

# Drug Testing in Public High Schools: Singling Out Student Athletes

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## Drug Testing in Public High Schools: Singling Out Student Athletes

### I. INTRODUCTION

Several recent cases challenging drug testing programs in public high schools indicate that student-athletes have often been singled out for testing, leaving other students unaffected by such policies. This article will examine how the court system has essentially encouraged such line-drawing and why it generally believes that drug testing practices aimed at student-athletes are more consistent with the Fourth Amendment than those directed at other members of the student population. However, although courts tend to favor this “singling out” process, not every drug testing program targeted at those on school sports teams will pass constitutional muster. Because the Fourth Amendment does not pertain to the actions of private schools,<sup>1</sup> they will not be included in this discussion.

### II. COURT ENCOURAGEMENT OF THE ‘SINGLING OUT’ PROCESS

Drug testing in public high schools is a rather recent phenomenon and thus, few cases have been adjudicated on this subject. Yet, in cases that have arisen concerning such testing practices, courts have impressed the notion that public school officials should narrowly tailor their testing programs.

In *Brooks v. East Chambers Consol. Ind. School Dist.*,<sup>2</sup> a case involving a drug testing program directed at all students who wished to participate in school-sponsored extra-curricular activities, the court made some telling comments regarding those testing programs that sweep too broadly. It stated, “Every court that has considered urine testing of the general student body in a public school has found it unconstitutional.”<sup>3</sup> With regard to the case at hand, the court said that the testing program was the most intrusive of any school district in the state because it tested the “widest range” of students.<sup>4</sup> Those participating in extra-curricular activities comprised over half the student body.<sup>5</sup>

The legal rationale relied upon by the *Brooks* court in striking down the expansive testing program stemmed from the case of *Odenheim v. Carlstadt-East Rutherford School Dist.*<sup>6</sup> In *Odenheim*, a program which required every student

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1. *Brooks v. East Chambers Consol. Ind. School Dist.*, 730 F.Supp. 763 (S.D. Tex. 1989). If a search is being conducted by a private entity and not under the color of state law, then it is not subject to the same level of scrutiny that a search by a public official would receive. The United States Supreme Court has held expressly that the Fourth Amendment applies to officials of public schools.

2. *Id.* at 765.

3. *Id.*

4. *Id.*

5. *Id.*

6. 510 A.2d 709 (N.J. Super. 1985).

in the school to submit annual urine samples for drug testing was invalidated.<sup>7</sup> The *Odenheim* court first described students as possessing reasonable expectations of privacy.<sup>8</sup> It then stated that regardless of what the true motives were for the program, the invasion on the privacy interests of the student population was not justified, largely because school policy already provided for exclusion and/or suspension of students who were found to be involved with drug activity.<sup>9</sup> As *Odenheim* illustrates, courts tend to favor a method for dealing with drug abuse by students which does not involve an intrusion into a student's person.

*Brooks* is consistent with the above view in that the *Brooks* court found the Indiana drug testing program to be an inadequate means for deterring students from using drugs, partly because students could find out in advance when they would be tested.<sup>10</sup> To obtain a clean result, students might decide to simply refrain from using drugs during the period immediately preceding the test. Thus, the ineffective testing procedure unnecessarily invaded the reasonable privacy interest of students in the school when drug abuse could perhaps be successfully limited by a different system, such as peer counseling programs for students who clearly have a substance abuse problem, or a system encouraging anonymous reporting of drug users by fellow students.<sup>11</sup>

Therefore, *Brooks* and *Odenheim* present instances where the means do not justify the ends. While school officials' interest in curbing drug abuse by all students in their institutions is a legitimate one, the court holdings reveal that when the goals sought by drug testing could be met by other means not involving the intrusion into bodily privacy, the testing program will likely be struck down. Although the other methods used could arguably infringe on privacy interests as well, urine testing, examined below, receives more suspicion from the courts because it qualifies as a Fourth Amendment search.<sup>12</sup> However, one will later note that when this search is applied solely to student-athletes, a lower level of scrutiny may be warranted, since this group's privacy interest is already somewhat weaker than that of other students.<sup>13</sup>

As in the previous two cases, the court in *Schail v. Tippecanoe County School Corp.*<sup>14</sup> flatly refused to endorse drug testing of broad groups of students. In addition, *Schail* did something which the *Brooks* and *Odenheim* courts did not do: the *Schail* court clearly advocated the separation of student-athletes and other students into two distinct groups.<sup>15</sup> As the court upheld a random drug testing program applicable only to students seeking to participate on the school's sports teams, it emphasized the relevance of the narrow scope to its

7. *Id.*

8. *Id.* at 713.

9. *Id.*

10. *Brooks*, 730 F. Supp. at 762.

11. *Id.*

12. *Schail v. Tippecanoe County School Corp.*, 864 F.2d 1309, 1318 (7th Cir. 1988).

13. *Id.* at 1318.

14. 864 F.2d 1309.

15. *Id.* at 1318.

ruling. It stated, "sports are quite distinguishable from almost any other activity. Random testing of athletes does not necessarily imply random testing of band members or the chess team."<sup>16</sup>

The *Schaill* court's attitude stemmed from the same point recognized in *Brooks* and *Odenheim*: students generally have a reasonable expectation of privacy. However, while the *Brooks* and *Odenheim* courts assumed that all schoolchildren had reasonable expectations of privacy that were not to be infringed upon by a broad-based urinalysis program when other alternatives could be invoked, *Schaill* presents another perspective. Under the *Schaill* view, student-athletes are excluded from the reasonable privacy interests category, in which all other students fall. Indeed, as the court plainly stated in a footnote, "the considerations discussed in the text also serve to distinguish athletes from members of the general school population."<sup>17</sup>

The "considerations" justifying the disparity in the privacy interests between the two groups will be addressed in the Fourth Amendment analysis section below.

As mentioned above, the *Brooks* court seemed to view all students as having reasonable expectations of privacy. Because this decision followed *Schaill*, the court sought to reconcile its views with those presented in that case. For that reason, it was stated in *Brooks* that the "law of the Seventh Circuit is different from and less protective of student rights than Fifth Circuit laws."<sup>18</sup> Despite this comment, the argument can be made that the *Brooks* court was not entirely opposed to the *Schaill* position that athletics are inherently different from other extra-curricular, or academic activities. This is indicated by its statement that the *Schaill* testing program was "considerably more limited than the one before this court."<sup>19</sup>

While "limited" could be read to refer solely to the fact that only thirty percent of students were to be tested under the *Schaill* program,<sup>20</sup> as opposed to over fifty percent pursuant to the *Brooks* program,<sup>21</sup> the use of the term might instead represent the view that student-athletes are a distinct group, even when a significant percentage of the school population composes this group. The inference can be made that the word "limited" is directly linked to the status of student-athletes themselves, because in terms of implications for student-athletes, the *Schaill* and *Brooks* testing programs are very similar. Under both programs, students testing positive for drug use would simply have to forego some participation in school-sponsored extracurricular activities.<sup>22</sup> No suspension or expulsion from school would result from a positive testing result. Thus, had the punishment on the student been the focus of the *Brooks* court, the *Schaill*

16. *Id.* at 1319.

17. *Id.* at fn. 10.

18. *Brooks*, *supra* note 1, at 766.

19. *Id.*

20. *See* *Schaill v. Tippecanoe County School Corp.*, 679 F.Supp. 833, 835 (N.D. Ind. 1988).

21. *Brooks*, *supra* note 1, at 765.

22. *Schaill*, *supra* note 12, at 1319; *Brooks*, *supra* note 1, at 765.

program could not have been considered more limited.

Before analyzing the singling out of student-athletes in the Fourth Amendment context, the legitimacy of such a process under the Equal Protection Clause of the Constitution should be mentioned. A student-athlete is not considered to be a member of a suspect class.<sup>23</sup> In addition, as education is not a fundamental interest, the participation in a sports program stemming from an educational institution is likewise not a fundamental interest.<sup>24</sup> Hence, “under the Equal Protection Clause, courts will uphold student-athlete drug testing that is rationally related to a state institution’s legitimate interest of ensuring the health and safety of athletes and protecting the integrity of the sport.”<sup>25</sup> Because of this weak standard, a student-athlete testing program is not likely to violate the Equal Protection Clause, as long as it is not an irrational means of achieving the asserted goals.

### III. FOURTH AMENDMENT ANALYSIS

The Fourth Amendment states: “The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated, and no warrants shall issue, but upon probable cause . . . .”<sup>26</sup> Urinalysis, a common method of drug testing, has been deemed a “search” under the Fourth Amendment because each person possesses a reasonable expectation of privacy in his act of urination and in the product which is excreted.<sup>27</sup> Because the U.S. Supreme Court has recently ruled that the probable cause and warrant requirements of the Fourth Amendment are not applicable to school searches,<sup>28</sup> the next inquiry that must be made centers on whether the search by public school officials is reasonable.<sup>29</sup> Determining reasonableness involves a careful balancing of the invasion on the individual’s privacy interest by the search against the purpose of the state-run academic institution in conducting the search.<sup>30</sup>

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23. Charles Feeney Knapp, *Drug Testing and the Student-Athlete: Meeting the Constitutional Challenge*, 76 IOWA L.REV. 107, 126 (1990).

24. *Id.* at 126.

25. *Id.*

26. U.S. Const. amend. IV.

27. *Schaill*, *supra* note 12 at 1318.

28. *Id.* at 1315 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985)). A school official’s primary mission is not to ferret out crime, but is instead to teach students in a safe and secure learning environment. School officials should not be required to proceed through the courts each time they desire to obtain further information regarding a possible violation of school rules.

29. *Id.* The fundamental command of the Fourth Amendment is that searches and seizures be reasonable, and although the concept of probable cause and the requirement of a warrant bear on the reasonableness of a search, . . . in certain limited circumstances neither is required.

30. *Acton v. Vernonia School Dist.*, 796 F. Supp. 1354, 1361 (D. Or. 1992).

### A. Student Athlete Privacy Interests

An initial examination of the reasonableness of the courts' position must focus on the intrusion on the student-athlete's privacy interest via drug testing. Then, one must determine what sets student-athletes apart from the rest of the student-body and why drug testing of the former group versus the latter is more likely to satisfy the Fourth Amendment.

The *Schail* court found that as compared to their fellow classmates, student-athletes have diminished expectations of privacy, and in particular, privacy with respect to urinalysis.<sup>31</sup> One reason it stressed to support this view was the element of 'communal undress' which is an integral part of athletic participation.<sup>32</sup> The logic seems to be that while many individuals are reticent about removing their clothing while in the presence of others, athletes normally are accustomed to changing their attire in open locker rooms, and thus they tend not to possess the same degree of modesty in this respect. A broader notion is also implicated. Since athletes may be comfortable with the notion of undressing when others are present, perhaps they likewise, will not feel timid about engaging in another usually private activity, urination, when school officials are nearby.

Another reason for the *Schail* court's determination that student-athletes do not have the same expectations of privacy as other students with regard to urine testing, was that physical examinations are a part of almost all athletic programs. The student-athletes in this case were already required to produce a urine sample as part of this medical examination.<sup>33</sup> While this sample tested solely for the presence of sugar in the urine, the court stated that "the fact that such samples are required suggests that legitimate expectations of privacy in this context are diminished."<sup>34</sup> Despite the difference between the narrow goals of this type of test versus a drug test, the important concept to note is that student-athletes, unlike other individuals, may view the two tests in a similar manner. Because many athletic activities place tremendous strain on the bodies of unfit or unhealthy individuals, it is arguably very important that a person receive a clean bill of health before he/she goes onto the playing field. Thus, all urine tests which detect substances adversely affecting the body may seem acceptable in the eyes of a student-athlete. While a student-athlete may not want to take any urine test, he/she may not feel hostile about submitting a urine sample that in some way will go towards protecting his/her well-being.

In upholding a student-athlete drug testing program, the court in *Acton v. Vernonia School Dist.* reinforced *Schail*. It stated, "[R]egulations already require that students undergo a physical examination prior to participation, the locker rooms themselves are open spaces and do not provide a great deal of privacy."<sup>35</sup>

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31. *Schail*, *supra* note 12, at 1318.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Vernonia*, *supra* note 30, at 1363.

While the *Brooks* court did not mention a diminished privacy expectation for the student-athletes encompassed by the testing program at issue, *Brooks* can perhaps be reconciled with *Schail* and *Vernonia* by again noting that the program also included students participating in non-sports related extracurricular activities. The wide sweep of the program was a major flaw of the school district's testing policy, and "by testing non-athletes, the school introduced testing subjects whose expectations of privacy are not diminished by the communal undress of locker rooms and the pre-existence of annual physicals and urine sampling."<sup>36</sup>

Although the elements of communal undress and submission of a urine sample as part of a mandatory medical examination lend support to the theory that student-athletes have weakened expectations of privacy with respect to urinalysis, other factors were also pertinent to the *Schail* court's conclusion. For example, in Indiana, students' participation in interscholastic athletics was already subject to a great deal of regulation, such as minimum grades, residency and eligibility requirements, and training rules, including prohibitions on smoking, drinking, and drug use both on and off the school premises.<sup>37</sup> Thus, unlike other students, student-athletes were used to satisfying standards and abiding by restrictions set by the school system. In other words, they had essentially opened themselves up to a situation in which much of their behavior will depend upon the direction of others. Accordingly, in the eyes of student-athletes already accustomed to following the orders of the school authorities, a urinalysis program perhaps would not be viewed with much alarm.

The *Schail* court also reasoned that student-athletes would not expect to remain immune from drug testing procedures since from numerous press reports, they already would know that many prominent collegiate and professional athletes have been obligated to undergo urine testing for drug use.<sup>38</sup> Likewise, they would be aware that some of these athletes with positive testing results have been suspended or disqualified for their sports.<sup>39</sup> Stated simply, student-athletes choosing to join athletic teams will likely believe that drug testing in the form of urinalysis simply comes with the territory.

### B. Purpose of Testing Programs

Because student-athletes in public schools can arguably be said to have a lesser privacy interest than their classmates, the Fourth Amendment balance will tend to more easily tip in the school's favor when a drug testing program targeting the student-athletes is at issue. However, the weakened privacy interest

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36. Knapp, *supra*, note 23, at 131. While none of the opinions specifically state who is encompassed by the category of student-athlete, *Schail* does make clear that cheerleaders may be tested in the same fashion as student-athletes. This is evident from the fact that the drug testing program upheld in that case tested student-athletes and cheerleaders in an identical manner. *Schail*, 864 F.2d at 1310.

37. *Schail*, *supra* note 12, at 1318.

38. *Id.* at 1319.

39. *Id.* at 1319.

possessed by those on school sports teams must still be overcome. Therefore, one must focus on the other side of the scale, which concerns the purposes of the public school officials for drug testing student-athletes. Because *Vernonia* and *Schail* are apparently the only decisions dealing specifically with student-athlete drug testing programs in public high schools, two main purposes for drug testing set forth in both of those cases deserve close attention. It should be noted that while there is some case law concerning student-athlete drug testing in the university setting,<sup>40</sup> the goals to be achieved with urinalysis in that context will likely be rather different from those adopted in high schools. The distinction relates to the fact that college students have "for the most part reached adulthood, university programs are far less structured . . . and discipline is largely left to the students."<sup>41</sup>

One purpose for testing only student-athletes relates to a special concern on the part of school officials over the safety of this group. This concern was heavily stressed in *Vernonia*.<sup>42</sup> There, the court cited convincing testimony that some football players under the influence of drugs ignored or forgot well-drilled safety routines.<sup>43</sup> The court also noted that a school wrestler had been severely injured when he failed to execute a basic maneuver, with the accident evidently somewhat attributable to marijuana use by him.<sup>44</sup> Testimony given by a physician corroborated the notion that drugs have deleterious effects on a person's "motivation, memory, judgment, reaction, coordination, and performance."<sup>45</sup> Thus, drug use may have a "numbing influence" on an individual, which may be especially dangerous to the student-athlete given the very competitive nature of many high school sports teams.<sup>46</sup> The *Vernonia* court found the drug testing program for student-athletes to be justified under the Fourth Amendment, partially due the school's interest in discovering the identity of the players using drugs as a means of averting further related accidents in athletic events.<sup>47</sup>

Likewise, in *Schail*, the school officials' desire to protect the safety of the student-athletes contributed to the court's decision that the student-athlete testing policy at issue was reasonable and hence, consistent with the Fourth Amendment. As in *Vernonia*, it was generally noted in *Schail* that use of drugs presented special risks to student-athletes: "Due to alterations of mood, reduction of motor coordination and changes in the perception of pain attributable to drug use, the health and safety of athletes was particularly threatened."<sup>48</sup> Direct evidence of the dangers drugs posed to students on school sports teams was also provided.

40. See, e.g., *Hill v. NCAA*, 801 P.2d 1070 (Cal. 1990).

41. *Vernonia*, *supra* note 30, at 1363.

42. *Id.*

43. *Id.* at 1356.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

For instance, in one situation, a baseball player, under the influence of drugs, suffered a broken nose after he misjudged a pitch and turned his face toward the ball.

The second purpose for testing only student-athletes for drug use pertains to disciplinary and behavioral matters. Both *Vernonia* and *Schaill* pointed to the fact that student-athletes are often very respected by their peers and may serve as role models to other students.<sup>49</sup> Due to their esteemed status, it is more likely that other students will attempt to follow in their footsteps, even if doing so involves misconduct.<sup>50</sup> Thus, if the abuse of drugs by student-athletes can be deterred by way of drug testing them, others students, desiring to emulate their role models, may similarly refrain from using the prohibited substances.<sup>51</sup> Stated somewhat differently, where non-athletes cannot be tested, they may nonetheless be inspired to abstain from drugs if drug use is not considered “cool” by those they admire. Both the *Vernonia* court and the *Schaill* court found this purpose to be reasonable. However, this purpose was more significant in *Vernonia*, due to the isolated and rural nature of the community in which drug testing was conducted.

Therefore, after comparing both sides of the balance in order to determine the reasonableness of a student-athlete drug testing program under the Fourth Amendment, it is evident that school officials can give courts persuasive reasons for conducting such a program without too much difficulty. However, the analysis cannot stop there. One must still take into account that such programs are by no means per se constitutional.

### C. Passing Muster Under the Fourth Amendment

Simply because public school officials target student-athletes with drug testing does not mean that courts will always approve of such programs. While it is true that in the two cases dealing specifically with student-athlete drug testing in public high schools the programs were approved, the courts in *Vernonia* and *Schaill* were still very cognizant of the fact that the Fourth Amendment reasonableness requirement is not easily satisfied. These courts made clear that having a diminished privacy interest on one side of the scale, and persuasive purposes for conducting the drug testing program, on the other, does not end the inquiry. The “invasion” component of the balancing test still must be more fully explored. In one respect, this term seems to operate hand-in-hand with the lessened privacy expectations of the student-athlete. That is, if a student-athlete’s privacy expectations are diminished, there logically will be less of an invasion on that right to privacy. Yet, for the invasion to be truly justified, it may still have to be highly necessary and very limited in scope. In other words, there are substantive and procedural considerations that are important for completing a determination on the reasonableness of a student-athlete drug testing program.

49. *Id.* at 1321; *Vernonia*, *supra* note 30, at 1363.

50. *Schaill*, *supra* note 12, at 1320.

51. *Vernonia*, *supra* note 30, at 1363.

The substantive consideration that must be focused on pertains to "individualized suspicion." When public school officials have no individualized suspicion that a particular student-athlete has ever used drugs, they must demonstrate a compelling need for the testing program.<sup>52</sup> This rule reveals a key point: Despite the fact that a student-athlete has a weakened expectation of privacy, if there is no compelling interest to justify the invasion on his rights when he, himself, is not suspected of taking drugs, a testing program applied to him may not be constitutional.

When a compelling interest is required to justify a student-athlete drug testing program, simply vocalizing a persuasive purpose for the search, will not suffice.<sup>53</sup> Thus, this explains why in both *Vernonia* and *Schail*, with respect to the purpose of preserving the safety of the athletes, the courts looked to the record for evidence linking dangers on the playing field to drug use. The position taken by both courts seems to be that in order to justify the testing of those student-athletes in whom there is no individualized suspicion, school officials must at least demonstrate that drugs have been used by *some* (not particular) student-athletes at their respective institution during an athletic practice or contest.<sup>54</sup> In *Schail*, both the assistant principal and the athletic director testified to three such instances noted,<sup>55</sup> while in *Vernonia*, the wrestling coach pointed to the two incidents mentioned previously.<sup>56</sup>

The above view receives further support from other cases. In *Brooks*, there was nothing in the record to support a connection between drug use, participation in extra-curricular activities, including athletics, and injuries sought to be avoided.<sup>57</sup> Likewise, in *Derdeyn v. University of Colorado*,<sup>58</sup> which involved a collegiate drug testing program, the court made an analysis similar to that in *Vernonia* and *Schail*, concluding that "no evidence of actual drug problems or drug related injuries among the University's athletes was found. Hence, the defendants failed to advance a compelling need based on actual student drug related problems."<sup>59</sup>

52. *Vernonia*, *supra* note 30, at 1362. The compelling need notion for urine testing can be traced to *Skinner v. Railway Labor Executives' Assn.*, 109 S.Ct. 1402, 1417 (1989) (suspicionless search does not violate the Constitution where state has a compelling interest in guarding against hazardous, latent conditions which rarely lead to individualized suspicion). *See also* Knapp, *supra* note 23, at 132 ("it seems apparent that the health and safety of athletes, where drug use and abuse is intensified, is no less important than railway safety").

53. *Vernonia*, *supra* note 30, at 1362.

54. The *Vernonia* court said that *Schail* "teaches that a school's random urinalysis program for interscholastic athletes which employs the least intrusive means possible to effectuate this goal may withstand constitutional scrutiny if based upon specific evidence of drug related injuries." Specific instances of drug use by student-athletes were then cited in *Vernonia* as an analogy to *Schail*. *Vernonia*, *supra* note 30, at 1362.

55. *Schail*, *supra* note 12, at 1320.

56. *Vernonia*, *supra* note 30, at 1356.

57. *Vernonia*, *supra* note 30, at 1362 (citing *Brooks*, 730 F. Supp. at 764-5).

58. *Derdeyn v. University of Colorado*, 832 P.2d 1031 (Colo. App. 1991).

59. *Id.* at 1034-5. *See also*, *Vernonia*, *supra* note 30, at 1362: "*Brooks* . . . and *Derdeyn* teach that a school may not justify a random urinalysis program upon amorphous statistics or generalized

The compelling need test appears somewhat more difficult to satisfy with regard to the second main purpose described previously, that of instilling discipline and limiting behavioral problems in public schools. The link between deterring student-athlete drug use through testing programs and limiting misconduct on the part of other students seems rather attenuated. Yet, in *Vernonia*, the court did note that there was evidence that student-athletes were role models for the entire community.<sup>60</sup> The court emphasized that the town was very small and rural, with limited entertainment opportunities. Thus, interscholastic athletics played “a dominant role in the community” and student athletes were “well known and admired.”<sup>61</sup> Again, *Vernonia* emphasizes that factual support for an articulated purpose has a key role when there is no individualized suspicion.

Although *Schaill* did not discuss the second purpose with reference to evidence in the record, one could argue that the court did not view this purpose to be as important as that of safety. While the Seventh Circuit decision quoted the district judge’s statement that “the student-athlete is generally viewed by the broader community with admiration and respect,” it ignored the district judge’s qualification that this notion would not, without more, legitimize a student-athlete drug testing program.<sup>62</sup> Stated differently, the compelling need for the testing program in *Schaill* seems more rooted in the purpose of preserving the welfare of student-athletes than in that of dealing effectively with school disciplinary and behavioral matters.

Therefore, to justify an invasion of a student-athlete’s privacy with a drug testing program in the absence of individualized suspicion, a factually based, compelling need must be shown. The relationship between the “invasion” component of the balancing test and procedural considerations now remains to be analyzed.

The *Schaill* court linked the “invasion” notion to its concern over discretion when it stated, “the search program must incorporate adequate safeguards” so that even the diminished student-athletes’ privacy interests are “not subject to the discretion of the official in the field.”<sup>63</sup> By safeguards, the court essentially meant that the program must be carefully planned and controlled, such that the search would not be any more intrusive on the privacy rights of those tested than was necessary. Among other factors, the court stressed that there were specific provisions for the manner in which the urine sample would be obtained and for the consequences of positive test results, along with a specification that student-athletes would be fully advised of the manner in which the program would operate when they were initially asked to sign consent forms.<sup>64</sup>

notions about the national drug problem.”

60. *Vernonia*, *supra* note 30, at 1363. The court did not elaborate on the exact nature of the evidence as it made this conclusion.

61. *Id.* at 1356.

62. *Schaill*, *supra* note 20, at 856.

63. *Schaill*, *supra* note 12, at 1321.

64. *Id.*

The collection of the urine sample in *Schail* involved a school official accompanying a student-athlete of the same sex to a bathroom. The student could then enter a stall and close the door. The water in the toilet was tinted so that the school official would know, without observing the student in the stall, that the urine sample was authentic.<sup>65</sup> The school official then was to listen for normal sounds of urination and to subsequently check the genuineness of the sample by seeing if it was warm. Thus, this procedure helped to ensure that the tests were not inaccurate due to tampering, yet the student-athlete's privacy was not substantially undermined.<sup>66</sup>

Meanwhile, in *Anable v. Ford*,<sup>67</sup> a case concerning a school drug testing program that was not targeted solely at student-athletes, the court found it unreasonable to require "a teenaged student to disrobe from the waist down while an adult school official, even though of the same sex, watches the student urinate in the 'open' into a tube."<sup>68</sup> Although *Brooks* did not involve a school official viewing the act of urination, the court still indicated that the method of collecting the sample was very intrusive since the student tested had to hand his urine sample to the school nurse in front of the school principal.<sup>69</sup>

The two cases reflect an attitude by the courts that school officials' ability to view a student's act of urination or the urine itself has more of an impact on privacy than does their ability to hear the sounds of urination. This position is logical due to the fact that when one urinates in any public restroom where there are various stalls, there is no mechanism to prevent the sound of this process from being heard by others who are also using the facility. The fact that a school official hears the sounds of a student's urination does not seem any different from this rather common occurrence. However, because bathroom stalls normally have doors to inhibit others from witnessing one's act of urination, the ability of a school official to see what others are not permitted to see clearly undermines an individual's privacy. Hence, unlike *Schail*, in these two cases, procedures were not used to limit the degree of invasion on the student's privacy during the collection process.

*Schail* also placed great emphasis on the consequences for positive test results with regard to the overall reasonableness of the program. The court stated that "a student who has a positive urinalysis result will not even be denied participation in the athletic program. He or she will merely be refused participation in 30% of the games."<sup>70</sup> The court did not view this as an excessive penalty. While in *Vernonia*, a student-athlete testing positive for drug use might face suspension from the athletic program, he could avoid that result by participating in an assistance program and taking a weekly drug test for six weeks.<sup>71</sup> In contrast, *Anable* concerned a program where students might face

65. *Id.* at 1311.

66. *Id.* at 1321.

67. *Anable v. Ford*, 653 F.Supp. 22, 41 (W.D. Ark. 1985), *modified*, 663 F.Supp. 149.

68. *Id.* at 41.

69. *Id.*

70. *Schail*, *supra* note 12, at 1319.

71. *Vernonia*, *supra* note 30, at 1358. While sports had great prestige in the community discussed

expulsion for positive test results.<sup>72</sup> Therefore, the testing programs in *Schail* and *Vernonia* show a very limited burden placed on the rights of even those student-athletes who test positive for drug use.

Last, the factor of consent should be focused on. *Schail* points to a program where student-athletes, prior to signing consent forms, were informed about what the drug testing would entail, including the manner in which the urine would be collected, the handling of the sample by a competent laboratory, and repercussions of positive testing results.<sup>73</sup> The court described how this process limited the invasion on privacy rights: “The notice provided by the consent forms significantly diminishes the subjective intrusiveness of the urine testing proposed.”<sup>74</sup> What is important to note is that those tested under this program had a real choice: With the knowledge they possessed, they could decide either to take the test and participate in athletics or, forego the test and face no consequences except for exclusion from school sports teams. This can be contrasted with *Anable* where certain students were “led to believe that they had to submit to the test on pain of dismissal from the school.”<sup>75</sup> While the student-athletes being tested in *Schail* were only teenagers, the court did not seem to view young age as a hindrance to a student’s ability in weighing these considerations. It did concede that “there is certainly a burden on these plaintiffs’ right to refuse drug testing,” but then stated that “that burden is a light one compared with . . . cases where drug testing is a condition of employment, promotion or similar job related interest.”<sup>76</sup>

Hence, it becomes evident from the carefully drawn program in *Schail* as compared and contrasted with other testing policies, how relevant the nature of the “invasion” on even diminished privacy rights of student-athletes truly is in satisfying the Fourth Amendment. The balancing test is not one to be heavily watered-down, as is evident from the fact that with student-athlete drug testing programs, school officials must follow adequate safeguards, they may not impose excessive penalties on those with positive results, and consent and notice must play important roles.

#### IV. CONCLUSION

In summary, although there have been relatively few drug testing cases concerning public high schools litigated before the courts, and even fewer such cases centering on student-athletes, it becomes clear from examining the opinions, that courts have encouraged the “singling out” of students on school

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in this case, and hence an inability to participate in them might seem a rather harsh penalty, note the ease with which a student-athlete could forestall such a result.

72. *Anable*, *supra* note 67, at 40.

73. *Schail*, *supra* note 12, at 1321.

74. *Id.* at 1320.

75. *Anable*, *supra* note 67, at 39.

76. *Schail*, *supra* note 12, at 1320. Hence, the court did not seem concerned with the notion that students may feel peer pressure to take part in school athletics. It labeled participation in interscholastic athletics as a “benefit.”

sports teams for testing. Drug testing targeted at student-athletes tends to be more consistent with the Fourth Amendment, because students on athletic teams have diminished expectations of privacy and public school officials have more persuasive reasons to justify the search of this group, as opposed to the rest of the student body. However, the term “invasion” in the balancing test also requires that other substantive and procedural considerations that must be analyzed before a student-athlete drug testing program can be deemed constitutional.

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