

ISSUE BRIEF

Drug Testing of TANF Recipients

I. Welfare No Longer Exists, Facts About TANF

Welfare has not existed in the United States for 13 years. The Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) was passed in 1996 and replaced Aid to Families with Dependent Children Program (AFDC - known as “welfare”) with the Temporary Assistance for Needy Families (TANF) block grant. Utah has named this program the Family Employment Program (FEP) to emphasize its focus on work supports, training, and employment.

TANF has a five-year lifetime limit on cash assistance, though states can set shorter time limits, which we have in Utah, limiting assistance to 36-months barring unique circumstances.¹ Recipients of TANF must work at least 30 hours per week (20 hours if they have a child under age six) to continue to receive benefits.² The definition of acceptable work activities is limited to: subsidized or unsubsidized employment; on-the-job training; work experience; community service; vocational training (up to 12 months); or provision of child care services to individuals who are participating in community service.³ Job search does qualify, but only for six weeks, and no more than four of those can be consecutive.

The 2005 Deficit Reduction Act (DRA) reauthorized the PRWORA and made changes to several programs, including TANF.⁴ The DRA further defined what work activities satisfy the participation rates, increased the requirements the state must meet regarding individual TANF recipients meeting participation requirements and established uniform reporting measures and guidelines for what supporting documentation is required to verify work activities.⁵

TANF is not a hand out, it is a temporary assistance program that helps families get the support and training they need to achieve self-sufficiency. In fact, a recent study by the Social Research Institute at the University of Utah found that, of the 813 customers who were new to cash assistance in 2006, half of the group used 9 months of cash assistance or less and then left TANF.⁶

¹ Personal Responsibility and Work Opportunity Reconciliation Act of 1996: Summary of Provisions. National Association of Social Workers, August 1996; UT Stat. 35A-3-306.

² The Next Phase of Welfare Reform: Implementing the Deficit Reduction Act of 2005. Press Release, US Department of Health and Human Services, December 7, 2006.

³ Personal Responsibility and Work Opportunity Reconciliation Act of 1996: Summary of Provisions. National Association of Social Workers, August 1996.

⁴ The Next Phase of Welfare Reform: Implementing the Deficit Reduction Act of 2005. Press Release, US Department of Health and Human Services, December 7, 2006.

⁵ Id.

⁶ Mary Beth Vogel-Ferguson, Family Employment Program (FEP) Study of Utah: A Snapshot in Time - 2008: Wave 3, Social Research Institute, College of Social Work, University of Utah, January 2009.

Most of these months were used immediately following their first month of cash assistance. In the period following the first year after starting cash assistance, only 27% of cash assistance customers received any additional months of assistance. Most had returned to employment as their primary means of support for themselves and their families. 28% of new cash assistance applicants were working at the time they applied for cash assistance - they were just unable to make ends meet due to low wages or too few hours and 26% of new applicants were attending school at the time they first applied for cash assistance.

Here is a look at the demographics of individuals on TANF:⁷

	Household Size				
Total Number of TANF Recipients, April 2009	1	2	3	4	5+
6,377	5%	43%	28%	14%	10%
# in each category	318.85	2,742.11	1,785.56	892.78	637.7
Amount of Monthly Benefit	\$288	\$399	\$498	\$583	\$740*

It should also be noted that 94% of participants are women and 79% are white. 49% of TANF recipients have had the other parent desert the family.

II. Cost of Drug Testing:

The cost of administering drug tests to all TANF recipients would be significant. The State of Utah currently has a contract with a company that provides drug testing for \$40. The test covers the following drugs: Marijuana, Cocaine, Amphetamines, Opiates, Phencyclidine, Barbiturates, Benzodiazepines, Propoxyphene, Methadone, Methaqualone. The contract also includes the required confirmation test due to the high percentage of false positives. Drug tests are only considered accurate and valid if the initial drug test and the confirmation test results agree.⁸ There are many drugs, conditions and food items that are known to produce false positives.⁹

⁷ Household Size of 1 is pregnant women, Benefits for household size of 5+ are an average of benefits for families with 5-8 in the household.

⁸ 49 CFR Part 40; Best Practices for DOT Random Drug and Alcohol Testing, U.S. Department of Transportation, Office of the Secretary, Office of Drug and Alcohol Policy and Compliance; Workplace Drug Testing, United States Department of Labor, Office of the Assistant Secretary for Policy, accessed June 17, 2009.

<http://www.dol.gov/asp/programs/drugs/workingpartners/dfworkplace/dt.asp>

⁹ Accutrim, Afrin, Aleve, Allerest, Amfepramone, Amifepamone, Amineptine, Amoxicillin, Ampicillin, Ampicin, Anti-anxiety pills, Antibiotics - False positives on Heroin Tests, Asthma medications (Marax, Bronkaid tablets, Primatine Tablets), Atomoxetine, Benzphetamine, Blue Lettuce, Bronkaid tablets, California Poppy, Cathne, Chloropromazine, Clobenzorex, Contac, Contact, Cough medicines, Cough suppressants with Dextromethorphan (DXM), Cylert, Demerol, Deprenyl, Desoxyephedrine, Dexatrim, Dexdenfluramine, Dexedrine, Dexfenfluramine, Dextroamphetamine, Dextromethorphan, Diabetes, Diazepam (generic name for valium), Diazepam False positives for PCP, Didrex, Dilantin, Dimetapp, Dristan Nasal

While many factors must be determined, such as who will be tested and how often, an estimate of the costs can still be calculated. These calculations are based on the current DWS TANF caseload of 6,377 in April 2009. The cost to test every recipient once under the state contract would be \$255,080. These costs may change as it is unclear if the state contract is set to a limited number of tests per month or year, and if the state wishes to test for other drugs. The Department of Labor, whose guidelines are often followed for all employee drug testing, recommends that tests be done quarterly, so it is unlikely that a recipient would only be tested once.¹⁰ Of course, as will be discussed below, it is unconstitutional to test every TANF recipient, or even to use random drug testing.

Many individuals on TANF have serious barriers, so the state will also have to provide funds for transportation to the site for drug testing and cover the cost of childcare while the individual is taking their test. Since you have to be a parent to be on TANF, probably a vast majority of TANF recipients will need childcare assistance. In addition, considering that TANF recipients have to participate in work activities a minimum of 30 hours a week, they may have a hard time getting out of work, school, or training to take the test. Individuals who live in rural Utah may not be eligible to receive assistance due to their distance from a qualified drug testing center.

Since suspicionless drug testing of TANF recipients is unconstitutional, if the State of Utah were to enact such a law, they must also consider the cost of defending a certain lawsuit, which could be more than a \$1,000,000.

Drug usage among TANF recipients is no different than that in the general population. According to a recent study done by the University of Utah's Social Research Institute, 4.6 percent of those who receive assistance indicated drug addiction.¹¹ This is similar to statistics about Utah's general population. According to the Division of Substance Abuse and Mental Health's annual report in 2008, 4.9 percent of Utah's were classified by the study as "needing treatment for drug and/or alcohol abuse."

Drug tests cannot be subtracted from a recipient's income or cash assistance, so the cost of the drug tests will fall upon DWS. While they can use TANF funds for the drug testing, it is not

Spray, Dronabinol (Marinol), Elavil - False positives for opiates for up to three days, Eldepryl, Emprin, Ephedra (Ma Huang), Ephedrine, Ephedrine based compounds, Etafediabe, Excedrin IB, Famprofazone, Fenelylline, Fenfluramine, Fenproporex, Fioricet and derivatives, Fiorinal, Fluspirilene, Hempseed Oil, Hydroymethamphetamine, Ibuprofen, Ketoprofen, Kidney disease, Kidney infection, Lettuce - Both Prickly and Blue, Liver disease, Liver infection, Lodine, Lortab - an opioid analgesic, Ma Huang, Marax, Matilija Poppy, Mefenorex, Menstrual cramp medications like Midol and Trendar, Mephentermine, Mesocarb, Methoxyphenamine, Methphenidate, Midol, Mini-thins, Morazone, Mormon Tea, Most prescription pain medications, Motrin, Naproxen, Nasal decongestants - False positives for Amphetamines, Neosynephren, Nuprin, Nyquil, Nyquil Nighttime Cold Medicine - False positives for Methadone up to 2 days, Orudis KT, OTC diet aids with phenylpropanolamine (Dexatrim, Accutrim), Over-the-counter nasal sprays (Vicks inhaler, Afrin), Pamprin, Pemoline, Percocet, Percodan, Percovil, Phendimetrazine, Phenegan-D, Phenergan, Phenmetrazine, Phenobarbital, Phentermine, Phenylephrine, Phenylpropanolamine, Pholedrine, Pnenylpropanolamine, Poppy seeds, Prescription sleeping pills, Prickly Lettuce, Prickly Poppy, Primatene-M containing perylamine, Primatine Tablets, Promethazine, Promethegan, Propanolamine, Propylephedrine, Pseudo ephedrine, Pseudoephedrine, Quetiapine, Quinine water - False positives for opiates, Red Poppy, Redux, Riboflavin, Ritalin, Robitussin Cold and Flu, Selegiline, Sudafed, Tavist-D, Telectin, Tonic water, Trendar, Tylenol with pain relief will commonly show up as muscle relaxers, Tylenol Sinus, Tylenol with codeine, Valium, Vicks Formula 44M containing Dextromethorphan, Vitamin B2, Wygesic.

¹⁰ Best Practices for DOT Random Drug and Alcohol Testing, U.S. Department of Transportation, Office of the Secretary, Office of Drug and Alcohol Policy and Compliance.

¹¹ Mary Beth Vogel-Ferguson, Family Employment Program (FEP) Study of Utah: A Snapshot in Time - 2008: Wave 3, Social Research Institute, College of Social Work, University of Utah, January 2009.

the cash assistance program that will be impacted, rather the contracts the state has to pay for childcare, mental health treatment, and job training. The end result is that the cost of drug testing will be taken from services for working families not on TANF. For every dollar spent on drug testing a TANF recipient, that is a dollar that can't be spent for a working family that needs child care assistance.

So if we calculate:

\$255,080 - cost of the test given just once to each recipient

\$1,000,000 - cost of lawsuit

\$124,351 - cost of childcare¹²

\$31,885 - cost of transportation¹³

We get a total cost of drug testing: \$1,411,316.50. This is only a very general estimation, and is only for the first year of the program. It does not even consider administrative costs to set up the program, the costs to notify TANF recipients that they need to get drug tested, or the cost of the constitutionally required oral hearing¹⁴ and Utah statutorily required three-step conciliation process¹⁵ that must occur as a result of action taken to disqualify a participant based on a positive drug test. It is important to note that the cost of maintaining a drug testing program after the initial costs are unknown, as no state has ever attempted to do so.

If we assume, generously, that the estimated 5% of all TANF recipients have substance abuse issues, and that they all test positive, the maximum savings in cash assistance that would be generated if these families cases were terminated is \$153,376.42. In addition to this very, very small amount of savings, these are all federal dollars, and could not be used by the state for anything that was not TANF related. It could not fill any budget gaps, nor would it even reduce the State's Maintenance of Effort dollars. Of course, there is also the very real possibility that families who do not have substance abuse issues may be disqualified from the program, so innocent families will be left without cash assistance.

III. Suspicionless Drug Testing of TANF Recipients is Unconstitutional.

Michigan was the first and only state to require random drug testing of all TANF recipients. The 6th Circuit Court in *Marchwinski v. Bowler*, held that Michigan's drug testing was unconstitutional. The U.S. Court of Appeals for the Sixth Circuit upheld a lower court's decision striking down the policy as unconstitutional. The law violated the Fourth Amendment and the court held that "upholding suspicionless drug testing would set a dangerous precedent." Drug testing in these circumstances must satisfy a "special need, and that need must concern public safety."

The Fourth Amendment protects against unreasonable search and seizure. Mandatory drug testing is considered a search and courts have ruled that most drug testing programs can only

¹² estimated that 65% of TANF recipients will need 2 hours of childcare at \$15 an hour.

¹³ estimated that 50% of TANF recipients will need transportation at \$10.

¹⁴ *Goldberg v. Kelly*, 397 U.S. 254 (1970).

¹⁵ Utah Department of Workforce Services, DWS Employment and Business Services Manual.

be imposed if they serve special needs, usually related to public safety. The ACLU's position is that suspicionless mandatory drug testing is discriminatory, an invasion of privacy and a waste of state funds. Other states have found cheaper, less intrusive ways in which to express their concerns about the use of drugs among welfare recipients. Mandatory drug testing assumes that welfare applicants are substance abusers and that being poor is a crime.¹⁶

Drug testing by itself does nothing to promote employment, economic stability, or responsible parenting. Two out of three TANF recipients are children. If routine drug tests are conducted, how will the safety of children be protected? Will there be treatment available? Is residential treatment available when needed? Where will the children live? After drug testing, the state must have policies to provide treatment and safety to children.

The U.S. Department of Health, Administration for Children and Families has this to say about drug testing of TANF recipients:

"The uses of drug testing in TANF programs are not as clear. They include identifying substance use problems as a potential barrier to employment or monitoring compliance with treatment required as part of a TANF client's service plan. Drug testing might also serve as a screen for TANF work programs referring clients to job opportunities with employers known to drug test applicants. More punitive uses, such as denying benefits to recipients who refuse random drug tests, are controversial. ... [S]tates potentially interested in adopting this type of policy, at least for the time being, to hold off on adopting this approach."¹⁷

"In addition to the legal implications of the uses of drug testing, states should carefully consider the limitations that come with this form of identification. For example, drug testing identifies recent drug use, not substance abuse or addiction. Given TANF agencies' focus on barriers to employment, they may be more interested in on-going addiction or abuse problems, not usage. Among other limitations, drug testing can be expensive; be considered unethical if used in situations where drug use is not suspected (i.e., such as the case of random or universal testing); and create an environment of confrontation or suspicion that prohibits the development of a positive relationship between case managers and TANF clients, thus inhibiting other barrier identification and constructive service planning."¹⁸

IV. Using Drug Testing as a Means to Treat Individuals with Substance Abuse Issues

With the obvious legal barriers to drug testing TANF recipients, we should only considering drug testing if it will help TANF recipients overcome barriers to self-sufficiency. Sen. Stowell's measure to study the possibility of penalizing recipients should consider treatment for addicts. Punishment is not the answer, comprehensive and effective substance abuse rehabilitation

¹⁶ Conditional Welfare: A Family Social Work Perspective on Mandatory Drug Testing, Michael Spencer, Jordana Muroff, Jorge Delva, The Haworth Press, 2000.

¹⁷ Study of Screening and Assessment in TANF/Welfare to Work, 1999-2002, U.S. Department of Health, Administration for Children and Families, Office of Planning, Research & Evaluation.

¹⁸ Study of Screening and Assessment in TANF/Welfare to Work, 1999-2002, U.S. Department of Health, Administration for Children and Families, Office of Planning, Research & Evaluation.

programs are what Utah needs. Currently Utah's capacity to treat individuals with substance abuse disorders are often overflowing, for both young people and adults. According to the Division of Substance Abuse and Mental Health's annual report in 2008, Utah's rehabilitation centers are incapable of treating those who need it. Of the estimated 85,614 who need treatment, only 16,320 are receiving it, less than 20 percent. This an unfortunate finding and should be improved on. Instead of spending Utah's scarce money on ways to spend more in the long term, we should invest it in our rehabilitation programs, getting people off drugs and back into the workforce.

According to a study published in 1997 by the Legal Action Center, women who were previously on welfare before substance abuse treatment were able to reduce their dependence on welfare by 22 percent. The same study cited a National Treatment Improvement Evaluation Study that found the number of individuals participating in welfare programs decreased by 10.7 percent after one year of treatment.

We should also consider the huge cuts that were made to substance abuse funding and drug courts in the recent session.

V. What Other States Are Doing

The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 gave states the option of drug testing welfare recipients. Section. 902 of P.L. 104-193 of 1996 Sec. 902: "Sanctioning for testing positive for controlled substances. Notwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances."

Despite this option there are currently no states which perform random, suspicionless drug tests on welfare recipients. Individual calls were made to all states and 49 responded with the following information:

The following states do absolutely no drug testing:

Alabama, Alaska, Arkansas, California, Connecticut, Delaware, Florida, Kentucky, Massachusetts, Montana, Nebraska, Nevada, New Hampshire, Ohio, South Dakota, Tennessee, Texas, Wyoming

While these do not drug test, further explanations is required:

Colorado: There is no state requirement for drug testing, but the 64 counties are allowed to decide if they want to drug test, at this point we could not find any information on if individual counties drug test.

Illinois, Kansas, Oregon: If a substance abuse problem is identified as being one that keeps a person from getting and keeping employment, the person must cooperate in addressing it. Cooperation may include drug testing. If the person doesn't cooperate, he or she can be faced with case closure.

Iowa: If a person claims substance abuse as a work barrier, the person must address it as part of the Family Investment Agreement to maintain eligibility. The Agreement must include dates for various steps and goals.

Maine: If a TANF participant had such a problem, he or she would be treated just like employees with the problem in the workplace

South Carolina: If a person's prospective employer requires a drug test, the state pays for it. If it is positive, the TANF caseworker is notified and has options to help the person, including referring to treatment.

The following states do no drug testing, but have required, non-testing screens, as a condition of TANF eligibility, and treatment is put in the workplan so that the addiction can be addressed: Idaho, Maryland, New York, Oklahoma: So can address in treatment plan.¹⁹

Virginia is unique in that it doesn't screen but requires all applicants to state up front if they have been convicted of a drug felony

Drug test required:

Wisconsin: Drug test is required for all applicants and participants who have been convicted of a drug felony in the last five years only

The following states said they have have no drug testing, but have considered or attempted to pass legislation:

Hawaii; Michigan (Tried to impose several years ago, was challenged in court, the state lost the case (US Appeals Court ruled in 2003)); Missouri (3 bills in 2009 session, which ended on May 14th. None passed. Last action on two of them was February 2, 2009 (HB 30, SB 73, SB 86)); North Dakota (Discussed in depth a couple years ago, decided not to even attempt); Pennsylvania (Bills introduced in previous years, but decided didn't want to risk court challenge, like Michigan); Vermont (A legislator did bring it up a couple years ago, but legislation didn't go anywhere); Virginia (Legislation introduced the last two sessions, no traction on SB914 this year, failed due to costs of drug testing); Washington (A bill was introduced this session); West Virginia (Legislation introduced last year, died in Committee, concerns of constitutionality).

VI. Questions That Would Need to be Addressed Before a Drug Testing Program Could be Instituted:

1. What will DWS do if they have a positive test?
 - a. Send individuals to treatment?
 - i. Statutorily must use a certified drug treatment facility. Is there capacity for this?

¹⁹ Many of these states may require drug testing if the TANF recipient identifies it as an issue and it is in the workplan.

- ii. Utah will need to provide childcare and transportation assistance for those who seek treatment.
 - b. Kick them off the program?
 - i. 2 out of 3 people on TANF are children
 - ii. Would those testing positive be referred to the Division of Child and Family Services?
 - 1. This will put children into the child welfare system – what will the cost be for Utah?
- 2. What are the legal implications for Utah? Is this constitutional? A Michigan drug testing program was halted when it was found to violate the Fourth Amendment.
- 3. Would only new applicants be subject to testing or would it apply to the entire TANF caseload?
- 4. Would those testing positive for illicit drugs also be denied food stamp benefits?
- 5. What will happen to the families that may test positive, but that do not have a substance abuse problem? A study published in January 2001 found that drug testing is not an efficient or cost effective way of testing for psychological disorders. Data analysis concluded that 4% of those on welfare were seen as drug dependent. Yet, 7-9% tested positive for drug use, despite not showing any drug dependent problem. Even more overwhelmingly, 21-22% did not test positive for drug use, but exhibited signs of alcohol dependence or psychological disorders.
- 6. Would a positive test result in a lifetime ban? If not, then for how long?
- 7. Would a person be denied benefits if they were unable to take the drug test due to lack of transportation or available child care?
- 8. If a person is sent to treatment due to a positive test and is on a waiting list, will they be denied benefits while on the waiting list?
- 9. Will children also be tested after a certain age?
- 10. How often will recipients be tested?
- 11. Will Utah provide transportation and daycare for those who do not have access to either in order to reach compliance?
- 12. Will time spent by the recipient attaining a test count as required work participation?
- 13. Will individuals with severe mental disabilities be exempted from testing? Many individuals are on several (and sometimes large) medications. Many individuals have difficulty with medical procedures such as blood drawings and regular checkups, if they are required to be tested, what if they are non-compliant with a drug test?

14. If an individual is kicked off TANF for a positive drug test, will Utah also deny them Food Stamps, Child Care Subsidy, etc?

15. What are the legal opinions of Utah's AG on testing?

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