Recent Court Decisions Impacting Juveniles

Introduction

The journal staff selected a number of recently decided court decisions involving the interests of juveniles. The cases summarized here include decisions of the United States Supreme Court, Federal Circuit Courts of Appeals, Federal District Courts, individual state Supreme Courts, and the California Courts of Appeal. Following the case summaries are two case spotlights which discuss in more detail two recently decided cases: (1) *Earls v. Board of Education*; and (2) *Braam v. State*, a Washington state case that could have far-reaching impact on other states' foster care systems.

Education

🕮 *Zelman v. Simmons-Harris*
122 S. Ct. 2460 (2002)

Ohio's Pilot Project Scholarship Program is an attempt to give educational choices to families affected by a failing school system. This project has a two-fold function. First, the program provides tuition aid to students in the Cleveland City School District who attend participating public or private schools of their parent's choosing. Second, the program provides tutorial aid for students who choose to remain in public school. As guided by the program, tuition aid is distributed to parents according to financial need, and parents are entirely free to choose their school of enrollment, religious or non-religious. In the 1999-2000 school year, however, 82% of the participating private schools had a religious affiliation and 96% of the students who participated were enrolled in religiously affiliated schools.

As a result, several Ohio state taxpayers challenged the program, claiming it violated the First Amendment's Establishment Clause. The district court granted summary judgment in favor of the taxpayers. On appeal, the Sixth Circuit Court of Appeals affirmed. In a 5-4 decision, the Supreme Court reversed the lower court, holding that the Ohio program is entirely neutral with respect to religion, permitting individuals to exercise genuine choice among public, private, secular and religious options.

Chief Justice Rehnquist, joined by Justices O'Connor, Scalia, Kennedy, and Thomas, described the program as being "one of true private choice, with no evidence that the State deliberately skewed incentives toward religious schools," thereby surviving scrutiny under the Establishment Clause. The Court concluded that the program does not offend the First Amendment because it was enacted for the valid purpose of providing educational opportunity and assistance. The majority also held that Ohio's program does not have the effect of advancing religion because vouchers are distributed to parents who have the private choice to apply the funding to religious schools. This indirect aid by the government does not result in the endorsement of religion. Rather than creating financial incentives that skew it toward religious schools, the program creates financial disincentives where private schools receive only half the assistance given to community schools and one-third given to magnet schools. In addition, parents must co-pay a portion of private school tuition.

In the dissenting opinion, Justice Souter, joined by Justices Stevens, Ginsburg, and Breyer, claimed that there is no excuse for giving short shrift to the Establishment Clause, despite Cleveland's failing schools.

🕮 *Prince v. Jacoby*
303 F.3d 1074 (9th Cir. 2002)

Tausha Prince, an eleventh grade student at Spanaway Lake High School in the Bethel School District, challenged the school's refusal to permit her Bible club to meet as an Associated Student Body club, which would entitle it to the same benefits as the other student clubs. The district court granted summary judgment in favor of the school district. The district court found that the Equal Access Act and the Establishment Clause forbid offering a religious club the various advantages offered to other student clubs. On appeal, the Ninth Circuit reversed holding that the school district violated the Equal Access Act and the Free Speech Clause of the First Amendment. The Ninth Circuit remanded the case to the district court for further proceedings.

🕮 *Ford v. Long Beach Unified Sch. Dist.*
291 F.3d 1086 (9th Cir. 2002)

Amanda Ford was scoring very high on traditional standardized IQ tests, but she was doing very poorly in school. Amanda's parents filed an action under the Individuals with Disabilities Education Act (IDEA), challenging the school district's assessment that she was not disabled. Amanda's parents believed Amanda was entitled to special education services for a condition described as a "central auditory processing disorder." The district court upheld the hearing officer's assessment that Amanda was not a learning disabled child. Her parents appealed, claiming the school district did not utilize a traditional IQ test. The Ninth Circuit affirmed the district court's ruling, holding that the assessment was not inadequate solely because the school district did not rely on traditional IQ tests.

🕮 *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*
307 F.3d 243 (3d Cir. 2002)

The Warren Hills School District enacted a racial harassment policy as a result of a pattern of disturbing racial incidents. Shortly after the enactment of the racial harassment policy, Thomas Sypniewski was suspended from school for wearing a "Jeff Foxworthy" t-shirt inscribed with "redneck" jokes. Sypniewski and his brothers filed this lawsuit to challenge the constitutionality of the school district's racial harassment policy. The racial harassment policy included a provision prohibiting the possession of materials creating "ill will." The district court held that the racial harassment policy was constitutional and denied the students' request for injunctive relief. The students appealed. The Third Circuit held that the policy was constitutional, except as applied to Sypniewski's shirt and the "ill will" provision. There was no evidence that the Sypniewski's expressive conduct in wearing the shirt caused the disruption required to regulate student's speech at school under *Tinker v. Des Moines Independent Community School District*. Additionally, while the policy was now valid because the school district inserted a disruption requirement, the policy's "ill will" provision" was struck because of both overbreadth and vagueness.

🕮 *Doe v. Pulaski County Special Sch. Dist.*
306 F.3d 616 (8th Cir. 2002)

J.M. and K.G. began "going together" during their seventh grade year. K.G. ended the relationship during the summer after their seventh grade year because of her interest in another boy. J.M. drafted a violent, misogynistic and obscenity-laden letter expressing a desire to molest, rape and murder K.G. The school expelled him, and J.M. sued, arguing the school board violated his free speech rights. The district court held the letter was not a "true threat," was protected speech under the First Amendment and ordered the expelled student, J.M.,

reinstated. A divided panel of the Eighth Circuit affirmed the district court's ruling. On rehearing en banc, the Eighth Circuit reversed, holding the letter amounted to a true threat because a reasonable recipient would have perceived the letter as a threat. Additionally, the Eighth Circuit held the school board decision to expel J.M. did not violate his First Amendment rights.

🕮 *Burwell v. Pekin Cmty. High Sch.*
213 F. Supp. 2d 917 (C.D. Ill. 2002)

A senior at Pekin Community High school reported that she was the victim of sexual harassment by male students at the school. The Pekin High School administrators investigated and concluded that no sexual harassment occurred. The senior then filed suit alleging that she was the victim of sexual harassment so "severe, pervasive and objectively offensive that she was deprived of access to educational opportunities and benefits." Plaintiff alleged that Pekin High School administrators were liable for intentional sexual harassment in violation of Title IX. She additionally alleged that the school-imposed restrictions designed to separate her and the defendants were actually retaliatory measures taken by the school. The district court granted Pekin High School's motion for summary judgment. It concluded Plaintiff's Title IX case failed under the standard set out by the Supreme Court in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999), and the evidence did not support Plaintiff's claim that the restrictions imposed on her were in retaliation for her sexual harassment complaint.

Delinquency

🕮 *In re Stanford*
123 S. Ct. 472 (2002) (mem.)

On October 22, 2002 the United States Supreme Court denied Stanford's petition for habeas corpus. Justice Stevens, with whom Justice Souter, Justice Ginsberg, and Justice Breyer joined, dissented.

Stanford requested that the court hold his execution would be unconstitutional because he committed his crime while less than eighteen years of age. Recently in *Atkins v. Virginia*, 536 U.S. 304 (2002) the Supreme Court held that subjecting mentally retarded persons to the death penalty was unconstitutional. For many of the same reasons, the dissenters stated it would also be unconstitutional to subject minors to the death penalty. Quoting Justice Brennan's dissent in *Stanford v. Kentucky*, 492 U.S. 361, 393-96 (1989), Justice Stevens pointed out the difference between minors and adults: "Juveniles so generally lack the degree of responsibility for their crimes that is a predicate for the constitutional imposition of the death penalty that the Eight Amendment forbids that they receive that punishment." Justice Stevens found support for his arguments in the fact that all states have legislation that "bars or significantly restricts" participation of minors in many activities that are open to adults. These activities include voting, serving on juries, and marrying without parental consent. Currently, the national trend requires individuals "to be older rather than younger" to participate in a number of activities. Moreover, the national consensus is moving toward the opinion that juvenile offenders should not be executed.

🕮 *United States v. Male Juvenile (Pierre Y.)*
280 F.3d 1008 (9th Cir. 2002)

A Native American juvenile, Pierre, committed two burglaries on the Fort Peck Indian Reservation. He had undergone tribal adjudication for one offense when the United States District Court for the District of Montana adjudged him a juvenile delinquent and prosecuted him for both burglaries. Pierre raised several objections to the federal prosecution, including an objection to certification under the Federal Juvenile Delinquency Act, 18 U.S.C.A. § 5032 (2002).

Under the Federal Juvenile Delinquency Act, a juvenile can only be federally adjudicated if the crime is "one against the United States." The Act further requires that the Attorney General obtain certification from the state of criminal activity declaring that the state does not have or will not exercise jurisdiction over the case. The defendant questioned the certification, contending that the Attorney General failed to consult relevant tribal authority to ascertain that the tribe would not assume jurisdiction.

On appeal, the Ninth Circuit held that § 5032 does not require the Attorney General to consult with tribal authorities before certification. Certification was proper because the Attorney General did obtain certification from the state of Montana.

🕮 *In re Robert H.*
117 Cal. Rptr. 2d 899 (Cal. Ct. App. 2002)

A minor used a nine-millimeter semi-automatic firearm to assault an adult. The minor had no prior contact with law enforcement. The juvenile defendant admitted to possession of an illegal firearm during case settlement. The court declared the minor a ward of the court. The minor then appealed the order of wardship, contending: (1) the court abused its discretion by ordering camp community placement in lieu of a disposition to home on probation; (2) the court abused its discretion by ordering

conditions of supervision for drug and alcohol testing because there was no relationship between drugs or alcohol and the offense; and (3) the court failed to make the formal findings required by Welfare and Institutions Code § 702 for removing a minor from the custody of his parents.

The Fourth Circuit held that the lower court did not abuse its discretion by considering the underlying assault as grounds for sentencing the minor to camp community placement because Welfare and Institutions Code § 125.5 requires the court to consider "the circumstances and gravity of the offense committed by the minor" and any other relevant or material evidence. The Fourth Circuit remanded the case to the lower court on the issues of conditions of supervision (whether drug and alcohol testing are allowed) and ordered the lower court to make the findings required by Welfare and Institutions Code § 702.

🕮 *Haas v. Super. Ct.*
40 P.3d 1249 (Ariz. Ct. App. 2002)

Maricopa County Superior Court assigned public defender Haas to represent three minors charged with incorrigibility. He moved to withdraw as counsel on the grounds that incorrigibility is not a delinquent act and the juveniles are not subject to detention. The Court denied his motion. Petitioner appealed. The Court of Appeals held that Haas misconstrued Ariz. Rev. Stat. § 8-221, at issue in the case. Petitioner focused only on the piece of legislation that affords juveniles the right to counsel in detention proceedings, while ignoring the statute in its entirety. The statute also contains a provision giving the court discretion in matters of attorney assignment for incorrigibility proceedings. The court concluded that it is the public defender's duty to accept court appointed clients and to represent them, and the juvenile court has the discretionary authority to so assign. Petition for Supreme Court review last denied on July 27, 2002.

Dependency

🕮 *In re Joshua R.*
128 Cal. Rptr. 2d 241 (Cal. Ct. App. 2002)

Joshua R. was born addicted to methamphetamines, and his mother was an incarcerated minor. In February 1997, shortly after his birth, he was placed in protective custody. At the time of his birth, the mother listed three men who could possibly be Joshua's father. Appellant was among the possible fathers. Appellant at first denied paternity, but six months later, claimed he was Joshua's father. Appellant requested a paternity test.

The trial court held that paternity was irrelevant because appellant was not the *presumed father*. The court of appeal affirmed. A presumed father is one who was married to (or in an attempted marriage with) the child's mother at the time of conception or birth, or one who receives the child into his home and openly holds the child out to be his own. Appellant does not meet the requirements of a presumed father and therefore paternity is irrelevant. Presumed fatherhood is based not on a biological connection but rather a man's *relationship* with the child (or the child's mother). Genetic testing, therefore, has no applicability in determining presumed father status. Because appellant is not the presumed father he is not entitled to reunification services or custody of the child.

🕮 *Dwayne P. v. Super. Ct.*
126 Cal. Rptr. 2d 639 (Cal. Ct. App. 2002)

Both parents of the children in this case stated that they may have Cherokee Indian heritage. The juvenile court held that the Indian Child Welfare Act (ICWA) did not apply because there was insufficient evidence that the children had Indian heritage. The juvenile court issued an order which terminated reunification services and scheduled a permanency planning hearing. The parents appealed from this decision.

The court of appeal held that the juvenile court had committed a prejudicial error by failing to comply with the ICWA. The parents had made the minimal showing required to trigger the ICWA notice requirements. The court of appeal issued a writ of mandate ordering the juvenile court to vacate its order, to send notice to the three federally recognized Cherokee tribes and to reinstate its order if no tribe intervened.

🕮 *In re Holly H.*
2002 Cal. App. LEXIS 5270 (Cal. Ct. App. 2002)

Sixteen years ago, at the age of three, Holly become a dependent of the court. When Holly was nineteen, the court terminated its jurisdiction over her. Holly and her attorney objected to the termination arguing that Holly was still in need of dependency services. A court will continue dependency past the child's eighteenth birthday when there is an existing or reasonably foreseeable threat of harm to the child. The juvenile court terminated dependency, because Holly had refused to take advantage of the services offered to her. The court of appeal found that the juvenile court did not abuse its discretion and upheld the termination.

Exploitation

🕮 *Ashcroft v. Free Speech Coalition*
535 U.S. 234 (2002)

The Child Pornography Prevention Act of 1996 ("Act") extended the federal ban on child pornography to virtual child pornography, sexually explicit images that appear to depict minors but were produced without using any real children. Two provisions of the Act were challenged in *Ashcroft v. Free Speech Coalition.* The first provision prohibited "any visual depiction, including any photograph, film, video, picture, or computer or computer-

generated picture" that "is, or appears to be, of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(B). The second provision banned any depiction of sexual conduct that is "advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct." 18 U.S.C. § 2256(8)(D). A trade association for the adult-entertainment industry, along with a book publisher, a painter, a photographer and others, challenged these two provisions. The district court granted summary judgment to the government. The Ninth Circuit reversed. In April 2002, the Supreme Court decided the two provisions were unconstitutional, because they were overbroad and violated the freedom of speech.

The government had argued that the Act was necessary, because virtual child pornography could threaten children in indirect ways. For example, pedophiles could use the virtual images to encourage children to participate in sexual activity. The Court, however, rejected the government's claim, noting that the government cannot ban speech fit for adults because it may fall into children's hands. The two provisions were unconstitutional because they had the possibility of proscribing speech which was neither obscene under *Miller v. California*, 413 U.S. 15 (1973) nor child pornography under *New York v. Ferber*, 458 U.S. 747 (1982). The Court noted that the Act would apply to pictures in a psychology manual, a film depicting the horrors of sexual abuse, the recent movie *American Beauty*, and various other works with literary, artistic, political or scientific value. Protected speech does not become unprotected speech simply because it resembles unprotected speech.

Case Spotlight: Board of Education v. Earls

122 S. Ct. 2559 (2002)

SLOAN R. SIMMONS

A national drug epidemic, a concerned community, and a suspicionless urinalysis drug test: these concepts bring to mind many images. It is unlikely that any of these images resemble a high school student in the show choir and marching band who is also a member of the Academic Team and National Honor Society. Even so, in *Board of Education v. Earls*,[1] the Supreme Court deliberated on a school district's drug testing policy that brought together this exact combination of factors and affirmed the "schools' custodial and tutelary responsibility for children."[2] The Court found that a school district's suspicionless urinalysis drug testing of students who participate in competitive extracurricular activities does not violate the Fourth Amendment.[3] As the basis for its decision, the Court looked to the 1995 holding in *Vernonia School District v. Acton*,[4] a case that allowed suspicionless drug testing of high school athletes. By its decision in *Earls*, the Court expanded school districts' latitude to conduct suspicionless drug tests on large portions of the

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[1] 122 S. Ct. 2559 (2002). Justice Clarence Thomas wrote the majority's opinion, joined by Chief Justice Rehnquist, and Associate Justices Scalia, Kennedy, and Breyer.

[2] *Id.* at 2565.

[3] *Id.* at 2569.

[4] Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 656 (1995).

student body as an effective measure against a national and local drug problem among the Nation's youth.[5]

In *Earls*, the center of controversy was the drug testing policy ("Policy") administered in the middle and high schools of Tecumseh, Oklahoma.[6] Tecumseh is a rural town outside of Oklahoma City.[7] The town's schools are operated by the Board of Education of Independent School District No. 92 of Pottawatomie County ("District").[8] The Policy required all Tecumseh middle and high school students to consent to drug testing as a prerequisite to participate in any of the schools' extracurricular activities.[9] Yet in practice only students involved in "competitive" extracurricular activities sanctioned by the Oklahoma Secondary Schools Association were subject to testing.[10]

The Policy required students intending to take part in an activity to submit to a drug test before participating as well as random tests throughout their involvement.[11] Furthermore, students agreed to be tested anytime upon reasonable suspicion.[12] A first positive test led to a five-day prohibition

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[5] The significance of the decision can be noted in the twelve amicus curia briefs filed with the Court. *Earls*, 122 S. Ct. at 2562. Among the individuals and organizations weighing in on the issue were the Solicitor General for the school district and the National Association of Criminal Defense Lawyers, the National Organization for the Reform of Marijuana Laws, the Cato Institute, the American Academy of Pediatrics, the National Education Association, the ACLU, and Yale law professor Akhil Reed Amar for Earls. *See id.*

[6] *Id.* at 2562. The Policy was instated in the fall of 1998 as the Student Activities Drug Testing Policy. *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.* at 2562, 2566. Examples of competitive extracurricular activities were memberships with the Future Farmers of America, Academic Team, Future Homemakers of America, band, choir, pom-pom, cheerleading, and athletics. *Id.* at 2562-63.

[11] *Id.* at 2563. The Policy used urinalysis tests that detected the presence of only illegal drugs such as amphetamines, marijuana, cocaine, opiates, and barbituates. *Id.* Individual medical conditions or authorized prescription medications were not subject to the tests. *Id.*

[12] *Id.*

from extracurricular activities.[13] After the five days, they could again participate if they showed proof that they were receiving drug counseling and agreed to take a second test.[14] A second positive test resulted in a two week suspension from extracurricular activities, mandatory substance abuse counseling and subsequent monthly testing.[15] A third positive test resulted in the student's suspension from all extracurricular activities for the rest of the school year or eighty-eight days, whichever was longer.[16]

The District identified four reasons for implementing its new testing policy for the Tecumseh schools. First, teachers testified that some students appeared to be on drugs while at school.[17] Teachers also reported that they heard students speaking about drug use.[18] Second, a drug dog found marijuana cigarettes near the high school's parking lot.[19] Third, police found drugs in the car of a member of the student-group, Future Farmers of America.[20] Lastly, community members voiced concerns over the schools' "drug situation" to the school board.[21]

Lindsay Earls was a student at Tecumseh High School.[22] She was a member of the school's show choir, marching band, Academic Team and the National Honor Society.[23] Lindsay and her parents brought a 42 U.S.C. § 1983 claim against the District challenging the Policy and seeking injunctive and declaratory relief.[24] Earls claimed that

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[13] *Id.* at 2567. After a first positive test result the student's parents were also notified to attend a meeting with school officials. *Id.*
[14] *Id.*
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.* It is unclear from the Court's opinion whether drugs or drug paraphernalia were found in the Future Farmer's vehicle. *See id.*
[21] *Id.*
[22] *Id.* at 2563.
[23] *Id.*
[24] *Id.* Daniel James also brought a § 1983 action against the school district, but the school district challenged his standing because his poor grades

the Policy's application to students in extracurricular activities violated the Fourth Amendment, that the District did not have a "special need" for the Policy, and that the Policy did not address an existing problem at the school or hope to provide any benefits in its implementation.[25] The district court upheld the Policy, finding that special needs existed in the school environment to limit student drug use.[26] The absence of an "epidemic" drug problem did not discount the record of drug use in Tecumseh schools.[27] Furthermore, the Policy was effective in limiting drug use because of its application to a broad range of the student body.[28] The Tenth Circuit Court of Appeals reversed, holding that the District could not implement a suspicionless drug test without first showing the existence of an "identifiable drug abuse problem."[29] The Supreme Court then granted certiorari.[30]

Finding the Policy constitutional under the Fourth Amendment,[31] the Court determined its reasonableness by balancing the students' privacy interest with the District's legitimate governmental interests.[32] The Court relied on

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made him ineligible to participate. *See id.* at 2563 & n.1. The district court and the Supreme Court found that the issue of James's standing was irrelevant because Lindsay Earls did have standing. *Id*.

[25] *Id.* Earls did not challenge the Policy's application to athletes or students who were under a reasonable suspicion of drug use. *See id.* at 2563 n.2.

[26] *Id.* at 2563.

[27] *Id*. (noting the district court's recognition of a drug problem in the Tecumseh schools dating back to the 1970's).

[28] *Id.*

[29] *Id.* at 2563-64.

[30] *Id.* at 2564.

[31] U.S. CONST. amend. IV.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularity describing the place to be searched, and the persons or things to be seized.

Id.

[32] *Earls*, 122 S. Ct. at 2564. The Court also explained that a warrant and probable cause are unnecessary to conduct a search and seizure (urinalysis

Vernonia's[33] fact specific balancing test and reviewed the students' expectation of privacy, the extent the Policy intruded on that expectation, the District's justifications for the Policy, and the efficiency of the Policy in furthering the District's justifications.[34] In doing so, the Court first looked to the expectation of privacy of students participating in extracurricular activities. The Court found the students' privacy interests were limited because of schools' "custodial responsibility and authority" over their discipline, health and safety. [35] Such responsibilities are necessary for schools to effectively educate.[36]

Lindsay Earls distinguished the case from *Vernonia*, arguing that students who participate in nonathletic extracurricular activities have a higher expectation of privacy.[37] Athletic participation requires recurring physical examinations and communal undress that are absent from other extracurricular activities.[38] The Court disagreed, noting that the decision in *Vernonia* relied on the schools' responsibility for children in their temporary custody.[39] Additionally, students who volunteer for nonathletic activities face similar intrusions to those that decrease a student athlete's expectation of privacy.[40] Such "intrusions" include off-campus travel where communal undress is necessary.[41] Furthermore, students participating in extracurricular activities

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drug test in this case) in the school setting because of schools' informal procedures and the burdensome nature of such requirements. *Id.* As a result, a school's administrative search and seizure is reasonable under the Fourth Amendment if it shows a "special need" for the procedure such as a school drug problem. *Id.*

[33] Vernonia Sch. Dist. v. Acton, 515 U.S. 646 (1995).

[34] *Earls*, 122 S. Ct. at 2565.

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.* at 2565 n.3.

[40] *Id.* at 2565-66.

[41] *Id.* at 2566. *But see id.* at 2574 (Ginsberg, J., dissenting) (noting that the "occasional out-of-town trips" required for extracurricular activities where communal undress is necessary are "hardly equivalent" to that in the athletic context).

are subject to rules that do not apply to the student body as a whole, similar to adults who participate in a closely regulated industry.[42] Such regulations diminish students' expectations of privacy. [43]

After finding that students subject to the Policy had a limited expectation of privacy, the Court turned to the nature of the intrusion caused by the District's testing.[44] The intrusion of students' privacy caused by the testing depends on the way the urine is collected.[45] The Policy required a faculty monitor to wait outside a closed restroom stall and listen for the "normal sounds of urination" to ensure that the student provided her own sample.[46] Collected urine was poured into two bottles, sealed, and placed in a mailing pouch.[47] This form of collection used in *Earls* is identical to that in *Vernonia*, except the District's policy provided more privacy to male students who could provide their sample in a closed restroom rather than in an open stall.[48] Consequently, the Policy's collection procedures were less problematic than the "negligible" intrusion caused in *Vernonia*.[49]

Though the Policy's procedures for collection were not intrusive on students' privacy, the use of the information gained from the tests is also a determinant of the Policy's intrusiveness.[50] The Policy required all test results to remain confidential and were released to school authorities only on a need to know basis.[51] Earls claimed that her choir teacher had

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[42] *Id.* at 2566. Each activity participant is monitored by a faculty advisor for compliance with the rules of the Oklahoma Secondary Schools Activities Association. *Id.*
[43] *Id.*
[44] *Id.* at 2566-67.
[45] *Id.* at 2566 (citing Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 658 (1995)). The excretory function of urination is traditionally allowed great privacy. *Id*. (quoting Skinner v. Ry. Labor Executives Ass'n, 489 U.S. 602, 626 (1989)).
[46] *Id.* at 2566.
[47] *Id.*
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*

reviewed her prescription drug list and carelessly left the information where other students could access it.[52] But, the Court dismissed her argument, as it did the distinction between athletic and nonathletic activities. The choir teacher was on a "need-to-know" basis and Earls's allegation that other students saw her private information was unsubstantiated.[53] Most importantly, law enforcement did not receive the test results and students were not subject to academic or other school-related discipline for a positive result.[54] A lengthy though indefinite suspension from the "privilege" of participating in extracurricular activities, after a student's third positive test, was the only adverse consequence of a positive test result.[55]

The last weight in the Court's reasonableness balance was the District's legitimate interests for the Policy and the Policy's fit to meeting these interests.[56] The Court restated its recognition in *Vernonia* of schools' interests in preventing drug use by students.[57] The emphasis on the health and safety needs of athletes in *Vernonia* apply just as convincingly to all school children.[58] The nationwide drug problem, coupled with evidence of drug use in the Tecumseh schools, solidified the District's interest in abating drug use by its students through its testing policy.[59] Even if the District lacked evidence of increased drug use in the Tecumseh schools, preventing the danger to children's health and safety caused by drug use entails the "necessary immediacy for a school testing

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[52] *Id.*

[53] *Id.* The Court also found Earls's "one example" of her choir teacher's alleged carelessness with her private prescription drug information insufficient to find an unreasonable privacy intrusion. *Id.*

[54] *Id.* at 2566.

[55] *Id.*

[56] *Id.* at 2567-69 (citing Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 661-62 (1995)).

[57] *Id.* at 2567.

[58] *Id.*; *see id.* at 2568 n.5 (noting the statistical data on drug use of the Nation's twelfth graders).

[59] *Id.* A demonstrated drug problem is unnecessary to justify a drug testing policy, but evidence of such "shores up" the "special need" for a program. *Id.* (citing Chandler v. Miller, 520 U.S. 305, 319 (1997)). The District's proffered evidence was enough to shore up the Policy's need. *Id.*

problem."[60] Furthermore, the Fourth Amendment does not require individualized suspicion to conduct a drug testing program.[61] Such a requirement might focus unfairly on unpopular student groups and the potential for litigation instigated by those selected for testing would chill a testing program's enforcement.[62] Lastly, a Fourth Amendment analysis that requires employing the least intrusive means for a drug testing program would foreclose any and all search and seizure policies.[63]

In dissent, Justice Ginsberg, speaking for herself and three other justices, alleged the majority's reliance on *Vernonia* and then its subsequent application of *Vernonia*'s balance[64] were both incorrect because of the differences between that case and *Earls*.[65] *Vernonia* relied particularly on the existence of a "drug culture" among the school district's student athletes.[66] The peer pressure that such students exert on the general student body and the increased safety concerns of student athletes under the influence of illegal drugs lay at the heart of the *Vernonia* holding and sufficed as the necessary special need to conduct suspicionless drug tests.[67] The "special needs" for testing athletes in the public school context do not apply to all suspicionless school drug tests.[68]

Ginsberg additionally disputed the majority's parallel between extracurricular activities and athletics on two grounds. First, the "voluntary" nature of extracurricular activities was questionable: "Participation in such activities is

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[60] *Id.* at 2568.
[61] *Id.*
[62] *Id.* at 2568-69.
[63] *Id.* at 2569 (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 556-57 & n.12 (1976)). *See id.* at 2569-71 (Breyer, J. concurring).
[64] *See id.* at 2565.
[65] *Id.* at 2571-78 (Ginsberg, J., dissenting). While Justice O'Connor joined Justice Ginsberg's dissent, she also filed a separate dissent. *Id.* at 2571 (O'Connor, J., dissenting). O'Connor noted that she believed that *Vernonia* had been wrongly decided and that even applying *Vernonia's* balance the policy in *Earls* was unreasonable. *Id.*
[66] *Id.* at 2572 (Ginsberg, J., dissenting).
[67] *Id.* at 2572, 2576-77.
[68] *Id.* at 2572.

a key component of school life, essential in reality for students applying to college, and for all participants, a significant contributor to the breadth and quality of the educational experience."[69] Contrary to the Policy's intended effect that students abstain from drug use to participate in extracurricular activities, it was just as probable that students would not participate so that their drug use remained secret.[70]

Second, the privacy interests of participants in athletics are different from that for students participating in extracurricular activities.[71] Student athletes regularly require communal undress and because of the potential risk of injury while competing, schools must take preventative action to ensure students are not participating while under the influence.[72] Additionally, the immediacy of the drug problem in *Vernonia* "dwarfed" the problem in the Tecumseh schools.[73] Thus, students who "voluntarily" participate in activities necessary for future success and who seemingly retain their expectations of privacy are subject to drug tests based on a "drug problem" that is supported by far less urgency than in *Vernonia*.[74]

The dissent noted that if the District was to teach students the value of constitutional principles "by example," the Policy taught a contrary lesson.[75] Schools are justified for conducting drug tests on student athletes leading an "exploding drug epidemic."[76] But such a testing scheme "unacceptably abridge students' rights" in different

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[69] *Id*. at 2573. *But see id.* at 2566 n.4 (noting that Justice Ginsberg's emphasis on the value of extracurricular activities to students' educational experience and college aspirations are just as relevant to school athletics).
[70] *Id.* at 2577 (Ginsberg, J., dissenting).
[71] *Id.* at 2573 (noting that volunteering for extracurricular activities is like volunteering for honors classes).
[72] *Id*.
[73] *Id*. at 2575.
[74] *See id*. at 2572 (noting the District Superintendent's comment that the Tecumseh schools drug problem was "not . . . major").
[75] *Id.* at 2578 (quoting Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting)).
[76] *Id.*

conditions.[77] Reweighing the majority's balance between the students' expectation of privacy and the District's legitimate governmental interests, the dissent concluded that the Policy was clearly unreasonable.[78] Instead the Policy "discount[ed] important principles of our government as mere platitudes."[79]

Despite the dissent's arguments, the Court's holding is no surprise. In the past seventeen years the Court has increasingly narrowed the constitutional rights of children tendered to the government's care during the school day.[80] Those opposed to the Court's movement in this direction cite the 1969 case of *Tinker v. Des Moines Independent Community School District* to stand for the notion that school children do not "shed their constitutional rights . . . at the schoolhouse gate."[81] But, as Justice Ginsberg noted, *Tinker* acknowledged that school children's rights are different than adults' rights, and must be tailored to the schools' unique responsibility for their students.[82] This is the result of the Court's emphasis on the schools' custodial and tutorial role and the more limited view of students' privacy expectations when they volunteer for activities outside of the general curriculum, which subject them to rules and practices inapplicable to the general student body.

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[77] *Id.*

[78] *See id.* at 2577 (noting that even if certain activities did pose safety risks, the Policy's weakness was not its "imperfect tailoring," but is lack of tailoring all together).

[79] *Id.* at 2578 (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)).

[80] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262-76 (1989) (holding that a principal's removal of two student articles from the school's newspaper did not violate the students' First Amendment rights to free speech); New Jersey v. T.L.O., 469 U.S. 325, 327-48 (1985) (holding that a vice principal's subsequent search into the inner compartments of a student's purse and discovery of marijuana was reasonable under the Fourth Amendment after he initially searched the purse for the existence of cigarettes because of reports that the students had violated school policy by smoking in a school restroom).

[81] 393 U.S. 503, 506 (1969).

[82] *Earls*, 122 S. Ct. at 2572 (quoting *Tinker*, 393 U.S. at 506 and Vernonia Sch. Dist. v. Acton, 515 U.S. 646, 655-56 (1995)).

Because of *Earls*, suspicionless drug tests on students in the band and Future Farmers of America is constitutional if the now minimal showing of special needs exist. The consequences of the *Earls* decision are both immediate and far reaching. In California and surely other states, the *Earls* decision has prompted drug testing companies to solicit school districts for business.[83] For schools with serious drug problems, *Earls* may legitimate a useful tool.[84] However, the inculcation of constitutional values to the Nation's youth is additionally challenging in the face of *Earls*-like policies because schools discount their importance in the school environment.[85] In concurrence, Justice Breyer advised that school districts discuss the concerns about such testing policies with the community before taking action.[86] For the time being, this may be the best way to ensure students' privacy where the Constitution apparently does not.

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[83] Laurel Rosen, *Schools Targeted by Drug Testers*, SACRAMENTO BEE, Nov. 16, 2002, at A1. Relying upon the Nation's schools' responses to *Vernonia*, it is unlikely that schools will welcome such business. *See* Schimmel, *supra* note 82, at *5 (noting that only 5% of the nation's schools instituted drug testing policies for student athletes in the seven years following *Vernonia*).

[84] *See* David Schimmel, Commentary, *Supreme Court Expands Random Drug Testing: Does the Fourth Amendment Still Protect Students?*, 170 EDUC. L. REP. 15, *6 (Dec. 5, 2002) (listing the procedures schools should follow if they choose to implement a suspicionless drug testing program in response to *Earls*).

[85] *See generally* Drug Policy Alliance, *at* http://www.drugtestingfails.org (last visited Jan. 10, 2003) (providing information and resources in opposition to drug testing programs and the *Earls* decision).

[86] *Earls*, 122 S. Ct. at 2571 (Breyer, J., concurring).

Case Spotlight: Braam v. State

No. 98-2-01570-1 (Wash. Super. Ct. May 31, 2002).

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Few cases have found that multiple foster care placements result in a harm that violates children's constitutional rights.[1] Researchers have extensively documented the emotional and psychological harm children suffer due to multiple foster care moves because they are deprived of stability and permanence.[2] But, courts have been reluctant to declare this practice unconstitutional. In *Braam v. State*,[3] a class of foster children who had been subjected to three or more foster homes and denied mental health care alleged that the conditions of the Washington foster care system violated their rights under the Fourteenth Amendment of the Constitution as well as various federal and state statutes.[4] The Washington State Superior Court held that the Department of Social and Health Services (DSHS) violated the constitutional rights of foster children in its care, and the

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[1] *See* Bill Grimm, *Jury Finds Washington Foster Care System Unconstitutional*, 13 YOUTH L. NEWS 1, Jan.-Feb. 2002, at 1, http://www.youthlaw.org/Braam02.pdf.

[2] THOMAS P. MCDONALD, ASSESSING THE LONG-TERM EFFECTS OF FOSTER CARE: A RESEARCH SYNTHESIS (1993).

[3] No. 98-2-01570-1 (Wash. Super. Ct. May 31, 2002). Filed in Whatcom County.

[4] *See* Grimm, *supra* note 1, at 1.

court issued an injunction ordering systemic reform of the state's foster care system.[5]

Several of the state's foster care practices were at issue in *Braam*. These practices included subjecting children to multiple placements and disruptions in school; failing to adequately train, inform and support foster parents; denying children necessary and effective mental health care; placing children in unsafe homes or facilities; and separating children from siblings in foster care.[6] These practices seem inconsistent with the state's obligation to provide care that protects children in its custody from harm and furthers their well being. The jury in *Braam* found that these harmful practices violated the constitutional rights of the foster children, and that these constitutional violations were the proximate cause of injury to the plaintiffs.[7]

The Washington State Superior Court issued an injunction addressing ways to remedy the constitutional violations found in each of the different areas of practice. The Court ordered DSHS to address the problem of placement stability by increasing the amount of therapeutic foster homes, notifying the child's attorney before terminating a placement, and ensuring educational continuity. The Court ordered DSHS to institute foster parent training and support requirements to address the lack of foster parents competent to care for children with emotional and psychological disabilities.[8] DSHS was also ordered to provide children with physical and mental health assessments and related treatment.[9] The court ordered DSHS to cease placing foster children in unsafe placements such as office buildings, detention centers or with sexually aggressive youth.[10] Lastly, the court ordered

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[5] Final Injunction Order at 2, Braam v. State (Wash. Super. Ct.) (No. 98-2-01570-1), http://www.childrensalliance.org/4Download/Braam-Final-Injunction-Order.pdf.
[6] *See* Grimm, *supra* note 1, at 1.
[7] Final Injunction Order, *supra* note 5, at 2.
[8] *Id*. at 3-5.
[9] *Id*. at 8.
[10] *Id*. at 8-9.

DSHS not to separate siblings placed in foster care unless a child's safety is at risk.[11]

DSHS appealed the Court's injunction to the Court of Appeals, which stayed all but one of the lower court's provisions. The case was then transferred to the Washington Supreme Court.[12] DSHS is appealing the injunction on five grounds. First, DSHS claims that foster children do not have a liberty interest subject to due process protection under the Fourteenth Amendment.[13] Second, DSHS argues that even if the foster children in this case are found to have a constitutional claim, the children did not establish that DSHS violated the constitutional test.[14] Third, DSHS argues that the court's injunction is overreaching and not warranted by the issues raised in the case.[15] Fourth, DSHS raises separation of power concerns, claiming that the legislature is the appropriate place to deal with reform of the foster care system.[16] Finally, DSHS challenges the court's holding on evidentiary and procedural grounds.[17] The Washington Supreme Court heard oral argument on November 19, 2002 and is expected to rule on the appeal in 2003.[18]

Many states are currently considering the court's role in protecting foster children and reforming the child welfare system.[19] The Washington Supreme Court's ruling in the

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[11] *Id*. at 9-10.
[12] WASH. ATT'Y GEN., BACKGROUND PAPER ON WASHINGTON SUPREME COURT CASE CHALLENGING CONSTITUTIONALITY OF FOSTER CARE SYSTEM: JESSICA BRAAM, ET AL, V. STATE OF WASHINGTON, *at* http://www.wa.gov/ago/braam/background.shtml.
[13] *Id*.
[14] *Id*.
[15] *Id*.
[16] *Id*.
[17] *Id*.
[18] Nat'l Ctr. for Youth Law, *Washington Supreme Court Hears Argument in* Braam v. State of Washington (2002), *at* http://www.youthlaw.org/Braamupd.pdf.
[19] Lawsuits have been filed in Washington, D.C. and nine states—Connecticut, Florida, Kansas, Missouri, Wisconsin, New Jersey, New Mexico, Tennessee and Georgia—asking judges to supervise entire foster-care agencies. *See* Cynthia McFadden, *Foster Care Stretched*

Braam appeal is likely to affect how foster children's constitutional rights are protected by the court in other states. William Grimm, an NCYL attorney noted, "This case has huge national implications in the pinball lives that children suffer upon entering foster care not only in Washington, but elsewhere."[20] If the Washington Supreme Court upholds the lower court's injunction and finds that a foster child is guaranteed at least as much protection under the law as a person civilly committed into a state psychiatric facility, many other state courts may follow Washington's precedent.[21] Child advocates may utilize the court system to a much greater extent in the nationwide effort to reform the foster care system and protect foster children's constitutional rights.

Beyond Limits, ABC NEWS, July 2, 2002, *at* http://abcnews.go.com/sections/wnt/DailyNews/fostercare020702.html

[20] Heath Foster, *Key Foster Care Case for State Justices*, SEATTLE POST-INTELLIGENCER, Nov. 19, 2002, http://seattlepi.nwsource.com/local/96240_foster19.shtml

[21] *Id*.