SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: Health Care Committee

BILL: CS/SB 1928

INTRODUCER: Health Care Committee and Senator Peaden

SUBJECT: High School Athletics

DATE: April 26, 2006 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Brown	Matthews	ED	**Favorable**
2.	Munroe	Wilson	HE	**Fav/CS**
3.			JU	
4.			EA	
5.			WM	
6.				

I. Summary:

This bill requires the Florida High School Athletic Association (FHSAA) to implement a three-year steroid testing program for grade 9th through 12th student athletes who participate in interscholastic competitions at member schools. Public and private schools are required to consent to the program as a prerequisite to membership in FHSAA under this bill.

The FHSAA board of directors is required to contract with an accredited testing agency.

Regarding actual testing, this bill requires that the names of all competing students be provided by each member school to the FHSAA, which will forward the names to the testing agency. From this group, at least one percent of students must be randomly tested. To compete in interscholastic athletics, students are required to sign consent forms.

The bill stipulates that records containing the findings of a student's drug test held by the testing agency that contracts with FHSAA for the testing program under the bill must be maintained separately from a student's educational record in accordance with s. 1002.22, F.S., and requires disclosure by the testing agency only to FHSAA, the student, the student's parent, the administration of the student's school, and the administration of any school to which the student may transfer during a suspension from participation in interscholastic athletics resulting from a positive drug finding.

The bill creates an exception to the public records exemption for student records under s. 1002.22(3), F.S., to authorize the disclosure of student records to FHSAA, the administration of the student's school, the administration of any school to which the student may transfer during a suspension from participation in interscholastic athletics resulting from a positive drug finding,

the student, and the student's parent only in accordance with the requirements of s. 1006.20(10), F.S., which relates to the drug testing program to randomly test for anabolic steroids in students grade 9th through 12th who participate in interscholastic athletics in member schools of FHSAA.

Subsequent to immediate suspension of a student athlete for a positive test, penalties range from suspension for 90 days to a permanent suspension, contingent upon the number of positive findings of steroid use. Additionally, the student is required to submit to repeated tests during high school athletics participation.

The bill specifies procedures for an appeal of the test findings, and authorizes challenges to findings and penalties by the member school or the student.

The FHSAA is required to produce a report on program results by October 1, annually, to the President of the Senate and the Speaker of the House of Representatives, which includes certain statistics and costs incurred by FHSAA.

The bill grants civil immunity to the FHSAA, its board of directors, employees, and member schools and their employees, for acts or omissions connected with the program. The Department of Legal Affairs, or its outside counsel, is required to defend FHSAA in civil actions.

A $3 million appropriation is provided from the General Revenue Fund to the FHSAA, to fund expenses relating to testing agency fees, administrative expenses, and legal costs of defense.

This bill amends sections 1002.22 and 1006.20, F. S.

This bill is linked to Senate Bill 2082, which provides public meetings exemption for specified meetings held in the implementation of the three-year anabolic steroid drug testing program for high school student athletes implemented by FHSAA.

This bill takes effect July 1, 2006, and the bill expires on the earlier of June 30, 2009, or when appropriated funds are spent.

II. Present Situation:

Florida High School Athletic Association

The Florida High School Athletic Association (FHSAA) is designated as the governing nonprofit organization of Florida public school athletics.[1] The FHSAA governs athletic competitions at member schools for students attending grade 6th through 12th. The membership structure of the FHSAA is such that the organization is a representative democracy in which the sovereign authority is vested in its member schools.[2] The school principal or designated assistant principal or athletic director is the official representative of each member school.[3]

[1] See s. 1006.20(1), F.S.
[2] See s. 1006.20(3)(a), F.S.
[3] See s. 1006.20(3)(b), F.S.

The FHSAA is required to comply with Florida law to preserve its designation.[4] An annual, independent financial audit is required of FHSAA accounts and records, and a copy of the report is required to be submitted to the Auditor General.[5] Private schools are eligible for membership in FHSAA where they engage in competitions with public high schools.[6]

The FHSAA bylaws establish eligibility criteria for all students who participate in high school athletic competition in its member schools.[7] Included in the bylaws is a requirement that all student participants satisfactorily pass a medical evaluation each year before competing in interscholastic athletics.[8] Requirements for obtaining a student's medical history and performing the medical evaluation are to be established in bylaw, to include a physical assessment of the student's physical capabilities to participate in interscholastic athletic competitions.[9] The assessment is to be recorded on a uniform pre-participation physical evaluation and history form. Students are not authorized to compete, until the medical evaluation results have been approved by the school.[10] Section 1006.20(2)(d), F.S., provides an exception, however, where based on religious beliefs, a parent objects in writing to the medical evaluation.

The FHSAA is required to establish an appeal procedure to provide due process to students to appeal unfavorable rulings of the committee on appeals regarding eligibility to compete. Student athletes and member schools may appeal unfavorable rulings to the board of directors. The board of directors is authorized to issue a final decision, to uphold, reverse, or modify the ruling of the committee on appeals.[11]

Educational Records

Section 1002.22, F.S., provides for the rights of students and their parents regarding the student's educational records in Florida. The parent of any student who attends or has attended any public school, career center, or public postsecondary educational institution shall have the following rights with respect to any records or reports created, maintained, and used by any public educational institution in Florida. However, whenever a student has attained 18 years of age, or is attending a postsecondary educational institution, the permission or consent required of, and the rights accorded to, the parents of the student shall thereafter be required of and accorded to the student only, unless the student is a dependent student of such parents as defined in 26 U.S.C. s. 152 (s. 152 of the Internal Revenue Code of 1954). The State Board of Education must adopt rules whereby parents or students may exercise these rights.[12]

Under s. 1002.22(3), F.S., every student has a right of privacy with respect to the educational records kept on her or him. Personally identifiable records or reports of a student, and any personal information contained therein, are *confidential and exempt* from the Public Records Law. A state or local educational agency, board, public school, career center, or public

[4] See s. 1006.20(1), F.S.
[5] See s. 1006.19, F.S.
[6] See s. 1006.20(1), F.S.
[7] See s. 1006.20(2)(a), F.S.
[8] See s. 1006.20(2)(c), F.S.
[9] *Id.*
[10] *Id.*
[11] See s. 1006.20(7), F.S.
[12] See Rule 6A-1.0955, F.A.C.

postsecondary educational institution may not permit the release of such records, reports, or information without the written consent of the student's parent, or of the student himself or herself if he or she is qualified as provided in this subsection, to any individual, agency, or organization. There is a difference between records that the Legislature has made exempt from public inspection and those that are exempt and confidential. If the Legislature makes a record confidential, with no provision for its release such that its confidential status will be maintained, such information may not be released by an agency to anyone other than to the persons or entities designated in the statute.[13] If a record is not made confidential but is simply exempt from mandatory disclosure requirements, an agency has discretion to release the record in all circumstances.[14]

Student records and reports under s. 1002.22, F.S., are *confidential and exempt* and are accorded a unique status regarding their disclosure. Section 1002.22(2), F.S., defines "records and reports" to mean official records, files, and data directly related to students that are created, maintained, and used by public educational institutions, including all material that is incorporated into each student's cumulative record folder and intended for school use or to be available to parties outside the school or school system for legitimate educational or research purposes. Materials that shall be considered as part of a student's record *include, but are not necessarily limited to*: identifying data, including a student's social security number; academic work completed; level of achievement records, including grades and standardized achievement test scores; attendance data; scores on standardized intelligence, aptitude, and psychological tests; interest inventory results; *health data*; family background information; teacher or counselor ratings and observations; verified reports of serious or recurrent behavior patterns; and any other evidence, knowledge, or information recorded in any medium, including, but not limited to, handwriting, typewriting, print, magnetic tapes, film, microfilm, and microfiche, and maintained and used by an educational agency or institution or by a person acting for such agency or institution. However, the terms "records" and "reports" do not include:

- Records of instructional, supervisory, and administrative personnel, and educational personnel ancillary to those persons, that are kept in the sole possession of the maker of the record and are not accessible or revealed to any other person except a substitute for any of such persons. An example of records of this type is instructor's grade books;
- Records of law enforcement units of the institution that are maintained solely for law enforcement purposes and that are not available to persons other than officials of the institution or law enforcement officials of the same jurisdiction in the exercise of that jurisdiction;
- Records made and maintained by the institution in the normal course of business that relate exclusively to a student in her or him capacity as an employee and that are not available for use for any other purpose;
- Records created or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in his or her professional or paraprofessional capacity, or assisting in that capacity, that are created, maintained, or used only in connection with the provision of treatment to the student and that are not

[13] Attorney General Opinion 85-62.
[14] *Williams v. City of Minneola*, 575 So.2d 683, 687 (Fla. 5th DCA), review denied, 589 So.2d 289 (Fla. 1991).

available to anyone other than persons providing such treatment. However, such records shall be open to a physician or other appropriate professional of the student's choice;
- Directory information as defined in s. 1002.22, F.S.;
- Other information, files, or data that do not permit the personal identification of a student;
- Letters or statements of recommendation or evaluation that were confidential under Florida law and that were received and made a part of the student's educational records prior to July 1, 1977; and
- Copies of the student's fingerprints. No public educational institution shall maintain any report or record relative to a student that includes a copy of the student's fingerprints.

The Fifth District Court of Appeal has held that a school board may not disclose student records, even with personally identifying information redacted.[15] The Fifth District Court of Appeal certified a question of great public importance to the Florida Supreme Court on whether s. 228.093(3)(d), F.S. (2002),[16] creates an exemption from the Public Records Law for the entire contents of a student's record within which there is a student's personally identifiable information or does it create an exemption only for such personally identifiable information within that record so that upon a proper request, the custodian must redact the personally identifiable information and produce the balance of the record for inspection under the Public Records Law? The Florida Supreme Court denied to review the case.[17]

However, personally identifiable records or reports of a student under s. 1002.22, F.S., may be released to the following persons or organizations *without the consent of the student or the student's parent*:

- Officials of schools, school systems, career centers, or public postsecondary educational institutions in which the student seeks or intends to enroll; and a copy of such records or reports shall be furnished to the parent or student upon request;
- Other school officials, including teachers within the educational institution or agency, who have legitimate educational interests in the information contained in the records;
- The United States Secretary of Education, the Director of the National Institute of Education, the Assistant Secretary for Education, the Comptroller General of the United States, or state or local educational authorities who are authorized to receive such information subject to the conditions set forth in applicable federal statutes and regulations of the United States Department of Education, or in applicable state statutes and rules of the State Board of Education;
- Other school officials, in connection with a student's application for or receipt of financial aid;
- Individuals or organizations conducting studies for or on behalf of an institution or a board of education for the purpose of developing, validating, or administering predictive tests, administering student aid programs, or improving instruction, if the studies are

[15] See *WFTV, Inc. v. School Board of Seminole County*, 874 So.2d 48 (5th DCA 2004), review denied, 892 So.2d 1015 (Fla. 2004).
[16] s 1058, ch 2002-387, Laws of Florida, repealed s. 228.093, F.S., effective January 7, 2003. Section 228.093, F.S., was recodified as s. 1002.22, F.S. The recodification of the law did not amend the provisions of s. 228.093, F.S.
[17] See *WFTV, Inc. v. School Board of Seminole County*, 874 So.2d 48 (5th DCA 2004), review denied, 892 So.2d 1015 (Fla. 2004), supra.

conducted in a manner that does not permit the personal identification of students and their parents by persons other than representatives of such organizations and if the information will be destroyed when no longer needed for the purpose of conducting such studies;

- Accrediting organizations, in order to carry out their accrediting functions;
- Early learning coalitions and the Agency for Workforce Innovation in order to carry out their assigned duties;
- For use as evidence in student expulsion hearings conducted by a district school board under ch. 120, F.S.;
- Appropriate parties in connection with an emergency, if knowledge of the information in the student's educational records is necessary to protect the health or safety of the student or other individuals;
- The Auditor General and the Office of Program Policy Analysis and Government Accountability in connection with their official functions; however, except when the collection of personally identifiable information is specifically authorized by law, any data collected by the Auditor General and the Office of Program Policy Analysis and Government Accountability is confidential and exempt from the Public Records Law and must be protected in a way that does not permit the personal identification of students and their parents by other than the Auditor General, the Office of Program Policy Analysis and Government Accountability, and their staff, and the personally identifiable data shall be destroyed when no longer needed for the Auditor General's and the Office of Program Policy Analysis and Government Accountability's official use;
- A court of competent jurisdiction in compliance with an order of that court or the attorney of record in accordance with a lawfully issued subpoena, upon the condition that the student and the student's parent are notified of the order or subpoena in advance of compliance therewith by the educational institution or agency;
- A person or entity in accordance with a court of competent jurisdiction in compliance with an order of that court or the attorney of record pursuant to a lawfully issued subpoena, upon the condition that the student, or his or her parent if the student is either a minor and not attending a postsecondary educational institution or a dependent of such parent as defined in 26 U.S.C. s. 152 (s. 152 of the Internal Revenue Code of 1954), is notified of the order or subpoena in advance of compliance therewith by the educational institution or agency;
- Credit bureaus, in connection with an agreement for financial aid that the student has executed, if the information is disclosed only to the extent necessary to enforce the terms or conditions of the financial aid agreement. Credit bureaus shall not release any information obtained under this paragraph to any person;
- Parties to an interagency agreement among the Department of Juvenile Justice, school and law enforcement authorities, and other signatory agencies for the purpose of reducing juvenile crime and especially motor vehicle theft by promoting cooperation and collaboration, and the sharing of appropriate information in a joint effort to improve school safety, to reduce truancy and in-school and out-of-school suspensions, and to support alternatives to in-school and out-of-school suspensions and expulsions that provide structured and well-supervised educational programs supplemented by a coordinated overlay of other appropriate services designed to correct behaviors that lead to truancy, suspensions, and expulsions, and that support students in successfully

completing their education. Information provided in furtherance of the interagency agreements is intended solely for use in determining the appropriate programs and services for each juvenile or the juvenile's family, or for coordinating the delivery of the programs and services, and as such is inadmissible in any court proceedings before a dispositional hearing unless written consent is provided by a parent or other responsible adult on behalf of the juvenile; and

- Consistent with the Family Educational Rights and Privacy Act, the Department of Children and Family Services or a community-based care lead agency acting on behalf of the Department of Children and Family Services, as appropriate.

Section 1002.22, F.S., does not prohibit any educational institution from publishing and releasing to the general public directory information relating to a student if the institution elects to do so. However, an educational institution is prohibited from releasing, to any individual, agency, or organization that is not listed in s. 1002.22, F.S., directory information relating to the student body in general or a portion thereof unless it is normally published for the purpose of release to the public in general. Any educational institution making directory information public must give public notice of the categories of information that it has designated as directory information for all students attending the institution and shall allow a reasonable period of time after the notice has been given for a parent or student to inform the institution in writing that any or all of the information designated should not be released.

Controlled Substances

Chapter 893, F.S., contains the Florida Comprehensive Drug Abuse Prevention and Control Act.[18] This Act provides a list of controlled substances, and classifies them according to their potential for abuse from Schedules I through V.[19] Anabolic steroids are classified as Schedule III controlled substances. Schedule III substances are considered to have a lower potential for abuse than Schedule I and II. Abuse of a Schedule III substance is thought to lead to moderate or low physical dependence, or high psychological dependence, although anabolic steroids are thought to possibly result in physical damage.[20] Anabolic steroids are chemically and pharmacologically related to testosterone.[21]

OPPAGA Study and Drug Testing in Florida

In October 2004, the Office of Program Policy Analysis and Government Accountability published a study on steroid use among high school students.[22] The report relied on the Florida Youth Substance Abuse Survey, and indicates the following:

- Although nationally and in Florida, steroid use remains relatively low compared to other drugs of concern, use has increased over time.

[18] See s. 893.01, F.S.
[19] See s. 893.02, F.S.
[20] See s. 893.03(3), F.S.
[21] See s. 893.03(3)(d), F.S.
[22] OPPAGA Information Brief, *Though the Option Is Available, School Districts Do Not Test Students for Steroids,* Report No. 04-72(Oct. 2004).

- About two percent of students nationally report using steroids, and use is highest among high school seniors.
- Steroid use in Florida among 6th through 12th graders is comparable to national levels.
- About 1.4 percent, or 19,350, of Florida students report using steroids previously, and 0.4 percent, or 5,600, report using steroids in the past 30 days.
- Males are represented much higher than females as steroid users.
- Steroid use increased in the 9th and 12th grades in Florida.
- Steroid testing is one of the more expensive drug tests, costing between $50 to $250 per test.
- As of the date of the report, Florida had 11 school districts that drug test, including testing of student athletes, but none tested for steroids.[23]
- Of those Florida districts which drug test, due to cost, the districts only test a percentage of athletes during the year and randomly thereafter.
- As of the date of the report, with 215,000 high school athletes in Florida, testing just 5 percent of the population annually could range from $537,500 to $2,687,500 in lab fees alone. Costs incidental to the testing are not included in these estimates.

While there is no express statutory authority regarding school drug testing, s. 1001.42, F.S., addresses general powers and duties of district school boards. Section 1001.42(6), F.S., stipulates that district school boards may "provide for. . .the attendance and control of students at school, and for proper attention to health, safety, and other matters relating to the welfare of students."

III. Effect of Proposed Changes:

The bill creates subsection (10) of s. 1006.20, F.S., to require FHSAA to facilitate a three-year program during the 2006-2007, 2007-2008, and 2008-2009 academic years in which students in grade 9th through 12th in its member schools who participate in interscholastic athletics governed by FHSAA must be subject to random testing for the use of anabolic steroids. All schools, both public and private, must consent to the provisions of this subsection as a prerequisite for membership in FHSAA for the duration of the program.

The board of directors of FHSAA must establish procedures for the anabolic steroid drug testing program based on minimum criteria specified in subsection (10) as created in the bill:

- The FHSAA must select and enter into a contract with a testing agency whose laboratory is accredited by the World Anti-Doping Agency;
- At least one percent of a random sample of students participating in each interscholastic sport must be tested in each year of the program;
- The names of all students who will compete must be reported by the member school to the FHSAA, who will then provide this list to the testing agency;
- The testing agency must give seven days notice to the school administration and the FHSAA of a specimen collection from a randomly selected student, whose name will not be disclosed; and

[23] As an update, the Department of Education indicates that as of school year 2004-2005, 17 Florida school boards had authorized drug testing of student athletes.

- The records containing the findings of a student's drug test held by the testing agency that contracts with FHSAA for the testing program under the bill must be maintained separately from a student's educational record in accordance with s. 1002.22, F.S., and requires disclosure by the testing agency only to FHSAA, the student, the student's parent, the administration of the student's school, and the administration of any school to which the student may transfer during a suspension from participation in interscholastic athletics resulting from a positive finding.

The bill creates an exception to the public records exemption for student records under s. 1002.22(3), F.S., to authorize the disclosure of student records to FHSAA, the administration of the student's school, the administration of the student's school, the administration of any school to which the student may transfer during a suspension from participation in interscholastic athletics resulting from a positive finding, the student, and the student's parent only in accordance with the requirements of s. 1006.20(10), F.S., which relates to the drug testing program to randomly test for anabolic steroids in students grades 9 through 12 who participate in interscholastic athletics in member schools of FHSAA.

To participate in interscholastic athletics, each student and his or her parents must complete and sign a consent form prescribed by FHSAA. The consent form must include specified information: a brief description of the drug testing program, the penalties for a first, second, and third positive finding, the procedure for challenging a positive finding, and the procedure for appealing a prescribed penalty.

The bill specifies requirements for challenge and appeal of the drug testing in the event of a positive test by the member schools of FHSAA and students. A student selected for testing who fails to provide a specimen will be suspended immediately from participation in interscholastic athletic practice and competition until the specimen is provided. If a student tests positive, the school administration will immediately suspend the student from participation, and notify and schedule a meeting with the student and his or her parent during which the principal or his or her designee will explain the finding, challenge procedure, penalties, and the procedures for appealing the penalties.

Penalties are provided in this bill, ranging from a 90 day suspension to permanent suspension, depending upon the number of positive findings of steroid use. An initial finding of drug use subjects the student to repeated tests during his or her eligibility for high school athletics. Additionally, the student must complete a mandatory drug education program.

Procedures for an appeal are established for a student who tests positive in a test administered under this subsection to ensure due process as follows:

- The member school may challenge a positive finding by getting an analysis of a sample of the original specimen, and is required to challenge the finding upon the student's request. The cost of analysis is borne by the member school or student's parent, unless the finding is negative, in which case, the cost is refunded. The student remains on suspension pending the outcome of the analysis, and if negative, eligibility is immediately restored.

- A member school may also appeal the period of ineligibility imposed on a student due to a positive finding. At the discretion of the FHSAA commissioner, a student's penalty may be reduced or eliminated. The student remains ineligible, however, until:

  - The student tests negative on the mandatory exit test; and
  - The FHSAA restores the student's eligibility.

- The member school may appeal the commissioner's decision with the FHSAA board of directors, and must appeal upon the student's request. The board of directors may modify or eliminate the student's penalty, but the student remains ineligible until testing negative on the mandatory exit test, and until eligibility is restored by FHSAA.
- Technical experts may serve as consultants to the FHSAA's commissioner and its board of directors in connection with appeals.

The FHSAA is required, following each year of the program, to provide a report on program results by October 1, to the President of the Senate and the Speaker of the House of Representatives. The report must include statistics on the number of students tested; the number of first, second, and third violations; the number of challenges and their results; the number of appeals and their dispositions; and the costs incurred by FHSAA to administer the program, including attorney's fees and other expenses of litigation.

The bill provides immunity from civil liability for FHSAA, including members of its board of directors, employees, and member schools and their employees. Immunity extends to any civil liability arising from any act or omission in connection with the program. The Department of Legal Affairs, or its outside counsel, must defend FHSAA, its board of directors, employees and its member schools, and their employees in civil litigation resulting from the program.

All expenses of the program must be paid with funds appropriated by the Legislature. Such expenses include, but are not limited to: fees and expenses charged by the testing agency for administrative services, and specimen collection and analysis; administrative expenses incurred by FHSAA; and attorney's fees and other costs of litigation.

Subsection (10) of s. 1006.20, F.S., as created in the bill expires on June 30, 2009, or at such earlier date as appropriated funds are exhausted.

The bill appropriates $3 million from the General Revenue Fund to FHSAA, to implement the drug testing program. Any unexpended or unencumbered balance remaining at the end of the 2008-2009 fiscal year reverts to the General Revenue Fund.

This act takes effect July 1, 2006.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

The provisions of this bill have no impact on municipalities and the counties under the requirements of Article VII, Section 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

Under ch. 119, F.S., "agency" is defined to mean any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of* any public agency. The FHSAA is a nonprofit organization of Florida public school athletics and governs athletic competitions at member schools for students attending grade 6th through 12th and has a quasi-governmental status. The FHSAA must comply with Florida law to preserve its designation but is not a state agency as defined in the Administrative Procedure Act. The bylaws of FHSAA govern high school athletic programs in its member schools and the students who participate in them unless otherwise specifically *provided by statute*. The FHSAA appears to be acting on behalf of member schools for students who are participants in athletic competitions at such schools and performing statutory duties imposed on it under s. 1006.20, F.S., as amended by the bill.

Section 1002.22, F.S., provides for the rights of students and their parents regarding the student's educational records in Florida. The bill creates an exception to the public records exemption for student records under s. 1002.22(3), F.S., to authorize the disclosure of student records to FHSAA, the administration of the student's school, the administration of any school to which the student may transfer during a suspension from participation in interscholastic athletics resulting from a positive finding, the student, and the student's parent only in accordance with the requirements of s. 1006.20(10), F.S., which relates to the drug testing program to randomly test for anabolic steroids in students grades 9 through 12 who participate in interscholastic athletics in member schools of FHSAA. The bill stipulates that records that contain findings of a drug test held by the testing agency that contracts with FHSAA must be maintained separately from a student's educational records and may be disclosed to certain persons.

This bill is linked to Senate Bill 2082, which creates an exemption from the Public Meetings Law for specified meetings held in the implementation of the 3-year FHSAA anabolic steroid drug testing program for high school student athletes.

C. Trust Funds Restrictions:

The provisions of this bill have no impact on the trust fund restrictions under the requirements of Article III, Subsection 19(f) of the Florida Constitution.

D. Other Constitutional Issues:

Although the U.S. Supreme Court case of New Jersey v. T.L.O. involved a search of a student's purse, rather than a drug test, it is frequently cited in student drug testing challenges.[24] This seminal case established the ability of private plaintiffs to challenge searches conducted by public school officials, based on the Fourth Amendment, which

[24] 469 U.S. 325 (1985).

had traditionally been reserved for police searches.[25] The T.L.O. Court stipulated that a student has a legitimate expectation of privacy. Additionally, the Court confirmed that school officials conducting searches as agents of the state do not need to obtain warrants, or evidence probable cause, but rather, need only show reasonableness.[26] The T.L.O. Court established a two-prong test to determine reasonableness, which is as follows:

i. Whether the action was justified at its inception; and
ii. Whether the search was reasonably related in scope to the circumstances which justified the interference in the first place.[27]

A student and his parents specifically challenged a school district policy of randomly drug testing student athletes as a condition of participation in Vernonia School District 47J v. Acton.[28] In assessing "reasonableness," the U.S. Supreme Court indicated a proper balancing of the intrusion on the student's Fourth Amendment interests against the promotion of legitimate governmental interests.[29] The court additionally confirmed that the public school setting constitutes a 'special need,' thereby removing the requirement of probable cause or a warrant.[30] While acknowledging that students in general have a legitimate expectation of privacy, the court determined that student athletes have even less of a legitimate privacy expectation, in that "an element of communal undress is inherent in athletic participation, and athletes are subject to preseason physical exams and rules regulating their conduct."[31] In upholding the school districts' practice of suspicionless searches of student athletes, the court cited that the risk of immediate physical harm to the athlete drug user or the athlete's competitors is especially high.[32]

In 2002, the U.S. Supreme Court applied the Vernonia ruling to a school board policy of requiring drug testing of middle and high school students who participated in competitive extracurricular activities, in Board of Education of Independent School District No. 92 of Pottawatomie County v. Earls.[33] In its analysis, the court drew comparisons between this class of students and athletes, in that some of these clubs and activities involve off-campus travel and communal undress, and all of these activities contain rules and requirements that do not extend to the student body as a whole.[34] The court classified the students who participate in extracurricular activities as voluntary participants, which further limits their expectation of privacy.[35]

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[25] Ronald T. Hyman, *Constitutional Issues When Testing Students for Drug Use, A Special Exception, and Telltale Metaphors*, 35 JLEDUC 1, 4 (Jan. 2006).
[26] *New Jersey v. T.L.O., supra* note 18, at 326.
[27] *Id.*
[28] 515 U.S. 646 (1995).
[29] *Id.* at 646.
[30] *Id.* at 653.
[31] *Id.* at 646-647.
[32] *Id.* at 662.
[33] 536 U.S. 822 (2002).
[34] *Id.* at 823.
[35] *Id.* at 832.

Courts have subsequently extended the Vernonia and Board of Education holdings to authorize drug testing of students who drive to school and park on school premises.[36] In Joye v. Hunterdon Central Regional High School Board of Education, the New Jersey Supreme Court indicated that parking at school is voluntary and a privilege, and that student drivers must comply with special rules and regulations that are not required of the student body at large:

> . . . the testing program avoids subjecting the entire school to testing. And it preserves an option for a conscientious objector. He can refuse testing while paying a price (nonparticipation that is serious, but less severe than expulsion from the school).[37]

However, it is unclear whether suspicionless drug testing of specific classes of students withstands constitutional muster based on the privacy provisions in state constitutions. By way of example, the Pennsylvania Supreme Court noted that the state's constitution required a higher level of scrutiny than that mandated under the Federal Constitution.[38] As such, the court required a school district to make an actual showing of the specific need for its policy of drug testing students who hold parking permits or participate in voluntary extracurricular activities, along with an explanation of its basis for believing that the policy would address that need.[39]

The Florida Constitution contains an express right of privacy as follows:

> Every natural person has the right to be let alone and free from governmental intrusion into the person's private life except as otherwise provided herein.[40]

The Fifth District Court of Appeal in Florida recently upheld a school's practice of daily, suspicionless pat-down searches of students.[41] However, critical to the court's finding was that the school was an alternative school, or a school for high-risk children, attendance at the school was in lieu of confinement, and a notable threat of violence existed at the school.[42] In the court's opinion, "alternative schools have an even greater need to maintain discipline and safety for the protection of students and staff, and create a healthy learning environment, than regular public schools . . ."[43]

It is unclear whether this same holding would extend to a policy of requiring suspicionless searches of student athletes as a condition of participation in interscholastic athletics, given the greater right of privacy afforded in the state constitution.

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[36] Joseph R. McKinney, *The Effectiveness and Legality of Random Student Drug Testing Programs Revisited*, 205 WELR 19, 28 (2006).
[37] 826 A.2d 624, 637 (2003).
[38] *Theodore v. Delaware Valley School District*, 836 A.2d 76, 88 (2003).
[39] *Id.* at 95-96.
[40] Section 23, Article 1, of the State Constitution.
[41] *C.N.H. v. State*, 2006 WL 357889 (Feb. 17, 2006).
[42] *Id.* at 1-3.
[43] *Id.* at 3.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The parent of the student who tests positive or the member school would be required to bear the cost of the steroid testing subsequent to the first positive finding. It is unclear whether the parent of the student who tests positive or the member school would be required to pay for costs associated with the mandatory drug education program.

C. Government Sector Impact:

The member school may be responsible for costs associated with conducting or contracting for a third party to conduct a mandatory drug education program for athletes who test positive for steroids under the bill.

According to the Department of Education, school districts would be required to comply, which would generate administrative costs associated with testing selection and suspension procedures. Districts could also incur costs associated with challenges and appeals. Presumably, the appropriation provided in this bill would apply to these costs.

It is difficult to ascertain costs of implementation, both due to the inexact estimates of cost per steroid test, and the inability to accurately capture the total number of student participants in sports. The FHSAA estimates that there are about 219,040 student participants in sports from grade 9th through 12th.[44] However, this is an overestimate, as students who participate in more than one sport may be duplicated in the total. Additionally, this estimate relied on data from 2004-2005 levels of participation, and updated figures are not yet available.

The bill provides a $3 million appropriation.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

[44] See the website of the Florida High School Athletic Association at: <www.fhsaa.org/programs/participation/2004_05.asp> (Last visited on 04/21/06).

VIII. Summary of Amendments:

None.