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Suspicionless Drug Testing of all Public School Students Wishing to Participate in Extracurricular Activities: The United States Supreme Court has Held the Process to be Constitutional, but will the Process Survive Under Article I, Section 8 of the Pennsylvania Constitution?

I. INTRODUCTION

On September 14, 1998, the Tecumseh Public School District ("District") in Oklahoma responded to several parents who insisted that the District should do more to combat student drug use by adopting the Student Activities Drug Testing Policy ("Policy"). Under the policy, any student wishing to participate in any extracurricular activity such as FFA [Future Farmers of America], FHA [Future Homemakers of America], Academic Team, Band, Vocal, Pom Pon, Cheerleader and Athletics is required to submit to drug testing prior to their participation in such activity. The drug test administered to these students, while not capable of detecting alcohol or nicotine, can detect amphetamines, cannabinoid metabolites (marijuana), cocaine, opiates, barbiturates, and benzodiazepines.
Pursuant to the Policy, participating students are called from their classes in small groups and are then directed to a restroom. Faculty members serve as monitors, waiting outside closed restroom stalls for the students' urine samples. The urine sample is then separated into two bottles, sealed by the students and the faculty monitor and placed into a mailing pouch, along with a form signed by the student. Each student tested is also given a form on which they may list any prescription drugs legally prescribed to them, which form is then, according to the policy, submitted to the lab performing the drug test in a sealed and confidential envelope. The Policy provides that the results of the drug test will not be turned over to law enforcement officials, nor will any academic sanctions be imposed, and the results will be kept in a file separate from the students' educational file, to be viewed only by "those school personnel with a need to know."

Lindsay Earls was a member of the show choir, the marching band, the Academic Team and the National Honor Society. Lindsay Earls' first experience in having the school collect her urine was troubling. In 1999, Lindsay was ordered by a principal's assistant, in front of her teacher and classmates, to report to the gymnasium where she would be tested for drug use. Three faculty member monitors, one of which joked "that the process seemed like an exercise in 'potty training,'" waited outside the closed stall in which Lindsay produced her urine sample, listening for the "normal sounds of urination." Lindsay was then required to watch as one of the faculty monitors felt her urine sample to ensure that it was the proper temperature and then held it up to the light to inspect its color and clarity. After all of this, Lindsay

5. Earls, 242 F.3d at 1267.
6. Id.
7. Id.
8. Id. at 1266. Although the policy provides that this prescription medication list is sent to the lab in a sealed and confidential envelope and shall not be viewed by school district employees, teachers necessarily view the prescription medication information of each student subject to the policy because teachers are expected to review and sign the initial consent form, which includes a list of prescription drugs legally prescribed to the student filling out the consent form. Respondents' Brief at 3, Earls (No. 01-332). Additionally, evidence was submitted showing that the choir teacher had looked at students' prescription drug lists and then left them where other students could potentially see them. Respondents' Brief at 6, Earls (No. 01-332).
9. Earls, 242 F.3d at 1268.
10. Earls, 122 S. Ct. at 2563.
11. Respondents' Brief at 5, Earls, (No. 01-332).
12. Id. Lindsay was embarrassed by this comment, if not the entire procedure. Id.
13. Id.
Earls, a member of the Academic Team and the National Honor Society, among other activities, was notified that her test results confirmed that she had not used drugs.\textsuperscript{14}

Daniel James, who sought to participate in the academic team, and Lindsay Earls, along with their parents, brought suit in Federal District Court challenging the application of the Policy to them as a condition to their participation in their desired extracurricular activities as violating the Fourth and Fourteenth Amendments to the United States Constitution.\textsuperscript{15}

Similarly, in July 1998, the Delaware Valley School District in Pennsylvania, because of its concern for “the health care of students” adopted a drug testing policy (“Policy 227”) requiring all students interested in participating in extracurricular activities or driving to school to submit to drug and alcohol testing.\textsuperscript{16} Policy 227 provides for five types of drug testing: initial testing to participate in an activity or to drive to school, random testing during participation in the activity, testing based upon reasonable suspicion, testing prior to being allowed to return to an activity, and follow up testing.\textsuperscript{17} Policy 227, unlike the policy at issue in Earls, through its consent form signed by students subject to the policy, authorizes the school district to collect breath, urine and blood samples from the students for intoxicant testing.\textsuperscript{18} The tests performed on these samples will produce a positive result upon a showing of a breath alcohol concentration of 0.02 or higher or a showing of the presence of any level of a controlled substance.\textsuperscript{19}

Pursuant to Policy 227, the testing of breath is conducted by a certified Breath Alcohol Technician using a National Highway

\textsuperscript{14} Id. at 6.

\textsuperscript{15} Earls, 242 F.3d at 1268. The Fourth Amendment to the United States Constitution provides, in pertinent part, that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated...” U.S. CONST. amend. IV. The Fourteenth Amendment to the United States Constitution provides, in pertinent part, “...[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...” U.S. CONST. amend. XIV, § 1.


\textsuperscript{17} See supra, Litchman, note 16

\textsuperscript{18} Theodore, 761 A.2d at 654.

\textsuperscript{19} Id.
Safety Administration approved breath testing device. Trained medical personnel in the school nurse's office collect the urine and blood samples, which are then sent to a laboratory that performs a split sample method of testing, following the procedures required by the Substance Abuse and Mental Health Services Administration.

If a student tests positive, a medical officer first notifies the student and his or her parents of the positive result, at which time the student may then opt out of the activity in which they are participating without the school ever being notified of the positive results. The school principal and various other school officials are notified of positive test results only if the student decides not to opt out of the activity in which they are participating. The school principal, upon notification of positive test results, is required to hold a conference with the student's parents; additionally, the student is required to, a) participate in a drug/alcohol assessment with a certified evaluator, b) participate in a drug/alcohol assistance program, c) submit to six weeks of weekly drug testing, d) receive a temporary suspension of the right to participate in activities or drive to school, and, e) have a negative test result prior to returning to the activity.

Jennifer Lynn Theodore possessed driving privileges and participated in the National Honor Society, the Science Olympiad, and the Scholastic Bowl. Kimberly Ann Theodore participated in tennis, swimming, and track and also possessed driving privileges. Jennifer and Kimberly, along with their parents, brought an action before the trial court challenging the constitutionality of

20. Id.
21. Id. The method of testing used cannot reveal any medical condition other than the presence of intoxicants. Id. Students are also required to reveal to the school principal or sponsor of the extracurricular activity any therapeutic drugs that the student is taking and must additionally provide a written certification from the students' physician stating that the drug will not inhibit the students' ability to safely participate in the activity. Id. at 654 n.7.
22. Id. at 654.
23. Theodore, 761 A.2d at 654-55. The school principal will also be notified of positive test results if the student's parents cannot be located. Id. at 655 n.11.
24. Id. at 655. A student who tests positive for drugs or alcohol twice is suspended for one calendar year from driving to school or participating in any extracurricular activities and must have a negative test result to return to the activity the following year. Id. A student who tests positive for drugs three times is banned from participating in any extracurricular activity or driving to school for the remainder of his time in the school district. Id.
25. Id. at 655 n.13.
26. Id.
Policy 227, as applied to them, as being violative of their right to privacy protected by Article I, § 8 of the Pennsylvania Constitution and sought injunctive relief to end the testing.27

Section II of this comment will review the United States Supreme Court's jurisprudence on the issue of suspicionless searching under the Fourth Amendment to the United States Constitution, from the Court's first review of the issue to the Court's resolution of the issue at hand. Section III of this comment will examine the state of the law in Pennsylvania regarding suspicionless drug and alcohol testing of school students wishing to participate in any extracurricular activity under Article I, § 8 of the Pennsylvania Constitution. Article I, § 8 of the Pennsylvania constitution often provides greater protection than the Fourth Amendment of the United States Constitution due to the fact that the core of the state's exclusionary rule is the protection of privacy, while the federal exclusionary rule aims at deterring police misconduct.28

II. THE UNITED STATES SUPREME COURT'S VIEW OF SUSPICIONLESS SEARCHES UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

One of the United States Supreme Court's first opportunities to establish the constitutional limits of a school official's search of a student arose in New Jersey v. T.L.O.29 T.L.O., a 14 year-old high school student, was one of two girls discovered smoking in a school lavatory.30 The students were taken to the school Principal's office, where they met with the Assistant Vice Principal, who asked T.L.O. to come into his private office for further questioning.31 In his office, the Assistant Vice Principal took and opened T.L.O.'s purse, finding a pack of cigarettes.32 Removing the cigarettes from

27. Id. at 655. Article I, § 8 of the Pennsylvania Constitution provides, in pertinent part, that "[t]he people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures..." P.A. CONST. art. I, § 8.
28. Theodore, 761 A.2d at 656. The United States Supreme Court, in Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989), states that an essential purpose of the Fourth Amendment's warrant requirement is to ensure that searches and seizures are not arbitrary acts of government officials and are authorized by law. Skinner, 489 U.S. at 621-22.
30. Id. at 328.
31. Id. T.L.O. denied that she had been smoking, in fact, T.L.O. denied being a smoker at all; presumably, this is why the Assistant Vice Principal asked T.L.O. to come into his office for further questioning. Id.
32. Id.
the purse revealed a package of cigarette rolling papers.\textsuperscript{33} Upon
seeing the cigarette rolling papers, the Assistant Vice Principal proceeded to carry out a thorough search of the entire purse, finding marijuana, drug paraphernalia and evidence that tended to implicate T.L.O. in marijuana dealing.\textsuperscript{34}

In response to the State’s filing of delinquency charges against her, T.L.O. moved to suppress the evidence found during the search of her purse as being found in violation of the Fourth Amendment’s protection from unreasonable searches and seizures.\textsuperscript{35} Thus, the \textit{T.L.O.} Court was faced with addressing the proper standard for determining the legality of searches of public school students conducted by public school teachers.\textsuperscript{36}

Justice White first explained that the reasonableness of a search under the Fourth Amendment is determined with regard to the context in which the search takes place.\textsuperscript{37} Determining the reasonableness of the search, the Court explained, is accomplished by balancing the individual’s legitimate expectation of privacy with the government’s need to effectively protect the public order.\textsuperscript{38} Moreover, where this balancing suggests that the most effective way to serve the public interest is to apply a Fourth Amendment standard somewhere short of probable cause, the Court will not hesitate to sanction such a standard.\textsuperscript{39} The majority then determined that, rather than requiring probable cause before a public school official may search a child, the legality of the search should depend on the reasonableness of the search viewed in light of all the circumstances.\textsuperscript{40} Thus, the \textit{T.L.O.} Court con-

\textsuperscript{33} \textit{Id.}

\textsuperscript{34} \textit{T.L.O.}, 469 U.S. at 328. The Assistant Vice Principal stated that, “in his experience, possession of rolling papers by high school students was closely associated with the use of marijuana.” \textit{Id.}

\textsuperscript{35} \textit{Id.} at 329.

\textsuperscript{36} \textit{Id.} at 328. The Court first determined that the Fourth Amendment prohibition of unreasonable searches and seizures applies to school officials through operation of the Fourteenth Amendment, being that public school officials are officers of the state. \textit{Id.} at 333-34.

\textsuperscript{37} \textit{Id.} at 337.

\textsuperscript{38} \textit{Id.}

\textsuperscript{39} \textit{T.L.O.}, 469 U.S. at 341. The majority stated that the school setting requires some easing of the Fourth Amendment restrictions that public officials are ordinarily subject to because requiring a warrant to be obtained before searching children suspected of violating school rules would impede the maintenance of the swift and informal disciplinary procedures necessary in schools. \textit{Id.} at 340.

\textsuperscript{40} \textit{Id.} at 341. Reasonableness, the Court explained, is determined by first determining whether the search was justified when it was initiated, and second, determining whether the search conducted was reasonably related in scope to the circumstances justifying the initiation of the search. \textit{Id.}
cluded that ordinarily, a search of a student by a public school official will be justified when it is initiated pursuant to reasonable grounds for suspecting that the search will reveal evidence that the student has violated either school policy, or the law.\textsuperscript{41} Further, a search of a student by a public school official will be reasonable in its scope if, in light of the age and sex of the student, as well as the nature of the suspected infraction, the search is not excessively intrusive and is reasonably related to the objectives of the search.\textsuperscript{42}

Applying the standard explained above, the majority determined that the search of T.L.O.'s purse was reasonable; the Assistant Vice Principal was entitled to act on the reasonable probability that T.L.O.'s purse would contain cigarettes and finding the cigarette rolling papers provided him with the suspicion necessary to conduct a more thorough search of the purse.\textsuperscript{43}

The United States Supreme Court first had the opportunity to rule on the constitutionality of suspicionless drug testing in 1989, with the companion cases of \textit{Skinner v. Railway Labor Executives' Association}\textsuperscript{44} and \textit{National Treasury Employees Union v. Von Raab}\textsuperscript{45}, both cases decided on the same day.

In \textit{Skinner}, the Court was faced with deciding the constitutionality of regulations passed by the Federal Railroad Administration ("FRA") mandating blood and urine tests of employees who were involved in certain train accidents and authorizing, but not requiring, breath and urine testing of employees who violated safety rules.\textsuperscript{46} The FRA passed these regulations in response to its findings that alcohol and drug abuse by employees posed a serious threat to the safety of both railroad employees and the general public.\textsuperscript{47}

Pursuant to the regulations, after an event that triggers the drug testing requirements of the regulations, all crew members from the train involved in the incident must be transported to an

\textsuperscript{41} \textit{Id.} at 341-42.
\textsuperscript{42} \textit{Id.} at 342.
\textsuperscript{43} \textit{T.L.O.}, 469 U.S. at 343-47.
\textsuperscript{44} 489 U.S. 602 (1989).
\textsuperscript{45} 489 U.S. 656 (1989).
\textsuperscript{46} \textit{Skinner}, 489 U.S. at 606.
\textsuperscript{47} \textit{Id.} Through a review of accident investigation reports, the FRA found that from 1972 through 1983 at least 21 significant train accidents involved alcohol or drug use, either as the causative factor or as a contributing factor. \textit{Id.} at 607. Further, the FRA, through its review of accident reports, found that alcohol or drugs were either a causative or contributing factor in 17 fatalities to railroad employees. \textit{Id.}
independent medical facility for the collection of blood and urine samples. The samples are then sent to the FRA laboratory where they are analyzed to detect the presence of alcohol or drugs. Employees are then notified of the results of the testing and, prior to a final investigative report being prepared, have an opportunity to respond in writing.

The Railway Labor Executives' Association, and others, brought suit seeking injunctive relief from the FRA's regulations arguing that the testing was a violation of the Fourth Amendment's protection from unreasonable searches and seizures.

The *Skinner* Court first established that the testing of breath, the collection of blood samples and the collection of urine samples are all intrusions that must be scrutinized under the Fourth Amendment. Next, the Court reviewed its precedent regarding Fourth Amendment searches and seizures, stating that, when faced with special needs beyond the normal need for law enforcement, it is necessary to undergo a balancing test of the governmental interests with the legitimate privacy interests of the individual in order to determine whether a warrant or probable-cause are required before the search may be conducted. Finally, the majority found that in circumstances where the privacy interests invaded by the search are minimal, and where an important governmental interest would be frustrated by the requirement of individual suspicion, a search may be conducted even in the absence of such suspicion.

The *Skinner* Court then had to determine whether the collection of urine samples from the railway employees, in the absence of individualized suspicion, was unreasonable under the Fourth

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48. *Id.* at 609.
49. *Id.* at 609-10
50. *Id.* at 610.
52. *Id.* at 616-17. The Court explains that any intrusion upon expectations of privacy that society recognizes as reasonable, which the expectation of privacy in our blood, breath and urine are, must be deemed searches under the Fourth Amendment. *Id.*
53. *Id.* at 619. The majority found that the drug testing in question was the result of a special need beyond law enforcement because the goal of the testing was not to assist in prosecution of railroad employees, rather it was implemented to prevent railroad accidents and casualties. *Id.* at 620-21. Further, because requiring the railroad to obtain a warrant would frustrate the purpose behind the search due to the delay in testing that would necessarily occur if a warrant were required, the Court determined that it was not necessary for the railroad to obtain a warrant for the drug testing. *Id.* at 623.
54. *Id.* at 624.
Amendment. In finding that the collection of urine samples for drug testing without individualized suspicion was reasonable under the Fourth Amendment, Justice Kennedy recognized that the collection required railway employees to perform an excretory function traditionally shielded by great privacy, however, the regulations were found to reduce the intrusiveness of the collection process by not requiring the direct observation of a monitor and also providing that the sample be collected in a medical environment. Further, the Court stated that the expectations of privacy of employees covered by the FRA regulations were diminished simply due to their participation in an industry so pervasively regulated as the railway industry. Thus, because the government's compelling interests served by the regulations would be significantly hindered by requiring railroads to possess individualized suspicion of impairment prior to testing employees for drug use and because the testing is not an unreasonable infringement on railway employees legitimate expectations of privacy, the Skinner Court held that the government's interests outweighed the privacy concerns of the employees and that the testing was constitutional.

In Von Raab, the United States Supreme Court was faced with the issue of whether a policy of the United States Customs Service ("Customs") requiring employees seeking to be promoted into certain positions to submit to mandatory drug testing violates the Fourth Amendment. The Customs policy was implemented because, as the Commissioner of Customs stated, "drug interdiction has become the agency's primary enforcement mission, and . . . 'there is no room in the Customs Service for those who break the laws prohibiting the possession and use of illegal drugs.'" Customs positions meeting one or more of the following three criteria were covered by the policy: (1) direct involvement in drug interdiction or enforcement of related laws; (2) a requirement that the employee carry firearms; (3) a requirement that the employee handle "classified" material.

55. Id. at 626. Before reaching the issue of the collection of urine samples, the Court determined that breath testing and the collection of blood samples without suspicion are both reasonable procedures under the Fourth Amendment. Id. at 624-26.
56. Skinner, 489 U.S. at 626.
57. Id. at 627.
58. Id. at 633.
59. Von Raab, 489 U.S. at 659.
60. Id. at 680.
61. Id. at 660-61.
The testing process begins with an independent contractor collecting a urine sample from the employee. The employee must remove any outer garments and personal belongings, and then produces the sample either behind a partition, or in a closed stall, while a monitor of the same sex listens to ensure that the employee does not tamper with the sample. The monitor then examines the sample to ensure that it is the proper temperature and color, seals the sample and submits it to a laboratory for testing after the employee signs a chain of custody form. Positive test results are submitted to a Medical Review Officer who, after verifying the positive result, relays the information to Customs. Employees who test positive for drugs, and can offer no satisfactory explanation, may be terminated from employment with Customs, however, the results will not be submitted to aid in prosecution of the employee.

The Von Raab Court, applying the 'special needs' test that it applied in Skinner, determined that the Customs' drug testing policy, as applied to positions falling in the first two criteria stated above, is reasonable under the Fourth Amendment, however, declined to rule on whether the policy was constitutional as applied to positions falling within the third criteria stated above. The majority explained that Customs employees directly involved with the interdiction of illegal drugs, or required to carry a firearm, have a diminished expectation of privacy due to the nature of such positions and, balancing these diminished privacy interests with the government's interest in performing the test, the majority found that the government's interest outweighed the employees' privacy interests. Because the government's interest in safeguarding our borders and protecting the public safety outweighs the diminished privacy expectations of employees seeking to be promoted to positions covered under the first two criteria of the

62. Id. at 661.
63. Id.
64. Von Raab, 489 U.S. at 662.
65. Id.
66. Id. at 663.
67. Id. at 665-66, 672, 677. The Court found that because the test results could not be used to prosecute the employees, and that the purpose of the program was to deter drug use among those eligible for promotion to sensitive Customs positions, that the testing served special needs beyond those of ordinary law enforcement. Id. at 666. The Court declined to rule on the reasonableness of the policy as applied to positions falling within the third criterion because it was not clear that all the positions listed as covered under that criterion would have access to "classified" material. Id. at 677-78
68. Id. at 672.
policy and due to the minimally intrusive nature of the testing procedure, the Court held that the suspicionless drug testing of such employees was reasonable under the Fourth Amendment. 69

The United States Supreme Court's first opportunity to rule on the constitutionality of suspicionless drug testing in the public school setting arose in *Veronia School District 47J v. Acton.* 70 In the fall of 1989, School District 47J in the town of Veronia, Oregon adopted the Student Athlete Drug Policy ("Policy") which provides for random urinalysis drug testing of all students who wish to participate in school athletic programs. 71 The stated purpose of the drug testing policy was, "to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs." 72

The Policy was adopted in response to a substantial increase in drug use by the school district's students reported by school teachers and administrators. 73 In School District 47J, the student athletes were shown to be the leaders of this growing drug culture, which caused even greater concern to the district because of the risk of severe, sports-related injuries that could result from athletes using drugs. 74

The Policy requires any student wishing to participate in school athletic programs to sign a consent form authorizing the testing of the student's urine for the presence of drugs before the season for their sport begins, and also authorizing the random testing of 10% of the students participating in the particular sport each week. 75

The testing procedure begins with the student entering an empty locker room in which the student produces a urine sample at a urinal while a monitor of the same sex observes from approximately 15 feet behind the student, listening for the normal sounds of urination. 76 The sample is then given to the monitor, who checks its temperature and places it in a vial for transmittal

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72. *Id.* at 650.
73. *Id.* at 648. Incident to the increase in drug use, teachers witnessed a nearly three-fold increase in classroom disruptions and disciplinary reports. *Id.*
74. *Id.* at 649. The high school football and wrestling coach witnessed players on the football team disregarding safety procedures and not executing properly on the field and also witnessed a serious sternum injury sustained by a wrestler, all of which, the coach felt, were attributable to drug use. *Id.*
75. *Id.* at 650.
76. *Veronia*, 515 U.S. at 650. Female students are permitted to produce samples in a stall behind a closed door. *Id.*
to an independent laboratory that performs the testing on the sample. The results of the test are made available only to the superintendent, principal, vice-principal and athletic directors and are not kept longer than one year.

Upon confirmation of positive test results through a second test, a meeting is held between the school principal, the student and the student's parents. The first time the results of a student's drug test are positive, the student is given the option of attending an assistance program for six weeks that includes weekly drug testing, or being barred from participating in the particular sport for the rest of the season. A second positive test result subjects a student to automatic suspension from the particular sport for the remainder of the season, while a third positive test result bars a student from participating in the particular sport for the remainder of the season in addition to the next two seasons.

James Acton, a football player, refused to submit to the drug testing, and was thus excluded from participation on the football team. Consequentially, Acton filed suit in federal district court seeking declaratory and injunctive relief from the application of the Policy, arguing that the Policy violated the Fourth and Fourteenth Amendments to the United States Constitution.

The Court, in addressing the constitutionality of the Policy, determined that the 'special needs' test set forth in Skinner should control. Addressing the balancing of the governmental interest in performing the testing against the privacy interest of the students, the majority stated that Fourth Amendment rights are different in public schools than elsewhere due to the school's custodial and tutelary responsibility for the students. Justice Scalia then pointed out that the student athletes have a diminished expectation of privacy due to the fact that they undress in the presence of one another in the locker room before each practice or

77. Id. The test performed by the laboratory can detect amphetamines, cocaine and marijuana, although other drugs can be screened for upon the school district's request. Id. at 650-51.
78. Id. at 651.
79. Id.
80. Id.
81. Veronia, 515 U.S. at 651.
82. Id.
83. Id. Acton also challenged the policy on the grounds that it violated Article I, § 9 of the Oregon Constitution. Id. at 651-52.
84. Id. at 653. The Court relied on its decision in T.L.O., 469 U.S. 325, in finding that "special needs" are present in the public school system. Veronia, 515 U.S. at 653.
85. Veronia, 515 U.S. at 656.
event and also because they are required to undergo a physical examination prior to the season of the sport in which they participate, both circumstances which are engaged in voluntarily by the student athlete.\footnote{Id. at 656-57}

The Court then turned to the character of the intrusion occasioned by the collecting of the urine samples. The majority explained that the collection of the sample is performed under circumstances nearly identical to those encountered daily in public restrooms, and thus, that the privacy interests invaded by the collection were negligible.\footnote{Id. at 658.} Further, the fact that the test performed on the students’ urine could reveal only the presence of drugs, and not any medical conditions, as well as the fact that the results of the test are disclosed only to a small number of school officials with a need to know and not to law enforcement officials, Justice Scalia explained, establishes that the drug testing is not a significant invasion of the students’ privacy.\footnote{Id. at 659.}

Finally, the Veronia Court addressed the immediacy of the government’s interest in testing the student athletes for evidence of drug use. The Court stated that the government’s interest need only be important enough to justify the particular search in question and that deterring drug use by school children is at least as important as the government’s interests in \textit{Skinner}, and \textit{Von Raab}. The majority also pointed out that the Policy is narrowly tailored to apply to student athletes, to whom a great risk of severe bodily harm is associated if their drug use were allowed to continue and who were leaders of the growing drug culture.\footnote{Veronia, 515 U.S. at 662-63.}

Based on the diminished expectation of privacy of student athletes, the negligible intrusion upon the students’ privacy interest and the important governmental interest furthered by the Policy, the Court held that the Policy did not violate the Fourth Amendment.\footnote{Id. at 664-65.} Justice Scalia emphasized, however, that the most significant element of this decision was that the Policy was implemented in furtherance of the government’s duties as guardian of the students in its school systems.\footnote{Id. at 665.}
In *Chandler v. Miller*, the Court was faced with the issue of whether a Georgia statute requiring candidates for certain state offices to certify that they had taken a drug test and passed before they could be placed on the ballot violated the Fourth Amendment. The *Chandler* Court declined to apply the 'special needs' test in determining the Constitutionality of the Georgia statute, explaining that the incompatibility of drug use with holding state office combined with the lack of concrete danger from such incompatibility was not enough to justify applying the 'special needs' exception to the Fourth Amendment. The majority went on to find that the governmental interest furthered by Georgia's policy was symbolic, rather than special, and that the purpose of the statute was to display Georgia's commitment to the fight against drug abuse. Finally, Justice Ginsburg underscored the concept of where there is a substantial risk to public safety, blanket suspicionless searches may be reasonable, however, if there is no risk to public safety, suspicionless searches will not withstand Fourth Amendment scrutiny.

Finally, in *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*, the United States Supreme Court had occasion to decide the issue that is the focus of this article, whether mandatory drug testing of all public school students wishing to participate in extracurricular activities is reasonable under the Fourth Amendment. The facts of this case, including details of the testing policy and procedure in question, are discussed above in the introduction section.

The Court began its discussion of the issue by stating that the Fourth Amendment does not require individualized suspicion prior to a search in every instance, rather when the government possesses special needs, other than the need for law enforcement, suspicionless searches may be permitted. Justice Thomas then

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93. Id. at 308.
94. Id. at 318-19. Georgia was not able to show any evidence of drug abuse by a state official. Id. at 319. The majority pointed out that, although a demonstrated problem of drug abuse is not necessary to the constitutionality of a drug testing policy, evidence of drug use may clarify the dangers posed by such use. Id.
95. Id. at 322.
96. Id. at 323.
98. Id. at 2564.
acknowledged that special needs are present within the public school system.\(^99\)

The respondents argued that unlike the student athletes in *Veronica*, the class of students at issue in this case are not subject to regular physical examinations and communal undress and thus possess a stronger privacy interest than the student athletes.\(^100\) The majority disagreed with the respondents, stating that the privacy interest of the class in question is similar to that of the student athletes because even the nonathletic extracurricular activity participants occasionally require off campus trips and communal undress, and further, each activity has its own set of rules and requirements for participating students.\(^101\)

The *Earls* Court next turned its attention to the character of the intrusion created by the drug testing procedure. Finding that the procedure in question here was nearly identical to the procedure upheld as a minimal intrusion in *Veronica*, except for the added protection of allowing a student to produce a sample behind a closed stall door, the majority held that the procedure was a "negligible" intrusion.\(^102\) Moreover, because the results of the testing were released only to those with a need to know, and not to law enforcement officials; and because the only consequence of positive test results is a limitation on a student's right to participate in an activity, the Court held the testing policy creates only a minimal intrusion on students' right to privacy.\(^103\)

Finally, Justice Thomas discussed the government's concerns and whether the policy was an effective means of abating those concerns. The Court stated that although the school district presented evidence of drug use at its schools, it is not a prerequisite to the validity of a suspicionless drug testing program to show a demonstrated drug abuse problem.\(^104\) Rather, "the need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school [drug] testing policy."\(^105\) Justice Thomas then explained that although the student athletes in *Ve-
were subject to the possibility of serious injury while playing sports under the influence of drugs, the nonathletic class of extracurricular activity participants in question in this case is subject to a variety of health risks, including death, as a result of drug use.\footnote{Id.}

After applying the "special needs" balancing test, and determining that the government's interest in conducting the testing outweighed the intrusion on the privacy interest of the students, the Earls Court held that the policy of mandatory drug testing for all students wishing to participate in extracurricular activities was constitutional under the Fourth Amendment.\footnote{Id., 122 S. Ct. at 2569.}

III. PENNSYLVANIA COURTS' VIEW OF SUSPICIONLESS SEARCHES WITHIN THE PUBLIC SCHOOL CONTEXT UNDER ARTICLE I, § 8 OF THE PENNSYLVANIA CONSTITUTION

The Pennsylvania Supreme Court case that establishes the requirements of a valid suspicionless search within the public school setting is In the Interest of F.B.\footnote{726 A.2d 361 (Pa. Commw. Ct. 2000).} In re F.B. involved a high school student who was found to be carrying a knife during a point of entry metal detector search at his high school.\footnote{Id. at 363.} At trial, the appellant moved to suppress the knife on the basis that it was found during a search conducted without individualized suspicion of his wrongdoing and, as such, was conducted in violation of Article I, § 8 of the Pennsylvania Constitution.\footnote{Id. at 364.} The court identified four considerations that must be addressed in determining the constitutionality of a suspicionless, general search within the public school context: "1) a consideration of the students' privacy interest, 2) the nature of the intrusion created by the search, 3) notice, and 4) the overall purpose to be achieved by the search and the imme-

\footnotesize{106. Id. This statement by Justice Thomas seems to skew the safety aspect discussed in both Veronia, 515 U.S. at 662-63, which focused on the possibility of severe bodily injury as a result of the activity itself, and Chandler, 520 U.S. at 323, which focused on a risk to public safety.

107. Earls, 122 S. Ct. at 2569.


109. Id. at 363. The school notified students and parents prior to the start of each school year that it is the school's policy to conduct, in certain instances, point of entry metal detector searches of all students entering the school. Id. The appellant was found to be carrying a Swiss Army Knife with a three inch blade and was then arrested for bringing a weapon onto school property. Id.

110. Id. at 364.
diate reasons prompting the decision to conduct the actual search. 111

The majority first discussed the students' privacy interest, finding that students possess a limited expectation of privacy concerning their person and belongings, although the expectation is more substantial in this instance than it is with regard to their lockers. 112

The court then discussed the character of intrusion created by the search, finding that the search of a person always involves a greater intrusion than the search of a thing, but that the character of intrusion suffered by the students subject to the search is no greater than that of a person passing through the metal detectors at the entrance of an airport. 113

Justice Cappy then explained that the school had satisfied the notice requirement through making available the Philadelphia Public School Policy and Procedure Manual which explained the search procedure, as well as routinely mailing notices to the students' homes and posting of notices throughout the school. 114

The majority then examined the overall purpose to be achieved by the search and the immediate reasons prompting the decision to conduct the actual search. The overall purpose to be achieved by the search is to keep weapons out of the schools, and "there can exist no logical argument opposing the decision of a public school board to prohibit students, or anyone else, from entering [a] school with weapons in their possession. 115

In conclusion, because the search "affected a limited privacy interest, was minimally intrusive, notice . . . was provided to the student population, parents and community, and the purpose for the search was compelling . . . ," the Pennsylvania Supreme Court

111. Id. at 365. Justice Cappy went on to explain that, because the Pennsylvania constitution affords more protection under Article I, § 8 than does the United States Constitution under the Fourth Amendment, if a search is found to be reasonable under the Pennsylvania Constitution, then it will in turn be reasonable under the Fourth Amendment. Id.
112. Id.
113. In re F.B., 726 A.2d at 366. This was found to be so even though the school search involved the use of hand held scanners and physical inspection of bags, while airport security utilizes walkthrough metal detectors and X-ray machines. Id.
114. Id.
115. Id. at 367. The reason that the search was conducted on that particular day was not given, but the school's policy states that the searches may be conducted when school staff or the school district becomes aware of information which indicates an increased likelihood of violence in the school or on school property. Id.
held that the search of the appellant was constitutional under both the Pennsylvania and United States constitutions.\textsuperscript{116}

On November 6, 2000, approximately two years prior to the United States Supreme Court's decision upholding suspicionless drug testing of all students wishing to participate in extracurricular activities in \textit{Earls}, the Pennsylvania Commonwealth Court held a similar policy to be a violation of Article I, § 8 of the Pennsylvania Constitution in \textit{Theodore v. Delaware Valley School District}.\textsuperscript{117} The facts of \textit{Theodore}, as well as details of the policy and drug testing procedure, are discussed above in the introduction section.

The students challenged the drug testing mandated by Policy 227 because it was conducted without individualized suspicion and was limited only to students wishing to drive to school or participate in extracurricular activities.\textsuperscript{118} The court began its examination of the issue by stating that, to satisfy Article I, § 8, a search must not only be based upon a compelling interest, but the intrusion must also be a means of effecting that interest.\textsuperscript{119} The majority then recited the four factors articulated in \textit{In re F.B.} to be considered when determining the constitutionality of a general, suspicionless search within the public school context. Judge Pellegrini opined that "where the nature of the intrusion in this case is for health care and there are only civil consequences from refusing to consent, privacy interests of the student body seem to give way to both ensuring a particular student's health and ensuring the health of others", however, this case differs from \textit{In re F.B.} in that the policy does not generally apply to all students, rather it requires testing of only a select group of students.\textsuperscript{120}

The majority first turned its attention to the privacy interest of the students, finding that because of the custodial nature of the relationship between the school and its students, the need to protect other students attending school, and the need for students to be healthy enough to learn, students have a lowered expectation of privacy.\textsuperscript{121} However, the court cautioned that a student's expectation of privacy is not lower than another student's simply by vir-

\begin{itemize}
\item \textsuperscript{116} \textit{Id.} at 368.
\item \textsuperscript{117} 761 A.2d at 661.
\item \textsuperscript{118} \textit{Id.} at 656.
\item \textsuperscript{119} \textit{Id.}
\item \textsuperscript{120} \textit{Id.} at 657-58.
\item \textsuperscript{121} \textit{Id.} at 659.
\end{itemize}
tue of his or her voluntary participation in an extracurricular activity.\textsuperscript{122}

The court next examined the nature of the intrusion occasioned by the drug testing. Judge Pellegrini explained that the methods used to obtain breath and urine samples were minimally intrusive because the urine sample is obtained under conditions similar to those in a public restroom, and the breath sample is collected under conditions similar to those at a sobriety checkpoint.\textsuperscript{123} Further, the majority stated that the collection of blood samples was also minimally intrusive because students are periodically subjected to other mandatory injections that are more intrusive than the ones at issue here, including some that involve placing highly contagious substances into a student's body.\textsuperscript{124} Next, addressing the notice consideration, Judge Pellegrini stated that the intrusiveness of the procedure is lessened even more due to the fact that students receive notice of the policy and must consent to the procedures before they are allowed to participate in extracurricular activities.\textsuperscript{125}

Finally, the court addressed the governmental interest involved and whether the policy was an effective means of carrying out that interest. The government's stated purpose for the policy was "to protect the health of students by the prevention of accidents and injuries resulting from the use of alcohol and controlled substances, discouraging its use and providing assistance programs."\textsuperscript{126} The school district failed, however, to articulate any special need to test only students choosing to participate in extracurricular activities.\textsuperscript{127} The majority then held that, without a showing of special need to test the particular group in question, the policy is violative of the students' expectation of privacy from unreasonable searches and seizures under Article I, § 8 of the Pennsylvania Constitution.\textsuperscript{128} Judge Pellegrini cautioned, however, that if the school can show a special need to test a particular group, such as the student athletes in \textit{Veronia}, the policy would not violate any constitutional right.\textsuperscript{129}

\begin{itemize}
\item \textsuperscript{122} Theodore, 761 A.2d at 660.
\item \textsuperscript{123} Id.
\item \textsuperscript{124} Id. at 660-61.
\item \textsuperscript{125} Id. at 661.
\item \textsuperscript{126} Id. at 661.
\item \textsuperscript{127} Theodore, 761 A.2d at 661.
\item \textsuperscript{128} Id.
\item \textsuperscript{129} Id.
\end{itemize}
IV. CONCLUSION

The Pennsylvania Supreme Court granted the Delaware Valley School District's petition for allowance of appeal on July 17, 2001. Although, it is not for this writer to speculate upon how the Pennsylvania Supreme Court will rule on this matter, it can be said that without a showing of a special need to test any particular group of students, a suspicionless drug testing regime will not be upheld. Justice Cappy made it abundantly clear, in his opinion in *Theodore*, that a testing policy aimed at student athletes would withstand constitutional scrutiny.

It remains to be seen whether, if provided with an articulated special need to test all students wishing to participate in extracurricular activities, the Pennsylvania Supreme Court will make the same connection between the diminished privacy interest of student athletes and that of students wishing to participate in nonathletic extracurricular activities that the United States Supreme Court did in *Earls* in determining the constitutionality of suspicionless drug testing of all students wishing to participate in extracurricular activities. Perhaps the Pennsylvania Supreme Court will find that the conditions of communal undress, experienced by student athletes frequently after practices and games, are substantially different from sharing a room or bathroom with other students that may be required periodically of nonathletic extracurricular activity participants. If so, the court may disagree with the United States Supreme Court and find that the students' privacy interests outweigh the interest of the government in conducting the testing since Justice Cappy already made it clear that a student does not have a lesser expectation of privacy than others simply by virtue of his or her participation in an extracurricular activity. Whether one agrees with the concept of suspicionless drug testing of all students wishing to participate in extracurricular activities or not, the United States Supreme Court has held that it is constitutional under the Fourth Amendment leaving all eyes on the Pennsylvania Supreme Court, which will soon determine if it is constitutional under Article I, § 8 of the Pennsylvania Constitution.

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132. *Id.* at 660.