

Fiscal impact reports (FIRs) are prepared by the Legislative Finance Committee (LFC) for standing finance committees of the NM Legislature. The LFC does not assume responsibility for the accuracy of these reports if they are used for other purposes.

Current FIRs (in HTML & Adobe PDF formats) are available on the NM Legislative Website (legis.state.nm.us). Adobe PDF versions include all attachments, whereas HTML versions may not. Previously issued FIRs and attachments may be obtained from the LFC in Suite 101 of the State Capitol Building North.

FISCAL IMPACT REPORT

ORIGINAL DATE 01/31/08

SPONSOR Anderson LAST UPDATED _____ HB 452

SHORT TITLE High School Athlete Steroid Testing SB _____

ANALYST Escudero

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY08	FY09		
	\$1,000.0	Non-Recurring	General Fund

(Parenthesis () Indicate Expenditure Decreases)

Duplicates: SB202

SOURCES OF INFORMATION

LFC Files

Responses Received From

Public Education Department (PED)
Department of Health (DOH)

SUMMARY

Synopsis of Bill

House Bill 452 enacts a new section of the Public School Code authorizing random drug testing for anabolic steroids among high school varsity athletes throughout New Mexico. The bill requires that by August 1, 2008, all local school boards must implement rules and procedures and begin random drug testing for anabolic steroid use among varsity high school athletes. The rules and procedures are to include protocols for addressing positive steroid test results.

HB 452 requires further that as a condition of a student participating in a varsity-level athletic program, the student, or the parent, custodian, legal representative or guardian of the student, must provide written consent to be tested for anabolic steroids.

HB 452 defines “varsity-level athletic program” to be an extracurricular athletic program offering the highest level of competition offered by one school or school district against the highest level of competition offered by an opposing school or school district.

FISCAL IMPLICATIONS

The appropriation of \$1,000.0 contained in this bill is a recurring expense to the general fund. Any unexpended or unencumbered balance remaining at the end of FY09 shall revert to the general fund

According to PED, the cost of steroid testing can be expensive. One vendor, Drug Test Systems, offered steroid tests for \$150 -\$170 per test.. Another vendor, Toxicology Associates Inc., charges \$450 per test. Robert Zayas, the Director of Communications at the New Mexico Activities Association, estimates that there are 42,000 student high school athletes in New Mexico. If one-third of this number plays at the varsity level, there are 14,000 students eligible for a random drug test. Depending on how many random tests are done, and what other administrative costs are associated with a school district's testing program, \$1,000.0 may be a limited amount to establish effective drug testing statewide. Unless districts receive new funding after the funding expires in 2010, they may choose not to conduct the drug testing.

The PED would have to designate staff to develop a rule requiring local boards to have steroid testing policies, conduct a public hearing and file the rule. In addition, staff would be required to flow money (either through a contract or flowing money to school districts) for the implementation and operation of the random steroid testing program and monitoring of the expenditure of monies. Estimated staff time for an Education Administrator 0 is 400 hrs x \$22.74/hr + 30% benefits= \$11.8/year.

SIGNIFICANT ISSUES

According to PED, the federal Constitutional right to privacy is implicated by any policy calling for the drug testing of student athletes. The 4th Amendment to the U.S. Constitution provides that the Federal Government guarantee “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...” The right to privacy applies to students in public schools, although students have diminished rights. This fourth amendment right to privacy applies to drug testing. *Skinner v. Railway Labor Executives Ass'n*, 489 U.S. 602 (1989).

A collective reading of applicable U.S. Supreme Court cases permits a conclusion that at least under the federal Constitution, random urinalysis drug testing of public school students who are involved in extracurricular activities may be permissible. *New Jersey v. T.L.O.*, 469 U.S. 325 (1985); *Vernonia School District v. Acton*, 515 U.S. 646 (1995); *Board of Education [..] Pottawatomie v. Earls*, 536 822 (2002).

Given the controversy in the area of mandatory drug testing of public school students, there is likely to be a challenge to this program. It should be noted that in a choice between testing for drugs on the basis of reasonable suspicion or randomly based only upon a student's participation in a high school varsity athletic program, HB 452 opts for random drug testing.

The bill does not indicate what a district or school should do if a student tests positive. Does a student get only one chance? Also, it leaves development of due process and “false-positive” testing to the school districts. A school district could not use the funds or its policy to test for other controlled substances even if it had reasonable suspicion that a student had consumed a drug other than anabolic steroids.

The bill does not address such important considerations as:

- whether drug test results can/must be turned over to law enforcement authority;
- whether test results and related documents can/must be kept confidential and who can access them;
- whether the test results can be transferred to another school/school district if the student changes schools;
- whether the test results can be transferred to a college that the student enters after leaving secondary school; and
- whether drug test results can be placed in a student's other educational records, which if they could would implicate privacy concerns under the federal Family Educational Rights and Privacy Act (FERPA).

It is not clear if the bill was intended to apply to charter schools since they are governed by a governing body instead of by a school board. As currently drafted, it would not apply.

Presumably the child of a parent(s) refusing to sign a consent form cannot participate in high school varsity athletic programs. Presumably, although the bill is silent, a child whose parents signed a consent form but who refuses to submit to drug testing would be denied further participation in the varsity sports.

In 2005, a statewide Steroid Task Force recommended a pilot study, which the PED conducted in four school districts throughout the state. Each of those districts had some sort of a drug testing policy. The only positive test result was of a female student who was not involved in any athletic activity.

According to AOG, anabolic steroids are classified as Schedule III controlled substances by federal law. See 21 U.S.C. 812. New Mexico state law also prohibits the use, possession or distribution of anabolic steroids (without prescription) and requires that the law be distributed to each licensed athletic trainer by the Athletic Trainers Advisory Board and displayed prominently in the athletic locker rooms of all state post-secondary and public schools. NMSA Section 30-31-41 (1978). The New Mexico Public Education Department has adopted a rule authorizing local school boards to regulate the use of controlled substances in public schools. NMAC 6.11.2.9B(4).

The United States Supreme Court, and the New Mexico Supreme Court, have both recognized that requiring a person to provide a urine sample for drug testing constitutes a search under the Fourth Amendment to the United States Constitution. See *Jaramillo v. City of Albuquerque* 125 N.M. 194, 958 P.2d 1244 (1998), quoting *Skinner v. Railway Labor Executives' Ass'n.*, 489 U.S. 602, (1989); also citing *Vernonia School District 47J v. Acton*, 515 U.S. 646 1995).

In the *Vernonia School District* case, the United States Supreme Court upheld a random drug testing regime implemented by the local public schools in Vernonia, Oregon. Under that regimen, student athletes were required to submit to random drug testing before being allowed to participate in sports. The Supreme Court held that although the tests were searches under the Fourth Amendment, they were reasonable in light of the schools' interest in preventing teenage drug use. The Court also held that among public school students, athletes have even less of an expectation of privacy and that they subject themselves to additional regulation and medical

screenings in order to participate in school sports. 515 U.S. at 657.

The United States Supreme Court decided the *Vernonia* case after the facts developed in the United States District Court indicated that drug use was a major problem in the school district; that student athletes were the “leaders” of the drug culture; that the school district administration was “at its wits end”, that drug use had reached “epidemic proportion”, and disciplinary and motivational problems had increased as a result of the increased drug and alcohol use among students. 796 F.Supp.1354,1357 (D. Ore. 1992).

After the *Vernonia* case was decided, the Supreme Court of the United States ruled that mandatory drug testing of students participating in *any* competitive extracurricular activities (band, choir, cheerleading, athletics etc.) was constitutional and that it was not necessary to show that there was a “drug problem” in the schools before implementing random drug testing. *Board of Education v. Earls*, 536 U.S. 822 (2002).

However, the drugs tested for in those cases were not limited to anabolic steroids as required by this bill. The legality of limiting testing to only those specific drugs without proving that the use of those drugs within New Mexico schools warrants such testing, will most likely be examined by the courts.

Further, the school districts involved in those cases had implemented strict procedural safeguards protecting the privacy of the students and insuring the accuracy of the testing. They had also adopted disciplinary penalties which were judged to be commensurate with the violations.

ADMINISTRATIVE IMPLICATIONS

According to PED, because the drug testing implementation funds are appropriated to the PED, the PED would have the fiduciary responsibilities of seeing that the funds are properly accounted for and expended consistent with the law. Given that the bill would go into effect on July 1, 2008 and the program commences on August 1, 2008, it is highly unlikely the PED could disseminate the funds in an equitable manner by August 1st. Whether budgets would be set up to move the money as between the Department of Finance and Administration and the PED in July of 2008 is also questionable.

PED would need to establish a rule requiring local school boards to adopt steroid testing policies

CONFLICT, DUPLICATION, COMPANIONSHIP, RELATIONSHIP

This bill is a duplicate of SB 202.

OTHER SUBSTANTIVE ISSUES

According to PED, if passed, this bill would become effective on July 1, 2008, but would require that rules and procedures be implemented, and that random drug testing would begin by August 1, 2008, one month after enactment. It is unrealistic to require school boards to adopt such policies just one month after the enabling law is enacted. The bill requires that rules and procedures that are developed also include protocols for addressing positive anabolic steroid test results. State law requires that when local school boards establish school discipline policies, they must hold public hearings and involve parents, school personnel and students in the development

of these policies. NMSA 1978, § 22-5-4.3 (A) Any discipline policies developed regarding positive anabolic steroid test results would need to require such involvement from the public, parents, personnel and students. The existing legal requirement makes it more unlikely that drug testing could begin by August 1, 2008. Perhaps a longer time could be considered.

The bill's definition of "varsity-level athletic program" conflicts with the New Mexico Activities Association's (NMAA) definition of *Varsity*, which is "The highest level or principal team which represents its school in Interscholastic Activities. (Each school is allowed only one team per gender, where applicable, at the varsity level). In neither of the definitions is "high school" mentioned.

Steroid testing is conducted by collecting a urine sample from a student, which will pose significant logistical issues for both the student and school administrators who must monitor and process the collection.

WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL

According to AOG, random drug testing and administration of appropriate disciplinary action for illegal drug use in public schools will continue to be regulated by the local school boards.

PME/mt