

CONSTITUTIONALITY OF DRUG TEST REQUIREMENT FOR ATHLETES?

As illustrated by the *Veronia* decision described herein, the Supreme Court of the United States has held a specific drug testing procedure for public school athletes to be constitutional based upon the following factors: the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search. In so doing, however, the Supreme Court in *Veronia* cautioned “against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts.” Accordingly, a similar drug testing program for participants in public recreation and sports programs, absent proof of a compelling governmental concern, would not necessarily “pass constitutional muster” under the *Veronia* analysis described below.

JUST SAY NO TO DRUG TEST?

In the case of *Veronia School District 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386 (1995), the U.S. Supreme Court considered the constitutionality of a school district’s drug testing policy for student’s participating in athletic programs. In this particular instance, the Student Athlete Drug Policy adopted by School District 47J in the town of Vernonia, Oregon, authorized random urinalysis drug testing of students who participate in the District's school athletics programs. The facts of the case were as follows:

Vernonia School District 47J (District) operates one high school and three grade schools in the logging community of Vernonia, Oregon. As elsewhere in small-town America, school sports play a prominent role in the town's life, and student athletes are admired in their schools and in the community.

Drugs had not been a major problem in Vernonia schools. In the mid-to-late 1980's, however, teachers and administrators observed a sharp increase in drug use. Students began to speak out about their attraction to the drug culture, and to boast that there was nothing the school could do about it. Along with more drugs came more disciplinary problems. Between 1988 and 1989 the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported in the early 1980's, and several students were suspended. Students became increasingly rude during class; outbursts of profane language became common.

Not only were student athletes included among the drug users but athletes were the leaders of the drug culture. This caused the District's administrators particular concern, since drug use increases the risk of sports-related injury.... The high school football and

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wrestling coach witnessed a severe sternum injury suffered by a wrestler, and various omissions of safety procedures and misexecutions by football players, all attributable in his belief to the effects of drug use.

Initially, the District responded to the drug problem by offering special classes, speakers, and presentations designed to deter drug use. It even brought in a specially trained dog to detect drugs, but the drug problem persisted... At that point, District officials began considering a drug-testing program. They held a parent "input night" to discuss the proposed Student Athlete Drug Policy (Policy), and the parents in attendance gave their unanimous approval. The school board approved the Policy for implementation in the fall of 1989. Its expressed purpose is to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs.

The Policy applies to all students participating in interscholastic athletics. Students wishing to play sports must sign a form consenting to the testing and must obtain the written consent of their parents. Athletes are tested at the beginning of the season for their sport. In addition, once each week of the season the names of the athletes are placed in a "pool" from which a student, with the supervision of two adults, blindly draws the names of 10% of the athletes for random testing. Those selected are notified and tested that same day, if possible.

The student to be tested completes a specimen control form which bears an assigned number. Prescription medications that the student is taking must be identified by providing a copy of the prescription or a doctor's authorization. The student then enters an empty locker room accompanied by an adult monitor of the same sex. Each boy selected produces a sample at a urinal, remaining fully clothed with his back to the monitor, who stands approximately 12 to 15 feet behind the student. Monitors may (though do not always) watch the student while he produces the sample, and they listen for normal sounds of urination. Girls produce samples in an enclosed bathroom stall, so that they can be heard but not observed. After the sample is produced, it is given to the monitor, who checks it for temperature and tampering and then transfers it to a vial.

The samples are sent to an independent laboratory, which routinely tests them for amphetamines, cocaine, and marijuana. Other drugs, such as LSD, may be screened at the request of the District, but the identity of a particular student does not determine which drugs will be tested. The laboratory's procedures are 99.94% accurate. The District follows strict procedures regarding the chain of custody and access to test

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results. The laboratory does not know the identity of the students whose samples it tests. It is authorized to mail written test reports only to the superintendent and to provide test results to District personnel by telephone only after the requesting official recites a code confirming his authority. Only the superintendent, principals, vice-principals, and athletic directors have access to test results, and the results are not kept for more than one year.

If a sample tests positive, a second test is administered as soon as possible to confirm the result. If the second test is negative, no further action is taken. If the second test is positive, the athlete's parents are notified, and the school principal convenes a meeting with the student and his parents, at which the student is given the option of (1) participating for six weeks in an assistance program that includes weekly urinalysis, or (2) suffering suspension from athletics for the remainder of the current season and the next athletic season. The student is then retested prior to the start of the next athletic season for which he or she is eligible. The Policy states that a second offense results in automatic imposition of option (2); a third offense in suspension for the remainder of the current season and the next two athletic seasons.

In the fall of 1991, respondent James Acton, then a seventh-grader, signed up to play football at one of the District's grade schools. He was denied participation, however, because he and his parents refused to sign the testing consent forms.

Acton filed suit against the District, enforcement of the Policy was unconstitutional. The trial court dismissed Acton's claims, but the federal appeals court held the District's drug testing policy violated the Fourth and Fourteenth Amendments to the United States Constitution. The U.S. Supreme Court granted the District's petition to review this decision.

REASONABLE SEARCH?

As noted by the Supreme court, "[t]he Fourth Amendment to the United States Constitution provides that the Federal Government shall not violate the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Under the circumstances of this case, the Court noted further that "state-compelled collection and testing of urine, such as that required by the Student Athlete Drug Policy, constitutes a "search" subject to the demands of the Fourth Amendment."

As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is "reasonableness."... [W]hether a particular

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search meets the reasonableness standard is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.

In determining "reasonableness," the Court stated: "The first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes":

The Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as "legitimate." What expectations are legitimate varies, of course, with context, depending, for example, upon whether the individual asserting the privacy interest is at home, at work, in a car, or in a public park. In addition, the legitimacy of certain privacy expectations vis-a-vis the State may depend upon the individual's legal relationship with the State.

Applying these principles to public schools, the Court found it particularly significant that "the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster":

Traditionally at common law, and still today, unemancipated minors lack some of the most fundamental rights of self-determination - including even the right of liberty in its narrow sense, i.e., the right to come and go at will. They are subject, even as to their physical freedom, to the control of their parents or guardians.

When parents place minor children in private schools for their education, the teachers and administrators of those schools stand *in loco parentis* [i.e., in place of the parents] over the children entrusted to them. In fact, the tutor or schoolmaster is the very prototype of that status...[T]he State's power over schoolchildren is ...custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults... Thus, while children assuredly do not shed their constitutional rights at the schoolhouse gate, the nature of those rights is what is appropriate for children in school.

Specifically, the Court found Fourth Amendment rights against unreasonable governmental searches "are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children":

For their own good and that of their classmates, public school children are routinely required to submit to various physical examinations, and to be vaccinated against various diseases... Particularly with regard to medical examinations and procedures,

therefore, "students within the school environment have a lesser expectation of privacy than members of the population generally.

REDUCED EXPECTATION OF PRIVACY?

As applied to sports programs, the Court found "[I]legitimate privacy expectations are even less with regard to student athletes" than public school students generally.

School sports are not for the bashful. They require "suiting up" before each practice or event, and showering and changing afterwards. Public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford. The locker rooms in Vernonia are typical: no individual dressing rooms are provided; shower heads are lined up along a wall, unseparated by any sort of partition or curtain; not even all the toilet stalls have doors... [T]here is an element of `communal undress inherent in athletic participation.

Moreover, the Court noted the school district's athletic programs created "a reduced expectation of privacy" for school athletes based upon the following requirements:

By choosing to "go out for the team," they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. In Vernonia's public schools, they must submit to a preseason physical exam...includ[ing] the giving of a urine sample. [T]hey must acquire adequate insurance coverage or sign an insurance waiver, maintain a minimum grade point average, and comply with any rules of conduct, dress, training hours and related matters as may be established for each sport by the head coach and athletic director with the principal's approval.

Under these circumstances, the Court found "students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."

DEGREE OF GOVERNMENTAL INTRUSION?

"Having considered the scope of the legitimate expectation of privacy at issue," the Court then considered "the character of the intrusion that is complained of":

[C]ollecting the samples for urinalysis intrudes upon "an excretory function traditionally shielded by great privacy... [T]he degree of intrusion depends upon the manner in which production of the urine sample is monitored.

However, under the circumstances of this case, the Court found “the privacy interests compromised by the process of obtaining the urine sample are in our view negligible”:

Under the District's Policy, male students produce samples at a urinal along a wall. They remain fully clothed and are only observed from behind, if at all. Female students produce samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering. These conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily.

In so doing, the Court noted another “privacy-invasive aspect of urinalysis,” viz., “the information it discloses concerning the state of the subject's body, and the materials he has ingested”:

In this regard it is significant that the tests at issue here look only for drugs, and not for whether the student is, for example, epileptic, pregnant, or diabetic. Moreover, the drugs for which the samples are screened are standard, and do not vary according to the identity of the student. And finally, the results of the tests are disclosed only to a limited class of school personnel who have a need to know; and they are not turned over to law enforcement authorities or used for any internal disciplinary function.

Accordingly, under the circumstances of this particular case, the Court held that “the invasion of privacy was not significant.”

COMPELLING GOVERNMENTAL INTEREST?

Finally, in determining the constitutionality of the Policy, the Court considered “the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it”:

It is a mistake, however, to think that the phrase "compelling state interest," in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concern, so that one can dispose of a case by answering in isolation the question: Is there a compelling state interest here?

Rather, the phrase describes an interest which appears important enough to justify the particular search at hand, in light of other factors which show the search to be relatively intrusive upon a genuine expectation of privacy.

Applying these principles to the facts of the case, the Court found “the nature of the [governmental] concern is important - indeed, perhaps compelling”:

Whether that relatively high degree of government concern is necessary in this case or not, we think it is met... School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor.

And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted. In the present case, moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction.

In so doing, the Court took particular note of the fact "this program is directed more narrowly to drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high":

Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District's Policy have been demonstrated to pose substantial physical risks to athletes...

As for the immediacy of the District's concerns: We are not inclined to question - indeed, we could not possibly find clearly erroneous - the District Court's conclusion that "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion," that "[d]isciplinary actions had reached `epidemic proportions,'" and that "the rebellion was being fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture."...

As to the efficacy of this means for addressing the problem: It seems to us self-evident that a drug problem largely fueled by the "role model" effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs.

"Taking into account all the factors we have considered above - the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search," the Supreme Court concluded "Vernonia's Policy is reasonable and hence constitutional."

While finding this particular Policy constitutional, the Supreme Court “caution[ed] against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts”:

The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care...

[W]hen the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake. Given the findings of need made by the District Court, we conclude that in the present case it is.

We may note that the primary guardians of Vernonia's schoolchildren appear to agree. The record shows no objection to this district wide program by any parents other than the couple before us here - even though, as we have described, a public meeting was held to obtain parents' views. We find insufficient basis to contradict the judgment of Vernonia's parents, its school board, and the District Court, as to what was reasonably in the interest of these children under the circumstances.

Having found the Policy constitutional, the U.S. Supreme Court, therefore, vacated the judgment by the appeals court and remanded (i.e., sent back) the case to the appeals for further proceedings consistent with this opinion to consider the constitutionality of the Policy under the Oregon state constitution.