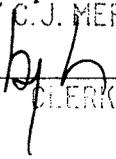


RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2006 NOV 22 A 10: 56

BY C.J. MERRITT NO. 78946-1


CLERK

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

HANS YORK and KATHERINE YORK, Parents of
AARON E. YORK and ABRAHAM P. YORK,
SHARON A. SCHNIEDER and PAUL A. SCHNEIDER,
Parents of TRISTAN S. SCHNEIDER

Appellants,

v.

WAHKIAKUM SCHOOL DISTRICT 200, et al.,

Respondents.

BRIEF OF RESPONDENTS

Fred A. Johnson, WSBA No. 7187
Prosecuting Attorney
Attorney for Respondent Wakhiakum
School District No. 200

Office and Post Office
Address:
P.O. Box 397
Wahkiakum County Courthouse
Cathlamet, Washington 98612
(360) 795-3652

ORIGINAL

TABLE OF CONTENTS

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR 1

1. Whether Article 1, § 7, of the Washington State Constitution prohibits random drug testing of student athletes attending public schools? 1

2. Whether the Special Needs Exception is recognized under Washington Constitutional law? 1

3. Whether Article 1, § 7, of the Washington State Constitution mandates a per se ban on all suspicionless searches? 1

STATEMENT OF THE CASE 1

ARGUMENT 13

CONCLUSION 45

TABLE OF AUTHORITIES

TABLE OF CASES

PAGE

Washington Cases

<u>Bedford v. Sugarman</u> , 112 Wn.2d 500, 509, 772 P.2d 486 (1989)	32
<u>Camer v. Seattle School District</u> , 52 Wn. App. 531, 537, 762 P.2d 356 (1988)	23
<u>Edmonds School District v. Mountlake</u> , 77 Wn.2d 609, 611, 465 P.2d 177 (1970)	21
<u>In re Juveniles A, B, C, D, E</u> , 121 Wn.2d 80, 849 P.2d 455 (1993)	29,30, 31
<u>Jacobson v. Seattle</u> , 98 Wn.2d 668, 658 P.2d 653 (1983)	17
<u>Kuehn v. Renton School District</u> , 103 Wn.2d 594, 696 P.2d 1078 (1985)	14,17
<u>Murphy v. State</u> , 115Wash. App. 297, 62 P.3d 533 (2003)	26
<u>Murphy v. State</u> , 149 Wash.2d 1035, 75 P.3d 968 (2003)	27
<u>NcNabb v. Department of Corrections</u> , 1 112 P.3d 592 (Wash. App. Div 3 June 2, 2005)	26
<u>O’Hartigan v. Department of Personnel</u> , 118 Wn.2d 111, 117, 821, P.2d 44 (1991)	32
<u>Robinson v. Seattle</u> , 102 Wn. App. 795, 10 P.3d 452 (2000)	24, 28,29

PAGE

State v. B.A.S., 103 Wn. App. 549, 13
P.3d 244 (2000) 25

State v. Brooks, 43 Wn. App. 560, 718
P.2d 837 (1986) 13,14,15,25,36,37,44

State v. Gunwall, 106 Wn.2d 54, 720
P.2d 808 (1996) 15,18,22,24,28

State v. Johnson, 128 Wn.2d 431, 445,
909 P.2d 293 (1993) 15

State v. McKinnon, 88 Wn.2d 75,
558 P.2d 781 (1977)36,37

State v. Meacham, 93 Wn.2d 735, 737,
612 P.2d 795 (1980) 1

State v. Mendez, 137 Wn.2d 208, 219,
970 P.2d 722 25

State v. Olivas, 122 Wn.2d 72, 856
P.2d 1076 (1993) 20

State v. Slattery, 56 Wn. App. 820,
787 P.2d 932 (1990)13,14,44

State v. Wadsworth, 139 Wn.2d 724 (200) 21

State v. White, 129 Wn.2d 105,
915 P.2d 1099 (1996). 16

Other Cases

Board of Education of Independent School District No. 92
of Pattawatomie County v. Earls, 536 U.S. 822,
122 S.Ct. 2559, 153 L.Ed.2d 735 (2002). 41

Griffin v. Wisconsin, 483 U.S. 868, 873,
107 S.Ct. 3164, 3168, 97 L.Ed.2d
709 (1987). 38

	PAGE
<u>Harris v. Thigpen</u> , 941 F.2d 1495, 1504 (11th Cir. 1991).	32
<u>Johnetta J. v. Municipal Court</u> , 218 Cal. App. 3d 1255, 1274, 267 Ca. Rptr. 666 (1990).	30
<u>Joye v. Hunderdan Central Regional High School Board of Education</u> , 176 N.J. 568, 826 A.2d 624 (2003)	33,34
<u>Knox County Edu. v. Knox County Bd of Educ.</u> , 158 F.3d 361, at 380 n. 25 (6th Cir. 1998).	17
<u>Murphy v. Washington</u> , 541 U.S. 1087, 124 S.Ct. 2812, 159 L.Ed.2d 249, 72 USLW 3740 (U.S. Wash. Jun 01, 2004).	27
<u>New Jersey v. T.L.O.</u> , 469 U.S. 325, 338, 105 S.Ct. 733, 741, 83 L.Ed.2d 720 (9185)	13,14,18,35,36,37,38,39
<u>Penn-Harris-Madison School Corp v. Joy</u> , 768, N. E.2d 940 (indi Ct. App. 2002)	34
<u>Skinner v. Railway Labor Executives' Ass'n</u> , 489 U.S. 602 (1989)	30
<u>Weber v. Oakridge School District</u> , 76, 184 Or. App. 415, 56 P.3d 504 (2002).	34
<u>Winton v. Lee</u> , 470 U.S. 753, 762 (1985)	31
<u>Vernonia School District 47J v. Acton</u> , 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995)	34,38,41,44
<u>Yin v. California</u> , 95 F.3d 864, 870 (9th Cir. 1996)	17

PAGE

Other Authorities

RCW 18.64.245 27

RCW 28A.320.015 20

RCW 28A.600.010 22

RCW 28A.600.200 19,22

RCW 28A.600.210 18

RCW 28A.600.220 18

RCW 28A.600.230 19

RCW 28A.600.240 19

RCW 28A.600.240(1) 19

RCW 28A.600.460(1) 19

RCW 43.43.754 21

RCW 69.41.330 19,20

RCW 69.41.340 20

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Whether Article 1, § 7 of the Washington State Constitution prohibits random drug testing of student athletes attending public schools?
2. Whether the Special Needs Exception is recognized under Washington Constitutional law?
3. Whether Article 1, § 7 of the Washington State Constitution mandates a per se ban on all suspicionless searches?

STATEMENT OF THE CASE

The relevant facts in this case are not in dispute. In granting the Respondent's Motion for Summary Judgment, the trial court explicitly found that this case presents no issues of material fact. (CP 487) The Appellants do not raise any factual issues.

On September 20, 1999, Wahkiakum School District No. 200 Board of Directors approved Board Policy No. 3515 (hereinafter referred to as the "Policy" CP 324), providing for mandatory random drug testing of students involved in all extracurricular activities at Wahkiakum Middle School and Wahkiakum High School. (CP 32) On October 18, 1999, the Policy was revised to provide for random drug testing of extracurricular athletes only. (CP 32)

The Board of Directors adopted the Policy based upon the

evidence of substantial alcohol and drug use among students, and pursuant to the School District's statutory authority and responsibility to maintain order and discipline in its schools, to protect the health and safety of its students, and to control, supervise and regulate interschool athletic activities. (CP 83)

Before the Policy was implemented, the School District took extensive actions to prevent drug and alcohol abuse. Before 1994, the School District developed training rules for student athletes which required that they abstain from use and possession of alcohol and illegal drugs. The DARE program was also implemented at the K-6 level. (CP 112)

From 1994 - 1996, K-12 staff received training on substance abuse and violence prevention, including how to detect and report it. (CP 112). A K-12 Substance Abuse Preventionist position was created in 1995 and funded through 2000. The Preventionist used the *Here's Looking at You-2000* program. Student support groups were also established. (CP 112)

In the 1996-1997 school year, a CARE Team was established to deal with violence prevention, namely bullying in the elementary school. (CP 113) Also during in the 1996-1997 school year, a high school Natural Helpers program was established. Natural

Helpers are students who are elected by their peers to assist at-risk students with accessing appropriate services for help. (CP 113)

In the 1997-1998 school year, the CrossLinks program was established. The program pairs high school students with at-risk elementary students to work on building self-esteem, academic success, anger management, creating friendships and making positive life choices. (CP 113) As part of the program, the high school students pledged to remain free of substances. (CP 90)

In 1998, a K-12 counseling position was created, which utilized the *Here's Looking at You-2000* curriculum, as well as *Second Step* (K-8 violence prevention), *Managing Anger* (Grades 7-8), *Personal and Social Responsibility* (Grade 9); *Positive Life Choices and Challenge Course Activities* (K-12 team building, cooperation and self-esteem). (CP 112)

Since the 1999-2000 school year, the School District has funded a part-time School Resource Officer from the Wahkiakum County Sheriff's Office. (CP 113) The officer remains on campus during the school day to prevent incidents and to intervene if any should occur. (CP 91)

For several years, the high school has also partnered with Wahkiakum County Human Services for youth prevention and

intervention services. (CP 113) Human Services staff provides education to the students in school regarding substance abuse. (CP 92)

In spite of all of these prevention and education efforts, drug use remained alarmingly high among students in the Wahkiakum School District. Data from several sources illustrate the extent of the problem.

In 1994, before the Policy was adopted, the Wahkiakum Community Network was formed pursuant to RCW 70.190.060 as a community public health and safety network. Acting independently of the School District, the Network surveyed students in the Wahkiakum School District. The results of the survey indicated that 45% of tenth graders and 65% of twelfth graders had used illegal drugs other than alcohol. The Network ranked teen substance abuse as the number one problem in Wahkiakum County. (CP 82)

From 1994 to 2002, students in the middle school and the high school participated in yearly surveys conducted by the Wahkiakum School District regarding the use of alcohol and/or illegal drugs. In 1995, 51 of 150 high school students reported that they had used marijuana during the last 30 days; this represented approximately 34% of the student body. In 1997, 50 of 160 high school students (31%) reported that they had used marijuana during the last 30 days.

In the spring of 1998, 40% of the 10th graders reported some prior use of illegal drugs and 19% of those 10th graders reported illegal drug use within the last 30 days. In the spring of 1998, 42% of the high school seniors identified themselves as illegal drugs users and 12.5% reported illegal drug use within the last 30 days. In a survey conducted in the spring of 2000, approximately 50% (53 of 102) of athletes self-identified as drug and/or alcohol users. (CP 82-83)

During the 1997-1998 school year, there were nine known alcohol violations and one known drug violation disciplined at the high school. (CP 111) During the 1998-1999 school year there were seven known alcohol violations at the high school and four known drug violations at the middle school. In the 1999-2000 school year, there were four alcohol violations, one drug violation, one alcohol and drug violation and three positive urinalysis tests for drugs at the high school. Six middle school students received disciplinary action for drug violations. (CP 106)

The Drug and Alcohol Advisory Committee (now the "Safe and Drug Free Schools Advisory Committee") was formed by the School District in 1994 to address the problem of student alcohol and drug use. The Committee is open to any community member and includes parents of students. Meetings are open to the public. (CP 87-89) The Committee's focus is to develop and implement a

program designed to delay the first use of drugs or alcohol among pre-teens and teens and to assist children who had already started to use alcohol and/or drugs. The Committee collected the survey information, evaluated the substance abuse programs that were in place, and held public discussions over a two to three year period regarding effectiveness of current programs and adoption of the Policy. (CP 83)

The procedures used to implement the Policy state that the School District's purpose in establishing the drug testing program is "(1) to provide for the health and safety of all student participants; (2) to undermine the effects of peer pressure by providing a legitimate reason for students to refuse to use illegal drugs or alcohol; and (3) to encourage students currently using alcohol or controlled substances to participate in treatment programs." (CP 104)

The procedure under the Wahkiakum School District's Policy is that a student is randomly selected for testing by an administrator drawing index cards, with an individual name on each card, from a box. Cards are drawn at the high school and at the middle school. The student is transported by the school superintendent, the middle school principal, or the high school principal to the Wahkiakum County Health Department where he or she provides information to a Health Department representative. Whenever possible, the student is

tested at the end of the school day prior to athletic practice. (CP 93-95)

The Wahkiakum County Health Department Policy for the collection of urine samples states that the student may provide the sample while in a closed bathroom stall. During collection, a Health Department employee stands either in the doorway of the bathroom or just inside of it, but the employee does not directly observe the student urinating. (CP 100) The school administrator waits at the other end of the hallway from the bathroom, in the lobby of the Health Department, to transport the student back to school. (CP 102)

The urine specimens are mailed from the Health Department to Comprehensive Toxicology Services in Tacoma, Washington. The results are then mailed back to the school superintendent. If the result of a particular urinalysis is positive for illegal drugs, the Superintendent contacts the Medical Review Officer in order to make a determination as to whether a prescription medication or something other than an illegal drug could have produced the positive result. (CP 96)

Under the Policy, students are not required to furnish information regarding prescription medications or past medical history to the Health Department employee, but a student has the option of providing the information in order to explain positive test

results. (CP 83)

Students are tested for amphetamine, methamphetamine, barbiturates, benzodiazepines, cocaine, ethanol, opiates, THC, and steroids. (CP 104)

Only the School District Superintendent or the superintendent's secretary receives results of drug tests. In the event that results are communicated by telephone, the Superintendent, secretary and Comprehensive Toxicology use a password. No other individual has knowledge of the password. (CP 97)

If a student tests positive for illegal drugs, the results are not sent to the sheriff's office, nor is the student suspended from school. The results of drug tests are not included in a student's academic record. A first violation of the Policy results in ineligibility for extracurricular athletic participation for the remainder of the season or 30 calendar days, whichever is longer. A second violation results in ineligibility for a period of one calendar year from the date of the second violation. A third violation results in permanent ineligibility for extracurricular athletic participation. The school provides assistance in obtaining drug and alcohol counseling. If the student tests positive for alcohol, the first violation results in a 14 day suspension from all extracurricular athletic activities with parent conference, pre-assessment or formal assessment (as determined by

a counselor), and completion of phase 1 or phase 2 of alcohol and other drug education program or a 28 day suspension from all extracurricular athletic activities. A second violation results in a 21 day suspension from all extracurricular athletic activities with parent conference and participation in an alcohol and drug education program or a 45 day suspension from all extracurricular athletic activities. Third and subsequent violations results in a 45 day suspension. (CP 78-79)

During the 1999-2000 school year, 184 out of 280 students (65.7%) in grades 7-12 participated in at least one sport. All of the students signed consent forms and only six forms were signed under protest by a student or a parent. (CP 83)

Student athletes are at a greater risk of injury if they participate in a sport while under the influence of drugs. Drugs impair reaction time and coordination and they can mask the true status of an injury due to false signs or symptoms. (CP 116) In the Wahkiakum School District, athletes are involved in the use of illegal drugs and alcohol at least to the same level as are non-athletes. (CP 116)

Students involved in extracurricular athletics in the Wahkiakum School District do not have a high level of privacy. There are no dividers between urinals in the boys' locker room at the

high school, the showers lack individualized cubicles, and the athletes undress in each others' presence. Wrestlers are required to weigh in while naked or wearing only an athletic supporter or briefs. (CP 116)

Washington Interscholastic Activities Association (WIAA) Rule 18.13.0 requires a physical examination prior to participation in athletics. (CP 117-118) WIAA Rule 18.22.1 requires member schools to adopt rules and regulations designed to have the effect of discouraging student use/abuse of illegal drugs. (CP 117, 119) WIAA Rule 18.22.2 requires disciplinary action to be taken against student athletes who possess or use illegal drugs. (CP 117, 119) WIAA Rule 64.6.0 requires wrestlers to submit a weight control plan as a condition to continued participation in the sport. (CP 117, 120)

Dr. Linn Goldberg is a Professor of Medicine and Head of the Division of Health Promotion and Sports Medicine and Director of the Human Performance Laboratory at the Oregon Health Sciences University in Portland, Oregon. Dr. Goldberg is also the author and principal investigator of the "Student Athlete Testing Using Random Notification" study ("SATURN"). The study was sponsored by the National Institute on Drug Abuse and the National Institutes of Health. (CP 123) Dr. Goldberg's opinion is that mandatory, random drug testing is a reasonable approach to addressing drug use among student athletes, it does not physically harm the athletes involved, it

may prevent substance use and it may work as a way to identify student athletes who may have a drug problem. (CP 125)

Aaron York was a senior at Wahkiakum High School during the 1999-2000 school year and was tested for drugs and alcohol under the Policy. (CP 165)

Abraham York graduated from Wahkiakum High School in 2003. Abraham was tested once under the Policy and did not personally mind being tested, was not embarrassed by the process, nor did he feel punished by the Policy. (CP 169-172) Abraham did not experience any anxiety because of the drug testing policy. (CP 169-172)

Tristan Schneider attended Wahkiakum High School from 1999 to 2003. She was a tenth-grade student at Wahkiakum High School during the 2000-2001 school year. Tristan was tested once under the Policy. (CP 174)

In 1989, the Vernonia School District implemented a Student Athlete Drug Policy which provides for random drug testing of student athletes. The Policy was approved by the School Board in response to a serious drug use problem among students, particularly student athletes, and to a rise in disciplinary problems resulting from their drug use. The Policy was based on concern for the safety and performance integrity of student athletes and their competitions.

Students were tested for amphetamines, marijuana, cocaine and LSD. (CP 177) As a result of enforcement of the Policy, the Vernonia School District in Vernonia, Oregon, experienced remarkable improvement in classroom and extracurricular behaviors with respect to disciplinary matters and common interpersonal relationships. The School District found the deterrent effect on student athletes to be profound. (CP 178)

In 1999, the Burlington Edison School District #100 in Burlington, Washington, implemented a Student Drug Testing Policy that provides for random drug testing of students involved in all extracurricular activities. The Policy was developed in response to rising drug use and disciplinary problems among students as well as strong community support for the Policy. Students are tested for amphetamines, cocaine and marijuana. (CP 181)

From 1997-2002, the average number of Burlington-Edison students testing positive for illicit drugs ranged from 1.3% to 2%, indicating a high degree of efficacy and deterrent effect. Teachers and staff consider improvements in student classroom and extracurricular behaviors with respect to disciplinary matters to be a direct result of enforcement of the Policy. Because of the efficacy of the Policy, Burlington-Edison School District budgets \$16,000 annually for the drug testing program. (CP 183)

ARGUMENT

A. Policy No. 3515 Does Not Violate Article 1, Section 7, of the Washington Constitution.

In State v. Brooks, 43 Wn. App. 560, 718 P.2d 837 (1986), the high school principal and vice-principal made a warrantless search of a student's locker and recovered hallucinogenic mushrooms. The student was charged and convicted of a violation of the Uniform Controlled Substances Act. The Court of Appeals found the search to be legal and affirmed the conviction. The Court of Appeals specifically held: "we conclude that article 1, section 7 affords students no greater protection from searches by school officials than is guaranteed by the Fourth Amendment."(emphasis added) Id., 43 Wn. App. at 568.

In State v. Slattery, 56 Wn. App. 820, 787 P.2d 932 (1990), the Court of Appeals again recognized the school search/special needs exception adopted by the United States Supreme Court in New Jersey v. T.L.O., 469 U.S. 325, 338, 105 S.Ct. 733, 741, 83 L.Ed.2d 720(1985). In Slattery, the Court approved a warrantless search conducted by school officials of a high school student's car interior, locked trunk and locked briefcase. Significantly, the Court in Slattery found that the warrantless school search did not violate article 1, section 7, of the Washington State Constitution. Id. at 825.

This holding acknowledges that the T.L.O. “special needs” analysis is applicable in determining the scope of the protection afforded by article 1, section 7. Both Brooks and Slattery, supra, acknowledge the T.L.O. “special needs” exception as part of Washington constitutional law.

Plaintiffs base their article 1, section 7, argument, in part, upon the Washington Supreme Court’s decision in Kuehn v. Renton School District, 103 Wn.2d 594, 696 P.2d 1078 (1985). Plaintiffs’ reliance on Kuehn is misplaced for two reasons. First, Kuehn was decided before the United States Supreme Court decision in T.L.O.. Second, a careful reading of Kuehn reveals it to be a Fourth Amendment case, not an article 1, section 7, case. The Kuehn Court held:

Because the search at issue here was conducted without individualized suspicion the student’s rights under the Fourth Amendment were violated. We therefore reverse the trial court’s determination of this issue. 103 Wn.2d at 595 (emphasis added).

There is no Washington State Supreme Court case decided after T.L.O. which specifically addresses the applicability of article 1, section 7, in the context of a public schools “special needs” search. Consequently, the precedent which controls the determination of the present case is State v. Brooks, supra, which unequivocally held that

article 1, section 7, affords students no greater protection from search by school officials than does the Fourth Amendment.

To determine whether Article 1, Section 7, of the Washington Constitution should be construed in a manner different from the Fourth Amendment analysis, the Court must apply a Gunwall analysis under State v. Gunwall, 106 Wn.2d 541 720 P.2d 808 (1986). Applying those Gunwall factors, this Court should not reject the position taken by the Court of Appeals in State v. Brooks, supra.

In determining whether Article 1, Section 7, of the Washington State Constitution affords greater protection in the context of the drug testing of student athletes than does the Fourth Amendment, the factors set forth in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986) must be analyzed. The six nonexclusive Gunwall factors for determining whether a state constitutional provision provides more protection than its federal counterpart are: (1) the textual language; (2) significant differences in the texts; (3) state constitutional and common law history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state interest or local concern. Gunwall, supra, at 61-62.

The Washington Supreme Court has previously analyzed Article I, Section 7, with respect to Gunwall factors (1), (2), (3), and (5). See, e.g., State v. Johnson, 128 Wn.2d 431, 445, 909 P.2d 293

(1996). Those factors need not be analyzed in the instant case. On the other hand, factors (4) and (6) are generally unique to the context in which the interpretation question arises. Id.

Although factor (1) need not be analyzed, it is, nonetheless, important to note the language of Article 1, Section 7, of the Washington State Constitution, which provides:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.

School District Policy No. 3515 clearly does not invade the home of any of the students involved. Nor does the Policy deal with a student athlete's private affairs. By their very nature, interscholastic athletic events are public, not private affairs. As noted by the United States Supreme Court in Vernonia School District 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), by participating in interscholastic sports, student athletes voluntarily subject themselves to a degree of regulation higher than that imposed on students generally.

Since the students give the urine samples inside a closed bathroom stall (CP 100), any reasonable expectation of privacy with respect to urination is not invaded. See State v. White, 129 Wn.2d 105, 915 P.2d 1099 (1996). Moreover, the Court in White specifically stated:

“We hold that a toilet stall is not entitled to the same ‘place’ protection as is the case with a home.” 129 Wn.2d at 111.

In any event, Plaintiffs exaggerate the sensitivity of urinalysis in their constitutional challenge. The giving of a urine sample is a normal part of a medical examination. Yin v. California, 95 F.3d 864, 870 (9th Cir. 1996). Moreover, “[a]nybody who has stood in line in men’s room urinals at sports stadiums, public arenas, theaters or public bars understands that the act of urination is not always a private one.” Knox County Educ. v. Knox county Bd. of Educ., 158 F3d 361, at 380 n. 25 (6th Cir. 1998).

The search at issue in this case is less invasive than the searches at issue in either Jacobson v. Seattle, 98 Wn.2d 668, 658 P.2d 653 (1983) (holding warrantless pat-down searches of attendees at rock concerts to be unconstitutional) or Kuehn v. Renton School District, 103 Wn.2d 594, 694 P.2d 1078 (1985) (holding search of student’s belongings on school-sponsored band’s trip to Canada to be unconstitutional).

In those cases, the general searches conducted by the government could uncover any item considered to be private, whether it be embarrassing, illegal or just something the owner wanted to keep confidential. The potential for abuse and invasion of privacy rights in those situations were far greater than the Wahkiakum School

District's student athlete drug testing policy which utilizes a certified testing laboratory to examine urine in order to determine only when an athlete uses certain specifically enumerated illegal drugs and shares the results of that test only with those who must know the results in order to implement the policy. Random drug testing in such a controlled setting is not a general search.

Gunwall factor (4) requires a consideration of previously established bodies of state law, including statutory law. Gunwall, supra, at 61. A whole series of Washington statutes support the argument that Washington constitutional law should include the special needs analysis of school search issues contained in T.L.O. and Vernonia, supra. Those statutes include the following.

RCW 28A.600.210 provides:

The legislature finds that illegal drug activity and weapons in schools threaten the safety and welfare of school children and pose a severe threat to the state educational system. School officials need authority to maintain order and discipline in schools and to protect students from exposure to illegal drugs, weapons, and contraband. Searches of school-issued lockers and the contents of those lockers is a reasonable and necessary tool to protect the interests of the students of the state as a whole.

RCW 28A.600.220, first adopted in 1989, provides:

No right nor expectation of privacy exists for any student as to the use of any locker issued or assigned to a student by a school and the locker shall be subject to search for illegal drugs, weapons, and contraband

as provided in RCW 28A.600.210 through 28A.600.240.

RCW 28A.600.240 authorizes school officials to conduct suspicionless general searches of student lockers. RCW 28A.600.240(1) specifically provides:

In addition to the provisions in RCW 28A.600.230, the school principal, vice principal, or principal's designee may search all student lockers at any time without prior notice and without a reasonable suspicion that the search will yield evidence of any particular student's violation of the law or school rule.

RCW 28A.600.240(1) provides, in part:

Any elementary or secondary school student who is determined to have carried a firearm onto, or to have possessed a firearm on, public elementary or secondary school premises, public school-provided transportation, or areas of facilities while being used exclusively by public schools, shall be expelled from school for not less than one year under RCW 28A.600.010.

RCW 28A.600.460(1) provides in relevant part:

School district boards of directors shall adopt policies that restore discipline to the classroom.

RCW 28A.600.200 provides in relevant part:

Each school district board of directors is hereby granted and shall exercise the authority to control, supervise and regulate the conduct of interschool athletic activities and other interschool extracurricular activities of an athletic, cultural, social or recreational nature for students of the district....

RCW 69.41.330 directs local school districts to post signs

warning students of the health risks that steroids present when used solely to enhance athletic ability; those signs must be displayed on the premises of school athletic departments. RCW 69.41.340 requires the state superintendent of public instruction to promulgate rules regarding loss of eligibility to participate in school-sponsored athletic events for any student athlete found to have violated the Legend Drug Act.

The Washington Interscholastic Activities Association also extensively regulates student athletes including requirements for preseason physical examinations and ineligibility penalties for the use of illegal drugs. (CP 117-120).

A school district's authority is rooted in article IX , Section 1 of the Washington State Constitution which provides that "it is the paramount duty of the state to make ample provision for the education of all children residing within its borders." The local school board is given broad discretionary power to adopt policies that promote the safe management and operation of the school district. See RCW 28A.320.015.

Although the Washington State Supreme Court has not directly ruled on the school special needs exception in the context of article 1, section 7, the Court has upheld suspicionless searches in other settings. In State v. Olivas, 122 Wn.2d 72, 856 P.2d 1076

(1993), the Court used a special needs analysis in approving the drawing of blood without a search warrant, probable cause or individualized suspicion, for purposes of establishing the state DNA data bank pursuant to RCW 43.43.754.

In State v. Wadsworth, 139 Wn.2d 724, 991 P.2d 80 (2000), the Court upheld suspicionless searches of all people entering the Kitsap County Courthouse. Although the Court did not specifically use a special needs analysis, it did uphold the suspicionless searches on the basis of the Kitsap County Superior Court's inherent power to ensure the safety of court personnel, litigants, and the public. Wadsworth, supra, at 741.

Just as the courts have the power to protect litigants, school districts have inherent constitutional authority to provide for the safety of their students. In Edmonds School District v. Mountlake, 77 Wn.2d 609, 611, 465 P.2d 177 (1970), the Washington State Supreme Court recognized the fundamental constitutional authority of a local school district:

In essence, a school district is a corporate arm of the state established as a means of carrying out the state's constitutional duties...and exercising the sovereign's powers in providing education. The state has thus made the local school district its corporate agency for the administration of a constitutionally required system of free public education

With regard to Gunwall factor (6), the conclusion is that control and protection of students in public schools is a matter of particular state interest and local concern. Local School Boards in the State of Washington possess broad authority to regulate the conduct of public school students. The adoption of Policy No. 3515 clearly expresses the local concern of the Board of Directors of Wahkiakum School District No. 200 with regard to the harmful effects of student drug use. The judgment of the local school board should be afforded great deference. School boards possess clear statutory authority to adopt rules governing school discipline and the participation in interscholastic athletic contests. The searches of students pursuant to Policy No. 3515, therefore, were made “under authority of law.”

RCW 28A.600.010 provides in relevant part:

Every board of directors, unless otherwise specifically provided by law, shall:

- ...
- (2) Adopt and make available to each pupil, teacher and parent in the district reasonable written rules and regulations regarding pupil conduct, discipline, and rights....

RCW 28A.600.200 provides in relevant part:

Each school district board of directors is hereby granted and shall exercise the authority to control, supervise and regulate the conduct of interschool athletic activities and other interschool extracurricular activities of an athletic, cultural, social or recreational nature for students of the district....

This court should give great weight and deference to the decisions of the local school board. In Camer v. Seattle School District, 52 Wn. App. 531, 537, 762 P.2d 356 (1988), the Court of Appeals correctly observed:

Courts and judges are normally not in a position to substitute their judgment for that of school authorities [citation omitted], nor are we equipped to oversee and monitor day-to-day operations of a school system.

Given the deference that must be shown to the discretion of a duly constituted school board, policy enactments of a school board, like municipal ordinances, should be presumed constitutional. The person attacking a municipal ordinance bears the burden of showing the invalidity of an enactment beyond a reasonable doubt. Seattle v. State, 100 Wn.2d 232, 238, 668 P.2d 1266 (1983). This presumption of constitutionality applies to legislative enactments by municipal corporations, whether those enactments be categorized as ordinances or resolutions. Bellevue v. State, 92 Wn.2d 717, 719, 600 P.2d 1268 (1979). The presumption of validity for such enactment is grounded in the fundamental notion of separation of powers. The Washington State Supreme Court in Lenci v. Seattle, 63 Wn.2d 664, 668, 388 P.2d 926 (1964), noted:

These rules are more than mere rules of judicial convenience. They mark the line of demarcation between legislative and judicial functions.

It is not a court's proper function to substitute its judgment for that of a legislative body regarding disputed factual issues. State v. Smith, 93 Wn.2d 329, 337, 610 P.2d 869 (1980); State v. Dickamore, 22 Wn.App. 851, 855, 592 P.2d 681 (1979). Consequently, analysis of this Gunwall factor also supports the proposition that in the context of school searches, Article 1, Section 7, of the Washington State Constitution does not afford any broader protection than does the Fourth Amendment.

B. Washington Constitutional Law Recognizes the Special Needs Exception.

Washington law recognizes the special needs exception to the warrant requirement. Furthermore, the existing law in the State of Washington is that for the purposes of this school-related litigation, Article I, Section 7, of the Washington State Constitution is coextensive with the Fourth Amendment to the United States Constitution.

The Court of Appeals, Division I, in Robinson v. Seattle, 102 Wn. App. 795, 10 P.3d 452 (2000) found that suspicionless preemployment drug testing of firefighters and police officers did not violate Article 1, Section 7, of the Washington State Constitution. Although it did not use the term "special needs," the Court did uphold the suspicionless searches because of the city's "compelling need" to

know of drug problems in firefighters and police officers. Id. at 827.

The Court of Appeals has consistently held that the Washington Constitution does not provide students with greater protections from searches by school officials than does the Fourth Amendment. State v. B.A.S., 103 Wn. App. 549, 553, 13 P.3d 244 (2000); State v. Brooks, 43 Wn. App. 560, 718 P.2d 837 (1986). As noted earlier, the Court in Brooks acknowledged the validity of the special needs analysis as developed by the United States Supreme Court.

The legality of a search under the special needs exception analysis depends upon the reasonableness of that search given the totality of the circumstances. The reasonableness of a person's expectation of privacy plays a role in an Article 1, Section 7, analysis. The Washington Supreme Court recently made it clear that a person's subjective expectation of privacy is not the controlling factor. In State v. Mendez, 137 Wn.2d 208, 219, 970 P.2d 722 (1999) this Court remarked:

The analysis under article 1, section 7, focuses, not on a defendant's actual or subjective expectation of privacy but, as we have previously established, on those privacy interests Washington citizens held in the past and are entitled to hold in the future [citing State v. White, 135 Wn.2d 761, 768, 958 P.2d 982 (1998)].

The following are cases in which Article 1, Section 7, was

analyzed independently of the Fourth Amendment and the court concluded that the state and federal protections are coextensive. In each case, the court analyzes the individual privacy interest and the State's interest in the intrusion.

In NcNabb v. Department of Corrections, 127 Wn. App. 854, 112 P.3d 592 (2005), an inmate claimed that the Department of Corrections force-feeding policy was unconstitutional under Article 1, Section 7. The Court analyzed the fourth and sixth factors, noting that the Washington courts have previously determined that inmates, as probationers and parolees, have a lowered expectation of privacy while in custody and that no case has suggested that the Washington constitution provides more protection to prison inmates than the federal constitution. 127 Wn. App. at 861. The court stated, "While in custody, an inmate's right to privacy under our state constitution must be balanced against the State's interest in preserving life and maintaining an orderly and disciplined prison system." Id. The court recognized that the force-feeding policy could violate the inmates' right to privacy, but the State's interest in the administration of the penal system outweighed that right. The court also cited cases from other jurisdictions that reached the same result. The court did not conduct any Fourth Amendment analysis.

In Murphy v. State, 115 Wash. App. 297, 62 P.3d 533 (2003)

(review denied by Murphy v. State, 149 Wash.2d 1035, 75 P.3d 968 (2003), certiorari denied by Murphy v. Washington, 541 U.S. 1087, 124 S.Ct. 2812, 159 Led.2d 249, 72 USLW 3740 (2004), the State Pharmacy Board disclosed the plaintiff's prescription drug records to the Snohomish County Prosecuting Attorney pursuant to RCW 18.64.245, which requires pharmacists to keep prescription records and make them available for inspection by the Board or other law enforcement officials. The plaintiff sued the State, alleging negligent disclosure of his prescription records. On appeal, the plaintiff argued that the Board unlawfully searched and seized his prescription records without a warrant. In holding that no warrant was needed for the Board to examine the plaintiff's records and that the statute does not violate constitutional privacy protections, the court said that the state constitution does not necessarily provide greater protection in all contexts. With regard to law enforcement access to pharmacy and drug store records of narcotic sales, article 1, section 7, provides no greater protection than the Fourth Amendment.

While it did not explicitly set out a balancing test, the court focused on the state's interest in the control of the illegal use of narcotic drugs and the fact that Washington has a long history of statutorily making pharmacy records available to law enforcement, on the impracticability of the warrant requirement due to the fact that

pharmacists are likely to be the primary reporters of suspected prescription drug abuse by patients, and the nature of the privacy interest in prescription records which is limited by an individual's reasonable knowledge that the State "will keep careful watch over the flow of [narcotic] drugs from pharmacies to patients." Id. at 311.

The court also stated, "federal precedent is still persuasive in our analysis of state privacy protections," and noted the fact that no other state has invalidated pharmacy protections," and further observed that no other state has invalidated pharmacy statutes that grant access to law enforcement on the basis of the Fourth Amendment or their own state constitutions. Id.

In Robinson v. Seattle, 102 Wn. App. 795, 10 P.3d 452 (2000), the Court conducted an analysis of the Gunwall factors concentrating on the fourth and sixth factors. In its constitutional analysis, the court stated that "the Washington Supreme Court has developed a different approach for article 1, section 7 analysis of governmental searches outside the context of law enforcement" and that "whether or not the special needs test is satisfied does not answer the question presented under Article 1, Section 7." Id. at 818. However, the court then went on to say, "Rather, we first consider whether the privacy interest intruded upon is one that citizens have held and should be entitled to hold safe from governmental trespass,

and then whether a compelling interest, achieved through narrowly tailored means, supports the intrusion.” Id. This appears to closely mirror the special needs analysis despite the fact that the court stated such an analysis was unhelpful in determining a violation of the state constitution. In analyzing the State’s interest, the court held that “[s]uspicionless preemployment drug testing is therefore justified under article 1, section 7, where the duties of a particular position genuinely implicate public safety, such that there is potential jeopardy to members of the public if such duties are performed by a person who abuses drugs.” Id. at 823. The court reasoned that “public safety justifies a preemployment search because of the compelling need to know of drug problems before the public safety is placed in jeopardy for even one day.” Id. at 827.

Recently, Robinson was called into doubt by York v. Wahkiakum School District No. 200, which stated, “applied to a suspicionless testing policy, the [article 1, section 7] analysis mirrors the special needs analysis: a compelling state interest must justify the policy and the testing must be a narrowly tailored means of serving this interest.” 110 Wn. App. 383, 386 (2002) (citing In re Juveniles A, B, C, D, E, 121 Wn.2d at 96-98; Robinson, 102 Wn. App. at 817-18).

In In re Juveniles A, B, C, D, E, 121 Wn.2d 80, 847 P.2d 455

(1993), the this Court held that RCW 70.24.015 mandating HIV testing of convicted sexual offenders did not violate the defendants' constitutional right to privacy. Because the parties had not briefed the Gunwall factors, the court interpreted Article 1, Section 7 by Fourth Amendment analysis, adopting the "special needs" doctrine as set out by Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602 (1989), and a test articulated by Johnetta J. v. Municipal Court, 218 Cal. App. 3d 1255, 1274, 267 Ca. Rptr. 666 (1990), which analyzes:

(1) whether the blood testing scheme arises from a "special need" beyond the needs of ordinary law enforcement and (2) if so, whether the intrusion of compulsory blood testing for AIDS, without probable cause or individualized suspicion that the AIDS virus will be found in the tested person's blood, is justified by the need.

In In re Juveniles A, B, C, D, E, this Court first held that nonconsensual HIV testing falls under the 'special needs' exception to the warrant requirement, reasoning that "the statute is not part of the criminal code; it is designed to protect the victim, the public, and the offender from a serious public health problem," the defendants were "not being tested in an effort to gain evidence for a criminal prosecution" nor would the results mean a longer sentence. Also, the requirement of individualized suspicion is impracticable because HIV does not often outwardly manifest symptoms. 121 Wn.2d at 92. This Court concluded that the State's compelling interest in detecting and

preventing the spread of HIV outweighs the defendants' expectation of privacy.

Second, this Court balanced the "individual's interest in avoiding testing against the government's interest in mandatory testing." Id. In analyzing the individual interest, this Court stated that blood testing does not constitute an extensive violation of privacy. Id. (citing Winston v. Lee, 470 U.S. 753, 762 (1985), State v. Meacham, 93 Wn.2d 735, 737, 612 P.2d 795 (1980)). Moreover, the rights of convicted criminals, and sexual offenders in particular, are greatly diminished because their criminal behavior places their victims in danger of contracting the virus. Id. at 92-93. This Court recognized that there is not only a privacy concern in the collection of the blood, but also in the subsequent testing. This concern was alleviated in In re Juveniles A, B, C, D, E, by the emphasis that the statute places on privacy and confidentiality by limiting the disclosure of test results. Id.

This Court also found that the State has substantial compelling interests in fighting the spread of AIDs, and also in protecting the rights of victims, particularly the alleviation of mental anguish that a victim suffers in not knowing whether he or she has contracted the disease. Testing also allows prisons and probation to effectively treat offenders who have HIV, to alter their behavior and

protect other inmates, furthering the State’s “obligation to provide minimally adequate medical care to those whom they are punishing by incarceration.” *Id.* at 94-95 (citing Harris v. Thigpen, 941 F.2d 1495, 1504 (11th Cir. 1991)).

For these reasons, this Court held that mandatory HIV testing of sexual offenders does not violate the Fourth Amendment, although the holding was narrowly applied to convicted sex offenders.

This Court went on to analyze the defendants’ constitutional right to privacy, although it did not mention Article 1, section 7 at all. The court recognized two types of privacy: the right to nondisclosure of inmate personal information or confidentiality, and the right to autonomous decision making. *Id.* At 96 (citing O’Hartigan v. Department of Personnel, 118 Wn.2d 111, 117, 821, P.2d 44 (1991), Bedford v. Sugarman, 112 Wn.2d 500, 509, 772 P.2d 486 (1989)). The right to nondisclosure may be outweighed if the State has a “rational basis” for it, and the autonomy may be compromised when the State has a “narrowly tailored compelling state interest.” *Id.* at 97. The confidentiality branch of privacy is implicated by the testing scheme of the statute, but this Court found that the compelling State interest outlined above outweigh the minimal intrusion of privacy. The autonomy branch is implicated by the taking of the blood, but again, the State’s compelling interests outweigh the intrusion as well

and the policy meets the ‘narrowly tailored’ requirement because it is aimed at a high risk group and disclosure of test results is limited. Id.

The foregoing cases demonstrate that the special needs exception to the warrant requirement is an integral part of this state’s Article 1, Section 7, jurisprudence. Furthermore, the existing law in the State of Washington is that for the purposes of the school exception, Article 1, Section 7, of the Washington State Constitution is coextensive with the Fourth Amendment to the United States Constitution.

Other states have adopted a “special needs” analysis when construing their state constitutions in the context of random student drug testing. In Joye v. Hunterdon Central Regional High School Board of Education, 176 N.J. 568, 826 A.2d 624 (2003), The New Jersey Supreme Court applied the ‘special needs’ doctrine and held that the high school’s random, suspicionless drug testing of students engaged in all extracurricular activities did not violate the search and seizure provision of its State Constitution because the students generally have diminished privacy expectations due to the school’s duty to maintain safety, order and discipline in schools; the results of the tests were confidential and did not disclose medical conditions or prescription medications to school officials; and the school’s need was demonstrated by first-hand experience of students using drugs

and a survey of students that indicated that there was a drug problem in the school. The Court found “nothing in the history of Article 1, paragraph 7, of the New Jersey Constitution in preexisting State law, or in the prevailing attitudes of the public that would warrant” construing the provision to provide greater protection than the Fourth Amendment. Joye, 176 N.J. at 607.

In Penn-Harris-Madison School Corp v. Joy, 768 N.E.2d 940 (Ind. Ct. App. 2002), the Indiana Court of Appeals held that random suspicionless testing of students who participated in extracurricular activities did not violate its State Constitution’s prohibition against unreasonable searches and seizures because results were not turned over to law enforcement, test results were kept confidential, students subject to testing had already subjected themselves to a higher degree of regulation by virtue of participation in extracurricular activities, the policy was generally preventative and rehabilitative as opposed to punitive, the school had evidence of a drug problem, and the school had an interest in preventing substance abuse among its students. The Court adopted Vernonia’s balancing test, weighing 1) the nature of the privacy interest upon which the search intrudes, 2) the character of the intrusion that is complained of, and 3) the nature and immediacy of the governmental concern.

In Weber v. Oakridge School District , 76 184 Or. App. 415,

56 P.3d 504 (2002), the Court of Appeals of Oregon upheld random urinalysis drug testing of student athletes and found that such testing did not violate Article I, Section 9, of the Oregon State Constitution. The Oakridge School District's student athlete drug testing policy was similar to the Wahkiakum School District's Policy No. 3515, except that the student was under direct observation when giving the urine specimen. Finding that the purpose of the Oakridge School District's Policy were noncriminal, the Court applied an administrative search exception to the warrant requirement in concluding that random drug testing is reasonable Id., 56 P.3d at 519.

Contrary to the Appellants' assertions, there is nothing radical, unreasonable, or unworkable about the trial court's application of the special needs exception to random drug testing of public school athletes. The special needs exception is well recognized under both federal and state constitutional law.

In New Jersey v. T.L.O., 469 U.S. 325, 105 C.Ct. 733, 83 L.Ed.2d 720 (1985), the United State Supreme Court announced the special needs exception to the warrant requirement. The exception was applied in upholding the validity of a school official's warrantless search of a student's purse. Id., 469 U.S. at 340. The Court also held that a search justified by the special needs exception need not be based upon probable cause. Id. The standard for school

searches is reasonableness, not probable cause: “rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search,” 469 U.S. at 341. The Court gave guidance for making the determination of reasonableness. According to the Court, a school search is reasonable if the school official was justified at its inception and the search as actually conducted was reasonably related in scope to the circumstances which justified the search in the first place. Id. Under the particular facts of T.L.O., the Court concluded that the school vice-principal had reasonable suspicion to search the student’s purse. Id. New Jersey v. T.L.O. was decided on January 15, 1985.

The Washington State Court of Appeals quickly adopted the T.L.O. analysis in the context of a school search case. In State v. Brooks, 43 Wn. App. 560, 718 P.2d 837, (1986) the Court of Appeals upheld the warrantless search of a metal box located in a high school student’s locker. Specifically, the Court of Appeals relied upon the T.L.O. analysis in reaching the conclusion that the warrantless search did not violate Article 1, § 7 of the Washington State Constitution.

The Court in Brooks also relied upon this Court’s decision in State v. McKinnon, 88 Wn.2d 75, 558 P.2d 781 (1977), which upheld the validity of a school principal’s search of the person of a high school student. The Court in McKinnon remarked: “to hold school

officials to the standard of probable cause required of law enforcement officials would create an unreasonable burden upon these school officials.” 88 Wn.2d at 81. Under the facts of McKinnon, the principal did have a reasonable suspicion to search the students for drugs.

McKinnon, supra, demonstrates that this Court has recognized some form of special needs exception for school searches for almost thirty years. Brooks, supra, shows that the special needs exception in the context of school searches has been part of this State’s Article 1, § 7, jurisprudence for some twenty years.

The real issue to be determined by this Court is whether the development of the common law related to the special needs exception must be frozen where it was in 1986. Appellants argue that Article 1, § 7, of the Washington State Constitution prohibits extension of the special needs exception to suspicionless school searches. It is the Respondents’ position that there is nothing in any reported Article 1, § 7, case which prohibits development of the special needs exception first enunciated by the United State Supreme Court in T.L.O., supra. Instead of rejecting the U.S. Supreme Court’s recent refinements of the special needs exception, this Court should continue to incorporate those refinements into its Article 1, § 7, jurisprudence.

The United State Supreme Court has further developed the T.L.O. analysis in two recent cases specifically upholding random, suspicionless drug testing of public school students. In Vernonia School District 47J v. Acton, 515 U.S. 646, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995), the United States Supreme Court upheld the validity of a public school district's policy which authorized random urinalysis drug testing of students who participate in its athletic programs. The Court found that the compelled collection and testing of urine constituted a search, but that the search was reasonable under the Fourth Amendment to the United States Constitution. The reasonableness of the drug testing policy was determined by balancing its intrusion on the individual privacy interests against its promotion of legitimate governmental interests. The Court's ruling hinged upon its extension of the "special needs" exception recognized in New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 83 L.Ed.2d 720 (1985), to suspicionless drug testing of student athletes. The Court reasoned:

A search unsupported by probable cause can be constitutional, we have said, "when special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable." Griffin v. Wisconsin, 483 U.S. 868, 873, 107 S.Ct. 3164, 3168, 97 L.Ed.2d 709 (1987) (internal quotation marks omitted).

We have found such “special needs” to exist in the public school context. There, the warrant requirement “would unduly interfere with the maintenance of the swift and informal disciplinary procedures [that are] needed,” and “strict adherence to the requirement that searches be based upon probable cause” would undercut “the substantial need for teachers and administrators for freedom to maintain order in the schools.” T.L.O., 469 U.S., at 340, 341, 105 S.Ct., at 742. The school search we approved in T.L.O., while not based on probable cause, was based on individualized suspicion of wrongdoing. As we explicitly acknowledged, however, “the Fourth Amendment imposes no irreducible requirement of such suspicion”“(emphasis in the original) 115 S.Ct. at 2391.

In analyzing the privacy interest involved in the instance of student drug testing, the court pointed out that whether an expectation of privacy is legitimate varies depending upon the context. Id. In examining the privacy interest of the Vernonia students, the court found it extremely significant that the students were children who had “been committed to the temporary custody of the State as schoolmaster.” Id. The court expanded upon that notion when it observed:

Fourth Amendment Rights...are different in public schools than elsewhere; the “reasonableness” inquiry cannot disregard the schools’ custodial and tutelary responsibility for children. For their own good and that of their classmates, public school children are routinely required to submit to various

physical examinations, and to be vaccinated against various diseases. Id. at 2392.

The court also recognized that student athletes have an even lesser expectation of privacy than students generally:

Legitimate privacy expectations are even less with regard to student athletes. School sports are not for the bashful. Id.

The court went on to note:

There is an additional respect in which school athletes have a reduced expectation of privacy. By choosing to “go out for the team,” they voluntarily subject themselves to a degree of regulation even higher than that imposed on students generally. Id. at 2393.

Having concluded that public school children in general, and student athletes in particular, have a diminished expectation of privacy, the court went on to examine the process used to collect the urine sample:

Under the District’s Policy, male students produce samples at a urinal along a wall. They remain fully clothed and are only observed from behind, if at all. Female students produce samples in an enclosed stall, with a female monitor standing outside listening only for sounds of tampering. These conditions are nearly identical to those typically encountered in public restrooms, which men, women, and especially school children use daily. Under such conditions, the privacy interests compromised by the process of obtaining the urine sample are in our view negligible. Id.

In examining the government’s interest in student drug testing, the court stated that the relevant inquiry is whether the state’s interest appears important enough to justify the particular search at hand. Id. at 2394. The court concluded that deterring drug use by school children was indeed an important governmental concern. Id. at 2395.

The Court also concluded that student athlete drug testing is an efficacious means of deterring drug use. The Court rejected the notion that the school district should have been limited to using only a suspicion-based drug testing program:

We have repeatedly refused to declare that only the “least intrusive” search practicable can be reasonable under the Fourth Amendment. Id. at 2396.

The Court underscored that the most fundamental inquiry in the context of the Fourth Amendment is whether the search is reasonable: “the relevant question is whether the search is one that a reasonable guardian and tutor might undertake.” Id. at 2397 (emphasis added) .

In Board of Education of Independent School District No. 92 of Pattawatomie County v. Earls, 536 U.S. 822, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002), the United States Supreme Court extended the reasoning of Vernonia to random drug testing of students participating in any extracurricular activity. The Tenth Circuit had

invalidated the policy because it found that the school district had not sufficiently identified a drug abuse problem among its students prior to implementation of the policy. The United States Supreme Court reversed the Tenth Circuit and found that the school district's student drug testing policy was reasonable and therefore did not violate the Fourth Amendment to the United States Constitution. In the words of the court: "Because this policy reasonably serves the School District's important interest in detecting and preventing drug use among its students, we hold that it is constitutional." *Id.*, 536 U.S. at 825.

The court found that a school district need only make "some showing" of a drug abuse problem in order to justify a random student drug testing policy. *Id.*, 536 U.S. at 835. With respect to the issue of the required showing, the court remarked:

[I]t would make little sense to require a school district to wait for a substantial portion of its students to begin using drugs before it was allowed to institute a drug testing program designed to deter drug use. 536 U.S. at 836.

The court emphasized that reasonableness is the key to determining whether a given policy violates the Fourth Amendment:

Given the nationwide epidemic of drug use and the evidence of increased drug use in Tecumseh Schools, it was entirely reasonable for the School District to enact this particular drug testing policy. *Id.*, 536 U.S. at 836.

The Court also rejected the notion that there was some particular percentage of student drug use that must be present in order to validate a random drug testing policy:

As we cannot articulate a threshold level of drug use that would suffice to justify a drug testing program for school children, we refuse to fashion what would in effect be a constitutional quantum of drug use necessary to show a drug problem. 536 U.S. at 836.

The Court also found as a matter of law that random student drug testing was an efficacious means of addressing concerns of drug use among students:

Finally, we find that testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District's legitimate concerns in preventing, deterring, and detecting drug use. *Id.*, 536 U.S. at 837.

The special needs exception provides a workable and understandable test while protecting the privacy rights of students consistent with Article 1, § 7, of the Washington State Constitution. This exception requires a school district to establish two (2) things: (1) a compelling interest and (2) a narrowly tailored means of serving the interest. Wahkiakum School District Policy No. 3515 clearly meets that test. The control of drug abuse among students is a compelling state interest. And, a urinalysis test that looks only for drugs of abuse is a narrowly tailored means of detecting and deterring harmful drug use among students.

The Appellants do not clearly articulate the test that should be used in the context of school searches. Appellants suggest a suspicion-based test and assert that Article 1, § 7, bans suspicionless searches. The random drug testing program used in the Wahkiakum Schools actually better protects students from arbitrary intrusions than does the ill-defined suspicion-based test advocated by Appellants. What passed the suspicion-based test in State v. Brooks and State v. Slattery, supra, were essentially uncorroborated statements from other students and teachers. The United States Supreme Court, in Vernonia School District v. Acton, supra, correctly referred to such testing as “accusatory drug testing.” 515 U.S. at 663. A student called in for such suspicion-based testing is automatically presumed by his or her peers to be using drugs. Under a program of random drug testing, other students only may conclude that the tested student’s “number has come up.” Random drug testing eliminates the potential for arbitrary witch-hunting that is inherent in suspicion-based testing. Therefore, a tailored system of suspicionless drug testing actually furthers the privacy interests protected by Article 1, Section 7, of the Washington State Constitution.

C. Article 1, Section 7, of the Washington State Constitution Does Not Mandate a Per Se Ban on All Suspicionless Searches.

State sanctioned suspicionless searches occur daily in the State of Washington at airports, at college football stadiums, at professional baseball fields, at courthouses, and at public schools. Government mandated random drug testing of publicly employed truck drivers and ferry crews also occur on a regular basis in the State of Washington. Article 1, Section 7, of the Washington State Constitution should not be construed as imposing a per se ban on all suspicionless searches and random drug testing. The appropriate standard in each instance is whether the search is reasonable under all of the circumstances. Applying that standard requires a fact-specific balancing of the competing interests involved.

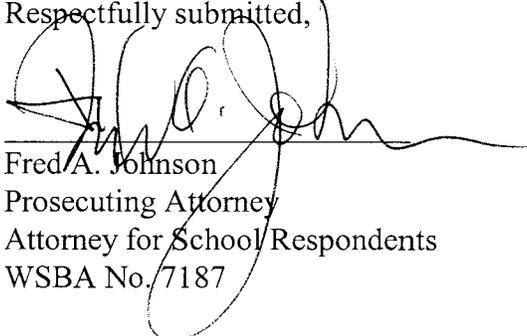
CONCLUSION

The trial court correctly applied Article 1, § 7, of the Washington State Constitution when it upheld Respondents' random drug testing policy. The trial court did not create a new special needs exception; it simply applied the existing law to a new set of circumstances, an endeavor which is a fundamental part of the common law.

Policy No. 3515 does not violate Article 1, Section 7 of the Washington State Constitution. The special needs test of Fourth Amendment jurisprudence is appropriate for Article 1, Section 7, constitutional analysis as well. The trial court correctly rejected Plaintiffs' claims based upon alleged violations of Article 1, Section 7, of the Washington State Constitution. The trial court's order granting Respondents' Motion for Summary Judgment should be affirmed.

DATED this 21st day of November, 2006.

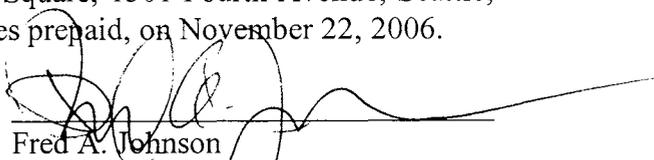
Respectfully submitted,



Fred A. Johnson
Prosecuting Attorney
Attorney for School Respondents
WSBA No. 7187

CERTIFICATE

I certify that I delivered via ABC Legal Messengers, a copy of the foregoing Respondent's Brief to Eric Martin, Attorney for Petitioners, at 2600 Century Square, 1501 Fourth Avenue, Seattle, Washington 98101-1688, fees prepaid, on November 22, 2006.



Fred A. Johnson
Prosecuting Attorney
Attorney for School Respondents
WSBA No. 7187

RECEIVED
SUPREME COURT
STATE OF WASHINGTON

2006 NOV 22 A 10: 57

BY C. J. MERRITT

CLERK