



Drug Testing

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Background

Mandatory drug testing in public schools is a relatively new issue for the law. Introduced during the late 1980s and expanding over the next decade, the practice of analyzing student urine for illegal drugs is carried out in a small but growing percentage of schools nationwide. In 2001, the *New York Times* estimated that hundreds out of the nation's 60,000 school districts require some form of testing. Thus students in thousands of individual schools are affected, and more districts have indicated their interest in adopting testing, too. Currently, the practice has been ruled constitutional in one form by the U.S. Supreme Court.

School drug-testing grew out of the so-called war on drugs. Prior to the 1980s, citizens were rarely tested for drugs except by law enforcement officers and primarily when there were grounds for suspicion. Exceptions existed in a few areas, notably in the routine testing of college and pro athletes and prison inmates. But along with other sweeping social changes, the drug war introduced the idea of so-called mandatory suspicionless testing in the workplace. After spreading from the public to the private sector, the trend reached public high schools in limited form—in the testing of student athletes—in the late 1980s.

Legally, mandatory suspicionless drug testing has proved controversial both in the workplace and school. The practice raises questions about how to balance a perceived social need for health and safety with privacy concerns. Not surprisingly, in light of its rulings favorable to workplace testing, the U.S. Supreme Court upheld suspicionless student drug testing in 1995. The Court already viewed the privacy rights of public school students as being lower than those generally enjoyed by adult citizens. Now, the majority saw an important social need for schools to combat drug usage, viewing the loss of student privacy as inconsequential.

However, the legal status of student drug-testing is cloudy. In large part, this is due to dramatic changes following the 1995 decision. School districts correctly saw the Supreme Court's decision as a green light, but some took the practice much further. Not merely student athletes but a range of student activities, such as band and choir, began requiring students to pass drug tests as a condition for eligibility. This trend has brought new lawsuits and divergent verdicts from the federal courts. As a result, the Supreme Court is expected to clarify certain limits on school drug testing in 2002.

Important legal milestones include the following:

- The Supreme Court defined students' reduced Fourth Amendment rights in *New Jersey v. T.L.O.* (1985), where it ruled that schools do not have to follow the customary requirements of having [PROBABLE CAUSE](#) or a [WARRANT](#) in order to carry out searches. Instead, school authorities must

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follow only a simple standard based on "the dictates of reason and common sense."

- In its first landmark drug-testing ruling, the Supreme Court upheld the suspicionless drug-testing of railroad employees who are involved in accidents in *Skinner v. Railway Labor Executives' Ass'n* (1989). The court held that the government has a compelling interest in public safety that overrides Fourth Amendment rights of the employees.
- In a second critical ruling on drug-testing, the Court upheld the suspicionless drug testing of U.S. Customs Service employees in sensitive positions that involve extraordinary safety and national security hazards in *National Treasury Employees Union v. Von Raab* (1989).
- The Supreme Court upheld the constitutionality of mandatory suspicionless drug-testing of student athletes in *Vernonia v. Acton* (1995). Applying its rulings in *Skinner* and *Von Raab*, the Court found that the students' Fourth Amendment rights were outweighed by the government's interest in drug-free schools when it approved a school's policy of random suspicionless testing of student athletes. In the wake of its landmark ruling, hundreds of school districts nationwide adopted similar policies.
- With the expansion of student drug testing beyond athletics, some schools began requiring random drug-testing as a condition for participation in other extracurricular activities. A panel of the Seventh Circuit Court of Appeals upheld the constitutionality of such a school program in *Todd v. Rush County Schools* (1998), and the Supreme Court refused to hear the case, letting the verdict stand.
- In contrast, another circuit court disapproved of broad extracurricular drug testing. A panel of the Tenth Circuit Court of Appeals overturned a school drug policy in *Earls v. Tecumseh* (2001), holding that extracurricular testing went further than what is permitted under *Vernonia*. With the two circuits in obvious disagreement, the Supreme Court accepted the case for review in 2002.
- A federal judge in Texas struck down what had been the nation's first school district policy requiring drug testing of all junior high school students in *Tannahill v. Lockney School District* (2001).

At both the federal and state level, the future of drug-testing policies is in question. In 2001, legal observers began to note a trend in the courts toward rejecting student drug testing as more cases ended in verdicts for plaintiffs who challenged their school policies. Although some viewed this as a shift in public attitudes, it was too early to say definitively what impact the cases would have on this developing area of law.

Federal Court Decisions

Mandatory Suspicionless Testing of Student Athletes Ruled Constitutional

The legal foundation for suspicionless student drug testing rests upon *Vernonia v. Acton* (1995). In that landmark decision, the Supreme Court upheld the constitutionality of a school policy requiring student athletes to pass random urinalysis tests as a ground for participation in interscholastic sports. The Court rejected a Fourth Amendment claim asserting that such tests are an unconstitutional invasion of privacy. Closely watched nationwide, the decision effectively opened the door for school districts to institute similar policies of their own.

In the late 1980s, school authorities in the small logging community of Vernonia, Oregon, noticed a sharp increase in illegal drug usage and a doubling in student disciplinary problems. They observed that student athletes were leaders of the drug culture. Officials responded by offering anti-drug classes and presentations, along with conducting drug sweeps with dogs. After these education and interdiction efforts failed, a large segment of the student body was deemed to be in "a state of rebellion," according to findings of the Oregon District Court.

With the support of some parents, school officials next implemented a drug-testing policy for student athletes in fall 1989. It had three goals: prevent athlete drug use, protect student health and safety, and provide drug

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assistance programs. It imposed strict eligibility requirements: parents of student athletes had to submit a consent form for drug testing of their children, and the student athletes had to submit to tests. Once weekly the school randomly tested 10 percent of all student athletes by taking urine samples that were analyzed for illegal drug usage—a procedure known as urinalysis.

A legal challenge to the policy arose when a student and his parents refused to consent to drug testing and he was denied the chance to play football. Their lawsuit charged that the district violated his Fourth Amendment right to be free from unreasonable searches and seizures as well as his privacy rights under the Oregon state constitution. The District Court rejected their claims, but they won on appeal. The school district then appealed to the U.S. Supreme Court.

In its 6-3 decision, the majority followed earlier precedents. In particular, it looked back on its landmark decision regarding privacy for public school students, *New Jersey v. T.L.O.* (1985). That decision extended the great basis in U.S. law for privacy—Fourth Amendment protections—to public school students. It held that they, too, were protected from "unreasonable" searches and seizures of their persons and property by authorities, since public school authorities are agents of the government. But *T.L.O.* set the standard that Fourth Amendment rights are "different in public schools than elsewhere." In lowering student rights, the Court did so observing that public school authorities have a compelling interest in supervision and maintaining order that outweighs individual student rights.

In *Vernonia*, the majority went further. First, it distinguished the rights of student athletes from the already reduced privacy rights of the public school student body. Justice Antonin Scalia's majority opinion stated that student athletes have an even lower expectation of privacy since they routinely undress in locker rooms, noting that "school sports are not for the bashful." Second, it approved the particulars of the Vernonia school district's policy. The urinalysis was performed under minimally intrusive conditions similar to those in the schools' restrooms. There was no concern that school officials might arbitrarily accuse certain students because every student athlete was subject to being tested. Furthermore, participation was ultimately voluntary, since no one was required to play sports. And finally, the school's goals in reducing a serious drug abuse and disciplinary problem justified the testing.

Three justices dissented. Writing for the dissenters, Sandra Day O'Connor observed that mass suspicionless searches of groups had been found unconstitutional throughout most of the court's history, except in cases where the alternative—searching only those under suspicion—was ineffectual. She concluded that the school's policy was too broad and too imprecise to be constitutional under the Fourth Amendment.

Lower Court Disagreement over Broader Extracurricular Student Testing

The practical effect of *Vernonia* was to clear the way for student athlete drug-testing in schools nationwide. But the decision did not envision what happened next. By the mid-1990s, schools had begun adopting even broader testing policies that expanded the definition of testable extracurricular activities to include activities such as band and choir and, as in the extreme instance of Lockney, Texas, the entire junior high school student body. This broadening set the stage for the next constitutional challenges, which resulted in conflicting verdicts among federal circuit courts. Given these varying rulings, there is as of 2002 no single standard in federal caselaw for when public schools may require students to pass drug tests.

Initially, one such policy passed constitutional approval. In 1998, a three-judge panel of the Seventh Circuit Court of Appeals upheld a school system's broad drug testing program in *Todd v. Rush County Schools* (1998). At issue was a policy by the Rush County School Board of Indiana, which in 1996 banned a high school student from participation in extracurricular programs unless the student first passed negative for alcohol and other drugs, or tobacco in a random, unannounced urinalysis exam. The policy covered students in activities ranging from the Library Club to the Future Farmers of America Officers, as well as those who

merely drove to and from school. Any student failing the urinalysis lost eligibility until such time as he or she successfully passed.

In rejecting a challenge to the policy, the Seventh Circuit found that the policy was consistent with the Supreme Court's ruling in *Vernonia*. Its brief opinion found sufficient similarity between the intent of the Indiana and Vernonia programs: deterring drug use rather than punishing users. The broader scope of the Indiana policy was not a constitutional problem, as the court observed that nonathletic extracurricular activities also "require healthy students." Its own 1988 decision on drug-testing student athletes, *Schall v. Tippecanoe County School Corp.*, also supported the broader policy. The Supreme Court declined to review the case. As with the earlier *Vernonia* decision, the New York Times reported that the Seventh Circuit's decision "set off a wave of such policies" nationwide. Ironically, however, the Indiana policy was later struck down on state constitutional grounds.

In 2001, a dramatically different verdict appeared. A panel of the Tenth Circuit Court of Appeals ruled that drug-testing for eligibility for extracurricular activities violated Oklahoma public school students' rights in *Earls v. Tecumseh*. Unlike the Seventh Circuit, the panel followed a very narrow reading of *Vernonia*. It applied that decision's facts and conclusions to the circumstances of the Tecumseh School District in Pottawatomie County, Oklahoma, and found sharp differences. No widespread drug problem existed in the school, unlike the Vernonia district. Moreover, the panel rejected the district's contention that drug testing was justified because extracurricular activities involved safety risks for unsupervised students. Instead, the panel ruled that the tests imposed unreasonable searches upon students in violation of their Fourth Amendment rights.

The Tenth Circuit panel specifically addressed the question of when a school drug testing policy was appropriate. It expressly stated that it did not expect schools to wait until drug abuse problems grew out of control. However, if school officials faced no requirements, they would be free to test students as a condition of attending school—an outcome that the justices did not believe the Supreme Court would uphold.

Significantly, the *Earls* decisions signaled a deep rift between two federal circuits in how to interpret *Vernonia*. Presumably for this reason, the Supreme Court accepted the case for review, with a decision expected some time in 2002. Lingering questions about the permissibility and scope of such policies may also have inspired the Court to return to the question. Indeed, in 2001, legal observers noted a shift in federal opinions away from support for student drug-testing policies. In addition to the *Todd* case, a federal judge struck down the pervasive policy of testing all public school students in grades seven through 12 in *Tannahill v. Lockney School District* (2001), while state courts also ruled against policies.

State Court Decisions

As a policy matter, student drug testing in public schools is widely determined by school districts. State legislatures have thus far not intruded, leaving these determinations to the discretion of local school boards. As such, policies vary widely nationwide, and even from district to district within given states. Most schools still have no testing policy, but those that have adopted policies tend to fall into two categories: mandatory suspicionless testing is required of students who wish to play intramural athletics, or, more broadly, it is required not only of athletes but also of students wishing to participate in extracurricular clubs and organizations.

Legal direction on school policies has come from the courts. The highest-profile challenges to the policies have been brought in federal court on Fourth Amendment grounds, but some cases have been brought on state constitutional grounds, too. State constitutions often have broader privacy protections than are found under the

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federal constitution, thus providing powerful legal grounds for plaintiffs who want to challenge overly aggressive school policies.

The first state constitutional challenge against mandatory testing of student athletes came in *Wilson v. Ridgefield Park Board of Education* (1997). The American Civil Liberties Union brought the case against Ridgefield Park, New Jersey school board, arguing that the policy violated state constitutional privacy rights. A state superior court judge agreed, additionally finding that the school had no [EVIDENCE](#) of a severe drug problem among athletes, and temporarily blocked enforcement of the policy pending trial. But before the case could be heard, the school board dropped the policy in a 1998 [SETTLEMENT](#).

State courts in Indiana, Oregon, and Pennsylvania have also found constitutional problems with school policies. Some state courts have addressed themselves to policies resulting from the expansion of student testing to other extracurricular activities. In rejecting one such policy, the Colorado state supreme court applied the U.S. Supreme Court's 1995 standard from *Vernonia v. Acton* when it held that high school marching band members have a higher expectation of privacy than student athletes who undress in locker rooms, in *Trinidad School District No. 1 v. Lopez* (1998). In other state [LITIGATION](#), school districts in Maryland and Washington discontinued policies following lawsuits. These cases signal that the legal future of suspicionless student drug testing is far from certain.

Additional Resources

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Organizations

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