

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

BILL: SB 308

SPONSOR: Senators Dawson and Miller

SUBJECT: HIV Testing of Inmates

DATE: January 24, 2002

REVISED: 01/28/02 \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Clodfelter</u>	<u>Cannon</u>	<u>CJ</u>	<u>Fav/1 amendment</u>
2.	_____	_____	<u>APJ</u>	_____
3.	_____	_____	<u>AP</u>	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

Senate Bill 308 would require the Department of Corrections (department) to test inmates for HIV infection not less than 60 days prior to release from prison. The department would not be required to retest those inmates known to be HIV positive nor those who had been tested within the previous year. Inmates that are released by an emergency court order are exempt from the testing requirement. The bill also requires the department to provide HIV positive inmates about to be released with certain transitional assistance:

1. education on preventing the spread of HIV and the importance of treatment,
2. an individualized discharge plan with links to health care services in the community, and
3. a 30 day supply of all HIV/AIDS-related medications that the inmate is taking prior to release under department and U.S. Department of Health and Human Services protocols.

If the inmate is HIV positive, the department would be required to notify the Department of Health as well as the county health department in the community where the inmate is to reside following release. The bill adds inmates about to be released to the list of situations not requiring informed consent for HIV testing. It provides an exception to confidentiality requirements to permit the department to transfer HIV status information resulting from testing pursuant to s. 945.355, F.S., to the Department of Health and local health departments. The bill also requires the department to report to the Legislature on the implementation of this bill.

The bill provides an appropriation of \$793,244 for the 2002-2003 fiscal year, and provides an effective date of July 1, 2002.

This bill amends and/or creates the following sections of the Florida Statutes: 381.004, 944.704, 945.10, and 945.355.

## **II. Present Situation:**

The prevalence of HIV in Florida prisons is higher than in the general population. As of December 2000, there were 2,640 known HIV positive inmates, 768 of whom had AIDS. Thus, approximately 3.5 percent of all inmates are known to be HIV positive. This includes 3.3 percent of all male inmates and 10.3 percent of all female inmates. According to the 1998 annual report of the Florida Corrections Commission, this infection rate can be explained by the high risk behaviors of persons who are sentenced to prison at some point in their lives. Such behaviors include histories of multiple sex partners, sexually transmitted diseases, injection drug use, and other life styles that increase the risk of infection.

### **Current Practice and Laws Governing HIV Education**

Inmates receive HIV education and orientation upon intake, including prevention information, pursuant to s. 945.35, F.S. Pursuant to statute, the department works in conjunction with the Department of Health to develop an HIV education program for inmates. The program is designed in recognition of the incarceration setting, cultural differences, and the guidelines of the Centers for Disease Control and Prevention (CDC), as well as the recommendations of the Correctional Medical Authority.

Section 945.35, F.S., also requires the department to develop an HIV education program for correctional staff with emphasis on appropriate behavior and attitude change. It allows the department to establish policies on housing, dining, and other physical contact, consistent with CDC guidelines.

A large portion of ch. 381, F.S. (Public Health) is devoted to HIV testing, treatment, education and prevention:

- s. 381.004(2)(a), F.S., defines “HIV test” to mean a test ordered after July 6, 1988, to determine the presence of the antibody or antigen to human immunodeficiency virus or the presence of human immunodeficiency virus infection.
- s. 381.0038, F.S., requires the Department of Health to design an HIV/AIDS education program “designed to reach all segments of Florida’s population.”
- s. 381.004(3)(a), F.S., requires the informed consent of the person to be tested, but allows for specific exceptions related to high risk of transmission.
- s. 381.004(6), F.S., creates criminal penalties for violating the right of confidentiality.

### **Current Practice and Laws Governing Testing**

The department does not presently have a mandatory HIV testing policy. Instead, inmates are tested upon request, due to a prison incident involving blood, bodily fluids, or exposure, or when they present behaviors or symptoms that suggest the need to test, according to the department’s Office of Health Services. Pursuant to s. 945.35(3), F.S., the department may begin testing when there is evidence of a “high risk behavior” of transmitting or contracting HIV. Some inmates do not want to be tested because of a perceived risk of being identified as HIV positive.

The department uses the ELISA test as a first step toward determining the presence of the HIV virus in an inmate. This test costs \$11.05. If the clinic receives a positive result, the inmate is retested with the Western Blot test (\$25.09 per test). If the positive result is confirmed, the department conducts further testing and diagnosis that costs considerably more. The department does not require inmates to pay for HIV testing.

### **Segregation and Transition Upon Release**

The department does not segregate HIV positive inmates, and they are distributed among the state's prisons. It is the current policy of the department to prepare a continuity of care plan, provide inmates on medication with a 30 day supply of medication upon release, and to notify the local health department where the inmate plans to reside. According to the Office of Health Services, most HIV positive releasees would meet the qualifications for Medicaid.

### **III. Effect of Proposed Changes:**

The passage of SB 308 would require the department to determine the HIV status of all inmates through testing prior to release. This bill would also require the department to provide transitional release services to those who test positive for HIV, including education, a treatment plan, and medication if appropriate. Three statutes are amended and cross-referenced to facilitate the purpose of this bill.

**Section 1** creates s. 945.355, F.S., concerning the department's responsibilities with regard to HIV testing of inmates prior to release, notice to the Department of Health, transitional assistance, and reporting to the Legislature. The following is a breakdown of section 1:

- Section 945.355(1), F.S., defines "HIV test" as "a test ordered to determine the presence of the antibody or antigen to human immunodeficiency virus or the presence of human immunodeficiency virus infection."
- Section 945.355(2), F.S., requires the department to test inmates not less than 60 days prior to being released by parole, accumulation of gain-time or expiration of sentence. Testing would not be required if the department knows the inmate to be HIV positive or if the inmate had been tested in the previous year and did not request retesting. There is an exemption from testing for inmates released by emergency court order.
- Section 945.355(3), F.S., requires the department to include the HIV test results in the inmate's medical records.
- Section 945.355(4), F.S., requires the department to notify the Department of Health and the local health department for the county where the inmate plans to reside when the department releases an HIV positive inmate. Otherwise, positive HIV status or test results are confidential and exempt from the public records requirement.
- Section 945.355(5), F.S., requires the department to provide HIV positive inmates with transitional assistance prior to the releasing of those inmates. The transitional assistance includes:

1. education on preventing transmission of HIV and on the importance of follow up care and treatment;
2. a written individualized treatment plan including referrals to and contacts with the county health department and local HIV primary care services in the area where the inmate plans to reside; and,
3. a 30 day supply of all HIV/AIDS-related medications that the inmate is taking prior to release under department and U.S. Department of Health and Human Services protocols.

**Section 2** requires the department to report to the Legislature not later than March 1, 2003, concerning implementation of this law.

**Section 3** amends s. 945.10, F.S., to provide an exception to confidentiality requirements governing release of inmate mental health, medical and substance abuse records. The amendment permits the department to transfer HIV status information resulting from testing pursuant to s. 945.355, F.S., to the Department of Health and the county health department where the inmate intends to reside.

**Section 4** adds the HIV testing of inmates about to be released from prison to the list of exceptions in s. 381.004, F.S., to the requirement to obtain informed consent to be HIV tested.

**Section 5** adds the transitional assistance provisions provided for in section 1 (the new s. 945.355(5), F.S.) to the list of transitional services the department is to provide to inmates being released as described in s. 944.704, F.S.

**Section 6** provides an appropriation of \$793,244 from the General Revenue Fund for Fiscal Year 2002-2003 for the purpose of implementing the bill.

**Section 7** provides an effective date of July 1, 2002.

#### **IV. Constitutional Issues:**

##### **A. Municipality/County Mandates Restrictions:**

None.

##### **B. Public Records/Open Meetings Issues:**

None.

##### **C. Trust Funds Restrictions:**

None.

D. Other Constitutional Issues:

While mandatory HIV testing is authorized in other states, questions remain concerning the issues of individual rights, medical confidentiality standards and the potential for discrimination associated with identifying HIV positive individuals.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The private prison companies contracting with the state to operate the five private prisons would experience an expense if required to participate in this program. It is possible that a contract adjustment could be negotiated to reflect that expense.

C. Government Sector Impact:

The bill appropriates \$793,244 from the General Revenue Fund for Fiscal Year 2002-2003 for the purpose of implementing its requirements. Three requirements could result in some expense to the state: testing, transitional assistance, and notice to health departments. The following table reflects the department’s projection of implementation costs:

Testing of 24,205 releasees with ELISA test at \$11.05 per test (Projected 25,924 releasees less 1719 who do not need to be tested because of known HIV status or testing within previous year)	\$267,465
Confirmation and diagnostic testing for 815 releasees at an average cost of \$719.98 [Based upon an assumption that 1019 releasees will test positive (the same rate as the known HIV positive rate in the entire inmate population), and that 80% will require additional confirming and diagnostic testing]	\$586,784
30-day supply of HIV drug therapy regimen for 815 releasees at \$28.00 per day	\$684,600
Additional costs for transition assistance	48,292
<b>Total costs of implementation</b>	<b>\$1,587,141</b>

The bill does not specifically require the department to perform confirming and diagnostic testing as it now does when a positive result is received. However, the department indicates that CDC protocols require a second confirming test and the additional, more costly physician diagnosis if the second test confirms a positive HIV status.

The bill’s cost to local governments is hard to determine. Depending on the releasee’s health, he or she may be eligible for HIV/AIDS treatment programs that are operated by local health departments or non-governmental agencies receiving government funding. The money to support local health services could come from local government, state

government, the federal government, or private grants. According to the department and the Department of Health, most HIV positive persons qualify for some level of assistance.

#### **VI. Technical Deficiencies:**

The bill does not specifically require additional testing if an inmate tests positive for HIV status. However, CDC protocols and department practice require additional confirmatory and diagnostic testing. It is the department's position that failing to follow the protocols could subject the department to liability.

Section 1 of the bill requires the department to notify the Department of Health and the local health department for the county where the inmate plans to reside when the department releases an HIV positive inmate. Under current law, this is confidential information that cannot be released. Section 3 addresses the confidentiality issue by creating an exception permitting the department to provide the health entities with HIV positive status information that results from testing pursuant to s. 945.355, F.S. However, the exception does not include transfer of HIV positive status information for inmates who are known to be HIV positive but were not tested pursuant to s. 945.355, F.S. Release of this information without an exception to the confidentiality requirement could subject the department to liability.

#### **VII. Related Issues:**

The bill does not specifically address whether it is intended to apply to inmates who are released from private prisons.

#### **VIII. Amendments:**

#1 by Criminal Justice:

Expands the exemption from confidentiality requirements to permit the department to report that an inmate has tested positive for the HIV infection antigen or antibody, without restriction to tests that were conducted pursuant to s. 945.355, F.S. This conforms the exemption to reporting requirements that are created by the bill.