

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 353 Drug Screening of Potential and Existing Beneficiaries of Temporary Cash Assistance
SPONSOR(S): Smith
TIED BILLS: **IDEN./SIM. BILLS:** SB 556

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Access Subcommittee		Batchelor	Schoolfield
2) Civil Justice Subcommittee			
3) Health Care Appropriations Subcommittee			
4) Health & Human Services Committee			

SUMMARY ANALYSIS

The bill creates s. 414.0652, F.S. establishing that the Department of Children and Families (DCF) shall create a drug screening program for temporary cash assistance applicants as a condition of eligibility. The program must be implemented no later than July 1, 2012. The bill provides the following:

- Applicants who have been convicted of a drug felony in the previous 3 years shall be drug screened and upon receiving cash assistance the individual will be screened for an additional 3 years.
- Applicants that fail the drug screen shall be disqualified from receiving temporary cash assistance for 3 years. However, DCF may designate another individual to receive the cash assistance benefits on behalf of a minor child.
- The methods of drug screening and confirmatory testing, including policies and procedures for specimen collection, testing, storage and transportation are detailed in the bill. DCF shall solicit competitive bids for drug screening and confirmatory screening services to ensure the lowest costs. The cost of screening and confirmatory testing shall be paid by the individual applicant.
- DCF shall provide any individual who tests positive for drugs with information concerning drug abuse and treatment programs in the area in which he or she resides. The bill specifies that neither DCF nor the state is responsible for providing or paying for substance abuse treatment as part of screening under this section.
- The drug screening program shall be implemented no later than July 1, 2012
- DCF is required to submit an annual report to the Speaker of the House of Representatives, the President of the Senate and the Governor by January 1, 2013.

The bill provides an effective date of July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Temporary Assistance for Needy Families (TANF)

Under the welfare reform legislation of 1996, the Personal Responsibility and Work Opportunity Reconciliation Act – PWRORA – Public Law 104-193, the Temporary Assistance for Needy Families (TANF) program replaced the welfare programs known as Aid to Families with Dependent Children (AFDC), the Job Opportunities and Basic Skills Training (JOBS) program and the Emergency Assistance (EA) program. The law ended federal entitlement to assistance and instead created TANF as a block grant that provides States, territories and tribes federal funds each year. These funds cover benefits, administrative expenses, and services targeted to needy families. TANF became effective July 1, 1997, and was reauthorized in February 2006 under the Deficit Reduction Act of 2005.¹ States receive block grants to operate their individual programs and to accomplish the goals of the TANF program. Those goals include:

- Assisting needy families so that children can be cared for in their homes;
- Reducing the dependency of needy parents by promoting job preparation, work and marriage;
- Preventing out-of-wedlock pregnancies;
- Encouraging the formation and maintenance of two-parent families.²

Currently, DCF administers the TANF program in conjunction with the Agency for Workforce Innovation (AWI). Current law provides that families are eligible for cash assistance for a lifetime cumulative total of 48 months (4 years).³ DCF reports that approximately 113,346 people are receiving temporary cash assistance.⁴ The FY 2010-2011 appropriation of TANF funds to support temporary cash assistance was \$211,115,965.

The TANF program expires on September 30, 2011 and must be reauthorized by Congress to continue the program.

Food Assistance Program (Supplemental Nutrition Assistance Program-SNAP)

The Food Assistance Program is a 100 % federally funded program to help low-income people buy food they need for good health. The U.S. Department of Agriculture (USDA) determines the amount of food assistance benefits an individual or family receives. Food assistance benefits are a supplement to a family's food budget. Households may need to spend some of their own cash, along with their food assistance benefits, to buy enough food for a month.⁵ DCF reports that over 1.9 million Floridians received food assistance during fiscal year 2009-10.⁶

Pilot Project for Drug Testing TANF Applicants

From January 1999 to May 2001, DCF in consultation with Workforce Florida implemented a pilot project in Regions 3 and 8 to drug screen and drug test applicants for TANF.⁷ A Florida State

¹ US Dept. of Health and Human Services, Administration on Children and Families <http://www.acf.hhs.gov/programs/ofa/tanf/about.html> (last visited on 2/15/11)

² *Id*

³ s. 414.105, F.S.

⁴ DCF Quick Facts, Access Program, January 1, 2011.

⁵ Food Assistance Program Fact Sheet, DCF <http://www.dcf.state.fl.us/programs/access/foodstamps.shtml> (last visited 3/3/11)

⁶ DCF Quick Facts, Access Program, January 1, 2011

⁷ Evaluation Report, Robert E.Crew, Florida State University (on file with committee staff).

University researcher under contract to evaluate the pilot program did not recommend continuation or statewide expansion of the project. Overall research and findings concluded that there is very little difference in employment and earnings between those who test positive versus those who test negative. Researchers concluded that the cost of the pilot program was not warranted.

Sanctions to Welfare and Food Assistance Recipients from Felony Drug Convictions.

Federal law provides that an individual convicted (under federal or state law) of any offense which is classified as a felony related to the possession, use or distribution of a controlled substance shall not be eligible for assistance under the TANF program or benefits under the food stamp program or any program carried out under the Food and Nutrition Act of 2008.⁸

The same section of Federal law provides that each state has the right to exempt individuals from having benefits withheld due to a felony drug charge.⁹ Florida has opted to exempt individuals from this provision and does not deny benefits for a felony drug conviction, unless the conviction is for drug trafficking.¹⁰

Drug Testing Welfare and Food Assistance Recipients

Federal law regarding the use of TANF funds provides that states may test welfare recipients for use of controlled substances and sanction those recipients who test positive.¹¹ However, there is no provision in federal law allowing drug testing recipients of the food assistance program. Further the Federal code provides that states cannot as a condition of eligibility impose additional application or application processing requirements, such as drug testing on recipients of the food assistance program.¹²

Protective Payees

The TANF program requires that people receiving cash assistance must satisfy work requirements established in federal law. Florida statutes provide that the Agency for Workforce Innovation develop specific activities that satisfy the work requirements.¹³

In the event that a TANF recipient is noncompliant with the work activity requirements, DCF has authority to terminate cash assistance to the family.¹⁴ In the event that assistance is terminated, DCF will establish a protective payee that will receive TANF funds on behalf of any children in the home who are under the age of 16.¹⁵ The protective payee shall be designated by DCF and may include:¹⁶

- A relative or other individual who is interested in or concerned with the welfare of the child or children and agrees in writing to utilize the assistance in the best interest of the child or children.
- A member of the community affiliated with a religious, community, neighborhood, or charitable organization who agrees in writing to utilize the assistance in the best interest of the child or children.
- A volunteer or member of an organization who agrees in writing to fulfill the role of protective payee and utilize the assistance in the best interest of the child or children.

Challenges to the U.S. Constitution

The courts have found in some cases that suspicion-less drug testing is constitutional and does not violate the Fourth Amendment, which protects an individual's rights against search and seizure. (Skinner v. Railway Labor Executives' Association in 1989).

⁸ P.L. 104-193, Section 115, 42 U.S.C. 862(a)

⁹ *Id*

¹⁰ s. 414.095, F.S.

¹¹ P.L. 104-193, Section 902, 21 U.S.C. 862(b)

¹² 7 CFR Part 273.2

¹³ s. 445.024, F.S.

¹⁴ s. 414.065, F.S.

¹⁵ *Id*

¹⁶ *Id*

However, there are other cases (*Marchwinski v. Howard* in 2003) where Michigan welfare recipients challenged a new law authorizing suspicion-less drug testing. The courts found that the law was an unconstitutional violation of individual's right to privacy under the Fourth Amendment. The court specifically ruled that drug testing was unconstitutional when applied universally or randomly without reasonable suspicion of drug use.

Agency for Health Care Administration – Laboratory Certifications

The Agency for Health Care Administration (AHCA) regulates facilities that perform clinical, anatomic, or cytology lab services to provide information or materials for use in diagnosis, prevention or treatment of a disease or in the identification or assessment of a medical or physical condition in accordance with Chapter 408 and 483, F.S. These are considered clinical labs. Additionally, AHCA regulates facilities for "Drug Free Workplaces" these types of labs perform chemical, biological or physical instrumental analyses to determine the presence or absence of specified drugs or their metabolites in job applicants of any agency in state government.¹⁷ AHCA does not have the authority to drug screen temporary cash assistance benefits in either of these labs.

Department of Health and Human Services Division of Workplace Programs

The United States Department of Health and Human Services (HHS), Substance Abuse and Mental Health Services Administration (SAMHSA), Division of Workplace Programs (DWP) provides oversight for the Federal Drug Free Workplace Program. DWP certifies labs that conduct forensic drug testing for federal agencies and for some federally-regulated industries.¹⁸

Effect of Proposed Changes

The bill creates s. 414.0652, F.S., establishing that DCF will create a drug screening program that requires individuals to consent to being drug screened as a condition of eligibility for temporary cash assistance. The program shall be implemented by July 1, 2012. DCF shall provide notice for the potential of drug screening to all applicants and shall require an applicant to sign an acknowledgement form that he/she has received notice of DCF's drug screen policy and that he/she can refuse to undergo the screen.

Drug Screening Process

Individuals will only be screened if they have been convicted of a drug felony within the prior 3 years, and will continue to be screened for 3 years after they begin to receive TANF funds. Currently, DCF does not drug screen any individual as a condition of eligibility for cash assistance. DCF estimates that between 170-340 people (based on current caseloads) would test positive as a result of a drug screen, and that about 1.7% of current recipients would have a prior drug felony conviction.¹⁹

The bill provides that an individual will be disqualified from receiving or continuing to receive TANF benefits if:

- They refuse to submit to a drug screen under this section.
- They test positive for drugs as a result of a confirmation test.

In the event that an individual fails a confirmation test they will be ineligible for TANF benefits for 3 years. The bill establishes that in the event the individual has minor children, the individual can designate an immediate family member or another individual approved by DCF to receive funds on behalf of the children. The designated individual may not have been convicted of a drug felony within the past 3 years.

¹⁷ Chapter 408, F.S.

¹⁸ *Id*

¹⁹ Email from Jennifer Lange on TANF (on file with committee staff). Numbers and Statistics based on data from North Carolina, DCF has been in exchanges with the state as it relates to the bill and numbers of people affected.

DCF shall provide an individual who tests positive for drugs information concerning substance abuse treatment programs that may be available in their area. Neither DCF nor the state is responsible for providing or paying for substance abuse treatment for these individuals as part of the screening conducted in this section of law.

Applicants for cash assistance shall be responsible for the cost of both the initial drug screen and the confirmatory test (if needed). DCF shall solicit competitive bids for drug screening and confirmatory testing to ensure the lowest possible cost. DCF estimates the initial screening cost at \$10 per person and the confirmatory test at \$25 per person.²⁰

The bill removes language from s. 414.095, F.S., eliminating the requirement that benefits be denied to an individual who has a felony drug conviction for drug trafficking pursuant to s. 893.135, F.S.

Definitions

The bill provides definitions for the following:

- Confirmation Test or Confirmatory Testing
- Drug
- Drug Screening or Screen
- Initial Drug Screening or Initial Screen
- Nonprescription Medication
- Prescription Medication
- Specimen

Specimen Collection

The bill details the use of results from specimen collection, requiring:

- That the individual to be screened or tested must provide written consent to be screened or tested on a form developed by DCF.
- A specimen shall be collected with due regard to the privacy of the individual providing the specimen and in a manner to prevent substitution or contamination of the specimen.

Specimen collection must be documented and should adhere to the following procedures:

- Labeling of specimen containers to preclude erroneous identification of drug screen or confirmation results.
- A form on which the individual being tested can provide any information that he/she feels is relevant to the screen, including prescription or non-prescription medications that are currently or were recently used. The form must provide notice of the most common medications by brand name or common name and by chemical name which may alter or affect a drug screen or confirmation test.

Specimen collection, storage and transportation to the testing site must be performed in a manner that reasonably precludes contamination of the specimen as specified in DCF policies and procedures for this section. Additionally, the specimen that produces a positive screen or positive test result must be preserved for a certain period of time as established by the department's policies and procedures.

Mandated Report

The bill requires DCF to submit a report detailing statistics from the program to the Governor, President of the Senate and Speaker of the House by January 1, 2013.

B. SECTION DIRECTORY:

²⁰ Per DCF bill analysis, 2/8/2011 (on file with committee staff).

Section 1: Creates s. 414.0652, F.S., relating to drug screening

Section 2: Amends s. 414.095, F.S., related to determining eligibility for temporary cash assistance.

Section 3: Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

B. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will have an impact on applicants who are required to undergo a drug screen or confirmation test as a condition of eligibility for temporary cash assistance funds. DCF estimates that the initial drug screen costs will be \$10.00 per person and the confirmatory test will be \$25.00 per person.²¹ However, exact costs will not be known until DCF solicits competitive bids from private laboratories.

C. FISCAL COMMENTS:

AHCA does not currently have authority to conduct the drug screening tests that are specified in the bill. If AHCA's certified labs are used then there is potential for an indeterminate fiscal if AHCA must create a licensure program in order to certify labs performing drug testing.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Marchwinski v. Howard in 2003, Michigan welfare recipients challenged a new law authorizing suspicion-less drug testing. The Sixth Circuit U.S. Court of Appeals upheld a lower court's ruling that the Michigan law was an unconstitutional violation of individual right to privacy under the Fourth

²¹ DCF Bill Analysis on HB 353 (2/8/2011)

Amendment. The court specifically ruled that drug testing was unconstitutional when applied universally or randomly without reasonable suspicion of drug use.

The current bill as drafted does not conduct universal or random drug testing. In addition, the testing is limited to individuals with prior drug related felony convictions in the past 3 years.

B. RULE-MAKING AUTHORITY:

Rule making authority is needed for DCF to implement the drug screening program.

C. DRAFTING ISSUES OR OTHER COMMENTS:

1. If an individual with a prior felony drug conviction passes the initial drug screen and begins receiving TANF benefits, they will be screened for an additional 3 years (while receiving benefits). The bill does not specify how often or when the individual will be screened.
2. If an individual fails a confirmation test they are not eligible for TANF benefits for 3 years, it is unclear when those 3 years will begin.
3. The bill states that neither the department nor the state is responsible for paying for substance abuse treatment for individuals as part of the screening conducted in this section. This could create problems for DCF in determining the individuals who failed TANF drug screening and are now seeking help at a DCF licensed substance abuse treatment facility or provider. It appears that DCF would need to establish a system to cross reference those denied temporary cash assistance due to drug screening with those who are seeking substance abuse treatment.
4. If the cost of drug testing is too expensive for applicable TANF applicants, it could become a deterrent for people applying to get cash assistance.
5. The bill requires DCF to contract with providers to perform drug screening through labs that are licensed or certified by either AHCA or the US Department of Health and Human Services (HHS). AHCA has expressed that neither they nor HHS have the authority to license or regulate the type of facilities that would perform drug screening for temporary cash assistance.
6. The last sentence of the definition of "specimen", lines 87-88, states "a urine specimen shall be collected and analyzed for all initial drug screens and confirmation tests under this section." This sentence is more related to policy than the definition of specimen. This should be moved to (5) "Use of Results."

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES