

**CONSTITUTION OF THE UNITED STATES: FOURTH AMENDMENT.**

**School board policy requiring drug testing of public school students and school board employees must be reasonable under Fourth Amendment standards and relatively unobtrusive. Interest of school board in conducting such compulsory, suspicionless searches must be balanced against individual privacy interests. Balancing test focuses on (1) whether pronounced drug problem exists within targeted group, and if not, whether existence of pronounced drug problem is unnecessary to justify suspicionless testing; and (2) magnitude of harm that could result from use of illicit drugs. Reasonableness of any search depends on facts of each particular case.**

The Honorable Charles R. Hawkins  
Member, Senate of Virginia  
January 31, 2000

You inquire whether local school boards may require drug testing of students and employees.

The Fourth Amendment to the Constitution of the United States requires that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Amendment guarantees the privacy and security of persons against certain arbitrary and invasive acts by officers of the government or those acting at their direction.<sup>1</sup> Compulsory drug testing implicates privacy interests and constitutes a search for Fourth Amendment purposes.<sup>2</sup> "Searches and seizures carried out by school officials are governed by the same Fourth Amendment principles that apply in other contexts."<sup>3</sup> "To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing."<sup>4</sup>

[A] search conducted in the absence of individualized suspicion would be reasonable only in a narrow class of cases, "where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not "subject to the discretion of the official in the field.'"<sup>5]</sup>

The supervision and operation of schools "presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."<sup>6</sup> Search warrants or a showing of "probable cause" is not required of school administrators seeking to maintain order in the public schools.<sup>7</sup> On the other hand, "[a]lthough [the Supreme] Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no legitimate expectations of privacy."<sup>8</sup> Consistent with the Fourth Amendment, therefore, individual privacy interests may be overcome, in the interest of school discipline, when there is a reasonable basis for suspecting that school rules are being violated.<sup>9</sup> In the case of *New Jersey v. T. L. O.*, the Supreme Court of the United States held that

the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, 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." Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.<sup>[10]</sup>

The reasonableness of any search is dependent upon the facts of each particular case.<sup>11</sup> As the Supreme Court also acknowledged in the case of *New Jersey v. T. L. O.*, "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search."<sup>12</sup>

You first ask whether a school board may require drug testing for any of its enrolled students prior to their participation in extracurricular activities or interscholastic athletics.

In 1995, the United States Supreme Court assessed the validity of a suspicionless school search.<sup>13</sup> The case arose from a school district's decision to implement a random urinalysis drug-testing program for student athletes in an effort to curb a documented increase in the use of drugs among students.<sup>14</sup> The Court analyzed the reasonableness of the program by balancing the students' legitimate privacy interests against the government's interests in conducting the search.<sup>15</sup> The Court upheld the drug testing as a reasonable search, finding that the student athletes enjoyed a lessened expectation of privacy when compared to students in general.<sup>16</sup> The Court noted that "public school children in general ... have a diminished expectation of privacy"<sup>17</sup> and held:

Taking into account all the factors we have considered ...—the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude [the policy of random urinalysis drug testing of student athletes] is reasonable and hence constitutional.<sup>[18]</sup>

Ultimately, however, the determination of whether such testing passes constitutional muster depends on a complete and detailed set of facts. The reasonableness of any search necessarily depends on the facts of each particular case.<sup>19</sup> Accordingly, I am unable to render any definitive opinion in response to your question due to a lack of pertinent and particular facts. It is, however, my general opinion that all such searches need to be viewed through the lens of the decision of the United States Supreme Court in *Vernonia School District 47J v. Acton*<sup>20</sup> and an assessment of the particular facts relative to whether a strong need for such a search exists and whether such search would be considered relatively unobtrusive.

You next ask whether a school board may require students who have been expelled for a drug-related offense to submit to a drug test before returning to school.

A 1989 opinion of the Attorney General concludes that "a local school board may adopt a drug testing policy for students who are seeking readmission after suspension or expulsion for a violation of school policies or state laws concerning controlled substances."<sup>21</sup> The opinion cautions, however, that

[a]ny such policy must, of course, be drafted and implemented to satisfy the constitutional principles discussed above. In accord with those principles, it is further my opinion that a general policy of compulsory drug testing of all students seeking re-enrollment solely because of a prior drug offense in the school would be vulnerable to constitutional attack. In order to avoid such an attack, therefore, any policy decision to require the drug testing of a student as a condition of re-enrollment should be made on a case-by-case basis and be based upon a review of the individual student's disciplinary problems and a reasonable belief that the compulsory testing will reveal the continuing use of drugs by that

student in violation of the law or school regulations.<sup>[22]</sup>

I concur with this opinion and the authority expressed in the opinion for school officials to require such drug testing.

Your final questions concern drug testing of school board employees. You ask whether a school board may require drug testing for all individuals accepting an offer of employment, and whether the school board may conduct random drug testing of its employees.

It is important to emphasize, again, that legal issues involving drug testing are entirely fact-oriented. Your inquiry has not detailed specific facts upon which a precise conclusion may be drawn. When such case-by-case determinations are required, this Office has refrained from rendering an opinion on general, hypothetical questions without specific facts being set forth.<sup>23</sup> Whether testing is appropriate, the extent of testing and the nature of the test will depend on the particular circumstances of each case.<sup>24</sup> It would be inappropriate, therefore, to give an answer to such questions and represent that the answer has universal application.<sup>25</sup> A drug testing program should be considered in light of the school board's own peculiar fact situation and the nature of its interest in establishing such a program.<sup>26</sup> My response, therefore, is general and may not be wholly applicable to every school board employer situation or testing program.

In responding to the specific inquiry of whether the Commonwealth may impose mandatory drug testing for new employees as a precondition to employment, a 1987 opinion concludes that the Commonwealth may not legally impose, as a precondition to employment, mandatory drug testing for new employees.<sup>27</sup> The opinion also notes that "the balance of interests in most work situations requires that drug testing be conducted only on the basis of at least 'reasonable suspicion,'"<sup>28</sup> and concludes that "random drug testing is not permissible in most work settings .... Moreover, any employer instituting random drug testing in appropriate circumstances should do so based on objective policy standards and preferably have the random selection computer-generated."<sup>29</sup>

In the case of *Skinner v. Railway Labor Executives' Association*, the Supreme Court of the United States considered the government's interest in testing railroad employees for drugs and alcohol after a number of serious train accidents without a showing of individualized suspicion that drugs were involved.<sup>30</sup> The Court began its analysis by noting that "[t]he problem of alcohol use on American railroads is as old as the industry itself,"<sup>31</sup> and that alcohol was the probable cause or a contributing factor in at least 21 significant train accidents occurring between 1972 and 1983, resulting in 25 fatalities, 61 nonfatal injuries, and property damages estimated at over \$19 million.<sup>32</sup> It was against this backdrop that the Court evaluated the Federal Railroad Administration's regulations which mandated "Post-Accident Toxicological Testing" for all employees involved in any train accident, which led the Court to determine that the government had a compelling interest in such testing because "[e]mployees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences."<sup>33</sup> The Court also noted that,

[b]y ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of

which no employee can predict with certainty, the regulations significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct, concomitantly increasing the likelihood that employees will forgo using drugs or alcohol while subject to being called for duty.<sup>[34]</sup>

The avoidance of such calamities outweighed the employees' privacy interests, which were "diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees."<sup>35</sup> Testing without a showing of a particularized suspicion was essential to the realization of a deterrent effect, i.e., the employee's inability to avoid detection simply by staying drug free at a prescribed test significantly enhanced the deterrent effect.<sup>36</sup>

In the case of *National Treasury Employees Union v. Von Raab*,<sup>37</sup> which was decided the same day as the *Skinner* case, the Supreme Court upheld drug testing by the United States Customs Service (the "Service") of employees seeking promotion or transfer to positions involved in the interdiction of illegal drugs, which required them to carry firearms. The Service's drug-testing regime was not prompted by a pronounced drug problem, but by its stature as the "Nation's first line of defense against one of the greatest problems affecting the health and welfare of our population."<sup>38</sup> The Court found that it was "readily apparent" that the government has a compelling interest in ensuring that the Service maintain unimpeachable integrity and judgment, and cautioned against the possibility of grievous consequences associated with having drug-using agents:

This national interest in self-protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics. A drug user's indifference to the Service's basic mission or, even worse, his active complicity with the malefactors, can facilitate importation of sizable drug shipments or block apprehension of dangerous criminals. The public interest demands effective measures to bar drug users from positions directly involving the interdiction of illegal drugs.<sup>[39]</sup>

The Court further noted that "the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force."<sup>40</sup>

The Supreme Court addressed the issue of drug testing in 1997 in the case of *Chandler v. Miller*.<sup>41</sup> Candidates for high office in the State of Georgia brought suit challenging the constitutionality of a statute which required candidates to submit to and pass a drug test within 30 days prior to qualifying for nomination or election to certain state offices. Balancing the candidates' privacy expectations against the state's interest in drug testing them, the Court held the statute unconstitutional. Specifically, the Court held that the suspicionless testing did not meet the Fourth Amendment's "special needs" exception to overcome the need for an individualized suspicion of wrongdoing. The Court's decision rested in

large part upon the lack of a demonstrated drug problem among state officeholders which, "while not in all cases necessary to the validity of a testing regime, would shore up an assertion of special need for a suspicionless general search program."<sup>42</sup> Ultimately, this led the Court to conclude that the Fourth Amendment shields society against drug tests such as Georgia's candidate drug test, which "diminishes personal privacy for a symbol's sake."<sup>43</sup>

As a general rule, in order to be reasonable, a search must be undertaken pursuant to a warrant issued upon a showing of probable cause.<sup>44</sup> In the *Chandler* case, however, the Supreme Court clarified how suspicionless testing—presumably inherently suspect because, by definition, it is not accompanied by individualized suspicion—can comport with the Fourth Amendment:

[P]articularized exceptions to the main rule are sometimes warranted based on "special needs, beyond the normal need for law enforcement." When such "special needs"—concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties. As *Skinner* stated: "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."<sup>[45]</sup>

Thus, where a Fourth Amendment intrusion serves special needs, "it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."<sup>46</sup> Quite simply, then, in evaluating the constitutionality of a proposed drug-testing policy, the government's (or public's) interest in testing must be balanced against the individual's privacy interest.

With regard to the government's interest in testing, the Supreme Court traditionally has focused its analysis on two central factors: (1) whether the group of people targeted for testing exhibits a pronounced drug problem; and, if not, whether the group occupies a unique position such that the existence of a pronounced drug problem is unnecessary to justify suspicionless testing; and (2) the magnitude of the harm that could result from the use of illicit drugs on the job.

The existence of a pronounced drug problem within the group of employees targeted for testing usually tips the equities in favor of upholding suspicionless testing. For example, in the *Skinner* case, the Court traced the history of drug and alcohol abuse among train operators and, in the *Vernonia* case, it emphasized the rampant increase in drug use among students participating in school athletic programs. In both cases the existence of a pronounced drug problem contributed to the Court's upholding of the drug testing regimes.

Likewise, in the *Chandler* case, the Court stated that the lack of a demonstrated drug problem among state officeholders in Georgia mitigated against allowing an unintrusive drug testing requirement. Thus, as would be expected when using a balancing test, in cases in which a pronounced drug problem exists within the target group, a drug-testing regime has a higher likelihood of being deemed constitutional because the more pernicious the drug problem is, the greater the public's interest is in abridging it.

The second factor that must be considered in the balancing test analysis focuses on the magnitude of harm that could result from the use of illicit drugs in any given set of circumstances. The possible basis for such a policy could be premised on a public interest argument that teachers, principals, and other such school personnel hold safety-sensitive positions and, further, that school boards have a legitimate and strong interest in safeguarding the health and welfare of the students by ensuring that people in safety-sensitive positions are not under the influence of drugs or alcohol at school. The validity of this argument, however, hinges in large part upon whether or not teachers, principals, and the other school officials covered by the testing actually occupy "safety-sensitive" positions.

As previously noted, the reasonableness of any drug-testing policy for employees of school boards depends entirely on the facts of each particular case. Accordingly, I am unable to render any definitive opinion on your final questions due to a lack of knowledge of all pertinent and particular facts that you may envision.

<sup>1</sup>Camara v. Municipal Court, 387 U.S. 523, 528 (1967); see also Delaware v. Prouse, 440 U.S. 648, 653-54 (1979); United States v. Martinez-Fuerte, 428 U.S. 543, 554 (1976).

<sup>2</sup>See, e.g., Skinner v. Railway Labor Executives' Assn., 489 U.S. 602 (1989).

<sup>3</sup>DesRoches by DesRoches v. Caprio, 156 F.3d 571, 574 (4<sup>th</sup> Cir. 1998).

<sup>4</sup>Chandler v. Miller, 520 U.S. 305, 313 (1997).

<sup>5</sup>DesRoches, 156 F.3d at 575 (quoting New Jersey v. T. L. O., 469 U.S. 325, 342 n.8 (1985) (quoting Delaware v. Prouse, 440 U.S. at 655 (quoting Camara, 387 U.S. at 532))).

<sup>6</sup>Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987) (upholding warrantless search of probationer's home by probation officer where there are "reasonable grounds" to believe that contraband was present).

<sup>7</sup>New Jersey v. T. L. O., 469 U.S. at 337-43.

<sup>8</sup>*Id.* at 338.

<sup>9</sup>*Id.* at 340-42.

<sup>10</sup>*Id.* at 341-43 (footnotes omitted) (quoting Terry v. Ohio, 392 U. S. 1, 20 (1968)).

<sup>11</sup>See, e.g., 1986-1987 Op. Va. Att'y Gen. 189.

<sup>12</sup>469 U.S. at 341.

<sup>13</sup>See *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995).

<sup>14</sup>515 U.S. at 648-51.

<sup>15</sup>*Id.* at 652-53.

<sup>16</sup>*Id.* at 657.

<sup>17</sup>*Id.* at 659 n.2.

<sup>18</sup>*Id.* at 664-65.

<sup>19</sup>1989 Op. Va. Att'y Gen. 204, 206 (reasonableness of school board's adoption of policy requiring drug testing before readmitting students expelled for drug offenses).

<sup>20</sup>See *supra* notes 13-18 and accompanying text.

<sup>21</sup>1989 Op. Va. Att'y Gen., *supra* note 19, at 206.

<sup>22</sup>*Id.* (footnote and citation omitted).

<sup>23</sup>See 1986-1987 Op. Va. Att'y Gen., *supra* note 11, at 190; *id.* at 274, 275.

<sup>24</sup>See 1986-1987 Op. Va. Att'y Gen., *supra*, at 189.

<sup>25</sup>*Id.*

<sup>26</sup>*Id.* at 189-90.

<sup>27</sup>*Id.* at 191.

<sup>28</sup>*Id.* at 190.

<sup>29</sup>*Id.* at 190-91.

<sup>30</sup>489 U.S. at 602.

<sup>31</sup>*Id.* at 606.

<sup>32</sup>*Id.* at 607.

<sup>33</sup>*Id.* at 628.

<sup>34</sup>*Id.* at 630 (citation omitted).

<sup>35</sup>*Id.* at 627.

<sup>36</sup>*Id.* at 629-30.

<sup>37</sup>489 U.S. 656 (1989).

<sup>38</sup>*Id.* at 668.

<sup>39</sup>*Id.* at 670.

<sup>40</sup>*Id.* at 671.

<sup>41</sup>520 U.S. at 305.

<sup>42</sup>*Id.* at 319 (citation omitted).

<sup>43</sup>*Id.* at 322.

<sup>44</sup>"Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause." Skinner, 489 U.S. at 619. That is, a valid search "ordinarily must be based on individualized suspicion of wrongdoing." Chandler, 520 U.S. at 313.

<sup>45</sup>520 U.S. at 313-14 (citations omitted) (quoting Skinner, 489 U.S. at 619 (internal quotation marks omitted), 624).

<sup>46</sup>Von Raab, 489 U.S. at 665-66.