

Legal Issues Involving Random Drug Testing: An American Perspective

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Introduction

Drug use among students during their junior high and high school years has reached alarming proportions in American public schools.¹ The most recent survey from the Department of Health and Human Services reveals that almost 10% of youth aged 12-17 had used an illicit drug within 30 days of the survey.² The 30-day prevalence of using an illicit drug ranges from 11.7% in eighth grade to 25.7% in 12th grade.³ Lifetime prevalence of various drugs for eighth, tenth, and twelfth graders was 26.8%, 45.6%, and 53.9%.⁴ Apart from illicit drugs, 50.5% of youth by the eighth grade reported having tried alcohol (more than a few sips) and 23.4% said they had already been drunk at least once. Students who smoked cigarettes were more likely to use illicit drugs.⁵ With the number of teens expected to increase from 23.6 million in 2000 to 25 million in 2010,⁶ the numbers of students participating in drug use can be expected to increase even if the percentage of use does not.

Beyond the general statistics of drugs among school-age young people is the perception of drugs on school campuses. The National Center on Addiction and Substance Abuse (CASA) reported in its 1997 survey that 76% of high school students and 46% of middle school students said that drugs were kept, used or sold on school grounds. The CASA survey revealed a dramatic difference between the perceptions of students and teachers. While 18% of middle school and 41% of high school students reported seeing drugs sold at school, only 8% of middle school, 12% of high school teachers, and 14% of principals saw drug sales.⁷ The challenge for school officials is how to address a problem that national statistics indicate is widespread among junior and senior high school students but which may not be apparent to school officials.

One way to address drug use in schools is drug testing of students, but it is an approach that is not without its difficulties. The purposes of this article are to review the various drug testing approaches that school districts have taken to address drug use and examine the legal challenges that have resulted. This review will occur in the context of the recent Supreme Court decision, *Board of Education of Independent District v. Earls* (Earls)⁸ that addressed the use of suspicionless random drug testing for students in extracurricular activities.

Suspicionless Drug Testing

Absent a state statute requiring or prohibiting drug testing of some or all students, the decision to drug test is left up to individual school districts. However, a decision by school officials to undertake suspicionless drug testing is not without risk.

Suspicionless drug testing can involve mandatory and/or random testing. In *Vernonia School District v. Acton* (Vernonia),⁹ the Supreme Court addressed a school district policy that included both kinds of testing for students participating in interscholastic sports. All students were tested at the beginning of the season for their sport and, thereafter, 10% of the students were selected randomly from a pool for each week of the season.¹⁰

Whether the purpose of the district's policy in *Vernonia* to deglamorize drug use¹¹ was consistent with the policy's implementation is debatable. Despite widespread evidence of drug abuse throughout the student body,¹² the district's policy was directed narrowly only at athletes 'where the risk of immediate physical harm to the drug user and those with whom he is playing his sport is particularly high.'¹³ The list of drugs chosen to be tested (amphetamines, marijuana, and cocaine),¹⁴ while harmful to athletes, omitted anabolic steroids that pose a higher risk to athletes than the drugs that were selected to be tested.¹⁵ Even though the omission of anabolic steroids may appear reasonable because its use was not prevalent in the school, its omission suggests that the policy of the school district as stated belied its real purpose, namely to get rid of drug use among the entire student body.

One can argue that the Vernonia School District's decision to randomly test only athletes because they were 'the leaders of the drug culture'¹⁶ was more strategically formulated than policy-driven. Given an earlier Supreme Court decision, *New Jersey v. T.L.O.* (T.L.O.),¹⁷ that required individualized reasonable suspicion for searches of students during the school day, selection of a more limited extracurricular athlete presented a new, and perhaps more defensible,¹⁸ fact situation for suspicionless drug testing than the one addressed in *T.L.O.* Had the Vernonia School District chosen to require suspicionless drug testing for all students, the district would have placed itself in the difficult position of having to persuade the Court that a suspicionless exception was needed to *T.L.O.*'s individualized reasonable suspicion, something the Court was probably not likely to grant.¹⁹

Vernonia left a mixed message concerning random drug testing. Does suspicionless random drug testing require evidence of drug abuse among students, and, if so, how prominent must the abuse be among the group selected for testing? In the absence of evidence of drug abuse, either among students generally or a selected population specifically, will a school's desire to deter drug use be a sufficient basis to justify suspicionless testing?

The recent Supreme Court decision in *Earls v. Board of Education of Tecumseh Public Schools* (Earls),²⁰ addressed these questions and resolved a conflict among the federal circuits. Following *Vernonia*, some school districts had extended random testing to a variety of other student settings, including non-athletic extracurricular activities,²¹ students fighting,²² students driving a car to school,²³ and other substances, particularly alcohol and nicotine.²⁴

Prior to the Supreme Court's decision in *Earls*, three federal circuits had rendered decisions involving suspicionless, random drug testing of all extracurricular activities.²⁵ In two post-*Vernonia* decisions,²⁶ *Todd v. Rush County Schools* (Todd)²⁷ and *Joy v. Penn-Harris-Madison Sch. Corp.* (Joy),²⁸ the Seventh Circuit upheld extracurricular suspicionless drug testing policies. However, in *Joy* the court had second thoughts about its earlier decision in *Todd* and suggested that, were it not bound by the result in *Todd* by *stare decisis*, it would probably rule differently.²⁹ The Eighth Circuit upheld random testing in *Miller v. Wilkes* (Miller),³⁰ but its decision was later

vacated for mootness.³¹ The Tenth Circuit, in a 2-1 decision in *Earls v. Board of Education of Tecumseh Public Schools* (Earls),³² declared random testing unconstitutional.

Undoubtedly, the division among the circuits influenced the Supreme Court's decision to revisit the issue of random drug testing in *Earls*. In addition to the differences between the Seventh and Eighth Circuits upholding drug testing and the Tenth Circuit invalidating it, the Tenth Circuit's decision in *Earls* contained a strident dissent that presaged some of the reasoning used by the Supreme Court in reversing the Tenth Circuit majority opinion.³³

Earls: Tenth Circuit Decision

In *Earls*, the Tenth Circuit struck down a school district policy for performing random drug testing³⁴ of all students participating in extracurricular activities involving some aspect of competition and sanctioned by the Oklahoma Secondary Schools Activity Association.³⁵ Although the federal district court had found no evidence of 'a drug problem of epidemic proportions, or a student body in a state of rebellion' (such as in *Vernonia*),³⁶ it found 'legitimate cause for concern,' which, when combined with judicial notice of 'the prevalence of drugs in our society, including our schools' and the attendant 'discipline problems, inattentiveness, and an atmosphere in the classroom,' created a 'special need' justifying random drug testing.³⁷

Based on its interpretation of the facts, the Tenth Circuit rejected the district court's finding of special need. The appeals court found that although some evidence of drug use existed in Tecumseh public schools, 'use among students subject to the testing was negligible.'³⁸

In balancing the school district's interest in deterring drug use with the students' expectation of privacy, the court opined that the voluntary nature of extracurricular participation did not translate into diminished expectation of privacy where 'participation in extracurricular activities ... has become an integral part of the educational experience for most students.'³⁹ However, extracurricular participants did have 'a somewhat lesser privacy expectation than other students' because they 'agree to follow the directives and adhere to the rules set out by the coach or other director of the activity.'⁴⁰ With regard to the health and safety issue that played a prominent part in *Vernonia*, the court found this argument inapposite for three reasons. First, some but not all of the extracurricular activities involved a safety issue comparable to athletics.⁴¹ Second, students involved in activities that did represent a safety risk, 'such as working with shop equipment or laboratories,' were not tested at all.⁴² As the court observed, if the school district is concerned about safety, 'it too often simply tests the wrong students.'⁴³ Third, the court dispatched the district's argument that students in extracurricular activities were subjected to less supervision than students in classrooms because 'there is an imperfect match between the need to test and the group tested.'⁴⁴ Students not involved in extracurricular activities were subjected to less supervision regularly 'when they are in the hallways between classes, at lunch, [and] immediately before and after school while they are entering and leaving school premises' and they were not randomly tested.⁴⁵

The Tenth Circuit majority, in applying the Supreme Court's balancing test in *Vernonia*, held that the school's interest in safety was outweighed by the students' privacy interest because there was no evidence of drug abuse among the group to be tested and the majority '[saw] little efficacy in a drug policy which tests students among whom there is no measurable drug problem.'⁴⁶ The dissenting justice in *Earls* vigorously disagreed with this application of the *Vernonia* balancing

test, arguing that, since students have diminished privacy expectations and have experienced only minimal intrusion on their privacy in providing a urine sample, the school's interest can be outweighed only if it is 'truly insignificant,' which was 'clearly not the case.'⁴⁷ Nonetheless, the majority cast a sop to public school districts by noting that they do not need to 'wait until [they] can identify a drug abuse problem of epidemic proportions before [they] may drug test groups of its students.'⁴⁸ However, the majority disavowed 'any bright line mark concerning the magnitude at which a drug problem becomes severe enough to warrant a suspicionless drug testing policy,'⁴⁹ thus leaving public schools with little practical guidance.

Earls: Supreme Court Decision

In a 5-4 decision, the Supreme Court reversed the Tenth Circuit. Writing for the majority,⁵⁰ Justice Thomas concluded that the school's drug testing policy was 'a reasonable means of furthering the School District's important means of preventing and deterring drug use among its schoolchildren.'⁵¹

Majority Opinion

The majority relied heavily on the Court's drug testing decision in *Vernonia* and rejected plaintiffs' claim that 'drug testing must be based on some level of individualized suspicion.'⁵² The Court's threefold analysis considered the students' expectation of privacy, the 'character of the intrusion' on student privacy, and 'the nature and immediacy or the government's concerns.'⁵³

The Court found a diminished expectation of privacy for students, because like the athletes in *Vernonia*, students in all extracurricular activities 'voluntarily subject themselves to many of the same intrusions on their privacy.'⁵⁴ Although some of the clubs and activities involved 'off-campus travel and communal undress,' similar to *Vernonia*, the Court found more dispositive the presence of 'rules and requirements for participating students that do not apply to the student body as a whole.'⁵⁵

The majority relied on several factors to find minimal intrusion into students' privacy. The method of collection was virtually identical to *Vernonia* with the added privacy element that male students could produce their samples behind a closed stall.⁵⁶ Drug testing results were kept in confidential files separate from a student's other educational records and were available only to school personnel on a 'need-to-know' basis. Evidence that a choir teacher had looked at a student's medication list was not considered intrusive because the teacher would have had access to this kind of information prior to the drug testing policy, and, in any case, the teacher needed to know this information with regard to choir performances off-campus.⁵⁷ In addition, test results were not released to law enforcement authority and negative test results did not lead to school discipline or academic consequences. Even the limitation on a student's 'privilege of participating in extracurricular activities' was softened by a progressive penalty system.⁵⁸

The nature and immediacy of the government's concerns was based on the importance 'in preventing drug abuse by schoolchildren . . . [as reflected by a] drug abuse problem among our Nation's youth [that] has hardly abated since *Vernonia* was decided in 1995.'⁵⁹ A 'particularized and pervasive drug problem' is not necessary to justify a suspicionless drug testing policy.⁶⁰

Because of ‘the nationwide epidemic of drug use,’ the Court considered that it made little sense ‘to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.’⁶¹

The Court rejected plaintiffs’ claim that reasonable suspicion of wrongdoing should be required for drug testing, finding a number of problems that might be associated with such a standard. Not only would such a standard ‘place an additional burden on public school teachers’, but it ‘might unfairly target members of unpopular groups.’⁶² In addition, individualized suspicion could lead to the fear of lawsuits that ‘may chill enforcement of the program.’⁶³

Drug testing of students under the Fourth Amendment need only be reasonable and ‘does not require employing the least intrusive means.’⁶⁴ *Vernonia* did not require that schools test the group of students most likely to use drugs, but evaluated drug testing ‘in the context of public school’s custodial responsibilities.’⁶⁵

Breyer Concurring

As the fifth vote for the majority, Justice Breyer does nothing in his opinion to qualify the constitutional position of the majority. Although he notes that he has no way of knowing whether the school district’s drug testing program will work, he declares unequivocally that ‘the Constitution does not prohibit the effort.’⁶⁶ He underscores the reasoning of Justice Thomas by observing that the drug problem in schools is serious, emphasizing that supply side interdiction of drugs has not reduced teenage drug use, schools must find new and effective ways to fulfill their *in loco parentis* responsibilities, and the random drug testing policy in dispute provides students a nonthreatening reason to decline drug-use invitations, namely in order to participate in extracurricular activities.⁶⁷ For Justice Breyer, the counterargument to alleged intrusion into student privacy is the democratic process that the school board engaged in that was designed to give the entire community the opportunity to develop the drug policy. The policy as formulated preserved the status of a ‘conscientious objector’ for the student who does not want to participate in drug testing. While the student exercising this status pays a price in nonparticipation, that price is ‘less severe than expulsion from the school.’⁶⁸

Dissenting Opinions

In her two-line dissent, Justice O’Connor dissented for the same reason that she did in *Vernonia*, namely that that case had been wrongly decided.⁶⁹ However, even if *Vernonia* had been decided rightly, *Earls* did not meet the balancing test in that case.

In her dissenting opinion, Justice Ginsburg provided the rationale for the four dissenters. She had concurred in *Vernonia*, but with the caveat that ‘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.’⁷⁰ In her dissent in *Earls*, Justice Ginsburg opines that the Court has stepped over the limit.

Essentially, her position is that *Vernonia* established a reasonableness test in determining appropriateness of intrusion into student privacy and the argument on behalf of the school district

in *Earls* does not rise to that level. Students' presence in public schools and their voluntary participation in extracurricular activities are 'factors relevant to reasonableness, but they do not on their own justify intrusive, suspicionless searches.'⁷¹ Justice Ginsburg found the school district's policy provided no effort to tailor the testing to the population affected by the drug use, as had been the case in *Vernonia* where 'sports team members faced special health risks and they 'were the leaders in the drug culture.'⁷² School district efforts to suggest safety problems with marching band members carrying heavy instruments, Future Farmers of America wrestling animals, and Future Homemakers of America working with sharp cutlery were met with Justice Ginsburg's whimsical references to 'out-of-control flatware, livestock run amok, and colliding tubas.'⁷³

At the heart of the dissent was a concern that extracurricular activities, although voluntary, are 'a key component of school life, essential in reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience.'⁷⁴ However, the result of the *Earls* drug testing policy would be that, 'even if students might be deterred from drug use in order to preserve their extracurricular eligibility, it is at least as likely that other students might forego their extracurricular involvement in order to avoid detection of their drug use.'⁷⁵ Thus, pressed to its illogical conclusion, the policy, according to the dissent, not only intrudes unreasonably upon student privacy, but also fails to deter drug use.⁷⁶

Analysis and Implications

The Supreme Court in *Earls*, as it had done in its earlier decision in the session in *Owasso Independent School District v. Falvo* (Owasso),⁷⁷ has stopped short of making educational policy. Just as the Court stopped short of deciding in *Owasso* that school districts should adopt peer-grading as a pedagogical strategy to address student learning,⁷⁸ so also the Court in *Earls* stops short of deciding that schools should adopt random drug testing to address drug use by students. In both cases, the Court simply removed putative statutory (*Owasso* – FERPA)⁷⁹ and constitutional (*Earls* – Fourth Amendment) barriers to the creation of educational policy by school boards.

Earls opens the door for more school districts to impose random drug testing on extracurricular activities. The case extended the class of students who can be randomly tested for drugs. In *Earls*, the Court upheld random drug testing for those students in extracurricular activities that are part of a state's interscholastic competition. Thus, drug testing in *Earls* includes not only the athletes who were approved for testing in *Vernonia*, but also the Future Farmers of America (FFA) and Future Homemakers of America (FHA), and, in addition, the show choir, the marching band and the academic team in which the plaintiffs in *Earls* were interested.⁸⁰

In the aftermath of *Earls*, what other refinements in the application of random drug testing could be made? The facts in *Earls* are not clear whether the groups tested were curriculum or non-curriculum-related, but presumably, that distinction, so vital in determining applicability of the Equal Access Act (EAA),⁸¹ has no bearing on drug testing. However, for the sake of argument, could a school district decide to limit random drug testing only to non-curriculum-related groups? For example, could students who want to participate in a Bible club be required to submit to a drug test before being permitted to meet with other students and then face random testing thereafter? Because *Earls* addresses only the issue *whether* non-athletic, extracurricular groups can be drug tested and not *which* groups can be tested, the answer is not apparent. One could argue that *Earls*

paints with such a broad brush that schools have considerable freedom in selecting the student groups to be tested as long as those groups share the two elements of voluntariness and rules not applicable to the student body at large. However, presumably these groups would also have to be chosen by criteria that are neutral and generally applicable and not based on the content of the student group,⁸² in part reflecting Justice Thomas' concern about not 'target[ing] members of unpopular groups.'⁸³

The necessity that a school district demonstrate a special need to support its drug testing policy, as had been done in *Vernonia*, seems to have dissipated in *Earls*. Evidence in *Vernonia* based on student drug use surveys⁸⁴ and disciplinary referrals that had reached 'epidemic proportions'⁸⁵ indicated not only a drug culture, but that the athletes, the groups eventually tested, were the leaders of that culture. In *Earls* this level of evidence is reduced to teacher testimony that 'students appeared to be under the influence of drugs and that they heard students speaking openly of using drugs.'⁸⁶ Although the Court states that this is 'sufficient evidence to shore up the need for its drug testing program,'⁸⁷ the Court's refusal 'to fashion . . . a constitutional quantum of drug use necessary to show a drug problem'⁸⁸ suggests that the meaning of special needs is not the same in *Earls* as it had been in *Vernonia*. What is not clear is whether the new test in *Earls* has provided a lowered floor or simply has eliminated the floor altogether.

One could argue that *Earls* has created a new lower floor of evidence to justify drug testing even if that evidence is anecdotal and based only on teacher observations. However, one could just as easily argue that the Court's reasoning leaves some doubt as to whether any evidence is required at all. On one hand the Court defines its test as not requiring 'a particularized or pervasive drug problem' before allowing suspicionless drug testing,⁸⁹ but on the other hand finds support for a basis for drug testing in *Treasury Employees v. Van Raub*.⁹⁰ In *Van Raub*, the Court upheld random drug testing for customs inspectors, not because there was particularized or pervasive evidence of drug use, but because custom inspectors, as those persons charged with preventing the flow of drugs into the country, can reasonably constitute a safety sensitive group that can be required to submit to suspicionless drug tests.⁹¹ More importantly, the Court in *Earls* cites *Van Raub* for the principle that drug testing can be done 'on a purely preventive basis.'⁹² Thus, one is unclear whether the Court's standard for use of a random drug test is a lowered floor whereby schools must provide some evidence of student drug use (less than particularized and pervasive) or whether the standard eliminates the floor altogether since the basis for testing can be purely preventive.

Another question that *Earls* leaves unanswered is whether random drug testing could be extended to all students enrolled in a public school. In an earlier post-*Vernonia* but pre-*Earls* decision, *Tannahill v. Lockney Independent School District*,⁹³ a federal district court struck down both a mandatory and random drug test policy for all students in grades six through twelve. The district court reasoned that 'students subject to drug testing in the Lockney School District comprise a much broader segment of the student population than the group of student athletes. Their expectations are higher.'⁹⁴ If the Supreme Court were to decide a *Tannahill* set of facts now, it is likely that it would come to the same conclusion but for a different reason.

Without having to address the size of the group being tested, the Court arguably need only defer to its earlier decision in *T.L.O.*⁹⁵ In *T.L.O.*, the Court upheld an individualized reasonable suspicion standard for conducting student searches during the school day. Because the Court found

that this reasonable suspicion standard satisfied the Fourth Amendment's protection from unreasonable searches,⁹⁶ one could reasonably argue that this is the constitutional floor for conducting student searches during the school day. As such, any effort to extend *Earls*' suspicionless drug testing standard for students in extracurricular activities to all students during the school day would run directly into *T.L.O.*'s reasonable suspicion standard.

Beyond the question of the appropriate standard is how the results of drug testing are used. Justice Thomas thought significant a part of the *Earls* policy that limited the results of testing to participation in extracurricular activities. Students in extracurricular activities who tested positive to drugs were not removed from school or reported to law enforcement authorities. What is not clear is whether not removing or reporting a student is an integral and necessary requirement for upholding a suspicionless random drug test. What might be the consequences if these requirements are essential to a suspicionless search? What effect, if any, would these requirements have on other forms of suspicionless searches, particularly those associated with the use of metal detectors and dog sniffing?

It is by no means clear that the *Earls* Court is declaring that results of suspicionless drug searches cannot be used for school discipline or law enforcement reporting, but the Court's mention of the restrictions in the *Earls* policy may lead parents and students in the future to challenge, not only how random drug testing results are used, but also how evidence garnered from other kinds of suspicionless searches is used. Contrary to the results of random testing in *Earls*, evidence of contraband gathered as a result of the use of metal detectors and sniffing dogs frequently does lead to school discipline and law enforcement reporting.⁹⁷ Arguably, the difference between random drug testing on one hand and the use of metal detectors and sniffing dogs on the other is that the latter produces the basis for a subsequent individualized reasonable suspicion search while the former produces the evidence of wrongdoing itself.

At this point in time the application of *Earls* to the use of metal detectors and sniffing dogs seems highly improbable because of the intervening presence of individualized reasonable suspicion. Thus, even if *Earls* stands for the principle that evidence of random drug testing cannot be used to remove students or report to law enforcement, there is no reason to anticipate that evidence resulting from the use of metal detectors and sniffing dogs would be treated the same.

Although *Earls* found random drug testing constitutional under the U.S. Constitution, there is no assurance that states will find the practice valid under their own constitutions.⁹⁸ Since the effect of the *Earls* decision is permissive only in terms as to whether schools can use drug testing, states would still be free to interpret the practice in light of their own constitutions, in much the same manner that cases can be addressed under the Establishment Clause.⁹⁹ The fact that some state courts have already found random drug testing in violation of their state constitutions probably suggests that this will be the litigation wave of the future.¹⁰⁰

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

The assumption that parents will remove their children if schools do not test for drugs overlooks the argument that parents may choose to remove their children *because* the public school is randomly testing. *In loco parentis* can be a convenient legal fiction for public schools,¹⁰² but school officials may find that they have pushed the limits of that fiction too far by implementing a policy that some parents neither favor nor would authorize for their children. Justice Breyer's comments about the importance of a democratic process involving parents in designing a drug testing policy to the contrary, parents, as was evident in both *Vernonia* and *Earls*, are not likely to acquiesce in a policy that is fundamentally opposed to their views of child rearing or their views on drug use. And, as Justice Breyer pointedly notes, the possibility of voucher money from states may facilitate and accelerate the departure of students from public schools.¹⁰³

The second question regarding cost may be more of a limitation. With public school districts struggling to meet operating expenses as they are, how many could afford the cost of testing 10% of their students per week, as was the case in *Vernonia*? If the average cost per test were \$30, that would amount to \$3,000 per week in a school of 1000 students and approximately \$108,000 per year.¹⁰⁴ The school could lower the percentage or number of students tested each week, but at some point the number would become so low as to lose its deterrent value. In addition, students who may not feel singled out when they are part of a larger group selected for testing, may feel more vulnerable and isolated when they are part of a very small number. In the end, school districts, now that they *can* randomly drug test, must decide whether they *will* do so at the expense of lost dollars and the possible loss of students.

Justice Ginsburg's concern about the relationship between the educational program and extracurricular activities is one that schools that choose to randomly test will have to face. Will students, even if they know that extracurricular participation may be important in college admissions, refuse to participate if they (and, presumably, their parents) object to random drug testing? If there can be a widespread acceptance among students for a drug culture, as had been the case in *Vernonia*, it seems just as possible that there could be a widespread rejection of extracurricular participation if drug testing is required. Whether excluding or discouraging student participation represents harmful effects for students is a matter of dispute. Some studies have suggested that, among certain student populations, participation in extracurricular activities may diminish the drop out rate and criminal behavior of high-risk students,¹⁰⁵ while other studies have found no connection.¹⁰⁶ In any event, Justice Breyer's democratic process in formulating a drug testing policy will probably go a long way in building community support; however, schools may find that this process will need to be ongoing to address the concerns of new groups of parents.

Drug Testing Policies: Procedures and Rationale

Although one cannot predict how many public schools will begin drug testing now that it is constitutionally permissible, school boards that want to use random testing need to consider carefully the policy they will develop and follow. As reflected in the cases discussed in this article, a drug testing policy developed by school districts should account for ten separate elements: (1) rationale for testing; (2) statement of the substance(s) for which students will be tested; (3) designation of school activities covered by drug testing (4) requirement of a consent form; (5) procedure for determining how students are to be selected randomly; (6) procedure to be followed

in collecting the sample for the substance(s) prohibited by the policy; (7) the tests to be used as determined by the substances to be tested; (8) report of positive test results to appropriate school officials (9) defenses available to students testing positive; and, (10) and penalties for students testing positive.

Conclusion

Prior to *Earls*, courts had been reluctant to support random drug testing where there is not evidence of a serious drug problem and where those being tested are not the persons contributing to the drug problem. Some courts had refused to find a basis to support suspicionless testing where the students being tested did not have the same health and safety risks of physical injury as for athletes. Whether *Earls* will change courts' viewpoints of random testing of extracurricular activities will probably depend on how states interpret their own constitutions.

Judicial concern for the privacy rights of students has a troubling side. Public school officials are charged with maintaining a safe school environment. Suspicionless random drug testing, which involves minimal inconvenience to students, provides an easily administered process with both specific and general outcomes. Specifically, the school, by tying extracurricular activity participation to testing, has a mechanism both for discouraging drug use and penalizing those who do use drugs without removing them from academic programs. In general, a random drug testing policy sends a message to parents and taxpayers that the school district is primarily concerned about preventing drug use.¹⁰⁷

What seems to have got lost in the judicial rhetoric critical of random drug testing is that schools do not have an infinite continuum of alternatives for dealing with drug use. A random testing policy that succeeds in preventing drug use would appear to be more effective in promoting the well-being of a school, its students and teachers than a drug use crisis situation that may take years to resolve.

Endnotes

1. See statistics in *Earls v. Board of Educ. of Tecumseh Pub. Schs.*, [151 Ed.Law Rep. 752] 242 F.3d 1264, 1280 (10th Cir. 2001 (dissenting opinion) (18.4% of 12-17-year-olds have used marijuana or hashish in their lifetimes; 10.9% of 12-17-year-olds currently use illegal drugs; and over ½ of new marijuana first-time users and cocaine first-time users are between the ages of 12 and 17).
2. U.S. Department of Health and Human Services, Office of Applied Studies, *Summary of Findings from the National Household Survey on Drug Abuse*, Chapter 2.
3. Office of National Drug Policy: Juveniles and Drugs (www.whitehousedrugpolicy.gov/drugfact/juveniles/juveniles_b.html) (last visited May 13, 2002)
4. U.S. Department of Health and Human Services, National Institute of Health, The University of Michigan, *Monitoring the Future*, 2001 Data From In-School Surveys of 8th, 10th, and 12th Grade Students.
5. See 'Juveniles and Drugs,' *supra* note 3.
6. Substance Abuse and the American Adolescent: A Report by the Commission on Substance Abuse Among America's adolescents, August 1997.

7. The National Center on Addiction and Substance abuse at Columbia University, 1977 Back to School Survey (www.casacolumbia.org/newsletter1457/newslettershow.htm?docid=5793) (last visited May 13, 2002)
8. 2000 WL 1378649 (2002).
9. 515 U.S. 646 [101 Ed.Law Rep. 37] (1995).
10. *Id.* at 650.
11. *See Acton*, 796 F.Supp. at 1357 (the students' 'glamorizing drug and alcohol use' was perceived as the cause of student rebellion and led to the district's drug testing policy).
12. *See Acton v. Vernonia Sch. Dist.*, 796 F.Supp. 1354, 1367 (D.Or. 1992) where 'the glamorization and use of drugs and alcohol became more blatant' and resulted in increasing frequency of classroom discipline problems.
13. *Vernonia*, 515 U.S. at 662.
14. *Id.*
15. *See generally*, William N. Taylor, *Anabolic Steroids and the Athlete* (1982) (the greatest danger of anabolic steroids is to the liver with other health problems including the possibility of heart attacks, sexual changes, and mental disturbance).
16. *Vernonia*, 515 U.S. at 649.
17. 469 U.S. 325 [21 Ed.Law Rep. 1122] (1985).
18. For an example of judicial support for discipline of athletes because athletics represents a privilege, not a right, *see Bush v. Dassel-Cokato Bd. of Educ.*, 745 F.Supp. 562 [63 Ed.Law Rep. 145] (D.Minn. 1990) (mere presence of athlete at an off campus function where alcohol was served could result in revocation of letter and suspension from competitions).
19. That the *T.L.O.* majority required a reasonableness standard for student searches is highlighted by the dissenting opinion that views this standard as an unauthorized departure from the Fourth Amendment's probable cause standard. *See T.L.O.*, 469 U.S. at 341-43, and 357-58 (Brennan, J., dissenting).
20. 242 F.3d 1264 [242 Ed.Law Rep. 752] (10th Cir. 2001), *cert. granted* 22 S.Ct. 509 [158 Ed.Law Rep. 544] (2001), *rev'd*, *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 2002 WL 1378649 (2002).
21. *See infra* notes 25-33 and accompanying text; *Gardner v. Tulsa Indep. Sch. Dist.*, 183 F.Supp. 854 [162 Ed.Law Rep. 862] (N.D.Tex. 2000) (drug testing policy for all extracurricular activities that included 80% of students struck down because no evidence of drug-related referrals, increased use of drugs on campus, and no rising tide of student drug use). *But see*, *Linke v. Northwestern Sch. Corp.*, 763 N.E.2d 972 [162 Ed.Law Rep. 525] (Ind. 2002) (extracurricular drug testing for students driving to school, and students participating in athletics, academic teams, student government, musical performances, drama, FFA, National Honor Society, and SADD upheld where survey of drug use in grades 7-12 was higher than average, nine middle and high school suspensions and expulsions for drug use had occurred in the first year of the policy, and three high school students had died of drug abuse in the ten years prior to the policy).
22. *See Willis v. Anderson Community Sch. Corp.*, 158 F.3d 415 [130 Ed.Law Rep. 89] (7th Cir. 1998) (court struck down policy requiring drug testing for all student suspended for three or more days for fighting).

23. See *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052 [144 Ed.Law Rep. 866] (7th Cir. 2000) (court upheld policy for random suspicionless drug testing but invalidated policy as to testing for nicotine). See also same case where policy was challenged under state constitution, *Penn-Harris-Madison School Corp. v. Joy*, 2002 WL 1060843 (Ind.Ct.App. 2002), where state appeals court upheld testing policy as to drugs and alcohol, but not as to tobacco).
24. *Id.*
25. In the Fifth Circuit, a federal district court in *Gardner v. Tulia Indep. Sch. Dist.*, 183 F.Supp.2d 854 [161 Ed.Law Rep. 862](N.D. Tex. 2000), ruled unconstitutional a random suspicionless drug testing policy of all students participating in extracurricular activities because there was no evidence of a major or widespread drug problem among students in general. In a pre-*Vernonia* decision, *Brooks v. East Chambers Consol. Indep. Sch. Dist.*, 730 F.Supp. 759 [58 Ed.Law Rep. 1120](S.D.Tex. 1989), *aff'd*, 930 F.2d 915 [66 Ed.Law Rep. 982](5th Cir. 1991), the Fifth Circuit upheld without an opinion a district court decision holding unconstitutional suspicionless drug testing of students wishing to participate in extracurricular activities.
26. The Seventh Circuit upheld random urinalysis testing of athletes in interscholastic sports in a pre-*Vernonia* decision, *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309 [51 Ed.Law Rep. 92]] (7th Cir. 1988). The facts in *Schaill* mirror those later litigated in *Vernonia*. A high percentage of high school students were using drugs, athletes had diminished privacy, the school district had a legitimate interest in finding unlawful conduct, and the procedures established by the district minimized intrusion into the students' privacy.
27. 133 F.3d 984 [125 Ed.Law Rep. [18]] (7th Cir. 1998).
28. 212 F.3d 1052 [144 Ed.Law Rep. [866]] (7th Cir. 2000).
29. *Id.* at 1066 ('the judges of this panel believe that students involved in extracurricular activities should not be subject to random, suspicionless drug testing as a condition of participation in the activity. Nevertheless, we are bound by this court's recent precedent in *Todd*.')
30. 172 F.3d 574 [133 Ed.Law Rep. [765]] (8th Cir. 1999).
31. To vacate means 'to nullify or cancel'. Black's Law Dictionary (7th ed. 1999).
32. 242 F.3d 1264 [151 Ed.Law Rep. 752] (10th Cir. 2001), cert. granted 122 S.Ct. 509 [158 Ed.Law Rep. 544](2001).
33. In the 2-1 court of appeals decision in *Earls*, the dissenting judge would have justified the random drug testing policy because young people are more susceptible to peer pressure to use drugs, probable cause is not required in school settings under *T.L.O.*, drug use by some students in a public school closed environment interferes with the rights of other students, and the Supreme Court in *Vernonia* vested in public schools the responsibility to protect the children entrusted to them. *Earls*, 242 F.3d at 1279-80 (Ebel, J., dissenting)
34. The substances tested for were amphetamines, marijuana, cocaine, opiates, barbiturates, and benzodiazepines. *Id.* at 1267.
35. *Id.* Although the district's policy was not limited to competitive extracurricular activities, the district applied the policy only to such activities. One of the plaintiffs in the case was a member of the show choir, the marching band and the academic team and the other plaintiff desired to participate on the academic team. *Id.* at 1268.

36. *Earls v. Board of Educ., Tecumseh Pub. Schs.*, 115 F.supp.2d 1281 [148 Ed.Law Rep. 152] (W.D.Okla. 2000).
37. *Id.* at 1287, 1288.
38. *Id.* at 1275 (much of the evidence was hearsay and anecdotal, but of 484 students tested under the policy for the school years, 1989-90 and 1999-2000, only 4 positive tests for drugs were recorded). *See id.* at 1273-75 for a recounting of the evidence.
39. *Id.* at 1276.
40. *Id.*
41. *See id.* at 1277. 'It is difficult to imagine how participants in vocal choir, or the academic team, of even the FHA are in physical danger if they compete in activities while using drugs, any more than any student is at risk simply from using the drugs.'
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 1283.
48. *Id.* at 1278.
49. *Id.*
50. In addition to Justice Thomas who wrote the majority opinion, the other members of the majority were Rehnquist, C.J. and Justices Scalia, Kennedy, and Breyer. Justice Breyer also wrote a concurring opinion. Justice O'Connor dissented in an opinion joined by Justice Souter. Justice Ginsburg filed a dissenting opinion in which Justices Stevens, O'Connor and Souter joined.
51. *Earls*, 2002 WL at *10.
52. *Id.* at *6.
53. *Id.* at *8.
54. *Id.* at *7.
55. *Id.* at *7.
56. *Id.* at *8.
57. *Id.* at *8.
58. *Id.* at *8. After a first positive test, the student could continue participating if, within 5 days of meeting with parents, the student shows proof of receiving drug counseling and submits to a drug test within 2 weeks. After a second test, a student is suspended from participation for 14 days and can return to participation after completing 4 hours of substance abuse counseling. Only after the third offense will a student be suspended for the balance of the school year or 88 days, whichever is longer.
59. *Id.* at *8.
60. *Id.* at *9 (the Court cites for support to *Treasury Employees v. Von Raub*, 489 U.S. 656 (1989) where the Court upheld drug testing for customs employees because government had a legitimate interest in testing employees in safety sensitive positions, namely those persons checking for drug traffic).

61. *Id.* at *9.
62. *Id.* at *10.
63. *Id.* at *10.
64. *Id.* at *10.
65. *Id.* at *10.
66. *Id.* at *12.
67. *Id.* at *11-12.
68. *Id.* at *12.
69. *See Vernonia*, 515 U.S. at 646 (O'Connor, J., dissenting) (O'Connor's argument is that, like *Vernonia*, suspicionless searches for students do not fit within 'allowed exceptions . . . where it has been clear that a suspicion-based regime would be ineffectual.')
70. *Vernonia*, 515 U.S. at 646 (Ginsburg, J., concurring).
71. *Earls*, 2002 WL at *14.
72. *Id.* at 17, citing to *Vernonia*, 515 U.S. at 649.
73. *Id.* at *17.
74. *Id.* at *14.
75. *Id.* at *17.
76. *Id.* at *17.
77. 534 U.S. 426, 122 S.Ct. 934 [161 Ed.Law Rep. 33] (2002) In *Owasso*, a unanimous Court held that peer-grading did not constitute a violation of FERPA).
78. *Id.* at 939 ('Correcting a classmate's work can be as much a part of the assignment as taking the test itself. It is a way to teach material again in a new context, and it helps show students how to assist and respect fellow pupils. By explaining the answers to the class as the students correct the papers, the teacher not only reinforces the lesson but also discovers whether the students have understood the material and are ready to move on.')
79. The Family Educational Rights and Privacy Act (FERPA) provides students protection from authorized disclosure of personally identifiable information and provides parents access to a child's education records. 20 U.S.C. § 1232g.
80. *See Earls*, 242 F.3d at 1268.
81. 20 U.S.C. § 4071 (EAA prohibits public schools from preventing student-initiated meetings in limited open forums 'on the basis of the religious, political, philosophical, or other content of the speech' where any noncurriculum-related student clubs are permitted to meet during noninstructional time.)
82. The requirement that public schools cannot single out particular viewpoints for different treatment has a recent history in the Supreme Court, beginning with *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 [83 Ed.Law Rep. 30] (1993) through *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 [154 Ed.Law Rep. 45] (2001). In a series of cases bordered by these two, the Court held that, under free speech, schools cannot treat groups differently based on the content of their message. In essence, the notion that categories must be neutral and generally applicable would apply to any objection based on discriminatory treatment.
83. *Earls*, 2002 WL at *10.

84. The use of surveys has met with differing results. For example, *see Tannahill*, 133 F.Supp.2d at 921 where a survey of students revealed that student drug use of drugs in the school was lower than stateside; *Earls*, 242 F.3d at 1272-74 where perceptions of faculty were not considered persuasive.
85. *Vernonia*, 515 U.S. at 663.
86. *Earls*, 2002 WL at *9.
87. *Id.* at *9.
88. *Id.* at *9-10.
89. *Id.* at *9.
90. 489 U.S. 656 (1989)
91. *Id.* at 674. '[T]he almost unique mission of the [Treasury] Service gives the Government a compelling interest in ensuring that many of these covered employees do not use drugs even off duty, for such use creates risks of bribery and blackmail against which the Government is entitled to guard. In light of the extraordinary safety and national security hazards that would attend the promotion of drug users to positions that require the carrying of firearms or the interdiction of controlled substances, the Service's policy of deterring drug users from seeking such promotions cannot be deemed unreasonable.
92. *Earls*, 2002 WL at *9.
93. 133 F.Supp.2d 919 [152 Ed.Law Rep. 549] (N.D.Tex. 2001).
94. *Id.* at 929.
95. *New Jersey v. T.L.O.*, 469 U.S. 733 [21 Ed.Law Rep. 1122] (1985).
96. *See id.* at 341 ('[T]he legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the ... action was justified at its inception,' ... ; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.')
97. *See Bundick v. Bay City Indep. Sch. Dist.*, 140 F.Supp.2d 735 [154 Ed.Law Rep. 183] (S.D.Tex. 2001) (expulsion of student upheld that result from search of student's truck following alert from dog); *Commonwealth v. Cass*, 709 A.2d 350 [125 Ed.Law Rep. 705] (Pa. 1998) (motion to suppress denied for marijuana discovered in student's locker as result of reasonable suspicion search following an alert by a dog); *People v. Pruitt*, 662 N.E.2d 540 [108 Ed.Law Rep. 329] (Ill.App.Ct. 1996) (motion to suppress denied for guns found on two students following alert by metal detector)
98. *See Penn-Harris-Madison School Corp. v. Joy*, 2002 WL 1060843 (Ind.Ct.App. 2002) (court upheld testing policy as to drugs and alcohol, but struck down testing for nicotine under the state's constitution protecting liberty interests); *York v. Wahkiakum Sch. Dist.*, 40 P.3d 1198 [162 Ed.Law Rep. 1023] (Wash.Ct.App. 2002) (drug testing policy for athletes violated Fourth Amendment and state constitution where there was no state compelling interest); *Tannahill v. Lockney Indep. Sch. Dist.*, 133 F.Supp.2d 919 [152 Ed.Law Rep. 549] (N.D.Tex. 2001) (random drug testing policy for students in interscholastic athletics violated state constitution where no evidence of student drug use and injury to athletes). *Theodore v. Delaware Valley Sch. Dist.*, 761 A.2d 652 [148 Ed.Law Rep. 985] (Pa.Comm. Ct. 2000) (random drug testing of students involved in extracurricular activities and driving to school invalidated under federal constitution); *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095 [129 Ed.Law Rep. 812] (Colo. 1998) (random drug testing policy for extracurricular activities unconstitutional under federal constitution as applied to marching band).

99. See *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 [29 Ed.Law Rep. 496] (1986) (Court upheld, against Establishment Clause challenge, state provision of assistance to blind student in a religious college; on remand, the state supreme court invalidated the assistance under the state constitution.) See *Witters v. Dep't of Servs. for the Blind*, 771 P.2d 1119 [53 Ed.Law Rep. 278] (Wash. 1989).
100. In cases where the constitutionality of random drug testing has been addressed only under the federal constitution, litigants may well revisit the issue under state constitutions. See *Theodore v. Delaware Valley Sch. Dist.*, 761 A.2d 652 [148 Ed.Law Rep. 985] (Pa.Comm. Ct. 2000) (random drug testing of students involved in extracurricular activities and driving to school invalidated under federal constitution); *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095 [129 Ed.Law Rep. 812] (Colo. 1998) (random drug testing policy for extracurricular activities unconstitutional under federal constitution as applied to marching band).
101. *Earls*, 2002 WL at 11. The reference to State help is to the Court's decision upholding the use of vouchers, *Zelman v. Simmons-Harris*, 2002 WL 1378554 (2002).
102. See generally, Ralph Mawdsley, 'In Loco Parentis: A Balancing of Interests,' Illinois Bar Journal, August, 1973. *In loco parentis* qualifies as a legal fiction because, while it purports to grant school officials the authority of parents to deal with students, the match between the two is not perfect. For example, parents do not have the authority to suspend or expel students that schools have, nor do schools share the immunity from civil lawsuits that parents enjoy. That *in loco parentis* is not sufficient to justify public school authority is reflected in *T.L.O.* ('Today's public school officials do not merely exercise authority voluntarily conferred on them by individual parents; rather, they act in furtherance of publicly mandated educational and disciplinary policies.') *T.L.O.*, 469 U.S. at 336.
103. See *Zelman v. Simmons-Harris*, 2002 WL 1378554 (2002) where the Court upheld a state voucher plan that provided low income families with tuition money to attend other public and nonpublic (including religious) schools.
104. Drug testing typically costs \$70,000 per year for weekly random tests of 75 students. See Dana Hawkins, *Trial by Vial*, U.S. News & World Report, May 31, 1999 at 73. See also George Dohrman, *War on Drugs Only a Skirmish*, L.A. Times, Jan. 25, 1996 at C 6 (in part discussing the cost of drug testing).
105. See Joseph Mahoney, 'School Extracurricular Activity Participation as a Moderator in the Development of Antisocial Patterns,' 71 *Child Development* 502 (2002) (in a long-term longitudinal study of 695 boys and girls interviewed from childhood through high school and again at ages 20-24, participation in extracurricular activities was associated with reduced rates of early dropout and criminal arrest among high risk boys and girls, but the decline in antisocial behavior was dependent on whether the students' social network also participated in extracurricular activities. However, the conclusion of the author is somewhat ambivalent; 'The issue seems to be what the adolescent is participating in and with whom. The success of extracurricular activity participation may lie in its emphasis on structured, progressive skill development that is inherently interesting to the participant and directly related to conventional values.') *Id.* at 514. For an article suggesting higher retention rates among Hispanic students involved in extracurricular activities, see Deanna B. Davalos, *et al.*, 'The Effects of Extracurricular Activity, Ethnic Identification, and Perception of School on Student Dropout Rates,' 21 *Hispanic J. of Behavioral Sciences* 61 (1999).
106. Not all studies have found a positive benefit related to student participation in extracurricular activities. See T. Andersson, 'Developmental patterns and the Dynamics of Alcohol Problems in Adolescence and

Young Childhood.' In L. R. Cairns, R. B. Nilsson, L. G. & L. Nystedt, (eds.) *Development Science And The Holistic Approach* 377-391 (2000); C.J. Botvin, 'Substance Abuse Prevention Through Life Skills Training.' R. D. Peters and R. J. McMahon (eds.) *Preventing Childhood Disorders, Substance Abuse and Delinquency* 215-240 (1996).

107. *E.g.*, in *Linke* the court remarks that 'parents may be reluctant to allow their children to participate in voluntary school activities if schools are not permitted to take the reasonable steps taken [by the school district in the case] to prevent drug use.') 763 A.2d at 984.

