House
Legislative
Analysis
Section

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MANDATORY HIV/HBV TESTING OF PRISONERS

House Bill 5488 (Substitute H-2)
House Bill 5881 as introduced
First Analysis (5-21-96)

Sponsor: Rep. David Galloway
Committee: Health Policy

THE APPARENT PROBLEM:

Public Act 419 of 1994 allows emergency first responders (who include police officers, fire fighters, and emergency medical workers) who are exposed to the body fluids of emergency patients in certain ways to request that health facilities test the patients for HIV. Public Act 420 of 1994 further allowed health facilities to test patients for HIV without the patient's consent at the request of an emergency first responder who had been exposed to the patient's body fluids in certain ways if the facility notified patients upon admission that such testing could be done under these circumstances without prior consent or counseling.

Some people believe that local law enforcement, court, and county employees should be authorized to request HIV testing of arrestees and incarcerated people along lines similar to the 1994 legislation covering emergency first responders and emergency patients. Similarly, some people believe that the Department of Corrections (DOC) should be authorized to require HIV and HBV testing of certain prisoners without their consent upon the request of DOC employees who were exposed in certain ways to the prisoner's body fluids. Legislation has been introduced that would address both of these issues.

THE CONTENT OF THE BILLS:

House Bill 5488 would amend the Public Health Code (MCL 333.5131, 333.5204, and 333.5205) to authorize certain police officers, fire fighters, local correctional officers or other county employees, and court employees who were exposed in certain ways to the blood or body fluids of an arrestee, correctional facility inmate, parolee, or probationer to request that he or she be tested for HIV or HBV (hepatitis B) infection. The requesting party would have to have received training in the transmission of bloodborne diseases (under rules governing exposure to bloodborne diseases in the workplace promulgated by the Occupational Health Standards Commission or incorporated by reference under the Michigan Occupational Safety and Health Act) and, while performing official duties, would have to have determined that he or she had sustained a percutaneous (that is, through the skin), mucous membrane, or open wound exposure to the blood or bodily fluid of the person in question.

Requests. Requests for testing would have to be in writing and on a form provided by the Department of Community Health not later than 72 hours after the exposure occurred. The request would have to be dated and contain the following information: the name and address of the officer or employee making the request, a description of his or her exposure to the blood or other bodily fluids of the proposed test subject, and a statement that the requester was subject to the Public Health Code's confidentiality requirements. The request form could not contain information that would identify the proposed test subject by name. An employer who received such a request would have to accept as fact the requester's description of his or her exposure.

Testing, payment. The testing would be done by the local health department or by a health care provider designated by the local health department. The officer or employee requesting the test would be responsible for paying for the test if his or her employer or health care plan didn't cover the cost of the test. The local health department (or designee) would be authorized to charge the officer or employee requesting the test the "reasonable and customary" charges of the test, and wouldn't have to provide HIV counseling to the requester unless he or she also were tested by that local health department (or designee). However, an arrestee, correctional facility inmate, parolee, or probationer who refused to undergo a requested test and who subsequently was tested under court order would be responsible for the cost of implementing that order (including the cost of the test).

Test results, confidentiality, penalties. Notification of test results, whether positive or negative, would have to be given to the requesting officer or employee by the local health department (or designee) within two days

after it had received the test results. (The local health department or designee also would have to notify the Department of Community Health of each positive HIV test.) Notification of test results would have to be transmitted directly to the requesting officer or employee, unless he or she had requested that the test results be sent to his or her primary care physician (or other health professional designated by the requester). Notification of test results couldn't contain information that identified the test subject, and information contained in the notice would be confidential and subject to the bill's provisions, the health code's HIV confidentiality provisions, and the confidentiality provisions for other communicable diseases and serious communicable diseases or infections other than HIV (i.e. hepatitis B) found in rules promulgated under the code (see BACKGROUND INFORMATION, below). Anyone who received confidential information under the bill's provisions would be authorized to disclose the information to others only to the extent consistent with the authorized purpose for which it had been obtained. In addition to existing penalties in the Public Health Code for breaching confidentiality (see BACKGROUND INFORMATION, below), someone who violated the confidentiality of the information would be guilty of a misdemeanor.

Test subjects. If the arrestee, correctional facility inmate, parolee, or probationer in question consented to the requested tests, either the requester's employer would transport the test subject to the local health department (or its designee) for testing or someone from the local health department (or its designee) would come to where the test subject was housed to take a blood or other body fluid sample for testing as soon as practicable after receiving the request for the test.

If the test subject refused to undergo a requested test, the requester's employer could petition the probate court under either the health code's health emergency commitment provisions (see BACKGROUND INFORMATION, below) or the bill's provisions, whichever were appropriate. Under the bill, the petition would have to contain substantially the same information as was contained in the original request by the affected officer or employee, except that, unlike the original request, it would have to contain the proposed test subject's name. The petition also would have to state (a) the reasons for the requester's determination that the exposure described in the request could have transmitted HIV or HBV, along with the date and place the officer or employee had received the required training in the transmission of bloodborne diseases; (b) the fact that the proposed test subject had refused to undergo the requested test; (c) the type of relief sought; and (d) a request for a court hearing on the allegations in the petition.

As is currently the case in the health code for petitions regarding people who were alleged to be health threats to others, the court would have to hold a hearing within 14 days after receiving the petition regarding HIV or HBV infection testing. Upon finding that the employer had proven the allegations set forth in the petition (including, but not limited to the requesting party's description of his or her exposure to the blood or body fluids of the proposed test subject), the probate court could order the proposed test subject to undergo testing for HIV or HBV infection (or both) after first considering the recommendation of a physician review panel. Before ordering testing, the probate court would have to appoint a review panel consisting of three physicians (from a list submitted by the Department of Community Health) to review the need for testing the proposed test subject for HIV or HBV infection (or both), one of whom could be selected by the proposed test subject. At least two of the physicians would have to have had training and experience in the diagnosis and treatment of serious communicable diseases and infections. The review panel would have to review the record of the proceeding, interview the proposed test subject (or document why he or she wasn't interviewed), and recommend either that the individual be tested for HIV infection or HBV infection, or both or not be tested for either, and document the reasons for the recommendation. (Note: The bill refers to the "commitment review panel," which appears to be a reference to the review panel in the section as originally enacted, which dealt with the possible commitment to health facilities of certain disease carriers and health threats to others.)

Contempt. An individual who refused to undergo a test for HIV infection or HBV infection, or both, would be guilty of contempt. (Note: The actual language of the bill, however, seems to suggest that the people who would be held in contempt under the bill would include two kinds of people: someone "committed to a facility under this section who leaves the facility before the date designated in the commitment order without the permission of the probate court or who refuses to undergo a test for HIV infection of HBV infection, or both.")

Other provisions. The Department of Corrections would be able to promulgate rules to administer the bill's provisions and would be required to develop and distribute the required request forms. A person or governmental entity that made a good faith effort to comply with the bill's provisions would be immune from civil liability or criminal penalty based on

compliance -- or failure to comply -- with the health code's HIV reporting requirements.

House Bill 5881. Currently, all incoming state correctional prisoners are tested for HIV, and the Department of Corrections (DOC) is required to report each positive test result to the Department of Community Health. If a DOC employee is exposed to the blood or body fluid of a prisoner in a manner that could transmit HIV, the prisoner is either tested for HIV or, if the prisoner refuses testing, is considered HIV positive by the department. Upon employee request, the DOC must provide or arrange for an HIV test for the employee free of charge.

The bill would amend the Department of Corrections Act (MCL 791.67 and 791.67a) to allow employees who sustained a percutaneous, mucous membrane, or open wound exposure to the blood or body fluid of a prisoner to request that the prisoner be tested for HIV infection or HBV infection, or both. Requests would have to be made to the department in writing on a form provided by the department within 72 hours after the exposure had occurred. (The department would be required to develop and distribute these forms.) The form would have to be dated and contain at least the name and address of the employee making the request, a description of his or her exposure to the blood or other bodily fluids of the prisoner, and a statement that the requester was subject to the confidentiality requirements of the Public Health Code. The request form couldn't contain information that would identify the prisoner.

When the DOC received a request from an employee for the testing of a prisoner, it would have to determine (a) whether or not there was reasonable cause to believe that the exposure described in the request had occurred and (b) if it was a percutaneous, mucous membrane, or open wound exposure under administrative rules. If the department did determine that the requisite exposure had occurred, it would be required to test the prisoner for HIV infection, HBV infection, or both, as indicated in the request. The department could test a prisoner under the bill whether or not the prisoner consented to the test and would not be required to give the prisoner either an opportunity for a hearing or to obtain a court order before administering the test.

The department would have to notify the requesting employee of the test results, whether positive or negative, within two days after obtaining the results. (The department also would be required to notify the Department of Community Health of each positive HIV test result.) The notification to the employee would have to be transmitted directly to the employee, unless he or she had requested that the results be sent to his or her primary care physician or to another designated health professional. The notice couldn't contain information that would identify the prisoner who's been tested, and information contained in the notice would be confidential and subject to the bill's provisions and the confidentiality provisions of the health code regarding HIV infection and the code's administrative rules regarding confidentiality of information regarding communicable diseases and serious communicable diseases or infections other than HIV infection (see BACKGROUND INFORMATION, below). Anyone who disclosed information in violation of the bill's provisions would be guilty of a misdemeanor, in addition to being subject to penalties prescribed elsewhere in the health code or its administrative rules. Anyone receiving confidential information under the bill could disclose it to others only to the extent consistent with the authorized purpose for which the information was obtained.

The department would be in compliance with the bill's provisions if it received a request and determined either that there wasn't reasonable cause to believe the requester's description of his or her exposure or that the exposure was not of the requisite kind (percutaneous, mucous membrane, or open wound) and as a result wasn't required to test the prisoner. However, the department would be required to state in writing on the request form the reason for its determination, and would have to transmit a copy of the completed request form to the requesting employee within two days after the date it made its negative determination. Unless the department tested the employee for HIV, it would not have to provide him or her with HIV counseling.

BACKGROUND INFORMATION:

Health code confidentiality provisions, penalties for violations. Article V of the Public Health Code addresses the prevention and control of diseases, infections, and disabilities, and, among other things, defines "serious communicable disease or infection" to mean a communicable disease or infection that is designated by departmental rule to be serious, and includes, but isn't limited to, HIV infection, AIDS, venereal disease, and tuberculosis. This article of the code makes information about certain of these diseases or infections confidential. Information ("all reports, records, and data pertaining to testing, care, treatment, reporting, research, and information pertaining to [legally required] partner notification") associated with HIV infection and AIDS is confidential under MCL 333.5131. (HIV and AIDS test results also are subject to the physician-patient privilege, except as otherwise provided by law.) Information about certain other

diseases or infections designated by administrative rule also is confidential under rules promulgated by the Department of Community Health (formerly the Department of Public Health). By law (MCL 333.5111), these other diseases or infections must include, but are not limited to, hepatitis B, venereal disease, and tuberculosis, and are not to apply to the "serious communicable diseases or infections" of HIV infection or AIDS. More specifically, Rule 325.181 says, in part, "Medical and epidemiological information which identifies an individual and which is gathered in connection with an investigation is confidential and is not open to public inspection without the individual's consent or the consent of the individual's guardian, unless public inspection is necessary to protect the public health as determined by a local health officer or the director . . . Medical and epidemiological information that is released to a legislative body shall not contain information that identifies a specific individual."

Violations of the health code's HIV and AIDS confidentiality provisions are misdemeanors punishable by imprisonment for up to one year, a fine of up to $5,000, or both. In addition, violators are liable in civil actions for actual damages of up to $1,000 plus costs and reasonable attorney fees.

Involuntary commitment of health threats. Public Act 490 of 1988 amended the Public Health Code to give health officers the authority to restrain people with "serious communicable diseases or infections" such as HIV infection, AIDS, venereal disease, or tuberculosis, including subjecting them to court-ordered commitment to an appropriate facility or emergency detention. More specifically, if the Department of Community Health or a local health department determines that someone is a carrier of a serious communicable disease or infection and a health threat to others, it can issue a warning to the carrier requiring his or her cooperation in efforts to prevent or control transmission of that serious communicable disease or infection. If the carrier fails or refuses to comply, the department can petition the probate court to order the carrier to do a number of things, including living part-time or full-time in a supervised setting or being committed to an appropriate facility for up to six months. To protect the public health in an emergency, the court can order the person to be temporarily detained.

Involuntary HIV testing. Currently, certain people in the judicial system or corrections facilities and certain patients can be tested for HIV infection without their prior written consent.

Under Public Act 510 of 1988, which amended the Department of Corrections act, immediately upon arrival at a state correctional facility each prisoner is tested for HIV (the act also requires that prisoners be tested for HIV if they expose a corrections employee to their blood or body fluids in a manner that could transmit HIV, but then goes on to say that if a prisoner refuses testing he or she will be considered by the department to be HIV positive). Public Acts 471 of 1988 and 72 of 1994 amended the Public Health Code to require the HIV and HBV testing of people arrested and charged with certain prostitution-related crimes or bound over to circuit court for certain sex crimes (gross indecency, prostitution, or criminal sexual assault, if the violation involved sexual penetration or the exposure of the victim to the defendant's body fluids) or convicted of certain sex crimes (gross indecency, solicitation, prostitution, criminal sexual assault) or for illegal IV drug use. In addition, Public Act 253 of 1995 requires the mandatory HIV testing of child molesters.

If a worker in a health facility is exposed in certain ways to the blood or body fluids of a patient in the facility, and the patient had been told when admitted that an HIV test might be done without his or her consent if a worker were so exposed, the patient may be tested for HIV without his or her prior written consent. Public Acts 419 and 420 of 1994 extended this involuntary HIV testing of patients to emergency patients when emergency first responders are exposed in certain ways to the emergency patient's blood or body fluids and requests that the patient be tested. Finally, Public Act 200 of 1994 amended the Public Health Code to require that pregnant women who went to a health care facility to give birth or for care immediately after having given birth outside of a health care facility be tested for VD, HIV, and HBV if the caregiver had no record of results of these tests for the patient.

FISCAL IMPLICATIONS:

Fiscal information is not available.

ARGUMENTS:

For:

The bills would simply put into effect the same kinds of protections for police officers, corrections employees, fire fighters, and employees of county jails or courts with respect to the people they deal with every day on their jobs that currently are enjoyed under law by emergency first responders with respect to exposure to

the blood and bodily fluids of emergency patients that they care for and transport. Police officers, fire fighters, corrections employees, and employees of county jails and courts come into contact with people who may expose these officers and employees to HIV in the course of doing their jobs. Yet even when they are in daily contact in the course of their jobs to people who may expose them to fatal or potentially fatal infections, such as HIV and hepatitis, they cannot ask that these people be tested for these infections. Instead, they have to endure the uncertainty of not knowing whether or not they have been exposed in situations involving blood or bodily fluids, and have to live with the dread of possibly exposing their families to these infections. The bills would let these officers and employees, like hospital workers and medical first responders, request that the people they come into contact with in the line of duty to be tested when a situation arises where HIV transmission may occur.

House Bill 5488 would incorporate into its provisions due process protections for people who objected to proposed testing, and would even provide a physician review panel -- that could have a member chosen by the potential test subject -- to provide objective oversight in these cases. There would be no Headlee implications because the officer or employee would be responsible for paying for the test (unless his or her employer or health care plan covered it), and only officers and employees who had had training in the transmission of bloodborne diseases would be allowed to request such testing in the first place.

Currently, prisoners are tested as they enter prison, and if an employee is exposed to the blood or body fluid of a prisoner in a manner that could transmit HIV, the prisoner is to be tested for HIV. However, if the prisoner refuses to undergo the test, he or she is simply considered by the department to be HIV positive and administratively segregated. A court order is needed to perform an HIV test against a prisoner's will, and there has been at least one case in which it took a year for the department to obtain such an order (whereupon the prisoner reportedly then decided to agree to be tested anyway). Rather than allowing prisoners to play such potentially deadly games, House Bill 5881 would simply allow the department, under reasonable circumstances and at the request of an exposed employee, to proceed with testing and thereby to protect the health, safety, and welfare of its employees.

Against:

House Bill 5488 would require that the cost of implementing a court-ordered test for an arrestee, correctional facility inmate, parolee, or probationer be borne by the test subject. However, no provisions are made for someone who is unable to pay all or a part of the cost, unlike the current provisions in law regarding individuals posing health threats to others. What would happen in such cases? The bill also appears to automatically make a person who refuses to undergo a test for HIV infection or HBV infection guilty of contempt, without limiting this to arrestees, correctional facility inmates, parolees, or probationers who in fact may have exposed an officer or employee to HIV infection.

POSITIONS:

The Department of Corrections supports the bills. (5-15-96)

The HIV/AIDS Alliance of Michigan supports the bills. (5-15-96)

The Michigan Corrections Organization supports the bills. (5-15-96)

The Michigan Association for Local Public Health supports House Bill 5488. (5-15-96)

The Department of Community Health supports House Bill 5488. (5-15-96)

■ 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.