HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 461 High School Athletics
SPONSOR(S): Llorente and others
TIED BILLS: HB 463 **IDEN./SIM. BILLS:** SB 2200

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Committee on Education Innovation & Career Preparation		White	White
2) Schools & Learning Council			
3) Policy & Budget Council			
4)			
5)			

SUMMARY ANALYSIS

Currently, there is no statewide requirement that high school student athletes be tested for anabolic steroids.

House Bill 461 establishes a one-year, random, anabolic steroids testing program for students in grades 9 through 12, who participate in football, baseball, and weightlifting. The program is to be administered by the Florida High School Athletic Association (FHSAA) during the 2007-2008 school year. Public and private schools must participate in the program as a prerequisite to FHSAA membership. The bill provides program requirements, penalties, and challenge and appeal procedures.

The bill requires FHSAA to submit an annual report of program results to the Legislature.

The bill provides that the random, steroid testing program is to be funded by the Legislature, but it does not contain an appropriation. The cost of the program is currently indeterminate. Please see FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. HOUSE PRINCIPLES ANALYSIS:

Provides Limited Government: The bill requires FHSAA member schools and student athletes in specified sports to participate in a mandatory random steroid testing program as a prerequisite to athletic participation.

B. EFFECT OF PROPOSED CHANGES:

Present Situation

Florida High School Athletic Association: The Florida High School Athletic Association (FHSAA) is the governing nonprofit organization for Florida public school athletics in grades 6 through 12.[1] The school principal, or his or her designee, is the official representative of each member school.[2] Private schools may also become members if they engage in competitions with public high schools.[3]

The FHSAA bylaws establish eligibility criteria for all students who participate in high school athletic competition in its member schools.[4] Included is a requirement that all students satisfactorily pass a medical evaluation each year before competing in interscholastic athletics;[5] however, an exception may be granted where a parent objects in writing due to religious beliefs.[6]

The FHSAA is required to establish procedures for students to appeal unfavorable rulings regarding his or her eligibility to compete. Appeals by student athletes or member schools are initially made to the regional committee on appeals. The committee on appeals decision may be appealed to the board of directors, which is authorized to issue a final decision regarding the ruling of the committee on appeals.[7]

Controlled Substances: Chapter 893, F.S., contains the Florida Comprehensive Drug Abuse Prevention and Control Act.[8] This Act provides a list of controlled substances, and classifies them according to their potential for abuse from Schedules I through V.[9] 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.[10] Anabolic steroids are chemically and pharmacologically related to testosterone.[11]

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[1] See s. 1006.20(1), F.S.
[2] See s. 1006.20(3)(b), F.S.
[3] See s. 1006.20(1), F.S.
[4] See s. 1006.20(2)(a), F.S.
[5] See s. 1006.20(2)(c), F.S.
[6] Section 1006.20(2)(d), F.S.,
[7] See s. 1006.20(7), F.S.
[8] See s. 893.01, F.S.
[9] See s. 893.02, F.S.
[10] See s. 893.03(3), F.S.
[11] See s. 893.03(3)(d), F.S.

OPPAGA Study and Drug Testing in Florida: In October 2004, the Office of Program Policy Analysis and Government Accountability (OPPAGA) published a study on steroid use among high school students.[12] 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.
- Approximately two percent of students nationally report using steroids, and use is highest among high school seniors.
- Steroid use in Florida among 6th through 12th graders is comparable to national levels.
- Approximately 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 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.[13]
- 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 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 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."

Effect of Proposed Changes

The bill creates subsection (10) of s. 1006.20, F.S., to require the FHSAA to facilitate a one-year program during the 2007-2008 academic year in which students in grades 9 through 12 in its member schools, who participate in regular and postseason football, baseball, and weightlifting sports that are governed by the FHSAA, must be subject to random testing for the use of anabolic steroids. All schools, both public and private, must consent to the provisions of this subsection as a prerequisite for membership in FHSAA for the duration of the program.

The board of directors of FHSAA must establish procedures for the anabolic steroid drug testing program which, at a minimum, require:

- The FHSAA to enter into a contract with a testing agency whose laboratory is accredited by the World Anti-Doping Agency;
- Each member school to report the names of all students who will compete to the FHSAA and the FHSAA to provide the list of all names submitted by the member schools to the testing agency;
- The testing agency to randomly select a maximum of one percent of the students on the list for testing;
- The testing agency to give at least seven days notice to the school administration and the FHSAA of the date that a it will collect a specimen from a randomly selected student, whose name will not be disclosed; and

[12] OPPAGA Information Brief, *Though the Option Is Available, School Districts Do Not Test Students for Steroids*, Report No. 04-72(Oct. 2004).

[13] 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.

- The finding of a drug test to be maintained separately from a student's educational record and to limit disclosure by the testing agency only to FHSAA, the student, the student's parent, the administration of the student's school, and the administration of any school to which the student may transfer during a suspension from participation in interscholastic athletics resulting from a positive finding.

In order to participate in football, baseball, or weightlifting, each student and his or her parents must complete and sign a consent form prescribed by FHSAA. Failure to sign the consent form results in the student's ineligibility to participate in all interscholastic athletics. 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.

If a student is selected for testing and refuses to provide a specimen, the bill requires that the student be immediately suspended from interscholastic athletic practice and competition until such time as a specimen is provided.

If a student tests positive in a drug test under the bill, the school administration must: immediately suspend the student from participation in all interscholastic athletic practice and competition; 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 penalties for a positive finding are a 90 school day suspension from all interscholastic athletic practice and competition. The student must take a mandatory exit drug test no sooner than the 60th school day of the suspension. If the exit test is negative, the FHSAA must immediately restore the eligibility of the student. If the exit test is positive, the student must remain suspended from all interscholastic athletic practice and competition until such time as a subsequent retest of the student results in a negative finding. Thereafter, the student shall be subject to repeated tests during his or her eligibility for high school athletics. Additionally, a student who tests positive must complete a mandatory drug education program. This program must be conducted by the student's school, the student's school district, or a third-party organization contracted by the school or school district.

The following due process appeal procedures are established for students who test positively in a drug test:

- The member school may challenge a positive finding by requesting an analysis of a sample of the original specimen, and must challenge the finding upon the student's 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 imposed on a student due to a positive finding, and must appeal if requested by the student. The commissioner may require the student to complete the penalty, may reduce the penalty by one-half, or provide complete relief from the prescribed penalty.
- A member school may appeal the commissioner's decision to the FHSAA board of directors, and must appeal upon the student's request. The board of directors may require the student to complete the penalty, may reduce the penalty by one-half, or provide complete relief from the prescribed penalty. The decision of the board is final.
- Technical experts are authorized to serve as consultants to the FHSAA's commissioner and its board of directors in connection with appeals.

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 is to be conducted to the extent funded by the Legislature and the FHSAA is authorized to only implement the program in one or two of the named sports if necessary to conduct the program within appropriated funds. Expenses of the program must 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.

C. SECTION DIRECTORY:

Section 1.: Amends s. 1006.20, F.S.; establishes a random steroid testing program to be administered by the FHSAA; provides program requirements; provides penalties; provides appeal procedures; provides civil immunity; provides that program is to be conducted to the extent funded by the Legislature.

Section 2.: Provides an effective date of July 1, 2007.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have a fiscal impact on state revenues.

2. Expenditures:

   The bill provides that the random steroid testing program is to be funded by the Legislature, but does not contain an appropriation. The bill further states that expenses of the program must 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.

   At the time of this analysis, estimated costs for FHSAA administrative expenses and litigation were unavailable. Regarding the costs of steroid testing, an OPPAGA study on steroid use among high school students indicated that steroid tests cost between $50 and $250.[14] According to the FHSAA website, 58,913 students participated in football, baseball, and weight lifting in 2005-2006.[15] Thus, steroid testing costs for the maximum of one percent of student participants permitted by the bill could range from $29,450 (589 students X $50 per test) to $147,250 (589 students X $250 per test). The number of student participants (58,913) may be overstated, however, because the data does not reflect that students may participate in more than one sport.

[14] OPPAGA Information Brief, *Though the Option Is Available, School Districts Do Not Test Students for Steroids*, Report No. 04-72(Oct. 2004).
[15] Data may be found at: http://www.fhsaa.org/programs/participation/2005_06.asp

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have a fiscal impact on local government revenues.

2. Expenditures:

Under the bill, a student who tests positive for steroids must complete a mandatory drug education program. This program must be conducted by the student's school, the student's school district, or a third-party organization contracted by the school or school district. Accordingly, a school or school district that does not have a drug education program currently available may incur costs for that program.

The bill also provides that a member school may challenge a positive drug test finding by requesting a re-analysis of the original specimen, and must challenge the finding upon the student's request. The cost of the re-analysis is borne by the member school or student's parent, unless the finding is negative, in which case, the cost is refunded. Accordingly, school districts may incur the cost of re-analyses if positive. The OPPAGA study on steroid use among high school students indicated that steroid tests cost between $50 and $250.[16]

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

During a challenge to a positive drug test finding, parents may be required to pay for the cost of a re-analysis that is positive. *See* Fiscal Impact on Local Governments, Expenditures, *supra.*

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not require a city or county to expend funds or to take any action requiring the expenditure of funds.

The bill does not reduce the authority that municipalities or counties have to raise revenues in the aggregate.

The bill does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

Searches: 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.[17] 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.[18] The T.L.O. Court stipulated that a student has a legitimate expectation of privacy.

[16] OPPAGA Information Brief, *Though the Option Is Available, School Districts Do Not Test Students for Steroids*, Report No. 04-72(Oct. 2004).
[17] 469 U.S. 325 (1985).
[18] Ronald T. Hyman, *Constitutional Issues When Testing Students for Drug Use, A Special Exception, and Telltale Metaphors*, 35 JLEDUC 1, 4 (Jan. 2006).

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.[19] 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.[20]

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.*[21] 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.[22] The court additionally confirmed that the public school setting constitutes a 'special need,' thereby removing the requirement of probable cause or a warrant.[23] 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."[24] In upholding the school districts' practice of suspicionless searches of student athletes, the court noted, "… that the risk of immediate physical harm to the athlete drug user or the athlete's competitors is especially high."[25]

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*.[26] 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.[27] The court classified the students who participate in extracurricular activities as voluntary participants, which further limits their expectation of privacy.[28]

State 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.[29] 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).[30]

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[19] *New Jersey v. T.L.O.*, *supra* note 18, at 326.
[20] *Id.*
[21] 515 U.S. 646 (1995).
[22] *Id.* at 646.
[23] *Id.* at 653.
[24] *Id.* at 646-647.
[25] *Id.* at 662.
[26] 536 U.S. 822 (2002).
[27] *Id.* at 823.
[28] *Id.* at 832.
[29] Joseph R. McKinney, *The Effectiveness and Legality of Random Student Drug Testing Programs Revisited*, 205 WELR 19, 28 (2006).
[30] 826 A.2d 624, 637 (2003).

However, it is unclear whether suspicionless drug testing of specific classes of students withstands constitutional muster under privacy provisions in state constitutions. For example, the Pennsylvania Supreme Court noted that its state constitution required a higher level of scrutiny than that mandated under the Federal Constitution.[31] 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.[32]

The right of privacy contained in the Florida Constitution provides:

> 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.[33]

The Fifth District Court of Appeal in Florida recently upheld the practice at Cornerstone Complex, an alternative middle school, of suspicionless pat-down searches of students.[34] Central to the court's holding were the facts that: the school was an alternative school, or a school for high-risk children; that attendance at the school was in lieu of confinement; and that a notable threat of violence existed at the school.[35] According to the court, "Students within a school environment have a lesser expectation of privacy than members of the general population, and they may waive a portion of their privacy rights in exchange for, or in lieu of something else. *J.A. See also Vernonia* (approved random drug urinalysis testing policy for student athletes)."[36] In this case, the court found that the students in the alternative school waived a portion of their privacy rights in exchange for a lack of confinement.[37] Further, the court stated that, "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 . . ."[38]

The court also stated that:

> In addition to weapons, Cornerstone had a legitimate interest in keeping drugs out of the school in order to promote a safe environment in which the students could redeem themselves and learn. A school may test for drugs because the school is responsible for maintaining the discipline, health and safety of students. *Earls*, at 836, 122 S.Ct. 2559. Further, a school has a legitimate concern in preventing certain students from using drugs. *Vernonia*.[39]

Whether the aforementioned holding would be applied in a challenge to the bill's requirement of random, suspicionless, drug testing of athletes as a condition of participation in interscholastic athletics is yet unknown.

Equal Protection: Article I, s. 2 of the Florida Constitution, sets forth the guaranty of equal protection, which provides that:

> All natural persons, female and male alike, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to

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[31] *Theodore v. Delaware Valley School District*, 836 A.2d 76, 88 (2003).
[32] *Id.* at 95-96.
[33] Section 23, Article 1, of the State Constitution.
[34] *C.N.H. v. State*, 927 So.2d 1 (Fla. 5th DCA 2006), *rev. den.* (July 14, 2006).
[35] *Id.* at 1-3.
[36] *Id.*at 4.
[37] *Id.*
[38] *Id.* at 3.
[39] *Id.* at 5.

pursue happiness, to be rewarded for industry, and to acquire, possess and protect property; except that the ownership, inheritance, disposition and possession of real property by aliens ineligible for citizenship may be regulated or prohibited by law. No person shall be deprived of any right because of race, religion, national origin, or physical disability.

Equal protection, however, does not require that a statute apply equally and uniformly to all persons within the state. It is sufficient if the statute applies uniformly to all persons who are similarly situated.[40] Furthermore, reasonable classifications, meaning a grouping of things because they agree with one another in certain particulars and differ from other things in those particulars, is permissible under the equal protection clause, so long as the classification is not arbitrary and is based on some difference in the classes having a substantial relation to the purpose of the legislation.[41]

The bill provides that the steroid testing program only applies to students participating in football, baseball, and weightlifting.

B. RULE-MAKING AUTHORITY:

This bill does not appear to create, modify, or eliminate rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES

[40] *State ex rel. Spence v. Bryan,* 87 Fla. 56 (1924).
[41] *Greater Miami Financial Corp. v. Dickinson,* 214 So.2d 874 (Fla. 1968).