

RANDOM DRUG TESTING IN SECONDARY SCHOOLS – WHERE DOES GEORGIA STAND?

I.	INTRODUCTION	358
II.	THE U.S. SUPREME COURT’S STANCE ON STUDENT DRUG TESTING.....	360
	A. Vernonia School District v. Acton <i>Established the Precedent for Drug Testing in Secondary Schools</i>	360
	B. <i>The U.S. Supreme Court Approves Drug Testing of Student Athletes in Vernonia</i>	362
	1. <i>The Nature of the Privacy Interest</i>	363
	2. <i>The Character of the Intrusion</i>	364
	3. <i>The Nature and Immediacy of the Governmental Concern</i>	365
	C. Board of Education v. Earls <i>Extends Student Drug Testing to Include All Competitive Extra-Curricular Activities</i>	367
	D. Chandler v. Miller - <i>The Eleventh Circuit’s Response to Drug Testing</i>	369
III.	DRUG TESTING BEYOND THE SUPREME COURT	371
	A. <i>The Supreme Court of Indiana and the Extension of Student Drug Testing</i>	372
	B. <i>Justice Boehm’s Dissent – The School’s Failure to Meet the Requirement of the Special Needs Doctrine</i>	373
	1. New Jersey v. T.L.O	373
	2. Vernonia v. Acton.....	374
	3. Chandler v. Miller.....	375
	4. <i>The Indiana School’s Policy Does Not Meet the ‘Special Needs’ Requirement</i>	375

C.	<i>The Seventh Circuit's Concerns Regarding Student Drug Testing</i>	377
IV.	GEORGIA SCHOOLS' DRUG TESTING POLICIES.....	379
V.	POSSIBLE CONSTITUTIONAL ALTERNATIVES.....	385
VI.	CONCLUSION.....	387

I. INTRODUCTION

Many school systems implement drug testing as a method to combat increasing drug problems and to protect students in extra-curricular activities.¹ This policy raises a couple of issues, such as: whether schools implement the drug testing policies in a manner that accomplishes that illustrious goal and whether school systems are overstepping their authority. In Georgia, the lack of state case law interpreting the validity of these drug testing policies has led schools to enact unchallenged policies that have the potential to lead to testing of the entire student population or blanket student drug testing.

Along with these issues, drug testing raises other important concerns.² Drug tests prove costly; depending on the type of drug being tested, tests can range in price from \$14 to \$100, for which the school district must pay.³ Furthermore, of the limited studies that have been conducted, there is no conclusive evidence that drug testing has any deterrent effect on drug use in secondary schools.⁴ In fact, a survey using data from 1998-2001 showed that drug testing was not associated with either the “prevalence or the frequency of student marijuana use or of

1. Ryoko Yamaguchi, Lloyd D. Johnston, & Patrick M. O'Malley, *Relationship Between Student Illicit Drug Use and School Drug-Testing Policies*, 73 J. SCH. HEALTH 159, 159 (2003), available at <http://monitoringthefuture.org/pubs/text/ryldjpom03.pdf>.

2. *Id.*

3. *Id.*

4. JENNIFER KERN ET AL., MAKING SENSE OF STUDENT DRUG TESTING, WHY EDUCATORS ARE SAYING NO 3-4 (2006), available at http://www.drugpolicy.org/docUploads/drug_testing_booklet.pdf.

other illicit drugs.”⁵ The study noted further that “drug testing of athletes [was not] associated with lower-than-average marijuana and other illicit drug use by high school male athletes.”⁶

Opponents argue that not only is drug testing ineffective and costly, it can potentially expose schools to litigation.⁷ It also can drive students away from extracurricular activities which help students stay away from drugs, it undermines the trust between parents and students, can result in false positives, may not identify students who have serious drug problems,⁸ and can lead to unintended consequences.⁹ Additionally, the student’s ability to “cleanse” his or her system of drugs prior to the testing may result in further inaccuracies.¹⁰

Although there has been much debate regarding drug testing in secondary schools, the United States Supreme Court has declared it constitutional in limited circumstances.¹¹ This comment focuses on the drug testing policies implemented by secondary schools throughout Georgia. Section II of this comment begins with an in-depth analysis of the leading U.S. Supreme Court decisions regarding secondary school drug testing, *Vernonia School District v. Acton*,¹² and *Board of Education v. Earls*,¹³ followed by *Chandler v. Miller*,¹⁴ a drug testing case from the Eleventh Circuit. Section III discusses an Indiana Supreme Court decision¹⁵ focusing on an enlightened dissent by Justice Boehm that provides commentary on the

5. See Yamaguchi, Johnston, & O’Malley, *supra* note 1, at 164.

6. *Id.*

7. See KERN, *supra* note 4, at 19.

8. See *id.* (explaining certain drugs may not be tested for and schools may rely solely on drug tests rather than on detecting symptoms of students).

9. See *id.* at 20 (unintended consequences include students turning to more dangerous drugs or binge drinking because marijuana is the most detectable drug and remains in the body for weeks and purchasing risky products off of the internet to “beat” drug tests).

10. Janelle Brown, *Why Drug Tests Flunk*, Apr. 22, 2002, http://dir.salon.com/story/mwt/feature/2002/04/22/drug_testing/index.html.

11. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995).

12. *Id.*

13. *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

14. *Chandler v. Miller*, 520 U.S. 305 (1997).

15. *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, (Ind. 2002).

“Special Needs” framework that could assist Georgia in interpreting student drug testing cases. Section IV will compare Georgia’s implementation of drug testing in secondary schools in light of *Vernonia*,¹⁶ *Earls*,¹⁷ *Chandler*,¹⁸ and Justice Boehm’s dissent in *Linke v. Northwestern School Corp.*¹⁹ Section V explains why Georgia courts should follow Justice Boehm’s analysis of drug testing, which provides greater Fourth Amendment protections to its citizenry, and only allow suspicionless drug testing in narrow circumstances. Section VI concludes that many secondary schools in Georgia have drug testing policies that are unconstitutional and urges Georgia’s schools to revise such policies.

II. THE U.S. SUPREME COURT’S STANCE ON STUDENT DRUG TESTING

A. *Vernonia School District v. Acton Established the Precedent for Drug Testing in Secondary Schools*

Vernonia involved a school district in Oregon that adopted a policy authorizing random urinalysis drug testing of students that participated in athletic programs within the district.²⁰ There had been a “sharp increase” in drug usage among the students within the school system and the school district discovered that athletes were among the most prevalent drug users.²¹ Disciplinary problems also accompanied the increase in drug use and although the school tried to combat the drug use with other means, such as offering classes, hosting expert speakers, and bringing in a drug dog, the drug problems persisted.²²

The school was particularly concerned with the participants of the athletic programs because drug use “increases the risk of sports-related injur[ies].”²³ At trial, expert testimony reiterated

16. *Vernonia*, 515 U.S. 646.

17. *Earls*, 536 U.S. 822.

18. *Chandler*, 520 U.S. 305.

19. *Linke*, 763 N.E.2d 972.

20. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 648-49 (1995).

21. *Id.* at 649.

22. *Id.* at 648-49.

23. *Id.* at 649.

the “deleterious effects of drugs on motivation, memory, judgment, reaction, coordination, and performance.”²⁴ The seriousness of drug use in athletics was further made apparent by incidents involving high school wrestling and football programs. A wrestler suffered a severe sternum injury, and there were “various omissions of safety procedures and mis-executions by football players.”²⁵ These were all believed by the wrestling and football coach to be from the effects of drug use.²⁶

After the failed attempts to combat the drug problem, the school considered implementing a drug testing program.²⁷ The school held an “input night” to discuss the proposed Student Athlete Drug Policy (“Policy”) with the parents.²⁸ The parents gave their unanimous approval, and the school board approved the new Policy.²⁹ The expressed purpose of the Policy was to “prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs.”³⁰ The Policy applied to “all students participating in interscholastic athletics.”³¹

The Policy had specific guidelines on how the testing would take place.³² These guidelines covered methods for collecting the sample, transporting the sample to the testing facility, what drugs the tests would search for, notification procedures, the parties to be notified, and what action would take place upon a positive result.³³ More specifically, under conditions similar to a communal restroom, students were tested by a person of the same sex as the student: a male student remained fully clothed with his back to the tester, and a female student would go into a bathroom stall while the tester remained outside.³⁴ Once the sample was taken, it was sent to an independent laboratory for testing where it was evaluated for amphetamines, cocaine, and

24. *Id.*

25. *Id.*

26. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 649 (1995).

27. *Id.*

28. *Id.* at 649-50.

29. *Id.*

30. *Id.* at 650.

31. *Id.*

32. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 650 (1995).

33. *Id.*

34. *Id.*

marijuana.³⁵ The identity of the student did not determine the type of drug tested for; in fact, the laboratory did not know the identity of the students.³⁶ Only the superintendent, principal, vice-principal, and athletic director were given the results.³⁷

If a student tested positive, the student was retested “as soon as possible to confirm the result.”³⁸ If the retest was positive, the parents were notified and the student could either participate in an “assistance program” and submit a weekly urinalysis, or be suspended from athletics for the remainder of the current season as well as the next season.³⁹ Subsequent positive tests resulted in automatic suspension from athletics for a longer period of time.⁴⁰

B. The U.S. Supreme Court Approves Drug Testing of Student Athletes in Vernonia

At issue in *Vernonia* was a student and his parent who refused to sign the required consent form to participate in the drug testing program for the district. As a result, the student was not allowed to participate in sports. Consequently, the family brought an action against the school asserting that the drug policy violated the student’s Fourth and Fourteenth Amendment rights.⁴¹ The U.S. Supreme Court granted certiorari.⁴²

The Court began its analysis by determining whether this particular “search” was reasonable.⁴³ The Court previously held that a urinalysis is considered a “search” for Fourth Amendment purposes in *Skinner v. Railway Labor Executives’ Ass’n*.⁴⁴

35. *Id.*

36. *Id.* at 651.

37. *Id.*

38. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 651 (1995).

39. *Id.*

40. *Id.*

41. *Id.* (stating that the Fourth Amendment protects people from “unreasonable searches and seizures” and has been extended to state officers and public officials).

42. *Id.* at 652.

43. *Id.*

44. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 652 (1995) (citing *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 617 (1989)).

Relying on *Skinner*, the Court in *Vernonia* stated that in order for a search to pass constitutional muster, it must be “reasonable.”⁴⁵ The reasonableness standard is “judged by balancing its intrusion on the individual’s Fourth Amendment interests against its promotion of legitimate governmental interests.”⁴⁶

1. *The Nature of the Privacy Interest*

In *Vernonia*, the Court’s analysis focused on the legitimate expectation of privacy versus the character of the intrusion, along with the immediacy of the stated governmental concern and efficacy of the means for meeting it.⁴⁷ The first factor the Court considered was the nature of the privacy interest in which the search intrudes.⁴⁸ In considering this factor, the Court noted that “[t]he Fourth Amendment does not protect all subjective expectations of privacy, but only those considered “legitimate.”⁴⁹ Whether the methods or procedures are considered “legitimate” depends on the context of the search.⁵⁰ The Court noted that Fourth Amendment rights are different in public schools and the “reasonableness” standard “cannot disregard the schools’ custodial and tutelary responsibility for children.”⁵¹ For example, public schools require students to submit to physical examinations and vaccinations.⁵² Therefore, the Court explained “students within the school environment have a lesser expectation of privacy than members of the population generally.”⁵³ However, the Court did not address the distinction that vaccinations and physicals obtained for school are typically performed by medical professionals and are not done within the school setting as opposed to student drug testing which is not performed by a medical professional and is done within the school setting.

45. *Id.*

46. *Id.* at 652-53.

47. *Id.*

48. *Id.* at 654.

49. *Id.*

50. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 654 (1995).

51. *Id.*

52. *Id.* at 656.

53. *Id.* at 656-57.

The Court further stated that student athletes have even lower expectations of privacy.⁵⁴ Typical public school locker rooms, such as those in *Vernonia*, offer little privacy.⁵⁵ Student athletes must change clothes prior to practice or an event and shower and change afterwards.⁵⁶ There are no individual dressing rooms and the showers are typically communal, consisting of multiple shower heads on a wall with no separation or partition.⁵⁷

In addition, student athletes subject themselves to a higher degree of regulation than students generally.⁵⁸ Student athletes must have a preseason physical exam, which in some cases includes a urine sample, and they must maintain adequate insurance coverage or sign an insurance waiver.⁵⁹ Students must also maintain a minimum grade point average to be eligible to participate in athletics. Moreover, students must comply with any specific rules designated by the coach or athletic director such as dress, training hours, or codes of conduct.⁶⁰ “[S]tudents who voluntarily participate in school athletics” should expect intrusions into their privacy.⁶¹

2. *The Character of the Intrusion*

The next factor examined by the Court was the character of the intrusion.⁶² Although the Court had previously stated that samples of urine were traditionally “shielded by great privacy,” they also noted the degree of the intrusion depends on how the sample is taken.⁶³ In this instance, samples are obtained in the same manner “typically encountered in public restrooms.”⁶⁴

54. *Id.* at 657.

55. *Id.*

56. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 657 (1995).

57. *Id.*

58. *Id.* (quoting *Schail v. Tippecanoe County Sch. Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1988)).

59. *Id.*

60. *Id.*

61. *Id.*

62. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 658 (1995).

63. *Id.* (stating the degree of intrusion “depends upon the manner in which the production of the urine sample is monitored”).

64. *Id.*

Males stand at a urinal, fully clothed, while monitored from behind.⁶⁵ Females enter an enclosed bathroom stall while being monitored from outside the stall.⁶⁶ Since these mirror the encounters school children face in the daily use of public restrooms, the Court found the privacy interests intruded upon were negligible.⁶⁷

The Court then examined another privacy aspect of the urinalysis: the information the results disclose about the student.⁶⁸ The information disclosed could be the state of the student's body, such as being pregnant or diabetic.⁶⁹ However, the Court noted the urinalysis here only tested for drugs, the testing does not vary according to who the student is, and an independent laboratory discloses the results to limited school personnel.⁷⁰ The Court also noted that the results of the tests are not turned over to law enforcement.⁷¹

3. *The Nature and Immediacy of the Governmental Concern*

The Court finally considered “the nature and immediacy of the governmental concern . . . and the efficacy of this means for meeting it.”⁷² Although the Court did not announce whether the government interest had to rise to the level of “compelling,” or whether the interest “appears *important enough* to justify the particular search at hand,” the test would be met in either case.⁷³ Deterrence of drug use by school children is important, “perhaps compelling.”⁷⁴ It is during these years that “physical, psychological, and addictive effects of drugs are most severe.”⁷⁵ Some effects of drug use in school children include “childhood losses in learning” which are “lifelong and profound,” and that “children grow chemically dependent more quickly than adults,

65. *Id.*

66. *Id.*

67. *Id.*

68. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 658 (1995).

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 660.

73. *Id.* at 661.

74. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 661 (1995).

75. *Id.*

and the record of recovery is depressingly poor.”⁷⁶ Further, the Court identified that drug use not only affects the users themselves, but can also have effects on the student population, the faculty, familial relationships, and the educational process.⁷⁷

Importantly, the Court pointed out that this particular program was “directed more narrowly to drug use by school athletes.”⁷⁸ The risk among this narrow group is particularly high as there is a risk of immediate physical harm to the player:⁷⁹

Apart from psychological effects, which include impairment of judgment, slow reaction time, and a lessening of the perception of pain, the particular drugs screened by the District’s Policy have been demonstrated to pose substantial physical risks to athletes. Amphetamines produce an “artificially induced heart rate increase, [p]eripheral vasoconstriction, [b]lood pressure increase, and [m]asking of the normal fatigue response,” making them a “very dangerous drug when used during exercise of any type.”⁸⁰ Marijuana causes “[i]rregular blood pressure responses during changes in body position,” “[r]eduction in the oxygen-carrying capacity of the blood,” and “[i]nhibition of the normal sweating responses resulting in increased body temperature.”⁸¹ Cocaine produces “[v]asoconstriction[,] [e]levated blood pressure,” and “[p]ossible coronary artery spasms and myocardial infarction.”⁸²

The Court found that these factors created a substantial interest for the school to combat the drug problem among student athletes.⁸³

The Court did not question the immediacy of Vernonia’s concerns.⁸⁴ The District Court concluded that a large portion of

76. *Id.*

77. *Id.* at 662.

78. *Id.*

79. *Id.*

80. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 662 (1995) (quoting Jerald Hawkins, *Drugs and Other Ingesta: Effects on Athletic Performance*, in *MANAGING SPORTS AND RISK MANAGEMENT STRATEGIES* 90, 90-91 (Herb Appenzeller ed., 1993)).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 663.

the student body, specifically students involved in interscholastic sports, were “in a state of rebellion,” and this rebellion was fueled by drug and alcohol use in addition to “students’ misperceptions about the drug culture.”⁸⁵ The Court then, focusing on the means used to address the problem, stated that it was “self-evident that a drug problem largely fueled by the ‘role model’ effect of the athletes’ drug use, and of particular danger to athletes, is effectively addressed by making sure athletes do not use drugs.”⁸⁶

In light of the students’ “decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search” the Court held Vernonia’s narrow policy to be constitutional.⁸⁷ However, the Court cautioned that suspicionless drug testing in any context will not “readily pass” constitutional muster.⁸⁸

C. Board of Education v. Earls *Extends Student Drug Testing to Include All Competitive Extra-Curricular Activities*

Although the Court held that suspicionless drug testing of student athletes in accordance with the school policy of Vernonia was constitutional, subsequent secondary schools and courts have struggled with *Vernonia*’s limits.⁸⁹ The Supreme Court addressed student drug testing again in 2002 and extended the *Vernonia* holding in *Board of Education v. Earls*.⁹⁰

In *Earls*, the school district’s drug testing policy was challenged on the basis that it incorporated all extra-curricular activities and was therefore not in line with the *Vernonia* decision.⁹¹ The Court noted that although the policy in

85. *Id.* (quoting *Acton v. Vernonia Sch. Dist.* 47J, 796 F. Supp. 1354, 1357 (Ore. 1992)).

86. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 663 (1995).

87. *Id.* at 665.

88. *Id.* at 664-65.

89. See generally Nathan Roberts & Richard Fossey, *Random Drug Testing of Students: Where Will the Line be Drawn?*, 31 J.L. & EDUC. 191 (Apr. 2002).

90. *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

91. *Id.* at 826 (stating the policy applied to activities “such as the Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, pom-pom, cheerleading, and athletics”).

Vernonia applied to student athletes, it was not the deciding factor in the case.⁹² The Court pointed out, however, that *Vernonia* did not open the door to all student drug testing; rather, the specific facts of each case must be considered.⁹³

The Court applied the *Vernonia* analysis but extended its interpretation of the “legitimate expectation of privacy interest” among students. The Court reasoned that students who voluntarily participate in competitive extracurricular activities are subject to similar privacy intrusions as athletes.⁹⁴ Some of the activities require travel, communal undress, and also have rules that are not applied to the student body as a whole.⁹⁵

The Respondents in *Earls* argued that the safety concerns that apply to athletes are not implicated in other extra-curricular activities and “safety is a ‘crucial factor’ in applying the special needs framework,” which is needed for the schools to conduct a search without probable cause.⁹⁶ The Court acknowledged that safety was a factor in the analysis and articulated that the “safety interest furthered by drug testing” is substantial for all children.⁹⁷

Because the *Earls* policy simply extended the *Vernonia* policy from drug testing student athletes to drug testing students in competitive extracurricular activities where similar concerns were present, the Court held that extending the policy to such activities was constitutional and upheld the policy.⁹⁸ This decision left ambiguity as to what student activities could be subject to drug testing for schools seeking to implement drug testing policies – essentially leaving schools wondering, what are the limits of “competitive extracurricular activities?”

92. *Id.* at 831.

93. *Id.* at 830.

94. *Id.* at 831.

95. *Id.* at 832.

96. *Bd. of Educ. v. Earls*, 536 U.S. 822, 836 (2002) (quoting Brief of Respondents at 25-27, *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (No. 01-332), 2002 WL 243578).

97. *Id.*

98. *Id.* at 838.

D. *Chandler v. Miller - The Eleventh Circuit's Response to Drug Testing*

The Eleventh Circuit has not addressed drug testing in the student context, but they have addressed the constitutionality of drug testing candidates for certain positions of state office.⁹⁹ A divided Eleventh Circuit panel upheld a Georgia statute¹⁰⁰ that required a passing drug test within thirty days of seeking designated state offices.¹⁰¹ However, the U.S. Supreme Court reversed the Eleventh Circuit's decision, deciding that drug testing in this instance did not meet the requirements regarding the "limited circumstances in which suspicionless searches are warranted."¹⁰²

In its decision, the Eleventh Circuit majority acknowledged that drug tests were searches but that the statute served "special needs" other than ordinary needs of law enforcement.¹⁰³ The court then balanced the individual's privacy expectations against the Government's intrusion to determine if a warrant or individualized suspicion should be required in this context.¹⁰⁴ Although the Eleventh Circuit noted the lack of any record of drug abuse among elected officials, the court relied on the prestige of the office and the level of trust the public puts in the officials once elected to office.¹⁰⁵ Given this public interest and the limited privacy intrusion since, under the statute, the candidate gets tested by his or her physician and can control the disclosure of the results by refusing to run for office if the test is positive, the Eleventh Circuit upheld the statute.¹⁰⁶ Judge Barkett dissented, stating that there should not be a balancing of interests because the State failed to establish a sufficient governmental need to warrant suspicionless drug testing because there was "nothing so special or immediate about the generalized governmental interests involved here"¹⁰⁷

99. *See Chandler v. Miller*, 520 U.S. 305 (1997).

100. O.C.G.A. § 21-2-140 (1993).

101. *Id.*

102. *Chandler*, 520 U.S. at 308.

103. *Id.*

104. *Id.* at 311.

105. *Chandler v. Miller*, 520 U.S. 305, 311 (1997).

106. *Id.* at 311-12.

107. *Id.* at 312-13.

The U.S. Supreme Court did not agree with the majority.¹⁰⁸ The Supreme Court relied on three major opinions; *Skinner v. Railway Labor Executives' Ass'n*,¹⁰⁹ *Treasury Employees v. Von Raab*,¹¹⁰ and *Vernonia*.¹¹¹ *Skinner* involved a regulation that required all rail employees involved in train accidents to submit blood and urine samples.¹¹² The Supreme Court upheld this statute, stating the following: (1) employees had diminished expectations of privacy by participating in an industry that is heavily regulated to ensure safety; (2) the test could deter illegal drug use by employees that are in positions that may cause the loss of human life (3) employees may not present any noticeable signs of drug use to supervisors; and (4) employees could not determine when an accident or violation would occur that would trigger the test, further deterring drug use.¹¹³

Von Raab concerned drug tests that were a condition of promotion or transfer to positions within the United States Custom Service that “directly involved drug interdiction or require[ed] the employee to carry a firearm.”¹¹⁴ The Supreme Court upheld this program even in the absence of a demonstrated drug problem because of the agency’s unique mission against smuggling illicit drugs into the United States and the “compelling interest” of the government to keep drug users out of these positions as drug users would be unsympathetic to the Service’s mission and might be tempted by bribes and threatened with blackmail.¹¹⁵

The Supreme Court finally discussed *Vernonia* and the focus the majority placed on the “immediate crisis” caused by the drug use in the school and student athletes as “leaders of the drug culture.”¹¹⁶ The Supreme Court also emphasized in *Vernonia*, drug-using student athletes are exposed to greater

108. See generally *Chandler*, 520 U.S. 305.

109. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989).

110. *Treasury Employees v. Von Raab*, 489 U.S. 656 (1989).

111. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995).

112. *Chandler v. Miller*, 520 U.S. 305, 314 (1997) (quoting *Skinner*, 489 U.S. at 608-12).

113. *Id.* at 314-15 (quoting *Skinner*, 489 U.S. at 626-34).

114. *Id.* at 315 (quoting *Von Raab*, 489 U.S. at 660-61).

115. *Id.* at 315-16 (quoting *Von Raab*, 489 U.S. at 660-71).

116. *Id.* at 315-16 (quoting *Vernonia*, 515 U.S. at 649-63).

injury on the playing field, not only to themselves but to other players as well.¹¹⁷

In *Chandler*, the court held that Georgia failed to show a special need to justify suspicionless drug testing.¹¹⁸ The Supreme Court noted that there was nothing to indicate that state office holders in Georgia had a drug problem; while this was not necessary, it would bolster the government's argument.¹¹⁹ Further, there was no indication of why ordinary law enforcement mechanisms would not work in apprehending addicted individuals if they are elected to office and are in the public eye.¹²⁰

The Supreme Court further noted that *Von Raab* is unique and was not meant to be a decision to open the door for suspicionless searches.¹²¹ While the employees in *Von Raab* did not engage in the type of activities that would subject them to day-to-day scrutiny by their peers and supervisors, due to their field work, candidates for public office are subject to relentless scrutiny beyond ordinary work environments.¹²² What reasoning is left of Georgia's scheme is "symbolic," as there is no evidence of a drug problem among those holding state office, the officials are not performing high-risk safety sensitive tasks, and the certification for public office "immediately aids no interdiction effort."¹²³ This symbolic effort does not rise to a special need and "setting a good example" alone is not enough to warrant suspicionless drug testing.¹²⁴

III. DRUG TESTING BEYOND THE SUPREME COURT

Circuit courts and state courts alike have differed in their interpretations of *Vernonia* and *Earls*.¹²⁵ While some courts extended the holding to include more than student athletes,

117. *Id.* at 316-17 (quoting *Vernonia*, 515 U.S. at 662).

118. *Chandler v. Miller*, 520 U.S. 305, 318 (1997).

119. *Id.* at 318-19.

120. *Id.* at 320.

121. *Id.* at 321.

122. *Id.*

123. *Id.* at 321-22.

124. *Chandler v. Miller*, 520 U.S. 305, 321-22 (1997).

125. *See e.g.*, *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972 (Ind. 2002), *see also* *Roberts & Fossey*, *supra* note 89, at 198.

other courts attempted to follow the reasoning in *Vernonia* and establish the parameters of the decision.¹²⁶ Although Georgia has yet to address student drug testing, looking at other state and circuit court opinions could indicate how Georgia should interpret *Vernonia*. Specifically, the Supreme Court of Indiana and the United States Court of Appeals for the Seventh Circuit have dealt with several drug testing challenges since *Vernonia*. Of particular interest is the reasoning found in Justice Boehm's dissent in *Linke v. Northwestern School Corp.*¹²⁷ Although not binding on Georgia courts, it provides a concise analytical framework relying on the "special needs" doctrine.¹²⁸

A. The Supreme Court of Indiana and the Extension of Student Drug Testing

In 2002, prior to *Earls*, the Supreme Court of Indiana upheld a school's policy of conducting random drug testing on students participating in athletics, extracurricular activities, co-curricular activities, and students with parking permits.¹²⁹ The court adopted the analytical approach announced in *Vernonia*, reiterating that students are entitled to less privacy at school since they are subject to supervision and control.¹³⁰ The court also stated that the policy did not compel students to consent to the testing because it only applied to privileged activities.¹³¹

The court further noted that the drug policy was reasonable because it did not require drug testing for students in voluntary activities in which they receive academic credit.¹³² Students were given the option of "providing alternative for-credit assignments" if they chose not to comply with the drug testing policy.¹³³ However, if the student chose that "option" they would not be allowed to participate in the extracurricular

126. See e.g., *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052 (7th Cir. 2000).

127. *Linke*, 763 N.E.2d 972.

128. *Id.*

129. *Id.*

130. *Id.* at 979-80.

131. *Id.* at 980.

132. *Id.*

133. *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 980 (Ind. 2002).

portion of the class, such as competitions.¹³⁴ The court stated that while the students had the option to obtain credit for the activity, in all likelihood, there may be some adverse impact by not participating in the extra-curricular portion of the class, such as being denied the opportunity to participate in competitions or live performances.¹³⁵ Further, there may be some benefit to students for participating in the extra-curricular portion of school sponsored activities, specifically for “students who wish to pursue post-secondary educational or professional training” in that particular activity.¹³⁶ Given the “totality of the circumstances,” the Indiana Supreme Court found the policy constitutional as schools are permitted to take “reasonable measures to deter drug abuse on their campuses.”¹³⁷

B. Justice Boehm’s Dissent – The School’s Failure to Meet the Requirement of the Special Needs Doctrine

Justice Boehm of the Indiana Supreme Court dissented from the court’s opinion in *Linke*, focusing on the “special needs” doctrine which is the narrow exception to the probable cause requirement.¹³⁸ Justice Boehm relied on three cases in his analysis: *New Jersey v. T.L.O.*,¹³⁹ *Vernonia v. Acton*,¹⁴⁰ and *Chandler v. Miller*.¹⁴¹

*I. New Jersey v. T.L.O.*¹⁴²

Justice Boehm pointed out that the “special needs” doctrine, in regard to school searches, arose in *T.L.O.*, where the U.S. Supreme Court held “the Fourth Amendment’s usual probable cause standard should not apply in a school setting.”¹⁴³ The search must be reasonable, but there were limits to the authority

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.* at 985.

138. *Id.* at 987.

139. *N.J. v. T.L.O.*, 469 U.S. 325 (1985).

140. *Vernonia v. Acton*, 515 U.S. 646 (1995).

141. *Chandler v. Miller*, 520 U.S. 305 (1997).

142. *T.L.O.*, 469 U.S. 325 (1985).

143. *Id.* at 325.

of school officials to conduct a search.¹⁴⁴ Specifically, “the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.”¹⁴⁵

2. *Vernonia v. Acton*

Justice Boehm noted that in *Vernonia*, the “special need” was established for a particular group of students: athletes.¹⁴⁶ This “special need” was established based on an “immediate crisis” in which the drug problem was found to come specifically from the group of student athletes.¹⁴⁷ Justice Boehm pointed out that the Court cited three factors to determine when a search would be reasonable in the school context: “the decreased expectation of privacy of the student athletes, the relative unobtrusiveness of the search, and the severity of the need met by the search.”¹⁴⁸ The Court then relied on specific instances reported by the school district to justify the need for the search, such as a substantial rise in the number of disciplinary referrals, students being increasingly rude in class, students having outbursts in class, and student athletes being the leaders of the drug culture.¹⁴⁹

Justice Boehm then looked to the policy used in the Indiana school system and determined that it did not meet any of the three requirements announced in *Vernonia*.¹⁵⁰ His dissent noted that the programs applied not only to athletes but participants in “a wide range of extra-curricular activities from Future Farmers of America to the school band.”¹⁵¹ He further pointed out that the school’s evidence of substance abuse came from a school survey that provided data on students who claimed to have used a particular substance but did not specify if they participated in

144. *Id.*

145. *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 988 (Ind. 2002) (quoting *N.J. v. T.L.O.*, 469 U.S. 325, 343 (1985)).

146. *Id.* at 987.

147. *Id.* at 988.

148. *Id.* at 989.

149. *Id.* at 989 (quoting *Vernonia v. Action*, 515 U.S. 646, 649 (1995)).

150. *Id.*

151. *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 989 (Ind. 2002).

any of the activities covered by the policy.¹⁵² In addition, Justice Boehm stated that “the testing intrudes on students who in no way qualify for the lessened expectation of privacy some cases [such as *Vernonia*] have attributed to athletes.”¹⁵³

3. *Chandler v. Miller*

The third case Justice Boehm addresses, *Chandler v. Miller*,¹⁵⁴ is of particular importance as it originated in Georgia.¹⁵⁵ Although this case dealt with drug testing of potential candidates for political office and not student drug testing, as discussed in Section II-D of this comment, the Supreme Court further explained how to apply the “special needs” doctrine.¹⁵⁶

4. *The Indiana School’s Policy Does Not Meet the ‘Special Needs’ Requirement*

Applying the “special needs” analysis to the Indiana school policy in light of *T.L.O.*, *Vernonia*, and *Chandler*, Justice Boehm concluded that the drug testing policy was unconstitutional. First, focusing on the student’s privacy interests, Justice Boehm agreed with the notion that schools stand in the place of parents and guardians regarding matters of conduct and discipline but disagreed that this supported

152. *Id.*

153. *Id.*

154. *Chandler v. Miller*, 520 U.S. 305 (1997).

155. *Linke*, 763 N.E.2d at 989.

156. *Chandler*, 520 U.S. at 323; *Linke*, 763 N.E.2d at 989. In *Chandler*, the Supreme Court struck down a Georgia statute that required certain candidates for public office to submit to drug testing. *Chandler*, 520 U.S. 305. In his dissent in *Linke*, Justice Boehm noted the Supreme Court found the Georgia statute unconstitutional because “Georgia’s plan to screen candidates for public office failed to address a ‘concrete danger.’” *Linke*, 763 N.E.2d at 989. Specifically, the *Chandler* Court explained that there was nothing in the record to suggest the hazards argued by the state were “real and not simply hypothetical for Georgia’s polity.” *Chandler*, 520 U.S. at 323. The Court also stated that Georgia’s statute was unconstitutional because the “requirement was not designed to identify drug users, it was feasible, within the environment of public office, to note erratic conduct that would lead to a suspicion of drug use and the risk to public safety was neither substantial nor real.” *Id.*

implementing a drug testing policy when student conduct and discipline were not at issue.¹⁵⁷ In addition, when the school carried out searches and other disciplinary functions in accordance with such policies, the school was still acting as a representative of the state and “not merely as surrogates for the parents.”¹⁵⁸

The dissent also addressed the majority’s argument that students consent to the searches by participating in privileged activities.¹⁵⁹ Although students have the choice to participate in alternate assignments, thereby revoking their “consent” to the drug test, they are denied the opportunity to perform in public with the rest of the group.¹⁶⁰ The student may have a high grade in the particular “for-credit” activity, but they will have a “gaping void in performance experience.”¹⁶¹ Justice Boehm analogized that an “aspiring vocalist’s” appearance in a public performance is akin to a future math major’s election to take calculus as opposed to the minimal requirement of algebra.¹⁶²

Justice Boehm agrees that it may be necessary to test certain groups, such as athletes, due to safety concerns, when there is a concrete reason to do so, but the students simply being “role models” within the school is not reason enough.¹⁶³ As the U.S. Supreme Court stated in *Chandler*, if the need to “set a good example” was sufficient to overcome a Fourth Amendment objection, then the explanations the Court made in prior cases, such as *Vernonia*, “ranked as ‘special’ wasted many words in entirely unnecessary, perhaps even misleading, elaborations.”¹⁶⁴

The dissent further explains that the school’s purpose is to educate, “not to monitor an arbitrarily defined category of students for the use of drugs, alcohol or nicotine”¹⁶⁵ Testing that is necessary to conduct education, such as in *Vernonia* where the students were disrupting classroom

157. *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 990 (Ind. 2002).

158. *Id.*

159. *Id.*

160. *Id.*

161. *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 990 (Ind. 2002).

162. *Id.*

163. *Id.* at 991-92.

164. *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 992 (Ind. 2002) (quoting *Chandler v. Miller*, 520 U.S. 305, 322 (1997)).

165. *Id.* at 993.

activities, coupled with an “immediate crisis prompted by the sharp increase” in student drug use, is permissible.¹⁶⁶ Specifically, the Indiana policy of simply purporting to prevent drug use, if it were a legitimate objective, “gives reason for [the school] to test every student.”¹⁶⁷ Blanket testing was not sanctioned by the Court in *Vernonia*, and if deterrence were the only relevant consideration, Justice Boehm posits it would have led to blanket testing of children in public schools.¹⁶⁸

The final factor in the “special needs” doctrine, as announced by the *Vernonia* decision and discussed by Justice Boehm in his dissent, is the nature and immediacy of the school’s concern and the efficacy of its testing program in addressing it.¹⁶⁹ Justice Boehm stated that “special need” means more than just asserting that a school has a drug problem and thereafter imposing random testing on “any student engaged in extra- or co-curricular activit[ies].”¹⁷⁰ Further, a drug problem in the student population in general does not demonstrate a correlation between drug use among such students and drug testing students involved in extra-curricular activities.¹⁷¹ The school in this instance “has not proven, or even attempted to prove, that a correlation exists between drug use and those who engage in extracurricular activities or drug use and those who drive to school.”¹⁷² Simply put, a program that tests these broad categories allows for drug testing of “all but the most uninvolved and isolated students.”¹⁷³

C. *The Seventh Circuit’s Concerns Regarding Student Drug Testing*

In his dissent, Justice Boehm also discusses the Seventh Circuit opinion in *Joy v. Penn-Harris-Madison School Corp.*¹⁷⁴

166. *Id.* at 993 (quoting *Chandler*, 520 U.S. at 319).

167. *Id.*

168. *Id.*

169. *Id.* at 994 (quoting *Vernonia v. Acton*, 515 U.S. 646, 660 (1995)).

170. *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 994 (Ind. 2002).

171. *Id.* at 995.

172. *Id.*

173. *Id.*

174. *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052 (7th Cir. 2000).

Although *Joy* was decided prior to *Earls*, and *Earls* undoubtedly cleared up several unresolved issues announced in *Joy*, the opinion expresses several concerns regarding student drug testing.

The drug testing policy in *Joy* covered a variety of individuals, including students involved in extracurricular activities and students who drive to school. The school also tested for a variety of substances including drugs, alcohol, and nicotine.¹⁷⁵ The Seventh Circuit used the reasoning as set forth in *Vernonia* and found that the policy did not satisfy any of the factors announced by the *Vernonia* opinion.¹⁷⁶ However, the court did uphold the policy on the grounds of *stare decisis*.¹⁷⁷

More importantly, however, is the court's discussion of how troubling the *Joy* opinion was for them.¹⁷⁸ The judges expressly stated that "students involved in extracurricular activities should not be subject to random, suspicionless drug testing as a condition of participation in the activity."¹⁷⁹ They further expressed concern regarding a transition to suspicionless testing of all students.¹⁸⁰ In fact, "[c]ounsel admitted that drug testing the entire student population on a suspicionless basis was the ultimate goal."¹⁸¹ Although the school's counsel tried to backtrack and focus on the voluntariness of students consenting to drug testing in exchange for a privilege, counsel again admitted later in oral argument that schools should be allowed to drug test everybody.¹⁸² In response to this, the court stated that "[i]f schools tested all students on a suspicionless basis, the

175. *Id.* at 1054-55.

176. *Id.* at 1058-62.

177. *Id.* at 1065.

178. *Id.* at 1066-67.

179. *Id.* at 1066.

180. *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1066 (7th Cir. 2000).

181. *Id.* ("THE COURT: So the slippery slope argument ought to be very much in our minds. I mean, you'll be back here in another year with another school district who wants to test everybody. And you will say there is no principled distinction between the holding you get today and the next case. It's just a matter of time till it gets here. Right? COUNSEL: Absolutely, your honor.").

182. *Id.*

element of voluntariness obviously would not be present.”¹⁸³ Although the court ultimately upheld the policy on stare decisis grounds, the court noted that “the case has yet to be made that a urine sample can be the ‘tuition’ at a public school.”¹⁸⁴

Just as the court in *Joy* was apprehensive in their holding and ultimately only upheld the policy based on stare decisis, Georgia Courts would be bound by prior precedent. The U.S. Supreme Court opinions of *Vernonia*¹⁸⁵ and *Earls*¹⁸⁶ set out the broadest scope of school’s ability to enact a drug testing policy, and Georgia is bound to follow the reasoning in both opinions.

IV. GEORGIA SCHOOLS’ DRUG TESTING POLICIES

Schools around the country have implemented drug testing policies in secondary schools, and Georgia is no exception.¹⁸⁷ Indeed, the Georgia Department of Education provides funding for the implementation of such policies.¹⁸⁸ Title IV, Part A, of the “Safe and Drug Free Schools and Communities Act,” implemented by the Georgia Department of Education, governs eligibility for funding to support programs that prevent, among other things, the illegal use of alcohol, tobacco, and other drugs.¹⁸⁹ Activities supported by Title IV funds include drug testing; so long as the policy is “consistent with the [F]ourth [A]mendment to the Constitution of the United States, students may be tested for illegal drug use (including at the request of, or with the consent of, a parent or legal guardian of the student), if the local educational agency elects to so test or inspect.”¹⁹⁰

Policies must conform to the Constitution, as interpreted by the Supreme Court, to receive Title IV funding.¹⁹¹ Although

183. *Id.*

184. *Id.* at 1067.

185. *Vernonia v. Acton*, 515 U.S. 646 (1995).

186. *Bd. of Educ. v. Earls*, 536 U.S. 822 (1997).

187. *See, e.g., Yamaguchi, Johnston & O’Malley, supra* note 1; *see also* Table of Drug Testing Policies in Georgia *infra* note 251.

188. Ga. Dept. of Educ., Title IV, Part A, Safe and Drug Free Schools and Communities, http://www.doe.k12.ga.us/sia_titleiv.aspx (last visited Mar. 22, 2010) [hereinafter Title IV, Part A].

189. *Id.*

190. *Id.*

191. *Id.*

some Georgia schools are implementing drug testing policies that do comply with the interpretation of the Fourth Amendment as held in *Vernonia* and *Earls*,¹⁹² others are pushing the constitutional limits.¹⁹³ Due to the lack of state and Eleventh Circuit Court opinions, Georgia has a unique opportunity to shape future law regarding drug testing policies within the state.

The Search and Seizure Clause in Georgia's Constitution is almost identical to the Fourth Amendment of the United States Constitution.¹⁹⁴ Although the language is almost identical, the analysis that the Georgia courts have used to interpret the Search and Seizure Clause of the Federal Constitution and its own state constitution have differed.¹⁹⁵ In *Gary v. State*, the Supreme Court of Georgia recognized that it had an ability to impose a higher standard on searches and seizures than required by the Federal Constitution, and thus chose to do so.¹⁹⁶

In light of Georgia's heightened protection of Fourth Amendment rights for its citizenry, the narrow approach as outlined in Justice Boehm's dissent in *Linke*,¹⁹⁷ along with the concerns expressed by the Seventh Circuit Court panel in *Joy* would likely assist the Georgia courts and the Eleventh Circuit in deciding cases involving student drug testing. Based on *Gary*, Georgia courts would likely find that the Search and Seizure Clause of the Georgia Constitution provides greater protection than the Federal Constitution, in regard to drug

192. See Table of Drug Testing Policies in Georgia *infra* note 251 (requiring drug testing based on individualized suspicion in Catoosa County and drug testing for activities that require an annual physical in White County).

193. See Table of Drug Testing Policies in Georgia *infra* note 251 (listing all policies in Georgia). A discussion of the constitutionality of specific policies will follow in this section.

194. GA. CONST. art. I, § 1, para. XIII (2008) ("The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue except upon probable cause supported by oath or affirmation particularly describing the place or places to be searched and the persons or things to be seized.").

195. See *Gary v. State*, 422 S.E.2d 426 (Ga. 1992) (imposing greater requirements upon its law enforcement officers [in regards to Fourth Amendment] than that required by U.S. Constitution, as interpreted by U.S. Supreme Court).

196. *Id.* at 428 (quoting *Cooper v. California*, 386 U.S. 58 (1967)).

197. *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 987-97 (Ind. 2002).

testing students, and adopt an approach similar to Justice Boehm's in *Linke*.¹⁹⁸ Such an approach would leave several Georgia school policies unconstitutional in their current form.¹⁹⁹

The Brantley County School System has such a policy.²⁰⁰ The drug testing policy complies with some of the requirements as set forth in the relevant U.S. Supreme Court opinions, such as methods for collecting the sample, techniques of testing of the sample, and the notification procedures. However, Brantley has impermissibly extended the policy to include not only student athletes and students participating in competitive extra-curricular activities, but students who apply for parking permits and students involved in "extra-curricular activities" in general.²⁰¹

First, it should be noted that according to the Fourth Amendment the search must be reasonable²⁰² in that "the interests of the students will be invaded no more than necessary to achieve the legitimate end of preserving order in the schools."²⁰³ The Supreme Court has held however, that school districts attempting to implement suspicionless drug testing for all students will not pass muster under the Fourth Amendment unless there is an articulated exception to the normal requirement of individualized suspicion.²⁰⁴ Here, focusing on the "special needs" doctrine, the school district would have to articulate how to meet this narrow exception to the Fourth Amendment.²⁰⁵ In this instance, there is no indication of a "special need" within the school district itself as there has been no challenge to the policy. However, as Justice Boehm makes

198. *Id.*

199. See Table of Drug Testing Policies in Georgia *infra* note 251 (listing all policies in Georgia).

200. BRANTLEY COUNTY BOARD OF EDUCATION, STUDENT DRUG TESTING POLICY,

<http://www.brantley.k12.ga.us/education/components/sectionlist/default.php?sectiondetailid=10284&category=0> (last visited Mar. 22, 2010).

201. Title IV, Part A, *supra* note 188.

202. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 646-52 (1995) (citing *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989)).

203. *N.J. v. T.L.O.*, 469 U.S. 325, 343 (1985).

204. *Chandler v. Miller*, 520 U.S. 305, 318 (1997).

205. *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972, 987 (Ind. 2002).

clear, testing only for deterrence is insufficient as this would lead to blanket testing of children in public schools.²⁰⁶

The policy states that it “applies to all students involved in extra-curricular activities in grades nine through twelve and in parking on the Brantley County High School Campus, which are all voluntary activities.”²⁰⁷ While Brantley is correct in identifying that these activities, including parking, are voluntary activities, this was not the deciding factor in either *Vernonia*²⁰⁸ or *Earls*.²⁰⁹ In addition, following Justice Boehm’s reasoning in his dissent, students aspiring to be vocalists are no more volunteering than a student aspiring to be a mathematician.²¹⁰ Students aspiring to be dancers or actors need to participate in performances provided for by the extra-curricular activities at school just as aspiring mathematicians must take certain classes to further their career. Therefore, the “voluntary” element alone cannot justify the intrusiveness of such a search as drug testing.

Further, in *Vernonia*²¹¹ and *Earls*,²¹² the Court focused on the specific facts of each policy, which do not apply to the parking aspect contained in the Brantley policy. For instance, in *Vernonia*, the Court emphasized the fact that student athletes must change prior to practice, or an event, and shower and change afterwards. Again typical locker rooms are communal and offer little privacy.²¹³ School parking permits clearly do not parallel an athlete’s privacy concerns. A student driving to and from school poses none of the same issues regarding privacy in order to “participate” in that activity.

The Court in *Vernonia* also noted that student athletes subject themselves to a higher degree of regulation than students generally.²¹⁴ While one may argue that students with parking permits are subject to greater regulation, the assertion lacks merit. For instance, in order for the school to argue that the student is subject to greater regulation, they must have a parking

206. *Id.* at 993.

207. Title IV, Part A, *supra* note 188.

208. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995).

209. *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

210. *Linke*, 763 N.E.2d at 990.

211. *Vernonia*, 515 U.S. 646.

212. *Earls*, 536 U.S. 822.

213. *Vernonia*, 515 U.S. at 657.

214. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 657 (1995).

permit policy. Brantley states in their drug-testing policy that it applies to “parking,” however; there is no specific policy for “parking.”²¹⁵ Although some schools may require a minimum grade point average in order to keep a parking permit, this still would not be enough to subject them to more regulation than students generally. Students generally must maintain a specific grade point average before being placed on academic probation. Although students with parking permits would lose their permit, other students without parking permits similarly face consequences as a result of a faltering grade point average. Further, even alcohol restrictions and gun free zones do not subject parking students to more regulation because these restrictions apply equally to all students. Simply obtaining a parking permit from the school would not be enough to subject the student to greater regulation than the student body.

Further, student drivers do not need a physical exam, as student athletes do.²¹⁶ Although students seeking a parking permit might be required to maintain a minimum grade point average, they would not be required to comply with any “rules of conduct, dress, training hours and related matter as may be established for each sport by the head coach and athletic director with the principal’s approval.”²¹⁷ Students “who voluntarily participate in school athletics” should expect intrusions into their privacy, however, students who are simply parking on school property are not subject to the same level of scrutiny and therefore should not expect intrusions into their privacy.²¹⁸

Although the school might persuasively argue that this is a safety concern, as driving in the parking lot is an activity which would implicate the need for drug testing to keep students safe, this would only bolster the argument that the school is simply extending the drug testing policy to blanket the majority, if not all students in the school system. As the Court noted in *Earls*, the “safety interest furthered by drug testing” is substantial for

215. BRANTLEY COUNTY BD. OF EDUC., <http://www.brantley.k12.ga.us/education/components/docmgr/default.php?sectiondetailid=10374&> (last visited Mar. 22, 2010).

216. *Vernonia*, 515 U.S. at 657.

217. *Id.*

218. *Id.*

all children.²¹⁹ Therefore, if safety alone were enough to validate drug testing students who obtain a parking permit, the school could effectively test *every* student because safety does not apply to parking students only but can be broadly used to apply to every student.

Further, Brantley runs afoul of the limits the U.S. Supreme Court has placed on drug testing students in secondary schools by testing students in “extra-curricular” activities in general.²²⁰ Although the U.S. Supreme Court did not articulate the reason for differentiating between using the language “competitive” and “non-competitive extra-curricular activities,” the Court expressly stated in *Earls* that a policy applying to “competitive extra-curricular activities” was constitutionally permissible.²²¹ Limiting drug testing to “competitive” extra-curricular activities as opposed to *any* extra-curricular activity is consistent with the holding in *Vernonia*, which pointed out the importance of the policy being narrow.²²²

Also, by including all extra-curricular activities and parking, the Brantley County school system is effectively able to test the majority of the student population, instead of the limited testing authorized by the U.S. Supreme Court.²²³ By testing students who obtain parking permits and students involved in all extra-curricular activities, the school only excludes students choosing not to obtain parking permits or become involved in *any* school program. As Justice Boehm argues “a program that tests these broad categories allows for drug testing for ‘all but the most uninvolved and isolated students.’”²²⁴

Morgan County High School²²⁵ and the Camden County School System²²⁶ employ similar drug testing policies.

219. Bd. of Educ. v. Earls, 536 U.S. 822, 836 (2002).

220. BRANTLEY COUNTY BD. OF EDUC., *supra* note 215.

221. *Earls*, 536 U.S. at 831.

222. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646, 662 (1995).

223. *Id.*

224. Linke v. Nw. Sch. Corp., 763 N.E.2d 972, 995 (Ind. 2002).

225. MORGAN COUNTY HIGH SCHOOL, DRUG SCREENING PROCEDURES, <https://eboard.eboardsolutions.com/ePolicy/policy.aspx?PC=JCDAC-R%281%29&Sch=4119&S=4119&RevNo=1.17&C=J&Z=R> (last visited Mar. 22, 2010).

226. CAMDEN COUNTY SCHOOLS, GUIDELINES FOR MANDATORY DRUG TESTING,

However, the policy in Camden County specified that it applied to “competitive interscholastic activities,” including “all competitive athletics, band, and literary competitions sanctioned by GHSA [Georgia High School Sports Association].”²²⁷ Interested parties debated the Camden County policy before it was adopted as the school was concerned with complying not only with the requirements of the Fourth Amendment regarding drug testing, but also with the privacy of their students.²²⁸ However, just as the Brantley School System, the Camden County policy includes parking permits in their “groups” of students subject to suspicionless drug testing.²²⁹

The policies discussed are not unique in Georgia. As indicated in the table following this comment, there are several policies in schools throughout Georgia extending drug testing beyond the contemplation of the U.S. Supreme Court. However, Georgia has alternatives to employ rather than extending drug testing beyond what has been expressly allowed in *Vernonia*²³⁰ and *Earls*.²³¹

V. POSSIBLE CONSTITUTIONAL ALTERNATIVES

Georgia school systems have impermissibly extended the Supreme Court’s holdings regarding suspicionless drug testing in secondary schools. If they continue to erode student’s Fourth Amendment rights, the concern the Seventh Circuit expressed in *Joy* regarding a transition to suspicionless testing of all students may become a reality in Georgia.²³² As such, the school systems must revise their policies in order to come into compliance with United States and Georgia Constitutions.

<https://eboard.eboardsolutions.com/ePolicy/policy.aspx?PC=JCDAC-R&Sch=4025&S=4025&RevNo=1.25&C=J&Z=R> (last visited Mar. 22, 2010).

227. *Id.*

228. Camden County Drug Policy Debate Article, FLA. TIMES UNION, July 14, 2005, http://www.redorbit.com/news/education/174520/camden_school_board_table_decision_on_drug_testing_debate_will.

229. See Table of Drug Testing Policies in Georgia *infra* note 251 (listing all policies in Georgia).

230. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995).

231. *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

232. *Joy v. Penn-Harris-Madison Sch. Corp.*, 212 F.3d 1052, 1066 (2000).

Possible alternatives include allowing “limited” testing as articulated in *Vernonia*²³³ and *Earls*,²³⁴ or, as noted by Eric Miller in his comment regarding suspicionless drug testing, enact a “suspicion-based scheme” to test the entire student body.²³⁵

The simplest solution for Georgia school systems is to come into compliance by revising their drug testing policies in accordance with the *Vernonia*²³⁶ and *Earls*²³⁷ opinions and by following Justice Boehm’s dissent in *Linke*.²³⁸ The Court was clear that suspicionless drug testing of students was constitutionally permissible for student athletes and competitive extra-curricular activities.²³⁹ Justice Boehm agreed with the need to test certain groups as long as there was a concrete reason to do so that complied with the “special needs” doctrine as articulated by the U.S. Supreme Court.²⁴⁰ Although some school systems, such as Camden County, have attempted to limit their testing of students involved in extra-curricular activities to only those involved in competitive extra-curricular activities,²⁴¹ other school systems have gone even further. For instance, the Brantley County School System, should revise its policy to reflect testing for only competitive extra-curricular activities.

The main issue, however, which is prevalent in Georgia school drug testing policies, is testing students holding parking permits. As mentioned above, this is beyond the holding of the Supreme Court in both *Vernonia*²⁴² and *Earls*.²⁴³ This aspect of the drug testing policy simply needs to be eliminated.

233. *Vernonia*, 515 U.S. 646.

234. *Earls*, 536 U.S. 822.

235. See generally Eric N. Miller, *Suspicionless Drug Testing of High School and College Athletes After Acton: Similarities and Differences*, 45 U. KAN. L. REV. 301 (Nov. 1996).

236. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995).

237. *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

238. *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972 (Ind. 2002).

239. *Vernonia*, 515 U.S. at 662; *Earls*, 536 U.S. at 831.

240. *Linke*, 763 N.E.2d at 992.

241. CAMDEN COUNTY SCHOOLS, *supra* note 226.

242. *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995).

243. *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002).

If Georgia school systems want to test students that hold parking permits, they have another alternative. The school systems could implement a policy that conducts suspicion-based testing of the entire student body. Although the Supreme Court has repeatedly stated that this would not be effective because parents are not likely willing to accept “accusatory drug testing,” the expense of defending lawsuits for the school system is high, and it puts pressure on teachers and administrators to “spot” drug abuse, it does provide a constitutional alternative.²⁴⁴ Indeed, some argue that because the students and teachers interact closely on a daily basis, they are in the best position to note changes in the student’s behavior and would be able to note suspicious behavior.²⁴⁵ Other proponents of suspicion-based testing argue that there is some indication that parents believe suspicion-based testing is the school’s role, and suspicionless testing the parent’s role.²⁴⁶

VI. CONCLUSION

The issue faced by many secondary schools is how to implement a drug testing policy that is constitutionally permissible. Because many schools in Georgia have enacted drug testing policies that encompass a vast majority of the student population, and are therefore extending testing beyond the “limited” testing as proscribed in *Vernonia*²⁴⁷ and *Earls*,²⁴⁸ the policies are unconstitutional. Due to the lack of case law in Georgia and the Eleventh Circuit, Georgia has the opportunity to shape future case law regarding student drug testing.

If Georgia chooses to follow the reasoning of Justice Boehm in *Linke*²⁴⁹ and provide greater Fourth Amendment protections to its secondary school students, Georgia school systems need to revise their current drug testing policies in order to come into compliance with the United States and Georgia Constitutions.

244. *Vernonia*, 515 U.S. at 663-64.

245. Miller, *supra* note 235, at 327.

246. Michael Winerip, *Drawing the Line on Drug Testing*, N.Y. TIMES, Nov. 19, 2008, http://www.nytimes.com/2008/11/23/nyregion/new-jersey/23Rparent.html?_r=1&ref=nyregion.

247. *Vernonia*, 515 U.S. 646.

248. *Earls*, 536 U.S. 822.

249. *Linke v. Nw. Sch. Corp.*, 763 N.E.2d 972 (Ind. 2002).

TABLE OF DRUG TESTING POLICIES IN GEORGIA²⁵⁰

COUNTY	POLICY²⁵¹
Brantley	All students involved in extra-curricular activities in grades 9 through 12 and in parking on the Brantley County High School campus
Bremen City (Haralson)	Any student enrolled in Bremen High School who participates in or applies for participation in any interscholastic athletic activity, any interscholastic extra-curricular activity or any student who applies for a parking permit and intends on parking a vehicle on school grounds at Bremen High School ²⁵²

250. eBoard Main Page, <https://eboard.eboardsolutions.com/> (follow “other eBoard Sites” and select county for hyperlink). The following is a list of counties with no school drug testing policy: Appling, Athens-Clarke, Atkinson, Atlanta Public Schools (Fulton), Augusta-Richmond, Bacon, Baker, Baldwin, Banks, Barrow, Bartow, Ben Hill, Berrien, Bleckley, Brooks, Bryan, Bulloch, Burke, Calhoun, Calhoun City (Gordon), Candler, Carroll, Carrollton City (Carroll), Cartersville City (Bartow), Chatham, Chattooga, Cherokee, Clayton, Clinch, Cobb, Coffee, Colquit, Columbia, Columbus-Muscogee, Commerce City (Jackson), Coweta, Crawford, Crisp, Dade, Dalton City (Whitfield), Dawson, Decatur City (DeKalb), DeKalb, Dodge, Dooly, Dougherty, Dublin City (Laurens), Early, Echols, Elbert, Emanuel, Evans, Fayette, Floyd, Forsyth, Franklin, Fulton, Gainesville City (Hall), Gilmer, Glascock, Glynn, Gordon, Grady, Greene, Gwinnett, Habersham, Hall, Hancock, Harris, Hart, Henry, Houston, Jackson, Jeff Davis Jefferson, Jefferson City (Jackson), Jenkins, Johnson, Jones, Lamar, Lanier, Lee, Liberty, Lincoln, Long, Lowndes, Lumpkin, Madison, Marietta City (Cobb), McDuffie, McIntoch, Meriwether, Miller, Mitchell, Monroe, Murray, Newton, Paulding, Peach, Pelham City (Mitchell), Pickens, Pike, Polk, Pulaski, Quitman, Rabun, Randolph, Rome City (Floyd), Rockdale Buts, Screven, Social Circle City (Walston), Spaulding, Stephens, Stewart, Sumter, Talbot, Tattnall, Tift, Thomas, Toombs, Treutlen, Troup, Upson Walton, Valdosta City (Lowndes) Ware, Warren, Washington, Wayne, Webster Wilcox, Worth. *Unable to Verify Policy:* Bibb, Buford City (Gwinnett), Charlton, Chattahoochee, Clay, Decatur, Irwin, Jasper, Laurens, Macon, Marion, Montgomery, Oglethorpe, Pierce, Schley, Seminole, Taliaferro, Taylor, Telfair, Terrell, Thomasville City (Thomas), Turner, Twiggs, Vidalia City (Toombs), Wheeler, Wilkes, Wilkinson.

251. eBoard Main Page, <https://eboard.eboardsolutions.com/> (follow “other eBoard Sites” and select county; then follow “Policies” for hyperlink).

252. Bremen High School, <http://www.bremencs.com/boardpolicy.html>

Camden	All students involved in competitive interscholastic activities in grades 7 through 12 and in parking on the Camden County High School campus
Catoosa	Official has individualized reasonable suspicion that a student has possession of or is under the influence of a drug or alcohol; student athletes; marching band members
Chickamauga City (Walker)	All students who are competing on interscholastic athletic teams or in band will be screened for substance usage prior to or during their competitive season; Students involved in any extracurricular activities such as Quiz Bowl, Literacy Meet, etc., and those who drive to school and park a vehicle on campus will not be subject to an initial screening but may be subject to random drug testing throughout the school year
Cook	All potential student athletes and students involved in extracurricular school activities
Douglas	All students who wish to participate in any privileged activities be it, interscholastic athletic activity, any interscholastic extracurricular activity, or any student who applies for a parking permit and intends to park a vehicle on school grounds of the Douglas County School System
Effingham	All high school students who participate in a school-sponsored extracurricular activity (includes parking a vehicle on school property)
Fannin	Students who seek to participate in a school-sponsored extracurricular activity, park a car on Fannin County School System property, or whose parents have chosen to utilize the opt-in option available to them

Haralson	All student who wish to participate in any interscholastic athletic activity, any interscholastic extra-curricular activity or any student who applies for a parking permit and intends parking a vehicle on school grounds at Haralson County High School
Heard	All students who wish to participate in any interscholastic athletic activity (including cheerleading and marching band) or who seek a campus parking permit at Heard County High School
Morgan	All students who wish to participate in any GHSA governed interscholastic activity or any student who applies for a parking permit and intends to park a vehicle on school grounds at Morgan County High School
Oconee	All students who wish to participate in any Georgia High School Association (GHSA) governed interscholastic activity or any student who applies for a parking permit and intends to park a vehicle on school grounds at North Oconee High School or Oconee County High School
Putnam	All students who wish to participate in any GHSA governed interscholastic activity or any student who applies for a parking permit and intends to park a vehicle on school grounds at Putnam County High School
Towns	All students who wish to participate in any interscholastic athletic activity, any interscholastic extra curricular activity or any student who applies for a parking permit and intends to park a vehicle on school grounds at Towns County High School
Trion City (Chattooga)	Students participating in interscholastic activities, extra curricular activities, and/or parking on the campus of Trion City Schools

Union	High school students participating in any interscholastic athletic activities, extracurricular activities, and/or making application for a permit to park a vehicle on school grounds (random testing) ²⁵³
Walker	All students who wish to participate in any interscholastic athletic activity, any interscholastic extracurricular activity, or any student who applies for a parking permit and intends to park a vehicle on school grounds of Walker County Schools
White	All students who participate in any sports activity that requires an annual physical as a condition of participation
Whitfield	Initial and random testing of students participating in extracurricular activities

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253. <http://www.union.k12.ga.us/board> (Follow “UC Drug Test Policy” for hyperlink).

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