

**WEST VIRGINIA**  
**SECRETARY OF STATE**  
KEN HECHLER  
**ADMINISTRATIVE LAW DIVISION**

Form #3

Do Not Mark In this Box

**FILED**

AUG 4 1 29 PM '95

OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

**NOTICE OF AGENCY APPROVAL OF A PROPOSED RULE  
AND  
FILING WITH THE LEGISLATIVE RULE-MAKING REVIEW COMMITTEE**

AGENCY: Division of Health TITLE NUMBER: 64

CITE AUTHORITY W. Va. Code § 16-3C-8

AMENDMENT TO AN EXISTING RULE: YES  NO

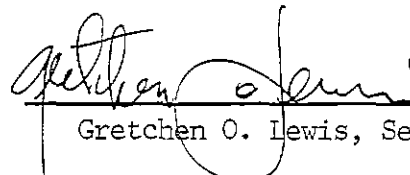
IF YES, SERIES NUMBER OF RULE BEING AMENDED: 64

TITLE OF RULE BEING AMENDED: AIDS-Related Medical Testing and  
Confidentiality

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: \_\_\_\_\_

TITLE OF RULE BEING PROPOSED: \_\_\_\_\_

THE ABOVE PROPOSED LEGISLATIVE RULE HAVING GONE TO A PUBLIC HEARING OR A PUBLIC COMMENT PERIOD IS HEREBY APPROVED BY THE PROMULGATING AGENCY FOR FILING WITH THE SECRETARY OF STATE AND THE LEGISLATIVE RULE MAKING REVIEW COMMITTEE FOR THEIR REVIEW.

  
\_\_\_\_\_  
Gretchen O. Lewis, Secretary

## FISCAL NOTE FOR PROPOSED RULES

**Rule Title:** Aids-Related Medical Testing and Confidentiality, 64 CSR 64

**Type of Rule:**  Legislative                       Interpretive                       Procedural

**Agency:** Department of Health and Human Resources

**Address:** Building 3, Capitol Complex  
Charleston, W. Va. 25305

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$	\$	\$	\$20,350	\$25,000
Personal Services					
Current Expense				20,350	25,000
Repairs & Alterations					
Equipment					
Other					

### 2. Explanation of above estimates.

Training for employees of twenty local health departments to support counseling and testing of convicted sex offenders.	\$10,000
Provide laboratory testing kits for approximately 150 sex offenders @ 150 X \$9.00 per kit	\$1,350
Contractual and administrative costs associated with laboratory testing of specimens, counseling of clients, and partner notification for HIV positive individuals (150 testing events at \$60 per event)	\$9,000

### 3. Objectives of this rule:

1) Make the rule consistent with amendments to W. Va. Code § 16-3C-1 et seq. relating to the testing of persons convicted of certain sexual crimes and the victims of such crimes, and also with amendments to the W. Va. Code relating to substituted consent and legal representation; 2) Incorporate new federal standards relating to laboratories and laboratory personnel; and 3) Address and clarify a few areas in which the present rule is deficient.

**4. Explanation of Overall Economic Impact of Proposed Rule.**

**A. Economic Impact on State Government.**

\$20,350 increase in State appropriation.

**B. Economic Impact on Political Subdivisions; Specific Industries; Specific Groups of Citizens.**

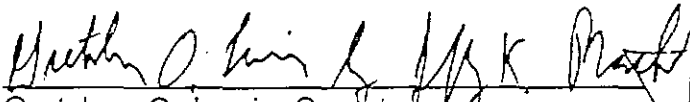
None.

**C. Economic Impact on Citizens/Public at Large.**

None.

**Date:** June 29, 1995

**Signature of Agency Head or Authorized Representative**



Gretchen O. Lewis, Secretary  
Department of Health and Human Resources

DATE: July 27, 1995  
TO: LEGISLATIVE RULE-MAKING REVIEW COMMITTEE  
FROM: Division of Health

LEGISLATIVE RULE TITLE: AIDS-Related Medical Testing and Confidentiality

1. Authorizing statute(s) citation W. Va. Code § 16-3C-8
2. a. Date filed in State Register with Notice of Hearing  
(Public Comment Period): June 30, 1995
  - b. What other notice, including advertising, did you give of the hearing?  
Notice and copies of the proposed rule were given to hospitals and the W. Va. Hospital Association, the W. Va. State Medical Association, the WV Society of Osteopathic Medicine, Counties, laboratories, the Division of Corrections, the Regional Jail & Correctional Facility Authority, the W. Va. Development Office, and various other interested organizations and agencies.
  - c. Date of hearing(s): Comment period 6-30-95 to 7-31-95
  - d. Attach list of persons who appeared at hearing, comments received, amendments, reasons for amendments.  
Attached  X  No comments received
  - e. Date you filed in State Register the agency approved proposed Legislative Rule following public hearing: (be exact)  
June 30, 1995
  - f. Name and phone number of agency person to contact for additional information:  
Kay Howard 558-3223

3. If the statute under which you promulgated the submitted rules requires certain findings and determinations to be made as a condition precedent to their promulgation:

a. Give the date upon which you filed in the State Register a notice of the time and place of a hearing for the taking of evidence and a general description of the issues to be decided.

N/A

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b. Date of hearing: N/A

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c. On what date did you file in the State Register the findings and determinations required together with the reasons therefor?

N/A

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d. Attach findings and determinations and reasons:

Attached N/A

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**SUMMARY OF PROPOSED RULE**  
**DEPARTMENT OF HEALTH AND HUMAN RESOURCES**  
**AIDS-RELATED MEDICAL TESTING AND CONFIDENTIALITY**  
**64 CSR 64**

Summary: The proposed amendments to the current legislative rule, **AIDS-Related Medical Testing and Confidentiality**, are needed to: 1) make the rule consistent with amendments to W. Va. Code § 16-3C-1 et seq. relating to the testing of persons convicted of certain sexual crimes and the victims of such crimes, and also with amendments to the W. Va. Code relating to substituted consent and legal representation; 2) incorporate new federal standards relating to laboratories and laboratory personnel; and 3) address and clarify a few areas in which the present rule is deficient. There are also some stylistic and technical revisions, including renumbering according to the system prescribed by the Secretary of State.

For further information contact: Loretta Haddy, Director, Office of Surveillance and Disease Control, Bureau for Public Health, Department of Health and Human Resources, 1422 Washington Street, East, Charleston, WV 25301-1978, telephone (304) 558-5358; or the Office of Regulatory Development, Bureau of Operations, Department of Health and Human Resources, Capitol Complex, Building 3, Room 265, Charleston, WV 25305, telephone (304) 558-3223.

7/3/95

**PROPOSED RULE - TITLE 64  
WEST VIRGINIA ADMINISTRATIVE RULES  
DIVISION OF HEALTH**

**SERIES 64**

**AIDS-RELATED MEDICAL TESTING AND CONFIDENTIALITY**

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**For Filing with the Legislative  
Rule-Making Review Committee**

**WEST VIRGINIA ADMINISTRATIVE RULES  
DIVISION OF HEALTH  
AIDS-RELATED MEDICAL TESTING AND CONFIDENTIALITY  
64 CSR 64**

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PROPOSED RULE - TITLE 64  
WEST VIRGINIA LEGISLATIVE RULES  
DEPARTMENT OF HEALTH AND HUMAN RESOURCES  
SERIES 64  
AIDS-RELATED MEDICAL TESTING AND CONFIDENTIALITY

FILED

AUG 4 1 29 PM '95

Ed. Note: This rule has been renumbered according to the format prescribed by the OFFICE OF WEST VIRGINIA SECRETARY OF STATE Secretary of State.

**§ 64-64-1. General.**

1.1. **Scope** - This legislative rule establishes specific standards and procedures concerning AIDS-related medical testing; record confidentiality and disclosure; substituted consent for testing; exclusion from schools; reporting requirements for physicians, laboratories and other health care providers; the approval of laboratories for HIV testing; and other matters pertinent and necessary for the implementation of the AIDS-Related Medical Testing and Records Confidentiality Act, W. Va. Code § 16-3C-1 et seq.

This rule supplements the AIDS-Related Medical Testing and Records Confidentiality Act, W. Va. Code § 16-3C-1 et seq., and should be read in conjunction with the ~~Code~~ Act.

1.2. **Authority** - W. Va. Code § 16-3C-8. Related - W. Va. Code § 16-3C-1 et seq.

1.3. **Filing Date** -

1.4. **Effective Date** -

1.5. Supersession and Repeal of Former Rules - This rule amends and reenacts AIDS-Related Medical Testing and Confidentiality, 64 CSR 64, 1990.

**§ 64-64-2. Application and Enforcement.**

2.1. **Application** - This rule ~~shall apply~~ applies to:

2.1.1. Health facilities;

2.1.2. Health care providers;

2.1.3. Funeral service providers and personnel;

2.1.4. Persons issuing marriage licenses;

2.1.5. Persons with access to or in charge of medical records or other sources of information regarding AIDS-related testing information; and

2.1.6. Laboratories seeking approval to conduct AIDS-related tests to be utilized in this State.

2.2. **Enforcement** - ~~This rule shall be enforced by the Administrator of the Division of Public Health.~~ This rule is enforced by the director of the division of health or his or her lawful designee.

**§ 64-64-3. Definitions.**

~~3.1. "Administrator" means the Administrator of the Division of Public Health or his or her lawful designee.~~

3.1. **AIDS** - means Acquired immunodeficiency syndrome.

3.2. **Anonymous HIV Testing** - HIV testing performed on a voluntary patient by a health provider with no knowledge of the person's identity.

3.3. **ARC** - means AIDS-related complex.

3.4. **Bureau of Public Health** - Division of health.

3.5. **CLIA-88** - Clinical Laboratory Improvement Amendments of 1988 (Public Law 100-578) to Section 353 of the Public Health Service Act (Title 42 United States Code Section 263a).

3.6. **Commissioner of the Bureau of Public Health** - Director of the division of health.

3.7. **Confidential HIV Reporting** - The reporting of an HIV infection by name of the person identified as being HIV infected. The use of information is limited by law.

3.8. **Confidential HIV Testing** - HIV testing performed by a health provider identifying the patient by name. The use of test results is limited by law.

3.9. **Convicted** - Pleas of guilty and pleas of nolo contendere accepted by the court having jurisdiction of the criminal prosecution, a finding of guilty following a jury trial to a court, and an adjudicated juvenile offender as defined in W. Va. Code § 49-5b-3.

3.10. **Director** - The director of the division of health of the department of health and human resources or his or her lawful designee.

3.11. **Division** - means The division of Public health of the state department of health and human resources.

3.12. **Funeral Director** - means Any person engaged, or holding himself him or herself out as engaged, in the business of funeral directing as defined in W. Va. Code § 30-6-4, and who uses in connection with his or her name or business the words or terms "funeral director," "undertaker," "mortician," or any other word, term, or title to imply or designate him or herself as a funeral director, undertaker, or mortician.

3.13. **Funeral Establishment** - means A place of business maintained and operated by a person, partnership, association, corporation, or other organization, conducted in a building, or series of buildings, or a separate portion of a building having a specific street address or location, and devoted to ~~such activities as~~ are incident, convenient, or related to the preparation and arrangements, financial and otherwise, for the embalming, funeral, transportation, burial or other disposition of dead human bodies.

3.14. **Health Facility** - means A hospital, nursing home, clinic, blood bank, blood center, sperm bank, laboratory or other health care institution.

3.15. **Health Care Provider** - means Any physician, dentist, nurse, paramedic, psychologist or other person providing medical, dental, nursing, psychological or other health care services of any kind.

3.16. **HIV - means** The human immunodeficiency virus identified as the causative agent of AIDS.

3.17. **HIV-Infected Person - means** A person who has been diagnosed with AIDS or ARC or who has a positive confirmatory test for HIV.

3.18. **HIV-Related Illness - means** A diagnosis of AIDS or ARC.

3.19. **HIV-Related Test - means** A test for the HIV antibody or antigen or any future valid test approved by the division, the Federal Drug Administration or the Centers for Disease Control.

**3.20. Legal Representative**

3.20.1. A guardian, temporary guardian or limited guardian appointed pursuant to the West Virginia Guardianship and Conservatorship Act, W. Va. Code, § 44-1-1-et seq., within the limits set by the order;

3.20.2. An individual appointed as committee or guardian prior to June 9, 1994, within the limits set by the appointing order and W. Va. Code § 44A-1-2(d);

3.20.3. A person having a medical power of attorney pursuant to the West Virginia Medical Power of Attorney Act, W. Va. Code §§ 16-30A-1 et seq., within the limits set by the law and the appointment;

3.20.4. A surrogate decision-maker appointed pursuant to the West Virginia Health Care Surrogate Act, W. Va. Code § 16-30B-1 et seq., or the West Virginia Do Not Resuscitate Act, § 16-30C-1 et seq., within the limits set by the appointment;

3.20.5. An individual having a durable power of attorney pursuant to W. Va. Code § 39-4-1, or a power of attorney under common law, within the limits of the appointment; or

3.20.6. A person lawfully appointed in a similar or like relationship of responsibility under the laws of this State, or another State or legal jurisdiction, within the limits of the applicable statute and appointing authority;

3.21. **Person - includes** Any natural person, partnership, association, joint venture, trust, public or private corporation or health facility.

3.22. **Release of Test Results - means** A written authorization for disclosure of HIV-related test results which is signed, dated and which specifies to whom disclosure is authorized and the time period during which the release is to be effective.

3.23. **Victim - The person or persons to whom transmission of bodily fluids from the perpetrator of the crimes of sexual abuse, sexual assault, incest or sexual molestation occurred or was likely to have occurred in the commission of such crimes.**

**§ 64-64-4. Testing.**

**4.1. Testing Voluntary Consent.**

4.1.1. A physician, dentist, or the ~~Administrator~~ director may request that a person consider voluntarily consenting to an HIV-related test when there is medical evidence providing

reasonable cause to believe that:

4.1.1.a. The person may have a positive HIV test;

4.1.1.b. The presence of HIV infection would affect medical decisions concerning the type of patient care recommended; or

4.1.1.c. Knowledge of a test result is necessary for effective counseling about behavior change.

4.1.2. The requesting physician, dentist or the ~~Administrator~~ director shall make arrangements to provide the person with information in the form of a booklet or printed information prepared or approved by the division or, in the case of persons who are unable to read, shall either show a video or film prepared or approved by the division to the patient or read or cause to be read to the patient the information prepared or approved by the division which contains the following specifics:

4.1.2.a. An explanation of the test, including its purpose, potential uses, limitations, the meaning of its results and any special relevance to pregnancy and prenatal care; and

4.1.2.b. An explanation of the procedures to be followed; and

4.1.2.c. An explanation that the test is voluntary and may be obtained anonymously; and

4.1.2.d. An explanation that the consent for the test may be withdrawn at any time prior to drawing the sample for the test and that ~~such~~ withdrawal of consent may be given orally if the consent was given orally, or shall be in writing if the consent was given in writing; and

4.1.2.e. An explanation of the nature and current knowledge of asymptomatic HIV infection, ARC and AIDS and the relationship between the test result and those diseases; and

4.1.2.f. Information about behaviors known to pose risks for transmission of HIV infection.

4.1.3. The provisions of ~~Section 4.1.b.~~ Subsection 4.1.2 of this rule ~~must~~ shall also be followed when a patient, without a request from a physician, dentist, or the division, voluntarily seeks an HIV test from any physician, dentist, or other health care provider, or from the division.

4.1.4. A person seeking an HIV-related test who wishes to remain anonymous has the right to do so, and to provide written, informed consent through use of a coded system with no linking ~~or~~ of individual identity to the test requests or results. ~~Such~~ A coded system may be used by a private health care provider as well as by public facilities. A health care provider who does not provide HIV-related tests on an anonymous basis shall refer ~~such a~~ the person to a test site which does provide anonymous testing, or to any local or county health department which provides for performance of an HIV-related test and counseling, or to any division-designated HIV counseling and testing site. Local or county health departments shall provide access or referral to designated sites or to private clinics which provide anonymous HIV testing for persons residing within their jurisdiction.

4.1.5. At the time of learning of an HIV test result, the subject of the test shall be provided with post-test counseling or referral for post-test counseling including assistance in

copied with the emotional consequences of learning a test result. This may be done by brochure or personally, or both. If a previously anonymously-tested individual makes his or her identity known to the health service provider or laboratory, the provider or laboratory shall report the name and shall make the name part of the individual's reporting record.

4.1.6. Nothing in the this rule shall be construed to provide a ground for any physician, dentist, or the ~~Administrator~~ director to refuse to treat a patient, nor shall the testing provisions of this rule be used by health care providers to screen patients.

#### 4.2. Consent Not Required.

No consent for testing is required and the provisions of ~~Section~~ Subsection 4.1 of this rule do not apply for the performance of an HIV test:

4.2.1. On a human body part (including tissue and blood or blood products and semen) or the donor or the recipient when the health care provider or health facility procures, processes, distributes or uses a human body part for a purpose specified under the uniform anatomical gift act, or for transplant recipients, or for the purpose of artificial insemination: Provided, That if a test is required of the donor or recipient of the human body part, reasonable efforts shall be made to obtain consent and otherwise follow the procedures of ~~Section~~ Subsection 4.1 of this rule.

Further, all confidentiality restrictions contained in Section 7 of this rule and in W. Va. Code § 16-3C-3 apply to information obtained through the testing of human body parts, tissue, blood, blood products, or semen.

Consent for HIV-related testing is required for donors of routine blood transfusions, and the provisions of W. Va. Code § 16-3C-2(e)(1) do not apply to such transfusions;

4.2.2. In documented bona fide medical emergencies: Provided, That:

4.2.2.a. The subject of the test is unable to grant or withhold consent; ~~and~~

4.2.2.b. Substituted consent has been sought but has been refused; ~~and~~

4.2.2.c. The test results are necessary for medical diagnostic purposes to provide appropriate emergency care or treatment; and

4.2.2.d. Post-test counseling is provided.

Necessary treatment shall not be withheld pending HIV test results; or

4.2.3. For the purpose of research: Provided, That the testing is performed in a manner by which the identity of the test subject is not known and may not be retrieved by the researcher or any other person.

#### 4.3. ~~Testing of Persons~~ Mandated HIV Testing of Sexual Offenders and Management of Victims.

4.3.1. The testing of persons convicted of ~~a crime specified in W. Va. Code § 16-3C-2(f)(2) shall be accompanied by pre-test and post-test counseling. All statutory provisions as to the confidentiality of HIV test results shall apply to this testing program. a sex-related crime as specified in W. Va. Code § 16-3C-2(f) is under the direction of the court having jurisdiction of the~~

criminal prosecution.

4.3.2. The director shall recommend guidelines for courts to follow in referring convicted sexual offenders for medical testing, sharing HIV test results of convicted sex offenders with victims, and advising victims or alleged victims of HIV counseling and testing services.

4.3.3. All convicted sex offenders who test HIV positive will be made available for partner notification consultation under the direction of the director. Partner notification information obtained from the convicted sex offender is protected information and shall be used by the director solely for referring individuals with a potential HIV exposure to HIV counseling and testing sources.

4.3.4. The director shall set the level of reimbursement the department will pay for the mandated HIV testing and counseling and pre- and post-conviction HIV-related testing and counseling for which it is responsible pursuant to the provisions of W. Va. Code § 16-2-(f). All restitution funds collected by the court from persons convicted of prostitution, sexual abuse, sexual assault, incest or sexual molestation for the cost of HIV testing and counseling and held in the State treasury are to be available to the director to facilitate the provision of HIV-related testing and counseling conducted pursuant to W. Va. Code § 16-3C-1 et seq.

4.3.5. If the ~~Administrator~~ director has evidence to support the belief that a person could be infected with HIV and that the blood or other bodily fluids of that person may have exposed another person receiving or rendering emergency medical aid or in the performance of their ~~his or her~~ work to a significant risk for transmission of HIV, the ~~Administrator~~ director may, upon request by a physician or at his or her discretion, request said person to consent to HIV-related testing; Provided, That if the person believed by the ~~Administrator~~ director to be infected refuses to consent, or if substituted consent is refused in the case of a person unable to grant or withhold consent, the ~~Administrator~~ director may require an HIV test if information from ~~such a~~ the test is believed by the ~~Administrator~~ director to be necessary to protect the life or health of the person who may have been exposed to HIV. The ~~Administrator~~ director ~~shall~~ may establish a list of health care providers who are approved to authorize HIV testing in emergency medical aid circumstances.

#### 4.4. Applicability to Insurers.

Nothing in Section 4 of this rule is applicable to any insurer regulated under ~~Chapter 33 of the West Virginia Code~~ W. Va. Code § 33-1-1 et seq.

#### § 64-64-5. Cease and Desist Orders.

If the director is presented with information that a known HIV-infected individual is involved in a behavior that potentially endangers the health of others the director may, after reasonable counseling provisions for the person, if he or she judges it necessary to promote appropriate conduct for preventing the transmission of HIV, initiate a public health cease and desist order. The cease and desist order shall be in writing, and shall set forth the name of the person to be restricted, and the initial period of time, not to exceed three (3) months, during which the order shall remain effective, the terms of the restrictions and such other conditions as may be warranted to protect the public health.

If a person violates a cease and desist order issued pursuant to this rule and it is shown that a person is a danger to others, the director shall enforce the cease and desist order by imposing such restrictions upon the person as are necessary to prevent the specific conduct

which endangers the health of others.

**§ 64-64-6. Review of Marriage License.**

The division ~~will~~ shall periodically review marriage licenses in order to determine compliance with the requirements of W. Va. Code § 16-3C-2(h) regarding documentation of the provision of information concerning AIDS and HIV-related testing and counseling.

**§ 64-64-7. Charting Information.**

Health care providers shall be permitted to enter in a patient's medical chart a diagnosis of an HIV-related illness, but may only enter the results of an HIV-related test in the chart of a patient if the following statement is printed on the test report in the chart:

"This information has been disclosed to you from records whose confidentiality is protected by State law. State law prohibits you from making any further disclosure of the information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law. A general authorization for the release of medical or other information is **NOT** sufficient for this purpose."

**§ 64-64-8. Confidentiality.**

8.1. Any laboratory performing an HIV-related test in West Virginia shall have the following statement of confidentiality appear on the report form or as an attachment to the report form returned to the health care provider or facility:

"This information has been disclosed to you from records whose confidentiality is protected by State law. State law prohibits you from making any further disclosure of the information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law. A general authorization for the release of medical or other information is **NOT** sufficient for this purpose."

8.2. No person who obtains information protected by the provisions of W. Va. Code § 16-3C-1 et seq. and this rule may convey ~~such~~ the protected information to any other person except in strict compliance with W. Va. Code § 16-3C-1 et seq. and this rule. Unauthorized disclosure will subject ~~such~~ the person to full penalties available.

8.3. The victims or alleged victims of sexual crimes are eligible for HIV counseling and testing at public health HIV testing sites in West Virginia. These individuals shall be managed as any other persons volunteering for HIV services in a testing facility. All victim testing information shall be managed under the confidentiality requirements of this rule and W. Va. Code § 16-3C-1 et seq. for voluntary testing.

8.4. HIV test results may be disclosed to agents or employees of funeral establishments or of health care providers or facilities if the agent or employee provides patient care or handles or possesses specimens of body fluids or tissues and the agent or employee has a need to know ~~such~~ the information. A person shall be ~~deemed~~ judged to have a need to know HIV test results under the provisions of W. Va. Code § 16-3C-3(a)(3) and this Subsection ~~of this rule where~~ when the information is medically necessary to protect the individual from a significant risk of transmission or will have an impact on the treatment modality.

**§ 64-64-9. Contact Notification.**

9.1. When a health care provider of an HIV-infected person notifies the division of a sexual or intravenous (IV) drug contact that has not been advised of ~~their~~ his or her exposure, the ~~Administrator~~ director shall review the identifying, locating and related epidemiologic information and specify follow-up recommendations. Contact notification shall be initiated by the ~~Administrator~~ director when the ~~Administrator~~ director has reason to believe that contacts may be unknowingly at risk for HIV infection. Notification ~~will~~ shall include an explanation of exposure to HIV, HIV prevention messages and information on accessibility to HIV counseling and testing services to the person with a reported HIV exposure. The name or identity of the person whose HIV test result was positive shall remain confidential. The confidentiality rules that apply to the names of HIV-infected persons shall apply to the names of ~~their~~ his or her contacts.

9.2. In contact notification situations, the division recommends that private health care providers refer contact notification activities to the division rather than attempt notification themselves. The division has an established program for notifying partners of persons with infectious conditions.

#### § 64-64-10. Substituted Consent.

10.1. If the person whose consent is necessary under the provisions of W. Va. Code § 16-3C-1 et seq. or this rule for HIV-related testing or for the authorization of the release of test results is unable to give ~~such~~ consent or authorization because of mental incapacity or incompetency, the consent or authorization shall be obtained from ~~another person in the following order of preference:~~ the person's legal representative.

~~40.1.1. A person holding a durable power of attorney for health care decisions;~~

~~40.1.2. The person's duly appointed legal guardian or guardian ad litem; or~~

~~40.1.3. The person's next-of-kin in the following order of preference: spouse, parent, adult child, sibling, uncle or aunt, grandparent.~~

10.2. The person's inability to consent shall not be permitted to result in delay or denial of necessary medical treatment.

10.3. The information and pre- and post-test counseling required to be provided to the person pursuant to W. Va. Code §§ 16-3C-2(b) and 16-3C-2(d) shall be provided to the person giving substituted consent.

10.4. Minors ~~will~~ shall be treated as established under W. Va. Code § 16-4-10.

#### § 64-64-11. School Exclusion.

Exclusion of an HIV-infected student from school or participation in school sponsored activities ~~will~~ shall be determined on a case by case basis through consultation with a committee which may include the student's parents or guardians, medical care provider, health authorities, school or institution administrators or medical advisors in accordance with policies and guidelines which may have been established by the entities. The exclusion ~~must~~ shall be based on the student representing an unacceptable risk for transmission of the HIV infection. If the student is under the jurisdiction of a protection or advocacy agency, a representative from that agency may be included. Any finding of unacceptable risk by the local committee ~~must~~ shall be approved by the ~~Administrator~~ director as an unacceptable risk for the transmission of HIV to others because of the stage or nature of the illness prior to the student's exclusion. The provisions of this rule and of W. Va. Code § 16-3C-1 et seq. regarding the confidentiality of and the

release of information are applicable in the school setting.

**§ 64-64-12. Requirement for All Health Care Providers to Report Positive Serologic and Other Tests for the Human Immunodeficiency Virus.**

12.1. All health care providers in West Virginia who perform, or cause to have performed, serologic or other tests for HIV shall make a report of all HIV infection associated with laboratory tests that are positive or results that are indicative of the HIV infection to the Administrator director on forms provided by the Administrator director for that purpose as follows:

12.1.1. All positive (reactive) ~~serologic antibody tests for HIV~~ laboratory test results;  
and

12.1.2. ~~All positive (reactive) laboratory tests for the identification of HIV; and All clinical status data.~~

~~41.1.(c) All other positive laboratory test results which identify the presence of HIV;~~

12.2. These health care provider reports shall include:

12.2.1. The name and full address of the laboratory;

12.2.2. The name of the test tests performed, the date each test was performed and the result results of the tests;

12.2.3. The legibly printed or typed name and location of the health care provider reporting the positive HIV laboratory results;

12.2.4. The name of the confidentially tested or the identification code of the anonymously tested individual; ~~tested and, if available, his or her, sex, age and address; and~~

12.2.5. Patient demographic information including age, sex, race and address, limited only when anonymous patient reporting occurs;

12.2.6. The signature of the health care provider. Social and risk factor information of the patient relative to HIV infection; and

12.2.7. Other information concerning HIV infection judged necessary by the director.

12.3. Reports of HIV infection ~~the above named laboratory tests~~ shall be submitted within ~~fifteen (15)~~ thirty (30) days of the receipt of ~~such~~ positive (reactive) test results.

12.4. Health care providers performing anonymous HIV testing on individuals shall use confidential reporting of HIV infection for patients revealing their identity in HIV infection consultation.

12.5. The Administrator director shall work with an individual's health care provider in for any follow-up of reported ~~the reports of~~ positive laboratory tests or HIV infection.

12.6. Health care providers who provide HIV care to patients on the basis of a medical or a self referral shall submit an HIV infection report form to the division.

12.7. The reports of all ~~positive tests~~ HIV infection submitted in compliance with this rule

are ~~deemed confidential~~ protected and are exempt from public disclosure under the exemption for medical records contained in ~~Chapter 29B of the West Virginia Code~~ W. Va. Code § 29B-1-1 et seq., the Freedom of Information Act: Provided, That the reports shall be subject to the provisions of W. Va. Code § 16-3C-1 et seq. ~~Such~~ This information shall not be used except as is necessary to enforce State public health laws and rules and to analyze the magnitude of HIV infection in the State for assisting in the development of adequate safeguards against its spread.

**§ 64-64-13. Requirement for Laboratories to Report Positive Serologic and Other Tests for the Human Immunodeficiency Virus.**

13.1. All laboratories conducting HIV testing in West Virginia or providing HIV testing results for use in this State shall make a report of all laboratory tests that are positive or results that are indicative of the HIV infection to the ~~Administrator~~ director on forms provided by the ~~Administrator~~ director for that purpose as follows:

13.1.1. All positive (reactive) serologic antibody tests for HIV;

13.1.2. All positive (reactive) laboratory tests for the identification of HIV; and

13.1.3. All CD4+ test results on peripheral blood with counts less than 200/mm<sup>3</sup> or less than fourteen per cent (14%); and

13.1.4. All other positive laboratory test results which identify the presence of HIV or the progression of an HIV infection.

13.2. These reports shall include:

13.2.1. The name and full address of the laboratory;

13.2.2. The name of the test, the date performed, and the result;

13.2.3. The name and location of the health care provider who submitted the specimen;

13.2.4. The name of the patient (or identification code) and (if available) the patient's sex, age and address;

13.2.5. Other information concerning HIV infection management and control judged necessary by the director; and

13.2.6. The signature of the supervisor of the laboratory.

13.3. Reports of the above named laboratory tests shall be submitted on the first and fifteenth days of each month.

13.4. If no reportable tests are performed during a reporting period, a statement to this effect shall be submitted by the supervisor of the laboratory.

13.5. The ~~Administrator~~ director shall work with an individual's health care provider in any follow-up of the reports of positive laboratory tests.

13.6. The reports of all positive tests submitted in compliance with this rule are ~~deemed~~

~~confidential protected~~ and are exempt from public disclosure under the exemption for medical records contained in ~~Chapter 29B of the West Virginia Code~~ W. Va. Code § 29B-1-1 et seq., the Freedom of Information Act: Provided, That the reports shall be subject to the provisions of W. Va. Code § 16-3C-1 et seq. ~~Such~~ The information shall not be used except as is necessary to enforce State public health laws and rules and to analyze the magnitude of HIV infection in the State for assisting in the development of adequate safeguards against its spread.

**§ 64-64-14. Quality Control of Laboratories Conducting HIV Tests.**

**14.1. Laboratories Required to be Approved.**

14.1.1. All laboratories conducting HIV testing in this State or providing HIV testing results for use in this State shall be approved by the division.

14.1.2. A laboratory located in West Virginia and seeking approval shall:

14.1.2.a. Show that it complies with the applicable requirements of W. Va. Code § 16-3C-1 et seq. and this rule; ~~and~~

14.1.2.b. Complete application forms when seeking initial approval or when there is a change of ownership, the laboratory administrator, or location; ~~and~~

14.1.2.c. Be certified for high complexity tests under CLIA-88.

14.1.3. A laboratory located outside of West Virginia ~~will~~ shall be eligible for approval only if it is ~~licensed~~ approved for high complexity testing by the federal government under the ~~Clinical Laboratories Improvement Act (CLIA) of 1967~~ rules and regulations promulgated pursuant to CLIA-88 (42 CFR Part 493, Laboratory Requirements, as amended in the April 24, 1995, edition of the Federal Register (60 FR 20035)).

**14.2. Laboratory Director and Personnel Qualifications.**

The laboratory director and personnel shall meet the qualifications set forth by the federal government ~~under the conditions of Coverage of Services of Independent Laboratories (for participation in Medicare), found at 42 CFR 405.1310 through 405.1315, 1987, inclusive, and the aforesaid qualifications are hereby adopted by reference pursuant to CLIA for certification of laboratories for participation in Medicare, and the relevant provisions of the October 1, 1994, edition of 42 CFR Part 493, Laboratory Requirements, as amended in the April 24, 1995, edition of the Federal Register (60 FR 20035), are hereby incorporated by reference.~~

**14.3. Quality Control Standards.**

A laboratory requesting approval ~~must~~ shall demonstrate that a quality control program acceptable to the division is in effect for verification and assessment of accuracy, measurement of precision, and detection of error. ~~Such~~ The demonstration shall be evidenced, when applicable, in part by:

14.3.1. Selection of test method(s) appropriate to the needs of those served by the laboratory;

14.3.2. Use of controls and calibrating standards;

14.3.3. Recording of the acceptable limits and the results of controls and calibrating standards;

14.3.4. Recording of maintenance and calibration of equipment and instruments;

14.3.5. Labeling and dating of all reagents, solutions, standards, and control materials; and

14.3.6. Maintaining a manual containing all procedures and policies currently in use, which shall include action to be taken when control results are outside the acceptable limits and the procedure for reporting positive HIV test results to the division.

#### 14.4. Proficiency Testing

Laboratories shall participate in a proficiency testing program approved by the division. ~~Such~~ The testing shall be conducted on a regular basis and satisfactory performance by the laboratory is mandatory. The laboratory shall be responsible for forwarding proficiency testing survey results to the division.

#### 14.5. On-site Inspection

An on-site inspection to determine compliance with this rule ~~shall~~ may be conducted initially prior to approval, and ~~on an annual basis~~ thereafter as frequently as the division deems necessary to insure compliance with this section. The division shall have the right of entry upon proper identification at ~~such~~ times ~~as deemed~~ judged necessary during operating hours in order to conduct ~~such~~ the inspections.

#### 14.6. Certificate of Approval; Revocation.

14.6.1. Certificates of approval for the performance of HIV testing shall be issued upon initial approval and on an annual basis thereafter pursuant to the conditions listed herein. Certificates issued ~~will~~ shall contain the name and location of the laboratory, a laboratory code number, the name of the laboratory director and the date of expiration of the certificate.

14.6.2. Laboratories shall notify the division when there is a change in ownership, laboratory director, technical personnel or location of the laboratory.

14.6.3. Approval may be revoked or suspended upon:

14.6.3.a. Unsatisfactory performance in on-site inspections;

14.6.3.b. Failure to comply with this rule and all applicable provisions of W. Va. Code § 16-3C-1 et seq;

14.6.3.c. Failure to report positive test results to the division according to W. Va. Code § 16-3C-8B and this rule; or

14.6.3.d. Closure of the laboratory.

#### § 64-64-15. Banking Blood.

The health care provider or a private, public, or nonprofit blood bank shall, upon request, store and bank a person's blood and the health care provider shall use ~~such~~ the blood in the

elective surgery or medical procedure to the extent ~~such~~ the blood is available.

**§ 64-64-16. Administrative Due Process.**

Those persons adversely affected by the enforcement of this rule desiring a contested case hearing to determine any rights, duties, interests or privileges shall do so in a manner prescribed in the **Rules of Procedure for Contested Case Hearings and Declaratory Rulings**, 64 WV CSR 1.

**§ 64-64-17. Severability.**

The provisions of this rule are ~~declared to be~~ severable. If any provision of this rule ~~shall be~~ is held invalid, the remaining provisions ~~shall~~ remain in effect.

**Commenters**

**Aids-Related Medical Testing and Confidentiality  
64 CSR 64**

Cabell-Huntington Hospital  
West Virginia State Medical Association

**Discussion of Public Comments Received  
Concerning the Proposed Rule  
AIDS-Related Medical Testing and Confidentiality, 64 CSR 64**

A public comment period on the proposed rule, **AIDS-Related Medical Testing and Confidentiality, 64 CSR 64**, was held beginning June 30, 1995 and ending July 31, 1995. There were only two (2) commenters. Comments are summarized below, and the Department's responses and changes to the rule are detailed.

**§4.1.5. Comment:** This statement is unclear in meaning and purpose.

**Response:** The statement has been clarified. The intent is to ensure that once an individual is no longer being tested, counseled, or treated anonymously, the individual's name becomes a part of the record maintained by the Department.

**§4.2. Comments:** Several suggestions were made concerning the relationship of W. Va. law and regulations, the federal OSHA Bloodborne Pathogen Standard, and employee concerns about exposure.

**Response:** Making the suggested changes would require revising the statute; a rule cannot conflict with the enabling statute. The Department interprets the OSHA standards as recognizing that state law may protect the individual's right to confidential testing (29 C.F.R. § 1910.1030(f)(3)(ii)). Therefore, there is no conflict between the State's law or rules and the OSHA standard. The Department emphasizes the utility of adherence to universal blood and body fluid precautions in the care of all patients to minimize the risk of transmission of HIV and other blood-borne pathogens from patients to health-care workers.

**§5. Comments:** What is the limitation of restriction? Would this include incarceration?

**Response:** The Department will seek the least restrictive conditions necessary to protect the public. If an individual does not comply with the Department's Cease and Desist Order, the Department could apply to the appropriate circuit court for an order, which could be enforced by the court by whatever means the court chose if the individual does not comply with the court order.

**§10. Comment:** The revision of the section on substituted consent is appropriate and needed, but can this be done without a revision of the underlying statute.

**Response:** The Department has revised this item and added a new term, "legal representative," to the definitions in order to make the rule consistent with various sections of the W. Va. Code relating to substituted consent and legal representation passed more recently than the AIDS-Related Medical Testing and Records Confidentiality Act, W. Va. Code § 16-3C-1 et seq. The more recent law supersedes the older law.

**§13.1.3. Comment:** The test listed is not specific for AIDS and probably should be left out.

**Response:** The item has been clarified.



# CABELL HUNTINGTON HOSPITAL

July 28, 1995

Regulatory Development  
Department of Health & Human Resources  
Capitol Complex, Building 3, Room 265  
Charleston, WV 25305

ATTN: Kay Howard

Dear Ms. Howard:

The following comments are related to the proposed amendments to the Rule entitled "AIDS-Related Medical Testing and Confidentiality," 64 CSR 64, which were filed July 30, 1995.

§64-64-10, Substituted Consent, has been revised to require consent from "the person's legal representative," which is in turn defined in §64-64-3.20. The prior language in this section was taken directly from §16-3C-4 of the West Virginia Code. This change is appropriate and needed, particularly since it recognizes surrogates, but can it be made without an amendment to the underlying law?

I have also received a number of comments about §64-64-4.2, "Consent Not Required" which I would like to share with you. This section of the Rule is taken from §16-3C-2(e) of the West Virginia Code. The OSHA Bloodborne Pathogen Standard, 29 C.F.R. §1910.1030, contains requirements for post-exposure evaluation and follow-up by the healthcare provider. In a number of instances, appropriate follow-up has been hindered either by a lack of cooperation or consent by the patient involved, or by the fact that the patient has left the facility before consent can be obtained. In addition, without a specific release, such information cannot be shared between providers in the course of a follow-up and evaluation.

Based on the OSHA requirements, the law and the regulations should be amended to permit testing without requiring a special consent in the event that a healthcare worker, during the performance of his or her duties, sustains a blood or body fluid exposure from a patient. This would help ease the healthcare worker's concerns and improve the evaluation and follow-up process. Of course, if the patient's test results are positive, the appropriate counseling and other information would be provided.

A further amendment which should be considered is to permit the release of test results and other information by a facility or a physician to a healthcare provider without a special release where it is demonstrated that those results are needed as part of a bona fide follow-up on a blood or body fluid exposure. This would avoid the need to retest a patient who has already been tested, and assist in those situations where the patient has left the facility where the exposure occurred before testing could be ordered.

Kay Howard  
Page 2  
July 28, 1995

Finally, the law and regulations should specifically recognize and permit compliance with 29 C.F.R. §1910.1030(f)(3)(ii)(C), which states that "[r]esults of the source individual's testing shall be made available to the exposed employee, and the employee shall be informed of applicable laws and regulations concerning disclosure of the identity and infectious status of the source individual."

I recognize that the patient's privacy rights need to be protected, but appropriate safeguards can be developed, which balance those privacy rights against the healthcare worker's need to know in the event of an exposure. Facilitating the evaluation and follow-up process by making such information more readily available would help allay the concerns of healthcare workers who believe that they are taking significant risks. Healthcare workers believe they have a clear need to know this information particularly if there is an exposure. These changes are also consistent with the OSHA Bloodborne Pathogen Standards discussed above.

Thank you for the opportunity to share these comments with you. If you have any questions, please do not hesitate to call me at (304) 526-2052.

Sincerely,



Paul English Smith  
Vice President for Legal Services  
and Risk Management

PES/ms

cc: Jane G. Harless, Director of Data Services, WVHA  
Barbara Jones, RN, Infection Control Nurse

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JUL 31 1995

**REGULATORY DEVELOPMENT**

# West Virginia STATE MEDICAL ASSOCIATION



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Executive Director  
Charleston

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**JUL 28 1995**

**REGULATORY DEVELOPMENT**

July 27, 1995

Kay Howard  
Regulatory Development  
Department of Health & Human Resources  
Capitol Complex, Building 3, Room 265  
Charleston, WV 25305

Dear Kay:

The West Virginia State Medical Association solicited four Infectious Disease physicians to review the Administrative Law Division, Title of Rule being Amended: "AIDS-Related Medical Testing and Confidentiality."

The following response was received in our office from Doctor Fred Kerns, of Kanawha County.

- 1) 4.1.5. At the time that an anonymously tested individual's identity becomes know, it shall become a part of the disease reporting record.

This statement is unclear in meaning and purpose.

- 2) 64-64-5. Cease and Desist Orders:

What is the limitation of restriction? Would this include incarceration?

- 3) 64-64-13. Requirement for Laboratories to Report Positive Serologic and Other Tests for the Human Immunodeficiency Virus.  
13.1.3 All CD4+ test results with counts less than 200/mm; and

This is not specific for AIDS and probably should be left out.

Kay Howard  
Regulatory Development  
AIDS-Related Medical Testing and Confidentiality  
PAGE TWO

Should you have any questions regarding these comments please contact Doctor Kerns at the address - phone number below or you may contact me at (304) 925-0342.

Fred T. Kerns, MD  
3100 MacCorkle Avenue, SE  
Suite 604  
Charleston, WV 25304  
(304) 345-5421

Thank you for this opportunity to review and comment on this important proposed rule.

Sincerely,

  
George Rider  
Executive Director

GR/tla  
c: Fred T. Kerns, MD