2003

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Publication Information
Paul M. Anderson, The Supreme Court Sets the Standard: Drug Testing at the Interscholastic Level, 4 Tex. Rev. Ent. & Sports L. 1 (2003).

THE SUPREME COURT SETS THE STANDARD: DRUG TESTING AT THE INTERSCHOLASTIC LEVEL

Paul M. Anderson[1]

High school student Lindsay Earls was a member of the show choir, marching band, academic team, and National Honor Society. Daniel James wanted to be a member of the academic team. Because these activities were outside of the classroom and extracurricular, both students were subject to a drug testing policy. The policy required all students in middle or high school to consent to the testing in order to participate in any extracurricular activity—even if the activity had no athletic or physical component.

Like so many school districts across the country, the Tecumseh School District set up the policy in an effort to combat what it perceived as a growing drug problem among its students even though there was limited evidence that students like Lindsay and Daniel were actually drug users. In fact, most high school officials would argue that students like these are actually less likely to use drugs, because if they do and are caught using drugs, they will lose their ability to participate anyway.

Because Lindsay and Daniel would not consent to the testing, both were barred from participating in what were clearly academic-related extracurricular activities. Who knows what impact their participation may have had on their future development as they prepared for college and a career after school? The school district said that the policy was voluntary, yet, the district made clear that if a student did not consent to the testing, that student could not participate in any extracurricular

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activities, activities that they otherwise could voluntarily join. Moreover, because Lindsay and Daniel were not drug users, they did not feel they should be forced to submit to an invasive drug testing policy.

Along with their parents, Lindsay and Daniel felt that the fact that they were basically being forced to consent to the testing program in exchange for being allowed to participate in their extracurricular activities was too much. They argued that the drug testing policy itself was a violation of their rights guaranteed by the United States Constitution—in essence, the right to be free from illegal searches and seizures.

Lindsay and Daniel were not the first students to contest such drug testing policies. For the better part of the last decade and a half, students all over the country have argued that similar drug testing policies are unconstitutional. In response to these claims, the United States Supreme Court has made two important and controversial rulings regarding drug testing of students at the interscholastic level.

This article will not debate or evaluate whether the Supreme Court has been correct in either of these decisions. Instead, it will present a unique look at the development of what will be termed a "judicial model" that courts have used when they review drug testing policies that involve students at the interscholastic level. The focus will be on an in-depth analysis of the cases involving reviews of these drug testing policies, followed by an analysis of whether the latest Supreme Court decision in this area has followed this model.

I. Introduction

Before analyzing the development of the judicial model used to evaluate drug testing programs, it is important to provide certain clarifications to the reader.

A. Interscholastics and Privileges

Initially, it bears noting that the interscholastic level that is discussed in this paper can generally be understood to include students in grades six through twelve. This covers most middle

to high school levels of extracurricular participation and will cover most of the drug testing policies that are discussed in the following pages.

It is also important to understand that participation in athletics and other extracurricular activities at the interscholastic level is a privilege and not a right.[2] This means that students do not have a property right in such participation, and thus cannot sue a school district or other entity merely because they are barred from participation. Instead, in the cases that will be discussed, students are claiming that the drug testing procedures themselves violate their privacy rights, and that this violation then keeps them from participating because they will not agree to be tested.

B. Drug Testing as a Search

This article presents an analysis of the constitutionality of drug testing in many different situations. As one court explained, "[w]henever a constitutional challenge is made to any search or investigation, a preliminary question must be whether state action is involved. If a search is being conducted by a private entity and not under the color of state law, then it is not subject to the identical scrutiny to which actions of public officials are subject."[3] Moreover, "[t]he United States Supreme Court has held expressly that the Fourth Amendment applies to the officials of local public schools."[4] Therefore, searches done at the public school level will always involve state action and so will be subject to constitutional scrutiny.

Any court will find that a drug testing policy is a search. As the United States Supreme Court has stated, "[a] 'search' occurs when an expectation of privacy that society is prepared to

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[2] Todd v. Rush County Sch., 983 F. Supp. 799, 806 (S.D. Ind. 1997) ("Participation in extracurricular programs is voluntary and a privilege; any student joining these activities is subject to regulation beyond that of a non-participant.").

[3] Brooks v. East Chambers Consol. Indep. Sch. Dist., 730 F.Supp. 759, 762-763 (S.D. Tex. 1989), *aff'd*, 930 F.2d 915 (5th Cir. 1991).

[4] *Id.*

consider reasonable is infringed."[5] The lawsuits that will be discussed present claims that various drug testing policies are violations of the Fourth Amendment to the United States Constitution and its prohibitions against illegal searches and seizures. The Fourth Amendment states that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but only upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.[6]

Following this language, any search conducted by a public official must be based "upon probable cause and a warrant, or at least some form of individualized suspicion of the individual being searched."[7] The focus of this article will be on cases that have reviewed situations where these requirements are modified.

II. Early Developments in the Special Needs Doctrine

In order to understand the current judicial model used to review drug testing programs at the interscholastic level, it is first necessary to understand the evolution of judicial review of these policies over time. This early analysis will begin with the United States Supreme Court's early delineation of the special needs doctrine, move to an early case that reviewed a drug testing policy applicable to athletes, add further clarification from the Supreme Court, and end with a look at one of the earliest cases dealing with a drug testing policy applicable to extracurricular participants.

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[5] United States v. Jacobsen, 466 U.S. 109, 113 (1984).

[6] U.S. CONST. amend. IV.

[7] Paul Anderson, *Drug Testing in Amateur Sports in the US*, *in* DRUGS AND DOPING IN SPORT: SOCIO-LEGAL PERSPECTIVES 205, 205-24 (John O'Leary, Ed. 2001).

A. The Genesis of Special Needs

The term "special needs" first appeared in Justice Blackmun's concurrence in *New Jersey v. T.L.O.*[8] In this case, a high school student was taken to the vice principal's office after a teacher saw her smoking in the lavatory.[9] After the student denied she had been smoking, the vice principal demanded to see the student's purse and found a pack of cigarettes and rolling papers commonly associated with the use of marijuana.[10] He then searched further and found marijuana, a pipe, plastic bags, money, a list with the names of other students that owed her money, and two letters implicating her in marijuana dealings.[11]

Before the Supreme Court the focus of the case was on the nature of the search and whether it was a violation of the Fourth Amendment.[12] Initially, the Court determined that the Fourth Amendment applies to searches conducted by school authorities on school grounds.[13] The Court then assessed the nature of the particular search by balancing "the individual's legitimate expectations of privacy and personal security" against "the government's need for effective methods to deal with breaches of public order."[14] The Court noted that:

> the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the

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[8] 469 U.S. 325 (1985).
[9] *Id.* at 328.
[10] *Id.*
[11] *Id.*
[12] *Id.* at 332.
[13] *T.L.O.*, 469 U.S. at 337.
[14] *Id.*

search.[15]

The Court added that this focus on reasonableness "will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense."[16] Reviewing the reasonableness of the search by school officials, the Court then found that "the search was in no sense unreasonable for Fourth Amendment purposes."[17]

Justice Blackmun went further in his concurrence. While noting that "the Court correctly states that we have recognized limited exceptions to the probable-cause requirement '[where] a careful balancing of governmental and private interests suggests that the public interest is best served' by a lesser standard," he reiterated that this test should only be applied "in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."[18] This is the genesis of the "special needs" doctrine.

The Supreme Court subsequently adopted the "special needs" analysis in two cases in 1987. The first case, *O'Connor v. Ortega*, involves a public employer's work-related search of its employee's office while the employee was on paid administrative leave.[19] A majority of the Court found that the employee had a reasonable expectation of privacy in his office, subject to Fourth Amendment

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[15] *Id.* at 340.

[16] *Id.* at 343. The Seventh Circuit Court of Appeals explained in *Schaill v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1314 (7th Cir. 1988):

> In *T.L.O.* the Court stressed that a school official's primary mission is not to ferret out crime, but is instead to teach students in a safe and secure learning environment. School teachers and administrators should not be required to keep abreast of the most recent developments in fourth amendment jurisprudence; nor should they be required to retain counsel and proceed through the courts each time they desire to obtain further information regarding a potential violation of school rules.

[17] *T.L.O.*, 469 U.S. at 343.

[18] *Id.* at 351 (Blackmun, J., concurring).

[19] 480 U.S. 709, 714 (1987).

protection.[20] The Court also noted that there are some circumstances in which it has recognized that a warrant requirement is unsuitable to a particular search, and adopted Justice Blackmun's language from *T.L.O.*, because, at times, "special needs" will allow for a search without a warrant.[21]

The companion case of *Griffin v. Wisconsin*[22] involved the warrantless search of Griffin's house while he was on probation after being convicted of resisting arrest, disorderly conduct and obstructing an officer.[23] The case focused on the reasonableness of the search of Griffin's house based on a tip that he might be in violation of his probation because he had a gun in the house.[24] In affirming the judgment of the Wisconsin Supreme Court that the search was reasonable, the court again followed Justice Blackmun's analysis noting that in limited circumstances, a search unsupported by either warrant or probable cause can be constitutional when "special needs" other than the normal need for law enforcement provide sufficient justification.[25]

Based on this special needs analysis, school districts have an extraordinary power to search students in public schools when their responsibility to protect in the students from any health and safety hazards might mandate that a search is necessary. This special needs analysis also becomes the first part of the judicial model used by courts to review drug testing policies.

B. Athletics

One of the earliest cases dealing with the validity of a drug testing policy testing students at the interscholastic level began in 1986 when the Tippecanoe County School Corporation (TSC), implemented a drug testing policy requiring all students interested in participating in athletics to consent to drug testing.[26]

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[20] *Id.* at 725.
[21] *Id.* at 720.
[22] 483 U.S. 868 (1987).
[23] *Id.* at 870-71.
[24] *Id.* at 873.
[25] *Id.* at 873.
[26] *Schaill*, 864 F.2d at 1310.

Under the testing procedure, a school official of the same sex and a student who was selected for testing went to a school bathroom.[27] The student was given an empty specimen bottle and allowed to enter a lavatory stall and close the door in order to produce a sample.[28] Although the students being tested were not under direct visual observation while producing the sample, the water in the toilet was tinted to prevent the student from substituting a different sample, and the school official waited outside the stall to listen for the normal sounds of urination.[29] In addition, the official was to check the temperature of the sample by hand in order to assure its genuineness.[30] Students who tested positive for certain drugs could be barred from participating in high school athletics.[31]

In 1987, two student athletes sued TSC claiming that the policy violated the Fourth Amendment.[32] After the district court upheld the constitutionality of the policy, the students appealed to the United States Court of Appeals for the Seventh Circuit.[33]

The Seventh Circuit began its review pointing to the *T.L.O.* case, noting that "[t]he Supreme Court has ruled that the probable cause and warrant requirements are not applicable to school searches,"[34] and therefore, "school searches should be judged under the standard of 'reasonableness[ ] under all the circumstances.'"[35] The court then looked at the competing interests of the parties to see whether the policy was reasonable.

The court also recognized that such searches are "more likely to be permissible in circumstances where an individual has diminished expectations of privacy."[36] On the other side of the equation, the government's interests furthered by a particular search must be "weighty, and generally of a nature that

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[27] *Id.* at 1311.
[28] *Id.*
[29] *Id.*
[30] *Id.*
[31] *Schaill*, 864 F.2d at 1311.
[32] *Id.*
[33] *Id.*
[34] *Id.* at 1315.
[35] *Id.* at 1314 (quoting *T.L.O.*, 469 U.S. at 369).
[36] *Id.* at 1317.

alternate, less intrusive means of detection would not sufficiently serve the government's ends."[37]

The court turned to an analysis of the student athletes' privacy interests. It recognized that interscholastic athletics have extensive requirements imposed on student participants from eligibility and grade requirements, to training rules and prohibitions on smoking, drinking and drug use.[38] In addition, high school athletes are aware of drug testing at the college and Olympic level and of the high profile suspensions of athletes at these levels on the basis of positive drug tests.[39] Although students had to consent to the drug testing in order to participate in athletics, such participation is not a right, instead it "is a benefit carrying with it enhanced prestige and status in the student community," and it is not unreasonable to couple these benefits with an obligation to be tested.[40] Given these factors, the court found it implausible that student athletes "would have strong expectations of privacy with respect to urine tests."[41]

The court then looked at the government's interest furthered by the drug testing policy. It noted that drug use is a particular health and safety concern for student athletes because, "[d]ue to alterations of mood, reductions of motor coordination and changes in the perception of pain attributable to drug use, the health and safety of athletes was particularly threatened."[42] In addition, due to their high visibility and leadership roles, drug use "by this widely admired group is likely to affect the behavior of others."[43] Therefore, TSC had a "substantial interest" in implementing its drug testing policy.[44]

The court also discussed the plaintiff's arguments that the school should have used a less intrusive method of searching than drug testing. The court disagreed, noting that "alternative

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[37] *Schaill*, 864 F.2d at 1318.
[38] *Id.*
[39] *Id.* at 1319.
[40] *Id.* at 1319-20.
[41] *Id.* at 1319.
[42] *Schaill*, 864 F.2d at 1320.
[43] *Id.*
[44] *Id.* at 1321.

methods of investigation would not adequately serve the school's interest in detection and deterrence of drug use," because, "[t]he school's choice of appropriate means to combat this health and disciplinary problem will not be overturned unless unreasonable in light of available alternatives," and "random testing may be particularly effective as a deterrent" to students.[45]

In the end, the Seventh Circuit found that the TSC drug testing policy was reasonable and did not violate the Fourth Amendment.[46]

C. Further Supreme Court Clarification

Two years after the *Schaill* decision, the United States Supreme Court again added to the special needs analysis in the cases of *Skinner v. Railway Labor Executives Association*[47] and *National Treasury Employees Union v. Von Raab*.[48]

The *Skinner* case dealt with federal railroad administration regulations requiring railroad employees to submit to drug testing after major accidents or violations of specific safety rules.[49] The employees sued, claiming that the policy was a violation of their constitutional rights.[50] Following the same "special needs" analysis referred to in *T.L.O., Griffin,* and *O'Conner,* the Court noted that "our cases establish that where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."[51] The Court then began its analysis by noting that "[t]he Government's interest in regulating the conduct of railroad employees to ensure safety . . .presents 'special needs' beyond normal law enforcement that may justify departures from

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[45] *Id.*

[46] *Id.* at 1322.

[47] 489 U.S. 602 (1989).

[48] 489 U.S. 656 (1989).

[49] *Skinner*, 489 U.S. at 606.

[50] *Id.* at 612.

[51] *Von Raab,* 489 U.S. at 665-66 (citing *Skinner*, 489 U.S. at 619-20).

the usual warrant and probable-cause requirements."[52]

Having established that there was a special need, the Court balanced the interests involved, in a similar way as was done in *Schaill,* and found that

> the compelling Government interests served by the FRA's regulations would be significantly hindered if railroads were required to point to specific facts giving rise to a reasonable suspicion of impairment before testing a given employee. In view of our conclusion that . . .the toxicological testing contemplated by the regulations is not an undue infringement on the justifiable expectations of privacy of covered employees, the Government's compelling interests outweigh privacy concerns.[53]

In the companion case, *Von Raab*, the U.S. Customs Service forced employees who were involved in drug interdiction, were required to carry firearms, or were required to handle classified material, to submit to a drug screening program.[54] Some of these employees sued claiming that the drug policy was an illegal search in violation of the Fourth Amendment.[55] The Court initially found that the government's substantial interest in deterring drug use among Customs agents was no less than its interests in the *Skinner* case and presented a "special need."[56] Therefore, after balancing the interests involved, the Court found that "the Government has demonstrated that its compelling interests in safeguarding our borders and the public safety outweigh the privacy expectations of employees,"[57] and so the testing program was reasonable under the Fourth Amendment.[58]

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[52] *Skinner*, 489 U.S. at 620 (quoting *Griffin*, 483 U.S. at 873-74).
[53] *Skinner*, 489 U.S. at 633.
[54] *Von Raab*, 489 U.S. at 660-61.
[55] *Id.* at 663.
[56] *Id.* at 666.
[57] *Id.* at 677.
[58] *Id.*

D. Extracurricular Activities

In the same year, one of the first cases reviewing the validity of a testing program applicable to all students in any extracurricular activity was decided. In 1988, the East Chambers Consolidated Independent School District in Texas implemented a drug testing program that tested all students from grades six to twelve who wished to participate in school-sponsored extracurricular activities.[59] Brent Brooks, a student participating in the Future Farmers of America program, sued claiming that the policy violated the Fourth Amendment.[60]

Under the policy, students were brought to the principal's office where they were confronted by the principal and a school nurse.[61] The student was then asked whether he or she was using any drugs that might cause a positive test result.[62] If the student answered affirmatively, the principal would leave the room and the student would disclose what drugs they were taking that would make the test result become positive.[63] Regardless, after being questioned, all students were told to go into the bathroom in the principal's office to produce the sample.[64] The student was not to flush the toilet until after the sample was given to the nurse.[65]

The United States District Court for the Southern District of Texas, Galveston Division, began its review of the case noting that according to *Von Raab*, the analysis under the Fourth Amendment begins by determining whether the conduct is a search, and then moves to whether the conduct is reasonable.[66] As to the first part of this analysis, again following *Von Raab*, the

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[59] Brooks v. East Chambers Consol. Indep. Sch. Dist., 730 F.Supp. 759, 760 (S.D. Tex 1989), aff'd, 930 F.2d 915 (5th Cir. 1991).

[60] *Id.*

[61] *Id.* at 762.

[62] *Id.*

[63] *Id.*

[64] *Brooks*, 730 F.Supp. at 764.

[65] During the course of the litigation, the school district revised the policy. However, the changes only had to do with the timing of the testing and are not part of this discussion of the case.

[66] *Id.* at 763 (citing *Von Raab*, 489 U.S. 656).

court found that "without a doubt" the drug testing program was a search.[67] The court then turned to an analysis of its reasonableness under the Fourth Amendment.

Unlike the *Schaill* case, this court followed a different portion of *T.L.O.* and found that the reasonableness analysis involves two parts: (1) "' whether the . . . action was justified at its inception,'" and (2) "whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"[68] Although never following the special needs language from *T.L.O.*, the court recognized that the school district could show a special interest justifying the testing program if "it were shown that participants in extra-curricular activities are much more likely to use drugs than non-participants, or that drug use by participants interfered with the school's educational mission much more seriously than does drug use by non-participants."[69] Instead of demonstrating that the students tested were more likely to use drugs, the court found that "logic would dictate that students who participate in athletics and other extra-curricular activities are, in fact, less likely to use drugs and alcohol, if only because Texas law forbids students who fail courses from participating in extra-curricular activities, and presumably, heavy drug or alcohol use will have a negative impact on academic performance."[70]

In what other courts will describe as a look at the character of the intrusion caused by the drug testing procedure, this court found that the drug testing policy in this case was "the most intrusive of any school district in Texas. It tests the widest range of students, grades seven through twelve—originally grades six through twelve—participating in extra-curricular activities," which was "over half the student body."[71]

Furthermore, in looking at the effectiveness of the policy in reaching the school district's goals of combating the problem of drug use, the court noted that the policy was not tailored to test

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[67] *Brooks*, 730 F.Supp. at 763.

[68] *Id.* at 764 (quoting *T.L.O.*, 469 U.S. at 343).

[69] *Brooks*, 730 F.Supp. at 764.

[70] *Id.*

[71] *Id.* at 765.

those who were most likely to use drugs.[72] Instead, without discussing the extent of the students' privacy interests, the court stated "[a] program that simply encourages drug-using students to give up activities outside of school is not sufficient justification for ignoring students' reasonable expectations of privacy."[73]

Finally, the court specifically disagreed with the *Schaill* decision because this court thought that it was more strictly following the *Von Raab* and *Skinner* decisions as it determined that the school district's interest in support of the testing program was "much less than the governmental interest that the [Supreme] Court found compelling in *Skinner* and *Von Raab*."[74] The court argued that the *Schaill* court might have reached a different decision if it had been decided after *Skinner* and *Von Raab*. Still, it also recognized that "the evidence before the Tippecanoe district court was significantly different than the evidence at bar, with the program approved by the Seventh Circuit considerably more limited than the one before this Court."[75]

The court ended by stating that "the school environment does not require an automatic forfeiture of certain rights and privacy expectations," and that "attendance does not trigger an instant diminution of rights."[76] It granted the parents an injunction barring the district from using the policy because it was a violation of the Fourth Amendment.[77]

E. Analysis

The *Schaill* case is an early example of a court's analysis of a drug testing policy involving high school students involved in extracurricular activities, here interscholastic athletics. While the court does not explicitly use a balancing test or assess special needs, this early case begins to show how courts will look at the

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[72] *Id.*
[73] *Id.*
[74] *Brooks*, 730 F.Supp. at 766.
[75] *Id.*
[76] *Id.*
[77] *Id.*

competing interests of students and school officials when a drug test is involved. In finding that the test was reasonable, the *Schaill* court carefully looked at the privacy interests of the students involved and weighed these against the government's interest in enforcing the testing policy. Interestingly, while the court notes that the students were required to submit to drug testing "only as a condition of participation in an extracurricular activity—athletics," it seems to foreshadow the extracurricular cases to come when it says that "[r]andom testing of athletes does not necessarily imply random testing of band members or the chess team."[78] The court also argues that the considerations discussed "distinguish athletes from members of the general school population. Our decision today should not be read as endorsing urine testing of all students attending a school."[79] This article will analyze whether the court's thoughts in this regard are correct.

It is also important to note, as the *Schaill* court so noted, "participation in athletics at the high school level in itself is a privilege and not a right."[80] Therefore, even though courts will analyze the student's privacy interests in the drug testing cases, these interests should not be equated with some sort of property right in participation itself. The question as to whether non-athletic forms of extracurricular participation in sports will also be given only privileged status will be examined throughout this article.

Von Raab and *Skinner* add to the analysis by showing that according to the United States Supreme Court, drug testing programs seemingly should be analyzed by first assessing whether there is a special need obviating the necessity for a warrant based on reasonable suspicion. If such a special need is found to exist, then the court assesses the reasonableness of the search involved by balancing the individual's privacy rights against the government's interests in conducting the testing. This basic test has been redefined over the years in its application to many groups—particularly interscholastic students

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[78] *Schaill*, 864 F.2d at 1319.

[79] *Id.* at 1319 n.10.

[80] Anderson, *supra* note 7, at 209.

at public schools.

The *Brooks* court seems to follow *Von Raab*, *Skinner*, and *T.L.O.*, but does not focus on the special needs doctrine. Instead, *Brooks* focuses on the lack of evidence of a particular drug abuse problem among the students tested—those participating in extracurricular activities. *Brooks* also would not equate simple attendance at a public school with some sort of reduction in privacy rights. As will be demonstrated in further cases, the *Brooks* courts' interpretation of the way in which such policies should be analyzed under the Fourth Amendment is incorrect.

III. Delineation of the Standard

The cases discussed so far provide the background to an understanding of the judicial model eventually followed in the *Earls* decision. However, while the early cases provided an overview of the model itself, the Supreme Court provided more explicit direction in 1995 and 1997.

A. Drug Testing of Student Athletes

In 1995, in the seminal case of *Vernonia School District 47J v. Acton*,[81] the Supreme Court reviewed the constitutionality of a drug testing program applied to student athletes at the high school level.[82] This is the first case to specifically set out the way

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[81] 515 U.S. 646 (1995).

[82] *Id.* at 648. For more in depth discussion of the *Acton* case, see, for example, Rhett Traband, *The Acton Case: The Supreme Court's Gradual Sacrifice of Privacy Rights on the Altar of the War on Drugs*, 100 DICK. L. REV. 1 (1995); Recent Development, *K. Vernonia School District 47J v. Acton: Suspicionless Drug Testing Of Student-Athletes Held Reasonable Under The Supreme Court's Balancing* Test, 22 J. CONTEMP. L. 281 (1996); George M. Dery III, *The Coarsening Of Our National Manners: The Supreme Court's Failure To Protect Privacy Interests Of Schoolchildren—Vernonia School District 47j v. Acton*, 29 Suffolk U. L. Rev. 693 (1995); Donald Crowley, *Student Athletes And Drug Testing*, 6 MARQ. SPORTS L.J. 95 (1995); Paul Porvaznik, *Sports Law: When Drug Testing Violates The Student Athlete's Right To Privacy*, 5 J. ART & ENT. LAW 173 (1995); Nancy D. Wagman, Casenote, *Are We Becoming A Society Of Suspects? Vernonia School District 47J v. Acton: Examining Random, Suspicionless Drug Testing Of Public School Athletes*, 3 VILL. SPORTS & ENT. L.J. 325 (1996); Robert L. Roshkoff, Casenote, *University Of Colorado v. Derdeyn: The Constitutionality Of Random,*

a court will review a drug testing policy at the interscholastic level.

It is important to keep in mind that even though the case dealt with a policy testing only student athletes, as the *Schaill* court noted, athletics are also an extracurricular activity. Therefore, the *Acton* case provides the foundation for understanding later cases involving other extracurricular activities.

In the mid-1980s, teachers and administrators in the Vernonia School District noticed a sharp increase in student drug use. Alongside this increase was an increase in disciplinary problems at the school.[83] The school district also found that student athletes were both users and leaders of the drug culture.[84] This caused particular concern as administrators were convinced that drug use among athletes could lead to sports-related injuries.[85] Initially, the district responded by increasing awareness and educational programs warning of the dangers associated with drug use. But the problem persisted.[86]

Eventually, the district implemented a drug testing policy that applied to all students participating in athletics.[87] Each student was required to sign a consent form, consenting to the random urinalysis testing policy.[88] During the test, each student would enter a locker room with an adult monitor to produce a sample.[89] Boys would produce the sample while standing fully clothed at a urinal with their back to the monitor.[90] Girls would produce the sample in a bathroom stall with the monitor standing outside the door.[91] The monitor would then check the sample for

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Suspicionless Urinalysis Drug-Testing Of College Athletes, 3 VILL. SPORTS & ENT. L.J. 361 (1996); Stephen L. Wasby, *The Road Not Taken: Judicial Federalism, School Athletes, And Drugs*, 59 ALB. L. REV. 1699 (1996).

[83] *Acton,* 515 U.S. at 649.

[84] *Id.*

[85] *Id.*

[86] *Id.*

[87] *Acton*, 515 U.S. at 650.

[88] *Id.*

[89] *Id.*

[90] *Id.*

[91] *Id.*

temperature and tampering.[92] While a positive test did not result in any criminal penalties, a second positive test could result in suspension of the student from participation in athletics.[93]

In 1991, seventh grader James Acton wanted to play football but refused to sign the consent forms.[94] As a result, he was not allowed to participate.[95] The Actons then sued the school district, claiming that the drug testing policy violated the Fourth Amendment.[96]

The District Court denied the Acton's claims on the merits and dismissed the action.[97] The United States Court of Appeals for the Ninth Circuit then reversed, holding that the policy violated the Fourth Amendment.[98] The Supreme Court granted certiorari to review the case.[99]

The Court began its review stating that in following the Fourth Amendment, "the ultimate measure of the constitutionality of a governmental search is 'reasonableness.'"[100] This reasonableness "'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'"[101]

In addition to this reasonableness test, the Court also reiterated that the warrant and probable cause requirements of the Fourth Amendment do not need to be followed when "special needs" make these requirements impracticable.[102] Contrary to the *Brooks* determination that "the school environment does not require an automatic forfeiture of certain rights and privacy expectations,"[103] the Supreme Court pointed to its decision in

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[92] *Acton*, 515 U.S. at 650.

[93] *Id.* at 651.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Acton,* 515 U.S. at 651.

[98] *Id.*

[99] *Id.*

[100] *Id.* at 652.

[101] *Id.* at 652-53 (quoting *Skinner*, 489 U.S. 602, 619 (1989)).

[102] *Acton*, 515 U.S.at 653 (quoting Griffin v. Wisconsin, 483 U.S. 868, 873 (1987)).

[103] *Brooks* , 730 F.Supp. at 766.

T.L.O. wherein it found that such special needs exist in the public school context because the requirement of a warrant "'would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed,' and would undercut 'the substantial need of teachers and administrators for freedom to maintain order in the schools.'"[104] Also, following *Skinner* and *Von Raab*, the Court noted that it had sustained such suspicionless searches to conduct drug testing in the past, and so the requirement of individualized suspicion was not mandatory in this case.[105]

The Court then began going through the reasonableness balancing test. As it described, the "first factor to be considered is the nature of the privacy interest upon which the search here at issue intrudes."[106] This privacy interest must be "legitimate" and may depend on the individual's legal relationship with the State.[107]

Central to this issue in the present case was the fact that the individuals tested were students who were "committed to the temporary custody of the State as schoolmaster."[108] While at school, "the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them."[109] In addition, "while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' the nature of those rights is what is appropriate for children in school."[110] Therefore, public school students already have a lesser degree of self-determination and privacy than other individuals in general and other students in particular. This privacy interest is further diminished because they are subject to vaccinations and medical exams due to the school's custodial relationship over them.[111]

Student athletes have an even lesser expectation of privacy.

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[104] *Acton*, 515 U.S. at 653 (quoting *T.L.O.*, 469 U.S. at 340, 341).

[105] *Acton*, 515 U.S. at 653-54.

[106] *Id.* at 654.

[107] *Id.*

[108] *Id.*

[109] *Id.*

[110] *Id.* at 655-56 (quoting Schaill v. Tippecanoe County Sch. Corp., 864 F.2d 1309, 1318 (7th Cir. 1988)).

[111] *Acton*, 515 U.S. at 656.

As the *Schaill* court noted, there is an element of communal undress to athletics[112] and athletes "voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."[113] These regulations include preseason physical exams, acquisition of insurance coverage, maintenance of minimum grade point averages, and rules as to dress and training hours. As the Court explained, "students who voluntarily participate in school athletics have reason to expect intrusions upon normal rights and privileges, including privacy."[114]

Having determined that students in public schools have a lower expectation of privacy, and that student athletes have even lower expectations of privacy, the court turned to the character of the intrusion onto these lowered, albeit legitimate, privacy rights. The *Skinner* Court had also analyzed urinalysis testing finding that "the degree of intrusion depends upon the manner in which production of the urine sample is monitored."[115] In the present case, male students remained fully clothed while they produced the sample with their backs turned toward the monitor, while female students produced samples behind a closed stall door while the monitor waited outside. According to the Court, "[t]hese conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily," and so the privacy interests compromised by the testing are at best "negligible."[116]

The Court then turned to the other aspect of the privacy interest involved, the information such testing discloses. The Court found it significant that the testing program only looked for drugs, and that the drugs searched for do not vary according to the student being tested.[117] Also, the results of the test were kept confidential and not used in any way for criminal sanctions.[118]

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[112] *Id.* at 657 (quoting *Schaill*, 864 F.2d at 1318).
[113] *Acton,* 515 U.S. at 657.
[114] *Id.*
[115] *Id.* at 658 (quoting *Skinner*, 489 U.S. at 626).
[116] *Acton*, 515 U.S. at 658.
[117] *Id.*
[118] *Id.*

The Actons argued that the policy was particularly invasive because students were required to provide information about their current medical history before being tested. However, making an explicit reading of the testing policy, the Court argued that students could provide this information confidentially, therefore, this "invasion of privacy was not significant" either.[119]

The Court then turned to an analysis of both the "nature and immediacy of the governmental concern at issue here, and the efficacy of this means for meeting it."[120] In past cases, the Court characterized such governmental concerns as "compelling."[121] However, in this case, it noted that this "compelling state interest" is not some "fixed, minimum quantum of governmental concern;" instead, such an interest must appear "*important enough* to justify the particular search at hand, in light of other factors that show the search to be relatively intrusive upon a genuine expectation of privacy."[122]

Examining the nature of the governmental interest involved, the Court agreed that the Vernonia School District was faced with an important governmental interest. Drug use by children is a serious problem and "[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe," because, "'children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor.'"[123] Moreover, drug use by students disrupts the educational process and harms the very children for whom the school "has undertaken a special responsibility of care and direction."[124] Of utmost importance, the policy was applied to student athletes "where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high."[125]

Next, the Court looked at the immediacy of the school district's concern. The Court would not question the district

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[119] *Id.* at 659.
[120] *Id.* at 660.
[121] *Acton*, 515 U.S. at 660.
[122] *Id.* at 661.
[123] *Id.*
[124] *Id.* at 662.
[125] *Id.*

court's assessment of the epidemic nature of the drug problem among students in the school district, as it found that

> "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion," that "disciplinary actions had reached epidemic proportions," and that "the rebellion was being fueled by alcohol and drug abuse as well as by the student's misperceptions about the drug culture."[126]

This was an "immediate crisis of greater proportions" than existed in either *Skinner* or *Von Raab*.[127]

Finally, the Court looked to the efficacy of the drug testing program in addressing the drug problem. The Court found that "a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs."[128] Contrary to the Actons' suggestion, the school district did not need to find the least intrusive means possible to reach its goal of reducing drug use among students. Instead, "[w]e have repeatedly refused to declare that only the 'least intrusive' search practicable can be reasonable under the Fourth Amendment."[129]

After balancing all of the factors discussed, the Court concluded that the drug testing policy was reasonable and constitutional and reversed the holding of the Ninth Circuit Court of Appeals.[130] Still, it cautioned that such suspicionless drug testing policies would not always pass constitutional scrutiny. Instead, it noted that "[t]he most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."[131] Many cases that will be presented in this article point to this as the most important factor leading to the Supreme

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[126] *Acton*, 515 U.S. at 662-63 (quoting *Acton*, 796 F. Supp. at 1357).
[127] *Acton*, 515 U.S. at 663.
[128] *Id.*
[129] *Id.*
[130] *Id.* at 664-65.
[131] *Acton*, 515 U.S. at 665.

Court's *Acton* decision.

B. Refinement of the Judicial Model

In *Acton*, the Supreme Court went to great lengths to delineate the particular test courts should use when reviewing a drug testing policy in a public school. Initially, the Court noted that as a search, the constitutionality of any drug testing policy must be measured by its reasonableness. This reasonableness is then judged by balancing the privacy interests of the individuals tested against the governmental interests promoting the policy. Throughout the opinion, the *Acton* court focused on weighing the different aspects of this reasonableness test.

The Court does not so clearly correlate its analysis of the policy as part of its special needs doctrine discussed earlier. Instead, the Supreme Court merely reiterated that it found such special needs to exist in the public school context.[132] As a result, given this initial finding that special needs exist, the focus of the case is on the reasonableness test itself.

Two years after *Acton*, the Supreme Court provided further guidance as to what these special needs are. The case of *Chandler v. Miller*[133] dealt with a random urinalysis drug testing policy for candidates to public office in Georgia.[134] In discussing whether there was a special need to test candidates, the Court provided further guidance as to exactly how to assess such special needs.

According to the Court, "[w]hen such 'special needs'. . .are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the

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[132] *Id.* at 653 (quoting New Jersey v. T.L.O., 469 U.S. 325, 340-41 (1985)).

[133] 520 U.S. 305 (1997). For further discussion of this case, see, for example, Joy L. Ames, Note, *Chandler v. Miller: Redefining "Special Needs" for Suspicionless Drug Testing Under the Fourth Amendment*, 31 AKRON L. REV. 273 (1997); Nathan A. Brown, Recent Development, *Reining In The National Drug Testing Epidemic: Chandler V. Miller*, 33 HARV. C.R.-C.L. L. REV. 253 (1998); Michael E. Brewer, *Chandler v. Miller: No Turning Back from a Fourth Amendment Reasonableness Analysis*, 75 DENV. U.L. REV. 275 (1997).

[134] *Id.* at 308.

parties."[135] These special needs must be "substantial," that is, "important enough to override the individual's acknowledged privacy interest, [and] sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."[136] The Court also noted that

> 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. Proof of unlawful drug use may help to clarify—and to substantiate—the precise hazards posed by such use.[137]

Striking down the policy, the Court held that the State of Georgia had not provided any evidence of a drug problem among elected officials and that these officials did not perform any safety sensitive tasks warranting drug testing.[138] The Court held that the need professed by the State was "in short, symbolic, not 'special.' " [139] The Court also stated that "where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable,'" but, "where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged."[140]

This clarification of special needs adds to the reasonableness balancing test presented in *Acton*. As another court explained, "[p]rior to conducting the balancing, in surveying the public interests at issue . . . we must specifically inquire into whether the drug-testing program at issue is warranted by a 'special need.'"[141] Moreover,

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[135] *Chandler*, 520 U.S. at 314.

[136] *Id.* at 318.

[137] *Id.* at 319.

[138] *Id.* at 321-22.

[139] *Id.* at 322 (stating that a "symbolic" need is one that is "insufficient to establish a special need justifying drug testing"). *See also* Baron v. City of Hollywood, 93 F. Supp. 2d 1337, 1341 (S.D. FL 2000).

[140] *Chandler*, 520 U.S. at 323.

[141] 19 Solid Waste Dep't Mech.'s v. City of Albuquerque, 156 F.3d 1068,

> Only if we can say that the government has made that special need showing do we then inquire into the relative strengths of the competing private and public interests to settle whether the testing requirement is reasonable under the Fourth Amendment. If the government has not made its special need showing, then the inquiry is complete, and the testing program must be struck down as unconstitutional. Thus, the first, and ultimately decisive, question . . . is whether the . . .drug testing program is warranted by a special need.[142]

Therefore, the inquiry is a two-step process: "[f]irst, a court must determine whether special needs exist that justify a suspicionless search. If, and only if, such special needs are present, may a court then proceed to the second phase, balancing public versus private interests."[143]

C The Judicial Model

In an earlier article, this author presented a judicial model for reviewing a drug testing policy in athletics, which included the assessment of special needs as part of the analysis of the governmental interest in promotion of the policy.[144] The analysis in this article leads to a different judicial model. Following from the cases already discussed (primarily *T.L.O.*, *Acton, Skinner*, *Von Raab,* and *Chandler*), the judicial model for reviewing a drug testing policy at the interscholastic level can be represented as follows.

Step One: Special Needs Analysis

> Following *Chandler*, a court must first undertake a context-specific inquiry examining the interests of

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1072 (10th Cir. 1998).

[142] *Id.*

[143] O'Neill v. Louisiana, 61 F. Supp. 2d 485 (E.D. La. 1998).

[144] Anderson, *supra* note 7, at 216.

the parties involved to make sure that they are supported by a special need. This special need must be substantial and not merely symbolic, meaning that it is important enough to override the individual's privacy interest, and sufficiently vital to suppress the requirement of individualized suspicion.

If a special need is present then the analysis shifts to the balancing test

Step Two: Reasonableness Balancing Test

Following *T.L.O.* and refined in *Acton,* the court must balance the invasion of the individual or group's privacy interests at stake against the governmental interest promoted by the policy.

The first part of this balancing is an assessment of the nature of the privacy interest at stake.

This interest must be legitimate, and may depend on the individual's relationship with the State.

This will also include a review of the character of the intrusion on the particular privacy interest caused by the government's conduct. In analyzing the character of the intrusion, a court should look to the degree of the intrusion and the type of information that the search discloses.

The second part of the balancing is a look at the governmental interest promoted by the policy.

This interest is assessed by looking at its

> nature, which may be compelling but must be important enough to justify the particular search.
>
> The court should also analyze whether the governmental interest is of an immediate nature so that it is a concern that must be dealt with.
>
> And the court must analyze whether the intrusion itself is an efficacious way to meet the concerns demonstrated by the governmental interest.

If there is a special need (Step One), and the government's interest in promotion of the testing outweighs its invasion of the individual's privacy rights (Step Two), then the test should be found to be reasonable, and therefore, constitutional.

To this point, this is the test that courts should follow in reviewing drug testing policies. The analysis will now shift to cases following *Acton*, which have dealt with drug testing policies at the interscholastic level that test more than just student athletes.

IV. Extracurricular Cases

After the *Chandler* decision, courts began to review many cases involving drug testing policies testing student participants in non-athletic extracurricular activities. These cases deal with programs that test students who are involved in extracurricular activities while in public school, often activities like debate team, Fellowship of Christian Students, or other activities which cannot properly be qualified as athletics of any nature. These activities do not involve the same health and safety concerns that are often found in athletics.

The cases will be presented in three separate chronological categories separated by decisions in the *Earls* case. This separation will assist in understanding the progression of

reasoning that courts have undertaken in dealing with the issue.

A. 1998 until Earls 1

The first cases discussed were decided after the *Chandler* decision and before the first decision in the *Earls* litigation. Overall, the courts in these cases look favorably on the drug testing policies promulgated by the various school districts involved.

1. *Todd v. Rush County Schools*[145]

In this case, the Rush County School Board instituted a drug testing program requiring students wishing to participate in extracurricular activities to consent to random suspicionless urine testing for nicotine, alcohol and unlawful drug use.[146] Extracurricular activities included Student Council, Foreign Language Clubs, the Fellowship of Christian Athletes, Future Farmers of America, and the Library Club.[147] Any student failing the drug test was given the opportunity to retest or explain the result by showing that they were lawfully taking medication, or that they had some other lawful excuse.[148] After failing two tests or without satisfactory explanation, the student would be barred from participating in extracurricular activities.[149] Several students and their parents sued claiming that the policy was an unconstitutional violation of the Fourth Amendment.[150]

In its review, the Seventh Circuit Court of Appeals explicitly followed its own decision in *Schaill* and the *Acton* decision, while noting that the Supreme Court determined "deterring drug use by students was a compelling interest, finding that 'school years are the time when the physiological, psychological, and addictive effects of drugs are most severe.'" [151] Although not specifically

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[145] 133 F.3d 984 (7th Cir. 1998).
[146] *Id.* at 984.
[147] *Id.*
[148] *Id.* at 985.
[149] *Id.*
[150] *Todd*, 133 F.3d at 985.
[151] *Id.* at 986 (quoting *Acton*, 515 U.S. at 661).

discussing the parts of the test used in *Acton*, the Seventh Circuit found that "the reasoning compelling drug testing of athletes also applies to testing of students involved in extracurricular activities"[152] because any such extracurricular activities also require healthy students.

The court noted that although participation in such extracurricular activities may be beneficial to the educational experience, such participation is still a privilege while in high school.[153] The court also looked to its earlier decision in *Schaill* and its finding that the student athletes tested were only tested "'as a condition of participation in an extracurricular activity,' in that case athletics."[154] Similar to the *Acton* case, "students in other extracurricular activities, like athletes, 'can take leadership roles in the school community and serve as an example to others,'" and therefore, "it is appropriate to include students who participate in extracurricular activities in the drug testing."[155]

In the end, according to the Seventh Circuit, and echoing *Acton*, "[t]he linchpin of this drug testing program is to protect the health of the students involved."[156] Therefore, as the drug testing program in *Todd* was "sufficiently similar" to the one in *Acton*, the Seventh Circuit found that it withstood constitutional scrutiny under the Fourth Amendment.[157]

2. *Willis v. Anderson Cmty Sch. Corp.*[158]

In December of 1997, Willis was suspended for fighting with a fellow student. Upon his return to school, he was informed that he would be tested for drug and alcohol use according to the drug testing policy of the Anderson Community School Corporation. When he refused to consent to the policy, he was suspended again, told that a further refusal would be deemed to be an admission of unlawful drug use, and that he would be suspended

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[152] *Id.*
[153] *Id.*
[154] *Id.* (quoting *Schaill*, 864 F.2d at 1319).
[155] *Todd*, 133 F.3d at 986.
[156] *Id.*
[157] *Id.*
[158] 158 F.3d 415 (7th Cir. 1998).

a third time pending expulsion proceedings. Willis sued claiming that this policy violated his constitutional rights. Even though this case does not deal with a policy testing student participants in extracurricular activities, it is still important because the court again analyzes a drug testing policy under the standards provided in *Acton*.

The Seventh Circuit focused on whether the Corporation had special needs warranting the drug testing policy. Although the court recognized that the Corporation alleged special concerns such as deterring drug use, disciplining students, and protecting the health of students, it went further and focused on the practicality of the testing policy.[159] It noted, "the feasibility of a suspicion-based search is a key consideration in determining whether it is reasonable for the government to implement a suspicionless regime."[160] Still, the court would not circumvent the entire special needs analysis simply to focus on the potential practicality of the search itself.

The court undertook a more detailed analysis of the *Acton* factors than in *Todd*. It first found that although the student's privacy interest was similar to that in *Acton*, there was no aspect of communal undress or voluntariness.[161] Next, the court found that the nature and immediacy of the policy was similar to *Acton* because the policy was specifically tailored to students that the Corporation determined were at risk. Moreover, even though there was not as immediate a problem as in *Acton*, such immediacy was not meaningfully less.[162] Finally, the court focused on the efficacy of the policy and noted, "it is hard to believe that Deans of Students would have any difficulty justifying a finding of reasonable suspicion in fighting cases. Therefore the imposition of a suspicionless policy seems to serve primarily demonstrative or symbolic purposes."[163]

Therefore, because the means used to address the drug testing problem were not efficacious, the government's interest did not

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[159] *Id.* at 420.
[160] *Id.*
[161] *Id.* at 422.
[162] *Id.* at 423.
[163] *Willis,* 158 F.3d at 423-24.

outweigh the student's privacy interest involved, and the policy was unreasonable under the Fourth Amendment.[164]

3. *Trinidad School District No. 1 v. Lopez*[165]

In this case, the Trinidad School District No. 1 Board of Education instituted a drug testing policy testing all sixth through twelfth grade students participating in extracurricular activities.[166] Carlos Lopez was a senior high school student who enrolled in two for-credit band classes and participated in the marching band.[167] Lopez refused to consent to the drug testing policy and was subsequently suspended from the band classes and marching band.[168]

In response, Lopez and his parents sued the District claiming that the policy violated his rights under the Fourth Amendment.[169] The trial court upheld the policy, and Lopez appealed the decision.[170] Both parties then sought an expedited review from the Supreme Court of Colorado.[171]

The Colorado Supreme Court began its review noting that the Supreme Court's *Acton* decision "established the framework for analyzing the constitutionality of a public school district's drug testing program similar to the one we consider here."[172] As a result, the drug testing policy at issue here also fell within the Supreme Court's special needs jurisprudence.[173] Therefore, the court turned to the test the Supreme Court used in *Acton*.

The court first looked at the nature of the student's privacy interest at issue. In assessing this interest, the Colorado Supreme Court disagreed with the trial court and distinguished the case from *Acton*. First, the court found it important that the

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[164] *Id.* at 424.
[165] 963 P.2d 1095 (Colo. 1998).
[166] *Id.* at 1096-99.
[167] *Id.* at 1097.
[168] *Id.*
[169] *Id.*
[170] *Lopez*, 963 P.2d at 1097.
[171] *Id.*
[172] *Id.* at 1105.
[173] *Id.* at 1106.

Acton court focused on the "communal undress" nature of athletics.[174] Contrary to this, "the record indicates a qualitatively different type of undressing from the communal undressing the Supreme Court described . . ."[175] Furthermore, the policy at issue did not simply apply to voluntary activities, it also applied to for-credit activities. In sum, "[w]hile we recognize that students in the public school system have lesser expectations of privacy than adults in the general population, we view the absence of voluntariness and the qualitatively different type of undressing in this case as significant."[176] As a result, the students tested in this case had higher expectations of privacy than those in *Acton*.

Next, the court reviewed the character of the intrusion caused by the drug testing program. The court questioned the trial court's comparison of the drug testing program to what students go through daily in a public restroom. As the court explained, ordinarily a student has some choice about when to use a restroom, does not have an official monitor, and does not have to urinate into a container.[177] Regardless of this disagreement, the court followed *Acton* and found that this intrusion was still negligible.[178]

Finally, the court looked to the nature of the governmental interest promoted by the policy and the efficacy of drug testing as a means to meet this interest. While the court agreed with the trial court's determination that the district had a serious drug problem, it disagreed with the trial court's analysis of the efficacy of the policy in dealing with this problem. The court found it of particular importance that, unlike *Acton*, "the Policy included all students participating in all extracurricular activities, as well as students who want to enroll in a for-credit class," even though there was no evidence that these students suffered from the same immediate risk of harm due to drug use as athletes.[179] In fact, evidence showed that the students affected by this policy "had

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[174] *Id.* at 1106-07.
[175] *Lopez*, 963 P.2d at 1107.
[176] *Id.*
[177] *Id.* at 1108.
[178] *Id.*
[179] *Id.* at 1109.

better discipline records and performed better academically than did students in the general population."[180] The court concluded that "[i]n our view, simply being a role model by virtue of participation in an extracurricular activity is insufficient to support a conclusion that the school's mandated drug testing program was reasonable."[181]

The court also found the sheer amount of students that were subject to testing troublesome. Although the district argued that participation in extracurricular activities is voluntary and a privilege, the court determined that "the reality for many students who wish to pursue post-secondary educational training and/or professional vocations requiring experience garnered only by participating in extracurricular activities is that they must engage in such activities."[182]

In the end, because it was able to distinguish the character of the intrusion from that in *Acton*, and because it determined that the drug testing was not an efficacious means to combat the drug testing program, the Colorado Supreme Court reversed the trial court's decision.

4. *Miller v. Wilkes*[183]

In the 1997-1998 school year, the School District Board of Education of Cave City, Arkansas, instituted a drug screening policy for students in grades seven through twelve.[184] Students who refused to consent to the testing were barred from participating in extracurricular activities.[185] Pathe Miller wanted to participate in the Radio Club, prom committees, the quiz bowl, and school dances, but refused to be tested and was barred from participating in any of these activities.[186] He and his parents then sued the school district, claiming that the policy violated his

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[180] *Lopez*, 963 P.2d at 1109.

[181] *Id.*

[182] *Id.*

[183] 172 F.3d 574 (8th Cir. 1999), *vacated as moot*, 1999 U.S. App. LEXIS 13289 (8th Cir. 1999).

[184] *Id.* at 576.

[185] *Id.*

[186] *Id.* at 577.

Fourth Amendment rights.[187]

The trial court granted summary judgment to the school district finding that the policy did not violate Miller's constitutional rights.[188] The Millers then appealed to the Eighth Circuit Court of Appeals.[189]

At the outset, the United States Court of Appeals for the Eighth Circuit discussed the *Acton* case and began to go through the Supreme Court's balancing test.[190] Assessing the scope of the student's legitimate expectations of privacy, the court determined that "student status was fundamental to [the Supreme Court's] conclusions concerning the diminished expectation of privacy" that it found student athletes to have.[191] Miller argued that the fact that the policy applied only to student athletes was more important. The court disagreed stating that

> The Court did say that 'legitimate privacy expectations are *even less* with regard to student athletes' . . . That is not to say, however, that it is only the student who seeks to engage in extracurricular school sports activities whose legitimate expectation of privacy is so diminished that a search such as this one can stand up to constitutional scrutiny.[192]

The Eighth Circuit also noted that extracurricular activities will have their own rules and regulations to be followed and someone to monitor compliance with these rules, therefore, "students who elect to be involved in school activities have a legitimate expectation of privacy that is diminished to a level below that of the already lowered expectation of non-participating students."[193]

Moving on to a review of the character of the intrusion itself, the court found that the procedure for collecting the urine sample

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[187] *Id.*
[188] *Miller*, F.3d at 577.
[189] *Id.* at 576.
[190] *Id.* at 577-78.
[191] *Id.* at 578.
[192] *Miller*, 172 F.3d at 579.
[193] *Id.*

was no more intrusive than that in *Acton* and so its intrusion on the lowered privacy interest of students was negligible.[194] The court also found that the information that was received from the testing was also protected in the same way as in *Acton* and so its intrusion was also not significant.[195]

The court finally turned to a review of the school district's interest in promoting the policy. Although finding that the nature of the district's policy in combating the drug use problem among students was the same as that in *Acton*, the court acknowledged that there was no immediacy to the drug problem in this case.[196] However, it did not believe that this difference was decisive. Instead, it stated that "[w]e see no reason that a school district should be compelled to wait until there is a demonstrable problem with substance abuse among its own students before the district is constitutionally permitted to take measures that will help protect its schools against the sort of 'rebellion'"[197] that existed in the *Acton* case. The court recognized the *Chandler* court's realization that demonstrating a severe drug problem would "shore up" an assertion of a special need leading to a drug testing program, but it determined that given the compelling state interest in deterring drug use, and the serious problems it can entail once such use is a problem, "the 'nature and immediacy' of the governmental concern provides strong support for the random testing policy at issue in this case."[198]

Balancing these factors by "[w]eighing the minimal intrusion on the lowered expectation of privacy against the district's concern and the essentially unchallenged efficacy of its policy," the court concluded that the policy was reasonable and constitutional under the Fourth Amendment.[199]

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[194] *Id.* at 579-80.
[195] *Id.* at 580.
[196] *Id.*
[197] *Miller*, 172 F.3d at 581.
[198] *Id.*
[199] *Id.*

5. *Earls v. Board of Education of Tecumseh Public School District*[200]

The final case to be discussed in this section is the first decision in the *Earls* litigation. The Board of Education of Tecumseh Public School District and Tecumseh Public Schools instituted a drug testing policy requiring all students who participated in extracurricular activities to submit to suspicionless drug testing in 1998.[201] Although the policy was initially only applied to extracurricular activities of a competitive nature, because the majority of students in the district participated in one or more extracurricular activities, the policy impacted a majority of the students. Lindsey Earls, a member of the show choir, marching band and academic team, and Daniel James, a student seeking to be a member of the academic team, sued challenging the policy as a violation of the Fourth Amendment.[202]

The United States District Court for the Western District of Oklahoma reviewed the case explicitly following the *Acton* decision. This case presents a much more in-depth use of the test developed by the Supreme Court than the cases just discussed.

The court began, mirroring Step One of the judicial model put forth above, with a discussion of special needs. Pointing to *Acton* and *T.L.O.*, the court noted that the United States Supreme Court has found that special needs exist in the public school context, meaning that the normal requirements of a warrant based on probable cause are not necessary.[203] The plaintiffs argued that the district did not show similar special needs because there was no epidemic drug problem as in *Acton*. While the court agreed that the evidence in the present case did not demonstrate a problem of that proportion, consistent with the Supreme Court's analysis the court also had to look to factors such as

> the cultural or social atmosphere in which students

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[200] 115 F. Supp. 2d 1281 (W.D. Okla. 2000) (hereinafter *Earls 1*).

[201] *Id.* at 1282.

[202] *Id.*

[203] *Id.* at 1283-84.

> spoke openly of illegal drug use, even in the presence of teachers; phone calls to school board members from parents; and the public plea of a concerned mother who implored the school board to "do something" about the problem of drug use among the high school's students.[204]

Looking at all of this evidence, the court found it beyond dispute that there was a drug problem in the school district.[205] Furthermore, similar to the *Miller* court, the Western District court found it "rather anomalous to require school officials to await an epidemic before taking peremptory measures."[206] Therefore, the first step of the test was met as the district had demonstrated a special need sufficient to justify the drug testing policy.

The court then moved to Step Two of the judicial model, the balancing test. Again mirroring the *Miller* case, the court did not agree, "it is only athletes whose legitimate expectation of privacy is so diminished that a search such as this one can withstand constitutional scrutiny."[207] Instead, "there are features of non-athletic, extracurricular school activities that will lower the privacy expectation of those who opt to participate to a point below that of fellow students."[208] Therefore, students who participate in extracurricular activities have an expectation of privacy that is diminished as compared to those who do not participate.

As to the character of the intrusion caused by the drug testing, the court found that the procedure and method by which test results were disseminated was similar to *Acton* and so in accord with the Supreme Court's decision, "the invasion of privacy was not significant."[209]

The court finally turned to the governmental interest involved although it only focused on the effectiveness of the policy in

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[204] *Id.* at 1286.
[205] *Earls 1*, 115 F. Supp. 2d at 1287.
[206] *Id.* at 1288.
[207] *Id.* at 1289.
[208] *Id.*
[209] *Id.* at 1295

addressing the district's concern. Although the parties debated whether the Tecumseh policy was as effective as that in *Acton*, the court made clear that the Supreme Court "does not require a school district to isolate those students most likely to use drugs."[210] According to this court, there was no doubt that "the drug problem among the student body is effectively addressed by making sure that the large number of students participating in competitive, extracurricular activities do not use drugs."[211]

Weighing these factors, the court determined that the district had justified its policy, and so the policy constituted a reasonable and constitutional search.[212]

6. Analysis

These first cases all attempted to follow the *Acton* decision and the judicial model, although the depth at which this was accomplished was not consistent. The *Todd* court focused on the health risks associated with drug testing and the leadership potential for students in extracurricular activities in finding that the district's policy served its goal of combating student drug use. The *Miller* court focused almost entirely on the fact that public school students, regardless of what activities they are involved in, have diminished expectations of privacy, and also would not force the school district to wait until there was an epidemic level problem before instituting a drug testing problem. The *Earls 1* court followed the *Miller* decision and provided a much more detailed analysis of the *Acton* case and the steps this article has presented as the judicial model. Interestingly, this court did not focus on the immediacy or compelling nature of the district's concern; instead, it focused on the efficacy of the policy and would not contradict the district's concerns.

The anomalous case is the Colorado Supreme Court's decision in *Lopez*. Instead of setting levels of diminished expectations of privacy based on whether students participated in activities or not, the Colorado Supreme Court found it important that the

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[210] *Earls 1*, 115 F. Supp. 2d at 1295.

[211] *Id.*

[212] *Id.* at 1296.

students involved had higher expectations of privacy than those in *Acton*. The court also found it of utmost importance that the drug testing policy tested students in extracurricular activities although there was no evidence that these students were part of the drug problem. Furthermore, the court was troubled by the sheer amount of students who could be tested (something that did not trouble the *Earls 1* court), and although it did not specifically state that extracurricular activities are more than a privilege at the interscholastic level, it found it very important that students be allowed to participate in these activities to meet their future goals.

At this point in the analysis, although there was as yet no Circuit split, the *Lopez* decision left some doubt as to the validity of drug testing policies affecting students in all extracurricular activities. The cases that follow only add to the confusion.

B. 2000 until Earls 2.

After the *Earls 1* decision, litigation over similar drug testing policies picked up. It was also at this time, until the next decision in the *Earls* litigation, when the judicial view toward these drug testing policies became decidedly unfavorable.

1. *Joy v. Penn-Harris-Madison School Corporation*[213]

Penn-Harris-Madison School Corporation instituted a random, suspicionless drug testing policy which tested all students involved in extracurricular activities, who drove to school, who volunteered to be tested, who were suspended from school, or who were reasonably suspected of drug use.[214] Students who refused to be tested were dealt with as if they had tested positive.[215] Students testing positive were subject to different levels of suspension from school.[216]

The testing procedure itself was slightly different from those discussed so far. Initially, students had to provide information

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[213] 212 F.3d 1052 (7th Cir. 2000).
[214] *Id.* at 1055.
[215] *Id.* at 1056.
[216] *Id.* at 1056 n.4.

about any medication that they were already taking and remove all outer garments leaving all of their belongings outside of the testing facility.[217] The student produced the sample in a stall with the monitor outside.[218] The monitor then checked the sample for temperature and tampering.[219]

Several students involved in extracurricular activities and who drove to school sued Penn High School claiming that the policy violated their Fourth Amendment rights.[220] The district court followed the *Todd* case and upheld the policy as it applied to the extracurricular students.[221] The district court also upheld the policy for students who drove to school finding that students consent to testing in exchange for the privilege of driving to school.[222] The students then appealed to the Seventh Circuit Court of Appeals.

The Seventh Circuit began with a discussion of the *Acton* balancing test. The court acknowledged that in its decision in *Todd* it had not followed this methodology closely, but it also discussed the *Willis* case, which had followed *Acton* more closely.[223] The court admitted that upon further review "if we were reviewing this case based solely on *Vernonia* and *Chandler*, we would not sustain the random drug, alcohol, and nicotine testing of students seeking to participate in extracurricular activities."[224] This initial statement, although not a conclusion in the case, hints at the court's changed viewpoint in regard to drug testing programs testing students at the interscholastic level.

Working through the *Acton* balancing test the court first found that "the expectation of privacy for students in extracurricular activities or with parking permits, although less than the general public, is still greater than the expectation of privacy for

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[217] *Id.* at 1057.

[218] *Joy*, 212 F.3d at 1057.

[219] *Id.*

[220] *Id.* at 1057.

[221] *Id.*

[222] *Id.*

[223] *Joy*, 212 F.3d at 1062-63.

[224] *Id.* at 1063. Several courts refer to the Supreme Court's decision in the *Vernonia School District 47J v. Acton* case as "*Vernonia*." For purposes of this article, the author refers to the case as *Acton*.

athletes."[225]

As to the character of the intrusion the court found that the policy itself was similar to that in *Acton* and "we conclude that the character of the intrusion is not overly invasive."[226]

The court then turned to an analysis of the governmental interest involved and unlike any of the other cases discussed, it stated that such interest should be analyzed from two perspectives: "whether there is any correlation between the defined population and the abuse, and whether there is any correlation between the abuse and the government's interest in protecting life and property."[227] Looking at these two perspectives, the court first found that the school had not shown any correlation between drug use and those students who engage in extracurricular activities or drive to school.[228] With regard to the second perspective, although the court found that the school corporation might have been justified because there was a definite risk of injury associated with student drivers, it had not "explained how drug use affects students in extracurricular activities differently than students in general."[229]

The court then turned to the immediacy of the governmental interest involved, finding that the school corporation "simply has not established that any immediate problem with drugs or alcohol exists for its students in extracurricular activities."[230] Finally, as to the efficacy of the testing to combat the perceived drug problem, the court found that "there is no showing that the students subject to testing are the ones that must be tested to resolve the perceived problems."[231]

In the end, the court determined that the school corporation had shown that testing student drivers was reasonable, but there was no sufficient governmental interest supporting testing of

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[225] *Id.*
[226] *Id.* at 1063-64.
[227] *Id.* at 1064.
[228] *Joy*, 212 F.3d at 1064.
[229] *Id.*
[230] *Id.* at 1065.
[231] *Id.*

students in extracurricular activities.[232] Still, following principles of stare decisis and precedent, the court decided that it had to follow *Todd* and uphold the policy.[233] The court cautioned though that its decisions in *Todd* and *Joy* did not equate to an allowance of drug testing programs for all students in public school, something the district admittedly was looking for. Instead, "the case has yet to be made that a urine sample can be the 'tuition' at a public school."[234]

2. *Linke v. Northwestern School Corp.*[235]

The Northwestern School Corporation (NSC) implemented a drug testing policy that applied to all students in grades seven through twelve who wanted to participate in athletics, extra-curricular activities and certain co-curricular activities similar to those covered by the policies already discussed.[236] Rosa Linke participated in the National Honor Society, Students Against Drunk Driving, the Prom Committee and the Academic Competition and did not want to be tested.[237] The Linkes sued, claiming that the policy violated her privacy rights.[238]

The Court of Appeals for the Fifth District of Indiana began its review of the case by pointing to the *Todd, Willis*, and *Joy* cases as representative of how drug policies in Indiana must be

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[232] *Id.*

[233] *Joy,* 212 F.3d at 1066. The court made clear that

> we are bound by this court's recent precedent in *Todd*. Given that the opinion in *Todd* was issued only two years ago, that the facts of our case do not differ substantially from the facts in *Todd*, that the court in *Willis* reaffirmed the basic principles in *Todd*, and that the governing Supreme Court precedent has yet to address the matter, we believe that we must adhere to the holding in *Todd* and affirm the district court's grant of summary judgment for the School as it relates to testing students involved in extracurricular activities. *Id.*

[234] *Id.* at 1067.

[235] 734 N.E.2d 252 (Ind. Ct. App. 2000).

[236] *Id.* at 253-54.

[237] *Id.* at 253, 254.

[238] *Id.* at 254.

reviewed.[239] However, this case called for more than a determination of whether the policy withstood scrutiny under the United States Constitution, it also asked the court to review how the policy fit under the Indiana Constitution. As the court explained, "there is support for the proposition that [the Indiana Constitution] provides greater protection than the Fourth Amendment," and cases under Indiana law "should be analyzed under an independent reasonableness standard."[240]

According to the court, under Indiana jurisprudence, the focus is on the reasonableness of the official behavior considered; however, the Indiana Constitution implicitly provides "a general requirement of individualized suspicion at least with regard to school children." [241] In addition, because NSC did not provide any direct correlation between the students tested and a drug problem (NSC admitted that the policy was about prevention and not about combating an existing problem), it was "an unmistakable move toward randomly testing all students."[242]

In the end, the court was dismayed by the contrary decisions in the cases discussed so far, stating that *Acton's* "suggested case-by-case approach to determine which groups of students may be randomly tested under the Fourth Amendment has failed,"[243] specifically with respect to the jurisprudence in the Seventh Circuit from *Todd* to *Joy*. The court struck down the policy as unreasonable under the Indiana Constitution.[244]

3. *Milligan v. The City of Slidell*[245]

The *Milligan* case did not deal with a drug testing policy. Instead, it dealt with a search of students called out of class based on rumors of a potential fight. Still, the case is useful because it presents the United States Court of Appeals for the Fifth Circuit's analysis of the special needs doctrine and

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[239] *Id.* at 257-58.
[240] *Linke*, 734 N.E.2d at 259.
[241] *Id.*
[242] *Id.* at 259-60.
[243] *Id.*
[244] *Id.*
[245] 226 F.3d 652 (5th Cir. 2000).

reasonable test.

Demonstrating the Fifth Circuit's approval of the judicial model discussed above, the court went through each aspect of the model and found that the search of the students was reasonable under the Fourth Amendment.[246] The court also reiterated that "the Supreme Court has refused to impose any least restrictive means test upon searches under the Fourth Amendment."[247] And therefore, "[c]onsidering the weakness of the claimed privacy right and the significance of the governmental concern, the officers' actions were reasonable and therefore constitutional."[248]

4. *Theodore v. Delaware Valley School District*[249]

This case again involved a drug testing policy testing student participants in extracurricular activities and those who wished to obtain driving and parking privileges. Similar to the *Linke* case, the focus of this case was on the state constitution and not the general protections of the Fourth Amendment.

The Commonwealth Court of Pennsylvania noted early on in its opinion that the Pennsylvania Constitution "provides greater protection" than the Fourth Amendment, "since the core of its exclusionary rule is grounded in the protection of privacy while the federal exclusionary rule is grounded in deterring police misconduct."[250] However, similar to the second prong of the reasonableness balancing test, "a search by the state must not only be based on a compelling interest, but . . .whether the state's intrusion will effect its purpose.'"[251]

The court concluded that the students' privacy expectations were still reduced even under the Pennsylvania Constitution.[252] Moreover, in this case, the testing was done to protect the health

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[246] *Id.*

[247] *Id.* at 655.

[248] *Id.* at 656.

[249] 761 A.2d 652 (Pa. Commw. Ct. 2000), *appeal granted*, 782 A.2d 551 (Pa. 2001).

[250] *Id.* at 656.

[251] *Id.* (quoting Stenger v. Lehigh Valley Hospital Center, 609 A.2d 796, 802 (1992)).

[252] *Theodore*, 761 A.2d at 658.

of the students involved and if they did not consent to the testing they would only have to give up "participation in extracurricular activities or driving/parking privileges,"[253] so their privacy interests were even lower.

Turning to *Acton*, the court found that the testing of student athletes would also have been reasonable under the Pennsylvania Constitution because there was a compelling government interest justifying the search.[254] However, after also looking to *Todd* and *Miller*, the court determined that under the Pennsylvania Constitution, "a student's privacy interests are no less than any other student's just by participating in any extracurricular activity or by seeking driving/parking privileges."[255] The court also examined the intrusion caused by the testing method and found that it was not significant. [256]

The court's main problem with the policy was that "no reason is given for a special need to test only those students who engage in optional activities or request driving/parking privileges more than the general student population."[257] Therefore, because the Pennsylvania Constitution provided the students with a higher expectation of privacy and because there was no special need or compelling interest put forth by the school district, the court found the policy to be unreasonable under the Pennsylvania Constitution.[258]

5. *Gardner v. Tulia Independent School District*[259]

The *Gardner* case involved a similar policy testing students in grades seven through twelve who were involved in extracurricular activities. Students sued the school district claiming that the policy violated the Fourth Amendment.

The District Court for the Northern District of Texas began by

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[253] *Id.* at 658.

[254] *Id.* at 659.

[255] *Id.*

[256] *Id.* at 661.

[257] *Theodore*, 761 A.2d at 661.

[258] *Id.*

[259] 183 F. Supp. 2d 854 (N.D. Tex. 2000), *judgment entered by*, 2000 U.S. Dist. LEXIS 20252, *vacated by*, 2002 U.S. App. LEXIS 19582 (5th Cir. 2002).

referring to *Brooks*, which struck down a similar policy as unreasonable under the Fourth Amendment.[260] In the present case, there was no widespread drug problem among the students tested; in fact, no students that participated in extracurricular activities had ever been subject to drug related discipline.[261] In addition, while acknowledging that some courts interpreted the *Acton* ruling as support for testing of students in all extracurricular activities, as in *Todd*, this court concluded that "the holding in *Vernonia* was limited to random drug testing of the student athletes."[262] The Supreme Court had made no pronouncement of the constitutionality of more generalized policies to this point.

As a result, because there was no connection between the testing program and any special or other need to test students in extracurricular activities, the court found that the policy violated the Fourth Amendment.[263]

6. *Tannahill v. Lockney Independent School District*[264]

Soon after the *Gardner* decision, the same Texas court reviewed the claim of a sixth grade student who sued the Lockney Independent School District claiming that its drug testing policy, which applied to the entire student population from grades six through twelve, was a violation of the Fourth Amendment. The court again turned to its earlier finding in *Brooks* as it reasoned that there were no special needs presented as justification for this testing policy.[265]

However, after reviewing the cases from the Firth Circuit and Supreme Court, this court found that two methods of establishing special needs have evolved:

> On the one hand, special needs can be shown in instances . . .when the individual subject to the test

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[260] *Brooks*, 930 F.2d 915.
[261] *Gardner*, 183 F. Supp. 2d at 856-57.
[262] *Id.* at 858.
[263] *Id* at 859.
[264] 133 F. Supp. 2d 919 (N.D. Tex. 2001).
[265] *Id.* at 924.

> performs highly regulated functions concerning the public safety or special governmental roles. On the other hand, a school district can prove the existence of a special need by showing exigent circumstances and continued failure in attempts to alleviate the problem.[266]

Furthermore, "general concerns about maintaining drug-free schools or desires to detect illegal conduct are insufficient as a matter of law to demonstrate the existence of special needs."[267]

The court then analyzed the privacy interests of the students tested, finding that "[t]heir expectations of privacy are higher" than that of the students in *Acton*.[268] Next, the court determined, in line with most of the cases discussed, that the method of testing was a minimal intrusion on these privacy rights.[269] And finally, as to the district's interest in support of the policy, the court determined that "the facts of the case at bar militate against a finding that the District's interest is compelling."[270]

In the end, given the student's higher expectations of privacy than student athletes, and the dearth of evidence of any special need in support of the testing, the court concluded that the policy was an unreasonable violation of the Fourth Amendment.[271]

7. *Earls v. Board of Education of Tecumseh Public School District*[272]

The final case to be discussed in this section is the second decision in the *Earls* litigation, the review of the United States District Court for the Western District of Oklahoma's decision by the United States Court of Appeals for the Tenth Circuit. The facts of the case were already discussed; what is important here is to focus on the Tenth Circuit's analysis of the judicial model.

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[266] *Id.* at 928.
[267] *Id.*
[268] *Id.* at 929.
[269] *Tannahill*, 133 F. Supp. 2d at 929.
[270] *Id.*
[271] *Id.* at 930.
[272] 242 F.3d 1264 (10th Cir. 2001) (hereinafter *Earls 2*).

The court begins by pointing to the *19 Solid Waste Dept. Mechanics* case where it laid out the special needs and reasonableness analysis. According to the court

> *Chandler* requires courts to inquire first into whether the government has established the existence of a special need before proceeding to any balancing of government and private interests. We defined that inquiry as two-fold: first, "whether the proffered governmental concerns were 'real' by asking whether the testing program was adopted in response to a documented drug abuse problem or whether drug abuse among the target group would pose a serious danger to the public"; and second, "whether the testing scheme met the related goals of detection and deterrence."[273]

Following this analysis, the court first found that "while there was clearly some drug use at the Tecumseh schools, such use among students subject to the testing Policy was negligible."[274] Subsequently, the court spent a significant amount of time analyzing the first part of Step Two of the judicial model—the student's privacy interest in the present case.

The Tenth Circuit would not focus on the communal undress language that so many other courts had found important from the *Acton* case as it explained "[w]e doubt that the Court intends that the level of privacy expectation depends upon the degree to which particular students, or groups of students, dress or shower together or, on occasion, share sleeping or bathroom facilities while on occasional out-of-town trips."[275] Moreover, while it was important that students in extracurricular activities voluntarily submit themselves to additional forms of regulation above that of other students, referring to the *Theodore* case, the court did not believe that this alone should cause a reduction in their expectation of privacy.[276] The court also pointed to the Supreme Court's admonition against " 'minimizing the importance to many

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[273] *Id.* at 1269 (quoting *19 Solid Waste Dep't Mech.'s*, 156 F.3d at 1072).

[274] *Id.* at 1275.

[275] *Id.*

[276] *Id.* at 1276.

students of attending and participating in extracurricular activities as part of a complete educational experience.'"[277] Still, due to the regulations apparent in any extracurricular activity, the court agreed with the district court that even these students have a "somewhat lesser privacy expectation than other students."[278]

The court then quickly analyzed the character of the intrusion found in the drug testing procedure, finding that because it mirrored that used in *Acton*, its invasion of privacy was not significant.[279]

Finally, the court looked to the nature and immediacy of the governmental interest involved, the other half of the reasonableness balancing test. The court quickly determined that

> given the paucity of evidence of an actual drug abuse problem among those subject to the Policy, the immediacy of the District's concern is greatly diminished. And, without a demonstrated drug abuse problem among the group being tested, the efficacy of the District's solution to its perceived problem is similarly greatly diminished.[280]

In the end, the court found that the governmental interest was outweighed by the student's privacy interest and so the policy was an unreasonable violation of the Fourth Amendment.[281]

8. Analysis

While the majority of the cases leading up to the *Earls 1* decision were in favor of the drug testing policies examined, the cases after that decision have overwhelmingly struck them down.[282] In fact, the reasoning behind these decisions has been

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[277] *Id.* (quoting Sante Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290 (2000)).

[278] *Earls 2*, 242 F.3d at 1276.

[279] *Id.*

[280] *Id.* at 1277.

[281] *Id.*

[282] Keep in mind that *Milligan* was not an extracurricular drug testing

surprisingly similar.

The *Linke* and *Theodore* decisions found it important that the particular state constitutions involved provided more protection to an individual's privacy interest than the Fourth Amendment. The *Linke*, *Theodore*, *Gardner*, *Tannahill*, and *Earls 2* cases all determined that the school district promulgating the drug testing policy at issue had failed in demonstrating a true special need. In each case, the court found it decisive that the district could not show any correlation between the drug testing policy and a drug problem within the student population tested. The *Joy* court agreed with this and provided the same reasoning even though it upheld a similar policy on merely precedential grounds.

These cases have also added to the judicial model proposed in this article. The *Joy* case pointed out that the governmental interest prong of the analysis should be analyzed from two perspectives: "whether there is any correlation between the defined population and the abuse, and whether there is any correlation between the abuse and the government's interest in protecting life and property."[283] In addition, the *Tannahill* court provided two methods for establishing special needs; they can be shown (1) "when the individual subject to the test performs highly regulated functions concerning the public safety or special governmental roles," or (2) "a school district can prove the existence of a special need by showing exigent circumstances and continued failure in attempts to alleviate the problem."[284]

And finally, almost specifically contrary to the *Chandler* decision's statement that a demonstrated problem of drug abuse will not always be necessary in support of a drug testing program,[285] the *Earls 2* court stated that

> any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem

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case. It is included in this article mainly because it provides an additional look at how another federal circuit follows the judicial model proposed in this article.

[283] *Joy*, 212 F.3d. at 1064.

[284] *Tannahill,* 133 F. Supp. 2d at 928.

[285] *Chandler*, 520 U.S. at 319.

> among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem.[286]

Whether the Supreme Court followed these additional clarifications to the judicial model will be discussed further on.[287]

C. 2002 until *Earls 3*

At this point in the analysis, the Circuit split that led to the Supreme Court addressing the validity of drug testing policies affecting students in extracurricular activities is apparent.[288] The Eighth Circuit found the policy in *Miller* to be reasonable under the Fourth Amendment. The Tenth Circuit struck down a

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[286] *Earls 2*, 242 F.3d at 1278.

[287] In 2001, the Supreme Court again addressed the special needs doctrine in the case of *Ferguson v. City of Charleston*, 532 U.S. 67 (2001). The *Ferguson* case dealt with a hospital drug testing policy that tested obstetrics patients. The court invalidated the drug testing program in this case because, contrary to its decisions in *Skinner*, *Von Raab*, *Vernonia*, and *Chandler* wherein "the 'special need' that was advanced as a justification for the absence of a warrant or individualized suspicion was one divorced from the State's general interest in law enforcement," in *Ferguson*, "the central and indispensable feature of the policy from its inception was the use of law enforcement to coerce the patients into substance abuse treatment." *Id.* at 79.

The Court also made clear that in these cases it did not simply accept whatever the governmental entity put forth as a special need. Instead, the Court "carried out a 'close review' of the scheme at issue before concluding that the need in question was not 'special,' as that term has been defined in our cases." *Id.* at 81.

For more in-depth discussion of the *Ferguson* case, see Krislen Nalani Chun, Casenote, *Still Wondering After All These Years: Ferguson v. City Of Charleston And The Supreme Court's Lack Of Guidance Over Drug Testing And The Special Needs Doctrine*, 24 U. HAW. L. REV. 797 (2002); Note, *A Decision Without A Solution: Ferguson v. City Of Charleston*, 53 S.C. L. REV. 717 (2002); Steven R. Probst, Case Comment, *Ferguson v. City Of Charleston: Slowly Returning The "Special Needs" Doctrine To Its Roots*, 36 VAL. U. L. REV. 285 (2001); Rosemary Missisian, Note, *The True Need Of The Special Needs Doctrine: Individual Rights - Ferguson v. City Of Charleston*, 33 U. TOL. L. REV. 879 (2002); Joseph S. Dowdy, Recent Development, *Well Isn't That Special? The Supreme Court's Immediate Purpose Of Restricting The Doctrine Of Special Needs In Ferguson v. City Of Charleston*, 80 N.C. L. REV. 1050 (2002).

[288] The Supreme Court granted certiorari in *Board of Educ. of Indep. Sch. Dist. No. 92 Of Pottawatomie County v. Earls*, 534 U.S. 1015 (2001).

similar policy in *Earls 2*.[289] Finally, although the Seventh Circuit upheld the policies in *Todd* and *Joy*, it clearly only did so in *Joy* due to principles of stare decisis. Beyond this, the court spent a significant amount of time showing why it otherwise disagreed with its initial decision in *Todd*.

Before turning to the Supreme Court's resolution of this confusion, the *Linke* and *Joy* cases came before the courts one more time, and need to be discussed to finish this analysis of judicial review of extracurricular drug testing policies.[290]

1. *Linke v. Northwestern School Corp.*[291]

On March 5, 2002, the *Linke* case reached the Supreme Court of Indiana on the Linkes' appeal of the decision of the Indiana Court of Appeals, Fifth District. Keep in mind that the district court determined that the drug testing policy was unreasonable

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[289] In the *Brooks* case, the district court for the Southern District of Texas struck down a similar policy. 730 F. Supp. 759. In 1991, the United States Court of Appeals for the Fifth Circuit affirmed this decision without opinion. *Brooks v. East Chambers County Sch.*, 930 F.2d 915 (5th Cir. 1991). Because the Fifth Circuit was affirming a case that took place before the Supreme Court's decisions in *Chandler* and *Acton*, it is not included as part of the Circuit split noted in this article.

[290] One other case that need not be discussed in depth is *York v. Wahkiahum Sch. Dist. No. 200,* 40 P.3d 1198 (Wash. Ct. App. 2002), *review denied*, 56 P.3d 565 (Wash. 2002). The *York* case dealt with a drug testing policy that tested students as a condition to participating in sports. In another permutation of the judicial test, the Washington Court of Appeals stated that "[t]o determine whether the special needs exception applies, a court examines the nature of the privacy interest and the character and degree of the intrusion. Then the court determines whether a compelling state interest justifies the intrusion and whether the intrusion is a narrowly tailored means of serving the interest." *Id.* at 1200. Unlike most of the courts discussed, this court used the reasonableness test in order to establish special needs, instead of making the determination of special needs the first part of the analysis.

In a surprisingly brief opinion, the court simply found that the plaintiffs had not demonstrated that the policy invaded any substantial legal right enjoyed by the student athletes tested. *Id.* However, because the district had stopped testing pending trial, the court dismissed the plaintiff's claims as moot and remanded the case for trial. *Id.* at 1199-1200.

[291] 763 N.E.2d 972 (Ind. 2002) (hereinafter *Linke 2*).

under the Indiana Constitution.[292]

In previous cases, the Supreme Court of Indiana had determined that an Indiana citizen's privacy rights protected under the Indiana Constitution must be evaluated by analyzing the totality of the circumstances by using a balancing test similar to that in *Acton*.[293] Therefore, on appeal the court made clear that in its review of whether the drug testing policy was reasonable under the Indiana Constitution, it would follow the approach used by the United States Supreme Court in *Acton*.

The review began by looking at the nature of the privacy interest held by the students involved. Following the U.S. Supreme Court's reasoning, the court determined that due to the supervision and control that a public school has over its students and "in view of the legislature's codification of the custodial and protective role of Indiana public schools, we find that students are entitled to less privacy at school than adults would enjoy in comparable situations."[294]

Second, the court found the fact that students had to consent to the policy very important, and it did not believe that such consent took away from the voluntariness of the participation in the testing. The court distinguished this case from *Lopez* because in that case, a student's academic credit was impacted by a decision not to be tested, while in this case students would only be deprived of participating in extracurricular activities.[295] The court also explained that the "fact that refusal to agree to drug testing results in forfeiture of the opportunity to obtain certain benefits is not so weighty as to constitute forced consent."[296]

Third, the court found it very important that the students involved had volunteered for an already regulated activity. Pointing to *Earls 2*, the court noted, "non-athletic extracurricular activities are also regulated in that various activities or clubs impose rules and requirements to which participants must

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[292] *Linke*, 734 N.E.2d at 260.
[293] *Linke 2*, 763 N.E.2d at 979.
[294] *Id.* at 979.
[295] *Id.* at 980.
[296] *Id.* at 981.

comply."[297] This extra regulation also diminished the privacy interests involved.

After establishing that the students tested had lower expectations of privacy than other students, the court then turned to a review of the character of the intrusion caused by the drug testing policy. The court mentioned several factors that must be considered when reviewing this character, including the type of testing involved, what the test searches for, the discretion given to those who monitor the testing, the disclosure of the test results, and whether the test is punitive or preventative and rehabilitative.[298] In analyzing all of these factors, the court found that the policy in this case was "much less intrusive" than the policy in *Acton*,[299] because: no students were compelled to provide any additional information, they were only tested for a prescreened set of drugs; school monitors were given no discretion as to who to test or what to test for; test results were kept confidential to a great extent; and the test results were not given to law enforcement, instead they were used for rehabilitative purposes. As a result, "the care exhibited by [the school corporation] to protect student privacy and to create a non-punitive test mitigates against the Linkes' privacy concern."[300]

Finally, the court considered the school corporation's interest in promulgating the policy. The court found that "[d]eterring drug abuse by children in school is an important and legitimate concern for our schools," and the school corporation's "interest in testing the included students is further heightened by the fact that the relevant extracurricular activities all have off campus components."[301] In addition, even though there may not have been legitimate safety concerns involved because the students were not participating in athletic extracurricular activities, the school held these students up as role models by submitting them to extra regulations and sending them to community functions as

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[297] *Id.*
[298] *Linke 2*, 763 N.E.2d at 982.
[299] *Id.*
[300] *Id.*
[301] *Id.* at 983-84

school representatives.[302] In essence, the school had "concrete evidence of drug abuse by NSC junior and high school students."[303]

Therefore, by looking at the totality of the circumstances, the court determined that the policy did not violate the Indiana Constitution and vacated the decision of the trial court.[304]

2. *Penn-Harris-Madison School Corporation v. Joy*[305]

Soon after the *Linke 2* decision, the *Joy* case returned to the Court of Appeals of Indiana, Fourth District. In the first *Joy* decision discussed in this article, the United States Court of Appeals for the Seventh Circuit determined that the drug testing policy reviewed was constitutional under the Fourth Amendment.[306] After that decision, the first *Linke* decision came down finding that the drug testing policy in that case was an unreasonable violation of the Indiana Constitution.[307] Thereafter, the school corporation asked the Indiana Supreme Court to transfer and consolidate the *Joy* dispute with *Linke*, which was also subject to a petition to transfer.[308] The Indiana Supreme Court accepted transfer of the *Linke* case, but did not consolidate the two cases in its ruling in *Linke 2* as it found that the policy in *Linke* did not violate the Indiana Constitution. The Court of Appeals of Indiana, Fourth District then addressed the case in light of this confusing precedent.

Following *Linke 2*, the court stated that in reviewing the drug testing policy, it was required to look at "the totality of the circumstances" and "'weigh the nature of the privacy interest upon which the search intrudes, the character of the intrusion that is complained of, and the nature and immediacy of the governmental concern.'"[309]

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[302] *Id.* at 984.
[303] *Linke 2*, 763 N.E.2d at 985.
[304] *Id.*
[305] 768 N.E.2d 940 (Ind. Ct. App. 2002) (hereinafter *Joy 2*).
[306] *Joy*, 212 F.3d at 1065.
[307] *Linke*, 734 N.E.2d at 260.
[308] *Joy 2*, 768 N.E.2d at 944.
[309] *Id.* at 947 (quoting *Linke 2*, 763 N.E.2d at 979).

In the first part of its balancing, the court followed *Linke 2* and found that "the nature of the privacy interests upon which the search intrudes parallels that in *Linke*," and so were lower than that of other students.[310]

Looking to the second factor, the character of the intrusion, the court found that this case was different from *Linke 2* because students had to provide the monitor with medical information about medication being taken before submitting to the testing.[311] However, because this information was also kept confidential, the court found that "the additional invasion is not significant."[312] The court also noted that similar to the policy reviewed in *Linke 2*, the policy in this case was rehabilitative in nature, also lessening the students' privacy interests.[313]

Finally, the court looked to the nature and immediacy of the governmental concern at stake. The court noted that the school corporation had "evidence of a substantial and immediate drug abuse problem among its students," and the students tested were treated as role models and student representatives as in *Linke 2*.[314] Therefore, the court found that the interest in this case was similarly as strong as that exhibited in *Linke 2*.

In the end, the court found that in viewing the totality of the circumstances, the policy in this case was "sufficiently similar to the drug testing program examined in *Linke* to pass constitutional muster."[315]

3. Analysis

The *Linke 2* and *Joy 2* cases both upheld the drug testing policies reviewed after taking a look at the totality of the circumstances and weighing the individual privacy interests against the governmental interests involved. This totality of the circumstances language is similar to the Supreme Court's overall

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[310] *Id.* at 948.
[311] *Id.*
[312] *Id.* at 949.
[313] *Joy 2,* 768 N.E.2d at 949.
[314] *Id.* at 950.
[315] *Id.* at 951.

look at all of the interests involved, characterized in the reasonableness balancing test. However, this can also be misleading because the Supreme Court dictated that the analysis should not be a mere look at the totality of the circumstances involved; instead, the interests must be balanced against each other. Therefore, if the privacy interest is stronger than the governmental interest, the search is unconstitutional; while if the government interest outweighs the privacy interest, the search is constitutional. A simple look at the totality of the circumstances may provide a misleading analysis of the constitutionality of the search involved.

The *Linke 2* case did provide a few interesting details that may be seen as factors in the reasonableness balancing test part of the judicial model—Step Two. The court noted that an assessment of the nature of the privacy interest involves includes three aspects: (1) the relationship of the individuals tested to the State entity providing the test, (2) the voluntariness of the consent to the testing program given by the individuals to be tested, and (3) whether the individuals to be tested are volunteering for a regulated activity. Although other courts have peripherally mentioned each of these aspects of the privacy interest, none were as clear in spelling them out.

The *Linke 2* court also examined several factors to consider in analyzing the character of the intrusion found in the testing: (1) the type of test, (2) what the test searches for, (3) discretion given to school officials in implementing the test, (4) disclosure of test results, and (5) the punitive or rehabilitative/preventative nature of the testing program. Different courts have addressed each of these factors, but none has so explicitly laid out the factors as in *Linke 2*.

The *Joy 2* case is also interesting due to its convoluted procedural history. The first *Joy* case discussed in this article was the decision of the United States Court of Appeals for the Seventh Circuit which begrudgingly upheld a testing policy on precedential grounds even though finding that under an *Acton* analysis it would not have upheld the policy. This later decision in *Joy 2* does not even remotely address the Seventh Circuit's concerns, instead it blindly follows the *Linke 2* decision and its holding that the drug testing policy was reasonable and

constitutional.

Even though these last two cases do not add to the Circuit split already discussed, they again show the confusion courts encounter when attempting to follow the judicial model, or parts thereof, while reviewing a drug testing policy. The *Linke 2* and *Joy 2* decisions are the last cases to be resolved before the Supreme Court enters the picture as it reaches its decision in the *Earls* litigation. It remains to be seen whether the United States Supreme Court will follow the reasoning of these courts.

V. The Supreme Court Reviews an Extracurricular Drug Testing Policy

Before presenting an analysis of the Supreme Court's review of an extracurricular drug testing policy, it is useful to recap the decisions of the many courts that have addressed the issue so far. To simplify the matter, only the most recent or final decision in each case is presented.[316]

The following five cases upheld extracurricular drug testing policies as reasonable and constitutional:

- *Todd v. Rush County Schools*, United States Court of Appeals for the Seventh Circuit (January 12, 1998)
- *Miller v. Wilkes*, United States Court of Appeals for the Eighth Circuit (March 31, 1999)
- *Joy v. Penn-Harris-Madison School Corporation*, United States Court of Appeals for the Seventh Circuit (May 12, 2000)
- *Linke v. Northwestern School Corp.*, Supreme Court of Indiana (March 5, 2002)
- *Penn-Harris-Madison, School Corporation*, v. *Joy*, Court of Appeals of Indiana, Fifth District (May 29, 2002)[317]

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[316] The *York* case is not included in this listing because the court never reached the merits of the issue as the case was dismissed as moot.

[317] This case and the Seventh Circuit's decision in *Joy* are included as

The following six cases held that similar policies were unreasonable and unconstitutional:

- *Brooks v. East Chambers Consolidated Independent School District*, United States District Court for the Southern District of Texas (August 23, 1989)[318]
- *Trinidad School District No. 1 v. Lopez*, Supreme Court of Colorado (June 29, 1998)
- *Theodore v. Delaware Valley School District*, Commonwealth Court of Pennsylvania (November 6, 2000)
- *Gardner v. Tulia Independent School District*, United States District Court for the Northern District of Texas (December 7, 2000)
- *Tannahill v. Lockney Independent School District*, United States District Court for the Northern District of Texas (March 1, 2001)
- *Earls v. Board of Education of Tecumseh Public Schools District No. 92*, United States Court of Appeals for the Tenth Circuit (March 21, 2001)

Given that the eleven cases listed here are split almost exactly down the middle, it is clear that the United States Supreme Court needed to get involved in order to provide some clarity to this issue.

1. *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*[319]

As described early on in this article, the Student Activities Drug Testing Policy adopted by the Tecumseh School District required all middle and high school students to consent to testing in order to participate in extracurricular activities. Several

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separate cases in this list due to the odd procedural history of the dispute as already discussed.

[318] The Fifth Circuit Court of Appeals opinion in this case is not included separately here as it simply affirmed this decision without opinion.

[319] 122 S.Ct. 2559 (2002) (hereinafter *Earls 3*).

students and their parents sued claiming that the policy violated the Fourth Amendment to the United States Constitution. The district court followed the Supreme Court's *Acton* decision and upheld the policy granting the school district summary judgment.[320] The Tenth Circuit Court of Appeals reversed this decision holding instead that the school district needed to demonstrate some identifiable drug problem among the group to be tested before implementing a drug testing policy.[321] The school district then appealed to the United States Supreme Court. Throughout the discussion of this case, reference will be made both to the judicial model proposed earlier and the potential additional considerations to this model that have developed in the extracurricular cases in the last seven years.

The Court began with Step One of the judicial model, the Special Needs Analysis. Unlike *Earls 1* and *Earls 2*, the court did not spend a significant amount of time discussing whether there were appropriate special needs presented by the school district. Instead, pointing to *Acton* and *T.L.O.*, the Court noted that "'special needs' inhere in the public school context," and "a finding of individualized suspicion may not be necessary when a school conducts drug testing."[322]

Having found that there was a special need in this case, the Court then moved to Step Two, the Reasonableness Balancing Test. Moving to the first part of the balancing test, the Court analyzed the student's privacy interest, noting "[a] student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety."[323] As several other cases had discussed,[324] the students argued that because they were not subject to regular physicals

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[320] *Earls 1*, 115 F. Supp. 2d at 1296.

[321] *Earls 2*, 242 F.3d at 1278.

[322] *Earls 3*, 122 S.Ct. at 2564-65.

[323] *Id.* at 2565 (quoting *Acton*, 515 U.S. at 656).

[324] *See, e.g.*, *Lopez*, 963 P.2d at 1106-07 (finding that students who participated in extracurricular activities had higher expectations of privacy the Colorado Supreme Court focused on the "qualitatively different type of undressing from the communal undressing" in *Acton*); *Willis*, 158 F.3d at 422 (finding the lack of "communal undress" important to its determination that the students tested had higher expectations of privacy than the student athletes in *Acton*).

and communal undress as the student athletes in *Acton*, they should have a stronger privacy interest than student participants in athletics. However, the Court made clear that the "distinction . . .was not essential to our decision . . .which depended primarily upon the school's custodial responsibility and authority."[325] Instead, the Court agreed that students who participate in extracurricular activities "subject themselves to many of the same intrusions on their privacy as do athletes," including some aspects of off-campus travel and communal undress, along with rules and requirements that do not apply to other students.[326] Therefore, agreeing with the *Earls 1* decision, the Supreme Court concluded that the students subject to the Tecumseh testing policy also "have a limited expectation of privacy."[327]

The Court then moved to the second part of the first half of the balancing test, a look at the character of the intrusion on these privacy rights imposed by the drug testing policy. The Court found that the policy in *Earls* was almost identical to that in *Acton* except that male students were provided with even more privacy because they were allowed to produce their samples behind the bathroom stall door.[328] Therefore, the method used in this case was "even less problematic" than the negligible intrusion in *Acton*.[329]

In addition, the test results were kept confidential and were only used to potentially bar a student from participation in a privileged activity-extracurricular activities. Therefore, again agreeing with the decisions in *Earls 1* and *Earls 2*, "[g]iven the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students' privacy is not significant."[330]

The Court then moved to the second part of the balancing test, an assessment of the nature and immediacy of the governmental

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[325] *Earls 3*, 122 S.Ct. at 2565.
[326] *Id.* at 2565-66.
[327] *Id.* at 2566.
[328] *Id.*
[329] *Id.*
[330] *Earls 3*, 122 S.Ct. at 2567.

concern at issue and the efficacy of the testing policy in meeting this concern. Initially, the Court pointed out that the "health and safety risks identified in *Vernonia* apply with equal force to Tecumseh's children."[331] Keep in mind that the Tenth Circuit had determined that the school district had presented a "paucity of evidence" that the students tested in this case were using drugs and so it found that there was no immediate governmental concern presented.[332] The Supreme Court disagreed as it found that the school district "presented specific evidence of drug use at Tecumseh schools."[333] The Court pointed to testimony by teachers that suspected students were under the influence of drugs, marijuana found in the school parking lot, drugs found in a student's car and the concern of the community that the school district had a drug situation. The Court would not second-guess the district court's decision that "'it cannot be reasonably disputed that the [School District] was faced with a 'drug problem' when it adopted the Policy.'"[334]

The *Earls 2* court had determined that school districts that wish to implement drug testing policies must "demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem."[335] The Supreme Court disagreed. Pointing to its decision in *Chandler*, the Court noted "this Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing."[336] Moreover, "the need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy."[337]

Similar to the *Miller* court,[338] the Supreme Court would not

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[331] *Id.*

[332] *Earls 2*, 242 F.3d at 1277.

[333] *Earls 3*, 122 S.Ct. at 2567.

[334] *Id.* (quoting *Earls 1*, 115 F. Supp. 2d at 1287).

[335] *Earls 2*, 242 F.3d at 1278.

[336] *Earls 3*, 122 S.Ct. at 2568.

[337] *Id.*

[338] In *Miller*, the Eight Circuit stated that "[w]e see no reason that a school district should be compelled to wait until there is a demonstrable problem with substance abuse among its own students before the district is constitutionally

force a school or school district to wait until a large proportion of its student population uses drugs before implementing a testing policy.[339] Specifically, the Court stated that "[a]s we cannot articulate a threshold level of drug use that would suffice to justify a drug testing program for schoolchildren, we refuse to fashion what would in effect be a constitutional quantum of drug use necessary to show a 'drug problem.'"[340]

Pointing to *Skinner* and *Von Raab*, the students also argued that health and safety considerations are also a crucial factor in support of a drug testing program. Therefore, because the students contesting the drug testing policy were not athletes, there were no safety concerns in support of the policy. The Court agreed that such safety concerns were important but found that "the safety interest furthered by drug testing is undoubtedly the substantial for all children, athletes and nonathletes alike."[341]

The students also argued that the school district should have used a method of individualized suspicion because this method would be less intrusive than drug testing. The Court made clear that this was not the case as "this Court has repeatedly stated that reasonableness under the Fourth Amendment does not require employing the least intrusive means."[342]

And finally, remember that the *Earls 2* court found that the drug testing policy was not an effective means of combating the drug problem in the school district because there was no demonstrated evidence of a drug problem among the students tested.[343] The Supreme Court again disagreed, finding instead 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."[344] Many other courts had focused upon the close nexus between the testing program and a particular

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permitted to take measures that will help protect its schools against the sort of 'rebellion'"found in *Acton*." 172 F.3d at 581.

[339] *Earls 3*, 122 S.Ct. at 2568.

[340] *Id.*

[341] *Id.*

[342] *Id.* at 2569.

[343] *Earls 2*, 242 F.3d at 1278.

[344] *Earls 3*, 122 S.Ct. at 2569.

problem of drug abuse among those tested, as in *Acton*,[345] but the Supreme Court stated that "such a finding was not essential to our holding" in *Acton*.[346] Instead, the Court explained that *Acton*, "did not require the school to test the group of students most likely to use drugs, but rather considered the constitutionality of the program in the context of the public school's custodial responsibilities."[347]

In the end, because the students tested possessed limited privacy rights, the intrusion on these rights as a result of the testing was not significant, and the government interest in protecting students from problems associated with drug use was important and legitimate, the Court concluded that "Tecumseh's Policy is a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren," and reversed the decision of the Tenth Circuit Court of Appeals.[348]

2. Analysis

The Supreme Court's decision in *Earls 3* follows the *Acton* case and to a large extent the judicial model proposed earlier. One interesting way to determine whether the Supreme Court's decision clarifies the confusing line of cases already discussed is by looking at how the *Earls 3* court would address the concerns presented in the earlier cases that struck down similar drug testing policies.

a. Earlier decisions

The cases already discussed that found that similar drug

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[345] *See, e.g., Joy*, 212 F.3d at 1063-64 (arguing that the school district needed to show some correlation between the students being tested and actual abuse among those students) and *Tannahill*, 133 F.Supp.2d at 928-929 (arguing that general concerns about a drug problem were not enough; instead the school district needed to present evidence of an actual problem among the students being tested).

[346] *Earls 3*, 122 S.Ct. at 2569.

[347] *Id.*

[348] *Id.* The case was then vacated and remanded in *Earls v. Board of Educ. of Tecumseh Pub. Sch. Dist.*, 300 F.3d 1222 (10th Cir. 2002).

testing policies violated the Fourth Amendment came to this conclusion for a variety of reasons.

1. *Brooks*

The *Brooks* case was resolved before the Supreme Court's *Acton* and *Chandler* decisions and so its reasoning is not as applicable to the present analysis. However, the court did focus on the fact that the school district did not provide evidence that the students being tested were part of the perceived drug abuse problem.[349] This same lack of evidence in support of a problem among the group tested became the crux of the decisions that followed in striking down similar policies.

2. *Lopez*

In *Lopez*, the Supreme Court of Colorado found it important that there was not an aspect of communal undress and that the policy applied to for-credit activities.[350] The court also found that the school district did not show that the students tested were drug users or part of the drug problem.[351] Therefore, because it focused on the fact that the students tested had higher expectations of privacy than student athletes, and because the policy was not efficacious in testing a group that had a demonstrated a drug abuse problem, it struck down the testing policy.

3. *Theodore*

In *Theodore*, the Commonwealth Court of Pennsylvania found that the Pennsylvania Constitution provided stronger protection to students than the Fourth Amendment.[352] However, the court struck down the testing policy because it also determined that the school district had not presented evidence of problem of drug use

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[349] *Brooks*, 730 F. Supp. at 764.
[350] *Lopez*, 963 P.2d at 1106-07.
[351] *Id.* at 1109.
[352] *Theodore*, 761 A.2d at 656.

among the students tested.[353]

4&5. *Gardner and Tannahill*

In *Gardner*, the district court for the Northern District of Texas found that there was no connection between any drug abuse problem among students in extracurricular activities and the need for a testing policy, and therefore struck down the testing policy.[354]

A little over three months later, in *Tannahill*, the same court stated that "general concerns about maintaining drug-free schools or desires to detect illegal conduct are insufficient . . .to demonstrate the existence of special needs."[355] This court also compared the privacy interests of the students involved to those of student athletes, finding them higher.[356] In the end, this court also struck down the testing policy.

6. *Earls 2*

The Tenth Circuit Court of Appeals also struck down the testing policy mainly because it found that the school district had not presented specific evidence of a drug abuse problem among the students tested.[357] It tied this lack of evidence to the efficacy of the testing policy, finding that because there was not a proven governmental concern to test the particular students it could not be efficacious to test them to combat this perceived problem.[358]

b. Clarification

The Supreme Court's decision in *Earls 3* clarifies how all of these courts were mistaken in several ways.

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[353] *Id.* at 661.
[354] *Gardner*, 183 F. Supp. 2d at 859.
[355] *Tannahill*, 133 F. Supp. 2d at 928.
[356] *Id.* at 929.
[357] *Earls 2*, 242 F.3d at 187.
[358] *Id.*

1. Special needs

Initially, contrary to *Tannahill*, the Court made very clear that the "general concerns" for maintaining drug free schools and the protection of the health and safety of children in these schools was enough of a special need to justify the testing.[359] In fact, the Court did not spend a significant amount of time assessing the special needs question in the *Earls 3* decision; instead, it simply echoed its findings in *Acton,* and earlier in *T.L.O.*, that special needs do exist in the public school context.[360]

2. Evidence of a problem

All of the cases that struck down drug testing policies focused on what they perceived as a lack of evidence supporting a drug problem among students participating in extracurricular activities. The Supreme Court makes clear that this is misguided. The Court would not set some "threshold level of drug use" that would somehow be enough to constitute evidence of a problem because it found that drug abuse in schools is a serious and pervasive problem.[361] The Court explicitly rejected the Tenth Circuit's test that a school district must provide some evidence of a problem among a particular group in order to test them.

Another aspect to this issue is that several courts argued that school districts could not implement a drug testing policy without demonstrating that a drug abuse problem did exist.[362] The Supreme Court made clear that school districts did not need to present evidence of a problem "before allowing the government to conduct suspicionless searches."[363]

In fact, the Court notes that it had already elaborated upon this point in *Chandler*. In that case, the Court acknowledged that evidence of a drug problem would shore up an assertion of special need, however, such evidence was not "in all cases

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[359] *Earls 3*, 122 S. Ct. at 2564.
[360] *Id.*
[361] *Id.* at 2568.
[362] *See supra* note 338 and accompanying text.
[363] *Id.*

necessary to the validity of the testing regime."[364] The *Earls 3* Court reiterates this point that so many courts had misunderstood.

3. Individual privacy interest

The cases that struck down the extracurricular drug testing policies all compared the privacy interests of those tested to the student athletes in *Acton*. Therefore, in comparison to those student athletes, the students who participate in other extracurricular activities have heightened expectations of privacy. This heightened expectation then was the first part of tipping the scale against the governmental interest in support of the policy.

The Supreme Court would not make this type of comparison. Instead of somehow comparing students in *Earls* to the student athletes in *Acton*, the court focused instead on the regulations that the students in extracurricular activities are subject to because the focus of their analysis was the "school's custodial responsibility and authority."[365] The Court would not set levels of privacy according to the type of student involved.

VI. Interpretation of the *Earls 3* Decision

The United States Supreme Court's decision in *Earls 3* established that in some situations suspicionless drug testing of students in extracurricular activities at the interscholastic public school level is reasonable and constitutional. The extent of this decision and its impact on the educational landscape is still open to debate.

A. Judicial interpretation of Earls 3

One way to begin to understand the impact of the *Earls 3* decision is by briefly looking at two cases that followed and interpreted the case.

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[364] *Chandler*, 520 U.S. at 319.

[365] *Id.* at 2565.

1. *Marchwinski v. Howard*[366]

The *Marchwinski* case dealt with a drug testing policy applied to people eligible for or receiving welfare assistance. The facts of the case are not pertinent to the present analysis. However, the United States Court of Appeals for the Sixth Circuit did discuss the *Earls 3* decision in reaching its result that the drug testing policy was supported by a special need.[367]

Relying on *Chandler*, the plaintiffs argued that only a very strong public safety rationale could qualify as a special need in support of a drug testing program.[368] The plaintiffs pointed to language in *Chandler* that seemed to imply that only a substantial public safety concern can support special needs. As the *Chandler* court said, "'[w]here the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable' . . . But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search.'"[369]

The Sixth Circuit did not agree "that this language stands for the broad proposition that special needs are limited to urgent public safety concerns."[370] Instead, following *Earls 3* and *Acton*, it noted "although public safety must be a component of a state's special need, it need not predominate."[371] Therefore, according to the Sixth Circuit, the standard should be "whether [the State] has shown a special need, of which public safety is but one consideration."[372]

2. *Joye v. Hunterdon Central Regional High School Board of Education*[373]

The *Joye* case involved claims by students engaged in

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366 309 F.3d 330 (6th Cir. 2002).
367 *Id.* at 335.
368 *Id.* at 334.
369 *Id.* (quoting *Chandler*, 520 U.S. at 323).
370 *Id.*
371 *Marchwinski*, 309 F.3d at 335.
372 *Id.*
373 803 A.2d 706 (N.J. Super. Ct. App. Div. 2002).

extracurricular activities who again sued a school board claiming that a drug testing policy applied to them was unconstitutional. Similar to the *Theodore* and *Linke* cases discussed earlier,[374] the trial court determined that the New Jersey Constitution provided greater protections to the students' privacy interests.[375] The trial court also found that the school board did not demonstrate a substantial special need showing a drug problem among the students tested to override these privacy rights.[376] The school board then appealed.

In reviewing the trial court's decision, the Superior Court of New Jersey, Appellate Division, closely followed the *Earls 3* decision. The Superior Court noted that the program implemented in this case "involves the same type of program as that involved in Earls, both with respect to the students tested and the procedure used."[377] Therefore, following *Earls 3*, there was "no room for debate about the breath or scope of the United States Supreme Court's opinion or the validity of the Hunterdon Central drug testing program under the Federal Constitution."[378] The real issue for the court was then to determine whether it had to reach a different result under the New Jersey Constitution.

Although the trial court had determined that the New Jersey Constitution offered greater privacy protection to the students tested, the Appellate Division found that

> we see nothing in the history or background of the State Constitution to warrant a different interpretation on this question, at least when it comes to the legitimate expectation of privacy among school children. To the contrary, the courts of New Jersey, to date, seem to follow the federal Supreme

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[374] *Linke*, 734 N.E.2d 252 (Ind. Ct. App. 2000) (finding that the Indiana Constitution provides stronger protection for privacy rights than the Fourth Amendment) and *Theodore*, 761 A.2d 652 (Pa. Commw. Ct. 2000) (finding similarly that the Pennsylvania Constitution provides stronger protection for privacy rights than the Fourth Amendment).

[375] *Joye*, 803 A.2d at 707.

[376] *Id.*

[377] *Id.* at 712.

[378] *Id.*

Court when dealing with issues of drug testing.[379]

In fact, the court pointed to several cases wherein the Supreme Court of New Jersey "looked to the Federal Constitution and United States Supreme Court opinions, and utilized the 'special needs' balancing approach for evaluating reasonableness that was discussed by Justice Thomas in *Earls*."[380]

Therefore, the court found no basis for coming to a different conclusion under the New Jersey Constitution and reversed and remanded the decision to the trial court.[381]

B. Communal Undress

In trying to create a distinction between the drug testing policy reviewed by the Supreme Court in *Acton* and the policies they were reviewing, several courts focused on the Court's "communal undress" language. Following the *Schaill* decision, the *Acton* court stated that the "'element of 'communal undress' inherent in athletic participation,'"[382] was an important factor in its determination that the student athletes involved had lowered expectations of privacy than other students.

The *Lopez* court focused on this language and found that the students' participation in extracurricular activities "indicates a qualitatively different type of undressing from the communal undressing" in *Acton*.[383] This difference was an important factor in the Supreme Court of Colorado's conclusion that the students tested had higher expectations of privacy than student athletes, and that this higher expectation could not be outweighed by the school district's interest in support of the testing program.

The *Willis* court similarly focused on this language, finding that there was not a similar element of communal undress apparent in the students tested in this case who were not student athletes.[384] The Seventh Circuit Court of Appeals found this to be

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[379] *Id.* at 714.
[380] *Joye*, 803 A.2d at 714.
[381] *Id.* at 714-15.
[382] *Acton*, 515 U.S. at 657.
[383] *Lopez*, 963 P.2d at 1107.
[384] *Willis*, 158 F.3d at 422.

important in distinguishing the students' privacy interest as higher than student athletes.

On the other hand, in *Earls 2* the Tenth Circuit would not focus on this communal undress language because it doubted that the Supreme Court intended "that the level of privacy expectation depends upon the degree to which particular students, or groups of students, dress or shower together or, on occasion, share sleeping or bathroom facilities while on occasional out-of-town trips."[385] This is one of the few areas where the Supreme Court agreed with the Tenth Circuit as it said that the language discussing communal undress "was not essential to our decision . . . which depended primarily upon the school's custodial responsibility and authority."[386]

Therefore, although thinking that they were following the *Acton* decision, courts have been wrong to merely focus on the exact nature of the type of activity that students participate in. Instead, courts must first recognize that the Supreme Court's *Acton* and *Earls 3* decisions found that the students' privacy interests were limited in the first instance due to their attendance at a public school before looking to the types of activities that the students are involved in.

C. Rights of Students in Public Schools

In 1985, the *T.L.O.* court determined that school officials did not need to follow the strict requirements of individualized suspicion and a warrant because "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."[387] The Court added that this focus on reasonableness "will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense."[388]

This is the language that the *Acton* court pointed to in finding

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[385] *Earls 2*, 242 F.3d at 1275.
[386] *Earls 3*, 122 S.Ct. at 2565.
[387] *T.L.O.*, 469 U.S. at 340.
[388] *Id.* at 343.

that special needs existed in the public school context, obviating the necessity for a warrant or individualized suspicion in support of the drug testing program testing student athletes.[389] The *Acton* court then looked at the nature of the privacy rights held by students in public schools and found that "the teachers and administrators of those schools stand *in loco parentis* over the children entrusted to them,"[390] and "while children assuredly do not 'shed their constitutional rights . . . at the schoolhouse gate,' the nature of those rights is what is appropriate for children in school."[391] Therefore, as already discussed, the Court determined that students at public schools already have a lesser expectation of privacy than other individuals in general and other students in particular. This privacy interest is further diminished because they are subject to vaccinations and medical exams due to the school's custodial relationship over them.[392]

The *Earls 3* court reiterated this conclusion. It noted "[a] student's privacy interest is limited in a public school environment where the State is responsible for maintaining discipline, health, and safety."[393] Therefore, even without any participation in extracurricular activities, athletic or otherwise, students in public schools will be found to have lesser expectations of privacy than other students and the general public at large.

D. Character of the Intrusion

In *Acton*, male students were tested by producing a sample at a urinal in a bathroom while a school monitor stood behind them. Female students produced samples in a closed stall with a monitor waiting outside. In analyzing the character of this intrusion on the students' privacy interests, the Court stated, "[t]hese conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially schoolchildren use daily. Under such conditions, the

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[389] *Acton*, 515 U.S. at 653.
[390] *Id.*
[391] *Id.* at 655-56.
[392] *Id.* at 656.
[393] *Earls 3*, 122 S.Ct. at 2565 (quoting *Acton*, 515 U.S. at 656).

privacy interests compromised by the process of obtaining the urine sample are in our view negligible."[394]

Virtually every other court since this decision has agreed, finding that because the testing policies reviewed were similar to that in *Acton*, they also were negligible intrusions on the privacy interests of the students tested.

One court that disagreed was the Supreme Court of Colorado in *Lopez*. The *Lopez* court questioned how this type of conduct could be classified as a negligible intrusion on someone's privacy interests as it said

> Ordinarily, a student has some choice about when to use the rest room and when to urinate. The fact that one student was not able to urinate after several attempts because he was too embarrassed underscores this point. Ordinarily, a student does not have an official monitor, a person whose sole purpose is to prevent the student from altering the student's urine sample, listening to (and perhaps watching from behind) the student urinating. Ordinarily, a student does not have to urinate into a container and present his or her urine sample to a school district representative for temperature assessment, labeling, and preparation for analysis. Ordinarily, a student urinates simply because the body requires it, not because a school district insists that the student provide a urine sample on demand in order for the school district to search it for the presence of drugs.[395]

One cannot help but sympathize with these concerns.

Regardless of these concerns, the *Earls 3* court simply equated the drug testing procedure testing extracurricular students with the procedure testing student athletes in *Acton*, and because every student in *Earls 3* was allowed to produce his or her sample behind a closed door, the Court found that the policy was "even

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[394] *Acton*, 515 U.S. at 658.

[395] *Lopez*, 963 P.2d at 1108.

less problematic" than the one in *Acton*.[396]

This does not necessarily mean that any testing policy will be found to be such a negligible intrusion. A good example of a policy that still may not pass constitutional muster is found in the *Brooks* case where students were required to come to the principal's office to produce their sample in the principal's own bathroom.[397] A truly invasive policy that would ask a student to produce a sample in full view of a school official may also be so different from the policies in *Acton* and *Earls 3* that it will be found to be a significant intrusion.

Still, school districts that want to implement a drug testing program would be wise to set up a program similar to that in *Acton* or *Earls 3*. As long as the policy is in a public school district, it should be free from classification as a significant intrusion on a student's privacy rights.

E. Deterrence or Prevention

Another important issue that concerned many of the courts was the perception that school districts were implementing drug testing policies to combat a drug abuse problem that they could not yet show existed. Because in their perception the Supreme Court had mandated that such policies could only be implemented if there were an epidemic level drug abuse problem, several courts struck down drug testing policies because they did not believe that the school district involved could present evidence of an actual drug problem among the students that it wanted to test.[398]

The Eighth Circuit Court of Appeals in *Miller* was one of the first courts to recognize that evidence of an epidemic level problem was not necessary before a school district could implement a drug testing policy. The court realized that a school district should not be "be compelled to wait until there is a demonstrable problem with substance abuse among its own

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[396] *Earls 3*, 122 S.Ct. at 2566.

[397] *Brooks*, 730 F. Supp. 762.

[398] *See, e.g.,*, *Theodore*, 761 A.2d at 661; *Gardner*, 183 F. Supp. 2d at 859; *Tannahill*, 133 F. Supp. 2d at 928.

students before the district is constitutionally permitted to take measures that will help protect its schools."[399] The *Earls 1* court agreed that it would be "rather anomalous to require school officials to await an epidemic before taking peremptory measures."[400]

In setting out two perspectives from which to analyze a sufficient governmental interest justifying special needs,[401] in *Joy* the Seventh Circuit Court of Appeals disagreed, finding instead that the school district therein had "not established that any immediate problem with drugs or alcohol exists for its students in extracurricular activities."[402] As a result, this governmental interest was outweighed by the students' privacy interest and but for stare decisis grounds, the court would have overturned the policy at issue.

In *Earls 2*, the Tenth Circuit Court of Appeals took this to the extreme by establishing a rule that "any district seeking to impose a random suspicionless drug testing policy as a condition to participation in a school activity must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing."[403]

The Supreme Court made clear in *Earls 3* that this fascination with a particular level of proof, and specifically the standard proposed by the Tenth Circuit, was incorrect. The Court noted "this Court has not required a particularized or pervasive drug problem before allowing the government to conduct suspicionless drug testing."[404] Moreover, it would not set a threshold level of drug abuse that would be sufficient to support a drug testing program.[405] Instead it found that prevention of harm to the school children tested was sufficient to demonstrate the necessity of implementing a drug testing policy.[406]

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399 *Miller*, 172 F.3d at 581.
400 *Earls 1*, 115 F. Supp. 2d at 1288.
401 *See supra* pp. 39-42, 55-56.
402 *Id.* at 1065.
403 *Earls 2*, 242 F.3d at 1278.
404 *Earls 3*, 122 S.Ct. at 2568.
405 *Id.*
406 *Id.*

This reasoning is one of the most difficult to comprehend. Following the *Earls 3* decision, it seems that any school district that can provide some evidence of a drug problem among some of its students, or that can at least provide that there is a legitimate concern about drug use in its community, will be able to show an immediate enough problem in support of the implementation of a drug testing program.

This conclusion may be easier to understand in the context of the relationship of public school children to their schools. As the Supreme Court has repeatedly found, a school sits in the position of the children's parents, or *in loco parentis*, while the students are in school or participating in school-related activities. The school is responsible for their well-being while the students are at school or involved in school activities. Therefore, because the Supreme Court has also repeatedly found that the drug problem is especially dangerous to school children, the immediate need to combat this problem flows out of the school district's responsibility to these students in the first instance.

F. Efficacy

Considerations as to the type of evidence that will be sufficient to demonstrate a substantial governmental interest in support of a drug testing program are intertwined with an analysis of whether a drug testing program is effective in combating the problem of drug abuse in public schools.

Several courts found that such policies were not effective because there was no evidence that the extracurricular students tested were students that were part of any drug abuse problem.[407] Most interestingly, in *Linke*, the Indiana Court of Appeals stated that the Supreme Court's "suggested case-by-case approach to determine which groups of students may be randomly tested under the Fourth Amendment has failed,"[408] because courts were upholding drug testing policies even though there was no evidence that the students tested were drug users. The *Brooks* and *Lopez* courts also noted that "logic would dictate that

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[407] *See, e.g., Lopez*, 963 P.2d at 122; *Joy*, 212 F.3d at 1065.

[408] *Linke*, 734 N.E.2d at 259-60.

students who participate in athletics and other extra-curricular activities are, in fact, less likely to use drugs and alcohol,"[409] because normally they have "better discipline records and performed better academically than did students in the general population."[410]

Although this last point may be true, the Supreme Court did not find the efficacy of the drug testing policy to be so problematic. Not only did the *Earls 3* Court find that testing students who participate in extracurricular activities was "an effective means" to address the school districts legitimate concerns in preventing and combating the drug problem, the Court also clarified that it had never required schools to only test the group of students most likely to use drugs, instead drug testing policies must be analyzed "in the context of the public school's custodial responsibilities."[411]

In the end, as most students at the interscholastic level participate in some form of extracurricular activity, a testing policy testing these same students may actually test the majority of all of the students in a school district. Therefore, following the Supreme Court's reasoning, it may be most efficacious to test this group because virtually all students who could be drug users will be covered.

G. Privileged Participation

At the interscholastic level, participation in athletics or any other extracurricular activities is a privilege. This participation is not a right in that students can not sue a school district or school officials who keep them from participating in an extracurricular activity when they refuse to be drug tested. The Seventh Circuit Court of Appeals recognized as much in 1987 in *Schaill* when it said that participation "is a benefit . . .It is not unreasonable to couple these benefits with an obligation to undergo drug testing."[412]

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[409] *Brooks*, 730 F. Supp. at 343.
[410] *Lopez*, 963 P.2d at 1109.
[411] *Earls 3*, 122 S.Ct. at 2569.
[412] *Schaill*, 864 F.2d at 1320.

Justice Ginsburg makes an interesting point about the nature of extracurricular activities in her dissent to *Earls 3*. Ginsburg notes that extracurricular activities are "part of the school's educational program," and that participation in these activities "is a key component to school life, essential in reality for students applying to college, and, for all participants, a significant contributor to the breadth and quality of the educational experience."[413] The *Lopez* court echoed Justice Ginsburg's concerns as it noted that "the reality for many students who wish to pursue post-secondary educational training and/or professional vocations requiring experience garnered only by participating in extracurricular activities is that they must engage in such activities."[414]

These statements lead some readers, or more importantly some students at the interscholastic level, to believe that participation in extracurricular activities is anything but a privilege. Still, to this point, although some courts have recognized the importance of such participation, no courts have found that students have a constitutional right to participate in athletics or other extracurricular activities.

H. The State of the Judicial Model

The Supreme Court's decision in *Earls 3* almost explicitly followed the judicial model proposed in this article. However, throughout this analysis other courts have provided additional considerations that were not in the original judicial model.[415] While these considerations may have some bearing within the particular jurisdictions concerned, the Supreme Court has not explicitly adopted any of them. In fact, as already stated, the Court specifically disagreed with the Tenth Circuit's new standard of proof demonstrating a special need and in support of a governmental interest in promotion of drug testing.

In the end, the proposed judicial model still stands as a

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[413] *Earls 3*, 122 S.Ct. at 2573 (Ginsburg, J., dissenting).

[414] *Lopez*, 963 P.2d at 1109.

[415] *See supra* extra considerations provided in the *Joy, Tannahill* and *Earls 2* cases discussed pp. 39-42, 46-51. *See supra* extra considerations provided in the *Linke 2* case discussed pp. 52-58.

representation of the Supreme Court's standard in assessing drug testing programs within its special need doctrine.

VII. Conclusion

This article has taken an in-depth look at the many cases reviewing the issue of drug testing students who wish to participate in extracurricular activities at the interscholastic level. Throughout its jurisprudence over the past two decades, the Supreme Court has developed a method courts can follow to review such testing policies. The judicial model proposed in this article is a representation that consolidates the different factors that the Supreme Court has discussed in these cases. Courts have followed this model in various ways, culminating in the Supreme Court's clear adherence to the model in its latest review of an extracurricular drug testing policy in *Earls 3*.

The Supreme Court's *Earls 3* decision mandates that similar testing policies of students in public schools are constitutional. The question that remains unanswered is the extent of this mandate. In other words, can a public school district simply test all of its students? As the *Joy* case noted, "the case has yet to be made that a urine sample can be the 'tuition' at a public school."[416]

School districts will find some support for an extensive drug testing program testing all students in *Acton* and *Earls 3*, both of which were grounded in the recognition that there is a special *in loco parentis* relationship between students at a public school and school officials. This relationship was paramount in the Supreme Court's finding that student athletes and students in extracurricular activities have lowered expectations of privacy, and that the drug testing policies were effective means to combat the drug problems in the particular school districts because they focused on ferreting out drug use among the students themselves.

However, keep in mind that both decisions made it clear that the students who were being tested had lower expectations of privacy than students in general-part of Step Two of the judicial model. While the Supreme Court has also noted that any student in a public school has a diminished expectation of privacy than

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[416] *Joy*, 212 F.3d at 1067.

that of adults or students in private schools, the actual extent of this diminished privacy right has not been explored. One must remember that the Supreme Court found it very important that student athletes and students who participate in other extracurricular activities are also subject to additional forms of regulation that also diminish their expectations of privacy. Students who do not participate in these activities may not be subject to similar regulation and so their expectations of privacy may be stronger.

From the perspective of a school district, because it can implement a drug testing policy that covers all students in any extracurricular activities, it may already cover the overwhelming majority of students in the district as most participate in some type of extracurricular activity. The problem is that the students who participate in extracurricular activities may not always be the students most susceptible to the problem of drug abuse because such abuse would impair their abilities to perform in these activities and could lead to their dismissal from the activities themselves.

While the judicial model proposed in this article serves as a framework for analyzing any drug testing policy proposed by a school district, it cannot answer the question as to the extent of the privacy interest possessed by students who do not participate in any activities. Still, all of the other considerations of this model would be the same as those discussed in *Acton* and *Earls 3*. Following Step One, the Court has made it clear that there is a special need in the public school context. Under Step Two as long as the policy proposed was similar to that in *Acton* or *Earls 3* its character should not be significantly intrusive, and the school district will most likely be able to demonstrate an immediate governmental interest in fighting the drug problem as shown in dealing with student athletes and extracurricular students. The focus of the issue would then be on the actual privacy interest possessed by this new category of student, these "other" students in our public schools.

In the end, the students who may be in the most need of rehabilitation due to drug use may be exactly those students who are not significantly involved in the culture of the school itself by being involved in any extracurricular activities. While the

Supreme Court has not answered the question as to whether an all encompassing drug testing policy will withstand constitutional scrutiny, it seems clear that its precedent from *Acton* to *Earls 3* has already found that students with a higher expectation of privacy (extracurricular participants) can be tested in the same way as those with lesser expectations of privacy (student athletes). It does not seem to be an extreme step to take the analysis to its logical end and find that students with an even higher expectation of privacy (students who do not participate in any activities) can also be tested because even they have diminished privacy rights while attending public school.

Time will tell whether providing a urinalysis sample becomes the "tuition" for attending public schools in the United States.