

Case Number 00-6128

IN THE UNITED STATES COURT OF
APPEALS FOR THE TENTH CIRCUIT

LINDSAY EARLS and LACEY :
EARLS, minors, by their next :
friends and parents, John David :
and Lori Earls, and :

DANIEL JAMES, a minor, :
by his next friend and mother, :
Leta Hager, :

Plaintiffs-Appellants, :

v. :

BOARD OF EDUCATION OF :
TECUMSEH PUBLIC SCHOOL :
DISTRICT, Independent School :
District No. 92 of Pottawatomie :
County, and :

TECUMSEH PUBLIC SCHOOL :
DISTRICT, Independent School :
District No. 92 of Pottawatomie :
County, :

Defendants-Appellees. :

On Appeal From The
United States District Court
For The Western District
Of Oklahoma

**BRIEF OF THE AMERICAN PUBLIC HEALTH ASSOCIATION, THE
NATIONAL ASSOCIATION OF SOCIAL WORKERS, THE
NATIONAL ASSOCIATION OF SOCIAL WORKERS – OKLAHOMA
CHAPTER, THE CENTER FOR LAW AND EDUCATION, THE
NATIONAL CENTER FOR YOUTH LAW, THE JUVENILE LAW
CENTER, THE LOYOLA CHILDLAW CENTER, ADVOCATES FOR
CHILDREN OF NEW YORK, LAWYERS FOR CHILDREN,
COVENANT HOUSE NEW JERSEY, PROFESSOR MARTIN
GUGGENHEIM & PROFESSOR RANDY HERTZ, *AMICI CURIAE*,
SUPPORTING PLAINTIFFS-APPELLANTS AND
FAVORING REVERSAL**

Dated: August 4, 2000

(continued on inside cover)

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Corporate Disclosure Statement

In accordance with Rules 26.1 & 29(c), Fed. R. App. P., *amici curiae* state that although some of the organizational signatories to this brief are incorporated, they are incorporated as non-profit corporations under §§ 501(c)(3) or (c)(6) of the Internal Revenue Code, have no parent corporations, and do not issue stock.

Identity of *Amici Curiae*, Interest in the Case, And Source of Authority to File

Amici Curiae are organizations and individuals from around the country with a wide range of experience working with and on behalf of adolescents. They are united by their view that the Tecumseh Public School District's policy at issue herein is harmful to the students to whom it applies. They seek to present their views to this Court for two reasons: First, there is an extensive body of social science research, bearing directly on the case, that is not presently before the Court and that appellees are unlikely to acknowledge. *Amici* believe this Court should have the benefit of this research when considering this matter. Second, *amici* respectfully submit that their collective experience considering and addressing the needs of young people provides them a uniquely informed perspective on the questions raised herein.

All parties have consented to the filing of this brief. Identification of each *amicus curiae* follows:

The American Public Health Association (“APHA”) is a national organization devoted to the promotion and protection of personal and environmental health. Founded in 1872, APHA is the largest public health organization in the world, representing over 50,000 public health professionals. It represents all disciplines and specialties in public health. Throughout its history, APHA has been in the forefront of numerous efforts to prevent disease and promote health. It publishes the American Journal of Public Health, a peer-reviewed journal. Its offices are in Washington, D.C.

The National Association of Social Workers (“NASW”) is a professional membership organization comprised of 150,000 social workers, with chapters in every state, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, and an international chapter in Europe. Created in 1955 by the merger of seven social work organizations, the NASW has as its purpose to develop and disseminate high standards of practice while strengthening and unifying the social work profession as a whole. NASW and its members have a significant interest in policies, such as the one at issue in the present case, that negatively effect children and youth. In NASW's policy on "Civil Liberties and Justice,” the Association expressed concern about the

unwarranted invasion of privacy that occurs when mandatory drug testing is used as a precondition for the receipt of services for which an individual would otherwise be eligible. The Association believes the negative and chilling effect on student participation in extracurricular activities caused by mandatory pre-participation drug testing requires review and reconsideration.

The National Association of Social Workers – Oklahoma Chapter (“NASW-OK”) is the largest professional association of social workers in Oklahoma. Founded in 1955, it has more than 1,000 members throughout the state. NASW-OK is a member organization that seeks to enhance the effective functioning and well-being of individuals, families, and communities in Oklahoma. Its members, trained professionals with degrees in social work, practice in a wide variety of settings, including public schools. Its members have extensive experience working with adolescents and addressing health issues including substance abuse. Its members’ experience in the schools and communities of Oklahoma, and working with Oklahoma’s young people, gives NASW-OK a well informed perspective on the issues raised in this case. Its offices are in Oklahoma City, Oklahoma.

The Center for Law and Education (“CLE”) is a national legal support and advocacy organization representing parents and students in efforts to improve the quality of public education. Since 1969, CLE has

pursued this goal through litigation, legislative and administrative advocacy, the provision of technical assistance, and training for attorneys, parents and other advocates. Its offices are in Boston, Massachusetts.

The National Center for Youth Law (“NCYL”) is a private, non-profit organization devoted to improving the lives of poor children in the United States. For more than 25 years, NCYL has provided support services to child advocates nationwide and direct representation in cases of significant impact. NCYL has expertise in areas including child welfare, public benefits for children and families, legal issues involving child and adolescent health, and juvenile justice. NCYL has participated as *amicus curiae* in cases before many state and federal courts of appeal, including the United States Supreme Court. Its offices are in Oakland, California.

The Juvenile Law Center (“JLC”) is a private, non-profit public interest law firm that has represented children since 1975 in cases involving child welfare, juvenile justice, mental health and public health systems. JLC has worked to ensure, *inter alia*, that children’s rights are protected throughout these systems. JLC’s publications are used by attorneys, judges, and child welfare professionals. They include A Guide to Judicial Decisions Affecting Dependent Children: A Pennsylvania Judicial Deskbook, Child Abuse and the Law, and the Children’s Rights Chronicle (a bi-monthly

newsletter). JLC has participated as *amicus curiae* in courts including the United States Supreme Court and the Pennsylvania Supreme Court. Its offices are in Philadelphia, Pennsylvania.

The Loyola ChildLaw Center (“Center”) houses the children’s law programs at Loyola University Chicago School of Law. The Center offers an extensive interdisciplinary child law curriculum. The Center’s ChildLaw Clinic currently represents over 100 children in cases involving education, child welfare, domestic violence, and other related areas. The Center’s Legislative and Policy Program engages in systemic advocacy related to children and families. The Center’s faculty train lawyers, social workers and other professionals in pediatric law and child and family advocacy. Faculty are also involved in numerous conferences and advisory panels aimed at improving the administration of justice for children and families. Its offices are in Chicago, Illinois.

Advocates for Children of New York, Inc. (“AFC”) has worked for over 25 years to secure quality and equal public education for children at greatest risk for school-based discrimination and/or academic failure. AFC provides individual case advocacy, technical assistance, and training for parents, students, and professionals about children's educational needs and the means of meeting them. AFC engages public policy makers in strategies to

modify procedures and practices that negatively impact on young people's academic success. AFC also conducts in-depth analyses of issues affecting academic achievement. Its experience as both researcher and advocate in the field of education allow AFC to provide informed commentary on the policy at issue here. Its offices are in New York, New York.

Lawyers For Children (“LFC”), founded in 1984, is dedicated to protecting and promoting the health and welfare of vulnerable children. LFC provides free, integrated legal and social work services to over 4,000 individual children per year, in a variety of legal contexts. In addition, LFC publishes guidebooks and other materials for both children and legal practitioners, conducts professional training sessions, and seeks systemic improvement of systems affecting vulnerable children. LFC staff have consulted to other child-focused organizations throughout the country. Its offices are in New York, New York.

Covenant House New Jersey (“CHNJ”) is the largest private agency serving homeless and runaway adolescents in New Jersey. It has developed a continuum of services for these troubled adolescents, ranging from outreach and counseling to transitional housing and educational and vocational assistance. CHNJ has a deep knowledge of the needs of adolescents, particularly adolescents experiencing difficulties, and of the approaches that

are most likely to be effective in addressing these young people's needs. Its offices are in Newark and Atlantic City, New Jersey.

Professor Martin Guggenheim of the New York University School of Law ("NYU") is among the nation's pre-eminent scholars, teachers and practitioners in the area of children's law. At NYU, he is Director of Clinical and Advocacy Programs, Executive Director of Washington Square Legal Services (NYU's free legal services program), and Supervising Attorney of NYU's Family Defense Clinic, which seeks to protect vulnerable families from unwarranted governmental intrusion. He directed NYU's Juvenile Rights Clinic for fifteen years, and currently teaches a seminar entitled Child, Parent & State that explores such issues as the rights of young people and the bases for according young people rights that adults have under the Constitution. As a pro bono advocate for children, Professor Guggenheim has litigated innumerable cases in the state and federal courts, and served as chief counsel for the following three cases in the United States Supreme Court: *Schall v. Martin*, 467 U.S. 253 (1984), *Lehman v. Lycoming County Children's Services Agency*, 458 U.S. 502 (1982), and *Santosky v. Kramer*, 455 U.S. 745 (1982). Professor Guggenheim serves on numerous national and regional boards of directors and advisors for organizations and projects involving children.

Professor Randy Hertz of the New York University School of Law (“NYU”) is also among the country’s leading scholars and teachers in the area of children and the law. He is the Supervising Attorney of NYU’s Juvenile Rights Clinic, and the Editor-In-Chief of the Clinical Law Review, a national, peer-reviewed scholarly journal. Professor Hertz is a current or former member of numerous professional organizations aimed at improving the administration of justice for children. He has published many books and articles on subjects including the legal needs of young people. He is the 2000 recipient of the American Bar Association's Livingston Hall Award for Juvenile Justice Advocacy.

Statement of Facts

The facts relevant to *amici*’s argument are few and uncontested: The Tecumseh Public School District (hereinafter “Tecumseh” or “School District”) mandates that all high school students wishing to participate in a broad range of extracurricular activities – whether academic, artistic, vocational, or otherwise – submit to involuntary drug testing, with no requirement of even a modicum of individualized evidence (or even

individualized suspicion) that any of the tested students has ever taken an illegal drug.¹

Summary of Argument

In upholding Tecumseh’s policy, the district court found that it falls within the “special needs” exception to the general Fourth Amendment requirement that governmental searches be preceded by findings of individual suspicion. In support of this conclusion, the court made two sweeping errors: it overestimated the potential benefit of the policy, and woefully underestimated its substantial harms to the very children it purportedly exists to help. These harms are well established by a voluminous body of research demonstrating that, in numerous respects, Tecumseh’s policy does far more harm than good to the community’s young people – rendering them, for example, more likely to drop out of school, less likely to be admitted to college, more likely to become involved with crime, and more likely to use drugs. Tecumseh’s policy thus fails on its own terms. It also severely undermines Tecumseh schoolchildren’s learning of, and respect for, essential American principles including respect for privacy, respect for individuals, innocence before proof of guilt, and limited government. The policy is

¹ *Amici* hereby adopt the detailed statement of facts in Plaintiffs-Appellants’ Brief.

supported by no need at all, certainly not by a “special need” warranting the waiver of core constitutional values and doctrine.

Argument

Amici do not question the sincerity of defendants’ intentions or the importance of what they take to be defendants’ essential goal: to provide the best chance for a bright future to the children of their community. But the means defendants have selected to effect this goal – subjecting all participants in cheerleading, the Academic Team, musical groups, the Future Farmers of America, and the Future Homemakers of America to mandatory drug testing without any factual showing or suspicion that any of these students may be using drugs – will have precisely the opposite result. That this result may be unintended does not render it any more reasonable, or any more worthy of exceptional constitutional or judicial deference.

I. Tecumseh’s Policy Deters Students From Activities Essential to Their Education, Well-Being and Healthy Development

Tecumseh’s policy acts as a strong deterrent to some students’ participation in extracurricular activities. Students “at the margin” – who stand to benefit most from extracurricular participation, and who without it are far more likely to fall into unhealthy, unproductive behaviors – are, with

tragic irony, among those most likely to be deterred from participation by the policy.

The extracurricular activities from which some Tecumseh students are deterred by the testing policy are not frivolous “add-ons” to the curriculum. Rather, they are central to the students’ education, personal development and future. In some cases, the extracurricular activities are formally linked to their classroom work, as the district court noted. (D.Ct. Op. at 18 n.42 (“Apparently, students who participate in an extracurricular activity usually enroll in a corresponding course for academic credit”).) The Supreme Court recently chastised a public school district for “minimiz[ing] the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience.” (*Santa Fe Independent School District v. Doe*, 2000 U.S. LEXIS 4154, *37 (June 19, 2000).)

The benefits of participation in extracurricular activities are manifold, and include the following: (a) improved academic performance (b) greater interest in school; (c) lower likelihood to drop out of school; (d) lower likelihood of involvement in violent crime; (e) lower likelihood to be a victim of a violent crime; (f) increased self-esteem; (g) lower incidence of clinical depression; (h) enhanced life skills, including teamwork, self-discipline and conflict resolution; (i) lower likelihood to engage in risk-taking behavior; (j)

lower levels of truancy; (k) lower likelihood of teen parenthood; (l) fewer disciplinary problems; (m) enhanced college admissions; and (n) lower likelihood to use alcohol, cigarettes or illegal drugs. These benefits are established by a voluminous body of research. For example:

- Children on their own during the after-school hours are far more likely to either become involved with, or to be victimized by, violent crime: “Violent juvenile crime triples during the hours of 3 pm and 8 pm. . . . Children are most likely to be victims of a violent crime by a non-family member between 2 pm and 6 pm. (National Institute on Out-of-School Time, Wellesley College, “Fact Sheet on School-Age Children’s Out-of-School Time” (December 1998), 1 (available on the Internet at <http://www.wellesley.edu/WCW/CRW/SAC/factsht.html>)(hereinafter “NIOST Fact Sheet”)(citations omitted).)
- “Children without adult supervision are at significantly greater risk of truancy from school, stress, receiving poor grades, risk-taking behavior, and substance use.” (NIOST Fact Sheet, at 1 (citations omitted).)
- “Teachers and principals report that students become more cooperative, learn to better handle conflicts, develop an interest in recreational reading, and receive better grades due to participation in after-school programs.” (NIOST Fact Sheet at 2 (citation omitted).)
- “Students who spend one to four hours per week in extracurricular activities are 49 percent less likely to use drugs and 37 percent less likely to become teen parents than students who do not participate in extracurricular activities.” (NIOST Fact Sheet, at 2 (citation omitted).)
- According to a report by the United States Departments of Education and Justice, “[E]ighth-graders who were unsupervised for eleven or more hours per week were twice as likely to abuse drugs or alcohol as those under adult supervision.” (United States Department of Education & United States Department of Justice, “Safe and Smart: Making After-School Hours Work for Kids,” Chapter 1: “The Potential of After-School Programs” (June 1998), 6 (citations omitted)(available on the Internet at

<http://www.ed.gov/pubs/SafeandSmart/chapter1.html>)(hereinafter “Safe and Smart”).)

- “A 1995 study gauged the ‘healthiness’ of communities by the prevalence of problem behaviors among youth, grades 9-12, such as drug and alcohol use, sexual activity, depression, and school problems. The communities with structured activities in which most youth participated (e.g. extracurricular sports, clubs, community organizations) were five times more likely to be ranked among the healthiest communities.” (Safe and Smart, at 6 (citation omitted).)
- “Students in after-school programs show better achievement in math, reading, and other subjects.” (Safe and Smart, at 7 (citation omitted).)
- “After-school programs often offer activities in which children would not otherwise be involved during the school day or at home. They give children the opportunity both to develop new skills and to pursue existing interests in greater depth.” (Safe and Smart, at 9.)
- “After-school programs can help children develop greater confidence in their academic abilities and a greater interest in school, both of which have been shown to lead to improved school attendance.” (Safe and Smart, at 10 (citation omitted).)
- “After-school programs provide opportunities for children to work and play together in a more informal setting than during the regular school day. The increased interaction with peers contributes to the development of social skills. In addition, after-school programs can help to improve children’s self-discipline by setting a routine for time spent outside of school and by giving children the opportunity to make choices among various activities. Children also benefit from increased interaction with caring adults, who serve as role models and mentors.” (Safe and Smart, at 12.)
- A 1998 report by the United States Department of Education states that “[o]ne way to enhance school-based prevention efforts is to get youth involved in healthy pursuits that reduce their exposure to risky situations that promote use of alcohol and drugs, especially during leisure time. Research shows that participation in adult-monitored activities during

early adolescence is an important deterrent to drug use, as well as to problem behavior in general.” (United States Department of Education, “Beyond Prevention Curricula: A Guide to Developing Alternative Activities Programs” (1998)(available on the Internet at <http://www.drugs.indiana.edu/publications/beyond/2.html>).)

- Another study found that “higher levels of connectedness to school” were associated with lower levels of violence, less frequent alcohol use, and less frequent marijuana use. (M. Resnick, *et al.*, “Protecting Adolescents From Harm: Findings From the National Longitudinal Study on Adolescent Health,” *Journal of the American Medical Association*, Vol. 278 No. 10 (September 10, 1997), 823, 828-30.)
- The National Association of State High School Associations has concluded that “cocurricular” activities (as they call extracurricular activities) “[s]upport the [a]cademic [m]ission of [s]chools. They are not a diversion but rather an extension of a good educational program. Students who participate in activity programs tend to have higher grade-point averages, better attendance records, lower dropout rates and fewer disciplinary problems than students generally.” Such activities also “are [i]nherently [e]ducational. Activity programs provide valuable lessons for practical situations – teamwork, sportsmanship, winning and losing, and hard work. Through participation in activity programs, students learn self-discipline, build self-confidence and develop skills to handle competitive situations. These are qualities the public expects schools to produce in students so that they become responsible adults and productive citizens.” (National Association of State High School Associations, “The Case for High School Activities,” 1 (available on the Internet at <http://www.nfhs.org/case.htm>).)
- “[I]ncreasing students’ attachment to school through extracurricular activities . . . appears warranted. Involvement in school, as indicated through . . . extracurricular involvement does show a relationship to decreased . . . drug use.” (J. Jenkins, “The Influence of Peer Affiliation and Student Activities on Adolescent Drug Involvement,” *Adolescence*, Vol. 31 No. 122 (Summer 1996), 297, 304.)
- A 1999 analysis concluded that “extracurricular activities are already playing a growing role in both the [college] admissions process and the awarding of scholarships. . . . [E]xtracurricular activities are a bigger

factor than ever in deciding who gets the celebrated thick [college acceptance] envelope and who gets the disappointing thin one.” (“Beating the Ivy League Odds,” *The Wall Street Journal* (April 16, 1999), W1.)

- “Time-use patterns of 10th graders were . . . predictive of whether they would engage in a variety of risky behaviors. For example, compared to those who reported spending 1-4 hours per week in extracurricular activities, students who reported spending no time in school-sponsored activities were 57 percent more likely to have dropped out by the time they would have been seniors; 49 percent more likely to have used drugs; 37 percent more likely to have become teen parents; 35 percent more likely to have smoked cigarettes; and 27 percent more likely to have been arrested. These significant negative relationships were found after controlling for related family, school, and student characteristics such as parent education and income levels, parent involvement in school-related activities, and students’ grades.” (N. Zill, *et al.*, “Adolescent Time Use, Risky Behaviors and Outcomes: An Analysis of National Data,” United States Department of Health and Human Services (September 11, 1995), Executive Summary, 2 (emphasis supplied).)
- “Our results demonstrate a relationship between lack of supervised care after school and susceptibility to cigarette use, alcohol use, marijuana use, depressed mood, risk taking, and academic grades.” (J. Richardson, *et al.*, “Relationship Between After-School Care of Adolescents and Substance Use, Risk Taking, Depressed Mood, and Academic Achievement,” *Pediatrics*, Vol. 92 No. 1 (July 1993) 32, 36.)
- A 1998 survey of Indiana youth “provide[d] powerful evidence that Hoosier middle school youth who participate in structured, adult supervised afterschool activities are much less likely to use illegal drugs than students who are unsupervised after school. These data suggest that youth who are supervised in the ‘critical hours’ between the end of school and the time that their family returns home to supervise them are protected from illicit drug involvement.” In quantified terms, this survey found that “[m]iddle school youth who participate in adult-supervised afterschool programs are less than half as likely as non-participants to use marijuana on a regular basis. They also are about half as likely to experiment with marijuana or to use it infrequently.” (W. Bailey, “Alcohol, Tobacco, and Other Drug Use by Indiana Children and Adolescents – The Indiana Prevention Resource Center Survey – 1998,” 1 (available on the Internet at

http://www.drugs.indiana.edu/publications/iprc/newsline/indiana_data.html).

- Another study of adolescents concluded similarly: “[T]he non[drug]using group reported significantly higher involvement in extracurricular activities as compared to the using and abusing groups. These findings support existing research which suggests that adolescents who do not report the use of alcohol or drugs tend to be more involved in a variety of activities while their drug-using counterparts tend to utilize their free time for nonstructured drug/alcohol-related activities. . . . The nonusing adolescents . . . tended to be highly involved in extracurricular activities.” (L. Shilts, “The Relationship of Early Adolescent Substance Use to Extracurricular Activities, Peer Influence, and Personal Attitudes,” *Adolescence*, Vol. 26 No. 103 (Fall 1991), 613, 615-16 (citation omitted).)
- “Eighth grade students, who took care of themselves for 11 or more hours a week, were at twice the risk of substance abuse as those who did not take care of themselves at all.” (J. Richardson, *et al.*, “Substance Use Among Eighth-Grade Students Who Take Care of Themselves After School,” *Pediatrics*, Vol. 84 No. 3 (September 1989), 556, 556.)
- Texas’s Commission on Alcohol and Drug Abuse found that “[s]econdary students were more likely to have higher levels of substance use . . . if they rarely participated in extracurricular activities” and that “[s]tudents who participated in extracurricular activities were less likely to use substances.” (Texas Commission on Alcohol and Drug Abuse, “Texas School Survey of Substance Use Among Students: Grades 7-12,” Executive Summary, 1996, 8 & 11.)
- Still another study attesting to the drug-averting value of activities for young people concluded that “individuals provided with healthful, nonchemical ways of gaining rewards and pleasures will be less likely to engage in drug or alcohol abuse.” (R. Cook, “The Alternatives Approach Revisited: A Biopsychological Model and Guidelines and Application,” *The International Journal of the Addictions*, Vol. 20 No. 9 (1985), 1399, 1399.)

Tecumseh’s policy deters its students from participating in extracurricular activities. It thereby pushes its students away from all the benefits

of such participation, and toward the multiple harms that frequently flow from non-participation. There are at least four groups of students whom the policy deters from extracurricular participation: (a) students who fear being identified as having used illegal drugs, (b) students who fear that the privacy of information regarding their legal but intensely personal activities (for example, taking prescription medication for epilepsy) will be compromised (*see infra*, at 20-21), (c) students who object on principle to the invasion of their privacy when they have done nothing wrong and provided no basis for suspecting otherwise, such as appellants, and (d) students who are embarrassed by the testing procedure, which requires students to urinate while being monitored by a staff member.

A number of Tecumseh students already have dropped out of the school's choir, and have explicitly informed the choir director that they were doing so because of embarrassment over the drug testing procedure. (*See* D.Ct. Op., at 16 n. 38.) This group does not include either (a) the students who have dropped out of extracurricular activities on account of the policy without stating their reason, or (b) the students who have decided not to pursue such activities in the first instance.

By deterring young people from participating in extracurricular activities, Tecumseh's policy, purportedly designed to pull students away

from illegal drug use, is almost certainly pushing a significant number of its students toward a myriad of dangers, including potentially destructive drug use.²

Amici acknowledge that the correlations established by the studies cited above do not necessarily establish causation. But they do establish that either one or the other of the following is true: either (a) only “good kids” – already relatively likely to have positive outcomes and relatively unlikely ever to use drugs – ever opt to participate in extracurricular activities, or (b) for at least some number of children, their participation in extracurricular activities itself makes the difference between productive, positive life choices and other, less rewarding choices, including drug use. Based on their extensive experience with adolescents, *amici* believe (b) to be the case. *Amici* have seen countless young people on the verge of making troublesome choices possibly leading to wayward lives who have been pulled back from this brink through participation in productive extracurricular activities, and have gone on to achieve great success in their schools, workplaces, families and communities.

² In addition to deterring students from participating in extracurricular activities that reduce their likelihood of using drugs, Tecumseh’s policy fosters drug use in another way: By creating a fearful, punitive environment regarding drugs, the policy chills the honest communication about drugs between students and faculty members that, in *amici*’s experience, lowers the chance that students will use drugs.

Either way, however, Tecumseh's policy is not responsive to any legitimate governmental need, and is unworthy of constitutional deference. If (a) is true, the policy is superfluous and exists only for show (perhaps to publicly exhibit defendants' misguided "toughness on drugs"), for if drug-using students never go out for extracurricular activities in the first instance they certainly will not be identified and "helped" by the policy. If (b) is true, however, as *amici* believe is certainly the case, the policy is quite pernicious. In this case – if extracurricular activities do help some children to pursue a better path in life – then by deterring children from participation in these valuable activities Tecumseh's policy is an exercise in social triage in which numerous children (including those on the margin of good and bad outcomes, who stand to benefit most from participation) are being purposely deterred from doing so and thereby relegated to the manifestly worse life chances established by the research.³

³ The fact that Tecumseh's policy is affirmatively harmful to students should not obscure the equally clear fact that it is certain to be ineffective at identifying any students who may be using drugs. Since all students know of the policy, any student who has even dabbled with an illegal drug in the relatively recent past surely will not pursue extracurricular activities, and thus will not be identified by the policy. The only effective way to identify such students (whether to help or punish them, or both) is to rely on a policy rooted in traditional Fourth Amendment principles of individualized suspicion – that is, to permit testing only of those students about whom there is actual evidence of drug use, whether or not they participate in extracurricular activities.

II. The Policy Invades Students' Privacy in a Manner Inaccurately Minimized by the District Court and Unjustified by Applicable Caselaw

In upholding Tecumseh's policy, the District Court underestimated the degree to which it intrudes on children's privacy.

The policy requires that children tested submit a list of any prescription drugs they may be taking to a faculty "monitor," beginning a multiple-link chain of custody leading to the testing laboratory. (D.Ct. Op., at 21.) This list could include anti-depressants, medication to address diabetes or attention deficit disorder, birth control pills, and any number of other legal medications students may be taking for wholly legitimate reasons and would not want others to know about. The dangers of judgment, stigmatization and ostracization that may follow from the inadvertent release of this information are profound, particularly (a) among adolescents, for whom group "belonging" plays an especially large role in psychological health and developmental well-being, and (b) in relatively small communities such as Tecumseh, where private information accidentally released could quickly spread throughout a town. With the stakes so high – and at a time when even our nation's nuclear weapons secrets are reportedly not safe from unauthorized eyes – students' skepticism regarding the integrity and

confidentiality of this process in operation is far more reasonable than the District Court's faith in it. (*See* D.Ct. Op., at 20-23.)

The District Court's ruling relies heavily on the Supreme Court's decision in *Vernonia School District 47J v. Acton*, 515 U.S. 646 (1995) (hereinafter "*Vernonia*"), which involved high school athletes. The instant case does not challenge Tecumseh's policy as it applies to athletes, but only as it applies to participants in nonathletic extracurricular activities including the Academic Team, the Future Farmers of America and the Future Homemakers of America. In extending *Vernonia*'s reasoning to the instant context, the District Court ignored several significant differences between student athletes and students participating in the nonathletic extracurriculars here at issue.

In *Vernonia*, the Supreme Court relied on the facts that student athletes (a) have a lower expectation of privacy than other students, by virtue of their participation in sports, which requires disrobing in locker rooms (where both fellow student athletes and adult coaches abound) and submitting to physical examinations; (b) are widely viewed as community leaders and role models by other students; and (c) are, by virtue of the physical rigor of competitive sports, especially vulnerable to bodily harm (which vulnerability authorizes their schools to insure that the athletes are not taking any substance that could

expose them to danger while on the fields of play). (*See Vernonia*, at 657 (noting that “[s]chool sports are not for the bashful”), 662-63.) None of these factors is present here.

First, the reduced expectation of privacy of athletes in locker rooms is plainly inapplicable to the students at issue here, who include members of the school choir and the academic team. Only by the most strained of analogies did the district court conclude otherwise. The court concluded that because the non-athletes to whom Tecumseh’s policy applies have enrolled in “extracurricular clubs and activities . . . [that] have their own rules and requirements for participating students that do not apply to the student body as a whole,” it follows that these students have voluntarily relinquished their expectation of privacy to the same extent as have athletes who must submit to physical examinations, often shower together, and are frequently naked in front of each other and adults. (D.Ct. Op., at 14-15.) By this reasoning, members of Tecumseh’s choir, by voluntarily submitting to rules governing choir participants – presumably such mandates as showing up for rehearsals, knowing their parts, and dressing appropriately for concerts – are impliedly granting the choir’s faculty leaders permission to violate their bodily privacy.⁴

⁴ The district court’s reasoning would apply equally to members of an extracurricular stamp club, for example, who agree to abide by the rules governing the trading of postage stamps with members of other schools’ clubs.

Second, in *Vernonia* the Supreme Court correctly recognized that student athletes, uniquely among high school students, are often role models for other students and leaders in their communities. Athletes are likely to appear and be discussed in the local media; they are commonly well known throughout the community; they and their athletic performances are discussed at student gatherings on and off campus; in many towns almost the entire student body, and much of the broader community, come out to the high school ballgames; and other students, particularly younger ones, often look to their school's star athletes as heroes.⁵ None of this applies to the student participants in the non-athletic activities to which Tecumseh's policy applies. While *amici* have great respect for the Future Farmers of America, the Future Homemakers of America, and for organizations like school choirs and academic teams (and intend no disrespect to their members, in Tecumseh or elsewhere), *amici* have yet to encounter a high school student body, or a community, that considers and treats these groups' members in a manner even

⁵ The Supreme Court recently noted the unique role high school athletics plays in the lives of many schools and communities: "To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is formalistic in the extreme. . . . High school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause." (*Santa Fe Independent School District v. Doe*, 2000 U.S. LEXIS 4154, *37-*38 (June 19, 2000)(internal quotation and citations omitted).)

remotely approaching the way athletes are considered and treated.⁶

Considering students in these groups as analogous to student athletes can only be part of a retrofit rationale for invading their privacy.⁷

Third, unlike participation in the contact sports at issue in *Vernonia*, participation in the extracurricular activities at issue here does not entail circumstances in which students are both vulnerable to bodily harm

⁶ It also is difficult to reconcile the student-leader-and-role-model rationale for Tecumseh's policy (*see* D.Ct. Op., at 23 (citing defendant-appellants' argument "that, like student athletes, the student members of the other competitive groups are held in high esteem by their peers, and tend to be regarded as leaders and role models")) with the fact that "[t]he vast majority of students participate in one or more school-sponsored activities" bringing them within the policy's mandate. (D.Ct. Op., at 2.) *Amici* are called to mind of Garrison Keillor's Lake Wobegon, where "all the children are above average." (*See, e.g.*, G. Keillor, Monologue Excerpt, A Prairie Home Companion, March 4, 1995, final paragraph (available on the Internet at http://phc.glass.mpr.org/activities/chats_1997/100197_children_hearts.shtml)). Given the encompassing sweep of the policy at issue here (applicable to the "vast majority" of students"), *amici* cannot conceive of a meaningful, principled distinction between this policy and one that made suspicionless drug testing a predicate merely to attending school, irrespective of participation in any extracurricular activity. Both such a hypothetical blanket policy and Tecumseh's actual policy are a very great distance from the narrowly circumscribed policy, applicable only to a select group of students who play a unique role in their schools and communities, that *Vernonia* approved.

⁷ Unlike participants in non-athletic high school extracurricular activities, elected government officials are community leaders, can reasonably be expected to serve as public role models, and (unlike even student athletes) hold formal positions of significant community trust. If the Fourth Amendment precludes the mandatory, suspicionless drug testing of candidates for elected office (*see Chandler v. Miller*, 520 U.S. 305 (1997) (striking down such a Georgia statute, and rejecting the state's argument that a "special need" warrants an exception to the Fourth Amendment's requirement of individual suspicion)), it cannot fairly be read to permit the invasive, involuntary testing of students mandated by appellees' policy.

themselves and at risk of imposing such harm on others. This final rationale supporting the *Vernonia* decision is also absent here.⁸

III. The American Academy of Pediatrics Opposes Tecumseh's Policy

Physicians are bound by the Hippocratic Oath, which establishes the primary ethical obligation of their profession: to do no harm. It is thus telling that the American Academy of Pediatrics (hereinafter "AAP") – our nation's foremost association of doctors specializing in the treatment of children and adolescents – has for four years formally opposed policies such as Tecumseh's. (See The American Academy of Pediatrics, Committee on Substance Abuse, "Testing for Drugs of Abuse in Children and Adolescents," Pediatrics, Vol. 98 No. 2 (August 1996), 305-07 (policy statement))

⁸ The district court cited with approval several cases in which "[t]he Supreme Court has . . . upheld suspicionless, warrantless searches and seizures to conduct drug testing". (D.Ct. Op., at 4 n.7 (citing *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602 (1989)(testing of railroad personnel involved in accidents), *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989)(testing of federal customs officers who carry firearms or are involved in drug interdiction), and *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990)(testing of potential drunk drivers)).) In all these cases, however, the persons subject to suspicionless testing (drivers of trains; law enforcement officials who carry weapons; drivers who, if under the influence of alcohol, would pose substantial public threats), were responsible for the safety of others. Similarly, the athletes in *Vernonia* were involved on the fields of play in rough physical contact with competing athletes (and perhaps teammates), and had the potential to inflict potentially serious injuries on innocent third parties if not in full command of their minds and bodies.

Tecumseh's policy does something altogether different: It mandates suspicionless, warrantless searches and seizures of students participating in extracurricular activities in which they pose no conceivable threat to any other person, solely for the theoretical protection of these students from themselves. Such a paternalistic rationale should be *per se* insufficient to justify a "special needs" exception to the Fourth Amendment's requirements.

(hereinafter “AAP Policy”).) While “[t]he AAP is opposed to the nontherapeutic use of psychoactive drugs by children and adolescents,” the organization “opposes . . . involuntary screening” and believes that “screening for drugs of abuse . . . should not be a condition for participation in sports or any school functions except for health-related purposes. Suspicion of drug use [that is, individualized suspicion] warrants a comprehensive evaluation by a qualified health care professional.” (AAP Policy, at 306-07.) Thus the professional organization whose primary obligation is to keep America’s young people healthy and free from harm firmly opposes policies such as Tecumseh’s.

IV. The Policy’s Teachings are Antithetical to Fundamental American Principles

Tecumseh’s policy teaches its community’s schoolchildren that their government may subject them to extremely invasive intrusions into their private affairs – indeed into their very bodies – with no individualized basis at all. In other words, the children of Tecumseh are taught the following civics lesson by their public educators: that their government may presume them guilty of criminal activity, without a scintilla of evidence, and may demand as a condition of participation in important educational and developmental activities that they first prove themselves innocent.

Tecumseh's scheme is in irreconcilable conflict with values every American child should learn in school, and that public schools have a particular obligation to honor in both creed and deed: that under our Constitution every person, individually, has inalienable rights; that among these rights is protection from unreasonable searches and seizures; and that government may not intrude upon these rights without demonstrable, individualized cause.

The Supreme Court has long recognized the crucial role of the public schools in protecting and inculcating these principles:

- Of the many functions which school officials perform, there are "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 Board of Education v. Barnette*, 319 U.S. 624, 637 (1943).)
- Among the educational system's functions is that of instilling in students "the very foundation of good citizenship." (*Brown v. Board of Education*, 347 U.S. 483, 493 (1954).)
- If public schools do not respect students' "fundamental rights," students are unlikely to learn "to respect their obligations to the State." (*Tinker v. Des Moines Community School District*, 393 U.S. 503, 511 (1969).)
- The "public schools [have an important role] in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests. . . . [A] teacher serves as a role model for his [or her] students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to

influence the attitudes of students toward government, the political process, and a citizen's social responsibilities. This influence is crucial to the continued good health of democracy." (*Ambach v. Norwick*, 441 U.S. 68, 76-79 (1979)(footnotes omitted).)

The Tecumseh policy's undermining of crucial American and constitutional values is in no way mitigated by the fact that students are not required to participate in extracurricular activities. While participation may not be formally mandatory, it is critically important for many reasons.⁹ More fundamentally, constitutional rights are not "chits" to be traded with the government for the receipt of benefits. To teach and act otherwise is to turn our public schools' essential pedagogical mission on its head.

Conclusion

Tecumseh's policy is not an appropriate response to a well established problem. On the contrary, the policy appears to be based primarily on inaccurate stereotypes of young people and appellees' desire to appear to be doing "something" – however misguided or counterproductive – about the threat of drugs, the third rail of our era's politics. There is no evidence that the community's schoolchildren will be helped by the policy appellees have adopted. Instead, there is extensive evidence that this policy will significantly harm these children, while also compromising important constitutional

⁹ See *supra*, at 11-17.

values. There is no governmental need here, “special” or otherwise. The judgment of the district court should be reversed and summary judgment entered for plaintiffs-appellants.

Dated: August 4, 2000

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Certificate of Compliance

In accordance with Rule 32(a)(7)(C), Fed. R. App. P., the undersigned counsel for *amici curiae* hereby certifies that the Identity of *Amici Curiae*, Interest in the Case, and Source of Authority to File, Statement of Facts, Summary of Argument, Argument, and Conclusion herein, including footnotes, collectively contain 6,962 words. This count was obtained using the word counting function of the Microsoft Word software.

Craig R. Levine

Certificate of Service

The undersigned counsel for *amici curiae* hereby certifies that the original version of the foregoing Brief of the American Public Health Association, The National Association of Social Workers, The National Association of Social Workers – Oklahoma Chapter, The Center for Law and Education, The National Center for Youth Law, The Juvenile Law Center, The Loyola ChildLaw Center, Advocates for Children of New York, Lawyers for Children, Covenant House New Jersey, Professor Martin Guggenheim & Professor Randy Hertz, *Amici Curiae*, Supporting Plaintiffs-Appellants and Favoring Reversal was served upon counsel for all parties, via Federal Express, on the 4th day of August, 2000, addressed as follows, and that true and exact copies of the foregoing – a corrected version of the same, including five minor corrections of the original version (which corrections were specified in a contemporaneous cover letter) – were served upon counsel for all parties, via Federal Express, on the 5th day of August, 2000, also addressed as follows:

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The undersigned further certifies that said brief was filed with the United States Court of Appeals for the Tenth Circuit by sending the original and seven copies of the same to Mr. Patrick J. Fisher, Clerk of the Court, via Federal Express, on the 4th day (original version) and 5th day (corrected version) of August, 2000.

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