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LD 1615 – Ought Not To Pass

An Act To Allow Drug Testing Prior to Providing Welfare Benefits

JOINT STANDING COMMITTEE ON HEALTH AND HUMAN SERVICES

May 19, 2017

Senator Brakey, Representative Hymanson, and members of the Committee on Health and Human Services, greetings. My name is Meagan Sway, and I am a Justice Fellow for the American Civil Liberties Union of Maine, a statewide organization committed to advancing and preserving civil liberties guaranteed by the Maine and U.S. Constitutions. On behalf of our more than 8,500 members, we oppose LD 1615.

The ACLU of Maine has consistently opposed repeated efforts to single out and invade the privacy of poor Mainers simply because they are poor. In fact, we have already opposed two bills on this very topic—drug testing TANF applicants and recipients—already this session. The proposal of LD 1615, that duplicates two other failed bills, at the height of the legislative session, is a waste of time, resources and money.

LD 1615 Does Not Pass Constitutional Muster and Proposes an Inappropriate Use of the SASSI Assessment

LD 1615 would require DHHS to deny a person's TANF application if (1) the applicant's score on a SASSI test or (2) "other factors" that the bill does not specify "create a reasonable suspicion by the department that the applicant is using an illegal drug or abusing a controlled substance." The arbitrariness of an application process for government benefits that is determined by a DHHS worker's suspicions is inconsistent the Due Process Clause. Furthermore, it opens the state up to equal protection and ADA lawsuits, as race and disability are often incorrectly correlated with the belief that a person is on drugs or is more likely to do drugs.[1]

LD 1615 also requires that "[i]f the department has a reasonable suspicion" that a current recipient of TANF benefits is using illegal drugs or abusing controlled substances, the Department must terminate a person's benefits. The bill does not give any guidance as to what "reasonable suspicion" would constitute.

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[1] *See, e.g.*, Kären M. Hess, Christine H. Orthmann, Henry Lim Cho, *Police Operations: Theory and Practice*, 6th Ed. Jan 1, 2013 at p. 48 (noting that many speech impediments are mistaken for drug use); Scott Thistle, LePage: Over 90 percent of drug dealers busted in Maine are black or Hispanic, Portland Press Herald, Aug. 24, 2016 http://www.pressherald.com/2016/08/24/gov-lepage-says-most-drug-traffickers-arrested-in-maine-are-black-or-hispanic/; Christopher Ingraham, White people are more likely to deal drugs, but black people are more likely to get arrested for it, Washington Post, Sept. 30, 2014, https://www.washingtonpost.com/news/wonk/wp/2014/09/30/white-people-are-more-likely-to-deal-drugs-but-black-people-are-more-likely-to-get-arrested-for-it/?utm_term=.c8fa0fc816a0.

The lack of specificity as to what factors would constitute a "reasonable suspicion" of drug use, this bill will lead to loss of benefits or drug testing for almost any reason at all. That approach is not supported by the Constitution.

The Supreme Court of the United States has long held that a drug test is a search protected by the Fourth Amendment to the United States Constitution. With limited exception, the Fourth Amendment requires at least *individualized suspicion,* if not probable cause, to justify a drug test. The provisions in this bill do not appear to meet the constitutional requirements. We are skeptical that a DHHS employee's consideration of unspecified "other factors" or a certain score on a SASSI test, could constitute even reasonable suspicion, let alone probable cause, required by the Fourth Amendment.[2]

The Fourth Amendment protects people in the United States from "unreasonable" searches and seizures.[3] The United States Supreme Court has held that in most circumstances, "a search or seizure ... is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause."[4] Part of the reason warrants ensure that a search is reasonable is that "[a] warrant . . . provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination of whether an intrusion is justified in any given case."[5] This bill would make the person determining whether such intrusion is warranted is a DHHS employee. DHHS is not a neutral entity.[6] Even if DHHS were a neutral entity, DHHS employees are not law enforcement agents. They are not trained or qualified to determine what constitutes a valid "reasonable suspicion" that a person is using illegal drugs.

In order to implement a policy of drug testing without first obtaining warrants, the state must (1) articulate "special needs, beyond the normal need for law enforcement"[7] for the tests and (2) show that the special needs are "substantial," meaning, "important enough to override the individual's acknowledged privacy interest [and] vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."[8]

The proposed bill fails to pass this stringent test. The Eleventh Circuit has called a state's interest in denying welfare benefits to those using illegal drugs an "ordinary government interest" that is "nothing

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[2] Currently, DHHS uses the Substance Abuse Subtle Screening Inventory (SASSI) assessment. The Committee should be aware that the SASSI Institute, the organization behind the screening instrument, specifically objects to this use of the SASSI assessment. In its position paper against these kinds of bills, the Institute cites ethical and legal concerns in addition to the constitutional deficiencies: "The purpose of the SASSI is to help people who have substance use disorders. ***To use the SASSI to discriminate against individuals, such as disqualifying job applicants or to deny public assistance, violates the purpose of the SASSI and is a violation of the Americans with Disabilities Act.*** " SASSI Institute, "Screening Issues," January 12, 2015. Emphasis in original.

[3] *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 619 (1989).

[4] *Id.*

[5] *Id.* at 620.

[6] Numerous times over the past six years, the administration has attempted to paint TANF applicants and recipients as drug abusers. *See, e.g.*, LD 390 Part EEEE, 128th Leg., First Reg. Sess. (Me. 2017) (Governor's Budget proposing to ban any TANF applicant or recipient with a drug felony in past 20.5 years from receiving TANF benefits); LD 1407, 127th Leg., First Reg. Sess. (Me. 2015) (Governor's bill, *An Act To Require Screening and Testing for Illegal Substances of Beneficiaries under the Temporary Assistance for Needy Families Program*); Chapter 1 – Eligibility Process, Non-Payment Situations, Rule 104P (proposed by DHHS in 2014); An Act To Allow Random Drug Testing for Recipients of Certain Public Benefits: Testimony regarding LD 678 to HHS Committee, 126th Leg., First Reg. Sess. (May 3, 2013) (letter from Dale Denno, Director, Office for Family Independence) ("The Department recognizes and supports the principles embedded in LD 678").

[7] *Id.*

[8] *Chandler v. Miller*, 520 U.S. 305, 318 (1997).

like the narrow category of special needs that justify" testing without a warrant.[9] There has been no showing by the Administration that drug abuse is a rampant problem amongst Mainers who receive TANF benefits. Even if the governor could present evidence of a problem, it is unclear why he would need to skirt normal law enforcement procedures to address the problem.

The ACLU successfully sued the states of Florida[10] and Michigan[11] over the constitutionality of laws that made public benefits contingent on passing a drug test. Both the Eleventh and Sixth Circuit courts – two of the most conservative circuits in the country – agreed with us that such drug testing programs violate the Fourth Amendment.[12]

LD 1615 Implicates Privacy Concerns

There are many reasons why an individual who has done nothing wrong may nevertheless refuse to take a drug test. First, it can be a humiliating experience. Second, scheduled medications are closely and widely associated with certain treatments or diseases that a person may not want to disclose. A drug test may reveal that a person is taking drugs that reveal very private information. Applicants will necessarily have to reveal every medication and why they take them in order to overcome suspicion and the denial of basic survival benefits.

LD 1615 is Fiscally Irresponsible

This bill is fiscally irresponsible. At the outset, just the process of sending the bill through the legislative process will cost $14,840 of taxpayer money[13] on a concept that has already been introduced twice this session, and has already died in the Senate. Put another way, the amount of money it cost to introduce this bill could pay the TANF benefits of more than two and a half families for an entire year.[14]

TANF is temporary help for children and their parents while the parents work toward becoming self-supporting. Without programs like TANF, families are likely to fall further into poverty, straining other state-based programs that are already strapped for funding. Maine's over-burdened food pantries and homeless shelters will have to fill the gap, which they are unlikely to be able to do. The state will have

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[9] *Lebron v. Secretary, Florida Dept. of Children and Families,* 772 F.3d 1352, 1355 (11th Cir. 2014).
[10] *Lebron v. Secretary, Florida Dept. of Children and Families,* 710 F.3d 1202 (11th Cir. 2013).
[11] *Marchwinski v. Howard,* 113 F. Supp. 2d 1134 (E.D. Mich. 2000), aff'd, 60 F. Appx. 601 (6th Cir. 2003).
[12] In February 2013, the Eleventh Circuit Court of Appeals struck down a Florida law requiring TANF applicants to submit to suspicionless drug tests. The enforcement of the law had previously been halted by a district judge within months of its going into effect as the result of a lawsuit brought by the American Civil Liberties Union of Florida. The appeals court concluded that "[t]he simple act of seeking public assistance does not deprive a TANF applicant of the same constitutional protection from unreasonable searches that all other citizens enjoy." In the unanimous decision, authored by Judge Rosemary Barkett, the court held that not only had the lower court not overstepped its bounds in issuing the injunction, but that the state had failed to prove that there was any reason to treat poor families in Florida as any more likely to be drug users. "[T]here is nothing inherent to the condition of being impoverished that supports the conclusion that there is a 'concrete danger' that impoverished individuals are prone to drug use," Barkett wrote for the court. In a concurring opinion, Judge Adalberto Jordan stated that, "[c]onstitutionally speaking, the state's position is simply a bridge too far." The ACLU challenged a similar Michigan drug testing program as unconstitutional, arguing that suspicionless drug testing of welfare recipients violates the Fourth Amendment's protection against unreasonable searches. The case, *Marchwinski v. Howard,* concluded in 2003 when the Sixth Circuit upheld the lower court's decision striking down the policy as unconstitutional.
[13] *See* 3 M.R.S. § 2 (legislators receive $70 in mileage and food reimbursement per day). For just the hearings in the committee, this bill will cost approximately $1,820 (13 committee members x 2 days (public hearing and work session)x $70). For the legislature to vote on it will cost approximately $13,020 ((151 representatives + 35 senators) x $70).
[14] Assuming a single-mother led household of three.

to spend more money on other social programs to meet the need. There will be a ripple effect that hurts Maine's largest cities, landlords, and hospitals. To suppose that making Maine's poorest families poorer will benefit the state's coffers defies common sense.

And, other states have already found that drug testing TANF recipients is essentially a waste of money. For example:

- From August 2013 through July 2014, Utah screened 4,786 TANF applicants or recipients and tested 454 individuals identified through screening. Of these, only 17 individuals tested positive, in other words *0.35% of those screened.* Utah spent over $32,000 for testing and screening of this period.
- From March 2013 through October 2014, Missouri screened nearly 70,000 applicants and identified 1,646 for testing. Of those, only 69 individuals tested positive, in other words *less than 0.1% of those screened.*[15]
- From July 2011 through October 2011, Florida drug tested 4,082 TANF recipients and only 108 – or 2.6% – failed the test. Florida spent $118,140 on drug testing TANF recipients before a court issued an injunction.[16]

LD 1615 Will Not Address Maine's Problems

LD 1615, though written in a way to suggest it is an attempt to address the opioid crisis in Maine, will likely not accomplish that. First, as noted in the section above, very few TANF recipients are found to use illegal substances, so this will not affect the crisis in any significant way. Second, although we commend the governor for writing in resources to the bill rather than expecting low-income people who need TANF just to survive to also pay for drug treatment, drug treatment facilities and resources in much of the state are not available in any quantity that would make the offer of treatment a real one for rural applicants. Third, because this bill further stigmatizes poverty and drug use by singling out people so poor they need TANF for drug tests, it is not going to encourage recovery.

There are many ways to successfully provide substance use treatment options to low-income Mainers. This bill is not one of them. We urge you to vote "ought not to pass" on this duplicative, constitutionally-challenged, expensive, and misguided bill.

[15] Center on Budget and Policy Priorities, "Drug Testing in TANF," January 2015.
[16] Lizette Alvarez, No Savings Are Found From Welfare Drug Tests, New York Times, Apr. 17, 2012, http://www.nytimes.com/2012/04/18/us/no-savings-found-in-florida-welfare-drug-tests.html