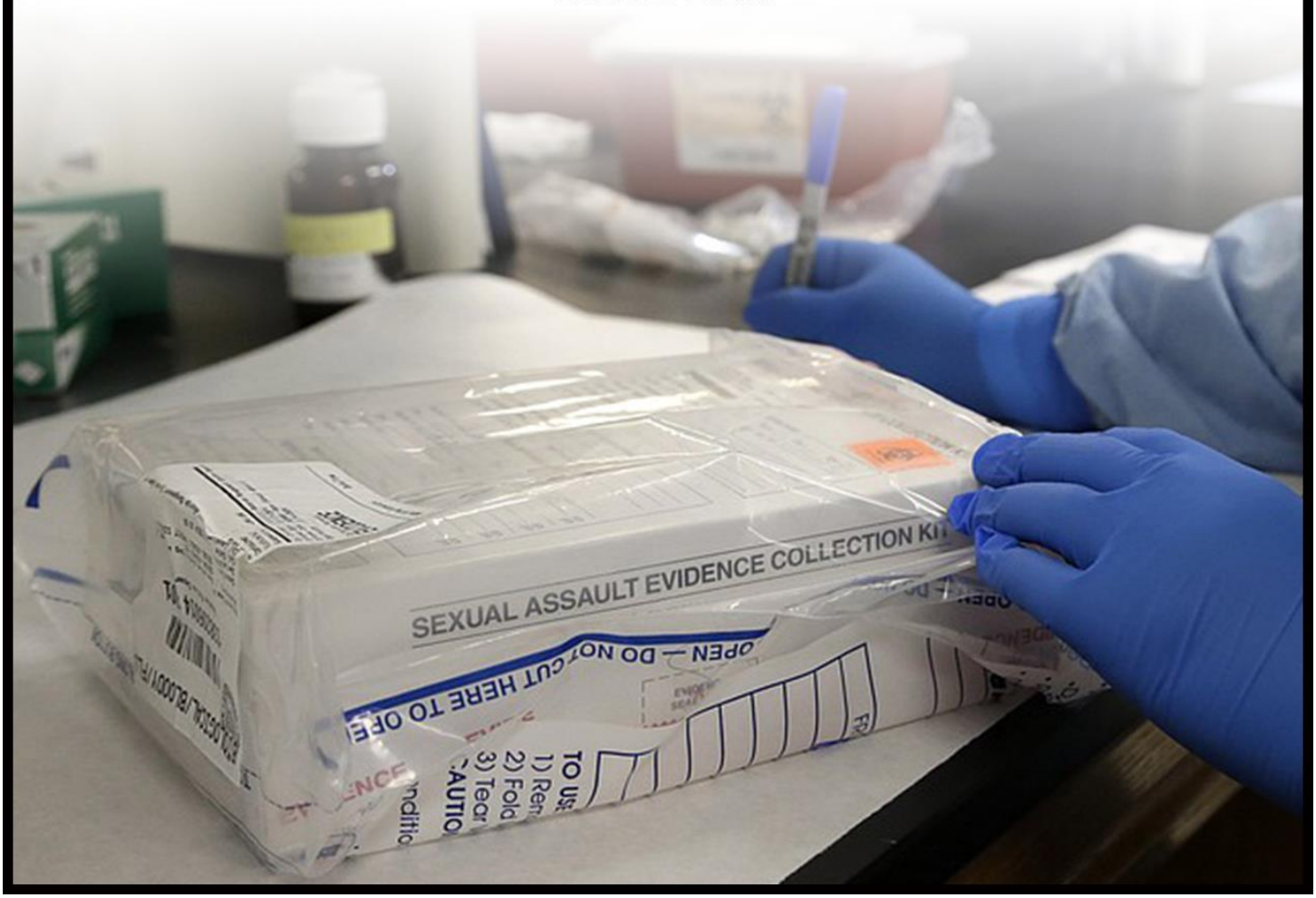
Maryland Sexual Assault Evidence Kit Policy and Funding Committee

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/Sexual-Assault-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.

[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

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Teresa Long	Crime Lab Director	Howard County Police Department
Holtzinger, Pamela	Forensic Nurse Coordinator	Frederick Memorial Hospital

[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.

Steven O'Dell	Chief	Baltimore Police Dept - Forensic Sciences and Evidence Management Div.
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Delegate Aruna Miller	Delegate and Member, House Appropriations	Maryland House of Delegates

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