

Suspicionless Canine Sniffs: Does The Fourth Amendment Prohibit Public Schools From Using Dogs To Search Without Individualized Suspicion?

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I. Introduction

Imagine that you are a freshman in high school. You are sitting in your first period class when the principal and vice-principal unexpectedly enter the classroom. The two administrators tell your entire class to leave their belongings exactly where they are and to exit the classroom. As you exit the classroom, you notice a police officer and a police dog standing just outside the door. You have no choice but to walk by both the officer and her dog as you exit the room. The dog sniffs the air around you as you pass. About twenty minutes later, you are told to return to your desk. As you return, you are again forced to walk in front of the officer and her dog. You later learn that the dog was sniffing you for

drugs. Now answer this question: have you been searched and, if so, is the search justified?

Is your answer to this question affected by the increasing presence of illegal drugs in our nation's schools? The National Center on Addiction and Substance Abuse at Columbia University completed a 2005 study concluding that 2.4 million, or 28% of middle school students, and 10.6 million, or 62% of high school students, will attend schools where drugs are used, kept, or sold.¹ Respectively, these figures are 41% and 47% higher than they were in 2002.² The numbers are even more alarming because the Center claims that teens who attend schools where drugs are used, kept, or sold are "three times likelier to have tried marijuana, three times likelier to get drunk in a typical month, and twice as likely to have tried alcohol, compared to teens who attend drug-free schools."³

Does the inability of schools to deal with the increasing presence of illegal drugs impact your response to the question? Keep in mind that the increasing presence of drugs on school campuses suggests that traditional means of combating the problem are unable to address the problem for most schools.⁴ This is why some schools are using specially trained dogs to sniff students.⁵ These schools subject their students to the canine sniffs without regard to whether an individual student was suspected of possessing or using drugs.

¹ THE NATIONAL CENTER ON ADDICTION AND SUBSTANCE ABUSE AT COLUMBIA UNIVERSITY, NATIONAL SURVEY OF AMERICAN ATTITUDES ON SUBSTANCE ABUSE X: TEENS AND PARENTS (2005), http://www.casacolumbia.org/Absolutenm/articlefiles/Teen_Survey_Report_2005.pdf

² *Id.*

³ *Id.*

⁴ For example, in *Doe v. Renfrow*, 475 F. Supp. 1012, 1015-16 (D. Ind. 1979), the district court noted that, prior to the suspicionless canine sniff program, the "atmosphere within the Highland Junior and Senior High Schools was one of frustration on the part of school administrators and faculty brought about by their inability to control or arrest the drug use problem." This implies that other traditional means of combating drugs in their schools were ineffective.

⁵ *See id.*

Such sniffs are called suspicionless sniffs or sniffs without individualized suspicion.

Having a hard time answering the question? So is the United States Supreme Court. The Supreme Court has not expressly ruled on whether suspicionless canine sniffs violate a public school student's Fourth Amendment protection against unreasonable searches.⁶ In fact, as this article discusses, the Supreme Court has acted in a manner that actually increases uncertainty around the issue. This uncertainty makes employing suspicionless canine sniffs difficult for public schools.

This article attempts to assist public school officials in determining whether to implement a suspicionless canine search program and, if so, how to develop such a program. The first section of this article (Part II) provides a background on the application of the Fourth Amendment to public school officials. The second section (Part III) discusses the Supreme Court's actions that have fueled uncertainty about whether suspicionless canine searches in schools violate the Fourth Amendment. The third section (Part IV) provides guidance to public school officials on how to decide if a suspicionless canine sniff program is appropriate for their school(s) and, if so, how to best implement such a program.

II. Applying the Fourth Amendment to a Public School

The Fourth Amendment prevents government officials⁷ and their agents from conducting unreasonable searches and seizures.⁸ The term "government officials" includes entities at all levels of government, including federal, state, and local.⁹

⁶ See *infra* text accompanying note 93.

⁷ *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921).

⁸ U.S. CONST. amend. IV. states that: "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."

⁹ *Wolf v. Colorado*, 338 U.S. 25, 28-29 (1949) (holding that the Fourth Amendment extends to state agents through the Fourteenth Amendment's Due Process Clause).

No matter how egregious the behavior, a person other than a government official can search and seize people and property without violating the Fourth Amendment.¹⁰ For example, a police officer violates the Fourth Amendment if he or she conducts an unreasonable search or seizure, such as performing a traffic stop on a vehicle for no reason or based solely on a hunch that the driver committed a crime.¹¹ In contrast, a gated community can employ a private security guard to stop and physically search all non-residents who wish to enter its property with impunity from the Fourth Amendment.¹² Accordingly, the Fourth Amendment could not bar private schools from using suspicionless canine sniffs to determine if its students possess illegal drugs.¹³ However, the Fourth Amendment would bar public schools from using drug dogs to sniff students under two conditions: (1) if public school officials qualify as government officials; and (2) if canine sniffs are an unreasonable search.¹⁴ This section explores both issues.

¹⁰ U.S. v. Jacobsen, 466 U.S. 109, 115 (1984) (holding that accidental, deliberate, reasonable, and unreasonable searches and seizures conducted by private characters do not violate the Fourth Amendment).

¹¹ See *Brown v. Texas*, 443 U.S. 47, 50 (1979) (holding that the Fourth Amendment barred a person from being punished under a Texas statute for refusing to identify himself because “the officers lacked any reasonable suspicion to believe appellant was engaged or had engaged in criminal conduct”).

¹² See *Wade v. Byles*, 83 F.3d 902, 906 (7th Cir. 1996), *cert. denied*, 519 U.S. 935 (1996) (holding that the Fourth Amendment is not applicable to a private security guard, employed by a public entity, who shot someone because his assigned powers were not exclusively reserved for police and he possessed powers no greater than those of armed security guards who are commonly employed by private companies to protect private property).

¹³ Even though the Fourth Amendment may not apply, private entities cannot search people with impunity; for example, tort law can provide some protections. See *Greenawalt v. Ind. Dep’t of Corr.*, 397 F.3d 587, 592 (7th Cir. 2005) (holding that the Fourth Amendment’s protection against unreasonable searches did not extend to the “unpleasantness of being subjected to a psychological test,” but the test may have violated state-law provided remedies, such as the tort law prohibiting the invasion of privacy and the intentional infliction of emotional distress).

¹⁴ See *N.J. v. T.L.O.*, 469 U.S. 325, 329 (1985) where the Supreme Court, in evaluating whether a school administrator’s search of a student was

A. Do Public School Officials Qualify as Government Officials?

In 1985, the United States Supreme Court firmly decided in *New Jersey v. T.L.O.* that public school officials are included under the Fourth Amendment's definition of government officials.¹⁵ Prior to the decision, courts took inconsistent positions on this issue. Some courts held that public school teachers and administrators were not government officials because they were not acting on behalf of the government, but in place of the students' parents who do not need a warrant to search their children or their children's property.¹⁶ Other courts made the determination on a case by case basis based on the intrusiveness of the search in question¹⁷ or on the extent to which school officials cooperated with police.¹⁸ The Supreme Court ended the debate by holding that public school teachers and administrators are government agents.¹⁹ The Court's reasoning included that school districts should operate under the Fourth Amendment and the other amendments comprising the Bill of Rights,²⁰ that school districts are empowered by publicly mandated polices which makes them more than surrogates of the parents,²¹ and that school children should see that the principles of government are serious and important to

governed by the Fourth Amendment, first addressed whether school officials qualify as government officials under the Fourth Amendment and then analyzed whether the search was reasonable.

¹⁵ *N.J. v. T. L. O.*, 469 U.S. 325, 334 (1985).

¹⁶ *See, e. g.*, *D. R. C. v. State*, 646 P.2d 252 (Alaska Ct. App. 1982); *In re G.*, 11 Cal. App. 3d 1193, (Cal. Ct. App. 1970); *In re Donaldson*, 269 Cal. App. 2d 509 (Cal. Ct. App. 1969); *R. C. M. v. State*, 660 S.W.2d 552 (Tex. App. 1983); *Mercer v. State*, 450 S.W.2d 715 (Tex. Civ. App. 1970).

¹⁷ *See M. M. v. Anker*, 607 F.2d 588, 589 (2d Cir. 1979).

¹⁸ *See M. v. Bd. of Ed. Ball-Chatham Cmty. Unit Sch. Dist. No. 5*, 429 F. Supp. 288, 292 (S.D. Ill. 1977); *Picha v. Wielgos*, 410 F. Supp. 1214, 1219-1221 (N.D. Ill. 1976); *State v. Young*, 234 Ga. 488, 498 (Ga. 1975).

¹⁹ *N.J. v. T. L. O.*, 469 U.S. 325, 337 (1985).

²⁰ *Id.* at 336-37 (noting its earlier decision in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), which held that public school officials are bound to some degree by First Amendment principles).

²¹ *Id.* at 337.

a free society.²² As a result, the Supreme Court has included public school officials squarely within the Fourth Amendment's definition of government officials.

B. Are Suspicionless Canine Sniffs of Public School Children Unreasonable Searches?

The Fourth Amendment protects people from unreasonable searches performed by government officials.²³ Generally, a search is reasonable under the Fourth Amendment if it is supported by a warrant or by probable cause.²⁴ For example, government officials and their agents need a warrant supported by probable cause to search a person's home;²⁵ a police officer needs probable cause to arrest a person²⁶ or search a person's car.²⁷ A warrant and probable cause are the highest and the second highest levels of Fourth Amendment protection respectively.²⁸ They both require individualized suspicion.²⁹ As with most legal rules, however, there are exceptions. The courts have found searches to be reasonable even though they were *not* supported by a warrant or probable cause.³⁰ Courts do so when "special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable."³¹ The remainder of this subsection traces the United States

²² *Id.* at 334 (quoting *W. Va. State Bd. of Ed. v. Barnette*, 319 U.S. 624, 637 (1943)).

²³ *Id.* at 334.

²⁴ *Maryland v. Buie*, 494 U.S. 325, 331 (1990).

²⁵ *Oliver v. U.S.*, 466 U.S. 170, 178 (1984) (noting "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.>").

²⁶ *Beck v. Ohio*, 379 U.S. 89, 91 (1964).

²⁷ *Carroll v. U.S.*, 267 U.S. 132, 149 (1925).

²⁸ See PHILLIP A. HUBBART, *MAKING SENSE OF SEARCH AND SEIZURE LAW: A FOURTH AMENDMENT HANDBOOK* 161-67, 169-70 (Carolina Academic Press ed., 2005).

²⁹ *U.S. v. Ventresca*, 380 U.S. 102, 107 (1965) (holding that a warrant can only be issued upon a showing of probable cause); *Carroll v. U.S.*, 267 U.S. 132, 150-151 (1925) (holding that probable cause is believing that seizable evidence will be found on the premises or person to be searched).

³⁰ *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 653 (1995).

³¹ *Id.*

Supreme Court's increasing willingness to consider suspicionless searches performed by public school officials to be reasonable under the Fourth Amendment.

1. New Jersey v. T.L.O.: Opening the Door to Warrantless Searches in Public Schools

In its 1985 opinion for *New Jersey v. T.L.O.*, the United States Supreme Court took the first step in finding that searches performed by public school officials without a warrant or probable cause could be reasonable. The relevant facts of this case began with a teacher claiming to have found a fourteen year-old freshman (hereafter "Minor") and her companion smoking cigarettes in a school restroom.³² Since the school expressly prohibited smoking in its restrooms, the teacher took the two students to meet with the vice principal.³³ During the meeting, the Minor denied smoking in the restroom and further claimed that she did not smoke at all.³⁴ The vice principal searched the Minor's purse without the student's permission.³⁵ He saw and removed a pack of cigarettes.³⁶ The removal of cigarettes led to the discovery of rolling papers and, eventually, of evidence suggesting that the Minor was dealing marijuana.³⁷ Ultimately, the Minor was charged with violating sections of New Jersey's criminal laws and was suspended from school.³⁸

The Supreme Court heard the Minor's case. The Court did not apply the general legal rule requiring that the vice principal have a warrant or probable cause in order to make his search of the Minor's purse reasonable under the Fourth Amendment. Instead, the Court concluded that requiring school officials to obtain a warrant prior to searching students would be an unworkable standard because it negates flexibility and "swift and informal disciplinary procedures."³⁹ The Court

³² N.J. v. T. L. O., 469 U.S. 325, 329-39 (1985).

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.*

³⁸ N.J. v. T. L. O., 469 U.S. 325, 329 (1985).

³⁹ *Id.* at 340.

also dismissed a probable cause standard by noting that “[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard.”⁴⁰ Accordingly, the Court adopted a two prong “reasonable suspicion” standard in determining if the vice-principal’s search of the Minor was reasonable under the Fourth Amendment. The two prongs were: (1) there must be a reasonable belief that the search will produce evidence that the student violated or is violating a law or a school rule; and (2) the scope of the search must be reasonably related to the justification.⁴¹ The first prong requires a form of individualized suspicion that the student was involved in wrongdoing.⁴² Therefore, the Court’s reasonable suspicion standard as applied to public school officials maintained the individualized suspicion requirements of the warrant and probable cause standards.

The Court found that this standard struck a proper balance between the students’ privacy interests and the need for public school officials to maintain order and to provide an educational environment.⁴³ It also reasoned that it spared teachers and school officials from having to learn the intricacies of the probable cause standard and, instead, allowed them to regulate student conduct according to reason and common sense.⁴⁴ In addition, the Court argued that the rule ensured that invasions to student privacy interests are limited to what is necessary for preserving order and a proper environment in schools.⁴⁵

The *T.L.O.* decision was the Supreme Court’s first step in finding searches performed by public school officials

⁴⁰ *Id.* at 341.

⁴¹ *Id.* at 342.

⁴² *Id.* at 341-42. *But see id.* at 342 n.8 (reserving judgment whether there may be some circumstances that “might justify school authorities in conducting searches unsupported by individualized suspicion”).

⁴³ *Id.* at 343.

⁴⁴ *N.J. v. T. L. O.*, 469 U.S. 325, 343 (1985).

⁴⁵ *Id.*

without a warrant or probable cause could be reasonable under the Fourth Amendment. The opinion lowered the bar and made it easier for public school officials to search their students despite maintaining a requirement for individualized suspicion. Under this decision, a public school student could not be subjected to a suspicionless canine sniff.

2. Vernonia School District v. Acton: Opening
the Door for Warrantless Searches Even
Further

Ten years after *T.L.O.*, the United States Supreme Court once again lowered the bar on what constitutes a reasonable search under the Fourth Amendment in the public school context. In 1995, the Court decided *Vernonia School District v. Acton*.⁴⁶ *Vernonia* centered around the suspicionless urine testing of student athletes. Starting in the mid-to-late 1980's, schools within the Vernonia School District had a significant rise in their drug problem.⁴⁷ Drug related disciplinary problems doubled and the educational environment was being disrupted by rude behavior and outbursts.⁴⁸ School officials became particularly concerned after learning that the athletes were leading the drug culture because drug use increases the risks of sports related injuries.⁴⁹ Coaches attributed some of their school's athletic injuries to drug usage.⁵⁰ The students boasted that the schools were powerless to stop the growing attraction to drugs.⁵¹ Hoping to prove the students wrong, the school district tried several options that did not alleviate the drug problem, including special classes, speakers, and presentations.⁵² The District Court concluded that the "administration was at its wits end," that students, particularly athletes, were in a "state of rebellion," and that disciplinary problems had reached

⁴⁶ *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646 (1995).

⁴⁷ *Id.* at 648.

⁴⁸ *Id.* at 649.

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.* at 648.

⁵² *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 649 (1995).

“epidemic proportions.”⁵³ As a next step, the school received unanimous approval from parents attending an “input night” for its drug testing program.⁵⁴ The policy called for both regular and random urine drug testing of all students participating in interscholastic athletics.⁵⁵ The stated goals of the policy were to deter drug use among athletes, to help protect athlete health and safety, and to provide drug assistance to those in need.⁵⁶ The policy had safeguards to help maintain a student’s privacy in regards to legal drug use and medical conditions.⁵⁷ The school district handled all disciplinary issues arising from positive drug tests internally; the police were not contacted when students tested positive for illegal drug use.⁵⁸

The District’s policy would have been struck down had the Supreme Court followed its precedent under *T.L.O.* Drug testing a student’s urine is a search under the Fourth Amendment.⁵⁹ Therefore, it must also be reasonable to comply with the Fourth Amendment.⁶⁰ *T.L.O.*, as noted above, required a degree of individualized suspicion for a search of a public school student to be reasonable under the Fourth Amendment.⁶¹ In contrast, the District’s policy in *Vernonia* required *all* athletes to have their urine drug tested even if they were not *individually* suspected of using drugs.⁶² The district’s policy is not consistent with the *T.L.O.* holding, yet the Court upheld it.

In *Vernonia*, the Supreme Court did not require individualized suspicion as it had in *T.L.O.* for a variety of reasons. First, the Court noted it had already upheld

⁵³ *Id.*

⁵⁴ *Id.* at 650.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.* at 651-52.

⁵⁸ *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 652 (1995).

⁵⁹ *Id.* at 653.

⁶⁰ *Id.* at 646.

⁶¹ *N.J. v. T. L. O.*, 469 U.S. 325, 341-342 (1985).

⁶² *Vernonia*, 515 U.S. at 650.

suspicionless searches in other contexts.⁶³ The Court cited several examples including the drug testing of railroad personnel involved in train accidents, the drug testing of federal customs officers that carry arms, and the drug testing of federal officers assigned to drug interdiction or to vehicle checkpoints for illegal immigrants, contraband, and drunk driving.⁶⁴ The Court found that deterring student drug use is at least as important as the interests served by the already approved types of suspicionless searches, especially because school aged children are more susceptible to the physical, psychological, and addictive effects of drugs.⁶⁵ Second, the Court noted that drugs affect more than just the user because drug usage disrupts the entire educational environment.⁶⁶ Third, the Court noted that the threat of physical harm from drugs is heightened when playing sports.⁶⁷ In addition, the Court noted that the athletes were in a state of rebellion, that disciplinary problems had reached epidemic proportions, and that drug usage was underlying these problems.⁶⁸ The Court cited as another justification that a vast majority of the students' parents supported the policy.⁶⁹ Finally, the Court stated that drug testing based on a reasonable suspicion standard is more problematic,⁷⁰ for it would turn the testing policy into a "badge of shame" for those that are tested,⁷¹ would allow school officials to drug test in an arbitrary manner that subjects the school to lawsuits,⁷² would create further obstacles before testing could be imposed,⁷³ and would not be effectively administered because school officials are not prepared and trained to spot signs that athletes are abusing drugs.⁷⁴ Given these reasons, the *Vernonia* decision held that

⁶³ *Id.* at 653-54.

⁶⁴ *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 653-654 (1995).

⁶⁵ *Id.* at 661.

⁶⁶ *Id.* at 662.

⁶⁷ *Id.*

⁶⁸ *Id.* at 663.

⁶⁹ *Id.* at 665.

⁷⁰ *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 663 (1995).

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 663-64.

⁷⁴ *Id.* at 664.

suspicionless drug testing of student athletes in public schools was reasonable under the Fourth Amendment.⁷⁵

3. Board of Education of Independent School District No. 92 v. Earls: Is the Door All the Way Open for Suspicionless Searches of Public School Students?

Approximately seven years after *Vernonia*, the United States Supreme Court's decision in *Board of Education of Independent School District No. 92 v. Earls*⁷⁶ expanded the category of students who could be subjected to suspicionless urine testing and made it even easier for public school officials to conduct such tests. In 1998, an Oklahoma school district adopted a policy that required all of its middle and high school students to be drug tested before participating in an extracurricular activity.⁷⁷ A few of the school's extracurricular activities awarded credits that some students needed in order to graduate.⁷⁸ Such activities included the Academic Team, National Honor Society, Future Farmers of America, Future Homemakers of America, band, choir, pom-pom, cheerleading, and athletics.⁷⁹ The policy required drug testing under three conditions: (1) testing prior to participating in any competitive extracurricular activity, (2) random testing while participating in an extracurricular activity, and (3) testing upon suspicion that the student was using drugs.⁸⁰ The drug test looked for illegal drugs and not for medical conditions or prescription drugs.⁸¹ A student that tested positive for illegal drugs was prevented from participating in extracurricular activities; no other discipline or academic consequence was imposed on students that tested

⁷⁵ *Id.*

⁷⁶ Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Co. v. Earls, 536 U.S. 822 (2002).

⁷⁷ *Id.* at 826.

⁷⁸ Amanda Bishop, *Students, Urinalysis & Extracurricular Activities: How Vernonia's Aftermath Is Trampling Fourth Amendment Rights*, 10 HEALTH MATRIX 217, 230 (2000).

⁷⁹ *Earls*, 536 U.S. at 826.

⁸⁰ *Id.*

⁸¹ *Id.*

positive and test results were not shared with law enforcement.⁸² The District never indicated that it had a drug problem of “epidemic proportions,” but it had a documented problem of drug problems starting in the 1970s that the Court found presented a “legitimate cause for concern.”⁸³

In *Earls*, the Supreme Court cited several reasons for upholding the District’s policy of testing all students involved in extracurricular activities. The Court noted that the health and safety risks associated with drugs, such as death from overdosing, are not limited to student athletes.⁸⁴ The opinion also discussed the problems associated with a reasonable suspicion standard, such as the increased burden on teachers that already have the difficult job of maintaining order and discipline, the potential for applying the program in an arbitrary and unfair manner to target unpopular student groups, and the fear that people would bring excessive lawsuits claiming arbitrary or unfair implementation.⁸⁵ Finally, the Court explained that testing should not be limited to athletes simply because they are the most likely to use drugs.⁸⁶

The 2002 *Earls* decision built upon the *Vernonia* decision to make the adoption of a suspicionless drug testing program easier for public schools. To uphold the suspicionless urine testing program, the *Vernonia* decision relied in part on the documented drug problem at the school.⁸⁷ In *Earls*, the Court held that a school district does not necessarily have to document a drug problem before implementing a suspicionless drug testing program; however, the Court concluded that “some showing does shore up an assertion of special need for a suspicionless general search

⁸² Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Co. v. Earls, 536 U.S. 822, 833 (2002).

⁸³ *Id.* at 827.

⁸⁴ *Id.* at 836.

⁸⁵ *Id.* at 837.

⁸⁶ *Id.* at 837-838.

⁸⁷ *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 663 (1995).

program.”⁸⁸ This case demonstrated that “*some showing*” is a low standard. The Court concluded that the showing was satisfied from the following facts: teachers saw students who appeared to be under the influence of drugs, students spoke openly about using drugs, a drug dog found marijuana cigarettes by a school parking lot, drug paraphernalia was found in the car driven by a Future Farmers of America member, and community members were calling the school board about the “drug situation.”⁸⁹ Therefore, “*some showing*” is a low standard because, arguably, most public high schools are likely to have at least this level of drug related activity on their campuses given the prevalence of drugs in today’s society.⁹⁰

The Court provided several reasons for adopting a low showing standard. First, the country’s drug epidemic makes fighting drugs a pressing concern for all schools.⁹¹ Second, the Court did not want to make school officials wait for a severe problem before allowing them to take corrective action.⁹² Third, the Court commented on previous precedent allowing for suspicionless drug testing.⁹³ Finally, the Court would have a very hard time articulating a clear, bright-line rule for a reasonable suspicion standard.⁹⁴

The *T.L.O.*, *Vernonia*, and *Earls* decisions did not expressly or impliedly state whether the Supreme Court would find that public school officials violate the Fourth Amendment by subjecting their students to suspicionless canine sniffs. The Supreme Court has not yet heard the issue. In fact, it declined to review two federal Circuit Court decisions addressing the

⁸⁸ Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Co. v. Earls, 536 U.S. 822, 835 (2002).

⁸⁹ *Id.* at 834-35.

⁹⁰ See *supra* notes 1-3 and accompanying text.

⁹¹ *Id.* at 834.

⁹² *Id.* at 836.

⁹³ *Id.*

⁹⁴ Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Co. v. Earls, 536 U.S. 822, 836 (2002).

issue in 1981 and 1983.⁹⁵ Given that *Earls* is a recent case that expands the grouping of students who can be subjected to suspicionless searches and makes it easier for public schools to adopt suspicionless drug testing programs, is the Supreme Court now ready to allow suspicionless canine sniffs under the Fourth Amendment as an alternative to identifying students in possession of drugs on public school grounds? The next section of this paper addresses this question.

III. The Federal Courts Are Split on Whether Public School Sponsored Suspicionless Canine Sniff Programs Measure Up to the Fourth Amendment

Federal courts have provided conflicting signals about whether a public school official must comply with the Fourth Amendment when implementing a suspicionless canine sniffing program. The Seventh Circuit holds that canine sniffs that are ordered by public school entities and that are performed on public school students are not searches under the Fourth Amendment.⁹⁶ In contrast, the Fifth and Ninth Circuits currently hold that such canine sniffs are searches.⁹⁷ Consequently, the Fourth Amendment does not apply to suspicionless canine sniff programs performed within the Seventh Circuit, but it would govern such programs within the Fifth and Ninth Circuits. The Seventh and Fifth Circuit cases were submitted to the Supreme Court for review, however it refused to review either.⁹⁸ By refusing to review the Seventh and the Fifth Circuit cases,⁹⁹ the Supreme Court has accepted each Circuit's holding, thus failing to resolve the split of authority.

⁹⁵ *Goose Creek Consolidated Indep. Sch. Dist. v. Horton*, 463 U.S. 1207 (1983); *Doe v. Renfrow*, 451 U.S. 1022 (1981).

⁹⁶ *Doe v. Renfrow*, 631 F.2d 91, 92 (7th Cir. 1980) (per curiam).

⁹⁷ *B.C. v. Plumas Unified Sch. Dist.*, No. 97-17287, 1999 U.S. App. LEXIS 38863 (9th Cir. Sept. 20, 1999); *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982).

⁹⁸ *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470 (5th Cir. 1982), *cert. denied*, 463 U.S. 1207 (1983); *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980), *cert. denied*, 451 U.S. 1022 (1981). Note that *B.C.*, the Ninth Circuit case, was never submitted to the Supreme Court for review.

⁹⁹ *Id.*

This section first examines the three Circuit Court decisions addressing the constitutionality of suspicionless canine sniff programs at public schools, and then it explains the difficulties of reconciling these holdings.

A. The Seventh Circuit: Suspicionless Canine Sniffs of Public School Children Are Not a Search as Defined by the Fourth Amendment

The 1980 decision in *Doe v. Renfrow*¹⁰⁰ made the United States Court of Appeals for the Seventh Circuit the first federal appellate-level court to address public school programs that expose students to suspicionless canine sniffs. This case involved a junior high and a high school campus located on the same site.¹⁰¹ During the twenty days leading up to March 23, 1979, the schools documented thirteen incidents of students possessing and/or being under the influence of drugs and alcohol.¹⁰² Moreover, some students claimed to be afraid of speaking out against the drug element for fear of reprisals.¹⁰³ The drug problem was hurting school morale and disrupting the learning environment, and the faculty and administrators were frustrated by their inability to address these issues.¹⁰⁴ As a result, the school initiated a suspicionless canine sniff program.¹⁰⁵ The program included small teams entering classrooms on a random basis.¹⁰⁶ Each team included a dog, its handler, a school administrator, and a police officer.¹⁰⁷ When the team entered a classroom, the students sat quietly in their seats with their hands and personal belongings on top of their desks.¹⁰⁸ The dog was led to each desk to conduct a sniff.¹⁰⁹ During the search, a dog alerted to

¹⁰⁰ *Renfrow*, 631 F.2d at 91.

¹⁰¹ *Doe v. Renfrow*, 475 F. Supp. 1012, 1015 (D. Ind. 1979).

¹⁰² *Id.* at 1015.

¹⁰³ *Id.* at 1021.

¹⁰⁴ *Id.* at 1016.

¹⁰⁵ *Id.* at 1016.

¹⁰⁶ *Id.*

¹⁰⁷ *Doe v. Renfrow*, 475 F. Supp. 1012, 1016 (D. Ind. 1979).

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

the same student five times.¹¹⁰ The dog continued to alert to the student even after she emptied her pockets.¹¹¹ The student was led to the nurse's office where two women ordered the student to remove her clothing.¹¹² The student was allowed to turn her back as the two women checked her clothing and hair for contraband.¹¹³ No contraband was found and the school later learned that, on the morning of the search, the student had been playing with her dog that was in heat.¹¹⁴ However, seventeen other students were found in possession of drugs as a result of the dog sniffs on March 23, 1979.¹¹⁵

Based on these events, the student initiated legal action.¹¹⁶ She filed a civil complaint against the Superintendent of Highland Town School District, the Principals of the high school and the junior high school, members of the Highland Town School District Board, the Highland Indiana Police Chief, the owner and operator of the canine academy who supplied and helped handle the dogs, and others ("Defendants").¹¹⁷ The student argued that the suspicionless canine sniff program violated her Fourth Amendment rights and sought an injunction against future use of the program.¹¹⁸ The Defendants moved for summary judgment based on governmental immunity, no constitutional fault, and lack of involvement arguments.¹¹⁹ The United States District Court for the Northern District of Indiana, Hammond Division reviewed the case prior to the Seventh Circuit. On August 30, 1979, District Judge Sharp granted most of the Defendants' motion.¹²⁰ In so doing, Judge Sharp

¹¹⁰ *Id.* at 1017.

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Doe v. Renfrow*, 475 F. Supp. 1012, 1017 (D. Ind. 1979)

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1012.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 1014.

¹¹⁹ *Doe v. Renfrow*, 475 F. Supp. 1012, 1027-1028 (D. Ind. 1979).

¹²⁰ *Id.* at 1038 (refusing, however, to declare that the nude search did not violate the student's Fourth Amendment rights).

held that the canine sniff program was not a search.¹²¹ The Seventh Circuit agreed to review Judge Sharp's decision and on July 18, 1980, it issued a per curiam decision affirming the holding that the canine sniff program did not constitute a search under the Fourth Amendment.¹²²

The Seventh Circuit affirmed Judge Sharp's "lengthy, thoughtful" decision and adopted his reasoning on the "search" question as its own without further elaboration.¹²³ In so doing, the Seventh Circuit found that the intrusion from using dogs was minimal since a dog was only in each classroom for several minutes.¹²⁴ The court further found the drug problem to be "excessive" given the school's documented drug use, the impact of drug use on the school's learning environment, the school's inability to control the student drug use, and the students' attitude towards drugs.¹²⁵ The court also determined that the program was not a police action, that students do not have a privacy interest in the air around them, and that students are already constantly supervised while in school.¹²⁶ Equally important was the fact that all students were searched in the same manner, so the dog sniff was not arbitrarily conducted or performed in a manner meant to embarrass any particular student.¹²⁷ For these reasons, the Seventh Circuit does not consider suspicionless canine searches to be a "search" and, as a result, such sniffs are not regulated by the Fourth Amendment within the Circuit's jurisdiction.

¹²¹ *Id.* at 1019, 1020.

¹²² *Doe v. Renfrow*, 631 F.2d 91 (7th Cir. 1980) (rejecting, however, Judge Sharp's conclusion that school officials were immune from suit and remanding the case for consideration of the question of damages to which the student was entitled as a result of the nude search).

¹²³ *Id.* at 92.

¹²⁴ *Doe v. Renfrow*, 475 F. Supp. 1012, 1019 (D. Ind. 1979).

¹²⁵ *Id.* at 1021.

¹²⁶ *Id.*

¹²⁷ *Id.* at 1022.

B. The Fifth and Ninth Circuits: Suspicionless Canine Sniffs of Public School Children Are a Search as Defined by the Fourth Amendment

In contrast to the Seventh Circuit, the Fifth and Ninth Circuits have both held that suspicionless canine sniffs are searches in *Horton v. Goose Creek Independent School District*¹²⁸ and *B.C. v. Plumas Unified School District* respectively.¹²⁹

In 1982, the United States Court of Appeals for the Fifth Circuit held in *Horton v. Goose Creek Independent School District* that a dog putting its nose against a student to smell for contraband is a search under the Fourth Amendment.¹³⁰ In that case, the Goose Creek Independent School District (GCISD) adopted a canine sniff program to help combat a growing drug and alcohol problem at its schools.¹³¹ The program involved contracting with a private security services firm to bring dogs to GCISD schools to sniff for contraband.¹³² The firm almost exclusively employed Doberman pinschers and German shepherds.¹³³ Before the dogs were used, the elementary school students were acquainted with the dogs in school assemblies and the junior and senior high school students were “informed” of the program.¹³⁴ After, the leashed dogs were brought into the classrooms on a random and surprise basis to sniff the students.¹³⁵ The dogs were sometimes allowed to sniff students off leash during “playtime”. The dogs’ noses would touch the students.¹³⁶ If the dogs alerted to a student, a school

¹²⁸ *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 479 (5th Cir. 1982).

¹²⁹ *B.C. v. Plumas Unified Sch. Dist.*, No. 97-17287, 1999 U.S. App. LEXIS 38863, at *20 (9th Cir. Sept. 20, 1999).

¹³⁰ *Horton*, 690 F.2d at 479.

¹³¹ *Id.* at 473.

¹³² *Id.*

¹³³ *Id.* at 474.

¹³⁴ *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 474 (5th Cir. 1982).

¹³⁵ *Id.*

¹³⁶ *Id.*

official discreetly removed the student from the classroom or play area, and the student's pockets, purse, and outer garments were searched.¹³⁷ School officials, and not the local police, handled any disciplinary issues that arose from the canine sniffs.¹³⁸ Two of the three plaintiffs in the *Horton* case were students that triggered alerts by the canines.¹³⁹ A search of one student's purse and of the other student's pockets, socks, and pant legs did not yield contraband.¹⁴⁰ The court did not indicate whether students other than the two plaintiffs were ever searched as a result of dog alerts and, if so, whether the searches led to the discovery of contraband.¹⁴¹

Based on these events, three students filed a civil complaint on behalf of all students enrolled in GCISD to challenge the canine sniff program.¹⁴² The complaint alleged that the GCISD violated the students' Fourth Amendment right against unreasonable searches and seizures.¹⁴³ In an unpublished opinion, a Texas District Court ruled that the canine sniffing amounted to a reasonable search under the Fourth Amendment.¹⁴⁴ This finding was unanimously reversed by a three-judge panel for the Fifth Circuit on November 1, 1982.¹⁴⁵

The Fifth Circuit reversed the district court's ruling after refusing to expand the plain view doctrine.¹⁴⁶ The plain view doctrine allows police to collect evidence that they plainly see from a legal vantage point without triggering the Fourth Amendment's protection against unreasonable searches

¹³⁷ *Id.* at 473.

¹³⁸ *Id.* at 474.

¹³⁹ *Id.*

¹⁴⁰ *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 474 (5th Cir. 1982).

¹⁴¹ *See id.*

¹⁴² *Id.* at 473.

¹⁴³ *Id.* at 474.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 488.

¹⁴⁶ *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 488 (5th Cir. 1982).

and seizures.¹⁴⁷ Federal courts have held that the doctrine includes a police canine sniffing luggage because the sniff simply enhances a government agent's sense of smell the same way a flashlight enhances the agent's sight.¹⁴⁸

The Fifth Circuit cited six reasons for refusing to extend the plain view doctrine to include suspicionless canine sniffs performed on public school children. First, the court noted that the Fourth Amendment "applies with its fullest vigor" when dealing with searching a person's body.¹⁴⁹ Second, the court reasoned that if the "far less intrusive" metal detectors have been found to be a search, then the use of large dogs must also be a search.¹⁵⁰ Third, a person's smell is not routinely exhibited for all to see; in fact, most people in our society take measures to mask their odors.¹⁵¹ Fourth, sniffing is offensive regardless of whether it is done by a person or a dog.¹⁵² Fifth, the court noted that adolescents are self-conscious about their bodies and, as a result, sniffing the air around them could be highly embarrassing.¹⁵³ Finally, the court expressed concern that the Doberman pinschers and German shepherds were employed for the program because of their image.¹⁵⁴

Similarly, the Court of Appeals for the Ninth Circuit decided by a vote of two-to-one in the 1999 holding of *B.C. v. Plumas Unified School District* that a public school administered suspicionless canine sniff program violates a

¹⁴⁷ *Horton v. California*, 496 U.S. 128, 137, 142 (1990) (holding that an officer could seize evidence not specified in a search warrant without violating the Fourth Amendment because the items were in plain sight, the items obviously constituted incriminating evidence, and the officer was lawfully present in the suspect's home).

¹⁴⁸ *Horton*, 690 F.2d at 477.

¹⁴⁹ *Id.* at 478.

¹⁵⁰ *Id.* at 478.

¹⁵¹ *Id.*

¹⁵² *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 478 (5th Cir. 1982)

¹⁵³ *Id.*

¹⁵⁴ *Id.*

student's Fourth Amendment rights.¹⁵⁵ On May 21, 1996, the principal and vice principal of a public high school in California's Plumas Unified School District instructed a classroom of students to exit the room.¹⁵⁶ As they exited, the students passed by a Deputy Sheriff and the deputy's drug-sniffing dog located next to the classroom door.¹⁵⁷ When the room was empty, the dog sniffed the student's desk and any belongings left in the room.¹⁵⁸ When the students returned to the classroom, the dog and handler were located next to the classroom door.¹⁵⁹ The dog alerted to the same student twice, once when he or she left the room and once when he or she re-entered the classroom.¹⁶⁰ The student was searched.¹⁶¹ No drugs were found at the high school that day.¹⁶²

B.C. filed a civil action naming the Plumas Unified School District, the superintendent, the principal, the vice principal, and members of the sheriff's department as defendants.¹⁶³ B.C. claimed that his or her Fourth Amendment right against unreasonable searches had been violated by the canine sniffing program administered by the defendants.¹⁶⁴ In an unpublished opinion, Chief District Judge Karlton of the United States District Court for the Eastern District of California¹⁶⁵ held that the canine sniff performed on B.C. amounted to an unreasonable search under the Fourth

¹⁵⁵ B.C. v. Plumas Unified Sch. Dist., No. 97-17287, 1999 U.S. App. LEXIS 38863, at *1-*2 (9th Cir. Sept. 20, 1999).

¹⁵⁶ *Id.* at *9.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at *9-*10.

¹⁶¹ B.C. v. Plumas Unified Sch. Dist., No. 97-17287, 1999 U.S. App. LEXIS 38863, at *9-*10 (9th Cir. Sept. 20, 1999).

¹⁶² *Id.*

¹⁶³ *Id.* at *8.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at *1.

Amendment.¹⁶⁶ A divided three-judge panel from the Ninth Circuit Court of Appeals affirmed this holding.¹⁶⁷

The majority opinion provided little explanation for the court's refusal to extend the plain sight doctrine to the facts of this case. In *United States v. Place* and *United States v. Beale*, the United States Supreme Court and the Ninth Circuit Court of Appeals, respectively, had held that a canine sniff of luggage was not a search under the Fourth Amendment.¹⁶⁸ However, the *Plumas* majority noted that a dog sniff performed on a person is more intrusive than a dog sniff performed on unattended luggage.¹⁶⁹ In distinguishing *Place* and *Beale*, the court also reiterated many of the same factors the Fifth Circuit highlighted: the personal nature of one's body, the fear caused by dogs, and the involuntary and random nature of the search.¹⁷⁰ Thus, the Ninth Circuit concluded that the use of suspicionless canine sniffs in *B.C.* amounted to a search under the Fourth Amendment.¹⁷¹

In contrast to *Horton*, the deputy's dog in *B.C.* did not have physical contact with the students.¹⁷² The dog's nose never actually touched any of the students.¹⁷³ Nevertheless, the Ninth Circuit opinion concluded that the public school students were searched even though they were never touched in any way by the canine.¹⁷⁴ The court also noted that the case was devoid of facts disclosing "that there was any drug crisis or even a drug problem at Quincy High in May 1996."¹⁷⁵ Taken together, these facts suggest that the Ninth Circuit is not any more likely to uphold a suspicionless canine sniff program simply because the dog does not actually touch the student,

¹⁶⁶ *Id.* at *16.

¹⁶⁷ *B.C. v. Plumas Unified Sch. Dist.*, No. 97-17287, 1999 U.S. App. LEXIS 38863, at *25 (9th Cir. Sept. 20, 1999).

¹⁶⁸ *Id.* at *18-*19.

¹⁶⁹ *Id.* at *22.

¹⁷⁰ *Id.* at *25.

¹⁷¹ *Id.* at *20.

¹⁷² *Id.* at *21.

¹⁷³ *B.C. v. Plumas Unified Sch. Dist.*, No. 97-17287, 1999 U.S. App. LEXIS 38863, at *21 (9th Cir. Sept. 20, 1999).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at *26.

but it may uphold such a program as reasonable if a school has a documented drug problem.

C. What to Make of the Contrasting Authority?

By ruling that suspicionless canine sniffs are not a search, the Seventh Circuit removed the sniffs from Fourth Amendment scrutiny. In contrast, the *Horton* and *B.C.* decisions, by ruling that canine sniffs are searches, provide public school students with Fourth Amendment protection for dog sniffs. The Supreme Court declined to review *Horton* two years after refusing to review *Doe*.¹⁷⁶ This, standing alone, could support an argument that the Supreme Court's view on suspicionless canine sniffs changed over time to provide school children with greater Fourth Amendment Protections and, as a result, the *Horton* decision provides a more reliable indicator of the Supreme Court's view on the issue than the *Doe* decision. However, this conclusion is negated by the Supreme Court's subsequent decisions. Since refusing to review *Horton* in 1983, the Supreme Court decided *T.L.O.* in 1985,¹⁷⁷ *Vernonia* in 1995,¹⁷⁸ and *Earls* in 2002.¹⁷⁹ Each of the three cases progressively minimizes the level of Fourth Amendment protection afforded to public school students.¹⁸⁰ Therefore, a trend argument would actually suggest that the Supreme Court is more likely to adopt the position of the Seventh Circuit in *Doe* rather than the Fifth Circuit's view in *Horton* or the Ninth Circuit's view in *B.C.*.

The reasoning given in the decisions does not provide a way to reconcile the conflict. All three circuits addressed the question of whether public school sponsored, suspicionless canine sniffs of students are a search under the Fourth Amendment in the *same* manner. The three opinions simply

¹⁷⁶ As already noted in this Section, *Doe v. Renfrow* was decided in 1980, and *Horton v. Goose Creek Independent School District* was decided in 1982. See accompanying text *supra* note 98.

¹⁷⁷ *N.J. v. T.L.O.*, 469 U.S. 325, 325 (1985).

¹⁷⁸ *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 646 (1995).

¹⁷⁹ *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Co. v. Earls*, 536 U.S. 822 (2002).

¹⁸⁰ See discussion *supra* Part II.B.

discussed arguments in support of their position. For example, the Court in *Doe* reasoned that students do not have a privacy interest in the air around them,¹⁸¹ students are already constantly supervised while in school,¹⁸² and all students were searched in the same manner.¹⁸³ The *Horton* and *B.C.* opinions note that sniffs are more intrusive than metal detectors which are searches,¹⁸⁴ Doberman pinschers and German shepherds provoke fear,¹⁸⁵ and sniffing is offensive if it is done by a person or a dog.¹⁸⁶ However, an actual value cannot be placed on these arguments or the other arguments cited in the opinions. Each argument could generate a spectrum of opinions regarding its value depending on the evaluator's personal views, experiences, and biases. As a result, there is no way to know which arguments the Supreme Court preferred when it refused to grant review of *Doe* and of *Horton*.¹⁸⁷

Therefore, a public school is faced with uncertainty on whether and how to implement a suspicionless canine sniff program in a constitutionally sound manner. The next section of this paper offers suggestions on how interested public schools could best implement canine search programs.

IV. How a Public School Could Best Implement a Suspicionless Canine Sniff Program

Glaring uncertainty surrounds how public school officials can conduct suspicionless activities designed to identify drug users and to combat drug use without violating

¹⁸¹ *Doe v. Renfrow*, 475 F. Supp. 1012, 1021 (D. Ind. 1979).

¹⁸² *Id.*

¹⁸³ *Id.* at 1022.

¹⁸⁴ *Horton v. Goose Creek Indep. Sch. Dist.*, 690 F.2d 470, 478 (5th Cir. 1982).

¹⁸⁵ *Id.*; *B.C. v. Plumas Unified Sch. Dist.*, No. 97-17287, 1999 U.S. App. LEXIS 38863, at *26 (9th Cir. Sept. 20, 1999).

¹⁸⁶ *Id.*

¹⁸⁷ As Table 1 located in Appendix A (Part VI) illustrates, all three Circuits have persuasive arguments in support of their respective holdings on whether suspicionless canine sniffs are searches.

the Fourth Amendment.¹⁸⁸ The Supreme Court contributed to this uncertainty by refusing to review the Seventh and the Fifth and Ninth Circuits' conflicting holdings on whether suspicionless canine sniffs are included in the Fourth Amendment's definition of a search.¹⁸⁹ Therefore, public schools must be cautious should they decide to adopt a suspicionless canine sniff program. To help, this section suggests five steps for a public school to take in deciding if a suspicionless canine sniff program is appropriate and, if so, how to create such a program.

The steps provided below are gleaned from three sources: (1) the two Supreme Court cases discussing suspicionless urine testing for drugs in public schools (*Vernonia* and *Earls*); (2) the three Circuit Court opinions that address suspicionless canine sniffs (*Doe*, *Horton*, and *B.C.*); and (3) legal commentary.

A. Step 1: Consider Whether a Suspicionless Canine Sniff Program Is Appropriate for Your School (Conduct a "Need Analysis")

Schools contemplating whether to adopt a suspicionless canine sniff program should analyze the need. The "need analysis" should include a collective discussion among administrators, school board members, and faculty. This discussion should address whether the concept of a suspicionless canine sniff program is consistent with the school's culture and if their drug problem is severe enough to warrant exposing students to canine sniffs. The collective discussion should also address whether less intrusive and more generally acceptable alternative options are available for addressing a drug problem. In *Vernonia*, the court identified a few alternatives: guest lectures, special education, and property searches.¹⁹⁰ Finally, the collective discussion should reflect that schools are typically the source of Constitutional

¹⁸⁸ Benjamin Gerald Dusing, *Constitutional Standards for Suspicionless Student Drug Testing: A Moving Target*, 88 KY. L.J. 687, 713 (2000).

¹⁸⁹ See cases cited *supra* note 98.

¹⁹⁰ *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 649 (1995).

education for our citizens and students will watch and learn from how the school treats the Constitution.¹⁹¹

In conducting a need analysis, a school should also address the notion that a suspicionless canine sniff program does not deter students from using drugs and, in practice, actually encourages students not to associate or participate with students groups that are targeted for sniffing.¹⁹² Testing certain student groups creates the possibility that, rather than stopping their use of illegal drugs, at least some students will choose to disassociate with the grouping.¹⁹³ Justice Ginsburg noted this possibility in her dissent to *Earls*:

“[e]ven if students might be deterred from drug use in order to preserve their extracurricular eligibility, it is at least as likely that other students might forgo their extracurricular involvement in order to avoid detection of their drug uses.”¹⁹⁴

If this is true, the students who choose not to participate in order to continue using drugs are driven away from the protective and constructive environments that extracurricular activities create.¹⁹⁵ These students will spend less time on campus and less time under the supervision of school officials that can monitor them and encourage them to get help.¹⁹⁶ Therefore, a need analysis should include a discussion of whether a school believes that some students will not associate with student groups in order to avoid

¹⁹¹ Michael A. Sprow, *The High Price of Safety: May Public Schools Institute a Policy of Frisking Students as They Enter the Building?*, 54 BAYLOR L. REV. 133, 168 (2002).

¹⁹² Bishop, *supra* note 78, at 240 (asserting that the “expected effect of a policy that tests a specific portion of the student body such as students in extracurricular programs is to drive those at-risk students away from the protective and constructive environments of the activities”).

¹⁹³ Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Co. v. *Earls*, 536 U.S. 822, 853 (2002) (Ginsburg, J., dissenting).

¹⁹⁴ *Id.*

¹⁹⁵ Bishop, *supra* note 78, at 240.

¹⁹⁶ *Id.* at 240-41.

detection and, if so, whether a suspicionless canine sniff program is worth the cost.

Finally, a need analysis for a program should involve parental input. In upholding a suspicionless urine test, the Supreme Court in *Vernonia* noted with approval that a vast majority of the students' parents supported the suspicionless urine testing policy.¹⁹⁷ Therefore, a school district should inventory parental support for a suspicionless canine sniff program as part of a need analysis.

B. Step 2: Showing the Need for a Suspicionless Canine Sniff Program

The *Vernonia*, *Earls*, and *B.C.* decisions indicate that a successful suspicionless canine sniff program should have goals directed at a documented problem. Therefore, a school should first document its drug problem, then develop goals for combating that problem.

Both *B.C.* and *Earls* provide guidance for documenting a drug problem. The Ninth Circuit's holding in *B.C.* suggests that the Court may have found the suspicionless canine sniff program in question to be reasonable under the Fourth Amendment had the school documented a sufficiently serious drug problem.¹⁹⁸ Also, in *Earls*, the Supreme Court held that a school district does not necessarily have to document a drug problem before implementing a suspicionless drug testing program; however, the Court concluded that "*some showing does shore up an assertion of special need for a suspicionless general search program.*"¹⁹⁹ Accordingly, a school should document as many factors indicating a drug problem as possible to make a court's decision to uphold a suspicionless canine sniff program easier. In so doing, a school should keep

¹⁹⁷ *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 665 (1995).

¹⁹⁸ *B.C. v. Plumas Unified Sch. Dist.*, No. 97-17287, 1999 U.S. App. LEXIS 38863, at *26 (9th Cir. Sept. 20, 1999).

¹⁹⁹ *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Co. v. Earls*, 536 U.S. 822, 835 (2002) (emphasis added).

in mind that the greater the problem, the more likely a court will uphold a suspicionless canine sniff program.²⁰⁰

To compile such documentation, a school should consult administrators, faculty, and local police to learn the number of drug related incidents occurring on and near their campuses that involve students. The *Vernonia* and *Earls* decisions provide examples of the type of incidents that courts may be interested in: students appearing to be under the influence of drugs, students openly speaking about using drugs, people finding marijuana cigarettes by a school parking lot, police finding drug paraphernalia on a student that would be targeted by a suspicionless program, community members calling the school board about the “drug situation,”²⁰¹ and disruption of the school’s learning environment due to drug usage.²⁰²

After a drug problem has been documented, a public school should develop goals for a suspicionless canine sniffing program. In *Vernonia*, the Supreme Court noted with approval the school district’s goals for its suspicionless drug testing program: to deter drug use among the target population, to help protect athlete health and safety, and to provide drug assistance to those in need.²⁰³ Hence, a school should consider articulating these goals if they are applicable.

C. Step 3: Develop Protocol for Dog Selection, Training, and Deployment

The third step in developing a suspicionless canine sniff program at a public school is to develop protocol for assuring that the dogs used are properly selected, trained, and deployed. Such protocol should address the following five issues. The first issue is breed selection. In *Horton*, the Fifth Circuit criticized the school district’s use of Doberman

²⁰⁰ Jennifer Bradfield, *Vernonia School District 47J v. Acton: A Step Toward Upholding Suspicionless Dog Sniff Searches in Public Schools*, 68 U. COLO. L. REV 475, 504 (1997).

²⁰¹ Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Co. v. Earls, 536 U.S. 822, 834-835 (2002).

²⁰² *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 662 (1995).

²⁰³ *Id.* at 650.

pinschers and German shepherds in its canine sniffing program.²⁰⁴ These dogs are known for their image and ability to provoke fear.²⁰⁵ Therefore, a school's protocol should limit the breed of dogs that can be used to those that are smaller in size and that have a friendlier image, such as hounds and Labradors.

In addition to selecting the proper breed, the protocol for this step should address dog training. The reliability of the dogs used will impact the success of a suspicionless canine program.²⁰⁶ The best type of canine to use for this type of program is a "single element point source" dog.²⁰⁷ These dogs are trained to follow a scent until they reach the source.²⁰⁸ The training, certification, and management of single element point source dogs should be formalized and, at a minimum, adhere to federal law enforcement standards.²⁰⁹ These standards include training to disregard distractions, such as food, harmless drugs, and residual scents.²¹⁰ The length of training varies, but most programs should last two to three weeks.²¹¹ The training should also involve more than drug detection, such as working under extraordinary conditions.²¹² Also, the dog should be recertified annually and continuously undergo practice searches.²¹³

The third issue that the protocol should address is how to review a dog's history prior to it being used in a program. Some courts consider a particular canine's reliability in deciding if a sniff is a search and, if so, whether the search is

²⁰⁴ Horton v. Goose Creek Indep. Sch. Dist., 690 F.2d 470, 478 (5th Cir. 1982).

²⁰⁵ *Id.* at 479.

²⁰⁶ Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 411, 420 (1997).

²⁰⁷ *Id.* at 409.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 410, 421.

²¹⁰ *Id.* at 414.

²¹¹ *Id.* at 421.

²¹² Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 421-422 (1997).

²¹³ *Id.* at 422.

reasonable.²¹⁴ To be safe, a school should review a canine's history for excessive false alerts and for failing to detect drugs (hereafter "false negative"). Canines with excessive false alerts or false negatives and canines without records should be avoided. Note that alerts to legal substances and alerts to where there are no drugs at all are worse than an alert to a location or person where a drug was once, but no longer, located.²¹⁵

A school should create protocol for addressing how to select the dog handler(s) used in a program. Almost all false alerts and false negatives result from a handler's misinterpretation of a dog's signals.²¹⁶ Some false alerts and false negatives are a product of a handler's subconsciously sent signals that improperly influence a canine's response.²¹⁷ Consequently, a handler should be trained on how to manage his or her dog, how to interpret his or her dog's signals, and how to work in a school environment.²¹⁸ Training canine handlers involves more time and effort than training of the canine.²¹⁹ After the training is completed, the handler must undergo periodic recertification exercises to ensure that he or she is still reliable.²²⁰

Finally, the protocol developed by a school should also address the number of sniffs a dog completes per deployment. A canine's success in finding drugs is related to the size of the area and/or the number of people that the dog sniffs per deployment.²²¹ The more drug-free areas and/or people that a dog sniffs per deployment, the greater the chance a dog will provide a false alert.²²² This suggests that a school district

²¹⁴ *Id.* at 418-419.

²¹⁵ *Id.* at 427.

²¹⁶ *Id.* at 422.

²¹⁷ *Id.* at 424.

²¹⁸ Robert C. Bird, *An Examination of the Training and Reliability of the Narcotics Detection Dog*, 85 KY. L.J. 405, 423 (1997).

²¹⁹ *Id.* at 412.

²²⁰ *Id.* at 413.

²²¹ *Id.* at 430.

²²² *Id.*

should limit the number of students that a particular dog sniffs at a time.

D. Step 4: Develop Protocol for Selecting Students to Be Sniffed

A school needs protocol that dictates which students will be exposed to suspicionless canine sniffing. In *Earls*, the Supreme Court expanded the types of students that could be subject to suspicionless urine testing from student athletes to any student involved in an extracurricular activity.²²³ The decision did not expressly state that the Court would find suspicionless drug testing of an entire student body to be reasonable under the Fourth Amendment. No school has succeeded in including the entire student body in their grouping for a urinalysis drug testing.²²⁴ This might be because protocol that ensures a solidly defined student grouping based on criteria related to drug use could help a district argue that their program incorporates some degree of individualized suspicion.²²⁵ Therefore, a school should establish protocol for limiting the number of students that will be tested to a group that is something less than the entire student body.

Prior cases provide guidance on how to limit which students would be sniffed. The school district in *Vernonia* was successful in simply targeting students that participate in school athletics.²²⁶ *Earls* held that another valid grouping is all students that participate in extracurricular activities.²²⁷ A Texas school district made their drug testing program grouping based on the degree to which students visibly represent the school.²²⁸ A Montana high school selected their grouping based on students that have had trouble with

²²³ Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Co. v. *Earls*, 536 U.S. 822, 826 (2002).

²²⁴ Bishop, *supra* note 78, at 235.

²²⁵ *Id.* at 231.

²²⁶ *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 650 (1995).

²²⁷ Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Co. v. *Earls*, 536 U.S. 822, 826 (2002).

²²⁸ Bishop, *supra* note 78, at 231.

attendance, grades, and/or fighting and on students that had been caught in possession of or using illegal drugs and drug paraphernalia.²²⁹ To also help create a grouping, a school could survey its students to garner more insight about drug use among various student populations.²³⁰

However, the protocol governing student selection should emphasize mandatory testing. A voluntary program may not produce desired results. The Grapeville-Colleville school district in Texas initially implemented a voluntary drug testing program.²³¹ The district, for unknown reasons, was unhappy with the voluntary program and later moved to a mandatory drug testing program.²³²

In addition, the protocol on student selection should stress fairness. The *Vernonia* and *Earls* decisions upheld a suspicionless standard over a reasonable suspicion standard in part because of fairness concerns. In both cases, the Supreme Court underscored the potential for a suspicion requirement to be implemented in an arbitrary and unfair manner, such as by targeting unpopular student groups.²³³ Even if a suspicion standard was not implemented discriminatorily, the Supreme Court was worried that the mere susceptibility of a suspicion standard to arbitrary and unfairness claims could chill a program's implementation.²³⁴ Consequently, a school wishing to develop a program should have protocol assuring that the grouping of students targeted for the suspicionless searches is fairly decided and that all in the group are sniffed in the same manner. To assure this, a program should contain clear practical and procedural safeguards that limit discretion by the program's implementers.²³⁵ The less discretion given to

²²⁹ *Id.*

²³⁰ *Id.* at 237.

²³¹ *Id.* at 231.

²³² *Id.*

²³³ *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 663-664 (1995); *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Co. v. Earls*, 536 U.S. 822, 837 (2002).

²³⁴ *Id.*

²³⁵ Kenneth L. Pollack, *Stretching the Terry Doctrine to the Search for Evidence of Crime: Canine Sniffs, State Constitutions, and the Reasonable Suspicion Standard*, 47 VAND. L. REV. 803, 854 (1994).

implementers in selecting who will be sniffed and how those selected will be sniffed, the more likely a court will find that the program is fair.²³⁶

The protocol developed for grouping students and for assuring fairness should also stress simplicity. One reason why the *Vernonia* and *Earls* decisions upheld the suspicionless urine testing was because a reasonable suspicion standard puts an increased burden on teachers that already have the difficult job of maintaining order and discipline.²³⁷ A school district should be careful not to negate this justification by creating a complex or otherwise hard to administer suspicionless canine sniffing program.

E. Step 5: Develop Protocol to Protect Students' State of Mind and Privacy

A suspicionless canine sniff program should be designed to safeguard the students' state of mind and their privacy. A school's program should include protocol that limits the amount of time an individual student is exposed to a dog for sniffing for two reasons. First, legal authority suggests such limitations are important to the constitutionality of such searches. In *Doe*, the Seventh Circuit stressed in its decision that suspicionless canine sniffs were not a search in part because the dogs were only in each classroom for several minutes.²³⁸ Second, common sense suggests that the longer a student remains still in order to be sniffed, the more it seems to an objective observer that the sniff was a search.

The protocol developed for this step should also assure that any disciplinary issues arising out of a program are handled internally by the school. In both *Vernonia* and *Earls*, the school districts, and not the police, handled disciplinary

²³⁶ *Id.*

²³⁷ *Vernonia*, 515 U.S. at 664; *Earls*, 536 U.S. at 837.

²³⁸ *Doe v. Renfrow*, 631 F.2d 91, 91-92 (7th Cir. 1980) (adopting the reasons laid out by the district court as its own). *See also Doe v. Renfrow*, 475 F. Supp. 1012, 1022 (D. Ind. 1979).

issues arising from positive drug testing results.²³⁹ The Supreme Court noted this in deciding to uphold suspicionless urine testing as reasonable under the Fourth Amendment.²⁴⁰ As a result, any school district wishing to adopt a suspicionless canine sniff program should have protocol in place to assure that resulting disciplinary issues are handled by the school and not by police.

Furthermore, the protocol for this step should also prevent dogs from physically touching students. The holding in *B.C.* suggests that the Ninth Circuit and the courts that follow the Ninth Circuit's reasoning will not give any deference to suspicionless canine sniffing programs that bar the dogs from actually touching students.²⁴¹ Nevertheless, a visual inspection is less intrusive than a physically invasive search.²⁴² A canine sniff where the dog does not actually physically touch a student is arguably more similar to a visual inspection than it is to a physically invasive search. As a result, a suspicionless canine sniff program that prevents the dogs from actually contacting students is arguably less intrusive. This argument will not hurt, and could only help, a program's chances of survival given the Ninth Circuit's holding in *B.C.*

Finally, and probably most importantly, a school should develop protocol that safeguards their students' personal and confidential information. Drug testing may incidentally reveal legal drug use. The Supreme Court noted in both *Vernonia* and *Earls* that the programs in question took two precautions to help minimize the privacy impact when a sniff inadvertently detected legal drugs on a student.²⁴³ First, a student had to reveal only enough personal information as

²³⁹ *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 651 (1995); *Board of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Co. v. Earls*, 536 U.S. 822, 833-34 (2002).

²⁴⁰ *Vernonia*, 515 U.S. at 658.

²⁴¹ *B.C. v. Plumas Unified Sch. Dist.*, No. 97-17287, 1999 U.S. App. LEXIS 38863, at *15 (9th Cir. Sept. 20, 1999).

²⁴² Sprow, *supra* note 191, at 160 (citing *Bond v. U.S.*, 529 U.S. 334, 337 (2000)).

²⁴³ *Vernonia*, 515 U.S. at 658-60; *Earls*, 536 U.S. at 833.

was necessary to convey that the drug usage in question was legal.²⁴⁴ Second, the number of people that received the information was as limited as possible.²⁴⁵ Any suspicionless canine program should therefore have protocol that provides the same two precautions to protect the privacy of students who legally use drugs.

V. Conclusion

In recent years, the Supreme Court has issued decisions that have lowered the level of Fourth Amendment protection afforded to public school children. Most recently, in its 2002 *Earls* decision, the Supreme Court upheld a program that subjected public school children involved in extracurricular activities to suspicionless urine testing. However, the Supreme Court thus far has failed to resolve a Circuit split on the question of whether a public school can employ a suspicionless canine sniffing program in a similar manner.

While the Seventh Circuit has held that canine sniffs ordered by public school entities are *not* a search under the Fourth Amendment, the Fifth and Ninth Circuits have held that such canine sniffs *are* a search. Consequently, the Fourth Amendment does not apply to suspicionless canine sniff programs performed within the Seventh Circuit, but it would regulate such programs within the Fifth and Ninth Circuits. By refusing to review the Seventh Circuit's 1981 decision in *Doe* and the Fifth Circuit's 1983 decision in *Horton*, the Supreme Court has allowed two mutually exclusive holdings to stand and, as a result, created uncertainty for public school officials that want to implement a suspicionless canine sniff program.

Although there is no clear guidance for how public schools can implement a suspicionless canine sniffing program, there are steps that a public school can take to help assure that a suspicionless canine sniff program survives

²⁴⁴ *Id.*

²⁴⁵ *Id.*

judicial scrutiny. If a public school wishes to adopt such a program, they should:

✓ *Step 1: Consider Whether a Suspicionless Canine Sniff Program Is Appropriate for Your School (Conduct a “Need Analysis”)*

✓ *Step 2: Gather Evidence Showing the Need for a Suspicionless Canine Sniff Program*

✓ *Step 3: Develop Protocol for Dog Selection, Training, and Deployment*

✓ *Step 4: Develop Protocol for Selecting Students To Be Sniffed*

✓ *Step 5: Develop Protocol to Protect Students’ State of Mind and Privacy*

This is not a complete list of steps for a school to take in adopting a suspicionless canine sniffing program, but they will help ensure that public school officials create and implement a program in a manner that complies with the Fourth Amendment. The steps cannot guarantee a program will survive judicial scrutiny because there is no Supreme Court case law directly on point and because judges and juries can be unpredictable. Therefore, in addition to these steps, schools within the Fifth, Seventh, and Ninth Circuits should review the *Horton, Doe*, and *B.C.* decisions respectively for additional insight on developing and implementing a program. Such schools need to comply with the applicable law of their Circuit because it is binding authority for them. In all jurisdictions, school officials should be sensitive to additional limitations created by state constitutions and statutes, and by local policy. School districts should also consult their legal counsel before implementing a suspicionless canine search program.

Finally, school officials, teachers, parents, and the public in general should remember Justice Jackson’s words from the Supreme Court’s 1943 decision in *West Virginia State Board of Education v. Barnette*:

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.²⁴⁶

In sum, implementing a suspicionless canine sniff program is a major and far-reaching decision for any school. As such, it should only be made after careful, in-depth contemplation of the school's drug problem and the impact the program will have on its student body.

²⁴⁶ West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

VI. Appendix A: Table Contrasting *Doe*, *Horton*, and *B.C.*

TABLE 1: The Seventh, the Fifth and the Ninth Circuits' Arguments Supporting Their Holdings Regarding Whether Suspicionless Canine Sniffs of Public School Children are a Search Under the Fourth Amendment

Seventh Circuit (<i>Doe</i>)	Fifth Circuit (<i>Horton</i>)	Ninth Circuit (<i>B.C.</i>)
<ul style="list-style-type: none"> • The dogs were only in each classroom for several minutes • The documented drug use at the school • The drug use's effects on the school's learning environment • The school's inability to control the student drug use • The students' pro-drug attitude • The program was not a police action • Students do not have a privacy interest in the air around them • Students are already constantly supervised while in school • All students were searched in the same manner; the program was not arbitrarily conducted 	<ul style="list-style-type: none"> • The Fourth Amendment "applies with its fullest vigor" when searching a person's body • Sniffs are less intrusive than metal detectors, and metal detectors have been found to be searches • Most people in our society take measures to mask their odors • Sniffing is offensive regardless if done by a person or a dog • Adolescents are self-conscious about their bodies and, as a result, sniffing the air around them could be highly embarrassing • Doberman pinschers and German shepherds were employed because of their image 	<ul style="list-style-type: none"> • A canine sniff performed on a person is more intrusive than one performed on unattended luggage • Most people in our society take measures to mask their odors • Dogs can cause fear • The school's program required involuntary and random canine sniffing