

**LEGISLATIVE EDUCATION STUDY COMMITTEE
BILL ANALYSIS**

Bill No: HB 874

49th Legislature, 1st Session, 2009

Short Title: School Truant Drug Testing Policies

Sponsor(s): Representatives Nora Espinoza, Zachary Cook, and Others

Analyst: Dorinda Fox

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Bill Summary:

HB 874 adds a new section and amends the *Public School Code* to require the Public Education Department (PED) to:

- establish a model drug testing policy for a school district or other school governing body that includes:
 - minimum accuracy standards;
 - descriptions of acts that may be used to find an individualized suspicion of illegal drug use; and
 - adequate safeguards against false positive results in a drug test; and
- provide by rule a means to cooperate with the district's nearest juvenile probation department in drug testing a truant or habitual truant while protecting individually identifiable student information.

Among its other provisions, the bill:

- defines "drug testing" as an analysis of blood, hair, or urine administered under the auspices of a juvenile probation office to screen for the presence of an illegal substance;
- adds a model drug testing policy in the general duties of PED; and
- amends the *Compulsory School Attendance Law* to:
 - allow a student's continued absence after a written notice of habitual truancy to constitute individualized suspicion sufficient to justify drug testing; and
 - suspend or expel a student who fails to submit to drug testing pursuant to this subsection; and
- requires each school district and charter school to maintain an attendance policy that provides for drug testing a truant¹ or habitual truant² according to the model drug testing policy established by PED.

¹ "Truant" means a student who has accumulated five unexcused absences within any 20y-day period, according to the New Mexico *Compulsory School Attendance Law*.

² "Habitual truant" means a student who has accumulated the equivalent of 10 or more unexcused absences within a school year, according to the New Mexico *Compulsory School Attendance Law*.

Fiscal Impact:

HB 874 does not make an appropriation.

According to the PED analysis, the cost for drug tests obtained from various drug testing companies ranges from \$70 to \$135. Based upon 68,349 students identified as truant or habitually truant in school year 2006-2007, at a cost of \$135 per test, the estimated cost for drug testing is \$92,271.

$$(68,349 \text{ students} \times \$135 \text{ per test} = \$92,271)$$

PED states that HB 874 is unclear which entity would be required to assume the cost of the required drug testing: PED, schools, or the Children, Youth and Families Department (CYFD).

Since the bill requires that drug testing take place under the auspices of a juvenile probation office, PED notes there may be further undetermined costs to both PED and CYFD, including:

- transportation for testing which may occur off campus;
- liability relating to testing performance; and
- recordkeeping to comply with the federal *Family Educational Rights and Privacy Act* (FERPA) and the *Health Insurance Portability and Accountability Act* (HIPPA).

Issues:

HB 874 seems to equate truancy with drug abuse and to suggest that mandatory drug testing of truants and habitual truants will discourage truancy. While enforcing school attendance laws and policies is a desirable goal, the approach taken by HB 874 raises a number of issues.

According to the PED analysis:

- The federal constitutional right to privacy is implicated by any policy calling for the drug testing of students. The Fourth Amendment to the US Constitution provides the following 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.
- 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, HB 874 opts for the new category of individualized suspicion triggered by a student’s status of continued absence from school. This would mean that even though a student or his parents had a reasonable explanation for the student’s absence (e.g., an extended vacation in Europe), the student would be treated as a delinquent and could not return to school without taking a drug test.
- The bill does not address such important considerations as: whether drug test results can/must be turned over to a 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 it does not address if drug test results can be placed in a student's other educational records which would implicate privacy concerns under FERPA.

- There is no research as to the use of drug testing as a deterrent to truancy.
- Truancy is a status offense and not a delinquent act; therefore, the status of truant or habitual truant would not be addressed through the children's court, and truants would not be assigned a probation officer.
- The bill allows that students failing to submit to drug testing may be suspended or expelled. This section conflicts with current statute that prohibits suspension and expulsion as a punishment for truancy.
- HB 874 would require drug testing of all students identified as truant or habitually truant in grades K-12. Student drug use is not generally associated with truancy in elementary grades, and in secondary schools drug use is not associated with most instances of unexcused absences.

According to a 2006 Drug Policy Alliance publication, research shows that drug testing:

- is not effective in deterring drug use among young people;
- is expensive, taking away scarce dollars from other, more effective programs that keep young people out of trouble with drugs;
- can be legally risky, exposing schools to potentially costly litigation;
- may drive students away from extracurricular activities, which are a proven means of helping students stay out of trouble with drugs;
- can undermine trust between students and teachers, and between parents and children;
- can result in false positives, leading to the punishment of innocent students;
- testing does not effectively identify students who have serious problems with drugs; and
- may lead to unintended consequences, such as students using drugs (like alcohol) that are more dangerous but less detectable by a drug test.

Further, the Drug Policy Alliance states that there are alternatives to drug testing that emphasize education, discussion, counseling, and extracurricular activities; and that build trust between students and adults.

Background:

Drug testing in schools has been an issue since at least the 1990s. The US Supreme Court of the United States first determined that drug testing of student athletes is constitutional in a June 1995 decision. In June 2002, the Supreme Court broadened the authority of public schools to test students for illegal drugs. Voting five to four in *Pottawatomie County v. Earls*, the court ruled to allow random drug tests for all middle and high school students participating in competitive extracurricular activities. The ruling greatly expanded the scope of school drug testing.

Federal grants for School-Based Student Drug Testing Programs are authorized by the *No Child Left Behind Act of 2001*. The purpose of these grants is to provide federal funds to local educational agencies and other public and private entities for drug testing programs for student athletes, students engaged in competitive extracurricular activities, and students, who along with their parent or guardian, provide written consent to volunteer to be drug tested. According to the Student Drug-

Testing Institute, there have been approximately 137 voluntary school-based drug testing programs funded by the US Department of Education in 32 states.

A 2008 Legislative Education Study Committee (LESC) Truancy Work Group met during the interim at the request of the LESC Chair. Represented on the work group were schools, children's courts, education organizations, PED, juvenile probation services, and CYFD. The group reviewed the *Compulsory School Attendance Law* and its effect on children and youth, and deliberated an approach to statewide policy directed toward keeping students in school. Rather than making truancy a juvenile offense, the consensus of the work group was to refine the existing attendance law passed in 2004 that focuses on intervention and parental responsibility.

Through its examination of successful truancy programs already operating in the state, the work group identified these practices as most effective:

- the case management approach;
- pre-adjudication training sessions for parents and students;
- age- and grade-level interventions;
- school-based behavioral health services; and
- community coordination teams.

Neither any member of the work group nor any respondents to a survey on truancy and attendance recommended drug testing as a means of addressing truancy or habitual truancy.

According to the Education Commission of the States, several state laws address drug testing for truant. In each case, however, the student is subject to court order.

Related Bill:

SB 189a *School Attendance Notices & Absences*