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SUPREME COURT: RANDOM DRUG TESTING CONSTITUTIONAL WITHOUT IDENTIFIABLE DRUG PROBLEM

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In the case of *Board of Education of Independent School Dist. No. 92 of Pottawatomie County v. Earls*, No. 01-332 (U.S. 06/27/2002), the Supreme Court of the United States considered the constitutionality of a mandatory drug testing policy for all students who participated in competitive extracurricular activities. (Note: This Supreme Court decision reverses the federal circuit court opinion reviewed in the July 2001 NRPA Law Review.) The facts of the case were as follows:

> The city of Tecumseh, Oklahoma, is a rural community located approximately 40 miles southeast of Oklahoma City. The School District administers all Tecumseh public schools. In the fall of 1998, the School District adopted the Student Activities Drug Testing Policy (Policy), which requires all middle and high school students to consent to drug testing in order to participate in any extracurricular activity…
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> Under the Policy, students are required to take a drug test before participating in an extracurricular activity, must submit to random drug testing while participating in that activity, and must agree to be tested at any time upon reasonable suspicion. The urinalysis tests are designed to detect only the use of illegal drugs, including amphetamines, marijuana, cocaine, opiates, and barbituates, not medical conditions or the presence of authorized prescription medications.

During this time, Lindsay and James were both students attending Tecumseh High School and either participating or planned to participate in non-athletic extracurricular activities. In their complaint, the students alleged that the Policy constituted an unreasonable governmental search and seizure in violation of the Fourth Amendment which was applicable to the School Board through the Fourteenth Amendment to the United States Constitution. In so doing, the students claimed the School District had "failed to identify a special need for testing students who participate in extracurricular activities."

Applying the principles articulated by the Supreme Court of the United States in *Vernonia School Dist. 47J v. Acton*, 515 U. S. 646 (1995), the federal district court rejected the students' claim that the policy was unconstitutional and granted summary judgment in favor of the School District. In *Veronia*, the Supreme Court had upheld "the suspicionless drug testing of school athletes."

In this particular instance, the federal district court, noted that "special needs exist in the public school context and that, although the School District did not show a drug problem of epidemic proportions, there was a history of drug abuse starting in 1970 that presented legitimate cause for

concern." Moreover, the district court found "the drug problem among the student body is effectively addressed by making sure that the large number of students participating in competitive, extracurricular activities do not use drugs."

The students appealed to the United States Court of Appeals for the Tenth Circuit. The federal appeals court reversed, holding that the Policy violated the Fourth Amendment. In reaching this conclusion, the appeals court held that a school "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." In this particular instance, the appeals court concluded the Policy was unconstitutional because the School District had failed to "demonstrate such a problem existed among Tecumseh students participating in competitive extracurricular activities." (Note: This decision was reviewed in the July 2001 NRPA Law Review.) The Supreme Court of the United States granted the School Board's petition to review this decision.

As cited by the Supreme Court, "[t]he Fourth Amendment to the United States Constitution protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." Moreover, the Court acknowledged that "[s]earches by public school officials, such as the collection of urine samples, implicate Fourth Amendment interests." Accordingly, the Court stated it "would review the School District's Policy for 'reasonableness,' which is the touchstone of the constitutionality of a governmental search."

On appeal, the students had argued that "drug testing must be based at least on some level of individualized suspicion." The Supreme Court rejected this argument.

> It is true that we generally determine the reasonableness of a search by balancing the nature of the intrusion on the individual's privacy against the promotion of legitimate governmental interests. But we have long held that the Fourth Amendment imposes no irreducible requirement of individualized suspicion. In certain limited circumstances, the Government's need to discover such latent or hidden conditions, or to prevent their development, is sufficiently compelling to justify the intrusion on privacy entailed by conducting such searches without any measure of individualized suspicion…
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> While schoolchildren do not shed their constitutional rights when they enter the schoolhouse, Fourth Amendment rights are different in public schools than elsewhere; the "reasonableness" inquiry cannot disregard the schools' custodial and tutelary responsibility for children. In particular, a finding of individualized suspicion may not be necessary when a school conducts drug testing.

Accordingly, in considering the constitutionality of a drug testing policy, the Supreme Court would conduct "a fact-specific balancing of the intrusion on the children's Fourth Amendment rights against the promotion of legitimate governmental interests." In so doing, the Court would

"first consider the nature of the privacy interest allegedly compromised by the drug testing." In this particular instance, the Court found it significant 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."

> When the government acts as guardian and tutor the relevant question is whether the search is one that a reasonable guardian and tutor might undertake. A student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety. Schoolchildren are routinely required to submit to physical examinations and vaccinations against disease.

As a result, the Court concluded that "the students affected by this Policy have a limited expectation of privacy." Having done so, the Court then considered "the character of the intrusion imposed by the Policy." In so doing, the Court noted that "[u]rination is an excretory function traditionally shielded by great privacy." The Court acknowledged, however, that "the degree of intrusion on one's privacy caused by collecting a urine sample depends upon the manner in which production of the urine sample is monitored." In this particular instance, the Court found "the minimally intrusive nature of the sample collection and the limited uses to which the test results are put" did not constitute a significant invasion of students' privacy.

> Under the Policy, a faculty monitor waits outside the closed restroom stall for the student to produce a sample and must listen for the normal sounds of urination in order to guard against tampered specimens and to insure an accurate chain of custody. The monitor then pours the sample into two bottles that are sealed and placed into a mailing pouch along with a consent form signed by the student.
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> In addition, the Policy clearly requires that the test results be kept in confidential files separate from a student's other educational records and released to school personnel only on a "need to know" basis. Moreover, the test results are not turned over to any law enforcement authority. Nor do the test results here lead to the imposition of discipline or have any academic consequences. Rather, the only consequence of a failed drug test is to limit the student's privilege of participating in extracurricular activities. Indeed, a student may test positive for drugs twice and still be allowed to participate in extracurricular activities.

IMMEDIATE GOVERNMENTAL CONCERN?

Having addressed the Policy's intrusion on the children's Fourth Amendment rights, the Court then considered "the nature and immediacy of the government's concerns and the efficacy of the Policy in meeting them." While noting "the importance of the governmental concern in preventing drug use by schoolchildren," the Court found further

that “the School District in this case has presented specific evidence of drug use at Tecumseh schools.”

> Teachers testified that they had seen students who appeared to be under the influence of drugs and that they had heard students speaking openly about using drugs. A drug dog found marijuana cigarettes near the school parking lot. Police officers once found drugs or drug paraphernalia in a car driven by a Future Farmers of America member. And the school board president reported that people in the community were calling the board to discuss the "drug situation."

Based upon such evidence, the Supreme Court refused to “second-guess the finding of the District Court that viewing the evidence as a whole, it cannot be reasonably disputed that the School District was faced with a `drug problem' when it adopted the Policy." On appeal, the students claimed this evidence was insufficient to establish a "real and immediate” governmental concern which would “justify a policy of drug testing non-athletes.” The Court disagreed. According to the Supreme Court, “a particularized or pervasive drug problem” is not required “before allowing the government to conduct suspicionless drug testing.” On the contrary, the Court found “some showing does shore up an assertion of special need for a suspicionless general search program."

Applying this reasoning to the facts of the case, the Court found the School District had “provided sufficient evidence to shore up the need for its drug testing program.”

> [T]he need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy. Indeed, it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.

Accordingly, the Supreme Court “reject[ed] the Court of Appeals' novel test that any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem."

> Among other problems, it would be difficult to administer such a test. As we cannot articulate a threshold level of drug use that would suffice to justify a drug testing program for schoolchildren, we refuse to fashion what would in effect be a constitutional quantum of drug use necessary to show a "drug problem."

As a result, the Supreme Court concluded that “testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns

in preventing, deterring, and detecting drug use." Moreover, the Court found that "the drug testing of Tecumseh students who participate in extracurricular activities effectively serves the School District's interest in protecting the safety and health of its students. "

> Within the limits of the Fourth Amendment, local school boards must assess the desirability of drug testing schoolchildren. In upholding the constitutionality of the Policy, we express no opinion as to its wisdom. Rather, we hold only that Tecumseh's Policy is a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren.

Accordingly, we reverse the judgment of the Court of Appeals which had found the Policy unconstitutional.