



Urine Trouble: Drug Testing of Students and Teachers in Public Schools

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Non-individualized (so-called “random”) drug testing in public schools presents issues of Constitutional law on both the federal and state levels, particularly with regard to citizens’ freedom from “unreasonable searches and seizures.” The trend toward increasing acceptance of such testing by the courts (and particularly the U.S. Supreme Court) stands in tension with public-health approaches to preventing abuse of psychoactive substances. This paper analyzes the major legal, social, and ethical challenges presented by random drug-testing in schools.

Keywords: drugs, public schools, searches, Fourth Amendment

Discouraging adolescents from ingesting harmful, psychoactive substances is a relevant goal for public schools. Also, encouraging those same students to value constitutional freedoms is an enduring understanding for the schools to cultivate. The two purposes, however, exist in tension when schools adopt programs of drug testing that are not based on individualized suspicion but rather on a general premise that at least some members of certain categories of students may be users of illicit drugs. This essay reviews the legal and social issues involved in such testing and includes an analysis of the socio-ethico-legal challenges the testing entails.

Though use of cigarettes and alcohol among secondary-school students is at its lowest level in at least 35 years, relatively high rates of abuse of marijuana, prescription drugs, and non-cigarette tobacco products (e.g., hookahs, smokeless tobacco) remain (Johnston et al., 2011). For example, nearly 22 percent of 12th-graders report binge drinking (five or more drinks in a row over the past two weeks), 11 percent report using synthetic marijuana (“Spice”), 8 percent abuse the opioid painkiller Vicodin,

and 8 percent abuse amphetamines (Johnston et al., 2011).

Substance abuse in adolescence increases risks of deleterious behaviors at that stage of development and well into adulthood. Examples of behaviors that have been correlated with substance abuse include: impaired driving, interpersonal violence, poor academic performance, disturbed family and interpersonal relationships, and criminal activity (Skiba, Monroe, & Wodarski, 2004).

Drug testing of students generally increased in the early 21st century, with approximately 25 percent of districts with a middle- and/or high-school having a student drug-testing policy, and 56 percent of those districts (or 14 percent of districts overall) including random testing in their policies (Centers for Disease Control & Prevention, 2006). Ringwalt et al. (2008) found that more than one-quarter of districts with random testing subjected all students to it, a practice that is more encompassing than the protocol approved by the U.S. Supreme Court in 2002¹. As technology enables testing of less “intrusive” samples than urine (e.g., hair, saliva), legal privacy concerns may be further diminished, with consequent court-approved

¹ *Earls v. Pottawatomie County School District*, 536 U.S. 822 (2002).

expansions in testing.

Constitutional Background for Drug Testing: The Fourth Amendment

To what extent does the Fourth Amendment's prohibition on "unreasonable searches and seizures" protect students in public schools? In 1969, in a case involving students' freedom to express their opposition to the Vietnam War by wearing symbolic armbands to school, the U.S. Supreme Court established the basic tenet that at least some constitutional provisions (in this case, the First Amendment's freedom of speech) apply to public-school students (*Tinker v. Des Moines Independent School District*, 393 U.S. 503 [1969]). However, it was not until the mid-1980s that the Court specifically addressed students' rights with regard to unreasonable searches and seizures.

In 1985, in *New Jersey v. Tracey Lis Odem* (*T.L.O.*) (469 U.S. 325), the Court considered a school's search of a 14-year-old high-school freshman's purse after a teacher reported that the girl had been smoking in the school restroom. In upholding the search, the Court emphasized the school's responsibility for maintaining safety and discipline. Accordingly, searches like this one do not require a search warrant or the justification of "probable cause" that are identified in the Fourth Amendment itself. The Court was satisfied that a search of a public-school student by school officials generally satisfies the Fourth Amendment if it is justified at its inception (i.e., if there is a reasonable basis for expecting that the search would disclose evidence of the particular student's violation of the law and/or of school rules) and if the scope is "reasonably related" to the situation that initially justified it (i.e., if the search is not "excessively intrusive in light of the age and sex of the student and the nature of the infraction").²

In the *T.L.O.* case, the Court justified dispensing with the warrant and probable-cause requirements of the Fourth Amendment by declaring that school searches such as this one are "special needs" searches. They serve needs beyond the normal needs of law enforcement, and they occur in settings where it is impractical to require warrants or probable cause. *T.L.O.* "marks the first time the Court extended the 'special needs' doctrine to the public school setting" (LaCroix, 2008, p. 258).

In lieu of using the existence of a valid warrant and probable cause as justification for searches that are deemed "special needs," the Court assesses whether or not the search is "reasonable" by balancing the individual's privacy interests against the government interests in conducting the search. In *T.L.O.*, the Court acknowledged that students do possess some privacy interests that the Fourth Amendment protects, but those interests are

attenuated in comparison with those of adults.

Individualized suspicion is traditionally highly valued in Fourth Amendment jurisprudence, and in *T.L.O.* the school did have suspicion of violation of school rules that was specific to *T.L.O.* herself. In the context of drug testing, however, controversy arises particularly when there is no individualized suspicion. For example, in random drug testing, there is no suspicion that any particular person is using illicit drugs, though there may be a more generalized, diffuse suspicion that some members of the group may be so doing.

In 1989, the Court upheld so-called "suspicionless" drug testing in two employment contexts, developing the relaxed "special needs" standard that it planted in *T.L.O.* (Hutchens, 2002). The Federal Railroad Administration's requirement for drug testing of employees who were involved in train accidents or who violated certain safety rules was upheld as a "special needs" search (*Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 [1989]). Likewise, the U.S. Customs Service's requirement for drug testing customs officers who seek transfer or promotion to positions that involve carrying firearms and/or drug interdiction was a legitimate "special needs" search (*National Treasury Employees Union v. Von Raab*, 489 U.S. 656 [1989]). The Court approved the drug testing in *Von Raab* even though the Customs Service produced no evidence of a specific drug problem among its employees and even conceded that the drug testing program was ineffective in identifying drug users. The Court also authorized random motor-vehicle stops at pre-established checkpoints, for the detection of drunk drivers (*Michigan Department of State Police v. Sitz*, 496 U.S. 444 [1990]). In all of these situations, the Court "balanced the intrusion on the individual's Fourth Amendment interests against the government's legitimate interests and found that the government's 'special needs' justified a Fourth Amendment exception" (Conlon, 2003, p. 302).

School-based, random drug testing: The U.S. Supreme Court view

In 1995 the U.S. Supreme Court first considered school-based drug-testing that was not based on individualized suspicion, in *Vernonia School District v. Acton* (515 U.S. 646). James Acton was a seventh-grader subject to the school's program of random drug testing of 10 percent of athletes each week, regardless of any individual athlete's suspicion of drug use. School officials had initiated the program in response to what they determined to be appreciably increased use of illicit drugs by students who had since graduated and the belief that the ringleaders of the "drug culture" at the school had been student-athletes, who were also role models for many other

² This two-part analysis for "reasonableness" of searches conducted without warrants or probable cause was first articulated by the Court in *Terry v. Ohio* (392 U.S. 1 [1968]), which authorized police "frisks" (brief pat-downs to detect weapons) of citizens in situations where the police lawfully "stop" a citizen and reasonably suspect that citizen may be armed.

students. Here again, the Court—in a 6-to-3 decision written by Justice Scalia—identified a “special needs” search, since the school’s “drug culture” represented a special need for detection of drug use without reporting such findings to law enforcement.

Consonant with its “special needs” jurisprudence, the Court balanced students’ privacy interests against the school’s strong interest in preventing use of illicit drugs. Though urine collection for drug analysis did represent a “search” as defined by the Fourth Amendment, the intrusion on students’ reasonable expectations of privacy was minimal, according to the Court. The collection of urine samples involved a school official standing a few feet behind a male student at a urinal, or just outside the closed stall door for a female student. The Court found this protocol not appreciably different from everyday occurrences in public restrooms. Additionally, the Court found that student-athletes’ expectations of privacy are even less than those of students who are not athletes, since the athletes are frequently required to engage in “communal undress” for changing clothing and showering, and since they are subjected to more school rules and regulations than non-athletes, and since there is a material possibility for severe sports-related injuries due to impaired athletes. In aggregate, the school’s legitimate interests in custody and control over student-athletes trumped the athletes’ attenuated privacy interests, legitimizing the drug testing under the Fourth Amendment.

The *Acton* case established that under the Fourth Amendment, the lawfulness of a program of random search by school officials, not based on individualized suspicion, is to be analyzed by balancing the competing interests of the student and the school. In particular, courts must: (1) consider the nature and magnitude of the students’ privacy interests, (2) evaluate the intrusiveness of the search, especially the manner in which it is conducted, and (3) consider the “nature and immediacy of the school’s concerns and the efficacy of the means chosen to address those concerns” (Palestini & Palestini, 2006). In situations such as existed in *Acton*, the Court refused to require individualized, reasonable suspicion as a prerequisite for drug testing, since that higher standard would be “impractical, arbitrary, and accusatory” (Einesman & Taras, 2007, p. 238). *Acton* emphasized the “custodial and tutelary” power of schools in crafting an important government need for random drug-testing of students.

In 2002, the Court expanded the ambit of school-based, random drug testing in *Earls v. Pottawatomie County School District* (536 U.S. 822). Though there was no evidence of any considerable drug problem in the district, all middle- and high-school students who voluntarily participated in any “competitive” extra-curricular activity were required to consent to random drug testing throughout their period of participation. “Competitive” activities were defined broadly and included band, choir, cheerleading, the Academic Team, the Future

Farmers of America, and Future Homemakers of America, in addition to athletics. In a 5-to-4 decision authored by Justice Thomas, the Court again classified these searches as “special needs” and determined that the district’s interest in protecting its students’ health and safety from the “drug epidemic” facing the nation outweighed the students’ privacy interests. Though many of these students were not athletes, the Court expanded its rationale from *Acton* by declaring that the students are similar to athletes in having attenuated expectations of privacy, due to the fact that they face additional school rules as part of the activities, and due to the occasional sharing of rooms that may occur if the group participates in competitions that occur in other venues.

The lack of evidence of drug use in the school district was not problematic for the Court, which focused instead on the national plague of illicit drug use. That same rationale was used in *Von Raab*, though that case involved a closely-regulated industry in which the drug testing was ostensibly for the sake of avoiding life-threatening injury to others through the impaired use of firearms or the corruption of drug-enforcement agents (Donaldson, 2006).

The Court did strike down one pervasive drug-testing program, though it was not in the context of schools. A Georgia statute required all nominees for state office to submit to a drug test within 30 days of being elected or of qualifying for election. In *Chandler v. Miller* (520 U.S. 305 [1997]), the Court refused to declare this a “special needs” search, finding instead that the statute had no legitimate purpose and that any drug problem that may exist among candidates for public office was more appropriately addressed through ordinary law enforcement. Here the candidates’ privacy interests prevailed.

Commentators have leveled considerable criticism at the *Earls* decision and, to a lesser extent, the *Acton* decision. Indeed, in each case the dissenting justices themselves presented powerful counterarguments. Whether public-school students, even student-athletes, are comparable to the “closely regulated industries” that justified drug testing in *Skinner and Von Raab* is certainly open to question. Traditionally the Court has found lesser expectations of privacy with regard to such industries because of extensive government regulation of them, usually consequent on the potential major dangers with which the industries deal.

The “communal undress” that was central to a finding of decreased expectations of privacy among student-athletes has been questioned:

It seems that the Court found that voluntary nudity in front of peers, a minor consequence of athletic participation, constituted an implied consent to being observed during the very personal process of urination by an adult who is present only for that reason, and whose ultimate purpose is to perform scientific tests on the urine to discover if something very

major is going on in the athlete's private life. (LaCroix, 2008, p. 260-261)

The extension of this rationale in *Earls* to students who participate in any competitive extracurricular activity is even more tenuous, especially when there is no evidence of a significant drug problem among these cohorts of students.

A broad policy allowing drug testing of all students involved in extracurricular activities may prove counterproductive in the long run: it "invades the privacy of students who need deterrence least, and risks steering students at greatest risk for substance abuse away from extracurricular involvement that potentially may palliate drug problems" (*Earls*, p. 853 [Ginsburg, J., dissenting]).

Another critique involves the applicability of the historical *in loco parentis* ("in place of a parent") rule. When the Fourth Amendment was adopted, the limited schooling that was available usually did involve schools that functioned in place of parents. American courts adopted from English common law the doctrine of *in loco parentis*, giving school officials broad authority over students in matters of conduct (including morality) and discipline. Accordingly, students had few rights to "due process" when they believed schools had overreached in those matters.

As compulsory school attendance became the norm, however, the *in loco parentis* philosophy became attenuated, such that schools no longer "have the same freedom from the constraints of the Constitution that parents enjoy" (Donaldson, 2006, p. 830). LaCroix (2008) notes that the relationship between the school and students no longer fits the *in loco parentis* model; rather, it is now "astoundingly diagnostic and treatment-oriented": "we want our schools to succeed so badly that we have commanded them to stop being parents and start increasing test scores" (p. 273). Fulfilling federal and state mandates (e.g., mandatory testing, accommodation of disabilities) has trumped any historical "parenting" role that public-school officials may have performed. Beginning with *T.L.O.*, the Court did clearly recognize school officials as state actors and applied a "reasonableness standard" to Fourth Amendment privacy invasions of students by school officials (Higbee, 2005).³ Nevertheless, particularly when schools present policies (e.g., regarding drug testing) as ostensibly designed to promote school safety, courts commonly defer in the interest of *in loco parentis*.

A correlative criticism relates to the Court's failure in both *Acton* and *Earls* to consider the fundamental right of parents to control the upbringing of their children. In *Wisconsin v. Yoder* (406 U.S. 205 [1972]) the Court used First Amendment freedoms, in combination with parental rights, to nullify a state compulsory education law. More

recently, in *Troxel v. Granville* (530 U.S. 57 [2000]), the plurality opinion identified parental rights as fundamental, though it "refused to establish an applicable level of scrutiny" (Donaldson, 2006, p. 842). This theory has potentially far-reaching implications: parents who in good faith refuse to consent to random drug-testing of their children are exercising a fundamental right with regard to raising their children. In refusing to delegate *in loco parentis* power to the school for drug testing, they are retaining a right which, at least in theory, inheres in their privilege as parents and cannot be usurped by the school.

More philosophically, in considering the essential functions of mandatory public schooling, one may query, "If one purpose of the public schools centers on preparing citizens for participation in our democratic society, then what is lost by wholesale denial of constitutional rights to schoolchildren?" (Hutchens, 2002, p.1286). Donaldson (2006) opines that "drug tests send a message to children that they are guilty until proven innocent" (p. 852).

School-based, random drug testing: State constitutional interpretations

State constitutions contain analogs to the Fourth Amendment, and state high courts can interpret those analogs to grant more rights to their citizens than the threshold set by the U.S. Supreme Court. With regard to random drug testing, some state supreme courts have chosen to use this power, though most have been content with the federal minimums.

In *Joye v. Hunterdon Central Regional High School Board of Education* (826 A.2d 624 [2003]), the New Jersey Supreme Court used rationales very similar to *Acton* and *Earls* to uphold random drug testing of students who park on school property, in addition to those who participate in extracurricular activities. The court emphasized the "special need" of the school to maintain order and safety (including keeping student-drivers safe), and that those who park at school are subjected to additional regulations (and hence have a compromised expectation of privacy). Also, the collection procedure was minimally intrusive, and there was evidence that a fair portion of students used alcohol and illicit drugs.

The Indiana Supreme Court found no violation of the federal or state constitutions with regard to a broad drug-testing program that covered athletes, participants in extra-curricular activities, and students who parked at school (*Linke v. Northwestern School Corporation*, 763 N.E.2d 972 [2002]). The court noted that the activities were all subject to regulations beyond those applicable generally to all students, that the students involved in these activities were commonly deemed role models, and that there was evidence of illicit drug use among the student body.

In contrast, in *Theodore v. Delaware Valley*

³ Hence, school officials cannot claim parental immunity with regard to Fourth Amendment rights, since they are not surrogate parents but rather state actors.

School District (836 A.2d 76 [2003]), the Pennsylvania Supreme Court considered a program of random drug testing of all middle- and high-school students who wished to participate in any extracurricular activity or wished to drive to school or park at school. Based on the state constitution, the court declared the program facially invalid. Using Pennsylvania's four-factor test, which was based on *Acton*, the court considered: (1) the students' privacy interests, (2) the nature of the intrusion, (3) the adequacy of notice given, and (4) the "overall purpose to be achieved, including the immediate reasons prompting the decision to conduct the search" (Young, 2010, p. 179). The fourth factor was the fatal one for the school district: the court concluded that the policy was "based on the general deterrence of drug use and failed to establish the existence of a specific drug problem in the District or with the targeted group of students" (Wolfe, 2005, p. 515). Likewise, there was no evidence the policy would be efficacious in addressing any drug problems that may exist. The court did intimate that the policy would have been valid if it applied only to student-athletes and student-drivers.

In *York v. Wahkiakum School District* (178 P.3d 995 [2008]), the Washington Supreme Court declared that the federal definition of "special needs" searches was too broad vis-à-vis the state constitution. The random testing of student-athletes had begun after half the school's student-athletes identified themselves as alcohol or drug users. In a unanimous decision, the court declared random drug testing of student-athletes unconstitutional under the state constitution. The court rejected the federal "reduced expectation of privacy" rationale for student-athletes: "We do not see how what happens in the locker room or on the field affects a student's privacy in the context of compelling him or her to provide a urine sample" (*York*, p. 995). Additionally, the court feared that random drug-testing could easily proliferate to encompass the entire student population.

Empirical studies of drug testing in schools

Results of empirical studies of random drug testing generally show disappointing results in terms of deterrent effect. For example, Yamaguchi, Johnston, and O'Malley (2003) used national survey data of eighth-, tenth-, and twelfth-grade students, finding that among high-school male athletes, use of illicit drugs showed no significant difference between schools with and without drug testing. Also, among all students surveyed, "school drug testing was not associated with either the prevalence or the frequency of student marijuana use, or of other illicit drug use" (Yamaguchi et al., p. 164).

A prospective randomized control trial of drug testing of student-athletes was undertaken at eleven Oregon high schools by Goldberg et al. (2007). The authors divided the schools into a control group without drug testing and an experimental group that initiated drug testing at the start of

the study. Over the course of two years, the testing schools showed significantly lower mean past-year drug use (measured by student-athlete self-report surveys), compared to the non-testing schools, but those results existed for only two of four follow-up time periods. Also, past-month drug use (where testing would be expected to have its greatest deterrent effect) showed no difference between control and experimental groups at any of the four follow-up time periods over two years. Finally, somewhat paradoxically, over time, athletes in the testing schools "had less belief in their athletic competence, believed less in the benefits of testing, believed that authorities were less opposed to drug use, and believed less that testing was not a reason to use drugs" (Goldberg et al., p. 426). All of those attitudes would seem to represent increased risk for future substance abuse.

Russell, Jennings, and Classey (2005) surveyed middle- and high-school students in four schools, representing grades 6 through 12. Nearly 45 percent of respondents said they had experimented with drugs, and nearly 75 percent said they had used alcohol. None of the schools had a drug-testing program. Most students said they would still participate in after-school activities if drug testing was required, but most students also felt that drug testing would violate their privacy. Students who reported frequent use of drugs or alcohol were least apt to believe drug testing would control drug use among students. Frequent drug use was significantly less common among students who participated in after-school activities (11 percent) than among those who did not (19 percent). In contrast, frequent alcohol use did not differ significantly between the two groups. The authors note that alcohol use is a much more prevalent problem than illicit drug use, though the former is generally not part of drug testing programs.

Evans et al. (2006) surveyed students at two rural high schools that were about to implement an aggressive program of drug testing. The testing would involve alcohol, tobacco, and illicit drugs, and it would involve any student in grade 6 through 12 who participated in any extracurricular activity or was issued a school parking permit. Though three-quarters of respondents believed the new policy would reduce drug use, 40 percent of respondents thought that the consequences of testing positive would be nothing or minimal.

Conlon (2003) conducted a mail survey and interviews with high-school principals, finding that most schools without random drug testing did not consider instituting it in the aftermath of the *Earls* decision. Schools with high rates of parental contact, high standardized test scores, low truancy rates, and high instructional expenditures per pupil generally did not use random drug testing, nor did schools that scored low on those variables. The author suggested that in wealthy districts, strong parental influence likely inhibits testing programs, as

influential parents do not wish their children to undergo testing that may have adverse ramifications. On the other hand, in poor schools, there is probably insufficient political energy to start random testing. It is in middle-range schools, where parents have less time to be involved in policy-making, that political power to start a program of random testing may devolve to principals, though “principals are making policy in the absence of data to show that random drug testing actually deters student drug use” (Conlon, p. 319).

In a survey of state-level education agencies and a sample of school districts, Cho, Hallfors, Iritani, and Hartman (2009) found that both gave low priority to student drug testing. This is in spite of the fact that both the U.S. Department of Education and the U.S. Office of National Drug Control Policy have made drug testing a high-priority strategy. In another survey of school districts, Ringwalt et al. (2009) discovered that nearly half of respondent school districts notified law enforcement of positive results from drug testing (including a first positive test), thereby potentially violating the federal Family Education Rights and Privacy Act (FERPA) and the federal Confidentiality of Alcohol and Drug Abuse Patient Records (42 CFR part 2, §2.1[f]). Other punitive responses included: one-third of districts with drug testing suspended students who tested positive, 13 percent sent such students to alternative schools, and 8 percent expelled the students.

Drug testing of teachers

The case law and commentary on drug testing of public-school teachers is much more limited than that with regard to students. Mawdsley (2004) argues that teachers’ expectation of privacy “is diminished by the reality that they have been employed to instruct students, most of whom are minors required under state compulsory attendance laws to attend school” (p. 609). He contends that in the school environment, consistency of standards is valuable, such that teacher rights “should be subject to the same ebb and flow of Supreme Court interpretation as for student rights” (Mawdsley, p. 617).

With reasonable suspicion, a public employer may search a public employee’s office (e.g., desk and file cabinets where personal correspondence is stored) (*O’Connor v. Ortega*, 480 U.S. 709 [1987]). This is fairly consistent with the standard for school searches of students articulated in the T.L.O. case. In *Shaul v. Cherry Valley-Springfield Central School District* (363 F.3d 177 [2004]), the 2nd Circuit upheld the school’s search of a suspended teacher’s classroom—including drilling open a locked file cabinet—in preparation for turning the classroom over to another teacher. The original teacher had been suspended for misconduct with a student and had not removed his personal items as required by the school. The court ruled that the teacher had only a minimal expectation of privacy in the classroom once he was suspended and left his personal items there. Additionally, the school had

reasonable suspicion that it would find material evidence (in this case, photos of the student) of the offense inside the classroom.

Mandatory pre-employment drug testing of teacher-applicants was upheld by the 6th Circuit in *Knox County Education Association v. Knox County Board of Education*, 158 F.3d 361 (1998). There was no evidence of a drug problem among applicants, but the court applied the “safety sensitive” positions rationale of *Skinner* and *Von Raab*. The court focused on teachers’ responsibilities for the safety and welfare of children, as well as the numerous regulations that govern the teaching profession. In her analysis of the decision, Schmidt (2001) criticizes the court’s expansion of the “special needs” exception in this context, arguing that it should apply only to drug testing involving employees “in situations where incredible risk weighs on the government interest side of the balancing analysis,” especially where those being tested are not members of a group which has a known drug problem (p. 255). Teaching, she contends, is not an industry that is “highly regulated” for safety, and the risks presented by teachers are not nearly so imminently catastrophic as “train wrecks or misguided gunshots” (Schmidt, p. 271).

In *United Teachers v. School Board* (142 F.3d 853 [1998]), the 5th Circuit considered drug testing required after any work-related injury. In nullifying the program, the court noted lack of evidence of a drug problem among the school-system employees, as well as the fact that it tested both too many (all injured employees, regardless of fault) and too few (no testing of non-injured employees, though there was no evidence that injured employees were more likely to be abusing drugs).

With regard to random drug testing, the 5th Circuit upheld against Fourth Amendment challenge the random testing of all employees in “safety sensitive” positions (*Aubrey v. School Board*, 148 F.3d 559 [1998]). The case involved a custodian/groundskeeper at an elementary school who routinely worked with dangerous equipment and was continually in the presence of students.

The U.S. District Court for the Eastern District of Kentucky upheld drug testing of teachers that was part of a program of randomly testing 25 percent of employees in “safety sensitive” positions (*Crager v. Board of Education of Knott County*, 313 F.Supp.2d 690 [2004]). Emphasizing teachers as role models for students, the court drew on *Skinner*, *Acton*, *Earls*, and *Knox* to justify the policy. There was little evidence of drug abuse among the teachers, but the court emphasized that the county in general was experiencing a significant drug problem.

In a survey of superintendents, Demitchell, Kossakoski, and Baldasaro (2008) found that 35 percent of respondents supported a random drug-testing policy, while 45 percent did not. Over half of respondents believed that such testing would not violate teachers’ constitutional rights. Non-supporters of random drug-testing generally

believed that drug use by teachers was not a problem, that testing would harm the school climate and violate teachers' personal liberties, and that it would be a financial burden. Supporters, on the other hand, felt testing would make schools safer, would exemplify the teacher as role model, and would provide fairness and leverage in testing students. The authors note the fact that though superintendents generally believe they can adopt testing policies for teachers, most choose not to do so.

Socio-ethico-legal issues in drug testing without reasonable suspicion

Based on the case law with regard to teachers, mandatory pre-employment drug testing, as well as testing based on reasonable suspicion, would appear to be lawful under the Fourth Amendment. Likewise, particularly after the U.S. Supreme Court's expansive view of random testing in *Earls*, it seems that courts are willing to consider teaching as a "safety sensitive" occupation and to allow area-wide drug problems to substitute for any particularized drug problem among teachers. Within this post-*Earls* paradigm, there appear to be few constitutional barriers to random drug-testing of teachers, similar to the situation for students.

Random drug-testing of students has expanded beyond *Earls* through use of expansive definitions of "extra-curricular activities" (e.g., a school dance) and new cohorts of students with presumably lesser expectations of privacy (e.g., those who park on campus). Though a strong argument can be made that random drug testing should require evidence of a significant drug problem within the particular school district (e.g., Turner, 2007), courts increasingly seem content with more amorphous, generic domains (e.g., county-wide or national substance-abuse).

If schools truly are concerned with harm prevention and harm reduction, with regard to illicit drugs, random testing of only certain cohorts of students is anomalous. This is particularly true with regard to extracurricular activities, since the most disconnected and alienated students (most of whom would likely be uninvolved in extra-curricular activities) are apt to be more drug-involved than students who are closely bonded to school activities and values (e.g., Darling, 2005).

One argument in favor of random testing involves "reverse peer pressure," in which the existence of random testing gives non-drug-using students an "excuse" for not doing drugs due to not wanting to get in trouble. However, if students do not see the sanctions for a positive test as particularly serious, as Evans et al. (2006) found, this dynamic is easily negated.

Cost-benefit aspects of random testing are also debatable. The cost for a standard drug screening ranges between \$14 and \$30, and a test for drugs such as steroids can cost over \$100 (Velasquez, 2010). Texas tests up to 3 percent of high-school student-athletes, at a cost of approximately \$6 million per year (Velasquez, 2010). The yield for the money may be minimal, e.g., in 2009 the

Texas University Interscholastic League reported seven positive results for steroids out of approximately 19,000 tests of high-school athletes (Young, 2010). Cost inefficiencies are particularly evident if random testing focuses on students less likely to abuse drugs, e.g., students involved in extra-curricular activities at school.

Einesman and Taras (2007) note that "preliminary studies of the deterrent effects of drug screening are not yet convincing" (p. 264). Indeed, adolescent psychology makes deterrence a difficult undertaking in general: "taking risks that do not make sense to adults is a notorious yet frustratingly normal part of teen development" (Brendtro & Martin, 2006, p. 75). Teens who abuse drugs may not be particularly sensitive to the social stigma of drug use; rather, it is common for them to see drugs as "substitutes for human bonds" (Brendtro & Martin, p.77).

From a public health perspective, random drug testing lacks epidemiologic sensitivity, since random testing easily "misses" many users, and since only select drugs are screened (Einesman & Taras, 2007). Alcohol, the drug most widely abused by adolescents, is rarely screened, in part because of its evanescent nature. Also, testing can motivate students to conceal drug use, e.g., by switching to drugs that are not screened or that are less detectable (e.g., cocaine, methamphetamines).

When testing focuses on students involved in extra-curricular activities, the testing itself may be iatrogenic, discouraging at-risk students from participating in activities which might actually inhibit drug abuse. Involvement in extracurricular activities can serve as a protective factor from high-risk behaviors (Brendtro & Martin, 2006).

A culture of drug testing "may send youths a message that they are not trusted by teachers, coaches, and counselors, potentially damaging a climate conducive to learning" (Einesman & Taras, 2007, p. 269). Trusting and supportive relationships between staff and students are particularly inhibited when school staff are directly involved in administering the testing. A focus on mutual trust and respect, as well as student engagement with school, may do far more to promote effective learning and to inhibit drug abuse. The American Academy of Pediatrics (2007), which opposes drug testing in schools, notes that "drug testing youth who have not been implicated in using drugs may be perceived as being unfair and, thereby, may reduce trust and connectedness with their school, which are essential for maintaining lines of communication" (p. 1381).

Alternative Strategies for Deterring Substance Abuse

Preventing and deterring substance abuse among adolescents can take the form of positive messages, as an alternative to the punitive approach of drug testing. For some students, drug testing may be iatrogenic. Roche et al. (2009) observe that "imposition of sanctions in the school setting may be counterproductive if they further exacerbate risk factors, such as low self-esteem, poor academic

performance, or lack of commitment to school—factors known to be associated with drug use” (p. 522). After reviewing the extant research, these same authors conclude that “currently, there are no empirical effectiveness data from independent, unbiased, and rigorous studies on which to base a case to support drug testing in schools” (p. 524). There is little evidence that such testing among adolescents either deters drug use or promotes desistance.

School-based programs to discourage substance abuse by students can be implemented in lieu of, or perhaps prior to, drug testing. Unfortunately data to support the effectiveness of such programs are largely deficient. Even the most well-accepted drug-prevention programs have little evidence of long-term salutary effects.⁴ Gandhi et al. (2007) note that designations of programs as “effective” have sometimes been based on just one or two evaluations. It is not uncommon for the evaluations to have been conducted by those who created the program (a potential conflict of interest) or in the case of multiple evaluations, to rely on the same data set. Also, some programs are successful with some types of students (e.g., experimenters) but are associated with increased use among others (e.g., users). Similar untoward effects have been reported with some programs led by teachers rather than by peers or older students.

Gandhi et al. (2007) also identify a variety of methodological shortcomings in research on school-based prevention programs. These include a focus on atypical, exceptionally well-implemented programs, a wide diversity of outcome measures as determinants for “success,” and a lack of clarity between treatment and control groups. Also, the authors note that even among programs demonstrating substantial impact, “any positive results dissipated after a few years” (Gandhi et al., p. 64).

It is generally recognized that “programs based on information and attitude change alone have minimal effect on adolescent substance-using behavior and in some cases contribute to experimentation” (Skiba, Monroe, & Wodarski, 2004, p. 346). For enduring effects, the attitudes, beliefs, and skills cultivated in substance-abuse prevention programs need to be supported and reinforced via the all-important adolescent social environment, including school policy, parental behavior, and community norms (Flay, 2000).

On a more “macro” level, any “program” to prevent or deter substance abuse is incomplete without societal commitment to child and youth development, through the cultivation of individual, family, and community strengths. Such commitments are expensive and

daunting, but “there is a strong body of policy research that demonstrates that countries that invest in supporting children and families achieve better outcomes in terms of child health, well-being and social functioning than countries with systems dominated by notions of individual responsibility and the policy philosophy of user-pays” (Spooner, 2005, p. 90).

Midford (2009) explains the futility of drug-prevention programs taking an abstinence approach to some drugs, noting, for example, that alcohol is consumed by two-thirds of the adult population in the United States. Rather than entirely pathologizing the use of such substances, programs should recognize that “curiosity, experimentation, and definition of personal boundaries are all part of the psychosocial development of young people” (p. 1692). In this regard, programs need to focus on health- and-welfare-based “harm reduction,” including contextualization as “part of a broader approach that addresses the systemic factors such as advertising and sales strategies that encourage underage and inappropriate use of legal drugs” (p. 1692).

Cuijpers’ (2002) review of school-based drug-prevention programs notes that those that have been deemed effective are often developed in research settings that do not jibe well with common practice in real-world schools. Nevertheless, the most promising programs used interactive methods, including open exchange of ideas—with feedback and constructive criticism—among students in a non-threatening atmosphere. The methods usually are based in a social influence approach.

Social-influence models emphasize the need to change “behaviors, attitudes, and knowledge in the context of the social environment,” e.g., by recognizing social modeling of adults’ behavior and the tendency to overestimate the prevalence of substance abuse among peers (Skiba, Monroe, & Wodarski, 2004, p. 348). Commonly they involve development of resistance skills, decision-making skills, and stress reduction. They have been found more effective when embedded within comprehensive, community-wide activities and mass-media initiatives. Cuijpers (2002) recommends that, based on the extant research, “prevention programs should be interactive and focus especially on norms (social prevalence knowledge, social acceptability knowledge, normative expectations, friends’ reactions to drug use), commitment of students to not use substances, and intentions not to use” (p. 1020).

In their review of research on a variety of school-based prevention programs, Botvin and Griffin (2007, p.

⁴ As an example, Drug Abuse Resistance Education (D.A.R.E.) was federally funded with hundreds of millions of dollars annually, for approximately two decades, though numerous empirical studies (including quasi-experimental and experimental designs) have documented its ineffectiveness in preventing drug use (Rosenbaum, 2007; West & O’Neal, 2004).

613) conclude that effective drug-prevention programs schools:

- 1) are guided by a comprehensive theoretical framework that addresses multiple risk and protective factors;
- 2) provide developmentally appropriate information relevant to the target age group and the important life transitions they face;
- 3) include material to help young people recognize and resist pressures to engage in drug use;
- 4) include comprehensive personal and social skills training to build resilience and help participants navigate developmental tasks;
- 5) provide accurate information regarding rates of drug use to reduce the perception that it is common and normative;
- 6) are delivered using interactive methods...to stimulate participation and promote the acquisition of skills;
- 7) are culturally sensitive and include relevant language and audiovisual content familiar to the target audience;
- 8) include adequate dosage to introduce and reinforce the material; and
- 9) provide comprehensive interactive training sessions for providers to generate enthusiasm, increase implementation fidelity, and give providers a chance to learn and practice new instructional techniques.

The general trend countenancing more expansive, non-individualized drug-testing of students seems on a collision course with public-health approaches, which focus on harm reduction and which counsel great caution with regard to widespread drug testing. Though legally (i.e., with regard to the U.S. and many state constitutions) such testing usually survives “search and seizure” challenges, schools would do well to recognize that empirical research has failed to demonstrate deterrent effects and that commentators have raised myriad, and often serious, potential downsides to the testing.

A school environment that is non-threatening and in which students are provided with realistic tools for understanding and dealing with the diverse social pressures they face may be a more effective goal than an admittedly more expedient program of random drug testing, if schools are meaningfully to influence students’ worlds regarding drugs. Such an environment would cultivate an earned sense of trust that students can feel with adults, especially at school. The school would value a holistic approach to drug abuse, addressing not only students but also the families and communities that are so integral to their everyday lives. In the long run such a perspective may be far more effective in changing drug-related behaviors than a “gotcha” approach that ascribes guilt only to those who “randomly” get caught.

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