SUPREME COURT OF NEW JERSEY

MICHAEL and DEBORAH JOYE, on behalf of themselves and their minor child, SHAUN JOYE; PHIL and JOAN GREINER, on behalf of themselves and their minor child, MELISSA REINER; MARK and LINDA ZDEPSKI, on behalf of themselves and their minor child, ANNA ZDEPSKI,

Plaintiffs-Appellants,

v.

HUNTERDON CENTRAL REGIONAL HIGH SCHOOL BOARD OF EDUCATION and ACTING SUPERINTENDENT OF SCHOOLS, JUDITH GRAY, in her official capacity,

Defendants-Respondents.

Majority Decision:

We are called on to evaluate the constitutionality of a high school's random drug and alcohol testing program. The program applies to all students who participate in athletic and non-athletic extracurricular activities, or who possess school parking permits. Students who test positive for drug or alcohol use are suspended temporarily from those activities or must relinquish their parking permits. They also are required to receive counseling and to seek other treatment if necessary. They are not, however, prosecuted or otherwise exposed to criminal liability. The United States Supreme Court has upheld similar programs of other states, concluding that they do not offend the United States Constitution. We hold that the program before us does not violate the New Jersey Constitution.

Specifically, the school's substance-abuse problem has been documented by survey results showing that a third of the students in the upper grades have used illegal drugs and that forty percent of students in the same grades have been intoxicated within the survey's prior twelve-month period. Those results are consistent with other data, including information regarding three deaths due to heroin overdoses in municipalities within the school district, and consistent with testimony of counselors and other school personnel.

In following the course charted by our federal counterpart, we do not signal a retreat from this Court's history of affording citizens enhanced protections under our State's constitution. The New Jersey Constitution remains a critical safeguard against unreasonable, unfair, and overbearing governmental action. The program before us is consistent with existing law recognizing that students have a diminished expectation of privacy in a public-school context. Equally important, our

law further provides that school officials are responsible for the children entrusted to their care.

Hunterdon Central Regional High School (Hunterdon Central) is located in Flemington and provides secondary education to approximately 2,500 students enrolled in grades nine through twelve. Since 1987, school administrators have implemented several policies designed to deter students from using alcohol and illegal drugs, and to counsel students who are experiencing substance-abuse problems. The school provides drug-related awareness programs in individual classes and through larger student assemblies. In addition, it maintains a student assistance program (SAP) that employs three full-time professionals who counsel students and their families regarding drug and alcohol abuse.

The school occasionally conducts searches of student lockers and so-called "dog-sniffing sweeps" in concert with the county prosecutor. Under a suspicion-based program in place since 1996, the school also tests individual students who are suspected of using illicit drugs or alcohol. The locker searches, dog-sniffing sweeps, and suspicion-based tests are not challenged in this appeal.

Lisa Brady is the school's principal. Brady submitted a certification in which she indicated that despite the above efforts, in 1997 administrators continued to have concerns "about the apparent presence of illegal drug and alcohol use by students." To assist it in better understanding the scope of the perceived problem, the Hunterdon Central Regional High School Board of Education (Board) retained the services of the Rocky Mountain Behavioral Science Institute, Inc. (RMBSI) of Fort Collins, Colorado. The Board commissioned the RMBSI to conduct a survey regarding "the nature and extent of illegal drug and alcohol use by Hunterdon Central students[.]" The survey reveals that as of the 1996-97 school year, over thirty-three percent of Hunterdon Central's students between grades ten and twelve had used marijuana within the preceding twelve-month period. It also indicates that thirteen percent of seniors had tried cocaine; twelve percent of juniors had used hallucinogens; twelve percent of sophomores had tried stimulants; and twenty-one percent of freshmen had tried inhalants. As for alcohol, the study indicates that over forty percent of students between grades ten and twelve had "been drunk" within the twelve-month period prior to the survey, and over eighty-five percent of all students had tried alcohol.

Challenging the program's constitutionality on behalf of themselves and their respective children, three sets of parents (collectively, plaintiffs) filed this suit in August 2000. Their complaint seeks to overturn the school's entire random-based policy, including its athletic and non-athletic components. Defendants are the Board and the Superintendent of Schools. Joan Greiner, formerly the task force's vice chair, is one of the plaintiffs. She submitted a certification on behalf of herself and her husband contending that the Board's policy violated their daughter's right to privacy and "interfered with our parental rights to raise our daughter as we

think best and to teach her the personal responsibility she needs as a young adult." The complaint asserts a similar contention on behalf of the other two sets of plaintiffs. Greiner also expressed a concern that if subjected to the program, her daughter would have had "to reveal medical information if she [had been] selected for random testing." More broadly, Greiner stated that "there was no evidence of the existence of drug or alcohol problems specifically among students who participate in sports, extracurricular activities, or who have parking permits."

The trial court agreed with plaintiffs, invalidating the entire program. The court determined that the program violated the prohibition against unreasonable searches and seizures under Article I, paragraph 7 of the New Jersey Constitution, a provision analogous to the Fourth Amendment of the United States Constitution. With one member of the panel dissenting, the Appellate Division reversed the trial court's determination in a reported opinion written by Judge Stern. Plaintiffs appealed to this Court as of right. R. 2:2-1(a)(2).

Turning to the merits of their arguments, the parties do not dispute that Hunterdon Central's random drug and alcohol testing program plainly is constitutional under federal law. The sole issue is whether the program offends the New Jersey Constitution.

The seminal case addressing random or suspicionless drug testing in a public school is Vernonia School District 47J v. Acton, 515 U.S. 646 (1995). In that case, a school district in Oregon adopted a policy that required "all students participating in interscholastic athletics" to consent to random drug testing. Considering three factors, "the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search," the Court held that the school district's policy was "reasonable and hence constitutional." The Court cautioned that suspicion-less drug testing might not "pass constitutional muster in other contexts."

In evaluating the policy under a special-needs balancing test, the Court first considered the nature of the privacy interest at stake. The Court explained that "particularly with regard to medical examinations and procedures, . . . 'students within the school environment have a lesser expectation of privacy than members of the population generally.'" (quoting New Jersey v. T.L.O., 469 U.S. 325 (1985). It further observed that student athletes have an expectation of privacy even lower than that of other students. The Court stated that "[b]y choosing to 'go out for the team,' [student athletes] voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally."

The Court next considered the nature of the intrusion engendered by the policy. In the Court's view, even though the collection of urine intrudes on an "'excretory function traditionally shielded by great privacy,' . . . the degree of intrusion depends upon the manner in which production of the urine sample is

monitored." The Court noted that the school collected urine samples under conditions "nearly identical to those typically encountered in public restrooms[.]" Under those circumstances, the Court concluded that "the privacy interests compromised by the process" were "negligible."

The Court's privacy analysis also included the scope of the urinalysis itself. In that regard, the Court found it significant that the tests sought to reveal only drug use and not "whether the student is, for example, epileptic, pregnant, or diabetic[.]" Moreover, the Court emphasized that the school disclosed the test results only to a limited number of personnel on a need-to-know basis, and that it did not forward the results to law enforcement authorities for criminal prosecution.

The Court then examined "the nature and immediacy of the governmental concern at issue[,]" and expressed no doubt that deterring student drug use "is important – indeed, perhaps compelling." The Court also viewed the policy as being narrowly tailored to detect "drug use by school athletes, where the risk of immediate physical harm to the drug user or those with whom he is playing his sport is particularly high." Along those same lines, the Court found that "the particular drugs screened by the [drug testing policy] have been demonstrated to pose substantial physical risks to athletes."

The Supreme Court extended Vernonia's holding in Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, (2002). The drug policy at issue in that case applied "to competitive extracurricular activities" such as the "Academic Team, Future Farmers of America, Future Homemakers of America, band, choir, pom-pom, cheerleading, and athletics." The policy required all students to submit to an initial drug test before beginning an extracurricular activity, to submit to random drug testing during the period of participation, and to "agree to be tested at any time upon reasonable suspicion."

With Vernonia and Earls as background, we turn to New Jersey law. Article I, paragraph 7 of the New Jersey Constitution states:

> 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 warrant shall issue except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the papers and things to be seized.

Generally, reasonableness under Article I, paragraph 7 requires the police to undertake a search of a person only when authorized by a warrant issued by a neutral judicial officer. N.J. Transit PBA Local 304 v. N.J. Transit Corp., 151 N.J. 531 (1997). In applying for the warrant, the government must have probable cause to believe that the person to be searched has violated the law. Those strictures, however, are not absolute.

Our willingness to tolerate a warrantless search often turns on the overall reasonableness of the government's conduct and the degree to which a citizen "has a legitimate expectation of privacy in the invaded place." State v. Stott, 171 N.J. 343 (2002). We have observed that "[a] subjective expectation of privacy is legitimate if it is one that society is prepared to recognize as reasonable[.]" Our law also reflects that schoolchildren possess a diminished expectation of privacy and, correspondingly, that school officials must have authority "to maintain order, safety and discipline [within a school]." State in re T.L.O., 94 N.J. 331 (1983).

This Court has observed that "[i]n a limited sense the teacher stands in the parent's place in his relationship to a pupil under his care and charge, and has such a portion of the powers of the parent over the pupil as is necessary to carry out his employment." Titus v. Lindberg, 49 N.J. 66 (1967). The foregoing does not mean, however, that school officials enjoy absolute constitutional immunity. Rather, courts have held that constitutional protections extend to students within the public-school context, but not to the full extent that such protections extend to adult citizens in other settings.

In T.L.O., we articulated a reduced constitutional standard for evaluating searches by school officials. We stated that school officials are authorized to conduct such administrative searches, without a warrant and without probable cause, provided that they have "reasonable grounds to believe that a student possesses evidence of illegal activity or activity that would interfere with school discipline and order[.]" T.L.O., therefore, established two critical principles. First, the right to be free of unreasonable searches and seizures extends to students within a public school. Second, the nature of the schoolhouse environment, with its emphasis on safety, order, and discipline, requires a relaxed application of traditional search-and-seizure rules.

In sum, we conclude that Vernonia's special-needs approach provides an appropriate framework for evaluating plaintiffs' State constitutional claims. The analysis, however, does not end there. Within the special-needs framework, we now must determine whether Hunterdon Central's random drug and alcohol testing policy is reasonable based on a weighing of three factors. They 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. We will address each factor separately and in that order.

Considering the first factor, students generally have diminished privacy expectations born of the government's duty to maintain safety, order, and discipline in the schools. Student athletes, in particular, shed much of their personal privacy when deciding to join a team sport. That they must dress and undress in front of teammates and often shower in open facilities is common knowledge. Although not to the same extent, students involved in non-athletic activities similarly subject themselves to additional regulation or to situations in which their privacy is

compromised. "Some of these clubs and activities require occasional off-campus travel and communal undress. All of them have their own rules and requirements for participating students that do not apply to the student body as a whole." Earls, *supra*. Similarly, a student who operates a motor vehicle on school grounds requires a parking permit, a requirement not applicable to students who do not seek parking privileges. Some extracurricular activities will not have the same elements of lack of privacy such as the communal undressing and locker room as athletics, but many extracurricular activities have elements of shared exposure to other student participants when performing specified activities such as the putting on of an organization's uniforms, or the general need to change into different required clothes for a particular event.

Given those realities and the traditional relationships between school officials and students, we are satisfied that the students affected by Hunterdon Central's random drug and alcohol testing program have a reduced expectation of privacy.

We next evaluate the relative obtrusiveness of the search. We affirm the basic premise that a citizen's "'excretory function traditionally [is] shielded by great privacy.'"

Hunterdon Central's 'collection policy' offers protections against being overly obtrusive. Students provide their specimen samples in closed-door restrooms without being observed directly by adult monitors. In that respect, the collection process affords students greater personal privacy than the process in Vernonia, supra, which required male students to produce samples at a urinal while monitors were permitted to "listen for normal sounds of urination." The process here also is less invasive than the collection process in Earls, supra, in which a faculty monitor waited outside the restroom stall and "'listen[ed] for the normal sounds of urination in order to guard against tampered specimens and to insure an accurate chain of custody.'"

We view the policy's intrusiveness within the broader context of current New Jersey regulations. Under existing law, students must undergo medical examinations as they enter school. N.J.A.C. 6A:16-2.2(d)(1). Additionally, they must submit to an examination once during early childhood (pre-school through third grade), once during pre-adolescence (grades four through six), and once during adolescence (grades seven through twelve). The above regulations apply equally to every student, not just to student athletes. Compare N.J.A.C. 6A:16-2.2(e) (regulating all students) and (h) (mandating more particular requirements for student athletes). We find that the school's test policy limits the intrusion on the students' privacy interests and protects their personal dignity to the extent possible under the circumstances.

The remaining factor under the special-needs analysis requires that we evaluate the strength of the government's asserted need in conducting the search. In New Jersey, data released in 1999 by then-Attorney General John J. Farmer, Jr., shows "virtually no change in young people's use of alcohol, marijuana, hallucinogens, cocaine, amphetamines and heroin" between 1995 and 1998. The data show that "[a]bout four in every five students (78.5%) report the use of alcohol at some time in their lives[,]" that "36.9% [report using marijuana] in the past year[,]" and that "[t]he most widely used illicit drugs, other than marijuana, are hallucinogens and amphetamines."

The survey results indicating that a third of the students in the upper grades continue to use marijuana, demonstrate the scope of the school's problem. Although the situation at Hunterdon Central does not equate with the "state of rebellion" that existed in Vernonia, the record clearly reveals illegal drug and alcohol use affecting a sizable portion of the student population. Viewing the record as a whole, we are satisfied that the Board was faced with a significant drug and alcohol problem when it expanded the random testing program to its present form.

We emphasize that no part of our analysis is intended as an endorsement of the Board's decision on policy grounds. Whether the Board's program reflects a wise or appropriate expenditure of resources is for the Board and its local constituents to determine. Our sole task is to evaluate the Board's action within the special-needs framework as articulated by our federal counterpart and as applied by this Court. Having considered the affected students' diminished expectation of privacy, the sufficient limitations on the obtrusiveness of the testing, and the substantial governmental interest in maintaining a school environment free of drugs and alcohol, we find that Hunterdon Central's program passes muster under Article I, paragraph 7 of the New Jersey Constitution.

Urging a contrary conclusion, plaintiffs argue that we should construe Article I, paragraph 7 as providing greater protection to Hunterdon Central's students than that available under the Fourth Amendment. On more than one occasion this Court has interpreted the State's constitution as affording its citizens greater protections than those afforded by its federal counterpart. Those instances, by and large, involved cases in which a citizen was exposed to criminal liability, with the Court concluding that local conditions required departure from federal jurisprudence.

In the case of suspicionless drug testing, however, we agree with Judge Stern that "the courts of New Jersey, to date, seem to follow the federal Supreme Court when dealing with [those types of] issues[.]" Our disposition is in accord with Desilets v. Clearview Regional Board of Education, 265 N.J. Super. 370 (App. Div. 1993). In that case, a junior high school sponsored a voluntary field trip, using buses provided by the school board. A parent of each participating student had to sign a permission slip, which stated that students' hand luggage would be searched. The court observed:

> The need for close supervision in the schoolhouse is intensified on field trips where opportunities abound to elude the watchful eyes of chaperones. Administrators and teachers have a duty to protect students from the misbehavior of other students.
>
> We are not persuaded that the New Jersey Constitution provides greater protection under the circumstances of this case than its federal counterpart. We note that in its T.L.O. opinion the New Jersey Supreme Court analyzed the search and seizure issue under the Fourth Amendment to the United States Constitution, and did not suggest that New Jersey's organic law imposed more stringent standards.

Plaintiffs also refer to a separate provision, Article I, paragraph 1, which provides:

> "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness." Plaintiffs cite numerous decisions of this Court construing that provision, contending that they "are significant because they evidence this State's heightened concern for protecting personal privacy in a wide variety of contexts."

There is no question that Article I, paragraph 1 forms the basis of several decisions implicating highly personal family-planning issues, such as sterilization and reproductive choice. See, e.g., Planned Parenthood v. Farmer, 165 N.J. 609 (2000) (citing Article I, paragraph 1 in invalidating statute conditioning minor's right to abortion on parental notification); Right to Choose v. Byrne, 91 N.J. 287 (1982) (invoking Article I, paragraph 1 in invalidating statute prohibiting Medicaid funding for non-life-threatening abortions); In re Grady, 85 N.J. 235 (1981) (referring to Article I, paragraph 1 in case involving sterilization of mentally incompetent persons).

Those cases, however, do not suggest that the right of privacy inherent in Article I, paragraph 1 should be interchanged with the privacy interests that otherwise would be reviewed under this Court's search-and-seizure jurisprudence. To the contrary, we consistently have separated the two lines of analysis, reserving exclusively to Article I, paragraph 7 any question implicating one's privacy interest in connection with a governmental search, including compelled collection of one's bodily fluids. See, e.g., State v. Ravotto, 169 N.J. 227 (2001) (analyzing exclusively under Article I, paragraph 7 and its Fourth Amendment analogue State's forced taking of blood to test alcohol content); N.J. Transit, supra, 151 N.J. 531 (evaluating

random drug test involving urine collection exclusively under Article I, paragraph 7). We adhere to that approach in resolving the present dispute.

Plaintiffs contend that participation in extra-curricular activities "are sufficiently important to an individual's educational success that the government's conditioning their availability on the relinquishment of the right to be free from suspicionless searches warrants careful scrutiny under Article I, ¶ 7." We recognize, of course, the intrinsic value of extracurricular activities. We have given the Board's policy the careful scrutiny urged by plaintiffs. In so doing, we cannot conclude that the importance of extracurricular activities outweighs the Board's articulated need to engage in reasonable efforts to enhance the educational environment for all students by reducing substance abuse within its high school.

The challengers also contend that the record contains no direct proof that illegal drug and alcohol use exists among student athletes and those engaged in other extracurricular activities, to whom the testing policy applies. To be sure, the RMBSI survey results do not distinguish between those who engage in extracurricular activities and those who do not. The Board, however, indicates that its expanded policy applies to about 2,000 of the school's 2,500 students, or about eighty percent of the entire student body. In view of that large percentage, the Board acted reasonably in considering the general survey results as relevant indicators of drug and alcohol use among the eligible test group.

Perhaps most important, no student is exposed to criminal liability because, at its heart, the program is designed to promote the health of Hunterdon Central's students and their ability to learn. Therefore, we have not applied a "traditional" search-and-seizure analysis for the simple reason that this is not a traditional case. Our holding thus is unrelated to the many criminal-law decisions in which we have afforded New Jersey citizens greater protections than those found under the federal constitution when the relevant circumstances have warranted that result.

The fact that a large number of high school students theoretically might be subject to drug testing does not render such tests constitutionally infirm. What that fact does require is that we carefully balance the interests at stake, which we have done in this case by virtue of applying all of the elements of the special-needs test. More significant, we state again that our holding is not to be construed as an automatic green light for schools wishing to replicate Hunterdon Central's program. Instead, those schools will have to base their intended programs on a meticulously established record, similar to the record here. Whether that becomes an easy or difficult task for other school boards to accomplish remains to be seen. For now, we pass judgment only on the program before us.

The dissent also suggests that the expansion of the program to non-athletic extracurricular activities is especially infirm on the ground that students who engage in such activities do not implicate their own personal safety to the same

degree as student athletes. True, some activities by their nature present more obvious concerns than others. We can envision, however, that many non-athletic activities involve giving students access to the school's more isolated areas, e.g., a publications room for the student newspaper, literary magazine, or school yearbook; a theatre or choir loft; or a band alcove. Because every such activity poses to some extent a challenge to the Board's supervisory authority, we cannot conclude that the Board has acted unreasonably in subjecting participants to elevated scrutiny for purposes of random testing. Cf. Desilets, supra, 265 N.J. Super. at 380 (justifying suspicionless searches on field trips in part because "[t]he need for close supervision in the schoolhouse is intensified on [such] trips where opportunities abound to elude the watchful eyes of chaperones").

Similarly, students wishing to park on school grounds ask school officials to extend their supervisory authority beyond the classroom. In response, the school must maintain an adequate lot, regulate traffic, and safeguard students from collision and other risks attached to motor vehicle use. That asked-for extension of supervision, touching as it does on issues of student safety, makes parking akin to an extracurricular activity triggering a special-needs analysis. From that perspective, the Board's undifferentiated treatment of athletic and non-athletic extracurricular activities does not breach the bounds of reasonableness under Article I, paragraph 7 insofar as random drug and alcohol testing is concerned.

We offer these closing observations. In upholding the testing of student athletes in Vernonia, supra, the Supreme Court accepted the school district's view that the district's drug problem had been fueled, at least in part, by the so-called "role-model" effect of athletes' drug use. 515 U.S. at 663, 115 S. Ct. at 2396, 132 L. Ed. 2d at 581. According to the Court, that circumstance contributed to the policy's efficacy. Ibid. In this case, defendants express a similar view, which we find equally reasonable. We reject the notion that students engaged in extracurricular activities are not role models to the same degree as student athletes. The nostalgic image of the star quarterback as the one most imitated by his peers has been supplemented by other images. Today, the lead actress in the school play, the editor-in-chief of the school newspaper, and similar leaders in non-athletic settings have joined student athletes, both male and female, in serving as student role models.

The central factor compelling our holding, namely, the unique public-school context, also serves as its primary inhibitor. By its own terms, today's decision should not extend beyond the schoolhouse walls. We also repeat that any future program will be assessed on the precise record on which it is based within the framework of the special-needs test. Under that test, we conclude that there is room in our State's constitution for school officials to attempt to rid Hunterdon Central of illegal drugs and alcohol in the manner sought here.

The Board's random drug and alcohol testing program is permissible under Article I, paragraph 7 of the New Jersey Constitution. Accordingly, the judgment of the Appellate Division is affirmed.

Dissenting Opinion:

A majority of our Court today holds that it is permissible under our State Constitution to subject public school students to mass suspicionless drug testing. I respectfully dissent.

The desire to wage war on drugs should not be permitted to coarsen our sensitivity to constitutional protections. The requirement that searches be reasonable and, at a minimum, based on some particularized suspicion is a constitutional mandate that applies to juveniles as well as adults. The protections of our State Constitution should not be shut out of our schoolhouses. In my view, the majority's application of the special-needs doctrine to support the school drug-testing program at issue here seriously erodes the traditional jurisprudential analysis governing searches and seizures.

For these students, state constitutional protection against government-initiated suspicionless searches of their bodily fluids is now conditioned on their giving up the opportunity to participate in extracurricular activities. That is the wrong lesson for our system of public school education to teach the young citizens entrusted to its care. As Justice Brandeis recognized, "[o]ur Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example." Olmstead v. United States, 277 U.S. 438 (1928).

In July 1997, the school board adopted a policy that authorized the routine random drug testing of student athletes. As justification for the policy the board cited a survey of the student body that it commissioned during the 1996-1997 school year, although the record does not disclose any connection between the survey results and the student athlete population targeted for testing. What the record does reveal is that the survey was funded by Roche Diagnostic Systems (Roche), a New Jersey pharmaceutical company that produces drug-testing kits, and was administered by the Rocky Mountain Behavioral Science Institute, Inc. (RMBSI). Students were surveyed using a self-administered, paper-and-pencil questionnaire that required approximately thirty-five minutes to complete. Coordinators of the survey selected students to "represent" the Hunterdon Central student body, but it is unclear how that selection was made.

On January 18, 2000, the Board approved expansion of its program of random drug testing to include the student groups identified in the Task Force report. Plaintiffs, three parents on behalf of their student children attending Hunterdon Central at the time of the filing of the action, brought the instant challenge to the constitutionality of that expanded program. The late Honorable Robert E. Guterl held that the program violated Article I, paragraph 7 of the New Jersey Constitution and issued a permanent injunction prohibiting its implementation.

The Appellate Division, in a divided opinion, reversed the holding that the drug-testing program was unconstitutional and remanded for further proceedings. Joye, supra, 535 N.J. Super. at 615. This appeal is before us as of right based on Judge Eichen's dissent. Judge Eichen agreed with the trial court "that all of the targeted students had an undiminished privacy expectation in their excretory functions and that in the absence of any showing of a particularized special need for the testing" the program of random drug testing was violative of Article I, paragraph 7 of the New Jersey Constitution.

This appeal involves a single issue: whether it is reasonable to subject these targeted public school pupils (to wit, students who participate in extracurricular activities or who seek school parking permits) to the school district's program of random and routine drug testing.

Any discussion of student searches must start with New Jersey v. T.L.O., 469 U.S. 325 (1985). In T.L.O., "special needs" permitted dispensing with the normal warrant and probable-cause requirements and allowed substitution of a reasonableness test because school officials demonstrated a justified and immediate need to act to enforce school rules to maintain an orderly school environment without the constraint of those two requirements. T.L.O. was caught smoking in a school lavatory and was brought before the assistant vice principal for questioning. When she denied ever having smoked, the principal searched her purse and found an offending pack of cigarettes, as well as drug paraphernalia. In connection with delinquency charges later filed against her, T.L.O. claimed the school official's search of her purse violated the Fourth Amendment. The United States Supreme Court agreed, but explained that requiring a warrant and individualized suspicion at a level that satisfied probable cause was not required for searches for evidence of a school rule violation. Instead, the Court applied a two-part test:

> [F]irst, one must consider "whether the . . . action was justified at its inception" . . .; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place[.]"

Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction. See T.L.O. However, Justice Blackmun underscored that warning, in a concurring opinion, that introduced the phrase "special needs" to emphasize that the reasonableness standard is an exception, not the rule: "Only in those exceptional circumstances in which special

needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable, is a court entitled to substitute its balancing of interests for that of the Framers."

The majority's analysis in Earls now readily permits a "reasonableness" or balancing test. Unlike Vernonia, the record developed in Earls was devoid of any allegation of a "crisis" or "epidemic" of drug use either occurring among the students targeted for testing, or fueled by them, rendering suspicion-based testing inadequate to stem an identified problem caused by the students to be tested. The majority in Earls was content to base its conclusion of "government need" on a generalized reference to evidence of a "nationwide" drug epidemic, relying on that to justify random drug testing of a student subset that had no demonstrated connection to drug use. Plainly, the Court was satisfied to forego the requirement of a demonstrated need to target a particular group of students for random drug testing.

Between Vernonia and Earls we embraced a special-needs test in New Jersey Transit PBA Local 304 v. New Jersey Transit Corp., 151 N.J. 531 (1997). There we applied a special-needs standard to a program of random drug testing of New Jersey Transit (NJT) police officers. 151 N.J. at 558. Mindful that, under the New Jersey Constitution, exceptions to the warrant requirement are "more limited" than under the federal constitution, we nonetheless concluded that the special-needs test provided a "useful analytical framework." The fact-specific inquiry of the special-needs test compels a court to assess first, in context, "the practicality of the warrant and probable-cause requirement."

Our Court has not shied away from affording citizens of this State greater protection under the New Jersey Constitution than that divined by federal interpretation of the United States Constitution. Accordingly, on numerous occasions we have declined to follow the approach of the Supreme Court on search and seizure standards. See, e.g., State v. Cooke, 163 N.J. 657 (2000); State v. Pierce, 136 N.J. 184 (1994); State v. Novembrino, 105 N.J. 95, 154 (1987); and State v. Johnson, 68 N.J. 349 (1975).

Here, where the school board's policy is challenged under Article I, paragraph 1, in addition to Article I, paragraph 7, we are informed by our prior holdings under our State Constitution that provide greater individual privacy protections than under the federal constitution. See Planned Parenthood of Cent. N.J. v. Farmer, 165 N.J. 609, 629 (2000). Accordingly, "governmental intrusion into privacy rights may require a more persuasive showing of a public interest under our State Constitution than under the federal Constitution." In re Grady, 85 N.J. 235, 249-50 (1981); State v. Saunders, 75 N.J. 200, 220 (1977).

The starting point in the analysis under Article I, paragraph 7 is that suspicionless searches, such as that involved in random drug testing, are prohibited

and must be justified by a special need. Only when that special need is established may one proceed to balance the nature of the intrusion on privacy against the severity of the demonstrated government need. By adhering to that requirement we prevent the special-needs exception from swallowing the rule, as Justice Blackmun cautioned in T.L.O., *supra*. That served as our premise in N.J. Transit, supra. 151 N.J. at 544 (stating that only "in certain limited circumstances" have warrantless searches, conducted without individualized suspicion or probable cause, been upheld). And, that special showing was required and satisfied in both Vernonia and N.J. Transit. In each, suspicion-based methods were insufficient to detect and stop drug use in the circumscribed populations impacted by the testing program. The use of drugs by members of the targeted populations posed a danger to them, as well as to other innocent individuals interacting with them. Drug use among the population of persons targeted for the random drug testing also was demonstrated clearly. The random program of routine testing that was devised in each case was tailored narrowly to the specific problem population only and it was necessary for safety's sake, other methods of preventing drug use having proven inadequate.

The record here is unlike those in Vernonia and N.J. Transit in each of those respects. It fails on every level. No special showing has been made to justify the right to employ a balancing-of-interests test in lieu of typical Article I, paragraph 7 protections for the classification of students targeted for suspicionless testing. The majority's apparent satisfaction with the level of proof on that threshold point effectively eliminates the first step of the analysis for the population of students affected. We should not even get to the balancing-of-interests step in the analysis, but if we did, the record fails that test as well.

There is no doubt that we would not countenance mass drug testing, without any demonstration of cause, of individuals found to loiter on street corners in known drug-infested neighborhoods. Public school students, unconnected with drug use or its promotion in any way, should enjoy no less protection from random bodily searches. Students' privacy interests are not ephemeral. Here, those interests are being cast aside without any justification for the targeting of this subset of students.

The surveys conducted do not demonstrate a drug problem among the extracurricular-program-involved students to be tested. Even the majority recognizes that "the RMBSI survey results do not distinguish between those who engage in extracurricular activities and those who do not." And, no attempt has been made to show that suspicion-based methods are inadequate to further the district's desire to curtail student drug use.

Here, there is no basis for finding special need to engage in a balancing of interests concerning the right of students in extracurricular activities to be free of the presumptively unreasonable search entailed by random drug testing. The majority avoids this failing in the Earls analysis by attempting to find an analogy here to administrative searches. The analogy is a poor one. Administrative searches

of pervasively regulated industries have been permitted without individualized suspicion because of the intensive government involvement that is a condition of the permitted activity. See, e.g., In re Martin, 90 N.J. 295 (1982) (finding that casino employees have limited expectation of privacy based on pervasive agency regulation of industry); State v. Turcotte, 239 N.J. Super. 285 (App. Div. 1990) (noting that horse racing is pervasively regulated industry). Warrantless searches conducted under that exception are permitted if three criteria are satisfied:

> First there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made . . . .
>
> Second, the warrantless inspections must be "necessary to further [the] regulatory scheme." . . .
>
> [And f]inally, "the statute's inspection program, in terms of the certainty and regularity of its application [must] provid[e] a constitutionally adequate substitute for a warrant."
> [N.J. Transit, supra, 151 N.J. at 546 (quoting New York v. Burger, 482 U.S. 691, (1987)).]

Students in school do not fall within the category of a pervasively regulated industry. Children must go to school through age sixteen. N.J.S.A. 18A:38-25 and –27. The State has a constitutional obligation to provide a thorough and efficient system of public school education. N.J. Const. art. VIII, § 4, ¶ 1. That setting, specifically the relationship between government and public school pupil, does not equate with an individual or entity being authorized to engage in an activity that the State permits to be performed, subject to the State's careful and intensive regulatory control as a condition of the privilege.

In sum, the mere incantation that students do not enjoy the full constitutional protections of adults while under the control of school officials does not support the right to engage in a balancing of interests concerning the integrity of their bodily fluids. The school administrators' tutelary and custodial responsibility for school children generally did not support the collection and testing of the student athletes' urine. In my view, the record here is woefully inadequate to demonstrate a basis for engaging in a balancing of interests as to the constitutional right of this broad class of students (those involved in extracurricular activities or permitted to park on campus) to be free of the unreasonable search of random, routine drug testing.

The record fails on a second level as well. Even if a balancing were to be performed, the school district has not carried its burden. The government need to perform this broad-based testing program is not compelling on this record. There is, as noted, no overwhelming problem in this school, or among this subset of students. Nor is the program of random drug testing supported by any legislative policy

encouraging this wide-reaching routine testing. See, e.g., N.J.S.A. 18A:40A-12 (authorizing suspicion-based drug intervention programs in schools). Moreover, the recent study reported in the Journal of School Health indicates that school-based drug-testing programs have not proven their anticipated deterrent effect.

Against the weak interest in testing this particular subset of students one must weigh the privacy interests of the individuals. Students' privacy expectations in their bodily fluids have never been violated like this before. The manner of the collection of the bodily fluids may not be in issue, but the collection and testing of the excretory fluids are still intrusions on privacy that must be justified in order to require the members of the group targeted to submit to testing. No reason has been given.

I do not suggest, nor do the parties appear to assert, that students have an absolute right to participate in school extracurricular activities. See, e.g., Albach v. Odle, 531 F.2d 983, 984-85 (10th Cir. 1976) (stating that "[p]articipation in interscholastic athletics is not a constitutionally protected civil right"). Rather, plaintiffs rest their argument in this respect on Perry v. Sindermann, 408 U.S. 593 (1972), where the Court wrote:

> [E]ven though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests . . . for if the government could deny a benefit to a person because of his [exercise of] constitutionally protected [rights], his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with constitutional rights is impermissible.

See also Bd. of County Comm'rs, Wabaunsee County, Kan. v. Umbehr, 518 U.S. 668 (1996); Sherbert v. Verner, 374 U.S. 398 (1963); and Right to Choose, supra, 91 N.J. at 287

Plaintiffs argue that the government is forbidden from making the receipt of a benefit or privilege (in this case, participation in extracurricular activities) contingent on the infringement of a constitutionally protected right (freedom from unreasonable searches and seizures). Defendants, in turn, counter that the high school students waive their right to be free from unreasonable searches and seizures by "voluntarily" participating in activities that are no more than a "privilege." Plaintiffs clearly have the better of the argument: The school district cannot require "voluntary" waiver of the right to be free from searches any more than the county commissioners of Wabaunsee County, Kansas could require municipal contractors to "voluntarily" waive their First Amendment right to

criticize the local government in order to receive government contracts. The contention is tantamount to conditioning receipt of a valuable government benefit on waiver of a constitutional right, an argument repeatedly rejected by the Supreme Court. See, e.g., Sindermann, *supra*, 408 U.S. at 597. In short, although the government may have no particular constitutional responsibility to provide a particular benefit, if it chooses to do so it cannot condition receipt of the benefit in a way that requires recipients to forego constitutional rights.

Furthermore, in today's society, it is not at all clear that participation in high school extracurricular activities is altogether voluntary - - at least for those students who wish to attend four-year colleges and universities. Moreover, with a majority of high school students participating in some form of extracurricular activity, high school students who wish to protect their right to be free from unreasonable searches should not be forced to ostracize themselves from their peers by foregoing participation in any school-sponsored activity.

Plaintiffs here concede that student participation in extracurricular activities can be conditioned, for example, on a G.P.A. requirement, or adherence to a school code of conduct, or any number of factors that bear on a school district's responsibility to provide a safe and orderly educational environment. However, the assertion of the right and authority to maintain a safe and orderly environment does not mean that students who participate must submit to random drug testing in order for that goal to be achieved, absent any showing of particularized drug use connected to the students involved in the extracurricular activities (or, as here, students who bring cars and park them on school property).

What is particularly mystifying to me is the majority's determination to provide less protection against unreasonable searches to a category of suspicionless school children, when it has not hesitated to provide enhanced protections under our State Constitution to suspects in criminal prosecutions. The majority's determination affords lesser personal protection from unreasonable searches to innocent public school students than to committed mental patients suspected of harboring drugs within their rooms in a State-run institution, State v. Stott, 171 N.J. 343 (2002), or to out-of-control intoxicated individuals transported to hospital emergency rooms from accident scenes by police officers, State v. Ravotto, 169 N.J. 227 (2001). Although those cases implicated potential criminal charges, the lack of a potential criminal consequence does not permit unfettered access to students' bodily fluids, absent any particularized suspicion of the students targeted. The lack of criminal prosecution in the current setting falls far short of logically supporting the analogy to an administrative search found by the majority today.

Not doubting for a second the good intentions of the school district, and that of the majority of our Court that has found room in our State Constitution for this broad program of drug testing of public school students, I nevertheless return to the notion that there are certain core values that are dear to our society and define our

self-identity. Central among them are the right to freedom from unreasonable searches, to adherence to the constitutional requirement of a warrant procured from a neutral magistrate upon a showing of probable cause, and to the assurance that the warrant requirement will be dispensed with only for the most compelling reasons.

We have not hesitated in the past to conclude that the State Constitution affords New Jerseyans greater protection against unreasonable searches than that which is afforded under the United States Constitution. We do not lightly interpret our constitutional language differently from its federal counterpart, but this is an occasion on which our Constitution's surpassing protection should be recognized. There is no convincing practical and necessary justification, no "special need," to deprive this targeted category of persons - - school children who wish to involve themselves in extracurricular activities - - of their right to be free from random, routine drug testing.

I would reverse and reinstate the judgment of the Chancery Division.