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***Bd. of Educ. of Indep. Sch. Dist. No. 92  
of Pottawatomie County v. Earls:***

**Mandatory, Suspicionless Drug Testing of Public School Students Participating in Extracurricular Activities is a Constitutionally Reasonable Intrusion that Furthers a Public School's Legitimate Interest in Deterring Drug Use**

By: Jennifer Merrill

In a five-to-four decision, the United States Supreme Court held mandatory, suspicionless drug testing of public high school students participating in extracurricular activities is a constitutionally reasonable intrusion that furthers a public school's legitimate interest in deterring drug use among children. *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls*, 122 S.Ct. 2559, 2562 (2002). The Court further held a public school need not demonstrate a pervasive drug problem among the population subject to testing to warrant the intrusion. *Id.* at 2568. In so ruling, the Court determined the government's compelling interest in preventing and eradicating drug use among children in the United States outweighs the limited privacy expectations held by public middle and high school students. *Id.* at 2568-69.

In the fall of 1998, the Tecumseh, Oklahoma School District ("School District") implemented the Student Activities Drug Policy ("Policy"). The Policy required all public middle and high school students to submit to suspicionless drug testing as a

prerequisite to participation in any extracurricular school activity and to adhere to random testing during participation in the activity. The Policy further obligated students to comply with testing at anytime upon "reasonable suspicion." Testing was conducted through urinalysis screening designed only to detect the presence of illegal drugs. While the Policy applied to all extracurricular activities, in practice, it was only used to test students participating in competitive activities such as band, athletics, and the Academic Team.

Tecumseh High School students, Lindsay Earls and Daniel James, filed a 42 U.S.C. § 1983 action against the School District in the United States District Court for the Western District of Oklahoma. The students requested injunctive and declarative relief based on their assertion that the Policy violated the Fourth Amendment.

Relying on the ruling in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) wherein the Supreme Court upheld suspicionless drug testing of public high school athletes, the trial court granted summary judgment for the School District. The Court of Appeals for the Tenth Circuit reversed and

declared the Policy unconstitutional, holding that "before imposing a suspicionless drug testing program . . . 'a school must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing.'" *Earls*, 122 S.Ct. at 2563 (*quoting Earls v. Bd. of Educ.*, 242 F.3d 1264, 1278 (10<sup>th</sup> Cir. 2001)). The United States Supreme Court granted certiorari to determine whether the School District must first identify that a substantial drug abuse problem exists among the students to be tested to justify the mandatory testing.

The Court began its analysis by recognizing the type of search conducted by the School District was an administrative search. *Id.* at 2564. The Court explained that a showing of probable cause is not necessary in an administrative search not associated with law enforcement. *Id.* Furthermore, an administrative search does not require any showing of individualized suspicion. *Id.* The Court stated the proper standard for determining whether an administrative search is reasonable is whether the government can show

a special need exists to discover the presence of, or prevent the development of, dangerous hidden conditions. *Id.*

Next, the Court addressed the privacy expectations held by students attending public middle and high schools. *Id.* at 2565. A public school student's privacy interest is "limited in a public school environment where the State is responsible for maintaining discipline, health and safety." *Earls*, 122 S.Ct. at 2565 (quoting *Vernonia Sch. Dist.*, 515 U.S. at 656. The Court concluded because students submit to additional regulations beyond general school policies when participating in an extracurricular activity, students have an even further diminished expectation of privacy. *Id.*

The Court then assessed the nature of the intrusion imposed by the drug testing on the students in the present case and determined that it was nominal. *Id.* at 2566-67. The School District conducted minimally invasive urinalysis tests for the sole purpose of detecting illegal drugs and the results were not turned over to law enforcement authorities. *Id.* Furthermore, the School District only divulged test results to other school personnel on a "need-to-know basis." *Id.* at 2566. Moreover, a student was given two chances to cure a positive test and was required to receive substance abuse counseling before being suspended from the activity. *Id.* at 2567. Finally, the only penalty for "failing" the drug test was exclusion from the extracurricular activity

for the greater of the rest of the school year, or eighty-eight school days, and not dismissal from school. *Earls*, 122 S.Ct. at 2567.

Next, the Court considered the nature of the government's concerns and the effectiveness of the Policy in addressing these concerns. *Id.* The Court noted the School District's interest in protecting its students from drug use was immediate and thus a special need considering the epidemic nature of drug use in the nation today. *Id.* Rejecting the decision of the court of appeals, the Supreme Court declared "[a] demonstrated problem of drug abuse is not necessary to the validity of a testing regime." *Id.* at 2567-68 (quoting *Chandler v. Miller*, 520 U.S. 305, 319 (1997)). However, the Court recognized the School District did provide specific evidence of a few occasions of drug use at the Tecumseh schools that bolstered the justification for testing. *Id.* at 2567.

Respondents asserted the testing of extracurricular students did not serve to address any safety concerns as is generally required in a special needs analysis. *Id.* at 2568. The Court stated the health risks associated with drug use constituted a proper safety concern to satisfy the special needs test for administrative searches. *Earls*, 122 S.Ct. at 2568. The Court also rejected the argument set forth by respondents that drug testing should be premised on individualized suspicion by reasoning such testing may unfairly target students of certain groups. *Id.* at 2568-69.

A lengthy dissent asserted the majority targeted "a student population least likely to be at risk from illicit drugs and their damaging effects" and thus did not serve any compelling government interest. *Id.* at 2572, 2577 (Ginsburg, J. dissenting). The dissent further opined the majority overstepped its bounds and expanded the *Vernonia* precedent too broadly. *Id.* The proper test, as suggested by the dissent, should consider a totality of the circumstances and a "fact-specific balancing" that weighs the privacy expectations of the group to be tested with the government's interests in addressing immediately identifiable and present safety concerns specific to the targeted group. *Id.* at 2574.

*Earls* increases the chance that Maryland public school students may be subject to mandatory, suspicionless drug testing. This decision also expands the scope of administrative searches by allowing the government to utilize broad concepts of special need as justification for such searches. By allowing a special need showing based on a sweeping, nationwide problem, the Court may allow other agencies to expand the scope of potential administrative special need searches without any specific showing of immediately identifiable need. As a result, Maryland agencies may now be able to legitimize administrative special need searches based on external societal concerns, instead of seeking justification based on identifiable, present, and internal concerns.