**S T A T E O F T E N N E S S E E**
OFFICE OF THE
**ATTORNEY GENERAL**
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**NASHVILLE, TENNESSEE 37243**

June 1, 2007

Opinion No. 07-84

Drug Tests as a Condition of Receiving Public Assistance

## QUESTION

Senate Bill 102 requires the Tennessee Department of Human Services ("DHS") to implement a program of substance abuse testing as a condition for public assistance eligibility if such testing is not prohibited by federal law or waiver. According to the fiscal note attached to the bill, DHS and the Bureau of TennCare have taken the position that federal regulations prohibit programs which provide public assistance to use substance abuse testing as a condition of eligibility. You requested verification of this position.

## OPINION

Title XIX of the Social Security Act, the TennCare waiver, and federal Food Stamp eligibility standards do not permit a state to condition eligibility on substance abuse testing. In addition, suspicionless drug testing of applicants for public assistance benefits has been held to be an unconstitutional search and seizure under the Fourth Amendment of the United States Constitution. Therefore, the program of substance abuse testing proposed by Senate Bill 102 could not be applied to TennCare or the Food Stamp program at all and could only be applied to any other public assistance programs to the extent that it could be read to require substance abuse testing based on individualized suspicion in a program which permits such testing.

## ANALYSIS

Senate Bill 102 proposes to amend Title 71, Chapter 5, Part 23 by adding a new section 71-5-2315 which provides as follows:

> (a) To the extent not prohibited by federal law, or by any federal waiver received by the state that waives any or all of the provisions of Title XIX of the Social Security Act as amended (P.L. 89-97) or pursuant to any other federal law as adopted by amendment to the required Title XIX state plan, the department of human

services shall implement a program of substance abuse testing as a condition for public assistance eligibility[1] under this chapter.

(b) An individual shall not be considered to have tested positive for substance abuse until the sample has been retested to rule out a false positive using the same sample obtained for the original test. Any individual whose sample tests positive for substance abuse upon retesting shall be provided with notice of such result and given an opportunity to appeal the denial or cessation of public assistance benefits pursuant to this section.

(c) Acting in accordance with the provisions of the Uniform Administrative Procedures Act, compiled in title 4, chapter 5, the department shall have rulemaking authority to establish any necessary rules for the administration of this section and shall have rulemaking authority to establish any rules to carry out the requirements of any title or part of any title that the department administers and that are necessary to immediately implement the provisions of this part to effect any federal legislative changes.

(d) By January 1, 2009, and each January 1 thereafter, the department shall submit an annual report on the testing program to the senate general welfare, health, and human resources committee and the house of representatives health and human resources committee. The annual report shall include at least the following information for the preceding year:

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[1]Notably, persons convicted of certain drug-related offenses are not eligible for public assistance or benefits.

> An individual convicted (under Federal or State law) of any offense which is classified as a felony by the law of the jurisdiction involved and which has as an element the possession, use, or distribution of a controlled substance (as defined in section 802(6) of this title) shall not be eligible for -
> (1) assistance under any State program funded under part A of title IV of the Social Security Act [Temporary Assistance for Needy Families, 42 U.S.C. § 601 *et seq*.], or
> (2) benefits under the food stamp (as defined in section 3(h) of the Food Stamp Act of 1977 [7 U.S.C. § 2012(h)]) or any State program carried out under the Food Stamp Act of 1977 [7 U.S.C. § 2011 *et seq*.].

21 U.S.C. § 862a(a). These eligibility exclusions apply to convictions based on conduct which occurred on or after August 23, 1996. 21 U.S.C. § 862a(d)(2). A State may opt out of these eligibility exclusions or limit the period of ineligibility, but the State of Tennessee has not. 21 U.S.C. § 862a(d)(1).

> (1) The number of individuals tested and the number of positive test results;
> (2) The costs of the testing; and
> (3) The number of sanctions imposed as a result of the testing.
>
> (e) The department of health shall assist the department of human services in implementing the substance abuse testing program for applicants and recipients for public assistance under the provisions of this section.

On its face, Senate Bill 102 would require DHS to implement a substance abuse testing program which would mandate substance abuse testing as a condition of eligibility for public assistance benefits, but only "to the extent not prohibited by federal law, or by any federal waiver received by the state that waives any or all of the provisions of Title XIX of the Social Security Act as amended (P.L. 89-97) or pursuant to any other federal law as adopted by amendment to the required Title XIX state plan." The term "public assistance" is not defined in state or federal statute. However, the proposed bill, which would be codified as Tenn. Code Ann. § 71-5-2315, by its terms, applies only to "public assistance eligibility under this chapter." Therefore, the proposed bill would appear to apply, if not prohibited by federal law or waiver, only to the public assistance programs codified in Title 71, Chapter 5 such as TennCare (Tenn. Code Ann. §§ 71-5-101 *et seq*.) and food stamps (Tenn. Code Ann. §§ 71-5-301 *et seq*.), but not the Families First program (Tenn. Code Ann. §§ 71-3-151 *et seq*.), which is found in Title 71, Chapter 3.

However, Title XIX of the Social Security Act, the TennCare waiver, and federal Food Stamp eligibility standards do not permit a state to condition eligibility on substance abuse testing. Title XIX of the Social Security Act requires that a state plan for medical assistance provide for making medical assistance available to "all individuals" who meet specified income and other standards, and that the medical assistance made available to these individuals "not be less in amount, duration, or scope than the medical assistance made available to any such other individual." 42 U.S.C. §§ 1396a(a)(10)(A)(i); 1396a(a)(10)(B). The statute has no language which would permit a state to require substance abuse testing as a condition of eligibility.[2] Nothing in the TennCare waiver would permit the State to condition eligibility on substance abuse testing. *http://www.state.tn.us/tenncare/Providers/tenncarewaiver.pdf*. Federal Food Stamp eligibility standards do not require substance abuse testing and do not permit a state to impose any additional eligibility requirements.

> Except as otherwise provided in this chapter, the Secretary shall establish uniform national standards of eligibility (other than the income standards for Alaska, Hawaii, Guam, and the Virgin Islands

[2]42 USC § 1396a (a)(A)(10)(ii) also allows the State to extend medical assistance under the Act to certain specified populations "at the option of the State." This language similarly contains nothing that would permit the State to condition eligibility on substance abuse testing.

> of the United States established in accordance with subsections (c) and (e) of this section) for participation by households in the food stamp program in accordance with the provisions of this section. No plan of operation submitted by a State agency shall be approved unless the standards of eligibility meet those established by the Secretary, and *no State agency shall impose any other standards of eligibility as a condition for participating in the program*.

7 U.S.C. § 2014(b) (Emphasis added.).

In addition, the Sixth Circuit Court of Appeals recently held that suspicionless drug testing of applicants for and recipients of public assistance benefits is an unconstitutional search and seizure under the Fourth Amendment of the United States Constitution. *Marchwinski v. Howard*, 60 Fed. Appx. 601, 2003 WL 1870916 (6th Cir. April 7, 2003). This case originated in the United States District Court for the Eastern District of Michigan, where welfare recipients challenged the constitutionality of a Michigan law which authorized suspicionless drug testing of welfare recipients, alleging that the law violated the Fourth Amendment of the United States Constitution. *Marchwinski v. Howard*, 113 F.Supp.2d 1134 (E.D.Mich. 2000). Pursuant to this law, Michigan's Family Independence Agency, which provides Temporary Assistance for Needy Families ("TANF") block-grant monies through the Family Independence Program ("FIP"), implemented a pilot program which required substance abuse testing and treatment as a condition of eligibility for family independence assistance. 113 F.Supp.2d at 1136. Persons testing positive were required to have a substance abuse assessment and, if the assessment resulted in a referral for treatment, to comply with the treatment plan. *Id*. Failure or refusal to submit a specimen for testing, complete an assessment, or comply with a treatment plan resulted in the denial, reduction, or termination of benefits. *Id*. at 1136-1137. The program also required random testing of twenty percent of the adults and minor parents with active cases up for redetermination after six months. *Id*. at 1136.

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (Welfare Reform Act) (Pub. L. 104-193, August 22, 1996, 110 Stat. 2105), which created the TANF program on which the Michigan welfare laws are based, permits substance abuse testing of welfare recipients.[3]

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[3]TANF regulations also require the States to "make an initial assessment of the skills, prior work experience, and employability of each recipient for assistance under the program who . . . has attained 18 years of age; or . . . has not completed high school or obtained a certificate of high school equivalency and is not attending secondary school." 42 U.S.C. § 608(b)(1). Based on this assessment, the State, "in consultation with the individual, may develop an individual responsibility plan for the individual, which . . . may require the individual to undergo appropriate substance abuse treatment." 42 U.S.C. § 608(b)(2)(A).

> In addition to any other penalties required under the State program funded under this part, the State may reduce, by such amount as the State considers appropriate, the amount of assistance otherwise payable under the State program to a family that includes an individual who fails without good cause to comply with an individual responsibility plan signed by the individual.

> Notwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances.

21 U.S.C. § 862b. However, the District Court considered these provisions in the context of the Fourth Amendment of the United States Constitution, which provides as follows:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The district court noted that the "collection and testing of urine is a search within the meaning of the Fourth Amendment." 113 F.Supp.2d at 1138. The district court further noted that, under the Fourth Amendment, "some quantum of individualized suspicion" is generally required for a search or seizure to be constitutional except in "certain limited circumstances" when "special needs" are shown. *Id*. at 1138. The district court held that the State had not " demonstrated a special need that [justified] departure from the ordinary Fourth Amendment requirement of individualized suspicion" and specifically that the State had failed to show that "public safety [was] genuinely placed in jeopardy in the absence of drug testing of all FIP applicants and of random, suspicionless testing of FIP recipients." *Id*. at 1139-1140. On this basis, the district court held that Michigan's suspicionless substance abuse testing program was an unconstitutional search and seizure under the Fourth Amendment. *Id*. at 1144.

Initially, the Sixth Circuit Court of Appeals reversed the district court opinion. *Marchwinski v. Howard*, 309 F.3d 330 (6th Cir. 2002). Subsequently, however, the Court voted to rehear the case en banc and vacated this decision. *Marchwinski v. Howard*, 319 F.3d 258 (6th Cir. 2003). The Court then affirmed the district court's opinion by an equally divided vote. *Marchwinski v. Howard*, 60 Fed. Appx. 601, 2003 WL 1870916 (6th Cir. April 7, 2003).

Based on the foregoing, the program of substance abuse testing proposed by Senate Bill 102 could not be applied to TennCare or the Food Stamp program as Title XIX of the Social Security Act, the TennCare waiver, and federal Food Stamp eligibility standards do not permit a state to condition eligibility on substance abuse testing. Since the proposed bill appears, by its terms, only to apply to the public assistance programs codified in Chapter 5 of Title 71, such as TennCare (Tenn. Code Ann. §§ 71-5-101 *et seq*.) and food stamps (Tenn. Code Ann. §§ 71-5-301 *et seq*.), it would appear that there is no program of substance abuse testing which DHS could implement pursuant to Senate Bill 102 without violating federal law or waiver. However, even if Senate Bill 102 did apply to other public assistance programs, such as TANF, which permit substance abuse testing, it

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42 U.S.C. § 608(b)(3).

could only require substance abuse testing based on individualized suspicion, because suspicionless drug
testing of applicants for and recipients of public assistance benefits has been held to be an unconstitutional search and seizure under the Fourth Amendment of the United States Constitution.

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