



Student Drug Testing

Legal History & Current Legal Issues

Presented by

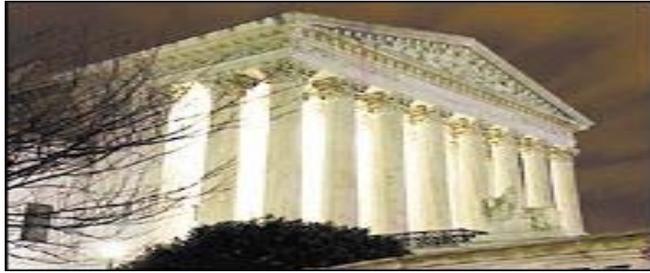
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And the

Drug-Free Schools Support Network



Drug Testing in School

IS

Legal

School Board Concerns

- 1. Will we get sued?**
- 2. What does it cost?**
- 3. How will it be received in the community?**
- 4. Is there a need for this?**

Objections

- 1. Privacy Issue.**
- 2. Scares Kids away from participating.**
- 3. Funds could be better spent.**

The Need

*“But we already have programs in place
to address this issue!”*

Prevention

- Education
- After-School Programs

Counseling

- SAS
- Counseling/ Referral

What's Missing?

Success Requires:

Prevention → Identification → Counseling



In Each School

2 Populations

2 different set of rules

General Student Body		Extra-Curricular
<u>Who?</u>	All	Those who Volunteer
<u>When?</u>	Reasonable Suspicion	1. Pre-Participation 2. R.S. 3. Random
<u>What?</u>	Expulsion	No impact on Academic side



Drug Testing in School

IS

Legal



Legal History

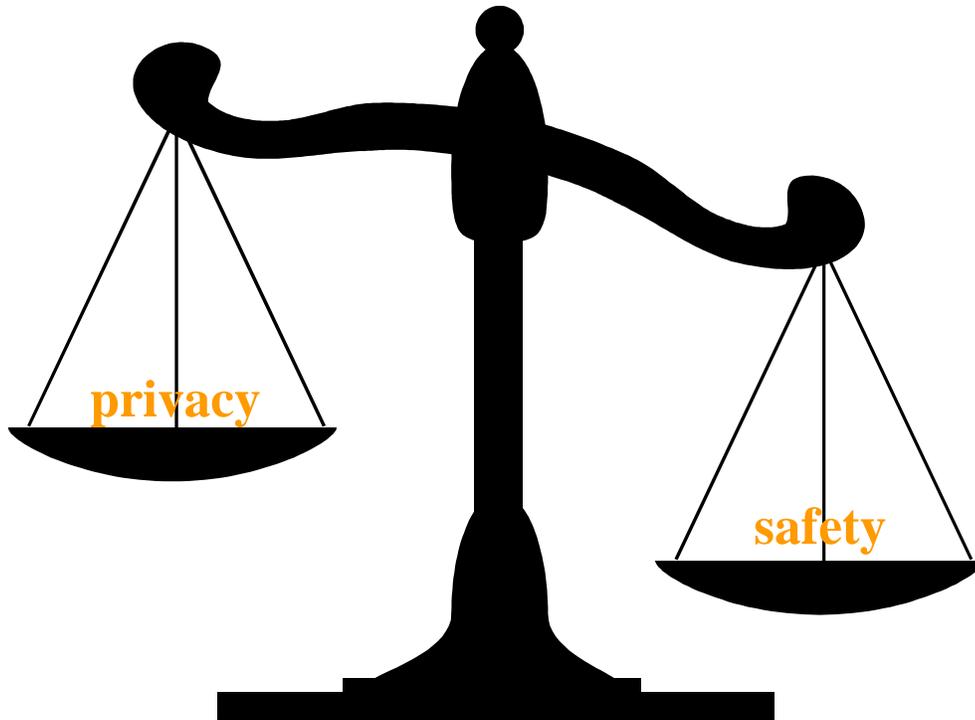
- 1943:** Schools bound by the US Constitution.
- 1985:** School Officials *do not* need a search warrant – *reasonable suspicion will do.*
- 1995:** Random testing of student athletes upheld.
- 2002:** Random testing of all “competitive extracurricular participants upheld.



Historical Issues

- Constitution applies in school.
- Searches must be reasonable
- Drug tests are searches

Fourth Amendment: “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”



Is drug testing students legal? **YES!**

So, why all the controversy?

The right of privacy vs. School's responsibility

Key points:

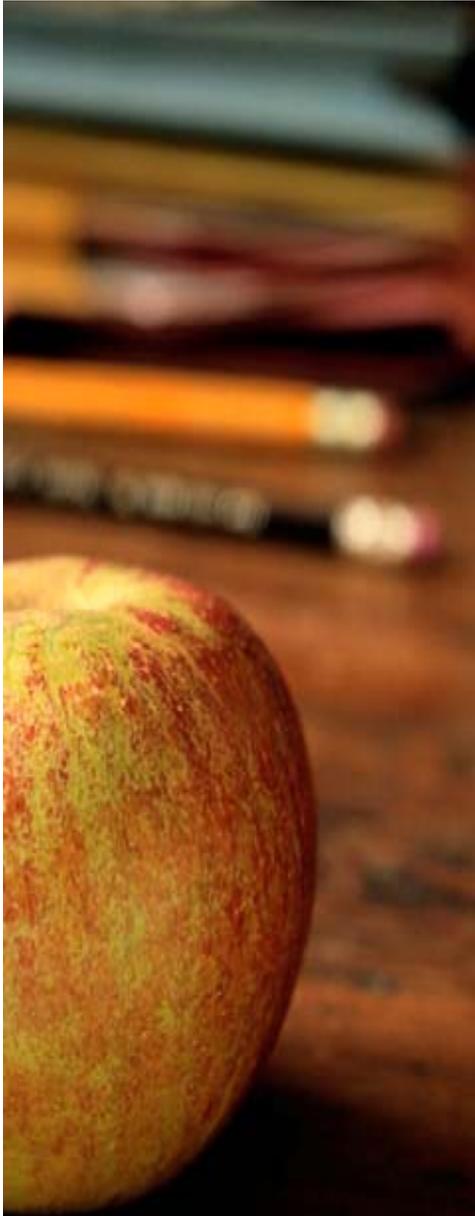
- **The Constitution limits school officials.**
- **A drug test is a search.**
- **A search conducted by a government official is only legal if it is reasonable.**
- **School children have diminished expectation of privacy.**



Constitutional Analysis

1. Drug test = search under 4th Amend
2. Search is legal if “reasonable”.
3. “Reasonableness” depends on a balance: *privacy v. gov’t interest*.
4. To be reasonable, search typically requires *warrant* based on *probable cause*.
5. Not all government searches require warrant/prob. Cause. *Limited to criminal setting*.
6. No warrant/p.c. where special needs exist.
7. “Special needs” exist in schools.
8. *T.L.O.* case involved “individualized suspicion”.
9. *Vernonia* case involved no suspicion.
10. *Earls* decision expands those subject to suspicionless searches.

- 4th Amend. does not protect all subject expectations of privacy – only those society deems to be “legitimate”.
- 4th Amend. imposes no “irreducible requirement” of suspicion. (*Vernonia*)
- The “probable cause” standard is peculiarly related to criminal investigations and may be unsuited to determine the reasonableness of administrative searches” designed to prevent hazardous conditions. (*Treasury Employees v VonRaab*, 489 U.S. 656 (1989)).



US Constitution

"The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures -- Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

West Virginia State Bd. of Ed. v. Barnette, 319 U.S. 624, 637 (1943)



New Jersey v. T.L.O.

US Supreme Court 1985



Search of purse by school officials *did not* require search warrant so long as there was reasonable suspicion of school rule violation.

New Jersey v. T.L.O., 469 U.S. 325 (1985)

“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 of teachers and administrators for freedom to maintain order in the schools."

Vernonia School Dist. 47J v. Acton

US Supreme Court 1995



- Student athletes were “leaders in the drug culture” which led to “a state of rebellion.”
- All alternative efforts failed.
- Random testing introduced.
- Drug test is a search under the 4th Amendment.
- Under these circumstances the searches/tests are reasonable.

NOTE: The law advanced from the TLO individual suspicion case to a suspicionless search of all athletes/role models.



Bd. of Ed. Of Ind. Sch. Dist. No.92 of Pottawatomie County, et al v. Earls, et al.

US Supreme Court 2002

- Policy applied to all Middle and High School students participating in “any extracurricular activity.”

- In reality Policy applied only to “competitive extracurricular activity participants.

- Relies heavily on Vernonia:

- Nature of the privacy interest viewed in context of public school setting. (lesser expectation of privacy due to participation had less to do with the decision than the school setting itself)

- Nature of the intrusion “not significant”.

- Nature and immediacy of the concern: national epidemic combined with evidence of increased local concerns.

• **The probable cause standard is “is peculiarly related to criminal investigations” and may be unsuited to determining the reasonableness of administrative searches where the “Government seeks to prevent the development of hazardous conditions.” *Treasury Employees v. Von Raab*, 489 U. S. 656, 667–668 (1989)**

“Given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students’ privacy is not significant.

“ . . . 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.



Student Rights

The Court in Vernonia said:

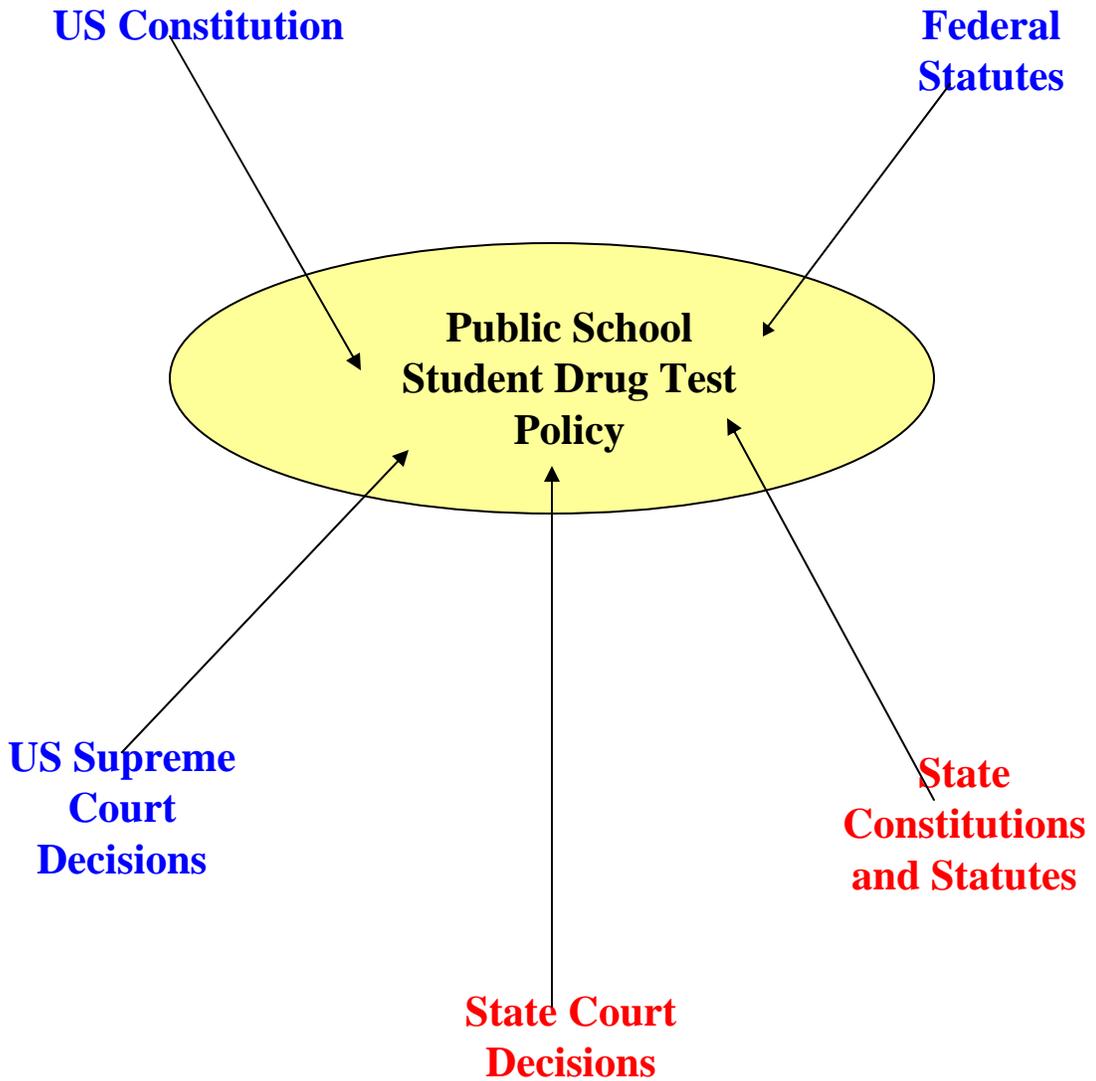
“While children assuredly do not shed their constitutional rights at the schoolhouse gate (*Tinker v. Des Moines Ind. Comm. Sch. Dist.* 393 U.S. 503 1969), the nature of those rights is what is appropriate for children in school” (*Goss v. Lopez*, 419 U.S. 565 1975).

“Un-emancipated minors lack some of the most fundamental rights of self-determination – including even the right of liberty in its narrow sense – the right to come and go at will”.

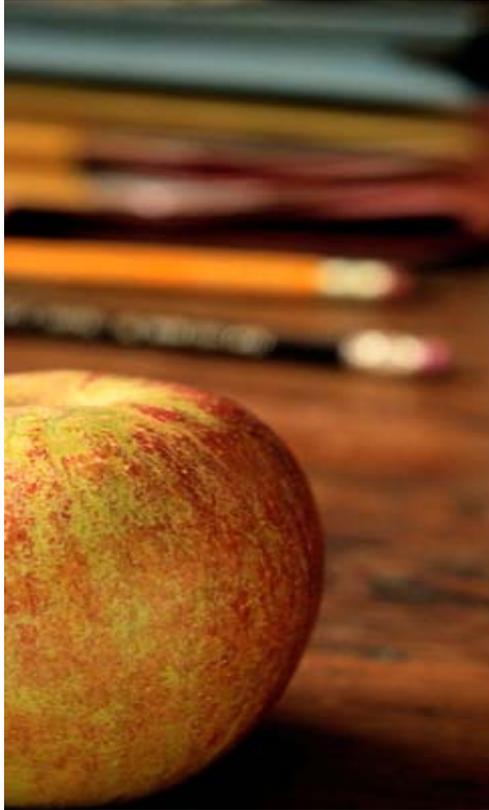
Central to the Court’s view? The focus of the Policy – children “who have been committed to the temporary custody of the state as schoolmaster.”

The nature of students’ rights is what is appropriate for children in school:

- “due process” in challenging disciplinary suspension requires **ONLY** informal discussion of alleged misconduct. *Goss v. Lopez*, 419 U.S. 565 (1975)
- School may prohibit vulgarity and offensive terms in public discourse. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986).
- School may censor school-sponsored publications. *Hazelwood Sch. Dist. V. Kuhlmeier*, 484 U.S. 260 (1988).



Evaluating the Legal Framework



Policy Issues

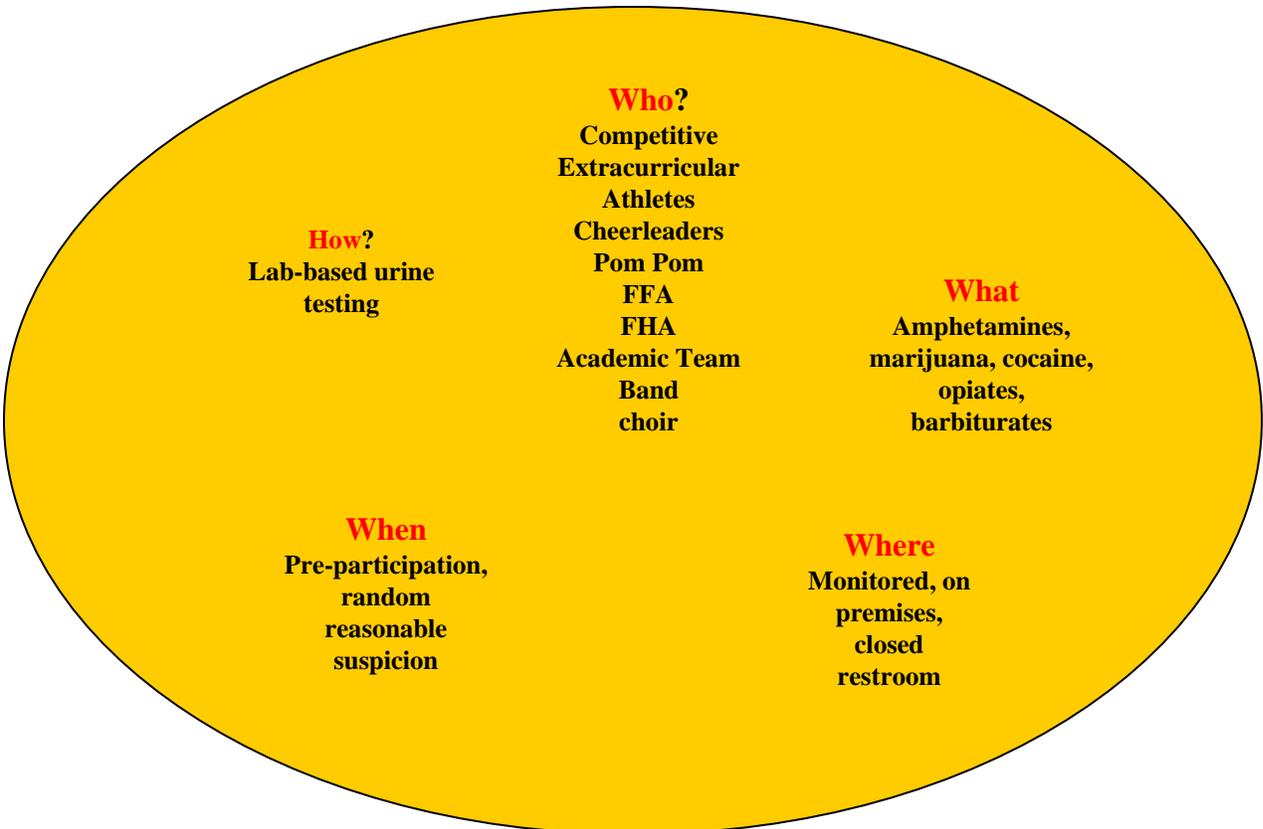
Earls/Vernonia

Constitutional

Circle

Of

Protection



Who

Can Be Tested?

Constitutional Circle of Protection

Athletes

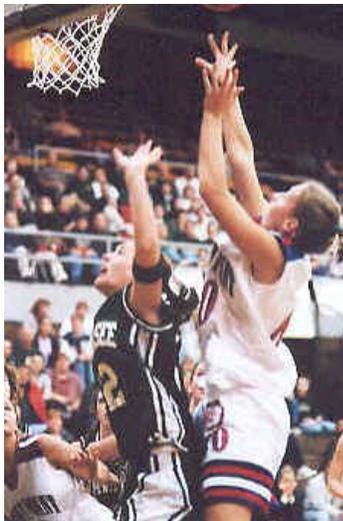
Cheerleaders

Band

Future Farmers

Future Homemakers

Academic Teams



Who

Can Be Tested?

Constitutional Circle of Protection

**Those permitted to
drive to school?**



What

Will substances will be tested for?

Constitutional Circle of Protection

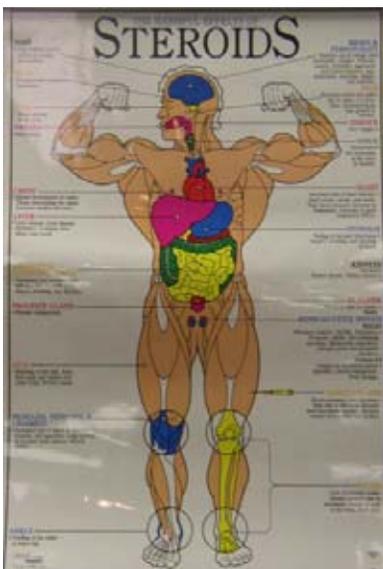
amphetamines

opiates

PCP

cocaine

marijuana



Where

**Will testing be conducted?
Constitutional Circle of Protection**

On-site?

HHS-certified Lab



When

Will testing be done?

Constitutional Circle of Protection

1. Pre-Participation

2. Reasonable Suspicion

3. Random

Issues



1. Selection Pool:

- in-season/all year?

2. Selection rate?

How

Will testing be done?

Constitutional Circle of Protection

Urine

Lab-based tests





Current Issues

- 1. State Constitutions provide more protection.**
- 2. State Statutes**
- 3. Designing Effective Programs.**



State Constitutional Protections

For Defendants:

- *Joye v. Hunterdon Central Regional High School Bd. Of Ed.* (2002 NJ)
- *Theodore v. Delaware Valley School District* (2002 PA); 2003 Reversed. Open Issue.
- *Northwestern School Corp. v Linke* (2002 IN)
- *Vernonia School Dist. No. 47J v. Acton* 1995 OR)

For Plaintiff:

- *Tannahill v. Lockney Indep. School Dist.* (2001 TX)
- *Trinidad School District No. 1 v. Lopez* (1998)



**A Quick Look
At State Laws**

State laws that:

1. Require reporting criminal activity to local law enforcement.

AL:Sec. 16-1-24.1(b)

IL:105 ILCS 127/1

LA:T.14, ch2, Pt. V, sec. 403.1

OR:ORS Sec. 40.245 (its not specific but certainly arguable)

UT:Utah Code Ann. Sec. 78-3e-2

2. Provide immunity to school personnel who report use by students.

AL:Sec. 16-1-24.1(g)

CT:Sec. 10-154a(d)

LA:T.14, ch2, Pt. V, sec. 403.1(F)

NJ:18A: 40A-13, 14

NM:N.M. Stat. Ann. Sec. 22-5-4.4(B)

OK:70 Okl. St. Sec. 24-138

PA:42 Pa. C.S. Sec. 8337

3. Authorizes alcohol testing of student suspected of being under the influence; test method must be as adopted by federal DOT.

WI:118.45

4. Requires that certain student information be maintained confidentially.

LA:La. R.S. 40: 1098.8

NJ:18A: 40A-7.1

OH:ORC Ann. 3319.321

OR:ORS Sec. 40.245

5. Requires school to have prevention/counseling services.

AR:Sec. 6-13-627

LA:La. R.S. 17: 402, 403(c)

NJ:18A: 40A-18

6. Requires each to be given written procedures for dealing with student who is under the influence.

OK:70 Okl. St. Sec. 24-138(B)

7. Requires/permits establishing a drug free school committee.

AL:Sec. 16-1-24.1

DE:14 Del. C. Sec. 3805

8. Requires each certified teacher to be trained within the first year of employment regarding the identification and reporting of student substance abuse.

NM:N.M. Stat. Ann. Sec. 22-10-3.2



Proper Program Design

1. **Organize the DFS Committee**
2. **Determine the needs.**
3. **Structure the Written Policy.**
4. **Establish procedures to protect student confidentiality**
5. **Select vendors/methods**





Future Challenges

- **Needed Legislation:**
 - School Personnel Immunity
- **Education:**
 - “De-mystifying the myths”
- **Counseling/Treatment**



Reasonable Suspicion?

What is it?

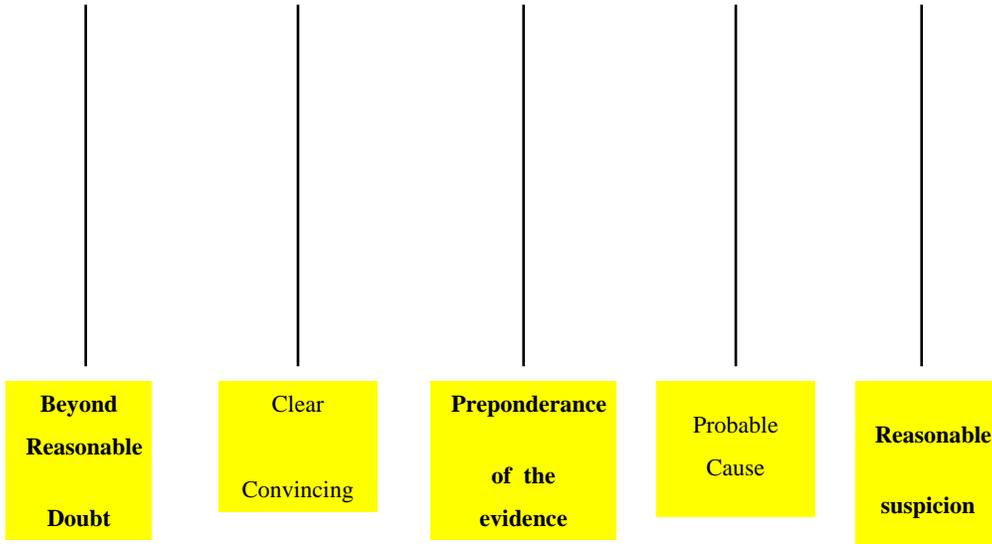
US Supreme Court defined it as:

“Something more than a hunch!”

“Something more than a hunch.”

Proof = Fact(s)

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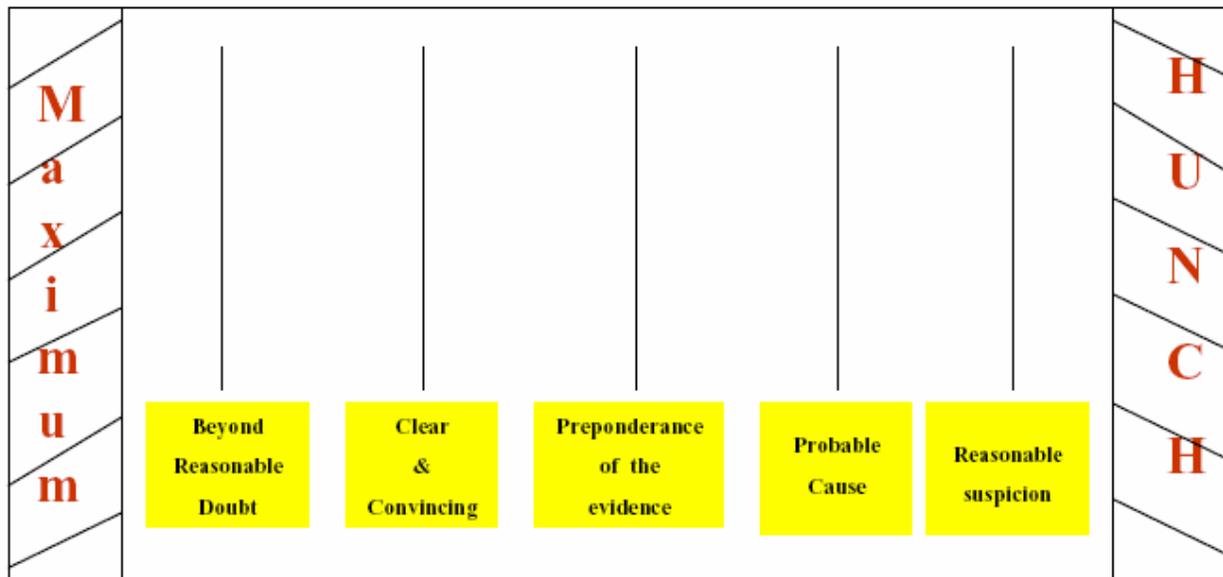


**H
U
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C
H**

Reasonable Suspicion of what? That the suspected student may have violated your school policy or the law - NOT that s/he is intoxicated!

“Something more than a hunch.”

Proof = Fact(s)



Reasonable Suspicion
Football Field

Drug Testing

Does it Work?

Professor Joseph McKinney

Ball State University

83 Indiana H.S. Principals surveyed.

1999 - 2001

- **85%** reported significant increase in use.
- Drug/alcohol expulsions/suspensions increased from 352 to 518 in 1 year.

2002 after re-instatement

- **73%** reported significant decrease in use.
- **80%** of the H.S with testing scored higher on state mandatory tests than those without.
- **71%** had higher graduation rates.
- **30%** reduction in drug & weapons expulsions.
- **90.5%** of students asked said it helped deter use and allowed them to say no.
- **11%** increase in extra-curricular participation.

**Striking a Balance
Federal Law v. State Law**

<p style="text-align: center;"><i>Vernonia</i> Balancing 3 Factors</p>	<p style="text-align: center;"><i>York et al. v. Wahkiakum Sch. Dist No. 200 (2/02)</i></p>
<p>(1) the nature of the privacy interest at issue;</p> <p>(2) the character of the intrusion; and</p> <p>(3) the nature and immediacy of the governmental concern and the efficacy of the means employed to address that concern.</p>	<p>“... applied to a suspicionless testing policy, the analysis mirrors the special needs analysis [of US Supreme Court]: a compelling state interest must justify the policy and the testing must be a narrowly tailored means of serving this interest.”</p>
<p style="text-align: center;">In balance Upheld the tests</p>	<p style="text-align: center;">Suspicionless search NOT unreasonable <i>per se</i></p>

Approximate Duration of Detectability of Selected Drugs in Urine

Drug	Duration of Detectability*
Amphetamine	48 hours
Methamphetamine	48 hours
Barbiturates	
Short acting	24 hours
Intermediate acting	48-72 hours
Long acting	7 days or more
Benzodiazepines	3 days (therapeutic dose)
Cocaine metabolites	2-3 days
Methadone	3 days (approximate)
Codeine/Morphine	48 hours
Propoxyphene/Norpropoxyphene	6-48 hours
Cannabinoids (marijuana)	
Single use	3 days
Moderate use (4 times weekly)	4 days
Heavy use (daily)	10 days
Chronic heavy use	21-27 days
Phencyclidine (PCP)	8 days (approximate)

•These are general guidelines only. Interpretation of the duration of detectability must take into account many variables, such as drug metabolism and half-life; the youth's physical condition, fluid balance, and state of hydration; route of administration; and frequency of ingestion.

Source: Council on Scientific Affairs. 1987. Scientific issues in drug testing. *Journal of the American Medical Association* 257(22):3112.