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FISCAL IMPACT REPORT

ORIGINAL DATE 3/9/15

SPONSOR Alcon **LAST UPDATED** _____ **HB** 523

SHORT TITLE School Athlete Drug Testing **SB** _____

ANALYST Chavez

ESTIMATED ADDITIONAL OPERATING BUDGET IMPACT (dollars in thousands)

| | FY15 | FY16 | FY17 | 3 Year Total Cost | Recurring or Nonrecurring | Fund Affected |
|--------------|------|-------------------------|------|-------------------|---------------------------|---------------|
| Total | | See Fiscal Implications | | | | |

(Parenthesis () Indicate Expenditure Decreases)

SOURCES OF INFORMATION

LFC Files

Responses Received From

Administrative Office of the District Attorneys (AODA)
 Administrative Office of the Courts (AOC)
 Attorney General’s Office (AGO)
 Public Education Department (PED)

Other Responses Received

New Mexico Activities Association (NMAA)

SUMMARY

Synopsis of Bill

House Bill 523 adds a new section of the School Personnel Act requiring a person hired to coach a school athletic activity be tested for “illicit and prescription drug abuse” prior to employment and subject to random drug testing thereafter at least annually.

The bill requires a coach who fails a drug test to be tested again within 3 days of the initial test. If a coach who fails a drug test continues to be employed by the school district as a coach, the coach shall submit to weekly drug tests for no less than one year.

Each school district is required to establish policies in consultation with the New Mexico Activities Association (NMAA) regarding reasonable suspicion of abusing illicit or prescription drugs, the protocol governing testing for the drugs and disciplinary action, and addiction interventions or fines.

The bill defines “illicit or prescription drug” to mean a substance listed in any of Schedules I through V of the Controlled Substances Act.

FISCAL IMPLICATIONS

There would be increased costs to school districts to perform drug tests and administrative costs to establish policies and protocols for implementing the Act.

NMAA analysis notes that drug tests cost approximately \$35 each. NMAA also notes that some of the larger high schools in the state employ 80 or more coaches per year, resulting in drug testing costs per school of up to \$3,000 annually for each school. As an example, NMAA estimates the initial cost of drug testing for high school coaches in Albuquerque Public Schools (APS) at approximately \$39,000 annually, which does not include the additional random drug testing.

PED analysis notes that instituting and administering a regular drug testing program for all middle, junior and high school athletic activity coaches could be of considerable expense to school districts, as could the provision that coaches who fail drug tests submit to weekly drug testing for no less than one year. PED adds such a cost would be prohibitive for most districts, causing districts to instead discharge coaches found to be abusing drugs under the Act.

SIGNIFICANT ISSUES

Analysis from the Attorney General’s Office (AGO) notes that there may be 4th Amendment implications to the random drug testing proposed by the bill. AGO states:

While this issue is not settled, several federal courts have ruled that in the context of each case, random drug testing of teachers violates their 4th Amendment right to be free of unreasonable searches and seizures. *American Federation of Teachers – West Virginia, AFL-CIO, et al v. Kanawha County Board of Education*, 592 F.Supp.2d 883 (S.D. W. Virginia 2009); *Smith County Educ. Ass’n v. Smith County Bd. Of Educ.*, 781 F.Supp.2d 604 (M.D. Tenn. 2011). In *American Federation of Teachers v. Kanawha*, the Court rejected the argument that all teachers were in “safety-sensitive” positions, something that would have justified lowering the level of protection for drug testing.

However, mandatory pre-employment drug testing of teacher-applicants has been upheld by the 6th Circuit in *Knox County Education Association v. Knox County Board of Education*, 158 F.3d 361 (1998).

Both PED and the Administrative Office of the Courts (AOC) note that under current law, the School Personnel Act requires local school boards and regional education cooperatives to develop policies and procedures to require background checks on an applicant who has been offered employment, a contractor or a contractor’s employee with unsupervised access to students at a public school, but does not require drug testing for those applicants prior to employment or during employment. PED analysis notes HB 523 does not provide detail as to how the School Personnel Act provisions for background checks work with or are expanded through the new section of law.

Additionally, AOC analysis notes that, as teachers are usually with students for many more hours

than coaches, there is a question as to why coaches would undergo drug testing but not teachers.

The bill as currently written does not define “abuse” or “reasonable suspicion”. AOC notes HB 523 requires a coach “reasonably suspected of abusing illicit or prescription drugs to undergo drug testing without prior notice” to the coach, but provides no guidance as to what will constitute a reasonable suspicion of abuse, instead leaving it to school districts to establish policies and protocols. This would likely lead to different definitions and policies regarding “abuse” and “suspicion” being promulgated in different school districts. AOC adds that school districts will have to provide training and guidance for school district personnel, as people not in law enforcement are generally not trained in standards for reasonable suspicion.

The bill defines “illicit or prescription drugs” as a substance listed in any of Schedules I through V of the Controlled Substances Act. However, PED notes that schedules III through V includes drugs that have “currently accepted medical use in treatment in the United States.” The bill does provide guidance for when the use of these drugs, through the use of prescription, is acceptable, and when it would be considered “abuse” under the act.

Also regarding prescription drugs, PED analysis notes distinguishing prescription drug abuse from other prescription drug use is impossible without knowledge as to the valid prescriptions held by the coach, but that asking for such information may violate the Americans with Disabilities Act. Additionally, AOC analysis notes HB 523 does not provide exceptions to testing for individuals who test positive because they use prescription drugs, use medical marijuana, or participate in the licensed methadone program.

ADMINISTRATIVE IMPLICATIONS

School districts would be required to develop policies, protocols, and disciplinary and intervention policies under the bill, as well as being required to perform drug testing. This could be a significant administrative burden for school districts.

TECHNICAL ISSUES

While the bill requires “a person hired to coach a school athletic activity” be tested, it is the responsibility of school districts under the bill to establish policies, protocols, and disciplinary action regarding drug testing. However, this section appears to leave out charter schools, especially state-chartered charter schools, from the same requirements.

PED notes the Legislature may wish to address the following issues for clarity:

An “Illicit and prescription drug” districts are charged with screening for coaching staff are defined as in the bill to mean “a substance listed in any of Schedules I through V of the Controlled Substances Act.” However, the Controlled Substances Act includes legal drugs in Schedules III-V, expressly stating that each of the Schedules III-V includes drugs that have “currently accepted medical use in treatment in the United States.” (See 30-31-5 NMSA 1978). Because drugs included in the new bill include those with medically accepted uses, the definitions of “abuse” and “suspicion of abuse” become critical.

The terms “abuse” and “suspicion of abuse” are left undefined in the bill. The bill merely instructs school districts to establish policies concerning “when a coach is reasonably

suspected of abusing illicit or prescription drugs” in consultation with the NMAA. Since the bill allows for negative employment consequences for a person taking prescription drugs currently accepted for medical use, is critical to define the terms.

Additionally, PED notes if more extensive drug screening for certain employees or contractors will be required as a result of this bill, the School Personnel Act should be amended.

POSSIBLE QUESTIONS

NMAA poses the following questions:

1. Where will these coaches be drug tested?
2. Who will monitor these drug tests?
3. Will the policies be consistent statewide?
4. Who will provide counseling and intervention for coaches that fail a drug test?
5. How will the random drug testing be monitored?

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