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BILL



ANALYSIS

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Senate Bill 275 (Substitute S-1 as reported)
House Bill 4118 (Substitute S-1 as reported)
Sponsor: Senator Joe Hune (S.B. 275)
Representative Jeff Farrington (H.B. 4118)
Senate Committee: Families, Seniors and Human Services
House Committee: Families, Children, and Seniors (H.B. 4118)

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RATIONALE

In 1996, the Federal government enacted the Personal Responsibility and Work Opportunity Reconciliation Act, which established the Temporary Assistance for Needy Families (TANF) program. The Act tasked states with designing programs to move families from government aid to financial independence. Further, the Act authorized states to test TANF recipients for use of controlled substances, and sanction recipients who test positive.

Michigan offers TANF benefits through the Family Independence Program (FIP), which provides temporary cash assistance to families. In 1999, Michigan began a pilot program of random drug testing in certain areas of the State. The program required applicants to pass a substance abuse test as a condition of receiving FIP benefits. Applicants who tested positive had to participate in substance abuse assessment and comply with a required substance abuse treatment plan. If an applicant failed or refused to take a test, or failed to comply with a treatment plan, without good cause, benefits were generally denied or terminated.

In 2000, a U.S. District Court found Michigan's pilot program unconstitutional (*Marchwinski v Howard*, 113 F. Supp. 2d 1134). The Court held that, in the absence of individualized suspicion, the State had not demonstrated a "special need" that satisfied the U.S. Constitution's Fourth Amendment

protection against unreasonable searches. The Court found that the goals of TANF and FIP were generally to provide financial support to needy families and increase recipient independence. Since neither program was designed to advance a special need such as public safety, the State had not justified singling out FIP applicants and recipients for *suspicionless* drug testing. Ultimately, an equally divided panel of the U.S. Sixth Circuit Court of Appeals upheld the District Court's ruling.

Many people continue to believe that individuals should not receive public assistance if they use illegal drugs, and suggest that Michigan should implement a program of *suspicion-based* drug testing of FIP applicants and recipients.

CONTENT

The bills would amend the Social Welfare Act to provide for a pilot program for substance abuse screening and suspicion-based testing for controlled substances as a condition of Family Independence Program eligibility.

The bills are tie-barred.

House Bill 4118 (S-1)

The bill would require the Department of Human Services (DHS) to establish and

administer the program for FIP applicants and recipients. By April 1, 2014, subject to State appropriation, the Department would have to conduct a screening and testing pilot program in three or more counties selected by the DHS.

The DHS would have to screen applicants and recipients using an empirically validated substance abuse screening tool, both upon initial application and at annual redetermination. If the screening results for an applicant or recipient provided the DHS with a reasonable suspicion to believe the person had illegally used a controlled substance, the person would have to take a substance abuse test. If the test results were negative, the DHS would have to pay for the cost of the test.

If an applicant or recipient refused to take a substance abuse test, he or she would be ineligible for assistance but could reapply after six months; he or she would have to test negative when reapplying in order to receive assistance.

Senate Bill 275 (S-1)

The bill would require the DHS to refer an applicant or recipient to the regional substance abuse coordinating (RSAC) agencies, and continue to provide FIP assistance, the first time an individual tested positive for illegal use of a controlled substance. The costs of administering the test would be deducted from the applicant's or recipient's FIP payment. The DHS would have to terminate FIP assistance for individuals who failed to either participate in treatment offered by the RSAC agencies, or submit to required periodic substance abuse testing required by them.

The second or subsequent time an applicant or recipient tested positive, he or she would be ineligible for FIP assistance. If the individual reapplied, he or she would have to test negative to receive FIP assistance. The DHS could refer the applicant to the RSAC agencies for substance abuse treatment.

The bill would require the pilot program to terminate on March 31, 2015.

By April 30, 2015, the DHS would have to report to the Legislature regarding the screening and testing program. The report

would have to include at least all of the following:

- The number of individuals screened.
- The number of individuals screened for whom there was a reasonable suspicion of illegal use of a controlled substance.
- The number of individuals who consented to submitting to a substance abuse test.
- The number of individuals who refused to submit to a substance abuse test.
- The number of individuals who submitted to a substance abuse test who tested positive for illegal use of a controlled substance.
- The number of individuals who submitted to a substance abuse test who tested negative for illegal use of a controlled substance.
- The number of individuals who tested positive for illegal use of a controlled substance for a second or subsequent time.
- The cost incurred by the DHS in administering the program.

Proposed MCL 400.57z (S.B. 275)

Proposed MCL 400.57y (H.B. 4118)

ARGUMENTS

(Please note: The arguments contained in this analysis originate from sources outside the Senate Fiscal Agency. The Senate Fiscal Agency neither supports nor opposes legislation.)

Supporting Argument

Illegal drug use can prevent or destroy strong family relationships and erect a barrier to employment, thwarting the FIP goal of self-sufficiency and creating an unhealthy home environment. The bills would protect the children of applicant and recipient families by motivating parents to stay off of illegal drugs. The bills also would encourage those on drugs to make positive changes in their life by quitting drug use. The bills would require substance abuse treatment when a recipient or applicant tested positive for illegal drugs, and deny benefits only if the recipient or applicant refused substance abuse treatment or repeatedly failed drug tests.

Response:

Instead of helping, the bills would penalize children by denying them public assistance if their parent or guardian had an ongoing illegal drug problem. According to the Michigan League for Public Policy, children

make up 70% of the FIP caseload. If assistance were revoked or denied, the bills would not provide for a third party to receive benefits on behalf of affected children.

Furthermore, the bills fail to treat illegal drug addiction as a medical treatment issue. The idea that denying assistance will motivate illegal drug users to stop using drugs ignores the power of drug addiction. This "incentive" is insufficient to encourage serious addicts to receive treatment. Reportedly, illegal drug addicts often require multiple substance abuse programs before they conquer drug abuse. The bills' provisions for substance abuse treatment do not reflect the difficulties of and efforts required for rehabilitation.

Arguably, the bills represent an attempt to make it difficult to receive public assistance in order to save the State money.

Supporting Argument

Providing public welfare to illegal drug users is unfair to the rest of society. If someone can afford illegal drugs, he or she does not need public assistance for food. Resources should go to those with the greatest needs. Also, many jobs require drug tests, so illegal drug use hampers entry into the job market. If someone chooses to limit his or her options for employment and uses illegal drugs, the rest of society should not be held accountable for that choice. If successful entry into the job market can depend on drug tests, so should qualification for public assistance.

Public assistance should be a reciprocal obligation: society should provide assistance to the individual, but only if the individual engages in responsible and constructive behavior. Taxpayers deserve to know that their tax dollars are appropriately used for providing assistance, not enabling and subsidizing illegal drug use.

Response: Public assistance is designed to elevate those who need help to a point that they can be independent. Drug addiction is a disease, and someone's addiction could be the cause of his or her inability to be independent. An illegal drug user might make genuine attempts at treatment, which is responsible and constructive behavior, but fail. Under the theory of a reciprocal obligation, the bills would allow the State to avoid its obligation

to provide assistance despite that person's positive behavior.

Given the nature of drug addiction, it is mistaken to assume that because someone buys illegal drugs, he or she must be able to also afford food and other necessities. The power of drug addiction will cause people to forego basic necessities to their own detriment in favor of the addiction.

Opposing Argument

Requiring FIP applicants and recipients to be screened and potentially tested for illegal drug use would hurt those in need of assistance, because of the stigma associated with drug use and public assistance. It would have a negative effect on the self-esteem of family providers, and reinforce negative stereotypes about drug use and the poor. Further, the bills do not indicate the type, amount, or standards that would be required for training personnel who would administer the screening process. If the screening process lacked integrity, it could subject applicants and recipients to unnecessary drug tests, and thus, more stigma and humiliation.

Opposing Argument

The bills would allow for unconstitutional searches. The Fourth Amendment to the U.S. Constitution protects against unreasonable searches, and the U.S. Supreme Court has held that government-administered drug tests are searches. This means that the State must have an individualized suspicion of illegal drug use in order to subject FIP applicants and recipients to testing. Although the bills would require the DHS to use an "empirically validated substance abuse screening tool", that screening would be for substance abuse, not illegal drug use.

Substance abuse is a broad category, and includes the abuse of legal substances, such as alcohol. Reasonable suspicion of substance abuse would not necessarily provide the requisite suspicion to justify a Fourth Amendment search for illegal substances via urinalysis or any other intrusive method that would violate individuals' privacy rights. If the screening process lacked integrity, as noted above, there would be even less grounds to justify the drug test.

Opposing Argument

The potential for an increased caseload for Child Protective Services (CPS) could outweigh any positive administrative or financial effects. The bills do not address whether CPS should be notified if a parent or guardian tested positive for illegal drug use. If the DHS reported all parents and guardians who failed, CPS could face a significant increase in its caseload.

Opposing Argument

The bills would conflict with existing State law permitting medical marijuana use, and pose a burden for Michigan residents who hold a medical marijuana card under the Michigan Medical Marijuana Act (MMMA). Recipients and applicants who use marijuana legally under the MMMA would be denied assistance if they submitted to a drug test. This would enable the State to penalize marijuana use despite a person's compliance with the MMMA.

The bills refer to testing positive for "illegal use of a controlled substance" as the trigger for substance abuse treatment or denial of benefits. The definition of controlled substance under Michigan law includes marijuana, and there are no exceptions for marijuana used for medicinal purposes. Thus, marijuana, whether used in compliance with the MMMA or not, qualifies as a controlled substance. The bills, however, would not define "illegal use". While the MMMA, a State law, authorizes medical marijuana use, Federal law does not. Since the bills do not specify that "illegal use" pertains only to State law, it is logical to conclude that "illegal use" would encompass both Federal and State law. Therefore, since medical use of marijuana that is in compliance with the MMMA is illegal under Federal law, using medical marijuana would be an illegal use of a controlled substance, and therefore grounds for denial of benefits, or substance abuse treatment referral, under the bills.

Response: The term "illegal use" would be included within Michigan statute, so its definition should be limited to illegal use in the context of Michigan law. Based on this construction, since medical marijuana use is a legal use of a controlled substance under Michigan law, denial of benefits or referral to substance abuse treatment would not be triggered if an MMMA cardholder tested positive for marijuana use.

FISCAL IMPACT

Subject to State appropriation, the bills would establish a substance abuse screening and testing pilot program for FIP, beginning in FY 2013-14. The annual net costs/savings of the program would depend on several unknown factors.

The DHS has indicated that the annual costs of a pilot program would be \$600,000. Based on the experiences of other states in setting up similar programs, the costs to implement a drug testing program statewide could be as much as \$3.4 million Gross. As the bills would require the pilot to take place in three or more counties, this analysis includes a statewide range.

Caseload savings could be possible, but would depend on the implementation of the empirically valid testing tool, as well as the percentage of recipients who tested positive for drugs and successfully completed a substance abuse treatment program. Caseload reductions due to positive tests could result in as much as \$370,000 to \$3.7 million Gross savings.

The bill would have no fiscal impact on local units of government.

Cost Calculations

The pilot program estimate of \$600,000 was provided by the Department, while the cost estimate of \$700,000 to \$3.4 million for a statewide program is based on information from a 1999 Florida pilot program and a program implemented in Missouri in 2012.

The 1999 pilot program in Florida estimated a cost of \$30 for each drug test and a cost of \$90 per test once staff costs and other program costs were added. These costs include both the drug test itself and administrative overhead, including the use of SASSI, an empirically validated screening tool. The baseline administrative costs are estimated at approximately \$60 per screened applicant. Treatment costs were not included. Adjusted for inflation, the total costs would increase to \$120, with \$40 going toward the drug test itself. If all applicants/recipients of FIP received the formal, empirically validated screening tool, the baseline administrative costs of \$80

would be applied to each case (approximately 31,400 in FY 2013-14). The total baseline costs – excluding the costs of the drug test itself – would be approximately \$2.5 million.

Missouri's suspicion-based program was projected to cost up to \$2.6 million in FY 2012-13. The estimate includes the costs of increased staffing, administrative hearings, drug treatment, changes to electronic applications, and hiring contractors to administer the drug tests. Of this total, approximately \$1.9 million was set aside for substance abuse treatment and \$700,000 for administrative costs.

The costs to the State of Michigan to cover false positive drug tests would total approximately \$213,500 Gross. In the Florida pilot program, the screening tool referred 22.4% of the welfare caseload to take a drug test. Less than a quarter of those who were referred by the screening tool tested positive for drugs (or 5.1% of the total caseload and new applicants). If this 17% difference is applied to the adult FIP caseload, approximately 5,300 cases would be referred to take a test and would test negative.

Most FIP recipients would be eligible for drug treatment services through Medicaid. A small percentage of FIP recipients might not have Medicaid coverage, however. Outpatient and residential treatment costs range between approximately \$700 and \$2,400 per person. The Department of Community Health currently prioritizes treatment for welfare recipients. It is not known whether the referral of FIP clients would result in increased costs and caseloads in the substance abuse regional centers, or whether an influx of FIP recipients would simply reduce the number of treatment slots that are available to other clients.

Potential Savings Calculations

There are several possible scenarios in terms of projecting ongoing, annual savings estimates. The State could realize approximately \$3.7 million Gross/\$743,800 GF/GP in caseload savings if the program were implemented statewide. Assuming that a pilot program would affect just 10% of the caseload, the savings could range from \$370,000 to \$3.7 million. The FIP

program is funded with approximately 20.0% GF/GP and 80.0% Federal funding.

Michigan's projected monthly FIP caseload in FY 2013-14 is 44,400 and the projected average monthly payment is \$394.81. The average number of child-only FIP cases from January 2012 to June 2012 was 13,000, making the total projected number of cases that could be affected by a drug testing policy approximately 31,400. For every case that was removed from assistance for six months, the State would save approximately \$2,400. For every case that was removed from assistance for 12 months, the State would save approximately \$4,700.

If the DHS were able to identify 5.0% of FIP clients as drug users, this group would be referred to substance abuse treatment and would be able to remain on assistance assuming that the individuals maintained their eligibility requirements otherwise. The National Institute of Health estimates that between 40.0% and 60.0% of those treated for illegal drug use will relapse. If 2.5% of those who were referred to treatment again tested positive, the State would realize approximately \$3.7 million Gross/\$743,800 GF/GP in caseload savings for 12 months. In a scenario in which costs reached the higher end of the scale at \$3.4 million, the State would have to remove approximately 2.5% of the current FIP caseload and new applicants from assistance for 12 months, in order to essentially break even.

The percentage of welfare recipients who use illegal drugs is similar to – and only slightly higher than – to the percentage of drug users among the rest of the general population. In 2011, the U.S. Department of Health and Human Services (HHS) issued a report on drug use among welfare recipients that consolidated data from several studies. According to the HHS, most of these studies found that between 5.0% and 10.0% of welfare recipients abuse illegal drugs. Similarly, in 1999, Michigan's pilot program found that 10.3% of FIP recipients tested positive for illicit drug use. Florida's 1999 suspicion-based pilot program found that a total of 5.1% of welfare applicants and recipients tested positive for illegal drug use over an 18-month period. If a program in Michigan followed the model of the pilot program that was introduced in Florida in 1999, it is possible that as many as 5.0% of

the total FIP caseload would be identified as drug users.

Additional Unknown Factors

Potential annual savings and additional costs would be based on several unknown factors, some of which would be determined by departmental policy and others of which would be based on individual clients. Some of the key undetermined factors include: (1) Implementation of the screening tool and drug test. Factors include the accuracy of the tool, whether additional staff would have to be hired to administer the tool, and whether the drug tests were timed correctly so that they could detect an illegal substance. (2) The number of people who refused to take a test and would be ineligible for FIP. The results of Florida's 1999 pilot project showed that 21.0% of applicants and recipients refused to take the screening and therefore were not eligible for assistance. Arizona has found that a significant number of applicants declined to participate in the initial screening tool. If these precedents are a good indicator of what could be expected to take place in Michigan, the FIP caseload would be reduced significantly on the front end.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.