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Making Specimen Cups as Normal as Prom Night: The Implications of Board of Education v. Earls on Public Schools Across the Nation

Caroline Slater Burnette

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NOTES

MAKING SPECIMEN CUPS AS NORMAL AS PROM NIGHT¹:
THE IMPLICATIONS OF BOARD OF EDUCATION v. EARLS²
ON PUBLIC SCHOOLS ACROSS THE NATION³

I. INTRODUCTION

Imagine you are a sophomore in a small high school in Oklahoma.⁵ You are an honor student and a member of the Show

1. Walter Shapiro, Student Privacy Just a Specimen for Profit, Politics, USA TODAY, July 27, 2002, at 4A.
3. The author would like to thank Charlotte Noel Fox for her editing, grammar, and active voice skills.
4. Christopher Z. Campbell, Use of School Resource Officers, Address at the North Carolina Council of School Attorneys Summer Law Conference (July 26, 2002).
Choir, marching band, Academic Team and the National Honor Society.⁶ Pretty distinguished, right? Now imagine you are sitting in class and there's a knock on the door. The principal's assistant walks into your class, in front of your classmates and your teacher, and announces that you are to report to the school's gym immediately for your drug test.⁷ Horrified? Embarrassed? Appalled?

Let's add to your humiliation. As you go into a stall in the bathroom of the gym to submit your urine sample in a plastic vial, three faculty members, all of whom you know, listen outside the stall to make sure you do not "cheat."⁸ When you come out of the stall, you hand your urine sample to one of the faculty members and then watch as the faculty member holds the vial to the light and checks the temperature.⁹ Do you feel violated? Lindsay Earls did. In fact, she felt so violated she filed suit.¹⁰

The process Lindsay endured was part of the Tecumseh Oklahoma School District Student Activities Drug Policy adopted in 1998 in order to deter drug use among its students.¹¹ The Policy was a method of last resort. In the past, other programs the school implemented did not reduce drug use by students.¹² Drug use was an obvious problem in the school district; teachers observed students who appeared to be high and the community was well aware of the problem.¹³

The implemented Policy works as follows: students are required to consent to and take a drug test before participating in a competitive activity.¹⁴ The student also agrees to be tested randomly while participating in the activity, or at any time when there is reasonable suspicion the student may be using drugs.¹⁵ The first time a student tests positive for drugs, a meeting is held with the student, the student's parent or parents, the athletic director and the principal.¹⁶ The student may continue to participate in the competitive activity if she agrees to attend drug counseling and take another drug test within two

6. Respondents' Brief at 4, Earls (No. 01-332).
7. Respondents' Brief at 5, Earls (No. 01-332).
8. Id.
9. Id.
11. Earls, 122 S. Ct. at 2562.
12. Petitioners' Brief at 4, Earls (No. 01-332).
13. Earls, 122 S. Ct. at 2567. The School Board president testified that people in the community were calling the board to discuss the "drug situation."
14. Id. at 2563.
15. Id.
16. Petitioners' Brief at 8, Earls (No. 01-332).
weeks. If a student tests positive a second time within the school year, she may not participate in competitive activities for fourteen days. By agreeing to complete four hours of drug counseling and random tests for the remainder of the year, the student may be reinstated after the fourteen day suspension has expired. A student who tests positive for the third time is banned from all competitive activities for the remainder of the school year or the remainder of the semester of the school year, whichever is longer.

No disciplinary or academic sanctions are imposed for a positive drug test. The process is kept confidential. Moreover, within the Policy is an appeals process to the Superintendent, which allows the student to continue competing until the appeal is heard.

Lindsay Earls believed extracurricular activities were vital to her acceptance into a competitive university. She also knew there was only one way to protect her privacy—not participate in extracurricular activities. However, not participating was not a viable option for Lindsay because she knew non-participation would put her in danger of not being accepted at Dartmouth, her college of choice.

In response to the Policy and her growing concerns, Lindsay and another student, Daniel James, who wanted to participate on the Academic Team, brought an action against the school district under 42 U.S.C. §1983 alleging the Policy of random drug testing violated their Fourth Amendment right to privacy as incorporated to the States by the Fourteenth Amendment. In September 2001, following a grant of summary judgment for the school district in district court and a reversal of the district court’s decision by the Tenth Circuit, the United States Supreme Court granted certiorari. It was Lindsay Earls’ fRESH-

17. Id.
18. Id. at 9.
19. Id.
20. Id.
21. Id. at 8.
22. Id.
23. Id. at 9.
24. Respondents’ Brief at 6, Earls (No. 01-332).
25. Id. at 5.
26. Id. at 6. See also Dartmouth’s “First Year Admissions,” available at http://www.dartmouth.edu/-admissions/admissions/index.html. Various factors are considered for admission into Dartmouth varying from academics to family values to a sense of humor. “Significant” participation in extracurricular activities ranging from community service and debate to athletics and drama are also considered.
man year at Dartmouth. Unfortunately, Lindsay's plight to protect her and her fellow students' Fourth Amendment rights against unreasonable searches and seizures was dashed by the United States Supreme Court. The Court's decision serves as a warning to all students who attend our nation's public schools: the next step is random drug testing for all.

II. FOURTH AMENDMENT GUARANTEES IN THE SCHOOL CONTEXT: "SPECIAL NEEDS"

The Fourth Amendment of the United States Constitution guarantees citizens' privacy will not be unreasonably interfered with by providing: "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated. . ." The basic purpose of the Fourth Amendment is to guarantee the privacy and security of individuals against arbitrary invasions by the government.

Not all searches and seizures by the government are unconstitutional. The cornerstone of search and seizure review by the government is reasonableness. Reasonableness in a criminal context requires a warrant or probable cause. However, there are several situations where neither warrants nor probable cause are required, but the search is still considered reasonable. In New Jersey v. T.L.O., the United States Supreme Court extended the Fourth Amendment guarantee to searches and seizures conducted by school officials. However, the Court also determined that such searches and seizures by school officials do not need to be supported by a warrant or probable

31. U.S. CONST. amends. IV.
32. Earls, 122 S. Ct. at 2564.
33. Id.
34. Id.
35. Id.
36. See New Jersey v. T.L.O., 469 U.S. 325 (1985). A student's purse was searched by the principal based on the belief the student possessed cigarettes. The search revealed the student was in possession of marijuana and paraphernalia. In a motion to suppress the evidence in her purse at her delinquency adjudication, the student argued the search violated her Fourth Amendment right to be free of unreasonable searches and seizures.
37. Id. at 336-37.
cause because special needs exist in public schools. The court explained warrant or probable cause requirements would "unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed" in schools. Pursuant to this line of reasoning, individualized suspicion may not be necessary in order to conduct school drug testing, due to the fact that "the reasonableness inquiry cannot disregard the schools' custodial and tutelary responsibility for children."

III. **VERNONIA: THE REASONABLENESS TEST POSITED**

The first case to challenge the constitutionality of suspicionless drug testing in school was *Vernonia School District 47J v. Acton*. The *Vernonia* school board enacted a random, suspicionless drug testing policy for athletes in response to a rampant drug culture in the schools, after it was discovered the athletes were the ring leaders. The drug problem had caused increased disciplinary problems in the school, and the involvement of athletes troubled administrators from a safety standpoint.

The Court's decision heavily favored the school system, keeping close to the notion that schools are responsible for the children they teach. Justice Scalia, writing for the majority stated, "[c]entral, in our view...is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the state as schoolmaster." In order to balance students' interests with the "spe-
cial needs" of the school system, the Court expounded a reasonableness balancing test.\footnote{Id. at 664.}

The first factor to be considered is the nature of the privacy interest intruded upon by the search.\footnote{Id. at 654.} The privacy interests intruded upon must be interests society recognizes as legitimate.\footnote{Id.} The second factor to be balanced is the character of the intrusion.\footnote{Id. at 658.} This factor inquires into the process of the drug test itself and the ramifications of the test on the student.\footnote{Id. at 660.} The third factor considers the nature and immediacy of the governmental concern along with the efficacy of the means chosen to meet that concern.\footnote{Id. at 660.}

In considering the nature of the student’s privacy interest, the Supreme Court recognized a student athlete’s privacy interest is less than that of a student who does not participate in athletics.\footnote{Id. at 658.} Athletes who choose to go out for the team are subjected to greater regulation than the average "Joe" who simply attends school.\footnote{Id. at 657.} Moreover, inherent in athletics is the tradition of “communal undress”\footnote{Id.} where students must shower and dress together with no partitions between them.\footnote{Id.} In the words of Justice Scalia, “[s]chool sports are not for the bashful.”\footnote{Id. at 657.}

In the Court’s eyes, the degree of intrusion to which the drug testing subjected athletes was “negligible,” and therefore, insignificant.\footnote{Id. at 660.} The collecting of urine samples was performed under normal conditions.\footnote{Id. at 657.} Moreover, since the drug test only screened the urine for illicit drugs and because the entire process was confidential, the intrusion was not enough to tip the Supreme Court’s balancing scales in favor of the students.\footnote{Id. at 660.}

Finally, in considering the nature and immediacy of the concern, the Supreme Court emphasized the high rate of drug use among the

\begin{itemize}
  \item \footnote{Id. at 664.
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\end{itemize}

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nation's school children and the school's interest in curbing and deter-
rming drug use. The policy met those concerns head-on according to
the Court because the targeted students—the athletes—led the drug
culture in the school.

The Vernonia case relied upon a very well-developed fact pattern. It
demonstrated the existence of a very specific drug problem among a
very narrow group—athletes. In making its decision the Supreme
Court held fast to those facts, stressing that the decision applied only
to student athletes. However, the Vernonia decision quickly became
the cornerstone for expanding school board policy throughout the
nation.

A. The Vernonia Progeny: School Boards Extend Vernonia to
Extracurricular Activities

Since the Vernonia decision, school districts throughout the
nation have relied on the Supreme Court's balancing factors to
develop and support drug testing programs, not just for student ath-
letes but for students involved in other extracurricular activities as
well. Because the decision in Vernonia only applied to student ath-
letes, it was unclear whether the decision extended to students who
participated in non-athletic extracurricular activities. Thus, courts
have reached different conclusions when faced with the issue of
whether suspicionless drug testing violates the privacy of a student
who participates in extracurricular activities. Inherent in subse-

61. Id. at 661. The Court noted that school years are the time when the
psychological, physical and addictive effects of drug use are most severe. The Court
also noted that the effects of drugs filter into the school system, disrupting the
educational process and disturbing the school's function of being responsible for
children.

62. Id.

63. Letter from Richard A. Schwartz, Attorney, Schwartz & Shaw, P.L.L.C., to
Susan McHugh, Superintendent, Polk County Schools 2 (February 11, 2002) (on file
with author).

64. Vernonia, 515 U.S. at 646.

65. Letter from Richard A. Schwarz, Attorney, Schwartz & Shaw, P.L.L.C., to Susan
McHugh, Superintendent, Polk County Schools 2 (February 11, 2002) (on file with
author).

66. Id.

67. Id.

68. See Neal H. Hutchens, Comment, Suspicionless Drug Testing: The Tuition for
Attending Public School?, 53 Ala. L. Rev. 1265 (2002); Letter from Richard A.
Schwartz, Attorney, Schwartz & Shaw, P.L.L.C., to Susan McHugh, Superintendent,
Polk County Schools 2 (February 11, 2002) (on file with author); Tamara A. Dugan,
Note, Putting the Glee Club to the Test: Reconsidering Mandatory Suspicionless Drug
quent courts' differing conclusions is the uncertainty about amount of emphasis each of the factors expounded by the Vernonia Court should receive.

B. Student Privacy and Evidence of a Drug Problem: Balancing the Scales

Because the fact pattern in Vernonia was so specific and the drug threat so immediate, courts dealing with the constitutionality of drug testing policies applied to students who participate in non-athletic extracurricular activities had very different ideas on the weight to be given to each factor. Must the school demonstrate an immediate, viable drug threat before they can constitutionally implement a random, suspicionless drug testing policy, or do statistics that show an increasing drug problem in our schools generally suffice the compelling interest for the school district? Does a student's voluntary participation in an activity that does not entail any communal dressing or intimate situation automatically lessen the student's expectation of privacy? Does the fact the student is held to higher standards of regulation lessen the student's expectation of privacy to the level of an athlete?

In decisions upholding drug testing policies, both the Seventh and the Eighth Circuit agreed that students who participate in extracurricular activities enjoy a lesser expectation of privacy than those students who do not participate.69 Both courts stressed the voluntary nature of competitive non-athletic extracurricular activities and the fact that stu-

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69. See Joy, 212 F.3d at 1063. The Seventh Circuit concluded that there were three tiers of privacy interest. Students who do not participate in any type of extracurricular activity enjoy the greatest amount of privacy while students who participate in athletics enjoy the least amount of privacy. Students who participate in extracurricular activities other than athletics fall in the middle of the spectrum. See also Miller, 172 F.3d at 579, where the Eighth Circuit stated because students who participate in extracurricular activities subject themselves to higher regulation than other students, they have a lesser expectation of privacy.
dents who do participate in extracurricular activities hold themselves out to stricter rules and regulations.\textsuperscript{70}

On the other side of the coin, the Supreme Court of Colorado and the Northern District of Texas found student drug testing policies to be unconstitutional, concluding students who participate in athletics have a lesser expectation of privacy than all other students.\textsuperscript{71} The Northern District of Texas asserted the only distinction needed to be made for drug testing policies was the distinction between those students who participate in athletics and those who do not.\textsuperscript{72} The communal dress and public showering aspects of athletics tips the privacy scales in favor of students who do not participate in athletics, including those students who participate in other competitive extracurricular activities.\textsuperscript{73} Along the same rationale, the Supreme Court of Colorado in \textit{Trinidad} also concluded that students who participate in athletics have a lesser expectation of privacy than other students stating, "one could hardly argue that the marching band is 'not for the bashful.'"\textsuperscript{74}

The immediacy of the school's interest also played a role in these courts' decisions. Since the drug problem in \textit{Vernonia} was demonstrable and of epidemic proportions,\textsuperscript{75} courts struggled with the issue of how evident the drug problem in the school had to be before the school could take action.\textsuperscript{76} The lack of a demonstrable, immediate drug epidemic led the Northern District of Texas in \textit{Tannahill} to conclude that the school district failed to demonstrate a compelling state interest.\textsuperscript{77} However, the Eighth Circuit in \textit{Miller} placed its emphasis on the substance abuse problem in public school and the need to maintain order in the classroom to justify the school district's interest to enact a drug policy.\textsuperscript{78} The court stated, "[w]e see no reason that a school district should be compelled to wait until there is a demonstrable problem with substance abuse among its own students before the

\textsuperscript{70.} Joy, 212 F.3d at 1063; Miller, 172 F.3d at 579.
\textsuperscript{71.} Trinidad, 963 P.2d at 1107; Tannahill, 133 F. Supp. 2d at 929.
\textsuperscript{72.} Tannahill, 133 F. Supp. 2d at 929.
\textsuperscript{73.} Id.
\textsuperscript{74.} Trinidad, 963 P.2d at 1107
\textsuperscript{76.} See Joy v. Penn-Harris-Madison Sch. Corp., 212 F.3d 1052 (7th Cir. 2000); see Miller \textit{ex rel.} Miller v. Wilkes, 172 F.3d 574 (8th Cir. 1999), \textit{vacated as moot}, 172 F.3d 582 (June 15, 1999); see Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095 (Colo. 1998); see Tannahill v. Lockney Indep. Sch. Dist., 133 F. Supp. 2d 919 (N.D. Tex. 2001).
\textsuperscript{77.} Tannahill, 133 F. Supp. 2d at 929-30. There was no evidence the drug problem in Lockney schools neared the proportions of the drug epidemic in \textit{Vernonia}.
\textsuperscript{78.} Miller, 172 F.3d at 579-80.
district is constitutionally permitted to take measures that will help protect its schools. . . .”

IV. THE TENTH CIRCUIT FINDS RANDOM, SUSPICIONLESS DRUG TESTING UNCONSTITUTIONAL

The Tenth Circuit, reiterated the three-factor test outlined in Vernonia, but in applying the test disagreed with fellow circuits that had found similar policies constitutional; therefore the court reversed the lower court’s grant of summary judgment in favor of the school district and found the Policy unconstitutional. The Tenth Circuit’s decision rested on “balancing of the students’ privacy interests against the District’s interest in testing students pursuant to the policy.”

The Tenth Circuit first considered the nature of the privacy interest. The school district argued students who participate in extracurricular activities have a lesser expectation of privacy for three reasons: (1) they voluntarily participate; (2) they occasionally travel out of town on trips where they must sleep together, dress together and use communal bathrooms; and (3) they hold themselves out to higher regulations both by the district and the Oklahoma Secondary Schools Activities Association (OSSAA). Judge Anderson, writing for the majority, quickly dismissed the second contention, stating it was doubtful that the Supreme Court wanted so much emphasis placed upon the communal undress of sports in its opinion in Vernonia.

Much more important to the Tenth Circuit was that students who take part in extracurricular activities voluntarily choose to participate and in doing so, choose to subject themselves to regulations. Judge Anderson made it clear, voluntary participation in an activity alone does not reduce a student’s expectation of privacy, but agreeing “to follow the directives and adhere to the rules set out by the coach or other director of the activity” does reduce the student’s expectation of

79. Id. at 581.
80. Bd. of Educ. v. Earls, 242 F.3d 1264, 1278 (10th Cir. 2001). The court stated, “In reaching this result, we realize that we are disagreeing with two of our fellow circuits. However, there are other courts with which we are in agreement. This issue is obviously a difficult one with which courts will continue to grapple.”
81. Id. at 1275.
82. Id.
83. Id.
84. Id. The court declined to give this argument too much weight, saying, “[w]e doubt that the Court intends that the level of privacy expectation depends upon the degree to which particular students...dress or shower together or, on occasion, share sleeping or bathroom facilities while on occasional out-of-town trips.”
85. Id. at 1275-76.
Therefore, "like athletes, participants in other extracurricular activities have a somewhat lesser privacy expectation than other students." Like most previous courts, the Tenth Circuit compared the character of the intrusion of the testing with the testing in Vernonia, and found the process of collecting urine samples on the students' privacy "not significant." At first, it looked as if the Tenth Circuit was leaning toward the same decision as reached in Vernonia, at least in regards to the first and second factors of the balancing test. Then, in considering the third factor, the nature and immediacy of the governmental concern and the efficacy of the means for meeting that concern, the court decided, "[t]his factor tips the balancing analysis decidedly in favor of the plaintiffs."

According to the court, the special needs concern was not met. Safety reasons could not be the sole factor for the Policy because it is both underinclusive and overinclusive. The Tenth Circuit found it hard to imagine how drug use could be a safety factor in extracurricular activities such as vocal choir and academic teams. At the same time, the Policy did not include testing of those students who engaged in activities that posed a safety risk such as shop class or experiments in laboratories.

Secondly, the Tenth Circuit rejected the District's argument that all extracurricular students are subject to less supervision than students in classrooms. The court again noted this could not be the sole justification for the Policy, since students who are not in extracurricular activities are not monitored constantly. Judge Anderson concluded, "neither a concern for safety nor a concern about the degree of supervision provides a sufficient reason for testing the particular students whom the District chose to test under the Policy."

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86. Earls, 242 F.3d at 1276. The court noted that mere participation in an extracurricular activity is integral to the "complete educational experience" of the student and does not reduce the student's expectation of privacy. However, the court also noted that by subjecting themselves to high regulations of a coach or other directive, the students constrain their personal freedom at least some of the time.
87. Id.
88. Id.
89. Id.
90. Id. at 1277.
91. Id.
92. Id.
93. Id.
94. Id.
95. Id.
The Tenth Circuit analyzed the nature of the District's concern and the immediacy of the drug problem in the district.96 "given the paucity of evidence of an actual drug abuse problem among those subject to the Policy, the immediacy of the District's concern is greatly diminished."97 In the court's eyes, the District did not demonstrate an actual drug abuse problem.98 Therefore, the testing of students who participate in extracurricular activities would not redress the drug problem in Tecumseh schools.99 In sum, in order to protect against Fourth Amendment violations, "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."100

In the dissent, Judge Ebel questioned the majority's line of reasoning in using the Vernonia balancing test.101 In his opinion, the drug abuse problem needed to rise to the level of a crisis in order to implement a drug testing policy102 and the decision to adopt a drug testing policy should be left up to the local boards of education.103 Additionally, Judge Ebel accused the majority of placing too much weight on the students' privacy interest and not enough on the state's interests.104 Judge Ebel reasoned the majority's emphasis on the immediacy of a demonstrable drug problem imposes additional special needs

96. Id.
97. Id.
98. Id. The court compared the demonstration of the drug problem in Vernonia with the problem here. The court found it hard to allow a drug testing policy where there was no real demonstrable drug problem.
99. Earls, 242 F.3d at 1278. The court found this to be a significant factor in its decision stating that, "Unless a district is required to demonstrate such a [drug] problem, there is no limit on what students a school may randomly and without suspicion test."
100. Id.
101. Id. at 1283.
102. Id. at 1284.
103. Id. at 1285. Judge Ebel writes: "I would therefore defer to the judgment of the local school boards, which are far better positioned (and more accountable) then federal judges to decide the type of drug testing policy that will best serve their need to protect children entrusted in their care."
104. Id. at 1283. Judge Ebel elaborated, "[t]he majority appears to forget its earlier conclusion that there is just not much for the school district's interests to be weighed against."

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requirements within the school context. According to Judge Ebel, this requirement "mandates a more detailed demonstration than was ever required... in Vernonia." He suggested using an analysis that does not rest on special needs and goes directly into the Vernonia balancing test.

V. Chandler v. Miller: How Much Is Enough Special Needs?

Chandler gave the Supreme Court a chance to rule on the scope of suspicionless drug testing from another viewpoint. The Supreme Court invalidated a Georgia law requiring all individuals seeking statewide political office to submit to and pass a drug test. Since the drug testing was essentially a search, the law had to be justified under a "special needs" exception or meet the Fourth Amendment requirement that searches must be based on individualized suspicion.

The Supreme Court held suspicionless drug testing of political candidates to be unconstitutional, violating the Fourth Amendment as it did "not fit within the closely guarded category of constitutionally permissible suspicionless searches." Justice Ginsburg's majority opinion noted the special needs of the state must be important enough to override the individual's privacy interest in order to "suppress the Fourth Amendment's normal requirement of individualized suspicion." Applying this need to the facts in Chandler, the Court found that even though the drug testing policy was noninvasive, the State failed to produce any evidence of a drug use problem among polit-

105. Earls, 242 F.3d at 1281. "Notwithstanding the majority's statement that no special need for random, suspicionless drug testing must be demonstrated by the school district in this case, the majority appears to reimpose a special needs requirement toward the end of its opinion."

106. Id.

107. Id. at 1280-81. Judge Ebel relied on the decision in Miller, 172 F.3d at 578, which stated, "[t]he Supreme Court has held that the public school environment provides the requisite 'special needs' so that a school district may dispense with those Fourth Amendment protections [of probable cause and warrants issued by a neutral magistrate]."


109. Id. at 309.

110. Id. at 314.

111. Id. at 309.

112. Id. at 314. The court must undertake a "context-specific inquiry, examining closely the competing private and public interests advanced by the parties" in order to meet the "special needs" doctrine.
cians or candidates for state political office, unlike the case of the student population in *Vernonia*.113

From the Supreme Court's holding in *Chandler*, it seemed the Tenth Circuit was correct in their decision—that in order to invoke the special needs exception, there must be evidence of a drug abuse problem.

VI. THE SUPREME COURT ANSWERS THE EXTRACURRICULAR QUESTION

After the Tenth Circuit's decision created a split among the circuits and the Supreme Court's ruling in *Chandler*, the question of the constitutionality of random, suspicionless drug testing was left hanging in the balance. It was unclear where the Supreme Court of the United States would stand on this issue when it granted certiorari in 2001.114 The Supreme Court, in a 5-4 decision, reversed the Tenth Circuit holding the Policy constitutional.115

Writing for the majority,116 Justice Thomas held, "[t]his Policy reasonably serves the School District's important interest in detecting and preventing drug use among its students."117

In reaching this conclusion, the Supreme Court applied the three-factor balancing test of *Vernonia* to the "somewhat different facts of this case."118 In evaluating the nature of the privacy interest intruded upon, the Supreme Court maintained a line of reasoning much like that of the *Vernonia* court, emphasizing the fact that the issue arises in the school context and it cannot be forgotten that schools have custo-

113. Id. at 319. The proof of unlawful drug use "bolsters" the argument of the state that drug testing programs are warranted and appropriate. The Court stated, "[a] demonstrated problem of drug abuse, while not in all cases necessary to the validity of a testing regime, would shore up an assertion of special need for a suspicionless general search program."


117. Earls, 122 S. Ct. at 2562.

118. Id. at 2565. The Court acknowledged the fact that Vernonia was decided on a very specific fact-balancing analysis.

http://scholarship.law.campbell.edu/clr/vol25/iss1/2
dial responsibility for its students which weighs heavily in the schools' favor.119

When determining the nature of the privacy interest intruded upon, the Court focused on the voluntary aspect of extracurricular activities. Students who participate in extracurricular activities do subject themselves to greater regulations by the OSSAA as well as the rules dictated by the particular club, which do not apply to the student body as a whole.120 Therefore, students who participate in non-athletic extracurricular activities have a lesser expectation of privacy than other students.121 In response to the contention that athletes have a lesser expectation of privacy than students who participate in non-athletic extracurricular activities, the Supreme Court curtly noted this distinction was not critical to their holding, as it was not essential to the decision in Vernonia.122

The dissent, written by Justice Ginsburg,123 challenged the characterization of extracurricular activities, contending that voluntary participation in athletics "has a distinctly different dimension" than voluntary participation in non-athletic extracurricular activities.124 The dissent argued that students subject themselves to the requirement of non-athletic extracurricular activities in order "to take full advantage of the education offered them."125 In stark contrast, due to the competitive nature of athletics, schools must regulate athletics in an attempt to mitigate the physical risks imposed to students.126 Moreover, athletics require health and safety regulations while non-athletic extracurricular activities such as band, choir and academic team do not.127

The majority then considered the character of the intrusion imposed by the Policy.128 In line with other courts that had previously

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119. Id. at 2565, n. 3. Justice Thomas wrote, "[t]his hefty weight on the side of the school's balance [in Vernonia] applies with similar force in this case even though we undertake a separate balancing with regard to this particular program."

120. Id. at 2566.

121. Id. at 2565. The Court reasoned that students who participate in extracurricular activities could be compared to adults who choose to participate in closely regulated industry. In both cases, there are intrusions upon "normal rights and privileges, including privacy."

122. Id. The decision in Vernonia, according to the Court, "depended primarily upon the school's custodial responsibility and authority."

123. Id. at 2571. Those joining Justice Ginsburg in her dissent included Justices Stevens, O'Connor and Souter.

124. Id. at 2573.

125. Id.

126. Id.

127. Id.

128. Id. at 2567
ruled on the issue, the majority looked at the process of collecting the urine sample itself, exactly what was detected in the urine, the confidentiality of the tests, and the consequences. The majority concluded that “given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students’ privacy is not significant.”

In balancing the interrelated third interest—the nature and immediacy of the government’s concerns and the efficacy of the Policy in meeting them—the majority tipped the scales in favor of the interests of the school district. The majority rejected the argument that there was no evidence offered by the school district of a real and immediate interest of a drug problem to justify the policy. The majority pointed to evidence of the increasing drug problem across the nation and the concerns this poses to the school district. Furthermore, the majority reiterated their view that “[a] demonstrated problem of drug abuse...[is] not in all cases necessary to the validity of the testing regime,” but some showing does “shore up an assertion of special need for a suspicionless general search program.” Thus, the school district’s evidence of teachers observing students who “appeared” to be on drugs, the phone calls to the school board concerning the drug problem and the few instances of drug paraphernalia in the school was sufficient evidence to warrant an immediate response. In reaffirming the Court’s proposition that school districts will not have to “prove” a demonstrable drug abuse problem in its schools, Justice Thomas wrote, “it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.”

The dissent argued the Tecumseh school district did not show sufficient evidence of a severe drug problem to warrant the adoption of the Policy. The dissent asserted that evidence of a severe drug prob-

129. Id.
130. Id. at 2566.
131. Id.
132. Id.
133. Id.
134. Id. (citing Chandler v. Miller, 520 U.S. 305, 319 (1997)).
135. Id.
136. Id. at 2568. The Supreme Court also rejected establishing a threshold test of drug abuse that a school district would have to meet in order to establish a drug testing policy.
137. Id. at 2575. Justice Ginsburg states that the drug abuse evidenced in Vernonia “dwarfed” the evidence in Earls.
lem must be demonstrated in order to tip the immediacy factor of the balancing test in the school’s favor.\textsuperscript{138} Justice Ginsburg declared a “showing” of a drug problem without any concrete evidence does not warrant a suspicionless drug testing policy.\textsuperscript{139}

The majority concluded safety was not an essential element in the special needs framework, rejecting the argument that testing of non-athletes was not required because there was no safety threat.\textsuperscript{140} The majority concluded safety interests are furthered in testing all children, athletes and non-athletes alike, “[w]e know all too well that drug use carries a variety of health risks for children . . ”\textsuperscript{141} The dissent ardently challenges the majority’s conclusions, accusing the majority of essentially cutting a major element out of the \textit{Vernonia} decision.\textsuperscript{142} Relying on the decisions in \textit{Chandler} as well as \textit{Vernonia}, the dissent declared special risks such as safety are necessary in order to implement a suspicionless drug testing policy.\textsuperscript{143} If extracurricular activities do not pose safety risks, then a drug policy tailored to test students to avoid safety hazards is not tailored at all.\textsuperscript{144} Justice Ginsburg eloquently illustrates:

\begin{quote}
Notwithstanding nightmarish images of out-of-control flatware, livestock run amok, and colliding tubas in 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. There is a difference between imperfect tailoring and no tailoring at all.\textsuperscript{145}
\end{quote}

Finally, the majority held the testing of students who participate in non-athletic extracurricular activities was an effective means of addressing the drug problem in the Tecumseh School District.\textsuperscript{146} However, the majority acknowledged the facts of \textit{Vernonia} provided a better “fit” in terms of addressing the drug problem.\textsuperscript{147} The majority found this was not essential to the holding of the case. The majority’s main

\begin{itemize}
  \item \textsuperscript{138} \textit{Id.}
  \item \textsuperscript{139} \textit{Id.}
  \item \textsuperscript{140} \textit{Id.} at 2576.
  \item \textsuperscript{141} \textit{Id.} at 2568.
  \item \textsuperscript{142} \textit{Id.} at 2567.
  \item \textsuperscript{143} \textit{Id.}
  \item \textsuperscript{144} \textit{Id.} at 2566.
  \item \textsuperscript{145} \textit{Id.} at 2576-77.
  \item \textsuperscript{146} \textit{Id.} at 2569.
  \item \textsuperscript{147} \textit{Id.} Justice Thomas conceded that the drug problem in \textit{Vernonia} was fueled by the student athletes, role models in the town, and thus provided more justification for the testing policy in \textit{Vernonia}.
\end{itemize}
concern was the fact that the program in Tecumseh was adopted in regards to the school's custodial responsibilities.\textsuperscript{148}

Justice Breyer's concurring opinion took the majority's opinion one step further. Justice Breyer believed the Policy in the Tecumseh school district was constitutional because school systems must find a way for students to be safe in schools.\textsuperscript{149} With a shift in the educational system from teaching the fundamentals to "shoulder[ing] the burden of feeding students breakfast and lunch, offering before and after school child care services, and provid[ing] medical and psychological services," it is essential schools be safe and provide encouraging learning environments.\textsuperscript{150}

The dissent contended the \textit{Vernonia} school district had "two good reasons to drug test athletes: sports team members were faced with health risks and they 'were the leaders of the drug culture.'"\textsuperscript{151} The Tecumseh school district did not have such reasonable justification to target students who participate in non-athletic extracurricular activities.\textsuperscript{152} The dissent argues the case at hand presents a very different factual scenario than \textit{Vernonia} and does not present enough evidence to invoke the special needs exception.\textsuperscript{153} Justice Ginsburg cautions a broad reading of \textit{Vernonia}, without giving weight to the specific factual situation would open to the door to allow drug testing of every student as a condition to attending public school.\textsuperscript{154}

VII. The Implications of \textit{Earls} for School Districts and Students

Slowly but surely, the Supreme Court is equipping school districts with bigger and better knives to carve away at students' Fourth Amendment rights. School boards are ready and willing to carve. In affirming the school district's right to conduct random, suspicionless drug tests on students who participate in competitive extracurricular activities as well as athletes, the Supreme Court has left in its wake a plethora of unanswered questions. What is the difference between a

\textsuperscript{148} Id. at 2569.
\textsuperscript{149} Id. at 2570.
\textsuperscript{150} Id.
\textsuperscript{151} Id. at 2577. (citing \textit{Vernonia}, 515 U.S. at 649)
\textsuperscript{152} Id. Justice Ginsburg, in support of the dissent's argument, stated that the holding in \textit{Chandler} supports this notion as the Court held that drug testing for candidates for office were incompatible with the Fourth Amendment because the program was "not well designed to identify candidates who violate anti-drug laws."
\textsuperscript{153} Id. at 2577-78.
\textsuperscript{154} Id. at 2572-73. Justice Ginsburg writes, "[m]any children, like many adults, engage in dangerous activities in their own time; that children are enrolled in school scarcely allows government to monitor all such activities."
competitive and noncompetitive extracurricular activity? How much evidence of a drug problem is needed before a school may implement a random, suspicionless policy? Can a school district require students who participate in activities for academic credit to consent to testing? If so, what are the ramifications for students who do not consent? Do they lose academic credit? Are they banned from participating in the class at all? Can a drug testing policy be implemented for students who drive to school? Go on a field trip? How far can a school district expand the holding in *Earls*? While the Supreme Court's decision answers the question struggled with by courts, the decision does not leave lower courts with guidance in implementing the three-factor balancing test.

The dissent and the Tenth Circuit were correct in their predictions—the Supreme Court opened the door for school districts to implement random, suspicionless drug testing for every student in the district without Fourth Amendment implications. First of all, the *Earls* decision strayed from major elements that weighed heavily in the *Vernonia* decision. *Vernonia* rested on a well-developed record that demonstrated a very serious drug culture headed by the student athletes. *Earls* rested on a poorly developed record that did not exhibit a serious drug culture in the school at all, much less headed by the students who participate in non-athletic extracurricular activities. The majority overlooked this very distinct aberration in the records and concluded that a school system only needs to produce evidence of "some" drug abuse problem in the school system in order to invoke the special needs exception. Where do we draw the line between a bona fide drug problem and a potential drug problem? If the bar is so low that school district only needs to target a select group of students, show some drug abuse problem in the school, and not have to show that the students in the targeted group are the drug users, then the potential exists that school districts will be able to test all students who walk through its doors.

Where did the safety concerns of *Vernonia* disappear in the *Earls* decision? The Supreme Court in *Vernonia* focused its opinion on the safety concerns that drugs play in athletics\(^{155}\)—a valid concern. The *Earls* Court concluded that safety interests are furthered in testing all children.\(^{156}\) The dissent attacked this rationale saying that a major portion of the *Vernonia* decision had been taken out of the decision.\(^{157}\) They were correct. Safety concerns should be essential in order to

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157. Id. at 2567.
implement a drug testing policy. A “high” academic team member could hardly be said to pose a safety risk to the other team members outside of the normal accidents that may occur even if the student was not “high.”

The Supreme Court has held random, suspicionless drug testing policies constitutional in the context of railway jobs and custom officials who must carry firearms or handle classified materials.158 However, these cases may easily be distinguishable from the public school context case because in each of these cases the government’s compelling concern involved safety.159 Operating a train, as well as carrying firearms under the influence of illegal drugs, could have devastating effects on a significant number of people. It is the effect on other people that justifies the government’s interests. It hardly can be said that a band member, academic team member or Future Farmers of America member who is under the influence of illegal drugs would pose a great safety risk for anyone, even herself. In the public school context, illegal drug use can hardly be justified using the “safety” rationale the Supreme Court has posited.

The majority’s rejection of the Tenth Circuit’s holding that school districts must demonstrate a valid drug problem simply opens the door wider for all students to be tested. More and more groups of students will be subjected to testing without safety concerns being present and despite whether an activity is classified as voluntary or not as justification for the policy. For example, students who choose to drive to school do so voluntarily; moreover, they choose to be regulated by standards more stringent than the regular student population in terms of parking and permits. From the majority’s rationale it logically would follow that if the school district shows there is some type of drug problem in the school (even though that drug use may be minimal and not be rampant in students who drive to school), the district may implement a suspicionless drug testing policy for students who choose to drive on school premises. The reasoning could just as easily be applied to students who want to attend field trips. Crafty administrators will eventually find a way to include all students in some type of voluntary, regulated group, just as they found a way to include students who participate in extracurricular activities and athletics.


159. Von Raab, 489 U.S. at 670-72; Skinner, 489 U.S. at 620-21. In each of these cases, the Court concluded that the governmental interest of safety for those who operate trains and operate firearms in connection with their profession were compelling.
The potential for creating drug testing for all students is further evidenced in the Supreme Court's assertion that the balancing scales are always weighed in favor of the school system and its custodial responsibility. Students who are concerned about their Fourth Amendment rights against unreasonable searches and seizures come into the legal arena with one strike against them. As the cases mentioned above indicate, courts are more than willing to concede the second factor of the balancing test—the character of the intrusion—is negligible when the urine samples are collected in a regular bathroom setting, the results are confidential and the consequences are not punitive. Thus, students have only the first factor of the *Vernonia* balancing test to hang their Fourth Amendment rights upon—the nature of the intrusion on their privacy. If the student voluntarily undertakes an activity that is regulated in any manner, the student has a lesser expectation of privacy than other members of the student body who do not voluntarily engage in extracurricular activities. The scales are weighed against the students as soon as they enter the legal arena to plead for the protection of their Fourth Amendment rights. For students in extracurricular activities, their pleas fell on the deaf ears of the majority of the Supreme Court who refused to recognize that students who participate in extracurricular activities have a greater expectation of privacy than athletes. As the rationale of the Court stands today, the plea of any students who voluntarily choose to participate in a regulated school activity will fall on deaf ears as well.

Not only are student's Fourth Amendment rights being affected but also suspicionless drug testing of students in extracurricular activities will affect the students themselves. From a public policy standpoint, the Supreme Court is sending a negative message to public school students across the nation. Students are guilty until their urine proves them innocent, even if they have never taken drugs. These students have a valid reason to be offended—they are implicated simply because of their choice to make themselves more well-rounded individuals. Isn't this what education is all about? Moreover, students who are concerned about their Fourth Amendment rights are essentially being forced to make a choice between being subjected to drug testing in order to participate in extracurricular activities, an integral part of the educational system, or not participating at all. In a generation where institutions of higher learning look not only to academics but also to involvement, that is a tough pill to swallow for students who are abreast of their right to be free from unreasonable searches and seizures.
Students who participate in extracurricular activities are less likely to abuse drugs than students who are not. By implementing random, suspicionless drug testing policies for students who participate in extracurricular activities, school districts are simply targeting the wrong class of students. While an argument could be made that drug testing does deter kids from doing drugs because they know they will get caught, these targeted students are simply not the students who are likely to use drugs. Furthermore, the deterrence of drug use does not and should not outweigh a student's privacy interests—a student's right to privacy of their bodies and the fluids they contain should not be outweighed absent some heightened safety concern for all children within the school.

VIII. CONCLUSION

It cannot be denied, students in public schools have Fourth Amendment guarantees. After the decision in *Earls*, it is unclear exactly what those guarantees entail and how long they are going to last. The holding in *Earls* answered lingering questions that existed in lower courts as to whether students who participate in non-athletic extracurricular activities have a lesser expectation of privacy. However, lurking in the halls of high schools everywhere are groups of students who are potential targets of a suspicionless drug testing regime. *Earls* will likely not be the last word in the drug testing debate in public schools. In the meantime, school districts may make specimen cups as much a part of the high-school experience for those who participate in competitive extracurricular activities as prom night.

Caroline Slater Burnette

161. Walter Shapiro, *Student Privacy Just a Specimen for Profit, Politics*, USA TODAY, July 27, 2002 at 4A.