

Legislative Analysis



DRUG TESTING OF FIP RECIPIENTS

Mitchell Bean, Director
Phone: (517) 373-8080
<http://www.house.mi.gov/hfa>

House Bill 6161 as introduced
Sponsor: Rep. David Farhat
Committee: Family and Children Services
First Analysis (9-21-04)

BRIEF SUMMARY: The bill would permit the Family Independence Agency to require recipients of Family Independence Program assistance to submit to a drug test if the FIA has probable cause to suspect the recipient of substance abuse.

FISCAL IMPACT: This bill converts a pilot program in three counties to a permanent statewide program. However, the language is permissive and allows FIA to order substance abuse testing “if a department employee has probable cause to suspect substance abuse.” Clearly, the costs of substance abuse testing of FIA benefit recipients will rise, but by an indeterminate amount.

THE APPARENT PROBLEM:

In 1996, Congress and then-President Clinton overhauled the nation’s welfare system in enacting the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA), P.L. 104-193, which placed a greater emphasis on personal responsibility and work in helping people make the transition from welfare dependency to self-sufficiency. Section 902 of the PRWORA (21 USC 862b) allows states to test welfare recipients for controlled substances and to sanction those recipients who test positive.

In 1999, the legislature and then-Governor Engler enacted Public Act 17, which permitted the Family Independence Agency to require substance abuse testing as a condition of eligibility for FIP assistance. Prior to the statewide implementation of the drug testing policy, the FIA was required to implement a pilot drug testing program in at least three counties. It was the intent of the legislature that statewide implementation occur by April 1, 2003.

The pilot program operated in Berrien County, Alpena and Presque Isle counties, and the Joy/Greenfield FIA office in Wayne County for five weeks in October and November 1999, until a temporary restraining order was issued. The program required all new FIP applicants to take a drug test before a case could be opened, and would have randomly tested 20 percent of adults and minor parent recipients whose cases were up for redetermination. According to FIA policy at the time, a substance abuse assessment and interview with a treatment agency was required for individuals who tested positive. If an individual was referred for treatment, he or she would be required to comply with the treatment plan or show good cause as to the reason for non-compliance. If an applicant failed or refused, without good cause, to submit to a drug test, the application for assistance would be denied. If an applicant failed to comply with the provisions of the

substance abuse assessment or treatment plan within the first two months without good cause, his or her case would be closed. If a recipient of FIP assistance were to randomly fail to complete a drug test without good cause, FIP benefits would be reduced by 25 percent for the first month of non-compliance, and another 25 percent for each subsequent month of non-compliance. If, at the end of four months, the recipient remained non-compliant, his or her case would be closed.

In September 2000, the Federal District Court for the Eastern District of Michigan issued a preliminary injunction prohibiting the FIA from conducting “suspicionless” drug tests of FIP assistance applicants and recipients, finding that such a practice violates the Fourth Amendment’s protection against unreasonable search and seizure. In October 2002, a three-judge panel of the 6th Circuit Court of Appeals reversed the decision of the district court. However, in March 2003, the case was reheard before the entire 6th Circuit Court (“en banc”), which - in an evenly divided vote - affirmed the decision of the district court.

In December 2003, the FIA and the American Civil Liberties Union (ACLU), which filed the lawsuit challenging the law, reached an agreement in which the parties agreed that the preliminary injunction ordered by the district court remain in effect until the FIA submits a report to the legislature on future suspicion-based drug testing pilot programs or until January 1, 2007 or upon further order of the court. Under the consent order, the FIA, at the discretion of the director, is permitted to conduct pilot programs of suspicion-based drug testing of welfare applicants and recipients according to a certain set of protocol.

Given the appellate court’s affirmation of the district court ruling, the state’s welfare drug testing law remains on hold. It has been suggested that the law be amended to require drug testing only when there exists probable cause of substance abuse.

THE CONTENT OF THE BILL:

The Social Welfare Act permits the Family Independence Agency (FIA) to require recipients of Family Independence Program (FIP) assistance to submit to a drug test as a condition of receiving assistance. The act also provides that prior to the statewide implementation of the drug testing policy, the FIA is required to implement a pilot drug testing program in at least three counties. It was the intent of the legislature that statewide implementation occur by April 1, 2003, following a report to the legislature by the FIA evaluating the pilot program.

The bill would permit the FIA to require a drug test for FIP assistance if a departmental employee has probable cause to suspect the recipient of substance abuse. The bill would also delete language regarding the pilot program.

MCL 400.571

BACKGROUND INFORMATION:

District Court opinion

In September 2000, the Federal District Court for the Eastern District of Michigan issued a preliminary injunction prohibiting the FIA from conducting suspicionless drug tests of FIP applicants and recipients, upon finding that conducting suspicionless tests violated the Fourth Amendment of the U.S. Constitution.

The court largely predicated its opinion on the U.S. Supreme Court's ruling in *Chandler v. Miller* 520 U.S. 305 (1997), in which the court struck down a Georgia state statute that required drug tests for candidates of high state office, as the statute "did not fit within the closely guarded category of constitutionally permissible suspicionless searches." The district court held that the Supreme Court's jurisprudence essentially permits suspicionless searches only when the state has a "special need" [a need to protect public safety], and that "[a]s in *Chandler*, the State in this case has not demonstrated a special need that justifies departure from the ordinary Fourth Amendment requirement of individualized suspicion. The State has not shown that public safety is genuinely placed in jeopardy in the absence of drug testing of all FIP applicants and of random, suspicionless testing of FIP recipients." The state's principal justification for the drug testing requirements was the need to move people from welfare dependency to self-sufficiency, as substance abuse is seen as a major impediment in finding meaningful, gainful employment. The state had tried to link the drug testing policy to public safety, by asserting that there is a high correlation between substance abuse and child neglect, and that children are the principal beneficiaries of FIP benefits. However, the court ruled that neither the Temporary Assistance to Needy Families (TANF) program nor the state's Family Independence Program were designed to address child abuse and neglect, and that "the State's financial assistance to parents for the care of their minor children through the FIP cannot be used to regulate the parents in a manner that erodes their privacy rights in order to further goals that are unrelated to the FIP." The court further noted, "[i]f the State is allowed to drug test FIP recipients in order to ameliorate child abuse and neglect by virtue of its financial assistance on behalf of minor children, that excuse could be used for testing the parents of all children who receive Medicaid, State Emergency Relief, educational grants or loans, public education or any other benefit from the State. In all cases in which the State offers a benefit on behalf of minor children, the State could claim that it has a broad interest in the case of those children which overcomes the privacy rights of parents."

Court of Appeals opinion

In October 2002, a three-judge panel of the 6th Circuit Court of Appeals reversed the decision of the district court, ruling that the district court erred in granting the preliminary injunction and erred in finding that the state's interest did not constitute a "special need" that justified the suspicionless drug test. The court held that public safety only had to be one component of the state's special need, not the sole component as the district court had ruled, in allowing suspicionless drug tests.

In particular, the court stated, “[w]e have no doubt that the safety of the children of families in Michigan’s Family Independence Program is a substantial public safety concern that must be factored into the determination of whether Michigan has shown a special need to this drug testing program. An additional public safety concern is the risk to the public from the crime associated with illicit drug use and trafficking. And we think it is beyond the cavil that the state has a special need to insure that public moneys expended in the FIP are used by the recipients for their intended purposes and not for procuring controlled substances--a criminal activity that not only undermines the objectives of the program but directly endangers both the public and the children the program is designed to assist. For all these reasons, we conclude that the district court erred in holding that [the FIA] could not establish that the state has a special need sufficient to justify the drug testing program.”

The court further held that the level of intrusion (in terms of invasiveness of the method of collection and the use of the information) into the privacy of welfare applicants and recipients was rather limited when compared to the state’s interests, that FIP assistance applicants and recipients had a diminished expectation of privacy, and that there has been no showing that the drug test constituted an unreasonable search.

En banc panel of the Court of Appeals

In March 2003, the entire 6th circuit court reheard the case, with six judges voting to reverse the district court decision, and six judges voting to affirm the district court decision. No opinions were issued, but under the federal circuit court’s rule about precedents, the decision of the federal district court was affirmed.

FIA/ACLU consent order

In December 2003, the federal district court issued a consent order under which the FIA and the ACLU reached an agreement specifying that the preliminary injunction ordered by the federal district court will remain in effect until the FIA submits a report to the legislature on future drug testing pilot programs or until January 1, 2007 or upon further order of the court, whichever occurs sooner. Under the consent order, the FIA is permitted to conduct, at the discretion of the director, pilot programs of suspicion-based drug testing of welfare applicants and recipients according to a certain set of protocol specified in the consent order.

The protocol specifies that FIP applicants and recipients would have to sign a release of information permitting employers, the FIA, Michigan Works! agencies, and court personnel to share drug test results and substance abuse assessment and treatment information. Family Independence Program applicants and recipients would have to complete a substance abuse survey developed by the FIA and administered by the Family Independence Specialist. The survey identifies individuals who have barriers to self-sufficiency or to strong family relationships that may be related to substance abuse. Such individuals would be referred to a substance abuse professional. If, based on a standardized substance abuse screening tool, the substance abuse professional suspects

the individual of substance abuse, the individual would be referred for a drug test and an assessment of need for substance abuse treatment. If the assessment results in a referral for treatment, the individual would participate in the appropriate treatment.

FIA Program Eligibility Manual 280

The following is a description of the FIA's drug testing policy at the time the program was in effect, as spelled out in its Program Eligibility Manual (PEM) 280:

A drug test is required for minor parent grantees and adults in an FIP applicant group at the time the application for assistance is made. A drug test is not required for applicants 65 years of age or older or 18 and 19 year olds still attending school. In addition, starting six months after the pilot program is initiated, a drug test is also required for one-fifth of FIP recipients (chosen randomly) with a case up for re-determination.

After a recipient or applicant is notified of the drug testing requirement, he or she has until the end of the next business day to go to an authorized collection site and submit a valid urine specimen, which is then forwarded to a lab and screened for marijuana, cocaine, amphetamines, opiates (morphine, codeine, or heroin), and phencyclidine (PCP). If the initial test is negative, no additional test required. If the initial test is positive, a second test will be performed on another sample from the same specimen. A drug test is considered positive only when the second test is also positive and the results are confirmed by a physician ("medical review officer").

If an individual tests positive, the medical review officer will contact that individual and allow the individual to explain why the result came back positive. If the individual does not provide an explanation, the drug test is certified as being positive. If an individual tests positive, he or she is required to complete a substance abuse assessment within 10 days. The assessment, which determines whether treatment is necessary, is to be completed by a substance abuse professional. In addition, a Family Independence Specialist will conduct a home visit at the individual's home to identify and eliminate any barriers to completing the assessment. The Family Independence Specialist should explain in the home visit that the drug test is used to refer an individual for assessment and treatment, and is not used to reduce the individual's FIP benefits or to remove the individual's children from the home.

If the assessment results in a referral for treatment, the individual has 10 days, after notice by the FIA, to begin treatment. During treatment, the treating agency will notify the drug testing coordinator of the local FIA office when the individual completes his or her first appointment, and will provide the drug testing coordinator with monthly progress reports.

If an applicant for FIP assistance fails or refuses (without good cause) to submit to a drug test, the application for assistance is denied though eligibility for Medical Assistance and Food Stamps is be unaffected. The individual can re-apply for FIP assistance at anytime. If an applicant fails, without good cause, to complete the assessment or treatment, his or

her FIP case is closed. If a recipient fails to take a drug test, or fails to complete the assessment or treatment, his or her FIP benefits and Food Stamp benefits are reduced by 25 percent. If after four months, the individual remains noncompliant, his or her FIP case is closed.

Pilot Program

The FIA conducted the drug testing policy through its office in Berrien County and Alpena and Presque Isle counties, and in the Joy/Greenfield district office in Wayne County (Detroit) from October 1 to November 9, 1999. The following table is a summary of the results of the pilot program.

	Joy/Greenfield	Berrien	Alpena/Presque Isle	Totals
Referrals	242	256	35	533
Refusals	0	0	0	0
Returned results	173	227	35	435
<i>Negative results</i>	155	202	33	390
<i>Positive results</i>	18	25	2	45

Prior to the issuance of the temporary restraining order, the FIA had planned to expand the pilot project to Kent County and the Romulus office in Wayne County.

ARGUMENTS:

For:

The bill seeks to re-start a state policy that has been inactive for nearly five years. Through its recent affirmation of the district court’s decision, the 6th Circuit Court of Appeals recently held that the state’s policy of suspicionless drug testing of applicants and recipients of FIP assistance is unconstitutional. This bill, then, seeks to remedy the deficiency in state law by permitting the FIA to require a recipient of FIP assistance to take a drug test if the FIA has probable cause to suspect the recipient of substance abuse. It appears this change would withstand constitutional scrutiny.

In addition, the bill reiterates the state’s policy of helping people make the transition from welfare dependency to self-sufficiency and the attainment of gainful employment. The state’s brief in the district court case states, “[o]ne widely recognized barrier to employment is substance abuse. While studies differ as to the exact prevalence of drug use and abuse among welfare recipients, there is ample agreement that a substantial percentage of welfare recipients use drugs, that a certain percentage of those users are impaired by drug use, and that the percentages of use and impairment are higher among recipients than non-recipients.

“The research that has been conducted to date also demonstrates that the effect of substance abuse on the poor is particularly devastating, in part because of its detrimental effect on maintaining employment. Given the documented prevalence of drug use among the welfare population and its potential impact on the success of efforts to transform the

welfare system into one that is temporary and work-oriented, substance abuse identification and treatment is a critical component of any successful welfare-to-work program.”

Moreover, it should be noted that, according to FIA policy when the program was in place, if an individual fails a drug test, he or she is referred to a substance abuse assessment and treatment. Failing the test does not, in itself, automatically reduce an individual’s FIP benefits. An individual’s benefits are only reduced if he or she fails to comply with provisions of the assessment and treatment program. In that regard, the policy is not punitive (as some would characterize). Rather, it seeks to help people turn their lives around by identifying incidents of substance abuse and providing treatment.

Against:

The FIA is constrained by the December 2003 consent order. The order states that the FIA cannot move forward with a statewide drug testing policy until it completes an evaluation of the suspicion-based drug testing pilot program or January 1, 2007 or further order of the court lifting the preliminary injunction. At this point none of these has occurred. If the FIA moves forward with the drug testing program, it will have to comply with the provisions of the consent order. The bill, however, does not conform to the consent order. This has the potential to open the FIA to future lawsuits and the imposition of costly fines and fees. If the state seeks to move forward with the drug testing policy, the FIA should be provided additional money to enable it to conduct pilot programs throughout the state and fully evaluate the results, as stipulated in the consent order. (At the very least, an effective date of 2007 should be added, to ensure that the drug testing policy does not conflict with the consent order.)

In addition, the bill permits the FIA to require a drug test if an employee has probable cause to suspect substance abuse. However, FIA employees generally do not have the skills necessary to make a determination that probable cause exists. Rather, the decision to require an individual to undergo a drug test should be left to substance abuse professionals. This method is already embodied in the consent order, which suggests that the FIA acknowledges that its employees do not have the requisite training to properly make a determination that an individual has a substance abuse problem.

The bill also has the potential to strain the resources of substance abuse treatment agencies throughout the state, as more individuals will be referred for assessment and treatment. Moreover, it is not entirely clear if an individual will face certain sanctions from the FIA if he or she is referred for treatment, but is placed on a wait list until the treating agency has sufficient resources to begin treatment.

Further, critics claim that drug use among welfare recipients is about the same as the population as a whole and suggest that, if FIA applicants are to be tested, then so should other recipients of government benefits, such as MEAP scholarships and tax subsidies.

POSITIONS:

The Association of Licensed Substance Abuse Organizations is neutral on the bill. (9-15-04)

The Family Independence Agency opposes the bill. (9-15-04)

The American Civil Liberties Union opposes the bill. (9-15-04)

The Center for Civil Justice opposes the bill. (9-15-04)

The Michigan League for Human Services opposes the bill. (9-15-04)

Legislative Analyst: Mark Wolf
Fiscal Analyst: Richard Child

■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.