13. URINALYSIS DRUG TESTING

13.1. General Considerations.

The United States Supreme Court has definitively ruled that urine testing is an intrusion on privacy, both during collection of the sample and when the sample is tested. Thus, state-compelled collection and testing of urine constitutes a "search" subject to the demands of the Fourth Amendment. Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 617, 626-627, 109 S.Ct. 1402, 1413, 1418-1419, 103 L.Ed.2d 639, 665-666 (1989).

For purposes of Fourth Amendment analysis, there are essentially two distinct types of compulsory urinalysis: (1) drug testing of a specific student based on an individualized suspicion that that student has recently abused or is under the influence of drugs or alcohol, and (2) suspicionless or "random" drug testing. The legal requirements concerning the former type of drug testing are discussed in Chapter 13.2 The legal requirements governing the latter type of drug testing are discussed in Chapter 13.3.

It is critical to note that in the case of ***both*** suspicion-based drug tests and random drug tests, positive test results may only be used by school officials for bona fide educational purposes, must be kept strictly confidential, and may not be provided to law enforcement agencies. It is not clear as a matter of law, however, whether a positive drug test may be used, either alone or in conjunction with other facts, in determining whether there are reasonable grounds that would justify school officials in conducting a search of a student's locker or belongings for physical evidence of illicit drugs or alcoholic beverages.

This question may be academic in the context of a suspicion-based drug test, since the facts or circumstances that would establish reasonable grounds to compel a student to submit to drug testing would seem also to provide reasonable grounds to conduct a search of that student's locker or possessions for controlled substances or alcohol. In other words, since the legal standard governing suspicion-based drug testing is identical to the standard that applies to more traditional searches for physical evidence undertaken by school officials, it would not be necessary for a school official to wait to learn the results of a drug test and to use that information to justify a search for controlled dangerous substances or alcohol. In fact, the better practice in those circumstances would be to conduct the search for physical evidence at or about the same time that the student is ordered to submit to urinalysis so as to make certain that any illicit drugs or alcohol that may be stored in the student's locker are not retrieved by

other students, (note that pursuant to State Board of Education regulations, the student believed to be under the influence of drugs or alcohol must be removed from the school), and also to provide medical practitioners with information that would assist them in providing appropriate diagnosis and treatment to the student who is suspected of being under the influence of some unknown intoxicating substance.

The issue is far more complex where a *random* drug test produces a positive result indicating that the student had recently used (and thus may still be in possession of) alcohol or a controlled dangerous substance. Note that school officials cannot search a locker, desk, or student property unless they have reasonable grounds to believe that drugs or alcohol are currently concealed in the place to be searched. Given the normal delays in receiving drug test results, a positive test result may in any event be too "stale" to justify the search of a locker or other place commonly used to conceal a cache of drugs or alcohol, at least in the absence of some other source of information. (See Chapter 3.2B(8) for a more detailed discussion of "staleness" in the context of suspicion-based searches.)

As noted in Chapter 13.3, the constitutionality of a random drug testing policy will depend on whether it is found to serve a "prophylactic and distinctly *non*punitive" purpose, which distinguishes a random drug test from an "evidentiary" search. While positive random drug test results can, under the Fourth Amendment, lawfully be used as the basis for excluding a student from participating in interscholastic athletic programs, and perhaps from participating in other extracurricular programs as well, it is by no means clear that the drug test results can be used as the predicate for an investigation leading potentially to more serious disciplinary actions, such as suspension, expulsion, or even eventual criminal prosecution for possession of illicit drugs found in a search conducted by school officials that would not have been conducted but for the positive drug test result.

There can certainly be no question that positive urinalysis results can never be provided to or used by a law enforcement agency. The issue, rather, is whether school officials in the course of enforcing school disciplinary rules, and police and prosecutors in the course of enforcing criminal laws, may rely upon physical evidence that was discovered as a result of a physical search predicated upon a well-grounded suspicion that in turn was engendered or bolstered by the results of a random drug test. It would seem that a search of a locker or other container in these circumstances would be deemed to be a "fruit" of the random drug test, unless school officials were already aware of other facts that provided an independent and sufficient basis to conduct the search for physical evidence.

From a policy perspective, the better rule would be that school officials should never be required to close their eyes to reliable facts that suggest that contraband has been brought on to school grounds and is likely to be secreted in a particular location. Given the legal controversies and uncertainties surrounding random drug testing, however, it is by no means certain or even likely that a majority of the members of the United States Supreme Court, much less the New Jersey Supreme Court, would permit school officials to use random drug test results in any way to initiate or support an investigation into violations of school rules or the criminal law.

13.2. Drug/Alcohol Testing Based on Suspicion of Intoxication.

The act of ordering a student to submit to urinalysis to detect the presence of alcohol, controlled dangerous substances, or their metabolites constitutes a "search" for Fourth Amendment purposes. Accordingly, an individual student may not be compelled by school officials to submit to urinalysis unless the school official meets the "reasonable grounds" test established in New Jersey v. T.L.O. and discussed in detail in Chapter 3 of this Manual.

State law and regulations clearly prescribe the responsibilities and procedures for school officials to follow where a student is believed to be under the influence of drugs or alcohol. See N.J.S.A. 18A:40A-12. The statutory procedures are restated and amplified in rules and regulations promulgated by the State Board of Education at N.J.A.C. 6:29-6.5. Specifically, N.J.A.C. 6:29-6.5a provides that:

> In instances involving alcoholic beverages, controlled dangerous substances or any chemical or chemical compound as identified in N.J.A.C. 6:29-6.3(a), the following shall apply:
>
> 1. Any professional staff member to whom it appears that a pupil may be under the influence of alcoholic beverages or other drugs on school property or at a school function shall report the matter as soon as possible to the school nurse or medial inspector and the principal.
>
> i. In the absence of the principal, his or her designee shall be notified; and,
>
> ii. In instances where the school nurse, medical inspector or the principal are not in attendance, the staff member responsible for the school function shall be immediately notified.

2. The principal or his or her designee shall immediately notify the parent or guardian and the chief school administrator and arrange for an immediate examination of the pupil. The examination may be performed by a physician selected by the parent or guardian or by the medical inspector. If the chosen physician is not immediately available, the examination shall be conducted by the medical inspector or, if the medical inspector is not available, the pupil shall be accompanied by a member of the school staff, designated by the principal, to the emergency room of the nearest hospital for examination. If available, a parent or guardian should also accompany the pupil.

3. If, at the request of the parent or legal guardian, the medical examination is conducted by a physician other than the medical inspector, such examination shall not be at the expense of the district board of education.

4. Provisions shall be made for the appropriate care of the pupil while awaiting the results of the medical examination.

5. A written report of the medical examination shall be furnished to the parent or guardian of the pupil, the principal and the chief school administrator by the examining physician within 24 hours.

6. If the written report of the medical examination is not submitted to the parent or guardian, principal and chief school administrator within 24 hours, the pupil shall be allowed to return to school until such time as a positive diagnosis of alcohol or other drug use is received.

7. If there is a positive diagnosis from the medical examination, indicating that the pupil is under the influence of alcoholic beverages or other drugs, the pupil shall be returned to the care of a parent or guardian as soon as possible. Attendance at school shall not resume until a written report has been submitted to the parent or guardian of the pupil, the principal and chief school administrator from a physician who has examined the pupil to diagnose alcohol or other drug use. The report shall certify that substance abuse no longer interferes with the pupil's physical and mental ability to perform in school. In addition, the staff member shall complete the Violence, Vandalism and Substance Abuse Incident Report.

8. Refusal or failure by a parent to comply with the provisions of N.J.S.A. 18A:40A-12 shall be deemed a violation of the compulsory education

(N.J.S.A. 18A:38-25 and 18A:38-31) and/or child neglect (N.J.S.A. 9:6-1 et seq.) laws.

9. While the pupil is at home because of the medical examination or after his or her return to school, the school may require additional evaluation for the purpose of determining the extent of the pupil's alcohol or other drug use and its effect on his or her school performance.

Rules and regulations promulgated by the State Board of Education establish nearly identical procedures with respect to cases involving the suspected use of anabolic steroids, see N.J.A.C. 6:29-6.5b, although anabolic steroids have since been classified Schedule III controlled dangerous substances. N.J.A.C. 8:65-10.3(b)(4); 24 N.J.R. 2256b (effective June 15, 1992). It would thus seem that the provisions of N.J.A.C. 6:29-6.5b have been rendered moot, and that school officials must comply with the provisions of N.J.A.C. 6:29-6.5a in cases involving anabolic steroids.

School officials must also scrupulously comply with state and federal laws and regulations concerning the confidentiality of substance abuse, diagnosis and treatment information. See e.g. 42 U.S.C. § 290dd-2 and 42 C.F.R. Part 2. These confidentiality laws and regulations are discussed in greater detail in Chapter 14.2.

13.3. Suspicionless or Random Drug Testing.

A. Introduction. There is probably no subject within the field of search and seizure law that is more controversial than the question whether and under what circumstances school officials may compel large numbers of students to submit to suspicionless or random urinalysis. As of the time this Manual is being prepared for publication, there are a number of pending cases in New Jersey courts challenging the constitutionality of school drug testing programs. It is impossible to predict with certainty how these cases will be resolved by the trial courts, and eventually, by the Appellate Division and the State Supreme Court. In the circumstances, this Chapter will not attempt to address every conceivable legal issue that might arise, and school officials who desire to implement a drug testing policy should consult with the school board attorney.

Nothing in this Manual should be construed as either endorsing or disapproving random drug testing programs. This discussion, rather, is intended only to provide a whirlwind tour of the legal issues that might arise were a school to adopt such a policy.

Because information learned during the course of a drug testing program may never be shared with law enforcement authorities, and because this is a specialized field of search and seizure law that extends beyond the expertise of county prosecutors as the chief law enforcement officers within their jurisdictions, school officials should not rely upon county prosecutors to give advice concerning random urinalysis programs, and prosecutors would be well-advised not to offer advice on this topic. (See the discussion in Chapter 14.5 concerning Attorney General Directive 1988-1, which authorizes county prosecutors to answer questions posed by school officials concerning search and seizure issues.)

As a practical matter, those school districts that have developed random drug testing programs will also employ a range of other policies and programs that are designed to discourage students from using alcohol and other drugs and from bringing drugs, alcohol, and other contraband on to school grounds. This is not to suggest that as a matter of constitutional law, school districts can only implement a random drug testing policy as a "last resort," where other tactics have failed or would likely prove to be unavailing in addressing a school's particular substance abuse problem. Compare N.J.S.A. 2A:156A-9 (electronic surveillance law that provides that a wiretap application can only be approved by a court upon a finding that "normal investigative procedures ... have been tried and have failed or reasonably appear to be unlikely to succeed if tried... .") In fact, the United States Supreme Court has repeatedly refused to declare that only the "least intrusive" search practical can be reasonable under the Fourth Amendment. See discussion in Chapter 2.8. Even so, as is true with respect to the use of drug-detection canines discussed in Chapter 4.5, the better policy and practice would be to use random drug testing, if at all, to supplement, not to supplant, other methods and procedures available to school officials to discourage students from abusing drugs and alcohol and from bringing and keeping drugs and alcohol on school grounds.

B. Fourth Amendment Issues. Recently, the United States Supreme Court decided a landmark case that explains when and under what circumstances school officials would be permitted under the Fourth Amendment to adopt a policy that requires certain students to submit to random, suspicionless drug testing. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). In that case, the school district in the town of Vernonia, Oregon, adopted a policy that authorized random urinalysis drug testing of students who participate in school athletics programs. The policy applied to all students participating in interscholastic athletics. Students wishing to play sports were required to sign a form consenting to the testing and were also required to obtain the written consent of their parents. (For the reasons discussed in Chapter 8, such compelled "consent" would not be a valid "waiver" of constitutional rights under New Jersey law.) Student athletes were tested at the

beginning of the season for their sport; in addition, once each week of the season, the names of the athletes were placed in a "pool" from which a student, under the supervision of two adults, would blindly draw the names of 10% of the athletes for random testing. Those randomly selected would be notified and tested that same day, if possible.

The students selected to be tested would complete a "specimen control form" bearing an assigned number. Students taking prescription medications were required to identify the specific medication by providing a copy of the prescription or a doctor's authorization. The student would then enter an empty locker room accompanied by an adult monitor of the same sex. Each boy selected would produce a sample at a urinal, remaining fully clothed with his back to the monitor, who would stand approximately 12 to 15 feet behind the student. Monitors were permitted to watch the student while he produces the sample, and they would listen for normal sounds of urination. Female athletes would produce samples in an enclosed bathroom stall, so that they could be heard but not observed. After the sample is produced, it would be given to the monitor, who would check it for temperature and tampering and then transfer it to a vial. The samples would then be sent to an independent laboratory, which would routinely test them for amphetamines, cocaine, and marijuana. Other drugs, such as LSD, might be screened at the request of the school district.

The United States Supreme Court accepted the finding that the laboratory's procedures are 99.94% accurate. The school district followed strict procedures regarding the "chain of custody" of the urine samples and access to test results. The laboratory, for example, would not know the identity of the students whose samples it tests. The laboratory was authorized to mail written test results only to the superintendent and to provide test results to school district personnel by telephone only after the requesting official recites a code confirming his or her authority. Only the superintendent, principals, vice-principals, and athletic directors had access to test results, and the results were not kept for more than one year.

If a sample tested positive, a second test would be administered as soon as possible to confirm the result. If the second test was negative, no further action would be taken. If the second test was positive, the athlete's parents would be notified, and the school principal would convene a meeting with the student and his or her parents, at which time the student would be given the option of (1) participating for six weeks in an assistance program that includes weekly urinalysis, or (2) suffering suspension from athletics for the remainder of the current season and the next athletic season. The student would then be retested prior to the start of the next athletic season for which he or she is eligible. The policy also provided that a second offense would result in

automatic imposition of option #2; a third offense would result in suspension of the remainder of the current season and the next two athletic seasons.

In upholding the constitutionality of this policy by a 6-3 margin, the United States Supreme Court began its analysis by observing that the ultimate measure of the constitutionality of a governmental search is "reasonableness." The question whether a particular search meets the reasonableness standard, in turn, "is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." 115 S.Ct. at 2390. The Court recognized that searches unsupported by probable cause can be constitutional "when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impractical." Id. at 2391. The Court in Vernonia recognized that it had previously determined that such "special needs" exist in the public schools, citing to New Jersey v. T.L.O..

The Supreme Court then considered the nature of the privacy interests upon which the search intrudes, recognizing that the Fourth Amendment does not protect all subjective expectations of privacy, but only those that society recognizes as legitimate. "Central, in our view, to the present case is the fact that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." Id. at 2391. The Court further explained that particularly with regard to medical examinations and procedures, "students within the school environment have a lesser expectation of privacy than members of the population generally." Id. at 2392. Legitimate privacy expectations, the Court reasoned, are even less with regard to student athletes. "School sports," the Court found, "are not for the bashful," and "public school locker rooms, the usual sites for these activities, are not notable for the privacy they afford." Id. at 2392-2393.

The Court also found that school athletes enjoy reduced expectations of privacy since, "[b]y choosing to 'go out for the team,' they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally," since the school district had long maintained a policy that athletes must submit to a pre-season physical exam. Id. at 2393. For all of these reasons, the Court concluded that the privacy interests compromised by the process of obtaining the urine sample are "negligible." Id.

The Court then considered the other aspect of privacy invasion associated with urinalysis, that is, the disclosure of information concerning the state of the subject's body and the materials that he or she has ingested. The Court found it significant that the tests at issue looked only for drugs, and not for whether the student is, for example,

epileptic, pregnant, or diabetic. Id. at 2393. Moreover, the drugs for which the samples were screened are standard and did not vary according to the identity of the student.

Finally, and of great importance, the Court noted that the results of the tests are disclosed only to a limited class of school personnel who have a need to know, and are not turned over to law enforcement authorities or used for any internal disciplinary function. Id. at 2393. This led the Court to conclude that these searches are undertaken for prophylactic and distinctly *non*punative purposes, thus clearly distinguishing these searches from so-called "evidentiary" searches. Id. at 2393, n.2. See also discussion in Chapter 4.5D4(c) (discussing the importance of the underlying "purpose" of a generalized or suspicionless search).

The Supreme Court concluded its Fourth Amendment analysis by turning to a discussion of the nature and immediacy of the governmental concern at issue and the efficacy of the means chosen by the school district to meet it. The Court concluded that it "can hardly be doubted" that the nature of the concern, deterring drug use by our nation's schoolchildren, "is important — perhaps compelling ... ." Id. at 2395. The Court found that:

> School years are the time when the physical, psychological, and addictive effects of drugs are most severe ... and of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted. In the present case, moreover, the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction.
> [Id. at 2395.]

The Court also emphasized that the urinalysis program at issue in that case was directed narrowly to drug use by school athletes, "where the risk of immediate physical harm to the drug user and those with whom he is playing his sport is particularly high." Id.

As to the effectiveness of this means for addressing the problem, the Court stated that, "it seems to us self-evident that a drug problem largely fueled by the 'role model' effect of athletes' drug use, and of particular danger to athletes, is effectively addressed by making sure that athletes do not use drugs." Id. at 2396. The majority of the Court at this point expressly rejected the respondent's argument that a "less intrusive" means to the same end was available, namely, "drug testing on suspicion of drug use." Id. at

2396. In fact, the Court concluded that, "[i]n many respects we think, testing based on 'suspicion' of drug use would not be better, but worse." Id.

Taking into account all of these factors — the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search — the United States Supreme Court concluded that the school district's policy was reasonable and hence constitutional. The Court nonetheless took pains to:

> caution against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts. The most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care.
> [Id. at 2396.]

C. *State Constitutional Analysis.* As noted throughout this Manual, the New Jersey Supreme Court has on several occasions interpreted Article I, Paragraph 7 of the New Jersey Constitution, the counterpart to the Fourth Amendment, to provide citizens with greater protections against unreasonable searches and seizures than are provided by the United States Constitution as interpreted by the United States Supreme Court and other federal courts. The question thus arises whether the random drug urinalysis scheme held to be constitutional by the United States Supreme Court in Vernonia would survive constitutional scrutiny by our state courts. In resolving this difficult question, New Jersey courts will look not only to the text of the constitutional provisional issue (in this instance, the text of Article I, Paragraph 7 of the New Jersey Constitution is virtually identical to the text of the Fourth Amendment to the United States Constitution), but also to pre-existing state law, distinctive state traditions, and public attitudes compelling a different state constitutional interpretation. See State v. Hunt, 91 N.J. 338, 364-367 (1982) (Handler, J., concurring).

With respect to pre-existing state law, there seems to be only one published state court decision dealing with a school policy requiring certain students to submit urine samples for drug testing, and that case, Odenheim v. Carlstadt-East Rutherford Reg. Sch., 211 N.J. Super. 54 (Ch. Div. 1985), was decided by a trial level judge, rather than by an appellate court or the New Jersey Supreme Court. The judge in that case ruled that the school search policy at issue was unconstitutional, although for the reasons discussed below, the precedental value of that trial court ruling is questionable if not negligible in light of Vernonia and more recent New Jersey Supreme Court decisions.

In Odenheim, a student challenged a school policy that required enrolled students to submit to a comprehensive medical examination that, in addition to other more traditional medical tests, included drug screening designed to detect the presence of controlled dangerous substances. The urine samples were taken for a number of traditional medical tests as well as the drug screen, and the policy provided that no civil or criminal sanctions would be imposed in the event of a positive test.

Even so, the trial court in Odenheim found that the policy violated the reasonable privacy expectations of schoolchildren. 211 N.J. Super. at 61. The court determined that the policy was:

> not reasonably related in scope to the circumstances which initially justified the interference. School policy already provides for exclusion and/or suspension of students who are involved with drug activity. The raw numbers and percentages of students referred to a student assistance counseling as compared with the total student body is not reasonably related in scope to the circumstances which justify the interference, urinalysis, in the first place.
> [211 N.J. Super. at 61.]

Although the decision notes that the plaintiff's challenge was based not only on the Fourth Amendment but also on Article I, Paragraph 7 of the New Jersey Constitution, the court's entire analysis was under the Fourth Amendment and the judge relied entirely on federal precedent. Indeed, the trial court cited to no published state court decision at all.

We now know, of course, in light of the recent Vernonia decision, that the Odenheim court's reliance upon federal precedent turns out to have been misguided. It is interesting that in Vernonia, the United States Supreme Court at the very end of its opinion commented that the 9th Circuit Court of Appeals, a federal court, had earlier held that Vernonia's policy not only violated the Fourth Amendment, but also, by reason of that violation, contravened Article I, Paragraph 9 of the Oregon Constitution. The United States Supreme Court observed, "[o]ur conclusion that the former holding was in error means that the latter holding rested on a flawed premise." 115 S.Ct. at 2397. Thus, by the same token, to the extent that the Odenheim court's ruling rested on Fourth Amendment principles, that holding too is based on a flawed premise.

In a slightly different context, an appellate-level court in 1987 ruled that the random drug testing of police officers violates Article I, Paragraph 7 of the New Jersey Constitution, even if such testing does not violate the Fourth Amendment of the United

States Constitution. See Fraternal Order of Police, Newark Lodge No. 12 v. The City of Newark, 216 N.J. Super. 461(App. Div. 1987). While the F.O.P. case might until very recently have been cited for the proposition that the New Jersey Constitution bans all forms of random drug testing, the fact remains that that case no longer carries any precedental weight in view of a recent New Jersey Supreme Court case that ruled that random drug testing of New Jersey Transit police officers does *not* violate the State Constitution. In New Jersey Transit PBA Local 304 v. New Jersey Transit Corp., 151 N.J. 531 (1997), the New Jersey Supreme Court, in a unanimous opinion authored by Chief Justice Poritz, chose to follow the lead of the United States Supreme Court, rather than to interpret the State Constitution to provide additional protections against random drug testing.

The PBA argued that the "special needs" test developed by the United States Supreme Court in its series of random drug testing cases is not compatible with Article I, Paragraph 7 of the New Jersey Constitution. The New Jersey Supreme Court, while acknowledging that it has on occasion found that Article I, Paragraph 7 affords greater protections against unreasonable searches and seizures than does the Federal Constitution, nonetheless found that the "special needs" test provides "a useful analytical framework for considering the protections afforded by Article I, Paragraph 7 of the New Jersey Constitution," and the Court thus adopted that method of analysis. Id. at 556. The Court in unanimously rejecting the PBA's argument added that, "[t]his [federal analytical] approach enables a court to take into account the complex factors relevant in each case and to balance those factors in such manner as to ensure that the right against unreasonable searches and seizures is adequately protected." Id. It is also interesting to note that the New Jersey Supreme Court cited to and to some extent relied on Vernonia in reaching its conclusion. Id. at 553.

After conducting a "context-specific inquiry," the Court, considering the police officers' decreased expectation of privacy, the adequate limitations on the intrusiveness of the testing, and the compelling state interests in promoting safe conduct by armed officers, held that random drug testing of the New Jersey Transit police force is constitutional. Id. at 564-565.

In light of the New Jersey Supreme Court's recent and unanimous opinion in New Jersey Transit PBA Local 304 v. New Jersey Transit Corp., there would seem to be no precedent to support the argument that the rule established by the United States Supreme Court in Vernonia would violate Article I, Paragraph 7 of the New Jersey Constitution. This is especially true in the context of students' privacy rights, since the New Jersey Supreme Court in T.L.O. had developed essentially the same legal standard for determining the reasonableness of school searches that was eventually accepted by

the United States Supreme Court in T.L.O.. (See Chapter 1.4, noting that while the United States and New Jersey Supreme Courts used the same "reasonable grounds" test, the Courts disagreed in applying the facts of that case to the legal standard of review.) This point was emphasized by the Appellate Division in Desilets v. Clearview Reg'l Bd. of Educ., 265 N.J. Super. 370, 379 (App. Div. 1993), a case discussed in Chapter 7 in which the court sustained the constitutionality of the school's policy of searching students' hand luggage prior to field trips. The court in Desilets, in rejecting the plaintiff's contention that the search policy violated Article I, Paragraph 7 of the New Jersey Constitution, explained:

> We note that in its T.L.O. opinion the New Jersey Supreme Court analyzed the search and seizure issue under the Fourth Amendment to the United States Constitution, and did not suggest that New Jersey's organic law imposed more stringent standards.
> [264 N.J. Super. at 382.]

D. Factual Basis Justifying a Random Drug Testing Program. A court reviewing the constitutionality of a school policy that requires certain students to submit to random drug testing must undertake a "context-specific" inquiry, examining closely the competing private and public interests advanced by the parties. See New Jersey Transit PBA Local 304 v. New Jersey Transit Corp., supra, 151 N.J. at 559. Given the inherent vagaries of this case-by-case balancing test, it is reasonable to expect that litigation will focus not on whether the State Constitution should be interpreted differently from the Fourth Amendment, but rather on how to apply the unique facts and circumstances of each particular case to the Vernonia legal standard. It is simply not clear exactly what facts must be presented to convince a court that random drug testing is a reasonable response to a school's drug problem.

In Vernonia, the United States Supreme Court briefly recounted the facts that were found at trial, beginning with an observation that in that Oregon school district, "as elsewhere in small town America, school sports play a prominent role in the town's life, and student athletes are admired in their schools and in the community." 115 S.Ct. at 2388.

According to the Court, teachers and administrators in the mid-to-late 1980's observed a sharp increase in drug use. Students in the Vernonia school district began to speak out about their attraction to the drug culture and to boast that there was nothing that the school could do about it. Along with more drugs came more disciplinary problems. The Court observed that between 1988-1989, the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported

in the early 1980s, and several students were suspended. The trial court had also found that students during this period became increasingly rude during class, and outbursts of profane language became common. Id.

Initially, the school district responded to the drug problem by offering special classes, speakers, and presentations designed to deter drug use, and the school district even resorted to the use of a drug-detection canine. Id. According to the findings of the trial court:

> The administration was at its wit's end and ... a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion. Disciplinary problems had reached "epidemic proportions." The coincidence of an almost three-fold increase in classroom disruptions and disciplinary reports along with the staff's direct observations of students using drugs or glamorizing drug and alcohol use led the administration to the inescapable conclusion that the rebellion was being fueled by alcohol and drug abuse as well as the student's misconceptions about the drug culture.
> [115 S.Ct. at 2389.]

At that point, school district officials held a parent "input" night to discuss a proposed student athlete drug policy, and the parents in attendance gave their unanimous approval. Id.

It is by no means certain, indeed doubtful, that a random drug testing policy could only survive constitutional scrutiny based upon a finding that a large segment of the student population is in a "state of rebellion." In other contexts where courts have sustained the constitutionality of suspicionless searches, courts have recognized that the goal of providing safe, drug-free schools is often impeded by the behavior of only a few students. See e.g., Commonwealth v. Cass, 709 A.2d 350, 364 (Pa. 1998). See also Desilets v. Clearview Reg'l Bd. of Educ. 265 N.J. Super. 370, 379 (App. Div. 1993) (court rejected the argument that the rare incidence of detection of contraband as a result of the school's policy of searching all hand luggage brought on class trips indicated that there was no problem at that particular middle school serious enough to justify these suspicionless searches).

Furthermore, the United States Supreme Court has repeatedly used the "special needs" test to sustain random drug testing policies involving highly-regulated professional and safety-sensitive jobs where there was no evidence that actual drug use by, for example, Customs Service agents or railway workers had reached significant much

less epidemic levels. See e.g., Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 109 S.Ct. 1384, 104 L.Ed.2d 685 (1989). In fact, the government in Von Raab did not even claim that the testing program was a response to a demonstrated drug problem within the Customs Service.

So too, the New Jersey Supreme Court in New Jersey Transit PBA Local No. 304 v. New Jersey Transit Corp., 115 N.J. 531 (1997), paid little attention to the problem of actual drug usage by New Jersey Transit police officers, noting only that the "concerns about illegal drug use by police officers are not simply hypothetical," and accepting the representation made at oral argument that pre-employment and random testing of trainees at the State Police Academy shows a statewide positive rate of about 4%. 115 N.J. at 563.

As noted in Chapter 2.9, as a general position, there is no minimum number of acts of violence, vandalism, disorder, or substance abuse that must occur before a school can lawfully adopt a particular search policy. Indeed, the United States Supreme Court in the Vernonia opinion itself emphasized that:

> It is a mistake ... to think that the phrase "compelling state interest" in the Fourth Amendment context, describes a fixed, minimum quantum of governmental concerns ... . Rather, the phrase describes an interest which appears *important enough* to justify that particular search at hand, in light of other factors which show the search to be relatively intrusive upon genuine expectation of privacy. Whether that relatively high degree of government concern is necessary in this case or not, we think it is met. [515 U.S. at ___, 115 S.Ct. at 2394, 2395 (italics in original).]

Clearly, no region, town, school district, or school building in America is immune from the influence of drug trafficking and substance abuse. While the precise nature and extent of the problem varies geographically and over time, it is hard to imagine that the drug problem among adolescents in Vernonia, Oregon in 1989 is disproportionately greater than the problem that exists today in school districts throughout New Jersey, especially in view of national and statewide surveys that show that the problem of teenage substance abuse has worsened in recent years. (See Chapter 1.2.)

A reviewing court, therefore, should not declare a drug testing policy unconstitutional merely because school officials choose not to describe the problem with imprecise hyperbolism, such as by characterizing the student body as being "in a state of rebellion," or by describing the drug and disciplinary problem as one of "epidemic proportions." The inquiry, rather, should focus on measurable (if not quantifiable) facts.

How prevalent is substance abuse, and how has that changed over time? To what extent has the increased use and availability of controlled dangerous substances affected student behavior, student performance (academic and otherwise), and student safety (including an assessment of *students'* perceptions of the dangers they face while in school)? Has there been an increase in the incidence of violence, vandalism, classroom disruptions, suspensions, and expulsions, and is there reason to believe that any such increase in disciplinary problems is related to the abuse and/or sale of illicit drugs and alcohol?

The real question may turn out to be who is in the best position to decide whether drug-related disciplinary problems have reached the point where random drug testing is a reasonable response. Phrased somewhat differently, the outcome of these cases may well depend on the extent to which reviewing courts will defer to the judgment of school officials in determining whether the school's substance abuse problem is such as to justify the decision to resort to random drug testing. Obviously, courts will not and must not abdicate their responsibility to conduct their own balancing test, or what is described in the caselaw as a thorough "context-specific inquiry." It nonetheless bears noting that the Supreme Court in Vernonia seemed to be especially impressed by the fact that the school officials in that case implemented the drug testing policy only after soliciting input from parents. The Court re-emphasized at the end of its discourse that:

> We may note that the primary guardians of Vernonia's schoolchildren appear to agree [that the drug testing policy is reasonable]. The record shows no objection to this districtwide program by any parents other than the couple before us here — even though, as we have described, a public meeting was held to obtain parents' views. We find insufficient basis to contradict the judgment of Vernonia's parents, its local school board and the District Court, as to what was reasonably in the interest of these children under the circumstances.
> [115 S.Ct. at 2397.]

In any event, school officials seeking to adopt a random drug testing policy must be prepared to develop a complete factual record to support their policy decision. (See Chapter 2.9.) Furthermore, school officials should be careful to document the nature and scope of the substance abuse and disciplinary problem in each specific school, grade level, or subpopulation of students that would be affected by the proposed drug testing policy. In her dissenting opinion in Vernonia, Justice O'Connor, who was joined by Justices Stevens and Souter, expressed concern in this regard that there was virtually no evidence in the record of a drug problem at the "grade school" at which the petitioner

attended when the litigation began. Rather, the witnesses who testified at trial to drug-related incidents were mostly teachers or coaches at the high school. 115 S.Ct. at 2406 (O'Connor, J., dissenting). As Justice O'Connor noted, "[p]erhaps there is a problem at the grade school, but one would not know it from this record." Id.

The United States Supreme Court in Vernonia specifically referred to certain kinds of facts and circumstances that would be relevant, including a marked increase in disciplinary problems and classroom disturbances, more common outbursts of profane language and rude behavior in classes, student athletes in a state of near rebellion, and direct school staff observations of students using and "glamorizing" drug and alcohol use. Other court decisions involving other types of suspicionless search programs may also provide guidance in identifying the kinds of facts and observations that should be made part of the record. In Commonwealth v. Cass, 709 A.2d 350, 357 (Pa. 1998), for example, the Supreme Court of Pennsylvania recently listed several reasons that supported school officials' "heightened concern" as to drug activity in the school that justified the use of drug-detection canines. These factors include:

- information received from unnamed students;
- observations from teachers of suspicious activity by the students, such as passing small packages amongst themselves in the hallways;
- increased use of the student assistance program for counselling students with drug problems (see Chapter 14.2 concerning the confidentiality of information that could reveal the identity of specific students participating in drug or alcohol counselling programs);
- calls from concerned parents;
- observation of a growing number of students carrying pagers;
- students in possession of large amount of money; and,
- increased use of pay phones by students.

School officials interested in pursuing the option of implementing a random drug testing program might also want to commission a confidential survey of students to gauge with some measure of empirical precision the prevalence of student drug use and the nature of students' attitudes concerning the use of alcohol and other drugs. These school-specific studies could be patterned after the high school survey administered every three years by the Division of Criminal Justice and the middle school survey recently developed by the Department of Health. (See Chapter 1.2.) (Both of these surveys are administered in conjunction with the Department of Education.)

Finally, although law enforcement agencies may play no part in a school's decision to adopt a drug testing program, and in any event would not be permitted to receive the

results of positive drug tests, police and prosecutors can nonetheless support local school officials in documenting the scope of the school's drug problem by providing information concerning the criminal activities of students. As noted in Chapter 14.3, the New Jersey Code of Juvenile Justice was amended in 1994 to make it easier for law enforcement agencies to share information with schools. Specifically, N.J.S.A. 2A:4A-60 now permits law enforcement or prosecuting agencies to provide school officials with information regarding a juvenile who is under investigation for an offense when, in the judgment of law enforcement authorities, the information may be useful to school officials in maintaining order.

The law also contains a provision that allows school principals to request information regarding any juvenile delinquency charges that were filed against enrolled students, and these requests may be made either by the principal on a case-by-case basis or in accordance with procedures that could be agreed to in advance as part of the Memorandum of Agreement Between Education and Law Enforcement Officials (1992). In this way, a school district and local police department might agree automatically to share information regarding all students enrolled in the district who are formally charged with any act of delinquency, including simple possessory drug charges and alcohol-related offenses. Furthermore, the recently-amended law *requires* that law enforcement or prosecuting agencies advise the school principal if an enrolled student is charged with delinquency where the offense occurred on school property or a school bus, occurred at a school-sponsored function, constitutes a first or second-degree crime, or involved the unlawful manufacture, distribution, or possession with intent to distribute a controlled dangerous substance.

E. Scope of the Student Population Subject to Drug Testing. The school drug testing policy at issue in Vernonia applied only to students participating in interscholastic athletics. It is thus not yet clear whether a school would be permitted to adopt a more wide-ranging program that would, for example, require students engaged in non-athletic extracurricular activities, or even the entire student body, to submit to random urinalysis. The Court in Vernonia cautioned "against the assumption that suspicionless drug testing will readily pass constitutional muster in other contexts," 115 S.Ct. at 2396, although it would appear that this warning was addressed mostly to those who might broadly interpret the case to permit random drug testing outside of the school context. Indeed, the Court observed in the very next sentence that, "[t]he most significant element in this case is the first we discussed: that the Policy was undertaken in furtherance of the government's responsibilities under a public school system, as guardian and tutor of children entrusted to its care." Id. at 2396.

One of the members of the Court who joined in the majority decision, Justice Ginsburg, wrote separately to explain that:

> I comprehend the Court's opinion as reserving the question whether the District, on no more than the showing made here, constitutionally could impose routine drug testing not only on those seeking to engage with others in team sports, but on all students required to attend school. [115 S.Ct. at 2397 (Ginsburg, J., concurring).]

Although Justice Ginsburg's concurring opinion technically means only that the court has reserved decision on the constitutionality of any more wide-ranging school urinalysis policy, the strong implication is that she would not join a majority to uphold a broader program, or at least one that applies to the entire student body.

Furthermore, a close reading of the majority decision indicates, as noted by Justice Ginsburg in her concurring opinion, that the constitutionality of the Vernonia school district's drug testing policy depended at least to some extent on the Court's findings that (1) there is a reduced privacy expectation and closer school regulation of student athletes, 115 S.Ct. at 2389, 2392-2393, and (2) that drug use by athletes risks immediate physical harm to users and those with whom they play. Id. at 2394-2395. The Court also noted that given the limited population that was subject to drug testing, the most severe sanction allowed under the school policy was suspension from extracurricular athletic programs. Id. at 2390. This led the Court to characterize the policy not only as being "nonpunitive," but also as not one that is not being used "for an internal disciplinary function." Id. at 2393.

At least one federal appellate court has sustained the constitutionality of a somewhat more expansive school drug testing program that applied to students engaged in nonathletic extracurricular activities. The United States Court of Appeals for the 7th Circuit ruled in Todd v. Rush County School, which was decided on January 12, 1998, that the reasoning set forth in Vernonia also applies to testing of students involved in any extracurricular activity. The court noted that, "certainly successful extracurricular activities require healthy students." The court also agreed with the finding of the district court judge that extracurricular activities, like athletics, "are a privilege at the high school," and added that students engaged in extracurricular activities, "like athletes, can take leadership roles in the school community and serve as an example to others."

In affirming the constitutionality of the Rushville, Indiana drug testing policy, the court concluded that the policy was undertaken in furtherance of the school district's

responsibilities as a guardian and tutor of children entrusted to its care and that the "lynchpin of [the] program" is to protect the health of the student's involved. The court thus concluded that the Rush County School's drug testing program, while broader than the one upheld in Vernonia, is "sufficiently similar to the programs in Vernonia ... to pass muster under the Fourth and Fourteenth Amendments."

It is far less likely that a school would be permitted to compel drug testing of *all* students, and, in fact, to this point, it appears that no court has permitted such a widespread policy. It is true that the Court in Vernonia, citing to New Jersey v. T.L.O., recognized that all students within the school environment, not just athletes, have a lesser expectation of privacy than members of the population generally, "particularly with regard to medical examinations and procedures ... ." 115 S.Ct. at 2392.

So too, the Court clearly stated that the "most significant element in this case": is that the drug testing policy was undertaken in furtherance of the government's responsibilities as guardian and tutor of children entrusted to its case, id. at 2396, and that, "[c]entral, in our view, to the present case is that the subjects of the Policy are (1) children, who (2) have been committed to the temporary custody of the State as schoolmaster." Id. at 2391. The Court's emphasis on this point suggests that the school's responsibilities, and thus the scope of its authority, extends to all pupils, and not just to athletes and students who participate in extracurricular activities.

Even so, there would seem to be insuperable practical as well as legal difficulties in implementing a schoolwide drug testing policy, including, most notably, the problem of fashioning an appropriate response or remedy in the event of a confirmed positive drug test. It is one thing to exclude a substance-abusing student from a sports team, orchestra, band, or club. It is another thing entirely to exclude the student from attending regular classes. See discussion in Chapter 13.2 describing the procedures that must be followed when a student is found to be under the influence of an intoxicating substance. A suspension from regular classes would thus seem to cross the line into the realm of an "internal disciplinary function," 115 S.Ct. at 2393, although it is at least conceivable (though by no means certain) that a court would tolerate such a program if it were used solely to place students who test positive in an appropriate treatment or counselling program.

F. Special Rules and Procedures Governing Random Drug Testing Programs. Because the use of random drug testing represents an aggressive, dramatic, and controversial tactic, school officials considering this technique must take special precautions to ensure that drug testing policies are developed and implemented in accordance with the principles and safeguards outlined in Vernonia. Many of these

procedures and special precautions are discussed in the preceding sections of this Chapter. It is appropriate, however, to restate some of these principles succinctly:

(1) *Soliciting Parental Input*. School officials are strongly encouraged to solicit input from parents, teachers, and other members of the school community before conducting a canine operation. See Vernonia, supra, 115 S.Ct. at 2395, 2397. Even if not constitutionally required, it is a good idea to meet with parents and afford them meaningful input in the decision to resort to the use of drug testing, since this provides education officials with an excellent opportunity to discuss with parents and other members of the school community the scope and nature of the school's drug problem and the need for a comprehensive response that goes far beyond relying on random urinalysis. Convening a parent "input" night not only provides school officials with an opportunity to solicit the opinions of the "primary guardians" of the district's schoolchildren, id. at 2397, but also affords an opportunity to engage in a fact-finding inquiry and to learn firsthand from parents their views concerning the scope and nature of the school's substance abuse problem.

(2) *Findings.* As noted throughout this Chapter, school officials should carefully document their findings to demonstrate why it is necessary and appropriate to implement a drug testing policy. These findings should spell out the nature and scope of the problem that exists in the school and why the proposed policy will help to alleviate the problem. (See Chapter 13.3D for a more detailed discussion of the kinds of facts and sources of information that would be relevant and that might support the implementation of drug testing policy.) It is also critical that the findings relate specifically to the particular school and population of students who will be subject to random drug testing.

(3) *Limited Purpose.* A school drug testing policy must be designed to deter substance abuse and not to catch and punish users. The policy must be undertaken for prophylactic and distinctly *non*punative purposes (i.e., protecting student athletes from injury and deterring drug use in the student population). The policy must make clear that positive test results will not be disclosed to law enforcement agencies. School officials should carefully consider whether there are less restrictive or intrusive alternatives to accomplish their legitimate objective, which is to discourage students from using alcohol or other drugs.

(4) *Minimize the Invasiveness of the Intrusion.* A random drug testing policy must specify the procedures for collecting and handling urine samples, so as to minimize to the greatest extent possible the invasion of student privacy. (See § 13.3B for a detailed discussion of the sample collection and monitoring procedures that were deemed

to be constitutional in the Vernonia case.) The conditions under which samples are taken must be "nearly identical to those typically encountered in public restrooms." Vernonia, supra, 115 S.Ct. at 2393.

In addition, the policy must establish a neutral plan that clearly prescribes the random selection method that will ensure that students selected to submit to urinalysis are not singled out on the basis of an individualized suspicion, or on the basis of some impermissible criteria, such as race, ethnicity, socioeconomic status, or membership in a "gang." (Note that where school officials have reason to believe that a particular student or group of students may be using or under the influence of an intoxicating substance, they must comply with the "reasonable grounds" test established in New Jersey v. T.L.O. and explained in Chapters 13.2 and 13.3.) The random drug testing program must *never* be used as a ruse or subterfuge to compel a student to submit to drug testing where a school official suspects that particular student may have used or is under the influence of an intoxicating substance.

G. Preserving the Chain of Custody and Ensuring the Accuracy of Drug Test Results. The policy must specify the procedures to preserve the so-called "chain of custody" of all samples that are taken, and must also include procedures, such as those described in the Vernonia case, to ensure reliable drug test results.

H. Preserving Confidentiality. It is critically important that the policy include provisions to make certain that the identity of students who test positive for drugs are kept confidential. See Chapter 14.2 for a more detailed discussion of federal law and regulations that protect the confidentiality of persons, including schoolchildren, who receive substance abuse diagnosis or treatment.

I. Prescription Medication. The student in the Vernonia case argued that the school district's drug testing policy was unduly intrusive because it required that students, if they were to avoid sanctions for a falsely positive test, identify *in advance* any prescription medications that they were taking. The Supreme Court agreed that this "raises some cause for concern," 115 S.Ct. at 2394. In an earlier case involving the random drug testing of Federal Customs Service employees, the Court "flagged as one of the salutary features of [that] program the fact that employees were not required to disclose medical information unless they tested positive, and even then, the information was supplied to a licensed physician rather than to the government employer." 115 S.Ct. at 2394, referring to Treasury Employees v. Von Raab, 489 U.S. 656, 672-673, n.2, 109 S.Ct. 1384, 1394-1395, n.2., 103 L.Ed.2d 685 (1989). It was not clear from the record in Vernonia whether the school district would have permitted students to

provide the requested information concerning prescription medication in a confidential manner, and the Court refused to "assume the worst." 115 S.Ct. at 2394.

In the circumstances, a school drug testing policy should include clear procedures to ensure the confidentiality of information provided by students concerning their lawful use of prescription substances, and schools would be well-advised to adopt a policy similar to the one described in Von Raab, whereby (1) students would not be required to disclose medical information unless they test positive, and (2) such information would be supplied only to a licensed medical professional rather than to school officials.