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## When School is not in Session: How Student Drug Testing can Transform Parenting

Cover Page Footnote

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## WHEN SCHOOL IS NOT IN SESSION: HOW STUDENT DRUG TESTING CAN TRANSFORM PARENTING

Amanda R. Lamberson\*

*“The signs weren’t overt . . . and as parents you always look to the bright side and want to be optimistic that everything’s going to be fine.”<sup>1</sup>*

### I. INTRODUCTION

Back-to-school jitters are not just for students. Parents experience a number of anxieties ranging from teacher quality to their child’s choice of friends.<sup>2</sup> One area, however, deserving particular attention involves our nation’s debate about school policies for random or mandatory drug testing of students.<sup>3</sup> There is an overlooked question in this debate: are parents in denial about their child’s exposure to and possible use of drugs?<sup>4</sup> As a recent study suggests, par-

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<sup>1</sup> Sharyn Alfonsi & Hanna Siegel, *Heroin Use In Suburbs On The Rise*, ABCNEWS.COM (Mar. 29, 2010), <http://abcnews.go.com/WN/heroin-suburbs-rise/story?id=10230269>.

<sup>2</sup> Jay Mathews, *8 Back-to-School Worries*, WASHINGTONPOST.COM (Sept. 1, 2011), [http://www.washingtonpost.com/blogs/class-struggle/post/8-back-to-school-worries/2011/08/31/gIQA7e1psJ\\_blog.html](http://www.washingtonpost.com/blogs/class-struggle/post/8-back-to-school-worries/2011/08/31/gIQA7e1psJ_blog.html). The term “child” is meant to broadly encompass the terms “teen,” “adolescent,” and “youth.”

<sup>3</sup> Compare Office of Nat’l Drug Control Policy, *Student Drug Testing Programs Deter Drug Use*, in *SCHOOL POLICIES* 25 (Jamuna Carroll ed., 2008) (arguing that student drug testing programs will prevent future drug use and help those already on the path to addiction), with Nat’l Org. for the Reform of Marijuana Laws, *Student Drug Testing Programs Are Ineffective and Harmful*, in *SCHOOL POLICIES* 30-31 (Jamuna Carroll ed., 2008) (“Schools are meant to educate, not police, our children.”).

<sup>4</sup> See Salynn Boyles, *Parents’ View of Teen Drug Use: Your Kid, Not Mine*, WEBMD.COM (Sept. 15, 2011), <http://www.webmd.com/parenting/news/20110915/parents-view-of-teen->

ents “put blinders on” when it comes to their own child’s drug use.<sup>5</sup>

The United States Department of Education, in its most recent publication on the topic, recognized that although there has been “a decline in adolescent substance use over the past ten years, the prevalence of illicit substance use among youth remains high and a cause of concern.”<sup>6</sup> Furthermore, the rise of prescription painkiller abuse will likely add significant changes to these statistics in the next publication.<sup>7</sup> Therefore, this Comment seeks to establish two main points. First, parenting plays a significant role in adolescent drug use.<sup>8</sup> Second, student drug testing can lead to a transformation in parenting by removing the stigma that parents who are proactive about drug use are policing their children’s lives.<sup>9</sup> It is time for parents to better understand the current student drug testing law, proposed changes in the law, and actions which they can take to stop addiction before it starts.

Section II examines the judicial decisions that have shaped both student rights and student drug testing policies. Section III introduces New York Education Law section 912-a,<sup>10</sup> the statute regulating student drug testing and urinalysis. This section also discusses a proposed amendment that seeks to make a significant change in this statute and the obstacles to its enactment. Section IV examines the

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drug-use-your-kid-not-mine (discussing the results of a survey suggesting parental denial about their child’s substance abuse).

<sup>5</sup> Boyles, *supra* note 4.

<sup>6</sup> U.S. DEP’T OF EDUC., THE EFFECTIVENESS OF MANDATORY-RANDOM STUDENT DRUG TESTING: EXECUTIVE SUMMARY, vii (July 2010), available at <http://ies.ed.gov/ncee/pubs/20104025/pdf/20104025.pdf>.

<sup>7</sup> See Will Van Sant, Robert Lewis & Sarah Crichton, *State Figures Show LI Drug Abuse on Rise*, NEWSDAY.COM (July 10, 2011), <http://www.newsday.com/news/health/state-figures-show-li-drug-abuse-on-rise-1.3016507> (discussing addiction to pain killers among teenagers on Long Island).

<sup>8</sup> A simple conversation between parent and child about drug use can make a difference. See U.S. DEP’T OF HEALTH AND HUMAN SERVS., RESULTS FROM THE 2010 NAT’L SURVEY ON DRUG USE AND HEALTH: SUMMARY OF NAT’L FINDINGS, 64 (Sept. 2011) (noting the significant role that parental disapproval plays in drug use among youth), available at <http://www.samhsa.gov/data/NSDUH/2k10NSDUH/2k10Results.pdf>. Also, the current New York statute allows school officials to examine any student for drug use, but only with “written request or consent of a parent of, or person in parental relation to, a child.” N.Y. EDUC. LAW § 912-a(2) (McKinney 2012).

<sup>9</sup> See Sandra Bookman, *State Senator Says To Spy On Your Kids*, 7ONLINE.COM (Feb. 2, 2011), [http://abclocal.go.com/wabc/story?section=news/local/new\\_york&id=7931144](http://abclocal.go.com/wabc/story?section=news/local/new_york&id=7931144). Beyond drug testing, parents who take a more active role in monitoring their children’s lives by checking on homework or the amount of time spent with friends on school nights may lead to fewer, if any, instances of drug use, drinking, and cigarette smoking. U.S. DEP’T OF HEALTH AND HUMAN SERVS., *supra* note 8, at 67.

<sup>10</sup> EDUC. § 912-a.

struggle over change, including both support for and opposition to student drug testing by parents, and whether drug testing is an efficient and effective solution to adolescent drug abuse. Lastly, Section V provides an approach to student drug testing which involves a variety of tools, including better information for parents about student drug use and the use of voluntary and mandatory programs. If implemented, an approach of this nature may end the student drug testing debate.

## II. THE HISTORY OF STUDENT RIGHTS AND STUDENT DRUG TESTING

### A. Student Rights

In a landmark student free expression case in 1969, the Supreme Court declared: “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>11</sup> This statement has been echoed in opinions ever since.<sup>12</sup> Although student drug testing was not at issue in *Tinker v. Des Moines Independent Community School District*,<sup>13</sup> from which this statement came, the case has provided the foundation for a variety of student rights issues.<sup>14</sup> In *Tinker*, three students were sent home and were subsequently suspended from school for wearing black armbands to protest the Vietnam War.<sup>15</sup> The students, through their parents, brought suit, seeking to have the school officials and school board enjoined from disciplining them and for nominal damages.<sup>16</sup>

The Court reversed and remanded the district court’s dismissal of the complaint, holding that after considering the behavior that “the record does not demonstrate any facts which might reasonably

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<sup>11</sup> *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969).

<sup>12</sup> *See, e.g.*, *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822, 829 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56 (1995) (utilizing the same language as *Tinker*).

<sup>13</sup> 393 U.S. 503 (1969).

<sup>14</sup> *See, e.g.*, *Earls*, 536 U.S. at 829 (deciding the issue of drug testing students involved in extracurricular activities); *Vernonia*, 515 U.S. at 655-56 (deciding the issue of drug testing student athletes).

<sup>15</sup> *Tinker*, 393 U.S. at 504.

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

have led school authorities to forecast substantial disruption of or material interference with school activities.”<sup>17</sup> Moreover, “[s]chool officials do not possess absolute authority over their students.”<sup>18</sup> The Court noted that students are “persons” under our Constitution, whether they are in school or not, and therefore their rights must be respected in both spheres.<sup>19</sup> Justice Black, in his dissenting opinion, complained that *Tinker* is part of “an entirely new era in which the power to control pupils by the elected ‘officials of state supported public schools’ in the United States is in ultimate effect transferred to the Supreme Court.”<sup>20</sup> Against the freedoms the Court established, Justice Black emphasized that “[s]chool discipline, like parental discipline, is an integral and important part of training our children to be good citizens—to be better citizens.”<sup>21</sup>

A central issue in student drug testing cases involves search and seizure under the Fourth Amendment of the United States Constitution.<sup>22</sup> In *New Jersey v. T.L.O.*,<sup>23</sup> the Court addressed “the legality of searches conducted by public school officials.”<sup>24</sup> This case is critical to the understanding of student drug testing and student rights. In *T.L.O.*, a student was called into the principal’s office where her purse was searched for a pack of cigarettes.<sup>25</sup> After finding rolling papers, the principal decided to search the entire contents of the purse to find what he believed would be more “evidence of drug use.”<sup>26</sup> He then discovered “marihuana, a pipe, a number of empty plastic bags, a substantial quantity of money[,] . . . an index card that appeared to be a list of students who owed T.L.O. money, and two letters that implicated T.L.O. in marihuana dealing.”<sup>27</sup> When the State brought charges against T.L.O, she moved to suppress evidence of both the

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<sup>17</sup> *Id.* at 514.

<sup>18</sup> *Id.* at 511.

<sup>19</sup> *Id.* (internal quotation marks omitted).

<sup>20</sup> *Tinker*, 393 U.S. at 515 (Black, J., dissenting).

<sup>21</sup> *Id.* at 524 (Black, J., dissenting).

<sup>22</sup> *See, e.g., Earls*, 536 U.S. at 828 (“We must therefore review the School District’s Policy for ‘reasonableness,’ which is the touchstone of the constitutionality of a governmental search.”); *Vernonia*, 515 U.S. at 652 (“As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is ‘reasonableness.’”).

<sup>23</sup> 469 U.S. 325 (1985).

<sup>24</sup> *Id.* at 328.

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

<sup>26</sup> *Id.*

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

contents of her purse and her confession, which she argued “was tainted by the allegedly unlawful search.”<sup>28</sup>

However, the trial court found the principal’s search reasonable<sup>29</sup> because the principal was searching the contents of the purse to find evidence of a violation of the rule against smoking in the school restroom, and the “marihuana violations [were] in plain view.”<sup>30</sup> The appellate division affirmed,<sup>31</sup> but on appeal the Supreme Court of New Jersey reversed.<sup>32</sup> This court held that the principal had no justification for his “extensive ‘rummaging’ through” the student’s personal belongings.<sup>33</sup> The United States Supreme Court was asked to consider only one question in the State of New Jersey’s petition for certiorari: “Whether the exclusionary rule should operate to bar consideration in juvenile delinquency proceedings of evidence unlawfully seized by a school official without the involvement of law enforcement officers.”<sup>34</sup>

In reversing the decision of the Supreme Court of New Jersey, the Court held that “the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search.”<sup>35</sup> The Court, describing the diminished search requirement students should expect, reasoned that “[b]y focusing attention on . . . 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.”<sup>36</sup> Most important to this discussion is the Court’s reason for adopting this standard. Justice White, on behalf of the majority, described the importance of “[m]aintaining order in the classroom [which] has never been easy.”<sup>37</sup> The Court went on to describe the “ugly forms” of school disorder, including drug use.<sup>38</sup> Therefore, the search and seizure of T.L.O.’s purse and its contents were found reasonable under the circum-

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<sup>28</sup> *T.L.O.*, 469 U.S. at 329.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 329-30.

<sup>31</sup> *Id.* at 330.

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

<sup>33</sup> *T.L.O.*, 469 U.S. at 331.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 341.

<sup>36</sup> *Id.* at 343.

<sup>37</sup> *Id.* at 339.

<sup>38</sup> *T.L.O.*, 469 U.S. at 339.

tances.<sup>39</sup>

Four years later, the Court considered the Fourth Amendment and its application in the context of drug testing adult employees.<sup>40</sup> In *Skinner v. Railway Labor Executives' Association*,<sup>41</sup> the Railway Labor Executives' Association and member organizations challenged the Federal Railroad Administration's regulations for drug and alcohol testing of railroad employees.<sup>42</sup> These regulations involved collecting blood, breath, and urine samples.<sup>43</sup> The Court held that "it is reasonable to conduct such tests in the absence of a warrant or reasonable suspicion that any particular employee may be impaired."<sup>44</sup> Justice Kennedy, delivering the majority opinion, reasoned that both "special needs"<sup>45</sup> and the speed at which alcohol and drugs leave the blood stream<sup>46</sup> create an exception to the warrant requirement.<sup>47</sup> Furthermore, a diminished expectation of privacy,<sup>48</sup> coupled with the pure chaos found at the scene of a major accident,<sup>49</sup> render individualized suspicion "impracticable."<sup>50</sup> In his dissent, Justice Marshall questioned the majority's reasoning by stating that "[t]he process by which a constitutional 'requirement' can be dispensed with as 'impracticable' is an elusive one to me."<sup>51</sup>

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<sup>39</sup> *Id.* at 347.

<sup>40</sup> *See Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602 (1989); *see also Nat'l Treasury Emps. Union v. Von Raab*, 489 U.S. 656 (1989) (indirectly related to student rights, these cases are helpful to understand when the drug testing debate began and in what context).

<sup>41</sup> 489 U.S. 602 (1989).

<sup>42</sup> *Id.* at 612.

<sup>43</sup> *Id.* at 609-11.

<sup>44</sup> *Id.* at 634.

<sup>45</sup> *Id.* at 620 (internal quotation marks omitted) ("The Government's interest in regulating the conduct of railroad employees to ensure safety, like its supervision of probationers or regulated industries, or its operation of a government office, school, or prison, 'likewise presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements.'") (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987)).

<sup>46</sup> *Skinner*, 489 U.S. at 623 ("As the FRA recognized, alcohol and other drugs are eliminated from the bloodstream at a constant rate . . .").

<sup>47</sup> *Id.* at 624.

<sup>48</sup> *Id.* at 627 ("[T]he expectations of privacy of covered employees are 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>49</sup> *Id.* at 631 (describing the difficulty in identifying each individual responsible for an entire accident).

<sup>50</sup> *Id.*

<sup>51</sup> *Skinner*, 489 U.S. at 637 (Marshall, J., dissenting).



## B. Student Athletics

In 1995, the Court decided *Vernonia School District 47J v. Acton*,<sup>52</sup> in which it granted certiorari to decide whether the Vernonia School District's policy of randomly drug testing student athletes was a violation of the Fourth and Fourteenth Amendments to the United States Constitution.<sup>53</sup> In *Vernonia*, "teachers and administrators observed a sharp increase in drug use."<sup>54</sup> It was suspected that drug use was the root of various problems, because "[b]etween 1988 and 1989 the number of disciplinary referrals in Vernonia schools rose to more than twice the number reported in the early 1980's, and several students were suspended."<sup>55</sup>

District administrators eventually grew concerned about the safety of student athletes.<sup>56</sup> The District, however, did not start drug testing immediately.<sup>57</sup> First, it tried an educational approach with programs and speakers<sup>58</sup> and then a drug-sniffing dog entered the schools.<sup>59</sup> When no method put an end to student drug use, parents and District officials met and unanimously approved a policy to randomly drug test student athletes.<sup>60</sup> The goal of the policy was "to prevent student athletes from using drugs, to protect their health and safety, and to provide drug users with assistance programs."<sup>61</sup> Although those who attended the meeting unanimously approved the policy, the entire District did not support it.<sup>62</sup>

The parents of a seventh grade student named James Acton were among those who opposed the drug testing policy.<sup>63</sup> James wanted to play football, but his parents did not want to sign the drug testing consent forms.<sup>64</sup> The Actons did not stop there. They decided to sue the school district to enjoin it from enforcing the drug testing

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<sup>52</sup> 515 U.S. 646 (1995).

<sup>53</sup> *Id.* at 648.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 649.

<sup>56</sup> *Id.*

<sup>57</sup> *Vernonia*, 515 U.S. at 649.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 649-50.

<sup>61</sup> *Id.* at 650.

<sup>62</sup> *Vernonia*, 515 U.S. at 651.

<sup>63</sup> *Id.* at 651.

<sup>64</sup> *Id.*

policy “on the grounds that it violated [their son’s] Fourth . . . Amendment[]” rights.<sup>65</sup> Although the district court dismissed their claims,<sup>66</sup> the United States Court of Appeals for the Ninth Circuit reversed and held that the policy violated the student’s rights.<sup>67</sup>

The United States Supreme Court, however, held that “Vernonia’s Policy is reasonable and hence constitutional.”<sup>68</sup> The Court first examined whether the Fourth Amendment had any impact on student drug testing.<sup>69</sup> The Court explained that the protection of the Fourth Amendment extends to searches and seizures by public school officials<sup>70</sup> and that the testing of urine has been considered a “search.”<sup>71</sup> However, the Court found the “special needs” exception<sup>72</sup> “exist[s] in the public school context.”<sup>73</sup>

In *Vernonia*, the Court gave great weight to the privacy interests of the student athletes involved.<sup>74</sup> The Court reasoned that student athletes have a diminished expectation of privacy because of the very culture of student athletics.<sup>75</sup> This includes public locker rooms, where there is “an element of ‘communal undress’ inherent in athletic participation.”<sup>76</sup> Next, the Court examined whether the student drug testing policy was unreasonably intrusive.<sup>77</sup> The Court found that it was not and that the conditions in obtaining the urine sample were appropriate, as a monitor stood behind the student or outside a stall.<sup>78</sup> Furthermore, the results were only provided to select school personnel and not for law enforcement purposes.<sup>79</sup> Lastly, the Court examined whether the search was related to a compelling government

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<sup>65</sup> *Id.* at 651-52.

<sup>66</sup> *Id.* at 652 (citing *Acton v. Vernonia Sch. Dist.* 47J, 796 F. Supp. 1354, 1355 (D. Or. 1992), *rev’d*, 23 F.3d 1514 (9th Cir. 1994), *rev’d*, 515 U.S. 646 (1995)).

<sup>67</sup> *Vernonia*, 515 U.S. at 652 (citing *Acton v. Vernonia Sch. Dist.* 47J, 23 F.3d 1514 (9th Cir. 1994), *rev’d*, 515 U.S. 646 (1995)).

<sup>68</sup> *Id.* at 665.

<sup>69</sup> *Id.* at 652.

<sup>70</sup> *Id.* (citing *T.L.O.*, 469 U.S. at 336-37).

<sup>71</sup> *Vernonia*, 515 U.S. at 652 (citing *Skinner*, 489 U.S. at 617).

<sup>72</sup> *Id.* at 653 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)).

<sup>73</sup> *Id.* at 653.

<sup>74</sup> *Id.* at 657.

<sup>75</sup> *Id.*

<sup>76</sup> *Vernonia*, 515 U.S. at 657 (quoting *Schaill by Kross v. Tippecanoe Cnty. Sch. Corp.*, 864 F.2d 1309, 1318 (1988)) (internal quotation marks omitted).

<sup>77</sup> *Id.* at 658.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

interest.<sup>80</sup> The Court reasoned that “[s]chool years are the time when the physical, psychological, and addictive effects of drugs are most severe”; therefore, the need to randomly drug test student athletes outweighed public policy concerns.<sup>81</sup>

### C. Extracurricular Activities

In 2002, seven years after *Vernonia*, the United States Supreme Court decided *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*.<sup>82</sup> The Court granted certiorari to decide the constitutionality of a school policy, which required drug testing of all students who participated in competitive extracurricular activities.<sup>83</sup> Unlike the situation in *Vernonia*, the reasons for the implementation of the drug testing policy were unclear.<sup>84</sup> The seriousness of the policy, however, was clear. It stated that “students are required to take a drug test before participating in an extracurricular activity, must submit to random drug testing while participating in that activity, and must agree to be tested at any time upon reasonable suspicion.”<sup>85</sup>

The policy involved all school activities, but in practice, the District only applied it to so-called “competitive” activities.<sup>86</sup> Examples of these activities included: “Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, pom-pom, cheerleading, and athletics.”<sup>87</sup> The purpose of the testing was “to detect only the use of illegal drugs, including amphetamines, marijuana, cocaine, opiates, and barbiturates, not medical conditions or the presence of authorized prescription medications.”<sup>88</sup> Similar to *Vernonia*, some students opposed the policy.<sup>89</sup> Lindsay Earls, for example, was an ambitious student involved in various extracurricular ac-

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<sup>80</sup> *Id.* at 660-61.

<sup>81</sup> *Vernonia*, 515 U.S. at 661.

<sup>82</sup> 536 U.S. 822 (2002).

<sup>83</sup> *Id.* at 827-28.

<sup>84</sup> *Id.* (“They also argued that the School District failed to identify a special need for testing students who participate in extracurricular activities . . .”).

<sup>85</sup> *Id.* at 826.

<sup>86</sup> *Id.*

<sup>87</sup> *Earls*, 536 U.S. at 826.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 826-27; *see also Vernonia*, 515 U.S. at 651-52 (discussing one student’s refusal to participate in the program).

tivities, including “the show choir, the marching band, the Academic Team, and the National Honor Society.”<sup>90</sup> Daniel James, another student, wanted to be a part of the Academic Team but did not want to submit to the drug testing.<sup>91</sup> With the assistance of their parents, Lindsay and Daniel brought suit against the District, challenging the drug testing policy.<sup>92</sup>

The respondents claimed that the policy violated their Fourth Amendment rights and sought to enjoin the school district from enforcing the drug testing policy.<sup>93</sup> This was nearly identical to the argument asserted in *Vernonia*.<sup>94</sup> Furthermore, they argued that the “District failed to identify a special need for testing students who participate in extracurricular activities.”<sup>95</sup> As in *Vernonia*, the lower courts reached conflicting conclusions.<sup>96</sup> The United States District Court for the Western District of Oklahoma rejected the claims, basing its decision on the reasoning and ruling in *Vernonia*.<sup>97</sup> The United States Court of Appeals for the Tenth Circuit, however, reversed.<sup>98</sup>

The United States Supreme Court held that the policy was “a reasonable means of furthering the School District’s important interest in preventing and deterring drug use among its schoolchildren.”<sup>99</sup> At this point, it is clear that a strong public policy argument for instituting a drug testing policy in schools will likely outweigh an argument for a lack of need. Deterring drug use altogether appears to be an adequate justification for such a policy. In *Earls*, the Court ap-

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<sup>90</sup> *Earls*, 536 U.S. at 826.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 826-27.

<sup>93</sup> *Id.* at 827.

<sup>94</sup> See *Vernonia*, 515 U.S. at 652 (“[T]he Policy violated both the Fourth and Fourteenth Amendments . . .”).

<sup>95</sup> *Earls*, 536 U.S. at 827.

<sup>96</sup> As mentioned above, the District Court dismissed the Actons’ claims. *Vernonia*, 515 U.S. at 652. However, “[t]he United States Court of Appeals for the Ninth Circuit reversed . . .” *Id.*

<sup>97</sup> *Earls*, 536 U.S. at 827 (“[A]lthough the School District did ‘not show a drug problem of epidemic proportions,’ there was a history of drug abuse starting in 1970 that presented ‘legitimate cause for concern.’” (quoting *Earls v. Bd. Of Educ., Tecumseh Pub. Sch. Dist.*, 115 F. Supp. 2d 1281, 1287 (2000))).

<sup>98</sup> *Earls*, 536 U.S. at 828 (“[T]he Court of Appeals concluded that a school ‘must demonstrate that there is some identifiable drug abuse problem among a sufficient number of those subject to the testing, such that testing that group of students will actually redress its drug problem.’” (quoting *Earls v. Bd. of Educ. of Tecumseh Pub. Sch. Dist.*, 242 F.3d 1264, 1278 (2001), *rev’d*, *Earls*, 536 U.S. 822 (2002))).

<sup>99</sup> *Earls*, 536 U.S. at 838.

plied the same framework for reaching its decision that it did in *Vernonia*.<sup>100</sup> The Court found “that the students affected by this Policy have a limited expectation of privacy.”<sup>101</sup> The concern was about “occasional off-campus travel and communal undress,” which the Court reasoned commands these activities to have requirements that “do not apply to the student body as a whole.”<sup>102</sup>

Next, the Court addressed the issue of intrusion.<sup>103</sup> The Court considered whether drug testing of students was far too intrusive and found that this concern was “not significant.”<sup>104</sup> Privacy was being protected because a student would produce the specimen behind a closed stall and the results would only be released to a school official “on a ‘need to know’ basis.”<sup>105</sup> The last issue the Court addressed was “the nature and immediacy of the government’s concerns and the efficacy of the Policy in meeting them.”<sup>106</sup> Finding that the policy certainly met the government’s concerns, it reasoned that “[t]he drug abuse problem among our Nation’s youth has hardly abated since *Vernonia* was decided in 1995.”<sup>107</sup> The Court also emphasized that it would be absurd “to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use.”<sup>108</sup>

### III. NEW YORK EDUCATION LAW SECTION 912-A

The New York statute for student drug testing is neither lengthy nor highly detailed.<sup>109</sup> New York Education Law section 912-a, which allows for “urine analysis [and] drug detection” of “children attending grades seven through twelve,” was introduced in 1973 and became effective on July 1, 1973.<sup>110</sup> The statute was most recently

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<sup>100</sup> In *Vernonia*, the Supreme Court examined privacy, reasonableness, and lastly, whether there was a compelling interest for instituting the policy. *Vernonia*, 515 U.S. at 657-58, 660.

<sup>101</sup> *Earls*, 536 U.S. at 832.

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 834.

<sup>105</sup> *Id.* at 832-33.

<sup>106</sup> *Earls*, 536 U.S. at 834.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.* at 836.

<sup>109</sup> N.Y. EDUC. LAW § 912-a (McKinney 2012).

<sup>110</sup> *Id.* § 912-a(1).

amended in 2004 and has been in effect since September 1, 2005.<sup>111</sup> The rise of heroin deaths and prescription drug abuse among children in New York, however, calls for a change in the statute.<sup>112</sup>

Section 912-a(1) details the purpose of the statute, which includes the goal of urinalysis and drug detection, and states that the statute applies to both “public and private schools.”<sup>113</sup> It reads:

The school authorities of each school district within the state may cause all children attending grades seven through twelve, inclusive, in the public and private schools located within such districts, to be separately and carefully examined in order to ascertain whether any such children are making use of dangerous drugs.<sup>114</sup>

Section 912-a(2), however, is most relevant to this Comment. This section establishes the significant role that parents play in student drug testing,<sup>115</sup> stating that “[s]uch examination may be made only upon the written request or consent of a parent of, or person in parental relation to, a child.”<sup>116</sup>

The remainder of section 912-a(2) describes the process for testing children for drugs, the role of school authorities, and the treatment of the results.<sup>117</sup> It requires that:

Such an examination shall be conducted without notice to the child and shall include the supervised taking of a urine sample which shall be analyzed for such drugs . . . . The results of such examination shall be promptly forwarded to the school authorities.<sup>118</sup>

Most interesting is the way in which results are reported. It can be argued that a parent who elects to allow a school to test his or her

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<sup>111</sup> *Id.* § 912-a.

<sup>112</sup> See Alfonsi & Siegel, *supra* note 1 (“Honor students and athletes, some not even old enough to drive, are overdosing on heroin.”); Yamiche Alcindor; with Ellen Yan, *Turning Back Drugs*, NEWSDAY, Sept. 26, 2010, at A18 (“DEA officials say the number of teens and young adults using heroin and abusing prescription drugs continues to rise.”).

<sup>113</sup> EDUC. § 912-a(1).

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* § 912-a(2).

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> EDUC. § 912-a(2).

child may, unknowingly, also authorize intervention by the Department of Social Services.<sup>119</sup> The reporting provision states:

If it should be ascertained . . . that any child is making use of dangerous drugs, the school authorities shall report same to the social services department for the social services district wherein such school is located and to the parent of, or person in parental relation to, such child together with a statement to such parent or person in parental relation as to available programs and facilities to combat such dangerous drug usage. The local social services department shall be empowered, in an appropriate case, to take such action and offer such protective social services as are prescribed by title six of article six of the social services law.<sup>120</sup>

Section 912-a(3) and (4) primarily deal with confidentiality. Section 912-a(3) provides that information obtained from a student drug test “shall be kept confidential and shall not be used for law enforcement purposes but may be utilized only for statistical, epidemiological or research purposes.”<sup>121</sup> Section 912-a(4) further explains that the results “shall be maintained separate and apart from such student’s other educational records . . . and shall be destroyed upon such student’s graduation or final severance from the secondary educational school system in this state.”<sup>122</sup> Section 912-a(4) also provides that “no such examination shall be required where a student objects thereto on the grounds that such examinations conflict with their genuine and sincere religious beliefs.”<sup>123</sup>

### **Jonny’s Law**

On July 13, 2011, 12th District Assemblyman Joseph Saladino introduced a bill, entitled “Jonny’s Law” in the New York State Assembly.<sup>124</sup> The bill, named after Jonathan Sieczkowski who died

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<sup>119</sup> *Id.* (granting authority to the Department of Social Services to intervene in particular cases).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* § 912-a(3).

<sup>122</sup> *Id.* § 912-a(4).

<sup>123</sup> EDUC. § 912-a(4).

<sup>124</sup> Assemb. 8528, 234th Leg., Reg. Sess. (N.Y. 2012).

of a heroin overdose at the young age of twenty-two,<sup>125</sup> seeks to add mandatory student drug testing to Section 912-a.<sup>126</sup> It raises the controversial question: “With drug abuse on the rise, should parents be required by law to test their children?”<sup>127</sup> Jonny’s Law would do so by requiring parents to drug test their children in the privacy of their own homes by use of at home drug testing kits.<sup>128</sup> In addition, the children of parents who fail to conduct the testing would not be permitted to attend school.<sup>129</sup> Assemblyman Saladino described the bill as “one piece of the puzzle to a state wide problem that requires a multifaceted approach.”<sup>130</sup>

If enacted, section 912-a would become part one of two parts found in the statute.<sup>131</sup> Therefore, what was previously section 912-a(1) would become section 912-a(1)(a).<sup>132</sup> Section 912-a(2), as described above, would become 912-a(1)(b).<sup>133</sup> Section 912-a(3) and (4) would thus become Section 912-a(1)(c) and (1)(d).<sup>134</sup> The new aspect of the statute detailing mandatory student drug testing begins with Section 912-a(2)(a), which would read:

Each parent of a child entering into grades nine through twelve in a school district within the state shall conduct or cause to be conducted a drug test on his or her child or children who will be entering [sic] grade nine, ten, eleven or twelve in any public or private school located within such district. Such drug test may be conducted by the parent by administering an at-home drug testing kit or the parent may cause the

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<sup>125</sup> See Dave Howard, *Teenagers in New York Could Face Annual Drug Tests*, BBC RADIO NEWSBEAT (Sept. 19, 2011), <http://www.bbc.co.uk/newsbeat/14968473> (discussing Jonny’s Law).

<sup>126</sup> Assemb. 8528.

<sup>127</sup> *Long Island Lawmaker Saladino Wants Parents To Drug Test Teens Annually*, CBS NEW YORK (Aug. 2, 2011, 10:30 PM), <http://newyork.cbslocal.com/2011/08/02/long-island-lawmaker-wants-parents-to-drug-test-teens-annually/>.

<sup>128</sup> Assemb. 8528.

<sup>129</sup> *Long Island Lawmaker Saladino Wants Parents To Drug Test Teens Annually*, *supra* note 127.

<sup>130</sup> Telephone Interview with Joseph Saladino, New York State Assemblyman, 12th District New York State Assembly (Nov. 7, 2011) (on file with author).

<sup>131</sup> See Assemb. 8528 (consisting of two parts).

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*



test to be conducted at a location or by an individual approved by the commissioner.<sup>135</sup>

Parenting plays a critical role in carrying out the duties identified by this statute. Without parental cooperation in administering an at-home drug test, the amendment would not be effective.<sup>136</sup>

The following section further details the pivotal role parents will play in complying with this statute. It reads:

Each parent shall be required to submit a signed statement or affidavit upon the student's entrance in grades nine, ten, eleven and twelve in such form as to be prescribed by the commissioner, stating that such parent conducted or caused to be conducted a drug test on their child and that the results of such test were observed by said parent.<sup>137</sup>

In order to carry out this statute, “[t]he department shall by rule and regulation establish guidelines for helping parents comply with the requirements of this subdivision.”<sup>138</sup> Although the results of the tests would not be provided to the school, the proposal further guarantees that “[i]nformation resulting from an examination . . . shall be kept confidential and shall not be used for law enforcement purposes . . . .”<sup>139</sup> Identical to Section 912-a(1)(d), “[a]ny record or information compiled from such examination which identifies an individual student as a user of dangerous drugs shall be maintained separate and apart from such student's other educational records.”<sup>140</sup>

Sponsoring Jonny's Law has been an uphill battle for Assemblyman Saladino. He has faced criticism on two major fronts: parents and the media.<sup>141</sup> For example, one individual, commenting on a news article on the topic, wrote, “One more ‘guilty until proven inno-

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<sup>135</sup> *Id.*

<sup>136</sup> See Assemb. 8528 (“Such drug test may be conducted by the parent by administering an at-home drug testing kit or the parent may cause the test to be conducted at a location or by an individual approved by the commissioner.”).

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

<sup>141</sup> See, e.g., *Long Island Lawmaker Saladino Wants Parents To Drug Test Teens Annually*, *supra* note 127; Telephone Interview with Joseph Saladino, *supra* note 130 (demonstrating some of the critiques of the proposed plan).

cent' piece of total garbage."<sup>142</sup> Another stated: "This has nothing to do with helping parents. What it will accomplish is causing a rift between parents, children, the school district, and the government."<sup>143</sup> Included in these criticisms are the concerns over both the rights of children and parents, with one individual stating, "That's ridiculous not to mention against our Rights and those of the children."<sup>144</sup> The media has also focused on the Assemblyman's work, titling articles as "Bill: Drug Test Teens at Home" and "Long Island Lawmaker Saladino Wants Parents To Drug Test Teens Annually."<sup>145</sup>

In an interview, the Assemblyman was candid about the purpose of the bill, as well as the struggles he has faced in sponsoring it.<sup>146</sup> "Whether or not we make this mandatory is less important than putting together new tools to describe the problems, the warning signs, and how to take action," he explained.<sup>147</sup> As to student drug use, he reasoned, "[t]his is a problem across Long Island and our state where there is not one solution, but a call for the effectiveness of many solutions and the changing of laws in Albany."<sup>148</sup> With regard to students' rights, the Assemblyman made a crucial point often overlooked in this debate: "Once a child turns eighteen, even if parents are fully supporting that child, that parent has absolutely no control and no right to force that child into rehab and is inevitably left with no ability to save their child's life."<sup>149</sup> He concluded, "[w]hen you take that into consideration it is so important to catch the problem before it starts."<sup>150</sup>

In response to the media criticism, the Assemblyman explained, "[t]he media is the 'catch-22' on the drug issue; it has shown that prescription drug and heroin abuse are problems, but at the same

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<sup>142</sup> Christopher Bowen, Comment to *Long Island Lawmaker Saladino Wants Parents To Drug Test Teens Annually*, (Aug. 6, 2011), *supra* note 127.

<sup>143</sup> May, Comment to *Long Island Lawmaker Saladino Wants Parents To Drug Test Teens Annually*, (Sept. 15, 2011), *supra* note 127.

<sup>144</sup> Ellen Benedetto, Comment to *Long Island Lawmaker Saladino Wants Parents To Drug Test Teens Annually*, (Aug. 2, 2011), *supra* note 127.

<sup>145</sup> Yancey Roy, *Bill: Drug Test Teens at Home*, NEWSDAY, Aug. 2, 2011, at A08; *Long Island Lawmaker Saladino Wants Parents To Drug Test Teens Annually*, *supra* note 127.

<sup>146</sup> See Telephone Interview with Joseph Saladino, *supra* note 130 (discussing the importance of addressing the issue of drug abuse among teenagers).

<sup>147</sup> Telephone Interview with Joseph Saladino, *supra* note 130.

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

time its focus on [drug] testing has not given people the ability to make mature and balanced opinions.”<sup>151</sup> He pointed out that “[n]o one seems to complain that students must be drug tested to play athletics for performance enhancing drugs, but how many times have you heard of a student overdosing on steroids?”<sup>152</sup> He further reasoned, “[i]f you suspect a problem you need to talk to your children about it.”<sup>153</sup> “If it is not your child, it is one of your child’s friends experimenting.”<sup>154</sup>

Despite this criticism, some have supported the Assemblyman’s bill. “ ‘Absolutely, absolutely,’ Vic Ciappa [a resident of Massapequa, New York] said when asked if he thinks home drug testing would have saved his daughter’s life.”<sup>155</sup> His daughter Natalie was eighteen years old when she died of a heroin overdose.<sup>156</sup> Ciappa adds, “[r]emember, she was already addicted by the time we realized what was going on.”<sup>157</sup> Another supporter stated: “It’s about time someone came up with this idea. One thing that has been lost in our War on Terror and War on Poverty has been the War on Drugs.”<sup>158</sup> Cheryl Sieczkowski, the sister of Jonathan Sieczkowski, explained, “[t]his would help parents get a glimpse of their children’s real lives.”<sup>159</sup> She made the important point, “we’re getting people to talk about it.”<sup>160</sup> Aside from talking about drug use, the bill would have more supporters if student rights were better understood.

#### IV. THE FIGHT FOR CHANGE

Some argue that “[s]chool officials are not surrogate parents, and issues regarding underage drinking or substance abuse are best

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<sup>151</sup> *Id.*

<sup>152</sup> Telephone Interview with Joseph Saladino, *supra* note 130.

<sup>153</sup> *Id.*

<sup>154</sup> *Id.*

<sup>155</sup> *Long Island Lawmaker Saladino Wants Parents To Drug Test Teens Annually*, *supra* note 127.

<sup>156</sup> Joye Brown, *Making a Difference, Two Years Later, A Terrible Loss Still Drives Them*, *NEWSDAY*, June 22, 2010, at A08.

<sup>157</sup> *Long Island Lawmaker Saladino Wants Parents To Drug Test Teens Annually*, *supra* note 127 (internal quotations omitted).

<sup>158</sup> Frank Rizzo, Comment to *Long Island Lawmaker Saladino Wants Parents To Drug Test Teens Annually*, (Aug. 3, 2011, 10:42 AM), *supra* note 127.

<sup>159</sup> Howard, *supra* note 125 (internal quotation marks omitted).

<sup>160</sup> *Id.*

left to be handled between parents and their children.”<sup>161</sup> On the other hand, others argue that “[s]chool pride and spirit increase as students, parents, and the school community become more involved in the school environment.”<sup>162</sup> Although these are strong views about student drug testing, how do parents feel about such programs? After all, it is their children who are the subjects of student drug testing. In addition, would parents be more receptive to a policy that involves at-home drug testing rather than drug testing conducted by schools?

Some school districts have surveyed both parents and the community in an effort to obtain feedback on student drug testing programs.<sup>163</sup> Others have used task forces or small panels made up of parents, administrators, and educators.<sup>164</sup> The results of these surveys do not show a clear pattern as to whether parents wholly oppose or wholly support student drug testing programs.<sup>165</sup> In addition, the task forces and panels formed across the country only reflect that there is sufficient support of such programs among some parents to participate in a group to petition lawmakers for change.<sup>166</sup> Aside from conducting a district-wide survey, obtaining parents’ opinions on this issue can be accomplished only in a very sporadic and isolated fashion.

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<sup>161</sup> Nat’l Org. for the Reform of Marijuana Laws, *supra* note 3, at 31.

<sup>162</sup> Office of Nat’l Drug Control Policy, *supra* note 3, at 26.

<sup>163</sup> See, e.g., The Associated Press, *Windsor Parents Oppose Random Student Drug Tests*, NEWSDAY.COM (May 14, 2010), <http://www.newsday.com/news/nation/windsor-parents-oppose-random-student-drug-tests-1.1912137> (surveying parents in Windsor, Colorado); The Associated Press / Chris Kieffer, *Tupelo Expanding Student Drug Tests*, NEWSDAY.COM (Apr. 15, 2010), <http://www.newsday.com/news/nation/tupelo-expanding-student-drug-tests-1.1863603> (surveying the community of Tupelo, Mississippi).

<sup>164</sup> See, e.g., The Associated Press/Casey Cora, *Chicago School Mulls Required Drug Tests*, NEWSDAY.COM (Feb. 21, 2010), <http://www.newsday.com/news/nation/chicago-school-mulls-required-drug-tests-1.1773417> (“The idea of implementing the policy was kicked around during a sparsely attended special meeting this week, and its future now rests with a 20-some person school task force and could be cemented with a Marist school board vote.”); Reid J. Epstein, *Suffolk Heroin Task Force Favors Drug Tests*, NEWSDAY.COM (December 16, 2010), <http://www.newsday.com/long-island/suffolk/suffolk-heroin-task-force-favors-drug-tests-1.2548747> (“The recommendation is one of 48 the 12-member panel made to lawmakers in a 51-page report.”).

<sup>165</sup> Compare *Windsor Parents Oppose Random Student Drug Tests*, *supra* note 163 (a Colorado school district’s online survey found opposition of drug testing programs), with *The Associated Press/Kieffer*, *supra* note 163 (surveys administered in Mississippi led to an expansion of student drug testing that will now include athletes and those involved in extra-curricular activities).

<sup>166</sup> See generally Deborah Bracke & Daniel Corts, *Parental Involvement and the Theory of Planned Behavior*, 133 Educ. 188 (Oct. 1, 2012), available at 2012 WLNR 20934991 (studying the participation of parents in education).

For example, one can assess the opinion of parents who take the time to voice their beliefs online on blogs or on social networking websites.<sup>167</sup> However, it is likely that only those with a strong opinion in one direction will ultimately voice feelings in this particular way.

Without a school district-wide survey, the fears that parents have about student drug testing programs appear general in nature and tend to result from a lack of information involving drug testing itself.<sup>168</sup> These fears, primarily, involve concerns that student drug testing programs infringe on privacy rights.<sup>169</sup> Therefore, parents tend to make the argument that schools should not interfere with an issue that should be left to parenting alone.<sup>170</sup> Others, however, firmly believe that by administering at-home drug tests or by searching their child's room, they are in a sense "policing" their child's life, which ultimately hinders the parent-child relationship in some irreparable way.<sup>171</sup> Lastly, some parents believe that drug testing can be inaccurate or can easily be tampered with in order to produce desired results.<sup>172</sup>

The legitimacy of these fears has been explored. In *Vernonia*, as discussed above, the Supreme Court concluded that there is a "special needs" exception in public schools to the warrant and probable-cause requirements of a reasonable search.<sup>173</sup> The concept of "special needs," as a departure from the requirements of the Fourth Amendment, was established not to infringe upon rights such as privacy, but rather to ensure safety.<sup>174</sup> With regard to schools acting as "surrogate" parents, in *Vernonia*, the Court addressed the common

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<sup>167</sup> See, e.g., Cora, *supra* note 164 ("But the idea of a schoolwide test has been met with opposition, including a small Facebook group.").

<sup>168</sup> See Victoria Clayton, *Parents, Experts Divided on School Drug Testing*, MSNBC.COM (Sept. 21, 2007), [http://www.msnbc.msn.com/id/20631668/ns/health-childrens\\_health/t/parents-experts-divided-school-drug-testing/#.TxZDIM3MeeY](http://www.msnbc.msn.com/id/20631668/ns/health-childrens_health/t/parents-experts-divided-school-drug-testing/#.TxZDIM3MeeY) (discussing concerns regarding drug testing).

<sup>169</sup> See, e.g., *Long Island Lawmaker Saladino Wants Parents To Drug Test Teens Annually*, *supra* note 127 (stating some belief drug testing is contrary to certain rights).

<sup>170</sup> In one particular blog posting a parent stated in regard to a mandatory student drug testing proposal, "[t]hat's ridiculous not to mention against *our* Rights and those of the children," Ellen Benedetto, Comment to *Long Island Lawmaker Saladino Wants Parents To Drug Test Teens Annually*, *supra* note 127 (emphasis added).

<sup>171</sup> See Bookman, *supra* note 9 (giving the counter-argument to this fear).

<sup>172</sup> See, e.g., *Long Island Lawmaker Saladino Wants Parents To Drug Test Teens Annually*, *supra* note 127; Clayton, *supra* note 168 (discussing the potential issue of tampered tests).

<sup>173</sup> *Vernonia*, 515 U.S. at 653.

<sup>174</sup> *Skinner*, 489 U.S. at 620.

law view that “minors lack some of the most fundamental rights.”<sup>175</sup> The Court went on to describe the power of private schools to stand *in loco parentis*.<sup>176</sup> Although public schools do not have such broad authority, the Court reasoned that, with respect to children, there is some “degree of supervision and control that could not be exercised over free adults.”<sup>177</sup> It further concluded that “while children assuredly do not ‘shed their constitutional rights . . . at the schoolhouse gate,’ the nature of those rights is what is appropriate for children in school.”<sup>178</sup>

The claim that by searching a child’s room or administering an at-home drug test parents are “policing” their children’s lives entails a serious parenting failure. In New York, patients are entering rehabilitation centers for non-alcohol related problems at increasingly younger ages.<sup>179</sup> According to one hospital, the average age for such admissions is twenty-three.<sup>180</sup> Furthermore, a report by the Substance Abuse and Mental Health Services Administration shows that in 2010 nearly half of children between the ages of “12 to 17 reported that it would be ‘fairly easy’ or ‘very easy’ for them to obtain marijuana.”<sup>181</sup> With respect to illicit drug use, one in eight children of the same age group reported that heroin is “fairly or very easily available.”<sup>182</sup> However, children in this age group who thought that their parents would strongly disapprove of their drug use were reportedly “less likely to use that substance than were youths who believed their parents would somewhat disapprove or neither approve nor disapprove.”<sup>183</sup> These statistics show that drug use among children is a significant threat to their wellbeing, and parents who are aggressively involved in detecting drugs can help prevent addiction before it starts.

The National Institute on Drug Abuse (“NIDA”) identifies

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<sup>175</sup> *Vernonia*, 515 U.S. at 654.

<sup>176</sup> *Id.* at 655-56 (defining the right of a school to act *in loco parentis* as school teachers and administrators applying the control that parents would normally exercise). The term *in loco parentis* is Latin for “in the place of a parent.”

<sup>177</sup> *Id.* at 655.

<sup>178</sup> *Id.* at 655-56 (quoting *Tinker*, 393 U.S. at 506).

<sup>179</sup> See Ridgely Ochs, *Detox Needs Rising*, NEWSDAY, Jan. 16, 2012, at A10, available at 2012 WLNR 992625 (discussing the increase in drug abuse among teenagers).

<sup>180</sup> *Id.*

<sup>181</sup> U.S. DEP’T OF HEALTH AND HUMAN SERVS., *supra* note 8, at 64.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.*

four different types of drug testing methods.<sup>184</sup> These methods involve the use of “urine, hair, oral fluids [saliva], and sweat.”<sup>185</sup> These testing procedures may identify a variety of drugs at one time.<sup>186</sup> According to the NIDA, “[t]ests are very accurate but not 100 percent accurate.”<sup>187</sup> Confirmation tests can help in the event of a false-positive result.<sup>188</sup> As one source alleges, students know the ways to “beat” drug tests.<sup>189</sup> However, as the NIDA makes clear, “masking products,” which attempt to manipulate the results of drug tests, are costly and are easily detectable by the drug test itself.<sup>190</sup> Furthermore, drug testing kits have become more advanced due to the threat of beating the test.<sup>191</sup> For example, some at-home drug tests include a thermometer to test both the body temperature of the subject and his or her sample.<sup>192</sup> Also, some tests, if tampered, produce a positive result.<sup>193</sup>

In New York, several schools have provided at-home drug tests to parents.<sup>194</sup> With the help of community groups, parents can often obtain a test for free.<sup>195</sup> If cost is a problem, at least on an annual basis, community programs are willing to provide at-home drug tests to interested parents. However, these tests alone cannot end the war on drugs that takes place in schools. A multifaceted approach is necessary because parents and schools alike need a plan for the han-

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<sup>184</sup> *Frequently Asked Questions About Drug Testing in Schools*, NATIONAL INSTITUTE ON DRUG ABUSE (NIDA), <http://www.drugabuse.gov/related-topics/drug-testing/faq-drug-testing-in-schools> (last visited Oct. 12, 2012).

<sup>185</sup> *Id.*

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> See Clayton, *supra* note 168 (discussing ways to tamper with the test).

<sup>190</sup> *Frequently Asked Questions About Drug Testing in Schools*, *supra* note 184.

<sup>191</sup> See Matt Markham, *Why More N.Y. Parents Are Drug Testing Their Kids*, ABCNEWS.GO.COM (Nov. 25, 2009), <http://abcnews.go.com/Health/parents-pick-free-drug-kits-kids/story?id=9164002#.Txcixc3MeeY> (discussing the advancements in the test kits).

<sup>192</sup> *Id.* (“The kits also come with a small thermometer attached so parents can check to see if the temperature of the sample is the same as their child’s body temperature, which makes it harder for kids to rig the test results.”).

<sup>193</sup> *Frequently Asked Questions About Drug Testing in Schools*, *supra* note 184.

<sup>194</sup> See, e.g., Markham, *supra* note 191; Sophia Chang & Denise Bonilla, *Parents Ready to Use Drug-Test Kits*, NEWSDAY, Jan. 12, 2010, at A03 (exemplifying the availability of at-home testing).

<sup>195</sup> Markham, *supra* note 191 (“Suffolk County announced that it had purchased 16,000 drug testing kits, available for free for parents who want to test their children.”).

dling of positive results.<sup>196</sup> The solution to each problem related to this issue requires the cooperation of all of the affected parties. Therefore, at-home drug test kits are only one tool to combat student drug use.

## V. CREATING A SUCCESSFUL APPROACH

In *Skinner*, the Court reached the conclusion that “no procedure can identify *all* impaired employees with ease and perfect accuracy.”<sup>197</sup> This conclusion can be applied to student drug testing, because no single method is available to put an end to this war that occurs in school hallways. Unfortunately, the influx of younger patients into rehabilitation centers<sup>198</sup> and the numbers of premature deaths<sup>199</sup> remain as a constant reminder of this continuing battle. The only approach that will prove to be effective and efficient starts with the rules that parents set at home. Second, schools must be honest with parents about the drug problems that are faced both statewide and in individual schools.<sup>200</sup> Schools must also create a student drug testing program, which involves both voluntary and mandatory drug testing.

Random student drug testing policies, currently the law in New York,<sup>201</sup> simply do not work.<sup>202</sup> The purpose of student drug testing is to deter drug use and also to help those who are currently using drugs find a way to stop their self-destructive behavior. Fur-

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<sup>196</sup> See Joie Tyrrell & Denise M. Bonilla, *Experts: To Fight Kids’ Drug Use, Parents Need A Plan*, NEWSDAY.COM (Jan. 12, 2010), <http://www.newsday.com/long-island/suffolk/experts-to-fight-kids-drug-use-parents-need-a-plan-1.1698241> (emphasizing the need for parental involvement).

<sup>197</sup> *Skinner*, 489 U.S. at 629 (emphasis added).

<sup>198</sup> See Ochs, *supra* note 179 (“[T]he average age for nonalcohol admissions is now 23; the average age five years ago was in the mid-30s to mid-40s.”).

<sup>199</sup> See, e.g., Brown, *supra* note 156; Howard, *supra* note 125 (discussing teenagers who have passed away due to drug use).

<sup>200</sup> In New York, schools can use the results of student drug testing for “statistical, epidemiological or research purposes.” N.Y. EDUC. LAW § 912-a(3) (McKinney 2012). This provides a valuable opportunity for schools to educate the community.

<sup>201</sup> *Id.* § 912-a(1) (“The school authorities of each school district within the state may cause all children attending grades seven through twelve, inclusive, in the public and private schools located within such districts, to be separately and carefully examined . . .”).

<sup>202</sup> See U.S. DEP’T OF EDUC., *supra* note 6, at xi (“34 percent of students subject to [mandatory-random student drug testing] reported that they ‘definitely will’ or ‘probably will’ use substances in the next 12 months, compared with 33 percent of comparable students in schools without [mandatory-random student drug testing].”).



thermore, drug use has been described by the Supreme Court as one of the “ugly forms” of school disorder.<sup>203</sup> Perhaps, however, it is the very word “random” that leads parents to overlook these critical reasons for student drug testing in some form. By randomly selecting students, schools are only building greater distrust between school personnel and students. Furthermore, schools are standing *in loco parentis* in the most invasive way possible. An education, after all, is one of the most valuable experiences of an individual’s life. A student should be entitled to an education free from the fear of being subjected to random drug testing when he or she may not be a drug user in the first place.

Although random student drug testing may detect drugs in a student’s system by chance, the war on drugs is far too serious for this gambling system. For this reason, the “special needs” exception applies in public schools.<sup>204</sup> Therefore, student drug testing should only exist in voluntary or mandatory forms. A multifaceted method, which involves both forms, is also feasible. A voluntary program would allow parents to reach out to the school as a helping hand in detecting their child’s drug use. This would allow parents who fear the results of their suspicions or cannot administer an at-home drug test due to a noncompliant child to obtain assistance. This program would permit schools to drug test a student using the urine testing method after a guardian’s request in the school nurse’s office. Regardless of whether the results are positive, the information obtained would be held confidential and provided only to the guardian accompanied by information on rehabilitation programs and other educational resources.

In addition to a voluntary program, a mandatory program should apply to all privileged activities. The Supreme Court, in *Earls*, upheld a school policy for drug testing students who participated in competitive extracurricular activities.<sup>205</sup> The Court reasoned that there are concerns about “occasional off-campus travel and communal undress,” which, the Court added, “do not apply to the student body as a whole.”<sup>206</sup> The New York statute<sup>207</sup> and the pro-

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<sup>203</sup> *T.L.O.*, 469 U.S. at 339.

<sup>204</sup> *Vernonia*, 515 U.S. at 653 (allowing search and seizure absent a warrant and probable cause).

<sup>205</sup> *Earls*, 536 U.S. at 838.

<sup>206</sup> *Id.* at 832; *see also Vernonia*, 515 U.S. at 657 (applying identical reasoning to student athletics).

posed amendment<sup>208</sup> fail to treat the classroom differently from all other non-educational activities. These activities include student athletics, extracurricular activities, and student parking permits. If students wish to participate in any of these programs, a mandatory drug test should be administered. This would protect the safety and well-being of student athletes, students involved in extracurricular activities, which may involve travel to and from the school, and students who commute to and from the school. One New Jersey school has already implemented student drug testing to obtain a parking permit and has found success.<sup>209</sup>

Drug testing of the general student body, however, should not be made mandatory. In an interview, Assemblyman Saladino noted the negative consequences which can follow from a program that would subject all students to mandatory drug testing by the school.<sup>210</sup> He was primarily concerned with funding such a program and also feared the backlash of permitting the school to act as parent.<sup>211</sup> Furthermore, there is a valid question regarding the reliability of drug testing methods.<sup>212</sup> The NIDA claims that the available methods are accurate, but they are not one hundred percent accurate.<sup>213</sup> Although attempts have been made to develop better testing methods,<sup>214</sup> a student may still attempt to “beat” the test in some way.<sup>215</sup> Furthermore, the cost of testing is an obvious issue for taxpayers and the school district. Investing in a mandatory drug testing program for all students when the results are not one hundred percent reliable is not ad-

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<sup>207</sup> N.Y. EDUC. LAW § 912-a (McKinney 2012).

<sup>208</sup> Assemb. 8528, 234th Leg., Reg. Sess. (N.Y. 2012).

<sup>209</sup> See, e.g., *N.J. Town to Vote on Middle School Drug Tests*, CBSLOCAL.COM (Jan. 10, 2011, 10:29 PM), <http://newyork.cbslocal.com/2011/01/10/new-jersey-town-to-vote-on-middle-school-drug-tests/> (“It’s been working well in the sense that parents and students understand the choices they make and are able to make better ones . . . .”) (internal quotation marks omitted).

<sup>210</sup> See Telephone Interview with Joseph Saladino, *supra* note 130.

<sup>211</sup> *Id.*

<sup>212</sup> *Frequently Asked Questions About Drug Testing in Schools*, *supra* note 184 (“How accurate are drug tests? Is there a possibility a test could give a false positive?”).

<sup>213</sup> *Frequently Asked Questions About Drug Testing in Schools*, *supra* note 184 (“Tests are very accurate but not 100 percent accurate.”).

<sup>214</sup> See, e.g., Markham, *supra* note 191 (“The kits also come with a small thermometer attached so parents can check to see if the temperature of the sample is the same as their child’s body temperature, which makes it harder for kids to rig the test results.”).

<sup>215</sup> See, e.g., *Frequently Asked Questions About Drug Testing in Schools*, *supra* note 184 (“Many drug-using students are aware of techniques that supposedly detoxify their systems or mask their drug use.”).

visable.

At-home drug testing should not be made mandatory, despite the recently proposed amendment that makes this suggestion.<sup>216</sup> To force parents to administer an at-home drug test is equivalent to authorizing a school official to enter the home and administer one. If a drug testing policy is to be both effective and efficient, parents must support it. A mandatory at-home drug testing program is also impractical. According to the proposed amendment, parents would be forced to sign a form that they have administered an at-home drug test.<sup>217</sup> There is no way, aside from honesty, of guaranteeing that parents have actually administered the test. A mandatory at-home drug testing program would also obviate the need for random drug testing, although the proposed amendment clearly details that both mandatory at-home drug testing and random drug testing at school can coexist.<sup>218</sup> If students were to be tested at home, why would it be necessary to have a random drug testing program in school? One positive result of mandatory at-home drug testing, however, is that parents would be forced to have a conversation with their children about drugs and the consequences involved in using them.<sup>219</sup>

The decision to institute any type of program should also involve parent opinion. It would be highly valuable for a school district to conduct a survey to determine community reaction to these proposed approaches. A survey, however, would not be of any assistance without informing parents about the current drug problem in the state and within the school. Although it can be argued that this information is readily available online, parents should be fully informed in the most uniform manner possible in order for a survey to be representative of an informed community. The statistics need not provide precise data broken down into numbers or percentages; it is enough to indicate whether the drug problem is “a serious problem,” “a cause for concern,” or “not a problem” based on disciplinary records maintained by the school.

This information and the proposed drug testing programs, however, will not work without the cooperation of parents. Parents play a critical role in student drug use and should be aware of their

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<sup>216</sup> See Assemb. 8528, 234th Leg., Reg. Sess. (N.Y. 2012).

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* (amending the current statute to include at-home mandatory drug testing, while leaving untouched the aspects of the statute detailing random drug testing).

<sup>219</sup> See Howard, *supra* note 125.

child's use rather than maintaining a "not my kid" attitude.<sup>220</sup> Keeping track of medicine kept in the home and disposing of unwanted medication appropriately is necessary to exercise control over any possible substance abuse.<sup>221</sup> The belief by parents that searching their child's room is a form of "policing" only allows the child to have more freedom to explore drug use. As the statistics demonstrate, one in eight students can easily obtain illicit drugs.<sup>222</sup> The "policing" perspective is also a misconception, because children have reported being less inclined to try drugs if they believe that their parents would strongly disapprove.<sup>223</sup> Therefore, if parents would take the time to have a simple conversation about drugs with their children, it can and will save lives.

This multifaceted approach consisting of information, voluntary and mandatory drug testing, and the cooperation of parents will lead to a significant change in the way drug use is handled by schools. Although it may seem odd that students do not have a voice in this discussion, it is clear that parents play an important role in controlling their children and that schools share in that role as well. It is time that parents understand the role they have in student drug use and allow schools to assist in fighting this war that is undeniably growing more severe. The average age that people will enter rehab or die of drug overdoses will become increasingly younger unless aggressive steps are taken. The current New York statute and the proposed amendment on this issue have failed to establish a multifaceted approach that provides the tools needed to win this war.

## VI. CONCLUSION

Justice Fortas once stated: "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of

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<sup>220</sup> See, e.g., Telephone Interview with Joseph Saladino, *supra* note 130 ("If it is not your child it is one of your child's friends experimenting.").

<sup>221</sup> See, e.g., Alcindor, *supra* note 112 ("Residents around Long Island got rid of medications yesterday that included antibiotics and morphine during a Drug Enforcement Administration-sponsored prescription drug take-back day targeting addiction among young people.").

<sup>222</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 8, at 63 ("About one in eight (11.6 percent) indicated that heroin would be fairly or very easily available, and 12.9 percent reported so for LSD.").

<sup>223</sup> U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 8, at 64.

speech or expression at the schoolhouse gate.”<sup>224</sup> Years later, however, the Court was compelled by the prevalence of drug use among our nation’s youth to develop a “special needs” exception to the warrant and probable-cause requirements of a reasonable search in public schools.<sup>225</sup> More recently, the Court has noted that this problem has “hardly abated” since the development of this exception.<sup>226</sup> With “high illicit substance use among youth”<sup>227</sup> and the rise of prescription painkiller abuse,<sup>228</sup> a change in New York student drug testing is needed. This change will lead to a parenting transformation by providing parents with multiple tools to help their children avoid drug use.

The current New York law provides for mandatory random student drug testing,<sup>229</sup> which is not an effective approach to the war on drugs.<sup>230</sup> Assemblyman Joseph Saladino’s proposed amendment to this statute seeks to solve the inherent drug problem by suggesting a mandatory at-home drug testing program.<sup>231</sup> As noted above, under this proposed amendment, a parent must sign a form acknowledging that an at-home drug test has been administered or the child will not be permitted to attend school.<sup>232</sup> This aggressive approach is impractical because there is no way to be certain that parents have complied with the program. A mere promise that parents are complying with a drug testing program does not guarantee that a student is drug free in school. In addition, the proposal has met great opposition despite the critical conversation it forces parents to have with their children.<sup>233</sup>

Therefore, a multifaceted approach that involves providing information to parents, a voluntary student drug testing program for all students, and a mandatory student drug testing program for privileged activities is warranted to solve the student drug problem. The war on drugs is far too complex and serious for an ineffective random stu-

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<sup>224</sup> *Tinker*, 393 U.S. at 506.

<sup>225</sup> *Vernonia*, 515 U.S. at 653.

<sup>226</sup> *Earls*, 536 U.S. at 834.

<sup>227</sup> U.S. DEP’T OF EDUC., *supra* note 6, at vii.

<sup>228</sup> Van Sant, *supra* note 7.

<sup>229</sup> EDUC. § 912-a.

<sup>230</sup> See U.S. DEP’T OF EDUC., *supra* note 6, at xi (detailing the probability that teenagers will use drugs).

<sup>231</sup> Assemb. 8528.

<sup>232</sup> *Id.*

<sup>233</sup> See, e.g., *Long Island Lawmaker Saladino Wants Parents To Drug Test Teens Annually*, *supra* note 127.

dent drug testing program. If the results of a drug testing program do not decrease drug use and drug related deaths, the program simply does not work. This is the current situation in New York. With better information and more tools, however, parents who are in denial would become informed. This change would save lives and make schools safer for everyone. In the end, however, parents should not overlook an obvious tool that has and always will be available to them. This tool is a simple conversation with children about the consequences of using drugs.