

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/CS/CS/CS/HB 353 Drug Screening of Potential and Existing Beneficiaries of Temporary Assistance for Needy Families

**SPONSOR(S):** Health & Human Services Committee; Judiciary Committee; Rulemaking & Regulation Subcommittee, Health & Human Services Access Subcommittee; Smith and others

**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 556

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Access Subcommittee	12 Y, 3 N, As CS	Batchelor	Schoolfield
2) Rulemaking & Regulation Subcommittee	9 Y, 6 N, As CS	Miller	Rubottom
3) Judiciary Committee	13 Y, 5 N, As CS	Woodburn	Havlicak
4) Health & Human Services Committee	12 Y, 6 N, As CS	Batchelor	Gormley

### SUMMARY ANALYSIS

The bill creates s. 414.0652, F.S., requiring the Department of Children and Families (DCF) to perform a drug screening for temporary cash assistance applicants as a condition of eligibility. The bill provides the following:

- DCF shall require a drug test consistent with s. 112.0455, F.S.
- All applicants for Temporary Assistance to Needy Families (TANF) shall be drug screened as a condition of eligibility to receive cash assistance benefits.
- Applicants who test positive for controlled substances will be disqualified from receiving temporary cash assistance for 1 year, unless the individual chooses to seek substance abuse treatment. If the individual chooses to seek treatment, he or she can reapply for TANF funds within a 6-month time frame. This is a one-time option.
- DCF must inform applicants who test positive of the ability to apply again one year from the date of the positive test, or within 6 months upon completion of a substance abuse program. Applicants who test positive again will be ineligible to receive TANF benefits for 3 years from the date of the second positive test.
- If a parent tests positive for controlled substances, DCF may designate a “protective payee” to receive the cash assistance benefits on behalf of a dependent child. Alternatively, the parent may choose an immediate family member to receive benefits on behalf of the child or DCF may approve another individual to receive the benefits; a person so designated by the parent or approved by DCF also must undergo drug testing.
- The cost of drug testing will be paid by the individual applicant.
- DCF will be required to provide any individual who tests positive for controlled substances 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.
- DCF is authorized to adopt rules as necessary to implement the law.

The bill raises important constitutional questions related to the permissibility of suspicionless drug testing as a condition of public assistance.

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.<sup>1</sup> 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.<sup>2</sup>

Currently, DCF administers the TANF program in conjunction with the Agency for Workforce Innovation (AWI).<sup>3</sup> Current law provides that families are eligible for cash assistance for a lifetime cumulative total of 48 months (4 years).<sup>4</sup> DCF reports that approximately 113,346 people are receiving temporary cash assistance.<sup>5</sup> 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.

##### ***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.<sup>6</sup> DCF reports that over 1.9 million Floridians received food assistance during fiscal year 2009-10.<sup>7</sup>

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<sup>1</sup> 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 3/30/11).

<sup>2</sup> *Id.*

<sup>3</sup> State Plan for Temporary Assistance for Needy Families Renewal, October 1, 2008-September 30, 2011, @  
<http://www.dcf.state.fl.us/Search.shtml?cx=001246626777910876508%3Aznyjo2rfb2i&cof=FORID%3A11&ie=UTF-8&q=Drug+test#1086>

<sup>4</sup> Section 414.105, F.S.

<sup>5</sup> DCF Quick Facts, Access Program, January 1, 2011.

<sup>6</sup> Food Assistance Program Fact Sheet, DCF <http://www.dcf.state.fl.us/programs/access/foodstamps.shtml> (last visited 3/30/11)

<sup>7</sup> DCF Quick Facts, Access Program, January 1, 2011.

## ***Pilot Project for Drug Testing TANF Applicants***

Currently, DCF does not drug screen any individual as a condition of eligibility for cash assistance. 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.<sup>8</sup> A Florida State 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.<sup>9</sup>

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.<sup>10</sup> 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.<sup>11</sup>

## ***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.<sup>12</sup> 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 on recipients of the food assistance program.<sup>13</sup>

## ***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.<sup>14</sup>

In the event that a TANF recipient is noncompliant with the work activity requirements, DCF has authority to terminate cash assistance to the family.<sup>15</sup> 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.<sup>16</sup> The protective payee shall be designated by DCF and may include:<sup>17</sup>

- 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.

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<sup>8</sup> Evaluation Report, Robert E.Crew, Florida State University (on file with committee staff).

<sup>9</sup> P.L. 104-193, Section 115, 21 U.S.C. 862(a).

<sup>10</sup> Id.

<sup>11</sup> Section 414.095, F.S.

<sup>12</sup> P.L. 104-193, Section 902, 21 U.S.C. 862(b).

<sup>13</sup> 7 CFR Part 273.2.

<sup>14</sup> Section 445.024, F.S.

<sup>15</sup> Section 414.065, F.S.

<sup>16</sup> Id.

<sup>17</sup> Id.

- 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 under the U.S. Constitution***

The United States Supreme Court has ruled in four situations that suspicion-less drug testing is constitutional and does not violate the Fourth Amendment, which protects an individual's rights against unreasonable search and seizure. These situations include suspicion-less drug testing of:

- Students in extracurricular activities;<sup>18</sup>
- Student athletes;<sup>19</sup>
- Certain Customs employees;<sup>20</sup> and
- Railroad employees after major accidents.<sup>21</sup>

In these cases the court focused on the special need of the government, the unique situation involved (school setting, drug enforcement, and major train accidents) and public safety.

The U.S. Supreme Court has held one suspicion-less drug test unconstitutional. In Chandler v. Zell, the state of Georgia required all candidates for designated state offices to certify that they had taken a drug test and the result was negative in order to run for state office.<sup>22</sup> In ruling the drug testing unconstitutional, the court held that,

Where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as 'reasonable'...But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search.<sup>23</sup>

The U.S. Supreme Court has not ruled on the constitutionality of suspicion-less drug testing of welfare recipients, but in 1999, the State of Michigan enacted a pilot program for suspicion-less drug testing of all family assistance recipients with the intent for the program eventually to become effective statewide.<sup>24</sup> Welfare recipients challenged the new law authorizing suspicion-less drug testing in federal court. The federal district court found that the law was an unconstitutional violation of an 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.<sup>25</sup>

### ***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 chapters 408 and 483, F.S. These are considered clinical labs. Additionally, AHCA regulates facilities for "Drug Free Workplaces."<sup>26</sup> 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,

<sup>18</sup> Board of Education v. Earls, 536 U.S. 822 (2002) (Drug testing students in extracurricular activities).

<sup>19</sup> Veronica School District v. Acton, 515 U.S. 646 (1995) (Drug testing student athletes).

<sup>20</sup> National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (Testing of certain Customs employees).

<sup>21</sup> Skinner v. Railway Labor Executives' Association, 489 U.S. 602 (1989) (Testing of railroad employees after major accidents).

<sup>22</sup> Chandler v. Miller, 520 U.S. 305 (1997).

<sup>23</sup> Id. at 323.

<sup>24</sup> P.A. 1999, No. 17, codified as s. 400.571, Michigan Compiled Statutes Annotated.

<sup>25</sup> Marchwinski v. Howard, 113 F. Supp. 2d 1134 (E. D. Mich. 2000). On appeal a panel of the Sixth Circuit first reversed the District Court, finding the required testing did not violate the Fourth Amendment to the U.S. Constitution. Marchwinski v. Howard, 309 F. 3d 330 (6<sup>th</sup> Cir. 2002). That decision was vacated for the entire court to consider the case. Marchwinski, vacated 319 F. 3d 258. The appellate court deadlocked 6-6 to reverse so the lower court decision stood affirmed. Marchwinski, affirmed after rehearing *en banc*, 60 Fed. Appx. 601, 2003 WL 1870916 (6<sup>th</sup> Cir. 2003).

<sup>26</sup> Section 112.0455, 440.102, F.S.

including those of any agency in state government.<sup>27</sup> AHCA does not have the statutory authority to drug screen temporary cash assistance benefits in either type of lab.

### ***U.S. 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.<sup>28</sup>

### ***Agency Rulemaking***

DCF must comply with the statutory requirements for rulemaking when implementing or interpreting a substantive statute.<sup>29</sup> Exercising rulemaking authority delegated by the Legislature requires the authority to adopt rules and sufficient statutory guidance to implement a specific statute.<sup>30</sup> DCF currently has no statutory authority, guidance, or direction to develop and implement a program of drug testing for TANF applicants.

### **Effect of Proposed Changes**

The bill creates s. 414.0652, F.S., requiring DCF to drug test each individual applying for temporary cash assistance as a condition of eligibility for those benefits. DCF shall provide notice of the required drug testing at the time of application. The notice must advise each person to be tested of the opportunity to voluntarily disclose any prescription or over-the-counter medication the person is taking prior to the test. DCF shall require each person subject to being tested to sign an acknowledgement form that he/she has received notice of DCF's drug screen policy, that he/she can refuse to undergo the screen by choosing not to apply for benefits, and that he/she has the opportunity to voluntarily disclose any medication being taken prior to the test.

Under the bill, all individuals included within the cash assistance group covered by the TANF application would be required to submit to testing with the exception of children under the age of 18. The bill requires all parents to be tested including minor parents who are not required to live with a parent, legal guardian, or other adult caretaker.

The bill provides an individual will be disqualified from receiving TANF benefits if that person tests positive for controlled substances. The initial disqualification is for one year from the date of the positive test. If an individual chooses, he or she can enter into a substance abuse treatment program. Upon showing proof of completing the program, the individual may reapply for TANF benefits within 6 months from the date of the positive test. This is a one-time option. If the person re-applies after the period of disqualification but again tests positive for controlled substances, that individual is disqualified from receiving TANF benefits for 3 years from the date of that positive test.

DCF may designate a statutory "protective payee" to receive funds on behalf of the child whose parent is disqualified from receiving TANF benefits under this section.<sup>31</sup> Alternatively, a parent found ineligible under this section may designate an immediate family member, or an individual approved by DCF, to receive TANF benefits on behalf of the child. The bill does not require a statutory protective payee to submit to drug testing but does require testing for the immediate family member or other individual designated by the parent. The bill does not define "immediate family member."

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<sup>27</sup> Chapter 408, F.S.

<sup>28</sup> Id.

<sup>29</sup> Section 120.54, F.S.

<sup>30</sup> Section 120.536(1), F.S. Sloban v. Florida Board of Pharmacy, 982 So. 2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001).

<sup>31</sup> Current law authorizes DCF to continue TANF payments through a "protective payee" for children under the age of 16 in a family where a member repeatedly fails to comply with the requirements of the program. The payee is selected by DCF and may be a relative, community member associated with a charitable organization, or volunteer member of an organization; the payee or organization must state in writing the payments will be used in the best interests of the child or children. Section 414.065(2), F.S.

DCF shall provide an individual who tests positive for controlled substances with information concerning substance abuse treatment programs which are available in the individual's geographic area. Neither DCF nor the state is responsible for providing or paying for substance abuse treatment for these individuals as part of the screening required by the law.

The individuals required to be tested shall be responsible for the cost of the drug test. DCF estimated the initial screening cost at \$10 per person and the confirmatory test at \$25 per person.<sup>32</sup>

**B. SECTION DIRECTORY:**

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

**Section 2:** Provides an effective date of July 1, 2011.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

**A. FISCAL IMPACT ON STATE GOVERNMENT:**

**1. Revenues:**

None. The bill authorizes no new revenue sources and existing revenues would not be increased by implementation of the program.

The bill does not address the resolution of potential conflicts with the present TANF Plan under which Florida will continue to receive TANF funding until September 30, 2011, unless renewed. The Plan as approved does not include universal drug testing of applicants as a condition of eligibility for benefits. The Plan discloses recipient eligibility is set by state statute.<sup>33</sup>

**2. Expenditures:**

Indeterminate. DCF may incur some cost to implement and execute the program, primarily in the initial implementation and on-going receipt, review and recording of the individual drug test results. The primary testing costs will be borne by applicants subject to testing.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

**1. Revenues:**

The bill authorizes no new revenue sources and existing revenues would not be increased.

**2. Expenditures:**

The bill requires no expenditures by local governments.

**B. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

The bill will have an impact on applicants who are required to undergo a drug test as a condition of eligibility for temporary cash assistance funds. DCF estimated the initial drug screen costs will be \$10.00 per person and the confirmatory test will be \$25.00 per person.<sup>34</sup>

**C. FISCAL COMMENTS:**

None.

<sup>32</sup> Per DCF bill analysis, 2/8/2011 (on file with HHSA subcommittee staff). The original bill required DCF to solicit competitive bids for drug screening and confirmatory testing to ensure the lowest possible cost.

<sup>33</sup> Temporary Assistance For Needy Families State Plan Renewal, October 1, 2008-September 30, 2011, found at <http://www.dcf.state.fl.us/Search.shtml?cx=001246626777910876508%3Aznyjo2rfb2i&cof=FORID%3A11&ie=UTF-8&q=Drug+test#1086> (last visited 3/30/11).

<sup>34</sup> DCF Bill Analysis on HB 353 (2/8/2011).

### 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:

#### ***U.S. Constitution***

As discussed above, under certain circumstances the U.S. Supreme Court found suspicion-less drug testing is constitutional and does not violate the Fourth Amendment.<sup>35</sup> In only one circumstance has the U.S. Supreme Court found a suspicion-less search unconstitutional. That case involved the drug testing of all candidates who wished to run for state office in Georgia. Those decisions did not address universal, suspicion-less drug testing of applicants for TANF benefits. In the only reported case addressing suspicion-less drug testing of all family assistance recipients the court ruled drug testing was unconstitutional when applied universally or randomly without reasonable suspicion of drug use. The current bill mandates universal, suspicion-less drug testing.

#### ***Florida Constitution***

The Florida Constitution guarantees every natural person's right to be let alone and free of governmental intrusion into their private life except as the Constitution otherwise provides.<sup>36</sup> In the context of medical treatment, this has been judicially interpreted as requiring a compelling state interest sufficient enough to overcome the constitutional right.<sup>37</sup> This right has not been interpreted in the context of drug testing as a condition of eligibility for TANF.

Providing rulemaking authority without sufficient direction has been found to be an invalid delegation of legislative power in violation of the Florida constitutional separation of powers.<sup>38</sup>

#### B. RULE-MAKING AUTHORITY:

A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.<sup>39</sup> Rulemaking authority is delegated by the Legislature<sup>40</sup> through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"<sup>41</sup> a rule.

#### ***Insufficient Statutory Guidance for Rulemaking***

The bill provides general rule making authority to DCF, which is necessary but not sufficient to fully implement the drug testing program.<sup>42</sup> The bill does not direct DCF with sufficient specificity in development and implementation of the drug testing program required by the statute, including direction in the following areas:

- Selecting and approving testing laboratories;

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<sup>35</sup> See note 20, above.

<sup>36</sup> Art. I, §23, Fla. Const.

<sup>37</sup> Burton v. State, 49 So.3d 263, 265 (Fla. 1<sup>st</sup> DCA 2010).

<sup>38</sup> Art. II, §3, Fla. Const.; Sloban v. Florida Board of Pharmacy, 982 So. 2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc., 794 So. 2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001).

<sup>39</sup> Section 120.52(16); Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region, 969 So. 2d 527, 530 (Fla. 1<sup>st</sup> DCA 2007).

<sup>40</sup> Southwest Florida Water Management District v. Save the Manatee Club, Inc., 773 So. 2d 594 (Fla. 1<sup>st</sup> DCA 2000).

<sup>41</sup> Section 120.52(17), F.S.

<sup>42</sup> Section 120.536(1), F.S.

- Establishing standards for taking, securing, preserving, and transporting the samples to be tested;
- Approving what method(s) of testing are scientifically accepted and sufficiently accurate for the purposes intended by the legislation;
- Establishing standards for drug screening and testing by approved laboratories; Developing drug- testing protocols, policies, and procedures necessary to implement the program;
- Reporting test results;
- Retaining and securing test results for the periods allowed in the statute for reapplications;
- Confidentiality of test results.

The original bill partially addressed methods of drug screening and confirmatory testing, including policies and procedures for specimen collection, testing, storage and transportation. The original bill required DCF to approve laboratories to perform drug tests, establish standards for drug screening, adopt protocols, policies, and procedures for drug screening and confirmation testing, and solicit competitive bids for drug screening and confirmatory screening services to ensure the lowest costs, but did not provide sufficient statutory guidance for development and implementation of such policies. This attempted guidance is absent in the present bill.<sup>43</sup>

### **Available Guidance for DCF**

The bill requires “a drug test consistent with s. 112.0455,” which creates a comprehensive drug testing program known as the “Drug Free Workplace Act.”<sup>44</sup> As presently drafted, the plain meaning of the bill is to require a “drug test” as that phrase is specifically defined:

“Drug test” or “test” means any chemical, biological, or physical instrumental analysis administered for the purpose of determining the presence or absence of a drug or its metabolites.<sup>45</sup>

As the wording of this section will be interpreted by giving otherwise undefined terms their ordinary and plain meaning,<sup>46</sup> the standards set out in s. 112.0455, F.S.,<sup>47</sup> will be limited to the definition of drug test. The language appears inadequate for DCF by rule to incorporate those statutory standards into a testing program required by this bill.

DCF has prior experience with implementing a comprehensive drug testing program under s. 112.0455, F.S. Since 1998 DCF has implemented the Drug Free Workplace Act for testing agency employees as an operating procedure.<sup>48</sup> Revising the bill to provide authority for DCF to implement the new drug testing program by referring to specific, pertinent provisions of existing statute would clarify the agency’s rulemaking scope.

### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

1. The bill states that neither the department nor the state is responsible for paying for substance abuse treatment for individuals as part of the testing conducted in this section. This language could create both a potential statutory conflict as well as a practical problem for DCF.
  - Present law and the TANF Plan provide a diversion program for families at risk of welfare dependency due to substance abuse, authorizing certain payments and services intended to prevent the family of a substance abuser from requiring sustained TANF payments.<sup>49</sup> Unless

<sup>43</sup> Under the original bill, approved labs were required to agree to defend the results and conclusions in appeal hearings, as described in s. 409.285, F.S.

<sup>44</sup> Section 112.0455(1), F.S.

<sup>45</sup> Section 112.0455(5)(b), F.S.

<sup>46</sup> Greenfield v. Daniels, 51 So. 3d 421 (Fla. 2010); Donato v. American Telephone and Telegraph Co., 767 So. 2d 1146 (Fla. 2000); Forsythe v. Longboat Key Beach Erosion Control District, 604 So. 2d 452, 454 (Fla. 1992).

<sup>47</sup> Standards established under s. 112.0455, the Drug Free Workplace Act, may provide the guidance necessary for proper rulemaking, particularly the following subsections: 112.0455(5), (8), (11), (12), and (13).

<sup>48</sup> CF Operating Procedure 60-05, Ch. 12 (1998), found at:

<http://www.dcf.state.fl.us/Search.shtml?cx=001246626777910876508%3Aznjyo2rfb2i&cof=FORID%3A11&ie=UTF-8&q=Drug+test#910> (last visited 3/30/11).

<sup>49</sup> Section 414.1585, F.S., implemented through section 2.8.e of the Plan (see note 31 above).



payments under this diversion program are separate and distinct from TANF benefit applications subject to testing, the bill may prevent provision of services to this separate population.

- Some individuals who test positive in the TANF drug screening may seek help at a DCF licensed substance abuse treatment facility or provider. DCF would need to establish a system to cross reference those denied temporary cash assistance due to drug testing with those who are seeking substance abuse treatment.
2. If the cost of drug testing is too expensive, TANF applicants may be deterred from applying for cash assistance.
  3. The bill is silent on how, when, and to whom the testing results are reported.
  4. Confidentiality of the Results. Article I, Section 24, Florida Constitution, makes all records of a public agency public unless expressly exempted by a law addressing no other subject and enacted by a 2/3 majority of both houses of the Legislature.
    - The results of certain mandatory drug testing are exempt from disclosure under Ch. 119, F.S., the Florida Public Records Act. These exemptions are found in the applicable substantive statutes for workplace drug testing,<sup>50</sup> workers compensation records held by the Florida Self-Insurers Guaranty Association, Inc.,<sup>51</sup> and unemployment compensation records which could disclose the identity of an employer or employee.<sup>52</sup> While there is not a specific exemption for drug testing results of TANF applicants in the bill, s. 414.295, F.S., does provide a general exemption for personal information relating to TANF that may apply. Section 414.295(1), F.S., provides that:

Personal identifying information of a temporary cash assistance program participant, a participant's family, or a participant's family or household member, except for information identifying a parent who does not live in the same home as the child, held by the department, the Agency for Workforce Innovation, Workforce Florida, Inc., the Department of Health, the Department of Revenue, the Department of Education, or a regional workforce board or local committee created pursuant to s. 445.007 is confidential and exempt from s. 119.07(1) and s. 24(a), Art. I of the State Constitution.

- Federal law may require the report of drug testing to remain confidential. Section 42 U.S.C. 290dd-2 provides:

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

The corresponding regulation prevents state law from compelling any otherwise prohibited disclosure.<sup>53</sup> There is also an issue as to whether records pertaining to personal health information are confidential.<sup>54</sup> If the disclosure of the drug testing report is subject to federal

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<sup>50</sup> Section 112.0455(11), F.S.; s. 440.102, F.S.

<sup>51</sup> Section 440.3851(1), F.S.

<sup>52</sup> Section 443.1715(1), F.S.

<sup>53</sup> 42 CFR s. 2.20.

<sup>54</sup> Health Insurance Portability and Accountability Act of 1996, P.L. 104-191.

confidentiality, the bill may need to state that nothing in the testing program shall be construed to compel disclosure of records required by federal law to remain confidential.

#### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 9, 2011, the Health and Human Services Access Subcommittee adopted a strike all amendment to House Bill 353. The strike all amendment does the following:

- establishes that DCF will continue to screen eligible drug felons at least annually for 3 years after the date they pass an initial drug screen and confirmatory test, that if an individual fails or refuses a confirmation test they are not eligible for temporary cash assistance for 3 years from the date of the failed screening,
- removes language requiring drug testing labs from being certified by HHS or licensed by AHCA,
- provides DCF with rule making authority to establish standards for drug screening and testing,
- requires that labs that administer drug screening agree to defend their results in administrative hearings,
- clarifies that food service assistance benefits shall not be denied to an individual solely based on a felony drug conviction, unless that conviction is for drug trafficking,
- clarifies that in order to be eligible for cash assistance an individual convicted of a drug felony must comply with s. 414.0652, F.S.,
- defines “applicants and recipients”,
- establishes the use of “protective payees” to ensure that children continue to receive benefits,
- establishes that an applicant who refuses or chooses not to take a confirmatory test is ineligible for benefits,
- grants DCF rule making authority to administer the drug screening program.

On March 23, 2011, the Rulemaking & Regulation Subcommittee approved a strike-all amendment creating CS/CS/HB 353. The original bill and the CS by the Health & Human Services Access Subcommittee only required drug testing for TANF participants with recent prior drug felony convictions. The CS/CS by the Rulemaking & Regulation Subcommittee substantially expanded the scope of the first CS. This analysis reflects the changes made by the latter amendment.

On March 31, 2011, the Judiciary Committee adopted one amendment. The amendment provides that a teen parent not required to live with a parent, legal guardian, or other adult caregiver must comply with the drug testing requirement in order to receive TANF benefits. The bill was then reported favorably. This analysis is drafted to the committee substitute.

On April 13, 2011, the Health and Human Services Committee adopted one amendment. The amendment provides that an individual who fails a drug test and is denied TANF benefits, may enter into a substance abuse treatment program, and, may reapply for TANF funds in 6 months if the individual can document completion of such a program. This is a one-time option. The bill was reported favorably as a Committee Substitute. This analysis reflects the Committee Substitute.