The Florida Senate

PROFESSIONAL STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Judiciary Committee

BILL:	CS/SB 2200
INTRODUCER:	Judiciary Committee and Senator Villalobos
SUBJECT:	High School Athletics/Drug Testing
DATE:	April 19, 2007 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	deMarsh-Mathues	Matthews	ED	**Favorable**
2.	Cibula	Maclure	JU	**Fav/CS**
3.			EA	
4.				
5.				
6.				

I. Summary:

Contingent upon funding by the Legislature, this bill requires the Florida High School Athletic Association (FHSAA) to implement a 1-year anabolic steroid testing program for 9th through 12th grade student athletes who participate in football, baseball, or weightlifting competitions at member schools. Public and private schools must consent to the program as a prerequisite to membership in FHSAA 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, which will forward the names to the testing agency. From this group, a maximum of 1 percent of students must be randomly tested. To compete in football, baseball, or weightlifting, students are required to consent to testing in writing.

The bill provides that an athlete who tests positive for steroids must be suspended from athletic competition and practice for 90 days and may not be reinstated until a he or she tests negative for steroids. Additionally, an athlete who tests positive for steroids will be subject to repeated tests for the duration of his or her high school athletic eligibility.

The bill specifies procedures for an appeal of the test findings, and authorizes challenges to findings and penalties by the member school or the student.

The FHSAA is required to provide to the Legislature a statistical report on the steroid testing program by October 1, 2008.

The 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 testing program. The Department of Legal Affairs, or its outside counsel, is required to defend FHSAA in civil actions.

This bill is linked to SB 2202, which provides a public records and meetings exemption for drug test findings.

This bill substantially amends section 1006.20, Florida Statutes.

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.[1] 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.[2] The school principal, designated assistant principal, or athletic director is the official representative of each member school.[3]

The FHSAA is required to comply with Florida law to preserve its status as the governing organization of public school athletics.[4] 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.[5] Private schools are eligible for membership in the FHSAA if they engage in competitions with public high schools.[6]

The FHSAA bylaws establish eligibility criteria for all students who participate in high school athletic competition in its member schools.[7] Included in the bylaws is a requirement that all student participants satisfactorily pass a medical evaluation each year before competing in interscholastic athletics.[8] Students are not authorized to compete until the medical evaluation results have been approved by the school.[9] 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 a procedure to provide due process to students to appeal unfavorable rulings. Student athletes and member schools may appeal unfavorable rulings to the committee on appeals and then 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.[10]

[1] Section 1006.20(1), F.S.
[2] Section 1006.20(3)(a), F.S.
[3] Section 1006.20(3)(b), F.S.
[4] Section 1006.20(1), F.S.
[5] Section 1006.19, F.S.
[6] Section 1006.20(1), F.S.
[7] Section 1006.20(2)(a), F.S.
[8] Section 1006.20(2)(c), F.S.
[9] *Id.*
[10] Section 1006.20(7), F.S.

Controlled Substances

Chapter 893, F.S., contains the Florida Comprehensive Drug Abuse Prevention and Control Act.[11] This Act provides a list of controlled substances, and classifies them according to their potential for abuse from Schedules I through V.[12] 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.[13] Anabolic steroids are chemically and pharmacologically related to testosterone.[14]

OPPAGA Study and Drug Testing in Florida

In October 2004, Office of Program Policy Analysis and Government Accountability (OPPAGA) published a study on steroid use among high school students.[15] 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 2 percent of students nationally report using steroids, and the use is highest among high school seniors.
- Steroid use in Florida among 6th through 12th graders is comparable to national levels.
- About 1.4 percent, or 19,350, of Florida students reported using steroids previously, and 0.4 percent, or 5,600, reported using steroids in the 30 days before the survey.
- Males are represented much higher than females as steroid users.
- Steroid use is increasing in the 9th and 12th 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.
- Of those Florida districts that 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 5 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 explicit statutory reference to public school drug testing, s. 1001.42(6), F.S., provides that districts 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."

[11] Section 893.01, F.S.
[12] Section 893.03, F.S.
[13] Section 893.03(3), F.S.
[14] Section 893.03(3)(d), F.S.
[15] OFFICE OF PROGRAM POLICY ANALYSIS AND GOVERNMENT ACCOUNTABILITY, INFORMATION BRIEF, REPORT NO. 04-72, THOUGH THE OPTION IS AVAILABLE, SCHOOL DISTRICTS DO NOT TEST STUDENTS FOR STEROIDS (Oct. 2004).

III. Effect of Proposed Changes:

Contingent upon funding by the Legislature, this bill requires the Florida High School Athletic Association (FHSAA) to implement a 1-year anabolic steroid testing program for 9th through 12th grade student athletes who participate in football, baseball, or weightlifting competitions at member schools for the 2007-2008 academic year. Public and private schools must consent to the program as a prerequisite to membership in FHSAA under this bill.

The board of directors of FHSAA must establish procedures for the anabolic steroid drug testing program based on the minimum criteria specified in the bill:

- The FHSAA must select and enter into a contract with a testing agency whose laboratory is accredited by the World Anti-Doping Agency;
- A maximum of 1 percent of the students participating in football, baseball, and weightlifting must be randomly selected for testing;
- 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
- The findings of a student's drug test held by the testing agency that contracts with FHSAA for the testing program and records of an appeal of a drug test finding must be maintained separately from a student's educational record.

To participate in football, baseball, or weightlifting, each student must complete and sign a consent form prescribed by FHSAA. The consent form must include specified information: a brief description of the drug testing program, the penalties for a positive finding, the procedure for challenging a positive finding, and the procedure for appealing a prescribed penalty.

The bill specifies requirements for the challenge and appeal of drug testing in the event of a positive test by a member school or student. A student selected for testing who fails to provide a specimen will be suspended immediately from participation in interscholastic athletic practice and competition until the specimen is provided. If a student tests positive, the school administration will immediately suspend the student from participation, and notify and schedule a meeting with the student and his or her parent during which the principal or his or her designee will explain the finding, challenge procedure, penalties, and the procedures for appealing the penalties. The school must challenge the test result or the period of ineligibility at the request of a student. Appeals are first heard by the FHSAA commissioner and then by the FHSAA board of directors.

The bill provides that an athlete who tests positive for steroids must be suspended from athletic competition and practice for 90 days and may not be reinstated until a he or she tests negative for steroids. However, on appeal, the penalty may be reduced by half or eliminated. Additionally, an athlete who tests positive for steroids will be subject to repeated tests for the duration of his or her high school athletic eligibility.

A student's rights to challenge a drug test finding are as follows:

- The 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 the student's request. The cost of the 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 imposed on a student due to a positive finding. At the discretion of the FHSAA commissioner, a student's penalty may be reduced by half or eliminated. However, an athlete must test negative on an exit test in order to be reinstated.
- The member school may appeal the commissioner's decision with the FHSAA Board of Directors, and must appeal upon the student's request. The board of directors may reduce by half or eliminate the student's penalty.
- Technical experts may serve as consultants to the FHSAA's commissioner and its board of directors in connection with appeals.
- The results of a drug test are not admissible in a criminal prosecution.

The FHSAA is required to provide a report on program results by October 1, 2008, to the President of the Senate and the Speaker of the House of Representatives. The report must include statistics on the number of students tested; the number of violations; the number of challenges and their results; the number of appeals and their dispositions; and the costs incurred by FHSAA to administer the program, including attorney's fees and other expenses of litigation.

The bill provides immunity from civil liability for 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, must defend FHSAA, its board of directors, employees and its member schools, and their employees in civil litigation resulting from the program.

The program must be conducted to the extent that it is funded by the Legislature. All expenses of the program must be paid with funds appropriated by the Legislature, including but not limited to: fees and expenses charged by the testing agency for administrative services, and specimen collection and analysis; administrative expenses incurred by FHSAA; and attorney's fees and other costs of litigation. To implement the program within the funds appropriated, the FHSAA may limit the program to only one or two of the sports named in the bill.

The provisions of the bill automatically repeal on October 2, 2008.

This act takes effect July 1, 2007.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Suspicionless Drug Testing of High School Students

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.[16] 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.[17] 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.[18] The *T.L.O.* Court established a two-prong test to determine reasonableness, which is as follows:

> i. Whether the action was justified at its inception; and
> ii. Whether the search was reasonably related in scope to the circumstances which justified the interference in the first place.[19]

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.*[20] 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.[21] The Court additionally confirmed that the public school setting constitutes a "special need," thereby removing the requirement of probable cause or a warrant.[22] 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."[23] In upholding the school district's practice of

[16] New Jersey v. T.L.O., 469 U.S. 325 (1985).
[17] Ronald T. Hyman, *Constitutional Issues When Testing Students for Drug Use, A Special Exception, and Telltale Metaphors*, 35 J.L. & EDUC. 1, 4 (Jan. 2006).
[18] *T.L.O.*, 469 U.S. at 326.
[19] *Id.*
[20] Vernonia School District 47J v. Acton, 515 U.S. 646 (1995).
[21] *Id.* at 646.
[22] *Id.* at 653.
[23] *Id.* at 646-647.

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.[24]

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.*[25] 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.[26] The Court classified the students who participate in extracurricular activities as voluntary participants, which further limits their expectation of privacy.[27]

Courts have subsequently extended the *Vernonia* and *Earls* holdings to authorize drug testing of students who drive to school and park on school premises.[28] 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 can refuse testing while paying a price (nonparticipation) that is serious, but less severe than expulsion from the school.[29]

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.[30] 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.[31]

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

[24] *Id.* at 662.
[25] Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls, 536 U.S. 822 (2002).
[26] *Id.* at 823.
[27] *Id.* at 832.
[28] Joseph R. McKinney, *The Effectiveness and Legality of Random Student Drug Testing Programs Revisited*, 205 WEST'S EDUC. L. REP. 19, 28 (2006).
[29] Joye v. Hunterdon Central Regional High School Board of Education, 826 A.2d 624, 637 (N.J. 2003).
[30] Theodore v. Delaware Valley School District, 836 A.2d 76, 88 (P.a. 2003).
[31] *Id.* at 92.

except as otherwise provided herein.[32]

The Fifth District Court of Appeal in Florida recently upheld a school's practice of daily, suspicionless pat-down searches of students.[33] 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.[34] 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 . . . ."[35]

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 right of privacy afforded in the state constitution.

Access to Courts

This bill makes persons and entities immune from civil liability for acts and omissions made in connection with the steroid testing of student athletes. As a result, the bill limits a student's access to courts. The Supreme Court in *Kluger v. White*, explained the test to determine whether a statute unconstitutionally denies access to courts as follows.[36]

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat. s 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[37]

Committee staff has been unable to locate any cases suggesting that one could have been liable for damages caused by an act or omission in connection with a drug test prior to the adoption of the Declaration of Rights in 1968. As a result, the grant of immunity provided by the bill does not appear to unconstitutionally deny access to courts.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

[32] FLA. CONST. art. I, § 23.
[33] C.N.H. v. State, 927 So. 2d 1 (5th DCA 2006).
[34] *Id.* at 2-4.
[35] *Id.* at 4.
[36] Kluger v. White, 281 So. 2d 1 (Fla. 1973).
[37] *Id.* at 4.

B. Private Sector Impact:

The parent of the student who tests positive or the member school may be required to bear the cost of the steroid testing subsequent to the first positive finding. The bill does not specify whether a school or a student's parents will pay for the mandatory drug education program for a student who tests positive for steroids.

C. Government Sector Impact:

The member school may be responsible for costs associated with conducting or contracting for a third party to conduct a mandatory drug education program for athletes who test positive for steroids under the bill.

For school districts, there may be some administrative costs associated with testing selection and suspension procedures. Districts could also incur costs associated with challenges and appeals.

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 were about 214,274 student participants in sports from grade 9th through 12th.[38] Of these, the FHSAA estimates the number of student participants in baseball, football (11-player), and weightlifting as 13,004, 37,748, and 8,161, respectively. However, this is an overestimate, as students who participate in more than one sport may be duplicated in the total. Additionally, this estimate relies on data from 2005-2006 levels of participation, and updated figures are not yet available.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[38] FLORIDA HIGH SCHOOL ATHLETIC ASSOCIATION, SPORTS PARTICIPATION SURVEYS: 2005-06 SPORTS PARTICIPATION SURVEY (last visited April 15, 2007), http://www.fhsaa.org/programs/participation/2005_06.asp.

VIII. Summary of Amendments:

None.