

A TIME FOR THE SUPREME COURT TO REVISIT PUBLIC SCHOOL
STUDENT’S FOURTH AMENDMENT PROTECTION: SUSPICIONLESS
BREATHALYZER TESTING POLICIES IN PUBLIC SCHOOLS

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I. INTRODUCTION

It has been eleven years since the last U.S. Supreme Court case addressing the constitutionality of public school’s suspicionless searches of students.¹ Since the decision in *Earls*, public school systems around the nation have been increasingly making policies to search students for drug and alcohol use.² In this article, I will show that existing public school policies and practices, permitting suspicionless breathalyzer testing, are violating student’s Fourth Amendment protection against unreasonable searches and seizures, and that it is time for the U.S. Supreme Court to set limits in order to safeguard this protection.

Part II of this article introduces the Supreme Court cases that establish how the Fourth Amendment of the U.S. Constitution is applied to public school’s suspicionless searches of students. Part III will compare the drug and alcohol problems in school aged children in order to determine whether there is a special need for suspicionless searches of public school students for alcohol. Part IV will examine a current example of public school suspicionless searches of students and I will determine whether this conforms to the constraints enumerated in the Fourth

¹ *Board of Education of Independent School Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822 (2002).

² See, e.g., Stratford Public Schools – Breathalyzer Policy, <http://www.stratfordk12.org/images/customerfiles/Community/1BreathalyzerPolicy2010.pdf> (allowing suspicionless Breathalyzer tests of all students attending school-sponsored events, and students face disciplinary action); See also, Fairfield Schools Policy, <http://fairfieldschools.org/board-of-education-policy-5000.htm> (breathalyzer used at school-sponsored dances and other selected school sponsored events, consequences outlines in district’s disciplinary procedures); See also, Barnstable High School – Breath Alcohol Testing Policy & Procedure, <http://www.barnstable.k12.ma.us/Domain/203> (breathalyzer testing at dances, prom and celebration – allows school to call police to take student into protective custody).

Amendment of the U.S. Constitution as applied by the Supreme Court. Part V will conclude this article by presenting why we will likely see a new question regarding the Fourth Amendment protection of public school students in front of the Supreme Court in the near future.

II. SUPREME COURT DECISIONS

In 1969, the Supreme Court stated, “It can hardly be argued that ... students ... shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”³ In 1985, the Supreme Court applied this rationale to the Fourth Amendment.⁴ The Supreme Court, in *New Jersey v. T.L.O.*, made it clear that public school officials do not act *in loco parentis*, but instead are state actors bound by constitutional constraints.⁵ However, the Court found the Fourth Amendment does not require a warrant or probable cause determination by a public school official; rather the legality of a search of the student depends solely on the reasonableness of the search.⁶

In 1995, for the first time, the Supreme Court heard a case involving public school officials using suspicionless searches on students.⁷ In determining whether the suspicionless

³ *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969) (holding that there was an unconstitutional denial of students’ right of expression of opinion for school regulation prohibiting wearing armbands to school and for suspension of any student refusing to remove the armband).

⁴ *New Jersey v. T.L.O.*, 469 U.S. 325, 325 (1985) (holding the Fourth Amendment’s prohibition on unreasonable searches and seizures applies to searches conducted by public school officials).

⁵ *Id.*

⁶ *Id.* at 326 (“[d]etermining the reasonableness of ... [a] search involves a determination of whether the search was justified at its inception and, whether, as conducted, it was reasonably related in scope to the circumstances that justified the inference in the first place”).

⁷ *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (holding the public school district’s student athlete drug policy, permitting suspicionless searches of student athletes, constitutional under the Fourth Amendment).

search was reasonable, the court looked to three factors.⁸ First, the Court “considered ... the nature of the privacy interest upon which the search ... at issue intrudes,” and in doing so, the Court examined if there was a subjective expectation of privacy that society recognizes as legitimate, as well as the legal relationship of the individual with the State.⁹ The Court found there was a decreased expectation of privacy.¹⁰ Second, the Court considered “the character of the intrusion that is complained of.”¹¹ The character of the intrusion depends upon the manner in which production of the sample is monitored and the information it discloses.¹² The Court found the search was relatively unobtrusive.¹³ Finally, the Court considered “the nature and immediacy of the government concern at issue ... and the efficacy of [the] means for meeting it.”¹⁴ The Court found the nature of the concern is important, perhaps compelling, though the Court refused to state if a compelling state interest is necessary.¹⁵ Furthermore, the District had

⁸ *Id.* at 654-61.

⁹ *Id.* at 655-57 (finding the state’s power is custodial and tutelary in nature).

¹⁰ *Id.* at 655-57, 66 (school children are routinely required to submit to various physical examinations, and legitimate privacy expectations are even less with regard to student athletes).

¹¹ *Id.* at 658

¹² *Id.* (finding the monitoring conditions identical to those typically encountered in a public restroom, the information disclosed is a standard drug search identical to everyone tested, the information is limited to school personnel that need to know, and that information is not turned over to police or used for any internal disciplinary function); See also *Skinner v. Railway Labor Executives’ Ass’n*, 489 U.S. 602, 626 (1989) (finding urine tests require “excretory function traditionally shielded by great privacy”).

¹³ *Id.* at 666.

¹⁴ *Id.* at 660.

¹⁵ *Id.* at 661-62 (detering drug use in school children at least as important as deterring drug use in other cases, school children at a time where physical, psychological, and addictive effects most severe, negative effects felt by entire school, and program directed narrowly at school athletes whom have the greatest chance of physical injury); See also *Skinner*, *supra*, at 628 (“Government interest of testing [train employees] without a showing of individualized suspicion is compelling”).

an immediate concern that was effectively addressed by making sure athletes do not use drugs.¹⁶ In finding, for the first time, that here, the suspicionless search of students by public school officials is reasonable and, therefore, constitutional under the Fourth Amendment, the Court noted “[t]he most significant element in this case ... [is] that the Policy was undertaken in furtherance of the government’s responsibilities, under a public school system, as a guardian and tutor of children entrusted to its care.”¹⁷

Only seven years later, in 2002, the Supreme Court, in a 5-4 decision, expanded the *Vernonia* decision to encompass all students who participate in competitive extracurricular activities.¹⁸ The Court used the same three factors that were previously used in *Vernonia* to review the Policy for reasonableness.¹⁹ First, there was a similar diminished expectation of privacy for students involved in competitive extracurricular activity.²⁰ Next, the intrusion was nearly identical to the intrusion deemed negligible in *Vernonia*, except it provided additional

¹⁶ *Id.* at 662-64 (large part of student body, particularly student athletes, were in rebellion, and disciplinary actions reached epidemic proportions; drug problem largely fueled by the role model effect of student athletes is effectively addressed by making sure athletes do not use drugs; “[This Court has] repeatedly refused to declare that only the least intrusive search practicable can be reasonable under the Fourth Amendment).

¹⁷ *Id.* at 665 (“the relevant question is whether the search is one that a reasonable guardian or tutor might undertake”)

¹⁸ *Board of Education of Independent School Dist. No. 92 of Pottawatomie County v. Earls*, 536 U.S. 822, 822 (2002) (holding “[the] policy requiring all students who participated in competitive extracurricular activities to submit to [suspicionless] drug testing ... did not violate the Fourth Amendment”); See also *Vernonia*, *supra*, at 646 (showing this policy was directed only at the public school district’s student athletes).

¹⁹ *Id.* at 823-24 ([1] nature of the privacy interest; [2] character of the intrusion; and [3] nature and immediacy of the government’s concern and the efficacy of the Policy in meeting them); See also *Vernonia*, *Supra*, 654-61 (identical three factors of Fourth Amendment “reasonableness”)

²⁰ *Id.* at 823 (finding communal undress was not essential to *Vernonia*, students here voluntarily subjected themselves to many of the same intrusions as athletes).

privacy.²¹ Finally, the Court concluded “the Policy effectively serves the School District’s interest in protecting its students’ safety and health.”²² Based on these three factors, the Court found that the Policy requiring students involved in extracurricular activities to submit to suspicionless drug testing “is a reasonable means of furthering the School District’s important interest in preventing and deterring drug use among its schoolchildren” and, therefore, it is constitutional.²³

Justice Breyer, joining the majority and writing a concurrence, gave the majority opinion its fifth and last necessary vote.²⁴ Due to this being the last Supreme Court decision on public school suspicionless searches of students and the close vote, it is important to note that in regards to the privacy-related burden this Policy imposed on students, Justice Breyer, in his concurrence, emphasized “the testing program avoids subjecting the entire school to testing.”²⁵ Furthermore, Justice Breyer noted that the District’s Policy “addresses a serious national problem by focusing

²¹ *Id.* at 832-33 (“it additionally protects privacy by allowing male students to produce their samples behind a closed stall”).

²² *Id.* at 834-38 (“this Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing,” there was a nationwide epidemic of drug use, the necessary safety interest under the special needs analysis is furthered for all students, and testing students participating in extracurricular activities is a reasonably effective means of addressing the District’s legitimate concerns); See also *National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 674 (1989) (in upholding drug testing of custom officials on a preventive basis, the Court said “Service’s policy of deterring drug users ... cannot be deemed unreasonable”); See also *Chandler v. Miller*, 520 U.S. 305, 319 (1997) (in holding that Georgia’s suspicionless search program for candidates of state office is unconstitutional under the Fourth Amendment, the Court said “A demonstrated problem of drug abuse, while not in all cases necessary to the validity of a testing regime, would shore up an assertion of special need for a suspicionless general search program”).

²³ *Id.* at 838.

²⁴ *Id.*

²⁵ *Id.* at 841 (Justice Breyer’s concurrence states “it preserves an option for a conscientious objector. He can refuse testing while paying a price (nonparticipation) that is serious, but less severe than expulsion from the school.”).

upon demand, avoiding the use of criminal or disciplinary sanctions, and relying upon professional counseling and treatment.”²⁶

III. CURRENT SPECIAL NEED OF STUDENT BREATHALYZER TESTING

The Supreme Court has held that in public schools, “a [suspicionless] search may be reasonable when supported by special needs beyond the normal need for law enforcement.”²⁷

Furthermore, the finding of a particularized or pervasive drug problem is not always necessary for the government to have this special need, because preventing drug use should not be halted until there is a substantial problem.²⁸ Finally, “safety factors into the special needs analysis, but the safety interest ... is undoubtedly substantial for all children, athletes and nonathletes alike.”²⁹ In comparing the use and safety risks of alcohol to drug abuse in adolescents, we will be able to determine whether the same type of special needs for drug abuse exists based on adolescent alcohol abuse.

A Nation Institute on Drug Abuse study from 2010 indicates that by eighth-grade about twenty-one percent of teens have used some form of illegal drugs, and that number increases to forty-eight percent by twelfth-grade.³⁰ The same study shows that by eighth-grade about thirty-six percent of teens have used alcohol and by twelfth-grade the number increases to seventy-one percent.³¹ Although the national drug abuse problem in adolescents was on the rise between the *Vernonia* and *Earls* decisions, adolescents using alcohol has decreased by about ten percent

²⁶ *Id.* at 838.

²⁷ *Id.* at 822.

²⁸ *Id.* at 835.

²⁹ *Id.* at 836 (drug use carries health risks for all children).

³⁰ J.L. Matheson, and R.T. McGrath, Jr., "Adolescent Alcohol and Other Drug Abuse," *Colorado State University Extension: Consumer Series / Family*, 10.216 (2012), <http://www.ext.colostate.edu/pubs/consumer/10216.html>.

³¹ *Id.*

between 1995, the year *Vernonia* was decided, and 2011.³² Despite the decrease in alcohol abuse in adolescents, it is clear our Nation's alcohol abuse problem is more prevalent than the abuse of other drugs.

It is also relevant to determine whether the safety concerns of alcohol and drug abuse are similar. Teen alcohol and drug abuse can cause problems with school, family, poor brain function, brain development, social spending, chemical dependence, and potentially death from abuse.³³ The Court in *Vernonia* and *Earls* found many of the same concerns important to their deliberation.³⁴ The concern of drug abuse, which the Court used in deciding that a special need existed in *Vernonia* and *Earls*, is identical to the potential problems of alcohol abuse in adolescents.

Based on the extensive nature of alcohol and drug abuse in teens, and the nearly identical problems with both, the Court would likely determine that the government, acting through school officials, has a special need in deterring alcohol abuse by public school children. However, a special need is only one factor in deciding whether a practice or policy is reasonable under the

³² *Earls*, supra, at 834 (“The drug abuse problem among our Nation’s youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse”); See also Center for Disease Control and Prevention, “Trends in the Prevalence of Alcohol Use, Nation YRBS: 1991-2011,” *Youth Risk Behavior Surveillance System*, http://www.cdc.gov/healthyyouth/yrbs/pdf/us_alcohol_trend_yrbs.pdf (showing decrease from about eighty percent to about seventy-one percent).

³³ Matheson and Mcgrath, supra (listing the problems with teen drug and alcohol use).

³⁴ *Vernonia*, supra, at 661-62 (drug abuse problems include time when physical, psychological, and addictive effects are most severe, nervous system more critically impaired, chemical dependence quicker than adults, recovery lower than adults, educational process disrupted for all students, and risk of physical harm of student athletes and those they compete against is particularly high); See also *Earls*, supra, at 836-39 (drug use carries a variety of health risks for children, including death from overdose; Justice Breyer, concurring, quoting White House Nat. Drug Control Strategy 25 “drug abuse leads annually to about 20,000 deaths, \$160 billion in economic costs).

Fourth Amendment; next I will apply the three factors from *Vernonia* and *Earls* to determine whether each state action is reasonable.

IV. CURRENT PRACTICE AND POLICIES

A. *St. Charles High School Graduation Rehearsal Breathalyzer Testing*

On the last day of school for graduating seniors at St. Charles High School, a public high school in Minnesota, school administrators required all seventy-three seniors to take a Breathalyzer test.³⁵ According to school administrators, teachers observed unusual behavior by a group of about twenty students and the administration feared those students would later drive, so school officials called local police in to administer a Breathalyzer test to every graduating senior.³⁶ The students report feeling forced to allow the search, because they would not be able to participate in graduation unless they complied.³⁷ All students, even those testing positive, were allowed to walk at graduation, although the students who tested positive received some sort of punishment.³⁸

The facts of this incident differ from those in *Vernonia* and *Earls* in several significant ways. Here, the school searched every student based on their class, rather than testing only those students who participate in competitive extracurricular activities.³⁹ Furthermore, the students

³⁵ Howerton, Jason. "Minn. High School Requires Entire Senior Class to Take Breathalyzer Before Graduating." *The Blaze*, sec. Education, June 05, 2012. <http://www.theblaze.com/stories/2012/06/05/minn-high-school-requires-entire-senior-class-to-take-breathalyzer-before-graduating/> (accessed); See also Brady, Aristeia. "School: Breathalyzer Or No Graduation." *WCCO: CBS Minnesota*, June 04, 2012. <http://minnesota.cbslocal.com/2012/06/04/school-breathalyzer-or-no-graduation/>.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Vernonia*, supra, at 646 (showing the suspicionless searches involved only student athletes); See also *Earls*, supra, at 822 (expanding *Vernonia* to include all students participating in competitive extracurricular activities).

here were tested with the help of police officers, who then had access to the findings.⁴⁰ Finally, there was no waiver form that gave the students and parents prior notice of the search.⁴¹

Before applying the three factors from *Vernonia* and *Earls*, it is important to note that because police were present and tested the students, this practice may require a probable cause analysis.⁴² If the reasonableness of the search required probable cause, the District's "special need" would not reduce the Fourth Amendment requirement to the three-factor determination of reasonability from *Earls* and *Vernonia*.⁴³ Without conceding that the Supreme Court would determine probable cause was not required, I will move on to the three-factor analysis applied as expanded in *Earls*.

First, I will consider the nature of the privacy interest compromised by the Breathalyzer test.⁴⁴ The relevant question is whether the search is one that a reasonable guardian or tutor might undertake.⁴⁵ Here, like *Earls*, a student's privacy interest is limited in a public school because of the official's responsibility for maintaining discipline, health, and safety.⁴⁶ However, unlike competitive extracurricular activities, seniors participating in graduation do not

⁴⁰ *Earls*, supra, at 832-33 (showing a faculty monitor collects the sample, samples mailed to private lab, test results not turned over to law enforcement and do not lead to disciplinary or academic consequences).

⁴¹ *Vernonia*, supra, at 650 (parents gave unanimous approval of the Policy; students and parents must give written consent before participating in interscholastic athletics).

⁴² *Earls*, supra at 829 ("Given that the School District's Policy is not in any way related to the conduct of criminal investigations, respondents do not contend that the School District required probable cause before testing students").

⁴³ *Earls*, supra, at 828 (citing *Skinner* "In the criminal context, reasonableness usually requires a showing of probable cause") See, *Skinner*, supra, at 619.

⁴⁴ *Earls*, supra, at 830 (first factor "We first consider the nature of the privacy interest allegedly compromised by the drug testing").

⁴⁵ *Vernonia*, supra, at 665.

⁴⁶ *Earls*, supra, at 831 (student's privacy interest limited in public schools, citing requirement of physical examinations and vaccinations).

voluntarily subject themselves to additional intrusions on their privacy.⁴⁷ The Supreme Court, in *Lee v. Weisman*, stated that participation in graduation is not voluntary in any sense of the word.⁴⁸ A student in the care of a public school may have a reduced privacy interest, but the general student's privacy interest is greater than a student voluntarily participating in extracurricular activities.

Next, I will consider the character of the intrusion of the Breathalyzer test.⁴⁹ The character of the intrusion depends on the manner in which the Breathalyzer sample is collected, as well as the information it discloses and the uses to which the results are put.⁵⁰ The Supreme Court, in *Skinner*, found breath tests to be less intrusive than urine tests.⁵¹ Although the intrusion here may be less than in *Earls*, the information and use of the results may be more problematic. Here, the samples are not sent to an independent laboratory that is unaware of the student's identity; rather, the students were tested directly in the presence of both school administrators and police.⁵² Also, medical conditions and prescription drugs, among other things, can trigger a false positive in a Breathalyzer test.⁵³ A false positive, or even the potential

⁴⁷ *Id.* (off-campus travel and communal undress, and additional rules and requirements).

⁴⁸ *Lee v. Weisman*, 505 U.S. 577, 595 (in holding that a school cannot provide a nonsectarian prayer at graduation, the Court stated "A school rule that excuses attendance [from graduation] is besides the point. Attendance may not be required by official decree ... [absenting from graduation is not voluntary] for absence would require forfeiture of those intangible benefits which have motivated the student").

⁴⁹ *Earls*, *supra*, at 832 (second factor).

⁵⁰ *Id.* at 834

⁵¹ *Skinner*, *supra*, at 626 ("the procedures for collecting the necessary [urine] samples, which require employees to perform an excretory function traditionally shielded by great privacy, raise concerns not implicated by blood or breath tests").

⁵² Howerton, *supra*.

⁵³ Hanson, David, Ph.D. "Hypoglycemia, Acetone and Breathalyzer (Alcohol Breath Tester) Results." <http://www2.potsdam.edu/hansondj/files/Hypoglycemia-Acetone-and-Breathalyzer-Results.html> (Hypoglycemia can produce acetone in breath, which is one case of false blood alcohol concentration; Hypoglycemia can be caused by diabetes, cardiac, kidney, and liver diseases, sulfa medications and pseudoephedrine).

for one, would require the student to turn that sensitive medical information over to the school officials or police, as opposed confidentially to the independent laboratory in *Vernonia*, to avoid the potential consequences.⁵⁴ Furthermore, unlike *Earls*, the police present at the school had access to the test results.⁵⁵ Finally, although the specific punishment for those who tested positive is not known, the school admitted there was some sort of punishment.⁵⁶ Given the differences, the character of the intrusion on students' privacy is more severe in the current case.

Finally, I will consider the nature and immediacy of the government's concern and the efficacy of the practice in meeting them.⁵⁷ Given the analysis in Part III of this article, that the national alcohol abuse problem is more prevalent than the drug abuse problem, and the school administrators' fear that students under the influence would drive home, it would seem that the nature and immediacy of the government's concern is met.⁵⁸ The suspicionless Breathalyzer test given to all senior students, without notice, is effective in detecting alcohol use, but it may not be effective in preventing or deterring it.⁵⁹ The third factor, as applied to the facts here, fits almost seamlessly within the *Earls* decision.

The students here have a greater privacy interest, and the nature of the intrusion of the school-sponsored search is more severe, than in *Earls*. If the Supreme Court were to hold that this type of suspicionless testing is constitutional, it would dramatically broaden suspicionless searches of school students by public school officials. The State would have carte blanche to test

⁵⁴ *Vernonia*, supra, at 660 (It may be that student is permitted to provide information in confidential matter, the Court will not assume the worst).

⁵⁵ *Earls*, supra, at 833 (test results not turned over to law enforcement).

⁵⁶ *Id.* ("Nor do the test results here lead to the imposition of discipline or have any academic consequences")

⁵⁷ *Id.* at 834 (third factor).

⁵⁸ Howerton, supra.

⁵⁹ *Earls*, supra, at 837 ("we find 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").

any student, without notice and consent from either the student or parent, and at any point in time that the student is under the authority of the school.

The facts here eviscerate much of Justice Breyer's concurrence, a deciding vote in the *Earls* decision.⁶⁰ Here, the school does not rely upon professional counseling and treatment, avoiding criminal or disciplinary sanctions.⁶¹ Furthermore, the testing does not avoid testing the entire school, nor does it allow an option for the conscientious objector.⁶² It does, however, allow the suspicionless search of students based on nothing more than the class they are in and, if allowed, this could be applied to the entire student body.

For these reasons, if this case were to be presented to the Supreme Court, I suspect that they would rule this practice unconstitutional, and Justice Breyer would be in the majority.

V. CONCLUSION

It is increasingly likely that we will see a case, such as the one examined in this article, in front of the Supreme Court in the near future. Schools around the nation have been crafting policies to allow suspicionless searches of students regardless of their involvement with competitive extracurricular activities. Students that attend events ranging from school dances to graduation are now subjected to suspicionless searches.⁶³ Unless the Supreme Court intends

⁶⁰ *Id.* at 838-42 (Justice Breyer's concurrence).

⁶¹ *Id.* at 838; See also Howerton, *supra* ("Officers ... were all present" and "Those students did receive some form of punishment").

⁶² *Id.* at 841 ("the testing program avoids testing the entire school to testing. And it preserves an option for a conscientious objector"); See also *Lee*, *supra*, at 595 (graduation is not voluntary in any sense of the word).

⁶³ See Stratford Public Schools – Breathalyzer Policy, <http://www.stratfordk12.org/images/customerfiles/Community/1BreathalyzerPolicy2010.pdf> (allowing suspicionless Breathalyzer tests of all students attending school-sponsored events, and students face disciplinary action); See also, Fairfield Schools Policy, <http://fairfieldschools.org/board-of-education-policy-5000.htm> (breathalyzer used at school-sponsored dances and other selected school sponsored events, consequences outlines in district's disciplinary procedures); See also, Barnstable High School – Breath

Earls to apply broadly to all public school students, at least some of these policies or practices would be found unconstitutional. The problem is that based on the limited decisions from the Supreme Court, this is a gray area for the State. Given the nature and immediacy of the drug and alcohol problem schools face, as well as the increase in policies outside the scope of *Earls* and *Vernonia*, the Supreme Court should hear another case on suspicionless searches and clearly outline the extent of the Fourth Amendment's prohibition of unreasonable searches of public school students.

Alcohol Testing Policy & Procedure, <http://www.barnstable.k12.ma.us/Domain/203>
(breathalyzer testing at dances, prom and celebration – allows school to call police to take student into protective custody).