

2009

HIV Testing in State Correctional Systems

James Lee Pope

Follow this and additional works at: <https://engagedscholarship.csuohio.edu/jlh>



Part of the [Health Law and Policy Commons](#)

[How does access to this work benefit you? Let us know!](#)

Recommended Citation

James Lee Pope, *HIV Testing in State Correctional Systems*, 22 J.L. & Health 17 (2009)
available at <https://engagedscholarship.csuohio.edu/jlh/vol22/iss1/4>

This Article is brought to you for free and open access by the Journals at EngagedScholarship@CSU. It has been accepted for inclusion in Journal of Law and Health by an authorized editor of EngagedScholarship@CSU. For more information, please contact library.es@csuohio.edu.

HIV TESTING IN STATE CORRECTIONAL SYSTEMS

JAMES LEE POPE*

I.	INTRODUCTION	17
II.	TESTING METHODS	18
	A. <i>Mandatory Testing</i>	18
	B. <i>Voluntary Testing</i>	19
	C. <i>Testing Under Other Circumstances</i>	19
III.	HIV TESTING POLICY ADOPTION.....	20
IV.	RELATED ISSUES	21
	A. <i>Testing of Sexual Offenders</i>	21
	B. <i>Housing, Segregation, and Medical Isolation</i>	21
	C. <i>Pre-Test and Post-Test Counseling</i>	21
	D. <i>Medical Treatment and Care</i>	22
	E. <i>Post-Release Treatment</i>	22
	F. <i>HIV Education</i>	23
V.	QUICK REFERENCE CHART	23
VI.	STATE SUMMARIES	23
VII.	PUBLIC HEALTH ORGANIZATION TESTING RECOMMENDATIONS.....	46
	A. <i>The Centers for Disease Control and Prevention (CDC)</i>	46
	B. <i>WHO, UNODC and UNAIDS</i>	47
	C. <i>The Council for AIDS Action</i>	48
	D. <i>National Commission on Correctional Health Care (NCCHC)</i>	48
VIII.	MODEL STATE TESTING POLICIES.....	49
	APPENDIX A.....	50

I. INTRODUCTION

In recent years, reports have surfaced that the prevalence of acquired immunodeficiency syndrome (AIDS) and human immunodeficiency virus (HIV) within U.S. prison systems is three to five times higher than that of the general

* The research for this article was conceptualized by and supported with funding from the AIDS Funding Collaborative in Cleveland, Ohio. The Author would like to acknowledge Lauren Tews Harbert, MPH, and William R. Joseph, Esq., for their guidance and feedback in the development of this work.

population.¹ These reports, combined with the release of new HIV testing guidelines by the Centers for Disease Control (CDC) in 2006, have caused many states to change their laws and policies regarding HIV testing in state correctional facilities.

This report briefly discusses some of the issues related to HIV testing within state correctional facilities. This report also discusses the methods of HIV testing currently used in state correctional systems as well as provides an overview of the laws governing HIV testing within each U.S. correctional system. Lastly, this report concludes with a survey of recommendations from various health organizations.

This report focuses on HIV testing methods as inmates enter prison and as they are released from prison. The summaries contained in this report are based on current state statutes, codes, rules, and regulations, as well as applicable reports and department of corrections policies, where available.² It does not cover other state detention facilities, such as city or county jails.

II. TESTING METHODS

A majority of U.S. prisons perform either voluntary or mandatory HIV tests upon entry and/or prior to release from state correctional facilities. In addition, many correctional facilities also perform HIV tests upon inmate request, upon physician request, or under other circumstances, such as when an inmate has a high risk of HIV infection or has been involved in an incident where there may have been possible exposure to HIV.

A. Mandatory Testing

Mandatory testing refers to an HIV test that is performed regardless of inmate consent. Although most public health organizations strongly discourage mandatory testing, it appears that twenty-four state correctional systems currently require mandatory HIV tests at intake and/or prior to release. In addition, most prisons also require mandatory testing upon the happening of some event, such as when an inmate becomes exposed to another person's blood or bodily fluids.

States are increasingly adopting policies of mandatory testing at intake and/or prior to release.³ It is difficult to speculate why a state would favor mandatory testing, but it may be easier to implement because it does not require individual HIV risk assessments or written consent forms. Additionally, if every inmate is tested, the correctional system would have more data on the inmate population and may be in a

¹ LAURA MARUSCHAK, BUREAU OF JUSTICE STATISTICS BULLETIN: HIV IN PRISONS, 2004 (November 2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/hivp04.pdf>; Susan Okie, *Sex, Drugs, Prisons, and HIV*, 356 NEW ENG. J. MED. 105-8 (2007).

² In some states, the amount of publicly available information regarding inmate testing is very limited and, thus, some of the summaries in this report may vary from what is actually being done in practice. Further, the methods of testing that are actually being implemented within a state correctional facility may vary from what is required or authorized by law. Therefore, the only way to fully ascertain what method of testing is being implemented within a particular correctional facility is to individually contact that facility. Due to the scope of this report, contacting every correctional facility throughout the nation was not feasible.

³ The following states are currently in the process of adopting or have recently adopted a mandatory testing policy: Arkansas, HB 1444; Delaware, SB 291; Indiana, SB 201; Oklahoma, SB 832; Texas, HB 1159.

better position to prevent HIV transmission within the prison system. However, most public health organizations not only believe that mandatory testing is unethical, but also suggest that is not an effective way to reduce the transmission of HIV.

B. Voluntary Testing

Voluntary testing refers to performing an HIV test only after receiving informed consent. Most correctional facilities that require informed consent prior to performing an HIV test will only test upon inmate request. However, for correctional facilities that do provide voluntary testing upon entry and/or prior to release, the two predominantly implemented methods of testing are “opt-in” testing and “opt-out” testing. Under the “opt-in” approach, inmates are provided with pre-test counseling and will receive an HIV test only after they have provided specific consent to an HIV test. Under the “opt-out” approach, also referred to as routine screening, inmates are provided with pre-test counseling and are informed that an HIV test will be performed unless they refuse.

Most public health organizations currently recommend that state correctional systems provide routine voluntary testing upon entry.⁴ In particular, it appears that most public health organizations support voluntary opt-out testing upon entry. According to the CDC, opt-out testing is more beneficial than opt-in testing because the rates of HIV testing are higher in settings that provide opt-out testing, and opt-out testing may be more cost effective than opt-in testing.⁵

Most public health organizations also recommend that all HIV testing should be performed only with an inmate’s consent. Beyond the fact that testing without consent is considered unethical, public health organizations also suggest that most people will agree to voluntary testing if it is offered; therefore, it can be just as effective as mandatory testing. It is also worth noting that there are certain issues with informed consent in the correctional healthcare setting that do not arise in other healthcare settings. First, there are concerns that inmates may be intimidated or coerced into HIV testing. Second, informed consent within the correctional setting may require providing inmates more information because an inmate’s HIV status may have certain repercussions, such as segregation or restricted access to other correctional programs. It appears that many correctional systems now have policies prohibiting segregation or other forms of discrimination based on an inmates HIV status. Thus, these concerns may not be as prevalent as they once were. Nonetheless, discrimination against inmates who are HIV positive still occurs in prisons, as it does in the larger community, in spite of such prohibitions.

C. Testing Under Other Circumstances

In addition to mandatory or voluntary testing upon entry and/or prior to release, many states also require or authorize HIV tests under special circumstances. The most common circumstances under which an inmate may be tested for HIV are when an inmate shows clinical indications of HIV infection, where an inmate has a “high-

⁴ See *infra* Section VII.

⁵ See Centers for Disease Control, *Revised Recommendations for HIV Testing of Adults, Adolescents, and Pregnant Women in Health-Care Settings* (2006), available at <http://www.cdc.gov/mmwr/previewmmwrhtmlr5514a1.htm> (last visited Oct. 27, 2008)..

risk” of HIV infection,⁶ or where an inmate has been involved in an incident during which there was possible exposure to HIV, i.e., an exposure incident.⁷

Many states that test for HIV upon entry have incorporated these circumstances into their testing policies. Tennessee, for example, requires the mandatory testing of all prisoners under the age of 21 upon entry. However, voluntary testing is offered upon entry to prisoners over 21 that have a high-risk of infection or that have clinical indications of infection.

Often, state occupational exposure statutes also require or authorize HIV tests if an inmate has been involved in an incident where there was a possibility of HIV exposure. Occupational exposure statutes generally allow a corrections officer or corrections employee to request that a prisoner be tested for HIV if the officer or employee was exposed to the prisoner’s blood or bodily fluids.⁸ Some occupational exposure statutes require a court order before an inmate may be tested. Others require immediate mandatory testing once an officer or employee has filed a request that the inmate be tested.

III. HIV TESTING POLICY ADOPTION

Most prison HIV testing policies were created through the legislative process. Therefore, most states have statutes, codes, or other legislative regulations that govern HIV testing within the state correctional system. There are, however, states where the legislature has not directly dealt with the issue or has merely delegated the decision to a state administrative agency, such as the department of corrections or department of health.

In states where the legislature or general assembly has responded to the issue of HIV testing in the correctional system, a particular statute or code section will typically require or authorize some form of voluntary or mandatory HIV testing. The specificity of the laws regarding HIV testing is unique to each state and varies greatly among states. For example, in both California and Illinois, an entire chapter of codified law has been devoted specifically to how and when inmates will be tested for HIV. However, in other states, inmate testing is mentioned only briefly within the provisions of another interrelated statute.⁹

In states where the legislature has delegated the prison HIV testing issue to an administrative agency, such as the department of corrections or department of health, administrative regulations promulgated by those agencies typically will govern the method of testing in the state correctional system. In some states, however, an

⁶ Most policies classify an inmate as having a "high-risk" of infection if they have engaged in certain past behaviors. What behaviors make an inmate "high-risk" vary depending on how it is defined within the particular policy.

⁷ See *infra* Section V.

⁸ In a minority of states, an inmate may request the testing of another inmate if they were exposed to the inmate’s blood or bodily fluids. Generally, however, occupational exposure statutes are geared toward protecting corrections officers and employees.

⁹ In these states, state administrative regulations may provide more guidance as to the method of HIV testing implemented. However, some states do not provide public access to the state administrative code and, therefore, some state summaries may be limited to interpretations of broad statutory regulations combined with other relevant articles and publications.

administrative agency may have re-delegated the issue to a correctional facility's head physician or facility director. Thus, different methods of testing may be implemented in different correctional facilities.

In states where the legislature has not responded to the issue at all, it is very difficult to ascertain what method of HIV testing is implemented within the state correctional system. In other states, however, an administrative agency may have adopted a particular method of HIV testing pursuant to some general grant of authority (e.g., the department of correction's authority to manage prisoners or the department of health's authority to prevent the spread of HIV).

IV. RELATED ISSUES

A. TESTING OF SEXUAL OFFENDERS

Almost every state as well as the District of Columbia and the Federal Bureau of Prisons require or authorize the testing of sexual offenders for HIV. This testing is usually conducted pursuant to a court order after a person has been charged with or convicted of a certain sexual offense. In states that require the mandatory testing of convicted sexual offenders, the sexual offender may not be re-tested as part of the intake process to a correctional facility because the offender was previously tested due to the commission of a sexual offense. Some correctional facilities may consider sexual offenders as being at a high-risk of having or transmitting HIV, which may affect the subsequent testing and housing of those particular inmates.

B. Housing, Segregation, and Medical Isolation

In the past, state correctional facilities thought the best way to prevent the spread of HIV among inmates was to either quarantine or segregate HIV positive inmates. Today, most state correctional facilities only segregate inmates on a case-by-case basis where it may be medically necessary, or where an inmate may pose a high risk of HIV transmission. Some states now specifically prohibit the segregation of HIV positive inmates.

In some states, an inmate may be placed in medical isolation or medical observation if he or she refuses HIV testing. Typically, the treating physician or facility director has discretion as to whether or not an inmate should be placed in medical isolation. That determination is usually based on whether or not an inmate has engaged in past high-risk behaviors or has clinical indications of infection. In jurisdictions, such as the District of Columbia and Wisconsin, medical isolation is required if an inmate refuses "voluntary" testing upon entry.

C. Pre-Test and Post-Test Counseling

Most states require pre-test counseling before an inmate may be tested for HIV. This counseling usually consists of discussing the HIV testing process and issues generally associated with HIV infection. In states that have adopted an opt-in approach, the last part of pre-test counseling usually includes obtaining informed consent. In states that have adopted an opt-out approach, the last part of pre-test counseling usually includes giving the inmate an opportunity to decline testing. The CDC recommends that all persons being tested should be informed either orally or in

writing that testing will be performed unless declined, which is consistent with an opt-out approach.¹⁰

Most states also require post-test counseling after an inmate has been tested for HIV. Post-test counseling encompasses discussing the inmate's test results and what should be done in light of those results. Thus, what is included within post-test counseling largely depends on whether a test result is positive or negative. The CDC recommends providing access to clinical care, prevention counseling, and support services for persons who receive a positive test result.¹¹

D. Medical Treatment and Care

Under the Eighth Amendment, inmates are protected from cruel and unusual punishment and are entitled to a safe and humane environment.¹² The United States Supreme Court has interpreted this to mean that correctional facilities cannot be deliberately indifferent to inmates who have serious medical needs.¹³ Therefore, where an inmate is obviously in need of medical care, a correctional facility has an affirmative duty to provide medical care.

The amount of medical treatment and care provided to HIV positive inmates varies greatly throughout the states. Many state correctional facilities have established chronic care clinics or other special treatment facilities just for the treatment and care of inmates infected with HIV. Other state correctional facilities, however, still have an established policy of providing only the very minimum treatment and care necessary.

In looking at the amount of care and treatment a correctional facility provides, consideration must be given to the resources available to that particular facility. In states where there has been a large amount of proactive legislation regarding inmate testing, state correctional facilities are likely to have more resources at their disposal. In particular, these correctional facilities may have a larger budget, more medically trained staff, access to private service providers, and access to technology that is more advanced. Therefore, these correctional facilities will be able to better diagnose and treat inmates for AIDS or HIV.

E. Post-Release Treatment

A large problem confronted by inmates who are diagnosed with HIV is access to care and treatment after they have been released from a correctional facility. In most states, if an inmate is known to be HIV positive and has been treated by the correctional facility, the facility will provide the inmate with a thirty-day supply of medication, a referral to appropriate medical services, and counseling prior to release. In states where testing is not mandatory, correctional facilities will often encourage testing for inmates who engage in high-risk behaviors as well as provide counseling and referrals to medical services.

¹⁰ See Centers for Disease Control, *supra* note 5.

¹¹ *Id.*

¹² U.S. CONST., amend VIII.

¹³ *Estelle v. Gamble*, 429 U.S. 97, 104 (1976).

F. HIV Education

In most state correctional facilities, inmates and correctional facility staff are provided with HIV education in one form or another. In some states, the department of corrections is required by statute to establish HIV education programs for the staff and inmates. These programs are usually developed and implemented with support from the department of health.

Most inmates are provided with HIV information as part of the admission process to a correctional facility. In states where testing is optional, the educational information may be used as a way to encourage testing. In states where testing is mandatory, the educational information may act as a substitute for pre-test counseling. The manner in which this information is provided to inmates varies by state, and in large part depends on what is statutorily mandated. Some states provide inmates with educational pamphlets. Other states offer, and sometimes require, in-depth educational programs for inmates throughout incarceration. As with medical care and treatment, the amount of HIV education offered within a state correctional facility most likely depends on the amount of resources a particular facility has available.

V. QUICK REFERENCE CHART

Provided below in Appendix A is a chart showing the circumstances under which an inmate may be tested for HIV. The chart is based on interpretations of relevant state statutes, regulations, and reported practices. In some instances, what is reported may contradict or conflict with state law. In that situation, the author has attempted to best ascertain what is being done in actual practice.

VI. STATE SUMMARIES

FEDERAL BUREAU OF PRISONS

The “Stop AIDS in Prison Act” was passed in the House of Representatives in September of 2007 and is currently awaiting a vote in the Senate . If enacted as law, the Act will require that Federal prisons offer voluntary opt-out testing to all inmates upon entry and prior to release, regardless of sentence length or risk factors. Provisions of the Act also provide for testing upon inmate request and incorporate HIV tests as part of routine health screenings.¹⁴

Under current law, the Federal Bureau of Prisons requires that all inmates sentenced to six months or more undergo mandatory testing in any of the following circumstances:¹⁵

1. Inmate injected illegal drugs and shared equipment;
2. Inmate engaged in sex with another man (for males);

¹⁴ Stop AIDS in Prison Act of 2007, H.R. 1943, 110th Cong. (2007)

¹⁵ FEDERAL BUREAU OF PRISONS, CLINICAL PRACTICE GUIDELINES: MANAGEMENT OF HIV (2006), *available at* <http://www.bop.gov/news/PDFs/hiv.pdf>; FEDERAL BUREAU OF PRISONS, REPORT ON INFECTIOUS DISEASE MANAGEMENT (2005), *available at* <http://www.bop.gov/news/PDFs/report.pdf>.

3. Inmate engaged in unprotected intercourse with more than one sex partner;
4. Inmate has a history of gonorrhea or syphilis;

Inmate is from a high risk country (Sub-Saharan Africa or West Africa);
Inmate received blood products between 1977 and 1985;
Inmate has hemophilia;
Inmate had percutaneous exposure to blood; or
Inmate requested to be tested

Under the Corrections Officers Health and Safety Act, inmates may also undergo mandatory HIV testing if they may have exposed an officer or employee of the United States to HIV. If an inmate is tested under this provision and results return positive, the inmate must be provided with appropriate access to counseling, healthcare, and support services.¹⁶

ALABAMA

Alabama law requires that any person sentenced to confinement or imprisonment within a state correctional facility for more than thirty days must be tested for HIV upon entry. Any person sentenced for more than ninety days must be tested at least thirty days prior to release.¹⁷

Any inmate who receives a positive test result must be provided with treatment if they are not otherwise financially able to pay for it. HIV positive inmates must also be provided with prevention counseling.¹⁸ Upon release of an HIV positive inmate, written notice must be sent to the state or county health officer located where the inmate plans to reside and the notice must include a record of the treatment administered while the inmate was incarcerated.¹⁹

Where there is reasonable cause to believe an inmate has HIV or has been exposed to HIV, a licensed physician must test and examine the inmate for HIV. If the inmate refuses testing, the inmate may be isolated until the physician believes that the inmate is no longer a health threat.²⁰ Therefore, the department of corrections may also test inmates who have a high risk of or clinical indications of HIV infection.

ALASKA

The Alaska Department of Corrections is required to perform a medical inspection of all inmates within fourteen days after admission to a state correctional facility. HIV testing is not specifically required as part of the exam, but testing will be provided upon inmate request. Inmates who are suffering or appear to be suffering

¹⁶ Corrections Officers Health and Safety Act, 18 U.S.C. § 4014 (2008).

¹⁷ ALA. CODE, §22-11A-17, 38 (2008).

¹⁸ ALA. CODE, §22-11A-20 (2008).

¹⁹ ALA. CODE, §22-11A-17 (2008).

²⁰ ALA. CODE, §22-11A-18 (2008).

from a communicable disease may be segregated, and any inmate who appears to be medically ill must be provided with proper medical care.²¹

Under the state occupational exposure statute, an inmate may be tested upon the request of a correctional officer who reasonably believes that, during the performance of their duties, they were significantly exposed to HIV. An inmate will only be tested under this provision if: (1) a licensed physician determines the officer was significantly exposed; (2) the officer's physician determines that the inmate's blood sample is needed to properly treat the officer; and (3) the officer also provides a blood sample. If an inmate is tested, he or she must receive pre-test and post-test counseling. An inmate can refuse testing under this provision, but it may result in a court ordered HIV test.²²

ARIZONA

Arizona law provides that the department of corrections may require HIV testing where there are reasonable grounds to believe an inmate is infected and is a health threat to others.²³ Therefore, the department of corrections may require mandatory testing where an inmate has clinical indications of infection. Otherwise, informed consent is required prior to performing an HIV test.²⁴

An employee of the department of corrections may request that an inmate be tested for HIV if an inmate has bitten, scratched, spit, or otherwise transferred blood or bodily fluids onto the employee. If a court finds probable cause to believe that there was a possible transfer of blood or bodily fluids, the court must order the inmate to be tested. Notice of the test results must be provided to the inmate, the person exposed, the officer in charge of the correctional facility, and to the chief medical officer of the correctional facility.²⁵

ARKANSAS

The passage of House Bill 1444 in March of 2007 recently amended Arkansas law so that all inmates must be tested for HIV prior to release. State law also requires that inmates who test positive for HIV must receive appropriate counseling and treatment.²⁶

According to the Arkansas Department of Corrections 2006 Annual Report, all inmates are examined for HIV upon entry to a state correctional facility as well as during routine physical exam updates. This testing appears to be voluntary unless an inmate's previous lifestyle puts him or her at a high risk of infection, e.g., intravenous drug use or prostitution.²⁷

²¹ ALASKA ADMIN. CODE Tit. 22, § 05.120 (2008)

²² ALASKA STAT. §18.15.400 (2008).

²³ ARIZ. REV. STAT, § 36-669 (2008).

²⁴ ARIZ. REV. STAT, § 36-663 (2008).

²⁵ ARIZ. REV. STAT, § 13-1210 (2008).

²⁶ ARK. CODE ANN §12-29-112 (2008).

²⁷ ARKANSAS DEPT. OF CORRECTIONS, ANNUAL REPORT (2006), available at http://www.adc.arkansas.gov/pdf/reports/2006_annual_report_.pdf.

CALIFORNIA

The California Penal Code provides that the chief medical officer (CMO) of each correctional facility may require an HIV test where he or she reasonably believes that an inmate is suffering from HIV, or where he or she reasonably believes that a correctional officer or inmate was exposed to the bodily fluids of another inmate.²⁸ Pursuant to department of corrections regulations, all inmates must be examined for communicable diseases within twenty-four hours after entering a state correctional facility.²⁹ Therefore, testing may be required upon entry if an inmate has clinical indications of HIV infection. However, it appears to be within the discretion of each facility's chief medical officer as to whether or not an inmate must be tested.

Inmates may also be tested for HIV when: (1) a corrections officer is exposed to the bodily fluids of an inmate; (2) an inmate is exposed to the bodily fluids of another inmate; or (3) a corrections officer or staff member observes or is informed of activities that are known to cause the transmission of HIV. If an inmate is tested, the inmate must be provided with counseling, educational information, and adequate medical services.³⁰

If a corrections officer or inmate believes he or she has been exposed to the bodily fluids of another inmate, the officer or inmate must file an incident report within two days after the incident occurred. After filing the report, the CMO will review the report and must determine within twenty-four hours whether the inmate involved should be tested.³¹

In making this determination, the CMO must consider the facts and circumstances and whether there was a significant risk of HIV transmission. In deciding whether there was a "significant risk" of HIV transmission, the CMO should consider the following factors:

Whether an exchange of bodily fluids occurred which could have resulted in a significant risk of HIV, based on the latest written guidelines and standards established by the federal Centers for Disease Control and Prevention and the State Department of Health Services;

Whether the person exhibits medical conditions or clinical findings consistent with HIV infection; and

Whether the health of institution staff or inmates may have been endangered as to HIV infection resulting from the reported incident.

If a corrections officer or staff member observes or is informed of activities that are known to cause the transmission of HIV, he or she may file a report with the CMO. After the report is filed, the CMO will again go through the same process listed above in order to make a determination of whether the inmate or inmates involved should be tested for HIV.³² The following are listed as reportable activities known to cause the transmission of HIV:

1. Sexual activity resulting in the exchange of bodily fluids;

²⁸ CAL. PENAL CODE § 7501 (2008).

²⁹ CAL. CODE REGS. tit. 15, § 3355 (2008).

³⁰ CAL. PENAL CODE § 7514 (2008).

³¹ CAL. PENAL CODE §§7510, 7512 (2008).

³² CAL. PENAL CODE §7516 (2008).

2. Intravenous drug use;
3. Incidents involving injury to inmates or staff in which bodily fluids are exchanged;
4. Tampering with medical or food supplies or medical or food equipment; and
5. Tattooing among inmates.

The department of corrections is required to provide all inmates with information about high-risk behaviors and methods for preventing HIV transmission.³³ Correctional facilities that test inmates for HIV are recommended to have comprehensive AIDS prevention and education programs. The goals of these programs include HIV education, bodily fluid precautions, and adequate AIDS medical services. Further, it is recommended that separate housing, comparable to the housing of the general inmate population, be provided for inmates who continue to engage in activities that may transmit HIV.³⁴ Lastly, the department of health may conduct periodic, anonymous, unlinked serological surveys of all or portions of the inmate population with the approval of the county health officer.³⁵

COLORADO

Colorado law provides that inmates may be tested for HIV without informed consent.³⁶ Pursuant to state administrative regulations, all inmates must be tested for HIV upon entry to a state correctional facility.³⁷ These regulations provide that all incoming inmates, as well as other inmates who exhibit high-risk behaviors, undergo testing for HIV. Testing, other than upon entry, is also required for all pregnant female inmates, inmates who claim exposure to a known HIV positive inmate, and inmates who have signs and symptoms of HIV (thrush, herpes zoster, oral hair leukoplakia, severe seborrhea, unexplained lymphadenopathy, or opportunistic infections).

If an inmate tests positive for HIV, the treating clinician is required to develop a treatment plan approved by a department of corrections physician. Counseling throughout incarceration is required as part of this plan. The office of offender management is also required to ensure that all HIV positive inmates are housed in a manner that provides for their medical needs and provides equal access to department programs. Upon release of an inmate who is known to be HIV positive, the inmate must be provided with counseling, a referral to department of health contacts, and a thirty-day supply of medication.

³³ CAL. PENAL CODE § 5008.1 (2008).

³⁴ CAL. PENAL CODE § 7552 (2008) .

³⁵ CAL. PENAL CODE § 7553 (2008).

³⁶ COLO. REV. STAT. § 25-4-1405 (2008).

³⁷ COLO. DEPT OF CORRECTIONS, A.R. 700-09 (2008), *available at* https://exdoc.state.co.us/userfiles/regulations/pdf/0700_09.pdf

CONNECTICUT

Upon entry in a state correctional facility, the department of corrections provides all inmates with educational material about HIV and will only test for HIV upon inmate request. Furthermore, the department requires written informed consent prior to performing an HIV test. However, the department will test an inmate without informed consent where either (a) the director of clinical services determines that an inmate poses a “significant risk of transmission” to others, or has caused a significant exposure to others, or (b) a department of corrections employee has experienced a “significant exposure” during the performance of his or her duties.³⁸ Performing an HIV test without consent under these circumstances is specifically authorized by state law.³⁹

The department defines a “significant risk of transmission” as sexual activity that involves the secretion of one person’s bodily fluids to another person, or the sharing of needles during intravenous drug use. Thus, if an inmate poses a high risk of transmitting HIV or is found engaging in sexual activity or intravenous drug use, the director of clinical services may require mandatory testing.

“Significant exposure” is defined as a percutaneous injury, contact of mucus membrane or non-intact skin, contact with intact skin when the duration is prolonged or involves an extensive area, or contact with blood, tissue or other potentially infectious body fluids. Thus, if an inmate significantly exposes another inmate or an employee of the department to blood or bodily fluids, the director may require mandatory testing.

DELAWARE

Delaware state law does not specifically require the testing of inmates upon entry or prior to release from state correctional facilities. However, state law does require that all inmates be examined for any sexually transmitted diseases as may be required according to accepted medical practices and the department of health.⁴⁰ The department of health requires that all inmates be “screened” for HIV upon entry, but does not specify whether this screening includes an HIV test. If an HIV test is performed as part of the screening process, it is most likely voluntary because the department of health requires written or verbal informed consent before any person may be tested for HIV.⁴¹

DISTRICT OF COLUMBIA

As of 2006, the department of corrections tests all inmates for HIV upon entry to District correctional facilities. Further, the department will place an inmate in medical isolation for a fourteen-day period if he or she refuses testing upon entry.⁴² It

³⁸ CONN. DEPT OF CORRECTION, A.D. 8.11 (2008), *available at* <http://www.ct.gov/doc/LIB/doc/PDF/AD/ad0811.pdf>

³⁹ CONN. GEN. STAT. § 19a-582 (2008).

⁴⁰ DEL. CODE ANN. tit. 16 § 706 (2008).

⁴¹ DEL. CODE ANN. tit. 16 § 1202 (2008).

⁴² DC APPLESEED, BRIEFING PAPER OF HIV IN JAILS (July 2006), *available at* <http://www.dcappleseed.org/projects/publications/HIVTestingJails.pdf>.

is unclear what method of testing, i.e., voluntary or mandatory, is being implemented with the District, but because every inmate is tested, it appears to be mandatory.

In July 2006, The Washington AIDS Partnership published a report that highly recommended the adoption of a voluntary or routine testing program, but it is uncertain whether the department of corrections has yet to adopt such a policy. The report was endorsed by the mayor, and the mayor has some authority under District law to regulate the methods of criminal HIV testing.⁴³ Therefore, the department of corrections may now offer voluntary testing upon intake or routine testing throughout incarceration. However, absent any specific statutory or regulatory requirements, it appears the type of testing method implemented is within the discretion of each facility.

FLORIDA

Florida law requires that the department of corrections test inmates for HIV at least sixty days prior to release unless an inmate's HIV status is already known. Inmates who have been tested within a year prior to their presumptive release date are only tested upon request.⁴⁴ The department of corrections is also required to test inmates when there is evidence that an inmate has engaged in behavior that places him or her at a high risk of transmitting HIV. High-risk behavior is defined to include sexual contact with any person, an altercation involving exposure to body fluids, the use of intravenous drugs, tattooing, and any other activity medically known to transmit HIV.⁴⁵

An inmate may also be tested if a correctional officer, employee, or any other person lawfully within the correctional facility believes he or she has been exposed to HIV by an inmate. If the health services staff of the facility determines there is reason to believe risk of exposure occurred, the inmate must be tested for HIV.⁴⁶

GEORGIA

Georgia law requires that the department of corrections test all inmates for HIV within thirty days after admission to a state correctional facility.⁴⁷ In accordance with this law, the department of corrections requires HIV tests upon entry as part of all inmates' initial physical exams. However, inmates convicted of a sexual offense who have already been tested for HIV prior to incarceration are not re-tested upon entry.⁴⁸

The department of corrections may segregate HIV positive inmates if an inmate is sexually active while incarcerated, if an inmate was sexually deviant prior to incarceration, or if separate confinement appears to be in the best interests of the department and the inmate population.⁴⁹

⁴³ D.C. CODE §22-3902 (2008).

⁴⁴ FLA. STAT. §945.355 (2008).

⁴⁵ *Id.*

⁴⁶ FLA. ADMIN. CODE ANN. r. 33-401.501 (2008).

⁴⁷ GA. CODE ANN. 42-5-52.1 (WEST 2008).

⁴⁸ GA. COMP. R. & REGS.125-4-4.05 (2008).

⁴⁹ GA. CODE ANN. 42-5-52.1 (WEST 2008).

If an inmate injures or contacts, or has injured or contacted, a correctional officer or other person in such a manner as to present a possible threat of HIV transmission, then the official who is in charge of the inmate may take reasonable steps necessary, including HIV testing, to determine whether the inmate has transmitted HIV. If an inmate refuses to cooperate, the official may petition a local court for an order authorizing the use of any degree of force reasonably necessary to complete such procedures.⁵⁰

HAWAII

Hawaii law does not specifically require HIV testing upon entry or prior to release from state correctional facilities. However, a recent survey conducted by the American Correctional Association reports that the Hawaii correctional system conducts HIV testing upon entry and upon inmate request.⁵¹ Furthermore, Hawaii correctional facilities test inmates who are involved in an incident where there was a possible exposure to HIV.⁵² Otherwise, Hawaii law only requires that persons convicted of a sexual offense must undergo mandatory HIV testing.⁵³

IDAHO

Idaho law provides that all inmates must be examined for communicable diseases upon entry and prior to release from state correctional facilities. HIV tests are specifically required as part of this examination. If an inmate tests positive, he or she must be provided with medical treatment.⁵⁴ State law also requires that any inmate exposed to HIV or AIDS must be offered appropriate medical and counseling services and that the department of corrections must provide HIV education to all inmates and correctional staff.⁵⁵

Any individual charged with a sexual offense, drug related crime, prostitution or any crime in which bodily fluids may have been transmitted to another must be tested for HIV. If the individual is tested by a department other than the department of corrections, the department of corrections is required to reimburse the department that tested the individual.⁵⁶

ILLINOIS

Illinois law specifically requires that all inmates must be provided with information and counseling regarding HIV upon entry to a state correctional facility. After counseling, each inmate must sign a form showing that he or she has been informed of his or her rights with respect to HIV testing and indicate whether he or she wants to be tested. All inmates must again be given the option to be tested prior

⁵⁰ GA. CODE ANN. 42-1-6 (WEST 2008).

⁵¹ BILLY LONG, A CONTENT ASSESSMENT OF U.S. PRISON-BASED AIDS EDUCATION PROGRAMS, 1995-2005, 31 CORRECTIONS COMPENDIUM 5 (2006).

⁵² See Maruschak, *supra* note 1.

⁵³ HAW. REV. STAT. §325-16 (2008).

⁵⁴ IDAHO CODE ANN. §39-604 (2008).

⁵⁵ IDAHO CODE ANN. §20-209 (2008).

⁵⁶ IDAHO CODE ANN. §39-604 (2008).

to release. Therefore, Illinois correctional system provides voluntary opt-in testing to all inmates upon entry and prior to release.

Illinois law also requires that HIV testing be provided upon inmate request and that all HIV tests must be free of cost.⁵⁷ Further, the department of corrections is required to provide all inmates with information concerning department of health services and other HIV programs upon their release.⁵⁸

INDIANA

Indiana law requires the immediate examination of all inmates for communicable diseases upon admission to a state correctional facility. This examination is specifically required to include mandatory HIV testing.⁵⁹ Effective July 1, 2007, all inmates must also be tested ninety days prior to being discharged or released on probation or parole.⁶⁰ State law also requires the mandatory testing of individuals convicted of a sex-related offense in which there was a high risk of HIV transmission.⁶¹

IOWA

Iowa law requires that all inmates must undergo a medical examination upon admission to a state correctional facility.⁶² This examination does not specifically require testing for HIV, but Iowa correctional facilities do test inmates for HIV upon entry and upon inmate request.⁶³ Otherwise, state law only requires HIV testing where an inmate has bitten someone or otherwise caused an exchange or secretion of bodily fluids.⁶⁴

KANSAS

Although not required by law, the Kansas correctional system provides voluntary HIV testing to all inmates upon entry and will provide testing upon inmate request.⁶⁵ Inmates may be subject to mandatory testing under the state occupational exposure statute if a corrections employee or corrections officer is exposed to the bodily fluids of one or more inmates in the course of his or her duties. However, such mandatory testing will only occur if the inmate first refuses a voluntary HIV test and a court subsequently orders the testing. If an inmate is tested and the test results return negative, the inmate must submit to another test six months after the date the first test was administered.⁶⁶

⁵⁷ 730 ILL. COMP. STAT. ANN. 5/3-8-2 (2008).

⁵⁸ 730 ILL. COMP. STAT. ANN. 5/3-14-1 (2008).

⁵⁹ IND. CODE ANN. §§11-10-3-2, 11-10-3-2.5 (LexisNexis 2008).

⁶⁰ IND. CODE ANN. § 11-10-3-2.5; *see also* S.B. 201.

⁶¹ IND. CODE ANN. §35-38-1-10.5 (LexisNexis 2008).

⁶² IOWA ADMIN. CODE R.201-51.13 (2008).

⁶³ *See* Maruschak, *supra* note 1; Long, *supra* note 51.

⁶⁴ IOWA CODE §356.48 (2008).

⁶⁵ ACA CORRECTIONS COMPENDIUM JOURNAL (Sept/Oct 2006).

⁶⁶ KAN. STAT. ANN. §65-6017 (2008).

KENTUCKY

Kentucky law provides that all inmates must undergo a health screening upon entry to a state correctional facility, but HIV testing is not required as part of the screening process.⁶⁷ Inmates may undergo mandatory testing if a correctional facility physician determines either that a corrections officer or employee was exposed to the bodily fluids of an inmate or that an inmate has engaged in high-risk behavior.⁶⁸ Furthermore, any person convicted of prostitution or a sexual offense must undergo mandatory testing for HIV and, if infected, be provided with treatment and counseling.⁶⁹ Thus, the Kentucky correctional system does not test inmates for HIV upon entry nor prior to release from state correctional facilities.

The department of corrections, in conjunction with the department of health, is also required to establish mandatory introductory and continuing HIV education programs for all inmates. These programs must be specifically designed for the prevention of HIV while inmates are incarcerated as well as after inmates are released.⁷⁰ Further, the department of corrections must develop HIV educational courses for all corrections personnel.⁷¹

LOUISIANA

Louisiana law requires that inmates be tested for HIV before they are placed on parole.⁷² Otherwise, the Louisiana correctional system does not require HIV testing upon entry or prior to release from state correctional facilities. Inmates may undergo mandatory HIV testing if they are involved in an incident in which another person may have been exposed to HIV by the inmates' throwing of feces, urine, blood, saliva, or any other form of human waste or bodily fluids. An inmate will be tested under this provision once the person who was exposed notifies the chief administrator of the correctional facility, by affidavit, that the exposure occurred. The results of the test must be submitted to the inmate and, if the results return positive, must be submitted to the facility's chief administrator. After the test, the inmate must be provided with counseling and referrals to appropriate healthcare and support services.⁷³

MAINE

Maine law provides that upon entry to a state correctional facility or at any time thereafter, inmates may request testing for HIV. If an inmate requests testing, the department of corrections must first obtain written informed consent and provide pre-test counseling.⁷⁴ Informed consent is not required if an inmate must be tested

⁶⁷ 501 KY. ADMIN. REGS 3:090 (2008).

⁶⁸ KY. REV. STAT. ANN. §438.250 (2008); KY. REV. STAT. ANN. §197.055 (2008).

⁶⁹ KY. REV. STAT. ANN §529.090 (2008), KY. REV. STAT. ANN. §510.320 (2008).

⁷⁰ KY. REV. STAT. ANN §197.055 (2008).

⁷¹ KY. REV. STAT. ANN § 196.171 (2008); KY. REV. STAT. ANN § 441.115 (2008).

⁷² LA. REV. STAT. ANN . § 15:574.4 (2008).

⁷³ THE LOUISIANA PRISON REFORM ACT OF 1995, LA. REV. STAT. ANN § 15:739 (2008).

⁷⁴ 03-201-18 ME. CODE. R. § VI (2008).

pursuant to a court order, but the department will still provide pre-test and post-test counseling.⁷⁵ Therefore, the Maine correctional system usually only provides testing upon inmate request, which may occur upon entry or prior to release from a correctional facility.

An inmate may also be required to submit to mandatory testing when a person is exposed to the inmate's blood or bodily fluids. Under Maine law, any person who experiences a "bona fide occupational exposure" may petition the local district court for an order requiring testing if the following conditions are met:

1. The exposure created a significant risk of HIV infection;
2. The representative of the employer has sought to obtain written informed consent;
3. Informed consent was not provided; and
4. The employee was tested immediately following exposure.

A "bona fide occupational exposure" is defined as any skin, eye, or mucous membrane contact with the potentially infectious blood or other bodily fluids of another that results during the performance of one's duties in the course of employment. Therefore, if a department of corrections employee is exposed to the blood or bodily fluids of an inmate during the performance of his or her duties, he or she may petition the court for an order requiring the inmate be tested for HIV.⁷⁶

MARYLAND

Maryland law provides that all inmates must be screened for HIV after admission to a state correctional facility.⁷⁷ Whether or not this "screening" includes testing for HIV is within the discretion of each facility director. If HIV testing is part of the screening process, it is most likely voluntary because Maryland law requires informed consent before performing any HIV test. If an inmate tests positive for HIV, the department of corrections will provide the inmate with health referrals and a twenty-four hour supply of medication upon release.

Under the state occupational exposure statute, inmates may undergo mandatory HIV testing if:

1. There was an exposure involving an inmate and a department of corrections employee;
2. The exposure occurred in connection with the inmate's violation of institutional regulations;
3. The inmate has been found guilty of violating the institutional regulation;

⁷⁵ ME. REV. STAT. ANN. TIT. 5, §19203-F (2008); ME. REV. STAT. ANN. TIT. 5 §19204-A (2008).

⁷⁶ ME. REV. STAT. ANN. TIT 5, §19203-C.

⁷⁷ MD. CODE REGS. 12.02.03.08 (2008).

4. The employee involved gave written notice to the official in charge of the correctional facility or the official's designee; and
5. The exposure has been confirmed by someone authorized to perform healthcare services and is under contract with or operated by the correctional facility.

An "exposure" is defined as percutaneous or mucocutaneous contact with blood, semen, or blood contaminated fluids. Therefore, if a department of corrections employee is exposed to the blood or bodily fluids of an inmate and the above conditions are satisfied, an inmate must be tested for HIV. If the results of a test performed return positive, the inmate and employee must be notified within forty-eight hours of confirmation of the inmate's diagnosis and be provided with appropriate counseling.⁷⁸

MASSACHUSETTS

Massachusetts law requires that each inmate who is committed to a state correctional facility for thirty days or more receive a thorough physical exam, including examination for the presence of venereal diseases (VDs).⁷⁹ The department of corrections examines all inmates for HIV upon entry but will only test with informed consent. The department also tests upon inmate request.⁸⁰

MICHIGAN

Michigan law requires that all inmates undergo mandatory HIV testing within sixty days after admission to a state correctional facility. An inmate will not be tested under this provision if he or she has been tested within a three-month period prior to admission. All inmates tested must be provided with counseling. If an HIV positive inmate engages in sexual misconduct, intravenous drug use, or assaultive behavior, he or she must be segregated.⁸¹

Inmates may also be subject to mandatory testing under the state occupational exposure statute if a department of corrections employee is exposed to the blood or bodily fluids of an inmate. If an employee requests testing within seventy-two hours of the exposure incident, the department will determine whether there is reasonable cause to believe that the employee was exposed. If so, the inmate involved in the incident must be tested. If an inmate refuses the HIV test, the inmate will be considered to be HIV positive.⁸²

MINNESOTA

Currently, the Minnesota correctional system does not require HIV testing upon entry or prior to release from state correctional facilities. However, state correctional facilities will test upon inmate request with informed consent. Consent is not

⁷⁸ MD. CODE. ANN. HEALTH-GEN. §18-338 (West 2008).

⁷⁹ MASS. GEN. LAWS ch.127, § 16 (2008).

⁸⁰ MASS. GEN. LAWS ch. 111, § 6 (2008).

⁸¹ MICH. COMP. LAWS §791.267 (2008).

⁸² *Id.*

required prior to testing persons convicted of a sexual offense involving sexual penetration or an exchange of bodily fluids.⁸³

Inmates may also be tested without consent if a corrections employee has been exposed to the blood or bodily fluids of an inmate.⁸⁴ However, the following conditions must be satisfied before the inmate can be tested:

1. The employee and corrections facility have documented exposure to blood or bodily fluids during the performance of the employee's work duties;
2. A licensed physician has determined that a significant exposure occurred and has documented that the testing is needed;
3. The corrections employee submits to testing as soon as feasible;
4. The correctional facility has asked the inmate for consent and the inmate has not given consent;
5. The correctional facility has provided the inmate and employee with all of the information required by the state informed consent statute; and
6. The employee has been informed of all state required confidentiality requirements and the penalties for violating such requirements.

MISSISSIPPI

Mississippi law provides that state correctional facilities must test inmates for HIV in accordance with the rules and regulations promulgated by the state department of health. The department of health requires that state correctional facilities test all inmates for HIV at least thirty days prior to admission.⁸⁵ Furthermore, any inmate convicted of a sexual offense and sentenced to ninety days or more must be tested at least thirty days prior to release.⁸⁶ State law also requires post-test counseling and provides that inmates may be segregated if medically necessary.

MISSOURI

Missouri law requires that the department of corrections test all inmates for HIV, without the right of refusal, upon entry and prior to release from state correctional facilities. Furthermore, the department of corrections must test inmates as part of their annual, or biannual, physical exams. An inmate will not be tested upon entry if he or she has already been tested due to committing a sexual offense and the

⁸³ MINN. STAT. § 611A.19 (2008).

⁸⁴ MINN. STAT. § 241.335 (2008).

⁸⁵ MISS. CODE ANN. § 41-23-1 (2008).

⁸⁶ MISS. CODE ANN. § 99-19-203 (2008).

department is able to obtain the prior test results.⁸⁷ Pre-test and post-test counseling are also required.⁸⁸

MONTANA

Montana law provides that the department of corrections may examine inmates for HIV at any time.⁸⁹ While it is unclear whether the department of corrections requires testing of inmates upon entry or prior to release, the department tests all inmates within its custody for HIV.⁹⁰ Because inmates may be tested without consent, this testing is most likely mandatory. State law also requires pre-test and post-test counseling and, if an inmate tests positive, adequate medical treatment must be provided.⁹¹ Inmates may also be subject to mandatory testing upon the request of a department of corrections officer who claims that he or she has been exposed to the blood or bodily fluids of an inmate and reasonably believes the exposure may have resulted in the transmission of HIV.⁹²

NEBRASKA

Nebraska law requires the establishment of HIV infection and AIDS care clinics in state correctional facilities for the treatment, counseling, and education about HIV of inmates.⁹³ Under the protocols, the clinics are required to include provisions for HIV testing of all inmates upon entry to a correctional facility and at the time of release, unless an inmate has previously tested positive for HIV.⁹⁴ The protocols also require provisions in order to determine when it is medically desirable to segregate HIV positive inmates. State law further provides that HIV testing may not be conducted prior to release without inmate consent. Therefore, state correctional facilities require mandatory testing upon entry but voluntary testing upon release. Any inmates tested must be provided with pre-test and post-test counseling.⁹⁵

The department of corrections is also required to perform an HIV test on all persons convicted of a sexual offense if the circumstances of the case demonstrate that the offender possibly transmitted HIV.⁹⁶

NEVADA

Nevada law requires the department of corrections to test all inmates for HIV upon entry to state correctional facilities. State law also requires the testing of

⁸⁷ MO. REV. STAT. § 191.659 (2008).

⁸⁸ MO. REV. STAT. § 191.653 (2008).

⁸⁹ MONT. CODE ANN. §50-18-108; -18-101 (2008).

⁹⁰ See Maruschak, *supra* note 1, at 6.

⁹¹ MONT. CODE ANN. §50-16-1007 (2007).

⁹² MONT. CODE ANN. §50-16-702 (2007).

⁹³ NEB. REV. STAT. §83-4, 159 Health Care (2008).

⁹⁴ NEB. REV. STAT. §83-4, 161 (2008).

⁹⁵ NEB. REV. STAT. § 71-5, 31(2008)..

⁹⁶ NEB. REV. STAT. § 29-2290 (2008); NEV. REV. STAT. § 209.385 (2008).

inmates who have been involved in an incident where there was a significant risk of exposure to HIV.⁹⁷ Furthermore, the department of corrections must test all inmates who are released by pardon or parole.⁹⁸ All testing must be approved by the department of health. Any inmate tested for HIV must be provided with counseling. Any inmate who tests positive for HIV and engages in high-risk behavior (e.g., assaultive behavior, sexual behavior, prior intravenous drug use) must be segregated.⁹⁹

In accordance with state law, the department of corrections requires the mandatory testing of all inmates upon entry to state correctional facilities. The department also requires the mandatory testing of *all* inmates prior to release, not just those being released by pardon or parole, which is all that is required by state law. Inmates who test positive for HIV are offered routine counseling as well as counseling prior to release. All inmates are provided with HIV educational information upon entry, and HIV positive inmates that engage in high-risk behavior are segregated. If an employee of the department is exposed to the blood or bodily fluids of an inmate, the employee must be informed of the inmate's HIV status and is entitled to free testing for HIV.¹⁰⁰

Under the state occupational exposure statute, a correctional officer who may have been exposed to a contagious disease while performing his or her official duties may petition a court for an order requiring the testing of the inmate who was the source of the exposure. If the court finds probable cause to believe that a possible transfer of blood or other bodily fluids occurred, the court will order the inmate to be tested for HIV.¹⁰¹

NEW HAMPSHIRE

New Hampshire law requires that all inmates undergo a comprehensive medical exam within ten days after being committed to a state correctional facility. The medical exam must include pre-diagnostic blood tests for infectious or contagious diseases. All testing must be performed by approved medical staff. If a treating physician determines that an inmate poses a threat to other inmates, the inmate may be segregated.¹⁰² Informed consent is not required where HIV testing is necessary for the placement and management of inmates.¹⁰³ Therefore, all inmates may undergo mandatory testing upon entry to a state correctional facility.

⁹⁷ NEV. REV. STAT. § 209.385 (2008).

⁹⁸ NEV. REV. STAT. § 209.511(1)(H) (2008).

⁹⁹ NEV. REV. STAT. § 209.385 (2008).

¹⁰⁰ NEV. DEPT. OF CORRECTIONS, A.R. 610 (2003), *available at* <http://www.doc.nv.gov/ar/pdf/AR610.pdf>

¹⁰¹ NEV. REV. STAT. § 441A.195 (2008).

¹⁰² N.H. ADMIN. R. ANN. HEALTH §303.01

¹⁰³ N.H. REV. STAT. § 141-F:5 (2008).

NEW JERSEY

New Jersey law requires that all inmates be medically examined within twenty-four hours after being committed to a state correctional facility.¹⁰⁴ While HIV testing is not required as part of the medical exam, an HIV test will be performed upon inmate request with informed consent.¹⁰⁵ Inmates may undergo court-ordered HIV testing if they are convicted of an offense involving a hypodermic needle or if there was a likely transmission of bodily fluids during the commission of the offense.¹⁰⁶ Otherwise, the New Jersey correctional system does not test inmates for HIV upon entry or prior to release.

NEW MEXICO

The New Mexico department of corrections will offer HIV testing upon entry to a state correctional facility if an inmate has a high-risk of infection, shows clinical indications of infection, or requests testing. The department also urges inmates who have previously engaged in high-risk behavior to be tested for HIV. If an HIV test is performed, the inmate must receive pre-test and post-test counseling.¹⁰⁷

It is the express policy of the department that inmates should not be tested for HIV without first obtaining informed consent. However, the department will perform an HIV test without consent in two situations: (1) where an employee of the department has been exposed to the blood or bodily fluids of an inmate and the inmate refuses to provide consent; and (2) in the event of an emergency where the inmate is unable to grant or withhold consent and the test results are necessary to provide appropriate medical care and treatment.

All inmate housing and work assignments must be made without regard to their HIV status unless an inmate poses a clear threat to other inmates or unless medically necessary. In addition, condoms must be provided to inmates for all conjugal visits.

NEW YORK

The New York department of corrections does not perform HIV tests upon entry or prior to release from state correctional facilities. However, New York correctional facilities routinely offer testing to all inmates throughout incarceration and draw blood samples from all inmates upon entry which are randomly tested for HIV every other year.¹⁰⁸

New York law does not require that inmates be tested for HIV, but does provide that the department of corrections must obtain informed consent before performing any HIV tests, and that any person tested for HIV must receive pre-test and post-test

¹⁰⁴ N.J. ADMIN. CODE. § 10A:16-2.11 (2008).

¹⁰⁵ N.J. ADMIN. CODE. § 10A:16-5.1 (2008).

¹⁰⁶ N.J. REV. STAT. § 2C:43-2.3 (2008).

¹⁰⁷ NEW MEXICO CORRECTIONS DEPARTMENT CD-176000 (2005), *available at* <http://corrections.state.nm.us/policies/policyhealth.html>.

¹⁰⁸ John G. Bartlett et. al., *HIV in Corrections*, <http://www.cminstitute.org/hivin.htm>, (July 1, 2000).

counseling.¹⁰⁹ State law also provides that the department of corrections may isolate any prisoner who may be infected with HIV for as long as medically necessary.¹¹⁰

NORTH CAROLINA

North Carolina law requires that all inmates undergo a medical evaluation as soon as practicable after admission to a state correctional facility.¹¹¹ While HIV testing is not required as part of this medical evaluation, the department of correction will perform an HIV test upon inmate request with informed consent. The department will also perform mandatory testing on inmates convicted of a sexual offense when ordered by a court.¹¹²

NORTH DAKOTA

North Dakota law requires that all individuals imprisoned within a state correctional facility for fifteen days or more be tested for HIV and, if found to be infected, be treated by the facility's health officer.¹¹³ HIV positive inmates may be segregated and treated in a separate clinic within a state correctional facility. Furthermore, an HIV positive inmate may be isolated and treated at the expiration of his or her sentence, and may be required to stay isolated within the state correctional facility for treatment purposes. Whether or not this actually occurs is uncertain, but it appears to be authorized by law.

OHIO

Ohio law requires that the director of the department of corrections develop a policy for handling problems related to HIV infection among inmates.¹¹⁴ Pursuant to this policy, the department of corrections requires all inmates to undergo HIV testing upon entry to a state correctional facility and to receive post-test counseling.¹¹⁵ Inmates may also have to submit to mandatory testing when the head of a correctional facility determines that there is good cause for believing that such testing is necessary. All HIV positive inmates must be housed in accordance with their safety and medical needs, e.g., inmates may be housed within the correctional facility chronic care clinic if they have progressed into later stages of AIDS infection.

OKLAHOMA

Oklahoma law provides that the department of health may require HIV testing without informed consent if it is in the best public interest.¹¹⁶ Pursuant to this

¹⁰⁹ N.Y. PUB. HEALTH LAW §2781 (2008); N.Y. Administrative Code Title 7, §7.4

¹¹⁰ N.Y. CORRECT. LAWS § 141 (2008).

¹¹¹ N.C. GEN. STAT. § 148-19 (2008).

¹¹² N.C. GEN. STAT. § 15A-615 (2008).

¹¹³ N.D. CENT. CODE §23-07-07.5 (2007).

¹¹⁴ OHIO REV. CODE ANN. § 5120.16 (West 2008).

¹¹⁵ OHIO ADMIN. CODE § 5120:9-58 (2008).

¹¹⁶ OKLA. STAT. ANN. tit. 63, § 1-534 (West 2008).

authority, the department of health requires that all inmates within state correctional facilities be tested for HIV.¹¹⁷ In accordance with this law, the department of corrections requires that all inmates undergo mandatory testing upon entry to a state correctional facility. Inmates may also undergo mandatory testing, if any person is exposed to the bodily fluids of an inmate in a state correctional facility and the inmate has not previously tested positive for HIV.¹¹⁸

OREGON

Oregon law provides that the department of corrections may test an inmate without consent upon entry if the inmate has been convicted of a sexual or drug related offense and shows clinical indications of HIV infection.¹¹⁹ Otherwise, the department of corrections will only test upon inmate request with informed consent. However, the state occupational exposure statute was recently amended to include correctional officers so that when a correctional officer is exposed to the blood or bodily fluids of an inmate in a manner that presents a significant risk of exposure to HIV the officer may file a petition with a local court requesting that the inmate be tested for HIV. If the court determines that exposure occurred, the department of corrections is required to test the inmate for HIV regardless of consent.¹²⁰

PENNSYLVANIA

Pennsylvania law provides that any inmate confined within a state correctional facility may be tested for HIV. If an inmate refuses to be tested for HIV, a correctional facility may petition a court for an order requiring such testing. State law also provides that correctional facilities must provide appropriate medical treatment to HIV positive inmates.¹²¹

Pursuant to department of corrections regulations, an inmate is offered HIV testing upon entry to a state correctional facility if he or she has a high risk or clinical indications of HIV infection. HIV testing is also provided upon an inmate's request. An inmate is required to undergo mandatory testing if an HIV test is ordered by a court, or if an employee of the department of corrections has been exposed to the blood or bodily fluids of an inmate. If an inmate is tested for HIV, he or she must be provided with pre-test and post-test counseling.¹²²

If any corrections employee is exposed to the blood or bodily fluids of an inmate, an HIV/AIDS workplace coordinator is responsible for determining whether a high risk of exposure occurred. If such exposure occurred, the coordinator must test the exposed employee for HIV and the facility physician must attempt to test the inmate voluntarily for HIV. If the inmate refuses testing, the employee may pursue a court order requiring an HIV test.

¹¹⁷ OKLA. STAT. ANN. tit. 63, § 1-524 (West 2008).

¹¹⁸ OKLA. STAT. ANN. tit. 63, § 1-523 (West 2008).

¹¹⁹ OR. ADMIN. R. 333-012-0265(3)(b) (2008).

¹²⁰ OR. REV. STAT. §433.085 (2008).

¹²¹ 35 PA. CONS. STAT. § 7601 (2008).

¹²² PENNSYLVANIA DEPARTMENT OF CORRECTIONS REG. 13.02.01 (2004), *available at* http://www.cor.state.pa.us/standards/lib/standards/13.02.01_Access_Health_Care.pdf.

RHODE ISLAND

Rhode Island law requires that every person committed to a state correctional facility be tested for HIV. Informed consent is not required prior to such testing, but state law provides that efforts should be made to first obtain informed consent. Periodic HIV testing is also required, including prior to release and when deemed appropriate by a physician.¹²³ Furthermore, an inmate may undergo mandatory testing if a facility physician determines that her or she was involved in an incident that may have placed another person at risk of contracting HIV.¹²⁴

All inmates must be provided with pre-test and post-test counseling. HIV positive inmates are entitled to reasonable medical care and treatment available for their illness. The department of corrections is prohibited from segregating, punishing, or denying recreational activities to inmates due to their HIV status. Lastly, the department of corrections is required to implement a comprehensive HIV education and drug treatment program for all inmates and staff.

SOUTH CAROLINA

South Carolina law provides that the department of corrections may examine any inmate for HIV. Prior to release, any inmate infected with HIV must be isolated or confined until medical release is approved by a local health officer. In lieu of isolating and treating HIV positive inmates at the correctional facility, a local health officer may release HIV positive inmates to report to a physician or the Department of Health and Environmental Control for post-release treatment.¹²⁵ State law does not mandate that the department of corrections test all inmates for HIV, but state correctional facilities test all inmates upon entry.¹²⁶

Inmates may also be subject to mandatory HIV testing if a healthcare worker within the department of corrections is involved in an incident where there was a significant risk of exposure to HIV, or where an inmate has attempted to throw, or threw, bodily fluids at an employee of the department of corrections.¹²⁷ Further, persons convicted of prostitution, burglary, or committing or attempting to commit a lewd act on a child under the age of 14 must be tested for HIV, if the crime resulted in exposing the victim to blood or seminal fluid.¹²⁸

SOUTH DAKOTA

South Dakota law provides that the department of health will provide HIV testing and counseling upon the reasonable request of any inmate or correctional officer.¹²⁹ Beyond that, state law does not mandate that the state correctional system test inmates for HIV. In 2004, it was reported that state correctional facilities tested all

¹²³ R.I. GEN. LAWS §42-56-37 (2008)

¹²⁴ *Id.*

¹²⁵ S.C. CODE ANN. §44-29-100 (2008).

¹²⁶ See Maruschak, *supra* note 1; Long, *supra* note 51.

¹²⁷ S.C. CODE ANN. §§ 24-13-470, 44-29-230 (2007).

¹²⁸ S.C. CODE ANN. §16-3-740 (2007).

¹²⁹ S.D. ADMIN. R. §61-21(L)

inmates upon entry.¹³⁰ However, more recent reports indicate that the department of corrections will only test upon inmate request beginning in 2006.¹³¹

TENNESSEE

Tennessee law requires that all inmates under the age of twenty-one be tested for HIV upon entry to a state correctional facility, unless they have been previously tested due to the commission of a sexual offense. All inmates that have not previously been tested in connection with the commission of a sexual offense must undergo a confirmatory test and be provided with counseling if necessary.¹³² State law also provides that correctional facilities must train all employees who may be at risk of potential exposure to HIV and may hire qualified personnel to examine inmates for HIV.¹³³

All inmates over the age of twenty-one are offered voluntary testing. Voluntary testing must be offered if an attending physician determines that an inmate may be infected based on previous high-risk behavior, if an inmate has clinical indications of infection, or if an inmate reports high-risk behavior and requests testing.¹³⁴ The department of corrections lists the following as high-risk indicators that would require offering an inmate voluntary HIV testing:

1. History of blood transfusions between 1978 and 1985
2. Intravenous drug use
3. Men who have, or have had, sex with other men
4. History of being diagnosed with a sexually transmitted disease (STD), including Hepatitis B
5. History of unprotected sex
6. Sexual offender or victim of sexual assault
7. Positive tuberculin tests
8. The inmate was the source of recent exposure or was exposed to blood or bodily fluids
9. Other indicators of HIV infection (e.g., tattoos, anal trauma, needle marks, etc.)

¹³⁰ See Maruschak, *supra* note 1.

¹³¹ See Long, *supra* note 51

¹³² TENN. CODE ANN. §41-21-107 (2008).

¹³³ TENN. CODE ANN. §§41-51-101, 41-4-138 (2008).

¹³⁴ Tenn. Department of Corrections Administrative Policy 113.45 (2006), available at <http://www.tennessee.gov/correction/pdf/113-45.pdf>.

The department also requires that any inmate tested for HIV be provided with pre-test and post-test counseling and that all inmates must receive HIV/AIDS educational information upon entry and prior to release. Furthermore, the department requires that HIV positive inmates remain housed with the general inmate population.

An inmate, regardless of age, may undergo mandatory HIV testing if an employee or visitor of a state correctional facility has been involved in an incident where he or she was exposed to the blood or bodily fluids of the inmate. The employee or visitor may file a report with the director of the facility requesting that the inmate be tested for HIV. If a report is filed, the inmate involved must be tested for HIV, with or without consent.¹³⁵

TEXAS

In May of 2007 Texas law was amended so that all inmates must be tested for HIV upon entry to a state correctional facility, unless an inmate is already known to be HIV positive. The pre-amendment law required mandatory testing prior to release but was silent as to testing upon entry.¹³⁶ Beginning in 2006, the department of corrections offered voluntary testing to all inmates upon entry and required mandatory testing prior to release.¹³⁷

An inmate may undergo mandatory testing if a correctional officer or department of corrections employee is exposed to the blood or bodily fluids of the inmate and the officer or employee requests that the inmate be tested. An inmate is only required to be tested if the officer or employee experienced the exposure during the course of his or her employment, believes the exposure has placed him or her at risk of HIV infection, and presents a sworn affidavit setting forth the reasons for his or her beliefs. If those requirements are met, an order will be issued and the inmate must be tested for HIV. If the inmate refuses to be tested, a court order must be obtained.¹³⁸

UTAH

Utah law requires that the department of corrections test all inmates for HIV upon admission to a state correctional facility or at a reasonable time thereafter. State law also authorizes the periodic testing of inmates for HIV. At the time an inmate receives his or her test results, the department of corrections must provide the inmate with educational information and counseling regarding HIV. The department is prohibited from segregating HIV positive inmates unless the exclusion is necessary for the protection of the general inmate population or staff.¹³⁹

VERMONT

Vermont law requires that all individuals sentenced to fourteen days or more undergo a medical evaluation upon admission to a state correctional facility.¹⁴⁰ The

¹³⁵ TENN. CODE ANN. §41-51-102 (2008).

¹³⁶ TEX. GOV'T CODE ANN. §501.054 (2007).

¹³⁷ See Long, *supra* note 51.

¹³⁸ TEX. HEALTH & SAFETY CODE ANN. § 81.050 (2007).

¹³⁹ UTAH CODE ANN. §64-13-36, 37 (2008).

¹⁴⁰ VT. STAT. ANN. tit. 28, §801 (2007).

department of corrections requires that all newly admitted inmates be examined for possible HIV infection as part of their medical evaluation, but does not require an HIV test as part of the evaluation process.

Pursuant to department of corrections guidelines for HIV testing and treatment, general screening of inmates for HIV is discouraged. HIV testing may only be conducted under the following circumstances: 1) at the request of a facility physician where an offender demonstrates clinical indications; 2) at the request of a facility physician where an offender is at high risk of having HIV; or 3) at the request of an inmate to participate in an educational, counseling, and testing program run by the department of health. If an HIV test is requested, the department requires an inmate's informed consent prior to performing the test.¹⁴¹

Inmate housing is based on the severity of the inmate's condition. If an inmate is asymptomatic, no special housing arrangements are required. If an inmate has an AIDS-related condition and is symptomatic, he or she may need a private cell. If an inmate has fully developed symptoms of AIDS, he or she will need special placement or hospitalization. HIV positive inmates may be segregated if there is reason to suspect sexual activity or violent behavior.

VIRGINIA

Virginia law requires that all inmates undergo a health screening upon arrival at a state correctional facility. Testing for HIV is not specifically required as part of this health screening but the examining physician may order laboratory tests and other tests as necessary.¹⁴² Therefore, while an inmate may be tested for HIV upon physician request, HIV testing is not offered nor required upon entry or prior to release from state correctional facilities.

An inmate may be subject to mandatory testing if a corrections employee is exposed to the inmate's blood or bodily fluids. If it is determined that there was a significant risk of exposure to HIV, the department of corrections will request that the inmate consent to an HIV test. If consent is withheld, a court order requiring testing may be obtained.¹⁴³ If an inmate is tested under this provision, the inmate must be provided with appropriate counseling.¹⁴⁴

WASHINGTON

Washington law provides that the department of corrections must offer testing to inmates who exhibit high-risk behaviors.¹⁴⁵ In accordance with state law, the department of corrections provides inmates with educational information and counseling regarding HIV as part of the initial medical evaluation at intake and offers testing to inmates who are identified as having a high risk of HIV infection. The department will also provide HIV testing upon inmate request. If an inmate tests

¹⁴¹ VT. DOC ADMINISTRATIVE DIRECTIVE 351.01, *available at* <http://www.doc.state.vt.us/about/policies/rpd/351.01%20Health%20Care%20Policy%20Addendum-AIDS.pdf>.

¹⁴² 6 VA. ADMIN. CODE §15-31-230 (2008).

¹⁴³ VA. CODE ANN. §32.1-45.2 (2008).

¹⁴⁴ VA. CODE ANN. §32.1-37.2 (2008).

¹⁴⁵ WASH. REV. CODE §70.24.360 (2008).

positive for HIV, he or she is provided with medical care and treatment and will not be segregated unless medically necessary.¹⁴⁶

Inmates may undergo mandatory testing if a corrections employee is substantially exposed to the blood or bodily fluids of an inmate. If an inmate is tested without consent, pre-test and post-test counseling are required.¹⁴⁷

WEST VIRGINIA

In 1996, the West Virginia Legislative Correctional Facility Standards Commission revised the minimum standards for the operations of state correctional facilities. The new rules require that, upon admission to a state correctional facility, all inmates must be informed of their right to medical treatment and provided with health education regarding HIV. In addition, all inmates must undergo a health appraisal by a qualified facility physician within seven days after admission. The health appraisal is required to include the administration of laboratory or diagnostic tests for the detection of HIV.¹⁴⁸ However, informed consent is also required prior to testing inmates for HIV.¹⁴⁹ Therefore, the department of corrections may provide voluntary testing to all inmates upon entry to a state correctional facility.

Inmates convicted of prostitution, sexual assault, sexual abuse, incest, or sexual molestation must undergo mandatory testing for HIV. Furthermore, those inmates may not be released until counseling and HIV testing has been performed.¹⁵⁰

WISCONSIN

Wisconsin law provides that all inmates must be examined for HIV upon entry to a state correctional facility.¹⁵¹ While it is unclear whether this exam includes testing for HIV, state correctional facilities have offered voluntary testing to all inmate upon entry. This is consistent with the state informed consent law that requires informed consent before performing any HIV tests.¹⁵²

If an inmate refuses to be tested for HIV, the department of corrections may isolate that inmate for medical observation for as long as medically necessary. If an inmate is confined to medical observation for this reason, a physician is required to examine the inmate for HIV within two days. Therefore, if an inmate is suspected of HIV infection and refuses testing, the department may isolate the inmate for further medical observation.

¹⁴⁶ WASH. DOC POLICY 670.020, available at <http://www.doc.wa.gov/policies/showFile.aspx?name=670020>.

¹⁴⁷ WASH. REV. CODE §70.24.340 (2008).

¹⁴⁸ W. VA. CODE R. § 95-2-14 (2008).

¹⁴⁹ W. VA. CODE §16-3C-1 (2008).

¹⁵⁰ W. VA. CODE §16-3C-2 (2008).

¹⁵¹ WIS. ADMIN. CODE DOC § 311.11 (2008).

¹⁵² WIS. STAT. § 252.12 (2007)

WYOMING

Wyoming law requires that all inmates sentenced to a state correctional facility for fifteen days or more be tested for HIV.¹⁵³ This mandatory testing is conducted as part of the intake process.¹⁵⁴ Inmates may also undergo mandatory testing if a corrections employee is exposed to the blood or bodily fluids of an inmate. If the inmate refuses testing, the employee may petition a court for an order requiring the inmate to submit to testing.

VII. PUBLIC HEALTH ORGANIZATION TESTING RECOMMENDATIONS

Many leading public health organizations have recently released new HIV testing guidelines for correctional facilities. These new guidelines are discussed below in order to provide an overview of what is currently being recommended for HIV testing in the prison environment.

A. The Centers for Disease Control and Prevention (CDC)

In September 2006, the Centers for Disease Control and Prevention (CDC) issued “Revised Recommendations for the HIV Testing of Adults, Adolescents, and Pregnant Women in Health Care Settings.”¹⁵⁵ The recommendations provide general testing guidelines for all healthcare facilities, but also specifically include correctional healthcare facilities. The recommendations state that healthcare providers should initiate “HIV screening” for all patients ages sixteen through sixty-four as part of routine clinical care. The CDC defines “HIV screening” as performing an HIV test on all persons in a defined population. The type of “screening” the CDC recommends is voluntary opt-out screening in which the patient is notified that an HIV test will be performed unless he or she declines.¹⁵⁶

In April 2006, the CDC also issued HIV testing recommendations more specific to the prison setting. These recommendations were made in connection with a study of the HIV risk behaviors and transmission patterns among male inmates within the Georgia Department of Corrections. Based on the results of that study, the report recommended that prisons provide HIV screening upon entry and prior to release, and that voluntary opt-out testing be offered periodically throughout incarceration. Further, the report also suggested that annual testing, HIV education programs, and condom distribution programs may effectively reduce HIV transmission among male inmates.¹⁵⁷

¹⁵³ WYO. STAT. ANN. § 35-4-134 (2008).

¹⁵⁴ Long, *supra* note 51.

¹⁵⁵ CENTERS FOR DISEASE CONTROL AND PREVENTION. REVISED RECOMMENDATIONS FOR HIV TESTING OF ADULTS, ADOLESCENTS, AND PREGNANT WOMEN IN HEALTH CARE SETTINGS. MMWR 2006; 55(No. RR-14).

¹⁵⁶ *Id.*

¹⁵⁷ CENTERS FOR DISEASE CONTROL AND PREVENTION. HIV TRANSMISSION AMONG MALE INMATES IN A STATE PRISON SYSTEM – GEORGIA, 1992 – 2005. MMWR WEEKLY April 21, 2006; 55(No. RR-15): 421-426.

B. WHO, UNODC and UNAIDS

In addition to the recent release of general HIV testing guidelines for all healthcare providers, the World Health Organization (WHO), the United Nations Programme on HIV/AIDS (UNAIDS), and the United Nations Office on Drugs and Crime (UNODC) have also recently released HIV testing guidelines specific to the prison setting.¹⁵⁸

In 2006, UNODC, WHO, and UNAIDS co-published “a framework for an effective national response” to HIV/AIDS in the prison setting. This framework was developed through a collaboration of experts and consultants from around the world who are familiar with issues involving HIV and prisons. The framework recommends that prisons take the following actions in regard to HIV testing and counseling:

1. Provide access to voluntary, confidential HIV testing with counseling for prisoners where such testing is available in the outside community. This should include access to anonymous HIV testing in jurisdictions where such testing is available outside of prisons.
2. Ensure prisoners are provided with sufficient information to enable them to make an informed choice about whether to undertake or refuse HIV testing.
3. Ensure adequate pre-test and post-test counseling as a mandatory component of HIV testing protocols and practice, and ensure effective support is available to prisoners when they receive test results and the period following.
4. Ensure confidentiality of HIV test results
5. Ensure that informed consent and pre-test and post-test counseling are mandatory for all HIV testing practices in prisons, including diagnostic testing, rapid testing, and testing as part of post-exposure prophylaxis protocols.

In 2007, WHO, UNODC, and UNAIDS also published a series of “Evidence for Action Technical Papers” that focus on effective interventions for managing HIV in prisons. These papers state that because knowledge of HIV status is a prerequisite to providing inmates with appropriate care, treatment, and support, it is essential that prisons increase access to voluntary HIV testing.¹⁵⁹ More specifically, the reports recommend the following:

¹⁵⁸ The general HIV testing guidelines by WHO and UNAIDS also recommend opt-out voluntary testing as a routine part of medical care for all patients. CONSIDER PLACING THIS IN THE BODY OF THE ARTICLE—SEEMS LIKE AN IMPORTANT ENOUGH NOTE.

¹⁵⁹ Ralf Jurgens, EVIDENCE FOR ACTION TECHNICAL PAPERS: INTERVENTIONS TO ADDRESS HIV IN PRISONS, HIV CARE, TREATMENT AND SUPPORT (2007). *available at*

1. Voluntary testing and counseling should be easily accessible to all prisoners upon entry and during imprisonment.
2. HIV testing should be confidential and everyone tested should provide informed consent and receive pre-test and post-test counseling.
3. HIV testing should be closely linked with access to care, treatment and support for prisoners that test positive, and be part of a comprehensive HIV program.
4. HIV testing should not be mandatory, and HIV positive prisoners should not be segregated because such practices are counterproductive.

C. The Council for AIDS Action

In October 2007, the Council for AIDS Action published a policy brief pertaining to HIV/AIDS in the criminal justice system. The brief states that mandatory testing, as opposed to voluntary opt-out testing, is not an effective public health measure. Further, it recommends that a “sound” HIV policy should include the following:

1. System-wide voluntary HIV testing, counseling and surveillance;
2. Provide care and treatment to all HIV positive inmates;
3. Provide access to counseling and appropriate materials on HIV prevention and care;
4. Consider the feasibility of distributing condoms, sterile syringes and bleach kits; and
5. Work with community-based organizations and medical providers in order to offer effective discharge and transitional planning.

D. National Commission on Correctional Health Care (NCCHC)

The NCCHC’s position statement on the management of HIV in correctional institutions states that HIV testing should be a routine part of medical care and should not be performed without specific informed consent.¹⁶⁰ Further, the position

http://www.unodc.org/documents/hiv-aids/EVIDENCE%20FOR%20ACTION%202007%20hiv_treatment.pdf.

¹⁶⁰ NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE, POSITION STATEMENTS: ADMINISTRATIVE MANAGEMENT OF HIV IN CORRECTIONAL INSTITUTIONS (2005), *available at* http://www.ncchc.org/resources/statements/admin_hiv2005.html.

statement and NCCHC “clinical guideline on HIV”¹⁶¹ also recommend the following:

1. HIV testing should occur upon entry to a correctional facility;
2. Anyone who has clinical indications of infection or has engaged in high-risk behaviors should be encouraged to test for HIV;
3. All pregnant women should be tested for HIV;
4. Inmates should not be segregated or medically isolated based solely on HIV status;
5. Tests, diagnoses, and treatments should remain confidential;
6. Inmates should receive effective HIV education, including peer education programs, discharge planning, and harm reduction techniques; and
7. Provide correctional staff with infection control training

VIII. MODEL STATE TESTING POLICIES

Although the above organizations generally recommend that correctional systems provide voluntary opt-out testing upon entry, the reality is that most state correctional systems are required by law to either test all inmates upon entry or only test with written informed consent upon inmate request. However, because these recommendations are still fairly recent, state laws regarding inmate HIV testing may change in the near future. An example of this change is the Stop AIDS in Prison Act of 2007. Soon after the CDC and other organizations released their recommendations, the Act, which contains provisions for voluntary opt-out testing upon entry and prior to release, was introduced.

For now, there appear to be some state correctional systems that have incorporated the above recommendations into their HIV testing policies. In particular, the Illinois and New Mexico correctional systems seem to contain some of the recommendations mentioned above. Illinois is apparently the only jurisdiction that currently requires voluntary testing both upon entry and prior to release. Furthermore, it is among the very few jurisdictions where the legislature has clearly provided how and when inmates will be tested for HIV. These provisions are important to implementing a uniform state testing policy that is in the best interests of the state. In contrast, New Mexico state law does not specifically address inmate HIV testing in great detail. However, the state department of corrections is also among a few that have actually drafted a clear HIV testing policy that incorporates many of the recommendations provided above.

¹⁶¹ NATIONAL COMMISSION ON CORRECTIONAL HEALTH CARE, CLINICAL GUIDELINE FOR HEALTH CARE IN CORRECTIONAL SETTINGS: HIV INFECTION (2006). For a current version of the Guideline, go to <http://www.ncchc.org/resources/clinicalguides.html>

APPENDIX A

State Correctional System HIV Testing Quick Reference Chart						
Correctional System	Testing Circumstances					
	Upon Entry	Upon Release	Inmate Reentry	Exposure Incident	High Risk Behavior	Other
Federal	Mandatory if high-risk		X	X		
Alabama	Mandatory (if sentenced to 30 days +)	Mandatory (if sentenced to 90 days +)				If reason to believe infected
Alaska			X			
Arizona			X	X	X	If reason to believe infected
Arkansas	Voluntary	Mandatory	X		X	
California			X	X	X	
Colorado	Mandatory		X	X	X	All pregnant inmates
Connecticut			X	X	X	
Delaware			X			
District of Columbia	Mandatory					Medical isolation if testing refused upon entry
Florida		Mandatory	X	X	X	
Georgia	Mandatory			X		
Hawaii	Mandatory		X	X		
Idaho	Mandatory	Mandatory	X			
Illinois	Voluntary (opt-in)	Voluntary (opt-in)	X			
Indiana	Mandatory	Mandatory				
Iowa	Mandatory		X			
Kansas	Voluntary		X	X		
Kentucky				X	X	

State Correctional System HIV Testing Quick Reference Chart						
Correctional System	Testing Circumstances					
	Upon Entry	Upon Release	Inmate Request	Exposure Incident	High Risk	Other
Louisiana		Mandatory (if parole)		X		
Maine			X	X		
Maryland				X		
Massachusetts	Voluntary		X			
Michigan	Mandatory		X	X		
Minnesota			X	X		
Mississippi	Mandatory	Mandatory (if sex offender sentenced to 90 days +)	X			
Missouri	Mandatory	Mandatory	X	X	X	
Montana						Tests all inmates in custody
Nebraska	Mandatory	Voluntary	X			
Nevada	Mandatory	Mandatory		X		
New Hampshire	Mandatory					
New Jersey			X			
New Mexico	Offered if risk of infection		X	X	X	
New York						Routinely offered
North Carolina			X			
North Dakota	Mandatory		X			
Ohio	Mandatory		X			If test deemed necessary
Oklahoma	Mandatory		X	X		
Oregon	Mandatory if clinical indications		X	X		
Pennsylvania	Offered if risk of infection		X	X		

Correctional System	Testing Circumstances					
	Upon Entry	Upon Release	Inmate Request	Exposure Incident	High Risk Behavior	Other
Rhode Island	Mandatory (efforts made to get consent)	Voluntary	X	X		
South Carolina	Mandatory		X	X		
South Dakota			X			
Tennessee	Mandatory (if under 21)/ Voluntary (if over 21)		X	X	X	
Texas	Mandatory	Mandatory	X	X		
Utah	Mandatory			X		
Vermont			X			If clinical indications
Virginia			X	X		
Washington	Offered if high-risk		X	X		
West Virginia	Voluntary					
Wisconsin	Voluntary		X			
Wyoming	Mandatory		X	X		