

Inquiry & ANALYSIS

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STUDENT DRUG TESTING: DEVELOPMENTS SINCE *EARLS*

By: *Nancy Dinsmore, NSBA School Law Fellow, Alexandria, Virginia*

In the 2004 State of the Union Address, President George W. Bush spoke of reducing the demand for illegal drugs and proposed an additional \$23 million in funding "for schools that want to use drug testing as a tool to save children's lives."¹ With this statement, President Bush both endorsed random student drug testing programs and asked for federal money to fund the implementation of these programs in school districts across the country. Random, suspicionless student drug testing policies have also withstood legal challenges. Two decisions by the U.S. Supreme Court determined that at least some random student drug policies do not violate students' rights under the Fourth and Fourteenth Amendments to the U.S. Constitution. Given the political and judicial support for such programs, one would think that a number of school districts would at least consider adopting random student drug testing policies in order to reduce or prevent drug use within their schools.

Yet precise information is lacking on the number of school districts that currently conduct random student drug testing. Although some programs receive federal funding, the U.S. Department of Education does not collect information about random student drug testing. Since the most recent Supreme Court decision in 2002 and former President Bush's State of the Union Address in 2004, some studies estimate that a steadily growing number of school districts have imposed random drug testing requirements on students. A study published in the *Journal of School Health* in 2007 found that 14.6% of

public and private middle and high schools nationwide conducted random drug testing on students.²

Due to the lack of official statistics, however, it is also difficult to get a clear picture of how successful random student drug testing requirements have been in achieving their goal of preventing drug use in young people. This may become clearer in early 2010, when the Institute for Education Sciences, an office within the Department of Education, is expected to release a report evaluating the impact of mandatory random student drug testing.³ In the meantime, students and parents have continued to mount legal challenges against random, suspicionless student drug testing policies in state courts. In recent years some parents have successfully challenged them as unconstitutional on state law grounds. This article will first examine the two Supreme Court decisions that form the basis of the legal landscape surrounding student drug testing policies. It will then look at the state court challenges and legislative developments in the area of random student drug testing since 2002.



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Supreme Court Precedent: *Vernonia* & *Earls*

The Supreme Court has twice decided cases involving student drug testing in schools. In 1995, the Court first addressed the issue of random urinalysis drug testing on students in *Vernonia School district 47J v. Acton*.⁴ The policy in *Vernonia* authorized random drug testing on students who participated in school athletics programs. The school administrators adopted the policy in response to an increase in drug use and disciplinary problems within the school. Student athletes were perceived to be the leaders of the drug culture, and school officials were concerned that drug use in athletes could lead to sports-related injuries. Under the program, all athletes would be tested at the beginning of the season for each particular sport and subsequently each week 10% of athletes would be randomly selected for testing.

In its decision, the Supreme Court outlined a balancing test with three factors for determining the constitutionality of a student drug testing program: (1) the nature of the privacy interest allegedly compromised; (2) the character of the intrusion complained of; and (3) the nature and immediacy of the school district's concerns and the efficacy of the policy in meeting those concerns.⁵ In examining these factors, the *Vernonia* Court focused on the diminished legitimate privacy expectations of students generally, and of student athletes in particular.⁶ The Court found that the privacy interests compromised by the collection of a urine sample were minimal, especially because the results were not turned over to law enforcement officials.⁷ Finally, the Court stated that the nature of the concern was important because the presence of drugs within the school disrupted the educational process.⁸ Under this analysis, the random student drug testing of athletes in *Vernonia* was deemed constitutional.

The Court again took up the issue of student drug testing in 2002 when it decided *Board of Education of Independent School District 92 of Pottawatomie County v. Earls*.⁹ The challenged student drug testing program once again involved urinalysis, but in this case the policy required all students who participated in competitive extracurricular activities to be tested. The students were required to take a drug test

before participating in the activity, and were subject to random drug testing thereafter. The students also had to agree to be subject to a drug test at any time based on reasonable suspicion.

Using the same three factors identified in *Earls*, the Court determined that testing students involved in extracurriculars was not a violation of the Constitution. Like the student athletes in *Vernonia*, the students in *Earls* who chose to participate in competitive extracurricular activities had a diminished expectation of privacy; the urinalysis was a minimal intrusion; and the interest of the school in preventing drug use by children was important.¹⁰ Furthermore, in *Earls* the Court clarified that a school district need not demonstrate a specific drug problem within a school in order to conduct this type of suspicionless student drug testing program.¹¹ The two Supreme Court decisions on student drug testing, it seemed, paved the way for school districts to drug test constitutionally at least some students within their schools.

Unanswered Questions after *Vernonia* & *Earls*

In *Earls*, Justice Thomas wrote in the majority opinion that the Court expressed no opinion as to the wisdom of student drug testing policies, but held only that the policy was "a reasonable means of furthering the School District's important interest in preventing and deterring drug use among its schoolchildren."¹² Thus *Earls* left unanswered questions not only as to the wisdom of adopting such policies, but also about the constitutionality and reasonableness of random student drug testing programs that differ from the ones reviewed in *Vernonia* and *Earls*.

First, in both *Vernonia* and *Earls* school districts were testing a specific subset of the student body, athletes and those who participated in extracurricular activities, respectively. What if a district wants to drug test all students who attend schools in the district? Second, when examining the character of intrusiveness imposed by the policies the Court noted in both cases that the results were not turned over to law enforcement. What if a district did release the results of positive tests to a law enforcement agency? Third, both *Vernonia* and *Earls* used urinalysis as the means of

conducting the drug testing. Both decisions pointed out that urinalysis collection was "minimally intrusive."¹³ What if a school district wants to use a different method of conducting the drug testing such as blood testing? And finally, the question of whether student drug testing policies are valid under state constitutions, which may provide greater protection for students' privacy rights than the Fourth Amendment, remains open in many states.

Some of these unanswered questions have led schools to adopt policies that have been the subject of litigation following *Earls*. In these cases, state courts have scrutinized questions regarding which students may be subject to random drug testing and what protections state constitutions afford students. In contrast, the questions surrounding the character of intrusiveness or means of conducting drug testing other than urinalysis have not been much debated either in courts or in schools themselves. This article discusses the general trends that have emerged in student drug testing through the lens of several specific court challenges that have arisen in the years following these Supreme Court cases.

Mandatory Drug Testing of All Students

As noted earlier, neither of the drug testing policies in the cases that have come before the Supreme Court involved testing the entire student population in a school. In *Earls*, the Supreme Court noted that both athletics and extracurricular activities "have their own rules and requirements for participating students that do not apply to the student body as a whole," which leads to the diminished expectation of privacy for participating students.¹⁴ This language suggests that even though students generally have a lesser expectation of privacy than the population at large,¹⁵ the student population as a whole enjoys a higher expectation of privacy than students who voluntarily participate in sports or extracurricular activities.¹⁶ This point was left unsettled by *Earls*, but in 2001, the year before the *Earls* decision, one Texas school district's experiment with a mandatory random drug testing policy for all students led to a district court finding the policy unconstitutional.¹⁷

In the late 1990s, school officials in Lockney Independent School District perceived a drug problem within both the community and the school district. In response, the school board implemented a policy that called for all students in grades six through 12 and their parents to sign a consent form agreeing to be part of a drug testing program.¹⁸ In the first year of the program, all students would be required to take a mandatory drug test and would be subject to a subsequent random urinalysis program equivalent to ten percent of the students being tested per month.¹⁹ As originally enacted, after the first year all incoming sixth graders would be required to take a mandatory drug test and all other students would be involved in the random ten percent testing per month.²⁰

The parent of a sixth grade student refused to consent to the policy and filed suit against the district. In *Tannahill v. Lockney ISD*, the district court struck down the district's drug testing policy. The court concluded that that the school district failed to demonstrate sufficient

need to justify suspicionless drug testing and the policy of testing all students violated the Fourth Amendment.²¹

Although *Tannahill* was decided before *Earls* extended the constitutionality of student drug testing to include students participating in competitive extracurricular activities, it is still instructive as to how courts might look at a policy that subjects all enrolled students to mandatory random drug testing. In holding Lockney ISD's drug testing policy unconstitutional, the district court noted "compulsory attendance at school is much different than voluntary participation in extracurricular activities."²² Consequently, when the court analyzed the three *Vernonia* factors it found that the student body as a whole had a higher expectation of privacy than the subset of students who participate in athletics.²³ As discussed above, the language of *Earls*, while broader than *Vernonia*, does not appear to contradict this finding.

Because the school district in *Tannahill* dropped its appeal as part of the subsequent settlement and the Supreme Court has yet to take up a case with a mandatory

Brewing Controversies over Student Drug Testing

The following states have experienced litigation or legislative activity on the subject of random student drug testing, but the issue has yet to be settled.

California

Brown v. Shasta Union High Sch. Dist., 164933 (Cal. Super. Ct. 2009) (granting request for preliminary injunction blocking school district from enforcing an expanded drug testing program that randomly tested students participating in noncompetitive academic clubs until case is resolved or until further order of the court).

Oregon

Weber v. Oakridge Sch. Dist. 76, 56 P.3d 504 (Or. Ct. App. 2002) (affirming lower court decision that upheld the district's random urinalysis drug testing policy for student athletes).

Tennessee

The Office of the Attorney General issued an opinion in 2008 on the constitutionality of a proposed bill authorizing random student drug testing for students participating in voluntary extracurricular activities and determined that such legislation, if enacted, is constitutionally defensible. See State of Tenn. Office of Att'y Gen., Op. No. 08-106 (May 7, 2008).

Texas

Marble Falls Indep. Sch. Dist. v. Shell, Nos. 03-02-00652-CV, 03-02-00693-CV, 2003 WL 1738417 (Tex. App. Apr. 3, 2003) (holding that district's random drug testing policy for students participating in any extracurricular activity did not violate students' religious freedom, privacy, or due process rights).

drug testing policy for all students, school districts are left with no greater clarity on this point. This may be why school districts appear reluctant to implement drug testing policies involving all enrolled students, and why there have been no cases involving such a policy since *Tannahill* was decided. Instead, schools have relied on *Earls* to test groups within the general student population such as athletes, participants in extracurricular activities, or students with parking privileges.

State Constitutional Challenges

Since 2002, school districts have been free under the U.S. Constitution to implement student drug testing policies that test students involved in sports and extracurricular activities. With this point relatively settled, recent years have seen an increase in legal challenges to such policies on state constitutional grounds. State high courts have come down on both sides of the line. In general, the outcome of a state constitutional challenge seems to turn on how closely the language of the state constitution tracks that of the Fourth Amendment and on the court's analysis of the "special needs" exception to the warrant requirement under state constitutional law.

This section examines the varied outcomes of several state constitutional challenges to student drug testing. In other states, the litigation is still making its way through the court system and the issue of whether student drug testing is permissible under the state constitution remains unanswered. The box on page three lists litigation and legislative activity regarding random student drug testing in a number of states where the issue has yet to be settled.



Student Drug Testing Unconstitutional Under State Law

Some state constitutions provide greater privacy protection for students than what is provided by the Fourth Amendment. The decisions reached by courts in Washington and Pennsylvania indicate that in some states, some random student drug testing policies may violate students' rights.

Washington

In 2008 in *York v. Wahkiakum School District No. 200*,²⁴ the question before the Supreme Court of Washington was whether random, suspicionless urinalysis of student athletes violated the Washington state constitution. Even though the U.S. Supreme Court held in *Earls* that randomly drug testing student athletes was not a violation of the federal constitution, some parents alleged in the suit that the policy was a violation of the Washington state constitution. The relevant provision of the Washington state constitution provides "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law."²⁵ The school district maintained that its random student drug testing policy was constitutional under both state and federal law.²⁶

The Supreme Court of Washington determined that the analysis under the state constitution differed from the Fourth Amendment analysis. Using a two-pronged test, the court first looked at whether student drug testing implicated one's "private affairs" and found that student athletes do have a privacy interest in controlling their bodily functions.²⁷ Like the U.S. Supreme Court, Washington courts recognize that students generally have a lower expectation of privacy than adults. Unlike the U.S. Supreme Court, however, the Washington Supreme Court found no reason that choosing to play sports would reduce a student's expectation of privacy even further.²⁸

Turning to the second prong of the state constitutional analysis, the court looked at whether a search has "authority of law," meaning a warrant.²⁹ Washington had never before adopted a special needs exception to the warrant requirement as it exists in federal jurisprudence. The school district asked the court to adopt a "special needs" exception to the "authority of law

requirement" that would allow for random, suspicionless drug testing of student athletes.³⁰ The court declined to adopt such an exception in the context of drug testing student athletes.³¹ The court concluded, therefore, that the school district's suspicionless drug testing policy did not comply with the state constitution's "authority of law" requirement and was a violation of the student athletes' rights.³²

Pennsylvania

In 2003, the Supreme Court of Pennsylvania confronted the issue of whether random student drug testing was constitutional under the state constitution in *Theodore v. Delaware Valley School District*.³³ The drug testing policy in this case authorized random, suspicionless drug testing of all middle and high school students who participated in any extracurricular activity or held school parking permits. The parents of two students sued the district, alleging that the policy deprived students of their right to be free from unreasonable searches and seizures as guaranteed by the Pennsylvania Constitution.³⁴

The Pennsylvania Supreme Court noted that the *Earls* decision would have required it to find the district's drug testing policy constitutional if faced with a Fourth Amendment challenge.³⁵ Under the state constitution, however, the analysis was, as the court observed, "more difficult."³⁶ Pennsylvania's constitution affords heightened privacy protection, and Pennsylvania courts have found that it specifically "mandate[s] greater scrutiny in the school environment."³⁷ In the school context, Pennsylvania had previously adopted a state constitutional test based on *Vernonia* that involved balancing four factors.³⁸ The court maintained this approach in determining whether the school district's drug testing policy passed state constitutional muster.

In employing its balancing test, the court focused on the school district's failure to produce evidence that there was a specialized need to conduct drug testing. The district had no reason to believe that there was an existing drug problem among students.³⁹ On this basis, the court distinguished the case from other student drug testing cases where the policies were upheld in the U.S. Supreme Court and other

state courts.⁴⁰ Noting that the school district relied simply on the importance of general deterrence of drug use, the court suggested that the students selected for testing were targeted for "symbolic purposes" while other segments of the school population that might be involved with drugs were ignored.⁴¹

Given the lack of evidence that the tested students were likely to be drug users, a policy requiring participants in all extracurricular activities to submit to drug testing was overbroad and too far-reaching to be characterized as reasonable.⁴² Under the heightened right to privacy afforded by the state constitution, therefore, the court held that a "search policy will pass constitutional scrutiny only if the District makes some actual showing of the specific need for the policy" and a reason for believing the policy would address that need.⁴³

The court's holding left room for other Pennsylvania school districts to adopt drug testing policies that might be constitutionally permissible. For instance, if a school district was able to show a specific need to respond to a documented drug problem within the school it could satisfy the court's ruling. Similarly, the court's ruling suggests that if a school implemented a policy that was less broad, by testing only athletes for example, it might also pass constitutional scrutiny.⁴⁴ It remains to be seen whether and under what circumstances such policies would be constitutionally permissible in Pennsylvania, as the Pennsylvania Supreme Court has yet to hear another challenge to a random student drug testing policy.

Student Drug Testing Constitutional Under State Law

In other cases, state courts have taken an approach that closely mirrors the U.S. Supreme Court's analysis in *Vernonia* and *Earls*. These states have found that the policies do not violate student rights under the state constitutions.

New Jersey

In 2003, the Supreme Court of New Jersey decided a case where several parents sued a school district for adopting a policy of random, suspicionless drug testing of students participating in extracurricular

activities and seeking parking privileges.⁴⁵ Unlike the Pennsylvania court, however, the New Jersey court held that the student drug testing policy did not violate the search and seizure provision of the state constitution.⁴⁶

Because the language of the New Jersey Constitution tracks the language of the Fourth Amendment closely,⁴⁷ the New Jersey Supreme Court conducted an analysis that was nearly identical to the U.S. Supreme Court's approach to student drug testing in *Vernonia* and *Earls*. The New Jersey court concluded that the state constitution provided no greater protection for student's privacy, because the "[state's] law regarding searches within the public-school context generally has mirrored federal law, encapsulating similar if not identical concepts and concerns."⁴⁸ After concluding that *Vernonia's* special needs approach was the correct framework for analysis,⁴⁹ the New Jersey court found that the school's random drug testing policy was reasonable by weighing the three factors the U.S. Supreme Court outlined in *Vernonia*.⁵⁰

Indiana

The Indiana Supreme Court also adopted the U.S. Supreme Court's three factor *Vernonia* approach when it decided *Linke v. Northwestern School Corporation* in 2002.⁵¹ Like the other drug testing policies discussed so far, the district's random drug testing policy applied to athletes, participants in specified extracurricular activities, and students seeking parking privileges. The objecting parents argued that the policy violated the Indiana Constitution.⁵² The language of the Search and Seizure Clause in the state constitution is nearly identical to the language of the Fourth Amendment.⁵³ Although the court noted that its analysis differed from a Fourth Amendment analysis, its analysis closely tracked the *Vernonia* reasoning in reaching its conclusion that the policy did not violate the Indiana Constitution.⁵⁴

Legislative Initiatives

Following these court cases, in recent years some states have taken legislative action in the area of random student drug testing. For example, in 2005 New Jersey enacted the New Jersey Student Drug Testing Act,



which authorized the adoption of student drug testing in public school districts.⁵⁵ Noting that student drug testing was consistent with both the New Jersey Constitution and the federal constitution (per the 2003 New Jersey Supreme Court decision discussed above), the legislation followed the court in permitting drug testing for students who participate in athletics and extracurricular activities, and students who receive parking privileges. The legislation also established procedures for school boards to follow prior to adopting a drug testing policy.⁵⁶ Even some states that have yet to hear a state constitutional challenge to student drug testing, such as Virginia, have enacted legislative amendments post-*Earls* to include language about student drug testing in schools.⁵⁷

Other states have adopted legislation that specifically addresses drug testing student athletes for anabolic steroids. In some cases, these athletic legislative initiatives are distinct from general student drug testing policies. The governor of Illinois, for instance, signed legislation in August 2009 that will be in place through 2011 requiring high school athletes to be tested for performance enhancing drugs.⁵⁸ This legislation differs significantly in terms of consequences of a positive test from the student drug testing policies discussed earlier. Under the Illinois law, parents must sign an acknowledgement that if their children are caught using steroids the student could face jail time.⁵⁹ As the Illinois legislation illustrates, student drug testing is still a growing area of interest where new policies continue to be tested both at the state and local levels.

Conclusion

Illegal drug use by students has long been a concern among school officials, particularly where the safety of students is concerned as it is with student athletes or student drivers. In the years following the two U.S. Supreme Court cases, random student drug testing for certain groups within the student population emerged as a potentially valuable tool for school districts to use as a means of preventing illegal drug use in schools. Yet, unresolved questions still remain that school officials should keep in mind before implementing a random student drug testing policy in their district.

In particular, the constitutionality of drug testing policies that differ in design from the two that survived U.S. Supreme Court challenges is unclear. In addition, many states have yet to determine whether greater protection is afforded to student privacy rights on the state level. And despite the federal funding available for schools who wish to implement random student drug testing, a comprehensive analysis has yet to be conducted on the effectiveness of these programs in preventing student drug use. The questions about effectiveness at least may be answered when the Institute for Education Sciences issues its report evaluating student drug testing programs in early 2010. Furthermore, random student drug testing programs do not appear to be simply a passing trend, so more state courts are likely to confront the issue in next few years and provide guidance to school districts as to what is allowable under their state constitutional law. **I&A**

End Notes

- George W. Bush, President of the U.S., Address Before a Joint Session of the Congress on the State of the Union (Jan. 20, 2004).
- Sherry Everett Jones et. al., *Healthy and Safe School Environment, Part I: Results from the School Health Policies and Programs Study 2006*, 77 JOURNAL OF SCHOOL HEALTH 522, 538 (2007).
- National Center for Education Evaluation and Regional Assistance, *An Evaluation of the Impact of Mandatory Random Student Drug Testing*, http://ies.ed.gov/ncee/projects/evaluation/other_drugtesting.asp (last visited Dec. 30, 2009).
- 515 U.S. 646 (1995).
- Id.* at 654-61.
- Id.* at 657.
- Id.* at 658.
- Id.* at 661.
- 536 U.S. 822 (2002).
- Id.* at 831-34.
- Id.* at 835.
- Id.* at 838.
- Id.* at 834.
- Id.* at 832.
- See *New Jersey v. T.L.O.*, 469 U.S. 325, 348 (1985).
- Participation in sports and other extracurricular activities is generally considered by courts to be a privilege and not a right. See, e.g., *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007).
- See *Tannahill v. Lockney Independent Sch. Dist.*, 133 F. Supp. 2d 919 (N.D. Tex. 2001). The school district settled after the court's ruling that the mandatory drug testing policy was unconstitutional. Under the terms of the settlement, the school district withdrew its appeal, ceased mandatory student drug testing, and paid a portion of the plaintiff's attorneys' fees. See American Civil Liberties Union, *After Bitter Battle, Texas School Agrees to Drop Mandatory Student Drug Testing Policy*, DRUG LAW REFORM, Apr. 30, 2001, <http://www.aclu.org/drug-law-reform/after-bitter-battle-texas-school-agrees-drop-mandatory-student-drug-testing-policy> (last visited Jan. 4, 2010).
- See *Tannahill*, 133 F. Supp. 2d at 922.
- See *id.*
- See *id.* The policy was subsequently revised to eliminate the requirement that sixth grade students submit to the mandatory drug tests. *Id.* at 923.
- Id.* at 930.
- Id.* at 929.
- Id.*
- 178 P.3d 995 (Wash. 2008).
- WASH. CONST. art. 1, § 7.
- In fact, the Wahkiakum School District modeled its student drug testing policy after the one used by the Vernonia School District that the U.S. Supreme Court had deemed constitutional under the Fourth Amendment. *York v. Wahkiakum Sch. Dist.* No. 200, 178 P.3d at 997.
- Id.* at 1002.
- Id.*
- Id.* at 1000-01.
- Id.*
- Id.* at 1005.
- Id.* at 1006.
- 836 A.2d 76 (Pa. 2003).
- The relevant provision of the Pennsylvania Constitution reads: "people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or seize any person or things without describing them as nearly as may be, not without probable cause, supported by oath or affirmation ascribed to by the affiant." PA. CONST. art. 1, § 8.
- Theodore v. Delaware Valley Sch. Dist.*, 836 A.2d at 88.
- Id.*
- Id.* (quoting *In re F.B.*, 726 A.2d 361, 365 (Pa. 1999)).
- Theodore v. Delaware Valley Sch. Dist.*, 836 A.2d at 88. The four factors are: (1) the students' privacy interests; (2) the nature of the intrusion created by the search; (3) notice; and (4) the overall purpose to be achieved by the search and the reasons prompting the decision to conduct the search.
- Id.* at 91.
- Id.* at 93.
- Id.* at 91-92.
- Id.* at 93.
- Id.* at 92. The case was remanded to the trial court for further proceedings, but the parents withdrew the suit.
- Id.* ("Were the suspicionless drug and alcohol testing in this case confined to student-athletes and students with driving/parking privileges, the question obviously would be closer").
- Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ.*, 826 A.2d 624 (N.J. 2003).
- Id.* at 626. The decision overruled a previous case decided decades earlier in New Jersey where the Chancery Court struck down a school's drug testing policy. See *Odenheim v. Carlstadt-East Rutherford Reg'l Sch. Dist.*, 510 A.2d 709 (N.J. Super. Ct. 1985).
- See N.J. Const. art. I, § 7 ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . .").
- Joye v. Hunterdon Cent. Reg'l High Sch. Bd. of Educ.*, 826 A.2d at 648.
- Id.* at 642.
- The three factors are: the affected students' expectation of privacy, the search's degree of obtrusiveness, and the strength of the government's asserted need in conducting the search. *Id.*
- Linke v. Northwestern Sch. Corp.*, 763 N.E.2d 972, 981 (Ind. 2002). Although it was decided earlier, this case also involved extracurricular activities. The Indiana Supreme Court's approach was very similar to the analysis in *Earls*. See Press Release, Indiana Judicial System, U.S. Supreme Court School Drug Testing Decision Similar to Recent Indiana Supreme Court Ruling (June 27, 2002), available at <http://www.in.gov/judiciary/press/2002/0627.html>.
- IND. CONST. art. I, §§ 11, 23.
- Section 11 provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable search or seizure, shall not be violated . . ." IND. CONST. art. I, § 11.
- Linke v. Northwestern Sch. Corp.*, 763 N.E.2d at 985.
- New Jersey Student Drug Testing Act, N.J. STAT. ANN. § 18A:40A-23 (West 2009).
- Specifically, these procedures included holding a public hearing and guidelines for what the policy should include. See N.J. STAT. ANN. § 18A:40A-24 (West 2009).
- See Va. CODE ANN. § 22.1-276.6 (West 2003) ("In accordance with the most recent enunciation of constitutional principles by the Supreme Court of the United States of America, the Board's standards for school board policies on alcohol and drugs and search and seizure shall include guidance for procedures relating to voluntary and mandatory drug testing in schools . . .").
- See Kerry Lester, *High School ADs, Coaches, Support Drug-testing Law*, DAILY HERALD, Aug. 7, 2009, <http://www.dailyherald.com/story/?id=312385> (last visited Feb. 2, 2010).
- See *id.*

2010 DEFENSE ACT EXPANDS FMLA COVERAGE FOR MILITARY FAMILIES

By: Nancy Dinsmore, NSBA School Law Fellow, Alexandria, Virginia

As 30,000 more troops prepare to be deployed to Afghanistan this year, the relatives of these and other service members now have expanded options for taking paid leave under the Family Medical Leave Act (FMLA) thanks to the newest amendments to that law. President Obama signed the National Defense Authorization Act for Fiscal Year 2010 (NDAA 2010) into law on October 28, 2009. Section 565 of the NDAA 2010 addresses family and medical leave for families of service members. The updated amendments in this section expand both the "qualifying exigency leave" and "military caregiver leave" provisions under which employees with relatives serving in the Armed Forces may take FMLA leave. This article will examine the impact of the changes contained in NDAA 2010 on these two military-related leave provisions of the FMLA.

Qualifying Exigency Leave

In January 2008, the FMLA initially was amended to provide two new military-related qualifying circumstances under which an employee could take paid leave. The Department of Labor issued final regulations implementing these FMLA changes in January of 2009. The first provision, known as qualifying exigency leave, allows an eligible employee to take up to 12 work weeks of FMLA leave during a 12 month period when a qualifying exigency arises due to a spouse, child, or parent being on active duty or called to active duty as a member of the National Guard or Armed Forces Reserves in support of a contingency operation. The Department of Labor's 2009 regulations defined "qualifying exigency" to include: short-term notice deployment, military events and related activities, urgent childcare, financial and legal arrangements, counseling, rest and recuperation to spend time with the service member on short-term leave, post-deployment activities, and other situations arising out of the active duty or call to active duty status provided the employer and

employee agree. As originally enacted, the qualifying exigency provision meant only employees who were relatives of National Guard members and Reservists could take leave under the FMLA.

The 2010 amendments change the qualifying exigency provision in two ways. First, the provision has been expanded so that family members of active duty service members are now eligible to take qualifying exigency leave, in addition to family of National Guard members and Reservists. Second, the right to take leave is no longer limited to a family member being on active duty or called to active duty in support of a contingency operation. The ability to take leave due to a qualifying exigency is now available during covered active duty, which is defined as when a spouse, child, or parent is deployed to a foreign country with the Armed Forces. These two changes expand the number of employees who are eligible to take qualifying exigency leave under the FMLA.

Military Caregiver Leave

The other type of leave related to military

service that was added to the FMLA in 2008 was the military caregiver provision. This provision, as originally enacted, allowed eligible employees to take up to 26 weeks of unpaid leave during a single 12 month period to care for a covered service member who was injured while serving on active military duty. The provision was limited to current members of the Armed Forces, including members of the National Guard and Reserves, who incurred a serious injury or illness while on active duty. "Serious injury or illness" was defined as an injury or illness that occurred in the line of duty on active duty in the Armed Services that rendered the service member medically unfit to perform the duties of the member's office, grade, rank, or rating.

The NDAA 2010 expanded the military caregiver leave provision in several important ways. First, the definition of "covered service member" has been expanded to include veterans. Family members may take leave to care for veterans as long as the veteran was a member of the Armed Forces, including the National Guard or Reserves, at any time in the five years prior to the date he or she began medical treatment, recuperation, or therapy. Second,



the new law expanded the definition of "serious injury or illness" to include preexisting injuries or illnesses that were aggravated in the line of duty.

Another change to the military caregiver provision involves when the serious injury or illness manifests itself. Previously the FMLA allowed military caregiver leave only for serious injury or illness that occurred while the service member was on active duty. This has been changed so that the serious injury or illness does not have to manifest itself while the service member is on active duty. Instead, under the new provision, it can manifest itself either before or after the service member becomes a veteran.

Under the terms of the NDAA 2010, the Secretary of Labor must define "qualifying injury or illness" before this type of leave is available. Because the changes provide that the injury can manifest itself after

the service member leaves active duty, however, psychological illnesses such as post-traumatic stress disorder may now be covered under the military caregiver provision.

What the Changes Mean for School Districts

School districts should assume that the new provisions are effective immediately, except for the provisions that require action by the Secretary of Labor. Accordingly, they should update their FMLA policies to reflect the new circumstances under which family members of service members may take leave. Human resources and other administrative personnel should be advised as to the new circumstances under which FMLA leave might be available.

In light of the changes the Department of Labor (DOL) is expected to issue new

notices, regulations, and forms in the near future, but it has not done so yet. The DOL also announced that it intends to review both the new military leave provisions and other FMLA revisions that were made during the Bush Administration. A notice of proposed rulemaking is expected to be issued by November 2010.

In the meantime, school districts should take special care that they are granting FMLA leave to military family members in accordance with the regulations as modified by the October 2009 amendments. As the DOL has yet to issue updated forms, relying on the now outdated forms could mean employers unknowingly violate the law by denying leave to an employee who is eligible under the modified FMLA military provisions. The chart below compares the new military FMLA provisions contained in the NDAA 2010 with the 2008 changes to the FMLA. **I&A**

	2008 Military FMLA Provisions	NDAA 2010 Amendment
Qualifying Exigency Leave	<ul style="list-style-type: none"> Limited to family members of National Guard members and Reservists Limited to service members on active duty or called to active duty "in support of a contingency operation" 	<ul style="list-style-type: none"> Expanded to include family members of all active duty service members Eliminated "in support of a contingency operation" and expanded the definition of covered active duty to "deployment with the Armed Forces to a foreign country"
Military Caregiver Leave	<ul style="list-style-type: none"> Limited to current members of the Armed Forces or service members on temporary disability retired status Limited the scope of serious injury or illness to those incurred while on active duty 	<ul style="list-style-type: none"> Expanded to include veterans who served in the Armed Forces during the five years preceding treatment, recuperation, or therapy Expanded serious injury or illness to include preexisting conditions aggravated while on active duty Serious injury or illness may manifest itself before or after the service member becomes a veteran

Save the Date!

The **2010 School Law Practice Seminar** will be held October 14-16 at the Renaissance Providence Hotel, Providence, Rhode Island. Program and registration information will be available soon!

Call for Proposals for the 2010 School Law Practice Seminar

Do you have a legal topic that you or your firm would like to present to a national audience? NSBA's Council of School Attorneys invites its members to submit proposals for the **2010 School Law Practice Seminar** to be held October 14-16 at the Renaissance Providence Hotel, Providence, Rhode Island. Please visit the Council's website at www.nsba.org/cosa for more information. **The deadline to submit your proposal is Monday, April 19, 2010.**

New School Law Practice Article Available on HITECH

Recent Health Information Technology for Economic and Clinical Health (HITECH) Act amendments to HIPAA have "covered entities"—including school districts—scrambling to understand and apply changes to their settled HIPAA privacy practices. This article discusses new HIPAA duties and expanded exposures added by HITECH and what districts should do to comply with HITECH. This article may be downloaded from COSA's eDocs store at <http://secure.nsba.org/storefront/>.

Thank You 2010 School Law Seminar Sponsors!

The Council would like to thank the sponsors of the *2010 School Law Seminar*:

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Thank You NSBA Council of School Attorneys Members!

Peter K. Fagen of Fagen, Friedman & Fulfroost, LLP of San Marcos, California, with the assistance of **Maggy Athanasious**, wrote NSBA's *amicus curiae* brief in *City of Ontario v. Quon*. The case, now before the U.S. Supreme Court, involves whether public employers may, without violating the Fourth Amendment, search the messages employees transmit and receive using government-issued communication devices. The Court will hear oral arguments in April, and a decision will be issued by the end of June. A copy of NSBA's *amicus* brief is available at <http://www.nsba.org/MainMenu/SchoolLaw/AmicusBriefs/City-of-Ontario-v-Quon.aspx>.

Elizabeth Eynon-Kokrda and **Kelly Clarke**, Baird Holm LLP, Omaha, Nebraska, wrote a **School Law Practice** article entitled *What Does HITECH Mean for Schools and Their Record Privacy Policies?* This article may be downloaded from COSA's eDocs store at <http://secure.nsba.org/storefront/>.

Kathryn Long Mahoney and **Vernie L. Williams**, Childs and Halligan, Columbia, South Carolina, did an audio conference entitled *Legal Issues Surrounding Student Misuse of Technology, Including Sexting*. A recording of the audio conference may be purchased at <http://www.nsba.org/SecondaryMenu/COSA/Seminars.aspx>.

2010 COSA Nominating Committee Report

The 2010 NSBA Council of School Attorneys' Nominating Committee met by conference call on February 4, 2010, to select candidates to serve as officers and directors for the 2010-2011 year. The Nominating Committee* consists of the Immediate Past Chairs of the Council and the Council Chair.

Elections for officers and directors will be held at the Council's annual meeting at 8:30 a.m. on Saturday, April 10, 2010, at the Hyatt Regency McCormick Place in Chicago, Illinois. During the meeting, the committee will thank retiring board members **Kenneth L. Childs** (SC), **Shellie Hoffman Crow** (TX), **Elizabeth A. Kaleva** (MT), and **Forrest Jack Lance** (GA) for their service to the Council. **Dean Pickett** (AZ), 2009-2010 Chair, will complete his term and will serve as Immediate Past Chair. **Deryl W. Wynn** (KS), 2006-2007 Chair, who has served as Past Chair for three years will complete his board service and will also be recognized at the Council business meeting. The committee thanks all those who submitted candidates for consideration.

RECOMMENDED SLATE OF NOMINEES

Thomas E. Wheeler, II, (IN) currently Chair-elect, becomes Council Chair without further vote of the membership.

Officers

Chair-elect.....**Patrice McCarthy** (CT)
 Vice-chair.....**Elizabeth Eynon-Kokrda** (NE)
 Secretary.....**Allison Brown Schafer** (NC)

Directors for First Two-year Term

Lisa A. Brown (TX)
Jennifer E. Gornall (PA)
Karla Schultz (TX)
Pilar Sokol (NY)

Directors for Second Two-year Term

John W. Borkowski (IN)
Justino D. Petrarca (IL)
Elizabeth B. Valerio (MA)
Maurice A. Watson (MO)

*Nominating Committee Members: Chair Jay Worona, Dean Pickett, Deryl W. Wynn, and Sam S. Harben, Jr.