Maryland Sexual Assault Evidence Kit Policy and Funding Committee

Annual Report

January 2019

INTRODUCTION

Every 98 seconds someone in the United States is sexually assaulted.[1] One in five women and one in seventy-one men will be raped in their lifetime.[2] Yet despite the prevalence of sexual assault in American society, the majority of perpetrators are never arrested or prosecuted.[3] Many factors contribute to low apprehension rates. In some jurisdictions, the backlog of untested sexual assault evidence kits ("SAEKs") is a contributing factor.[4]

SAEKs can be vital to the successful prosecution of sexual assaults. These kits often recover the perpetrator's DNA, which once tested can be compared with offender samples in the Combined DNA Index System ("CODIS").[5] This allows law enforcement to identify assailants and establish a link between multiple crimes.[6] Despite the evidentiary value of SAEKs, in 2014 the White House Council on Women and Girls reported that many SAEKs were not being tested at all, while others were languishing for months before being tested.[7] Since the White House report, there has been a nationwide effort to end the backlog of untested kits.

Maryland joined the effort in 2015 when the General Assembly passed Senate Bill 498, which required law enforcement agencies to conduct an audit of their untested kits and report the results to the Office of the Attorney General ("OAG"). Under that law, the OAG was required to submit a report to the General Assembly detailing the number of untested kits and the date each

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[1] RAPE, ABUSE & INCEST NATIONAL NETWORK, https://www.rainn.org/statistics (last visited Nov. 15, 2018).
[2] M.C. BLACK, K.C. BASILE, M.J. BREIDING, S.G. SMITH, M.L. WALTERS, M.T. MERRICK, J. CHEN, M.R. STEVENS, THE NATIONAL CENTER FOR INJURY PREVENTION AND CONTROL & THE CENTERS FOR DISEASE CONTROL AND PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1 (2011), *available at* https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf.
[3] WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 2 (2014), *available at* https://obamawhitehouse.archives.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf.
[4] *Id*.
[5] *Id.*
[6] *Id.*
[7] *Id*.

kit was collected.[8] The OAG was also directed to develop recommendations to address any backlog of untested kits.[9]

To comply with the General Assembly's mandate, the Governor's Office of Crime Control and Prevention ("GOCCP")—on behalf of the OAG—surveyed 135 law enforcement agencies. The survey revealed a total of 3,736 unsubmitted kits statewide. It also revealed that Maryland does not have a backlog of untested kits in the traditional sense, meaning that there is no waitlist of kits that have been submitted, but have not been tested. Rather, the majority of untested kits are kits that law enforcement has determined should not be tested. Although there is no backlog of untested kits, the survey revealed inconsistent policies among agencies regarding how SAEKs are handled and when kits are submitted for testing. In its Report, the OAG recommended that the General Assembly establish policies governing SAEKs and create a Statewide SAEK Oversight Committee.[10]

In response to this recommendation, the General Assembly established the Maryland Sexual Assault Evidence Kit Policy and Funding Committee ("SAEK Committee" or "Committee").[11] The SAEK Committee is chaired by the OAG and consists of a broad cross-section of stakeholders including law enforcement, medical professionals, crime victim rights attorneys, victim advocates, prosecutors, agency officials, and legislators.[12] The Committee is charged with creating uniform statewide policies regarding the collection, testing, and retention of

[8] S.B. 498, Chapter 37 (2015).
[9] *Id.*
[10] A copy of the OAG's report entitled, *Statewide Accounting of Untested Sexual Assault Evidence Kits in the State of Maryland*, is incorporated and attached to the Committee's Report as Appendix A.
[11] S.B. 734, Chapter 659 (2017).
[12] *See* MD. CODE, Crim. Proc. § 11-927 (2017); A list of the current members of the SAEK Committee has been attached as Appendix B to the Committee's Report.

medical forensic evidence in sexual assault cases and increasing access to justice for victims[13] of sexual assault.[14] The SAEK Committee is staffed by an Assistant Attorney General who serves as counsel to the Committee and assists with the implementation of policies adopted by the Committee.

The law creating the SAEK Committee[15] went into effect on June 1, 2017, making fiscal year 2018 ("FY2018") the Committee's first full year of operation. Since its inception, the full Committee has met five times: October 17, 2017, January 18, 2018, February 6, 2018, April 12, 2018, and October 24, 2018. The Committee is organized into three Subcommittees: (1) Testing, Retention, Tracking and Victim Notification ("Testing Subcommittee"); (2) Availability of Exams and Shortage of Forensic Nurse Examiners ("FNE Subcommittee"); and (3) Funding ("Funding Subcommittee"). These Subcommittees meet independently and are responsible for advancing the Committee's substantive work in their particular areas. Meeting agendas, minutes, and other resources related to the Committee's work are posted on the Committee's website.[16]

Under Section 11-927(i) of the Criminal Procedure Article of the Maryland Code, the Committee must submit an annual "report on [its] activities during the prior fiscal year to the Governor and…the General Assembly." In compliance with this statutory mandate, the Committee submits this report which sets forth its activities during FY2018.[17] During its first year, the Committee has: (1) issued preliminary recommendations; (2) applied for and received a federal grant to support the testing and tracking of SAEKs and provide victim services; (3) assisted the

[13] The term "victim" is used throughout this report to refer to people who have experienced sexual assault because it is a term used in relevant statutes and the criminal justice system. We appreciate, however, that many people who have suffered sexual assault prefer the term "survivor." We respect that preference and mean no disrespect by our choice of language.
[14] *See supra* note 12, at § 11-927(c)-(d).
[15] *Supra* note 11.
[16] The SAEK Committee's web address is http://www.marylandattorneygeneral.gov/Pages/Groups/SAEK.aspx.
[17] This report also contains information regarding the Committee's activities in fiscal year 2019.

OAG in promulgating regulations regarding SAEK retention and victim notification procedures;[18] and (4) established additional recommendations and areas of focus for fiscal year 2019 ("FY2019").

I. Publication of Preliminary Recommendations

When the legislature created the SAEK Committee, it directed the Committee to develop recommendations on the collection, testing, and retention of SAEKs.[19] The Committee agreed to focus its early efforts on recommending SAEK policies where there was already broad stakeholder consensus. Each Subcommittee met independently and developed initial recommendations. The full Committee finalized the recommendations and issued twelve preliminary recommendations in April 2018. Aptly titled *Preliminary Recommendations*, the publication is organized by subcommittee. A copy of *Preliminary Recommendations* is incorporated and attached to the Committee's Report as Appendix C. These recommendations are also posted on the Committee's website.[20]

A. Testing, Retention, Tracking, and Victim Notification Subcommittee Preliminary Recommendations

The Testing Subcommittee's preliminary recommendations cover a broad spectrum of topics, ranging from evidence collection to statutes governing chain of custody. However, uniformly, the majority of the recommendations are victim-centered, meaning they seek to offer support to victims of sexual assault and minimize retraumatization. In encouraging the adoption and/or implementation of its preliminary recommendations, much of the Committee's work has

[18] *See* COMAR 02.08.01.01–.05.
[19] *Supra* note 12, at § 11-927(e)(1).
[20] *Supra* note 16.

focused on those recommendations requiring a change in agency policy/regulation or State law. Substantial progress has been made on two of the Testing Committee's recommendations.[21]

Under Preliminary Recommendation 5(d), the Committee recommended that the Maryland Police Training and Standards Commission ("Police Training Commission") amend its law enforcement training curriculum. Specifically, the Committee recommended that the training curriculum include instructions on:

(i) Trauma-informed response;
(ii) The importance of DNA to solve crimes, connect cases, identify serial offenders, and exonerate the wrongfully convicted;
(iii) Recognizing the range of reactions and behaviors post trauma;
(iv) The collection, submission, and preservation of evidence;
(v) Emergent medical needs of the victim;
(vi) The rights and options of sexual assault victims including victim notification options and evidence preservation, and instruction on explaining this information to victims; and
(vii) The roles and responsibilities of other emergency responders, including forensic nurses and victim advocates.

Of particular importance is the recommendation that law enforcement be trained on trauma-informed response to sexual assault. A trauma-informed response recognizes the traumatic impact of sexual assault and the effects that this trauma can have on a victim.[22] Trauma can produce a range of emotions and affect the victim's memory and ability to give detailed information.[23]

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[21] The Committee also took steps to implement the Testing Subcommittee's third preliminary recommendation. Recommendation 3 proposed that the General Assembly enact a "Notice & Demand" statute governing chain of custody and confrontation issues at trial. The statute would create a bypass that would allow prosecutors to present DNA evidence without calling numerous live witnesses (unless the presence of these witnesses is demanded by the defendant) solely to establish the chain of custody of the SAEK. Delegate Hettleman introduced House Bill 1125 in February of 2018. The Bill, which was supported by the Committee, passed the House with unanimous support, but unfortunately stalled in the Senate. The Committee expects the Bill to be refiled during the 2019 legislative session and will again work to secure its passage.

[22] *See* STATE OF NEW HAMPSHIRE: GOVERNOR'S COMMISSION ON DOMESTIC AND SEXUAL VIOLENCE, A MODEL PROTOCOL FOR RESPONSE TO ADULT SEXUAL ASSAULT CASES 25 (2017), *available at* https://www.doj.nh.gov/criminal/victim-assistance/documents/sexual-assualt-protocol.pdf; *see also* Steven Keener, M.S., *Searching for A Comprehensive Understanding of Collegiate Sexual Assault Rates: Assessing Cross-Campus Variance of Sexual Assault Rates According to Community, Institutional, and Student Characteristics*, 21 Geo. Pub. Pol'y Rev. 1, 30, n.vi (2016).

[23] *Id.*

Trauma-informed response training for law enforcement is vital to ensure that first responders not only treat victims with professionalism and compassion, but also obtain the necessary evidence to prosecute the case.[24]

The Committee met with the Police Training Commission on October 3, 2018 and conducted a presentation on the importance of adopting a trauma-informed approach, as well as the additional recommendations outlined above. The Commission agreed to adopt the recommendation and amend its current training curriculum for sexual assault cases. The new training curriculum will be incorporated into the Police Training Commission's mandatory reoccurring in-service training. Once it is finalized and disseminated, Maryland law enforcement officers will consistently receive trauma-informed response training throughout their careers.

The Committee has also made significant advancements with Recommendation 6, which proposed that Maryland create a statewide tracking system for all SAEKs.[25] This recommendation was codified by House Bill 1124, Chapter 429 (2018), which directed the SAEK Committee to develop recommendations for the creation and operation of a statewide tracking system. The Committee issued the following recommendation:

> A tracking system should:
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> (a) Track the status of sexual assault evidence kits from the collection site throughout the criminal justice process, including but not limited to the initial collection at medical facilities, inventory and storage by law enforcement agencies or crime lab, analysis at crime laboratories, and storage or destruction after completion of analysis.
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> (b) Allow all agencies or facilities that receive, maintain, store, or preserve sexual assault evidence kits to update the status and location of the kits. This information should include:
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> i. The date and location of the exam;

[24] *Id.*

[25] In April of 2018, the Joyful Heart Foundation conducted a presentation for the SAEK Committee on the national best practices for SAEK tracking systems.

ii. Victim identification (name or anonymous Jane Doe identifier);
iii. Police report number;
iv. Date and time of law enforcement receipt;
v. Date of testing and completion of testing; and
vi. Date results entered into CODIS.

(c) Allow victims of sexual assault to anonymously access the system and receive updates regarding the location and status of their sexual assault evidence kits.

(d) Use electronic technology that allows continuous access by victims, medical facilities, law enforcement, and crime laboratories.

(e) Require participation from law enforcement agencies, medical facilities, crime laboratories and any other facilities that receive, maintain, store, or preserve sexual assault evidence kits. These entities should participate in the system within one year of the creation of the tracking system.

House Bill 1124 also required the Committee to apply for federal grant funding to support the implementation of the tracking system. To comply with this mandate, the SAEK Committee applied for and received the Sexual Assault Kit Initiative ("SAKI") grant. The tracking system will be implemented pursuant to the SAKI grant, which will be discussed more in-depth below.

B. Availability of Exams and Shortage of Forensic Nurse Examiners Subcommittee Preliminary Recommendations

The FNE Subcommittee's initial recommendations focused on improving access to sexual assault forensic examinations ("SAFE"). For example, Recommendation 7 proposed that GOCCP extend its reimbursement timeline for collecting SAEK samples.

Currently, Section 10.12.02.03(B)(1)(a) of the Code of Maryland Regulations ("COMAR") provides that a "sexual assault forensic examination shall be performed…within 120 hours [five days] of the alleged sexual offense." Based on this provision, medical personnel are only reimbursed for SAEK samples collected within five days of the sexual assault. This five-day collection requirement is based on outdated research and should be revised.

Recent advancements in forensic science have extended the window that DNA can be collected from a victim's cervix to at least nine days after the assault and potentially up until the victim's next menstrual cycle.[26] GOCCP's reimbursement policy should reflect these advancements. The Committee recommends that GOCCP change its reimbursement policy to allow for reimbursement for collection and submission of cervical swabs taken within 15 days of the sexual assault. GOCCP's reimbursement policy should reimburse for collection and testing of samples taken beyond 15 days if the clinician recommends testing based on his or her professional discretion.

In furtherance of its recommendation, the Committee sent a letter to GOCCP's Executive Director. The letter explained the new forensic research and encouraged GOCCP to adopt new regulations. The Committee met with GOCCP representatives to discuss the proposed change to the reimbursement policy. At that meeting, GOCCP inquired about the potential cost of expanded reimbursement. The Committee agreed to try and gather data on the potential increase in reimbursement costs to the State.

To do so, the Committee asked members of the Maryland Hospital Association ("MHA"), who also serve on the SAEK Committee, to speak with hospital representatives about their testing policies when the SAFE is performed more than five days post-assault. MHA reported having difficulty collecting information because most hospitals do not conduct tests if victims present after five days, due to the current limits on reimbursement. Only two hospitals reported tracking the number of patients presenting outside of the five day window.[27] Unfortunately, it is difficult to

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[26] PATRICIA SPECK & JACK BALLANTYNE, POST-COITAL DNA RECOVERY STUDY 77–80 (2015), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/248682.pdf.

[27] One hospital with a high volume SAFE Program that sees an average of 750 patients annually, reported collecting evidence up to 14 days after the assault. Of these patients, an estimated 120 patients presented after the five day window.

provide an accurate statewide cost estimate due to the lack of data. It should be noted however, that the Committee's recommendation is specific to cervical swabs. Therefore, any future cost analysis should limit its inquiry to the cost of testing only cervical swabs, as opposed to the entire SAEK.

In a recent Committee meeting, GOCCP advised that it is hesitant to adopt the Committee's recommendation without a clear estimate of the potential cost. The Committee has made substantial efforts to provide GOCCP with a cost estimate, but as noted above, is unable to do so. That said, the Committee's inability to provide detailed cost data should not prevent GOCCP from adopting its recommendation. The research is clear that DNA can be obtained for many days beyond the current five day reimbursement timeframe.[28] Failure to revise the policy in light of this new research leaves potentially dispositive evidence uncollected. Public safety considerations and the interests of victims also warrant a policy revision. Therefore, the Committee strongly recommends that GOCCP allow reimbursement for cervical swabs collected up to 15 days after the sexual assault and urges the legislature to ensure that GOCCP has the funding to do so.

The Committee also adopted Recommendation 8, which proposed that the Maryland Institute for Emergency Medical Services Systems ("MIEMSS") list all SAFE programs in the Maryland Medical Protocols for Emergency Medical Services ("EMS") providers. The Committee made this recommendation in recognition of the OAG's report that "sexual assault survivors may be shuttled from place to place, sometimes giving up and never getting an exam."[29] The Committee spoke with representatives from MIEMSS, who advised that MIEMSS had already begun implementing the recommendation which will ensure that all EMS providers know where to transport victims to obtain a SAFE.

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[28] *Supra* note 26.
[29] *See* Appendix A, at 12.

C. Funding Subcommittee Preliminary Recommendations

The Funding Subcommittee's preliminary recommendations focus on ensuring that sexual assault victims have full access to Human Immunodeficiency Virus ("HIV") non-occupational post-exposure prophylactic (nPEP) treatment. HIV nPEP is a form of medical intervention designed to prevent HIV infection after exposure to the virus.[30] For maximum efficiency, HIV nPEP must be taken within 72 hours after the initial exposure.[31] The full 28-day treatment is necessary in order for nPEP to effectively protect against HIV.[32] Currently, Maryland only reimburses victims for the HIV nPEP "starter pack," which includes medication for three to seven days.[33] Maryland does not reimburse victims for the cost of the remaining 21 to 25 day treatment.[34] HIV nPEP offers victims who have been exposed to HIV the best chance to avoid contracting an incurable disease that will affect the rest of their lives. Post-exposure prophylaxis intervention can reduce the risk of HIV infection by over 80%.[35] To ensure that victims receive this vital treatment, the Committee proposed that the State cover the cost of the full 28-day nPEP treatment.

Adherence to the 28-day course is critical to the effectiveness of the intervention.[36] The CDC acknowledged that providing the victim with the full regimen "increase[s] the likelihood of

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[30] MARYLAND DEPARTMENT OF HEALTH AND MENTAL HYGIENE & MARYLAND INSTITUTE OF EMERGENCY MEDICAL SERVICES SYSTEMS, IMPROVED ACCESS TO SEXUAL ASSAULT MEDICAL FORENSIC EXAMINATIONS IN MARYLAND 15 (2015), *available at* https://phpa.health.maryland.gov/Documents/Sexual-Assault-Forensic-Exam-Report-2015.pdf.
[31] World Health Organization Postexposure Prophylaxis Guideline Development Group et al., *World Health Organization Guidelines on Postexposure Prophylaxis for HIV: Recommendations for a Public Health Approach*, *in* 60 Clinical Infectious Diseases S161, S163 (Oxford University Press, 2015), *available at* https://www.who.int/hiv/pub/prophylaxis/02.pdf.
[32] *HIV Post-Exposure Prophylaxis*, OH DEP'T. OF HEALTH, https://www.odh.ohio.gov/-/media/ODH/ASSETS/Files/health/SADVP/Ohio-Protocol/HIV-Post-Exposure-Prophylaxis-March-14-2018.pdf?la=en2018.pdf?la=en (last visited November 15, 2018) ("Incomplete PEP treatment presents a theoretical risk to the victim").
[33] *Supra* note 30, at 31.
[34] *Id.*
[35] *Post-Exposure Prophylaxis to Prevent HIV Infection,* WORLD HEALTH ORG., https://www.who.int/hiv/topics/prophylaxis/info/en/ (Dec. 1, 2014).
[36] *Id.*

adherence, especially when patients find returning for multiple follow-up visits difficult."[37] In a 2009 study by the London School of Hygiene and Tropical Medicine, 71% of patients who were given the full course of medication on the first visit completed the full regimen.[38] Only 29% of patients who were given the starter pack with follow-up appointments, completed the full course. Additionally, a 2015 study published by the Oxford University Press found that providing "starter packs do not improve adherence to [n]PEP and may result in lower adherence and completion rates."[39] These findings have caused many entities, like the World Health Organization, to recommend that the full 28-day course of nPEP be provided at the initial visit.[40]

While the risk of contracting HIV during consensual sex is low, victims of sexual assault have an increased risk because sexual assaults typically cause abrasions or lacerations (i.e. broken skin) which increase the likelihood of transmission.[41] This heightened risk poses equally troubling mental health concerns for victims. Fear of HIV has been found to cause depression as well as emotional and psychological strain for victims of sexual assault.[42]

In addition to the health risk and psychological effects of possible HIV exposure, under the current rules, obtaining HIV nPEP treatment can prove burdensome, if not impossible for many

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[37] CENTERS FOR DISEASE CONTROL AND PREVENTION, UPDATED GUIDELINES FOR ANTIRETROVIRAL POSTEXPOSURE PROPHYLAXIS AFTER SEXUAL, INJECTION DRUG USE, OR OTHER NONOCCUPATIONAL EXPOSURE TO HIV—UNITED STATES, 2016 39 (2016), *available at* https://www.cdc.gov/hiv/pdf/programresources/cdc-hiv-npep-guidelines.pdf.
[38] Julia C. Kim ET AL. *Comprehensive care and HIV prophylaxis after sexual assault in rural South Africa: the Refentse intervention study*, 9 (2009), *available at* http://researchonline.lshtm.ac.uk/5553/1/Comprehensive%20care%20and%20HIV%20prophylaxis%20after%20sex sex%20assault%20in%20rural%20South%20Africa_%20the%20Refentse%20intervention%20study%20_%20The %20BMJ.pdf.
[39] Nathan Ford ET AL., *Starter Packs Versus Full Prescription of Antiretroviral Drugs for Postexposure Prophylaxis: A Systematic Review*, *in* 60 CLINICAL INFECTIOUS DISEASES S182, S182–S186 (Oxford University Press, 2015), *available at* https://academic.oup.com/cid/article/60/suppl_3/S182/374293.
[40] *Supra* note 31, at S161–S164.
[41] *See* Jessica E. Draughon, *Sexual Assault Injuries and Increased Risk of HIV Transmission*, 34 ADV. EMERG. NURS. J. Emergency Nursing J. 82, 82–87 (2012).
[42] Edna Aryee, *I Was Raped: The Psychological Effects of Rape Among Liberian & Ghanaian Women in Ghana*, 12 WOMENS HEALTH & URBAN LIFE J. 98, 108 (2013), *available at* https://tspace.library.utoronto.ca/bitstream/1807/35219/1/12.1.Aryee.pdf.

sexual assault victims in Maryland. One of the barriers for victims to obtain HIV nPEP is the high cost of the medications. If a victim has health insurance, co-pays can be as high as $1,500.[43] Without insurance, a full course of treatment can cost between $3,212 and $3,371, depending on the medication prescribed.[44] Victim's enrolled in Maryland's Medicaid Program fare the best with regard to paying for HIV nPEP therapy, as the copay can be as low as $1.00.[45] However, not all victims of sexual assault are eligible for Medicaid and the exorbitant cost of the medication presents a barrier for those victims.

The Committee is aware that the pharmaceutical companies that manufacture HIV nPEP medications offer patient assistance programs to offset the cost for uninsured victims. Nonetheless, these programs require substantial staff time and place onerous administrative burdens on victims. For example, the manufacturing biopharmaceutical company Gilead, requires victims to: (1) prepare a letter of medical necessity for nPEP; (2) have the letter signed by a clinician, case manager, or victim advocate; (3) fax the letter of medical necessity to Gilead; and (4) sign a consent form for Gilead's assistance.[46] The clinician, case manager, or victim advocate must then call Gilead to complete a prescreening process, wherein they must provide certain information about the case and the victim such as the victim's demographics, possible health coverage, and household income, or if the victim has no income, they must advise how the victim is supported.[47]

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[43] FNEs who consulted with the SAEK Committee advised that co-pays typically average around $1,500. *See generally* FLORIDA DEPARTMENT OF HEALTH'S, BUREAU OF COMMUNICABLE DISEASE, DIVISION OF DISEASE CONTROL AND HEALTH PROTECTION'S, HIV/AID SECTION, nPEP TOOLKIT FOR PROVIDERS 22 (2016), *available at* http://www.floridahealth.gov/diseases-and-conditions/aids/prevention/_documents/nPEP-toolkit.pdf.

[44] The Committee obtained this numerical data from our survey of 15 Maryland hospitals. Additional results from the survey will be discussed in more depth later in this section.

[45] MARYLAND DEPARTMENT OF HEALTH, JOINT CHAIRMAN'S REPORT PROPHYLACTIC HIV THERAPY (PG. 79) 10 (2018).

[46] FLORIDA DEPARTMENT OF HEALTH'S, BUREAU OF COMMUNICABLE DISEASE, DIVISION OF DISEASE CONTROL AND HEALTH PROTECTION'S, HIV/AID SECTION, nPEP TOOLKIT FOR PROVIDERS 23 (2016), *available at* http://www.floridahealth.gov/diseases-and-conditions/aids/prevention/_documents/nPEP-toolkit.pdf.

[47] *Id.*

Furthermore, if a doctor prescribes the medication Isentress,—a drug which can be prescribed as part of the HIV nPEP regimen—the manufacturer reimbursement can only be obtained via a paper application.[48] Medical professionals and victim advocates on the SAEK Committee advised that oftentimes these programs require documentation like a W-2 form or a tax return in order to complete the application. Timely completing a lengthy application or quickly obtaining financial documentation can be impossibly overwhelming to a person who has recently experienced the trauma of a sexual assault. Adding to the stress is the fact that victims must obtain the medication within 72 hours of the assault for it to be effective, meaning that all of the above hurdles must be cleared in the three days after the sexual assault. These programs also pose privacy concerns because some victims may be unwilling or unable to obtain the required information or documents without disclosing the assault to a partner or parent. These requirements could ultimately prevent victims from obtaining the vital treatment.

The same privacy concerns that prevent some victims from applying for pharmaceutical assistance programs are also present if victims are able to access their private health insurance. If a victim is covered by a spouse's or parent's insurance plan, confidentiality cannot be guaranteed. Some victims will forgo nPEP treatment rather than risk a spouse or parent learning of the sexual assault.[49]

Maryland has made a commitment to protect a sexual assault victim's confidentiality and encourage reporting by covering the cost of the SAFE exam, emergency hospital treatment, and follow-up medical testing.[50] Covering the cost of the full course of HIV nPEP therapy should be a

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[48] *Id.*
[49] The State has passed a law to help shield insurance information related to intimate partner violence. However, the law has been slow to be implemented and does not necessarily ensure confidentiality for victims of sexual assault. *See* Senate Bill 790, Chapter 72 (2014).
[50] *See* MD. CODE, Crim. Proc. § 11-816.1 (2018).

part of this commitment. The Maryland General Assembly acknowledged the importance of HIV nPEP treatment during the 2018 legislative session. Legislators in both the House and Senate introduced bills addressing access to nPEP for sexual assault victims. Unfortunately, the bills were unsuccessful after fiscal concerns were raised.[51] Although the legislation was not reported out of the Committee, the General Assembly formally expressed concern that "victims that seek a sexual assault forensic exam also have access to appropriate prophylactic HIV therapy."[52] The legislature requested that the Maryland Department of Health ("MDH"), in consultation with GOCCP, research and report on specific information regarding HIV nPEP therapy. [53] On November 30, 2018, MDH submitted its report, wherein some of the findings overlap with the Committee's report. Nonetheless, the Committee does not agree with some of the conclusions drawn in the report.

The SAEK Committee agrees with MDH's assertion that HIV is and should continue to be a public health priority for Maryland.[54] The Committee also supports the MDH's finding that a two-pronged approach is the best course of action to expand access to nPEP. The report explained: "The Sexual Assault Reimbursement Unit (SARU)…could be expanded to (1) provide the full 28-day course of nPEP HIV therapy instead of a starter pack, and (2) broaden the guidelines to align with those set by the Centers for Disease Control and Prevention for nPEP HIV therapy."[55] This particular conclusion is in line with the Committee's recommendation.

The Committee disagrees, however, with MDH's proposed solution to increase access to nPEP treatment. According to MDH, "education and outreach to those hospitals within the State

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[51] *See* H.B. 639, 438th Sess. (Md. 2018); *see also* S.B 731, 438th Sess. (Md. 2018).
[52] GENERAL ASSEMBLY OF MARYLAND, JOINT CHAIRMAN'S REPORT 79 (2018) *available at* http://mgaleg.maryland.gov/pubs/budgetfiscal/2018rs-budget-docs-jcr.pdf.
[53] *Id.*
[54] *Supra* note 45, at 4.
[55] *Id.*

designated as Sexual Assault Forensic Examination Centers may be a more appropriate and cost-effective first step towards understanding and addressing barriers to nPEP HIV therapy."[56] The maximum effects of education and outreach to SAFE Programs have already been achieved. Any further exploration would likely prove futile and serve to delay the full coverage for nPEP treatment that should be afforded to victims of sexual assault. Overall, the Committee respectfully disagrees with MDH's reluctance to provide prompt HIV nPEP to victims. This treatment is essential and victims of sexual assault cannot afford a delay. The Committee recommends that Maryland's policy be expeditiously changed to fully support HIV prevention for all victims of sexual assault.

When the Committee developed its recommendation for nPEP reimbursement in Maryland, the Committee analyzed the nPEP reimbursement policies of several sister states. Although not completely ideal, Ohio's reimbursement structure may offer guidance if the legislature is reluctant to provide the full course of treatment at the outset. In Ohio, the Attorney General's SAFE Program offers reimbursement for the full nPEP regimen. The Ohio Administrative Code provides,

> A hospital, children's advocacy center, or other emergency medical facility shall accept payment of the actual amount billed; not to exceed twenty-five hundred dollars, as payment in full for any cost incurred in administration of HIV post-exposure prophylaxis protocol[.][57]

Ohio's policy ensures that victims obtain the nPEP medications free of charge, however, Ohio does not require the 28-day dose to be administered all at once. A letter from Ohio's SAFE Manger and Victim Service Coordinator explained,

> In order to be eligible for reimbursement the medical facility must provide the patient with the full 28-day dose or make provision to provide the remainder of the

[56] *Id.*
[57] OHIO ADMIN. CODE 109:7-1-02 (2017).

> regimen from the facility at no cost to the patient. If the patient is released with a lesser dose of prophylaxis, reimbursement for the medication and all services related to the HIV assessment will be reduced proportionately unless the facility has made provision for the patient to receive the reminder at no additional cost from the facility.[58]

Ohio's OAG said that the primary purpose of this policy is to ensure that "all victims of sexual assault have access to the full regimen of HIV post-exposure prophylaxis."[59] Maryland should join states like Ohio who have already acknowledged the importance of fully protecting the medical needs and interests of victims.

The Committee is aware that the potential cost for providing victims with the full 28-day treatment is of concern to the General Assembly. In the fall of 2018, MHA—on behalf of the Committee—surveyed 15 SAFE Programs at Maryland hospitals to estimate the cost. The survey revealed that, on average, 2,100 patients are seen annually at SAFE Program sites in the ten major jurisdictions in Maryland.[60] Of these patients, an estimated 900 were offered nPEP treatment. However, on average, half of the patients who qualified chose not to initiate treatment.[61] As previously stated, the cost of nPEP treatment can range from $3,212 to $3,371 depending on the medication prescribed. If all of the 900 patients that were offered nPEP treatment accepted the treatment, and the State provided the full 28-day regimen to all 900 patients, the estimated cost

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[58] The letter from Sandy Huntzinger, who is the SAFE Manger and Victim Service Coordinator at Ohio's OAG, is attached to the Committee's report as Appendix D.

[59] Ohio Attorney General, *Instructions for Sexual Assault Forensic Examination & HIV Prophylaxis Reimbursement Form*, 3 (2017), *available at* https://www.ohioattorneygeneral.gov/Files/Forms/Forms-for-Victims/Sexual-Assault-Forensic-Examination/SAFE-Reimbursement-Instructions.

[60] The following jurisdictions were included in the survey: Anne Arundel County, Baltimore City, Baltimore County, Howard County, Montgomery County, Prince George's County, Eastern Shore, Frederick County, Southern Maryland, and Western Maryland.

[61] The SAFE Programs surveyed did not indicate why patients declined treatment. Some anecdotally cited the high co-pay cost. Programs also cited transportation to the pharmacy as a potential barrier. Other reasons a victim may choose to decline nPEP include concerns about toxicity (including potential interactions with a victim's personal medical conditions) and individual choices about risk assessment.

would be between $2,890,800 and $3,033,900 annually.[62] There are a number of factors however, that may reduce cost.

For instance, the State could choose to provide the medication in two-week increments, to account for those instances where the victim chooses to stop the nPEP regimen. Victims may choose to stop treatment for a range of reasons, including reevaluating their risk of contracting HIV, as well as the victim's inability to tolerate the side effects of the medication. Moreover, in 2017, the Maryland General Assembly passed a law establishing a process for emergency testing of sexual assault perpetrators.[63] If a victim learns that the assailant is HIV negative, he or she can more confidently stop nPEP treatment and further reduce medication cost. While these factors may reduce cost, the Committee urges the State to provide the full course at the outset because "provision of a partial prescription with the necessity to return for follow-up appointments could increase inequity in populations with limited access to healthcare facilities."[64] Furthermore, victims are more likely to complete the regimen when it's provided at the initial assessment.[65]

The Committee recognizes that an nPEP reimbursement program carries with it significant unknowns. In order to effectively address these unknowns, a three-year pilot program is recommended. The pilot program would provide the State a reliable estimate of the number of sexual assault victims likely to access the medication, and thus a more accurate estimate of the potential costs of a permanent reimbursement program, while providing victims access to nPEP without further delay. At the conclusion of the proposed pilot program, the Committee recommends an evaluation to assess actual costs, including cost savings from HIV reduction, and benefits to victims who have been sexually assaulted.

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[62] This data provides information regarding a ceiling for costs as the State develops policy.
[63] Md. Code Ann., Crim. Proc. §11-110.1 (LexisNexis 2017).
[64] *Supra* note 31, at S163.
[65] *Id.*

The State should also formally adopt the current CDC guidelines for providing nPEP and allow physicians to use their professional judgement regarding whether there are additional circumstances where nPEP should be provided. Reimbursement for the cases outside the CDC guidelines should be evaluated on an individual basis. Finally, the State should consider negotiating directly with pharmaceutical companies in order to create a patient assistance program for sexual assault victims.

The Committee believes that providing the full 28-day nPEP treatment free of charge is the only way to ensure that victims of sexual assault are not forced to live with an incurable disease and a painful daily reminder of their assault. No victim should be denied HIV prevention simply because they cannot afford the medication. Moving forward, the Committee will continue to advance its recommendation that victims receive the full 28-day nPEP regimen free of charge.

II. Sexual Assault Kit Initiative

After the SAEK Committee published its preliminary recommendations, the Committee applied for the 2018 federal SAKI grant.[66] The Sexual Assault Kit Initiative is a federal grant program administered by the Department of Justice's Bureau of Justice Assistance ("BJA").[67] The BJA provides funding to address the growing number of unsubmitted SAEKs and prevent the accumulation of unsubmitted SAEKs in the future.[68] The goal of SAKI is to help jurisdictions create effective and sustainable practices for collecting and processing forensic evidence, investigating and prosecuting sexual assault cases, and supporting survivors of sexual assault.[69]

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[66] In February of 2018, the Committee met with a Senior Policy Advisor from the U.S. Department of Justice who conducted a presentation on the SAKI grant and national SAEK best practices.
[67] *Bureau of Justice Assistance Sexual Assault Kit Initiative*, BUREAU OF JUSTICE ASSISTANCE, https://www.bja.gov/ProgramDetails.aspx?Program_ID=117 (last visited Nov. 15, 2018).
[68] *Id.*
[69] *Id.*

In preparation for the SAKI grant application, the OAG conducted a follow-up survey with the 13 agencies responsible for more than 90% of the unsubmitted SAEKs. Nine agencies responded. The updated information revealed that there are over 6,000 unsubmitted kits in Maryland.[70]

The Committee's grant proposal requested $3 million (the highest amount allowed under the grant) to: (1) conduct a statewide inventory; (2) test unsubmitted kits; (3) establish a statewide tracking system; and (4) provide victim services. On September 30, 2018, the BJA awarded Maryland $2.6 million—the first SAKI funding awarded to the State.

The grant will be administered by GOCCP and led by the OAG. The Maryland State Police Forensic Science Division ("MSP"), the Maryland Coalition Against Sexual Assault ("MCASA"), and the SAEK Committee will also fill important roles. MSP will aid in the process of testing kits and upload qualifying DNA profiles into CODIS. MCASA is responsible for developing and implementing victim notification policies and providing other support services. The SAEK Committee will select a tracking system and continue to develop SAEK policies consistent with the goals of the grant. Thus far, the OAG has published a job announcement and is in the process of hiring investigators to start the detailed statewide inventory process required by the grant.

III. COMAR 02.08.01.01–.05—Sexual Assault Victims' Rights–Disposal of Rape Kit Evidence and Notification

House Bill 255, Chapter 159 (2017) expanded the state's victim notification and sexual assault evidence kit retention requirements. Enacted as Criminal Procedure Article, Section 11-926, the bill also required the OAG to adopt regulations for the uniform statewide implementation

[70] This number is a sharp increase from the 2015 survey which reported that there were only 3,736 unsubmitted kits. *See* Appendix A, at 5–9.

of the newly established notification and retention requirements.[71] The SAEK Committee supported the OAG in drafting regulations to comply with this mandate.

On October 8, 2018, the OAG adopted new regulations, entitled *Sexual Assault Victims Rights–Disposal of Rape Kit Evidence and Notification*, codified under COMAR 02.08.01.01–.05. The regulations track the provisions § 11-926(a)–(d), and govern both health care providers and law enforcement agencies.

To ensure consistent statewide implementation of § 11-926, the new regulations establish additional reporting requirements for law enforcement agencies. Pursuant to Regulation 02.08.01.05, by January 6, 2019, all agencies must provide the OAG a copy of their written policies demonstrating compliance with the victim notification and retention requirements.[72] In the following years, on or before September 1, 2019, and every 2 years thereafter, agencies must also submit the following information to the OAG:

(1) The number of sexual assault evidence collection kits in its possession as of June 30th of that calendar year;

(2) The date each sexual assault evidence collection kit in its possession was received;

(3) The number of sexual assault evidence collection kits tested within the prior 2 years as of June 30th of the calendar year;

(4) The number of sexual assault evidence collection kits destroyed during the prior 2 years as of June 30th of that calendar year; and

(5) The number of written requests received pursuant to Regulation .04D[73] of this Chapter during the prior 2 years as of June 30th of that calendar year.[74]

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[71] *Supra* note 12, at § 11-926(e).
[72] COMAR 02.08.01.05.
[73] Under Regulation .04(D), which is COMAR 02.08.01.04(D), if a victim makes a written request to the law enforcement agency with custody of their SAEK or other crime scene evidence relating to a sexual assault, the law enforcement agency must "(1) notify the victim no later than 60 days before the date of the intended destruction of disposal of the evidence; or (2) retain the evidence for 12 months longer than the [20 year] period specified in § B of this regulation…." Law enforcement agencies must advise the OAG in their biannual reports about the number of written requests they receive pursuant to Regulation .04(D).
[74] *Supra* note 72.

The OAG sent a letter to all law enforcement agencies in the State advising them of the new regulations.

IV. Additional Recommendation and Points of Focus for FY2019

Throughout FY2018, the Subcommittees met several times, built upon previous recommendations, and also established new recommendations. The Subcommittees' new recommendations are outlined below and will be the Committee's focus for FY2019. The Committee will also continue to advocate for the implementation of its preliminary recommendations.

A. Testing, Retention, Tracking, and Victim Notification

As discussed above, the OAG's 2016 audit revealed that law enforcement agencies have inconsistent SAEK testing policies. Since the audit, some agencies with the highest number of untested kits have expanded their testing criteria or are in the process of expanding their testing criteria.[75] Although many agencies have already begin to reevaluate which kits should be tested, to ensure consistency, the Testing Subcommittee recommends that the General Assembly enact legislation to establish the following uniform statewide SAEK testing criteria for law enforcement agencies:

> An investigating law enforcement agency that receives a sexual assault evidence collection kit shall transfer the sexual assault evidence collection kit to a forensic laboratory for analysis unless:

[75] *See* Catherine Rentz, *Thousands More Untested Rape Kits Revealed in Maryland as Authorities Ramp up Efforts to Process Evidence*, BALTIMORE SUN, (Dec. 3, 2018), http://www.baltimoresun.com/news/maryland/crime/bs-md-untested-rape-kits-20181107-story.html ("[P]olice are researching now to determine what to process….[b]etter technology and less expensive DNA testing have enabled police to take a fresh look at cases.").

(1) The allegation of sexual assault is determined through investigation to be false or baseless[76] (see below for guidelines regarding the proper definition of "false or baseless");
(2) The suspected perpetrator of the sexual assault pleaded guilty to an offense requiring DNA collection upon conviction; or
(3) The victim from whom the evidence was collected declines to give consent for analysis.

A "false or baseless" allegation of sexual assault is one where investigating authorities have concluded that no crime occurred. An allegation of sexual assault is not "false or baseless" just because:

(1) The identity of the suspect is known;
(2) The suspect admitted to sex with the victim, but maintained that it was consensual; or
(3) The State's Attorney's Office determined that a crime had been committed, but declined prosecution.

To track the implementation and effect of the proposed testing criteria, the Testing Subcommittee recommends requiring law enforcement agencies to provide the following information to the OAG every two years:

(1) The number of kits not tested because the allegation of sexual assault was determined through investigation to be false or baseless;
(2) The number of kits not tested because the suspected perpetrator of the sexual assault pled guilty to an offense requiring DNA collection upon conviction;
(3) The number of kits not tested because the victim from whom the evidence was collected declined to give consent for analysis; and
(4) The number of any other kits not tested and an explanation for why the kit was not tested.

The Subcommittee also recognizes that it is critical for increased funding to accompany the expanded testing criteria. The Subcommittee therefore recommends that the State dedicate funds to the Maryland State Police's Forensic Sciences Division to support the testing that the

[76] The term false covers any case that law enforcement determines is untrue, meaning the victim fabricated the complaint. An allegation is classified as baseless if the criminal act does not meet the legal definition of sexual assault. The Committee has decided not to test kits where the allegations are determined to be false or baseless because these types of cases are ineligible for CODIS and thus, cannot be used to identify offenders.

State laboratory conducts. Funds should also be assigned to GOCCP to award grants to those local jurisdictions that have independent testing laboratories.

The Committee has discussed creating a review process for law enforcement determinations that an allegation of sexual assault was determined to be false or baseless. The false or baseless determination has been criticized for being misapplied by many agencies in the past, and a review process would allow the victim to seek a second opinion of the law enforcement agency's determination.[77] Balancing the appropriate level of oversight against the independence of law enforcement has proven difficult; as a result the Committee has agreed to continue to discuss this potential recommendation with impacted stakeholders in FY2019.

B. Availability of Exams and Shortage of Forensic Nurse Examiners

The FNE Subcommittee reached a consensus on the following recommendations, which are separated into three categories:

(1) FNE Workforce Support & Reimbursement for Services

(a) Forensic Nurse Examiners, as qualified hospital health care personnel that deliver medical care with forensic implications, should be reimbursed for time spent collecting evidence during the sexual assault forensic exam.

(b) The state should clarify the definition of "follow up medical testing" as referenced in COMAR 10.12.02.05(B)(2) and the definition should include follow up visits.

(c) The state should increase the current physician reimbursement for providing medical clearance screening to an amount corresponding with the professional fees included in the Maryland Medical Assistance Program's Professional Services Fee Schedule.

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[77] *See* Alex DeMetrick, *Changing the Culture of Rape Investigation*, THE BALTIMORE SUN (Jan. 4, 2017), http://www.baltimoresun.com/news/opinion/editorial/bs-ed-rape-kits-20170104-story.html (explaining that "individual police agencies in Maryland appear to differ widely in how often they consider cases "unfounded."); *see also* Alex Campbell and Katie J.M. Baker, *This Police Department Tosses Aside Rape Reports When A Victim Doesn't Resist "To The Best Of Her Ability,"* BUZZFEED (Sept. 8 2016), https://www.buzzfeednews.com/article/alexcampbell/unfounded (These departments routinely mark an extraordinary percentage of rape allegations as false or baseless…It is implausible that this many victims are making up rape allegations, experts say, raising crucial questions about how seriously police treat sexual assault claims — and how likely they are to be biased against women who report them.").

(d) The state should conduct a review of the current rate for the emergency services cost center for hospitals submitting claims for sexual assault forensic examinations under policies of the Health Services Cost Review Commission (HSCRC) to determine if reimbursement levels are adequate for services offered.

(e) The state should require the Governor's Office of Crime Control and Prevention (GOCCP) to modify the current policies for processing claims submitted by providers to require only the consent form and list of services be submitted in order to preserve patient confidentiality and protect patient information that is forensic in nature.

(2) Board of Nursing

(a) The Board of Nursing should communicate the status of the FNE's application throughout the process and issue guidance, on a reasonable time frame, to make a determination on the status of the initial application and renewal process.

(b) The Board of Nursing should allow for online renewals to align with what is currently allowed for nurses with expanded practice.

(c) The Board of Nursing should allow partial online learning courses from nationally accredited professional associations with an in-person clinical practicum to meet education criteria.

(d) The Board of Nursing should conduct an annual review of regulations, standards and curriculum while including stakeholders in the process to determine if updates are recommended to improve the program.

(3) Advocate Presence During Sexual Assault Forensic Exams

(a) Sexual Assault Forensic Exam (SAFE) programs should include access to advocates. SAFE programs should collaborate with the local certified Rape Crisis and Recovery Center (RCC) to ensure that an advocate is always offered to a survivor and members of their support network during the SAFE process. In accordance with national protocol recommendations, the SAFE program shall expeditiously notify the RCC to request advocacy involvement in order to eliminate any delays in conducting the forensic exam and to ensure the survivor's needs are prioritized. In jurisdictions where there is 24/7 access to advocacy services, the SAFE program shall notify the RCC of the upcoming forensic exam immediately upon learning of the need for it. In jurisdictions where 24/7 advocacy services are not available, the RCC should be immediately notified during standard operating hours, and if there is a need for a forensic exam outside of the RCC's standard operating hours, the SAFE program shall contact the RCC as soon as

the RCC reopens. If an advocate is not immediately available, and the survivor prefers to move forward with the exam without the advocate physically present, the FNE will offer to call the local RCC and allow the survivor to speak with an advocate before the forensic exam. The FNEs, and all SAFE program employees, will focus on ensuring that the survivor feels empowered to dictate who is in the exam room during the SAFE process. All medical, advocacy, and investigative (if indicated) staff will attempt to honor these requests from the survivor.

(b) In pediatric cases of sexual assault, the national protocol recommendation for pediatric forensic exams advises that a chaperone always be present during the forensic exam, but that it is good practice to limit additional persons in the exam room. If developmentally appropriate, the child should select the chaperone who will be present (i.e. advocate, caregiver, other healthcare provider). Pediatric cases are complex and should be handled on a case-by-case basis, with members of the medical and advocacy staff evaluating whether the presence of additional support persons is appropriate during the exam. Law enforcement and child protective services personnel should not be in the room during a forensic exam.

In FY2019, the FNE Subcommittee will focus on developing strategies for implementing the above recommendations and offering additional changes to the regulations concerning reimbursement.

C. Funding

In FY2019, the Funding Subcommittee will continue to advance its recommendation that Maryland provide full 28-day HIV nPEP treatment to victims of sexual assault free of charge. The Subcommittee also intends to explore and support strategies to fund expanded testing of SAEKs.

1. Funding for Maryland's HIV nPEP Reimbursement Program

The Subcommittee established core values for Maryland's HIV nPEP reimbursement program:

- Survivor-Centered
  - The mechanics of the program should be structured by evidence-based practices which should inform decisions such as how the medication is distributed (i.e. full 28-day supply, prescription provided with a starter pack, or medication given over time at follow up visits with an initial starter pack provided).

- Removal of Financial Barriers
    - Survivors should be able to access the HIV prophylactic medication with no out of pocket expense
- Protection of Privacy
    - Survivors should not have to bill their health insurance in order to access nPEP.
- Ease of Access
    - The reimbursement program should not place administrative burdens on survivors and staff. Administrative burdens may include: requiring a substantial amount of paperwork and requesting demographical information beyond what would be reasonably necessary.
- Ensure Proper Follow Up is Available at No Cost
    - Follow up testing and counseling should be provided at appropriate time intervals based on clinical guidance.
- Financially Sustainable
    - A pilot program should be structured such that prophylactic HIV treatment and follow up can be offered consistently and successfully statewide
- Data Collection
    - Certain data should be collected to inform future efforts to estimate the cost of providing prophylactic HIV treatment to all qualifying survivors and measure the compliance rates associated with how this medication is provided to survivors and monitored. Care should be taken to protect the victim's privacy and only necessary data should be collected.

The Funding Subcommittee also developed three funding strategies to help the State estimate and decrease the cost of providing the full regimen.

(1) The State should establish a three year pilot program with a sunset and review process, funded by a combination of funding streams such as funds for HIV prevention activities and the Crime Victim Compensation Fund. The mechanics and implementation of the pilot program should be developed by a subgroup of the Committee with the appropriate stakeholder involvement. The subgroup will established the parameters of the program, such as: the appropriate cap on the reimbursement amount, the number of participating patients, or the type of patients able to participate (i.e. excluding military or incarcerated victims).

(2) The State should explore direct negotiations with the pharmaceutical companies that produce the HIV prophylactic medications that are currently recommended for patients to receive based on clinical guidance, similar to how the state

negotiates lower rates for the Maryland AIDS Drug Assistance Program. Any savings or rebates achieved should go into the Special Fund for State-Identified Priorities for HIV prevention or another established special fund.

(3) The State should consider the potential benefits offered by SAFE Programs at hospitals who participate in the federal 340B Program. Under Section 340B of the Public Health Service Act, pharmaceutical manufacturers enter into a pharmaceutical pricing agreement ("PPA"), with the Department of Health and Human Services' Secretary.[78] Under the PPA, "the manufacturer agrees to provide front-end discounts on covered outpatient drugs purchased by specified providers, called "covered entities," that serve the nation's most vulnerable patient populations."[79] The medications used in the nPEP regimen are considered covered outpatient drugs under the 340B Program.[80] As such, hospitals who participate in the 340B Program receive discounts on nPEP medications. This could prove beneficial to the State. It should be noted however, that not every hospital that operates a SAFE Program is eligible to participate in the 340B Program.

The Committee will review these recommendations with stakeholders to determine the best funding strategy.

2. Funding for Expanded Testing Criteria

In September of 2018, the Funding Subcommittee conducted a survey to determine the cost of implementing the expanded testing criteria established by the Testing Subcommittee. Fifteen law enforcement agencies—13 jurisdictions with the most untested kits, as well as two smaller jurisdictions located in Western Maryland—completed the survey. Survey questions focused on the cost of testing an individual kit and how much each jurisdiction spent in previous fiscal years to test SAEKs.

The Committee drew the following conclusions from the survey results:

- The majority of agencies use the MSP lab to test SAEKs.

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[78] *Overview of the 340B Drug Pricing Program*, 340B HEALTH, https://www.340bhealth.org/members/340b-program/overview/ (last visited Dec. 12, 2018).
[79] *Id.*
[80] Torey Lam & Lauren Hedges, *340B Price Guide Update: Post-Exposure Prophylaxis of HIV for Adults and Adolescents*, 340B PRICE GUIDE (June 30, 2015, 2:26 PM), http://www.340bpriceguide.net/articles-news/57-340b-price-guide-update-post-exposure-prophylaxis-of-hiv-for-adults-and-adolescents.

- Five agencies (in addition to MSP) have the capacity to test their own sexual assault evidence kits: Anne Arundel County Police Department, Baltimore City Police Department, Baltimore County Police Department, Montgomery County Police Department, and Prince George's County Police Department.
- It costs between $240 and $4,000 to test SAEKs depending on what evidence the lab is testing.
- Most agencies do not allocate specific funds to test SAEKs. Agencies typically use funds from their general operations budget to test kits.

In its survey, MSP indicated that it costs $4,000 to test a SAEK in-house and $3,000 to outsource SAEK testing.[81] Expanding the testing criteria would require additional staffing and equipment, which would raise the cost of in-house analysis. Therefore, the Committee recommends that the General Assembly allocate sufficient funding to ensure that the recommended criteria does not unduly burden individual law enforcement agencies. This will allow more kits to be tested, ultimately identifying repeat sexual predators and increasing access to justice for victims of sexual assault.

D. Drug-Facilitated Sexual Assault

Over the years, there has been a nationwide increase in the number of drug-facilitated sexual assaults ("DFSA").[82] DFSA occurs when alcohol or drugs are used to compromise an individual's ability to consent to sexual activity.[83] Offenders who commit drug-facilitated sexual assaults are committing multiple crimes.[84] In addition to the sexual assault itself, it is illegal to drug an individual without his or her consent and many of the drugs used in drug-facilitated sexual

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[81] The Committee encourages law enforcement agencies to apply the new testing criteria to not only future kits that the agencies obtain, but also all of the older kits that are in the agencies possession. A distinction should be made between the cost for testing "old" kits and the cost for testing future kits. Under the SAKI grant, the Committee is receiving a specially negotiated outsourcing rate for testing done pursuant to the grant. However, the Committee will only be able to test about 15% of the older kits utilizing SAKI funding. As such, there will need to be additional funding to test all of the remaining "old" kits. The Committee will continue to look for resources like the SAKI grant to support that effort.

[82] U.S. Department of Justice: National Drug Intelligence Center, *Drug-Facilitated Sexual Assault Fast Facts, Questions, and Answers* (2004), https://www.justice.gov/archive/ndic/pubs8/8872/8872p.pdf.

[83] DRUG ENFORCEMENT ADMINISTRATION, DRUG-FACILITATED SEXUAL ASSAULT 3 (2018), *available at* https://www.dea.gov/sites/default/files/2018-07/DFSA_0.PDF.

[84] *Id.* at 5.

assaults are themselves illegal to possess.[85] Furthermore, many of the drugs used are a hazard to the public and can be physically detrimental to the victim.[86]

MHA, on behalf of the SAEK Committee, surveyed a broad geographical spectrum of Maryland hospitals to obtain information on drug-facilitated sexual assault. They found that none of the surveyed hospitals have the capacity to conduct toxicology screening in-house. Ten hospitals reported independently outsourcing toxicology testing for SAEKs, via contacts with outside laboratories. The hospitals varied regarding where they outsourced testing. Six hospitals reported sending specimens to national reference laboratories like ARUP Laboratories and NMS Laboratories. The remaining four hospitals reported using the clinical laboratory Quest Diagnostics. The hospitals who do not independently outsource toxicology testing in suspected DFSA cases advised that they provide the specimens to law enforcement with the sexual assault evidence kit.

In addition to surveying hospitals, the Committee also surveyed 15 law enforcement agencies.[87] Similar to hospitals, none of the surveyed agencies conduct toxicology tests in-house for drug-facilitated sexual assault. Only two agencies outsource toxicology tests for drug-facilitated sexual assault.[88]

Although the survey results revealed important information, there are still unanswered questions. In December, the Committee attended a training taught by FBI Toxicologist, Marc LeBeau and presented by MCASA. The Committee learned about common myths surrounding DFSA, common drugs used by perpetrators, indicators of DFSA, and challenges crime labs face

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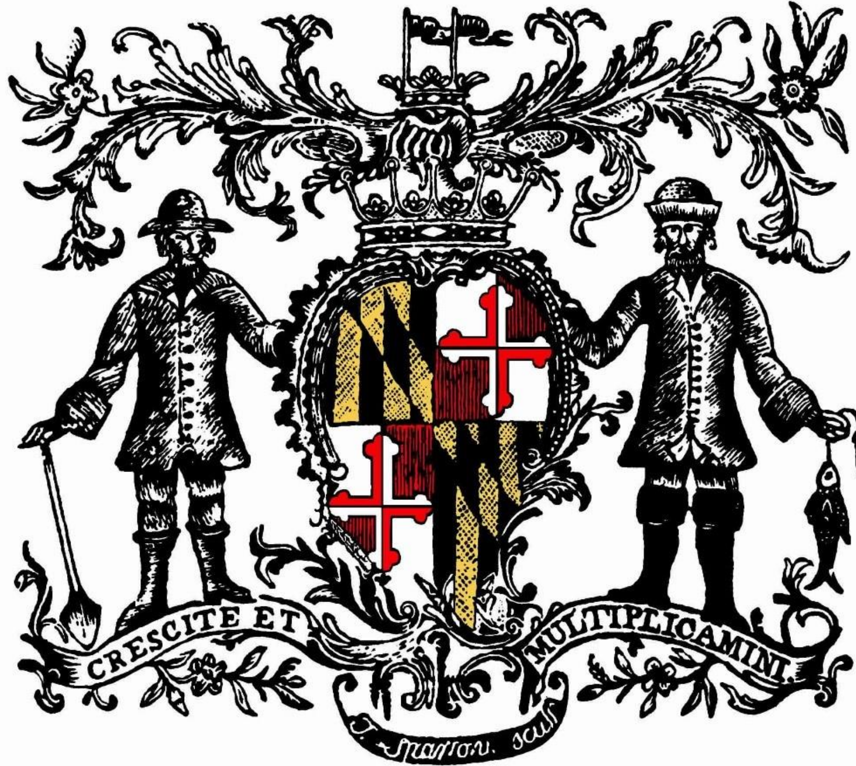
[85] *Id.*
[86] *Id*. at 6.
[87] The survey was conducted in September of 2018. The Funding Subcommittee questioned law enforcement agencies about their capacity to conduct toxicology tests on SAEK samples.
[88] Both the Anne Arundel County Police Department and Montgomery County Police Department indicated that their agency independently outsources toxicology testing for drug-facilitated sexual assault.

in DFSA cases. Drug-facilitated sexual assault is difficult to detect for a variety of reasons including the victim's delay in reporting, the evolving list of drugs used to facilitate sexual assaults, and the labs' ability to adequately test for DFSA. With this new information, the Committee intends to continue to explore ways to prevent and prosecute drug-facilitated sexual assault. In FY2019, the Committee will explore the best practices for DFSA testing and develop a standard protocol for hospitals, law enforcement, and labs to utilize.

CONCLUSION

The Sexual Assault Evidence Kit Policy and Funding Committee has made substantial achievements in its first year. The Committee has issued preliminary recommendations, applied for and received a $2.6 million federal SAKI grant, assisted the OAG in adopting new regulations, and developed new recommendations for FY2019. The Committee looks forward to continuing to improve Maryland's policies regarding SAEKs and increasing access to justice for all sexual assault victims.

Appendix



Statewide Accounting of Untested Sexual Assault Evidence Kits in the State of Maryland

Report of the Office of Attorney General

Brian E. Frosh
Attorney General

January 1, 2017

Introduction

Every 22 minutes, someone in the United States is sexually assaulted. Sexual assault forensic examinations (SAFEs) and sexual assault evidence kits (SAEKs) are vital to the investigation and prosecution of these sexual assaults[1] DNA and other evidence recovered from SAEKs are an important tool used to identify perpetrators, prove sexual contact, and corroborate the victim's testimony.[2] The FBI's Combined DNA Index System (CODIS)—a national DNA database populated by samples submitted by participating federal, state, and local forensic laboratories—also uses SAEK evidence to identify serial perpetrators of sexual assault and exonerate innocent people accused of crimes.

Timely testing of SAEKs is critical to maximizing the value of the evidence collected. But in 2014, the White House Council on Women and Girls and the Office of the Vice President issued a report titled *Rape and Sexual Assault: A Renewed Call to Action*, which found that many evidence kits were not being submitted to the lab for testing, while others were languishing for months before being tested due to lack of resources and funding for crime labs. The report noted that

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[1] Sexual assault forensic examinations are performed by health care providers trained in forensic examination and evidence collection. Sexual assault evidence kits collect the evidence recovered during the SAFE exam. SAEKs typically include paperwork to document the exam, swabs and glass slides for biological evidence collection, containers for blood and urine samples, evidence bags for clothing and other large pieces of evidence, and envelopes for hair, fibers, and other trace evidence.

[2] The term "victim" is used throughout this report to refer to people who have experienced sexual assault because it is the term used in relevant statutes and the criminal justice system. We appreciate, however, that many people who have suffered sexual assault prefer the terms "survivor" or "victim/survivor." We respect those preferences and mean no disrespect by our choice of language.

requests for DNA testing continue to rise, and so long as demand continues to outpace capacity, "the rape kit backlog may continue to grow."

Since the White House report, a nationwide effort to end the backlog of untested kits has gained momentum. The Department of Justice and the Manhattan District Attorney's Office have awarded $38 million in grants to state and local agencies to test backlogged kits. Thirty-five states have audited their number of untested kits and made changes to the processes for collecting, tracking, and storing SAEKs in an effort to improve the number of kits tested.

Maryland joined this effort last year when the General Assembly passed Senate Bill 498 requiring law enforcement agencies to conduct an audit of their untested kits and report the results to the Office of the Attorney General. Under that law, the OAG is required to submit a report to the General Assembly "detailing: (1) the number of untested sexual assault collection kits being stored by each agency; (2) the date that each untested sexual assault collection kit was collected; and (3) recommendations for addressing any backlog of untested sexual assault collection kits."

To comply with the General Assembly's mandate, the Governor's Office of Crime Control and Prevention (GOCCP) – on behalf of the OAG – surveyed 135 law enforcement agencies and asked a number of questions about the untested kits in their possession. The survey results revealed that Maryland does not have a "backlog" of untested SAEKs in the traditional sense of the word. That is, there is no waitlist of kits that have been submitted to the lab but have not yet been tested due to a lack of staffing and resources. Rather, the law enforcement survey revealed that the vast majority of untested kits in Maryland are kits that, for various policy reasons, law enforcement have determined should not be submitted for testing. The kits are not untested because the lab is backlogged; rather, they are untested because a determination was made not to submit them to the lab for testing.

Although there is no "backlog" of kits awaiting testing, the OAG saw the survey responses as presenting a different opportunity for improvement.[3] A follow-up survey was conducted to identify the criteria used when determining not to submit SAEKs for testing. The results revealed inconsistent policies among agencies regarding not only when to test SAEKs, but also how long untested kits are retained, and whether the victim is notified during different phases of the collection and testing procedure. A Working Group was assembled that included forensic nurse practitioners, prosecutors, DNA analysts, law enforcement officers, and victim advocates.[4] The Working Group provided invaluable insight and contributed to the recommendations for best practices contained in this report.

Section I of the report explains the inventory survey and its results. Section II explains the current policies amongst agencies relating to the testing, storage, and retention of SAEKs.

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[3] The End the Backlog website, run by the Joyful Heart Foundation, agrees that rape kit "backlogs" are really comprised of two distinct problems: (1) "untested" or "unsubmitted" kits, which are rape kits that are "collected and booked into evidence," but not submitted for DNA testing; and (2) "backlogged" kits which occur "where rape kits that have been submitted for testing are awaiting DNA analysis." http://www.endthebacklog.org/backlog-what-it/defining-rape-kit-backlog. Maryland has kits that fall into the first category, not the second. However, adopting policies which lead to expanded or accelerated testing could create "backlogged" kits and should therefore be accompanied by sufficient funding to accommodate the increased volume.

[4] The members of the Working Group included: **Bryan Bowen**, Baltimore Police; **Francis Chiafari**, Montgomery Cty Police, Program Admin, Crime Laboratory Director; **Donna Clarke**, Prince Georges Hospital Ctr., Program Administrator, **Rana DellaRocco,** Baltimore City Police, Director; **Elizabeth Embry,** OAG, Criminal Division, AAG –Counsel; **Pamela Holtzinger,** Frederick Memorial Hosp., Forensic Nurse Coord.; **Janice Howe,** Morgan, Lewis & Bockius LLP, Attorney; **Zenita Hurley,** OAG, Civil Rights and Legislative Affairs Chief Counsel; **Lisae Jordan,** MCASA, Executive Director; **Daniel Katz,** Maryland State Police (MSP) - Forensic Services Division, Director; **Jeffrey Kloiber,** MSP, Exec Officer; **Karen Kruger,** Md Sheriffs' Associations & Executive Director, MD Chief of Police; **Ron Levitan,** OAG, MSP, Counsel; **Kathleen McDermott,** Morgan, Lewis & Bockius LLP, Attorney; **Lynnett Redhead,** PG County Police Dept, DNA Laboratory Manager; **Robert Taylor,** OAG, Criminal Appeals AAG; **Carrie Williams,** OAG, Criminal Appeals AAG; **Elizabeth Wynkoop,** MCASA SAFE/SART, Program Coordinator; **Jeffrey Zuback,** GOCCP, Research Chief.

Section III identifies the best practices for handling SAEK kits, and discusses national and state standards. Section IV offers recommendations for further action.

I. Inventory of Untested Sexual Assault Evidence Kits

To identify the State's inventory of untested SAEKs, GOCCP surveyed 135 law enforcement agencies regarding untested SAEKs in their possession. Specifically, the survey sought information from each agency regarding: (1) The number of untested SAEKs; (2) the date that each untested SAEK was collected; (3) total number of SAEKs that are Jane Doe/Anonymous SAEKs[5]; (4) whether the agency submits Jane Doe SAEKs to a crime lab for biological analysis; and (5) recommendations for expediting the testing of SAEKs.

In response to the survey, 102 law enforcement agencies submitted responses revealing a total of approximately 3700 untested SAEKs statewide. (See Table 1.) About 60% of the kits were collected between 2009 and 2016. Five percent were collected between 1981 and 1997, and the rest were collected between 1998 and 2009. (See Table 2.) As discussed more fully below, most jurisdictions reported no backlog of untested kits because the kits were deliberately not tested due to the agency's testing policies. The key data is set forth in the following tables.

[5] Jane Doe or Anonymous kits refer to SAEKs collected from victims who do not wish to participate in the criminal justice system. Under federal law, 42 U.S.C. §3796gg-4, to be eligible for funding under the Violence Against Women Act of 2005, states must provide forensic examinations to victims free of charge, regardless of whether the victim wishes to pursue criminal charges. All Maryland jurisdictions and the Maryland State police have complied with this federal mandate.

Table 1. Number of untested and anonymous SAEKs in Possession of Law Enforcement Agencies[6]

Agency	# Untested SAEKs	# Anonymous SAEKs
Allegany County Sheriff's Office	N/A	N/A
Annapolis City Police Department	36	3
Anne Arundel County Police Department	207	Unknown
Anne Arundel County Sheriff	N/A	N/A
Baltimore Police Department	871	0
Baltimore City Community College Office of Police and Public Safety	N/A	N/A
Baltimore City Sheriff	N/A	N/A
Baltimore County Police Department	197	34
Baltimore County Sheriff	N/A	N/A
Bel Air Police Department	0	N/A
Berlin Police Department	9	9
Berwyn Heights Police Department	N/A	N/A
Bladensburg Police Department	N/A	N/A
Boonsboro Police Department	1	0
Bowie Police Department	N/A	N/A
Bowie State University	0	0
Brentwood Police Department	N/A	N/A
Brunswick Police Department	0	0
Calvert County Sheriff	48	0
Cambridge Police Department	51	0
Capitol Heights Police Department	0	0
Caroline County Sheriff	0	N/A
Carroll County Sheriff	49	16
Cecil County Sheriff	9	1
Centreville Police Department	0	0

[6] A few of the agencies that responded "0" to the question of how many untested kits were in their possession also noted that kits collected by their officers were tested and retained by other law enforcement agencies. It is therefore possible that some agencies who responded "0" had no untested kits because they do not perform this function, and thus are more appropriately categorized under "N/A." For purposes of this report, agency responses are being reported exactly as they were submitted.

Agency	# Untested SAEKs	# Anonymous SAEKs
Charles County Sheriff	14	4
Chestertown Police Department	4	0
Cheverly Police Department	0	N/A
Chevy Chase Village Police Department	N/A	N/A
Colmar Manor Police Department	N/A	N/A
Comptroller of Maryland - Field Enforcement Division	N/A	N/A
Crisfield Police Department	4	0
Crofton Police Department	N/A	N/A
Cumberland Police Department	0	0
Denton Police Department	4	1
Dorchester County Sheriff	0	0
Easton Police Department	1	0
Edmonston Police Department	0	0
Elkton Police Department	4	2
Fairmount Heights Police Department	0	0
Federalsburg Police Department	0	0
Frederick County Sheriff	32	1
Frederick Police Department	143	18
Frostburg State University Police Department	0	0
Fruitland Police Department	0	0
Gaithersburg Police Department	0	0
Garrett County Sheriff's Office	0	N/A
Glenarden Police Department	0	0
Greenbelt Police Department	0	N/A
Greensboro Police Department	0	N/A
Hagerstown Police Department	12	1
Hampstead Police Department	N/A	N/A
Hancock Police Department	0	0
Harford County Sheriff	107	5
Havre de Grace Police Department	13	1
Howard County Police Department	503	10
Howard County Sheriff	N/A	N/A
Hurlock Police Department	2	0

Agency	# Untested SAEKs	# Anonymous SAEKs
Hyattsville City Police Department	21	0
Kent County Sheriff	0	0
Landover Hills Police Department	N/A	N/A
Laurel Police Department	N/A	N/A
Luke Police Department	N/A	N/A
Maryland Capital Park Police - PG County Division	0	0
Maryland State Police	57	14
Montgomery County Police Department	1,165	80
Montgomery County Sheriff	N/A	N/A
New Carrollton Police Department	N/A	N/A
North East Police Department	N/A	N/A
Ocean City Police Department	0	0
Ocean Pines Police Department	N/A	N/A
Pocomoke City Police Department	2	0
Prince George's Community College Police Department	N/A	N/A
Prince George's County Police Department	99	91
Prince George's County Sheriff	N/A	N/A
Queen Anne's County Sheriff	2	0
Ridgely Police Department	0	0
Riverdale Park Police Department	N/A	N/A
Salisbury Police Department	46	0
Salisbury University Police Department	N/A	N/A
Seat Pleasant Police Department	N/A	N/A
Smithsburg Police Department	0	N/A
Snow Hill Police Department	0	N/A
Somerset County Sheriff's Office	0	N/A
Spring Grove Hospital Center Police	0	0
St. Mary's County Sheriff	0	0
St. Michael's Police Department	1	0
Sykesville Police Department	0	0
Talbot County Sheriff's Office	0	0
Thurmont Police Department	2	0

Agency	# Untested SAEKs	# Anonymous SAEKs
Towson University Police Department	1	0
Trappe Police Department	1	0
University of Baltimore Police Department	N/A	N/A
University of Maryland Baltimore County Police Department	3	0
University of Maryland, Baltimore Police Force	N/A	N/A
University of Maryland Police Department	4	0
University Park Police Department	0	N/A
Upper Marlboro Police Department	0	0
Washington County Sheriff	10	2
Westminster Police Department	0	0
Wicomico County Sheriff	1	1
Worcester County Sheriff	0	0

Table 2.

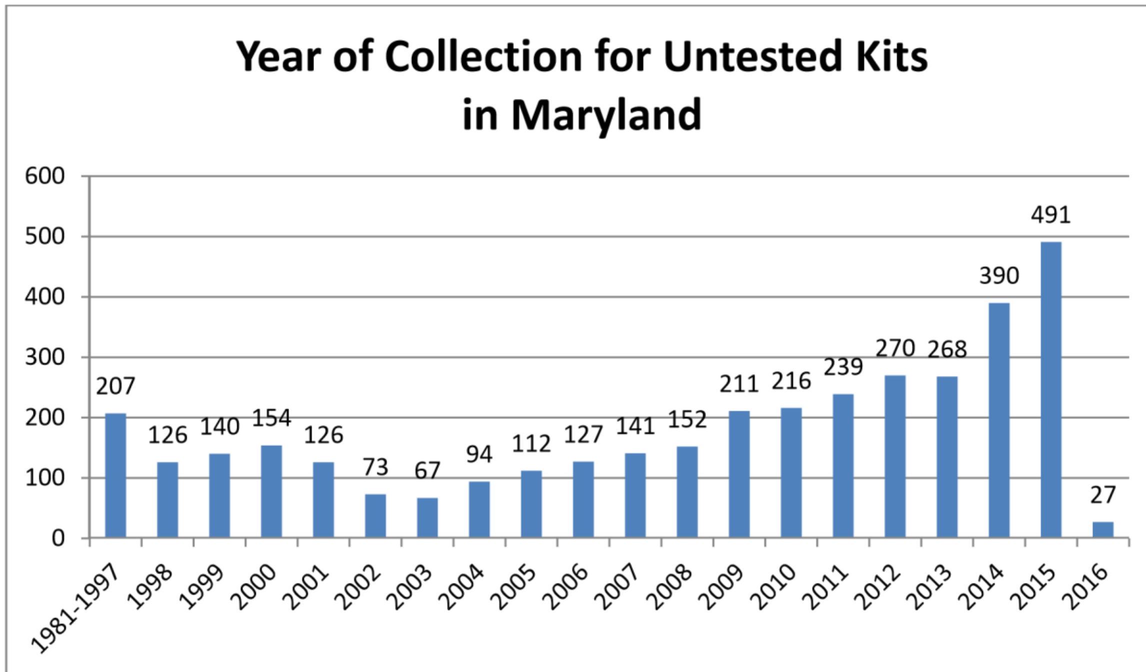
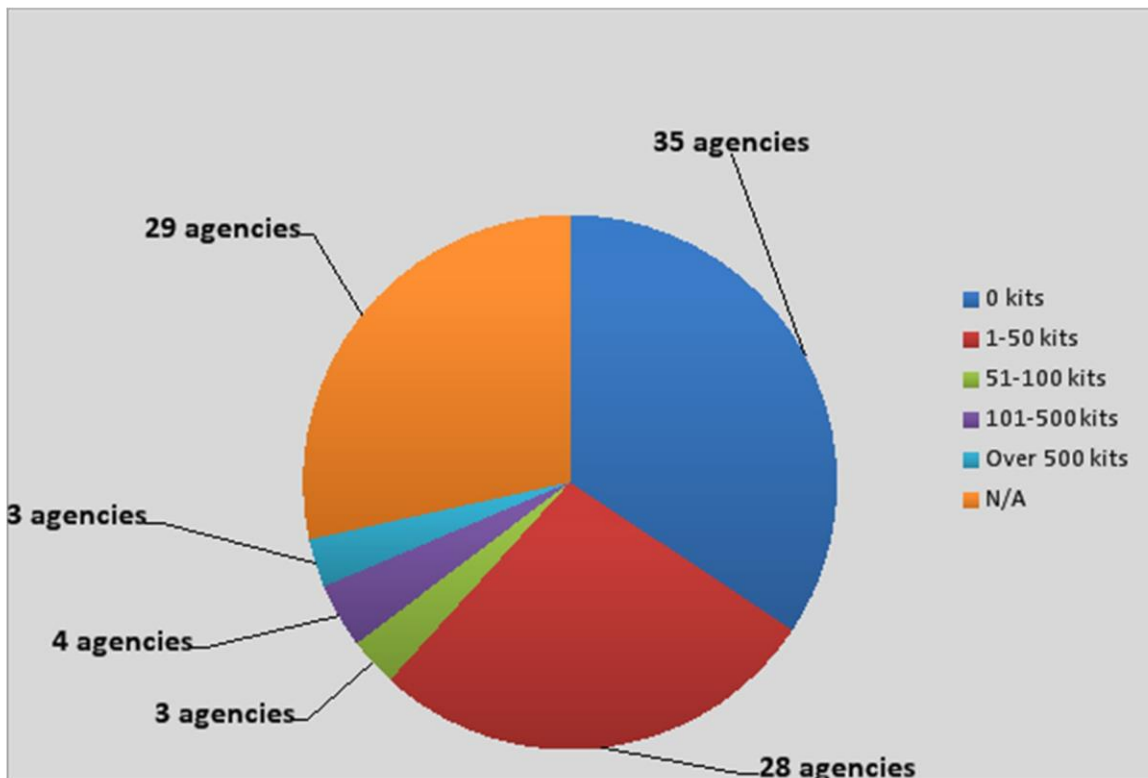


Table 3. Number of agencies broken down by range of untested kits in their possession



More than 90% of untested kits were in the custody of 13 of the 102 responding agencies. (See Table 3.) Many of these agencies serve the most populated counties or cities in Maryland, but some smaller jurisdictions also have significant numbers of untested kits. The 13 agencies with the most untested kits in their possession are: (1) the Montgomery County Police Department (1,165); (2) the Baltimore City Police Department (871); (3) the Howard County Police Department (503); (4) the Anne Arundel County Police Department (207); (5) the Baltimore County Police Department (197); (6) the Frederick Police Department (143); (7) the Harford County Sheriff's Office (107); (8) the Prince George's County Police Department (99); (9) the Maryland State Police (57); (10) the Cambridge Police Department (51); (11) the Carroll County Sheriff's Office (49); (12) the Calvert County Sheriff's Office (48); and (13) the Salisbury Police Department (46).

On their own, these numbers don't convey much about the effectiveness of an agency's SAEK testing protocols. Each jurisdiction sets its own policy for retaining untested SAEKs. And an agency with a 10-year retention policy will have many more untested kits in its inventory than an agency that destroys untested kits every 12 months. The Montgomery County Police Department, for example, reports 1,082 untested kits in its possession, the highest number of any agency surveyed. But the Montgomery County Police Department's policy is to retain all untested kits indefinitely, so many of the kits in its possession would have been destroyed years ago in other jurisdictions.

Similarly, an agency might have fewer untested kits because fewer crimes of sexual assault were reported in its jurisdiction. On the other hand, it may lack officers trained to determine when it is appropriate to collect SAEK evidence. For these reasons, no conclusions should be drawn about an agency's operations based solely on the number of untested kits reported.

This report focuses instead on the policy reasons agencies choose not to test SAEKs in their possession, and the practices surrounding SAEK collection, testing and storage. To further assess the policies and practices related to untested kits, the OAG sent a follow-up survey to agencies with 50 or more untested kits. The follow-up questions focused on the criteria used in determining not to test SAEKs. All respondents confirmed that the vast majority of untested kits in their possession were not tested pursuant to agency policy. Reasons given by agencies for not testing kits include:

Identity of suspect known
Allegations unfounded[7]
Victim signed no prosecution form/refused to prosecute
Suspect admitted to consensual sex
State's Attorney declined prosecution
Case held for post-conviction
Case occurred in other jurisdiction
Suspect pled guilty
False Report
Anonymous/Jane Doe kit
Missing records
Analysis not needed for prosecution per State's Attorney

II. Current SAEK Practices in Maryland

Maryland law does not require law enforcement agencies to collect, store, track, or test SAEKs, and no uniform standards exist to guide law enforcement agencies. As a result, many

[7] Under the FBI's Uniform Crime Report (UCR), "unfounded" means baseless (the criminal act does not meet the legal definition of sexual assault) or false (victim fabricated the claim). However, at least one media investigation has found that law enforcement agencies mischaracterize SAEK cases as unfounded where there is no evidence the claim was baseless or fabricated. *See* "Unfounded: When Detectives Dismiss Rape Reports Before Investigating Them," Alex Campbell and Katie J.M. Baker, *Buzzfeed*, September 8, 2016. Although this report makes no conclusions about the survey respondents' kits that were marked unfounded, evidence that the term "unfounded" can be easily misused supports our recommendation in Section IV that all kits be tested unless the allegations of sexual assault were "disproven."

jurisdictions have implemented their own policies for collection, storage, and retention of SAEKs.[8] Not surprisingly, these protocols differ amongst jurisdictions.

Practitioners from several Maryland jurisdictions were surveyed regarding their process for keeping or destroying SAEKs, whether there are any special procedures for handling anonymous SAEKs, and the procedure for notifying victims regarding the SAEK test results.[9] The results indicated that policies for kit retention varied widely – from 90 days to indefinite retention. Retention polices for anonymous kits are equally varied. Anonymous kits are kept for 3 months in Baltimore County, 6 months in Allegany County, 12 months in Calvert and Carroll Counties, 18 months in Howard County and Baltimore City, and 2 years in Wicomico County. Montgomery

[8] It is important to note that Sexual Assault Forensic Exams (SAFEs), from which SAEKs are collected, are not always accessible to victims for two reasons. First, not all hospitals have a SAFE programs. There are 24 "SAFE Programs", with some providing sexual assault forensic exams only to non-pediatric cases (over 13 years old) and others only to pediatric cases. Complicating this further, there is a serious shortage of forensic nurse examiners, so even when a SAFE *program* exists, there may not be a nurse available to perform an exam. As a result, sexual assault survivors may be shuttled from place to place, sometimes giving up and not getting an exam to collect evidence of a sex crime. Beyond preventing some victims from accessing medical care, inaccessibility of SAFE exams also jeopardizes potential criminal cases against assailants. *See*, Department of Health and Mental Hygiene (2015), *Report to the Governor, the Senate Finance Committee, and the House Health and Government Operations Committee Regarding Improved Access to Sexual Assault Medical Forensic Examinations in Maryland House Bill 963/Chapter 627, Section 2(g) of the Acts of 2014* ("DHMH Report"); and *Id.,* Appendix R, Testimony by the Maryland Coalition Against Sexual Assault (MCASA). We understand that earlier this year the legislature directed DHMH to report by December 15, 2016 on its efforts to establish mobile SAFE teams or other protocols to ensure that all hospitals with emergency departments have a plan so that sexual assault victims have access to SAFEs at hospital facilities. The legislature also directed the Board of Nursing to report by October 1, 2016 on the availability of online instruction for forensic nurse examiners to become certified to perform SAFE exams. We urge the legislature to closely review the content of these reports and consider taking any other action appropriate to improve statewide access to SAFE exams.

[9] The following agencies were surveyed about their SAEK procedures: Allegany County, Baltimore City, Calvert County, Harford County, Montgomery County, St. Mary's County and Wicomico County. Unfortunately, because very few jurisdictions have written SAEK policies and process SAEKs across several different agencies and/or organizations, it is difficult to find one individual who can speak with authority on all stages of SAEK collection, testing and storage practices in a given region. As a result, many of the surveys were returned with incomplete responses

County keeps anonymous kits indefinitely. In several jurisdictions, anonymous kits are the only kits that are tracked and stored for a specific period of time.

Storage methods and follow up also differ. Some kits are stored in refrigerators; others in evidence storage lockers. Although some jurisdictions have forensic nurses and victim advocates followup with victims after the kit is collected, a number of jurisdictions leave follow up to police department discretion and, consistent with current State law, require notice only upon a victim's affirmative inquiry. Some jurisdictions notify anonymous victims prior to destroying their kits, others do not.

The policy inconsistencies among jurisdictions are due in large part to the lack of statewide guidance on best practices in handling SAEKs. For example, there is no law mandating retention time or requiring victim notification or support.[10] There is also no dedicated funding for testing SAEKs or focused training related to collection, storage, and testing of SAEKs.

Some experts have noted that the definition of sexual assault in federal statutes and many other jurisdictions includes but is broader than the legal definition of rape. It means any nonconsensual sexual act proscribed by federal, tribal or state law, including when the victim lacks capacity to consent. *See e.g.,* Section 3772 (4)(c) of *Survivor's Bill of Rights Act of 2016*. Generally, in Maryland, policies related to untested kits may be the result of confusion and ambiguity in Maryland's current rape statute that requires a rapist use force or a threat of force as

[10] A law enacted in 2015 requires health care professionals who perform the examinations and collect the biological and other evidence to provide a victim of sexual assault with contact information of the law enforcement agency assigned to the investigation, and victims must be provided with access to information about the testing of their SAEKs upon request, but nothing requires law enforcement to initiate follow up or notice. See Md Code Crim. Proc. §11-926 (2015).

an element of the crime. The fact of an assault but the absence of physical resistance may contribute to an agency's policy decision not to pursue testing or prosecution. *See e.g.* Maryland Coalition Against Sexual Assault, September 22, 2016 Press Release, http://www.mcasa.org/mcasaapplaudsplanstoreintroducebill/. Other issues, including bias, may impact the desire to pursue testing as found in the U.S. Department of Justice's recent review of the Baltimore City Police Department.[11]

III. Best Practices Identified From Other Jurisdictions and National Standards

Since 2014, in response to growing evidence that SAEKs were not used effectively in combatting sexual assault crime, 35 have enacted various audit and reform measures to address the systemic deficiencies in procedures and funding related to collection, tracking, testing, storage, notification, and training. Many state legislatures have also provided designated funding for untested kits, investigations and prosecutions, training and victim support. See Compilation of State Data in Appendix. Creating time mandates for collection, testing, and destruction, and providing victim's notification rights are the most common areas of reform. Many jurisdictions have sought grant funding for SAEK testing, training, and prosecution, and a condition of grant funding may be adoption of one or more model provisions related to the timing of testing, duration of storage and victim notification rights.

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[11] See "Investigation of the Baltimore City Police Department," by the U.S. Department of Justice Civil Rights Division, August 10, 2016, pages 122-127, available at https://www.justice.gov/opa/file/883366/download, which found evidence of gender bias among other issues, including that the Baltimore City Police Department ("BPD") persistently neglects to request lab testing of sexual assault evidence kits. The BPD, which reported over 800 untested SAEKs, recently entered into an Agreement in Principle ("Agreement") with the United States Department of Justice on August 9, 2016 relating to its policing practices. See Agreement in Principle Between The United States and the City of Baltimore Regarding the Baltimore City Police Department, August 9, 2016, available at https://www.justice.gov/opa/file/883376/download. One area of mandated reform is how the agency responds to sexual assault crimes. See Agreement at p. 5

The federal government has also responded. In 2016, President Obama signed the *Survivor's Bill of Rights Act of 2016*, declaring that any federal government grant recipients must afford sexual assault victims certain rights, including: the right to be provided a forensic medical examination free of charge; the right to have his or her SAEK preserved until the statute of limitations for the sexual crime expires or 20 years, whichever is shorter; the right to receive notice of any result from a SAEK, including DNA matches; the right to be notified before kit destruction; and the right to have notice of the policies related to the collection and preservation of SAEKs. The law also directs the U.S. Department of Justice to establish a working group to develop best practices regarding the care and treatment of sexual assault victims and the preservation of forensic evidence. *Public Law 114-236 114th Congress (October 7, 2016*).

Determining which SAEKs Should Be Tested

A number of states considering the types of SAEKs that should be tested ultimately recommend a broad presumption to test all kits with very limited exceptions. An Arizona report on the issue determined that:

> "The only circumstances in which a sex crimes evidence kit should not be submitted to the laboratory for testing is if law enforcement determines the case is unfounded or a victim chooses not to report. The presumption in favor of testing ensures sex offender DNA will be uploaded into state and federal law enforcement databases for appropriate use. Sex crimes evidence kits should be tested even if the identity of the suspect is known and regardless if the case is ultimately prosecuted. Testing all kits builds trust with victims who choose to undergo the medical forensic exam and report to law enforcement. Testing all kits can identify or confirm the suspect's identity and can link cases across jurisdictions to help identify serial and unknown offenders."[12]

[12] See Report of the Arizona Sexual Assault Evidence Collection Kit Task Force, September 30, 2016, at p.14.
http://azgovernor.gov/sites/default/files/sexual_assault_evidence_collection_kit_task_force_report_09302016.pdf

Recent Oregon legislation mandates the testing of all rape kits except for anonymous or Jane Doe kits. (*See* "Melissa's Law", SB 1571 (2016).) Broad testing protocols ensure fair and equal treatment of victims and provide law enforcement the best tools for prosecuting crimes of sexual assault.[13]

Time Mandates for the Collection and Testing of SAEKs

States vary significantly regarding time-of-collection rules and many have structural deficiencies that may undermine the goal of timely testing. Significantly, many states do not require the tracking or testing of kits even where collection is regulated. In Oregon, for example, law enforcement is required to collect kits from hospitals within 7 days, and submit kits for testing within 14 days of collection, but there is no time limit for when the lab must test the kit. In Pennsylvania, kits must be collected from hospitals within 72 hours, submitted to the crime lab within 15 days, and tested by the crime lab within 6 months. In Idaho, the law requires "timely" testing but does not mandate any particular time. In California, law enforcement is required to submit the kit for testing within 20 days, and the crime lab must complete testing within 120 days. In Texas, law enforcement must submit kits for testing within 30 days and the crime lab must test as soon as "feasible."

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[13] See e.g., The Detroit Sexual Assault Kit Action Research Project, November 9, 2015, pp. 173-174, available at https://www.ncjrs.gov/pdffiles1/nij/grants/248680.pdf, which identified 785 CODIS eligible profiles, 455 CODIS hits, and 127 "serial sexual assault hits" (a DNA match across two or more kits) during its audit of 1,595 untested SAEK kits. Similarly, in Ohio's Cuyahoga County, after testing 5,000 kits in 2013, the State Prosecutor's office completed 2,332 follow-up investigations, indicted 527 defendants, and as of November 2016, had convicted 219 defendants. SAEK testing played an important role in obtaining many of these convictions. See http://bigstory.ap.org/article/92a6536a8e3241c4ba1c21f27d8bab47/testing-backlogged-rape-evidenceleads-hundreds-convictions.

The best practice identified is to require testing of kits within designated time parameters. There are two significant time periods for which parameters must be set. The first is the time for law enforcement to submit a kit for testing—best practices here appear to be between seven and 30 days. The second is the time period by which the kit must be tested by the lab. States establishing a time requirement for this period usually require that kits be tested between 30 and 90 days of submission. For example, Connecticut requires that kits be sent to the lab within 10 days of collection and be tested by the lab within 60 days. Florida requires that kits be sent to the lab within 30 days of collection and be tested within 120 days of submission to the lab. Michigan requires that kits be sent to the lab within 14 days of collection and be tested within 90 days of submission to the lab.

States implementing a mandatory-test system for the first time (*e.g.* Kentucky) have included a staggered maximum time for testing kits, for example, within 90 days by 2018, within 60 days by 2020. To ensure that any established timeframes are met, Arizona recommended establishing a tracking system that could follow the kit from issuance through its final disposition, storage or destruction. Oregon requires state and local law enforcement agencies to adopt written policies and procedures regarding the handling of kits and to also input testing results into CODIS. Pennsylvania requires law enforcement agencies to report the number of untested kits in their inventories to the Department of Health within six months of receipt, and must submit these untested kits to the law within one year of reporting.

Duration of Kit Storage and Destruction Policies

Statutory retention periods for SAEKs vary among the states that have enacted such laws. Best practices in this area include: (1) retaining kits –other than anonymous kits –for, at minimum,

the statute of limitations for the offense; (2) retaining *all* kits for, at minimum, the statute of limitations for the offense—regardless of whether a victim elects (initially) to prosecute; (3) ensuring that all kits—after testing—are retained in a police-controlled evidence storage facility, with appropriate humidity, temperature, and related environmental controls as well as chain-ofcustody controls. A few jurisdictions maintain kits for significantly longer than their limitations period. The federal standard suggests that kits be preserved for 20 years. *Survivor's Bill of Rights Act of 2016.* Because there is no statute of limitations for crimes of sexual assault in Maryland, a policy to retain kits consistent with the statute of limitations would require indefinite storage.

Victim Notification Rights

Some jurisdictions have no mandated notification rights. Other jurisdictions have passive notice procedures authorizing information in the event of a survivor query. For example, law enforcement in Oregon must have at least one person within the agency to answer survivors' questions regarding the status of their kits and local law enforcement must respond within 30 days. Other states, such as Kentucky, Pennsylvania and Utah, have recently enacted affirmative notice procedures, requiring law enforcement to advise survivors of key information related to the timing of testing and database matching.

California and Idaho have the most comprehensive victim notice obligations. In California, law enforcement must tell victims if they decide not to test a rape kit within established time limits, and must notify victims 60 days prior to destroying a kit. Victims are also granted the right to designate a sexual assault victim advocate to receive any of the above information. The law also requires law enforcement agencies to inform victims if the law enforcement agency does not

analyze the DNA evidence within certain time limits, whether or not the identity of the perpetrator is known.

In Idaho, law enforcement must notify victims of the status of their rape kits including when: (1) a kit is submitted to a lab; (2) a DNA profile is uploaded to the DNA database; (3) a match occurs between the profile and another profile in the database; (4) a kit is going to be destroyed; and (5) any change in case status occurs, including the reopening of the case. In 2015, Pennsylvania passed a law requiring law enforcement to notify the victim when a kit is submitted to the lab, when a sample is entered into the DNA database, and when there is a database match.

Other states providing victim notification rights include Kentucky, Oregon, and Utah.

Funding Untested Kits and Uniform Standards

States that have implemented reforms generally have received dedicated funding from their state legislatures, or grants from the federal government or other funding source. Funding is critical to ensure sufficient resources to properly test and store SAEKs, to train law enforcement and lab personnel, and to provide victim support services The U.S. Department of Justice's Bureau of Justice Assistance and the Manhattan Office of the District Attorney are two agencies that have provided substantial funding to states and local communities to improve SAEK policies.

Training and Education

To implement uniform procedures for the collection, testing, and storage of SAEKs, and to improve victim support and notification requires training and education. At the federal level, the U.S. Department of Justice's Bureau of Justice Assistance sponsors the National Sexual Assault Kit Initiative, which provides funding and offers a National Training and Technical Assistance Program that assists in establishing sustainable changes in policies that relate to untested SAEKs

and sexual assault response. The National Training and Technical Assistance Program offers an online toolkit/resource guide that provides guidance and a source for evidence based practices and resources.[14] Other training resources exist also, including those provided by the National Sexual Violence Resource Center.[15]

IV. Recommendations for Further Action

The following recommendations are offered for review and consideration by the General Assembly, law enforcement agencies, victim advocacy organizations, and other interested stakeholders. Many of these recommendations can be implemented without legislation, through the adoption into the policies and general orders of law enforcement agencies. The implementation of some of these recommendations will be costly, and it will likely be necessary to supplement state resources with federal and other grant funding in order to implement these recommendations.

1. Establish a statewide policy that sexual assault evidence kits will be tested within defined time parameters unless: (1) there is clear evidence disproving the allegation of sexual assault (unfounded); or (2) the allegation, even if true, would not result in the creation of forensic evidence of sexual assault.[16] In the case of a Jane Doe/anonymous kit, the victim should be given the explicit option to consent to testing without any commitment to further action. Where consent to test is still denied, the kit should not be tested. This same

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[14] *See* https://www.bja.gov/ProgramDetails.aspx?Program_ID=117#horizontalTab3.

[15] *See* http://www.nsvrc.org/projects/eliminating-rape-kit-backlog#response.

[16] It is probable that an increase in SAEK testing will reveal a high incidence of repeat offenders and multiple sexual assaults involving the same suspect. Although beyond the scope of this report, many workgroup members felt that this information would be more valuable if Maryland joins those states which have adopted the federal rule regarding the admissibility of prior sexual assaults in a criminal prosecution. See Federal Rule of Evidence 413 (allowing evidence of a defendant's prior sexual assaults even if the victim is not the same) and FRE 414 (allowing evidence of child sexual abuse even if the victim is not the same.) There have been prior attempts to amend Maryland's law to comport with the federal rule, but they have not been successful. See e.g., House Bill 218 (2016).

standard should be applied to the State's existing inventory of untested kits. Existing untested kits that don't fall into any of the above exceptions should be tested unless the suspect is already in CODIS, his identity is not disputed, and there has been a final conviction, with all appeals having been exhausted. Kits related to cases where a defendant is still challenging his or her conviction should be tested.[17]

2. Establish a fixed period of time for retaining untested kits, including anonymous kits, that is no shorter than that prescribed by federal law, which requires that kits be preserved for the statute of limitations or 20 years, whichever is shorter. At least two local jurisdictions—Harford County and Montgomery County—already store SAEKs indefinitely. Notwithstanding any other policy, all kits related to convictions for first- or second-degree rape or sexual assault must be preserved, whether tested or not, due to the mandates of the DNA Postconviction Act. (Md. Code Ann., Crim. Proc. Art. §8-201).)

3. Implement victim notification requirements that mandate that investigators notify victims when a kit is sent for testing to the crime laboratory and of the results of the test (i.e. if there is a match in the database). Procedures for notifying victims about their cases should make use of community-based sexual assault victim advocates who can provide support

[17] In testing old kits, labs should seek to avoid confirmation contamination. One example would be to employ a double-blind process so that the people doing the pre-screening of known perpetrators have nothing to do with the testing, and none of the information about suspects or known perpetrators should be in the material provided to the technicians and analysts who actually do the testing and comparisons. The materials seen by the analysts should not in any way indicate that there has already been a trial or guilty plea in a case, or even that a suspect has been identified. Agencies should also be cautious in destroying old untested kits. Due to the requirements of Md. Code Ann., Crim. Proc. Art. §8-201, destroying untested old kits could lead to a person convicted of a certain offense claiming entitlement to a presumption that he would have been exonerated by the DNA sample under §8-201(j)(3).

and other services to survivors. It is also critical that protections be put in place to ensure victim privacy during notification process.

4. Develop a Model Policy with uniform standards for all jurisdictions and crime laboratories related to the collection, tracking, storage, testing, destroying, and reporting of kits. The Model Policy should include the recommendations set forth in paragraphs 1 through 3 above. In addition, it should include a standard form showing chain of custody, storage, and (where relevant) destruction. The policy should also extend to the handling and retention of evidence after conviction, in compliance with Section 8-201 of the Criminal Procedure Article.

5. Similar to the *Survivor's Bill of Rights Act of 2016*, create a Statewide SAEK Oversight Committee to develop: mandated uniform standards in a Model Policy; corresponding support for funding, training, education and survivor notification; long-term monitoring of agency compliance with the Model Policy; and policy guidance on the availability, collecting, testing and storage of sexual assault evidence kits and related issues.[18]

6. Provide funding for testing the current inventory of untested kits and designated funding for uniform standards and time mandates related to collection, tracking, storage, testing,

[18] The *Report to the Governor, the Senate Finance Committee, and the House Health and Government Operations Committee Regarding Improved Access to Sexual Assault Medical Forensic Examinations in Maryland (House Bill 963 - 2014)* also noted concern about the lack of statewide oversight for SAFE programs. Testimony by the Maryland Coalition Against Sexual Assault encouraged policymakers to consider carefully where this oversight should be housed, noting that though "forensic exams include medical components, the purpose of a forensic examination also includes collection and preservation of evidence. … [I]nvestigation, arrest, and prosecution rates increase when SAFE programs are effectively implemented. (Citations omitted.)

and reporting of test results. Funding should also be required for any future audits of untested kits, if desired.

7. The State and local jurisdictions should pursue private and grant funding to provide training and education to support compliance with current and modified policies.

8. Amend the State's consent form for victims to authorize testing of the rape kit even if the victim does not wish to take any additional action, and specify that the victim's DNA profile will not be used for any other purpose.

9. Enact a "Notice & Demand" statute governing chain of custody and confrontation issues at trial that is modeled after Md. Code Ann., Cts. & Jud. Proc. Art. §§ 1-1001 et seq. (2013), and creates a statutory bypass that allows prosecutors to present DNA evidence without calling numerous live witnesses. Such a law would (a) allow the state to establish chain of custody by providing a chain of custody log in advance of trial, which would avoid the presentation of testimony of low-level lab technicians who may have helped process the DNA evidence, but add nothing substantive to the proceedings. The defendant can still insist on the presence of these people, but he would have to do so in writing, in advance of trial.

Acknowledgements

In addition to the members of the OAG Working Group, the OAG would like to express its deepest appreciation to the law firm of Morgan, Lewis, whose contributions in surveying the national landscape of state SAEK audits and condensing the Working Group's discussions and recommendations into proposed text were crucial to the completion of this report. A special thanks goes to David Butler of Morgan, Lewis & Bockius LLP, who initiated the partnership between Morgan Lewis and the OAG and Kathleen McDermott who led the firm's efforts. We also acknowledge with much appreciation the work of Ana Victoria Hubickey, Esquire and Christina Lago, who were masterful in helping us explore the many ways the agency data could be illustrated in chart and graph form. Other Morgan Lewis counsel who contributed to this report include: Laura Flores (DC Office); Janice Howe (Boston); Kimberley Kimmone Kirkland (Boston); Jason Ray (Dallas); and Judd Stone (DC). Last but not least, many thanks to Jeffrey Zuback and his team at GOCCP who spent numerous hours assisting the OAG in developing and tracking responses to the law enforcement survey.

Appendix

Compilation of State SAEK Reforms

Appendix B
SAEK Committee Members

SAEK COMMITTEE MEMBERS

Carrie Williams (Chair)	Division Director, Criminal Appeals Division, Office of the Attorney General	Office of the Attorney General
Daniel Katz	Director	MSP - Forensic Sciences Division
Karin Green	Director	Criminal Injuries Compensation Board
Randi Walters	Deputy Secretary for Programs	Department of Human Services
Joyce Dantzler	Chief, Center for Injury and Sexual Assault Prevention	Department of Health
Teresa Long	Crime Lab Director	Howard County Police Department
Pamela Holtzinger	Forensic Nurse Coordinator	Frederick Memorial Hospital
Steven O'Dell	Chief	Baltimore Police Dept - Forensic Sciences and Evidence Management Div.
Tianna Mays	Managing Attorney	Sexual Assault Legal Institute
Claire Kelleher-Smith	Senior Staff Attorney	Maryland Coalition Against Sexual Assault
Scott Shellenberger	State's Attorney	Baltimore County
Keva Jackson McCoy	Deputy Director	State Board of Nursing
Justice Schisler	Chief of Planning & Implementation	Governor's Office of Crime, Control and Prevention

EX-OFFICIO MEMBERS

Senator Edward J. Kasemeyer	Senator and Chair of Budget and Taxation	Maryland Senate
Senator Delores G. Kelley	Senator and Vice-Chair of Judicial Proceedings	Maryland Senate

EX-OFFICIO MEMBERS CONTINUED

Delegate Susan McComas	Delegate and Member, House Judiciary	Maryland House of Delegates
Delegate Aruna Miller	Delegate and Member, House Appropriations	Maryland House of Delegates

ADVISORY MEMBERS

Lt. Russell C. Trow	Asst. Commander of our Criminal investigations Division	St. Mary's County Sheriff's Office
Jennifer Witten	Government Relations Director	Maryland Hospital Assn
Nora Hoban (alternate to Witten)	Senior Vice President, Policy and Data Analysis	Maryland Hospital Assn
Donna Melynda Clarke	Program Director	Domestic Violence & Sexual Assault Ctr., Prince George's Hospital Center
Brian Browne, MD	Chair, Emergency Medicine, UM School of Medicine	UM School of Medicine
Argi Magers	Forensic Scientist Manager, Biology Section	MSP - Forensic Sciences Division

STAFF

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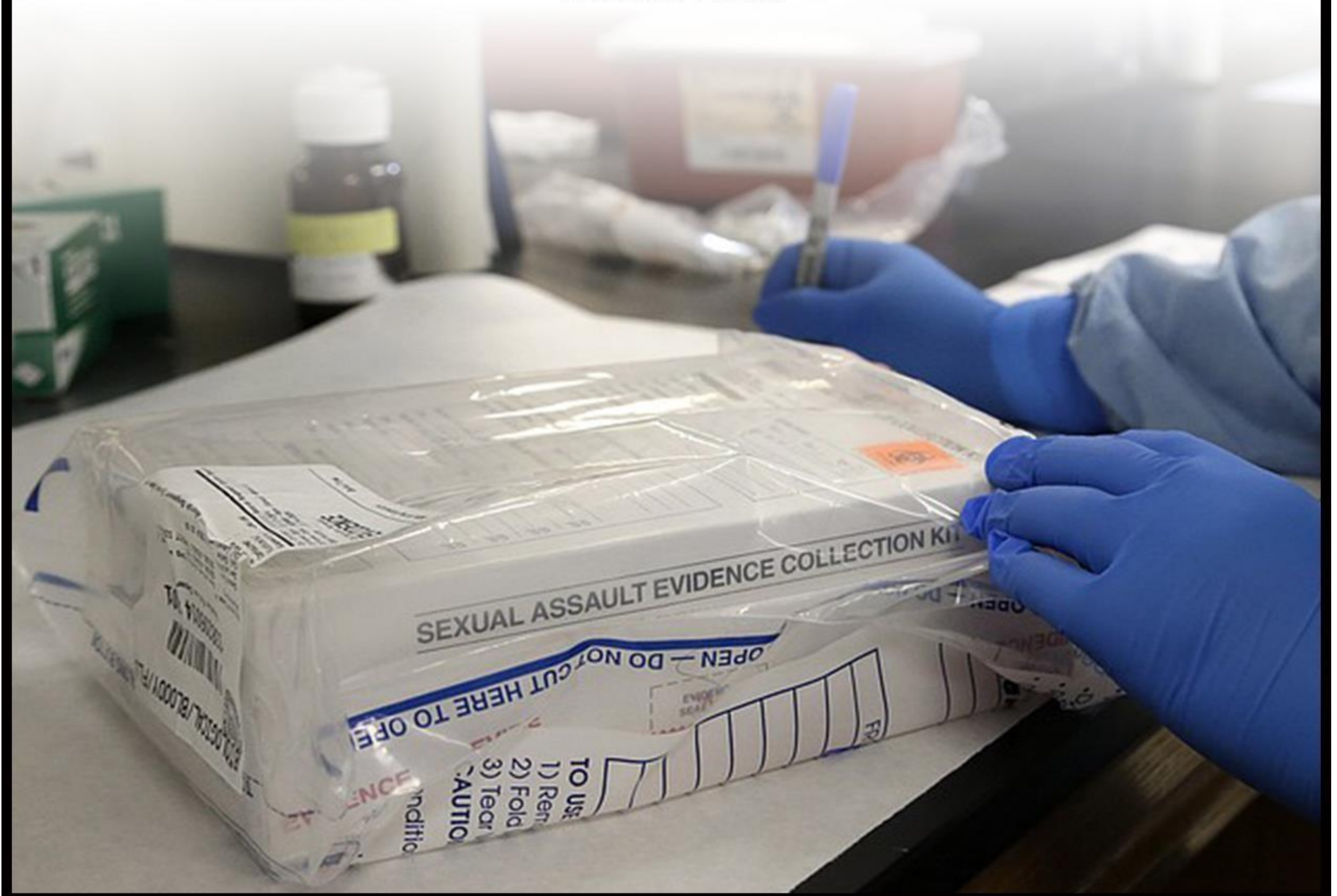
Ron Levitan	Counsel, State Police, Office of the Attorney General	Office of the Attorney General
Jessica Williams	Assistant Attorney General, Civil Rights, Office of the Attorney General	Office of the Attorney General

MARYLAND SEXUAL ASSAULT EVIDENCE KIT POLICY AND FUNDING COMMITTEE

PRELIMINARY RECOMMENDATIONS

APRIL 2018



INTRODUCTION

The Maryland Sexual Assault Evidence Kit (SAEK) Policy and Funding Committee was established by Senate Bill 734 in June of 2017 to create effective statewide policies regarding the collection, testing, and retention of medical forensic evidence in sexual assault cases and increase access to justice for sexual assault victims. Since its inception, the full Committee has met three times, with most of the substantive work advanced by three Subcommittees: (1) Testing, Retention, Tracking and Victim Notification; (2) Availability of Exams and Shortage of Forensic Nurse Examiners; and (3) Funding. During its first meeting, the Committee agreed to focus its early efforts on the collection and identification of SAEK policies for which there was already broad stakeholder consensus. Resources reviewed by the Committee included: Statewide Accounting of Untested Sexual Assault Evidence Kits in the State of Maryland, Office of the Attorney General, January 2017: http://www.marylandattorneygeneral.gov/Reports/Rape_Kit_Report.pdf; Department of Health and Mental Hygiene (2015), Report to the Governor, the Senate Finance Committee, and the House Health and Government Operations Committee Regarding Improved Access to Sexual Assault Medical Forensic Examinations in Maryland House Bill 963/Chapter 627, Section 2(g) of the Acts of 2014 ("DHMH Report"): https://phpa.health.maryland.gov/Documents/SexualAssault-Forensic-Exam-Report-2015.pdf; and National Best Practices for Sexual Assault Kits: A Multidisciplinary Approach, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice, August 2017: https://www.ncjrs.gov/pdffiles1/nij/250384.pdf. Based on its review, the Committee issues the following 12 preliminary recommendations, organized by subcommittee. Where appropriate, the Committee has indicated whether implementation of a recommendation requires a statutory or regulatory change.

RECOMMENDATIONS

Testing, Retention, Tracking and Victim Notification

Definitions:

a. Victim-centered: A victim-centered approach seeks to minimize retraumatization associated with the criminal justice process by providing the support of victim advocates and service providers, empowering survivors as engaged participants in the process, and providing survivors an opportunity to play a role in seeing their assailant(s) brought to justice.
b. Trauma-informed: A program, organization, or system that is trauma-informed realizes the widespread impact of trauma and understands potential paths for recovery; recognizes the signs and symptoms of trauma in victims, families, staff, and others involved with the system; responds by fully integrating knowledge about trauma into policies, procedures, and practices; and seeks to actively resist re-traumatization.

c. Community-based advocate: Advocates employed by an independent, usually nonprofit, organization dedicated to assisting victims of sexual assault. Community-based advocates serve victims regardless of whether they report to the criminal justice system, and community-based advocates typically can offer victims confidential services.

1. **Evidence Collection.** All biological evidence or specimens, including urine samples for drug screening, should be collected only at a medical facility.

2. **Collaborative Approach**
   a. Sexual Assault Forensic Examination (SAFE) Programs, local Rape Crisis Centers and victim advocates should participate in local Sexual Assault Resource Teams (SARTs), with prosecutors, crime lab personnel, advocates for underserved and vulnerable populations, law enforcement, and victim rights attorneys, where available.

   b. Response should be victim-centered and trauma-informed.

   c. System and community-based victim advocates should be included in interactions with victims as soon as possible. Advocates should be notified as soon as possible, recognizing that the point of entry for the victim may be law enforcement or the hospital. Victim advocates should explain to victims any confidentially restrictions during the initial meeting.

   d. Underserved or vulnerable populations within the jurisdiction should be involved in the collaboration.

3. **Chain of Custody/Transfer**

   Enact a "Notice & Demand" statute governing chain of custody and confrontation issues at trial modeled after Md. Code Ann., Cts. & Jud. Proc. Art. §§10-1001 *et seq.* (2013), to create a statutory bypass that allows prosecutors to present DNA evidence without calling numerous live witnesses. Such a law would allow the state to establish chain of custody by providing a chain of custody log in advance of trial, which would avoid the presentation of testimony of low-level lab technicians who may have helped process the DNA evidence, but add nothing substantive to the proceedings. The defendant can still insist on the presence of these people, but he would have to do so in writing, in advance of trial. **Requires statutory change.**

4. SAFE Coordination with Other Services
   a. Health care providers should not contact law enforcement without victim consent, except where otherwise required by law (*see e.g.*, Md. Code Ann., Family Law § 5-704), and victims should be advised of any mandatory reporting requirements.

   b. Health care providers who would provide care and medical treatment to victims of sexual assault should be informed about SAFE options through trainings approved by the SAEK Committee and based on best practices. Victims should be provided at time of medical care

information regarding local Rape Crisis Centers and victim advocates regardless of whether a SAFE exam is performed or not.

5. Increasing Awareness of Victims' Rights

a. Materials on victims' rights, in the appropriate language, should be made available to all sexual assault victims, and/or their guardian, by law enforcement and SAFE programs at the initial point of contact. The SAEK Policy and Funding Committee will work with stakeholders to ensure that information on victims' rights is accessible to law enforcement, SAFE Programs, prosecutors and their staff.

b. Law enforcement officers and prosecutors and their staff should be trained on the options and rights of sexual assault victims and be able to inform victims of these rights and options. This training should be trauma-informed.

c. Law enforcement officers and Sexual Assault Nurse Examiners (SANEs) should communicate to victims of sexual assault that a SAFE may be important to investigative and apprehension efforts. Officers and SANEs should also communicate that a victim has the right to choose whether or not they receive an exam but neither choice will affect their ability to file a police report or access support services. Law enforcement or SANEs should never dissuade a victim from undergoing a SAFE.

d. The Maryland Police Standards and Training Commission should ensure that its law enforcement training for responding to sexual assaults includes:
    i. Trauma-informed response;
    ii. The importance of DNA to solve crimes, connect cases, identify serial offenders, and exonerate the wrongfully convicted;
    iii. Recognizing the range of reactions and behaviors post trauma;
    iv. Instructions regarding the collection, submission, and preservation of evidence;
    v. Instructions regarding emergent medical needs of the victim;
    vi. The rights and options of sexual assault victims including victim notification options and evidence preservation, and instruction on explaining this information to victims; and
    vii. The roles and responsibilities of other emergency responders, including forensic nurses and victim advocates. **Regulatory change may be needed. The Committee will seek input from the Maryland Police Standards and Training Commission.**

6. Tracking

Maryland should create a statewide system to track all SAEKs. Initially, access to the system should be limited to forensic nurses, law enforcement, crime labs, and prosecutors, with the goal of providing secure access to victims once the system is tested, operational, and fully functioning. A tracking system should:

a. Track the status of sexual assault evidence kits from the collection site throughout the criminal justice process, including but not limited to the initial collection at medical facilities, inventory and storage by law enforcement agencies or crime lab, analysis at crime laboratories, and storage or destruction after completion of analysis.

b. Allow all agencies or facilities that receive, maintain, store, or preserve sexual assault evidence kits to update the status and location of the kits. This information should include:

    i. The date and location of the exam;
    ii. Victim identification (name or anonymous Jane Doe identifier);
    iii. Police report number;
    iv. Date and time of law enforcement receipt;
    v. Date of testing and completion of testing; and
    vi. Date results entered into CODIS.

c. Allow victims of sexual assault to anonymously access the system and receive updates regarding the location and status of their sexual assault evidence kits.

d. Use electronic technology that allows continuous access by victims, medical facilities, law enforcement, and crime laboratories.

e. Require participation from law enforcement agencies, medical facilities, crime laboratories, and any other facilities that receive, maintain, store, or preserve sexual assault evidence kits. These entities should participate in the system within one year of the creation of tracking system.

The Committee recommends evaluating costs incurred by other states that have adopted and operated such systems and including a request for funding in any grant application supported or undertaken by this Committee. **Requires statutory change.**

Availability of Exams and Shortage of Forensic Nurse Examiners

7. Timeline for Collecting SAEK Samples and Expanded Reimbursement

The treating physician or forensic nurse examiner (FNE) should make every effort to collect SAEK samples from any sexual assault victim seeking care as soon as possible and within 120 hours (five days) after the sexual assault.[1] However, because there have been advances in forensic science which allow retrieval of evidence for significantly longer time periods, reimbursement should be available for SAEK samples collected more than five days after an assault. Accordingly, the regulations should be updated to allow for flexibility and keep pace with advancements in medical and laboratory technology.

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[1] This reflects the current timeline set forth in Section 10.12.02.03(B) of the Code of Maryland Regulations ("COMAR").

Specifically, the Committee recommends that the Maryland Department of Health (MDH) expand its reimbursement for collection and submission of *cervical swabs* from 5 days to 15 days after the assault. This would be consistent with the Maryland State Police Forensic Sciences Division's 15-day testing policy, which is based on studies that show that DNA can be obtained on cervical swabs as late as nine days after the assault and potentially up until the next menstrual cycle. Moreover, MDH reimbursement should allow for consideration of a clinician's perspective and discretion if testing is recommended beyond 15 days. These policies should be reviewed and updated annually to ensure that they remain consistent with advancement in medical and laboratory technology and SAEK best practices.

In support of this change, the Maryland Hospital Association will work with stakeholders to educate them on the most recent evidence supporting extended time frames. **Requires regulatory change.**

8. Transportation of SAEK victims

The Maryland Institute for Emergency Medical Services Systems (MIEMSS) should list all SAFE programs in the Maryland Medical Protocols for EMS providers.

9. Emergent Medical Care is First Priority in Sexual Assault Response

When responding to a report of sexual assault, law enforcement should not impede the provision of emergent medical care by EMS or other first responders. For example, law enforcement should not dismiss EMS or delay transporting the victim for medical care for the purpose of interviewing the victim.

10. Immediate Safety Needs and Transport for Medical Care

With the consent of a victim of sexual assault, law enforcement should address immediate safety needs and provide immediate transport for medical care and evidence collection.[2]

11. Law Enforcement Policies for Sexual Assault Reports

Every law enforcement agency should adopt a written policy and establish a protocol for responding to individuals reporting a sexual assault, and can use the Committee's template. **Statutory change recommended**: Requiring the each law enforcement agency to use a template issued by the Committee for trauma-informed responses to sexual assault, and the collection and submission of sexual assault kits. The template should be developed in consultation with interested stakeholders.

[2] This reiterates the mandate in Section 11-924(b)(1) of the Maryland Code, Criminal Procedure, which requires that "A police officer, sheriff, or deputy sheriff who receives a report of an alleged sexual assault shall offer the alleged victim the opportunity to be taken immediately to the nearest facility."

Funding

12. HIV Prophylactic Treatment (nPEP) Reimbursement

The Committee evaluated the current MDH reimbursement policy for nPEP[3], specifically considering whether MDH should reimburse for the cost of the full 28-day HIV prophylactic treatment versus the current practice of reimbursing for only the starter pack, which could include anywhere from 1 to 7 days' worth of treatment. According to MDH, in 2017, the agency provided reimbursement for 20 starter kits at a cost of $5,707. In 2016, 21 reimbursements for starter kits were provided at a cost of $3,157. The full 28-day treatment costs between $1500 and $3000. After hearing from MDH, forensic nurse examiners, victim advocates and other stakeholder, the Committee recommends that the State expand MDH reimbursement to cover the full 28-day nPEP treatment.

The Committee also recommends that MDH revise its eligibility criteria so that they reflect the most current medical consensus on the risk of HIV transmission through sexual assault. Currently, according to MDH, to be eligible for reimbursement, the sexual assault must have involved multiple assailants, an assailant who is a known IV drug user or is known to be HIV positive, or anal penetration. These criteria are not consistent with the more recent 2016 Center for Disease Control (CDC) standards, which recognize that there are circumstances that don't fit these criteria where clinicians should exercise their professional discretion and prescribe nPEP. Consequently, the Committee recommends that MDH immediately and then annually review its criteria for nPEP reimbursement to ensure that it is consistent with the most recent CDC guidelines. The MDH policy should be revised to allow for reimbursement of nPEP where the prescribing physician has acted consistent with MDH policy and/or with guidance obtained from CDC-approved medical professionals.

COMMITTEE MEMBERS

Carrie Williams (Chair)	Division Director, Criminal Appeals Division, Office of the Attorney General	Office of the Attorney General
Daniel Katz	Director	MSP - Forensic Sciences Division
Karin Green	Director	Criminal Injuries Compensation Board
Randi Walters	Deputy Secretary for Programs	Department of Human Services

[3] nPEP: Non-occupational post-exposure prophylaxis; a medical intervention designed to prevent HIV infection after exposure to the virus. Prophylaxis is only available with a prescription. See DHMH Report at p.15.

Joyce Dantzler	Chief, Center for Injury and Sexual Assault Prevention	Department of Health
Teresa Long	Crime Lab Director	Howard County Police Department
Holtzinger, Pamela	Forensic Nurse Coordinator	Frederick Memorial Hospital
Steven O'Dell	Chief	Baltimore Police Dept - Forensic Sciences and Evidence Management Div.
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Nora Hoban (alternate to Witten)	Senior Vice President, Policy and Data Analysis	Maryland Hospital Assn

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Brian Browne, MD	Chair, Emergency Medicine, UM School of Medicine	UM School of Medicine

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Ron Levitan	Counsel, State Police, Office of the Attorney General	Office of the Attorney General
Rob Taylor	Assistant Attorney General, Criminal Appeals Division, Office of the Attorney General	Office of the Attorney General

Appendix D
Letter from SAFE Manager/Victim Service Coordinator at the Office of the Ohio Attorney General

MIKE DEWINE
★ OHIO ATTORNEY GENERAL ★

Crime Victim Services
Office 614-466-5610

30 E. Broad St., 23rd Floor
Columbus, OH 43215
www.OhioAttorneyGeneral.gov

October 2, 2018

Dear Colleague,

On October 3, 2017, the Ohio Attorney General's Office (OAG) will begin implementing reimbursement for HIV Prophylaxis as part of the Sexual Assault Forensic Exam (SAFE) Program. In July 2017, the Ohio legislature approved language within the SAFE statute to add payment for HIV prophylaxis when directly related to a sexual assault and done in conjunction with forensic evidence collection.

Ohio Administrative Code 109:7-1-02(B) is intended to ensure that all victims of sexual assault have access to the full twenty-eight day HIV prophylaxis regimen at no cost to them. The Centers for Disease Control have found that providing the 28-day regimen "increase[s] the likelihood of adherence, especially when patients find returning for multiple follow-up visits difficult." In order to be eligible for reimbursement the medical facility must provide the patient with the full 28-day dose or make provision to provide the remainder of the regimen from the facility at no cost to the patient. If the patient is released with a lesser dose of prophylaxis, reimbursement for the medication and all services related to the HIV assessment will be reduced proportionately unless the facility has made provision for the patient to receive the reminder at no additional cost from the facility.

The HIV Prophylaxis reimbursement allows for charges up to $2,500 to be submitted to the SAFE Program. These charges include:

- Rapid HIV testing
- Labs related to risk exposure, including pregnancy testing
- 28-day dose of HIV prophylaxis (prescribed medication is based on medical discretion and the CDC Guidelines)
- Anti-emetic medication
- Follow-up care provided at the same medical facility

Initially the pdf writable HIV Reimbursement Form will be posted as a link under the Online Submission form on the SAFE information web page here SAFE page. You will need to save this form and upload it along with your SAFE reimbursement invoice. Your request, up to $2,500, will be paid along with the monthly SAFE payment. If the $2,500 is not depleted at the initial visit and future charges are incurred for follow-up care at the same medical facility you may submit an HIV Prophylaxis Supplemental Form up to 8 months post-treatment date with the patient invoice to safe@ohioattorneygeneral.gov.

Detailed instructions will be posted on the OAG SAFE page at SAFE/HIV Instructions under the Online Submission link. If you have any questions about the process and reimbursement please call the SAFE Manager at 614-466-4797 or email to Sandra.huntzinger@ohioattorneygeneral.gov.

Sincerely,

Sandy Huntzinger

Sandy Huntzinger
SAFE Manager/Victim Service Coordinator