

Mandatory Steroid Testing of High School Athletes: A Synthesis of State Initiatives and Federal Constitutional Rights

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Abstract

In an effort to protect schoolchildren from sacrificing their health for steroid induced athletic grandeur, some states have experimented with laws implementing suspicionless drug testing of student athletes. These laws leave open several avenues for legal challenges to be brought through the prohibitions against unreasonable search and seizure found in the *Fourth Amendment* to the United States Constitution. Such drug testing laws, both current and future, should align the policy goals of the initiatives with the constitutional framework of the United States Supreme Court's *Fourth Amendment* jurisprudence as it specifically relates to suspicionless drug testing of schoolchildren. To assist those interested in such initiatives, the authors have attempted to synthesize the state initiatives with the federal constitutional restraints upon suspicionless searches conducted by public school officials.

I. INTRODUCTION

In 2005, Seth Livingston, a writer for Sports Weekly, conducted a round-table discussion with athletes from high schools in the metropolitan Washington, D.C. area. The topic was steroids in high

school sports. The revelations were disturbing.¹ Among them, he found that the use of steroids “takes place openly in the locker rooms, weight rooms, and cafeterias of public and private high schools” in the area; that “[c]oaches, as well as athletes, know what’s going on but are often powerless to stop the use of performance enhancers”; and that some coaches and athletes are in fact “willing to turn a blind eye” to such drug use.²

Award winning sports journalist Peter King found similarly troubling revelations while serving on the Steroid Task Force for the State of New Jersey.³ Mr. King interviewed 28 coaches, athletes, athletic trainers, and school administrators. During these interviews, one athletic trainer stated that “[y]ou can stand on the sidelines and look at arms and necks and tell ... that steroids are being used.”⁴ One student told Mr. King that “[i]f you ask our players, all they would want is that the player across from them be under the same rules as we are. We don’t want to play against men when we’re boys.”⁵ While Mr. King was careful to state that “steroid use is not an epidemic,”⁶ he forcefully and credibly makes the point that steroid use is a problem that “we desperately need to address”⁷

News outlets have provided extensive coverage of this issue through reporting and editorials that focus on drug use in sports. The Associated Press, recognizing the importance of this issue, named steroids in sports the Associated Press Sports Story of the Year for 2009, beating out the Tiger Woods infidelity scandal.⁸ In March 2011, six years after New Jersey instituted the first statewide drug testing program

¹ Seth Livingston, *Fight against steroids gaining muscle in high school athletics*, USA TODAY (June 8, 2005),

http://www.usatoday.com/sports/preps/2005-06-08-sports-weekly-steroids-report_x.htm.

² *Id.*

³ GOVERNOR’S TASK FORCE ON STEROID USE AND PREVENTION, *Final Report to Acting Governor Richard J. Codey* (December 2005), available at http://slic.njstatelib.org/slic_files/digidocs/h434/h4342005k.pdf (last visited Sept. 29, 2011).

⁴ *Id.* at 14.

⁵ *Id.* at 7.

⁶ *Id.* at 6.

⁷ *Id.* at 7.

⁸ Nancy Armour, *Steroids’ Shadow is AP Sports Story of the Year*, ASSOCIATED PRESS (December 23, 2009), available at http://www.huffingtonpost.com/2009/12/23/steroids-shadow-2009-ap-s_n_401938.html.

for high school athletes, a New Jersey grand jury indicted several suspected drug-ring members who were allegedly selling steroids to Danbury, New Jersey high school students.⁹

Both scholarly and public-policy researchers have also been examining this issue. Between 2007 and 2008, university researchers conducted a series of surveys of high school athletic directors (A.D.'s) to measure what their perceptions of steroid use among interscholastic student athletes. In their first study focusing on A.D.'s from a single state in the Midwest, the researchers found that 25% of A.D.'s suspected steroid use among their own athletes or athletes on opposing teams.¹⁰ In a broader study spanning A.D.'s from multiple states, the researchers found that 33% of the A.D.'s responding to the survey suspected athletes in their programs of taking steroids, while 65% of the same A.D.'s suspected athletes in other programs of steroid use.¹¹ In spite of these perceptions, an overwhelming number of the A.D.'s responding to the researchers' survey ranked education as the most effective way of preventing steroid use.¹²

The problem of steroid use by our nation's children is brought into increasingly clearer focus by further studies conducted by the United States Centers for Disease Control and Prevention (CDC) and by researchers at the University of Michigan. In 2009, the CDC's *Youth Risk Survey* found that 3.3% of students nationwide reported taking steroid pills or injections without a doctor's prescription one or more times during their life.¹³ Researchers at the University of Michigan Institute for Social Research, working with the National Institutes of Health and the National Institute on Drug Abuse, have been conducting a

⁹ Eileen Fitzgerald, *Indictment revives debate over drug testing for high school students, athletes*, CTPOST.COM (March 20, 2011), <http://www.ctpost.com/local/article/Indictment-revives-debate-over-drug-testing-for-1225954.php>.

¹⁰ John J. Miller & John T. Wendt, *Interscholastic Athletic Director's Perception of Steroid Use: A State Study*, 2(3) JOURNAL OF CONTEMPORARY ATHLETICS 207 (2007).

¹¹ John Miller, John T. Wendt & Todd Seidler, *Tackling Steroid Abuse in Interscholastic Athletics: Perceptions of Athletic Directors*, 9(2) INTERNATIONAL JOURNAL OF SPORT MANAGEMENT 117 (2008); John J. Miller, John T. Wendt & Sean Kern, *Steroid Use In Interscholastic Athletics: Is There Reasonable Suspicion?*, 3(2) JOURNAL OF CONTEMPORARY ATHLETICS 111 (2008).

¹² *Id.*

¹³ CENTERS FOR DISEASE CONTROL AND PREVENTION, YOUTH RISK SURVEY – UNITED STATES 2009, SURVEILLANCE SUMMARIES, 2009, MMWR Vol. 2010; 59, No. SS-5; available at <http://www.cdc.gov/mmwr/pdf/ss/ss5905.pdf> (last visited Oct. 23, 2011).

long-term study of adolescent drug use since 1975.¹⁴ The 2010 results of this study, titled *Monitoring the Future: National Results on Adolescent Drug Use* (hereinafter, *Monitoring the Future*) found that 2.5% of male high-school seniors surveyed used steroids at least once in the twelve months preceding their responses to the 2010 survey.¹⁵

While the statistics are troubling, we must note that the trend of steroid use among U.S. teens has declined. According to the CDC, while steroid use among teens increased from 1991 through 2003 (2.7% to 6.1%), it has been in steady decline from 2003 to 2009 (6.1% to 3.3%). Rates of usage, however, are but one of the results of the *Monitoring the Future* study. A much more potentially troubling result of the survey is that the perceived risk and disapproval of steroids among our nation's adolescents – often seen as the leading indicator of future trends in a drug's use – has been in steady decline since 1993.¹⁶ This change in perceived risk and disapproval indicates that there is a possibility that steroid use among the adolescent population will see increases again in the immediate future.¹⁷

With this harbinger of change in mind, it is understandable that there could be broad concern in our society for the safety and well-being of our children and correspondingly broad support for steroid testing of high school athletes. According to a 2005 study by researchers at Sacred Heart University Polling Institute, 87% of Americans strongly supported

¹⁴ Lloyd D. Johnston et al., *MONITORING THE FUTURE NATIONAL RESULTS ON ADOLESCENT DRUG USE, 2010* (2011), <http://www.monitoringthefuture.org/> (last visited Sept. 20, 2011) (“Monitoring the Future is an ongoing study of the behaviors, attitudes, and values of American secondary school students, college students, and young adults. Each year, a total of approximately 50,000 8th, 10th and 12th grade students are surveyed (12th graders since 1975, and 8th and 10th graders since 1991). In addition, annual follow-up questionnaires are mailed to a sample of each graduating class for a number of years after their initial participation. The Monitoring the Future Study has been funded under a series of investigator-initiated competing research grants from the National Institute on Drug Abuse, a part of the National Institutes of Health. MTF is conducted at the Survey Research Center in the Institute for Social Research at the University of Michigan.”).

¹⁵ *MONITORING THE FUTURE NATIONAL RESULTS ON ADOLESCENT DRUG USE: OVERVIEW OF KEY FINDINGS, 2010* (2011), <http://www.monitoringthefuture.org/pubs/monographs/mtf-overview2010.pdf>.

¹⁶ *Id.* at 42.

¹⁷ *Id.*

or somewhat supported random steroid testing for high school athletes.¹⁸ The pendulum on this issue, however, does seem to swing wildly. State budgetary problems and a scarcity of positive test results in states with testing programs (that later of which, interestingly enough, has been used by both sides of this debate as either evidence that testing programs have a positive deterrent impact *and* that testing programs are unnecessary) have created pushback against such programs indicating a weakening of public support.¹⁹

Many school districts and athletic associations have sided with the pro-testing side of the debate and taken it upon themselves to institute random drug testing programs for their students. As of 2012, however, only three states, New Jersey,²⁰ Texas,²¹ and Illinois,²² have current laws and regulations mandating statewide steroid testing of their high school athletes.²³ One other state, Florida, experimented with legislatively mandated steroid testing of high school athletes,²⁴ which began in 2007, but the Florida legislature changed course and abandoned this initiative in early 2009 for budgetary reasons. In an attempt to assist state legislators to enact such statutes, The Student Drug-Testing Coalition, a project of the Drug-Free Projects Coalition, has proposed a twenty-one page model act entitled *Model Legislation for Student Drug-Testing Programs, State Bill and Insertion Language*²⁵ (hereinafter

¹⁸ Jerry Lindsley & Don Cook, *Support for Random Steroid Testing Among High School Athletes, U.S. Poll*, MEDICAL NEWS TODAY (May 02, 2005), available at <http://www.medicalnewstoday.com/articles/23686.php> (last visited July 31, 2011).

¹⁹ Shaun Assael, *High School Testing Loses Momentum*, ESPN OUTSIDE THE LINES (Mar. 5, 2009, 4:20 PM ET) <http://sports.espn.go.com/espn/otl/news/story?id=3951039>; see also James Clark, *Four years of High School Steroid Testing: \$400,000 Spent, 2,000 Athletes Tested, One Positive Test*, PRESS OF ATLANTIC CITY (Jan. 2, 2001, 12:15 am, Updated Jan. 5, 2011),

http://www.pressofatlanticcity.com/news/press/new_jersey/article_afc9fe78-1603-11e0-8da3-001cc4c03286.html; cf. Scott A. Anderson, *A Call for Drug-Testing of High School Student-Athletes*, 19 MARQ. SPORTS L. REVIEW 325 (2008).

²⁰ N.J. ADMIN. CODE §6A:16-4.4 (2010).

²¹ TEX. EDUC. CODE ANN. §33.091 (2009).

²² 105 ILL. COMP. STAT. 25/1.5 (2010).

²³ There are other states that have provisions in their legislative codes addressing drug testing of public schoolchildren. However, in all but the four states discussed herein, this legislation stops well short of establishing a statewide testing program.

²⁴ FLA. STAT. § 1006.20 (2006).

²⁵ MODEL LEGISLATION FOR STUDENT DRUG-TESTING PROGRAMS STATE BILL AND INSERTION LANGUAGE, (The Nat'l Student Drug-Testing Comm, Proposed Official Draft (2003).

“Model Act”). While this Model Act is broader in scope than the enacted statutes and many of the existing local policies – it is not limited to athletes or performance enhancing drugs – if any State enacted this Model Act, student athletes would be subject to random and suspicionless drug testing for steroids.

Moving away from the legislative and policy initiatives to the courts, there have been numerous cases challenging the constitutional validity of warrantless and suspicionless searches of students by school officials. In a series of opinions spanning a little over three decades, the United States Supreme Court has developed a jurisprudential framework balancing the United States Constitution’s *Fourth Amendment* prohibition against unreasonable searches and seizures with the “substantial need of teachers and administrators for freedom to maintain order in the schools.”²⁶ This line of cases directly impacts any legislation implementing a drug-testing program for students of public schools.

When the above cited state statutes and Model Act are placed within this jurisprudential framework, surprisingly, several avenues for constitutional challenges remain available; therefore, it is the focused purpose of this article to synthesize state drug testing legislation with federal constitutional law in the hopes of providing interested policy makers and public school administrators at the state and local level the support needed to construct constitutionally sound drug-testing legislation. Accordingly, the state statutes cited above and the Model Act should be amended consistent with the analysis and recommendations found in the remainder of this article. Furthermore, any future legislation or policies should be written with special attention the analysis and recommendations found below.²⁷

To assist in the meeting of these ends, we begin our next section with a two-part descriptive analysis of the applicable constitutional framework governing the drug testing of schoolchildren, which consists of (1) the text of the *United States Constitution* and (2) the Supreme Court’s case law interpreting the *United States Constitution* as it directly pertains to school conducted drug testing of high school athletes. In the

²⁶ See *New Jersey v. T. L. O.*, 469 U.S. 325, 340 (1985).

²⁷ Due to the vast number of local school districts and athletic associations creating untold numbers of locally enforced drug-testing policies, this article will focus on the state legislative enactments and the Model Act proposed by The Student Drug-Testing Coalition. The recommendations proposed, however, are equally applicable to drug-testing programs crafted at the local subdivisions of state government.

next section of the paper, we continue with our descriptive analysis by examining the state laws and the Model Act that implement or propose to implement statewide steroid testing of high school athletes. In the paper's final section, we conclude our analysis by applying the framework of the Supreme Court's *Fourth Amendment* jurisprudence to the body of state legislative enactments and the Model Act to synthesize this body of law so that we may make recommendations concerning the current and future state initiatives mandating student drug testing. In approaching our analysis in this systematic manner, we hope to lay the proper foundation for all who come to read this article – not just the legal scholar, practicing attorney, judge, or state legislator, but also the school superintendent, high school A.D., or the director of the state high school athletic association.

At this point, it is worth taking note what this article is not: this article is not an endorsement nor is it a refutation of the ethical, scientific, or economic soundness of drug testing policies – for countervailing arguments regarding the these debates, there are numerous well-made points and opinions.²⁸ While these debates are unsettled, it is an undeniable fact that some states and many local jurisdictions have sided with the pro-testing movement and continue to test their student athletes for drugs. It is, therefore, the intent of the authors of this paper to provide policymakers with an analysis and recommendations regarding the constitutional requirements of such policy decisions.

II. THE CONSTITUTIONAL FRAMEWORK

Any government mandated drug-testing policy must pay heed to the restraints on government action found in the *United States Constitution's Fourth and Fourteenth Amendments*, which grant the people the right to be free of unreasonable searches and seizures from

²⁸ For a short sample of the varying and credible points and counter points available, Compare Susanne James-Burdumy et al., U.S. DEPT. OF EDUC., *THE EFFECTIVENESS OF MANDATORY- RANDOM STUDENT DRUG TESTING*, (2010), available at <http://ies.ed.gov/ncee/pubs/20104025/pdf/20104025.pdf> (study supporting thesis that drug testing is effective in combating teenage drug use), with Robert Taylor, *COMPENSATING BEHAVIOR AND THE DRUG TESTING OF HIGH SCHOOL ATHLETES*, *CATO JOURNAL*, Vol. 16, No. 3 (Winter 1997) (arguing that drug testing may actually lead to increased drug use).

both federal and state government officials respectively. States, who are interested in passing such legislation, should carefully draft drug-testing laws to avoid not only infringing on this constitutional right, but also to proactively avoid inviting costly constitutional challenges.

With this in mind, let us now turn our attention to these constitutional restraints placed on drug-testing legislation.

A. The Fourth and Fourteenth Amendments to the United States Constitution

The *Fourth Amendment* to the *United States Constitution* establishes the right of the people to be free from *unreasonable* searches and seizures. The text of the *Fourth Amendment* specifically provides the following:

“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, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”²⁹

Considering the importance of the individual liberties conferred upon the people by the *Fourth Amendment*, it is striking in its brevity, a brevity which has created ambiguity, judicial discord, and difficulty in the application of its promised protections. One of the most glaring examples of this is found in three of the most important words of the entire text of the amendment – *search*, *seizure*, and *unreasonable* – all of which are found abandoned within the text of the amendment, left wanting for a definition or any sort of guidance as to their application. Looking further at the text of the *Fourth Amendment*, unlike what is found in the *Fifth Amendment*,³⁰ there is no remedy provided for its violation. Lastly, like the rest of the *Bill of Rights*, the amendment says nothing about its application in limiting the exercise of power by officials of the various states.

²⁹ U.S. Const., amend. IV.

³⁰ U.S. Const. amend V, § 1, cl. 2 (the *Fifth Amendment* specifically protects individuals from trial without presentment or indictment, double jeopardy, and self-incrimination).

A person need to look no further than the *Fourteenth Amendment* to remedy the *Fourth Amendment's* failure to apply its limitation on the government's ability to conduct searches and seizures to state officials. The *Fourteenth Amendment*, which prohibits state and local governments from "... depriv[ing] any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws,"³¹ extends all constitutional limitations of federal power to state actions.³² Therefore, the *Fourteenth Amendment* extends the right to be free of unreasonable searches and seizures to such actions conducted by State Officers.³³

Yet, not all of the shortcomings created by the brevity of the *Fourth Amendment* are answered through the text of the *Constitution* itself. To define the scope of what constitutes an unreasonable search and seizure and to discover what remedies are available to citizens who wish to invoke their *Fourth Amendment* rights, we must turn our examination to the precedent set forth in the case law of the United States Supreme Court.³⁴ This is especially true when applying the *Fourth* and *Fourteenth Amendment's* constitutional protections to uniquely situated classes of individuals, such as schoolchildren, who are being asked to subject themselves to a unique category of searches such as suspicionless drug testing.

B. The United States Supreme Court's Fourth Amendment Framework

When drafting legislation or implementing policy, legislators and policymakers must examine whether the proposed acts called for in the legislation or policy violates the Constitution. Therefore, the legislator or policymaker needs a legal definition of the term "search" as it relates to (1) drug testing, (2) of public schoolchildren by (3) public school officials. This legal definition should give guidance regarding the structure and constitutional requirements of drafting such laws or policies consistent with the limitations of the *Fourth Amendment's* prohibition against unreasonable searches and seizures.

Therefore, the following question must be answered: (1) is state-compelled drug testing a "search" for the purposes of the *Fourth*

³¹ U.S. Const. amend XIV, § 1, cl. 2

³² See *Mapp v. Ohio*, 367 U.S. 643 (1961).

³³ *Elkins v. United States*, 364 U.S. 206, 213 (1960); See U.S. Const., amend. IV.

³⁴ See generally *Marbury v. Madison*, 5 U.S. 137, 180 (1803).

Amendment? If this first question is answered in the affirmative, the next question easily follows is: does mandated drug-testing of schoolchildren participating in athletics in the public schools constitute a search under the *Fourth Amendment*? Lastly, if the second question is also answered in the affirmative, then the final question is: what is the scope of reasonableness when school officials conduct such searches?

In 1989, the United States Supreme Court answered the first question in the affirmative by ruling that “state-compelled” drug testing “constitutes a ‘search’ subject to the demands of the *Fourth Amendment*.”³⁵ This is now a well-settled point of law supported by a long line of cases applying this precedent in many different contexts.³⁶ The answers to the second question (does mandated drug-testing of schoolchildren participating in athletics in the public schools constitute a search under the *Fourth Amendment*?) and to the third question (what is the scope of reasonableness when school officials conduct such searches?) were developed in a series of Supreme Court cases beginning with the 1985 landmark case of *New Jersey v. T. L. O.* (hereinafter *T. L. O.*). In *T. L. O.*, the Supreme Court reviewed the appropriateness of applying the exclusionary rule³⁷ in the public school setting as a remedy for searches carried out in violation of the *Fourth Amendment*.³⁸ The resulting opinion and its progeny set the stage for all subsequent

³⁵ See *Skinner v. Railway Labor Executives’ Assn.*, 489 U.S. 602, 617 (1989).

³⁶ See *Treasury Emp. v. Von Raab*, 489 U.S. 656 (1989) (drug testing of federal agents carrying firearms and assigned drug interdiction duties); See *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (drug testing of pregnant women in hospitals); See *United States v. Valenzuela*, 24 M.J. 934 (A.C.M.R.1987) (drug testing of members of the U.S. military); and See *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646 (1995) (drug testing of high school students).

³⁷ It is also well settled that the remedy for violations of the *Fourth Amendment*’s prohibition against unreasonable search and seizure is the invocation of the exclusionary rule. The Supreme Court established the exclusionary rule to deter the government from violating the rights of citizens in pursuit of evidence. According to the exclusionary rule, the ill-gotten fruits of unreasonable searches and seizures are inadmissible in a court of law. In the seminal case of *Mapp v. Ohio*, Justice Harlan applied the exclusionary rule to evidence seized, by local police officers in the State of Ohio, in violation of the *Fourth Amendment*. In his opinion, Justice Harlan stated, “[o]nly last year the Court itself recognized that the purpose of the exclusionary rule ‘is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it’” 367 U.S. at 656, (citing *Elkins v. United States*, 364 U.S. at 217).

³⁸ See *T. L. O.*, 469 U.S. 325.

constitutional challenges of searches and seizures involving public schoolchildren.

In a broad ranging opinion delivered by Justice Byron White,³⁹ the Court, recognizing that the “school setting” presented unique difficulties, refused to apply the warrant requirement to school officials, and relaxed the probable cause requirement.⁴⁰ The Court also went on to partially reject the *in loco parentis* doctrine⁴¹ and hold the *Fourth Amendment’s* prohibition on unreasonable searches and seizures, as applied to the States through the *Fourteenth Amendment*, applied to the searches conducted by public school officials.⁴² Six years later, in the 1995 case of *Vernonia School District v. Acton*, the Supreme Court expanded the school-setting reasoning by establishing the “school context” special-needs exception to many of the traditional *Fourth Amendment* tests and requirements.⁴³ In *Vernonia* (1995), the Court was asked to review the constitutionality of random suspicionless drug testing of high school athletes. The Court’s six-member majority partially resurrected the *in loco parentis* doctrine by constructing and then applying the “school context” special-needs exception – an exception that draws from the *in loco parentis* doctrine for its intellectual foundation – to many of the tradition *Fourth Amendment* tests and

³⁹ An interesting sports-related side note: well-prior to his legal career, Justice Byron Raymond White gained national fame as a college and professional football player. An All-American halfback for the University of Colorado, where White was nicknamed “Whizzer” for his speed and elusive moves on the gridiron, he was inducted into the College Football Hall of Fame in 1954. He was drafted with the 4th overall pick of the first round in the 1938 NFL draft and had three All-Pro seasons as a halfback in the National Football League, where he played for the Pittsburg Pirates (now Steelers) and your authors’ hometown team, the Detroit Lions. His NFL career was cut short by World War II, when he joined the U.S. Navy and served in the Pacific Theater. The NFL named Justice White to their *1940’s All Decade Team*. See DENNIS J. HUTCHINSON, *THE MAN WHO ONCE WAS WHIZZER WHITE: A PORTRAIT OF JUSTICE BYRON R. WHITE* (1998).

⁴⁰ *T.L.O.*, 469 U.S. at 340 – 341.

⁴¹ *In loco parentis*, which is translated “in the place of a parent,” is a doctrine that establishes that a parent “may . . . delegate part of his parental authority, during his life, to the tutor or schoolmaster of his child; who is then in loco parentis, and has such a portion of the power of the parent committed to his charge, viz. that of restraint and correction, as may be necessary to answer the purposes for which he is employed.” *Vernonia Sch. Dist. 47j*, 515 U.S. at 655 (quoting 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 441 (1769)).

⁴² *T. L. O.*, 469 U.S. at 336-337.

⁴³ *Vernonia Sch. Dist. 47j*, 515 U.S. 646.

requirements.⁴⁴ To do so, the *Vernonia* Court had to expand the scope of the last clause of its famous and oft-quoted precedent that while “children assuredly do not ‘shed their constitutional rights . . . at the schoolhouse gate’ *the nature of those rights is what is appropriate for children in school.*”⁴⁵

In developing the school context special-needs exception, the Court reasoned that students who choose to participate in athletics “voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally . . . somewhat like adults who choose to participate in a ‘closely regulated industry.’”⁴⁶ The Court went on to reason that “*Fourth Amendment* rights, no less than *First* and *Fourteenth Amendment* rights, are different in public schools than elsewhere; the ‘reasonableness’ inquiry cannot disregard the schools’ custodial and tutelary responsibility for children.”⁴⁷ In the context of schools “the *Fourth Amendment* does not require a finding of individualized suspicion . . .”⁴⁸

In 2002, the Supreme Court was once again faced with a case testing the limits of State drug testing of schoolchildren. In *Board of Education of Independent School District No. 92 of Pottawatomie County, et al., v. Lindsey Earls, et al.* (hereinafter *Earls*) the Court was asked to review the expansion of a *Vernonia* type suspicionless drug testing policy that was being applied to students in nonathletic extracurricular activities. Justice Thomas, writing for the majority, reinforced and expanded the precedent developed in *T. L. O.* and *Vernonia* by upholding a testing regime that, while applying to a larger population of the student body, procedurally looked strikingly similar to the regime at issue in *Vernonia*.⁴⁹ The student Respondent’s argued that because there was no particularized or pervasive drug problem in the school district at issue, unlike the school district in *Vernonia*, there was no real and immediate government interest justifying a suspicionless drug-testing program applied to such a large portion of the student

⁴⁴ *Id.* at 655.

⁴⁵ *Id.* (quoting *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969)) (emphasis added).

⁴⁶ *Id.* at 657 (citing *Skinner*, 489 U.S. at 627 and *United States v. Biswell*, 406 U.S. 311, 316 (1972)).

⁴⁷ *Id.* at 656.

⁴⁸ *Bd. of Educ. v. Earls*, 536 U.S. 822, 837 (2002).

⁴⁹ *Id.* at 842.

body.⁵⁰

The *Earls* Court rejected this line of reasoning by first reinforcing their school context special-needs exception to individualized suspicion requirement of the *Fourth Amendment*. The Court stated clearly that “[i]n this context, the *Fourth Amendment* does not require a finding of individualized suspicion ... and we decline to impose such a requirement on schools attempting to prevent and detect drug use by students.”⁵¹ This clear validation of *T. L. O.* and *Vernonia* further reinforced the school context special-needs exception to the *Fourth Amendment*.

Secondly, the Court went further and expanded the school context special-needs exception by rejecting the need for even a general non-individualized suspicion supported by a particularized or pervasive drug problem, as was invoked as support for suspicionless searches in the *Vernonia* case. The Court reasoned that “... the need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for a school testing policy.”⁵² The Court continued this line of reasoning by stating the commonsense conclusion that “it would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.”⁵³

The constitutional framework provided by the Supreme Court in the *T. L. O.*, *Vernonia*, and *Earls* cases leads to the distillation of thirteen specific provisions that comprise the framework of the Supreme Court’s *Fourth Amendment* jurisprudence as it applies to drug testing schoolchildren. These thirteen provisions, complete with footnotes to pinpoint each provision within the corresponding opinions of the Court, are as follows:

1. Testing must be random.⁵⁴
2. Testing must be unrelated to any current or subsequent criminal investigations. Law enforcement authorities shall not be notified of the test results.⁵⁵
3. Results should not lead to discipline or academic consequences other than loss of participation in activity or, as

⁵⁰ *Id.* at 835.

⁵¹ *Id.* at 837.

⁵² *Id.* at 836.

⁵³ *Id.*

⁵⁴ *Id.* at 834.

⁵⁵ *Id.*

- an alternative, drug counseling.⁵⁶
4. Students provide sample while in bathroom stall.⁵⁷
 5. Trained monitor, of the appropriate sex, shall wait outside the stall and listens for the normal sounds of urination (no visual monitoring should be allowed).⁵⁸
 6. Test results must be kept in confidential files separate from the students' other education records.⁵⁹
 7. Test results may be disclosed to school personnel only on a need-to-know basis.⁶⁰
 8. The tests at issue look only for drugs (not pregnancy, epilepsy, diabetes, etc.).⁶¹
 9. The drugs for which the samples are screened are standard and do not vary according to the identity of the student.⁶²
 10. Procedures regarding the chain of custody and access to test results are established and strictly followed.⁶³
 11. A system must be in place for students to *confidentially* identify medications they are currently taking to avoid (1) sanctions for a falsely positive test and (2) disclosing medical

⁵⁶ *Id.*; See also *Earls* 536 U.S. at 834. This provision should also specifically state that it preempts any state or local zero-tolerance rules, regulations, or laws regarding drug use and/or possession.

⁵⁷ *Earls*, 536 U.S. at 832-833.

⁵⁸ *Id.* (The *Earls* Court found that the intrusion was “negligible” due to the monitoring method as outlined in this provision. While the Court did not mandate that no visual monitoring should be allowed, such nonvisual auditory monitoring methods were found constitutional by the *Earls* Court and therefore should be followed to avoid any intrusion that would require further judicial review. Furthermore, the U.S. Supreme Court in dealing with a search that extended to the “exposure of intimate parts” of a schoolchild, in *Safford Unified Sch. Dist. v. Redding*, stated that “[t]he meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.” 557 U.S. 364, 365 (U.S. 2009). Because drug testing of the type discussed within this article is suspicionless by design, and due to the *Earls* Court insistence that such searches must be of limited intrusion (i.e., negligible), such visual monitoring to keep students from cheating the test would appear to run afoul of the Court’s jurisprudential framework and should, therefore, be avoided.)

⁵⁹ *Vernonia Sch. Dist. 47j*, 515 U.S. at 658 and n. 2; See also *Earls*, 536 U.S. at 833.

⁶⁰ *Vernonia Sch. Dist. 47j*, 515 U.S. at 658.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Earls*, 536 U.S. at 832.

conditions in violation of state and federal privacy rights.⁶⁴

12. General Authorization forms must be signed by the students and the students' parents consenting to drug testing and the release of results pursuant to the confidentiality requirements of the policy.⁶⁵
13. Upon a positive result, a second test will be administered as soon as possible to confirm the results; if second test is negative, no further action is taken.⁶⁶

These thirteen provisions directly answer the third question of our inquiry as outlined at the beginning of this section: what is the scope of reasonableness when conducting such searches? Any state law or administrative policy implementing the random drug testing of high school athletes, or any other students for that matter, should adopt these provisions to ensure that their drug testing policy does not exceed the scope of reasonableness and thereby violate the *Fourth Amendment* rights of their student athletes to be free from unreasonable searches and seizures.

III. STATE DRUG TESTING PROGRAMS⁶⁷

As stated in the introduction, although many school districts across the United States have taken it upon themselves to randomly test their athletes over the years, as of 2011, only four states have mandated steroid testing of their high school athletes. Currently, only Texas,⁶⁸ New

⁶⁴ *Vernonia Sch. Dist. 47j*, 515 U.S. at 659 – 660. The Court, while not striking down Vernonia's drug testing policy, does raise "some cause for concern" that students must "identify *in advance* prescription medications they are taking" to "avoid sanction for a falsely positive test." It is, therefore, the authors' opinions that such cause for concern must be addressed proactively. One solution to this problem is to allow such medication information to be given to school officials in a sealed envelope to be sent along with the specimen to the testing lab. Another solution would be to allow students to submit, subsequent to the positive results, information that explains the positive test results and why the results do not constitute a violation of the school's policy.

⁶⁵ *Id.* at 659.

⁶⁶ *Id.* at 651.

⁶⁷ Due to the use of several different statutes from several different jurisdictions, the authors have followed the advice of Rule 12.10(b) of THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. at 124 (Columbia Law Review Ass'n et al. eds., 19th ed. 2010) by using the full citation form for statutes throughout the footnotes of this paper in order to clearly identify each statute and avoid confusion.

⁶⁸ TEX. EDUC. CODE ANN. §33.091 (2009).

Jersey,⁶⁹ and Illinois⁷⁰ have statewide laws mandating steroid testing of high school athletes. One other state, Florida, experimented with a statewide steroid testing law,⁷¹ which began in 2007 but was abandoned in early 2009 due to budgetary reasons. Also, the Student Drug-Testing Coalition, a project of the Drug-Free Projects Coalition, has drafted a twenty-one page Model Act entitled *Model Legislation for Student Drug-Testing Programs, State Bill and Insertion Language*.⁷²

The legislation and regulations from these four states and the Model Act all contribute to the regulatory efforts to combat steroid use in high school athletics. None of these differing approaches, however, have been written to be in full compliance with the framework of the United State Supreme Court's *Fourth Amendment* jurisprudence.⁷³ Before we fully synthesize these drug testing laws with the constitutional framework, let us briefly examine the background and some of the details of the individual state laws and the Model Act.

A. New Jersey⁷⁴

In 2005, New Jersey became the first state to promulgate laws and regulations to implement statewide mandatory steroid testing for high school athletes. Unlike the other three states that had the benefit of New Jersey's example and subsequently implemented mandatory steroid testing through detailed legislative statutes, New Jersey implemented their program through a patchwork of legislative, executive, and administration action.⁷⁵ This patchwork approach has created several conflicts between the differing laws and regulations as will be further examined in the Section IV below.

On December 20, 2005, New Jersey's then acting Governor,

⁶⁹ Exec. Order No. 72 (2005), <http://www.nj.gov/infobank/circular/eoc72.htm>; see also N.J. ADMIN. CODE §6A:16-4.4 (2010).

⁷⁰ 105 ILL. COMP. STAT. 25/1.5 (2010).

⁷¹ FLA. STAT. § 1006.20 (2006).

⁷² MODEL LEGISLATION FOR STUDENT DRUG-TESTING PROGRAMS STATE BILL AND INSERTION LANGUAGE (The Nat'l Student Drug-Testing Comm. Proposed Official Draft 2003).

⁷³ See supra § II (B) *The United States Supreme Court's Fourth Amendment Framework*.

⁷⁴ N.J. ADMIN. CODE §6A:16-4.4 (2010).

⁷⁵ N.J. STAT. ANN. § 18A: 40A-22 (West 2011) (eff. August 29, 2005.); Exec. Order No. 72 (2005), <http://www.nj.gov/infobank/circular/eoc72.htm>; N.J. ADMIN. CODE §6A:16-4.4 (2010).

Richard J. Codey, signed *Executive Order #72*.⁷⁶ As is customary with executive orders, *Executive Order #72* does not detail the process or procedures to be used to implement the policy at issue. The executive order simply directs the New Jersey Department of Education and the New Jersey State Interscholastic Athletic Association (hereinafter collectively “the Agencies”) “to develop and implement a program of random testing for steroids of teams and individuals qualifying for championship games” to “commence with the 2006-2007 school year.”⁷⁷

The New Jersey Department of Education allowed the New Jersey State Interscholastic Athletic Association (NJSIAA) to craft the policy to meet the requirements of *Executive Order #72*. The NJSIAA decided to randomly test 5% of all their athletes *only* in state championships. Under this policy, any athlete who qualifies for a state championship tournament may be tested. This figure comes to approximately 10,000 student-athletes who are eligible to be tested in any given school year.

In the last two years, 2010⁷⁸ and 2011⁷⁹, the New Jersey legislature appropriated one-half of the \$100,000.00 per-year budget for the New Jersey State Interscholastic Athletic Association (NJSIAA) drug testing program with the NJSIAA providing the remaining \$50,000 from internal funding. On March 20, 2012, the NJSIAA announced through a press release that the State of New Jersey was once again committing to this 50/50 financing structure.⁸⁰ According to the New Jersey administrative regulations that govern the specifics of the program, as crafted by the NJSIAA, 60% of the tests come from football, wrestling, track and field, swimming, lacrosse, and baseball while the remaining 40% of the tests are from any of the other NJSIAA sports.⁸¹

The NJSIAA states that “... any person who tests positive in an

⁷⁶ Exec. Order No. 72 (2005), <http://www.nj.gov/infobank/circular/eoc72.htm>; see also N.J. ADMIN. CODE §6A:16-4.4 (2010).

⁷⁷ Exec. Order No. 72 (2005), <http://www.nj.gov/infobank/circular/eoc72.htm>.

⁷⁸ See 2010 N.J. ALS 35; 2010 N.J. Laws 35; 2010 N.J. Ch. 35; 2010 N.J. S.N. 3000.

⁷⁹ See 2011 N.J. ALS 85; 2011 N.J. Laws 85; 2011 N.J. Ch. 85; 2010 N.J. S.N. 4000.

⁸⁰ See NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, *NJSIAA Receives \$50K Annual reimbursement from State for High School Steroid Testing Program* (Mar. 20, 2012), available at

<http://www.njsiaa.org/NJSIAA/Steroid50KPressRelease2012.pdf>.

⁸¹ See NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, *NJSIAA'S Steroid Testing Program*, <http://www.njsiaa.org/NJSIAA/09steroidmemo.pdf> (last visited October 27, 2011).

NJSIAA-administered test, or any person who refuses to provide a testing sample, or any person who reports his or her own violation will immediately forfeit his or her eligibility to participate in NJSIAA competition for a period of one year from the date of the test.”⁸² In addition, the student-athlete is also required to attend drug counseling and produce a negative test before being reinstated. There is no recommendation for a second or third offense.⁸³ What are the outcomes of this program? In the 2010 – 2011 academic school year, four students tested positive for steroids, which represents the most in a single academic year since the program began in the 2006 – 2007 academic year.⁸⁴

B. Florida⁸⁵

In 2007, then Florida Governor Charlie Crist signed into law the Florida Legislature’s Bill mandating a one year pilot program to randomly drug test 1% of high school athletes. This bill restricted testing to athletes in grades 9 through 12 who participated exclusively in the sports of football, baseball, and weightlifting throughout the regular season and postseason.⁸⁶ Under this regime, approximately 59,000 student-athletes in Florida were eligible to be tested per school year.⁸⁷ Student-athletes were tested for anabolic steroids as well as substances that are used to mask the use of anabolic steroids. The tests did not include recreational drugs such as marijuana or cocaine.

The state of Florida set aside \$100,000 a year for the tests.⁸⁸ The consequence of an athlete testing positive was a 90 day school suspension from practice and competition in all sports for the first offense with no recommendations for a second or third offense.⁸⁹ In addition, the student-athlete had to undergo a drug education program

⁸² *Id.*

⁸³ *Id.*

⁸⁴ See *See NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, supra* note 77.

⁸⁵ FLA. STAT. § 1006.20 (2006).

⁸⁶ Chris Hamby, *High School Athletes Next for Steroid Tests*, STATELINE.ORG, <http://www.stateline.org/live/details/story?contentId=216783> (last visited Oct. 29, 2011).

⁸⁷ *Id.*

⁸⁸ FLA. STAT. § 1006.20.

⁸⁹ *Id.*

conducted by the school, the school district, or a third-party organization contracted by the school or school district.⁹⁰ According to then Governor Charlie Crist, it was the hope of Florida that through this legislation, the number of high school student-athletes struggling with steroid use would be limited. However, as stated in the introduction above, the Florida legislature abandoned this initiative in early 2009.⁹¹

C. Texas⁹²

In 2007, the state of Texas – where they are as passionate about high school football as anywhere in the nation – instituted the most ambitious steroid testing laws of all the states. The Texas law aimed to test 3% of *all* athletes in *all* sports accounting for over 742,000 athletes who are eligible to be tested.⁹³ The legislative history supporting this bill contains a committee report that references a 2002 survey by Texas A&M University researchers that found an estimated 42,000 Texas student-athletes in grades 7 through 12 admitted to having taken steroids.⁹⁴ Such statistics were used by the backers of this law to pass this ambitious and robust testing regime. Texas originally budgeted \$3 million a year for testing.⁹⁵ As of 2011, however, the Texas Legislature had cut funding to \$750,000. This cut in funding seriously limited Texas' program by drastically reducing the number of athletes tested. Yet, the program has survived these budget cuts, which many observers thought would necessitate a repeal of the law and the elimination of the program entirely.⁹⁶

It is not just the scope of the Texas law that originally set it apart. The ramification for an athlete testing positive in Texas is stricter than Florida and New Jersey. A first offense in Texas would result in a 30 day

⁹⁰ *Id.*

⁹¹ 2009 FL. ALS 20, 23; 2009 Fla. Laws ch. 20, §23; 2009 Fla. SB 1282.

⁹² TEX. EDUC. CODE ANN. §33.091 (2009).

⁹³ *Id.*, see also Hamby, *supra* note 79.

⁹⁴ 2005 Legis. Bill Hist. TX H.B. 3563; See also Seth Livingstone, *Fight Against Steroids Gaining Muscle in High School Athletics*, USA TODAY, (June 8, 2005), http://www.usatoday.com/sports/preps/2005-06-08-sports-weekly-steroids-report_x.htm.

⁹⁵ Jim Vertuno, *Steroid Testing of Texas High School Athletes to Survive Budget Cuts*, ASSOCIATED PRESS, (May 24, 2011), <http://lubbockonline.com/sports/2011-05-23/steroid-testing-texas-high-school-athletes-survive-budget-cuts#.Tqy5iPSXuso>.

⁹⁶ *Id.*

suspension for the athlete, a second positive test would require a one-year suspension, and a third offense includes a permanent ban.⁹⁷

D. Illinois⁹⁸

In the 2008-2009 academic year, Illinois implemented a pilot program to drug test student athletes in postseason play such as regionals, sectionals, and state championships. After the pilot program initially tested 684 students (with no athlete testing positive for performance enhancing drugs), then Illinois Gov. Pat Quinn signed legislation taking the Illinois high school drug testing policy from pilot program to state law.⁹⁹

The law costs \$150,000 a year and tests 1,000 randomly selected male and female students during their regular season instead of during post-season play.¹⁰⁰ Illinois has the strictest penalties of all the states; Illinois penalizes students for a single positive drug test with a one-year forfeiture of eligibility to participate in all state sanctioned athletic activities.¹⁰¹ What is different from the other states that have been examined is that Illinois requires all high school coaches to complete an education program preventing the abuse of steroids or other similar substances. According to the Illinois High School Association the purpose of this education program is to help deter high school athletes from using steroid and performance enhancing drugs.

IV. ANALYSIS AND RECOMMENDATIONS

In this fourth and final section, we conclude our analysis by applying the framework of the Supreme Court's *Fourth Amendment* jurisprudence to the body of state laws and the Model Act. The resulting synthesis of this body of law will allow us to make recommendations to those policymakers who are interested in drug testing policies and

⁹⁷ Hamby, *supra* note 79.

⁹⁸ 105 ILL. COMP. STAT. 25/1.5 (2010).

⁹⁹ *See Id.*

¹⁰⁰ Ill. High Sch. Ass'n, *IHSA Performance-Enhancing Substance Testing Policy 2011-2012* (last visited April 10, 2012),

http://www.ihsa.org/documents/sportsmedicine/2012-12_IHSA_Performance-Enhancing_Substance_Policy.pdf.

¹⁰¹ *Id.*

procedures as they relate to high school athletes.

Let us now apply the *Fourth Amendment* guidance, regarding suspicionless drug testing of high school students, received from the United States Supreme Court Cases as discussed above in Section II of this paper, to the specific sections and provisions promulgated in the state laws and the Model Act. Table 1 below contains a comparison of the thirteen provisions from Section II above with the three state laws and the Model Act. For reasons described below, New Jersey is not represented in Table 1. The state laws have been ordered left to right by the date that their law came into effect with the first state implementing such laws being Texas (again because New Jersey is not included in this table) and the most recent being Illinois.

Table 1: Provisions the United States Supreme Court has found compliant with the *Fourth Amendment's* protections against unreasonable search and seizure as they relate to drug testing of high school athletes compared to proposed and actual state legislation mandating such drug testing.

<i>Fourth Amendment Requirements</i>	Texas	Florida	Illinois	Model Act
1. Testing must be random.	X	X	X	X
2. Testing must be unrelated to any current or subsequent criminal investigations. Law enforcement authorities shall not be notified of the test results.	X	X	X	X
3. Results should not lead to discipline or academic consequences other than loss of participation in activity or, as an alternative, drug counseling	X	X		
4. Students provide sample while in bathroom stall				
5. Trained monitor of the appropriate sex waits outside the stall and listens for the normal sounds of urination (no visual monitoring should be allowed)				X

6. Test results must be kept in confidential files separate from the student's other education records	X	X	X	X
7. Test results can be disclosed to school personnel only on a need to know basis	X	X		X
8. The tests at issue look only for drugs (not pregnancy or illness, etc.)				
9. The drugs for which the samples are screened are standard and do not vary according to the identity of the student	X	X	X	
10. Procedures regarding the chain of custody and access to test results are established and strictly followed				X
11. Have a system in place for students to confidentially identify medications they are currently taking to avoid sanctions for a falsely positive test			X	
12. General Authorization forms must be signed by the students and the students' parents consenting to drug testing and the release of results pursuant to the confidentially requirements of the policy	X	X	X	X
13. Upon a positive result, a second test will be administered as soon as possible to confirm the results; if second test is negative, no further action is taken.	X	X	X	X

An analysis of Table 1 must begin with the recognition that none of the state laws nor the Model Act fully comply with the guidance provided by the Supreme Court's *Fourth Amendment* jurisprudence. There appears to be three causes for these shortcomings: (1) some of these shortcomings appear to be simply a lack of detailed and systematic application of the specifics of the Supreme Court's *Fourth Amendment* jurisprudence in this area of the law; (2) some states have made legitimate policy decisions to favor other policy concerns at the expense of not strictly following the framework of the Supreme Court's *Fourth*

Amendment jurisprudence; and (3) New Jersey's patchwork of laws has created problems specific to that state that make analysis of their drug testing regime impossible to analyze in the table format found in Table 1 due to conflicting provisions found in their administrative regulations and legislative enactments.

Provisions that fall under the first cause can easily be remedied by inserting language into the text of the law or regulation to bring it into compliance with the Supreme Court's *Fourth Amendment* jurisprudence. For example, the Illinois act should be amended to specifically prohibit results from leading to discipline or academic consequences other than loss of participation in activity or, as an alternative, drug counseling. Such amendments would provide necessary guidance to administrative agencies, school administrators, A.D.'s, and coaches to assist them in complying with the *Fourth Amendment* and would also limit the ability of those impacted by the law from bringing *Fourth Amendment* challenges.

To address the second cause, lawmakers must first analyze what policy choices and decisions are being made and then make every attempt to reconcile the policy with the Supreme Court's *Fourth Amendment* jurisprudence. In spite of New Jersey not being included in Table 1 above, New Jersey's statute lends us the best example of this second cause. Let us, therefore, look at one such policy choice the New Jersey legislature made regarding provision two in Table 1 above (testing must be unrelated to any current or subsequent criminal investigations. Law enforcement authorities shall not be notified of the test results) and examine how New Jersey's policy decision could have been made without jeopardizing the constitutionality of the drug testing legislation. This provision stems from the *Earls* decision, where the Court placed a great deal of importance on the fact that the "limited uses to which the test results are put," including the critical fact that "the results are not turned over to any law enforcement authority" supported the conclusion that the drug testing program in that case was "minimally intrusive on the students' privacy" and therefore reasonable in scope.¹⁰² In reading the *Earls* case, a policymaker may quickly see the *Fourth Amendment* problems raised by turning over to law enforcement officials a positive drug test result that was obtained from a student athlete, who was subject to suspicionless drug testing due solely to his or her desire to play a

¹⁰² *Earls* at 833 – 834.

school-sponsored sport. Such an act of suspicionless search and seizure by a state officer that results in criminal investigation and possibly prosecution is exactly what the *Fourth Amendment's* prohibition against unreasonable searches and seizures is meant to protect and the *Earls* Court specifically recognized this.¹⁰³

With this in mind, why would New Jersey disregard such a straight forward and reasonable provision? The answer to that question is that New Jersey wanted to protect children who might be abused or neglected by their parents or guardians.¹⁰⁴ New Jersey's statute allows school officials to disclose positive drug test results of students to the New Jersey Division of Youth and Family Services or to an appropriate law enforcement agency "if the information would cause a person to reasonably suspect that ... the pupil or another child may be an abused or neglected child"¹⁰⁵ This type of child-welfare exception has yet to be challenged in the courts. It is, however, easy to see the policy decision that New Jersey policy makers made: they placed the benefit of protecting the welfare of abused and neglected children above the cost of the constitutional risks involved with this exception.

This calculus was, however, an unnecessary choice to a false dilemma. The drafters of N.J. STAT. § 18A:40A-7.1(b)(4) could have added a provision that stated that:

... positive test results disclosed for the purpose of this child-welfare exception shall only be admissible against persons charged with abuse or neglect of the children who tested positive and not against the children themselves who, as the victims of the alleged abuse or neglect, are the indented beneficiaries of the statute.

Such a clause would satisfy the *Earls* Court's "limited uses" precedent found in provision two of Table 1 above without sacrificing the policy goal of protecting abused and neglected children.

While it is admirable that the State of New Jersey placed the welfare of abused and neglected children first, it was not necessary to create a mutually exclusive either/or situation. By understanding the constitutional parameters provided by the thirteen provisions from Table 1 that make up the framework of the Supreme Court's *Fourth Amendment* jurisprudence in this area, it becomes clear that there was a

¹⁰³ *Id.*

¹⁰⁴ N.J. STAT. § 18A:40A-7.1(b)(4) (2011).

¹⁰⁵ *Id.*

drafting solution available to this false dilemma. The New Jersey law could have been drafted to reconcile the desire to protect abused and neglected children *and* maintain the constitutionality of the law.

Another potential conflict may arise from state or local “zero-tolerance” policies that mandate suspension or expulsion of schoolchildren caught using drugs. Such policies, as their name reveals, leave no room for tolerance of drug use and would, therefore, be in direct conflict of provision three of Table 1. Results should not lead to discipline or academic consequences other than loss of participation in activity or, as an alternative, drug counseling. Such conflict between provision three and zero-tolerance policies would be much harder to reconcile and do present an actual policy dilemma where policy tradeoffs would need to be debated and decided upon.

Lastly, New Jersey’s patchwork system of laws governing the drug testing of high school students creates numerous overlapping and inconsistent policies. Therefore, we have chosen not to place New Jersey’s often conflicting and inconsistent laws into Table 1. This is extremely unfortunate because New Jersey has been at the forefront of the drug testing movement. This fact, being an innovative and aggressive advocate of student-athlete drug testing, is one of the main reasons for the patchwork of executive orders, statutes, and administrative rules and regulations. The State of New Jersey and their policy makers have been honest and direct in their desire to act in what they believe is in the best interests of the youth of New Jersey in spite of political or procedural hurdles. Their zeal to clear these hurdles, however, is what has created some of the difficulty in analyzing their drug testing regime. It is our recommendation to the policy makers in the state of New Jersey that they examine all orders, laws, rules, and regulations to codify such policies and procedures in the New Jersey Statutes in a manner that eliminates inconsistencies and is consistent with their stated objectives and the Supreme Court’s *Fourth Amendment* jurisprudence.

V. CONCLUSION

Any policymaker contemplating the introduction of drug testing programs for high school athletes must take care to insure that their policies meet the constitutional requirements as set forth in the United States Supreme Court’s *Fourth Amendment* jurisprudence. This jurisprudence, when examined, can be distilled to thirteen provisions that

give direct guidance to school officials on how to meet the goals of a student athlete drug testing policy without violating the civil liberties of their students. Such parameters will assist policymakers in reaching some of the legitimate policy goals while not running afoul of federal constitutional law.

Finally, it is our recommendation to the states with current drug testing programs, New Jersey, Texas, and Illinois, that they amend their current laws to specifically include all thirteen provisions found in Table 1 above in order to insulate their current drug testing programs from constitutional challenges. While the Model Act has yet to be sponsored and introduced in any state, it is our further recommendation that the Model Act should also be amended in similar fashion prior to any possible proposal.

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