

March 26, 2001

## COURT OF APPEALS NULLIFIES DRUG TESTING POLICY

*(Earls v. Board of Education of Tecumseh Public School District)*

Last week the Washington Legal Foundation (WLF) received the disappointing news that the U.S. Court of Appeals for the Tenth Circuit struck down an Oklahoma school district policy that requires students who represent a school in extracurricular activities to be tested for illicit drugs. The school district is considering further appeals, and WLF has pledged to support any such efforts to reverse last week's decision.

WLF had filed a brief with the court on behalf of itself; Oklahoma Governor Frank Keating; U.S. Senators Don Nickles of Oklahoma and Judd Gregg of New Hampshire; Representative Fred S. Morgan, Minority Leader of the Oklahoma House of Representatives; the Oklahoma Secondary Schools Activities Association; the Allied Educational Foundation; and 18 parents of students who attend school in the Tecumseh School District. Aligned against WLF is the American Civil Liberties Union (ACLU), which sued the district on behalf of certain students who object to the drug testing policy.

In a 36-page decision, two members of a three-judge panel ruled that the school policy violates the objecting students' Fourth Amendment right to be free from "unreasonable" searches and seizures. The majority first noted that drug use "among students subject to the testing Policy was negligible." It then found that the balance of privacy rights and the district's interest in rooting out drug use tipped in favor of the former. The court ruled that "like athletes, participants in other extracurricular activities have a somewhat lesser privacy expectation than other students." It also agreed with the school district that "the invasion of privacy was not significant." However, the majority concluded that the balance tipped "decisively" in favor of the objecting students, because "neither a concern for safety nor a concern about the degree of supervision provides a sufficient reason for testing the particular students" subject to the drug testing policy. For these reasons, the majority struck down the policy as unconstitutional.

WLF had filed a brief with the court of appeals, arguing that the drug testing policy satisfies the constitutional requirement that any search conducted by public officials be reasonable. First, WLF asked the court of appeals to follow binding U.S. Supreme Court precedent, which directly addresses the constitutionality of searches conducted in public

schools, rather than cases relied on by the ACLU, which do not discuss the unique setting of public schools. Second, WLF maintained that U.S. Supreme Court decisions interpreting the Fourth Amendment in the context of public schools allow a school to require students who represent it to undergo random drug testing. Third, WLF pointed out that the Tenth Circuit should be guided by decisions of the U.S. Court of Appeals for the Seventh Circuit, which have identified several reasons why public schools may constitutionally impose a drug testing requirement on students participating in all kinds of extracurricular activities, not just interscholastic sports.

This case arose when the Tecumseh School District adopted a policy requiring students who represent a school in extracurricular activities to be tested for illicit drugs. In adopting its policy, the school district applied the policy only to students participating in genuinely out-of-class activities. Only when a student actually participated in an out-of-class activity, such as a band performance, would the drug testing requirement apply. Moreover, the district sharply limited the consequences of violating the policy. If a student either failed a drug test or refused to agree to be tested, their only penalty was suspension from participating in extracurricular activities. The student was subject neither to school discipline, such as suspension or expulsion, nor to being reported to the police. Despite the district's care in crafting the policy, the ACLU filed a lawsuit against the district in the U.S. District Court for the Western District of Oklahoma claiming that the students' Fourth Amendment right to be free of unreasonable searches and seizures had been violated.

"We are disappointed with the court's decision," said Shawn Gunnarson, WLF's Senior Counsel for Litigation Affairs. "The dangers of drug abuse are well known and the capacity to detect such abuse is readily available. We hope that the court of appeals will reconsider and let schools continue doing all they can to encourage students to avoid the plague of illegal drugs."

The Washington Legal Foundation is a nonprofit public interest law and policy center with supporters nationwide. It devotes a significant portion of its resources to defending and promoting the principles of free enterprise and effective public education.

\* \* \*

For further information, contact WLF Senior Counsel for Litigation Affairs Shawn Gunnarson at (202) 588-0302.