

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 353 Drug Screening of Potential and Existing Beneficiaries of Temporary Cash Assistance
SPONSOR(S): Rulemaking & Regulation Subcommittee, Health & Human Services Access Subcommittee; Smith
TIED BILLS: IDEN./SIM. **BILLS:** SB 556

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Health & Human Services Access Subcommittee	12 Y, 3 N, As CS	Batchelor	Schoolfield
2) Rulemaking & Regulation Subcommittee	9 Y, 6 N, As CS	Miller	Rubottom
3) Judiciary Committee			
4) Health Care Appropriations Subcommittee			
5) Health & Human Services Committee			

SUMMARY ANALYSIS

The bill creates s. 414.145, F.S., requiring the Department of Children and Families (DCF) to perform a drug screening for temporary cash assistance applicants as a condition of eligibility. The bill provides the following:

- DCF shall require a drug test consistent with s. 112.0455, F.S.
- All applicants for Temporary Assistance to Needy Families (TANF) shall be drug screened as a condition of eligibility to receive cash assistance benefits.
- Applicants who test positive for controlled substances will be disqualified from receiving temporary cash assistance for 1 year. DCF must inform applicants who test positive of the ability to apply again one year from the date of the positive test. Applicants who test positive again will be ineligible to receive TANF benefits for 3 years from the date of the second positive test.
- If a parent tests positive for controlled substances, DCF may designate a “protective payee” to receive the cash assistance benefits on behalf of a dependent child. Alternatively, the parent may choose an immediate family member to receive benefits on behalf of the child or DCF may approve another individual to receive the benefits; a person so designated by the parent or approved by DCF also must undergo drug testing.
- The cost of drug testing will be paid by the individual applicant.
- DCF will be required to provide any individual who tests positive for controlled substances with information concerning drug abuse and treatment programs in the area in which he or she resides. The bill specifies that neither DCF nor the state is responsible for providing or paying for substance abuse treatment as part of screening under this section.
- DCF is authorized to adopt rules as necessary to implement the law.

The bill raises important constitutional questions related to the permissibility of suspicionless drug testing as a condition of public assistance.

The bill provides an effective date of July 1, 2011.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Temporary Assistance for Needy Families (TANF)

Under the welfare reform legislation of 1996, the Personal Responsibility and Work Opportunity Reconciliation Act – PWRORA – Public Law 104-193, the Temporary Assistance for Needy Families (TANF) program replaced the welfare programs known as Aid to Families with Dependent Children (AFDC), the Job Opportunities and Basic Skills Training (JOBS) program and the Emergency Assistance (EA) program. The law ended federal entitlement to assistance and instead created TANF as a block grant that provides States, territories and tribes federal funds each year. These funds cover benefits, administrative expenses, and services targeted to needy families. TANF became effective July 1, 1997, and was reauthorized in February 2006 under the Deficit Reduction Act of 2005.¹ States receive block grants to operate their individual programs and to accomplish the goals of the TANF program. Those goals include:

- Assisting needy families so that children can be cared for in their homes;
- Reducing the dependency of needy parents by promoting job preparation, work and marriage;
- Preventing out-of-wedlock pregnancies;
- Encouraging the formation and maintenance of two-parent families.²

Currently, DCF administers the TANF program in conjunction with the Agency for Workforce Innovation (AWI),³ Current law provides that families are eligible for cash assistance for a lifetime cumulative total of 48 months (4 years).⁴ DCF reports that approximately 113,346 people are receiving temporary cash assistance.⁵ The FY 2010-2011 appropriation of TANF funds to support temporary cash assistance was \$211,115,965.

The TANF program expires on September 30, 2011 and must be reauthorized by Congress to continue.

Food Assistance Program (Supplemental Nutrition Assistance Program-SNAP)

The Food Assistance Program is a 100 % federally funded program to help low-income people buy food they need for good health. The U.S. Department of Agriculture (USDA) determines the amount of food assistance benefits an individual or family receives. Food assistance benefits are a supplement to a family's food budget. Households may need to spend some of their own cash, along with their food assistance benefits, to buy enough food for a month.⁶ DCF reports that over 1.9 million Floridians received food assistance during fiscal year 2009-10.⁷

¹ US Dept. of Health and Human Services, Administration on Children and Families
<http://www.acf.hhs.gov/programs/ofa/tanf/about.html> (last visited on 2/15/11)

² *Id*

³ State Plan for Temporary Assistance for Needy Families Renewal, October 1, 2008-September 30, 2011, @
<http://www.dcf.state.fl.us/Search.shtml?cx=001246626777910876508%3Aznyjo2rfb2i&cof=FORID%3A11&ie=UTF-8&q=Drug+test#1086>

⁴ s. 414.105, F.S.

⁵ DCF Quick Facts, Access Program, January 1, 2011.

⁶ Food Assistance Program Fact Sheet, DCF <http://www.dcf.state.fl.us/programs/access/foodstamps.shtml> (last visited 3/3/11)

⁷ DCF Quick Facts, Access Program, January 1, 2011

Pilot Project for Drug Testing TANF Applicants

Currently, DCF does not drug screen any individual as a condition of eligibility for cash assistance. From January 1999 to May 2001, DCF in consultation with Workforce Florida implemented a pilot project in Regions 3 and 8 to drug screen and drug test applicants for TANF.⁸ A Florida State University researcher under contract to evaluate the pilot program did not recommend continuation or statewide expansion of the project. Overall research and findings concluded that there is very little difference in employment and earnings between those who test positive versus those who test negative. Researchers concluded that the cost of the pilot program was not warranted.

Sanctions to Welfare and Food Assistance Recipients from Felony Drug Convictions

Federal law provides that an individual convicted (under federal or state law) of any offense which is classified as a felony related to the possession, use or distribution of a controlled substance shall not be eligible for assistance under the TANF program or benefits under the food stamp program or any program carried out under the Food and Nutrition Act of 2008.⁹

The same section of Federal law provides that each state has the right to exempt individuals from having benefits withheld due to a felony drug charge.¹⁰ Florida has opted to exempt individuals from this provision and does not deny benefits for a felony drug conviction, unless the conviction is for drug trafficking.¹¹

Drug Testing Welfare and Food Assistance Recipients

Federal law regarding the use of TANF funds provides that states may test welfare recipients for use of controlled substances and sanction those recipients who test positive.¹² However, there is no provision in federal law allowing drug testing recipients of the food assistance program. Further the Federal code provides that states cannot as a condition of eligibility impose additional application or application processing requirements, on recipients of the food assistance program.¹³

Protective Payees

The TANF program requires that people receiving cash assistance must satisfy work requirements established in federal law. Florida statutes provide that the Agency for Workforce Innovation develop specific activities that satisfy the work requirements.¹⁴

In the event that a TANF recipient is noncompliant with the work activity requirements, DCF has authority to terminate cash assistance to the family.¹⁵ In the event that assistance is terminated, DCF will establish a protective payee that will receive TANF funds on behalf of any children in the home who are under the age of 16.¹⁶ The protective payee shall be designated by DCF and may include:¹⁷

- A relative or other individual who is interested in or concerned with the welfare of the child or children and agrees in writing to utilize the assistance in the best interest of the child or children.
- A member of the community affiliated with a religious, community, neighborhood, or charitable organization who agrees in writing to utilize the assistance in the best interest of the child or children.

⁸ Evaluation Report, Robert E.Crew, Florida State University (on file with committee staff).

⁹ P.L. 104-193, Section 115, 21 U.S.C. 862(a)

¹⁰ *Id*

¹¹ s. 414.095, F.S.

¹² P.L. 104-193, Section 902, 21 U.S.C. 862(b)

¹³ 7 CFR Part 273.2

¹⁴ s. 445.024, F.S.

¹⁵ s. 414.065, F.S.

¹⁶ *Id*

¹⁷ *Id*

- A volunteer or member of an organization who agrees in writing to fulfill the role of protective payee and utilize the assistance in the best interest of the child or children.

Present Testing of Offenders on Community Supervision

In Florida, offenders convicted of certain non-violent felonies who are chronic substance abusers may be placed by the courts on community supervision with the Department of Corrections (DOC); the program includes random drug testing.¹⁸ Those placed on drug offender probation serve an average sentence of 2.9 years. According to DOC statistics, during 2009-2010 there were 40,851 people on community supervision due to a drug offense. This includes offenders sentenced to specialized drug offender probation in addition to those who committed a drug offense but were not sentenced to drug probation.¹⁹

Challenges under the U.S. Constitution

Federal courts have found in certain instances that suspicion-less drug testing is constitutional and does not violate the Fourth Amendment, which protects an individual's rights against unreasonable search and seizure.²⁰

However, in 1999 the State of Michigan enacted a pilot program for suspicion-less drug testing of all family assistance recipients with the intent for the program eventually to become effective statewide.²¹ Welfare recipients challenged the new law authorizing suspicion-less drug testing in federal court. The federal district court found that the law was an unconstitutional violation of individual's right to privacy under the Fourth Amendment. The court specifically ruled that drug testing was unconstitutional when applied universally or randomly without reasonable suspicion of drug use.²²

Agency for Health Care Administration – Laboratory Certifications

The Agency for Health Care Administration (AHCA) regulates facilities that perform clinical, anatomic, or cytology lab services to provide information or materials for use in diagnosis, prevention or treatment of a disease or in the identification or assessment of a medical or physical condition in accordance with Chapter 408 and 483, F.S. These are considered clinical labs. Additionally, AHCA regulates facilities for "Drug Free Workplaces."²³ These types of labs perform chemical, biological or physical instrumental analyses to determine the presence or absence of specified drugs or their metabolites in job applicants, including those of any agency in state government.²⁴ AHCA does not have the statutory authority to drug screen temporary cash assistance benefits in either type of lab.

U.S. Department of Health and Human Services Division of Workplace Programs

The United States Department of Health and Human Services (HHS), Substance Abuse and Mental Health Services Administration (SAMHSA), Division of Workplace Programs (DWP), provides oversight for the Federal Drug Free Workplace Program. DWP certifies labs that conduct forensic drug testing for federal agencies and for some federally-regulated industries.²⁵

¹⁸ s. 948.20, F.S.

¹⁹ "2009-2010 Agency Statistics" at http://www.dc.state.fl.us/pub/annual/0910/stats/csp_population.html

²⁰ Board of Education v. Earls, 536 U.S. 822, 122 S. Ct. 2559, 153 L. Ed. 2d 735 (2002); Skinner v. Railway Labor Executives' Association, 489 U.S. 602, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).

²¹ P.A. 1999, No. 17, codified as s. 400.571, Michigan Compiled Statutes Annotated.

²² Marchwinski v. Howard, 113 F. Supp. 2d 1134 (E. D. Mich. 2000). On appeal a panel of the Sixth Circuit first reversed the District Court, finding the required testing did not violate the Fourth Amendment to the U.S. Constitution. Marchwinski v. Howard, 309 F. 3d 330 (6th Cir. 2002). That decision was vacated for the entire court to consider the case. Marchwinski, vacated 319 F. 3d 258. The appellate court deadlocked 6-6 to reverse so the lower court decision stood affirmed. Marchwinski, affirmed after rehearing *en banc*, 60 Fed. Appx. 601, 2003 WL 1870916 (6th Cir. 2003).

²³ s. 112.0455, 440.102, F.S.

²⁴ Chapter 408, F.S.

²⁵ *Id*

Agency Rulemaking

DCF must comply with the statutory requirements for rulemaking when implementing or interpreting a substantive statute.²⁶ Exercising rulemaking authority delegated by the Legislature requires the authority to adopt rules and sufficient statutory guidance to implement a specific statute.²⁷ DCF currently has no statutory authority, guidance, or direction to develop and implement a program of drug testing for TANF applicants.

Effect of Proposed Changes

The bill creates s. 414.145, F.S., requiring DCF to drug test each individual applying for temporary cash assistance as a condition of eligibility for those benefits. DCF shall provide notice of the required drug testing at the time of application. The notice must advise each person to be tested of the opportunity to voluntarily disclose any prescription or over-the-counter medication the person is taking prior to the test. DCF shall require each person subject to being tested to sign an acknowledgement form that he/she has received notice of DCF's drug screen policy, that he/she can refuse to undergo the screen by choosing not to apply for benefits, and that he/she has the opportunity to voluntarily disclose any medication being taken prior to the test.

Under the present bill, all individuals included within the cash assistance group covered by the TANF application would be required to submit to testing with the exception of children under the age of 18. The bill requires all parents to be tested but is silent on minor children under the age of 18 who themselves are parents of other minor children covered by the application.²⁸

The bill provides an individual will be disqualified from receiving receive TANF benefits if that person tests positive for controlled substances. The initial disqualification is for one year from the date of the positive test. If the person re-applies after the period of disqualification but again tests positive for controlled substances, that individual is disqualified from receiving TANF benefits for 3 years from the date of that positive test.

DCF may designate a statutory "protective payee" to receive funds on behalf of the child whose parent is disqualified from receiving TANF benefits under this section.²⁹ Alternatively, a parent found ineligible under this section may designate an immediate family member, or an individual approved by DCF, to receive TANF benefits on behalf of the child. The bill does not require a statutory protective payee to submit to drug testing but does require testing for the immediate family member other individual designated by the parent. The bill does not define "immediate family member."

DCF shall provide an individual who tests positive for controlled substances with information concerning substance abuse treatment programs which are available in the individual's geographic area. Neither DCF nor the state is responsible for providing or paying for substance abuse treatment for these individuals as part of the screening required by the law.

²⁶ s. 120.54, F.S.

²⁷ s. 120.536(1), F.S. *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

²⁸ The prior bill required testing only of individuals convicted of a drug felony within the prior 3 years and required re-screening annually for 3 years after they begin to receive TANF funds. DCF estimates that between 170-340 people (based on current caseloads) would test positive as a result of a drug screen, and that about 1.7% of current recipients would have a prior drug felony conviction. Email from Jennifer Lange on TANF (on file with RR subcommittee staff). Numbers and Statistics based on data from North Carolina, DCF has been in exchanges with the state as it relates to the bill and numbers of people affected.

²⁹ Current law authorizes DCF to continue TANF payments through a "protective payee" for children under the age of 16 in a family where a member repeatedly fails to comply with the requirements of the program. The payee is selected by DCF and may be a relative, community member associated with a charitable organization, or volunteer member of an organization; the payee or organization must state in writing the payments will be used in the best interests of the child or children. s. 414.065(2), F.S.

The individuals required to be tested shall be responsible for the cost of the drug test. For the prior bill DCF estimated the initial screening cost at \$10 per person and the confirmatory test at \$25 per person.³⁰ An updated estimate for the cost of drug testing under the present bill was not provided.

B. SECTION DIRECTORY:

Section 1: Creates s. 414.145, F.S., relating to drug screening.

Section 2: Provides an effective date of July 1, 2011.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None. The bill authorizes no new revenue sources and existing revenues would not be increased by implementation of the program.

The bill does not address the resolution of potential conflicts with the present TANF Plan under which Florida will continue to receive TANF funding until September 30, 2011, unless renewed. The Plan as approved does not include universal drug testing of applicants as a condition of eligibility for benefits. The Plan discloses recipient eligibility is set by state statute.³¹

2. Expenditures:

Indeterminate. DCF may incur some cost to implement and execute the program, primarily in the initial implementation and ongoing receipt, review and recording of the individual drug test results. The primary testing costs will be borne by applicants subject to testing.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill authorizes no new revenue sources and existing revenues would not be increased.

2. Expenditures:

The bill requires no expenditures by local governments.

B. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill will have an impact on applicants who are required to undergo a drug test as a condition of eligibility for temporary cash assistance funds. In response to the prior bill, DCF estimated the initial drug screen costs will be \$10.00 per person and the confirmatory test will be \$25.00 per person.³² No updated figures were provided about the estimated drug testing costs under the present bill.

C. FISCAL COMMENTS:

None.

³⁰ Per DCF bill analysis, 2/8/2011 (on file with HHS subcommittee staff). The original bill required DCF to solicit competitive bids for drug screening and confirmatory testing to ensure the lowest possible cost.

³¹ Temporary Assistance For Needy Families State Plan Renewal, October 1, 2008-September 30, 2011, @ <http://www.dcf.state.fl.us/Search.shtml?cx=001246626777910876508%3Aznyjo2rfb2i&cof=FORID%3A11&ie=UTF-8&q=Drug+test#1086>.

³² DCF Bill Analysis on HB 353 (2/8/2011)

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

U.S. Constitution

As discussed above, under certain circumstances the U.S. Supreme Court found suspicion-less drug testing is constitutional and does not violate the Fourth Amendment.³³ Those decisions did not address universal, suspicion-less drug testing of applicants for TANF benefits. In the only reported case addressing suspicion-less drug testing of all family assistance recipients the court ruled drug testing was unconstitutional when applied universally or randomly without reasonable suspicion of drug use. The current bill mandates universal, suspicion-less drug testing.

Florida Constitution

The Florida Constitution guarantees every natural person's right to be let alone and free of governmental intrusion into their private life except as the Constitution otherwise provides.³⁴ In the context of medical treatment, this has been judicially interpreted as requiring a compelling state interest sufficient enough to overcome the constitutional right.³⁵ This right has not been interpreted in the context of drug testing as a condition of eligibility for TANF.

Providing rulemaking authority without sufficient direction has been found to be an invalid delegation of legislative power in violation of the Florida constitutional separation of powers.³⁶

B. RULE-MAKING AUTHORITY:

A rule is an agency statement of general applicability which interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.³⁷ Rulemaking authority is delegated by the Legislature³⁸ through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"³⁹ a rule.

Insufficient Statutory Guidance for Rulemaking

The bill provides general rule making authority to DCF, which is necessary but not sufficient to fully implement the drug testing program.⁴⁰ The bill does not direct DCF with sufficient specificity in development and implementation of the drug testing program required by the statute, including direction in the following areas:

- Selecting and approving testing laboratories;
- Establishing standards for taking, securing, preserving, and transporting the samples to be tested;

³³ See note 20, above.

³⁴ Art. I, §23, Fla. Const.

³⁵ *Burton v. State*, 49 So.3d 263, 265 (Fla. 1st DCA 2010).

³⁶ Art. II, §3, Fla. Const.; *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1st DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1st DCA 2001).

³⁷ s. 120.52(16); *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1st DCA 2007).

³⁸ *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1st DCA 2000).

³⁹ s. 120.52(17).

⁴⁰ s. 120.536(1), F.S.

- Approving what method(s) of testing are scientifically accepted and sufficiently accurate for the purposes intended by the legislation;
- Establishing standards for drug screening and testing by approved laboratories; Developing drug- testing protocols, policies, and procedures necessary to implement the program;
- Reporting test results;
- Retaining and securing test results for the periods allowed in the statute for reapplications;
- Confidentiality of test results.

The original bill partially addressed methods of drug screening and confirmatory testing, including policies and procedures for specimen collection, testing, storage and transportation. The original bill required DCF to approve laboratories to perform drug tests, establish standards for drug screening, adopt protocols, policies, and procedures for drug screening and confirmation testing, and solicit competitive bids for drug screening and confirmatory screening services to ensure the lowest costs, but did not provide sufficient statutory guidance for development and implementation of such policies. This attempted guidance is absent in the present bill.⁴¹

Available Guidance for DCF

The bill requires “a drug test consistent with s. 112.0455,” which creates a comprehensive drug testing program as the “Drug Free Workplace Act.”⁴² As presently drafted, the plain meaning of the bill is to require a “drug test” as that phrase is specifically defined:

“Drug test” or “test” means any chemical, biological, or physical instrumental analysis administered for the purpose of determining the presence or absence of a drug or its metabolites.⁴³

As the wording of this section will be interpreted by giving otherwise undefined terms their ordinary and plain meaning,⁴⁴ the standards set out in s. 112.0455⁴⁵ will be limited to the definition of drug test. The language appears inadequate for DCF by rule to incorporate those statutory standards into a testing program required by this bill.

DCF has prior experience with implementing a comprehensive drug testing program under s. 112.0455. Since 1998 DCF has implemented the Drug Free Workplace Act for testing agency employees as an operating procedure.⁴⁶ Revising the bill to provide authority for DCF to implement the new drug testing program by referring to specific, pertinent provisions of existing statute would clarify the agency’s rulemaking scope.

C. DRAFTING ISSUES OR OTHER COMMENTS:

1. The bill states that neither the department nor the state is responsible for paying for substance abuse treatment for individuals as part of the testing conducted in this section. This language could create both a potential statutory conflict as well as a practical problem for DCF.

- Present law and the TANF Plan provide a diversion program for families at risk of welfare dependency due to substance abuse, authorizing certain payments and services intended to prevent the family of a substance abuser from requiring sustained TANF payments.⁴⁷ Unless payments under this diversion program are separate and distinct from TANF benefit

⁴¹ Under the original bill, approved labs were required to agree to defend the results and conclusions in appeal hearings, as described in s. 409.285.

⁴² s. 112.0455(1), F.S.

⁴³ s. 112.0455(5)(b), F.S.

⁴⁴ Greenfield v. Daniels, 51 So. 3d 421 (Fla. 2010); Donato v. American Telephone and Telegraph Co., 767 So. 2d 1146 (Fla. 2000); Forsythe v. Longboat Key Beach Erosion Control District, 604 So. 2d 452, 454 (Fla. 1992).

⁴⁵ Standards established under s. 112.0455, the Drug Free Workplace Act, may provide the guidance necessary for proper rulemaking, particularly the following subsections: 112.0455(5), (8), (11), (12), and (13).

⁴⁶ CF Operating Procedure 60-05, Ch. 12 (1998), @

<http://www.dcf.state.fl.us/Search.shtml?cx=001246626777910876508%3Aznyjo2rfb2i&cof=FORID%3A11&ie=UTF-8&q=Drug+test#910>

⁴⁷ s. 414.1585, F.S., implemented through section 2.8.e of the Plan (see note 31 above).

applications subject to testing, the bill may prevent provision of services to this separate population.

- Some individuals who test positive in the TANF drug screening may seek help at a DCF licensed substance abuse treatment facility or provider. DCF would need to establish a system to cross reference those denied temporary cash assistance due to drug testing with those who are seeking substance abuse treatment.
2. If the cost of drug testing is too expensive, TANF applicants may be deterred from applying for cash assistance.
 3. The bill is silent on how, when, and to whom the testing results are reported.
 4. Confidentiality of the Results. Article I, Section 24, Florida Constitution, makes all records of a public agency public unless expressly exempted by a law addressing no other subject and enacted by a 2/3 majority of both houses of the Legislature.
 - The results of certain mandatory drug testing are exempt from disclosure under Ch. 119, F.S., the Florida Public Records Act. These exemptions are found in the applicable substantive statutes for workplace drug testing,⁴⁸ workers compensation records held by the Florida Self-Insurers Guaranty Association, Inc.,⁴⁹ and unemployment compensation records which could disclose the identity of an employer or employee.⁵⁰ There does not appear to be an exemption applicable to drug testing results of TANF applicants, so unless an exemption bill is adopted prior to the effective date, the records retained by DCF would be available for public inspection.
 - Federal law may require the report of drug testing to remain confidential. Section 42 U.S.C. 290dd-2 provides:

Records of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States shall, except as provided in subsection (e) of this section, be confidential and be disclosed only for the purposes and under the circumstances expressly authorized under subsection (b) of this section.

The corresponding regulation prevents state law from compelling any otherwise prohibited disclosure.⁵¹ There is also an issue as to whether records pertaining to personal health information are confidential.⁵² If the disclosure of the drug testing report is subject to federal confidentiality, the bill may need to state that nothing in the testing program shall be construed to compel disclosure of records required by federal law to remain confidential.

5. The bill is not clear on whether teenagers under the age of 18 but who are parents of children who may be eligible for TANF will be tested. The bill expressly requires testing of parents and expressly exempts children under the age of 18 from testing. The Florida TANF Plan provides for cash assistance payments to defined teenage parents under the age of 19 but the payments are paid on behalf of both the teenage parent and the child to an alternate payee selected by DCF.

⁴⁸ s. 112.0455(11), F.S.; s. 440.102, F.S.

⁴⁹ s. 440.3851(1), F.S.

⁵⁰ s. 443.1715(1), F.S.

⁵¹ 42 CFR s. 2.20.

⁵² Health Insurance Portability and Accountability Act of 1996, P.L. 104-191.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 23, 2011, the Rulemaking & Regulation Subcommittee approved a strike-all amendment creating CS/CS/HB 353. The original bill and the CS by the Health & Human Services Access Subcommittee only required drug testing for TANF participants with recent prior drug felony convictions. The CS/CS by the Rulemaking & Regulation Subcommittee substantially expanded the scope of the first CS. This analysis reflects the changes made by the latter amendment.