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## SEARCH AND SEIZURE 2010: STUDENT DRUG TESTING REVISITED

## Overview

Beginning in the 1960's and moving through the early 1980's, as the student rights movement spread in scope, carrying out student searches in public schools became a minefield of potential litigation. *In loco parentis*, the traditional source of school disciplinary authority, had been replaced by a need to balance the constitutional rights of students with the disciplinary prerogatives of school policy-makers and administrators—including but not limited to the Fourth Amendment's protection against "unreasonable searches and seizures." It was just a matter of time before our nation's highest court would get involved.

*The Supreme Court Speaks.* In 1985, the United States Supreme Court decided its first public school student search case. In New Jersey v. T.L.O. (1985) the Court addressed "only the questions of the proper standard for assessing the legality of the searches conducted by public school officials and the application of that standard to the facts of this case." However, in reaching a decision the high court : (1) clearly said that while public school students are protected by the Fourth Amendment school officials retain legitimate authority to maintain school discipline and control, (2) recognized that even a limited search of a person is a substantial invasion of privacy, (3) drew a distinction between police searches and searches conducted by public school administrators, and (4) established that *reasonable suspicion* and not *probable cause* is the primary basis upon which public school searches are initiated.

To create a proper balance between student Fourth Amendment protections and the disciplinary prerogatives of public school officials, the high court fashioned a two-pronged standard of analysis. First, a search conducted by public school officials must be justified at its inception—*i.e.*, when there is *reasonable suspicion* to believe that present in the situation is a violation of law and/or school policy or rules. Second, the search as carried out must be reasonably related to the purpose and objectives of the search, *i.e.*, must remain narrow in scope and not be overly intrusive. Vacca and Boshier (2008) In the words of the Court, "This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorizes unrestrained intrusions upon the privacy of school children." T.L.O. (1985)

Because the T.L.O. case specifically involved a school administrator's search of a female student's purse the new two-pronged standard had to be applied in subsequent privacy sensitive areas of student search. Suffice it to say, in the late-1980's lower court's were busy applying the T.L.O. standard in a variety of situations often resulting in mixed and contradictory judicial opinions—especially in cases involving student “strip searches,” and situations where police controlled “drug-sniffing dogs” were used. However, the courts were consistent in ruling that the closer a school administrator's search came to the student himself/herself (body and/or personal property) the more reasonable suspicion grew in degree, and individualized suspicion was needed to launch the search.

## **Student Drug Testing**

At the outset of the T.L.O. (1985) opinion, Justice White offered the following observation: “Maintaining order in the classroom has never been easy, but in recent years school disorder has often taken particularly ugly forms: drug use and violent crime in schools have become major problems.” Things did not change in the years immediately following T.L.O. As my colleague Professor Boshier and I have commented, “In the 1990's, educational personnel had to contend with pervasive substance abuse in schools. It is a problem that surfaced in secondary schools and has since expanded to include lower grades as well.” Vacca and Boshier (2008)

In response to a growing need to protect the health, safety, and security of students, public school systems across the country put in place mandatory drug testing programs. Where these programs were established their intent was to: (1) prevent the escalation of drug-related problems on school grounds and at school sponsored activities and events, and (2) deal in a disciplinary way with students who possessed, sold, and/or used drugs on school property and/or at school sponsored activities and events. Suffice it to say, privacy concerns sprung up and the potential for litigation escalated.

*Vernonia (1995) and Earls (2002): The Supreme Court and Student Drug Testing.* While some student drug testing issues already had reached the courts by the 1980's, e.g., Odenheim v. Carlstadt-East Rutherford School District (N.J. Super Ct. 1985), Anable v. Ford (W.D. Ark. 1985), and Schail v. Tippecanoe (7th Cir. 1989), it was not until 1995 that the United States Supreme Court handed down a decision on the subject. In Vernonia School District v. Acton (1995) the Court upheld a public school district's policy requiring students to submit to random, unannounced urinalysis as a precondition to participation in high school athletic activities. School officials said that they were “taking necessary steps to deter drug use.”

In 2002, the Supreme Court, by a vote of 5-to-4, extended the authority of public school officials when it upheld a local school board's policy requiring random drug testing (urinalysis) of all middle and high school students as a precondition to participation in all (not just sports-related) competitive extra curricular activities. Board of Education v. Earls (2002) In this case school officials were taking steps to detect, prevent, and deter drug abuse. It is important to note that the intent of the school officials was not solely punitive. And, the method of carrying out the actual testing procedure was procedurally fair, discrete, and minimally intrusive. *See also, Doe v. Little Rock School District* (8th Cir. 2004)

Taken together, Vernonia (1995) and Earls (2002) gave judges a “special needs analysis” to apply in deciding student drug testing cases. In essence, within the unique context of a public school, special needs does not require that school officials first show the existence of a pervasive drug problem or establish individualized suspicion in order to launch drug testing of a student. As school law experts have summarized, “special needs may be determined to exist by school administrators where there is a concern that something harmful to students may be secreted in the school.” Alexander and Alexander (2008)

## Recent Case Law

Recently, I came across an interesting student drug testing case from a federal district court in Indiana. The case, Long v. Turner (S.D. Ind. 2009) presents the reader with a very interesting, relevant, and timely set of facts and, at the same time, demonstrates the applicability of a special needs analysis of the issues presented to the court. What is more, the court's reliance on New Jersey v. T.L.O. (1985), Vernonia v. Acton (1995), and Board of Education v. Earls (2002) shows the sustained importance and viability of the standards created by the United States Supreme Court.

*The Facts.* On the morning of November 21, 2007, the Wednesday before the Thanksgiving break, the plaintiff in this case (hereafter referred to as Kevin), and three other students (2 male students and 1 female student) were sitting in a car on the school parking lot. Classes had not yet started. School administrators suspected that the students were smoking marijuana in the car. When confronted by administrators later in the day two of the students admitted smoking marijuana and the female student denied it. However, all three students implicated Kevin in the smoking activity. A consensual search of the car turned up marijuana; in fact, one of the male students had pointed it out to those conducting the search. The three students were appropriately dealt with, but an assistant principal was unable to contact Kevin that same day—he already had left school as a part of an internship program.

On November 26, 2007, the Monday after Thanksgiving break, Kevin returned to school and was immediately summoned to the office of a male assistant principal. The assistant principal informed Kevin that the three other students had implicated him and, based on his investigation, he had reason to believe that Kevin was smoking marijuana on school property. He also told Kevin that he faced expulsion for violating the school system's drug policy. There was a slight difference in Kevin's recollection of the facts of this meeting. In Kevin's version he said that the assistant principal told him that because he, Kevin, admitted being in the car he could be expelled from school and that the only way to prove that he was not smoking marijuana and avoid expulsion from school was to give a urine sample. He said that the assistant principal gave him no other options. As such, to avoid expulsion he agreed to give the urine sample. In the assistant principal's version it was Kevin who proposed the idea to him.

Subsequently, the assistant principal and another male assistant principal took Kevin to a single-user bathroom in the administrative office area. The bathroom had one toilet, without a stall, and one sink. The two administrators stood next to the door, about four or five feet from Kevin who stood next to the toilet. Kevin faced away from the administrators in order to produce a urine sample in a cup. The stories differ regarding what happened next. According to Kevin, the administrators instructed him to turn and face them so that they could directly see him urinating into the cup. Kevin stated that he complied with the directive to face them. In later testimony given in court, it was determined that at least one administrator had instructed Kevin to turn, *i.e.*, he might have said "face me." However, the administrator contended that it was not his intent to have Kevin face him during the giving of the urine sample. All he wanted to see was the specimen cup and not Kevin's genitals. He said that he told Kevin to turn around "so I can see the cup." His intent, he said, was to see Kevin provide the sample. He did not want the sample diluted.

Initially Kevin was unable to urinate into the cup. He said that he was uncomfortable being watched in such close quarters. At one point Kevin said that he asked to call his mother but his request was denied. At least one of the administrators testified later that this did not happen. Kevin did not claim that he ever withdrew his consent to urinalysis; nor did he claim that he was coerced or required to participate in the test.

At this point Kevin and the two supervising administrators left the bathroom. Kevin was given some water to drink and was told that he could try later to give a urine sample. After two hours and about 32 ounces of water, Kevin felt a need to urinate. He was led to the same bathroom by the same two administrators and was told to face them. Again he had trouble giving the sample. He asked to speak to his parents, but the request was denied. Again he left the bathroom. He sat in the administrative office drinking water. He once again failed to produce a urine sample so he again drank more water. Eventually, about twenty or thirty minutes after the end of the school day, Kevin was able to provide the urine sample. He did so by being able to turn slightly away from his supervisors. This time one of the two persons supervising him was a male guidance counselor.

Kevin's urine sample was sent out to a laboratory for analysis. The test came back negative. The lab report indicated possible dilution and the test results were inconclusive. Thus, school officials decided not to suspend or expel Kevin from school; rather, that he be placed on probation and a plan was put in place between the school administration and Kevin's parents. One of the elements in the plan required that Kevin be subjected to periodic random drug testing done in the school nurse's office restroom without witnesses.

In May, 2008, Kevin was expelled from school for reasons unrelated to incident and circumstances described above.

*Federal District Court Action.* Kevin filed suit in a federal district court under 42 U.S.C. 1983. In the law suit he named as defendants the school district, the high school, and the school administrators who conducted and supervised the collection of the urine sample. Kevin claimed that his Fourth and Fourteenth Amendment rights had been violated by the urine sample collection procedure, *i.e.*, the manner of collection employed by the school administrators. Kevin did not claim that the initiation of urinalysis testing was unconstitutional—he admitted that he agreed to it. Defendants filed a motion for summary judgment on all claims. Because it was not a suable entity, the parties agreed that the high school be dropped from the case.

*District Court Rationale.* First, the district court made clear that the differences in testimony of what happened were immaterial, because Kevin voluntarily agreed to urinalysis. Also important, to the court, was the fact that Kevin did not allege that he was subject to coercion or undue influence by school administrators. Kevin only challenged the manner in which the urine sample was collected.

Regarding Kevin's Fourth and Fourteenth Amendment rights claim the district court focused on the *reasonableness* of the individual administrators directly observing while he urinated. Citing T.L.O. (1985) and Vernonia v. Acton (1995), the court emphasized the context within which the search took place and where a balance existed between the need to search and the invasive nature of the search. In this case the special context of the school setting is the determining factor in analyzing "reasonableness." Thus, said the district court, consideration must be given to: (1) the nature of the privacy interest upon which the search intrudes; (2) the character of the intrusion into the student's privacy; and (3) the nature and immediacy of the governmental interest and the efficacy of its means for meeting it.

Quoting directly from Board of Education v. Earls (2002), the district court opined that "[i]t is well settled that a school's collection of urinalysis samples implicates Fourth Amendment protections." However, "it is well settled that, in the school context, students have a lesser expectation of privacy than do members of the population generally." While "urination is 'an excretory function traditionally shielded by great privacy' ... the degree of privacy caused by the collection of the sample 'depends upon the manner in which the production of the urine sample is monitored.'" Moreover, said the district court, the United States Supreme Court has recognized the dangers posed by drug abuse in the schools and the legitimate interest of school officials in

combating it by administering urinalysis in particular situations—such as a condition for participation in athletics, Vernonia v Acton (1995), and non-athletic extracurricular activities, Board of Education v. Earls (2002), where particularized suspicion of students was not mandated.

*The Decision.* The district court found significant the fact that no case was cited by defendants or uncovered as a result of the court’s own research in which a court approved a process where a school monitor conducted direct observation of a student’s genitals as he gave or attempted to give a urine sample. And, in the court’s view, the fact that Kevin did give his consent to be subjected to urinalysis “does not excuse the manner in which it was administered.” Given the disputed facts in this case regarding the “direct observation” issue, the district court held that summary judgment could not be entered. The district court also held that because a genuine issue of material fact also existed as to whether the school district was entitled to Eleventh Amendment immunity summary judgment could not be entered.

Finally, since plaintiff cited “no authority holding that direct observation of a student’s production of a urine sample is unreasonable in the circumstances of this case...” the district court held that defendants were entitled to qualified immunity and entitled to be dismissed.

### **Policy Implications**

Recent reports in the general media involving increased substance abuse (including steroids, inhalants, prescription drugs, tobacco, alcohol) among our nation’s middle and high school students have increased the demands of parents and other concerned citizens that school officials, public and private, take proactive steps to combat and mitigate this growing problem. At the same time, the potential for increased criminal activity associated with the street drug trade has increased the efforts of school officials to: (1) reduce the number of students who might experiment with drugs, and (2) make school property and school events and activities safer and more secure. One result has been a renewed interest in the development and implementation of effective student drug (substance) testing policies.

The value of Long v. Turner (S.D. Ind. 2009) to local school officials lies less in the final decision of the court and more in the court’s rationale. In essence, the Long case offers the reader a quick review of the United States Supreme Court’s benchmark decisions on point and, at the same time, illustrates issues that might spring up in the implementation school system policy. Listed below are generalized suggestions for policy gleaned from the federal district court’s rationale in that case.

Local school system substance abuse testing policies must make it clear that:

- The intent is to provide and maintain a healthy, safe, secure, and crime-free learning environment in every school and at all school sponsored and sanctioned activities and events, and to early identify students who are in need of professional help and counseling.
- Parent and student constitutional and statutory rights (federal and state) will be protected throughout the substance abuse testing procedure.
- Students will be subjected to both voluntary and mandatory substance abuse testing (including unannounced, random testing).
- Independent testing will be allowed where banned substances are discovered through school system testing procedures.

- All students found in violation of school system disciplinary policies regarding the possession, or sale, or use of prohibited substances on school property or at school sponsored or sanctioned activities and/or events will be subject to appropriate disciplinary sanctions.

*Final Note.* While it was not a part of the court's deliberations in Long v. Turner, it is nonetheless important to suggest that school policy make it clear that law enforcement agencies will be notified where reasonable suspicion of criminal activity is discovered as a part of the school system's substance abuse investigation.

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**Note:** The views expressed in this commentary are those of the author.