

2013 HOUSE HUMAN SERVICES

HB 1385

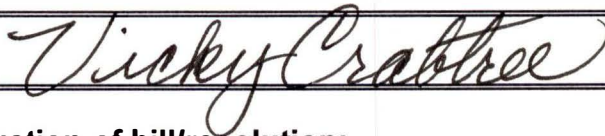
2013 HOUSE STANDING COMMITTEE MINUTES

House Human Services Committee Fort Union Room, State Capitol

HB 1385
February 4, 2013
Job #18208

☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

Relating to drug testing the temporary assistance for needy families program..

Minutes:

See Testimonies #1-12

Chairman Weisz opened the hearing on HB 1385.

Rep. Dennis Johnson: From District 13 introduced and sponsored the bill. (See Testimony #1) (Handouts #2-4)

8:31 Rep. Mooney: Doesn't this bill make the assumption that the recipient would be young and not elderly? What about elderly having to do drug testing?

Rep. Johnson: I have thought about this. Two things in the bill, first time applicant is tested the other thing is some think it is unconstitutional. Once they apply they are in and done retesting. I'm getting elderly, but I have to do a spot drug test when running my truck. They make it pretty painless to do a drug test.

Rep. Mooney: It could be a humiliating experience for some. Do you have any idea how much it will cost for drug testing and which substances would be tested for?

Rep. Johnson: The department has that cost and will give that information.

Rep. Muscha: Who did you envision as a third party if a family member can't do it?

Rep. Johnson: A close relative could test and be clean so no dependents are left out. Could be a neighbor or a friend.

Rep. Muscha: Social workers would find them?

Rep. Johnson: If you don't test clean if you've got a friend that can do the test for you so you can get the benefits for the family.

Rep. Oversen: If they test negative the department will reimburse the cost, but I don't see that in the language of the bill. Was it intended to be in the language of the bill?

Chairman Weisz: On page 2, line 5.

Rep. Oversen: Thank you. In rural areas will they have capability to do drug testing?

Rep. Johnson: I live in a rural area and we have a work release program there and they drug test twice a day. The test kit costs \$2.60 and third party administers the test so by the time you add on their fees it gets close to \$50. I could see third parties being region offices for human services.

15:44 Rep. Keith Keppenich: From District 39 testified in support of 1385. There are a number of private providers that do this testing and I don't think it will be overly burdensome.

16:47: Rep. Mooney: The people coming to the program are poor or exceedingly poor, \$2 may not even be their pocketbook. Wouldn't that be burdensome being asked to pay for something and to through that process?

Rep. Keppenich: Look at what is being spent nationally on these programs. Almost every employment requires a drug test. If their lifestyle has got them to this point and are coming in asking for help I don't think this is a burdensome requirement.

Rep. Mooney: Are we assuming then that all the people applying for these programs are already on drugs?

Rep. Keppenich: I'm not saying that. We need to look at standards when people come to the state for help. It is a self-certification on how they get into these programs.

Rep. Laning: The person applying for benefits would undergo drug testing. Is there also a random requirement?

Rep. Keppenich: No, it is an initial.

Rep. Laning: Do you recall the period of time a person needs to stay clean to get a negative result?

Rep. Keppenich: Depends on the drug. It's an easy procedure.

Rep. Mooney: Have you ever been poor?

Rep. Keppenich: Yes.

Rep. Mooney: Did you have to go in and ask for help?

Rep. Keppenich: Twenty years ago when we got started here we used the TANF program. You don't need to be poor to be on TANF.

Rep. Mooney: My family has used programs in my lifetime and in that time I've never been a drug user. To have been asked to go through one more level of requirement after having to eat all the crow left on my plate; and every ounce of humility left in my body and soul to get to that office, are we not asking too much for people to get help?

Rep. Keppenich: You are trying to turn this into a philosophical argument. Almost every job requires drug testing. I don't think a drug test is a big hurdle to get over.

OPPOSITION

24(?) Rep. Kathy Hogan: From District 21 testified in opposition of the bill. (See Testimony#5) Handed out (Handout #6)

30:03 Rep. Laning: Do you know how long temporary is?

Rep. Hogan: Lifetime limit is five years. The average length of time is 6 months.

Rep. Laning: Can you do the five years consecutively? There are some exceptions to the five year rule.

Rep. Hogan: Yes you can.

Rep. Looyzen: Do you have solutions to ensure that these benefits are getting where they should go? Is there a better way to go about this?

Rep. Hogan: Currently in TANF everyone has to make a self-sufficiency plan. Part of the plan can be drug treatment. There is screening and treatment. Not everyone is assumed to have a drug or alcohol program.

Rep. Hofstad: Speaking to the people who have a drug and alcohol program, often times identifying these people is difficult. We enable those people to live that lifestyle when they receive these programs. Is that not an avenue we should be talking about?

Rep. Hogan: The issue is how do you cast the net? How do we screen for those drug addictions?

Rep. Fehr: Can you describe in detail the protocol you are talking about? What are the things that trigger testing and referrals?

Rep. Hogan: Defer to the department.

Rep. Mooney: This is focused on substance abuse rather than alcohol? Does one complicate life more than another?

Rep. Hogan: Alcohol is the primary substance abuse in this state. When you test and find an illegal substance and then you get the law enforcement involved. Then you get a whole lot of follow up issues.

Rep. Fehr: In the handout, Florida says only 2.6% of their applicants failed the drug testing. In 2011 a Florida judge halted the mandated drug testing laws. What kind of drug law we could pass if we passed it might not be a problem?

Rep. Hogan: Many of the drug testing programs that have been passed by states are currently in court. At this point I don't think we have an answer to that question.

39:00 Shari Doe: Director of Burleigh Co. Social Services testified in opposition of the bill. (See Testimony #6)

44:43 Rep.Fehr: You use the term, "it presumes people are simply guilty because they need temporary assistance". If D.O.T. requires drug testing or employers, does that mean they are presuming someone is guilty?

Doe: No, not at all. It is a difference between a job which is a choice you make; asking for temporary assistance is not the same.

Rep. Fehr: Are the current protocol procedures in place in terms of TANF and SNAP doing a good job of identifying people who have a drug program?

Doe: TANF has an extensive assessment process. If they have a drug problem we address that and they can go through treatment.

Rep. Fehr: They have to disclose that or are identified by drug felonies? Is there any other way to identify a drug problem?

Doe: If it is not self-disclosed and not part of a criminal record probably not.

Rep. Hofstad: This is a don't ask don't tell. We all want to identify these people and get them into programs that will help. How do we bring these people into a program that helps them?

Doe: Will defer to my co-director in Sioux County.

Vincent Gillette: Director from Sioux County Social Services. TANF clients have to go through an assessment and you are required to put in 20-30 of hours a week in depending on the age of your children. If you don't meet the qualification of hours you are called in to a "good cause" meeting where you are asked why you aren't meeting the requirements. If this becomes a pattern the jobs people can have them take an assessment. If the client chooses not to then their benefits are cut off for a whole month.

52:03 Trina Gress: Vice President of Community Options for Residential and Employment Services testified in opposition to the bill. (See Testimony #7)

57:31 Rep. Silbernagel: How would your group look at a random pool requirement of drug testing?

Gress: It is a much better idea. They are getting benefits before a random test.

Rep. Hofstad: Early discussion about drug testing and found positive, then law enforcement is involved. Do you inform law enforcement?

Gress: No, we don't unless we feel someone would be endangered. We get them into a treatment facility or assist them in registering for that initial screening at the human service center.

Rep. Hofstad: You have no obligation to inform law enforcement if these are using illegal substances? If they have admitted to you to using illegal substances would you inform the police department?

Gress: Yes, we will call the police department.

Rep. Laning: You mentioned that someone under the program with the pay performance criteria may lose their individual benefits, but the benefits for their children continue. If a person is sanctioned, I am assuming they lose all of their benefits.

Gress: Yes.

Rep. Anderson: How long can an individual be on TANF and what is the average they are on the program?

Gress: They can be on for a lifetime limit of five years or 60 months. The average time they are on is 6-9 months depending upon their current family situation.

Rep. Mooney: You indicated that 6.7% were found to having used drugs. Do you know out of the 1,524 who might use alcohol on a regular basis?

Gress: We do, but didn't bring the statistics.

Christopher Dobson: Executive Director from the ND Catholic Conference Testified in opposition to the bill. (See Testimony #8)

1:08:57 Paul Ronnigan: Representing the Children's Defense Fund testified in opposition of the bill. (See Testimony #9)

1:15 David Boeck: A state employee and lawyer for the Protection and Advocacy Project testified in opposition of the bill. (See Testimony #10)

INFORMATIONAL TESTIMONY

1:23 Carol Cartledge: Director of Economic Assistance Policy Division for the DHS gave information. (See Testimony #11)

1:32 Chairman Weisz: On page 1, when you are referencing 1176, so are saying we in that case we could require a drug test to let them back in?

Cartledge: Yes, according to federal law if you change the current law and modify that law, then drug testing would be an option.

Rep. Fehr: Earlier it was suggested on a random drug test after they are on the program. Would that be allowed?

Cartledge: Under TANF law there is nothing to prohibit that. Under SNAP there is.

Rep. Fehr asked her to repeat what she said.

Cartledge: Repeated what she said.

Rep. Mooney: Regarding HB 1176 if this becomes law. The fourth amendment is still applicable in that instance as well.

Cartledge: Correct.

HANDED IN TESTIMONY

Sidney Schock: From Cass County Social Services. (See Testimony #12)

Chairman Weisz closed the hearing on HB 1385.

2013 HOUSE STANDING COMMITTEE MINUTES

House Human Services Committee Fort Union Room, State Capitol

HB 1385
February 11, 2013
Job #18208

☐ Conference Committee

Committee Clerk Signature

Vicky Crabtree

Explanation or reason for introduction of bill/resolution:

Relating to drug testing the temporary assistance for needy families program applicants.

Minutes:

See ATTACHMENTS #1 and 2

Chairman Weisz: (Spoke of HB 1170, recorder turned off and then turned back on for HB 1385.) I think there are some amendments from Rep. Hofstad.

Rep. Hofstad: I move the amendments on HB 1385.

Rep. Looyen:

Rep. Hofstad: The amendments will eliminate the SNAP program from the drug testing. Looking at the eligibility for TANF the applicant will be tested when there is a reasonable suspicion exists.

Rep. Fehr: Would the applicant still bare the cost of testing if they have to take one?

Rep. Hofstad: That is correct.

Rep. Mooney: Can you tell me what reasonable suspicion looks like?

Rep. Hofstad: No.

Chairman Weisz: A past attorney from the department said, "Reasonable is whatever we say it is".

VOICE VOTE: MOTION CARRIED

Rep. Mooney: I am passing out an email from Phillip Longie from the Cankdeska Cikana Community College, Next Steps Director. (See Attachment #1) I still feel the same about this bill and propose we do not pass it.

Rep. Mooney: I make a motion of a Do Not Pass as amended on this bill.

Rep. Oversen: Second.

Rep. Hofstad: I think the intent of the bill is to take that recipient and put him into a program of rehabilitation.

Rep. Silbernagel: WSI has some online programs and one of them is identifying drug users for safety purposes and what is reasonable suspicion. There is training available to that effect.

Rep. Laning: It appears to me the bill still has some benefits to provide some benefits to the families and the kids even if the parents are drug users. I have gotten many e-mails saying they don't want their tax dollars to support somebody that is on drugs. We need to assure the assistance funds aren't being used for drug use.

Rep. Muscha: Looking back on my notes, no one seems to think there is a big misuse now.

Rep. Kiefert: We are not trying to punish these people; we are trying to help them. I am for this.

Rep. Mooney: I understand your position, but I believe this is a measure to try to keep people from what they need. They need assistance. I stand by my decision.

ROLL CALL VOTE: 5 y 8 n 0 absent

MOTION FAILED

Rep. Fehr: Do Pass As Amended and re-refer to Appropriations

Rep. Kiefert: Second

ROLL CALL VOTE: 7 y 6 n 0 absent

MOTION CARRIED - DO PASS as Amended and re-refer to Appropriations

Bill Carrier: Rep. Looyen

FISCAL NOTE
Requested by Legislative Council
01/22/2013

Bill/Resolution No.: HB 1385

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties			
Cities			
School Districts			
Townships			

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

HB1385 would require applicants to have drug testing for controlled substances as part of eligibility determination for the Temporary Assistance for Needy Families (TANF) and Supplemental Nutrition Assistance Programs (SNAP).

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Although there is a fiscal impact the Department cannot determine the amount of the fiscal impact due to the level of uncertainty with how the drug testing would be administered as the Bill is written. If the uncertainty is clarified in amendments to the Bill the Department expects to be able to put an amount on the fiscal note.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*
- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*
- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

February 12, 2013

V/R
2/12/13
10/2

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1385

Page 1, line 3, remove "and the supplemental nutrition assistance"

Page 1, line 4, remove "program"

Page 1, line 9, replace "and supplemental nutrition assistance programs" with "program"

Page 1, line 10, replace "The" with "If a reasonable suspicion exists, the"

Page 1, line 10, replace "every applicant" with "an eligible recipient"

Page 1, line 11, remove "and every applicant for the supplemental nutrition assistance"

Page 1, line 12, remove "program"

Page 1, line 12, replace "applicant" with "eligible recipient"

Page 1, line 17, remove "or supplemental nutrition assistance program"

Page 1, line 20, remove "or supplemental nutrition"

Page 1, line 21, remove "assistance program"

Page 2, line 3, remove "or"

Page 2, line 4, remove "supplemental nutrition assistance program"

Page 2, line 7, remove "The individual must be advised that the"

Page 2, remove lines 8 and 9

Page 2, line 10, remove "assistance program benefits."

Page 2, line 21, remove "or supplemental"

Page 2, line 22, remove "nutrition assistance program"

Page 2, after line 28, insert:

"g. Comply with the confidentiality requirements for substance abuse treatment records as governed by title 42, Code of Federal Regulations, part 2.

h. Require an eligible recipient for the temporary assistance for needy families program to sign a release of information form at the time of application. The release must allow the county to receive treatment records and disclose that information to the department and to the office of administrative hearings when necessary."

Page 2, line 30, remove "or supplemental nutrition assistance program"

Page 3, line 4, remove "or"

Page 3, line 5, remove "supplemental nutrition assistance program"

Page 3, line 8, remove "or supplemental nutrition assistance program"

Renumber accordingly

Date: 2-11-13
Roll Call Vote #: 1

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1385

House Human Services Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep. HOFSTAD Seconded By Rep. LOOYSEN

Representatives	Yes	No	Representatives	Yes	No
CHAIRMAN WEISZ			REP. MOONEY		
VICE-CHAIRMAN HOFSTAD			REP. MUSCHA		
REP. ANDERSON			REP. OVERSEN		
REP. DAMSCHEN					
REP. FEHR					
REP. KIEFERT					
REP. LANING					
REP. LOOYSEN					
REP. PORTER					
REP. SILBERNAGEL					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

will eliminate SNAP
from drug testing.
TANF client will
be tested if reasonable
suspension exists

Voice Vote
Motion
Carried

Date: 2-11-13
Roll Call Vote #: 2

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1385

House Human Services Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☒ Do Not Pass ☒ Amended ☐ Adopt Amendment
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep. Mooney Seconded By Rep. Overn

Representatives	Yes	No	Representatives	Yes	No
CHAIRMAN WEISZ	✓		REP. MOONEY	✓	
VICE-CHAIRMAN HOFSTAD	✓		REP. MUSCHA	✓	
REP. ANDERSON		✓	REP. OVERSEN	✓	
REP. DAMSCHEN		✓			
REP. FEHR		✓			
REP. KIEFERT		✓			
REP. LANING		✓			
REP. LOOYSEN		✓			
REP. PORTER		✓			
REP. SILBERNAGEL		✓			

Total (Yes) 5 No 8

Absent _____

Floor Assignment 0

If the vote is on an amendment, briefly indicate intent:

Date: 2-11-13
Roll Call Vote #: 3

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1385

House Human Services Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☒ Do Pass ☐ Do Not Pass ☒ Amended ☐ Adopt Amendment
☒ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep Fehr Seconded By Rep. Kiefert

Representatives	Yes	No	Representatives	Yes	No
CHAIRMAN WEISZ		✓	REP. MOONEY		✓
VICE-CHAIRMAN HOFSTAD		✓	REP. MUSCHA		✓
REP. ANDERSON		✓	REP. OVERSEN		✓
REP. DAMSCHEN	✓				
REP. FEHR	✓				
REP. KIEFERT	✓				
REP. LANING	✓				
REP. LOOYSEN	✓				
REP. PORTER	✓				
REP. SILBERNAGEL	✓				

Total (Yes) 7 No 6

Absent _____

Floor Assignment Rep. Looyesen

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1385: Human Services Committee (Rep. Weisz, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** and **BE REREFERRED** to the **Appropriations Committee** (7 YEAS, 6 NAYS, 0 ABSENT AND NOT VOTING). HB 1385 was placed on the Sixth order on the calendar.

Page 1, line 3, remove "and the supplemental nutrition assistance"

Page 1, line 4, remove "program"

Page 1, line 9, replace "and supplemental nutrition assistance programs" with "program"

Page 1, line 10, replace "The" with "If a reasonable suspicion exists, the"

Page 1, line 10, replace "every applicant" with "an eligible recipient"

Page 1, line 11, remove "and every applicant for the supplemental nutrition assistance"

Page 1, line 12, remove "program"

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Page 1, line 17, remove "or supplemental nutrition assistance program"

Page 1, line 20, remove "or supplemental nutrition"

Page 1, line 21, remove "assistance program"

Page 2, line 3, remove "or"

Page 2, line 4, remove "supplemental nutrition assistance program"

Page 2, line 7, remove "The individual must be advised that the"

Page 2, remove lines 8 and 9

Page 2, line 10, remove "assistance program benefits."

Page 2, line 21, remove "or supplemental"

Page 2, line 22, remove "nutrition assistance program"

Page 2, after line 28, insert:

- "g. Comply with the confidentiality requirements for substance abuse treatment records as governed by title 42, Code of Federal Regulations, part 2.
- h. Require an eligible recipient for the temporary assistance for needy families program to sign a release of information form at the time of application. The release must allow the county to receive treatment records and disclose that information to the department and to the office of administrative hearings when necessary.

Page 2, line 30, remove "or supplemental nutrition assistance program"

Page 3, line 4, remove "or"

Page 3, line 5, remove "supplemental nutrition assistance program"

Page 3, line 8, remove "or supplemental nutrition assistance program"

Renumber accordingly

2013 HOUSE APPROPRIATIONS

HB 1385

2013 HOUSE STANDING COMMITTEE MINUTES

House Appropriations Committee Roughrider Room, State Capitol

HB 1385
2/15/13
Job 19076

☐ Conference Committee

Committee Clerk Signature

Meredith Trachott

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to create and enact a new section to chapter 50-06 and a new subdivision to subsection 1 of section 50-09-29 of the North Dakota Century Code, relating to drug testing for the temporary assistance for needy families program.

Minutes:

You may make reference to "attached testimony."

Rep. Robin Weisz, District 14: Introduced the bill.

02:38

Chairman Delzer: I would think the Fiscal Note would come back undeterminable.

Rep. Weisz: It probably will. There are a couple court challenges and whether that applies to search and seizure part of the Constitution, and if we can even require the test for TANF.

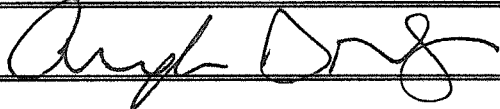
Chairman Delzer: We'll take a recess.

2013 HOUSE STANDING COMMITTEE MINUTES

House Appropriations Committee Roughrider Room, State Capitol

HB 1385
February 20, 2013
Job 19241

☐ Conference Committee



Explanation or reason for introduction of bill/resolution:

Relating to drug testing for the temporary assistance for needy families program

Minutes:

Rep. Kempenich moved a Do Pass.

Rep. Brandenburg seconded.

Rep. Pollert: The objective was to more go after the people on SNAP than the people on TANF. Now because of the wisdom of our federal government, we can't question the people on SNAP. It almost seems like we're going after the wrong people. Even though I am a sponsor on the bill, I can't support the motion.

Chairman Delzer: There are a lot of working people that have to take a drug test. But I don't know if this is achieving the purpose we hoped for.

Rep. Brandenburg: I'm going to support it. There are times you only get halfway to what you want to do. There needs to be some accountability. A drug test is not that invasive.

Rep. Glassheim: I find it difficult to understand that we are going to significantly punish people for being addicted. We're all against addiction and drug use, I understand that. But for six months, they will have no income and an addiction. What are they going to do?

Rep. Grande: If we were dealing with SNAP, that made sense. TANF is a different ball of wax. We're going after the wrong group of what we were trying to do. This is not beneficial. The federal government has tied our hands.

Rep. Pollert: On one side, I want to be tough with those people. On this side, I just can't.

Rep. Kempenich: You can look at it as a job. They are getting money from the state. They can find something to do. Some of these jobs may not pay the childcare bill, and then they go on TANF. They are getting money for not doing something or they're getting money because they got a kid. Yes they have issues, but everybody does. Just about any job these days you get a drug test. The federal government is subsidizing personal behavior.

Chairman Delzer: This was 7-6 Do Pass out of Human Services, so it's obviously a split-vote.

Rep. Monson: If we pass it and someone tests positive, what happens to them? Do we take away the children and put them in a foster home? Do we just take away the food and the kids will have nothing?

Rep. Kempenich: It's in the bottom of section 1 on page 3. They have to find a responsible adult to apply for these.

Rep. Brandenburg: On page 3 line 7 or 8, they can reapply after six months. They're not out forever.

Rep. Nelson: It's a surprise to some people that TANF was included in this bill. I'm curious about the \$420,000 change to the Vision program. Is \$100,000 for legal costs adequate because every state where this has been attempted it has been contested in court? Can anyone answer that?

Chairman Delzer: I doubt it. In regards to the changes to the Vision program, that's what the department thinks.

Rep. Nelson: What is the VISION?

Chairman Delzer: That's the eligibility program.

Roll Call Vote:

Yes: 6

No: 14

Absent: 2

Rep. Holman moved to Do Not Pass.

Rep. Glassheim seconded.

Roll Call Vote:

Yes: 16

No: 4

Absent: 2

Carried by **Rep. Holman**.

FISCAL NOTE
Requested by Legislative Council
02/13/2013

Amendment to: HB 1385

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures			\$595,828		\$175,600	
Appropriations			\$595,828		\$175,600	

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties			
Cities			
School Districts			
Townships			

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

HB1385 would require applicants to have drug testing for controlled substances as part of eligibility for the Temporary Assistance for Needy Families (TANF) program.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

On average 205 applicants meet all other eligibility requirements and are granted benefits under the TANF program each month, this fiscal note assumes 6% of new applicants will have a history of drug use. This equates to 12 eligible recipients each month that could be deemed as reasonably suspicious, if these individuals are subject to mandatory drug testing at a cost of \$52.50 per test, the estimated costs for the 2013-2015 biennium would be \$15,120, of which all is general fund. On average 1,596 current TANF recipients are granted benefits each month, since 50% of these recipients participant in JOBS, which is an employment and training contract and are already subject to employer drug testing, this fiscal note assumes 6% of the 798 recipients who are not already being tested by an employer will have a history of drug use. This equates to 48 eligible recipients that could be deemed as reasonably suspicious, if these individuals are subject to mandatory drug testing at a cost of \$52.50 per test, the estimated costs for the 2013-2015 biennium would be \$60,480, of which all is general fund. Also there would be an additional general fund cost of \$420,228, for current system changes to Vision; these changes would be required for TANF to accommodate drug testing disqualification and monitoring. If delayed implementation occurs the department will have the opportunity to address these system changes in the new eligibility system that is currently being developed. The department does not anticipate additional costs to include changes for drug testing disqualification and monitoring into the new system. An additional \$100,000 in general fund, is included to pay for legal costs associated with clients appealing drug test eligibility denials and/or challenging the violation of their fourth amendment right to unreasonable search and seizure. The fiscal note presumes no caseload or drug test cost increase for the 2015-2017 biennium so the impact remains at \$75,600 for the drug testing and \$100,000 for legal costs for the 2015-2017 biennium.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

For the 2013-2015 biennium the department expects to expend general fund of \$75,600 for drug tests for individuals applying for the TANF program, \$420,228 for changes to the current Vision system, and \$100,000 for legal costs. For the 2015-2017 biennium the department expects to expend general fund of \$75,600 for drug tests for individuals applying for the TANF program and \$100,000 for legal costs.

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

The department will need a general fund appropriation increase of \$595,828 for the 2013-2015 biennium and \$175,600 for the 2015-2017 biennium.

Name: Paul R. Kramer

Agency: Department of Human Services

Telephone: 701-328-1980

Date Prepared: 02/01/2013

FISCAL NOTE
Requested by Legislative Council
01/22/2013

Bill/Resolution No.: HB 1385

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties			
Cities			
School Districts			
Townships			

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

HB1385 would require applicants to have drug testing for controlled substances as part of eligibility determination for the Temporary Assistance for Needy Families (TANF) and Supplemental Nutrition Assistance Programs (SNAP).

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Although there is a fiscal impact the Department cannot determine the amount of the fiscal impact due to the level of uncertainty with how the drug testing would be administered as the Bill is written. If the uncertainty is clarified in amendments to the Bill the Department expects to be able to put an amount on the fiscal note.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*
- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*
- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

Name: Paul R. Kramer

Agency: Department of Human Services

Telephone: 701-328-1980

Date Prepared: 02/01/2013

Date: 2/20/13
Roll Call Vote #: 1

**2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1385**

House Appropriations Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☒ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep. Kempenich Seconded By Rep. Brandenburg

Representatives	Yes	No	Representatives	Yes	No
Chairman Delzer	X		Rep. Streyle	X	
Vice Chairman Kempenich	X		Rep. Thoreson		X
Rep. Bellew		X	Rep. Wieland		X
Rep. Brandenburg	X				
Rep. Dosch	X				
Rep. Grande		X	Rep. Boe		
Rep. Hawken		X	Rep. Glassheim		X
Rep. Kreidt		X	Rep. Guggisberg		X
Rep. Martinson			Rep. Holman		X
Rep. Monson		X	Rep. Williams	X	
Rep. Nelson		X			
Rep. Pollert		X			
Rep. Sanford		X			
Rep. Skarphol		X			

Total Yes 6 No 14

Absent 2

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

Date: 2/20/13
Roll Call Vote #: 2

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1385

House Appropriations Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☒ Do Not Pass ☐ Amended ☐ Adopt Amendment
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep. Holman Seconded By Rep. Glassheim

Representatives	Yes	No	Representatives	Yes	No
Chairman Delzer		X	Rep. Streyle	X	
Vice Chairman Kempenich		X	Rep. Thoreson	X	
Rep. Bellew	X		Rep. Wieland	X	
Rep. Brandenburg		X			
Rep. Dosch		X			
Rep. Grande	X		Rep. Boe		
Rep. Hawken	X		Rep. Glassheim	X	
Rep. Kreidt	X		Rep. Guggisberg	X	
Rep. Martinson			Rep. Holman	X	
Rep. Monson	X		Rep. Williams	X	
Rep. Nelson	X				
Rep. Pollert	X				
Rep. Sanford	X				
Rep. Skarphol	X				

Total Yes 16 No 4

Absent 2

Floor Assignment Rep. Holman

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1385, as engrossed: Appropriations Committee (Rep. Delzer, Chairman)
recommends **DO NOT PASS** (16 YEAS, 4 NAYS, 2 ABSENT AND NOT VOTING).
Engrossed HB 1385 was placed on the Eleventh order on the calendar.

2013 TESTIMONY

HB 1385

#1

Mr. Chairman and members of the House Human Services Committee,

I'm Representative Dennis Johnson and I represent District 15 in Devils Lake. House Bill 1385 now before this committee relates to instituting a drug testing requirement for those seeking benefits under TANF or SNAP. Drug use by welfare recipients is a real problem in this state. Studies have shown that recipients of TANF and SNAP who use drugs have a high degree of unemployability because of such drug use. This bill isn't meant to be a penalty on those using drugs. Instead, it's meant to be an incentive to keep them clean. Taxpayers shouldn't have to subsidize the drug use of those seeking public assistance. If a person can afford drugs, they shouldn't be asking for public assistance.

This bill would require anyone applying for benefits under TANF or SNAP to submit to a drug test before being eligible for the programs. The costs of such testing would initially be borne by the individual seeking assistance. If the drug test comes up negative, the individual would be reimbursed for the cost of the test. But if the drug test is positive, that individual would be ineligible for the program for one year and must bear the cost of the test themselves. A second positive drug test would increase that ineligibility period to three years. As a way of incentivizing people to keep clean, a shorter six month ineligibility period would apply if a person successfully completes a substance abuse treatment program. Because this bill would not affect benefits under Medicaid, eligible individuals would be able to receive such treatment under that program.

It's important to note that this bill does not affect the benefits of dependent children under age 18. A parent failing the drug test will be able to designate a third party to receive and use those benefits for the children. Several states have already implemented this type of legislation and numerous others are currently considering similar requirements.

TANF was established by Congress in 1996, and was meant to help end dependence on the government by promoting job preparation, employment, and marriage. The terms of TANF include such things as work search and work requirements, among others.

Congress has authorized states to test welfare recipients for use of controlled substances and has allowed states to sanction welfare recipients testing positive for drug use. Studies have shown that those using drugs are less likely to be employable because of their drug use. Many private employers now require drug testing as a prerequisite to employment, and welfare recipients on drugs wouldn't be hireable because of that fact. Studies have shown that a strong correlation exists between drug use and employability of an individual.

Drug use is also harmful to families. It affects the ability of parents to provide the care, supervision, and guidance that children need. There is empirical evidence showing unhealthy outcomes for children whose parents use drugs.

This bill provides a needed incentive for people to keep clean from drug use. The passage of this bill through your committee is an important first step in encouraging a meaningful discussion on this issue. While there may be a need for certain revisions to the bill as it currently stands, I hope this committee recognizes the importance of implementing a drug test requirement. I respectfully ask this committee to give a "Do Pass" recommendation on House Bill 1385, and will now stand for any questions from the committee.

Representative Dennis Johnson, District 15

#2

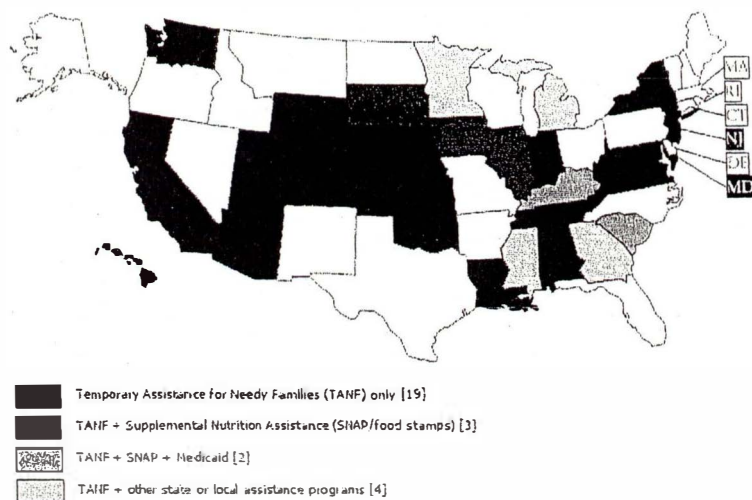
Drug Testing and Public Assistance

November 2012

Quick Fact: At least 28 states put forth proposals in 2012 to require drug testing or screening for public assistance applicants or recipients.

Three states passed legislation in 2011 and four states have passed legislation in 2012, bringing the total number of states to seven. In 2012, Utah passed legislation requiring applicants to complete a written questionnaire screening for drug use and Georgia passed legislation requiring drug tests for all applicants for Temporary Assistance for Needy Families. Tennessee approved a bill to require substance abuse testing for all applicants and Oklahoma passed a measure requiring all applicant TANF to be screened for illegal drug use.

Map of 2012 State Legislative Proposals



History and Overview

States have proposed drug testing of applicants and recipients of public welfare benefits since federal welfare reform in 1996. The federal rules permit drug testing as a condition of eligibility for the Temporary Assistance for Needy Families block grant. In recent years, many states have proposed some form of drug testing or screening for applicants. In 2012, over 20 states proposed legislation that would require drug testing as a condition of eligibility for public assistance programs. In 2010 at least 12 states had similar proposals. None of these proposals became law because most of the legislation was focused on "suspicionless" or "random" drug testing, which is at odds with a 2006 Michigan Court of Appeals case. Marchinski v. Howard ruled that subjecting every welfare applicant in Michigan to a drug test without reason to believe that drugs were being used, was unconstitutional.

2011 Legislation

At least 36 states put forth proposals in 2011 around drug testing of welfare (Temporary Assistance to Needy Families - TANF) and food stamp (Supplemental Nutrition Assistance Program - SNAP) recipients. Three states enacted legislation:

Arizona established a temporary requirement for fiscal year 2011-2012 requiring the department to screen and test applicants who they have a reason to believe are engaging in illegal substance use (S.1620). This bill was signed by the Governor on April 6, 2011.

Florida passed a law (HB.353) requiring all applicants for TANF benefits to be tested. Applicants must be notified of the drug testing requirement at the time of application, and are required to pay for the test. If they test negative the applicant will be reimbursed for the cost by adding the amount to their benefit check. If a applicant tests positive the applicant is ineligible for benefits for one year, but can reapply in 6 months if he/she completes an approved substance abuse treatment program. A parent's positive test result does not affect the child's eligibility for benefits; however, any benefits received must be disbursed through a protective payee who must also pass a drug test. The Governor signed the bill on May 31, 2011 and went into effect on July 1, 2011. Florida's law is the first since Michigan's pilot program was challenged in the courts and ruled unconstitutional in 2003. The American Civil Liberties Union filed a lawsuit to stop the bill from being implemented. A federal judge ordered a temporary injunction and Governor Scott has appealed the decision. The issue is still pending a final court ruling.

Missouri passed HB.73 requiring the department to require a urine drug test for all applicants and recipients of TANF for whom they have reasonable cause to believe based on screening that they are engaged in illegal use. If the individual tests positive or refuses to take the test, they are ineligible for benefits for three years unless they enter and complete a substance abuse treatment program, in which case they can reapply in six months. Caseworkers are also required to report suspected child abuse as a result of drug abuse if caseworker knows they tested positive or refused to test. Governor Nixon signed the bill into law on July 12, 2011 and took effect August 28, 2011.

2012 Legislation

At least 28 states put forth proposals requiring drug testing for public assistance applicants or recipients in 2012. Four states, Utah, Georgia, Tennessee and Oklahoma passed legislation.

Utah passed [HB 155](#) requiring individuals applying for cash assistance to complete a written questionnaire screening for illegal drug use. If there is reason to believe a person has a substance use disorder or is engaging in illegal drug activity, the applicant must take a drug test. If the test is positive, the individual is required to complete treatment and remain drug free in order to receive benefits. The state will terminate benefits for an applicant who refuses to take the test. Governor Herbert signed the bill into law on March 23, 2012.

Georgia passed [HB 861](#) requiring drug tests for all individuals applying for Temporary Assistance for Needy Families benefits. Applicants must be notified of the drug testing requirement at the time of application, and are required to pay for the test. If an applicant tests positive the person is ineligible for benefits for one month until he or she tests negative. A parent's positive test result does not affect the child's eligibility for benefits; however, any benefits received must be disbursed through a protective payee who must also pass a drug test. Governor Deal signed the bill on April 16, 2012 and goes into effect July 1, 2012.

Tennessee passed [SB 2580](#) requiring a substance abuse test of all applicants for welfare benefits. Applicants are required to pay for the test. If the test is positive a confirmation test is required, which is paid for by the lab. Applicants with a confirmed positive test result are ineligible for benefits for one year. Individuals can reapply for benefits after six months if they complete a substance abuse treatment program and have two negative drug tests. A parent's positive test result does not affect child's eligibility for benefits; however, any benefits received must be disbursed through a protective payee.

Oklahoma passed [HB 2388](#) requiring the Department of Human Services to screen all adult applicants for Temporary Assistance for Needy Families (TANF) to determine if they are engaged in illegal use of controlled substances. If so, the applicant's request for benefits shall be denied. The bill was signed by Governor Fallin on May 1, 2012 and goes into effect November 1, 2012.

Programs Included

Several states include other assistance programs, such as medical assistance, Supplemental Nutrition Assistance Program (SNAP, also formerly known as food stamps) child care, and other state-funded programs. At least 12 states include language requiring testing only if there is reasonable cause to believe the person is using illegal substances. In most cases, if the applicant or recipient tests positive they are ineligible for benefits for a specified period of time or until they complete a substance abuse treatment program. The requirements often do not affect the eligibility of a child in a home where the parent tests positive, however, a family member or other designated person who has also passed a drug test is required to be the protective payee for the child's benefits.

Below is a table listing states with proposals in 2012 and the programs included:

Program	# of States	States
Temporary Assistance to Needy Families (TANF)	28	AL, AZ, CA, CO, GA, HI, IA, IL, IN, KS, KY, LA, MD, MI, MN, MS, NE, NJ, NY, OK, SC, SD, TN, UT, VA, WA, WV, WY
TANF + Supplemental Nutrition Assistance Program only (SNAP, also known as food stamps)	6	IA, IL, MI, KY, SC, SD
TANF + Medicaid	3	GA, KY, SC
TANF + other state or local programs	4	GA, MI, MN, MS

For more information, contact Rochelle Finzel in the NCSL Denver office at [303.364.7700](tel:303.364.7700) or cyl-info@ncsl.org

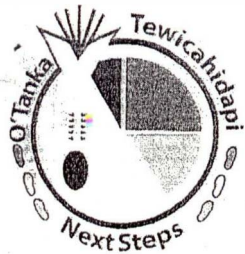
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#3
Cankdeska Cikana Community College

NEXT STEPS PROJECT

PO Box 269

Fort Totten, ND 58335

Phone: 701-766-1375

Fax: 701-766-4077 Attn: Carla Carmona



PURPOSE

The "Next Steps" program is intended to provide health related education and/or training to Native American TANF recipients and Native Americans with low income, so that they can acquire the skills to get a better paying job in one of the health professions.

The "Next Steps" program can assist with such expenses as: tuition; books; fees; transportation; childcare; housing assistance; etc.

However, "Next Steps" will not pay for old bills, or for any outstanding balances on personal accounts. The program will only assist with current expenses.

ELIGIBILITY

1. Applicants must be an enrolled member of a federally recognized Indian Tribe and a resident of North Dakota, with the exception of Standing Rock Reservation which extends into South Dakota.
2. All applicants must have been accepted into the "Next Steps" program through the application process.
3. All applicants must be enrolled in a College/University or vocational education program within the state of North Dakota.
4. All applicants will be required to be drug tested and should be aware that the "Next Steps" program has a ZERO tolerance policy.
5. Applicants who are applying as low income students must not exceed the income level for their size family, which is as follows:

Family size of one.....\$ 23,798

Family size of two.....\$ 38,982

Family size of three.....\$ 53,514

Family size of four.....\$ 66,052

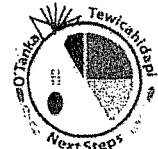
Family size of five.....\$ 77,962

Family size of six.....\$ 91,172

If you are under the age of 24 with no dependents, a copy of your parents' latest filed income tax return will be the determining document.



Next Steps Project
Cankdeska Cikana Community College
O'Tanka Tewicahidapi Program



Next Steps Project Application Form

The Next Steps Project provides academic and nonacademic support services to American Indian students in Pre-Nursing, LPN, ADN, BSN programs, Social Work, Nutrition & Dietetics, and other Allied Health professions at tribal/junior colleges and four year colleges & universities in North Dakota.

To apply for the Next Steps Project:

1. Complete and submit this Next Steps Project Application Form.
 - Attach tribal enrollment verification
 - Or, degree of Indian blood (*BIA Form 4432*)
 - Attach income verification
 - Attach TANF verification (*if applicable*)
 - Submit Unofficial Academic Transcripts (copies) from high school and/or colleges/universities attended
2. You will be notified regarding your status in the project.
3. If accepted, you will be required to undergo:
 - Background check (State/Federal/Tribal)
 - Drug testing

All application materials must be submitted to:

Next Steps Project
ATTN: Carla Carmona, Administrative Assistant
Cankdeska Cikana Community College
PO Box 269
Fort Totten, ND 58335
Phone: (701) 766-1375 or (701) 766-1326
OR FAX transcripts to Next Steps: (701) 766-4077
www.littlehoop.edu

If you have any questions regarding your application to Next Steps please contact us.



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Workplace Drug Testing in North Dakota

North Dakota law doesn't restrict an employer's right to drug test employees or applicants.

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Has your employer or prospective employer in North Dakota asked you to take a drug test? Federal law places few limits on employer drug testing: Although the federal government requires testing by employers in a few safety-sensitive industries (including transportation, aviation, and contractors with NASA and the Department of Defense), federal law doesn't otherwise require – or prohibit drug tests. For the most part, state and local laws determine whether an employer may test employees and applicants for drugs.

North Dakota Drug Testing Laws

Although many states have passed laws regulating or restricting an employer's right to require drug testing, North Dakota is not one of them. North Dakota has no comprehensive law addressing drug testing in private employment. Instead, North Dakota law provides only that:


- An employer who requires drug testing must pay the cost of the test.
- In workers' compensation cases, an employer may require an employee to take a drug test following an accident or injury, if the employer has a mandatory policy of testing under these circumstances or the employer or a physician has reasonable grounds to suspect that the incident was caused by impairment due to alcohol or drugs. An employee who tests positive or refuses to take a test in these circumstances forfeits the right to benefits.

Because North Dakota doesn't otherwise place limits on an employer's right to drug test, drug testing is not prohibited or restricted, unless it violates other legal provisions (such as a law prohibiting discrimination; see below).


Legal Claims for Drug Testing

Because North Dakota law doesn't put any limits on workplace drug testing, employees who believe their test was illegal will have to rely on other legal theories. For example, an employer may run into legal trouble based on who is tested or how the test is conducted. Here are some examples:

- **Disability discrimination.** The Americans with Disabilities Act (ACA) protects an applicant or employee who is taking medication for a disability. Some prescribed medications can result in a positive result on a drug test, and some drugs that would otherwise be illegal (such as opiates) are legitimately prescribed for certain conditions. If an applicant is turned down because of a positive drug test, and the applicant's medication was legally prescribed for a disability, the company could be liable (unless the drug is medical marijuana).
- **Other discrimination claims.** An employer who singles out certain groups of employees—for example, by race, age, or gender—for drug testing could face a discrimination claim.
- **Invasion of privacy.** Even an employer that has a legitimate reason to test might violate employee privacy in the way it conducts the test. For example, requiring employees to disrobe or provide a urine sample in front of others could be a privacy violation, depending on the circumstances.
- **Defamation.** An employee might have a valid claim for defamation if the employer publicizes a false positive result, if the employer acts in bad faith and knew (or should have known) that the result was incorrect.

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#5

Testimony -- HB 1385
Human Service Committee
Feb 4, 2012
By Representative Kathy Hogan

Chairman Weisz and members of the Committee, my name is Kathy Hogan, I represent District 21 which is central Fargo. I am concerned about HB 1385.

I am concerned about HB 1385 based on my experience as the Director of Cass County Social Services. The vast majority of individuals who apply for financial assistance in North Dakota are embarrassed and ashamed to apply for help.

There are three primary reasons individuals applied for assistance. First, a single woman become pregnant and decides to keep the child. This is a very difficult choice and she will face many difficulties including the need to ask for financial help. I believe this is a wise choice and that we as the community need to support her decision. Another common example is the stay at home mother with two or three children whose husband seriously abuses her. She and the children end up in a short term domestic violence shelter. She applies for financial help to assist her in the transition. Grandparents living on social security agree to take their grandchildren because of their daughter's inability to care for her children. They can't afford the additional costs and ask for help.

When these people apply for assistance they are often very distraught. The counties would inform them that they need to get a drug screen which typically costs between \$30 and \$100. Most people will not have those funds available. In small rural counties, they would often have to travel to arrange a screening.

A second major concern is the section regarding protective payees. There is currently a shortage of protective payees for vulnerable adults. Finding protective payees for TANF families would create another major challenge. This bill would create significant work by county eligibility staff and doesn't identify what is to happen if a protective payee is not available.

Perhaps it is time for the ND Legislature to do a comprehensive review of the current TANF laws and this proposal should be turned into a study resolution.

Being poor is very hard and the actual consumers of TANF typically don't speak for themselves. I urge you to visit with actual recipients before passing such a major piece of legislation.

Thank you for your time and I am willing to answer any questions.

part of #5



TANF Policy Brief

Updated October 2012

Random Drug Testing of TANF Recipients is Costly, Ineffective and Hurts Families

Matt Lewis, Elizabeth Kenefick, and Elizabeth Lower-Basch

Substance abuse and addiction can interfere with parents' ability to get and keep jobs, as well as contribute to child abuse and neglect. While only a small fraction of low-income families receiving cash assistance under the Temporary Assistance for Needy Families (TANF) suffer from these problems, they are of legitimate concern for the TANF program. In recognition of this fact, states have developed a range of approaches to identify TANF recipients who abuse alcohol or other drugs, and refer them to appropriate treatment services.

However, one approach has received disproportionate attention in recent years — mandatory drug testing for parents applying for or receiving TANF assistance. In 2012 alone, legislators in at least 28 states proposed bills related to drug screening and testing with some even extending it to recipients of other public benefits as well, such as unemployment insurance, medical assistance and food assistance.¹ At the federal level, Senator David Vitter (R-LA) has offered bills and amendments multiple times to impose mandatory drug testing on TANF recipients and deny them eligibility if they failed a second test after treatment.² Furthermore, during the most recent debates around extension of federal extended unemployment insurance benefits, House Republicans proposed requiring mandatory drug testing to receive unemployment insurance.³

Proposals for mandatory drug testing of TANF recipients raise multiple concerns. First, these proposals are based on stereotypes about the prevalence of substance abuse among recipients, and not evidence. Proponents often claim that drug testing will save money, assuming that many applicants will be denied benefits. However, the experience of Florida, the one state that has recently implemented universal testing of applicants, is that few applicants test positive. During the four months of Florida's mandatory drug testing program only 2.6 percent of the state's applicants, (108 of 4,086 applicants) failed the drug test and an additional 40 people canceled their applications.⁴ Universal testing is a costly, flawed and inefficient way of identifying low-income parents in need of treatment. Better alternatives exist and are already being implemented to address drug abuse among TANF beneficiaries and ultimately reduce their barriers to work.

Second, universal random drug testing may well be unconstitutional. In 2003, Michigan's drug testing program was struck down as a violation of the Fourth Amendment's protection against searches without reasonable cause and more recently, in 2011 a U.S. District Judge halted enforcement of Florida's law mandating drug tests for applicants.⁵ Finally, and most important, sanctions for noncompliance put vulnerable children at risk. In particular, policies that require applicants to travel to testing facilities — and even to pay up front for the cost of tests — impose a significant burden on low-income families, who often are in crisis by the time they seek

* See CLASP's companion brief for information on alternatives to suspicionless testing: Elizabeth Kenefick and Elizabeth Lower-Basch, "Helping TANF Recipients Overcome Addiction: Alternatives to Suspicionless Drug Testing," CLASP, October 2012, <http://www.clasp.org/admin/site/publications/files/Helping-TANF-Recipients-Overcome-Addiction.pdf>.

assistance from TANF. State and federal policymakers should not enact more barriers to a safety net program that protects low-income children and families when there are alternative ways to identify substance abuse that do not risk similar harms.

Drug Testing is Expensive and Inefficient

Random or widespread drug testing is an inefficient use of taxpayer money. As multiple states have determined, it is costly to administer, especially when precautions are taken to prevent false results, and is not cost-effective for identifying true cases of substance abuse. Testing should be limited to cases where agencies have good cause to believe that a client may be using drugs, or where the client has acknowledged drug use and agreed to participate in a treatment program.

Small Share of Recipients Abuse Drugs

Proponents of drug testing suggest that substance use is widespread among TANF recipients — and a major cause of their poverty. In fact, research finds little evidence that drug use and/or abuse is particularly prevalent among TANF beneficiaries. Studies have varied widely, putting the portion of the TANF recipient population with a substance abuse disorder at anywhere between four and 37 percent, but the variation is due in part to the definitions and measurement methods. Rates are on the lower end when they are indicators of abuse of or dependence on illicit drugs, whereas the rates increase when they signify drug *use* and/or include alcohol abuse.⁶

In 1996, the National Institute of Alcohol Abuse and Alcoholism found that “proportions of welfare recipients using, abusing, or dependent on alcohol or illicit drugs are consistent with proportions of both the adult U.S. population and adults who do not receive welfare.”⁷ Furthermore, Michigan, the first state to have imposed random drug testing on TANF beneficiaries, found that only 10 percent of recipients tested positive for illicit drugs, with 3 percent testing positive for “hard” drugs, such as cocaine.⁸ As noted above, Florida had even lower rates of positive tests during its recent testing program. Again, these rates are consistent with its general population.⁹ While other studies show that TANF recipients are somewhat more likely to have tried illicit drugs or have substance abuse disorders than the general population, the fact remains that a large majority of recipients do not use drugs.

Nevertheless, for the small group of TANF recipients that do struggle with substance abuse, it can be a significant barrier to employment. The obstacles are often multiplied as substance abuse tends to co-occur with other barriers to employment, such as mental health issues and domestic violence.¹⁰ Many states recognize this and as highlighted below and outlined in the companion brief, *Helping TANF Recipients Overcome Addiction: Alternatives to Suspicionless Drug Testing*, states already have policies to identify and treat such individuals.

Chemical Tests Do Not Always Identify Substance Abuse Problems

Chemical drug tests, typically conducted by analyzing urine samples, have several significant shortcomings when it comes to identifying substance abuse problems. First, they do not test for abuse, but rather only the specific chemicals the test is designed to report. They do not test for alcohol, which is the most commonly abused

substance. They are also more likely to catch users of marijuana than other drugs because it remains in the urine longer. The tests also are at risk for reporting false positives, as they cannot distinguish between the legitimate use of prescription drugs and that of controlled substances. For example, in Florida, a mother who had recently had surgery was investigated for child abuse because the test detected the prescription painkiller that she was taking.¹¹ Misclassifications can also occur from mishandling of samples.

Finally, and most importantly, the tests cannot distinguish between occasional substance users and substance abusers. While drug *abuse* may pose a barrier to work and economic advancement¹², occasional drug use alone does not appear to have a significant impact on employment outcomes or receipt of public assistance. In a study of Florida TANF recipients, individuals who tested positively for drug use had earnings and were employed at nearly the same level as individuals who had tested negatively.¹³ In another study, drug use was as prevalent among employed TANF recipients as among the unemployed.¹⁴ Studies of the general population confirm that most drug users have full-time employment.¹⁵

It is Costly to Administer Tests That Yield Reliable and Valid Results

Testing all applicants or participants, regardless of whether they show any indications of drug use, is a highly inefficient means of identifying individuals who are using drugs. Since few substance abusers are identified in tests, but many are tested, the cost of catching a drug abuser is much higher than the amount paid for that individual's test. This is not a new phenomenon, in the early nineties the Texas Instruments Corporation and the federal government found after completing drug testing programs that the full costs of a testing program ran between \$20,000 and \$77,000 per diagnosed person.¹⁶

Urine tests for drugs cost anywhere from \$25 to \$150 each.¹⁷ These costs are increased by the need to repeat tests to confirm results and avoid false positives. In order to provide due process protections against false positives, guidelines by the Substance Abuse and Mental Health Administration (SAMHSA) for federal agencies include confirmation tests and reserving a portion of the urine sample for repeat tests to confirm results (split samples).¹⁸ States including Idaho and Utah have identified needing to require human service agencies to conduct repeat tests of split samples before imposing sanctions.

The direct cost of the tests is only a portion of the total costs of a testing program. Recent draft regulations issued by Missouri show that a full accounting of the costs should include the expense of reprogramming administrative databases, conducting hearings and appeals for recipients who challenge the results of the tests, and providing treatment services.¹⁹ Similarly, in 2010, the Idaho Legislature directed the Idaho Department of Health and Welfare to study the possibility of implementing a random drug testing program. The Department reported that such a program would not reduce assistance costs by an amount equal to the cost of administering the program, and would therefore require additional funding to be appropriated by the state.²⁰

Screening is an Established Alternative to Random or Widespread Drug Testing

Proven alternatives to chemical tests have been developed and have been implemented since the early days of welfare reform. As outlined in the companion brief, *Sensible Strategies for Addressing Substance Abuse*, more than half the states responding to a 2012 survey reported that they were formally screening recipients for substance abuse, with other states typically relying on caseworkers to informally identify recipients with substance use issues.²¹ Most states use a “screen-and-refer” method of detection and treatment promotion, and typically, a paper-and-pencil test is administered. One such test, the Substance Abuse Subtle Screening Inventory (SASSI), has an accuracy rate of between 89-97 percent, can distinguish between drug users and abusers, and can detect alcohol abuse.²² The Oklahoma Department of Human Services found that a questionnaire they administered identified 94 out of 100 drug abusers.²³ Paper tests and caseworker observation also have the benefit of being less intrusive and costly than drug testing when there is not yet a reasonable basis to require a drug test. Still, research has shown that this method of detection can be improved. Many of the workers administering drug screening are inexperienced or uncomfortable with the task. As a result some states have developed more involved alternatives to detect drug abuse including creating partnerships with other state agencies and employing licensed clinicians to conduct the screens. (See companion paper for more details.)

Drug Testing Not Based on Individualized Suspicion is Likely Unconstitutional

Before 2011, only one state, Michigan, had ever required all adult TANF recipients to submit to random drug tests. In *Marchwinski v. Howard*, the ACLU challenged Michigan’s across-the-board testing and the district court ruled in September 2000 that the random drug test requirement violated the recipients’ Fourth Amendment rights against unreasonable searches. The U.S. Court of Appeals for the Sixth Circuit reversed the decision, but then withdrew the reversal in 2003 after rehearing the case and splitting the vote.²⁴

In the past two years Florida and Georgia also passed bills mandating drug tests for TANF applicants. Signed on May 31, 2011, HB 353 in Florida went into effect on July 1, 2011, but in October, 2011 a U.S. District Judge preliminarily enjoined enforcement of the law ruling that it likely violates the Fourth Amendment rights in *Lebron v. Wilkins*, 820 F. Supp. 2d 1273 (M.D. Fla. 2011), the case filed by the ACLU the month prior.²⁵ The state of Florida appealed the decision and is still waiting for a final ruling. In Georgia, HB 861, was scheduled to go into effect on July 1, 2012, but the state has postponed implementation while it develops guidelines and watches the result of the Florida case. The ACLU and the Southern Center for Human Rights have stated that they will challenge the law in court if it is implemented.²⁶

Random searches are only justified if they meet a high legal standard. In general, individualized suspicion is necessary to perform a search.²⁷ States may and do impose drug testing requirements on individuals who have been identified as substance abusers, or as a condition of reinstating benefits for an individual convicted of a drug-related felony. However, simply receiving cash assistance is not a basis for suspicion of drug use and the state must have some reason to believe that a particular individual may be using drugs.

In *Lebron v. Wilkins*, the U.S. District Judge explained that the desire to prevent public funds from potentially being used to fund drug use does not justify suspicionless testing.

[If such a desire] were the only requirement to establish a special need, the State could impose drug testing as an eligibility requirement for every beneficiary of every government program. Such blanket intrusions cannot be countenanced under the Fourth Amendment.

What the Fourth Amendment requires is that such incursions by the Government must be reserved for demonstrated special needs of government or be based on some showing of reasonable suspicion or probable cause. The State has made no showing that it would be “impracticable” to meet these prerequisites in the context of TANF recipients. Any suggestion that it would be impracticable should be based on some evidentiary showing, and any such showing would likely be belied by the fact that other states competently administer TANF funds without drug tests or with suspicion-based drug testing and no other state employs blanket suspicionless drug testing.²⁸

Targeted testing approaches, whether based on a validated screening methodology or as a condition of restoring benefits to recipients who have been convicted of drug-related felonies, do not raise the same constitutional issues.²⁹

Sanctions Put Vulnerable Children and Treatment at Risk

Many of the proposals call for denying assistance to anyone who fails a drug test, or who does not complete the testing process. Such penalties will have negative impacts on children. Welfare sanctions and benefit decreases have been shown to increase the risk that children will be hospitalized and face food insecurity.³⁰ Because TANF benefits are so low (below 50 percent of the poverty line in all states and below 30 percent in a majority³¹), children suffer even when only the “adult portion” of the benefit is eliminated. Without these benefits, families may be unable to meet children’s core basic needs, such as housing and clothing. There is a growing body of evidence that poverty, especially deep poverty, has lasting negative impacts on children’s physical, emotional, and mental development.³²

It is important to recognize that drug testing programs may serve as barriers to receipt of assistance for parents who are *not* using drugs, as well as for those who are. Depending on the program design, applicants may have to travel to a different location from the welfare office to be tested. When Florida implemented its law, three counties had no approved testing sites — and the state did not pay for transportation costs.³³ Florida also requires applicants to pay up front for the tests, with those who test negative receiving reimbursement months later. This may force applicants to choose between paying for the test, to get help, or buying gas or other necessities.

Sanctions may also interfere with the treatment process by deterring people from admitting that they are using drugs and seeking treatment. Also, treatment and recovery are not one-time events. Many people require a series of treatment sessions, and relapse rates during and after treatment are high.³⁴ If TANF recipients are sanctioned, they may lose access to treatment programs that may take time and repeated efforts to show results. No study has shown that denying assistance facilitates substance abuse treatment. To the contrary, transportation, housing and

child care support help parents overcome barriers to successful program completion. Denying access to benefits will increase barriers to economic advancement and family well-being.

Additional Funding and Comprehensive Treatment are Needed

Drug treatment is an efficient use of taxpayer money. A national study of treatment programs serving women found significant employment gains, a modest rise in income, and a modest decline in the number receiving public benefits.³⁵ The benefits of treating TANF recipients in California, according to one study, exceeded the costs by more than two and one half times.³⁶ Unfortunately, while some states have seen the benefits of treatment and investing in programs—about 60 percent of states in a 2002 survey indicated that they had invested TANF funds in alcohol and drug treatment in FY2002³⁷—the current dire budget situations in most states could threaten the progress. For instance, California put \$50 million a year in treatment, as the percentage of CALWORKS parents receiving substance abuse treatment tripled over the last decade,³⁸ but in 2011 the state allowed counties to temporarily redirect substance abuse and mental health funding to other employment services.³⁹

Several comprehensive treatment options have also shown positive results. Drug abuse problems tend to co-occur with mental health and other problems, and low-income women with children face significant logistical barriers to completing treatment programs. More comprehensive treatment programs address transportation, housing and child care needs, as well as provide employment counseling and mental health services. One comprehensive approach to treatment in New York and North Carolina, called CASA WORKS for Families, showed positive results.⁴⁰ In Louisiana, a demonstration project with an intensive screening, referral, and treatment system slightly raised employment levels and significantly improved wages.⁴¹

Conclusion

Given the high cost of treatment programs and the waiting lists for services in many areas, mandatory drug testing of all applicants for or recipients of TANF benefits is a poor use of resources. In a time of tight state budgets, it is perverse to spend limited funds in pursuit of the small number of substance abusers who are not identified through screening processes, rather than on providing actual services. Despite the persistence of proposals to impose drug testing at the state and federal levels, these proposals have consistently been rejected because the data do not support the money-saving claims. In the late 1990s, New York, Maryland, Iowa, and Louisiana considered drug testing, but decided it was more cost-effective to use questionnaires and observational methods to detect substance abuse problems. And as previously mentioned, Idaho's Department of Health and Welfare studied the financial sustainability of requiring tests in 2010 and found that doing so would not save any money.⁴²

If identified drug users are sanctioned and not provided with treatment services and basic cash assistance, then these parents are less able to adequately care for their children. Thus, what might appear to be savings in TANF actually results in increased costs in child welfare and decreased overall child well-being.

Notes

¹ The number of states is based on proposals tracked by CLASP and the Center on Budget and Policy Priorities in 2012, with assistance by Rochelle Finzel at the National Conference of State Legislatures who also tracks states with proposals, see: <http://www.ncsl.org/issues-research/human-services/drug-testing-and-public-assistance.aspx>. For an extensive overview of bills proposed in previous years, see: Jordan C. Budd, *Pledge Your Body for Your Bread: Welfare, Drug Testing, and the Inferior Fourth Amendment*, William & Mary Bill of Rights, September 6, 2010, Available at SSRN: <http://ssrn.com/abstract=1687871>.

² During debate of the FY 2010 budget resolution Senator Vitter (R-LA) introduced an amendment proposing mandatory drug testing for TANF recipients that failed 18-79. In addition he introduced stand-alone bills several times in past sessions including: the *Drug Free Families Act of 2008* (S 3361) and the *Drug Free Families Act of 2009* (S 97). Neither of these two bills however gained support to make it out of committee. Furthermore, only S 3361 received a co-sponsor. The most recent is The Drug Free Families Act of 2011 (S 83).

³ Elizabeth Lower-Basch, "Unemployment Insurance Drug Testing: A Bad Cure in Search of a Problem," Center for Law and Social Policy, February 2012, <http://www.clasp.org/admin/site/publications/files/UI-Drug-Testing.pdf>. The final enacted law allows states to require drug tests for individuals who are seeking employment in industries that routinely require drug tests of job applicants.

⁴ Lizette Alvarez, "No Savings Are Found From Welfare Drug Tests," *New York Times*, April 17, 2012, http://www.nytimes.com/2012/04/18/us/no-savings-found-in-florida-welfare-drug-tests.html?_r=3&ref=us.

⁵ *Lebron v. Wilkins*, 820 F. Supp. 2d 1273 (M.D. Fla. 2011).

⁶ Laura Radel, Kristen Joyce, and Carli Wulff, "Drug Testing Welfare Recipients: Recent Proposals and Continuing Controversies," *ASPE Issue Brief*, U.S. Department of Health and Human Services, Office of the Assistant Secretary for Planning and Evaluation, October 2011, <http://aspe.hhs.gov/hsp/11/DrugTesting/ib.pdf>.

⁷ Ann Bradley and Diane Miller, "NIAAA Researchers Estimate Alcohol and Drug Use, Abuse, and Dependence Among Welfare Recipients", National Institutes of Health Press Release, October 1996, <http://www.nih.gov/news/pr/oct96/niaaa-23.htm>.

⁸ *Marchwinski v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000), aff'd, 60 F. App'x 601 (6th Cir. 2003).

⁹ "Selected Drug Use, Perceptions of Great Risk, Average Annual Rates of First Use of Marijuana, Past Year Substance Dependence or Abuse, Needing But Not Receiving Treatment, and Having at Least One Major Depressive Episode in Michigan, by Age Group: Percentages, Annual Averages Based on 2007-2008 NSDUHs: Table 46," SAMHSA. Office of Applied Studies, National Survey on Drug Use and Health, 2007 and 2008, <http://oas.samhsa.gov/2k8/state/stateTabs.htm>.

¹⁰ Jon Morgenstern, et al., "Improving 24-Month Abstinence and Employment Outcomes for Substance Dependent Women Receiving Temporary Assistance for Needy Families with Intensive Case Management," *American Journal of Public Health*, February 2009.

¹¹ Craig Patrick, "Documents describe 'debacle' of welfare drug testing," *Fox 13*, Tampa, September 16, 2012, <http://www.myfoxtampabay.com/story/19549851/2012/09/14/documents-describe-debacle-of-welfare-drug-testing>.

¹² Research and literature available finds that women on TANF with substance abuse problems exhibit more barriers to employment than women in the general welfare population and recipients with substance abuse problems are less likely to maintain full-time employment over time. For a general overview of the literature see Lisa R. Metsch, Margaret Pereyra, Christine C. Miles, and Clyde B. McCoy, "Welfare and Work Outcomes after Substance Abuse Treatment," *Social Service Review*, June 2003, http://ssrn.med.miami.edu/documents/Welfare_and_Work_Outcomes.pdf.

¹³ Robert E. Crew, Jr. and Belinda Creel Davis, "Assessing the Effects of Substance Abuse Among Applicants for TANF Benefits: The Outcome of a Demonstration Project in Florida," *Journal of Health & Social Policy*, 2003.

¹⁴ Harold Pollack, Sheldon Danziger, Rukmalie Jayakody, and Kristin Seefeldt, *Drug Testing Welfare Recipients – False Positives, False Negatives, Unanticipated Opportunities*, January 2001, <http://www.fordschool.umich.edu/research/pdf/drugtest.pdf>.

¹⁵ Substance Abuse and Mental Health Services Administration, "Worker Drug Use and Workplace Policies and Programs: Results from the 1994 and 1997," National Household Survey on Drug Abuse, 1999.

¹⁶ See *Federal Drug Testing Said to Produce Little Benefit Despite its High Costs*, and *Texas Instruments : Employee Input Led to Drug Tests for Every Worker*, published in the National Report on Substance Abuse (Buraff Publications) in 1991 as cited in Mark A. Rothstein, "Workplace Drug Testing: A Case Study in the Misapplication of Technology," *Harvard Journal of Law and Technology*, Volume 5, Fall Issue, 1991 and *Drug Testing: A Bad Investment*, American Civil Liberties Union, September 1999, <http://www.aclu.org/FilesPDFs/drugtesting.pdf>.

¹⁷ Radel, Joyce, and Wulff, *ASPE Issue Brief*, October 2011.

¹⁸ The Office of Compliance Assistance Policy at the US Department of Labor provides guidance to assist in creating a drug-free workplace. In terms of drug testing it recommends private employers follow the standardized procedures established by the US Department of Health and Human Services' Substance Abuse and Mental Health Services Administration (SAMHSA) for federal agencies conducting drug testing in order to avoid legal trouble. The guidelines include the following procedures: chain of custody, initial screen, confirmation test, and split samples. See: "Workplace Drug Testing," *elaws® - Drug-Free Workplace Advisor*, US Department of Labor, <http://www.dol.gov/elaws/asp/drugfree/drugs/dt.asp>, accessed June 26 2012.

¹⁹ Missouri Department of Social Services, Family Support Division, Proposed Rule published in the *Missouri Register*, Vol. 37, No. 15, August 1, 2012, <http://www.sos.mo.gov/adrules/moreg/current/v37n15/v37n15b.pdf>.

²⁰ *Drug Testing Public Assistance Program Participants*, Idaho Department of Health and Welfare, February 2011, <http://www.idahoreporter.com/wp-content/uploads/2011/02/DHW-report.pdf>.

- ²¹ The surveys had different response rates and participating states, so are just estimates of the number of states that do screening for substance abuse problems. The 2002 study was by Legal Action Center, see: Gwen Rubinstein, *The State of State Policy on TANF & Addiction: Findings from the "Survey of State Policies and Practices to Address Alcohol and Drug Problems Among TANF Recipients"*, Legal Action Center, June 2002.
- ²² Crew and Davis, *Journal of Health & Social Policy*, 2003
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- ²⁴ *Marchwinski v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000), aff'd, 60 F. App'x 601 (6th Cir. 2003)
- ²⁵ "Judge Halts Enforcement of Unconstitutional Law Mandating Drug Tests for Temporary Assistant Applicants," ACLU, October 24, 2011, <http://www.aclu.org/criminal-law-reform/judge-halts-enforcement-unconstitutional-law-mandating-drug-tests-temporary>.
- ²⁶ Andy Miller, "Drug Testing for Welfare Put on Hold," *Georgia Health News*, July 3, 2012, <http://www.georgiahealthnews.com/2012/07/welfare-drug-testing-law-put-hold/>
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- ²⁸ *Lebron v. Wilkins*, 820 F. Supp. 2d 1273 (M.D. Fla. 2011), <http://www.aclufl.org/pdfs/2011-10-24-ACLUtanfOrder.pdf>, page 23
- ²⁹ Rubenstein, "The State of State Policy on TANF & Addiction," 2002.
- ³⁰ *The Impact of Welfare Sanctions on the Health of Infants and Toddlers*, Children's Sentinel Nutrition Assessment Program, July 2002.
- ³¹ Ife Finch and Liz Schott, "TANF Benefits Fell Further in 2011 and Are Worth Much Less Than in 1996 in Most States," Center on Budget and Policy Priorities, November 2011, <http://www.cbpp.org/cms/index.cfm?fa=view&id=3625>.
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- ³⁴ Dan Bloom, *Comment on 'Supporting Work for Low-Income People With Significant Challenges'*, Urban Institute, 2009, <http://www.urban.org/publications/411727.html>.
- ³⁵ Dean R. Gerstein, Robert A. Johnson, and C. L. Larison, *Alcohol and Other Drug Treatment for Parents and Welfare Recipients: Outcomes, Costs, and Benefits*, U.S. Department of Health and Human Services, 1997, p. 39 as cited in Rubenstein.
- ³⁶ Center for Substance Abuse Treatment, *Women In Treatment, National Treatment Improvement Evaluation Study*, Rockville, Maryland, 1997, as cited in Rubenstein 2002.
- ³⁷ Rubenstein 2002.
- ³⁸ *Letter to Assembly Member Jim Beall*, Country Welfare Directors Association of California: March 25, 2008.
- ³⁹ "All County Letter No. 11-34," State of California, Health and Human Services Agency, Department of Social Services, April 08, 2011, <http://www.dss.cahwnet.gov/lettersnotices/entres/getinfo/acl/2011/11-34.pdf>.
- ⁴⁰ See the CASAWORKs for Families grant report: Susan Parker, *CASAWORKs(SM) For Families Helps Women Get Off Drugs and Into Jobs*, Robert Wood Johnson Foundation Grant Results, October 2009, <http://www.rwjf.org/reports/grr/045793.htm> and evaluation studies: McLellan AT, Gutman MA, Lynch KG, et al, *One year outcomes from the CASAWORKs for Families intervention for substance-abusing women on welfare*, Eval Rev, 2003; 27:656-680 as cited in Morgenstern 2009.
- ⁴¹ *State of Louisiana TANF Evaluation: Year 3 Evaluation of TANF Initiatives Programs*, Department of Health and Hospitals, Office for Addictive Disorders, September 2004.
- ⁴² *Drug Testing Public Assistance Program Participants*, Idaho Department of Health and Welfare, Feb. 4, 2011, <http://www.idahoreporter.com/wp-content/uploads/2011/02/DHW-report.pdf>.

#6

TESTIMONY
HUMAN SERVICE COMMITTEE
HOUSE BILL 1385
REPRESENTATIVE WEISZ, Chairman
February 4, 2013

Chairman Weisz and members of the House Human Services Committee, my name is Shari Doe. I am the Director of Burleigh County Social Services. I am here today to speak in opposition to HB 1385.

Requiring welfare recipients to be tested for drugs is an idea that many people could probably support and in fact, many other states are working on similar legislation.

I couldn't agree more that benefit dollars should not be used for drugs but this bill does not address addiction issues and it presumes people are guilty simply because they need temporary assistance.

- Studies have shown little difference between the rate of illegal drug use by welfare recipients and the general population. However, the stereotypes of welfare recipients often trumps facts.
- Mandatory drug testing will cost taxpayers far more than they will save. For starters, the millions of dollars that will be needed to conduct the testing; to administer the program – tracking the test results, monitoring time frames if someone tests positive, finding and arranging for a protective payee for a child whose mom or dad tested positive; and the human costs – indignity and stigma.
- Expecting the recipients to pay for their own drug test is very unrealistic. Living below the poverty level does not leave much discretionary income. Who will collect the money and what if a recipient doesn't have the money to pay for it? Will they be denied for being poor?
- Those recipients who use controlled substances **legally must inform someone** of this before the test. What does that type of disclosure do to an individual's right to privacy?
- Some states have approach mandatory drug testing for welfare recipients as a way to address substance abuse. If the focus were really about addressing substance abuse you wouldn't approach this with a drug-testing framework, but rather with a screening assessment *and providing treatment approach*.

- What if a recipient begins using or relapses after eligibility has been established? Will Eligibility workers have to watch for drug use signs among their clients?
- If we believe this type of legislation will make individuals seek treatment, stop buying drugs and become happy productive taxpaying citizens, we are fooling ourselves. The etiology of addiction is far more complex than by simply passing a bill targeting people *assumed* to be addicts.
- Over the past few years, many states have either passed or considered laws requiring testing. Many of the testing bills proposed in other states went nowhere or were defeated once it became clear there was little likelihood of saving money. Last year Florida became the most recent state to pass and fully implement a bill mandating suspicion-less drug testing of all applicants for Temporary Assistance for Needy Families (TANF). The law mandated that all applicants pay for the cost of the drug test themselves, and that they be reimbursed if their test came back negative. The law was in effect for four months before a federal court blocked the law, saying it was unconstitutional. 4,086 welfare applicants had been tested. Only 108 or 2.6 percent — tested positive for drug use (most for marijuana).
- Currently there are federal rules to disqualify anyone with a drug felony conviction for both TANF and SNAP. Section 5 (b) of the Food and Nutrition Act and Section 273.2(a)(1) of the Code of Federal Regulations state the Department cannot as a condition of eligibility impose additional application or application processing requirements. Mandatory drug testing would impose an additional requirement and is prohibited by federal SNAP regulations (i.e. Section 5(b) of the Act and 273.2(a)(1) of the code of federal regulations.

In conclusion, we should not support ineffective, constitutionally questionable, and costly government reforms that intrude into the lives of often innocent people and target the most vulnerable among us.

Chairman Weisz, thank you for the opportunity to speak on this bill and I'm happy to answer questions.

#17

House Bill #1385

Chairman Robin Weisz and members of the committee, my name is Trina Gress. I am the Vice President of Community Options for Residential and Employment Services, Inc. (Community Options, Inc.) and we do not support HB 1385.

Community Options, Inc. has worked as an employment contractor for the Department of Human Services working with the Temporary Assistance for Needy Families (TANF) population since July 2007. Community Options, Inc. is one of three employment contractors in the state of North Dakota. Community Options, Inc. works with the TANF population in 46 out of the 53 counties in North Dakota. In 2012, Community Options, Inc. worked with 1524 TANF individuals. Of this total there were only 102 TANF individuals (which is only 6.7%) who reported a history of using drugs or had a background check which showed a drug related charge.

We do not support HB 1385 because of 4 major existing program elements in the North Dakota TANF program. These program elements ensure one of two things happen. Either the TANF individual with usage issues addresses their barriers and becomes self-sufficient or they do not address their issues and the case closes resulting in loss of the TANF grant.

1. **'Upfront Eligibility'**
2. **'Pay after Performance' Policy**
3. **'Monthly Employability Plan' updates**
4. **'Proof of Performance'**

'Upfront Eligibility' must be met before any TANF grant is released to a work eligible TANF individual. 'Upfront Eligibility' means the TANF individual must first meet with Community Options, Inc. or another employment contractor to complete an intake and create an Employability Plan. If the TANF individual fails to meet 'Upfront Eligibility' their application for TANF will be denied and no TANF grant will be awarded.

If 'Upfront Eligibility' is met, then each TANF individual is subject to the **TANF 'Pay after Performance' Policy**. The 'Pay after Performance' Policy states that during the first four months of receiving TANF benefits, the TANF individual will receive benefits for their children only. The TANF individual will not receive their portion of the benefit until they reach their . monthly work requirement listed in their **'Monthly Employability Plan'**. Community Options, Inc. meets face to face with each TANF individual at least monthly create a 'Monthly Employability Plan' to assist the TANF individual in overcoming barriers by career planning, job coaching, and goal setting. Each 'Monthly Employability Plan' assists the TANF individual in finding an appropriate work activity that will help them in move forward toward self-

sufficiency. In the 'Monthly Employability Plan', failure to complete any listed requirements or being out of compliance for 3 or more days, may result in a sanction, and ultimately a loss of TANF benefits.

If a sanction is imposed and the TANF individual loses their TANF benefit, they must complete a **'Proof of Performance'** by showing successful reengagement to the program and complete the requirements of their failed 'Monthly Employability Plan' before benefits are full reinstated. If the TANF sanctioned individual fails to start a 'Proof of Performance' or fails to successfully complete it, their TANF case will close and the TANF Benefits will end. If the TANF case closes due to a sanction, regardless of the amount of time passed, the TANF individual must still successfully complete the 'Proof of Performance' prior to their case re-opening.

As an employment contractor, Community Options, Inc. has assisted TANF individuals with substance abuse issues overcome these issues by requiring them to attend our program and be held accountable to seeking treatment. This is listed on their 'Monthly Employability Plan' and without follow through the TANF individual is subject to sanction and the TANF individual will lose the TANF grant.

In summary, the North Dakota Department of Human Services has already established a successful TANF program which allows employment contractors to address the needs of TANF individuals in order to assist them towards self-sufficiency and becoming tax paying citizens regardless of their pattern of drug usage. The 4 elements shared with you today address TANF program eligibility; ensure TANF individuals are held accountable to treatment if they are using and the sanction process if the TANF individual chooses to not comply with the program. Therefore, please vote "NO" on HB 1385.

Thank you for your time.



Representing the Diocese of Fargo
and the Diocese of Bismarck

Christopher T. Dodson
Executive Director and
General Counsel

78

To: House Human Services Committee
From: Christopher T. Dodson, Executive Director
Subject: House Bill 1385 Drug Testing for TANF and SNAP Recipients
Date: February 4, 2013

A fundamental criterion for our state's welfare policy should be protecting human life and human dignity in the spirit of charity. We feel House Bill 1385 fails this test.

House Bill 1385 is Misdirected and Misguided.

The purpose of the Temporary Assistance for Needy Families Program (TANF) and the Supplemental Nutrition Assistance Program (SNAP) is to provide a safety net for families with children and to help them address problems that may be beyond their capacity for a time so that they can become working and self-sufficient. It is not about catching drug abusers. In fact, persons convicted for drug-related offenses are already prohibited from receiving benefits.

While drug use may interfere with a parent's ability to obtain and keep a job, denying the parent needed assistance and returning him or her to the streets benefits neither the individual nor society. It is especially counterproductive and unwise to deny and delay benefits to a parent willing to immediately enter treatment.

House Bill 1385 is Prohibited by Law

With regard to SNAP, the bill is pointless. SNAP is a federal program and federal law does not allow states to use drug testing in determining eligibility for the program.¹ Concerning TANF, courts have ruled requiring drug testing for every TANF applicant violates the United States Constitution.²

Better and More Effective and Legal Options Exist

Drug testing applicants is costly. Before enjoined by a federal court, Florida's attempt to test TANF applicants resulted in only 2.6 percent of the applicants testing positive, resulting in the state picking up the costs for 97.4 percent of the tests administered.³ States such as Idaho, New York, and Maryland have

studied the matter and concluded that the costs outweigh any savings.

There exist more effective and cost-effective ways of helping people with substance abuse problems, which is why substance abuse experts oppose drug testing welfare recipients.⁴ For example, studies have found that entry questionnaires and behavioral screening are more successful at identifying applicants with drug abuse problems. Moreover, they have the added benefit of detecting alcohol abusers; something that cannot be accomplished with a drug test.

We should also remember that TANF recipients must participate in work or educational activities and participate in individual responsibility plans. If drug use interferes with accomplishing those tasks, getting the recipient substance abuse counseling as part of a comprehensive TANF to work program would be more effective.

House Bill 1385 Violates the Spirit of Charity

The greatest reason to defeat HB 1385 is that it violates the spirit of charity that should guide any public assistance program. Many people are concerned that government assistance has replaced private charity. Some feel that both are needed. If any government assistance exists, however, the dignity of the human person requires policies in conformity with principles of charity rather than paternalist social assistance that is demeaning to those in need. Even government programs must be shaped by charity which, as its Latin root reveals, is about love.

One of the early Christian Church Fathers, Saint John Chrysostom addressed head-on the tension between our call to care and our human tendency to judge a person's worthiness. Drawing on Abraham, Paul, and Christ himself, Chrysostom reminded his flock that when it comes to addressing a person's need, all that matters is that person's need. To judge a person's worthiness is not an act of charity.⁵

Asking why a person is poor has its value, but not for the purpose of determining whether the person deserves help. The person deserves help because he or she needs it. Discovering why a person is poor helps us to address the problems that might have contributed to the person's plight. The information should not be used to determine worthiness or to deny or delay filling the person's need.

Every public assistance program should be informed by charity and as St. John Chrysostom reminded us as far back as the Fourth Century: “Charity is so called because we give it even to the unworthy.”

We respectfully ask for a **Do Not Pass** recommendation on House Bill 1385.

¹ Section 5(b) of the Food and Nutrition Act, codified at 7 U.S.C. §214(b), “No plan of operation submitted by a State agency shall be approved unless the standards of eligibility meet those established by the Secretary, and *no State agency shall impose any other standards of eligibility as a condition for participating in the program*” (emphasis added). See also, *Drug Testing and Crime-Related Restrictions in TANF, SNAP, and Housing Assistance*, Congressional Research Service, March 7, 2012.

² *Lebron v. Wilkens*, Case No. 6:11-cv-01473-Orl-35DAB, Order Granting Motion for Preliminary Injunction (M.D. Fla. 2011). *Marchwinski v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000); *Marchwinski v. Howard*, 60 Fed. App’x 601 (6th Cir. 2003) (affirming the district court decision). [Michigan law authorizing suspicionless drug testing of welfare recipients was unconstitutional where not designed to address jeopardy to public safety; state’s desire to address substance abuse as barrier to employment was not special need sufficient to justify departure from ordinary Fourth Amendment requirement of individualized suspicion.]

³ “Florida’s welfare drug tests cost more money than state saves, data shows” *Miami Herald*, April 20, 2012. <http://www.miamiherald.com/2012/04/20/2758871/floridas-welfare-drug-tests-cost.html#storylink=cpy>; “No Savings Are Found From Welfare Drug Tests” *New York Times*, April 17, 2012. http://www.nytimes.com/2012/04/18/us/no-savings-found-in-florida-welfare-drug-tests.html?_r=0

⁴ E.g., Center for Addiction and Mental Health, American Public Health Association, National Association of Social Workers, Inc., National Association of Alcoholism and Drug Abuse Counselors, National Council on Alcoholism and Drug Dependence, Association of Maternal and Child Health Programs, National Health Law Project, National Association on Alcohol, Drugs and Disability, Inc.

⁵ Saint John Chrysostom on Wealth and Poverty (St. Vladimir’s Seminary Press).

“For if you wish to show kindness, you must not require an accounting of a person’s life, but merely correct his poverty and fill his need.”

“The poor man has one plea, his want and his standing in need: do not require anything else from him; but even if he is the most wicked of all men and is at a loss for his necessary sustenance, let us free him from hunger.”

“When you see on earth the man who has encountered the shipwreck of poverty, do not judge him, do not seek an account of his life, but free him from his misfortune.”

“Need alone is the poor man’s worthiness . . .”

“We do not provide for the manners, but for the man.”

“We show mercy on him not because of his virtue but because of his misfortune, in order that we ourselves may receive from the Master His great mercy . . .”

#9

HB 1385
House Human Services
February 4, 2013
9:00 AM
Robin Weisz, Chairman

Chairman Weisz, members of the House Human Services Committee,
I am Paul Ronningen, representing the Children's Defense Fund – North
Dakota. The mission of The Children's Defense Fund Leave No Child
Behind[®] mission is to ensure every child a *Healthy Start*, a *Head Start*, a
Fair Start, a *Safe Start* and a *Moral Start* in life and successful passage to
adulthood with the help of caring families and communities.

I am here to testify against HB 1385 for several reasons.

First of all, I am concerned about his bills attempt **to separate out the**
“worthy” from the “unworthy” recipient using the myth of drug addled
welfare recipients as the starting point. These programs are to serve
dependent children who live with parents struggling to make ends meet.
From my view, this bill will further victimize and marginalize children, who
when born, had chosen parents, that have used and/or have an addiction
problem.

Are there recipients who have used or may be dependent on drugs? (Yes). Are there legislators who are or have been drug dependent? (Yes.) In fact, there have been a number of legislators who have courageously, and publicly, come forward and sought treatment while I have served the state and county.

It should be noted that TANF clients by definition are either working or going to school. In addition, I have been told that the Federal Government has banned drug testing for SNAP Clients, in most situations.

Second, I am also concerned with the **potential cost to the state**, if drug testing were implemented. In other words how many drug tests would we expect in the coming year, how many of these potential applicants would be expected to fail the drug tests, based on other state's experiences, and finally what do you plan to pay for the services of an "appropriate protective payee"? I would also assume the entire TANF and SNAP population would be required to do the drug tests to continue their eligibility. (See **Attachment C**)

I did call a local provider of drug testing, Preble Medical Services. Preble has three levels of testing ranging from a 1) Walk in urine test for \$30.00/test, a 2) urine test for \$40/test that has independent lab confirmation of the results and finally 3) a hair test which would be able to look back 90 Days for \$125/test. The first two tests might be accurate between 72 hours to 30 days. The question, asked of me was...what drugs do you want testing for in this process....a question the committee should be clear about if this bill were to move forward. Also, what of the cost, in time and money, for the appeal process which will certainly be an issue.

According to the Department of Human Services web site, there are approximately 27,439 households on SNAP. In addition, the data for TANF recipients suggests 1,738 current clients (**See Attachment D**) Lets assume that there would be 30,000 people needing testing from this pool (conservative number because some households have two adults). Lets use the \$40/test, that can be backed up with independent lab confirmation. The total cost of the testing would be \$1,200,000, just to test the current caseload, yet there is no current fiscal note to this bill.

Now, if we assume a 2.6% failure rate, as occurred in Florida (See Attachment A), the cost to state government would be \$1,168,800 while the remaining \$43,200 would be picked up by those who failed the test.

In addition, an “appropriate protective payee” would need to be hired for the 780 of the 30,000 households that could be projected to fail the drug test. Lets assume that it would take one hour of work for this payee to administer this money, at \$15/hr./month. This would be a monthly cost of \$15/hr X 780 households X 12 months in a year = **\$140,400 per year for payees.**

Thus, the potential cost for one year of implementing this bill might be \$1,303,000 for the first year or \$2.6 million for the biennium.

This does not include any administrative overhead for managing the extra paperwork, the hiring process or contracting for the protective payee organization that would manage this aspect of the program. **(See attachment C: How much does it cost to implement drug testing in TANF Programs?)** Finally, these costs do not reflect the numbers of new applicants that would need drug tests nor the costs to do random drug tests on those who passed the first time.

It should be noted that the Florida law was found to be unconstitutional after a law suit by the ACLU (See Attachment A) This occurred after only four months of operation... alleging that the Florida law violated the Fourth Amendment of the Constitution, which protects individuals from unreasonable search and seizure.

Finally, this bill will potentially not punish the drug users but their children, who are to be the real beneficiaries of these programs. It also should be noted that there was actually a drop of 74% in the TANF case load from 1993 to 2013 (6625 cases to 1738 cases) in North Dakota. (See Attachment D)

Thus, I would urge a no vote on this HB 1385 because it is 1) likely unconstitutional, 2) will cost the state more money 3) is surely an inefficient use of North Dakota's resources 4) may punish the children of drug users who are to be the beneficiaries of these programs and 5) there already has been a dramatic drop in caseloads in TANF since 1993.

Finally, would you really require a women, who just lost her husband to cancer, diabetes or heart disease to get drug tested in order to receive these benefits?

This concludes my testimony, I would be happy to answer any questions.

Florida drug testing of Welfare Applicants:

Just as We Suspected: Florida Saved Nothing by Drug Testing Welfare Applicants

By Rachel Bloom, ACLU at 1:52pm

Last year Florida became the first state to pass and fully implement a bill mandating suspicionless drug testing of all applicants for Temporary Assistance for Needy Families (TANF). The law mandated that all applicants pay for the cost of the drug test themselves, and that they be reimbursed if their test came back negative. The law was in effect for a mere four months before the ACLU of Florida filed a lawsuit and a federal court blocked the law, saying it was unconstitutional.

Today the New York Times released the most comprehensive data yet on how the law fared during the short period of time it was in effect. We already knew that the law was a failure; what we didn't know was just *how much* of a failure it was.

In the four months that Florida's law was in place, the state drug tested 4,086 TANF applicants. A mere 108 individuals tested positive. To put it another way, only 2.6 percent of applicants tested positive for illegal drugs — a rate more than three times lower than the 8.13 percent of all Floridians, age 12 and up, estimated by the federal government to use illegal drugs. Now might be a good time to remind folks that in the debate over the bill, Gov. Rick Scott argued that this law was necessary because, he said, welfare recipients used drugs at a higher rate than the general population.

The utter absurdity of this law is magnified when you realize how much it cost the state of Florida to run this program. The data released today shows that Florida spent \$118,140 reimbursing the overwhelming number of Florida TANF applicants — 3,938 to be exact — who tested negative for drugs. That is far more than any money saved by the program, at a net cost to the State of over \$45,000. And that's only part of the cost to the state to run this program. There are also the administrative costs, staff costs, and, of course, the litigation costs. Furthermore, the testing program didn't deter individuals from applying for help — an internal document about TANF caseloads revealed that, at least from July through September, the policy did not lead to fewer cases.

Despite the complete failure of this program to unearth anything other than the fact that there is no overwhelming drug problem amongst welfare applicants, the state of Florida continues to defend this law. And unfortunately, other states have followed Florida's ill-informed lead. Over 25 states introduced welfare drug testing legislation this year. You'd think that the court rulings and high costs might have logically stopped these bills, but they have not. In fact, just this Monday, Georgia Gov. Nathan Deal signed a bill into law that is very similar to Florida's, mandating all TANF applicants in Georgia be drug tested before being eligible to receive benefits.

Texas Drug Testing of Welfare Recipients

Starting off the early filings before the upcoming legislative session, Gov. Rick Perry and Lt. Gov. David Dewhurst announced their support for a bill that would allow drug testing for Temporary Assistance for Needy Families (TANF) and unemployment benefit recipients. We have to ask: What are they smoking?

The governor should certainly discourage illegal drug use, but drug testing welfare recipients is one of the least effective and most expensive ways of doing so. Other states have tried this policy, and it simply does not work.

Texas tried a similar plan before, in a multi-million dollar program to test student athletes for steroids. After 51,000 drug screenings revealed only 21 testing positive, the funding was cut as an inefficient use of resources. Other states have had similar issues with mass drug tests.

Earlier this year, Florida implemented mandatory drug tests for people seeking welfare benefits, and the state saw no direct savings, caught few drug users and had little effect on the number of welfare applications. Over the program's first four months, Florida spent \$45,000 more on drug tests than the screenings saved. And by that point the program was halted due to lawsuits alleging that the state was violating the Fourth Amendment protection against unreasonable search and seizure.

Texas should want none of this.

Beyond the unnecessary costs, mandatory screenings would potentially punish not the drug users themselves, but their children, who are supposed to be the real beneficiaries of TANF payments.

Houston Chronicle

How much does it cost to implement drug testing in TANF programs?

The estimated cost of drug testing TANF applicants and recipients varies by State and proposed law, depending on the proposed number of individuals who would be tested and the range of activities for which costs were estimated. Aggregate cost estimates of proposed welfare drug testing legislation were identified for twelve States (see [Appendix C](#) for details). The estimated costs in these States ranged from \$92,487, for drug testing 20% of recipients and treating 2% of those tested in Louisiana, to \$20 million, for just the testing of all public assistance applicants and recipients in New York. Other estimates include the cost of increasing staff to monitor or administer the tests, as in Maryland and Missouri. Idaho's estimate includes the cost of making programming changes to the State's information system. Florida's law and Alabama's proposal require the applicant or recipient to pay for the up-front costs of the drug test, though both would reimburse those who test negative. Most estimates do not incorporate costs relating to increased substance abuse treatment utilization or to increased child welfare interventions.

Examples of costs used in State cost estimates include:

- **Purchasing the drug tests, including initial and retests**
- **Laboratory fees**
- **Staff time to administer the tests**
- **Staff time to monitor compliance and eligibility**
- **Staff time to deal with increased administrative hearings**
- **Modifying facilities to accommodate the testing**
- **Modifying computer programs to include drug testing in eligibility**
- **Substance abuse treatment**
- **Hiring a contractor to administer the tests**
- **Legal fees if the law is challenged**

None of the State cost estimates identified for this paper showed net savings resulting from proposed drug testing programs, though these are all legislative cost estimates rather than rigorous cost-benefit analyses. Also, none of the State cost estimates identified described anticipated unit costs of drug testing programs. However, an article from a magazine published by The Society for Human Resources Management reported in 2005 that, "testing an applicant or employee ranges from \$25 to \$44 for urinalysis... [while] hair follicle testing costs \$75 to \$150 per test."^[35] News reports regarding the implementation of Florida's new drug testing policy have cited an estimate of \$30 per TANF recipient for the drug tests being required of applicants,^[36] though the State's drug testing pilot program in the early 2000s cost \$90 per test once staff costs and other program costs were included.^[37] Testing costs among the Indian Tribes that currently administer drug tests in their TANF programs ranges from \$15 per client to \$89 per client, with most reporting unit costs in the range of \$30 to \$50.^[38]

Attachment D

Testimony
Department of Human Services
Human Services Committee
Representative Alon Wieland, Chairman
October 4, 2012

Caseload Comparison - Economic Assistance Policy
Carol Cartledge, Director, Economic Assistance Policy

	2005 - 2007 Biennium			2007 - 2009 Biennium			2009 - 2011 Biennium			SFY 2012	
	Actual 2006	Actual 2007	Biennial Average	Actual 2008	Actual 2009	Biennial Average	Actual 2010	Actual 2011	Biennial Average	Actual 2012	
TANF	1993 6625	2,708	2,560	2,634	2,590	2,440	2,515	2,147	1,925	2,036	1,738

The Temporary Assistance for Needy Families (TANF) caseload has decreased over time due to the 2005 Deficit Reduction Act, which identified and required work activities for adults in TANF families. Additional factors attributing to the decreased caseload are the 2009 Pay After Performance policy implementation and the positive economic climate in North Dakota.

LIHEAP	5,737	5,872	5,805	5,732	6,353	6,042	6,265	6,100	6,182	5,269
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The Low Income Heating and Energy Assistance Program (LIHEAP) caseload is affected by weather conditions and fuel prices.

Child Care Assistance	4,060	3,955	4,003	4,054	3,810	3,932	3,780	3,589	3,685	2,526
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The Child Care Assistance caseload has decreased overtime due to the economic climate in North Dakota. Increased household incomes have resulted in ineligibility or lower payments through the Child Care Assistance program.

SNAP	19,214	19,926	19,570	21,572	23,104	22,338	26,686	27,857	27,272	27,439
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The Supplemental Nutrition Assistance Program (SNAP) caseload has increased over time due to the 2006 implementation of simplified reporting, which makes it easier for households to be on the program for longer periods of time. In addition, Federally-required outreach efforts have also raised awareness of the program and increased the number of SNAP cases. The Department launched the online Application for Assistance in August of 2010 and recently launched the online review to make it easier for people to apply for and requalify for the program.

#10

House Human Services Committee
Sixty-Third Legislative Assembly of North Dakota
House Bill No. 1385
February 4, 2013

Good morning, Chairman Weisz and Members of the House Human Services Committee: I am David Boeck, a State employee and lawyer for the Protection & Advocacy Project. The Protection & Advocacy Project is an independent state agency that acts to protect people with disabilities from abuse, neglect, and exploitation, and advocates for the disability-related rights of people with disabilities.

People with disabilities have higher rates of poverty than the rest of the population. Consequently, more people with disabilities rely upon government poverty programs. The Supplemental Nutrition Assistance Program (SNAP) is a program upon which some low-income people with disabilities rely.

People with disabilities who rely on SNAP include, among others, individuals with intellectual disabilities, traumatic brain injuries, dementia, and mental illnesses including paranoia. Many of these individuals rely upon others to manage their finances.

An individual with a disability who receives Supplemental Security Income (SSI) might have a "representative payee" appointed by the Social Security Administration to manage monthly SSI income. Others with disabilities might have guardians or conservators appointed by the courts to manage their finances.

Some guardians, conservators, and representative payees are professionals. Others are family members or friends. Under House Bill 1385, there would apparently be at least two people taking drug tests when an individual with a disability needs someone to manage income and finances.

One regional health care provider would charge forty-five dollars (\$45.00) for one urine test for controlled substances. Many impoverished people would be unable to afford \$45.00 up front to cover this cost. When there is a guardian, conservator, or representative payee, there would be two tests and an impoverished person with a disability would have to pay \$90 for the drug tests in advance. This cost would be prohibitive.

House Bill 1385 is not designed to prevent impoverished persons with disabilities from participating in SNAP. This would be an unwelcome consequence.

Many impoverished persons with disabilities excluded from SNAP would turn to community soup kitchens, food pantries, and churches for some assistance. Despite the vitality of North Dakota's economy, many of these community resources are already facing needs they cannot satisfy.

Another consequence would be the classic dilemma of an impoverished person choosing between medicines and food ... and now drug tests.

House Bill 1385 would also lead to a person homebound by disabilities having to find extraordinary resources to be able to travel to a clinic for a

urine test or having to get clinic personnel to come into her home to collect a urine sample. This would be an additional expense.

Persons in various stages of dementia or with various mental illnesses might be confused, disoriented, aggravated, angry, or otherwise significantly troubled by this requirement for urine tests. This would create unwelcome difficulties for their care providers.

It is important that we fight the drug war effectively. Regrettably, House Bill 1385 would be impractical, prohibitively expensive, and unduly harsh for some individuals with disabilities.

House Bill 1385 does not provide appropriate protection for private health information of some individuals who lawfully take prescription medications that might show up on the drug tests.

The Bill anticipates that problems might arise when parents who failed the drug test have dependent children under age 18. The bill contains a mechanism to protect the children from adverse consequences that might follow when a parent fails a drug test. Despite this concern, the proposed solution is impractical.

When a family buys groceries, all members of the family consume the food. When the SNAP allocation is reduced to exclude the parents, the family buys fewer groceries. This has an impact on each member of the family. It is quite unrealistic to imagine otherwise.

The Bill also addresses the Temporary Assistance for Needy Families (TANF) program. TANF grants are used to pay rent, heating, clothing, laundry, car maintenance and repairs – household expenses. These expenses do not go down when the parents are excluded from the TANF grant. As a practical matter, the children cannot be protected from direct adverse consequences.

There are no provisions on how test results might be used in a criminal proceeding. Several federal courts have found similar provisions in other states to be unconstitutional.

Thank you. Please let me know whether you have questions.

#11

Testimony
House Bill 1385 – Department of Human Services
House Human Services Committee
Representative Weisz, Chairman
February 4, 2013

Chairman Weisz, members of the House Human Services Committee, I am Carol Cartledge, Director of the Economic Assistance Policy Division, for the Department of Human Services (Department). I am here today to provide information and request the committee provide clarification on questions the Department has on House Bill 1385. The Department was not able to prepare a fiscal note as the clarifications needed have impacts on the calculation of the expected increase in expenditures that would result from the enactment of this bill.

Supplemental Nutrition Assistance Program (SNAP)

According to Section 5(b) of the Food and Nutrition Act and Section 273.2(a)(1) of the Code of Federal Regulations, the State agency [the agency that administers SNAP; in North Dakota, the Department is the State agency] cannot, as a condition of eligibility, impose additional application or application processing requirements. Mandatory drug testing would impose an additional requirement and is prohibited by federal SNAP regulations. The Department requests that the committee amend the bill to remove the requirement for drug testing as a condition of eligibility for SNAP applicants to avoid creating a conflict between state and federal requirements for SNAP.

If the Legislative Assembly modifies the lifetime disqualification for felony drug convictions as proposed in HB 1176, however, drug testing along with completion of a rehabilitation program may be used as a condition to receiving SNAP benefits for that individual.

Temporary Assistance for Needy Families (TANF)

TANF provides cash assistance to eligible low-income families that include a child, deprived of support of a parent, who is living with a parent or a caretaker relative. The average number of cases monthly is 1,717. Of the 1,717 cases, 39 percent are "child only" cases. This means grandparents or aunts or uncles are receiving a benefit only for the child or children. The remaining cases include a parent or caretaker who must comply with TANF requirements by participating in the Job Opportunity and Basic Skills (JOBS) program.

Through the JOBS program, the parent or caretaker is assessed for barriers to employment, and an employment plan is developed that provides a work plan for the individual to achieve self-sufficiency. If a plan includes a requirement to receive treatment, such as substance abuse treatment, and the individual does not follow-through with the recommended treatment, the individual is sanctioned. A sanction means the TANF benefit is reduced to the amount needed for the child or children only, and if the individual does not resolve the issue within a month, the entire case is closed.

The TANF benefit for a family of three is \$427 per month. For a household to be eligible for TANF benefits, the household income must be at or below 25 percent of the federal poverty level, which is an annual gross income of \$5,124 for a household of three. Disqualifying the adult in a household of three that is made up of one adult and two children, would result in a benefit for the children of \$195 per month.

Questions on House Bill 1385

As noted earlier, due to outstanding questions on House Bill 1385, a fiscal note was not prepared. Upon clarification of the following questions, the Department will be able to prepare a fiscal note.

1. Laws containing language similar to House Bill 1385 have been susceptible to constitutional challenges. Drug testing as a condition of receipt of economic assistance is generally considered a search under the Fourth Amendment. Attached to my testimony are two documents related to this:
 - a. Congressional Research Services report (January 19, 2012).
 - b. A review conducted by the Department's Legal Advisory Unit on challenges to state laws requiring drug testing as an eligibility requirement for receipt of benefits from economic assistance programs.

The Department proposes the committee consider an amendment for a delayed implementation until the current Fourth Amendment challenges are resolved.

2. House Bill 1385 uses the term 'applicants'. Applicants may or may not be eligible for benefits. If an applicant undergoes drug testing but is otherwise determined to be ineligible, would the Department still be expected to reimburse the applicant the cost of the testing? There is no mechanism in the bill to facilitate this type of reimbursement. Would the committee support an amendment to require testing only for applicants who have been determined to be otherwise eligible for TANF rather than all applicants?

3. The Department needs to know what type of drug panel/test is required (blood, urine, etc.) and for which drugs. The cost of a drug test varies depending on the method of testing and the drugs being tested.
4. The bill requires testing to determine if an applicant is engaged in illegal drug use, but doesn't define what would be considered "illegal drug use". It further states that "an individual who tests positive for controlled substances as a result of a drug test required under this section is ineligible to receive" TANF or SNAP benefits. This does not allow the Department to consider whether the reason an applicant tests positive for a controlled substance is the result of medical treatment.

Concerns

TANF is state supervised and county administered. As a requirement of eligibility, county social service agencies would be required to implement this law by referring the individual to a local clinic if one is available.

Families applying for TANF have low incomes and may not have reliable transportation to travel to a clinic for a drug test. In addition, since the adult applicant is responsible for paying for the drug test up front, it may be cost prohibitive for households to pay for the test.

There are also concerns about the receipt and retention of the drug test results. To assure appropriate chain of evidence, the county would need to receive the drug test results directly from the clinic or lab. There are also federal and state safeguarding rules that require the results to be received and maintained in a secure area and which define who may receive the results and who may have access to the results. The counties

would need to retain the actual drug test results as the Department would expect these files to be reviewed during routine program audits.

Additionally, confidentiality requirements for drug and alcohol treatment records are governed by 42 CFR Part 2, so allowance would have to be made within the program to ensure that any records relating to an applicant's participation in a treatment program are afforded the confidentiality required under 42 CFR Part 2. This would need to include a process for the county to obtain a release of information to receive treatment records and to redisclose them to the Department and to the Office of Administrative Hearings if necessary.

The bill includes SNAP, and as noted previously, requiring drug testing as a condition of initial eligibility for an applicant to receive SNAP benefits is a violation of federal regulations. If the committee chooses not to remove the requirements for drug testing for SNAP applicants, likely federal penalties would increase the fiscal cost estimate. In addition, due to the Fourth Amendment challenges noted above, the costs of litigation challenging the constitutionality of the legislation may need to be considered in developing a fiscal note.

The Department is willing to assist the committee with any recommended amendments for the bill.

This concludes my testimony and I would be happy to answer any questions.

Drug Testing Requirements for TANF and SNAP

Michigan was the first state to pass a law establishing a mandatory drug testing program as a condition to receiving TANF benefits in the late 1990s.

- The federal district court granted a preliminary injunction, finding that the plaintiffs had a strong likelihood of succeeding on the merits of claim that the law violates the Fourth Amendment, which protects against unreasonable searches. *Marchwinski v. Howard*, 113 F.Supp.2d 1134 (E.D. Mich. 2000).
- The 6th Circuit Court of Appeals affirmed the district court when they heard the case *en banc* (the 12 judges were evenly divided).
- The case did not proceed further due to a settlement. Michigan modified the program so that tests would only be conducted when there is a reasonable suspicion that a recipient is using drugs.

Florida passed a law in 2011 requiring drug testing for applicants and recipients.

- The federal district court in Florida granted a preliminary injunction to enjoin enforcement of the law, finding a substantial likelihood of success on the merits. *Lebron v. Wilkins*, 820 F.Supp.2d 1273 (M.D. Fla. 2011).
- Florida appealed to the 11th Circuit Court of Appeals. Oral arguments were heard on November 1, 2012, so the ruling should be within the next few months.

The other states that have passed similar laws in 2011 and 2012 are: Arizona, Missouri, Utah, Georgia, Tennessee, and Oklahoma.

- In Tennessee, blanket testing was originally proposed, but the Tennessee Attorney General issued an opinion, citing both *Marchwinski* and *Lebron*, that the proposed law would be unconstitutional. The law that passed requires a screening process and if the screening indicates a suspicion of drug use, the applicant will be tested.
- In Georgia, the law will not go into effect until final rules are implemented. According to a newspaper article, officials are waiting for the result of the Florida litigation. The article stated that a lawsuit is planned if the law does go into effect.
- Utah's law requires testing only if a questionnaire applicants complete indicates a reasonable likelihood of drug use. If they fail, they can continue receiving benefits if they seek treatment. The applicants tested do not have to pay for the test. The ACLU is not challenging this law, although they are monitoring it.

Conclusion

Laws similar to Florida's law may be susceptible to constitutional challenge. Drug testing as a condition of receipt of economic assistance is generally considered a search under the Fourth Amendment. The reasonableness of searches generally requires individualized suspicion unless there is a showing of special need. The two courts which have ruled on the issue found that the government did not show a special need justifying suspicionless testing. A law which requires testing only if there is reasonable suspicion is more likely to survive a constitutional challenge.



Constitutional Analysis of Suspicionless Drug Testing Requirements for the Receipt of Governmental Benefits

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Prepared for Members and Committees of Congress

Summary

For decades, federal policymakers and state administrators of governmental assistance programs, such as the Temporary Assistance for Needy Families (TANF) block grants, the Supplemental Nutrition Assistance Program (SNAP, formerly Food Stamps), the Section 8 Housing Choice Voucher program, and their precursors, have been concerned about the “moral character” and worthiness of beneficiaries. For example, the Anti-Drug Abuse Act of 1988 made individuals who have three or more convictions for certain drug-related offenses permanently ineligible for various federal benefits. A provision in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 went a step further by explicitly authorizing states to test TANF beneficiaries for illicit drug use and to sanction recipients who test positive. In part prompted by tight state and federal budgets and increased demand for federal and state governmental assistance resulting from precarious economic conditions, some policymakers recently have shown a renewed interest in conditioning the receipt of governmental benefits on passing drug tests. For example, the House of Representatives, on December 13, 2011, passed a provision that would have authorized states to require drug testing as an eligibility requirement for certain unemployment benefits. Additionally, lawmakers in a majority of states reportedly proposed legislation in 2011 that would require drug testing beneficiaries of governmental assistance under certain circumstances.

Federal or state laws that condition the initial or ongoing receipt of governmental benefits on passing drug tests without regard to individualized suspicion of illicit drug use are vulnerable to constitutional challenge. To date, only two state laws requiring suspicionless drug tests as a condition to receiving governmental benefits have sparked litigation, and neither case has been fully litigated on the merits. To date, the U.S. Supreme Court has not rendered an opinion on such a law; however, the Court has issued decisions on drug testing programs in other contexts that have guided the few lower court opinions on the subject.

Constitutional challenges to suspicionless governmental drug testing most often focus on issues of personal privacy and Fourth Amendment protections against “unreasonable searches.” The reasonableness of searches generally requires individualized suspicion, unless the government can show a “special need” warranting a deviation from the norm. However, governmental benefit programs like TANF, SNAP, unemployment compensation, and housing assistance do not naturally evoke special needs grounded in public safety that the Supreme Court has recognized in the past. Thus, if lawmakers wish to pursue the objective of reducing the likelihood of taxpayer funds going to individuals who abuse drugs through drug testing, legislation that only requires individuals to submit to a drug test based on an individualized suspicion of drug use is less likely to run afoul of the Fourth Amendment. Additionally, governmental drug testing procedures that restrict the sharing of test results and that limit the negative consequences of failed tests to the assistance program in question will be on firmer constitutional ground.

Numerous CRS reports focusing on policy issues associated with governmental benefit programs also are available, including CRS Report R40946, *The Temporary Assistance for Needy Families Block Grant: An Introduction*, by Gene Falk; CRS Report R42054, *The Supplemental Nutrition Assistance Program: Categorical Eligibility*, by Gene Falk and Randy Alison Aussenberg; CRS Report RL34591, *Overview of Federal Housing Assistance Programs and Policy*, by Maggie McCarty et al.; and CRS Report RL33362, *Unemployment Insurance: Programs and Benefits*, by Katelin P. Isaacs and Julie M. Whittaker.

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Background

For decades, federal policymakers and state administrators of governmental assistance programs, such as the Temporary Assistance for Needy Families (TANF) block grants,¹ the Supplemental Nutrition Assistance Program (SNAP, formerly Food Stamps),² the Section 8 Housing Choice Voucher program,³ and their precursors have been concerned about the “moral character” and worthiness of beneficiaries.⁴ Beginning in the 1980s, the federal government imposed restrictions on the receipt of certain governmental benefits for individuals convicted of drug-related crimes as one component of the broader “War on Drugs.” For example, the Anti-Drug Abuse Act of 1988⁵ made individuals who have three or more convictions for certain drug-related offenses permanently ineligible for various federal benefits.⁶ A provision in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996⁷ went a step further by explicitly authorizing states to test TANF beneficiaries for illicit drug use and to sanction recipients who test positive.⁸

In part prompted by tight state and federal budgets and increased demand for federal and state governmental assistance resulting from precarious economic conditions, some policymakers recently have shown a renewed interest in conditioning the receipt of governmental benefits on passing drug tests. For example, the House of Representatives, on December 13, 2011, passed a provision that would have authorized states to require drug testing as an eligibility requirement for certain unemployment benefits.⁹ Additionally, lawmakers in a majority of states reportedly proposed legislation in 2011 that would require drug testing beneficiaries of governmental assistance under certain circumstances.¹⁰

¹ For more information on TANF, see CRS Report R40946, *The Temporary Assistance for Needy Families Block Grant: An Introduction*, by Gene Falk.

² For more information on SNAP, see CRS Report R42054, *The Supplemental Nutrition Assistance Program: Categorical Eligibility*, by Gene Falk and Randy Alison Aussenberg.

³ For more information on the Section 8 Housing Choice Voucher and other federal housing assistance programs, see CRS Report RL34591, *Overview of Federal Housing Assistance Programs and Policy*, by Maggie McCarty et al.

⁴ *King v. Smith*, 392 U.S. 319, 320-25 (1967) (discussing various eligibility requirements of the Aid to Families with Dependent Children (AFDC) welfare program and its precursors that attempted to distinguish between the “worthy” poor and those unworthy of assistance) (*held*: an Alabama state regulation that prohibited AFDC assistance to dependent children of a mother who had a sexual relationship with an “able-bodied man” to whom she was not married violated the Social Security Act).

⁵ P.L. 100-690 §5301.

⁶ This provision has since been amended. See 21 U.S.C. §862a.

⁷ P.L. 104-193.

⁸ P.L. 104-193 §902, *codified* at 21 U.S.C. §862b (“Notwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances.”). This provision, in and of itself, does not raise constitutional concerns because it does not directly impose drug testing; however, state drug testing programs that are implemented pursuant to this authority may be vulnerable to constitutional challenge.

⁹ H.R. 3630, the Middle Class Tax Relief and Job Creation Act of 2011, as engrossed in the House, §2127 (stating, in relevant part: “Nothing in this Act or any other provision of Federal law shall be considered to prevent a State from testing an applicant for unemployment compensation for the unlawful use of controlled substances as a condition for receiving such compensation; or denying such compensation to such applicant on the basis of the result of such testing.”). On December 17, 2011, the Senate passed an amended version of H.R. 3630 that did not include the drug testing provision.

¹⁰ A. G. Sulzberger, *States Adding Drug Test as Hurdle for Welfare*, N.Y. Times, October 10, 2011, available at <http://www.nytimes.com/2011/10/11/us/states-adding-drug-test-as-hurdle-for-welfare.html?pagewanted=all> (“Policy makers in three dozen states this year proposed drug testing for people receiving benefits like welfare, unemployment (continued...)”).

Federal or state laws that condition the initial or ongoing receipt of governmental benefits on passing drug tests without regard to individualized suspicion of illicit drug use are vulnerable to constitutional challenge. Constitutional challenges to suspicionless governmental drug testing most often focus on issues of personal privacy and Fourth Amendment protections against “unreasonable searches.” To date, only two state laws requiring suspicionless drug tests as a condition to receiving governmental benefits have sparked litigation, and neither case has been fully litigated on the merits. To date, the U.S. Supreme Court has not rendered an opinion on such a law; however, the Court has issued decisions on drug testing programs in other contexts that have guided the few lower court opinions on the subject. These Supreme Court opinions also likely will shape future judicial decisions on the topic.

To effectively evaluate the constitutionality of laws requiring suspicionless drug tests to receive governmental benefits, this report first provides an overview of the Fourth Amendment. It then reviews five Supreme Court decisions that have evaluated government-administered drug testing programs in other contexts and provides an analysis of the preliminary lower court opinions directly on point. The report concludes with a synthesis of the various factors that likely will be important to a future court’s assessment of the constitutionality of these laws, which also may guide policymaking on the subject.

Fourth Amendment Overview

The Fourth Amendment protects the “right of the people” to be free from “unreasonable searches and seizures” by the government.¹¹ This constitutional stricture applies to all governmental action, federal, state, and local, by its own force or through the Due Process Clause of the Fourteenth Amendment.¹² Governmental conduct generally will be found to constitute a “search” for Fourth Amendment purposes where it infringes “an expectation of privacy that society is prepared to consider reasonable....”¹³ The Supreme Court, on a number of occasions, has held that government-administered drug tests are searches under the Fourth Amendment.¹⁴ Therefore, the constitutionality of a law that requires an individual to pass a drug test before he may receive federal benefits likely will turn on whether the drug test is reasonable under the circumstances.

What a court determines to be reasonable depends on the nature of the search and its underlying governmental purpose. Reasonableness under the Fourth Amendment generally requires some form of individualized suspicion, which frequently takes the form of a warrant that is based on probable cause.¹⁵ An exception to the ordinary individualized suspicion requirement has gradually

(...continued)

assistance, job training, food stamps and public housing.”).

¹¹ U.S. CONST. amend. IV (“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.”).

¹² *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

¹³ *United States v. Jacobsen*, 466 U.S. 109, 113 (1984).

¹⁴ See, e.g., *Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie Cnty. v. Earls*, 536 U.S. 822 (2002); *Chandler v. Miller*, 520 U.S. 305 (1997); *Vernonia Sch. Dist. v. Acton*, 515 U.S. 646 (1995); *Nat’l Treasury Emp. Union v. Von Raab*, 489 U.S. 656 (1989); and *Skinner v. Ry. Labor Exec. Ass’n*, 489 U.S. 602 (1989).

¹⁵ *Von Raab*, 489 U.S. at 665 (“While we have often emphasized, and reiterate today, that a search must be supported, as a general matter, by a warrant issued upon probable cause, our decision in *Railway Labor Executives* reaffirms the (continued...)”).

evolved, however, for cases where a “special need” of the government, not related to criminal law enforcement, is found by the courts to outweigh any “diminished expectation” of privacy invaded by a search.¹⁶ In instances where the government argues that there are special needs, courts determine whether such searches are reasonable under the circumstances by assessing the competing interests of the government conducting the search and the private individuals who are subject to the search.¹⁷

Supreme Court Precedent

The Supreme Court has assessed the constitutionality of governmental drug testing programs in a number of contexts. Five opinions are especially relevant to the question of whether a mandatory, suspicionless drug test for the receipt of governmental benefits would be considered an unreasonable search under the Fourth Amendment. Each of these decisions, *Skinner v. Railway Labor Executives Association*,¹⁸ *National Treasury Employees Union v. Von Raab*,¹⁹ *Vernonia School District v. Acton*,²⁰ *Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls*,²¹ and *Chandler v. Miller*,²² is analyzed in turn.

Skinner focused on Federal Railroad Administration (FRA) regulations that required breath, blood, and urine tests of railroad workers involved in train accidents.²³ The Supreme Court held that because “the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable,” FRA testing for drugs and alcohol was a “search” that had to satisfy constitutional standards of reasonableness.²⁴ However, the “special needs” of railroad safety—for “the traveling public and the employees themselves”—made traditional Fourth Amendment requirements of a warrant and probable cause “impracticable” in this context.²⁵ Nor was “individualized suspicion” deemed by the majority to be a “constitutional floor” where the intrusion on privacy interests is “minimal” and an “important governmental interest” is at stake.²⁶ According to the Court, covered rail employees had “expectations of privacy” as to their own physical condition that were “diminished by reasons of their participation in an industry that is regulated pervasively to ensure safety....”²⁷ In these circumstances, the majority held, it was

(...continued)

longstanding principle that neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance.” (internal citations omitted); *Chandler*, 520 U.S. at 313 (“To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing.”).

¹⁶ *Chandler*, 520 U.S. at 313-14.

¹⁷ *Id.* at 314 (“courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties.”).

¹⁸ 489 U.S. 602 (1989).

¹⁹ 489 U.S. 656 (1989).

²⁰ 515 U.S. 646 (1995).

²¹ 536 U.S. 822 (2002).

²² 520 U.S. 305 (1997).

²³ *Skinner*, 489 U.S. at 606.

²⁴ *Id.* at 617.

²⁵ *Id.* at 621, 631.

²⁶ *Id.* at 624.

²⁷ *Id.* at 627.

reasonable to conduct the tests, even in the absence of a warrant or reasonable suspicion that any employee may be impaired.²⁸

In the *Von Raab* decision, handed down on the same day as *Skinner*, the Court upheld drug testing of U.S. Customs Service personnel who sought transfer or promotion to certain “sensitive” positions, namely those involving drug interdiction or carrying firearms, without a requirement of reasonable individualized suspicion.²⁹ A drug test was only administered when an employee was conditionally approved for a transfer or promotion to a sensitive position and only with advanced notice by the Customs Service.³⁰ According to the Court,

the Government’s compelling interests in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation’s borders or the life of the citizenry outweigh the privacy interests of those who seek promotions to those positions, who enjoy a diminished expectation of privacy by virtue of the special physical and ethical demands of those positions.³¹

Neither the absence of “any perceived drug problem among Customs employees,” nor the possibility that “drug users can avoid detection with ease by temporary abstinence,” would defeat the program because “the possible harm against which the Government seeks to guard is substantial [and] the need to prevent its occurrence furnishes an ample justification for reasonable searches calculated to advance the Government’s goal.”³²

In *Vernonia*, the Court first considered the constitutionality of student drug testing in the public schools. At issue was a school district program for random drug testing of high school student athletes, which had been implemented in response to a perceived increase in student drug activity. All student athletes and their parents had to sign forms consenting to testing, which occurred at the season’s beginning and randomly thereafter for the season’s duration. Students who tested positive were given the option of either participating in a drug assistance program or being suspended from athletics for the current and following seasons.³³

A 6 to 3 majority of the Court upheld the program against Fourth Amendment challenge. Central to the majority’s rationale was the “custodial and tutelary” relationship that is created when children are “committed to the temporary custody of the State as schoolmaster.”³⁴ This relationship, in effect, “permit[s] a degree of supervision and control that could not be exercised over free adults.”³⁵ Students had diminished expectations of privacy by virtue of routinely required medical examinations, a factor compounded in the case of student athletes by insurance requirements, minimum academic standards, and the “communal undress” and general lack of

²⁸ *Id.* at 633.

²⁹ *Von Raab*, 489 U.S. at 679.

³⁰ *Id.* at 672.

³¹ *Id.* at 679.

³² *Id.* at 673-75.

³³ *Vernonia*, 515 U.S. at 649-50.

³⁴ *Id.* at 654.

³⁵ *Id.* at 654-56.

privacy in sports' locker rooms.³⁶ Because "school sports are not for the bashful," student athletes were found to have a lower expectation of privacy than other students.³⁷

Balanced against these diminished privacy interests were the nature of the intrusion and importance of the governmental interests at stake. First, the school district had mitigated actual intrusion by implementing urine collection procedures that simulated conditions "nearly identical to those typically encountered in public restrooms"; by analyzing the urine sample only for presence of illegal drugs—not for other medical information, such as the prevalence of disease or pregnancy; and by insuring that positive test results were not provided to law enforcement officials.³⁸ School officials had an interest in deterring student drug use as part of their "special responsibility of care and direction" toward students.³⁹ That interest was magnified in *Vernonia* by judicial findings that, prior to implementation of the program, "a large segment of the student body, particularly those involved in interscholastic athletics, was in a state of rebellion ... fueled by alcohol and drug abuse...."⁴⁰

Consequently, the Court approved the school district's drug testing policy, reasoning that the Fourth Amendment only requires that government officials adopt reasonable policies, not the least invasive ones available. The majority in *Vernonia*, however, cautioned "against the assumption that suspicionless drug-testing will readily pass muster in other constitutional contexts."⁴¹

Earls concerned a Tecumseh Public School District policy that required suspicionless drug testing of students wishing to participate "in any extracurricular activity."⁴² Such activities included Future Farmers of America, Future Homemakers of America, academic teams, band, chorus, cheerleading, and athletics. Any student who refused to submit to random testing for illegal drugs was barred from all such activities, but was not otherwise subject to penalty or academic sanction. Lindsay Earls challenged the district's policy "as a condition" to her membership in the high school's show choir, marching band, and academic team.⁴³

By a 5 to 4 vote, the Court held that the Tecumseh school district's drug testing program was a "reasonable means" of preventing and deterring student drug use and did not violate the Fourth Amendment. In its role as "guardian and tutor," the majority reasoned, the state has responsibility for the discipline, health, and safety of students whose privacy interests are correspondingly limited and subject to "greater control than those for adults."⁴⁴ Moreover, students who participate in extracurricular activities "have a limited expectation of privacy" as they participate in the activities and clubs on a voluntary basis, subject themselves to other intrusions of privacy, and meet official rules for participation.⁴⁵ The fact that student athletes in the *Vernonia* case were regularly subjected to physical exams and communal undress was not deemed "essential" to the

³⁶ *Id.* at 657.

³⁷ *Id.*

³⁸ *Id.* at 658.

³⁹ *Id.* at 662.

⁴⁰ *Id.* at 662-63.

⁴¹ *Id.* at 664-65.

⁴² *Earls*, 536 U.S. at 826.

⁴³ *Id.* at 826-27. The plaintiff did not protest the policy as applied to student athletics.

⁴⁴ *Id.* at 830-31.

⁴⁵ *Id.* at 831-32.

outcome there.⁴⁶ Instead, that decision “depended primarily upon the school’s custodial responsibility and authority,” which was equally applicable to athletic and nonathletic activities.⁴⁷

The testing procedure itself, involving collection of urine samples, chain of custody, and confidentiality of results, was found to be “minimally intrusive” and “virtually identical” to that approved by the Court in *Vernonia*.⁴⁸ In particular, the opinion notes test results were kept in separate confidential files only available to school employees with a “need to know,” were not disclosed to law enforcement authorities, and carried no disciplinary or academic consequences other than limiting extracurricular participation.⁴⁹ “Given the minimally intrusive nature of the sample collection and the limited uses to which the test results are put, we conclude that the invasion of students’ privacy is not significant.”⁵⁰

The majority concluded that neither “individualized suspicion” nor a “demonstrated problem of drug abuse” was a necessary predicate for a student drug testing program, and there is no “threshold level” of drug use that must be satisfied.⁵¹ “Finally, we find that testing students who participate in extracurricular activities is a reasonably effective means of addressing the School District’s legitimate concerns in preventing, deterring, and detecting drug use.”⁵²

Conversely, the Court in *Chandler* struck down a 1990 Georgia statute requiring candidates for governor, lieutenant governor, attorney general, the state judiciary and legislature, and certain other elective offices to file a certification that they have tested negatively for illegal drug use.⁵³ The majority opinion noted several factors distinguishing the Georgia law from drug testing requirements upheld in earlier cases. First, there was no “fear or suspicion” of generalized illicit drug use by state elected officials in the law’s background that might pose a “concrete danger demanding departure from the Fourth Amendment’s main rule.”⁵⁴ The Court noted that, while not a necessary constitutional prerequisite, evidence of historical drug abuse by the group targeted for testing might “shore up an assertion of special need for a suspicionless general search program.”⁵⁵ Secondly, the law did not serve as a “credible means” to detect or deter drug abuse by public officials.⁵⁶ Since the timing of the test was largely controlled by the candidate rather than the state, legal compliance could be achieved by a mere temporary abstinence.⁵⁷ Another “telling difference” between the Georgia case and earlier rulings stemmed from the “relentless scrutiny” to which candidates for public office are subjected, as compared to persons working in less exposed work environments.⁵⁸ Any drug abuse by public officials is far more likely to be detected

⁴⁶ *Id.* at 831.

⁴⁷ *Id.*

⁴⁸ *Id.* at 832-34.

⁴⁹ *Id.* at 833.

⁵⁰ *Id.* at 832-34.

⁵¹ *Id.* at 835-37.

⁵² *Id.* at 837.

⁵³ *Chandler*, 520 U.S. at 322.

⁵⁴ *Id.* at 318-19.

⁵⁵ *Id.* at 319.

⁵⁶ *Id.*

⁵⁷ *Id.* at 319-20.

⁵⁸ *Id.* at 321.

in the ordinary course of events, making suspicionless testing less necessary than in the case of safety-sensitive positions beyond the public view. The Court concluded:

We reiterate, too, that where the risk to public safety is substantial and real, blanket suspicionless searches calibrated to the risk may rank as “reasonable”—for example, searches now routine at airports and at entrances to courts and other official buildings. But where, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged.⁵⁹

Synthesis of Supreme Court Precedent

Skinner and *Von Raab* indicate that “compelling” governmental interests in public safety or national security may, in appropriate circumstances, override constitutional objections to testing procedures by employees whose privacy expectations are diminished by the nature of their duties or the workplace scrutiny to which they are otherwise subject. The *Earls* and *Vernonia* rulings show that minors have diminished privacy expectations relative to adults, especially when drug testing is implemented by individuals in a guardian or tutor capacity. Although not dispositive, *Earls*, *Vernonia*, and *Chandler* also illustrate that drug testing programs imposed on a subset of the population that has a “demonstrated problem of drug abuse” may tilt the balancing test in the government’s favor, especially if the testing program is designed to effectively address the problem. The extent to which drug test results are shared or kept confidential also may be relevant to a court’s review of the competing public and private interests. Drug testing programs that require results to be kept confidential to all but a small group of non-law enforcement officials and that only minimally impact an individual’s life are more likely to be considered reasonable. On the other hand, programs that allow drug test results to be shared, especially with law enforcement, or that have the potential to negatively impact multiple or significant aspects of an individual’s life, are less likely to be considered reasonable.

Preliminary Lower Court Opinions on the Michigan and Florida Laws

Two state laws that established mandatory, suspicionless drug testing programs as a condition to receiving TANF benefits have been challenged on Fourth Amendment grounds. The federal district court ruling in *Marchwinski v. Howard*,⁶⁰ which was affirmed by the U.S. Court of Appeals for the Sixth Circuit (Sixth Circuit) as a result of an evenly divided *en banc* panel,⁶¹ involved a Michigan program that began in the late 1990s. The other ruling, *Lebron v. Wilkens*,⁶² is part of ongoing litigation regarding a program instituted pursuant to Florida law. Both decisions were delivered at the preliminary stages of litigation and were not based on a complete

⁵⁹ *Id.* at 323 (internal citations omitted).

⁶⁰ *Marchwinski v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000).

⁶¹ *Marchwinski v. Howard*, 60 Fed. App’x 601 (6th Cir. 2003) (affirming the district court decision in accordance with *Stupak-Thrall v. United States*, 89 F.3d 1269 (6th Cir. 1996), because a 12-member *en banc* panel of appellate judges was evenly split, with six judges wanting to affirm and six judges wanting to reverse the district court’s opinion).

⁶² *Lebron v. Wilkens*, Case No. 6:11-cv-01473-Orl-35DAB, Order Granting Motion for Preliminary Injunction (M.D. Fla. 2011), available at <http://www.aclufl.org/pdfs/2011-10-24-ACLUtanfOrder.pdf> (hereinafter, *Lebron*, Preliminary Injunction).

evidentiary record. However, future courts that review similar drug testing programs may look to these decisions for guidance, and they may be useful for lawmakers who consider crafting legislation that requires individuals to pass drug tests in order to qualify for governmental benefits.

The Challenged Michigan Law—*Marchwinski v. Howard*

Marchwinski concerned Michigan Compiled Laws Section 400.57l, which imposed a pilot drug testing component to Michigan's Family Independence Program (FIP). Under the FIP program, individuals would have to submit a urine sample for testing as part of the TANF application process. The applications of those who refused to submit to the test would be denied. Individuals who tested positive for illicit drugs would have to participate in a substance abuse assessment and, potentially, would have to comply with a substance abuse treatment plan. Those who failed to comply with a treatment plan and could not show good cause would have their applications denied. Additionally, individuals who were already receiving TANF benefits would be subject to random drug tests. Active participants who tested positive for drug use or failed to adhere to the random drug testing requirements would have their benefits reduced and possibly terminated.⁶³

Several individuals who would be subject to the FIP drug testing program filed suit, seeking a preliminary injunction that would prevent the implementation of the program because it would violate their Fourth Amendment rights against unreasonable searches. The court granted the preliminary injunction, which, among other factors, required a finding that the plaintiffs would likely succeed on the merits of their Fourth Amendment claims.⁶⁴

The *Marchwinski* court stated that “the *Chandler* Court made clear that suspicionless drug testing is unconstitutional if there is no showing of a special need, and that the special need must be grounded in public safety.”⁶⁵ According to the court, the state’s “primary justification ... for instituting mandatory drug testing is to move more families from welfare to work.”⁶⁶ This worthy legislative objective, however, is not “a special need grounded in public safety” that would justify a suspicionless search, in the view of the court.⁶⁷ The court also was unmoved by the state’s argument that the drug testing served a special need of reducing child abuse and neglect. Upon an examination of the programs’ express legislative purposes, the court found that neither TANF nor FIP was designed specifically to address child abuse and neglect. Therefore, “... the State’s financial assistance to parents for the care of their minor children through the FIP cannot be used to regulate the parents in a manner that erodes their privacy rights in order to further goals that are unrelated to the FIP.”⁶⁸ Further, allowing the state to conduct suspicionless drug tests in this context would provide a justification for conducting suspicionless drug tests of all parents of children who receive governmental benefits of any kind, such as student loans and a public education, which “would set a dangerous precedent.”⁶⁹ Thus, the court concluded that the

⁶³ *Marchwinski*, 113 F. Supp.2d at 1136-37.

⁶⁴ *Id.* at 1137. Other factors that the court weighed were “the probability that granting the injunction will cause substantial harm to others; and [] whether the public interest is advanced by the issuance of the injunction.” *Id.*

⁶⁵ *Id.* at 1143.

⁶⁶ *Id.* at 1140.

⁶⁷ *Id.*

⁶⁸ *Id.* at 1141-42.

⁶⁹ *Id.* at 1142.

“Plaintiffs have established a strong likelihood of succeeding on the merits of their Fourth Amendment claim.”⁷⁰ The case did not progress because the FIP administrators, as part of a settlement with the American Civil Liberties Union (ACLU), which represented the plaintiff, agreed to modify the program so that tests would be conducted only when “there is a reasonable suspicion that [a] recipient is using drugs.”⁷¹

The Challenged Florida Law—*Lebron v. Wilkens*

The *Lebron* case involves Florida Statute Section 414.0652, enacted on May 31, 2011, which requires all new TANF applicants to submit to a drug test and all current beneficiaries to be subject to random drug testing as a condition to receiving benefits.⁷² The up-front cost of the drug test must be born by the applicant/recipient; however, individuals whose results are negative for illicit drugs will be reimbursed for the cost of the test using TANF funds. Although the statute does not require it, individuals must disclose information about all prescription and over-the-counter medications they use to avoid false-positive results for illicit drugs. Individuals who test positive are barred from receiving benefits for one year unless they complete a substance abuse treatment class and pass another drug test, at which point they may regain eligibility in six months. Applicants must pay for both the treatment programs and the additional drug tests, and those costs will not be reimbursed by the state.⁷³ However, children of an applicant who failed a drug test may receive TANF benefits through another adult, called a “protective payee,” if that adult passes a drug test and is otherwise approved by Florida’s Department of Children and Families (DCF). The results of positive drug tests are shared with the Florida Abuse Hotline, which triggers a referral to the Florida Safe Families Network database. Information in the Florida Safe Families Network database is available to law enforcement officials. Additionally, information provided to the Florida Abuse Hotline may be disclosed to law enforcement officials and to state attorneys who work on child abuse cases.⁷⁴

An applicant, who met all eligibility requirements for TANF benefits except that he refused to submit to a drug test, filed a motion with a federal district court seeking a preliminary injunction of the enforcement of the drug testing requirements of the Florida law because it violates his Fourth Amendment protections against unreasonable searches.⁷⁵ The court granted the motion until the matter can be fully litigated, finding that the plaintiff “has a substantial likelihood of success on the merits” of his Fourth Amendment claims.⁷⁶

The court, citing *Skinner*, *Von Raab*, *Vernonia*, and *Earls*, found that the drug test represents a Fourth Amendment search due to “the intrusion into a highly personal and private bodily function” necessary for the urinalysis, the fact that private information such as prescription drug

⁷⁰ *Id.* at 1143.

⁷¹ See *Settlement Reached In Lawsuit Over Mandatory Drug Testing of Welfare Recipients*, Am. Civil Liberties Union Press Release, December 18, 2003, available at <http://www.aclumich.org/issues/search-and-seizure/2003-12/1044>.

⁷² *Lebron*, Preliminary Injunction at 9-10.

⁷³ *Id.* at 10.

⁷⁴ *Id.* at 10-11.

⁷⁵ *Id.* at 2.

⁷⁶ *Id.* at 34.

use could be divulged as part of the test, and that the test results could be made available to law enforcement and other non-medical third parties.⁷⁷

The court also held that the state had failed to show a valid “special need” for testing TANF recipients justifying a deviation from the Fourth Amendment’s traditional requirement of individualized suspicion. The state argued that four different interests served as special needs:

(1) ensuring that TANF funds are used for their dedicated purpose, and not diverted to drug use; (2) protecting children by “ensuring that its funds are not used to visit an ‘evil’ upon the children’s homes and families;” (3) ensuring that funds are not used in a manner that detracts from the goal of getting beneficiaries back to employment; (4) ensuring that the government does not fund the “public health risk” posed by the crime associated with the “drug epidemic.”⁷⁸

The only evidence submitted in the record that the court considered “competent ... on this issue” was results from a pilot TANF drug testing program, called the Demonstration Project, that was commissioned by the state in the late 1990s, and the preliminary results from the first month of testing under the Section 414.0652 program.⁷⁹ According to the court, not only did this evidence not support the proffered special needs, but it also undermined them.⁸⁰

The Demonstration Project was mandated by a Florida law enacted in 1998. It required Florida’s DCF to conduct an empirical study to determine if “individuals who apply for temporary cash assistance or services under the state’s welfare program are likely to abuse drugs,” and if “such abuse affects employment and earnings and use of social service benefits.”⁸¹ Under the law, only those TANF applicants for which the DCF had a “reasonable cause to believe” used illegal drugs were to be drug tested.⁸² To implement the program, DCF utilized a written test to screen 6,462 TANF applicants for potential drug use. Based on this screening, 1,447 were subjected to a drug test. Of the 1,447 individuals tested, 335 tested positive for illegal drugs. This represented 5.1% of the 6,462 applicants who were screened.⁸³

Regarding the first goal of study, as to whether or not the TANF applicants are likely to abuse drugs, the study noted that the 5.1% positive rate was lower than the rate found in a number of national welfare recipient drug studies. The court also noted that it was lower than the 8.13% estimated rate of drug use by Floridians, as a whole.⁸⁴ The study also did not find significant correlations between drug users and non-users on employment-related factors. The DCF report explained:

⁷⁷ *Id.* at 14-18.

⁷⁸ *Id.* at 23 (quoting the state’s response to the plaintiff’s motions, docket no. 19).

⁷⁹ The state offered three additional studies as evidence that were disregarded by the court because they were outdated and not based on the specific population relevant to the case. *Id.* at 24-25.

⁸⁰ *Id.* at 34 (“Florida has already conducted its experiment. It commissioned a Demonstration Project that proceeded unchallenged, and it was based on suspicion of drug use. Through this effort, Florida gathered evidence on the scope of this problem and the efficacy of the proposed solution. The results debunked the assumptions of the State, and likely many laypersons, regarding TANF applicants and drug use. The State nevertheless enacted Section 414.0652, without any concrete evidence of a special need to do so—at least not that has been proffered on this record.”).

⁸¹ *Lebron*, Preliminary Injunction at 4.

⁸² *Id.* at 4 (citing Fla. Stat. §414.70(1) (1998) (repealed 2004)).

⁸³ *Id.* at 4-5.

⁸⁴ *Id.* at 5-6.

First, [the findings] emphasize the difficulty of determining the extent of drug use among welfare beneficiaries. Any test utilized for this purpose is likely to provide, at best, an estimate of these numbers. Such estimates are suitable only for planning purposes and not for sanctioning.

Secondly, the findings suggest that states may not need to test for drug use among welfare beneficiaries. Evidence from the Florida demonstration project showed very little difference between drug users and non-users on a variety of dimensions. Users were employed at about the same rate as were non-users, earned approximately the same amount of money as those who were drug free and did not require substantially different levels of governmental assistance. If there are no behavioral differences between drug users and non-users and if drug users do not require the expenditure of additional public funds, then policymakers are free to concentrate on other elements of welfare policy and to avoid divisive, philosophy-laden debates.⁸⁵

Drug testing pursuant to Florida Statute Section 414.0652 began in July 2011.⁸⁶ According to the preliminary results of the first month of testing that were presented to the court, approximately 2% of TANF applicants tested positive for illicit drugs. An additional 7.6% of applicants refused to submit to testing, but the court pointed out that

... it is difficult to draw any conclusions concerning the extent of drug use or the deterrent effect of the statute from this fact because declining to take the drug test can be attributed to a number of factors in addition to drug use, including an inability to pay for the testing, a lack of laboratories near the residence of an applicant, inability to secure transportation to a laboratory or, as in the case at bar, a refusal to accede to what an applicant considers to be an unreasonable condition for receiving benefits.⁸⁷

Thus, the state could only demonstrate that between 2% and 5.1% of TANF applicants used illegal drugs.⁸⁸

According to the court, both the findings of the Demonstration Project and the preliminary results from the Section 414.0652 testing undercut each of the four special needs proffered by the state.⁸⁹ The evidence provided to the court suggests that the rate of illicit drug use by TANF applicants is lower than that of the general public and that there were no significant differences between drug-using applicants and drug-free applicants pertaining to employment, income, and level of governmental support.⁹⁰ Additionally, the state was unable to show that the drug testing would provide net cost savings for the TANF program due to the reimbursements for negative drug tests and the protective payee provision.⁹¹

⁸⁵ *Id.* at 7.

⁸⁶ *Id.* at 8.

⁸⁷ *Id.* at 12.

⁸⁸ *Id.* at 12-13.

⁸⁹ *Id.* at 34.

⁹⁰ *Id.* at 31-32.

⁹¹ *Id.* at 33.

In the absence of evidence in the record to justify any of the special needs asserted by the state,⁹² the “Plaintiff has shown a substantial likelihood of success on the merits of [his Fourth Amendment claims].”⁹³

Implications for Future Federal or State Legislation

Based on the case law analyzed above, state or federal laws that require drug tests as a condition of receiving governmental benefits without regard to an individualized suspicion of illicit drug use may be susceptible to constitutional challenge. Drug tests historically have been considered searches for the purposes of the Fourth Amendment. The reasonableness of searches generally requires individualized suspicion, unless the government can show a special need warranting a deviation from the norm. However, governmental benefit programs like TANF, SNAP, unemployment compensation, and housing assistance do not naturally evoke the special needs that the Supreme Court has recognized in the past.

The implementation of governmental assistance programs and the receipt of their benefits do not raise similar public safety concerns as those at issue in *Skinner* and *Von Raab*. In implementing these programs, the government also does not clearly act as tutor or guardian for minors, as the Court considered important in *Earls* and *Vernonia*. Finally, the evidence, at least thus far, in *Lebron* has failed to show a pervasive drug problem in the subset of the population subjected to suspicionless testing that strengthened the government’s interests in *Earls* and *Vernonia*. Thus, if lawmakers wish to pursue the objective of reducing the likelihood of taxpayer funds going to individuals who abuse drugs through drug testing, legislation that only requires individuals to submit to a drug test based on an individualized suspicion of drug use is less likely to run afoul of the Fourth Amendment.⁹⁴ Although it was never challenged in the courts, the drug testing component of Florida’s Demonstration Project raised fewer constitutional concerns, in part, because individuals were only tested after administrators determined there was reason to believe the individual abused drugs based on a minimally intrusive written screening.⁹⁵

Additionally, the way drug testing programs are implemented can affect a court’s constitutional analysis of the program. For instance, the fact that Florida’s Section 414.0652 program requires positive drug test results to be shared with government officials outside of the TANF program, such that the information ultimately could be made available to law enforcement officials,

⁹² In dicta, the court seemed to suggest that the third asserted special need, that is, transitioning TANF beneficiaries to gainful employment, may not have qualified as a special need, but did not have to reach that conclusion because the state failed to offer evidence to support the contention. *Id.* at 28-29 (“Even if this interest qualified as a special need, see *contra Marchwinski*, 113 F. Supp. at 1140, the evidence does not support its application.”).

⁹³ *Lebron* Preliminary Injunction at 34.

⁹⁴ But see *Earls*, 536 U.S. at 837 (“In this context, the Fourth Amendment does not require a finding of individualized suspicion, and we decline to impose such a requirement on schools attempting to prevent and detect drug use by students. Moreover, we question whether testing based on individualized suspicion in fact would be less intrusive. Such a regime would place an additional burden on public school teachers who are already tasked with the difficult job of maintaining order and discipline. A program of individualized suspicion might unfairly target members of unpopular groups. The fear of lawsuits resulting from such targeted searches may chill enforcement of the program, rendering it ineffective in combating drug use.”) (internal citations omitted); *Vernonia*, 515 U.S. at 663-664. This dicta seems to be limited to the context of drug testing minors in public schools.

⁹⁵ It should be noted that, while the Demonstration Project may have raised few constitutional concerns, the empirical study of the project suggested that it may not have served its legislative objectives.

increases the level of intrusion into the privacy interests of TANF applicants more than if the results were kept confidential to all but the administrators of the TANF program. As a result, applicants who fail drug tests under the Florida program also could be subject to criminal drug investigations or investigations of child abuse, in addition to losing their TANF benefits. In contrast, the testing programs that complied with the Fourth Amendment at issue in *Von Raab*, *Earls*, and *Vernonia* limited the number of people who had access to the test results, prohibited the results from being passed to law enforcement officials, and restricted the negative consequences of failing a drug test to the specific activities the testing was designed to address (e.g., school extracurricular activities). Although they may not have been determinative, these factors reduced the privacy intrusion of the plaintiffs and seem to have played a role in the Court's balancing test evaluation. Therefore, governmental drug testing procedures that restrict the sharing of test results and that limit the negative consequences of failed tests to the assistance program in question will be on firmer constitutional ground.

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#12

Schock, Sidney <SchockS@casscountynd.gov> wrote:

Sidney has worked at Cass County for 31 years in the county's eligibility unit. Her are his observation of HB 1385:

Stopped in to share some observations regarding the HB proposing mandatory drug testing for TANF/FS applicants.

1) a longitudinal study conducted by DHS purportedly found that almost 60% of current TANF caretakers experienced Foster Care placement in their youth. If any believe that driving families deeper into poverty by concentrating upon its presumed effects without addressing the cause is a fool's, fool. Children will suffer at a greater rate than they already do, and the circle will, alas, still be unbroken.

2) this county (Cass County) was once found to be administering one of the 10 best TANF offices in the nation. Such was the view of Mary Nakashian – one-time head of the Department of Welfare in the city of New York [during the term of Mayor Dinkus]) during her two visits under the auspices of ACF's "Peer to Peer" program.

At the heart was our coordinated approach to money, jobs, and mental health / substance abuse programs; this viz a viz on-site Mental Health practitioner to whom were referred TANF caretakers who evidenced [by observation based on an objective 'observational check list'] Substance Abuse, and whose conclusions were made a mandatory part of every

Employability Plan; one which required the parent's adherence to the 'professional recommendations' and defined whether they were in compliance with that work program.

What we found was, in the main, Caretaker's evidencing Dual Diagnosis. Mental Illness combined with Substance Abuse in a parent is lethal to the youth, and barring families from social programs that include an assessment component and mandate adherence to a holistic treatment plan will do more to exacerbate the very problems some [I believe] erroneously feel rife within the TANF population.

If we care about our young; if we feel we know what 'good for them', then let us offer a setting that allows the assessment of the issues that some feel so prevalent among TANF families, and referral to professional

treatment that is so necessary. Let us help those who seek help and take away the excuses of the unwilling.

Failing that, we will simply accelerate misery among youth and insure that the untreated turn to even more vile means to cling to life for themselves and their children.

Substance Abuse has a cause, and 'treating' only the effect will solve NO PROBLEM – NONE

Unfortunately, we no longer have a means to professionally assess those who suffer those maladies. Budget cuts [which long ago required the Mental Health practitioner to abandon her 'post' here at the county] have increased to the point of Regional Human Service agencies imposing a moratorium on new admissions.

So we're back to past, trying to treat the effect w/out offering help for those suffering from the cause.

I don't know if this is any help to you – but it's where I come from. Anecdotal observation makes poor policy, and reducing the TANF population (and their meager payment) is not the right step toward anything good. We now serve c. 1600 families in TANF in ND, paying a basic grant \$5 less than we did in 1995! My god, nobody's in it for the money; not with a work program 10 times more vigorous than any that's existed, in any PA program, during the last 31 years (my tenure).

These people are the walking wounded; the poorest of the poor; the least educated, most ill-equipped, and greatest oppressed by their own youth and their own horrible experiences [witnessing and being the object of Domestic Violence is the most frequent reason for children being removed from their home and placed into Foster Care]. We'll only increase the costs of care by exchanging one Welfare Program (TANF) for another (Foster Care). [By the way, a monthly Foster Care payment for 6 year old is \$797.80 / month; for a mom and 1 child; \$333].

#1

From: Phillip Longie [mailto:phillip_longie@littlehoop.edu]
Sent: Friday, February 08, 2013 1:45 PM
To: 'Dennis Johnson'
Cc: 'Rhonda R. Allery'; 'Cynthia Lindquist'; 'Erica Cavanaugh'; 'Leander McDonald'; 'carla.carmona@littlehoop.edu'
Subject: Next Steps

Hello Dennis:

It has come to my attention that you have been talking about our 'Next Steps' program as an example for drug testing for the TANF and food stamp programs being considered in your bill #1385 as a means of addressing drug use by some TANF recipients.

I have not read your Bill #1385 but I did hear you talk about it on radio/youtube, hosted by Dale Wetzel, and I have to say that I disagree with what you are proposing not to mention that I take offence with you using our "Next Steps" program as an example, without our consent.

I have researched our program's early records and what you are quoting, is from a flier that we used in our recruitment effort, to provide Qualified Service Provider training to TANF recipients and low income individuals. These fliers were used in January of 2011 for the training in February, 2011. This is the only time that statement was used, we have a ZERO tolerance policy and only test when required by the Nursing Profession that we are working with at the time.

The reason for the statement on drug testing was that we were training individuals who were going to take care of our elders here at Spirit Lake and the surrounding non-native area and we did not want individuals who may be using drugs as they were being trained to work with elders in their own homes so that the elders would not have to go to some nursing home somewhere, and these QSPs would have access to the elders medication in some cases.

So in the future I and Cankdeska Cikana Community College would appreciate you not using us as an example, unless you tell the whole story.

Respectfully,

Phillip "Skip" Longie
"Next Steps"
Program Director

File:

Proposed Amendments to HB 1385

Page 1 Line 3 overstrike "and the supplemental nutrition assistance"

Page 1 Line 4 overstrike " program"

Page 1 Line 10 overstrike "applicant" replace with "eligible recipients"

Page 1 Line 11 overstrike "and every applicant for the supplemental nutrition assistance"

Page 1 Line 12 overstrike " program"

Page 1 Line 12 overstrike "applicant" replace with "eligible recipients"

Page 1 Line 13 after "substance" insert "when a reasonable suspicion exists"

Page 1 Line 17 overstrike "or supplemental nutrition assistance"

Page 2 Line 3 overstrike "or"

Page 2 Line 4 overstrike "supplemental nutrition assistance program"

Page 2 Line 7 overstrike "The individual must be advised that the"

Page 2 Line 8 overstrike "required drug testing may be avoided if the individual does not apply for"

Page 2 Line 9 overstrike " temporary assistance for needy families program or supplemental nutrition"

Page 2 Line 10 overstrike " assistance program benefits."

Page 2 Line 21 overstrike "or supplemental"

Page 2 Line 22 overstrike "nutrition assistance program"

Page 2 Line 29 add "g. Comply with the confidentiality requirements for substance abuse treatment records as governed by 42 CFR Part 2." "h. Require a release of information form be signed by the eligible recipient for the temporary assistance for needy families program at the time of application, which would allow the county to receive treatment records and disclose that information to the Human Services Department and to the Office of Administrative Hearing when necessary."

Page 2 Line 30 overstrike "or supplemental nutrition assistance program"

Page 3 Line 4 remove "or"

Page 3 Line 4 remove "supplemental nutrition assistance program"

Page 3 Line 8 remove "or supplemental nutrition assistance program"

13.0543.01000

Sixty-third
Legislative Assembly
of North Dakota

Introduced by
Representatives D. Johnson, Brandenburg, Hofstad, N. Johnson, Kempenich, Pollert
Senators Campbell, Larsen, Sitte

A BILL for an Act create and enact a new section to chapter 50-06 and a new subdivision to subsection 1 of section 50-09-29 of the North Dakota Century Code, relating to drug testing for the temporary assistance for needy families program and the supplemental nutrition assistance program.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 50-06 of the North Dakota Century Code is created and enacted as follows:

Screening for controlled substances - Eligibility for temporary assistance for needy families and supplemental nutrition assistance programs.

1. The department shall require every applicant eligible recipient for the temporary assistance for needy families program and every applicant for the supplemental nutrition assistance program to submit to a drug test to determine if the applicant eligible recipient is engaged in the illegal use of a controlled substance when a reasonable suspicion exists. The cost of the drug testing is the responsibility of the individual tested.

2. An individual who tests positive for controlled substances as a result of a drug test required under this section is ineligible to receive temporary assistance for needy families program or supplemental nutrition assistance program benefits for one year after the date of the positive drug test unless the individual meets the requirements of subsection 4. An individual who tests positive in a second drug test is ineligible to receive temporary assistance for needy families program or supplemental nutrition assistance program benefits for three years after the date of the second positive drug test.

3. The department shall:

- a. Provide notice of drug testing to each individual at the time of application. The notice must advise the individual that drug testing will be conducted as a condition for receiving temporary assistance for needy families program or supplemental nutrition assistance program benefits and that the individual must bear the cost of testing. If the individual tests negative for controlled substances, the department shall increase the amount of the initial benefit by the amount paid by the individual for the drug testing. ~~The individual must be advised that the required drug testing may be avoided if the individual does not apply for temporary assistance for needy families program or supplemental nutrition assistance program benefits.~~ Dependent children under the age of eighteen are exempt from the drug testing requirement;
- b. Require that for two - parent families, both parents must comply with the drug testing requirement when a reasonable suspicion exists
- c. Require that any teen parent who is not required to live with a parent, legal guardian, or other adult caretaker relative must comply with the drug testing

- requirement.
- d. Advise each individual to be tested, before the test is conducted, that the individual may advise the agent administering the test of any prescription or over - the - counter medication the individual is taking .
 - e. Inform an individual who tests positive for a controlled substance and is deemed ineligible for temporary assistance for needy families program ~~or supplemental nutrition assistance program~~ benefits that the individual may reapply for those benefits one year after the date of the positive drug test unless the individual meets the requirements of subsection 4 .
 - f. Provide any individual who tests positive with a list of licensed substance abuse treatment providers available in the area in which the individual resides. The department is not responsible for providing or paying for substance abuse treatment as part of the screening conducted under this section.
 - g. Comply with the confidentiality requirements for substance abuse treatment records as governed by 42 CFR Part 2.
 - h. Require a release of information form be signed by the eligible recipient for the temporary assistance for needy families program at the time of application, which would allow the county to receive treatment records and disclose that information to the Human Services Department and to the Office of Administrative Hearing when necessary.
4. An individual who tests positive under this section and is denied temporary assistance for needy families program ~~or supplemental nutrition assistance program~~ benefits as a result may reapply for those benefits after six months if the individual can document the successful completion of a substance abuse treatment program offered by a licensed substance abuse treatment provider. An individual who fails the drug test required under subsection 1 may reapply for benefits under this subsection only once .
5. If a parent is deemed ineligible for temporary assistance for needy families program ~~or supplemental nutrition assistance program~~ benefits as a result of failing a drug test conducted under this section:
- a. The dependent child's eligibility for temporary assistance for needy families program ~~or supplemental nutrition assistance program~~ benefits is not affected.
 - b. An appropriate protective payee must be designated to receive benefits on behalf of the child. The parent may choose to designate another individual to receive benefits for the parent's minor child. The designated individual must be an immediate family member or, if an immediate family member is not available or the family member declines the option, another individual, approved by the department, may be designated. The designated individual also must undergo drug testing before being approved to receive benefits on behalf of the child when a reasonable suspicion exists.
6. The department shall adopt rules to implement this section.
- SECTION 2. A new subdivision to subsection 1 of section 50-09-29 of the North Dakota Century Code is created and enacted as follows:**
- Require applicants to comply with the drug testing requirements of section 1 of this Act.**

Options: Could define reasonable suspicion

Could change when a reasonable suspicion exists to **if** a reasonable suspicion

Instead of using the term reasonable suspicion could use "who the department has

reasonable cause to believe engages in the illegal use of controlled substances to be screened and tested"

Define what type of drug testing is required..urine or blood? Inclusive of alcohol or just substances?.

To be 'reasonable' under 4th Amendment, a search incidentally must be based on an individualized suspicion of wrongdoing -