



WEST VIRGINIA SECRETARY OF STATE

MAC WARNER

ADMINISTRATIVE LAW DIVISION

eFILED

6/28/2023 3:35:13 PM

Office of West Virginia
Secretary Of State

NOTICE OF PUBLIC COMMENT PERIOD

AGENCY: Crime Delinquency And Correction

TITLE-SERIES: 149-10

RULE TYPE: Legislative Amendment to Existing Rule: No Repeal of existing rule: No

RULE NAME: Sexual Assault Forensic Examinations

CITE STATUTORY AUTHORITY: W.Va. Code 15-9B-4

COMMENTS LIMITED TO:

Written

DATE OF PUBLIC HEARING:

LOCATION OF PUBLIC HEARING:

DATE WRITTEN COMMENT PERIOD ENDS: 07/28/2023 9:00 AM

COMMENTS MAY BE MAILED OR EMAILED TO:

NAME: Brandolyn N Felton-Ernest

ADDRESS: 1900 Kanawha Blvd., E.

Building 1, Room W-400

EMAIL: brandolyn.feltonernest@wv.gov

PLEASE INDICATE IF THIS FILING INCLUDES:

RELEVANT FEDERAL STATUTES OR REGULATIONS: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

INCORPORATED BY REFERENCE: No

(IF YES, PLEASE UPLOAD IN THE SUPPORTING DOCUMENTS FIELD)

PROVIDE A BRIEF SUMMARY OF THE CONTENT OF THE RULE:

This rule establishes requirements for the treatment of sexual assault victims at a health care facility that provides sexual assault forensic exams.

SUMMARIZE IN A CLEAR AND CONCISE MANNER CONTENTS OF CHANGES IN THE RULE AND A STATEMENT OF CIRCUMSTANCES REQUIRING THE RULE:

This rule is a new rule with all new language. The rule includes definitions, information regarding the treatment of sexual assault victims, information regarding photo documentation, information regarding submitting sexual assault evidence for testing, information regarding receipt of sexual assault evidence by laboratory, and information on the maintenance of non-reported Sexual Assault Evidence Collection Kits.

SUMMARIZE IN A CLEAR AND CONCISE MANNER THE OVERALL ECONOMIC IMPACT OF THE PROPOSED RULE:

A. ECONOMIC IMPACT ON REVENUES OF STATE GOVERNMENT:

0

B. ECONOMIC IMPACT ON SPECIAL REVENUE ACCOUNTS:

0

C. ECONOMIC IMPACT OF THE RULE ON THE STATE OR ITS RESIDENTS:

0

D. FISCAL NOTE DETAIL:

Effect of Proposal	Fiscal Year		
	2023 Increase/Decrease (use "-")	2024 Increase/Decrease (use "-")	Fiscal Year (Upon Full Implementation)
1. Estimated Total Cost			
Personal Services			
Current Expenses			
Repairs and Alterations			
Assets			
Other			
2. Estimated Total Revenues			

E. EXPLANATION OF ABOVE ESTIMATES (INCLUDING LONG-RANGE EFFECT):

BY CHOOSING 'YES', I ATTEST THAT THE PREVIOUS STATEMENT IS TRUE AND CORRECT.

Yes

Brandolyn N Felton-Ernest -- By my signature, I certify that I am the person authorized to file legislative rules, in accordance with West Virginia Code §29A-3-11 and §39A-3-2.

TITLE 149
LEGISLATIVE RULE
GOVERNOR'S COMMITTEE ON CRIME, DELINQUENCY AND CORRECTION

SERIES 10
SEXUAL ASSAULT FORENSIC EXAMINATIONS

§149-10-1. General.

1.1. Scope. -- This Rule establishes requirements for the treatment of sexual assault victims at a health care facility that provides sexual assault forensic exams.

1.2. Authority. -- W. Va. Code §15-9B-4.

1.3. Filing Date. --

1.4. Effective Date. --

1.5. Sunset Provision. -- This Rule shall terminate and have no further force or effect on August 1, 2029.

1.6. Applicability. -- This Rule is applicable to any health care facility that provides sexual assault forensic exams.

§149-10-2. Definitions.

2.1. "Acute" means within 96 hours of a sexual offense as defined section 2.19.

2.2. "Advanced practice registered nurse" or "APRN" has the meaning ascribed in W. Va. Code §30-7-1 et seq.

2.3. "Alcohol-facilitated sexual offense" means the use of any alcoholic beverage in the commission of a sexual offense.

2.4. "Drug-facilitated sexual offense" means the use of a chemical submissive agent in the commission of a sexual offense that produces relaxant effects, blackouts, coma, impaired judgment, or loss of coordination.

2.5. "Health care professional" means a physician, a physician assistant, a sexual assault forensic examiner, an APRN, a registered professional nurse, a licensed practical nurse, or a sexual assault nurse examiner.

2.6. "Health care facility" means a publicly or privately owned facility, agency or entity that offers or provides health services, whether a for-profit or nonprofit entity and whether or not licensed, or required to be licensed, in whole or in part.

2.7. "Hospital" means a facility licensed pursuant to the provisions of W. Va. Code §16-5B-1 et seq. that primarily provides inpatient diagnostic, treatment, or rehabilitative services to the injured, disabled, or sick persons under the supervision of physicians with a 24-hour emergency department.

2.8. "Licensed practical nurse" has the meaning ascribed in W. Va. Code §30-7a-1 et seq.

2.9. “Medical forensic services” means health care delivered to patients within or under the care of qualified medical provider who is trained to conduct medical forensic examinations. “Medical forensic services” includes, but is not limited to, taking a medical history, performing photo documentation, performing a physical and anogenital examination, assessing the patient for evidence collection, collecting evidence in accordance with a statewide sexual assault evidence collection program administered by the West Virginia Police using the Sexual Assault Evidence Collection Kit, if appropriate, assessing the patient for drug-facilitated or alcohol-facilitated sexual offense, and appropriate discharge and follow-up healthcare planning.

2.10. “Nonreported kit” means a kit collected from a sexual assault victim who has consented to the collection of the kit but has not consented to participation in the criminal justice process.

2.11. “Photo documentation” means digital photographs or colposcope videos stored and backed-up securely in the original file format.

2.12. “Physician” means a person licensed to practice medicine in all its branches as defined in W. Va. Code §30-3-1 et seq.

2.13. “Physician assistant” has the meaning ascribed in W. Va. Code §30-3E-1 et seq.

2.14. “Qualified medical provider” includes:

2.14.1. a sexual assault nurse examiner course and clinical skills session(s) approved by the SAFE Commission.

2.14.2. a physician who has completed a modified training course approved by the SAFE Commission.

2.14.3. an advanced practice registered nurse who has completed a modified training course approved by the SAFE Commission.

2.14.4. a registered nurse who has completed a 40-hour sexual assault nurse examiner course approved by the SAFE Commission and has access to a teleSANE.

2.15. “Registered Professional Nurse” has the meaning ascribed in W. Va. Code §30-7-1 et seq.

2.16. “SAFE Commission” means the Sexual Assault Forensic Examination Commission created by W. Va. Code §15-9B-1 et seq.

2.17. “Sexual Assault Evidence Collection Kit” or “SAECK” or “kit” means a set of materials, including, but not limited to, swabs and tools for collecting blood samples, clothing, or other materials used to gather forensic evidence from a sexual assault victim of an acute sexual offense and the evidence obtained with the materials.

2.18. “Sexual Assault Forensic Examiner” means an APRN or registered professional nurse who has completed a 40- hour sexual assault forensic examiner course and advanced practicum skills session(s) approved by the SAFE Commission.

2.19. “Sexual offense” means any offense or attempted offense in the jurisdiction of the state in which a Sexual Assault Evidence Collection Kit is collected, including, but not limited to, the following sections:

2.19.1. W. Va. Code §61-8-12;

2.19.2. W. Va. Code §61-8A-2;

2.19.3. W. Va. Code §61-8A-4;

2.19.4. W. Va. Code §61-8A-5;

2.19.5. Any offenses listed in W. Va. Code §61-8B-1 et seq.;

2.19.6. Any offenses listed in W. Va. Code §61-8C-1 et seq.; and

2.19.7. Any offenses listed in W. Va. Code §61-8D-1 et seq.

2.20. “Sexual assault nurse examiner” or “SANE” means an APRN or registered professional nurse who has completed a 40- hour sexual assault nurse examiner course and advanced practicum skills session(s) approved by the SAFE Commission.

2.21. “Sexual assault victim” or “victim” means a person who presents for medical forensic services in relation to injuries or trauma resulting from a sexual offense.

2.22. “TeleSANE” means certified sexual assault nurse examiner with documented expertise who provides forensic exam guidance through telehealth technology and is an approved provider by the SAFE Commission.

§149-10-3. Treatment of sexual assault victims.

3.1. Every hospital shall have available 24 hours a day seven days a week:

3.1.1. Qualified medical personnel performing exams on adults/adolescents who have completed a 40- hour sexual assault nurse examiner course and advanced practicum skills sessions approved by the SAFE Commission;

3.1.1.a. Qualified medical personnel performing exams on pediatric (under age 14)/adolescent victims (ages 14-18) who have completed a 40-hour pediatric sexual assault nurse examiner course and advanced practicum skills sessions approved by the SAFE Commission;

3.1.2. Physicians or APRNs who have completed a modified training course or registered nurses who have completed a 40-hour sexual assault nurse examiner course and have access to a teleSANE. All courses, modified courses, and teleSANE providers must be approved by the SAFE Commission; or

3.1.3. In lieu of the requirements contained in subsections 3.1.1 and 3.1.2., a signed written agreement with a hospital that is in compliance with the requirements of subsections 3.1.1 and 3.1.2.

3.2. A health care facility that provides sexual assault forensic exams shall provide the following services:

3.2.1. Appropriate medical forensic services without delay, in a private, age-appropriate or developmentally appropriate space, required to ensure the health, safety, and welfare of a sexual assault victim and that may be used as evidence in a criminal proceeding against a person accused of the sexual offense, in a juvenile delinquency proceeding under W. Va. Code 49-4-701 et seq.;

3.2.2. An offer to complete the Sexual Assault Evidence Collection Kit for any sexual assault victim who presents within 96 hours after the offense, or who has disclosed past sexual assault by a specific individual and was in the care of that individual within the last 96 hours;

3.2.2.a. Appropriate oral and written information concerning evidence-based guidelines for the collection of evidence, depending on the sexual development of the sexual assault victim, the type of sexual offense, and the timing of the sexual offense, shall be provided to the sexual assault victim. A qualified medical provider shall educate and request consent to evidence collection of sexual assault victims who present to a health care facility with a complaint of sexual offense within 96 hours after the sexual offense;

3.2.2.b. The information required under this section shall be provided in person by the qualified medical provider providing medical forensic services directly to the sexual assault victim;

3.2.2.c. Following the discussion regarding the evidence-based guidelines for evidence collection in accordance with subdivision 3.2.2.a, evidence collection shall be completed at the sexual assault victim's consent.

3.2.3. Appropriate oral and written information concerning the possibility of infection or sexually transmitted infection in accordance with CDC guidelines.

3.2.4. Medically accurate written and oral information about emergency contraception in accordance with CDC guidelines;

3.2.5. Appropriate oral and written information concerning accepted medical procedures, laboratory tests, medication, and possible contraindications of that medication available for the prevention or treatment of infection or disease resulting from sexual offense;

3.2.6. After a medical forensic or physical examination, access to a shower at no cost, unless showering facilities are unavailable;

3.2.7. Photo documentation, with permission of the sexual assault victim, of the victim's injuries, anatomy involved in the offense, or other visible evidence on the sexual assault victim's body to supplement the medical forensic history and written documentation of physical findings and evidence. Photo documentation does not replace written documentation of the injury;

3.2.8. Referral by the health care facility personnel for appropriate counseling. Initial referral should be to a community-based rape crisis center;

3.2.9. With the consent of the sexual assault victim, a rape crisis center advocate shall remain in the exam room during the medical forensic examination. (See W. Va. Code §61-11A-9 (Sexual Assault Victims' Bill of Rights));

3.2.10. Written information regarding services provided by a rape crisis center and children's advocacy center, if applicable;

3.2.11. Information on drug- or alcohol-facilitated sexual offense testing, including an explanation of the comprehensive scope of a drug test or blood alcohol test, and the limited time frame within which evidence can be collected; and

3.3. If a sexual assault victim is unable to consent to medical forensic services, the services may be provided under the West Virginia Health Care Decisions Act, the Health Care Surrogate Act, or other applicable State and federal laws;

3.4. Procedures to ensure the welfare and privacy of the victim shall be followed and shall include, but not be limited to, the following:

3.4.1. A member of the health care team shall respond immediately with the goal of placing a victim in a private area within 30 minutes of arrival to ensure privacy. Upon arrival the health care team shall initiate the facility's plan for sexual assault victims. Health care personnel shall refer to victims by code to avoid embarrassment.

3.4.2. If, for any reason, the victim is incapable of receiving oral and written information required in subsection 3.2.2.a., the information shall be given to the caregiver/guardian.

3.4.3. When a victim is in custody, or has been arrested for or convicted of a violent crime or forcible felony and continues to be in custody when the victim presents for the medical forensic exam, then if the qualified medical provider and the representative of the custodial agency, after consultation with the rape crisis center advocate, agree that it is a necessary safety precaution, the representative of the custodial agency may remain in the room. In these situations, health care facility staff shall facilitate privacy for the victim using curtains and positioning.

3.4.4. The health care facility shall call a rape crisis center advocate and shall offer to call a friend or family member to accompany the victim.

3.5. All health care facilities that provide emergency medical services to sexual assault victims shall comply with the West Virginia Crime Victims Compensation Act, West Virginia Health Care Decisions Act, and any local ordinances, municipal codes, rules, or regulations that may apply to the treatment of sexual assault victims.

3.6. Nothing in these Rules creates a physician-patient relationship that extends beyond discharge from the health care facility.

3.7. The health care facility shall take all reasonable steps to secure the patient's informed written decision to consent to or decline examination and treatment.

3.8. Nothing in these Rules prohibits a health care facility from treating a sexual assault victim who presents more than 96 hours following the offense.

§149-10-4. Photo documentation.

4.1. Photo documentation taken during a medical forensic examination shall be maintained in a confidential manner.

4.2. Photo documentation shall be stored and backed up securely in its original file format in accordance with written facility protocol.

4.3. Photo documentation of the sexual assault victim's injuries, anatomy involved in the offense, or other visible evidence on the sexual assault victim's body may be used in connection with peer review; expert second opinion; or in a criminal proceeding against a person accused of sexual offense, a juvenile delinquency proceeding pursuant to W. Va. Code 49-4-701 *et seq.*, or an abuse and neglect investigation. Any dissemination under this subsection shall be in accordance with State and federal law.

§149-10-5. Submitting sexual assault evidence for testing.

5.1. The Sexual Assault Evidence Collection Kit shall be used in the manner prescribed by the information contained in that kit.

5.2. With the victim's consent, as prescribed by section 5.3., the kit shall be completed in acute cases if the victim presents themselves for medical forensic services within 96 hours after the sexual offense or has disclosed past sexual offense by a specific individual and was in the care of that individual within the last 96 hours.

5.3 Written Consent to the Release of Sexual Assault Evidence for Testing.

5.3.1. Prior to the medical forensic exam, the health care professional providing the medical forensic services shall provide the patient the opportunity to sign a written consent to allow the transmission of sexual assault evidence for testing or to be stored as a non-reported kit. The written consent shall be on a form included in the Sexual Assault Evidence Collection Kit.

5.3.1.a. If the victim is an adult who has a guardian, a health care surrogate, or an agent acting under a health care power of attorney, the consent of the guardian, surrogate, or agent is not required to release evidence and information concerning the sexual assault or sexual abuse. If the adult is unable to provide consent for the release of evidence and information and a guardian, surrogate, or agent under a health care power of attorney is unavailable or unwilling to release the information, then an investigating law enforcement officer may authorize the release.

5.3.1.b. After the health care professionals make a mandatory report to law enforcement, all Sexual Assault Evidence Collection Kits collected on minors under the age of 18 shall be transmitted to the West Virginia State Police Lab for testing with no consent required.

5.3.2. The health care facility shall provide the sexual assault victim with the kit tracking number and inform the victim that the kit may be tracked using the tracking kit number at www.go.wv.gov/kit.

5.3.3. The health care facility shall keep a copy of the written consent form in the patient's forensic medical record.

5.4. If an adult sexual assault victim does not consent to law enforcement involvement, the victim will be given the opportunity to sign a written request that the kit shall be designated a nonreported kit and transmitted to the Marshall University Forensic Science Center. Sexual assault victims will be informed in writing at the time their non-reported kit is collected that the kit will be stored and maintained for a period of 20 years from the date the kit was collected.

5.5. If the sexual assault victim has consented to the transmission of sexual assault evidence for testing, upon collection a Sexual Assault Evidence Collection Kit shall be transmitted for testing by the health care facility to the West Virginia State Police Forensic Laboratory within 30 days of collection or as soon thereafter as practicable. All packaging kits for transmittal and transmittal protocols shall be designed to meet applicable standards for maintaining the efficacy of the sample and chain of custody.

5.6. If the sexual assault victim does not consent to law enforcement involvement, upon collection the kit shall be designated a nonreported kit and submitted by the health care facility to the Marshall University Forensic Science Center for storage.

5.7. The commission shall, in cooperation with the West Virginia State Police, develop protocols for storage of previously tested materials to be made available for secondary testing upon a court order to do so.

5.8. Biological evidence obtained through tests of Sexual Assault Evidence Collection Kits shall not be destroyed per W. Va. Code §15-9B-4(g). State and local law-enforcement agencies shall retain, preserve, and/or transfer biological evidence under conditions that are suitable for DNA testing per national best practices as set forth in National Institute for Justice (2013) The Biological Evidence Preservation Handbook Best Practices for Evidence Handlers.

5.9. Upon completion of the processing and testing, the Sexual Assault Evidence Collection Kit shall be transmitted to the appropriate investigating local or state law-enforcement agency which shall retain all identified biological material that is secured in connection with any sexual offense or attempted sexual offense.

5.10. After processing and testing of a Sexual Assault Evidence Collection Kit, the West Virginia State Police Laboratory shall transmit the Sexual Assault Evidence Collection Kit to the appropriate investigating state or local law-enforcement agency through any reasonable means sufficient to establish the proper chain of custody. The lack of timely submission or inadvertent loss or destruction of a Sexual Assault Evidence Collection Kit, standing alone, shall not constitute a bar to the prosecution of a sexual offense.

§149-10-6. Receipt of sexual assault evidence by laboratory.

6.1. Upon receiving a Sexual Assault Evidence Collection Kit, the West Virginia State Police Forensic Laboratory or a laboratory approved and designated by the Superintendent of the West Virginia State Police shall prepare a record that includes the date the sexual assault evidence was received from the health care facility, the date the evidence was reviewed, and the date the evidence was reviewed for collection quality.

6.2. No Sexual Assault Evidence Collection Kit need be tested where the sexual assault victim has not consented to the testing, requests that the kit not be tested, where the sexual assault victim recants as to the allegation of a sexual offense, or the allegation that a sexual offense occurred is determined to be unfounded.

6.3. If the sexual assault victim does not consent to law enforcement involvement, the kit shall be designated a nonreported kit and transmitted to the Marshall University Forensic Science Center. Sexual assault victims will be informed in writing at the time their non-reported kit is collected that the kit will be stored and maintained for a period of 20 years from the date the kit was collected.

6.4. A sexual assault victim may request that the status of their kit be changed from reported to non-reported if the West Virginia State Police Crime Laboratory has not begun testing the kit. Upon execution of written request from the victim, the West Virginia State Police Crime Laboratory will transfer the kit to the Marshall University Forensic Science Center to be stored as a non-reported kit.

6.5. A sexual assault victim may request that the status of their kit be change from non-reported to a reported kit by authorizing the change in writing.

§149-10-7. Maintenance of non-reported Sexual Assault Evidence Collection Kits.

7.1. Sexual Assault Evidence Collection Kits transmitted to the Marshall University Forensic Science Center pursuant to section 6.4 shall be maintained for a period of 20 years from the date the kit was collected.

7.2. Upon receipt of a kit, the Marshall University Forensic Science Center will confirm that the kit is a non-reported kit. If it is not, Marshall University Forensic Science Center will arrange for the kit to be

sent for testing at the WV State Police Laboratory. Similarly, if the WV State Police Laboratory receives a non-reported kit, it will arrange for the kit to be sent to Marshall University Forensic Science Center to be stored.

7.3. After a two-year period from the date the kit was collected, if adequate storage space is not available, non-report kits will be assessed for evidence and re-packaged from original kits into smaller containers for the remainder of the initial 20-year storage periods.

7.4. The Marshall University Forensic Science Center will develop a detailed protocol approved by the SAFE Commission, to triage the kit, preserve any potential evidentiary materials, retain blood/urine toxicology specimens, create an electronic case file and take an electronic photo of any packaging and unused kit materials that are disposed.

7.5. The Marshall University Forensic Science Center will maintain a strict protocol approved by the SAFE Commission for the disposition of kits. This will include the shredding/destruction of personal confidential information as well as the utilization of a regulated biohazardous medical waste disposal service for the disposition of any biological materials. All electronic case files on a disposed kit will be permanently deleted.

7.6. The Marshall University Forensic Science Center will send a notice to the sexual assault victim's last known address no fewer than 60 days prior to the date of the intended destruction or disposal of the evidence of the victim's rights under W. Va. Code §61-11A-9 (Sexual Assault Victims' Bill of Rights). The notice shall include information on the process that allows the victim to request, in writing, a ten-year extension on their kit's retention to the Marshall University Forensic Science Center, as provided in W. Va. Code §61-11A-9 (Sexual Assault Victims' Bill of Rights).