



STATE OF WEST VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
CHARLESTON 25305

MARIO J. PALUMBO
ATTORNEY GENERAL

(304) 348-2021
FAX 348-0140

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Mr. Jimmy B. Plear, Deputy Chief of Operations
Regional Jail and Correctional Facility Authority
307 Jefferson Street
State Capitol Complex
Charleston, West Virginia 25305

Dear Mr. Plear:

You have requested the opinion of the Attorney General concerning mandatory human immunodeficiency virus (HIV) testing requirements for persons convicted of sex-related offenses under West Virginia Code § 16-3C-2(f)(2) (1991). You have asked that we address the following two questions:

(1) Does W. Va. Code § 16-3C-2(f)(2) mandate that the sentencing county perform compulsory HIV tests on incoming inmates convicted of certain sex-related offenses prior to placing the inmate in a regional jail facility, or is it the responsibility of the regional jail facility to perform compulsory HIV tests on incoming inmates convicted of these sex-related offenses?

(2) If the answer to question (1) above is a regional jail facility, does W. Va. Code § 16-3C-2(f)(2) require that the regional jail facility perform compulsory HIV tests on incoming inmates convicted of certain sex-related offenses who are sentenced to a State facility but temporarily housed at the regional facility because of a lack of bed space at the State facility?

The performance of mandatory HIV testing for persons convicted of certain sex-related offenses is required by W. Va. Code § 16-3C-2(f)(2) (1991), which provides that:

An HIV-related test shall be performed on any persons convicted of any of the following crimes or offenses:

(i) Prostitution;

(ii) Sexual abuse, sexual assault, incest or molestation.

Human immunodeficiency virus (HIV) is the virus that causes the fatal communicable disease, acquired immune deficiency syndrome (AIDS). W. Va. Code § 16-3C-1(b) and (f) (1991). The above-quoted statute specifies a limited group of sex-related crimes for which the compulsory HIV testing program applies. However, it fails to specify when the mandatory HIV test is to take place, or which correctional facility is to perform the test.

While the provisions of the AIDS-Related Medical Testing and Records Confidentiality Act, W. Va. Code §§ 16-3C-1 to -9 (1991), are silent as to the mechanics of executing the mandatory HIV testing of convicted sex offenders, W. Va. Code § 16-3C-8 (1991) empowers the director of the Division of Health, Department of Health and Human Resources, to implement rules to the extent necessary for further implementation of article 3C.¹ The existing rules promulgated pursuant to W. Va. Code § 16-3C-8 do not provide guidance as to when the mandatory HIV test is to take place or who is to perform the test.² Nevertheless, the Division of Health clearly has the power, and may also have the duty, to issue such rules. Consequently, this opinion does not preclude the director of the Division of Health from issuing rules to implement mandatory HIV testing in a manner different from that set forth in this opinion.

An overview of the laws relating to Public Health in Chapter 16, West Virginia Code, reveals that the Legislature has mandated that persons convicted of sex-related crimes also undergo compulsory venereal disease testing. Specifically, W. Va. Code § 16-4-5 (1991) provides, in part:

When any person has been tried and convicted in any police court, or in any criminal or circuit court, or before a justice of the peace, upon any charge or offense growing out of sex immorality, such as has been set out in the last preceding section, said person shall not be released from custody by the judge, justice, or police officer trying the case until the local health officer having proper jurisdiction has been notified and has had

¹"The director of the [Division] shall immediately implement and enforce the provisions of this article, and shall adopt rules to the extent necessary for further implementation of the article." W. Va. Code § 16-3C-8(a) (1991).

²Division of Health (Title 64) Legislative Rules, Series 64, titled "Aids-Related Medical Testing and Confidentiality" (1990).

time to make all necessary tests and examinations to ascertain whether in fact such person is infected with a venereal disease

Unlike W. Va. Code § 16-3C-2(f)(2), § 16-4-5 expressly addresses the issue of when persons convicted of sex-related crimes are subject to a compulsory examination. West Virginia Code § 16-4-5 requires that the local health officer perform the mandatory venereal disease tests and examinations prior to transporting the person to the prison.

The "local health officers" responsible for conducting the mandatory venereal disease examinations for convicted sex offenders are county and municipal health officers. W. Va. Code § 16-4-2 (1991). These health officers are legally qualified physicians appointed by either the director of the Division of Health pursuant to W. Va. Code § 16-2-1 (1991), or the county or municipal boards of health, pursuant to W. Va. Code § 16-2A-4 (1991). They are also designated as the executive officers of their respective county or municipal boards of health. W. Va. Code §§ 16-2-1, 16-2A-5 (1991).

The local boards of health are imbued with the authority and mandated to protect the general health of their respective counties and municipalities. West Virginia Code § 16-2A-3 (1991) states:

It shall be the duty of such local boards of health to protect the general health and . . . to enforce the laws of this State pertaining to public health, and the rules and regulations of the state board of health, insofar as they are applicable to such counties or municipalities the director [of the Division of Health] . . . may, if deemed necessary or expedient by him, act through any county or municipal board of health

Moreover, W. Va. Code § 16-2-1 (1991) requires that "[t]he county board of health shall exercise all the powers and enforce all the rules and regulations of the West Virginia board of health, so far as applicable to such county."

The duties of the local health officers and the corresponding local boards of health may also extend to the provision of medical services to inmates, apart from the mandatory venereal disease testing for persons convicted of certain sex-related offenses. West Virginia Code § 16-2A-5 (1991) states, in part:

The duties of such health officer may include the rendering of medical or surgical services on an

individual basis to inmates of any public institution operated or maintained by any county commission or municipality.

Under a basic rule of statutory construction, statutes which are not inconsistent and have the same common purpose are read in pari materia, and should be construed together. This rule is particularly applicable where a statute is incomplete and must be read in connection with related statutes to effectuate its purpose. Department of Highways v. Arbogast, 157 W. Va. 359, 201 S.E.2d 492 (1973). Statutory sections 16-2-1, 16-2A-3, 16-2A-5, 16-3C-2(f)(2), 16-3C-8, and 16-4-5, are consistent public health provisions that have the common purpose of implementing procedures for preventing the transmission of communicable disease, and consequently should be construed together.

West Virginia Code § 16-3C-2(f)(2) is incomplete in its failure to state when the post-conviction mandatory HIV test is to be performed. Therefore, W. Va. Code § 16-3C-2(f)(2) should be construed in connection with sections 16-2-1, 16-2A-3, 16-2A-5, 16-3C-8 and 16-4-5, and be interpreted (in the absence of contrary regulations) as requiring that the county and municipal health officers perform the mandatory HIV tests on persons convicted of sex-related offenses.

Furthermore, in the absence of new legislative rules implementing the mandatory HIV testing program, an implication necessary to effectuate the program is that county and municipal health officers perform the mandatory HIV tests. Assuming that one of the avowed purposes of the Public Health laws is preventing the exposure of persons to communicable or infectious diseases, see, e.g., W. Va. Code §§ 16-1-10, 16-3-1 (1991), this goal will be furthered by performing the mandatory HIV test at the earliest possible post-conviction stage of processing the incoming inmate. Therefore, consistent application of the Legislature's preventative public health strategy requires that local health officers perform the mandatory HIV test and venereal disease examinations on persons convicted of sex-related offenses.

For the foregoing reasons, it is our opinion that, in the absence of legislative rules to the contrary, it is the responsibility of the county and municipal health officers to perform compulsory HIV tests on persons convicted of sex-related offenses, prior to the defendant being released by the court from the custody of local authorities to serve his or her sentence in a regional jail facility.

SUMMARY

Pending the promulgation of legislative rules, W. Va. Code § 16-3C-2(f)(2) (1991) contemplates that county and municipal health officers perform the compulsory HIV tests on persons convicted of the sex-related offenses of prostitution, sexual abuse, sexual assault, incest or molestation. Such testing should take place prior to the defendant being released from the custody of local authorities to serve his or her sentence in a regional jail facility.

Very truly yours,

MARIO J. PALUMBO
ATTORNEY GENERAL

By *James P. Carbone*
JAMES P. CARBONE
ASSISTANT ATTORNEY GENERAL

JPC/rlp