

**To Pee or Not To Pee:
School Drug Testing in an Era of Oral Fluid Analysis**

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Abstract

In *Vernonia School District v. Acton* (1995), the Supreme Court upheld the constitutionality of random drug testing for students who participate in school athletics. In the *Board of Education v. Earls* (2002), the Court expanded *Vernonia* to include students who participate in *any* type of competitive extracurricular activity. Given the court's inclination to gradually expand a school's authority to drug test students, the current essay recommends that schools consider implementing a random drug testing program for *all* students, regardless of their involvement in extracurricular activities. A review of the juvenile delinquency and alternative drug testing technology literature suggests that such a comprehensive drug testing program is the next step in achieving the recognized goals of deterrence and drug prevention in public schools.

Introduction

There are two Supreme Court decisions related to the constitutionality of drug testing in public schools: *Vernonia School District v. Acton* (1995)² [hereafter *Vernonia*] and the *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls* (2002)³ [hereafter *Earls*]. Within the confines of the Fourth Amendment, the former upheld the constitutionality of random drug testing for students who participate in school athletics. In *Earls*, the Court expanded *Vernonia* to include students who participate in any type of competitive extracurricular activity. The rationales for these decisions are threefold: privacy expectations, the nature of the intrusion, and the immediacy of the state's concern. They are addressed sequentially below.

Privacy Expectations

In both *Vernonia* and *Earles*, the Court considered the nature of the privacy interest that was purportedly compromised by the request for a urine specimen. Dating back to *New Jersey v. T.L.O* (1985),⁴ the Court has recognized that a student relinquishes certain rights to privacy when s/he is entrusted to a school for supervision. The relinquishment of these rights, the Court stated, was critical because the state was responsible for “maintaining discipline, health, and safety.”⁵ Rejecting the argument that children participating in non-athletic activities had a greater expectation of privacy, the Court in *Earles* stated that “students who participate in competitive extracurricular

² 515 U.S. 646 (1995).

³ 536 U.S. ____ (2002).

⁴ 469 U.S. 325 (1985).

⁵ *Supra* note 3.

activities voluntarily subject themselves to many of the same intrusions on their privacy as do other athletes,” including “occasional off-campus travel and communal undress.”⁶ The rationale of the Court, therefore, was that students who participate in extracurricular activities voluntarily subject themselves to the same intrusions on their privacy, and should thus be held to the same standards, as athletes.

Nature of the Intrusion

The Court in *Earles* next considered the personal invasiveness imposed by the collection of a urine specimen. In *Vernonia*, the Court stated that the “degree of intrusion” caused by the collection of a urine specimen “depends upon the manner in which production of the urine sample is monitored.”⁷ The Court determined, in both *Vernonia* and *Earles*, that the method of the collection caused, at worst, a negligible intrusion. Moreover, a positive test had no criminal justice implications. The only negative consequence for *two* failed drug tests was that the student could not participate in the extracurricular activity. Given the minimal intrusion during the actual specimen collection, and the relatively minor sanctions that could be imposed following repeated positive tests, the Court in *Earles* concluded that the “invasion of students’ privacy is not significant.”⁸

⁶ Id.

⁷ Supra note 2, at 658.

⁸ Supra note 3.

Immediacy of the State's Concern

The ultimate rationale for implementing a drug testing protocol, in any environment and within any population, is the reduction and prevention of illicit drug use. With findings from Monitoring the Future (MTF) (Johnston et al., 2003), the Court recognized that illicit drug use is a serious problem facing American youth and indeed was a problem that had not abated between 1995 (*Vernonia*) and 2002 (*Earles*). As the Court noted, “the nationwide drug epidemic makes the war against drugs a pressing concern in every school.”⁹ In addition to MTF results, evidence about illicit drug use in Tecumseh schools was also presented. Rejecting the argument in *Earles* that safety issues are not relevant for non-athletes, the Court concluded that, “given the nationwide drug epidemic of drug use, and the evidence of increased drug use in Tecumseh schools, it was entirely reasonable for the School District to enact this particular drug testing policy.”¹⁰

The decisions in *Vernonia* and *Earles* are clear in their support for drug testing in public schools. That eligibility for drug testing has expanded from athletes *only* in 1995 to *all* students participating in extracurricular activities suggests a conservative shift in the Court’s position on how best to address school-based drug issues. A logical next step is the consideration of random drug testing for *all* students, regardless of their involvement in extracurricular activities. Indeed, targeting only students involved in extracurricular activities misses those students most at risk for illicit drug use. A brief review of the literature on juvenile delinquency and alternative drug testing technologies

⁹ Id.

¹⁰ Id.

provides a justifiable framework for expanding *Earles* to include *all* students.

Juvenile Delinquency

One of the most popular criminological theories during the 1970s and 1980s was social control theory. Making the most thorough statement of social control theory to date, Hirschi (1969) elaborated on the components that caused youths to bond or attach themselves to the dominant value system. Hirschi argued that delinquency would result if youths were not controlled in some fashion. He identified four elements that created conformity: attachment, commitment, involvement, and belief (Hirschi, 1969).

Attachment is the most important of the four elements and represents the effect of close ties to parents and peers and to legitimate institutions, like clubs, school, or church (Hirschi, 1969). The stronger the attachments, the less likely delinquency will occur.

Commitment refers to an investment in conventional ideals (Hirschi, 1969). For youth, a high level of commitment might be running for class president or a spot on a sports team.

Involvement represents the time and energy spent in conventional activities (Hirschi, 1969). The operating assumption with the element of involvement is that individuals who spend time engaged in legitimate activities, like sports or clubs, will have little or no time for illegitimate activities, like drug use. Finally, *belief* is a general respect for society's values and the accompanying feelings to obey them (Hirschi, 1969).

Individuals who illustrate a high degree of loyalty to middle class values are less likely to violate them.

The most relevant of the social bond elements for school-based drug testing is involvement. The Supreme Court has targeted students involved in extracurricular

activities. While the Court's logic for doing so is not unreasonable, targeting *only* students involved in extracurricular activities misses those students most at risk for illicit drug use. Several decades of social control findings suggest that a *lack* of extracurricular involvement is a risk factor for juvenile delinquency, such as illicit drug use. If the past several decades of social control research are valid, and if the goals of reducing and preventing the use of illicit drugs in schools are rational ones, then jurisdictional policymakers and school administrators would be well advised to implement random drug testing for all students, regardless of their involvement in extracurricular activities.

A random drug testing plan for *all* students has two major advantages. First, the use of urinalysis or an alternative testing method provides an objective measure of recent drug use and would thus allow school officials to accurately identify the prevalence of illicit drug use. Given that a body of research (Yacoubian, 2000; Harrison, 1995) has indicated that respondents surveyed about illicit drug use are likely to underreport their involvement, a biological specimen would be the most accurate method by which drug use prevalence could be estimated. Second, a drug-testing program that involves all students would accomplish the ultimate goal of reducing and preventing drug use more comprehensively than one that only targets an extracurricularly involved subset of the student body. Indeed, students who are at highest risk for illicit drug use are currently *not* part of the sample of students targeted for intervention.

Oral Fluid Analysis

While urinalysis is generally recognized as the gold standard for detecting recent drug use, a variety of drug testing technologies has been developed within the past few years.

One of these innovations – oral fluid (OF) testing – may offer researchers and practitioners an acceptable alternative to urinalysis because the detection period for both measures is approximately 48 hours (Cone, 1993). Indeed, results from field tests during the past several years suggest that OF analysis is about as accurate as urinalysis for detecting the recent use of most illicit drugs (Wish and Yacoubian, under review, 2002; Yacoubian et al., 2001).

Yacoubian et al. (2001), for example, collected urine and OF specimens from 114 adult male arrestees in Anne Arundel, Charles, and Prince George's Counties, Maryland, between April and July 2000. With urinalysis as the reference standard, the Intercept Oral Specimen Collection Device (IOSCD) was 100% sensitive and 99% specific for cocaine and 88% sensitive and 100% specific for opiates. Wish and Yacoubian (2002) collected urine and OF specimens from 284 adult arrestees in Baltimore City during the spring of 2001. With laboratory urinalysis as the criterion measure, the IOSCD was 95% sensitive and 98% specific for cocaine and 90% sensitive and 99% specific for opiates. For marijuana, the sensitivity was 56%, and the specificity was 99%. Most recently, Wish and Yacoubian (under review) collected urine and OF specimens from 163 adult intensive outpatient and methadone maintenance treatment clients in Baltimore City. With laboratory urinalysis as the reference standard, the IOSCD was 100% sensitive and 100% specific for benzodiazepines, 82% sensitive and 96% specific for cocaine, 100% sensitive and 92% specific for methadone, and 83% sensitive and 99% specific for opiates. For marijuana, the sensitivity was 39% and the specificity was 93%.

Taken collectively, these results suggest that OF analysis is about as accurate as urinalysis for detecting the recent use of most illicit drugs. The most problematic drug

with respect to detection capability is clearly marijuana. That the aforementioned marijuana specificities are high suggests that few false-positives are being generated by OF analysis. That is, most marijuana-negative urine specimens were also negative by OF analysis. Relatively low sensitivity coefficients, however, translate into a high proportion of false-negatives. That is, a high percentage of respondents tested negative for marijuana when urinalysis detected them marijuana-positive. Marijuana-positives would thus have been missed if only OF had been used. OF is particularly useful when detecting very recent (<12 hour) marijuana use, but becomes less accurate as the time frame between use and testing increasing (Cone, 1993). The low sensitivities may be particularly problematic with students because marijuana is the most prevalent drug within this population (Johnston et al., 2003). Because OF is a relatively new technology, school administrators must realize that a certain proportion of marijuana-using students, who would be detected as positive by urinalysis, may be missed with the OF testing method. As with all new products, technological improvement should, over time, increase the sensitivity coefficients to more acceptable levels.

Opponents of school-based drug testing argue that the privacy intrusion is significant (American Civil Liberties Union (ACLU), 2002). The ACLU, for example, opposes drug testing in schools because, “at a level of both subjective and objectively reasonable feelings, a drug testing regime conducted by a school is intrusive.” A salient issue, however, is whether *all* biological specimens are invasive or if the intrusiveness is enhanced with the collection of a urine sample. It is likely safe to assume that the ACLU is opposed to all drug testing, regardless of the specimen obtained. That is, simply asking a child to prove drug abstinence is an invasion of privacy. There is, however, a major

difference between urine and OF. Collecting the former requires the exposure of genitals, while the latter simply requires the use of an oral swab. While OF may still be perceived by the ACLU as invasive, it nevertheless provides a less intrusive method than urinalysis for objectively identifying the recent use of illicit drugs.

The procedures for collecting OF are simple. Under direct supervision, the provider takes a swab and rubs it between his/her lower cheek and gums for two minutes. The swab is then pushed into a vial, and the vial is capped. No saliva stimulation is necessary. The specimen can be collected in any environment by any collector. Given the type of biological specimen being collected, there is no need for gender-matched collectors, nor issues of provider embarrassment. Moreover, the expenditures for urinalysis and OF are comparable – both cost approximately \$10 per specimen, depending on volume. The body of empirical and anecdotal evidence at our disposal clearly suggests that OF collections are superior to the collection of urine specimens.

Discussion

Two recent Supreme Court cases – *Vernonia* and *Earles* – expressly permit the drug testing of students involved in extracurricular activities. Given the court's inclination to gradually expand a school's authority to drug test its students, the current essay recommends that schools consider implementing random drug tests for *all* students, regardless of their involvement in extracurricular activities. A review of the juvenile delinquency and alternative drug testing technology literature suggests that such a comprehensive drug testing program is the next step in achieving the recognized goals of deterrence and drug prevention in schools.

Arguments against school-based drug testing are threefold: searches in the school context must be based on individualized suspicion, that the nature of the privacy intrusion is significant, and drug testing is not a proven solution to deterring or preventing illicit drug use (ACLU, 2001). The Court has determined that, with respect to drug issues, aggregate data, as opposed to individualized suspicion, suffice to establish a problem in need of remedy. Indeed, *Vernonia*, while not explicitly undermining *T.L.O.*, conveyed the all-important message that drug problems be particularly severe to warrant a departure from the reasonableness standard. The ACLU's second argument, that drug testing is inherently invasive, is specious with the advent of the virtually non-invasive OF testing. Unless opponents of school-based drug testing are prepared to argue that the collection of *any* biological specimen is inherently intrusive, OF analysis should provide an acceptable alternative to urinalysis. The third argument, that drug testing has not been proven to deter or prevent illicit drug use among high school students, is an empirical question that can only be answered with future research. Given the minimal nature of OF technology, and the admirable goals of combating drug use in schools, the hypothesis that drug testing can indeed deter illicit drug use is worth testing.

The ACLU has argued that because students involved in non-athletic extracurricular activities are the least likely segment of the study body to use drugs, that drug-testing programs should be curtailed. This solution, however, does not reconcile a school's mandate to deter and prevent the use of illicit drugs. Randomly drug testing all students discriminates against no one and does indeed provide a remedy for combating the use of illicit drugs. The ACLU has stated that "if every student in every school is subject to testing, the need devolves from being special to being routine – a lesson to all

students that the Constitution is a mere platitude, that no rights are inalienable, and that liberty is available only at the whim of state authorities” (ACLU, 2001). This is an unfortunate misinterpretation of the spirit of a drug testing campaign. A routine drug testing protocol that makes all students eligible for selection conveys the message that student drug use is a community concern requiring the cooperation of all parties and that we, as a society, recognize that the health of our students supercedes the minimal intrusions produced by a drug testing regimen.

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