

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 3/03/09

SPONSOR Ezzell LAST UPDATED _____ HB 868

SHORT TITLE Public Assistance Recipients Drug Testing SB _____

ANALYST Earnest

APPROPRIATION (dollars in thousands)

Appropriation		Recurring or Non-Rec	Fund Affected
FY09	FY10		
	None		

(Parenthesis () Indicate Expenditure Decreases)

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

	FY09	FY10	FY11	3 Year Total Cost	Recurring or Non-Rec	Fund Affected
FTE		\$1,865.0	\$1,865.0	\$3,730.0	Recurring	General Fund and Federal Funds
IT System		\$40.0		\$40.0	Non- Recurring	General Fund and Federal Funds
Drug Testing		\$8,830.0 to \$16,670.0	\$8,830.0 to \$16,670.0	\$17,660.0 to \$33,340.0	Recurring	General Fund and Federal Funds

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From
Human Services Department (HSD)

SUMMARY

Synopsis of Bill

House Bill 868 amends the Public Assistance Act to require applicants to submit to drug testing as a condition of eligibility for federal and state public assistance available under the New Mexico Works Act, the Education Works Act, and the Low Income Utility Assistance Act. The bill requires:

1. applicants or recipients of federal public assistance (excluding Medicaid) to complete drug testing should probable cause exist;
2. HSD to create a unit, either internally or by contract, capable of screening of an applicant's or recipient's blood, hair, or urine for illegal substances;
3. HSD to promulgate rules providing the specific conditions under which a drug test shall be required and specific tests to be administered;
4. HSD to refer applicant's or recipient's whose drug test indicates the use of an illegal substance to a treatment program; and
5. HSD to impose a 12-month period of ineligibility and compliance should an applicant or recipient not comply with any condition of the drug testing process.

FISCAL IMPLICATIONS

The bill does not carry an appropriation, but HSD estimates significant costs to implement the bill. HSD states that it does not have any facilities or personnel to support the drug screening contemplated by the bill and would have to contract for such services. Based on the costs of drug testing services for the state from two contractors, HSD estimated the following cost ranges to implement the bill if all applicants and recipients are required to submit to drug testing. These estimates should probably be viewed as an upper limit, given that the bill requires HSD to determine probable cause for drug testing.

- Recipients of utility assistance through LIHEAP: \$1.73 million to \$3.3 million
- Applicants of Food Stamps: \$4.4 million to \$8.3 million
- Recipients of Food Stamps: \$2.7 million to \$5.1 million

HSD reports that drug testing as a condition of eligibility for Food Stamps is a violation of federal law, and all costs would have to be borne by the state.

HSD estimates the need for additional 40 FTEs, primarily due to a potential increase in fair hearings arising from more benefit delays and denials. Specifically, HSD states:

HB 868 would increase the amount of time it takes to process and approve an application for public benefits, thus delaying the provision of needed services. Termination and denials of public assistance benefits based on the new requirements would also be subject to challenge. Current regulation affords households whose benefits are terminated or denied the right to an administrative or fair hearing. In order to meet the potential increase in fair hearing requests, approximately 40 additional FTE's would be required. Applicants and recipients of public assistance also have a right to pursue judicial review of fair hearing decisions that are adverse to them. The Department would incur additional costs for handling such appeals, including attorney time, employee time in the hearings bureau and elsewhere needed to prepare the administrative record for the courts, contractual services for transcribing hearing records.

HSD also reports a need for training of staff, including:

- determining probable cause (who meets conditions for drug testing);
- new procedures for case management, including application processing, disqualifications, and benefit termination; and
- initiating and tracking referrals for rehabilitation services.

Current regulation gives the Department the responsibility to assist applicants in the eligibility process, including obtaining any documentation required for eligibility. Based on this regulation it is unclear if the Department would be required to assist with the transportation costs to complete the drug testing process. This would require the Department to invest money in persons who may not be eligible to receive public assistance. Further, it is unknown if transportation assistance extends to assisting applicants and recipients in meeting the requirement to complete a rehabilitation program.

HSD estimates the IT upgrades to track applicants that would need to participate in a rehabilitation program would cost about \$40,000.

Finally, as discussed in more detail below, based on experience in other states, the drug testing program that is the subject of the bill would likely be the subject of litigation challenging its constitutionality and legality under federal and state law. The State of New Mexico, including the Department and the public liability fund administered by the Risk Management Division of the General Services Department, could incur substantial costs in defending such litigation and bear the damages, costs and attorneys fees awards that could potentially be made to the plaintiffs.

SIGNIFICANT ISSUES

HSD states that portions of the bill are in direct violation of federal law. Federal food stamp program regulations do not require substance abuse testing and do not permit a state to impose any additional eligibility requirements. 7 U.S.C. § 2014(b). There are similar federal prohibitions in the low income home energy assistance program.

Federal law governing the temporary for needy families (TANF) program does allow states to test TANF recipients for use of controlled substances. HSD notes that:

drug testing by the government is subject to challenge under the search and seizure clause of the fourth amendment of the U.S. Constitution and similar provisions of state constitutions. In the 1997 case of Chandler v. Miller, the U.S. Supreme Court found a Georgia law requiring candidates for state office to test negative in a drug urinalysis to be unconstitutional. In the context of drug testing of public assistance recipients, the Chandler case was applied to determine unconstitutional a Michigan law requiring “suspicionless” and random drug testing of applicants for and recipients of public assistance benefits and imposition of sanctions for testing positive. See Marchwinski v. Howard, 60 Fed. Appx. 601, 2003 W.L. 1870916 (6th Cir. 2003), which affirmed Marchwinski v. Howard, 113 F. Supp.2d 1134 (E.D. Mich. 2000). In the wake of Marchwinski, a number of states dropped plans to begin random or “suspicionless” drug testing. Oregon ended its program after widespread opposition and Florida dropped it rather than face a legal suit from the ACLU. The state of Louisiana also opted not to fund random testing proposed by state legislators.

While HB 868 is not identical to the Michigan law struck down in Marchwinski and requires the Department to make “probable cause” determinations to justify testing of a particular individual, legal challenges to the bill, if enacted, would still be likely. For example, as indicated above, each termination or denial of benefits based on testing positive would be subject to an administrative appeal and judicial review of an adverse administrative decision. In addition, a number of the bill’s provisions presume consent to

testing based on a probable cause finding by the Department. Such consent provisions are vulnerable to constitutional challenge. Moreover, HB 868 does not define “probable cause” for the purposes of determining applicants and recipients are subject to drug testing or providing guidance to the Department to use in promulgating rules prescribing the “specific conditions under which a drug test shall be required and the specific tests to be administered.” This vagueness, in itself, will provide a legal basis for challenging the delegations that the bill makes to the Department, as well as any rules promulgated.

HSD also finds that the bill will cause a delay in the provision of cash assistance.

ADMINISTRATIVE IMPLICATIONS

HSD estimates a significant administrative impact to implement the bill, including the need for 40 FTE, IT upgrades, and contractual services funding for drug testing. See fiscal implications section for more detail.

TECHNICAL ISSUES

According to HSD:

The bill’s amendment to subsection 27-2B-4(J) states cash assistance recipients who refuse a request to undergo a drug test based on a finding of probable cause of illegal substance use shall be required to enter in the conciliation process. This appears to contradict the bill’s amendment to subsection 27-2-4(G), which states drug testing is a condition of eligibility for public assistance. Moreover, the conciliation process is relevant only to persons who are already New Mexico Works recipients and does not affect eligibility for public assistance.

BE/mt