

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: Education Committee

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BILL: SB 1928

INTRODUCER: Senator Peaden

SUBJECT: High School Athletics/Steroid Tests

DATE: April 17, 2006

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Brown</u>	<u>Matthews</u>	<u>ED</u>	<b>Favorable</b>
2.	_____	_____	<u>HE</u>	_____
3.	_____	_____	<u>JU</u>	_____
4.	_____	_____	<u>EA</u>	_____
5.	_____	_____	<u>WM</u>	_____
6.	_____	_____	_____	_____

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## I. Summary:

This bill requires the Florida High School Athletic Association (FHSAA) to implement a three year steroid testing program for grade 9 through 12 student athletes who participate in interscholastic competitions at member schools. Public and private schools are required to consent to the program as a prerequisite to membership under this bill.

The FHSAA board of directors is required to contract with an accredited testing agency.

Regarding actual testing, this bill requires that the names of all competing students be provided by each member school to the FHSAA, who will forward the names to the testing agency. From this group, at least one percent of students must be randomly tested. To compete, students are required to sign consent forms.

This bill stipulates that drug test results are to be kept separate from student records, and provides for limited disclosure.

Subsequent to immediate suspension for a positive test, penalties range from suspension for 90 days to a permanent suspension, contingent upon the number of positive findings of steroid use. Additionally, the student is required to submit to repeated tests during high school athletics participation.

This bill provides an appeal process, and authorizes challenges to findings and penalties by the member school or the student.

The FHSAA is required to produce a report on program results by October 1, annually, to the Senate President and House of Representatives Speaker, which includes the costs incurred by the FHSAA.

This bill grants civil immunity to the FHSAA, its board of directors, employees, and member schools and their employees, for acts or omissions connected with the program. The Department of Legal Affairs, or its outside counsel, is required to legally defend the FHSAA in civil actions.

A \$3 million appropriation is provided from the General Revenue Fund to the FHSAA, to fund expenses relating to testing agency fees, administrative expenses, and legal costs of defense.

This bill substantially amends section 1006.20 of the Florida Statutes.

This bill is linked to SB 2082, which provides public records exemptions for drug testing findings and meetings that constitute appeals or challenges to drug testing findings and student ineligibility to participate.

This bill takes effect July 1, 2006, and sunsets on the earlier of June 30, 2009 or when appropriated funds are spent.

## II. Present Situation:

### *Florida High School Athletic Association*

The Florida High School Athletic Association (FHSAA) is designated as the governing nonprofit organization of Florida public school athletics.<sup>1</sup> The FHSAA governs athletic competitions at member schools for students attending grades 6 through 12. The membership structure of the FHSAA is such that the organization is a representative democracy in which the sovereign authority is vested in its member schools.<sup>2</sup> The school principal or designated assistant principal or athletic director is the official representative of each member school.<sup>3</sup>

The FHSAA is required to comply with Florida law to preserve its designation.<sup>4</sup> An annual, independent financial audit is required of FHSAA accounts and records, and a copy of the report is required to be submitted to the Auditor General.<sup>5</sup> Private schools are eligible for membership in the FHSAA where they engage in competitions with public high schools.<sup>6</sup>

FHSAA bylaws establish eligibility criteria for all students who participate in high school athletic competition in its member schools.<sup>7</sup> Included in the bylaws is a requirement that all student participants satisfactorily pass a medical evaluation each year before competing in

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<sup>1</sup> s. 1006.20(1), F.S.

<sup>2</sup> s. 1006.20(3)(a), F.S.

<sup>3</sup> s. 1006.203(b), F.S.

<sup>4</sup> s. 1006.2(1), F.S.

<sup>5</sup> s. 1006.19, F.S.

<sup>6</sup> s. 1006.2(1), F.S.

<sup>7</sup> s. 1006.2(2)(a), F.S.

interscholastic athletics.<sup>8</sup> Requirements for obtaining a student's medical history and performing the medical evaluation are to be established in bylaw, to include a physical assessment of the student's physical capabilities to participate in interscholastic athletic competitions.<sup>9</sup> The assessment is to be recorded on a uniform pre-participation physical evaluation and history form. Students are not authorized to compete, until the medical evaluation results have been approved by the school.<sup>10</sup> Section 1006.20(2)(d), F.S., provides an exception, however, where based on religious beliefs, a parent objects in writing to the medical evaluation.

The FHSAA is required to establish an appeal procedure to provide due process to students to appeal unfavorable rulings of the committee on appeals regarding eligibility to compete. Student athletes and member schools may appeal unfavorable rulings to the board of directors. The board of directors is authorized to issue a final decision, to uphold, reverse, or modify the ruling of the committee on appeals.<sup>11</sup>

### ***Controlled Substances***

Chapter 893, F.S., contains the Florida Comprehensive Drug Abuse Prevention and Control Act.<sup>12</sup> This Act provides a list of controlled substances, and classifies them according to their potential for abuse from Schedules I through V.<sup>13</sup> Anabolic steroids are classified as Schedule III controlled substances. Schedule III substances are considered to have a lower potential for abuse than Schedule I and II. Abuse of a Schedule III substance is thought to lead to moderate or low physical dependence, or high psychological dependence, although anabolic steroids are thought to possibly result in physical damage.<sup>14</sup> Anabolic steroids are chemically and pharmacologically related to testosterone.<sup>15</sup>

### ***OPPAGA Study and Drug Testing in Florida***

In October 2004, the Office of Program Policy Analysis and Government Accountability published a study on steroid use among high school students.<sup>16</sup> The report relied on the Florida Youth Substance Abuse Survey, and indicates the following:

- Although nationally and in Florida, steroid use remains relatively low compared to other drugs of concern, use has increased over time.
- About two percent of students nationally report using steroids, and use is highest among high school seniors.
- Steroid use in Florida among 6<sup>th</sup> through 12<sup>th</sup> graders is comparable to national levels.

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<sup>8</sup> s. 1006.20(2)(c), F.S.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> s. 1006.20(7), F.S.

<sup>12</sup> s. 893.01, F.S.

<sup>13</sup> s. 893.02, F.S.

<sup>14</sup> s. 893.03(3), F.S.

<sup>15</sup> s. 893.03(3)(d), F.S.

<sup>16</sup> OPPAGA Information Brief, *Though the Option Is Available, School Districts Do Not Test Students for Steroids*, Report No. 04-72(Oct. 2004).

- About 1.4 percent, or 19,350, of Florida students report using steroids previously, and 0.4 percent, or 5,600, report using steroids in the past 30 days.
- Males are represented much higher than females as steroid users.
- Steroid use increased in the 9<sup>th</sup> and 12<sup>th</sup> grades in Florida.
- Steroid testing is one of the more expensive drug tests, costing between \$50 to \$250 per test.
- As of the date of the report, Florida had 11 school districts that drug test, including testing of student athletes, but none tested for steroids.<sup>17</sup>
- Of those Florida districts which drug test, due to cost, the districts only test a percentage of athletes during the year and randomly thereafter.
- As of the date of the report, with 215,000 high school athletes in Florida, testing just five percent of the population annually could range from \$537,500 to \$2,687,500 in lab fees alone. Costs incidental to the testing are not included in these estimates.

While there is no express statutory authority regarding school drug testing, s. 1001.42, F.S., addresses general powers and duties of district school boards. Section 1001.42(6), F.S., stipulates that district school boards may “provide for...the attendance and control of students at school, and for proper attention to health, safety, and other matters relating to the welfare of students.”

### **III. Effect of Proposed Changes:**

Starting with the 2006-2007 school year, the Florida High School Athletic Association (FHSAA) is required to implement a three year steroid testing program for grade 9 through 12 student athletes who compete at member schools. As a prerequisite to membership in the FHSAA, all public and private schools are required to consent to the program.

This bill requires the board of directors to establish the following:

- The FHSAA must select and enter into a contract with a testing agency whose laboratory is accredited by the World Anti-Doping Agency;
- At least one percent of a random sample of participating students must be tested in each year of the program;
- The names of all students who will compete must be reported by the member school to the FHSAA, who will then provide this list to the testing agency;
- The testing agency must give seven days notice to the school administration and the FHSAA of a specimen collection from a randomly selected student, whose name will not be disclosed; and
- Drug test results are to be maintained separate from a student’s educational records, with limited disclosure to the FHSAA, the student and his or her parent(s), school administration, and the administration of any school to which the student transfers during suspension from participation in athletics resulting from a positive finding.

To participate in interscholastic athletics, each student must sign a consent form.

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<sup>17</sup> As an update, the Department of Education indicates that as of school year 2004-2005, 17 Florida school boards had authorized drug testing of student athletes.

This bill provides that a student selected for testing who fails to provide a specimen will be suspended immediately from participation until the specimen is provided. If a student tests positive, the school administration will immediately issue a suspension from participation, and notify and schedule a meeting with the student and his or her parent(s), at which the principal will explain the finding, challenge procedure, penalties, and appeal process.

Penalties are provided in this bill, ranging from a 90 day suspension to permanent suspension, depending upon the number of positive findings of steroid use. An initial finding of drug use subjects the student to repeated tests during his or her eligibility for high school athletics. Additionally, the student is required to complete a mandatory drug education program.

An appeals process is established to ensure due process as follows:

- A member school may challenge a positive finding by getting an analysis of a sample of the original specimen, and is required to challenge the finding upon student request. The cost of analysis is borne by the member school or student's parent, unless the finding is negative, in which case, the cost is refunded. The student remains on suspension pending the outcome of the analysis, and if negative, eligibility is immediately restored.
- A member school may also appeal the period of ineligibility due to a positive finding. At the discretion of the FHSAA commissioner, a student's penalty may be reduced or eliminated. The student remains ineligible, however, until:
  - The student tests negative on the mandatory exit test; and
  - The FHSAA restores the student's eligibility.
- The member school may appeal the commissioner's decision with the FHSAA board of directors, and must appeal upon student request. The board of directors is also authorized to modify or eliminate the student's penalty, but the student remains ineligible until testing negative on the mandatory exit test, and until eligibility is restored by the FHSAA.

The bill is silent on the testing agency that may be used by the student in contesting the findings.

The FHSAA is required to provide a report on program results annually, by October 1, to the Senate President and the House of Representatives Speaker, to include costs incurred by the FHSAA.

This bill provides immunity from civil liability for the FHSAA, including members of its board of directors, employees, and member schools and their employees. Immunity extends to any civil liability arising from any act or omission in connection with the program. The Department of Legal Affairs, or its outside counsel, is required to legally defend the FHSAA, its board of directors, employees and its member schools, and their employees in civil litigation resulting from this program.

The Legislature is required to appropriate funds for all expenses of the program. Expenses include, but are not limited to:

- Fees and expenses charged by the testing agency for administrative services, and specimen collection and analysis;
- Administrative expenses incurred by the FHSAA; and
- Attorney's fees and other costs of litigation.

This bill provides for a \$3 million appropriation from the General Revenue Fund to the FHSAA, to implement this program. Any unexpended or unencumbered balance remaining at the end of the 2008-2009 fiscal year will revert to general revenue.

This act takes effect July 1, 2006, and sunsets on the earlier of June 30, 2009 or when the appropriated funds are spent.

#### IV. Constitutional Issues:

##### A. Municipality/County Mandates Restrictions:

None.

##### B. Public Records/Open Meetings Issues:

Limited disclosure of positive drug testing findings is provided in this bill. This bill is additionally linked to SB 2082, which provides a public records exemption for drug testing findings and meetings that constitute appeals or challenges to drug testing findings and student ineligibility to participate.

##### C. Trust Funds Restrictions:

None.

##### D. Other Constitutional Issues:

Although the U.S. Supreme Court case of New Jersey v. T.L.O. involved a search of a student's purse, rather than a drug test, it is frequently cited in student drug testing challenges.<sup>18</sup> This seminal case established the ability of private plaintiffs to challenge searches conducted by public school officials, based on the Fourth Amendment, which had traditionally been reserved for police searches.<sup>19</sup> The T.L.O. Court stipulated that a student has a legitimate expectation of privacy. Additionally, the Court confirmed that school officials conducting searches as agents of the state do not need to obtain warrants, or evidence probable cause, but rather, need only show reasonableness.<sup>20</sup> The T.L.O. Court established a two-prong test to determine reasonableness, which is as follows:

- Whether the action was justified at its inception; and

<sup>18</sup> 469 U.S. 325 (1985).

<sup>19</sup> Ronald T. Hyman, *Constitutional Issues When Testing Students for Drug Use, A Special Exception, and Telltale Metaphors*, 35 JLEDUC 1, 4 (Jan. 2006).

<sup>20</sup> *New Jersey v. T.L.O.*, *supra* note 18, at 326.

- Whether the search was reasonably related in scope to the circumstances which justified the interference in the first place.<sup>21</sup>

A student and his parents specifically challenged a school district policy of randomly drug testing student athletes as a condition of participation in Vernonia School District 47J v. Acton.<sup>22</sup> In assessing “reasonableness,” the U.S. Supreme Court indicated a proper balancing of the intrusion on the student’s Fourth Amendment interests against the promotion of legitimate governmental interests.<sup>23</sup> The court additionally confirmed that the public school setting constitutes a ‘special need,’ thereby removing the requirement of probable cause or a warrant.<sup>24</sup> While acknowledging that students in general have a legitimate expectation of privacy, the court determined that student athletes have even less of a legitimate privacy expectation, in that “an element of communal undress is inherent in athletic participation, and athletes are subject to preseason physical exams and rules regulating their conduct.”<sup>25</sup> In upholding the school districts’ practice of suspicionless searches of student athletes, the court cited that the risk of immediate physical harm to the athlete drug user or the athlete’s competitors is especially high.<sup>26</sup>

In 2002, the U.S. Supreme Court applied the Vernonia ruling to a school board policy of requiring drug testing of middle and high school students who participated in competitive extracurricular activities, in Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls.<sup>27</sup> In its analysis, the court drew comparisons between this class of students and athletes, in that some of these clubs and activities involve off-campus travel and communal undress, and all of these activities contain rules and requirements that do not extend to the student body as a whole.<sup>28</sup> The court classified the students who participate in extracurricular activities as voluntary participants, which further limits their expectation of privacy.<sup>29</sup>

Courts have subsequently extended the Vernonia and Board of Education holdings to authorize drug testing of students who drive to school and park on school premises.<sup>30</sup> In Joye v. Hunterdon Central Regional High School Board of Education, the New Jersey Supreme Court indicated that parking at school is voluntary and a privilege, and that student drivers must comply with special rules and regulations that are not required of the student body at large:

...the testing program avoids subjecting the entire school to testing. And it preserves an option for a conscientious objector. He

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<sup>21</sup> *Id.*

<sup>22</sup> 515 U.S. 646 (1995).

<sup>23</sup> *Id.* at 646.

<sup>24</sup> *Id.* at 653.

<sup>25</sup> *Id.* at 646-647.

<sup>26</sup> *Id.* at 662.

<sup>27</sup> 536 U.S. 822 (2002).

<sup>28</sup> *Id.* at 823.

<sup>29</sup> *Id.* at 832.

<sup>30</sup> Joseph R. McKinney, *The Effectiveness and Legality of Random Student Drug Testing Programs Revisited*, 205 WELR 19, 28 (2006).

can refuse testing while paying a price (nonparticipation that is serious, but less severe than expulsion from the school).<sup>31</sup>

However, it is unclear whether suspicionless drug testing of specific classes of students withstands constitutional muster based on the privacy provisions in state constitutions. By way of example, the Pennsylvania Supreme Court noted that the state's constitution required a higher level of scrutiny than that mandated under the Federal Constitution.<sup>32</sup> As such, the court required a school district to make an actual showing of the specific need for its policy of drug testing students who hold parking permits or participate in voluntary extracurricular activities, along with an explanation of its basis for believing that the policy would address that need.<sup>33</sup>

The Florida Constitution contains an express right of privacy as follows:

Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein.<sup>34</sup>

The Fifth District Court of Appeal in Florida recently upheld a school's practice of daily, suspicionless pat-down searches of students.<sup>35</sup> However, critical to the court's finding was that the school was an alternative school, or a school for high-risk children, attendance at the school was in lieu of confinement, and a notable threat of violence existed at the school.<sup>36</sup> In the court's opinion, "alternative schools have an even greater need to maintain discipline and safety for the protection of students and staff, and create a healthy learning environment, than regular public schools...."<sup>37</sup>

It is unclear whether this same holding would extend to a policy of requiring suspicionless searches of student athletes as a condition of participation in interscholastic athletics, given the greater right of privacy afforded in the state constitution.

## V. Economic Impact and Fiscal Note:

### A. Tax/Fee Issues:

None.

### B. Private Sector Impact:

It is unclear whether the parent of the student who tests positive would be required to bear the cost of the steroid testing subsequent to the first positive finding, and the mandatory drug education program.

<sup>31</sup> 826 A.2d 624, 637 (2003).

<sup>32</sup> *Theodore v. Delaware Valley School District*, 836 A.2d 76, 88 (2003).

<sup>33</sup> *Id.* at 95-96.

<sup>34</sup> Section 23, Article 1, of the State Constitution.

<sup>35</sup> *C.N.H. v. State*, 2006 WL 357889 (Feb. 17, 2006).

<sup>36</sup> *Id.* at 1-3.

<sup>37</sup> *Id.* at 3.



**C. Government Sector Impact:**

According to the Department of Education, school districts would be required to comply, which would generate administrative costs associated with testing selection and suspension procedures. Districts could also incur costs associated with challenges and appeals. Presumably, the appropriation provided in this bill would apply to these costs.

It is difficult to ascertain costs of implementation, both due to the inexact estimates of cost per steroid test, and the inability to accurately capture the total number of student participants in sports. The FHSAA estimates that there are about 219,040 student participants in sports from grades 9 through 12.<sup>38</sup> However, this is an overestimate, as students who participate in more than one sport count twice in the totals. Additionally, this estimate relied on data from 2004-2005 levels of participation, and updated figures are not yet available.

The bill provides for a \$3 million appropriation.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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<sup>38</sup> [www.fhsaa.org/programs/participation/2004\\_05.asp](http://www.fhsaa.org/programs/participation/2004_05.asp)



## **VIII. Summary of Amendments:**

None.

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