STATE OF TENNESSEE
OFFICE OF THE
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Opinion No. 12-41

Limitations on Drug Testing as a Condition of Receiving Public Assistance

QUESTION

What, if any, federal or Tennessee legal limitations exist on proposed legislation that would require the Tennessee Department of Human Services ("TDHS") to implement a program of substance abuse testing as a condition for public assistance?

OPINION

Title XIX of the Social Security Act, the TennCare waiver, and the federal Food Stamp program do not permit a state to condition eligibility on substance abuse testing or consent to such testing. In addition, even where federal law does permit the drug testing of public assistance applicants, drug testing without some quantum of individualized suspicion constitutes an unconstitutional search and seizure under the Fourth Amendment of the United States Constitution.

ANALYSIS

This opinion request seeks guidance as to any legal limitations on three proposed bills pending before the Tennessee General Assembly, each of which to varying extents require TDHS to implement a program of substance abuse testing as a condition for public assistance eligibility. The three bills in question are Senate Bill 652/House Bill 957, 107th General Assembly, 2nd Sess. (2012) ("SB652"), Senate Bill 2272/House Bill 3090, 107th General Assembly, 2nd Sess. (2012) ("SB2272") and Senate Bill 2580/House Bill 2725, 107th General Assembly, 2nd Sess. (2012) ("SB2580"). Each of these bills is analyzed separately below.

Senate Bill 652

SB652 amends the Tennessee Code to add § 71-5-2315, providing in pertinent part:

> (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.O. 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 for each adult

> recipient who is otherwise eligible for public assistance or who the department has reasonable cause to believe engages in the illegal use of controlled substances. Prior to receiving public assistance every adult recipient who applies for public assistance shall sign a document that gives consent of such adult recipient to a test or tests for the purpose of determining the drug content in such adult recipient. The failure of an adult recipient to sign a document giving consent to such test or tests shall be ground for denial of public assistance benefits.

SB652, §1. SB652 thus conditions, to the extent not prohibited by federal law or waiver, public assistance eligibility upon the results of a drug test and consent to allow drug testing. *Id.*

This Office has previously opined that Title XIX of the Social Security Act, the TennCare waiver, and the federal Food Stamp program (hereinafter referred to collectively as "Title XIX benefits") do not permit a state to condition eligibility on substance abuse testing. Op. Tenn. Att'y Gen. 07-84 (June 1, 2007).[1] This Office in so concluding reasoned:

> 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. §§ 1396(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. Nothing in the TennCare waiver would permit the State to condition eligibility on substance abuse testing. [citation omitted] Federal Food Stamp eligibility standards do not require substance abuse testing and do not permit a state to impose any additional eligibility requirements.
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> > 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 of the United States established in accordance with subsections (c)

[1] This opinion addressed drug testing as a condition for public assistance eligibility as proposed by Senate Bill 102/House Bill 0588, 105th General Assembly, 1st. Sess. (2007) ("SB0102"). SB0102 stated in relevant part:

> (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 under this chapter.

> 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.*
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> 7 U.S.C. § 2014(b).

Id. at 3-4 (footnotes omitted) (emphasis in original).

Nothing has transpired since the issuance of Opinion No. 07-84 to change the Opinion's conclusion. In short, a state cannot impose any conditions on eligibility for these federal benefits other than those allowed by federal law. *See also Carleson v. Remillard,* 406 U.S. 598, 603-04 (1972) (holding that a California regulation excluding absence because of "military absence" from the definition of "continued absence" of a parent from the home as a condition of eligibility for benefits from the program for aid to families with dependent children was invalid under the Supremacy Clause of the United States Constitution); *Townsend v. Swank,* 404 U.S. 282, 286 (1971) (held invalid under the Supremacy Clause an Illinois eligibility standard that excluded from AFDC benefits needy dependent children 18 to 20 years of age attending college, finding an absence of any congressional authorization for this exclusion in the Social Security Act or its legislative history); *King v. Smith,* 392 U.S. 309, 320 (1968) (finding that an Alabama statute conflicted with the Social Security Act "by flatly denying AFDC assistance to otherwise eligible dependent children"). As one court succinctly observed, under the Supremacy Clause, "[s]tate participation in federal funding programs is voluntary, but once a state has accepted federal funds, it is bound by the strings that accompany them." *Planned Parenthood of Houston and Southeast Texas v. Sanchez,* 403 F.3d 324, 336-37 (5th Cir. 2005).

Accordingly, under the terms of SB652, the requirements of substance abuse testing and signing a consent to drug testing would be inapplicable to recipients of Title XIX benefits because federal law currently does not impose substance abuse testing or consent to such testing as a condition of eligibility for Title XIX benefits. Moreover, given the bulk of public assistance provided by TDHS emanates from Title XIX programs, *see* TDHS Program Descriptions *located at* http://www.tn.gov/humanserv/progdescr.pdf, the impact of SB652 would be severely restricted if not completely curtailed.

Furthermore, as discussed below, even where a federal program permits drug testing of applicants for federal assistance, such testing requires some quantum of individualized suspicion in order to meet federal constitutional standards.

Senate Bill 2272

SB2272 would amend the Tennessee Code by adding Tenn. Code Ann. § 71-3-167(a)(1). SB2272 provides in pertinent part:

> (A) The department shall require a suspicion-based urine drug test program consistent with title 50, chapter 9, to screen each individual who applies for or who receives Temporary Assistance for Needy Families (TANF). The cost of drug testing is the responsibility of the individual tested.
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> (B) The department of human services shall develop a program to screen each applicant or recipient who is otherwise eligible for temporary assistance for needy families benefits under this part, and then test, using a urine dipstick five panel test, each one who the department has reasonable cause to believe, based on the screening, engages in illegal use of controlled substances.
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> (3) An individual who tests positive for controlled substances as a result of a drug test required under this section is ineligible to receive TANF benefits for one (1) year after the date of the positive drug test unless the individual meets the requirements of subdivision (b)(10).

SB2272, § 1. These provisions in essence require drug screening for all applicants for TANF, and disallow eligibility for TANF for one year after any positive test for drugs. The issue of drug screening under TANF was also previously addressed in this Office's opinion regarding SB102 introduced in 2007, and nothing subsequently has occurred to change that opinion. Op. Tenn. Att'y Gen. 07-84 at 4-5. This Office observed in that opinion that, while TANF does permit substance abuse testing of welfare recipients (21 U.S.C. § 862b), the Sixth Circuit Court of Appeals has held that suspicionless drug testing of TANF applicants constitutes an unreasonable search and seizure under the Fourth Amendment of the United States Constitution. *Id.; Marchwinski v. Howard,* 113 F. Supp. 2d 1134, 1142 (E.D. Mich. 2000), *aff'd en banc,* 60 Fed. Appx. 601 (6th Cir. 2003) (affirmed on rehearing by an evenly divided *en banc* panel). *See also LeBron v. Wilkins,* Case No. 6:11-cv-01473-Or1-35DAB, 2011 WL 5040993 at *7-17 (M.D. Fla. Oct 24, 2011) (finding suspicionless drug testing of TANF applicants constitutionally suspect, even if the applicant had initially consented to the drug test in order to apply for TANF benefits).

Accordingly these provisions of SB2272 are constitutionally suspect, given SB2272 authorizes suspicionless drug testing of all TANF applicants.

Senate Bill 2580

SB2580 would amend Tennessee Code Annotated, Title 71, Chapter 5, by adding Sections 2 through 10. Section 3 of SB2580 provides in pertinent part:

> (a) To the extent not prohibited by federal law, the department of human services shall implement a program of substance abuse testing for each adult applicant who is otherwise eligible for temporary assistance for needy families referred to in this part as (TANF), [sic], or a successor program. The department shall require a [sic] the results of a recent urine drug test be submitted by each individual who applies for TANF. The cost of drug testing is the responsibility of the individual tested.
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> (f) An individual who tests positive for controlled substances as a result of a drug test required under this section is ineligible to receive TANF for one (1) year from the date of the positive drug test unless the individual meets the requirements of subsection (j).

SB2580, § 3. Like SB2272, SB2580 requires drug testing for all applicants for TANF and disallows eligibility for one year after any positive drug test. Unlike SB2272, SB2580 qualifies the requirement of drug testing for all TANF applicants by stating this requirement is mandated only "[t]o the extent not prohibited by federal law." Thus, as previously discussed, the reach of SB2580 would be severely constrained since current federal law as interpreted by the Sixth Circuit Court of Appeals prohibits suspicionless drug testing of TANF applicants as unreasonable searches and seizures under the Fourth Amendment of the United States Constitution. *Marchwinski,* 60 Fed. Appx. at 601.

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