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STUDENT DRUG TESTING: ISSUES AND POLICY IMPLICATIONS**Overview**

In Virginia all newly enacted statutes take effect on July 1. This year, a statute worth noting deals directly with drug testing students in public schools. It is important to mention that the new statute does not require drug testing. At the same time, however, it does not preclude local school boards from adopting such policies. The new law directs Virginia's State Board of Education to develop statewide policies and guidelines covering both voluntary and mandatory drug testing, and specifies that local school boards follow these guidelines in drafting local policies.

Why the heightened interest in student drug testing? Is it possible to draft policies requiring student drug testing acceptable to all segments of the community? What can be learned from past challenges to student drug testing policies and procedures?

The purpose of this commentary is threefold. First, to briefly review the emergence of student drug testing as a viable option available to public school officials. Second, to discuss examples of court decisions involving past challenges to student drug testing policies. Third, to make suggestions for consideration by local school officials if and when student drug testing policies are drafted.

The Reasonable Suspicion Standard. In 1985, the United States Supreme Court handed down its landmark public school search and seizure decision, New Jersey v T.L.O. In balancing student Fourth Amendment protections (including a legitimate expectation of privacy) with the substantial interest of public school officials and teachers to conduct searches of students and their belongings, Justice White made 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 social problems...." Thus, he opined, school officials and teachers must be granted flexibility in carrying out their disciplinary functions especially where *reasonable suspicion* exists to believe that a student is violating school policy and/or the law. New Jersey v T.L.O. (1985)

In the two decades following T.L.O., public school officials relied on the *reasonable suspicion* standard (different from the *probable cause* standard applied to police searches) to proactively and vigorously wage war

on the illegal possession, sale, and use of drugs in schools and at school-sponsored activities and functions. The primary intent of these efforts was to establish and maintain drug and crime free schools. The authority of public school officials to provide a safe environment in school extends beyond school property boundaries. Shade v Farmington (2002) As experts in school law consistently remind us, “If school rules are reasonably related to its interest in maintaining order and discipline, or protecting students in a safe school environment, the rules will be upheld.... As long as a school’s actions are reasonable, and rationally related to legitimate school purposes, the actions should be upheld.” Schwartz (2000)

Discipline versus Remediation. Current efforts to establish and maintain drug-free public schools take two forms. First, school officials have a legal responsibility to carry out and enforce *disciplinary* policies and procedures to punish students found in possession of, or selling, or using drugs on school grounds or at school-sponsored functions. Second, school officials are ethically obligated to (1) early identify students who might get caught-up in drug use and are in need of help and assistance, and (2) prevent and reduce student drug use and abuse before it starts or spins out of control. These *remedial* efforts may or may not include the establishment of programs to assist students already caught in the horrors of drug dependency. Suffice it to say, the *disciplinary* (legal) and the *remedial* (ethical) aspects sometimes clash and produce litigious issues.

The Disciplinary Approach. As a general rule, contemporary school administrators are duty bound by state law and local school board policy to swiftly deal with students caught possessing, selling, or using drugs. The approach most often taken by public school officials, to carry out their legal duty, is disciplinary (punitive) in nature and involves *searching* for and *seizing* drugs.

In 2003 school searches are often carried out in collaboration with local police agencies, because student drug-related problems may involve criminal activity. On balance, judges consistently grant school administrators considerable discretion when searching for drugs and weapons, even when school resource officers (police officers) are minimally present and/or involved. In re D.D. (2001) Suffice it to say, the implementation of search policies and procedures (coupled with a “zero tolerance” attitude) has produced numerous successes, but has not been issue free.

The Remedial Approach. Over the past decade, a growing number of public school districts have added policies requiring *drug testing of students*. While characterized by some researchers and school officials as a “new approach,” such is not the case. Currently there are several states where student drug testing is either permitted or mandated by statute.

Why Drug Test Students? Where they exist, student drug testing policies have a varied history. In some communities such policies resulted from a formal, statistically valid and reliable survey demonstrating the existence of a serious problem of drug use and abuse among significant numbers of students in the school district. In other communities these policies may be a product of convincing evidence of a nexus between growing disciplinary problems and student drug use and abuse. In other communities, however, such policies may have been hastily initiated in response to public pressure following some highly publicized and tragic incidents (e.g., automobile accidents, acts of violence in schools) involving students and the actual or suspected presence of drugs. Student drug testing policies are not issue free, especially those that were “hastily drafted.”

Emerging Issues

Student drug testing policies and procedures have not spawned as many legal challenges as have search and seizure policies and procedures. However, substantive court decisions involving student drug testing do exist,

especially where school board policies require: (a) students to submit to *urinalysis testing*, and (b) *random, suspicionless drug testing* as a precondition of participation in competitive extra-curricular activities (both athletic and non-athletic). Hudgins and Vacca (1999) What follow are some examples worth noting.

Case Law Examples:

A New Jersey court decided one of the first cases involving student drug testing. In Odenheim v Carlstadt-East Rutherford School District (1985), a school board policy requiring all secondary school students to submit to a urinalysis test was challenged. Characterizing the urinalysis test as a “search,” the judge in the case applied the United States Supreme Court’s T.L.O (1985) standard and invalidated the testing requirement. In his view, reasonable suspicion of drug use did not exist warranting an infringement on the privacy interests of the students. What is more, he said, the testing results could lead to a student’s exclusion from school without being given procedural due process.

That same year, a United States District Court in Arkansas also ruled on student drug testing by urinalysis. In this case a local school board policy required urinalysis testing of any student “suspected” of using drugs. The parent of a student suspected of using marijuana challenged the policy. The court ruled in favor of the parent based upon a lack of reliability of the urinalysis test results. While this type of test could detect the presence of marijuana in one’s urine, it could not establish how much or when marijuana had been used. Anable v Ford (1985)

In 1995, the United States Supreme Court upheld a local school board policy under which all students wishing to participate in interscholastic athletics had to agree to be drug tested (*i.e.*, urinalysis in search of amphetamines, cocaine, and marijuana). Subsequent to that, each student participant had to agree to be randomly tested over the school year, or lose his/her privilege to play.

In writing the majority opinion, Justice Scalia focused upon three factors: first, the relative unobtrusiveness of the submission and collection of urine samples, and the protection of test results; second, the “decreased expectation of privacy” of student athletes in the school environment; and, third, the important interest of school officials to take necessary steps to deter drug use. Of particular significance is this last point, *i.e.*, school officials taking “necessary steps to deter drug use.” In effect, while underscoring the need to establish a nexus between the existence of student drug abuse among a sufficient number of students being tested and school disciplinary problems, the Supreme Court also stressed a “special need” for local public school officials to create policies requiring student drug testing to prevent student athletes from falling prey to drugs. Vernonia v Acton (1995) As one writer questioned, post-Acton, “[t]he U.S. Supreme Court has now upheld the right of school districts to conduct random drug tests of student athletes. But when and why should school districts adopt such a policy?” Mahon (1995)

Special Needs Analysis. The application of the Acton ruling to more generalized student drug testing programs remained unknown in the years immediately following the decision. Valente (1998). However, in 1998, the Circuit Court of Appeals for the Seventh Circuit upheld a local school district’s policy requiring students to submit to random, unannounced urinalysis testing before they could participate in any extracurricular activity. The policy also applied to students who drove their cars to school. In this case the Court approved the program on the basis that school officials had a special relationship with students. More specifically, said the Court, they serve as “guardian or custodian of children in their care.” Todd v Rush (1998) The United States Supreme Court denied certiorari in Todd. It should be noted, however, that the Seventh Circuit reached a completely opposite

conclusion in a similar case decided that same year, and the United States Supreme Court denied certiorari. Willis v Anderson (1998)

In 2000, a federal district court in Texas struck down a local school board's mandatory, random, suspicionless drug testing policy. Characterizing the testing procedure as a search, the court found the policy (which included all students in seventh through twelfth grades participating in extracurricular activities) in violation of the Fourth Amendment. School officials could not demonstrate the existence of widespread drug problems among the student population covered by the policy. Gardner v Tulia, I.S.D. (2000)

Last year the United States Supreme Court handed down a decision involving drug testing of public school students, where the *special needs analysis* was of critical importance. Board of Education of I.S.D.No 92 v Earls (2002), involved a Fourth Amendment challenge (brought by parents) to a local school board's policy requiring drug testing of all students as a precondition of participation in all competitive extra-curricular activities (athletic and non-athletic). Under the policy all middle and high school students had to consent to urinalysis testing. A federal district court ruled in favor of the school board. On appeal, however, the United States Court of Appeals for the Tenth Circuit overturned that ruling. To the Tenth Circuit, the policy did not pass constitutional muster because it required suspicionless drug testing in a situation where school officials could not demonstrate the existence of drug problems in a sufficient number of students, especially those who participate in non-athletic activities. The United States Supreme Court granted certiorari.

Subsequently, by a vote of 5 to 4, the United States Supreme Court reversed the Tenth Circuit. The majority opinion in Earls is built squarely on a *special needs analysis*. In the Court's view, the privacy interests of students "are limited in a public school environment where the state is responsible for maintaining discipline, health, and safety..." Thus, since the policy serves an immediate and important need (*i.e.*, the need to detect, prevent, and deter student drug use and abuse), said Justice Thomas, the necessary reasonableness of the school board policy is demonstrated. Moreover, he said, the "reasonableness inquiry cannot disregard the school's custodial and tutelary responsibility for children." In essence, the Earls decision marked a swing away from the preeminence of the more reactive disciplinary (search and seizure) approach, and a movement toward using a more proactive, preventive, remedial (early identification) approach to establishing drug-free schools.

As in Acton (1995), the Supreme Court in Earls (2002) underscored both the legal duties and ethical responsibilities of school officials in justifying a policy requiring random, suspicionless drug testing of students. However, the two opinions differ since the Court in Earls did not require school officials to demonstrate the presence of a widespread drug problem in the student population being tested in order to justify their policy. Rather, the five member majority in Earls saw the following five factors as compelling: (1) the policy's emphasis on detecting, preventing, and deterring drug use and abuse among students, (2) the fact that the school board policy was not solely punitive, (3) the confidential nature of information collection and sharing, (4) the fact that the data gathered were not automatically shared with law enforcement agencies, and (5) the presence of a parental notification requirement.

Policy Implications:

As public school officials look ahead to the 2003-2004 school year, and more and more public school districts consider establishing student drug testing policies, it would be wise to use the coming summer months to proceed deliberately and cautiously with the policy drafting process. What follow are some suggestions for consideration by local school boards where a decision is made to enact a student drug testing policy, especially

if suspicionless, random drug testing of all students is on the table. In addition to preparing a compelling rationale for the need to drug-test students, school officials must make it clear that the school district's policy:

- Is intended to (a) maintain safe, secure, drug-free and crime-free schools, (b) deter and prevent student drug use and abuse, (c) early identify students who need help and assistance, and (d) promote student health.
- Requires *either* voluntary *or* mandatory testing.
- Includes (or does not include) a provision for random, suspicionless testing.
- Complies with federal and state constitutional principles, state statutory law, and state guidelines.
- Specifies categories of students (e.g., athletes, students in all competitive extra-curricular activities, etc.) covered.
- Includes a list of substances covered (i.e., defines the term "drug") and the tests (e.g., urinalysis) required.
- Allows for independent testing where banned substances are discovered.
- Specifies both *disciplinary* and *remedial* options available where students are found in violation of policy.
- Ensures confidentiality of data collected through drug testing.
- Contains a parental notification requirement.

It is obvious that other policy provisions (not included in the above list) may need to be explored (e.g., provisions covering: legitimate prescription drugs taken by students while at school, inclusion of special education students, financial responsibility for required drug testing, the person or persons [by title] responsible for implementing the policy, storage and security of data collected, security and custody of samples collected from students, possible notification and involvement of law enforcement agencies where criminal activity is discovered). Because of the complex and technical nature of student drug testing, it is strongly suggested that public school officials: (1) establish an advisory board (administrator, student, parent, police officer, medical doctor, substance abuse expert, community at large) to help draft the policy, (2) follow state guidelines, and (3) stay in constant contact with the school board attorney at every step of the policy drafting process.

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