

NEIL ABERCROMBIE
GOVERNOR



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DEPARTMENT OF HUMAN SERVICES
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March 28, 2011

MEMORANDUM

TO: The Honorable John M. Mizuno, Chair
Committee on Human Services

FROM: Patricia McManaman, Director

SUBJECT: **H.C.R. 246/H.R. 209 - URGING THE DEPARTMENT OF HUMAN SERVICES TO EXPLORE THE POSSIBILITY OF CONDUCTING RANDOM DRUG TESTING OF ADULT INDIVIDUALS RECEIVING PUBLIC ASSISTANCE AND SUSPENDING THIS ASSISTANCE IF THE INDIVIDUAL TESTS POSITIVE FOR SUBSTANCE ABUSE**

Hearing: Monday, March 28, 2011; 9:00 a.m.
Conference Room 329, State Capitol

PURPOSE: The purpose of these resolutions is to urge the Department of Human Services to explore the possibility of conducting random drug testing of adult individuals receiving public assistance and suspending this assistance if the individual tests positive for substance abuse.

DEPARTMENT'S POSITION: The Department of Human Services (DHS) appreciates the intent of this measure and would like to offer the following comments.

The Food Stamp program is an exclusively federally funded program. The U.S. Code charges the Secretary of the U.S. Department of Agriculture with establishing national uniform standards of eligibility. As stated, "No State agency shall impose any other standards of eligibility as a condition for participating in the program." We would not be allowed to implement this requirement on our Food Stamp population.

In addition, compliance with treatment for financial assistance recipients with a substance abuse problem is already a requirement for continued eligibility. Disability is any physical or mental condition as diagnosed by a physician, psychiatrist or psychologist, and certified by our Medical Review Board, which prevents an individual from working full-time. Addiction to substances, illegal or otherwise, typically qualifies as a disability.

For the General Assistance program, an individual must be temporarily disabled to be eligible for financial assistance. For the Assistance to the Aged, Blind, and Permanently and Totally Disabled program, the individual must be at least age sixty-five, legally blind, or permanently disabled to be eligible for financial assistance. For the Temporary Assistance for Needy Families (TANF) program, disability is not a condition of eligibility but if identified, it affects work activity requirements.

Once eligible, disabled individuals are required to accept and comply with treatment as a condition of eligibility. Recipients of General Assistance specifically due to drugs or alcohol must follow a treatment plan. For TANF and GA recipients identified to be substance abusers, drug testing is already a requirement.

Compliance is monitored by treatment providers. Failure to comply with treatment makes the household ineligible for varying periods of time. Under TANF, the first noncompliance makes the family ineligible until compliance, the second is for two months or until compliance, whichever is longer, the third and future noncompliance make the family ineligible for three months or until they comply, whichever is longer. Under General Assistance, the first non-compliance causes a one month disqualification, the second is for three months and the third and future non-compliance causes six months of disqualification.

We currently have approximately 60 families per month and 1,006 adult singles receiving financial assistance that require substance abuse treatment.

Lastly, given the current fiscal difficulties, it would not be prudent to explore this at this time since funding most likely would be required to do a study.

We also respectfully defer to the Department of the Attorney General regarding any legal questions raised on this issue.

Thank you for the opportunity to provide comments.

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COMMITTEE ON HUMAN SERVICES

Rep. John Mizuno, Chair

Rep. Jo Jordan, Vice Chair

Monday, March 28, 2010

9:00 a.m.

Room 329

STRONG OPPOSITION

HCR 246/HR 209 - Random drug testing of adults receiving public assistance

<http://www.capitol.hawaii.gov/emailtestimony>

Aloha Chair Mizuno, Vice Chair Jordan and Members of the Committee!

My name is Kat Brady and I am the Coordinator Community Alliance on Prisons. This testimony is respectfully offered on behalf of the 6,000 Hawai'i individuals living behind bars, always mindful that almost 1,800 individuals are serving their sentences abroad, thousands of miles away from their loved ones, their homes and, for the disproportionate number of incarcerated Native Hawaiians, far from their ancestral lands.

HCR 246/HR 209 urges the Department of Human Services to explore the possibility of allowing government agencies providing government assistance to conduct random drug testing of adult individuals receiving public assistance and suspending this assistance if the individual tests positive for substance abuse.

This is a recurring issue raised in times of economic strife where certain groups are scapegoated as the recipients of our collective anger. In 2004, a similar bill was introduced (HB 2923) and never made it to cross over.

Community Alliance on Prisons is in strong opposition to this resolution for the following reasons:

- ***Constitutionality***

Hawai'i's constitution purposefully has **privacy** clauses that are stronger than the US. Constitution (Article 1, Section 6 - **RIGHT TO PRIVACY**)

Our **equal protection** clause prevents any specific group from being targeted, as this resolution proposes ((Article 1, Section 3 - **EQUALITY OF RIGHTS**); Article 1, Section 5 - **DUE PROCESS AND EQUAL PROTECTION**)

In 2003, a **federal court struck down a Michigan law** that would have allowed for "random, suspicionless" testing, saying it violated the US Constitution's protections against unreasonable search and seizure.

- ***Random Drug Testing of Public Assistance Recipients is Medically and Scientifically Unsound:***

The Center for Addiction and Mental Health (CAMH) recommended against implementing random drug testing of welfare recipients. CAMH believes that there was little benefit to testing and that the stigma associated with testing impacted those on welfare negatively. They recommended that resources be allocated towards better training for government workers to detect signs of substance abuse and mental disorders, as well as to greater assistance and treatment to those who need help.¹

In addition, mandatory drug testing of public assistance recipients is opposed by the American Public Health Association, National Association of Social Workers, Inc., National Association of Alcoholism and Drug Abuse Counselors, American College of Obstetricians and Gynecologists, National Council on Alcoholism and Drug Dependence, Association of Maternal and Child Health Programs, National Health Law Project, National Association on Alcohol, Drugs and Disability, Inc., National Advocates for Pregnant Women, National Black Women's Health Project, Legal Action Center, National Welfare Rights Union, Youth Law Center, Juvenile Law Center, and National Coalition for Child Protection Reform.²

- ***Random Drug Testing of Public Assistance Recipients is Fiscally Irresponsible:***

Random, widespread drug testing is an inefficient use of taxpayer money as multiple states have determined. It is costly to administer, especially when precautions are taken to prevent false results, and is not cost-effective for identifying true cases of substance abuse.³

Drug testing is expensive.

The average cost of a drug test is about \$42 per person tested,⁴ not including the costs of hiring personnel to administer the tests, to ensure confidentiality of results and to run confirmatory tests to guard against false positives resulting from passive drug exposure, cross-identification with legal, prescription drugs such as codeine and legal substances such as poppy seeds.

¹ Ctr. for Addiction and Mental Health, Position Statement on Mandatory Drug Testing and Treatment of Welfare Recipients (2000) (available at http://www.camh.net/Public_policy/Public_policy_papers/man_drug_test_pos00.pdf.pdf).

² Brief of Amici Am. Pub. Health Ass'n et al., *Marchwinski v. Howard*, 309 F.3d 330 (6th Cir. 2002) (No. 00-2115), rev'd en banc, 2003 WL 1870916 (Apr. 7, 2003) (available at /files/FilesPDFs/marchwinskiamicusbrief1_22_01.pdf).

³ RANDOM DRUG TESTING OF TANF RECIPIENTS IS COSTLY, INEFFECTIVE AND HURTS FAMILIES, TANF POLICY BRIEF, February 3, 2011 Update, <http://www.clasp.org/admin/site/publications/files/0520.pdf>

⁴ U.S. Dep't of Educ., Robert L. DuPont, Teresa G. Campbell and Jacqueline J. Mazza, Report of a Preliminary Study: Elements of a Successful School-Based Student Drug Testing Program 8 (2002).

Another way to measure the cost is by counting what it costs to “catch” each drug user. Drug testing is not used by many private employers because of the exorbitant cost of catching each person who tests positive. One electronics manufacturer, for example, estimated that the cost of finding each person who tested positive was \$20,000, since after testing 10,000 employees, only 49 tested positive. A congressional committee also estimated that the cost of each positive drug test of government employees was \$77,000, because the positive rate was only 0.5%.⁵

We find this proposal particularly troubling in these challenging economic times. This proposal is unwise at any time, but especially when unemployment is high and poised to go even higher because of the tsunami in Japan. Those recipients of unemployment would also fall under ‘recipients of public assistance.’ Hawai‘i’s tourism-based economy that was just starting to recover from the economic doldrums, has been suffering the impacts of Japan’s tsunami as well. This has an effect on our workforce and on those applying for public assistance (welfare, unemployment benefits, food stamps, etc.).

An article from The Guardian provides an objective look at this issue:

“...It doesn't seem like the kind of thing to bring up during a recession,” said Ron Haskins, a senior fellow at the Brookings Institution. “People who are unemployed, who have lost their job, that's a sympathetic group. Americans are tuned into that, because they're worried they'll be next.”

Indeed, these proposals are coming at a time when more Americans find themselves in need of public assistance.

Although the number of traditional welfare recipients has stayed relatively stable at 3.8 million in the last year, claims for specific benefit programmes like unemployment payments and food assistance have soared.

In December, more than 31.7 million Americans were receiving food assistance funds that can be spent only at grocery stores compared with 27.5 million the year before...⁶

In 1996, the National Institute of Alcohol Abuse and Alcoholism found that “proportions of welfare recipients using, abusing, or dependent on alcohol or illicit drugs are consistent with proportions of both the adult U.S. population and adults who do not receive welfare.”⁷

An article from March 24, 2011 by Grant Smith stated:

“...the only thing a drug test does is indicate that a person has used an illicit drug. Tests do not indicate if a person is impaired, how much a person has used, or whether they are using less than

⁵ R. Brinkley Smithers Inst., Cornell Univ., *Workplace Substance Abuse Testing, Drug Testing: Cost and Effect* (Jan. 1992).

⁶ US states consider drug tests for assistance recipients - The effort comes as more Americans turn to unemployment benefits and welfare to ride out recession, Associated Press, [guardian.co.uk](http://www.guardian.co.uk), Thursday 26 March 2009 17:00 GMT <http://www.guardian.co.uk/business/2009/mar/26/usa-welfare-unemployment-drug-test>.

⁷ NIAAA Researchers Estimate Alcohol and Drug Use, Abuse, and Dependence Among Welfare Recipients, National Institutes of Health Press Release, 1996, <http://www.nih.gov/news/pr/oct96/niaaa-23.htm>.

they have in the past. Marijuana can show up in a drug test days or weeks after the person used the drug. An individual could have decided a week prior to quit using marijuana, or used marijuana for the first time in their life, and still be denied help. Drug tests easily identify marijuana use but often miss cocaine, methamphetamine, and opiate-based drugs that ordinarily clear out of the body within a few days. Moreover, alcohol typically doesn't show up at all.

A congressional committee once estimated that the cost of each positive drug test of government employees to be in the neighborhood of \$77,000 because the positive test rate among all government employees is only about half of one percent. In 2002, a federal court struck down as unconstitutional a Michigan law on the basis that it violated the Fourth Amendment's protection against unreasonable searches. Earlier this year, South Dakota legislators reasoned that it isn't fair to make welfare recipients get drug tested when everyone else who benefits from tax cuts isn't required to get the same test...⁸

Conclusion:

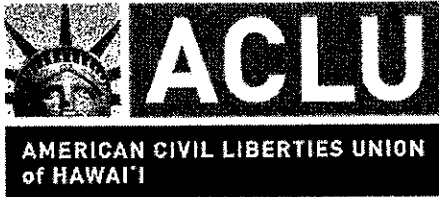
The TANF Policy brief referenced above sums up the situation well.

“Given the high cost of treatment programs and the waiting lists for services in many areas, mandatory drug testing of all applicants or recipients of TANF benefits is a poor use of resources. In a time of tight state budgets, it is perverse to spend limited funds in pursuit of the small number of substance abusers who are not identified through screening processes, rather than on providing actual services. Despite the persistence of proposals to impose drug testing at the state and federal levels, these proposals have consistently been rejected because the data do not support the money-saving claims. In the late 1990s, New York, Maryland, Iowa, and Louisiana considered drug testing, but decided it was more cost-effective to use questionnaires and observational methods to detect substance abuse problems. Last year, Idaho's Department of Health and Welfare was commissioned to study the financial sustainability of requiring tests and is in the process of reporting that it would not save any money.

Moreover, if identified drug users are sanctioned and not provided with treatment services and basic cash assistance, these parents are less able to adequately care for their children. Thus, **what might appear to be savings in TANF will actually result in increased costs in child welfare and decreased overall child wellbeing.**

Community Alliance on Prisons appreciates the opportunity to share this research with the committee in the interest of promoting data-driven, thoughtful, and sound public policymaking.

⁸ **Children, Budgets Suffer from Drug Testing the Poor - Legislation is pending in over a dozen state legislatures and the U.S. Congress that would deny help with food and housing or unemployment to recipients who fail a drug test, AlterNet, By Grant Smith, March 24, 2011, http://www.alternet.org/story/150366/children%2C_budgets_suffer_from_drug_testing_the_poor?page=entire**



Committee: Committee on Human Services
Hearing Date/Time: Monday, March 28, 2011, 9:00 a.m.
Place: Room 329
Re: Testimony of the ACLU of Hawaii in Strong Opposition to H.C.R. 246/H.R. 209

Dear Chair Mizuno and Members of the Committee on Human Services:

The American Civil Liberties Union of Hawaii ("ACLU of Hawaii") writes in strong opposition to H.C.R. 246/H.R. 209.

Suspicionless, mandatory drug testing is a discriminatory and unnecessary invasion of privacy, as well as scientifically, medically, and unconstitutionally unsound. Spending any amount of money on studying or implementing these programs is neither an appropriate nor an effective use of state funds. Public assistance recipients' constitutional rights are no less sacred than the rights of any other state assistance recipients, including those of corporations that receive subsidies from the state. This bill would deny benefits to the neediest children and send the message to public assistance beneficiaries that they are criminals solely because of their socioeconomic level. As a defender of civil liberties, the ACLU of Hawaii believes that all people, rich and poor, are entitled to the same privacy rights. No one should have to choose between their constitutional rights and providing for their health and that of their families.

Random drug testing of welfare recipients is scientifically and medically unsound:

- Welfare recipients are no more likely to use drugs than the rest of the population.
 - According to a 1996 study by the National Institute of Alcohol Abuse and Alcoholism, differences between the proportion of welfare and non-welfare recipients using illegal drugs are statistically insignificant.¹
 - Before the Michigan policy was halted, only 10% of recipients tested positive for illicit drugs. Only 3% tested positive for hard drugs, such as cocaine and

¹ National Institutes of Health Press Release, *NIAAA Researchers Estimate Alcohol and Drug Use, Abuse, and Dependence Among Welfare Recipients*, (1996). Available: <http://www.nih.gov/news/pr/oct96/niaaa-23.htm>

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amphetamines² – rates that are in line with the drug use rates of the general population.³

- Seventy percent of all illicit drug users (and presumably a much higher percentage of alcohol users), ages 18-49, are employed full-time.⁴
- Science and medical experts overwhelmingly oppose the drug testing of welfare recipients.
 - The Center for Addiction and Mental Health (CAMH) recommended against implementing random drug testing of welfare recipients. CAMH believes that there was little benefit to testing and that the stigma associated with testing impacted those on welfare negatively. They recommended that resources be allocated towards better training for government workers to detect signs of substance abuse and mental disorders, as well as to greater assistance and treatment to those who need help.⁵
 - In addition, mandatory drug testing of welfare recipients is opposed by the American Public Health Association, National Association of Social Workers, Inc., National Association of Alcoholism and Drug Abuse Counselors, American College of Obstetricians and Gynecologists, National Council on Alcoholism and Drug Dependence, Association of Maternal and Child Health Programs, National Health Law Project, National Association on Alcohol, Drugs and Disability, Inc., National Advocates for Pregnant Women, National Black Women's Health Project, Legal Action Center, National Welfare Rights Union, Youth Law Center, Juvenile Law Center, and National Coalition for Child Protection Reform.⁶

Random drug testing of welfare recipients is fiscally irresponsible:

- Drug testing is expensive.

² Brief of Plaintiffs-Appellees, *Marchwinski v. Howard*, 309 F.3d 330 (6th Cir. 2002), rev'd en banc, 319 F.3d 258 (6th Cir. 2003).

³ Substance Abuse and Mental Health Servs. Admin., *2006 National Survey on Drug Use and Health* (available at <http://www.drugabusestatistics.samhsa.gov/nsduh/2k6nsduh/2k6Results.cfm#Fig2-1>).

⁴ Substance Abuse and Mental Health Servs. Admin., *Worker Drug Use and Workplace Policies and Programs: Results from the 1994 and 1997 National Household Survey on Drug Abuse I* (1999).

⁵ Ctr. for Addiction and Mental Health, *Position Statement on Mandatory Drug Testing and Treatment of Welfare Recipients* (2000) (available at http://www.camh.net/Public_policy/Public_policy_papers/man_drug_test_pos00.pdf.pdf).

⁶ Brief of Amici Am. Pub. Health Ass'n et al., *Marchwinski v. Howard*, 309 F.3d 330 (6th Cir. 2002), rev'd en banc, 319 F.3d 258 (Apr. 7, 2003).

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- The average cost of a drug test is about \$42 per person tested,⁷ not including the costs of hiring personnel to administer the tests, to ensure confidentiality of results and to run confirmatory tests to guard against false positives resulting from passive drug exposure, cross-identification with legal, prescription drugs such as codeine and legal substances such as poppy seeds.
- Another way to measure the cost is by counting what it costs to “catch” each drug user. Drug testing is not used by many private employers because of the exorbitant cost of catching each person who tests positive. One electronics manufacturer, for example, estimated that the cost of finding each person who tested positive was \$20,000, since after testing 10,000 employees, only 49 tested positive. A congressional committee also estimated that the cost of each positive drug test of government employees was \$77,000, because the positive rate was only 0.5%.⁸
- Mandatory drug testing is an ineffective means to uncover drug abuse.
 - An Oklahoma study found that a questionnaire was able to accurately detect 94 out of 100 drug abusers. The questionnaire was also useful in detecting alcohol abusers, something drug tests fail to accomplish.⁹
 - Certain counties in Oregon experimented with drug testing on some welfare recipients, but the process was halted when it was found that drug testing was less effective in identifying drug abuse than less invasive, cheaper methods.¹⁰
 - Most types of drug tests fail to detect alcohol abuse – the most commonly abused substance among Americans – and are most likely to detect marijuana use since the active ingredient in marijuana stays in the body’s system longer than any other illicit substance. Therefore, drug tests often fail to identify people who are using more powerful, more addictive and more dangerous drugs like methamphetamine or cocaine, which exit the body’s system in a matter of hours or days.¹¹

⁷ U.S. Dep’t of Educ., Robert L. DuPont, Teresa G. Campbell and Jacqueline J. Mazza, *Report of a Preliminary Study: Elements of a Successful School-Based Student Drug Testing Program 8* (2002).

⁸ R. Brinkley Smithers Inst., Cornell Univ., *Workplace Substance Abuse Testing, Drug Testing: Cost and Effect* (Jan. 1992).

⁹ Oklahoma Dept. of Human Svcs., “*TANF: Focus on Substance Abuse*” (March 5, 1998)

¹⁰ Ctr. for Addiction and Mental Health, *Forcing Welfare Recipients into Drug Testing and Treatment*, (2001).

¹¹ “*Drugs of Abuse Reference Guide*,” LabCorp Inc, Internet. Available:

http://www.labcorp.com/images/Drugs_of_Abuse_Reference_Guide_Flyer_3166.pdf

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- Many states have rejected the random drug testing of welfare recipients as impractical and fiscally unjustifiable.
 - For example, New York and Maryland each considered a program to randomly drug test those receiving welfare, but abandoned the plan as not cost-effective, given that urinalysis is almost exclusively a barometer of marijuana use and that welfare recipients are required to undergo regular supervision, allowing for effective monitoring absent the cost and intrusion of mandatory drug testing.¹²
 - Louisiana passed a law in 1997 requiring drug testing for welfare recipients. However, a task force set up to implement the law found more limited drug testing of individuals identified by a questionnaire to be more cost-effective than mandatory drug testing.¹³
 - Alabama decided against drug testing because it found that focusing on job training programs was a more effective method of moving individuals off of welfare.¹⁴

Random drug testing of welfare recipients is likely unconstitutional under both the U.S. Constitution and the Hawaii Constitution:

- Michigan is the only state to attempt to impose drug testing of welfare recipients – a policy that was struck down as unconstitutional in 2003. The ACLU challenged the mandatory drug testing program as unconstitutional, arguing that drug testing of welfare recipients violates the Fourth Amendment’s protection against unreasonable searches. The case, *Marchwinski v. Howard*, concluded when the U.S. Court of Appeals for the Sixth Circuit upheld a lower court’s decision striking down the policy as unconstitutional.¹⁵
- At the time Michigan’s drug testing scheme was struck down, the 49 other states had rejected such a program for a variety of fiscal and practical reasons: at least 21 states concluded that such a program “may be unlawful”; 17 states cited cost concerns; 11 states had not considered drug testing at all; and 11 gave a variety of practical/operational reasons.¹⁶

¹² Nancy Young and Sidney Gardner, *Implementing Welfare Reform: Solutions to the Substance Abuse Problem* (1997).

¹³ New York Times, *Opposition to Plan to Test Welfare Applicants For Drugs* (1999).

¹⁴ The Lindsmith Ctr., *Drug Testing Welfare Applicants: A Nationwide Survey of Policies, Practices, and Rationales* (Nov. 1999).

¹⁵ *Marchwinski v. Howard*, 113 F. Supp. 2d 1134 (E.D. Mich. 2000), aff’d, 60 F. App’x 601 (6th Cir. 2003).

¹⁶ The Lindsmith Ctr., *Drug Testing Welfare Applicants: A Nationwide Survey of Policies, Practices, and Rationales* (Nov. 1999).

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- In halting the implementation of Michigan's drug testing law, U.S. District Court Judge Victoria Roberts ruled that the state's rationale for testing welfare recipients "could be used for testing the parents of all children who received Medicaid, State Emergency Relief, educational grants or loans, public education or any other benefit from that State."¹⁷ Indeed, any of the justifications put forth to subject welfare recipients to random drug testing would also by logical extension apply to the entirety of our population that receives some public benefit and/or that is a parent. It is clear that our constitution – and common sense – would object to the random drug testing of this large group of people, making the drug testing of an equally absurd category of people – welfare recipients – unconstitutional as well.
- Some states' constitutions, including Hawaii's, actually offer greater privacy protection to individuals than does the U.S. Constitution. It is very possible that random drug testing schemes for welfare recipients will run afoul of these state-specific protections as well.

The ACLU of Hawaii's mission is to protect the fundamental freedoms enshrined in the U.S. and Hawaii Constitutions. The ACLU of Hawaii fulfills this through legislative, litigation, and public education programs statewide. The ACLU of Hawaii is a non-partisan and private non-profit organization that provides its services at no cost to the public and does not accept government funds. The ACLU of Hawaii has been serving Hawaii for over 40 years.

Thank you for this opportunity to testify.

Sincerely,

Laurie A. Temple
Staff Attorney
ACLU of Hawaii

¹⁷ *Marchwinski v. Howard*, 113 F. Supp. 2d 1134, 1142 (E.D. Mich. 2000), aff'd, 60 F. App'x 601 (6th Cir. Apr. 7, 2003).

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