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**MEMORANDUM**

TO: Leadership Team  
Executive Directors of Voluntary Agencies  
Willowbrook Parties

FROM: Eileen Zibell  
Associate Attorney  
Counsel's Office

DATE: May 4, 2012

SUBJECT: OPWDD Protocol for Obtaining Informed Consent for HIV Testing

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New York State Law regarding HIV testing was amended in 2010 (see Chapter 308 of the Law of 2010). This Chapter mandates that HIV testing be offered to all persons between the ages of 13 and 64 receiving hospital or primary care services. The revision is intended to increase HIV screening and promote prompt treatment of individuals who test positive. Although the new law is intended to make HIV testing a routine part of health care, **written informed consent for testing is still required when a test is offered as part of routine health care in a hospital or as part of primary care services.** More information regarding the new law can be found at [www.health.ny.gov/diseases/aids](http://www.health.ny.gov/diseases/aids).

In keeping with the intention of this new law, OPWDD will facilitate compliance with the new requirements on behalf of the individuals we serve. Individuals who are at greatest risk for exposure to HIV are a priority for testing. The following factors contribute to an individual's risk for HIV exposure:

- a) A history of unprotected sex including vaginal, oral and anal sex;
- b) A history of IV drug abuse including "street drugs," vitamins, steroids and other injectable medications;
- c) Incarceration in jail or prison;
- d) Body piercing or tattoos; and
- e) Birth to a HIV positive mother.

Although individuals who are at high risk for exposure to HIV are a priority for testing, **all** individuals served by OPWDD should be offered the opportunity to be tested for HIV. Individuals, and the surrogates who provide consent on their behalf, should be educated and encouraged to consent to an HIV test as a part of the individual's routine health care.

### Obtaining Consent

Although the HIV test requires only a blood draw and is not an invasive procedure, written informed consent is required by law for routine HIV testing. OPWDD regulations at 14 NYCRR 633.11 must be followed when seeking informed consent from individuals receiving services from OPWDD or from their surrogates.

- a) **Individuals who are self-consenting** - Individuals who are capable of providing consent to HIV testing must be given the opportunity to consent or decline testing. Staff should educate self-consenting individuals regarding this new requirement prior to their appointment with a primary care physician. In addition, if necessary, staff should advise the physician that OPWDD clinicians consider the individual to be capable of consenting. If an individual refuses to consent to an HIV test, staff should document the refusal in the individual's record and continue to educate the individual regarding the benefit of knowing his/her HIV status.
- b) **Individuals with an authorized surrogate** - For those individuals who are not capable of providing consent to HIV testing, but who have a health care agent, a guardian or an actively involved family member who acts as a surrogate pursuant to 14 NYCRR 633.11, consent must be sought from such surrogate. (This includes CAB for Willowbrook class members with full representation). If possible, staff should send the Department of Health's model consent form (or a consent form received from a physician's office) to the appropriate surrogate in advance of the individual's next scheduled medical appointment. If this does not occur, the information and form must be forwarded to the surrogate after the appointment.
- c) **Individuals in need of Surrogate Decision Making Committee (SDMC) Consent** - For those individuals who are not capable of providing consent to HIV testing, and who do not have a health care agent, a guardian or an actively involved family member to act as a surrogate pursuant to 633.11, an SDMC petition should be completed. The 220-A form has been amended for this purpose. Staff should work with individual's primary care physicians to evaluate and prioritize individuals in this category. If possible, several SDMC petitions for different individuals should be submitted together, so that they can be combined into one hearing. OPWDD will be working with SDMC to streamline the process for consent to HIV testing.

Whenever possible, applications for consent to other health care treatment submitted to SDMC should also include a request for consent to HIV testing.

Exceptions to the requirement to offer testing:

Providers are NOT required to offer HIV testing if the individual:

- a. is being treated for a life threatening emergency; or
- b. has previously been offered or has been the subject of an HIV related test (unless otherwise indicated due to risk factors); or
- c. lacks the capacity to consent and no other appropriate person is available to provide consent.

**NOTE:** This exception may lead many community providers to assume they do not need to offer HIV testing to individuals served by OPWDD. If surrogate consent has not been obtained prior to the individual's appointment, primary care physicians may not offer the test and will document this exception. However, OPWDD staff are expected to follow up with the appropriate consent giver following the appointment.

Occupational Exposures:

The new law also provides for **anonymous testing of a source patient** in cases of occupational exposure which create a significant risk of contracting or transmitting HIV infection if **all** of the following conditions are met:

- the source person is deceased, comatose or is determined by his or her attending professional to lack mental capacity to consent; and
- the source person is not expected to recover in time for the exposed person to receive appropriate medical treatment; and
- there is no person available or reasonably likely to become available who has legal authority to consent in time for the exposed person to receive appropriate medical treatment; and
- the exposed person will benefit medically by knowing the source person's HIV test results.

As always, a source person with capacity or his/her authorized surrogate may decline testing in the event of an occupational exposure, and an HIV test may not be conducted.

A physician may **only** order an immediate anonymous test when there has been an occupational exposure involving a source patient who is deceased, comatose or otherwise unable to consent. The medical benefit of knowing the source person's test result must be documented in the exposed person's medical record. Moreover, the law requires that the provider order an anonymous test of the source person with results being provided **only** to the attending professional of the **exposed** person and solely for assisting the exposed person in making appropriate decisions regarding post – exposure medical treatment. DOH strongly recommends use of a rapid, HIV test in these situations. The results of the anonymous test **cannot** be disclosed to the **source** person or placed in that source person's medical record.

**NOTE: For needle-sticks and other types of occupational exposures in which the source person is an individual served by OPWDD, community providers may assume the person is not capable of consenting and has no surrogate immediately available and seek anonymous testing immediately. If staff are aware that this is occurring, they should make an attempt to contact the individual's authorized 633.11 surrogate by phone to obtain verbal consent prior to proceeding with anonymous testing. If consent is obtained, the results can and should be documented in the source person's medical record.**

#### Written Informed Consent

Use of the DOH model forms (Informed Consent to Perform HIV Testing), or its equivalent is **required** unless the physician's office has provided its own HIV consent form. The model form can be found at <http://www.health.ny.gov/diseases/aids/forms/informedconsent.htm>

DOH requires that individuals receive 7 points of information about HIV before consenting. A description of these points can be found at:

[http://www.health.ny.gov/diseases/aids/forms/docs/key\\_facts\\_before\\_testing.pdf](http://www.health.ny.gov/diseases/aids/forms/docs/key_facts_before_testing.pdf)

Please address any questions you may have regarding this memo to Vicki Schultz, Director of Nursing and Health Services ([Victoria.Schultz@opwdd.ny.gov](mailto:Victoria.Schultz@opwdd.ny.gov)) or Eileen Zibell in Counsel's Office ([Eileen.Zibell@opwdd.ny.gov](mailto:Eileen.Zibell@opwdd.ny.gov)).