *Id.* at 341-42.

57. *Id.* at 341.

58. *Id.* at 347.

59. *See, e.g., Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 475-82 (5th Cir. 1982) (upholding the right of school officials to use drug sniffing dogs to detect drugs in lockers and students’ automobiles, but not the right to sniff the students themselves); *In re Patrick Y.*, 358 Md. 50, 67 (Md. 2000) (upholding right of school officials to search lockers when state law and school policy made it clear that lockers are school property); *Commonwealth v. Cass*, 551 Pa. 25, 54-55 (Pa. 1998) (holding students’ privacy expectations concerning lockers is minimal and could be searched if school officials reasonably suspected contraband), *cert. denied*, 525 U.S. 833 (1998).

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

61. *Id.* at 664-65.

62. *Id.* at 650.

63. *Id.* The only difference between this policy and that in *Earls* is that male students produced the sample at a urinal in *Vernonia* as opposed to being allowed to use a stall with a door in *Earls*. *Bd. of Educ. v. Earls*, 536 U.S. 825, 832 (2002).



would have to fail three drug tests.<sup>64</sup> This policy was implemented in response to a perceived drug problem in the schools in Vernonia, Oregon.<sup>65</sup>

In reiterating the reasonableness standard outlined in *T.L.O.*, the Court applied a three-factor analysis to *Vernonia*'s suspicionless drug testing policy: (1) the nature of the privacy interest invaded by the drug testing; (2) the character of the intrusion created by the drug testing; and (3) the nature and the immediacy of the government's concern and the effectiveness of the drug testing policy in addressing that concern.<sup>66</sup>

In the Court's view, the nature of the privacy interest depends on the context.<sup>67</sup> Society only recognizes legitimate expectations of privacy, which may be different depending on whether the person is in a public or private place.<sup>68</sup> More relevant to students, legitimate expectations of privacy also depend on the relationship the person has with the state.<sup>69</sup> Students' legitimate expectations of privacy in public schools are diminished as a result of "schools' custodial and tutelary responsibility for children."<sup>70</sup> The Court observed school children are subject to physical examinations, vaccinations, and health screenings.<sup>71</sup> Additionally, in the course of athletic participation, athletes routinely find themselves in locker rooms which involve communal undressing and showering.<sup>72</sup> Public school athletes "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."<sup>73</sup>

Similarly, the Court in *Vernonia* was not convinced the drug testing policy was particularly intrusive.<sup>74</sup> Although the Court noted that collecting urine samples "intrudes upon an excretory function traditionally shielded by great privacy," the procedure for collecting the samples sufficiently minimized the intrusion.<sup>75</sup> Furthermore, the information provided by the drug

---

64. *Vernonia*, 515 U.S. at 651, 658.

65. *Id.* at 648. School officials noticed "a sharp increase in drug use" of which the athletes appeared to be the "leaders." *Id.* The Court did not question the district's conclusion that many of its students abused drugs. *Id.* at 648-49, 663.

66. *Id.* 654-64.

67. *Id.* at 654.

68. *Id.* The Court hinted that a person in his or her home reasonably expects more privacy than a person at work or in a public place. *Id.*

69. *Id.*

70. *Id.* at 656.

71. *Id.* at 656-57.

72. *Id.* at 657.

73. *Id.* The Court also noted, "Somewhat like adults who choose to participate in a 'closely regulated industry,' students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy." *Id.* (quoting *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 627 (1989)).

74. *Id.* at 658.

75. *Id.* (quoting *Skinner*, 489 U.S. at 626). The students remain fully clothed and the monitors, standing at a distance, listening only for the normal sounds of urination, do not observe the excretory process itself. *Id.*

testing itself did not excessively intrude on the students' legitimate expectations of privacy.<sup>76</sup> The Court noted the test only screened for illegal drugs and did not detect diseases or other health conditions.<sup>77</sup> Additionally, the information was not used for criminal prosecutions or even school disciplinary actions and only certain school officials had access to the results.<sup>78</sup>

Finally, the *Vernonia* Court examined the nature and immediacy of the government's concern and the effectiveness of addressing that concern.<sup>79</sup> The Court suggested that this policy addressed the issue of growing drug use by students and to reduce the risk athletes faced when using drugs while participating in sports.<sup>80</sup> The Court also dispelled the contention that the "least intrusive means" is always reasonable, pointing out drug testing based solely on suspicion of drug use created a risk of lawsuits, in addition to effectively acting as a "badge of shame" for those students being tested upon suspicion.<sup>81</sup> Testing based on suspicion would open up the possibility that teachers would misuse the policy to test "troublesome" students.<sup>82</sup> In light of the three factors, the Court in *Vernonia* upheld the drug testing policy as reasonable and constitutional.<sup>83</sup>

In addition to the school environment, the Court has found special needs to exist in other cases as well. In *Hudson v. Palmer*, the Court held that "the Fourth Amendment has no applicability to a prison cell."<sup>84</sup> In *Griffin v. Wisconsin*, the Court upheld warrantless searches of probationers' homes.<sup>85</sup> Two years later, the Court decided two "special needs" cases, both concerning drug searches. In *Skinner v. Railway Executives' Association*, the Court upheld drug testing of railroad employees, citing the "governmental interest in ensuring the safety of the traveling public and of the employees themselves."<sup>86</sup> On the same day, in *National Treasury Employees Union v. Von Raab*, the Court approved testing United States Custom Service employees for drugs, in part because they were the front line in stopping the influx of illegal drugs across the border.<sup>87</sup>

---

76. *Id.*

77. *Id.* The Court was not persuaded by the argument that the requirement students disclose prescription medications to avoid "false positives" even before the problem arose was particularly more intrusive. *Id.* at 659.

78. *Id.* at 658.

79. *Id.* at 660-61.

80. *Id.* at 661. As part of the justification for the policy, the Court devoted one paragraph to the physical effects drugs have on athletes. *Id.* at 661-62.

81. *Id.* at 663.

82. *Id.*

83. *Id.* at 664-65.

84. *Hudson v. Palmer*, 468 U.S. 517, 536 (1984).

85. *Griffin v. Wisconsin*, 483 U.S. 868, 880 (1987).

86. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 621 (1989).

87. *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 668, 672 (1989).

However, the Court has declined to adopt a "special needs" justification in some cases. For instance, the Court would not uphold warrantless drug testing of pregnant women suspected of drug use in *Ferguson v. City of Charleston*.<sup>88</sup> Likewise, in *City of Indianapolis v. Edmond*, the Court held that vehicle checkpoints for illegal drugs were unconstitutional.<sup>89</sup> Finally, in *Chandler v. Miller*, the Court rejected Georgia's contention that mandatory drug testing of political candidates was constitutional.<sup>90</sup> The *Chandler* Court observed that "special needs" did not exist in this situation because the policy was targeting a group not known for drug use and they were not engaged in any activities which posed special risks to the health and safety of the candidates or others.<sup>91</sup> Prior to the Supreme Court's holding in *Earls*, numerous state and circuit courts had addressed the issue of testing non-athletic extracurricular activities participants, but the holdings were often contradictory.<sup>92</sup>

#### PRINCIPAL CASE

In granting *certiorari* to hear *Earls*, the United States Supreme Court was called upon to decide whether to uphold the testing policy as the United States District Court for the Western District of Oklahoma did or to affirm the United States Circuit Court of Appeals for the Tenth Circuit, which struck down the policy.<sup>93</sup> In analyzing the constitutionality of the school district's drug testing policy, the United States Supreme Court weighed "the intrusion on the children's Fourth Amendment rights against the promotion of legitimate governmental interests."<sup>94</sup> To accomplish this analysis, the Court followed the same balancing test applied in *Vernonia*, which the *Earls* Court labeled a "fact-specific balancing test."<sup>95</sup> The Court considered three factors: (1) the legitimate expectation of privacy held by the students; (2) the nature of the privacy invasion created by the drug testing policy; and (3) the nature and the immediacy of the government's con-

---

88. *Ferguson v. City of Charleston*, 532 U.S. 67, 86 (2001).

89. *City of Indianapolis v. Edmond*, 531 U.S. 32, 47-48 (2000).

90. *Chandler v. Miller*, 520 U.S. 305, 323 (1996).

91. *Id.* at 321-22.

92. *See, e.g.*, *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999) (upholding a mandatory random drug testing policy for students involved in extracurricular activities); *Todd v. Rush County Sch.*, 133 F.3d 984 (7th Cir. 1998) (upholding a policy that required parental consent to drug testing of their children who participated in extracurricular activities or drove to school); *Theodore v. Delaware Valley Sch. Dist.*, 761 A.2d 652 (Pa. Commw. 2000) (striking down a drug testing policy similar to that in *Todd v. Rush County Schools* on the grounds that random drug testing of students who drove to school or participated in extracurricular activities was an unreasonable search and seizure); *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095 (Colo. 1998) (striking down a policy that called for drug testing of members of the marching band). For further discussion of these decisions, *see infra* notes 198-200, 249-56 and accompanying text.

93. *Bd. of Educ. v. Earls*, 536 U.S. 822, 827-28 (2002).

94. *Id.* at 830.

95. *Id.*

cern and the effectiveness of the drug testing policy in addressing that concern.<sup>96</sup>

As in *Vernonia*, the *Earls* Court first examined the nature of the privacy interest the drug testing invaded.<sup>97</sup> In following the holding in *Vernonia*, the Court discussed the nature of the relationship between minor students and public school officials charged with their care.<sup>98</sup> The Court pointed out that students have a diminished expectation of privacy while in public schools. According to the Court, "A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease."<sup>99</sup> However, unlike the situation in *Vernonia*, the *Earls* Court had to address the legitimate expectations of privacy held by a student participating in a non-athletic activity.<sup>100</sup> Although the Court in *Vernonia* devoted several paragraphs to the diminished expectations of privacy held by athletes, the *Earls* Court noted that the difference between athletes and non-athletes in regard to expectations of privacy "was not essential to [the Court's] decision in *Vernonia* which depended primarily upon the school's custodial responsibility and authority."<sup>101</sup> However, even if such distinction was not essential to the analysis, the Court nonetheless went on to point out that non-athletic participants "voluntarily subject themselves to many of the same intrusions on their privacy as do athletes."<sup>102</sup> For example, non-athletic teams may travel together overnight and dress and undress in communal locker or dressing rooms.<sup>103</sup> Similar to athletes, students participating in non-athletic activities are subject to rules and regulations which do not apply to the student body as a whole and are set by Oklahoma Secondary Schools Activities Association.<sup>104</sup> In the Court's view, students who participate in extracurricular activities, whether they be athletics or not, have a diminished expectation of privacy because of these additional regulations and the less private nature of overnight travel and communal undress.<sup>105</sup>

The Court next turned to the character of the intrusion the policy

---

96. *Id.* at 830-38.

97. *Id.* at 830.

98. *Id.* at 830-31. The Court noted that "when the government acts as guardian and tutor[,] the relevant question is whether the search is one that a reasonable guardian and tutor might undertake." *Id.* at 830 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995)).

99. *Id.* at 830-31.

100. *Id.* at 831.

101. *Id.*

102. *Id.*

103. *Id.* at 832. The Court addressed extracurricular non-athletic activities in general and did not mention those extracurricular activities which may not involve communal undress or overnight travel. *Id.*

104. *Id.*

105. *See id.* at 831-32.

created—specifically, the process of collecting a urine sample and how the test results were handled.<sup>106</sup> As already noted, the process by which the urine sample was collected was largely identical to that in *Vernonia*.<sup>107</sup> Although the collection of urine was “traditionally shielded by great privacy,” the Court found the policy sufficiently protected the privacy of students and the intrusion was only “negligible.”<sup>108</sup>

The second area in which the Court examined the policy’s intrusion on students’ privacy was the issue of confidentiality of the test results.<sup>109</sup> The Court noted the results were kept separate, not used for criminal prosecutions, and released only to those staff members who “need[ed] to know.”<sup>110</sup> The results of the drug tests were used exclusively for administration of the policy.<sup>111</sup> With the “limited uses” of the test results and the measures taken by school officials to restrict access to the results, the Court found the character of the intrusion created by the policy was “not significant.”<sup>112</sup> However, Earls contended that the standard confidentiality of the policy was compromised by careless handling of information by the choir teacher, who apparently left a list of prescription drugs on a desk in plain view of anyone who walked by the desk.<sup>113</sup> The Court was not persuaded that “one example of alleged carelessness” increased the character of the intrusion.<sup>114</sup>

The final factor the Court considered in *Earls* was the nature and immediacy of the government’s concerns and the effectiveness of the drug testing policy in meeting those concerns.<sup>115</sup> According to the Court, drug abuse by schoolchildren is a pressing matter in which the government’s interest, particularly a public school’s interest, is undeniable.<sup>116</sup> While the “war against drugs,” in general, is a legitimate interest, the Court also observed the school officials themselves had a concern about drug abuse in

---

106. *Id.* at 832.

107. *Id.* at 832-33. The Court noted that the test used in *Earls* “additionally protect[ed] privacy by allowing male students to produce their samples behind a closed stall.” *Id.*

108. *Id.* at 833. *But cf.* *Anable v. Ford*, 653 F. Supp. 22, 44 (W.D. Ark. 1985) (holding that making female student suspected of smoking marijuana remove clothing from the waste down and urinate in full view of a female faculty member was an excessive intrusion upon the student’s legitimate expectations of privacy “in light of the age and sex of the students and the lack of need therefor”).

109. *Earls*, 536 U.S. at 833. In *Vernonia*, the Court expressed some concern as to the policy requiring disclosure of prescription medications which would logically reveal students’ medical conditions as well. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 659 (1995).

110. *Earls*, 536 U.S. at 833.

111. *Id.* at 833-34.

112. *Id.* at 834.

113. *Id.* at 833.

114. *Id.*

115. *Id.* at 834.

116. *Id.*

Tecumseh.<sup>117</sup> For example, teachers observed students they believed to be under the influence of drugs, students were overheard talking about drug use, a K-9 unit found marijuana near the school parking lot, the police found drugs or drug paraphernalia in an FFA member's car, and members of the community often expressed a concern about the drug use problem.<sup>118</sup> Not questioning that concern or the extent of the problem, the Court deferred to the judgment of the school district in deciding to implement this policy.<sup>119</sup> The Court further pointed out that "a demonstrated problem of drug abuse . . . is not in all cases necessary to the validity of a testing regime, but that some showing does shore up an assertion of special need for a suspicionless general search program."<sup>120</sup> As to the effectiveness of the policy in combating drug use, the Court succinctly stated in one paragraph that "the [drug] testing of students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use."<sup>121</sup> The Court flatly threw out the Court of Appeals' test which would require that

any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem.<sup>122</sup>

The Court also rejected the notion that the safety concerns that accompany the testing of athletes are not present in non-athletic activities.<sup>123</sup> The majority held, "Respondents are correct that safety factors into the special needs analysis, but the safety interest furthered by drug testing is undoubtedly substantial for all children, athletes and nonathletes alike."<sup>124</sup> Finally, the Court echoed its holding in *Vernonia*, finding that a policy implementing testing based on individualized suspicion, although less invasive, was not practical.<sup>125</sup> As in *Vernonia*, the Court found too many problems with the potential for lawsuits against the school district, the chance teachers may target a

---

117. *Id.* at 834-35.

118. *Id.* at 835.

119. *Id.* Earls argued that these incidents did not rise to the level of creating a "real and immediate interest." *Id.*

120. *Id.* (internal quotations omitted) (quoting *Chandler v. Miller*, 520 U.S. 305, 319 (1997)).

121. *Id.* at 837.

122. *Id.* at 836. The Court stated it would not adopt a "threshold level" of drug use which would make testing reasonable, but instead deferred to the district's judgment. *Id.*

123. *Id.*

124. *Id.* In *Vernonia*, however, the Court pointed out, "[I]t must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 662 (1995).

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

particular unpopular group, and the further tax such a policy would place on the teachers to detect and root out student drug use.<sup>126</sup>

### *The Concurrence*

Justice Breyer filed a concurring opinion in which he addressed the district's need for drug testing and the "privacy-related burden that the drug testing imposes upon students."<sup>127</sup> Concerning the district's need for drug testing, Breyer made four basic observations: (1) the drug problem, especially in schools, is a growing problem; (2) the government's attempts to stop the supply of drugs to students have not worked; (3) schools have an obligation to address the issue of drug use by students—school officials are charged with not only the education of students, but with providing for their safety and health; and (4) this policy helped address the peer-pressure factor associated with drug use by giving students an excuse to say "no."<sup>128</sup>

With respect to the privacy issues the policy implicated, Justice Breyer made three points. First, the Court's labeling of the urine collection procedure as a "negligible" intrusion on privacy is open for dispute as some people do feel significantly intruded upon by someone standing a few feet away listening for the normal sounds of urination.<sup>129</sup> However, in Breyer's view, this issue can be addressed by giving the community "the opportunity to be able to participate in developing the drug policy," as Tecumseh school officials did in this case.<sup>130</sup> Second, Justice Breyer observed that this policy did not test the entire student population, leaving an alcove for a "conscientious objector" who, rather than be tested for drugs, would choose not to participate.<sup>131</sup> Finally, on the issue of individualized suspicion, Justice Breyer indicated that requiring individualized suspicion to implement a drug test would "push the boundaries of individualized suspicion to its outer limits, using subjective criteria that may unfairly target members of unpopular groups."<sup>132</sup> Justice Breyer concluded his opinion by making the observation that he was unsure if the policy would work to prevent drug use among students, but he saw nothing in the Constitution that should prevent the school district from trying.<sup>133</sup>

---

126. *Id.*

127. *Id.* at 838-42 (Breyer, J., concurring).

128. *Id.* at 839-41 (Breyer, J., concurring).

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

130. Justice Breyer wrote, "The board used this democratic, participatory process to uncover and to resolve differences, giving weight to the fact that the process, in this instance, revealed little, if any, objection to the proposed testing program." *Id.* at 841 (Breyer, J., concurring).

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

132. *Id.* at 841-42 (Breyer, J., concurring) (internal quotations and citations omitted).

133. *Id.* at 842 (Breyer, J., concurring).

*The Dissent*

Justice Ginsburg filed a dissenting opinion in which she was joined by Justices Stevens, O'Connor, and Souter.<sup>134</sup> In the dissent's view, "The particular testing program upheld today is not reasonable, it is capricious, even perverse: Petitioners' policy targets for testing a student population least likely to be at risk from illicit drugs and their damaging effects."<sup>135</sup> The dissent agreed that students participating in sports and students participating in non-athletic activities share common characteristics, such as the voluntary nature of these activities.<sup>136</sup> However, the dissent pointed out that the realities of modern education, with students mindful of applying to college, make extracurricular activities "a key component of school life," albeit voluntary.<sup>137</sup> Participants in both athletic teams and non-athletic groups are public school students, under the care of the school officials who have an obligation to provide for the health and safety of the students.<sup>138</sup> But the dissent believed that such an obligation did not justify the testing in this case, for "[t]hose risks . . . are present for *all* schoolchildren."<sup>139</sup> According to the dissent, what set *Vernonia* apart from *Earls* was the particular nature of athletics:

Schools regulate school athletes discretely because competitive school sports by their nature require communal undress and, more important, expose students to physical risks that schools have a duty to mitigate . . . Interscholastic athletes . . . require close safety and health regulation; a school's choir, band, and academic team do not.<sup>140</sup>

In the dissent's view, public school athletics and non-athletic activities do not fall on the same side of the "fact-specific balancing" test adopted

---

134. *Id.* (Ginsburg, J., dissenting). Justices O'Connor and Souter also filed a separate two-sentence dissent in which they re-iterated their objection to the holding in *Vernonia*, but pointed out that even accepting *Vernonia*'s precedent, Tecumseh's policy failed the balancing test articulated in *Earls*. *Id.* (O'Connor, J., dissenting).

135. *Id.* at 843 (Ginsburg, J., dissenting). Justice Ginsburg filed a separate concurrence in *Vernonia*, supporting the testing policy there: "I comprehend the Court's opinion as 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." *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 666 (1995) (Ginsburg, J., concurring).

136. *Earls*, 536 U.S. at 845-46 (Ginsburg, J., dissenting).

137. *Id.* at 845 (Ginsburg, J., dissenting).

138. *Id.* at 844 (Ginsburg, J., dissenting).

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

140. *Id.* at 846 (Ginsburg, J., dissenting). The dissent compared sports to certain industries that are closely regulated because, by their very nature, they "require substantial government oversight." *Id.* See, e.g., *United States v. Biswell*, 406 U.S. 311, 316-17 (1972) (upholding law enforcement's right to conduct warrantless, suspicionless inspections of pawn shop's gun store room).



in *Vernonia*.<sup>141</sup> First of all, the nature of the privacy interests held by students in non-athletic activities remain high compared to their athletic counterparts.<sup>142</sup> While sports routinely require communal undress, showering, and overnight trips, activities such as band and choir only occasionally involve overnight trips.<sup>143</sup> Communal undress is limited as often students come to school already dressed in their uniforms or can change in public restrooms, which afford more privacy than the average high school locker room.<sup>144</sup>

The dissent maintained that the character of the intrusion was only superficially considered by the majority.<sup>145</sup> Although the majority was unconcerned with the claims that the choir teacher was careless with where she kept a list of students' confidential prescription medication, the dissent believed a factual basis for such claims should have been made rather than the Court simply "assum[ing] that the confidentiality provisions will be honored."<sup>146</sup> In the dissent's view, the Court did not have enough information to declare the policy's intrusion negligible.<sup>147</sup>

The bulk of the dissent was concerned with the final factor of the fact-specific balancing test: The nature and immediacy of the government's concern and the efficacy of the policy in meeting those concerns.<sup>148</sup> With respect to the nature and immediacy of the school district's concerns, the dissent distinguished the situation that justified the testing of athletes in *Vernonia* from the situation in *Earls*, pointing out the policy in *Vernonia* came about in response to widespread drug use in the school and, more particularly, the role of athletes as the leaders of the drug culture.<sup>149</sup> In contrast, Tecumseh schools, by their own words, stated in a 1998-1999 grant application that "types of drugs other than alcohol and tobacco including controlled dangerous substances, are present in the schools but have not identified

---

141. *Earls*, 536 U.S. at 846-47 (Ginsburg, J., dissenting).

142. *Id.* at 847-48 (Ginsburg, J., dissenting).

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

144. *Id.* at 848 (Ginsburg, J., dissenting). The dissent also mentioned the choir teacher's testimony that some creative students had found ways to change into their choir uniforms on the bus without anyone else seeing them undressed, as opposed to the athletic locker rooms with showers lined up along a wall with no privacy separators and some bathroom toilet stalls that did not have doors. *Id.* at 848 n.1 (Ginsburg, J., dissenting).

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

146. *Id.* at 849 (Ginsburg, J., dissenting) ("At [the summary judgment stage], doubtful matters should not have been resolved in favor of the judgment seeker.").

147. *Id.* (Ginsburg, J., dissenting). Justice Ginsburg focused her analysis in the dissent on the apparent breaches of the confidentiality provisions of the policy. *Id.* (Ginsburg, J., dissenting). The dissent did not examine the actual urine collection procedure other than to mention its similarity to *Vernonia*'s. *Id.* (Ginsburg, J., dissenting).

148. *Id.* at 849-53 (Ginsburg, J., dissenting).

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

themselves as major problems at this time.”<sup>150</sup> Without an identified, major problem, the need for such a policy is “greatly diminished.”<sup>151</sup>

The dissent also had a problem with the “tailoring” of the policy.<sup>152</sup> While in *Vernonia* the policy was directed at the source of the problem, the dissent viewed the Tecumseh policy as “indiscriminately” targeting students.<sup>153</sup> The dissent did not equate the physical risks drugs posed to athletes to the physical risks the Future Homemakers of America or band members face while using drugs.<sup>154</sup> Furthermore, the dissent cited studies which indicate students involved in extracurricular activities are “significantly less likely to develop substance abuse problems.”<sup>155</sup> The dissent likened the situation in *Earls* to that in *Chandler v. Miller* in which the Court struck down a Georgia law requiring drug testing of candidates for office: “Georgia’s testing prescription, the record showed, responded to no ‘concrete danger,’ was supported by no evidence of a particular problem, and targeted a group not involved in ‘high risk, safety-sensitive tasks.’”<sup>156</sup> Additionally, the dissent expressed concern at the possibility that students would avoid participating in activities because of their drug use and miss out on the positive peer influence that may in fact reduce or eliminate their drug use.<sup>157</sup> The dissent concluded with a commentary on what such a policy was teaching the students of Tecumseh:

It is a sad irony that the petitioning School District seeks to justify its edict here by trumpeting the school’s custodial and tutelary responsibility for children. In regulating an athletic program or endeavoring to combat an exploding drug epidemic, a school’s custodial obligations may permit searches that would otherwise unacceptably abridge students’ rights. When custodial duties are not ascendant, however, schools’ tutelary obligations to their students re-

---

150. *Id.* at 849-50 (Ginsburg, J., dissenting).

151. *Id.* at 850 (Ginsburg, J., dissenting) (quoting *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1277 (10th Cir. 2001)). The dissent seemed less deferential than the majority when it came to the district’s ability to evaluate the need for such a drug testing policy. *Id.* at 849-50 (Ginsburg, J., dissenting). In the dissent’s view, the stories of drug abuse relied on by the majority were anecdotal at best and not indicative of a widespread drug abuse problem at Tecumseh schools, as further evidenced by the district’s own words in its grant applications. *Id.* (Ginsburg, J., dissenting).

152. *Id.* at 851-52 (Ginsburg, J., dissenting).

153. *Id.* at 851 (Ginsburg, J., dissenting).

154. *Id.* at 851-52 (Ginsburg, J., dissenting) (“Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas disturbing the peace and quiet of Tecumseh, the great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree.”).

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

156. *Id.* at 854 (Ginsburg, J., dissenting) (citations omitted) (quoting *Chandler v. Miller*, 520 U.S. 305, 319, 321-22 (1997)).

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

quire them to teach by example by avoiding symbolic measures that diminish constitutional protections.<sup>158</sup>

#### ANALYSIS

Both Justice Thomas's majority opinion and Justice Ginsburg's dissent applied the same "fact-specific balancing test," but each came up with a different result.<sup>159</sup> A close analysis of the majority opinion reveals several key shortcomings of the opinion, namely with respect to the third factor.<sup>160</sup> The majority failed to account for the apparent lack of a drug abuse problem at Tecumseh schools and how a special need exists in the absence of specific facts which point to that need.<sup>161</sup> And even if one were to accept the majority's high level of deference to the school district in identifying a drug abuse problem, the efficacy of this policy in addressing that concern is questionable.<sup>162</sup> Additionally, the majority's analysis of the first two factors leaves even more concerns unaddressed. In short, this opinion may make the Court's position on random drug testing of students in extracurricular activities clear, but in the process, it takes public schools down an uncertain path, possibly toward the testing of all public school students.<sup>163</sup>

#### *Expectations of Privacy in Public Schools*

---

158. *Id.* at 855 (Ginsburg, J., dissenting) (internal quotations and citations omitted).

159. *Id.* at 830, 846-47 (Ginsburg, J., dissenting). See George M. Deary III, *Are Politicians More Deserving of Privacy than Schoolchildren? How Chandler v. Miller Exposed the Absurdities of Fourth Amendment "Special Needs" Balancing*, 20 ARIZ. L. REV. 73 (1998). In criticizing the incongruous results obtained in *Chandler* and *Vernonia*, Professor Deary suggests the flaw may rest with the balancing test itself:

The special needs balancing analysis is not truly an analysis at all. It merely demonstrates whether or not as few as five members of the Court value a particular government action. *Chandler* exemplifies this judicial whimsy; as easily as Justice Ginsburg determined that the balance of interests favored the individual, the special needs test would have allowed her to reach the exact opposite conclusion.

*Id.* at 88.

160. See Meg Penrose, *Shedding Rights, Shredding Rights: A Critical Examination of Students' Privacy Rights and the "Special Needs" Doctrine After Earls*, 3 NEV. L.J. 411, 412 (2003) ("Likewise, Earls breaks with precedent in the special needs area by allowing the global problem of drug use generally to provide ample basis for suspicionless drug testing of an identifiable group: elementary and secondary public school students.").

161. The majority said a demonstrated problem of drug abuse in Tecumseh is not necessary. *Earls*, 536 U.S. at 835.

162. For a discussion of the effectiveness of these policies, see *infra* notes 234-38 and accompanying text.

163. Professor Irene Merker Rosenberg predicts "[t]he reach of Earls will undoubtedly soon be determined. After *T.L.O.*, *Acton*, and *Earls*, I have no doubt that there is some school administrator somewhere who will decide to require all students to undergo urinalysis as a condition of school attendance." Irene Merker Rosenberg, *The Public Schools Have a "Special Need" for Their Students' Urine*, 31 HOFSTRA L. REV. 303, 321 (2002).

In exploring the first factor of the “fact-specific balancing” test, the majority in *Earls* suggested that even if non-athletic students have a “stronger expectation of privacy than the athletes tested in *Vernonia*” the nature of the privacy interest rests on “the school’s custodial responsibility and authority,” not on the nature of the activities themselves.<sup>164</sup> In effect, the majority suggested that students in extracurricular activities have a diminished expectation of privacy because the school has a responsibility to look after the health and well-being of the students under their supervision.<sup>165</sup> Justice Thomas pointed to compulsory vaccinations and physical examinations which are required in most public schools.<sup>166</sup> However, this seems to be a change from the Court’s analysis in *Vernonia*, in which the Court justified the policy in large part on student athletes’ diminished privacy expectations, which are the direct result of the nature of athletics.<sup>167</sup> The *Earls* majority, therefore, seems to have ignored a major part of the *Vernonia* holding.<sup>168</sup> Citing pre-season physicals, insurance requirements, and the rules of conduct, dress, and training hours, the *Vernonia* Court compared athletes to adults “who chose to participate in a closely regulated industry.”<sup>169</sup> The *Vernonia* Court also stated that students “who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy.”<sup>170</sup>

Although the majority in *Earls* stated the nature of extracurricular activities is not the basis for a student’s diminished privacy expectations, Justice Thomas nonetheless went on to point out students in extracurricular competitive activities, whether athletes or not, do share a common diminished privacy expectation.<sup>171</sup> Given that the Court generally does not indulge in extraneous dictum, Thomas’s detour into an area he says is not even a factor in *Earls* is telling.<sup>172</sup> Perhaps Justice Thomas felt compelled to address

---

164. *Earls*, 536 U.S. at 831 (“Securing order in the school environment sometimes requires that students be subjected to greater controls than those appropriate for adults.”).

165. *Id.* at 830-31 (“A student’s privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease.”).

166. *Id.*

167. The *Vernonia* Court emphasized that “it must not be lost sight of that this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.” *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 662 (1995).

168. See *Penrose*, *supra* note 160, at 441 (“Realizing that the Supreme Court cannot issue advisory opinions and generally tries to steer clear of excessive dicta, it seems anomalous that Justice Scalia would have been so careless with his language in the *Vernonia* opinion.”).

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

170. *Id.*

171. *Earls*, 536 U.S. at 831-32. Specifically, students in activities are subject to additional rules, travel off-campus, and undress communally. *Id.* at 832.

172. See *Penrose*, *supra* note 160, at 441 (suggesting that the Court does not often resort to “excessive dicta”).

Justice Ginsburg's dissent.<sup>173</sup> This may also have been an attempt to acknowledge a substantial part of *Vernonia*'s rationale, which the *Earls* majority nonetheless disregarded.<sup>174</sup>

In *Vernonia*, and even in *Earls*, the Court tried to distinguish between the privacy expectations of athletes and non-athletes. However, even this analysis is flawed, as all students have virtually the same privacy expectations, athletes or not. As the majority pointed out, all students are subject to routine health screenings and vaccinations, which are performed under the school's custodial responsibility and authority.<sup>175</sup> However, the Court in *Vernonia* and *Earls* failed to fully explore the privacy expectations of all students. No opinion addressed the existence of required physical education classes in public schools, which also involves communal undress and showering, often in the same locker rooms used by athletes.<sup>176</sup> And unlike athletics, physical education is still required in most states.<sup>177</sup> Similarly, overnight trips are not confined to athletes and competitive non-athletic groups.<sup>178</sup> Non-competitive, non-athletic groups also make overnight trips, sharing hotel rooms.<sup>179</sup> As the United States Court of Appeals for the Tenth Circuit stated, "We doubt that the Court intends that the level of privacy expectation depends upon the degree to which particular students, or groups of students, dress or shower together, or on occasion, share sleeping or bathroom facilities while on occasional out-of-town trips."<sup>180</sup>

The *Vernonia* Court did identify one aspect of athletics which truly does distinguish athletics from most non-athletic activities: the risk of injury due to drug use.<sup>181</sup> Competitive extracurricular athletics involves a level of physicality the regular student does not encounter, even in physical education classes.<sup>182</sup> The particular risks athletes face in sports was a major focus

---

173. *Earls*, 536 U.S. at 847-48 (Ginsburg, J., dissenting) ("[O]ccasional out-of-town trips [where] students like Lindsay Earls must sleep together in communal settings and use communal bathrooms . . . are hardly equivalent to the routine communal undress associated with athletics.").

174. Interview with Jerry Parkinson, Dean, University of Wyoming College of Law, in Laramie, Wyo. (Oct. 2, 2003).

175. *Earls*, 536 U.S. at 830-31.

176. *But cf.* *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1104 (Colo. 1998) (rejecting the contention that students in P.E. had the same diminished expectations of privacy as athletes, pointing out that in Colorado P.E. was only required for one year and showering, although recommended, was optional).

177. See Garth Thomas, Comment, *Random Suspicionless Drug Testing: Are Students No Longer Afforded Fourth Amendment Protections?*, 46 N.Y.L. SCH. L. REV. 821, 846-47 (2002) (pointing out physical education requirements in many states are mandatory).

178. *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1277 (10th Cir. 2001).

179. *Id.*

180. *Id.* at 1275.

181. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 662 (1995).

182. Students on the football field face greater risks than students in marching band. See *Earls*, 536 U.S. at 851-52 (Ginsburg, J., dissenting).

of the opinion in *Vernonia*.<sup>183</sup> It is here that a significant part of the “special need” is created.<sup>184</sup> Schools have a custodial responsibility to protect athletes from the risks associated with drug use—risks posed to those who use drugs themselves or to those whose teammates or competitors are using drugs.<sup>185</sup> The Court in *Earls* could not identify a similar special risk for non-athletic activities, so it instead cited the general custodial duty of the school as the sole basis for diminished privacy expectations, which departs from the holding in *Vernonia*.<sup>186</sup>

### *Nature of the Invasion*

The second prong of the fact-specific balancing test gave both the majority and minority in *Earls* the least amount of trouble. Justice Ginsburg’s dissent did not even address the procedure for collecting the urine samples, but instead focused on how the results were handled.<sup>187</sup> Only Justice Breyer seemed hesitant to accept the majority’s characterization of the intrusion as minimal.<sup>188</sup> But in the end he deferred to the school district in determining whether a policy was intrusive.<sup>189</sup> Much of the majority’s analysis with respect to the nature of the intrusion focused on how the policy minimized the invasion by allowing students to produce samples behind closed stalls while same-sex faculty monitors waited outside, listening to ensure sample integrity.<sup>190</sup>

According to one commentator, this brief analysis with respect to the nature of the invasion marginalizes the invasion brought upon students by the policy:

The unfortunate consequence of this finding is that it completely minimizes the horrors of adolescence—the time when male junior high students begin growing pubic hair and become self-conscious of their genitalia and the new and, often, uncomfortable bodily responses that accompany puberty. Likewise, junior high is often the time when female students begin menstruating. Imagine the humiliation and embarrassment of a menstruating junior high student required to provide school officials with a urine sample that will possibly reveal that she is taking birth control pills, is HIV positive, is on medication for depression, or perhaps

---

183. *Vernonia*, 515 U.S. at 662.

184. *Earls*, 536 U.S. at 851 (Ginsburg, J., dissenting) (“We have since confirmed that these special risks [faced by athletes] were necessary to our decision in *Vernonia*.”).

185. *See, e.g., Vernonia*, 515 U.S. at 662.

186. *Earls*, 536 U.S. at 831.

187. *Id.* at 848–49 (Ginsburg, J., dissenting).

188. *Id.* at 841 (Breyer, J., concurring).

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

190. *Id.* at 832.

suffers from a sexually transmitted disease. To assert that providing a urine sample during these formative and agonizing years presents only a "negligible" privacy violation denies the very real fact of adolescence—every little act or action is generally amplified and overwhelming. It is disingenuous to suggest that taking a state-compelled urine sample from an adolescent does not invoke the most intimate of privacy interests.<sup>191</sup>

The Court also failed to acknowledge the context of urine collection. In previous drug testing cases, the Court upheld a drug testing policy which involved collection done by a doctor or medical personnel.<sup>192</sup> Here, the Court upheld a testing procedure where students provided a sample in the presence of a teacher or a coach, in a public restroom—not a doctor's office.<sup>193</sup> In addition to listening to the students urinate, faculty monitors also checked the sample for tampering, correct temperature, and possibly wiped away any spillage.<sup>194</sup> The procedure is not as tidy as perhaps the *Earls* Court depicted. Additionally, "the Court fails to adequately grasp the significance for children of urinating in public before a teacher or coach."<sup>195</sup> Although not mentioned in *Earls*, it has been suggested that producing a urine sample in front of a coach or teacher "transformed what might otherwise be friendly, trusting, and caring relations . . . into untrusting and confrontational relations."<sup>196</sup>

The Court's rationale also suggested that because students have a diminished expectation of privacy, it is only a negligible intrusion on that privacy by demanding students provide a urine sample.<sup>197</sup> In *Trinidad School District No. 1 v. Lopez*, the Colorado Supreme Court found the process by which a drug test is administered was nothing like normal school routines.<sup>198</sup> The court pointed out that a student usually "urinates simply because the body requires it, not because a school district insists that the student provide a urine sample on demand in order for the school district to search it for the presence of drugs."<sup>199</sup> In *Trinidad*, the court referred to a student who after trying as many as seven times to produce a sample after school for a number of days was still unable to produce a sample out of embarrassment.<sup>200</sup> In *National Treasury Employees Union v. Von Raab*, Justice

---

191. See Penrose, *supra* note 160, at 435.

192. See, e.g., *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 661 (1989) (testing done by an independent contractor in a medical setting).

193. *Earls*, 536 U.S. at 832.

194. *Id.*

195. Penrose, *supra* note 160, at 441.

196. *Univ. of Colorado v. Derdeyn*, 863 P.2d 929, 941 (Colo. 1993).

197. *Earls*, 536 U.S. at 833.

198. *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1108 (Colo. 1998).

199. *Id.*

200. *Id.* at 1100.

Scalia characterized urinalysis as a “kind of immolation of privacy and human dignity in symbolic opposition to drug use.”<sup>201</sup> Lindsay Earls herself indicated that she objected to this policy mainly because “[she] thought that the drug testing was such an invasion of [her] privacy as an American citizen [and she] didn’t feel like [she] should have to prove to [her] school that [she] wasn’t using drugs.”<sup>202</sup> Clearly, the nature of the invasion involved more than the majority in *Earls* suggested.

*Efficacy of Policy—Is the Special Need Even Being Addressed?*

The third factor of the fact-specific balancing test required the Court to “consider the nature and immediacy of the government’s concerns and the efficacy of the Policy in meeting them.”<sup>203</sup> The Court began its analysis with a brief synopsis of the nationwide campaign against drug use by children, sometimes referred to as the “War on Drugs.”<sup>204</sup> Citing statistics of worsening drug use nationwide, the Court noted that “the nationwide drug epidemic makes the war against drugs a pressing concern in every school.”<sup>205</sup> On the local level, the Court cited specific instances of drug abuse at Tecumseh schools.<sup>206</sup> Of course, none of the instances cited by the majority as evidence of drug use in Tecumseh pointed to a widespread, epidemic of drug use as much as they indicated isolated incidents of drug use among a few students.<sup>207</sup> Furthermore, the majority’s comment that a specific identifiable drug use problem is not necessary, but merely shores up the special need for a suspicionless general search program is a departure from its holding in *Vernonia*.<sup>208</sup> In *Vernonia*, the Court also referenced the nationwide concern in curbing drug use, calling it important if not compelling.<sup>209</sup> However, the *Vernonia* Court found the immediacy of the concerns in the findings that the school was “in a state of rebellion,” as athletes were at the center of the drug abuse and related discipline problems.<sup>210</sup> To support its holding in *Earls*, the Court cited two other non-school cases in which it upheld random suspi-

---

201. *Nat’l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting).

202. *Connie Chung Tonight* (CNN Television Broadcast, June 27, 2002).

203. *Bd. of Educ. v. Earls*, 536 U.S. 822, 834 (2002).

204. *Id.* The “War on Drugs,” although often associated with the Reagan administration’s “Just Say No” campaign, has its origins in the Nixon administration. On June 17, 1971, by executive order, Nixon created the Special Action Office for Drug Abuse Prevention to “mobilize and concentrate the comprehensive resources of the Federal Government in an all out campaign to meet this threat.” Exec. Order No. 11,599, 36 Fed. Reg. 11,793 (June 17, 1971).

205. *Earls*, 536 U.S. at 834 n.5.

206. *Id.* at 834-35.

207. *Id.* at 849-50 (Ginsburg, J., dissenting).

208. *Id.* at 835.

209. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661-62.

210. *Id.* at 662-63.



tionless drug testing absent specific identifiable drug problems.<sup>211</sup> In *Von Raab*, the Court upheld drug testing of U.S. Customs employees absent a specific showing of a drug problem when the agents were often involved in intercepting illegal drugs as part of their job.<sup>212</sup> In *Skinner*, the Court was similarly concerned with the “disastrous consequences” that could result from a railway employee’s drug use.<sup>213</sup> Similarly, the *Vernonia* Court pointed out that “the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high.”<sup>214</sup>

However, the *Earls* Court cited no similar immediacy and did not identify “enormous risks to the lives and limbs of others” faced by participants in non-athletic extracurricular activities.<sup>215</sup> In *Earls*, participants in non-athletic extracurricular activities were not accused of being at the center of the drug culture as were the student athletes in *Vernonia*.<sup>216</sup> While the nature of the government’s concerns is undeniable in light of the nationwide drug use issue, with respect to Tecumseh schools, the nature and immediacy of that concern takes on diminished proportions absent a serious drug abuse problem among the students being tested.<sup>217</sup> If anything, *Earls* resembles *Chandler* more than *Von Raab* and *Skinner*.<sup>218</sup> In *Chandler*, Justice Ginsburg, writing for the majority, struck down a drug testing requirement for state political candidates, noting “no evidence of a drug problem among the State’s elected officials, [and] those officials typically do not perform high-risk, safety-sensitive tasks.”<sup>219</sup>

The Court’s reluctance to examine Tecumseh’s drug problem—or lack thereof—in detail may be due to several considerations. First, the majority is reluctant to articulate a threshold level of drug use that would satisfy the immediacy requirement.<sup>220</sup> Doing so would possibly create many practi-

---

211. *Earls*, 536 U.S. at 835-36 (citing *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 673-74 (1989); *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 607 (1989)).

212. *Von Raab*, 489 U.S. at 674.

213. *Skinner*, 489 U.S. at 628.

214. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 662 (1995).

215. *See Earls*, 536 U.S. at 850-51 (Ginsburg, J., dissenting). Justice Ginsburg also pointed out that the risks outlined by the majority “are present for *all* schoolchildren.” *Id.* at 844 (Ginsburg, J., dissenting).

216. *Vernonia*, 515 U.S. at 662-63.

217. *See Earls*, 536 U.S. at 849 (Ginsburg, J., dissenting). *See also Earls v. Bd. of Educ.*, 242 F.3d 1264, 1278 (10th Cir. 2001) (“Special needs must rest on demonstrated realities.” (quoting *United Teachers of New Orleans v. Orleans Parish Sch. Bd.*, 142 F.3d 853, 857 (5th Cir. 1998))).

218. *See Chandler v. Miller*, 520 U.S. 305 (1997). Justice Ginsburg also likened *Earls* to *Chandler*. *Earls*, 536 U.S. at 854-55 (Ginsburg, J., dissenting).

219. *Chandler*, 520 U.S. at 321-22.

220. *Earls*, 536 U.S. at 836 (“As we cannot articulate a threshold level of drug use that would suffice to justify a drug testing program for schoolchildren, we refuse to fashion what would in effect be a constitutional quantum of drug use necessary to show a drug problem.”).

cal problems in applying such a rule, creating even more confusion for school districts and courts alike.<sup>221</sup> Challenges to school drug testing policies based on whether schools meet that threshold level would likely plague school districts, bogging them down in expensive litigation and crowding court dockets.<sup>222</sup>

In contrast to the legal quagmire that may arise out of establishing a threshold level of drug use, deferring to the school district poses fewer problems and is in the spirit of deferring to local school authorities.<sup>223</sup> Yet, it is also clear that deferring to the school district in determining the immediacy of the concern is problematic as well. In deciding to implement a drug policy, overreaction and politics may play a bigger role than the immediacy of the school's concerns.<sup>224</sup> These policies are often implemented because they sound like a good idea, look good to the community, and not because they are supported by research or any indication of effectiveness.<sup>225</sup> The case in *Earls* is a typical example. Despite the inability of the school board to present evidence of a drug problem, as evidenced by the isolated, conclusory incidents of drug use at Tecumseh schools, this policy was implemented.<sup>226</sup> The school officials themselves admitted that drug use was not a serious problem in Tecumseh.<sup>227</sup> The two substances the school repeatedly identified as being used most often by students—alcohol and tobacco—were not

---

221. To get an idea of the inconsistencies among lower courts in analyzing drug testing of students, compare the United States Tenth Circuit Court of Appeals decision striking down a drug testing policy in *Earls v. Bd. of Educ.*, 242 F.3d 1264 (10th Cir. 2001), with its counterparts in the Seventh and Eighth Circuits. Both *Todd v. Rush County Sch.*, 133 F.3d 984 (7th Cir. 1998), and *Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999), upheld drug testing policies similar to that in *Earls*. Similarly, courts would likely struggle with applying a rule that requires a threshold level as opposed to a rule that requires no threshold level of drug use.

222. See Paul Goodwin, *Student Drug Testing Since Vernonia: "Guidance Down the Slippery Slope,"* 38 WILLAMETTE L. REV. 579, 606 (2002) (calling the Tenth Circuit's threshold standard in *Earls* "confusing" and warning school districts in the Tenth Circuit to be ready for "lengthy litigation . . . despite the court's attempt to leave the drug problem determination to each school district").

223. See Ralph D. Mawdsley, *Random Drug Testing for Extracurricular Activities: Has the Supreme Court Opened Pandora's Box for Public Schools?*, 2003 B.Y.U. EDUC. & L.J. 587, 592 (2003) ("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.").

224. See, e.g., *Chandler v. Miller*, 520 U.S. 305, 321 (1997) ("By requiring candidates for public office to submit to drug testing, Georgia displays its commitment to the struggle against drug abuse.").

225. *Id.* at 321-22.

226. The evidence of drug use cited by the district involves only two incidents of drugs actually being found, one of which was associated with a non-athletic extracurricular participant. *Bd. of Educ. v. Earls*, 536 U.S. 822, 834-35 (2002).

227. *Id.* at 850 (Ginsburg, J. dissenting) ("Types of drugs other than controlled dangerous substances, are present in the schools but have not identified themselves as major problems at this time.") (citations and quotations omitted).

tested by the policy.<sup>228</sup> In effect, this policy tested for drugs not identified as a problem in the schools and did not test for the two most abused drugs.<sup>229</sup>

The second part of the third factor required the Court to examine the efficacy of the drug testing policy in meeting the concerns associated with student drug use.<sup>230</sup> Both the United States Court of Appeals for the Tenth Circuit and Justice Ginsburg's dissent focused on an obvious defect in this policy: It did not test the students most likely to do drugs.<sup>231</sup> Choir and the Future Homemakers of America were not known for being the leaders of the drug culture at Tecumseh High School, and they were probably the students least likely to do drugs in the entire school.<sup>232</sup> On the other hand, the students most likely to do drugs were not tested by the policy.<sup>233</sup>

Even more critical of the efficacy of this policy in curbing student drug use is an April 2003 study published in the *Journal of School Health* which indicates that drug testing policies like those in Tecumseh do not affect student drug use.<sup>234</sup> The crux of the study suggests that among students in eighth, tenth, and twelfth grades, "drug testing (of any kind) was not a significant predictor of student marijuana use in the past 12 months. Neither was drug testing for cause or suspicion."<sup>235</sup> Additionally, drug testing of male athletes, whether randomly or based on suspicion, did not seem to affect marijuana use by those athletes.<sup>236</sup> Similarly, when the researchers considered other illicit drugs, school drug testing policies appeared to have no effect on student drug use.<sup>237</sup> Basically, the study indicated that the difference in student drug use between schools which do test for drugs and schools which do not is insignificant.<sup>238</sup>

Additionally, the school district may inadvertently be contributing to an increased risk of drug use among certain students. Conscientious objectors may choose not to participate in extracurricular activities out of princi-

---

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

229. During the course of three semesters leading up to the District Court's ruling, three Tecumseh high school students tested positive for drugs. *Earls v. Bd. of Educ.*, 242 F.3d 1264, 1273 (10th Cir. 2001). All three were athletes. *Id.*

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

231. *Id.* at 853 (Ginsburg, J., dissenting) (citing N. ZILL ET AL., *ADOLESCENT TIME USE, RISKY BEHAVIOR, AND OUTCOMES* 52 (1995)).

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

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

234. Ryoko Yamaguchi et al., *Relationship Between Student Illicit Drug Use and School Drug Testing Policies*, 73 J. SCH. HEALTH 159 (2003).

235. *Id.* at 163.

236. *Id.*

237. *Id.*

238. *Id.* at 164. The influence of such a study seems unclear, as the New Jersey Supreme Court in *Joye v. Hunderton Central Regional High School Board of Education*, which specifically referenced this study, called the research in this area "relatively new," "not complete," and "yield[ing] mixed results." 826 A.2d 624, 648 (N.J. 2003).

ple. Shy, sensitive students may decline to join rather than endure the embarrassment of having to urinate while a teacher listens outside the stall.<sup>239</sup> Such students will go from being in a low-risk group to a high-risk group.<sup>240</sup> Additionally, students on the “bubble,” those who use drugs occasionally, are not always served by such a policy. They may choose to give up drugs in order to join a team, but they may also choose not to join for fear of being caught or because they would rather use drugs. This effectively limits the positive influence of non-drug using peers and certainly increases opportunity to continue using drugs.

Justice Ginsburg pointed out in her dissent that the drug testing policy was not well-tailored to suit the school’s objectives.<sup>241</sup> With respect to student safety, the activities being tested did not pose any greater risk to students in activities than to students as a whole.<sup>242</sup> The opinion of the United States Court of Appeals for the Tenth Circuit echoed Justice Ginsburg’s concern:

It is difficult to imagine how participants in vocal choir, or the academic team, or even the FHA are in physical danger if they compete in those activities while using drugs, any more than any student is at risk simply from using drugs. On the other hand, there are students who are not subject to the testing Policy but who engage in activities in connection with school, such as working with shop equipment or laboratories, which involve a measurable safety risk. Thus, safety cannot be the sole justification for testing all students in competitive extracurricular activities, because the Policy, from a safety perspective, tests both too many students and too few. In essence, it too often simply tests the wrong students.<sup>243</sup>

Similarly, the policy did not target all students who leave campus for travel or overnight trips.<sup>244</sup> Neither did the policy cover all students who were on school property before and after school, students who left campus during

---

239. Lindsay Earls herself reported of knowing several students who dropped out of extracurricular activities rather than facing the embarrassment of being tested. *Connie Chung Tonight* (CNN Television Broadcast, June 27, 2002).

240. See, e.g., J.A. Buckhalt et al., *Relationship of Drug Use to Involvement in School, Home, and Community Activities: Results of a Large Survey of Adolescents*, 70 PSYCH. REPORTS 139 (1992) (indicating the level of participation with positive peer groups, such as extracurricular activities, relates to reduced levels of drug use).

241. *Bd. of Educ. v. Earls*, 536 U.S. 822, 851 (2002) (Ginsburg, J., dissenting).

242. *Earls*, 536 U.S. at 852 (Ginsburg, J., dissenting) (“[T]he great majority of students the School District seeks to test in truth are engaged in activities that are not safety sensitive to an unusual degree.”).

243. *Earls v. Bd. of Educ.*, 242 F. 3d 1264, 1277 (10th Cir. 2001).

244. *Id.*

lunch or drove to school, or students in non-competitive clubs or intra-school activities—all of whom may be under less supervision.<sup>245</sup> The school cites the importance of the school's custodial duties in upholding the policy, but the policy was not tailored to cover students who are similarly situated.<sup>246</sup> The only distinction that sets students who were tested apart from those who were not tested was the inter-scholastic voluntary and competitive nature of the activities.<sup>247</sup>

*Earls' Impact on the Future of Drug Testing in Public Schools—Are All Students Next?*

Although the Supreme Court has put the constitutional stamp of approval on the Tecumseh School District's drug testing policy, many obstacles must still be overcome by a school seeking to implement a similar policy. The extent to which a policy can deviate from that upheld by the Court is unclear. For example, can the results be used for academic sanctions or for criminal prosecution? The Court seemed to hint that part of what made the Tecumseh policy acceptable was that it was not used for academic or criminal sanctions, pointing to both factors as tipping the balance in favor of the policy.<sup>248</sup>

Additionally, state constitutions and laws may expand the rights of students with respect to drug testing. Several cases have been brought under state constitutional claims. For example, the Pennsylvania Supreme Court struck down drug testing of students in *Theodore v. Delaware Valley School District*.<sup>249</sup> Students who participated in extracurricular activities and students who drove to school were subject to being tested under the policy.<sup>250</sup> The court held, "Absent a showing of special need or justification, [the drug testing policy] invades a student's privacy rights against unreasonable searches and seizures under Article 1, Section 8 of the Pennsylvania Consti-

---

245. *Id.*

246. As the United States Court of Appeals for the Tenth Circuit suggested, if the school is concerned with the health and safety of its students with regard to drug use "the logical solution is to test all students." *Id.* at 1277 n.12.

247. The dissent in *Earls* even questioned whether extracurricular activities are truly voluntary:

While extracurricular activities are 'voluntary' in the sense that they are not required for graduation, they are part of the school's educational program . . . . Participation in such activities is a key component of school life, essentially a reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience.

*Earls*, 536 U.S. at 845 (Ginsburg, J., dissenting).

248. *Id.* at 833.

249. *Theodore v. Delaware Valley Sch. Dist.*, 761 A.2d 652, 661 (Pa. 2000).

250. *Id.* at 653.

tution.”<sup>251</sup> In *Trinidad School District No. 1 v. Lopez*, the Colorado Supreme Court, in a pre-*Earls* decision, held a school district’s drug testing policy as it related to marching band was unconstitutional as to the Fourth Amendment.<sup>252</sup> However, the Court did not address the issue of whether such a policy violated the Colorado Constitution, finding such analysis unnecessary “because . . . the Policy violated the United States Constitution.”<sup>253</sup> Nevertheless, such an analysis, in light of *Earls*, may indeed become necessary in Colorado and other states.

Several state courts have upheld drug testing policies under their state constitutions. In Texas, the Court of Appeals for the Third District of Texas held that a school drug testing policy did not violate the Texas Constitution.<sup>254</sup> In *Joye v. Hunderton Central Regional High School Board of Education*, the New Jersey Supreme Court upheld a drug testing policy under the New Jersey Constitution: “[New Jersey state] law regarding searches within the public-school context generally has mirrored federal law, encapsulating similar if not identical concepts and concerns.”<sup>255</sup> Courts in Indiana and Oregon have arrived at similar holdings.<sup>256</sup>

Other hurdles exist as well. Local communities may not be as receptive to such a policy in their children’s schools and opposition could be vocal and fierce.<sup>257</sup> School board members may also oppose such policies and not all administrators and teachers support the idea of drug testing students.<sup>258</sup> However, “[i]t is also likely that parents will applaud the idea [of drug testing their children] because it shifts the burden of conflict between them and their children to the schools.”<sup>259</sup> Finally, drug testing can be expensive and time-consuming.<sup>260</sup> In an era of school budget crises, schools

---

251. *Id.* at 661.

252. *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095, 1097 (Colo. 1998).

253. *Id.* at 1097 n.5.

254. *Marble Falls Indep. Sch. Dist. v. Shell*, 2003 Tex. App. LEXIS 2845, at \*15-18 (Tex. App. 2003).

255. *Joye v. Hunderton Cent. Reg’l High Sch. Bd. of Educ.*, 826 A.2d 624, 648 (N.J. 2003).

256. *Linke v. N.W. Sch. Corp.*, 763 N.E.2d 972 (Ind. 2002) (holding that under the Indiana Constitution, testing participants in selected extracurricular activities and students who drove to school was constitutional); *Weber v. Oakridge Sch. Dist.* 76, 56 P.3d 504 (Or. Ct. App. 2002) (upholding testing of students in extracurricular activities under Oregon Constitution), *review denied*, 335 Or. 422 (Or. 2003).

257. See Cynthia Kelly Conlon, *Urineschool: A Study of the Impact of the Earls Decision on High School Random Drug Testing Policies*, J.L. & EDUC. 297, 308 (2003) (“One [principal] explained that parents were very protective of their children and worried about invasion of their privacy rights.”).

258. *Id.* at 309.

259. See Rosenber, *supra* note 163, at 321.

260. Laboratory urinalysis testing like that used in *Earls* and *Vernonia* for a “typical private sector small business (about 300 employees)” is on average \$52.00 per test, but testing can range from \$8.90 to \$87.00. DAVID G. EVANS, 1 DRUG TESTING LAW TECH. & PRAC. § 6:45 (2003).

may be less inclined to spend money on drug testing as opposed to educational materials. Many of these considerations may explain why nationwide, a small percentage of schools have drug testing policies.<sup>261</sup>

Few can deny the Court has moved closer to approving the testing of all students as its reasoning evolved from *T.L.O.* to *Vernonia* to *Earls*. Certainly, the legitimate expectations of privacy held by all students can be no more than students on the speech team or in band, especially since all students undergo some form of health screenings and have to submit to vaccinations in order to attend school.<sup>262</sup> Additionally, the nature of the invasion is minimal according to the Court.<sup>263</sup> Finally, the Court has acknowledged that the nature and immediacy of the government's concerns justify testing even when an identifiable drug problem is not present.<sup>264</sup> In short, drug testing the entire student body might just be another routine procedure, like scotiosis screenings, hearing checks, and MMR shots.<sup>265</sup>

However, this analysis is perhaps too tidy—leaving unaddressed some obvious problems. First, there is no room for conscientious objection, short of a student dropping out of school entirely or enrolling in a private school, both of which are not always financially practical.<sup>266</sup> While mandatory vaccination requirements often allow for religious or health exceptions, it is difficult to envision a drug testing policy offering similar exceptions for conscientious objectors.<sup>267</sup> The *Earls* Court seemed to indicate that the limited consequences of the Tecumseh policy made it acceptable.<sup>268</sup> Students who tested positive were only denied participation in extracurricular activities; they were not prosecuted or expelled.<sup>269</sup> However, if a school testing all students could not resort to either academic sanctions or criminal charges, it has little recourse against an uninvolved student not interesting in joining a team or other extracurricular activity. The school could require mandatory counseling, but even then, a student is still free to continue using drugs if the Court's *dicta* are read to mean schools cannot expel nor involve the police based on random suspicionless drug testing. Additionally, the *Vernonia*

---

261. In 1999, only 2.87% of schools tested athletes for drugs and only .57% tested other extracurricular activities. By 2001, the numbers had risen to 4.95% and 3.30% respectively. Yamaguchi, *supra* note 234, at 160.

262. Bd. of Educ. v. Earls, 536 U.S. 822, 830-31 (2002).

263. *Id.* at 834.

264. *Id.* at 835-37.

265. See Rosenberg, *supra* note 163, at 321 (suggesting it may only be a matter of time before a public school institutes a policy to test all students for drugs).

266. Part of Justice Breyer's concurrence expressed approval of the policy because it allowed for the conscientious objector. *Earls*, 536 U.S. at 841 (Breyer, J., concurring).

267. See, e.g., WYO. STAT. ANN. § 21-4-309 (Lexis 2003) (outlining requirements for vaccinations of students and procedure for exemptions); see also LePage v. Wyoming Dep't of Health, 18 P.3d 1177 (Wyo. 2001); Jones ex rel. Jones v. Wyoming Dep't of Health, 18 P.3d 1189 (Wyo. 2001).

268. *Earls*, 536 U.S. at 833.

269. *Id.*

Court "caution[ed] against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts."<sup>270</sup> With this in mind, there may be limits on how far a drug testing policy can go, and perhaps a policy testing all students just might be going too far.<sup>271</sup>

#### CONCLUSION

In *T.L.O.*, the Court boldly declared schools are not prisons:

Although this Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy. We have recently recognized that the need to maintain order in a prison is such that prisoners retain no legitimate expectations of privacy in their cells, but it goes almost without saying that the prisoner and the schoolchild stand in wholly different circumstances, separated by the harsh facts of criminal conviction and incarceration. We are not yet ready to hold that the schools and the prisons need be equated for purposes of the Fourth Amendment.<sup>272</sup>

In light of subsequent cases like *Vernonia* and *Earls*, the Court may no longer be able to make such a statement. Under *T.L.O.*, the Court dispensed with probable cause in school searches.<sup>273</sup> Under *Vernonia*, the Court dispensed with individualized suspicion.<sup>274</sup> Now, under *Earls*, the Court has effectively dispensed with a meaningful "special need," as heightened physical risks and an immediate drug problem among those being tested are no longer necessary.<sup>275</sup> In short, with respect to public schools, every significant provision in the Fourth Amendment has been abrogated by the nebulous "special needs" doctrine that now exists just because schools are responsible for their students, not because a real problem may exist or special risks may be present.<sup>276</sup> In Professor Rosenberg's view, "Notwithstanding their purported non-criminal objectives, our schools are becoming fortresses of police power without adequate constitutional controls, engaging

---

270. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 665 (1995).

271. Of course, based on the Court's holding in *Vernonia*, commentators were predicting the Court would strike down the testing policy in Tecumseh as it related to non-athletic groups. See, e.g., Nathan Roberts and Richard Fossey, *Random Drug Testing Students: Where Will the Line Be Drawn?*, 31 J.L. & EDUC. 191, 206 (2002) ("The weight of authority appears to be that the testing of student athletes may be the boundary.").

272. *New Jersey v. T.L.O.*, 469 U.S. 325, 338-39 (1985) (internal citations and quotations omitted).

273. *Id.* at 340.

274. *Vernonia Sch. Dist. No. 47J v. Acton*, 515 U.S. 646, 653 (1995).

275. *Bd. of Educ. v. Earls*, 536 U.S. 822, 831 (2002).

276. See *id.* at 831-32.



in drug testing, strip searches, dogs patrolling the halls and classrooms, and corporal punishment. Is there any time for education in them?"<sup>277</sup> Indeed, schools sound more like prisons than ever. Reasonableness is the touchstone of a valid constitutional search.<sup>278</sup> But in this case, testing students who are not using drugs, are not likely to start using drugs, and face no special risks due to the nature of their activities hardly seems reasonable. As Justice Ginsburg said, "The particular testing program upheld today is . . . capricious, even perverse."<sup>279</sup>

JACOB L. BROOKS

---

277. Rosenberg, *supra* note 163, at 322.

278. *Earls*, 536 U.S. at 828.

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