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RANDOM DRUG TESTING REQUIRES IDENTIFIABLE DRUG ABUSE PROBLEM

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(Note: The United States Supreme Court reversed the federal circuit court opinion described herein. See the October 2002 NRPA Law Review.)

The February 1999 NRPA Law Review, entitled "Constitutionality of Drug Test Requirement for Athletes?," described the 1995 opinion of the United States Supreme Court in the case of *Veronia School District 47J v. Acton*, 515 U.S. 646, 115 S.Ct. 2386 (1995). As noted in this article, the *Veronia* decision "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." This article noted, however, that "the Supreme Court in *Veronia* cautioned against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts." Accordingly, the article opined that "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 therein.

The case of *Earls v. Board of Education of Tecumseh Public School District* described below provides an example of a situation in which there was insufficient proof of a compelling governmental concern to warrant a random suspicionless urinalysis drug testing program for all students participating in competitive extracurricular activities.

STUDENT ACTIVITIES DRUG TESTING POLICY

In the case of *Earls v. Board of Education of Tecumseh Public School District*, No. 00-6128 (10th Cir. 03/21/2001) students at Tecumseh High School challenged "the constitutionality of the random suspicionless urinalysis drug testing policy which the District implemented for all students participating in competitive extracurricular activities." The facts of the case were as follows:

Tecumseh High School has for many years offered a variety of extracurricular activities for students interested in participating therein. Such activities have included the choir, band, color guard, Future Farmers of America ("FFA"), Future Homemakers of America ("FHA"), and the academic team. Additionally, it has also sponsored athletic teams, cheerleaders and Pom Pon. The vast majority of students participate in one or more school-sponsored activities.

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On September 14, 1998, the District adopted the Student Activities Drug Testing Policy (the "Policy") requiring drug testing of all students who participate "in any extra-curricular activity such as FFA, FHA, Academic Team, Band, Vocal, Pom Pon, Cheerleader and Athletics." Each student seeking to participate in such activities must sign a written consent agreeing to submit to drug testing prior to participating in the activity, randomly during the year while participating, and at any time while participating upon reasonable suspicion. The test detects amphetamines, cannabinoid metabolites (marijuana), cocaine, opiates, barbiturates and benzodiazepines. It does not detect alcohol or nicotine. Students subject to the Policy must pay a yearly fee of four dollars.

Although the Policy does not expressly so state, it is undisputed that the Policy has in fact only been applied to those extracurricular activities involving some aspect of competition and which are sanctioned by the Oklahoma Secondary Schools Activity Association ("OSSAA").

The district court described the actual drug testing process as follows:

[T]he students to be tested are called out of class in groups of two or three. The students are directed to a restroom, where a faculty member serves as a monitor. The monitor waits outside the closed restroom stall for the student to produce the sample. The monitor pours the contents of the vial into two bottles. Together, the faculty monitor and the student seal the bottles. The student is given a form to sign, which is placed, along with the filled bottles, into a mailing pouch in the presence of the student. Random drug testing was conducted in this manner on approximately eight occasions during the 1998/1999 school year. Approximately twenty students were tested each time.

At the time of the testing, the monitor also gives each student a form on which he or she may list any medications legally prescribed for the student. According to the Policy, "[t]he medication list shall be submitted to the lab in a sealed and confidential envelope and shall not be viewed by district employees."

The results of the drug tests are placed in confidential files separate from the students' other educational files. They "shall be disclosed only to those school personnel who have a need to know, and will not be turned over to any law enforcement authorities." Students who refuse to submit to the drug testing under the Policy are prohibited from participating in any extracurricular activities. There are no academic sanctions imposed.

Plaintiff Lindsay Earls was a member of the show choir, the marching band and the academic team. Plaintiff Daniel James wanted to participate in the academic team and was enrolled during the

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1999-2000 school year in the academic team class. They and their parents challenged the application of the Policy to them as a condition to their participation in those activities. Plaintiffs did not challenge the policy as it applied to athletes.

The federal district court granted summary judgment in favor of the District, concluding that "the policy does not violate the Fourth Amendment's prohibition against unreasonable searches." Plaintiffs appealed.

As noted by the federal appeals court, the Supreme Court of the United States has held that the "state-compelled collection and testing of urine" is a search subject to the Fourth Amendment's reasonableness requirement.

The Fourth Amendment ordinarily requires "some quantum of individualized suspicion" before a search may constitutionally proceed. However, the Supreme Court has recognized that the Fourth Amendment imposes no irreducible requirement of such suspicion. Rather, the ultimate measure of the constitutionality of a governmental search is "reasonableness."

On appeal, the specific issue was, therefore, whether this particular search of school children while at school violated the Fourth Amendment. In addressing this issue, the appeals court examined "the general nature of the rights and obligations of students and school personnel in the school setting":

[W]hile students retain their Fourth Amendment right to be free from unreasonable searches while at school, the nature of that right is different-it "is what is appropriate for children in school." It is in this unique environment that we examine the constitutionality of the Policy.

As noted by the court, the school district had justified the Policy based on the "special needs" doctrine, which the Supreme Court has developed through a series of cases permitting suspicionless drug testing in certain situations. As cited by the appeals court, the Supreme Court had explained the "special needs" doctrine as follows:

We have recognized exceptions to the warrant requirement when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable. When faced with such special needs, we have not hesitated to balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular context.

Accordingly, under this special needs doctrine, courts are required to identify a special need which

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makes impracticable adherence to the warrant and probable cause requirements. If a special need is identified, the court will balance the government's interest in conducting the particular search against the individual's privacy interests upon which the search intrudes. As a result, in determining the constitutionality of a particular random drug testing policy, the courts are required to "inquire first into whether the government has established the existence of a special need before proceeding to any balancing of government and private interests, applying the following "two-fold inquiry":

First, whether the proffered governmental concerns were "real" by asking whether the testing program was adopted in response to a documented drug abuse problem or whether drug abuse among the target group would pose a serious danger to the public"; and second, whether the testing scheme met the related goals of detection and deterrence.

Applying this two-fold inquiry to the Policy in this particular case, the appeals court noted that "the evidence of drug use among those subject to the Policy was far from the "epidemic" and "immediate crisis" faced by the Vernonia schools and emphasized by the Supreme Court's opinion in *Vernonia School District 47J v. Acton*. On the contrary, the federal appeals court found "the evidence of actual drug usage, particularly among the tested students, is minimal" in the Tecumseh School District:

Principal James Blue testified that in the "many" years he had been principal of Tecumseh High School, there had been no alcohol or drug-related injuries or deaths...

Danny Jacobs, the assistant superintendent, testified that 243 students were tested under the Policy during the 1998-99 school year, and of those students, three tested positive, two high school students and one middle school student. He further testified that approximately 241 students were tested in the 1999-2000 school year, and one tested positive.

Principal James Blue testified that, with respect to the two high school students who tested positive, one was involved in wrestling and FFA and one was involved in baseball and FFA...

In response to interrogatories, the District provided information that in the 1998-99 year, 208 students participated in FFA, 119 in FHA, 70 in Band, 14 in Academic Team and 75 in Vocal Music. In the first semester of the 1999-2000 school year, 100 participated in FFA, 63 in FHA, 67 in Band, 16 in Academic Team and 65 in Vocal Music. Thus, in the 1998-99 year, of the 486 students who participated in the five listed extracurricular activities, two students, both also athletes, tested positive.

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Moreover, the appeals court noted that “only one student, apparently an athlete and not involved in any of the listed extracurricular activities, tested positive” in a population of “311 students participating in extracurricular activities the first semester of the 1999-2000 year.”

As a result, while acknowledging that “there was clearly some drug use at the Tecumseh schools,” the appeals court concluded that “such use among students subject to the testing Policy was negligible.” In so doing, the appeals court reiterated that circumstances in Tecumseh schools were “vastly different from the epidemic of drug use and discipline problems among the very group subject to testing in *Vernonia*.”

NATURE OF PRIVACY INTEREST

In light of such “negligible” drug use, the appeals court then considered the “nature of the privacy interest upon which the search here at issue intrudes.” As cited by the appeals court, students do not “shed their constitutional rights at the schoolhouse gate.” On the other hand, the appeals court recognized that “students within the school environment have a lesser expectation of privacy than members of the population generally.”

Specifically, the court found that students participating in extracurricular activities, like athletes, “voluntarily submit themselves to at least some additional requirements and obligations.” Accordingly, the court examined “whether the voluntariness of the participation in the activity reduces a student’s legitimate expectation of privacy while participating in that activity.” In the opinion of the appeals court, “voluntary participation in an activity, without more, should not reduce a student’s expectation of privacy in his or her body”:

Members of our society voluntarily engage in a variety of activities every day, and do not thereby suffer a reduction in their constitutional rights... [W]e disagree with the view that just by exercising a privilege in any activity that is part of the educational process, a student’s privacy interests are lessened and that a school district can, without more, condition participation in that activity on agreeing to testing just because the activities are optional.

Moreover, while participation in extracurricular activities is voluntary, such participation has become an integral part of the educational experience for most students. The Supreme Court recently cautioned against “minimiz[ing] the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience.”

[T]he reality for many students who wish to pursue post-secondary educational training

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and/or professional vocations requiring experience garnered only by participating in extracurricular activities is that they must engage in such activities. Involvement in a school's extracurricular offerings is a vital adjunct to the educational experience.

On the other hand, the appeals court found the participants in extracurricular activities, like athletes, "have a somewhat lesser privacy expectation than other students."

[There are] aspects of participating in extracurricular activities which do legitimately lower a student's expectation of privacy. While students participating in non-athletic extracurricular activities need not obtain pre-participation physicals or insurance, as athletes must, they do, like athletes, agree to follow the directives and adhere to the rules set out by the coach or other director of the activity. This inevitably requires that their personal freedom to conduct themselves is, in some small way, constrained at least some of the time.

Further, based upon "the manner of testing, the information obtained, and the use to which that information is put" in this particular case, the appeals court found that "the invasion of privacy was not significant."

IMMEDIACY OF CONCERN & EFFICACY OF SOLUTION

Having found negligible drug use and an insignificant intrusion on privacy, the appeals court then considered "the nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it." Under the circumstances of this particular case, the appeals court found that "[t]his factor tips the balancing analysis decidedly in favor of the plaintiffs." In particular, the appeals court found that the challenged Policy "too often simply tests the wrong students." In so doing, the appeals court noted that "safety cannot be the sole justification for testing all students in competitive extracurricular activities, because the Policy, from a safety perspective, tests both too many students and too few."

While there may indeed be some extracurricular activities that involve a safety issue comparable to that of athletes, there are other students involved in extracurricular activities and therefore subject to the Policy who can hardly be considered a safety risk.

It is difficult to imagine how participants in vocal choir, or the academic team, or even the FHA are in physical danger if they compete in those activities while using drugs, any more than any student is at risk simply from using drugs. On the other hand, there are students who are not subject to the testing Policy but who engage in activities in connection with school, such as working with shop equipment or laboratories, which

involve a measurable safety risk.

As a result, in the opinion of the appeals court, “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.”

[G]iven 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. And, without a demonstrated drug abuse problem among the group being tested, the efficacy of the District's solution to its perceived problem is similarly greatly diminished.

The appeals court, therefore, found “little efficacy in a drug testing policy which tests students among whom there is no measurable drug problem.” Accordingly, applying the factors identified by the Supreme Court in *Vernonia*, the federal appeals court concluded that “the testing Policy is unconstitutional.”

We do not suggest that a school must wait until it can identify a drug abuse problem of epidemic proportions before it may drug test groups of its students. Nor do we declare any bright line mark concerning the magnitude at which a drug problem becomes severe enough to warrant a suspicionless drug testing policy. We leave that to each school district. However, 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.

Special needs must rest on demonstrated realities. Unless a district is required to demonstrate such a problem, there is no limit on what students a school may randomly and without suspicion test. Without any limitation, schools could test all of their students simply as a condition of attending school. The District admits it could not test its entire student body and we doubt very much that the Supreme Court would permit such broad testing were the issue presented to it.

As a result, the federal appeals court reversed the summary judgment in favor of the District. In reaching this decision, however, the federal appeals court acknowledged both agreement and disagreement among other federal circuit court decisions which have considered the constitutionality of drug testing policies for extracurricular activities. Accordingly, the court recognized that “[t]his issue is obviously a difficult one with which courts will continue to grapple.”