

Stretching the Justifiable Limit:

The Ineffectiveness and Constitutional Violation of Random School Drug Testing
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Random drug testing in public school systems should be prohibited, since it is a violation of students' Fourth Amendment rights and, furthermore, not an effective means to reduce student drug use. The Fourth Amendment of the United States grants the right of its citizens to be secure from unreasonable searches and seizures by the government without probable cause. "Probable cause" means there must be enough evidence that a reasonable person would believe a crime was committed.¹ "In carrying out searches and other functions pursuant to disciplinary policies mandated by state statutes, school officials act as representatives of the State, and they cannot claim the parents' immunity from the Fourth Amendment's strictures."² Thus, there is a difference between precedents involving school officials' searches of individually "suspicious" students, or in other words, those where school systems had probable cause to search the student, and those involving testing at random, where no probable cause is present.

The 1985 case *New Jersey v. T.L.O.* is an example of a justified search of a "suspicious" individual student.³ A teacher at a New Jersey high school discovered respondent, a 14-year-old freshman, and her friend smoking cigarettes in the school restroom, and escorted them to meet with the Assistant Vice Principal. The Assistant Vice Principal proceeded to search through respondent's purse when she denied that she

¹ Judicial Learning Center. (2012). *Your 4th Amendment Rights*. Retrieved from <http://judiciallearningcenter.org/your-4th-amendment-rights/>

² *New Jersey v. T.L.O.*, 469 U.S. 325. ("The Fourth Amendment's prohibition on unreasonable searches and seizures applies to searches conducted by public school officials and is not limited to searches carried out by law enforcement officers").

³ Id.

had been smoking in the lavatory, finding a pack of cigarettes along with a package of “rolling papers” commonly used to make marijuana joints. Pursuant to the “probable cause” standard of the Fourth Amendment, the search in this case was not unreasonable, because the report to the Assistant Vice Principal after finding respondent smoking in the lavatory warranted a reasonable suspicion that she had been smoking on school grounds, violating school policy. The analysis used to measure the reasonableness of a student search used in *New Jersey v. T.L.O.* balanced the invasiveness of the search against the need for the search – or in other words, the individual’s right and legitimate expectations of personal security against the state’s “need for effective methods to deal with breaches of public order.”⁴

The Court stretched the “suspicion” standard beyond what can justifiably be called reasonable in *Vernonia School District 47 v. Acton* in 1995.⁵ A school district adopted a policy authorizing random drug testing of student athletes as a means to fixing a known drug problem in the school district, and knowledge that the student athletes were among some of the drug users and dealers. “By 1989, disciplinary actions had reached ‘epic proportions’ motivating the district to introduce the Student Athlete Drug Policy.” Respondent, 7th grader James Acton, refused to consent to the testing and was therefore not allowed to participate on the school’s football team.⁶ When the Court was presented with the challenge, it justified the random testing with the “special needs” of the schools, which is had done 10 years prior in *New Jersey v. T.L.O.* However, unlike in *T.L.O.*, in

⁴ Susan P. Stuart, *When the Cure is Worse than the Disease: Student Random Drug Testing 7 Its Empirical Failure*, 44 Val. U.L. Rev. 1055 (2010). (“[t]he Court’s approach to student drug testing in particular is now wrong as a matter of fact”).

⁵ *Vernonia School District 47J v. Acton*, 515 U.S. 646

⁶ *Id.* The Student Athlete Drug Policy authorized random urinalysis drug testing of students who participated in its athletics programs.

this case, the Court held a greater burden in justifying the lack of an individualized suspicion and in finding a State interest that would work.⁷ Instead of keeping *Vernonia* consistent with *T.L.O.*, the Court did not require the school to provide a “compelling” government interest that random drug testing would facilitate, but rather determined that the interest must merely be “important enough” to justify the particular search.⁸

Although the Court named off several “important” state interests for the Student Athlete Drug Policy, it refused to “quantify” the interests and concluded that regardless of if the governmental concern was necessary in the case, it was met by the use of the drug testing policy. With this final holding, the Court denied to look for evidence showing that the random student drug testing program was effective in accomplishing the states’ interests.⁹

Relying on its reasoning in *Vernonia*, the Court further decreased the state’s burden to fulfill an “important” interest to justify an even more random and suspicion-less drug testing program in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*.¹⁰ In this case, a school district implemented a random drug-testing policy for all middle school and high school students involved in any and all

⁷ Susan P. Stuart, *When the Cure is Worse than the Disease: Student Random Drug Testing 7 Its Empirical Failure*, 44 Val. U.L. Rev. 1055, 1058 (2010).

⁸ *Id.*

⁹ *Id.* at 1059. (“As the counterpoint in its balancing analysis, the Court’s examination of the state’s ‘heightened’ interest in administering these tests embraced four factors: (1) deterring drug use in the targeted group; (2) controlling the disruptive influence in the educational function caused by the users; (3) protecting the non-users in the school from being ‘infected’ by the users; and (4) protecting the health and safety of the targeted group – student-athletes – from immediate harm visited upon them by both using drugs and participating in sports”).

¹⁰ Greenstein, N. (July 31, 2013). Privacy and the Law: How the Supreme Court Defines a Controversial Right. [Student Drug Testing: Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls](http://nation.time.com/2013/08/01/privacy-and-the-law-how-the-supreme-court-defines-a-controversial-right/slide/student-drug-testing/). *TIME*. Retrieved at <http://nation.time.com/2013/08/01/privacy-and-the-law-how-the-supreme-court-defines-a-controversial-right/slide/student-drug-testing/>.

extracurricular activities.¹¹ However, not only was there no individualized suspicion to justify a search on a student in this case, but the only interest the state had for such random testing in this case, which the Court found legitimate enough to outweigh the students' Fourth Amendment expectations of privacy, was that there was a national "war on drugs" epidemic occurring. Thus, the school targeted a completely suspicion-less student population, and the Court created precedent that "...a school district can now justify its government interest in support of student drug tests merely by evoking a judicially hysterical response to the 'war on drugs.'"

In the above rulings, the Court only interpreted federal law. However, schools are also subject to state law, which in some cases provide greater protection of students' Fourth Amendment privacy rights. For example, the Supreme Court of Pennsylvania held that random drug testing is unconstitutional under the state's search and seizure law without a showing of a specific need.¹² Similarly, a Texas decision held unconstitutional a mandatory student drug testing policy, requiring the testing of all students in grades seven through twelve.¹³

¹¹ *Id.* The 2002 case involved two high school students and their parents who alleged that the school's blanket drug-testing policy violated their Fourth Amendment rights because it neither addressed a proven problem nor promised to bring any benefit to the students or the school. Lindsay Earls was a member of show choir, the marching band, the Academic Team, and the National Honor Society. Daniel James sought to participate in the Academic Team.

¹² *Theodore v. Delaware Valley School Dist.* 575 Pa. 321. Students and parents challenged a school's policy of random, suspicion-less drug and alcohol testing of students seeking parking permits or participating in extracurricular activities (2003).

¹³ *After Bitter Battle, Texas School Agrees to Drop Mandatory Student Drug Testing Policy.* The American Civil Liberties Union and the Lockney Independent School District announced a settlement in a mandatory student drug testing challenge brought on behalf of a local parent. The settlement came out of a District Court ruling that the school district's policy was unconstitutional. Retrieved at <https://www.aclu.org/DrugPolicy/DrugPolicy.cfm?>

Current evidence and empirical studies conclude that student drug testing is ineffective, and thus a school's search of any student without any individual probable cause constitutes an unreasonable search under the Fourth Amendment. Therefore, although the Court may have consistently held that a school had a justifiable interest due to its "special needs" to deter drug use in students and maintain public order, students' Fourth Amendment rights in situations of random drug testing outweigh the schools' interests since there is no longer any reasonable notion that random student drug testing will sustain these goals.¹⁴

The first "scientific" evidence suggesting the ineffectiveness of student drug testing was not published until early 2003.¹⁵ The data for the study spanned five years and included nearly 100,000 students – eighth graders and high school sophomores and seniors from 894 schools. The students filled out extensive questionnaires on their drug use and related behaviors. The five-year study yielded a concise conclusion regarding the 18.8% of the schools in the study that reported using student drug testing:

There are...no significant differences in marijuana use or the use of other illicit drugs as a function of whether or not the school has (a) drug testing of any kind; (b) drug testing of students based on cause or suspicion; or (c) drug testing of athletes. Nor is there evidence that the heavy drug-using segment of the student population, specifically, is deterred from using marijuana or other illicit drugs by random or for-cause testing.

Although the researchers did not conclude that drug testing in schools would *never* work, they did conclude that "the most 'promising' (and popular) types of student drug testing – random testing of all students and of student-athletes – did not produce encouraging

¹⁴ Id. at 1056.

¹⁵ The study was conducted between the years 1998-2001 by Ryoko Yamaguchi, Lloyd Johnston, and Patrick O'Malley.

results.”¹⁶ A follow-up study added data for the year 2002, reaching the same results as the previous study with one major exception: in schools that randomly tested students, 12th graders were *more* like to smoke marijuana.¹⁷

A more recent study, published in 2007, concluded that school drug testing is not only ineffective, but actually reverses the deterrent effect sought-for by the states in implementing these policies. The study compared five “intervention” high schools that had implemented random drug and alcohol testing programs with six “control” high schools that had not implemented such programs. The study concluded that the “intervention” schools actually increased risk factors for future substance abuse, and also increased the use of anabolic steroids. In addition, the “intervention” schools suggested more negative attitudes in those students about the benefits of drug testing.¹⁸

In addition to these well-known studies, several more recent studies have supported the conclusion that school drug testing is ineffective, or even harmful. One such study showing ineffectiveness of school drug testing was done in 2013, which analyzed 14 years of data on student drug use finding that school drug testing was

¹⁶ *Id.* at 1062. The 2003-published study examined nationally representative student data and school characteristics data and was conducted out of the University of Michigan, which also produces the Monitoring the Future study, the university’s highly regarded annual survey of student drug use (supported by the National Institute on Drug Abuse).

¹⁷ Grim, R. (March 21 2006). Blowing Smoke: Why random drug testing doesn’t reduce student drug use. *Slate*. Retrieved from http://www.slate.com/articles/health_and_science/science/2006/03/blowing_smoke.html. The White House criticized the first Michigan study for failing to look at the efficacy of random testing. Thus, Yamaguchi, Johnston, and O’Malley conducted a follow-up study, published later in 2003, tracking 94,000 middle and high school students, showing that even if drug testing is done randomly and without suspicion, it is not associated with a change in the number of students who use drugs in any category.

¹⁸ *When the Cure is Worse than the Disease: Student Random Drug Testing 7 Its Empirical Failure*. The 2007 study was one part of the SATURN research study. “Intervention” schools reported a deterrent effect in “past year” student-athlete drug use compared to “control” schools, but there was no deterrent effect for “past month” use.

associated with “moderately lower marijuana use,” but with increased use of more dangerous, illicit drugs. Another 2014 study concluded that school drug testing was not associated with changes in substance use at all.¹⁹

Having proved that school drug testing is a violation of students’ Fourth Amendment privacy rights, since it does not facilitate the “special needs” interests of public school districts, evidence has also shown that such drug-testing policies serve as a deterrent for students to participate in school activities. Especially since the Court’s decision in *Vernonia*, an editorial, Wald (2002), suggested that such drug-testing policies could be setting barriers for students, particularly for those students who are on the fence, to participate in school extracurricular activities or sports teams, for fear of being drug tested.²⁰ In addition, an even more grave effect of these random drug-testing policies is that such testing could have a “compensating” behavior effect – meaning that there is a high risk that student athletes may consequently quit the team because of the policies, and even perhaps increase their drug use.²¹

The lack of a deterrent effect of random drug testing policies in public school systems can be attributable to, among other things, schools’ inability to anticipate adolescent trends in drug use. Student drug use goes through cycles of high use to low use, and researchers have suggested a couple of causes for these cycles, which relate to the basic idea that drug testing is ineffective. The first is that drug abuse tends to be

¹⁹ Ingraham, C. (2015). School drug tests: Costly, ineffective, and more common than you think. *The Washington Post*. Retrieved from <http://www.washingtonpost.com/blogs/wonkblog/wp/2015/04/27/schools-drug-tests-costly-ineffective-and-more-common-than-you-think/>

²⁰ Ryoko Yamaguchi, Ph.D., Lloyd D. Johnsotn, Ph.D.,; and Patrick M. O’Malley, Ph.D. *Drug Testing in Schools: Policies, Practices, and Association with Student Drug Use*. Youth, Education, and Society (YES) Occasional Paper 2 (2003).

²¹ *Id.* Taylor (1997).

“drug-specific.” Thus, drug prevention efforts taken by schools must use a “drug-by-drug” strategy, rather than a blanket drug policy in order to increase the effectiveness of such policies.²² A second problem with the efficacy of random drug testing policies is the adolescent desire to “fool the system” and continuance to use drugs without getting caught.²³ As students become more technologically savvy, they are much more able to quickly and efficiently find ways to get around the “system.” This second problem also relates to the third problem of drug testing: the limitation on their accuracy. Testing for drugs is extremely complex and there are several limitations that cause student drug testing to rarely yield positive results for individual students. For example, if someone is using a drug not being tested for, the test will come up negative. Furthermore, a test will generally also come up negative if the student hasn’t used a drug being tested for within 48 to 72 hours. Finally, prescription drugs interfere with drug testing.

Yet another problem with school drug testing is students’ lack of fear, and thus failure to take drug testing seriously. Teenagers are aware of the efficacy, or lack thereof, of school drug testing, and thus their behavior for fear of being caught using drugs does not generally change.²⁴

²² *When the Cure is Worse than the Disease*. A “new” drug of choice will spike in use until its harms are better known, and therefore prevention efforts must focus on a drug-by-drug strategy, a dynamic for which drug testing must necessarily lag behind. The drug user “generational memory” is also cyclical. In addition to their attraction of new drugs, adolescents return to golden oldies such as LSD and methamphetamines, as well as PCP and Ecstasy. Even more problematic is the current adolescent generation’s abuse of prescription drugs.

²³ *Id.* Just drinking two half-liter bottles of plain water will dilute the urine so much that it’ll drive detection of substances below detection level.

²⁴ *Id.* A journalist interviewed several students at one Indiana school that administered drug testing programs. One senior stated that approximately seventy-five percent of the senior class had tried marijuana and were rarely caught, despite a six-year testing regime.

Several valid studies have concluded that student drug testing in public school systems is ineffective. Even worse, studies have indicated that in some schools that implement drug-testing policies, drug use actually *increases* in certain students, completely reversing the deterrent effect that schools have used to justify, and the Courts have held as justifiable, their “special need” for random student drug testing. Because empirical evidence now shows that such drug testing policies are either ineffective or actually harm these interests, these policies cannot be said to facilitate a school’s special interest that outweighs students’ Fourth Amendment rights to privacy. Therefore, until a more effective means to reduce drug-use amongst students in public schools, random drug testing in public school systems should be prohibited as a violation of the Fourth Amendment.

Another student stated, “[d]rug testing is costing a lot of taxpayer money; but anything that’s going on around here would be out of your system by the time you’re tested.”