

**GUIDELINES CONCERNING  
STUDENT DRUG TESTING  
IN VIRGINIA  
PUBLIC SCHOOLS**

Adopted by the  
Board of Education

June 23, 2004

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# GUIDELINES CONCERNING STUDENT DRUG TESTING IN VIRGINIA PUBLIC SCHOOLS

## Authority for Guidelines

The 2003 Virginia General Assembly amended sections 22.1-279.6 and 22.1-279.7 of the *Code of Virginia* to authorize the Virginia Board of Education to develop guidelines for local school boards concerning the implementation of voluntary or mandatory drug testing. The state statutory provisions do not require the adoption of drug testing programs by local school boards, but leave to local board discretion whether drug testing will be encouraged or required. Section 22.1-279.6 of the *Code* provides that “ a school board may, in its discretion, require or encourage drug testing in accordance with the Board of Education’s guidelines and model student conduct policies required by subsection A [of section 22.1-279.6] and the Board’s guidelines for student searches required by § 22.1-279.7.”

The Board of Education’s guidance for procedures relating to voluntary and mandatory drug testing in schools are required by § 22.1-279.6 of the *Code* to include, but not be limited to, which groups may be tested, use of test results, confidentiality of test information, privacy considerations, consent to the testing, need to know, and release of the test results to the appropriate school authority.

These guidelines concerning student drug testing are intended to supplement existing guidelines for student searches and student conduct policies. They are intended for use as technical assistance by local school officials to develop local policies and procedures. These guidelines are not regulations and do not replace local discretion; it is incumbent upon local school boards and their legal counsel to assure that related local policies and practices are in compliance with state and federal laws and constitutional principles. These Guidelines Concerning Student Drug Testing in Virginia Public Schools were approved by the Board of Education on June 23, 2004.

## Background

In *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995), the United States Supreme Court upheld a school division’s random drug testing program of student athletes. The school, in response to an increasing drug problem, had developed special classes and speakers’ programs regarding the problems of drug abuse. Despite these efforts, students continued to glamorize drug use and classroom disruptions increased three-fold. Parent-teacher meetings provided unanimous approval for the random drug testing of student athletes. The program was upheld (6-3) by the United States Supreme Court because it was narrowly tailored to protect students who choose to play sports, and the “role model” effect of student athletes’ drug use is important in deterring drug use among children. *See also Miller v. Wilkes*, 172 F.3d 574 (8th Cir. 1999) (upholding under Fourth and Fourteenth Amendments a policy of random urine testing of students for the presence of controlled substances and alcohol, with

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disqualification from extra activities as a sanction for refusal to submit to a test or for testing positive); *Todd v. Rush County Sch.*, 133 F.3d 984 (7th Cir. 1998), *reh'g en banc, denied*, 139 F.3d 571 (7th Cir. 1998), *cert denied*, 525 U.S. 824 (1998) (upholding school district policy requiring random drug tests for all students participating in extracurricular activities); *Willis by Willis v. Anderson Community Sch. Corp.*, 158 F.3d 415 (7th Cir. 1998), *cert. denied*, 526 U.S. 1019 (1999) (overturning as violative of the Fourth Amendment a school division's policy that required drug testing of all suspended students, regardless of their offense).

More recently, in *Bd. of Educ. v. Earls*, 536 U.S. 822 (2002), the United States Supreme Court ruled, in a 5-4 decision, that a School District policy requiring all middle and high school students to consent to urinalysis testing for drugs in order to participate in any extracurricular activity is a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren and does not violate the Fourth Amendment. The district policy required students to take a drug test before participating in an extracurricular activity, to submit to random drug testing while participating in the activity, and agree to be tested at any time upon reasonable suspicion. Students providing urine samples are monitored by a listening faculty member. The test was designed to test the use of illegal drugs only, but test results are not turned over to any law enforcement authority. Test results are kept confidential and apart from other educational records and shared with school personnel on a "need to know" basis. After a first positive test, the school contacts the parent or guardian for a meeting; the student may continue to participate in the activity upon a showing that he has received drug counseling and submits to a second drug test. After a second positive result, the student is suspended from extracurricular activity for 14 days, must complete substance abuse counseling, and submit to monthly drug tests. A third positive result will result in suspension from extracurricular activities for the rest of the school year or 88 school days, whichever is longer. Writing for the majority, Justice Clarence Thomas cast this case as a logical extension of *Vernonia*.

Because searches by public school officials implicate Fourth Amendment interests, the Court reviewed the policy for "reasonableness" – termed "the touchstone of constitutionality." "In contrast to the criminal context, a probable cause finding is unnecessary in the public school context because it would unduly interfere with the maintenance of the swift and informal disciplinary procedures that are needed."<sup>2</sup> Throughout its analysis the Court focused on the school's "custodial and tutelary responsibility." In upholding the suspicionless drug testing of athletes, the *Vernonia* Court conducted a fact-specific analysis balancing the intrusion on the children's Fourth Amendment rights against the promotion of legitimate governmental interests. In *Earls*, the Supreme Court applied *Vernonia's* principles to decide whether the challenged search was "reasonable" under the Fourth Amendment. The Court's four-part analysis and essential findings are as follows:

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<sup>1</sup> From *Virginia School Search Resource Guide* (2000). Memorandum of Legal Principles Animating Guidelines (August 20, 1999), Office of the Attorney General.

<sup>2</sup> *Bd. Of Educ. v. Earls*, 536 U.S. 822 (2002), LEXIS 4882 (2002).

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Principle 1. Privacy interests of students affected by the policy.

Findings: Students affected by the policy have a limited expectation of privacy. Students who participate in competitive extracurricular activities voluntarily subject themselves to many of the same intrusions on their privacy as do athletes.

Principle 2. Character of the intrusion into that privacy.

Findings: The invasion of students' privacy is not significant, given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put. Test results are kept in separate, confidential files, released only on a "need to know" basis, and not turned over to any law enforcement authority. Consequences of a failed drug test are limited to the student's privilege of participating in extracurricular activities.

Principle 3. Nature and immediacy of the School District's interest.

Findings: The policy effectively serves the School District's interest in protecting its students' safety and health. Preventing drug use by schoolchildren is an important governmental concern. The need to prevent and deter the substantial harm of childhood drug use provides the necessary immediacy for the school testing policy.

Principle 4. Degree to which the policy satisfies those interests.

Findings: Given the nationwide epidemic of drug use and the evidence of increased drug use in Tecumseh schools, it was entirely reasonable for the School District to enact this particular drug testing policy.<sup>3</sup>

## **Policy**

### **Development of Local Policy**

The question of whether to test students for drugs involves myriad complex issues that must be fully understood and carefully weighted before testing begins. Although in *Earls* the United States Supreme Court upheld a drug testing program for students involved in competitive extracurricular activities, it is not a blanket endorsement of drug testing for all students. Before implementing a drug testing program, local school boards should consult with legal counsel familiar with the laws regarding student drug testing.

The Office of National Drug Control Policy (ONDCP) advises that the development of local policy involve the entire community and provide ample opportunities for public input – including that of drug-testing opponents. In addition to local school board members, school administrators and staff (including the school division's Safe and Drug-Free Schools Program Coordinator), those who should be consulted include parents, community leaders, drug prevention and treatment professionals, officials at schools that already have drug-testing programs, and students.

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<sup>3</sup> *Id.* at 831-836.

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ONDCP further advises that schools first determine whether there is a need for drug testing. Although the Supreme Court ruled that a demonstrated drug abuse problem is not always necessary to the validity of a testing regime, the Court noted that some showing of a problem does shore up an assertion of a special need for a suspicionless general search. As a practical matter, a needs assessment provides objective information about both the nature and the level of drug use among students. A needs assessment yields information important in deciding drugs to target for testing and in assessing whether the drug testing program is truly effective in preventing drug use.

### **Purpose and Intent**

Local school board policy should include a statement of purpose and intent. In *Earls*, the Court affirmed "the School District's important interest in detecting and preventing drug use among its students" and concluded that "the Policy effectively serves the School District's interest in protecting its students' safety and health."<sup>4</sup> Findings from the school division's needs assessment can provide more specific justification for the policy. Additional purposes that local school boards may consider include providing students who are found to be using drugs with assistance to overcome the problem, giving students additional reasons for declining to use drugs, and ensuring that students set an appropriate example for fellow students for whom they are role models.

### **Definitions**

Local school board policy should clearly define which groups of students may be tested. In *Earls*, the policy upheld applied only to students in "competitive extracurricular activities" sanctioned by the Oklahoma Secondary Schools Activities Association and included activities such as Future Farmers of America, Future Homemakers of America, Academic Team, Band, Vocal, Pom Pom, Cheerleader and Athletics.

In addition to defining the group subject to testing, local policy should clearly define key terms including "drug/alcohol use test," "random selection," "illegal drugs," "performance-enhancing drugs," "positive test result" and "reasonable suspicion."

### **Relationship to Existing Discipline Policies**

Local policy governing student drug testing should supplement and complement other local policies, rules, and regulations related to student searches and to student conduct. The relationship of student drug testing policy to policies governing student searches and student conduct should be explicitly stated.

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<sup>4</sup> *Id.* at 838.

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## **Procedures**

### **Consent**

Local school board policy also should explicitly state that participation in school-sponsored extracurricular activities is a privilege and that consent to drug testing is a mandatory prerequisite for all students to participate in any school extracurricular program. Local school boards may require consent for participation in any required training program that is a prerequisite for the extracurricular program.

Local policy should require that students seeking to participate in extracurricular activities receive a copy of the drug testing policy and that written consent is obtained from the student and parent or legal guardian. Such written consent should be obtained before the student becomes eligible to practice or to participate in any extracurricular program.

Consent should provide for drug testing (a) when the student is chosen on the basis of random selection; (b) at any time there is reasonable suspicion of drug use; and (c) when a student voluntarily discloses, or a parent reports, drug use by the student. Local policy may include other circumstances for testing such as the student's annual physical examination or for eligibility to participate.

### **Random Selection Procedure**

Local policy must establish a neutral plan for selecting students to be tested that clearly prescribes the random selection method that will ensure that students selected are not singled out on the basis of individualized suspicion or other impermissible criteria.

### **Collection Protocol**

The specific procedures for collecting samples will be dictated by the drug testing method used. Urinalysis is the most common drug testing method and was the method used by the Tecumseh Public Schools whose policy was challenged and upheld in *Earls*. According to the Office of National Drug Control Policy, urinalysis has been demonstrated to be accurate and reliable and has undergone rigorous challenge in courts, and is currently the only technique approved for drug testing in the Federal workforce. Other commonly used methods involve testing of hair, oral fluids, sweat, and breath. Each type of test has different applications and is used to detect a specific drug or group of drugs; some tests show recent use only while others indicate use over a longer period. Local school boards should conduct a review of the latest drug testing technology as part of the policy development process. Additionally, findings from the school division's needs assessment should influence the selection of drug testing method(s) and professional laboratory services.

Regardless of the drug testing method used, a random drug testing policy must specify the procedures for selecting and handling samples so as to minimize intrusiveness of the

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procedure and to safeguard the personal and privacy rights of the student. Local policy should require the drug testing laboratory chosen to conduct the testing to be fully qualified and to have detailed written procedures to ensure proper chain of custody of samples, proper laboratory control, and scientifically validated testing methods.

### **Confidentiality**

It is critically important that the local policy include provisions to ensure that the results of testing of individual students are kept confidential. Test results should be kept in files separate from the student's other educational records and should be disclosed to parents and only those school personnel who have a need to know. Test results may not be disclosed to law enforcement authorities. The policy also should set forth clear procedures to ensure the confidentiality of information provided by students concerning their lawful use of prescription or over the counter drugs. Local school boards may consider use of a medical review officer to review positive test results and determine whether there could be a legitimate explanation.

### **Consequences**

Consequences of a failed drug test should be to limit the student's privilege of participating in extracurricular activities. No academic penalty can be imposed solely as the result of a positive test result. Consequences may reflect graduated sanctions for first and subsequent violations.

Local policy should clearly state that a refusal to provide a sample, or the alteration or falsification of a specimen or test result, will be treated as a resignation from all extracurricular activities for a period of time to be determined by the school board.

### **Intervention**

Because drug use can lead to addiction, punishment alone may not necessarily halt this progression. Local policy may include provisions for linking students and their parents to substance abuse intervention resources in the community or requirements for drug-positive students to enroll in a drug education intervention activity.

### **Appeal**

Local policy should include specific procedures for appeal of suspensions of the privilege of participating in extracurricular activities resulting from a positive drug test. A local board may deem a student ineligible to participate in extracurricular activities pending the appeal.