Drug Testing in American Schools: A Status Report

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Introduction

Unlike the courts in Australia and New Zealand[1] where the issue has yet to be litigated to any great extent, the American judiciary has increasingly been called upon to deal with legal problems associated with searching for evidence of substance abuse in schools. More specifically, in light of growing concerns over such abuse, American courts have seen an increase in the number of suits involving drug and alcohol testing[2] of both students and teachers under the Fourth Amendment to the United States Constitution which prevents unreasonable searches and seizures.[3]

Based on the legal issues associated with drug testing, this article focuses on recent developments in American federal courts. The article concentrates on federal cases, not only because the majority of litigation has occurred in these courts, but also because these decisions typically have a greater impact than rulings handed down by state courts. The first part of the article discusses testing of students while suggesting guidelines for school systems that are considering the adoption of policies and procedures for drug testing of students. The second part of the article examines questions surrounding the drug testing of teachers. By reviewing the parameters of recent case law in the United States, it is hoped that educators and policy makers in Australia and New Zealand will have an enhanced understanding of the problem and that it will provide them with an established body of legal literature. Moreover, insofar as legal issues associated with drug testing in American public schools implicate rights explicitly protected in the Bill of Rights – contained largely within the first ten amendments to the United States Constitution - discussion of these questions may be informative to Australian readers since the Australian Constitution does not include similar provisions and Australia does not have a Bill of Rights. It is noted also that the New Zealand Bill of Rights[4] is not incorporated into a written Constitution.

Students and Testing

Despite stepped up efforts at the federal, state, and local levels, progress in limiting, let alone eliminating, drug use by American students has been less than successful. For example, the results of a recent study of drug use by eighth, tenth, and twelfth grade students are astounding. In response to a question which asked whether they engaged in AAny illicit drug use in [the] past 12 months,≅ the rate for eight graders increased from 11% in 1991 to 24% in 1996 to 22% in 1997. The rate among tenth graders went from 20% in 1992 to 38% in 1996 to 39% in 1997. Among twelfth graders the rate rose from 27% in 1992 to 40% in 1996 to 42% in 1997.[5]

As schools continue to struggle in the battle against substance abuse, more and more school districts are turning to drug testing as a means of deterrence. And, as might be expected, the additional attention paid to drug testing has been accompanied by a corresponding increase in litigation. Four recent cases, two of which upheld drug testing policies, and two of which struck them down, raise interesting questions about the need for, legality of, and practical considerations associated with drug testing of students.

In *Todd v. Rush County Schools*,[6] the Seventh Circuit affirmed that a school board policy in Indiana mandating random drug testing for all students who participate in extracurricular activities did not violate the Fourth Amendment prohibition against unreasonable searches and seizures. *Todd* is significant because, unlike the Supreme Court=s ruling in *Vernonia School District 47J v. Acton*,[7] which applied only to student-athletes, the policy covered all students who participated in extracurricular activities.[8]

Conversely, *Willis v. Anderson Community School Corporation*[9] involved a school district=s attempt to suspend, and ultimately expel, a first year high school student who refused to submit to a urine analysis drug test as a precondition for returning to class after he was suspended for fighting with a fellow student. This time the Seventh Circuit reversed a trial court ruling in favor of the school district and held that such a requirement violated the student=s rights under the Fourth and Fourteenth Amendments.[10]

Early Case Law

As a precursor to reviewing case law involving drug testing of students, it is important to consider the only two United States Supreme Court cases dealing with searches and seizures in the public schools as these have set the standard that other courts have had to observe. Following a few early disputes involving search and seizure in the schools, the Supreme Court first addressed the issue in *New Jersey v. T.L.O.*[11] In 1980 a fourteen year-old student in a New Jersey high school, identified as T.L.O. (her initials were used to protect her identity) was accused of smoking cigarettes in the school lavatory. Upon searching T.L.O.=s purse, an assistant principal discovered that she possessed cigarettes along with cigarette rolling papers, a small amount of marijuana, a pipe, a number of

plastic bags, a substantial quantity of one dollar bills, an index card that appeared to be a list of students who owed her money, and two letters that implicated her in dealing marijuana.

After T.L.O. confessed to selling marijuana at her high school, a trial court refused to suppress the evidence, adjudicated her as delinquent, and sentenced her to a year on probation. An appellate court affirmed that the school officials had not violated T.L.O.=s Fourth Amendment rights of protection against unreasonable searching. Nonetheless the appellate court remanded the case to determine whether the student had knowingly and voluntarily waived her rights under the Fifth Amendment. However, the Supreme Court of New Jersey subsequently reversed the decision and declared that the search of T.L.O.'s purse did in fact violate her Fourth Amendment rights.

On further review, the United States Supreme Court reversed the Supreme Court of New Jersey decision and found in favour of the State of New Jersey. In holding that the Fourth Amendment=s prohibition against unreasonable searches and seizures applies to public school officials, the Court devised a two-part test in evaluating the legality of a search. AFirst, one must consider >whether the ... action was justified at its inception;= second, one must determine whether the search as actually conducted >was reasonably related in scope to the circumstances which justified the interference in the first place.=≅[12] (p. 341).

According to the Court, a search is ordinarily justified at its start when school officials have reasonable grounds for suspecting that a search of a student will uncover evidence that the pupil has violated or is violating either school rules or the law. Insofar as school searches, also known as administrative searches, are designed to ensure school safety where there are generally large numbers of young people and reasonably few adults present, educators need only articulable justification in order to proceed. A related concern in considering the totality of circumstances means that school officials may have to depend on the reliability of witnesses in determining whether to search. Keeping in mind that there is a wide spectrum of possibilities, it is more likely that a principal would proceed in searching a student or his locker based on a tip from a teacher who is well regarded than a student who is frequently in trouble.

Turning to the scope of a search, the Court offered the view that a search is permissible if its goals are reasonably related to its objectives and if it is not excessively intrusive in light of the age and sex of a student and the nature of an infraction. For example, school officials will have to adopt less intrusive methods when searching younger students and may act in a more invasive manner if they are looking for a gun rather than a child=s missing lunch.

Ten years after *T.L.O.* the Supreme Court revisited the Fourth Amendment rights of students in considering the implications of mass and suspicionless searches. In

Vernonia School District 47J v. Acton,[13] the Court addressed the question of individualised suspicion that it left unanswered in *T.L.O. Acton* involved a seventh grade student in a school in Oregon who was suspended from interscholastic athletics because he and his parents refused to comply with a district policy requiring them to sign a consent form allowing him to be tested for drug use. The family challenged his suspension claiming that the district violated his rights under the Fourth Amendment to the United States constitution and a similar provision in the state constitution since there was no reason to believe that he used drugs.

Acting in response to the perception of increased drug use on campus, the board in Vernonia School District 47 J implemented a policy which required that all students trying out for interscholastic athletic teams submit to a urine analysis drug test. As part of the policy, student athletes were tested individually at the beginning of each season and randomly throughout the season. In order to safeguard the privacy rights of students, explicit procedures were created. Students who tested positive were required to undergo a second examination. Those who tested positive on a second test were suspended from the team and sent for counselling. Subsequent violations led to mandatory suspensions from athletics.

The Supreme Court applied a three-part balancing test in affirming the constitutionality of the policy. First, it found that students have a lesser expectation of privacy than ordinary citizens. In fact, the Court reasoned that student athletes in particular, experience diminished privacy because they are subject to physical examinations before becoming eligible to play and because they dress in open areas of locker rooms. Second, the Court indicated the urine analysis was minimally intrusive since it was coupled with safeguards that allowed little encroachment on students= privacy. Finally, given the perception of increased drug use, the Court maintained that there was a significant need for the policy. However, it is worth noting that *Acton* applies only to suspicionless drug testing of student athletes. In this regard the following cases of *Todd* and *Willis* are important as they raise questions about the extent to which students who are involved in extracurricular activities may be subject to suspicionless testing.

Todd v. Rush County Schools

Based on its belief that there was a growing problem with drug use at its high school, in August 1996, the Board of Education of the Rush County Schools adopted a drug testing policy that went into effect in October 1996. In that same month, four students and their parents filed suit in a federal trial court in Indiana claiming that the policy violated the Fourth Amendment to the Federal Constitution and the analogous provision under the state constitution.

Pursuant to the policy, students who participate in any extracurricular activity are subject to tests for drugs, alcohol, or tobacco in random, unannounced urine analysis tests. The policy also permits testing of students based on individualised reasonable suspicion. In addition, the Board developed comprehensive testing procedures, similar to those in *Acton*, to safeguard the rights of students. After the policy was implemented, five or six tests, each involving twenty to thirty students, were conducted. In the first three tests, three to five students per examination had positive results. Subsequently, only two to three students tested positive. Out of all of these results, three or four students used marijuana; the remainder tested positive for using tobacco.

As the dispute moved rapidly through the judicial processes, the trial court, in *Todd v. Rush County Schools* granted the Board=s motion for summary judgment. The court decided that since there was evidence that a minority of students had used drugs, tobacco, or alcohol, the Board had a sufficient interest in developing and implementing its policy. The court also observed that while the students who were involved in non-athletic extracurricular activities had legitimate expectations of privacy, it was satisfied that the Board=s policy, as applied, was constitutionally acceptable because it was accompanied by well developed procedures.

On appeal the Seventh Circuit unanimously affirmed the trial court=s judgment. In its brief opinion, the court relied on both *Acton* and its own precedent in *Schaill v. Tippecanoe County School Corporation*.[14] In *Schaill*, the court had upheld a policy that called for random urine analysis testing of students who participated in interscholastic athletics. Essentially, the court reasoned that since the board is responsible for the welfare of its students, it was justified in requiring drug testing of all participants in extracurricular activities because it was motivated by its legitimate concern over on-going drug use in the school community. The court rounded out its rationale by quoting from *Schaill* to justify the expansion of testing to include participants in all extracurricular activities. The court based its conclusion on its belief that since they gain Aenhanced prestige and status in the student community . . . it is not unreasonable to couple these benefits with an obligation to undergo drug testing.≅[15]

Willis v. Anderson Community School Corporation

Faced with growing concerns over substance abuse by their students, in August 1997 the Board of Education of the Anderson Community School Corporation (the School) adopted a drug and alcohol testing policy for its secondary schools. Under the policy, students could be tested either on the basis of individualised suspicion or for possessing or using tobacco products, for being suspended for three or more days for fighting, for being habitually truant, or for violating any other school rule that resulted in at least a three-day suspension. The policy, which was designed to help identify and intervene with students who used drugs and to involve their parents immediately, did not impose additional

punishments on students who tested positive. Additionally, the policy permitted school officials to expel pupils who tested positive but who refused to participate in a drug education program and to consider such students as having admitted to unlawful substance use.

After James Willis engaged in a fight with a classmate, he was suspended from school. When Willis refused to submit to urine analysis testing to determine whether he violated the policy against drug and alcohol use, he was again suspended. Further, school officials informed Willis that if he refused to submit for the third time, they would begin expulsion proceedings. In response, Willis and his father unsuccessfully sought a preliminary injunction in a federal trial court in Indiana that would have prevented the enforcement of the policy. Shortly thereafter, the same court entered a judgment in favor of the School. The trial court maintained not only that Willis= behaviour had created reasonable suspicion that he used drugs but also that the School=s special needs outweighed his privacy interests. On appeal, in *Willis v. Anderson Community School Corporation*, the Seventh Circuit unanimously reversed the decision in favour of the student in declaring that the policy violated the Fourth and Fourteenth Amendments.

The Seventh Circuit Court of Appeal began its analysis by considering whether the School acted on the basis of reasonable suspicion, the appropriate standard enunciated by the Supreme Court in *New Jersey v. T.L.O.* The Court pointed out that the Dean of Students who was responsible for enforcing discipline at the high school had no reason to suspect that Willis was impaired or under the influence of drugs or alcohol at the time of the fight. Consequently, the court easily rejected the School=s argument that since there was a causal nexus between the use of illegal substances and violent behaviour, it was reasonable to believe that Willis had used an illegal substance. In asserting that such a generalisation flew in the very face of the concept of individualised reasonable suspicion, admittedly more a term of art than a precise legal measure, and that the School=s own data were at best inconclusive in creating a nexus between drug use and fighting, the court found that the School had failed to prove its point.

Turning to the School's 'special needs', the court sought to balance the privacy rights of students against the system=s purported need to use drug testing under the circumstances. In relying on *Acton* and its own precedent in *Todd*, the court declared that even though students at the high school had a lesser expectation of privacy, they still had a greater interest than their counterparts in *Acton* and *Todd* because unlike *Willis*, they were subjected to drug testing due to their voluntary participation in extra curricular activities. As such, the court was convinced that based on these differences, the policy failed to protect Willis= privacy interest.

In considering the nature and immediacy of the school=s need for drug testing, the court was careful to avoid relying on this as the only deterrence for substance abuse.

Consequently, while conceding that the nature and immediacy of the school=s concern over drug use was similar to the situation in *Acton*, the court indicated that there was a sharp contrast between the efficacy of the policy in *Acton* (and by extension *Todd*) because the suspicionless standard was too broad. Thus, insofar as it was concerned that the policy in *Willis* primarily appeared to serve demonstrative or symbolic purposes, the court struck it down as unconstitutional because it was convinced that the school could have more effectively addressed the problem by employing a traditional suspicion-based approach to drug testing.

The US Supreme Court subsequently refused to hear appeals in *Todd v. Rush County Schools*[16] and *Willis v. Anderson Community School Corporation*[17] Although the Court=s denial of *certiorari* is of no precedential value outside of the Seventh Circuit, it will be interesting to observe how other school districts that are experiencing difficulties with drug use by students will react.

Discussion

Viewed together, *Todd* and *Willis* fit squarely within the mainstream of American case law dealing with searches of public school students and their property, even if these four opinions involved the uncommon element of drug testing. Both cases applied the rule of law insofar as they were consistent with precedent which helps to set limits on the authority of school officials who search students and their property. In *Todd* the Seventh Circuit upheld the Board=s action because it articulated a legitimate need for testing based on student behaviour. Conversely, in *Willis* the court ruled that in the absence of individualised reasonable suspicion, school officials lacked sufficient reason to overcome the student=s legitimate expectation of privacy.

In light of continuing concerns about drug abuse among students, administrators and boards face increased pressure to act. Conversely, failure to act is often interpreted as blatant disregard of a serious problem in our society. Before administrators act or, in some cases, react to the serious problem of drug and alcohol abuse, they must first reflect on the issue with their boards and key staff members. Ideally, this session should be private, and should occur before drug testing becomes a matter of public concern. By formulating policies before major problems can erupt, education authorities such as boards or Councils or Education Departments can stay one step ahead and avoid a potentially divisive debate within the community. Consequently, as educational leaders assess a problem, they would be wise to consider the following steps:

1. Address drug testing with their boards of education, and their legal advisors, in order to obtain input before embarking on a course of action. In consulting with a board, school leaders should provide specific data such as the numbers of students who have been suspended and/ or expelled for drug use as this can help to focus

on the need for action. Throughout the process, administrators should keep in mind the impact that drug testing might have on the school community with regard to such questions as whether the solution may be worse than the problem or how it might impact on staff/student relationships.

2. Take the community=s attitude toward the perceived drug problem into consideration and work to gain wide-spread support for the proposed policy. The greater the support that the board and administration has, the easier their job will be. If privacy is a larger concern to local residents than drug testing, then a board may wish to reconsider its actions. Insofar as drug testing student athletes and other youngsters who participate in interscholastic activities may be a drastic step for many community members, it is wise to proceed with caution.
3. Educational leaders should review pre-existing practices/ policies in discussing a policy on drug testing.
4. Leaders should establish a committee to develop a draft policy. The committee should include a cross section of the school community including board members, administrators, teachers, staff, parents, students, and community members.
5. The superintendent or Chief Executive Officer should make sure that the committee knows its role. In other words, the committee recommends a course of action, while the board approves the policy, and the Chief Executive Officer, along with the administrative staff, establishes administrative guidelines.
6. A wise practice is to keep staff members who might have to administer the program out of leadership roles on the task force. This can help to avoid the possibly unpleasant situation of having that person being accused of administering his or her own drug testing program.
7. Examine the cost factors associated with implementing a policy since drug testing can be expensive.
8. Consider implementing a pilot program as a way to keep the door open for flexible administrative action.
9. The policy on drug testing must, at a minimum, include: a clear, justifiable, data-based rationale; adequate procedural guidelines sufficient to protect the rights of students who are subject to random testing; and permit individualised testing, if at all, based only on reasonable suspicion.
10. The Education Authority, whether Board, Council or Department, should identify in advance how it will assess the success of its drug testing policy. Insofar as drug testing of students can be divisive, by taking a careful and pro-active approach schools can address this crucial issue in an informed and sensitive fashion.

11. Review the drug testing policy on an annual basis. An annual review should not only help to ensure that the policy complies with any recent developments in the law but also helps the board to reexamine some of its basic beliefs about how the schools should operate.

Teachers and Substance Abuse

Drug testing of teachers and/ or other school employees, unlike that of students, has received little attention. To date, the US Supreme Court has upheld drug testing of public employees who had safety sensitive positions[18] but has struck it down in the case of candidates for public office.[19] Moreover, the few lower federal courts[20] that have examined drug testing of other public employees,[21] including teachers[22] and/ or other school personnel[23] have reached mixed results even though testing teachers was not directly at the heart of any of these cases. Thus, it was *Knox County Education Association v. Knox County Board of Education*[24] which was the first federal appellate court to address, and uphold, drug testing of teachers.

In *Knox County*, the Sixth Circuit reinstated a board policy that, even in the absence of a pronounced substance abuse among its staff, permitted suspicionless testing of job applicants and reasonable suspicion drug, but not alcohol, testing of school employees. This policy emanated from a concern for the need to protect students. Yet, *Knox County* may have left the door open to more problems than it has resolved. For in permitting suspicionless testing of educators and job applicants, it signals a further erosion of the privacy rights of individuals albeit in the legitimate quest to eradicate drug use in the schools. In light of the Sixth Circuit=s ruling, the next section briefly reviews the Sixth Circuit=s opinion and reflects on the meaning of *Knox County* for educators.

Knox County Education Association v. Knox County Board of Education

Despite the lack of evidence of a pronounced drug/alcohol problem among its teachers, in December 1989 the Knox County Board of Education adopted its initial Drug-Free Workplace Policy. The policy called for the pre-employment drug screening of job applicants and reasonable-suspicion substance testing of current employees. In November 1991 the Knox County Education Association (the KCEA) obtained a preliminary injunction from a federal trial court in Tennessee to prevent the enactment of the policy on the basis that it violated the Fourth Amendment.

The initial dispute went to trial in June 1992. In July 1992, the Board amended the pre-employment drug screening and reasonable suspicion substance testing sections of the policy. According to the pre-employment provision, all applicants for professional positions had to submit to urine analysis testing before being hired. Under the reasonable suspicion section, any school employee was subject to drug testing if the Director of

Personnel was of the opinion that the individual was under the influence of drugs or alcohol while on duty. The trial court, which ruled in April 1994, not only ordered the July 1992 policy to be made part of the record but also based its judgment on this latest version of the Policy.

The trial court struck the policy down as unconstitutional since it neither sufficiently described the methods or procedures to be used in testing applicants nor ensured adequate protections for the privacy of applicants. Turning to the reasonable suspicion section of the policy, the court conceded that while the Board had a legitimate interest in acting, it also was unconstitutional since it lacked specificity in protecting the privacy rights of the employees.

In response to the trial court=s ruling, in June 1994, the Board adopted another version of the policy which permitted testing under two conditions. Under the first condition, applicants for Asafety sensitive≅ positions including principals, teachers, traveling teachers, teacher aides, substitute teachers, school secretaries, and school bus drivers, can be tested after they are offered jobs but before they begin working and prior to resuming their duties if they are returning to work from rehabilitation. Applicants who refuse to submit to testing are disqualified from employment. A candidate who has tested positive on an initial screening for which there is no current medical prescription may be retested. If the first, or any subsequent, test returns a positive result, a job offer will be revoked. The policy also permits testing of current employees who seek to transfer into safety sensitive positions. A positive test result not only disqualifies a current staff member from being considered for a transfer or promotion but may lead to disciplinary action for insubordination and may result in dismissal.

The second condition under which the revised policy permits testing is if an individual who is authorised to act for the Board reasonably suspects that an employee=s performance or on-the-job behaviour may have been affected by illegal drugs or alcohol. Employees who refuse to take a test based on their behaviour while on duty or during work hours, in or on Board property, or while in attendance at a Board-approved or school-related function, will be charged with insubordination and are subject to disciplinary action including dismissal. The policy also includes detailed procedures for regulating testing. Since the Board initiated testing in December 1989, four individuals have tested positive for drug/alcohol use; two were teachers, one was an applicant for a teaching position, and one was an employee who was not in a safety-sensitive position. Three of the persons were tested on the basis of reasonable suspicion while the last individual was subject to pre-employment suspicionless testing. The KCEA challenged the new policy once again claiming that it violated the Fourth Amendment=s prohibition against unreasonable searches and seizures. The trial court=s March 1997 ruling struck down suspicionless testing as unconstitutional. The court was convinced that the Board=s

interest in ensuring the safety of students by testing staff was weakened since there was no evidence either that there was a drug/alcohol problem among employees or that any teacher or other school personnel placed a child at risk by being in an impaired condition at work. The court added that testing infringed upon teachers= legitimate expectations of privacy in the work place. However, the court upheld that part of the policy dealing with reasonable suspicion drug testing on the grounds that it fairly limited the discretion of individuals who conducted the test and that this method adequately protected the Board=s interest in removing drug impaired employees from the workplace while protecting their privacy rights. The court found that the alcohol testing provision was unconstitutional since it lacked clear standards, set the level at which an employee could test positive too low, and still called for the police to administer breathalyser tests even though the school system had its own equipment.

On cross appeals in *Knox County*, a unanimous Sixth Circuit largely reversed the trial court's ruling with regard to suspicionless testing. It affirmed the suspicion-based portion of testing, and reversed and remanded as to whether alcohol testing is constitutional. The court began by establishing that a valid search must ordinarily be based on individualised suspicion of wrongdoing. Yet, the Sixth Circuit asserted that a suspicionless test, which is presumably inherently suspect because it is not accompanied by individualised suspicion, can still be constitutional as long as there is a special need or where privacy interests are minimal, and where an important governmental interest is furthered. As such, the court observed that where an intrusion serves a special need, it is necessary to balance the government, or public=s need for testing against the privacy interests of individuals.

Here the Sixth Circuit relied on the two key factors that the Supreme Court had applied in cases involving non-school employees. The first part of the test asks whether the group targeted for testing exhibits a pronounced drug problem and, if not, whether their jobs are so unique that the existence of a such a problem is unnecessary to justify suspicionless testing. The second inquiry considers the magnitude of the harm that could result from the use of illicit drugs on the job. The court conceded that only one job applicant tested positive for drug or alcohol use and that there was neither empirical data or historical evidence of an ongoing problem. Despite the Board=s lack of data, the court focused on the Board=s interest in ensuring the safety and security of students coupled with a state law that conferred *in loco parentis* status on teachers. This review convinced the court that educators are in such a unique position that they could be subject to suspicionless testing even in the absence of a glaring need to do so.

The court then considered the second factor and the need to balance the magnitude of the harm that could result from use of illicit drugs by educational personnel. Even in conceding that teachers are not typically considered to occupy safety-sensitive positions, the court refused to construe the term narrowly in light of the harm that could befall

school children. As such, the court asserted that the Board=s failure to point to even a single incident of drug or alcohol abuse by an employee in a safety-sensitive position was not essential to its case. Rather, the court indicated that since the Board did not have to wait for a tragedy to occur and could adopt pro-active measures to head off disaster, the public interest in suspicionless testing was very strong.

The court maintained that since teachers= legitimate expectations of privacy were reduced by working in a highly regulated industry, the public interest in suspicionless testing outweighed their concerns. In so doing, the Sixth Circuit focused on the intrusiveness of the testing scheme and the degree to which the industry is regulated. Although it admitted that drug testing usually implicates the privacy interests of employees, the court was satisfied that it was constitutional. Substantively, the court upheld the policy because it did not involve random testing, applied only to those who sought safety-sensitive positions, and was a one-time event that was not repeated if an individual obtained the position. Procedurally, the court was content that there were: sufficient safeguards in place with regard to the testing itself; confidentiality of results; and how the information would be used.

Shifting to the privacy expectations of school personnel, the court found it necessary to first consider the degree to which education is regulated. Based on a wide array of statutes, regulations, and board policies, the Sixth Circuit rejected the trial court=s narrow reading of the degree of state oversight of education. The court believed that since most employees enter the field knowing that education is heavily regulated by rules covering virtually every aspect of their professional lives, they are likely to have had diminished expectations of privacy.

The Sixth Circuit was convinced that since the privacy interests of school personnel to be free from suspicionless testing was diminished both by the level of state regulation and the nature of their work, the one-time, suspicionless testing of applicants for safety-sensitive positions was reasonable. The court added that the educators= *in loco parentis* status with regard to students, coupled with the public interest in seeking to ensure that they perform their jobs in an unimpaired condition, outweighed their right not to be tested since the policy was sufficiently narrowly-tailored and not overly intrusive in pursuing its goal of drug-free schools.

Turning to its brief analysis of suspicion based drug testing, the court began by noting that the policy permits testing if the Director of Personnel reasonably suspects that an individual=s on the job performance or behaviour may have been influenced by the use of illegal drugs or alcohol. After reiterating circumstances under which screening could be considered, the Sixth Circuit summarily upheld the trial court=s ruling. The court stated that since the requirement of reasonable cause appropriately limited the discretion of the

officials who administered the testing, and because testing was based on individualised suspicion, this part of the policy was constitutional.

The Sixth Circuit then briefly disposed of the first two of the three bases on which the trial court struck down the alcohol testing provision in the policy. First, the court conceded that while the trial court had a legitimate basis for concerns over the privacy rights of employees since the breathalyser tests had initially been conducted by staff from the local Sheriff=s office, this was no longer an issue because the Board now used its own personnel. Second, the panel Circuit rebuffed the trial court=s concerns about whether there were sufficient procedures in place to ensure the accuracy of the breathalyser machine and the testing protocols. The court conceded even though the use of the breathalyser did not follow federal guidelines, the fact that a positive breath test was followed up by urine analysis sufficiently protected the privacy rights of employees.

In turning to the trial court=s third rationale for striking down the policy, the Sixth Circuit agreed that the testing procedures rendered it unconstitutional because the threshold, which was only one fifth of the state=s level for drunk driving for a positive result, was too low. The court was also unclear why the Board set such a low level and how or why it may have been related to the policy=s legitimate goals. Yet, since the Sixth Circuit was unable to decide whether this part of the test was legal, it reversed on whether alcohol testing was constitutional and remanded for a determination of whether the low level was reasonably related to the purpose of testing.

Discussion of *Knox*

Clearly, the use of illegal drugs and alcohol abuse have reached disturbing levels. Just as clearly, there is an obligation to protect students. Yet, as laudable as the Board=s concern for the safety of children is, its adoption of a policy that was not backed up by data suggests that it may have overreached its boundaries and intruded into the privacy rights of its employees and job seekers. Moreover, had the Board relied upon the bargaining process, or some other method of establishing a consensus with employees, it might have had a better chance of garnering support and avoiding the lengthy, and undoubtedly, costly, litigation that ensued. In a related vein, at a time when public confidence in education is low, one must wonder what could be gained in potentially further undermining the status of teachers, and prospective educators, especially if there is no individualised suspicion.

In addressing the extent to which public education is a highly regulated industry, the court correctly recognised the degree to which the state=s regulatory machinery directs day-to-day activities in schools. Even so, the court failed to acknowledge that state regulations typically focus on the substantive dimensions of public education, ranging from teacher certification to curricular concerns to student outcomes among a plethora of

activities, rather than the personal lives of educators. Clearly, no one wishes to hire or promote individuals who use illegal drugs and/ or alcohol in the workplace. Yet, other than the slight, and ultimately speculative, potential deterrent effect that suspicionless testing may have had, coupled with the lack of data that the Board had at its disposal, *Knox* may have opened the door to further government intrusion into the lives of school employees. At the same time, given the cost of testing, let alone of litigation, in return for the limited benefit of disqualifying one applicant for employment via suspicionless testing, one can only wonder if the Board would have been better served by a different approach.

Similarly, it is unclear why the court=s analysis of suspicion-based drug testing failed to recognise that educators in safety-sensitive positions are different from other groups of public employees since school administrators and other supervisory personnel typically work in close proximity with individuals who serve in Asafety-sensitive≅ positions. In this regard school authorities can remove impaired teachers from their classes or other staff members of their duties prior to testing. Had the court, let alone the Board, followed a similar line of reasoning, then its holding in this area, although reasonable, would have been better grounded.

Calls for drug testing of teachers and students raise one final, interesting thought: insofar as alcohol leads to more problems vis-a-vis abuse and deaths involving cars than other substances, what message do some school districts send out by serving alcoholic beverages at school events? If districts are truly concerned about Adrug free≅ environments, then they may want to take a very hard look at their own practices and either limit, or eliminate, serving alcoholic beverages at school-related functions. Adopting a policy that models the appropriate drug-free behaviour will speak much more eloquently, and, hopefully, effectively, than any policy. Admittedly, drug-free school policies are essential to maintaining safe and orderly learning environments. Yet, some districts send out a mixed message if they have a policy for students but do not address the same issue with regard to their own functions. Moreover, considering a change in current practices would send out the clear and unmistakeable message that drugs, in any form (regardless of whether it includes tobacco as in *Todd* or focuses on alcohol and other forms of drugs in *Willis*), are unacceptable. Such a change would also help to create a comprehensive and consistent policy that applies equally to all stakeholders who are a formal part of the school community ranging from students to school officials to board members.

Conclusion

Unfortunately, difficulties with illegal drugs and alcohol continue to plague the schools, let alone society as a whole. In light of the experiences of American courts and schools,

perhaps educators and policy makers in Australia and New Zealand can learn from the actions of Americans in order to create schools that will provide safer learning environments where all children can learn free from the threat of disruption caused by use of illegal drugs.

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English v. Talladega County Bd. of Educ., 938 F. Supp. 775 (N.D. Ala. 1996)

Georgia Ass=n of Educators v. Harris, 749 F. Supp. 110 (N.D. Ga. 1990).

Jones v. McKenzie, 878 F.2d 1476 (D.C. Cir. 1987).

Knox County Educ. Ass=n v. Knox County Bd. of Educ., 158 F.3d 361 (6th Cir. 1998).

Miller v. Wilkes, 172 F.3d 574 (8th Cir. 1999); No. 98-3227, 1999 U.S. App. Lexis 13289 (8th Cir. June 15, 1999).

National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989).

New Jersey v. T.L.O., 469 U.S. 325 (1985).

19 Solid Waste Dep=t Mechanics v. City of Albuquerque, 156 F.3d 1068 (10th Cir. 1998).

Patchogue-Medford Congress of Teachers v. Board of Educ. of the Patchogue-Medford Union Free Sch. Dist., No. 156, 517 N.Y.S.2d 456 (N.Y. 1987)

Schaill v. Tippecanoe County Sch. Corp.,. 864 F.2d 1309 (7th Cir.1988).

Skinner v. Railway Labor Executives= Ass=n, 489 U.S. 602 (1989).

Todd v. Rush County Schs., 983 F. Supp. 799 (S.D. Ind. 1997); 133 F.3d 984 (1998); cert. denied, 119 S. Ct. (1998).

Trinidad Sch. Dist. No. 1 v. Lopez, 963 P.2d 1095 (Colo. 1998).

Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995).

Willis v. Anderson Community Sch. Corp., 158 F.3d 415 (7th Cir. 1998).

Articles and Websites

Facts You Need to Know, http://www.freeyellow.com/members2/sportsafc/webdoc1.htm.

Optican, S. Search and Seizure in the Court of Appeal B An Essay on the Uses and Misuses of Section 21 of the Bill of Rights, 18 *New Zealand Universities Law Review* 411-430 (1999).

Rishworth, P. Search and Seizure in Public Schools, 1-37. In *School Discipline and Students=Rights*, Legal Research Foundation (1996).

Endnotes

1. For a discussion of search and seizure in education, see Paul Rishworth, Search and Seizure in Public Schools, 1-37, in "School Discipline and Students= Rights", *Legal Research Foundation* (1996). For a discussion of search and seizure generally in New Zealand, see Scott Optican, "Search and Seizure in the Court of Appeal B An Essay on the Uses and Misuses of Section 21 of the Bill of Rights", 18 *New Zealand Universities Law Review*, 411-430 (1999).
   Although there has been considerable media interest in the problem of drugs there are apparently no reported cases involving search and seizure in Australian schools.
2. For the sake of consistency, unless otherwise noted, the term Adrug testing,≅ as used in this article refers to tests for both drugs and alcohol.
3. In its relevant section, the Fourth Amendment reads that: 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated … ' U.S. CONST. amend. IV.
4. *See* Rishworth, Paul, "The Birth and Rebirth of the Bill of Rights". In G. Huscroft and P. Rishworth (eds.) (1996) *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993*.
5. Facts You Need to Know, http://www.freeyellow.com/members2/ sportsafc/webdoc1.htm.
6. 983 F. Supp. 799 (S.D. Ind. 1997), 133 F.3d 984 (1998); *cert. denied*, 119 S. Ct. (1998).
7. 515 U.S. 646 (1995).
8. In Miller v. Wilkes, 172 F.3d 574 (8th Cir. 1999), the Eighth Circuit initially affirmed a board policy from Arkansas that called for random testing for illegal substances of all students who were going to participate in any school activity that was outside of the regular curriculum. However, the Eighth Circuit subsequently struck the decision down as moot since the student was no longer enrolled in the district and had not taken a voluntary action to avoid the judgment of the court. The Eighth Circuit also rejected a petition for an en banc rehearing. The unreported opinion can be found at Miller by Miller v. Wilkes, No. 98-3227, 1999 U.S. App. Lexis 13289 (8th Cir. June 15, 1999).
9. 158 F.3d 415 (7th Cir. 1998).
10. In *Trinidad Sch. Dist. No. 1 v. Lopez*, 963 P.2d 1095 (Colo. 1998), the Supreme Court of Colorado struck down a board policy that would have required random suspicionless urinalysis of all students who participated in extracurricular activities. The court agreed

with the pupil who challenged the policy in finding that members of the high school=s marching band had a greater expectation of privacy than student-athletes.

11. 469 U.S. 325 (1985).

12. *Id*. at 341.

13. Supra, n.7.

14. 864 F.2d 1309 (7th Cir.1988).

15. *Schaill*, 1988, p. 1320.

16. *Cert. denied*, 119 S. Ct. 68 (1998)

17. *Cert denied*, 119 S. Ct. 1254 (1999).

18. In *Skinner v. Railway Labor Executives=Ass=n*, 489 U.S. 602 (1989) the Court permitted testing of railroad employees for dugs and alcohol after a serious accident without a showing of individualised suspicion. Similarly, in *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) the Court upheld the United States Customs Service=s practice of drug testing employees who seek promotion or transfer to drug interdiction positions that require them to carry firearms.

19. *Chandler v. Miller*, 530 U.S. 305 (1997) (striking down a Georgia statute that would have required suspicionless testing of all candidates for high office).

20. Further, only one state high court has addressed drug testing of teachers. In *Patchogue-Medford Congress of Teachers v. Board of Educ. of the Patchogue-Medford Union Free Sch. Dist., No. 156*, 517 N.Y.S.2d 456 (N.Y. 1987), the Court of Appeals of New York affirmed lower court rulings that struck down a suspicionless drug testing policy of teachers as unconstitutional.

21. *19 Solid Waste Dep=t Mechanics v. City of Albuquerque*, 156 F.3d 1068 (10th Cir. 1998) (holding that the government=s concerns are hypothetical rather than real); *Bangert v. Hodel* 705 F. Supp. 643 (D.D.C. 1989) (prohibiting random drug testing of employees of the Department of the Interior, including teachers who worked for the Bureau of Indian Affairs).

22. For a case involving teachers, other than Knox County, *see Georgia Ass=n of Educators v. Harris*, 749 F. Supp. 110 (N.D. Ga. 1990) (holding that the state=s generalised interest in a drug free work force was insufficient to outweigh the fourth amendment rights of applicants for teaching positions).

23. For cases involving other school employees, *see Jones v. McKenzie*, 878 F.2d 1476 (D.C. Cir. 1987) (holding that it was not unreasonable to require urine analysis drug testing where a school bus attendant=s duties involved direct contact with young students and testing was conducted as part of a routine, reasonably required, employment examination with a clear nexus between the test and the board=s legitimate safety concerns); *English v. Talladega County Bd. of Educ.*, 938 F. Supp. 775 (N.D. Ala. 1996) (holding that a county board of education did not violate the Fourth Amendment rights of a mechanic=s helper

who was required to undergo mandatory random drug testing); *Aubrey v. School Bd. of Lafayette Parish*, 148 F.3d 559 (5th Cir. 1998) (holding that a school board=s need to conduct suspicionless tests of a custodian and other safety-sensitive school personnel in an elementary school pursuant to its drug testing policy outweighed their privacy interests); *Cox v. McCraley*, 993 F. Supp. 1452 (M.D. Fla. 1998) (finding that a letter sent to an annual employee requiring him to submit to a drug test, enter a drug assistance program, or resign did not violate his right to privacy since the employee, who elected not to take the drug test and whose contract was not renewed, did not have a liberty interest at stake); *Cornette v. Commonwealth*, 899 S.W. 2d 502 (Ky. Ct. App. 1995) (upholding the constitutionality of a state statute and regulation that ordered mandatory drug testing of public school bus drivers following an accident that results in bodily injury or $1000 in property damage except where the bus was struck while legally parked).

24. *Knox County Educ. Ass=n v. Knox County Bd. of Educ.*, 158 F.3d 361 (6th Cir. 1998).