

PART 367
AIDS/CONFIDENTIALITY AND ACCESS TO HIV-RELATED INFORMATION

(Statutory authority: Executive Law, §243)

CONFIDENTIALITY OF HIV-RELATED INFORMATION

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CONFIDENTIALITY OF HIV-RELATED INFORMATION

§367.1 Definitions.

- (a) **AIDS** means acquired immune deficiency syndrome, as may be defined from time to time by the centers for disease control of the United States public health service.
- (b) **HIV infection** means infection with the human immunodeficiency virus or any other related virus identified as a probable causative agent of AIDS.
- (c) **HIV-related test** means *any* laboratory test or series of tests for any virus, antibody, antigen or etiologic agent whatsoever, thought to cause or to indicate the presence of HIV infection.
- (d) **Capacity to consent** means an individual's ability, determined without regard to such individual's age, to understand and appreciate the nature and consequences of a proposed health care service, treatment or procedure, and to make an informed decision concerning such service, treatment or procedure.

(e) **Protected individual** means a person who is the subject of an HIV related test, or who has been diagnosed as having AIDS or HIV infection.

(f) **Confidential HIV-related information** means any information, in the possession of a person who provides one or more health or social services, including probation services, or who obtains the information pursuant to a release of confidential HIV-related information, concerning whether an individual has been the subject of an HIV-related test, or has HIV infection, HIV-related illness or AIDS, or information which identifies or reasonably could identify an individual as having one or more of such conditions, including information pertaining to such individual's contacts.

(g) **Release of confidential HIV-related information** means a written authorization for disclosure of confidential HIV-related information that complies with the requirements of article 27-F, section 2780(9) of the Public Health Law. Only the specific release form authorized for this purpose by the Division of Probation and Correctional Alternatives may be used.

(h) **Client** means a person who receives services, which have been ordered or authorized by the criminal or family court, from a probation department. Such persons include, but are not limited to, probationers.

(i) **Contact** means an identified spouse or sex partner of the protected individual or a person identified as having shared hypodermic needles or syringes with the protected individual.

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§367.2 Application.

These regulations apply to persons who receive confidential HIV-related information in the course of providing probation services and who receive confidential HIV-related information pursuant to a release while providing such services. All disclosures of confidential HIV-related information made on or after filing of this rule are subject to these regulatory provisions.

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§367.3 Anti-discrimination.

(a) Every probation director shall advise their respective staff of the laws prohibiting discrimination against protected individuals. Under New York State Executive Law, article 15 (known as the Human Rights Law) discrimination against individuals who have or who are perceived to have disabilities is prohibited. The Human Rights Law of the City of New York

also prohibits discrimination on the basis of an individual's disability or the perception of a disability. AIDS and HIV infection are considered to be disabilities under the terms of these acts.

(b) Every probation director shall establish written procedures for reviewing client claims of discrimination because of AIDS, HIV infection, or the perception that the client has AIDS or HIV infection.

(c) Nothing shall preclude differential treatment in order to provide adequate and appropriate treatment or probation services. Specialized caseloads may be established, if deemed appropriate. The confidentiality of individuals receiving such treatment or within such caseloads shall be preserved.

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§367.4 Disclosure Pursuant to a Release.

(a) No confidential HIV-related information shall be disclosed pursuant to a general release. Disclosure is only permitted for HIV-related information pursuant to a specific release form that has been approved by the Department of Health. The release must be signed by the protected individual, or if the protected individual lacks capacity to consent, by a person authorized pursuant to law to consent to health care for the individual. Whenever appropriate, an attempt should be made to secure consent.

(b) The provision in subdivision (a) of this section is also applicable to confidential HIV-related information contained in court ordered documents, including presentence, pre-plea, predispositional, or other investigation reports.

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§367.5 Confidentiality and Disclosure.

(a) No person who obtains confidential HIV-related information in the course of providing probation services or pursuant to a release of confidential HIV-related information while providing such services may disclose or be compelled to disclose such information, except to the following:

(1) the protected individual or, when the protected individual lacks capacity to consent, a person authorized pursuant to law to consent to health care for the individual;

(2) any person to whom disclosure is authorized pursuant to a release of confidential HIV-related information in accordance with section 367.4(a) of this Part;

(3) authorized counseling or treatment programs providing contractual services to the probation department, when knowledge of the HIV-related information is necessary to provide appropriate treatment to the protected individual. Such agencies shall be authorized to redisclose such information only pursuant to the provisions of article 27-F of the Public Health Law;

(4) authorized agencies as defined by Social Services Law (section 371) and corporations that are incorporated or organized to receive children for adoption or foster care, in connection with foster care or adoption of a child. Such agencies shall be authorized to redisclose such information only pursuant to the provisions of article 27-F of the Public Health Law or in accordance with the provisions of section 373-A of the Social Services Law;

(5) any person to whom disclosure is ordered by a court of competent jurisdiction pursuant to article 27-F, section 2785 of the Public Health Law;

(6) an employee or agent of the Division of Parole, or Commission of Correction, authorized by law to access records to carry out functions, powers and duties with respect to the protected individual, in accordance with regulations promulgated by these agencies;

(7) a medical director of a local correctional facility in accordance with regulations promulgated by the Commission of Correction to the extent such individual is authorized to access records containing such information in order to carry out functions, powers, and duties with respect to the individual. Redisclosure by the medical director is prohibited except as permitted under Public Health Law, article 27-F and its implementing regulations; and

(8) any other persons specifically authorized in article 27-F, section 2782 of the Public Health Law.

(b) Confidential HIV-related information may be disclosed to probation department employees when such employees have access to records in the ordinary course of business and such information is reasonably necessary for supervision, monitoring, administration, or provision of other probation services. This subdivision permits disclosure to probation department employees in intrastate or interstate transfers of probation supervision for these specified purposes.

(c) Confidential HIV-related information may be disclosed to employees of the Division of Probation and Correctional Alternatives when such employees have access to records as a result of performing activities enumerated in section 367.11(a) of this Part.

(d) No person to whom confidential HIV-related information has been disclosed shall disclose the information to another person except as authorized by this Part, provided, however, that the provisions of this Part shall not apply to the protected individual or to a natural person who is authorized pursuant to law to consent to health care for the protected individual.

(e) Confidential HIV-related information shall not be released pursuant to a subpoena. A court order pursuant to Public Health Law, article 27-F section 2785 is required.

(f) Confidential HIV-related information shall not be disclosable pursuant to Public Officers Law, article 6, The Freedom of Information Law. Prior to disclosing confidential HIV-related information, supervisory consultation should be made to ensure access is authorized.

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§367.6 Protections against Redislosure.

(a) All written disclosures of confidential HIV-related information must be accompanied by a statement restricting redisclosure. The statement shall include the following language or substantially similar language: “This information has been disclosed to you from confidential records that are protected by state law. State law prohibits you from making any further disclosure of this information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law. Any unauthorized further disclosure in violation of state law may result in a fine or jail sentence or both. A general authorization for the release of medical or other information is not sufficient authorization for further disclosure.”

(b) HIV-related information in a court-ordered document, including a presentence, pre-plea, predispositional, or other investigation report shall be contained in a separate section at the end of the document. The HIV-related information shall be prefaced by the statement in subdivision (a) of this section or substantially similar language restricting redisclosure.

(c) If oral disclosures are necessary, they must be accompanied or followed as soon as possible, but no later than 10 days, by the written statement required by subdivision (a) of this section.

(d) The statement required by subdivisions (a)-(c) of this section is not required for release to the protected individual or to his or her legal representative.

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§367.7 Probation Department Policy and Procedures.

Every probation director shall develop and implement written policies and procedures to maintain the confidentiality of HIV-related information. Such policies and procedures shall assure that such confidential HIV-related information is disclosed to employees or contractors only when appropriate under this Part. Such policies and procedures shall include:

(a) initial employee education and periodic in-service education of employees regarding the legal protections against unauthorized disclosure in Public Health Law, article 27-F;

(b) protocols for ensuring that records are maintained securely, and used for the purpose intended; establishing a procedure whereby when confidential HIV-related information is contained in any probation record, it shall be maintained in a manner where it can be easily identified and removed if necessary;

(c) procedures for handling requests by other parties for confidential HIV-related information.

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§367.8 Significant Risk.

(a) The three factors necessary to create a significant risk of contracting or transmitting HIV infection are:

- (1) the presence of a significant risk body substance;
- (2) a circumstance which constitutes significant risk for transmitting or contracting HIV infection; and
- (3) the presence of an infectious source and a non-infected person. Transmission occurs only from infected to uninfected persons.

(b) Any body substances that have been epidemiologically implicated in the transmission of HIV are considered to be a significant risk body substance. These include blood, semen, vaginal secretions, and breast milk. Other body substances that have been considered infectious for HIV include tissue and the following body fluids: cerebrospinal, amniotic, peritoneal, synovial, pericardial, and pleural. These body substances shall also be considered significant risk body substances.

(c) Circumstances that constitute significant risk for transmitting or contracting HIV infection are as follows:

- (1) sexual intercourse (vaginal, anal, oral) that exposes a non-infected individual to blood, semen, or vaginal secretions of an infected individual;
- (2) sharing of needles and other paraphernalia used for preparing and injecting drugs between infected and non-infected individuals;
- (3) the gestation, birthing or breast feeding of an infant when the mother is infected with HIV;

(4) transfusion or transplantation of blood, organs, or other tissues obtained from an infected individual to an uninfected individual, providing such products have not tested negatively for antibody or antigen and have not been rendered non-infective by heat or chemical treatment;

(5) other circumstances not identified in paragraphs (1) through (4) of this subdivision during which a significant risk body substance (other than breast milk) of an infected individual contacts mucous membranes (e.g. eyes, nose, mouth), non-intact skin (e.g. open wound, dermatitis, abraded areas), or the vascular system of a non-infected person. Such circumstances include, but are not limited to, needle stick or puncture wound injuries and direct saturation or permeation of these body surfaces by the infectious body substance.

(d) Circumstances that do not constitute significant risk include:

(1) exposure to urine, feces, sputum, nasal secretions, saliva, sweat, tears or vomitus that does not contain blood that is visible to the naked eye;

(2) human bites where there is no direct blood to blood, or blood to mucous membrane contact;

(3) exposure of intact skin to blood or any other body substance;

(4) occupational settings where individuals use scientifically accepted barrier techniques and preventive practices in circumstances that would otherwise pose a significant risk.

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§367.9 Training and protection of probation department employees who may be in contact with human immunodeficiency virus (HIV).

(a) Every probation director shall implement and maintain a program for the prevention of circumstances that could result in employees becoming exposed to significant risk body substances during the provision of services. Such a program shall include:

(1) information about generally accepted protective barriers and preventive practices during job-related activities that may involve exposure to significant risk body substances. Preventive action should be taken by the employee when job-related activities may involve exposure to such body substances. Preventive action is an essential element to avoid bi-directional spread of HIV;

(2) training at the time of initial employment and periodic staff development education on the use of protective equipment, preventive practices, and circumstances that represent

a significant risk for all employees whose job-related tasks may involve exposure to significant risk body substances;

(3) availability of personal protective equipment for employees that is appropriate to the tasks being performed; and

(4) a system for monitoring preventive programs to assure compliance and safety.

(b) Every probation director shall develop, implement and maintain a policy/procedure for the management of individuals who may be exposed to significant risk body substances. The policy/procedure shall include, but is not limited to the following:

(1) voluntary employee notification where exposure may have occurred (*e.g.*, a needle stick) to the probation director or his or her designee;

(2) availability of services for evaluating the circumstances of a reported exposure and providing appropriate follow-up of the exposed individual; and

(3) assurances for protection of confidentiality for those employees involved in reported exposures.

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§367.10 Education of Clients and Protection of Contacts.

(a) All clients shall, where feasible, be provided with written literature describing the transmission of HIV infection and preventive measures to minimize the risk of transmission.

(b) All clients shall be counseled to avoid behavior that creates a significant risk of contracting or transmitting HIV infection.

(c) All clients with a confirmed diagnosis of AIDS or HIV infection shall be urged to inform their contacts.

(d) If after urging a client with a confirmed diagnosis of AIDS or HIV infection to inform a contact, the probation officer reasonably believes there is a significant risk of infection to the contact and that the client will not inform the contact, the probation officer may, after consultation with the probation department director or authorized designee, discuss with their legal representative the feasibility of obtaining and securing a court order for disclosure of confidential HIV-related information, in accordance with the provisions of article 27-F, section 2785 of the Public Health Law. Disclosures to a contact made with the consent of the protected individual or through a court order may only be made by authorized health employees who have received training in the transmission of HIV infection and must be accompanied by supportive

counseling and/or referrals for such counseling. The identity of the protected individual may not be disclosed to a contact.

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INTER/INTRA-AGENCY CONFIDENTIALITY

§367.11 Division Access.

(a) No employee of the Division of Probation and Correctional Alternatives shall have access to health information related to any identified person, including confidential HIV-related information, except in connection with the following activities:

- (1) investigation of any agency as authorized by the state director;
- (2) monitoring and technical assistance for local probation departments;
- (3) research studies approved by the state director;
- (4) as necessary in order to fulfill explicit statutory responsibilities of the state director;
and
- (5) provision of direct probation services, where disclosure shall be restricted in the manner described in this Part.

(b) No employee of the Division of Probation and Correctional Alternatives who has access to confidential HIV-related information shall disclose such information to any other person unless such person also has access to confidential HIV-related information as described in this section or in section 367.5 of this Part.

(c) Each employee of the Division of Probation and Correctional Alternatives who is given authorized access to the probation records of an identified person that contain HIV-related information, shall:

- (1) be advised in writing by the supervisor that the employee shall not:
 - (i) examine documents containing HIV-related information unless required to in the course of his or her official duties;
 - (ii) remove or copy any such documents unless he or she is acting within the scope of his or her assigned duties; and
 - (iii) discuss the content of any such documents with any person unless that person is authorized access to such documents.

(2) sign a statement attesting that he or she has read the above restrictions and stating that he or she understands that violation may lead to disciplinary action, including suspension or dismissal from employment and that such violation may be against New York State law and lead to arrest and criminal prosecution.

(3) whenever protected HIV-related information is received, the security of such information must be maintained and safeguarded at all times.

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