

SEXUAL ASSAULT KIT EVIDENCE SUBMISSION ACT

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House Bill 5445 (Substitute H-1)

Sponsor: Rep. John Walsh

Committee: Criminal Justice

(Enacted as Public Act 227 of 2014)

Complete to 5-21-14

A SUMMARY OF HOUSE BILL 5445 AS REPORTED FROM COMMITTEE 5-14-14

House Bill 5445 would create a new act known as the Sexual Assault Kit Evidence Submission Act to establish time periods within which sexual assault evidence collection kits must be (1) retrieved by the investigating law enforcement agency, (2) submitted to Michigan State Police forensic laboratories or other accredited laboratories, and (3) analyzed for forensic evidence by the MSP or other accredited laboratories.

Release of Sexual Assault Kit Evidence

Under the Public Health Code (MCL 333.21527), if an individual alleges to a physician or other attending or admitting hospital staff that the individual has been the victim of criminal sexual conduct (CSC) within the past 24 hours, the attending health care staff treating the individual shall inform that individual of the availability of a sexual assault kit (SAK) to collect evidence and, with the individual's consent, have evidence of that alleged sexual assault collected.

House Bill 5445 provides that after a health care facility obtains written consent to release the SAK evidence, the facility would have to notify – within 24 hours – the appropriate investigating law enforcement agency, if known, or the law enforcement agency having jurisdiction in that portion of the local unit of government in which the medical facility is located. If the facility does not obtain written consent to release the SAK evidence, it would have to notify the victim of the facility's policy on storing SAK evidence and provide information on how the victim could have SAK evidence released to law enforcement at a later date. Any SAK evidence not released to law enforcement would have to be stored by the facility for at least one year.

Local Law Enforcement Retrieval of Sexual Assault Kit Evidence

Investigating law enforcement agencies would have to retrieve SAK evidence within 14 days after being notified by a health care facility that SAK evidence has been released to that law enforcement agency. If the law enforcement agency determines that the alleged sexual assault took place outside their jurisdiction, the agency would have to notify the appropriate law enforcement agency within 14 days after retrieving the SAK. The appropriate law enforcement agency would have to retrieve the SAK within 14 days after being notified.

After taking possession of an SAK, the investigating law enforcement agency would have to assign a criminal complaint number to the SAK, and forward the SAK to the Michigan

State Police (MSP) or other accredited laboratory within 14 days. (Any SAK evidence received by an investigating law enforcement agency within 30 days before the bill's effective date would also have to be submitted to MSP or accredited laboratory.)

Forensic Analysis of Sexual Assault Kit Evidence

All SAK evidence received by MSP on or after the bill's effective date would have to be analyzed for forensic evidence by MSP or other accredited laboratory within 90 days after all necessary evidence is received, "provided that sufficient staffing and resources are available to do so." Additionally, DNA profiles obtained from the SAK evidence would have to be uploaded to state and federal DNA databases specified by MSP.

Effect of Noncompliance on Criminal Proceedings

The failure of a law enforcement agency to take possession of, or forward for forensic testing, SAK evidence would not alter the authority of that agency to take possession of, or submit for testing, SAK evidence, and would not alter the authority of MSP or other accredited laboratory to accept and analyze SAK evidence or upload any DNA profiles into state and federal DNA databases.

Additionally, the failure to comply with the requirements set forth in the bill would not constitute grounds to challenge the validity of any evidence, including any DNA database match. Likewise, a court could not exclude that evidence on those grounds. The failure to comply with the requirements of the bill would also not be grounds to set aside the conviction or sentence.

Destruction of Sexual Assault Kit Evidence

If a law enforcement agency intends to destroy or dispose of any SAK evidence before the expiration of the statute of limitations, and its destruction does not otherwise conflict with the requirements of Section 16 of Chapter X of the Code of Criminal Procedure, the agency would have to provide written notice to the victim at least 60 days before the SAK evidence is destroyed or disposed of. (Section 16 permits currently incarcerated prisoners convicted prior to January 8, 2001, to petition a court to have evidence tested for DNA and, based on the findings, to petition for a new trial.)

FISCAL IMPACT:

The bill would have an indeterminate fiscal impact on the Department of State Police (MSP). The requirement that MSP analyze SAK evidence within 3 months of receiving the SAK evidence from an investigating law enforcement agency could potentially require the department to hire additional forensic scientists (biologists). The department reports that the turnaround time for processing SAK evidence in FY 2013-14 is about 79 days. Since March 2014, the average turnaround time has been 53 days. (These turnaround times do not include the time spent on creating DNA profiles for uploading to state and federal DNA database.)

Thus, based on current caseloads, the MSP forensics laboratories are meeting the turnaround time standards established in the bill. However, it is expected that the bill

would increase the number of SAKs submitted for testing, potentially requiring additional staffing and resources for MSP. However, the bill provides that the forensic turnaround time requirements applies "provided that sufficient staffing and resources are available to do so." Thus, the bill would not directly require additional resources per se. At present, MSP does not have an estimate on the projected increase in caseload or the resulting increase in staff necessary to adhere to the 90-day time standard.

BACKGROUND INFORMATION:

Following the closure of the Detroit Police Department (DPD) crime lab in 2008, a cache of more than 10,000 sexual assault kits – some going back more than 20 years – were discovered in a DPD evidence storage facility. Since that discovery, state and local law enforcement agencies have begun the process of testing that cache of untested kits. The process began several years ago with "Project 400" as a way to begin understanding the evidentiary status of these kits – i.e., whether the case was adjudicated, whether the statute of limitations had run out, victim profiles, and perpetrator profiles. Of that first batch of 400 kits, there were more than 90 associations ("hits" against state and federal DNA databases) made identifying known perpetrators or unknown, but potentially serial, perpetrators. Federal funding enabled MSP, in partnership with the Wayne County Prosecutor's Office, DPD, and private forensics laboratories to test a second tranche of 1,600 untested SAKs, resulting in an additional 455 associations.

Following the testing of these two batches of SAKs, the Wayne County Prosecutor's Office and DPD identified about 8,000 SAKs that still required testing. 2013 PA 102 (HB 4112) provided \$4.0 million from the Attorney General's lawsuit settlement proceeds, which otherwise lapses to the General Fund, to MSP to process this remaining backlog of untested kits. MSP is outsourcing that work among two contractors, and has worked with them to streamline the testing (focusing on DNA), which has helped speed testing times and greatly reduce the cost. (MSP's contract with Bode Technology provides a cost of \$453/SAK.) Because of that, the testing and DNA profiling of the remaining balance of the cache of untested Detroit SAKs should be completed by March 2015, according to MSP. As of last week, MSP had indicated that nearly 1,000 of the remaining SAKs had been tested, with an expectation that the vendors will test about 1,000 SAKs each month when they're operating at full capacity.

Reportedly, MSP has been working with the Prosecuting Attorney's Association of Michigan (PAAM) and the Michigan Association of Chiefs of Police to determine the extent to which local law enforcement agencies also have a stockpile of untested SAKs sitting in police evidence storage lockers around the state. This bill does not address testing of those kits.

BRIEF DISCUSSION OF THE ISSUES:

Arguments in support of the bill. The bill is an important first step to avoid delays in the processing of sexual assault kits (SAKs). The time frames and chain of custody established in the bill should provide better tracking of the kits so none are inadvertently

lost. Timely processing of SAKs is important because rapists often go on to commit other crimes, and in the case of serial rapists, commit other rapes. Reportedly, of the old Detroit SAKs recently tested, at least 127 of the cases were identified as associated with serial rapists. By comparing the DNA profiles obtained from the samples with state and national criminal DNA databases, it was discovered that these individuals had committed rapes in 23 other states. In one instance, one of the old SAKs got a positive hit on an offender recently convicted of raping and murdering five women. Had that kit been processed in a timely manner, and the offender identified and prosecuted, perhaps those women would be alive today.

Arguments in opposition to the bill. The primary concern expressed was that the bill prevents a hospital or other facility that obtained a SAK from turning the kit over to law enforcement unless the victim provides written consent. This not only delays the identification and capture of a potential serial rapist/murderer, it may mean some kits are never tested at all. It means that the victim, and not the police, have control over criminal evidence that could be used to remove a threat to public safety. Regardless of whether the victim is willing or able to cooperate with the prosecution (such as testifying in court against the assailant), a crime is always considered to be against "the people" and therefore the evidence should be accessible to keep "the people" safe.

Response. Reportedly, some advocates interpret a provision in a federal law that provides funds for states, Indian Tribal governments, and local governments to offer free forensic medical exams to sexual assault victims as meaning that a state cannot receive the federal funds if it requires victims to cooperate with law enforcement. Mandating turning over the kits to law enforcement agencies is seen as forcing victims to cooperate.

Advocates maintain that it is difficult enough to get sexual assault victims to come forward for medical evaluation and treatment and to agree to have a SAK completed. Victims need to feel in control after a sexual assault, and obtaining their permission to obtain a SAK, and their permission to turn the kit over to the police, is an important first step in returning a sense of control to the victim. In addition, some victims only come forward to have the samples tested for sexually transmitted diseases or to see if they may have become pregnant. One concern of advocates is that if facilities are required to immediately turn over the SAK to law enforcement, that these victims will not go to the ER or a rape crisis center in the first place. If that were to happen, valuable evidence would never be collected and retained. At least, if the bill in its current form increases the number of victims coming forward, then trained sexual assault counselors and medical professionals have a better chance of assisting victims in the healing process, which may enable many to feel comfortable in releasing the kits, and to assure them that releasing a kit does not commit them to aiding in the investigation or prosecution unless they want to.

Rebuttal. Some, however, would say that the federal funding law does not prevent a state from mandating SAKs to be automatically turned over to law enforcement. In fact, several states have such mandates. The language simply says that to be in compliance with the federal law (42 USC 3796gg-4), which provides for payment of funds for

governmental entities to offer free forensic medical exams, the governmental entity must provide the exams free of charge to victims (or arrange for victims to obtain such exams free of charge) *without regard to whether the victim participates in the criminal justice system or cooperates with law enforcement*. To some, participation would involve such things as looking at a police line-up, testifying in open court, and so on, and not to turning over evidence in a crime.

POSITIONS:

The Wayne County Prosecutor testified in support of the bill. (5-14-14)

Representatives of the Department of State Police testified in support of the bill. (5-14-14)

A representative of the Michigan Domestic Violence & Sexual Assault Treatment Board testified in support of the bill. (5-14-14)

The Prosecuting Attorneys Association of Michigan indicated support for the bill. (5-14-14)

The Office of Attorney General indicated support for the bill. (5-14-14)

Right to Life of Michigan indicated support for the bill. (5-14-14)

The Michigan Coalition to End Domestic & Sexual Violence indicated support for the bill. (5-14-14)

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■ This analysis was prepared by nonpartisan House staff for use by House members in their deliberations, and does not constitute an official statement of legislative intent.