

**Department of State Health Services
Council Agenda Memo for State Health Services Council
January 22, 2010**

Agenda Item Title: Repeal of a rule and an amendment to a rule concerning the testing of Sexually Transmitted Diseases (STD) including Acquired Immunodeficiency Syndrome (AIDS) and Human Immunodeficiency Virus (HIV)

Agenda Number: 51

Recommended Council Action:

For Discussion Only

For Discussion and Action by the Council

Background: The HIV/STD Prevention and Care Branch is located in the Prevention and Preparedness Services Division, and is responsible for the treatment and prevention of HIV and STD in Texas. The Branch implements HIV/STD disease intervention, treatment and service programs through contracts and relationships with local city and county health departments, private physicians, area hospitals and community clinics. The Branch also implements HIV/STD prevention programs through contracts and relationships with local community organizations. The Branch holds over 100 contracts with local health departments and community-based organizations.

The Branch receives approximately \$113 million in federal funding through the Centers for Disease Control and Prevention, Health Resources Services Administration, Housing and Urban Development; and approximately \$55 million in State general revenue funds.

Summary: The purpose of the repeal is to delete an unnecessary rule from DSHS rule base in order to maintain clear and concise rules for the public. Section 97.135 is not necessary because the statute of Texas Health and Safety Code, Section 81.090, Serological Testing During Pregnancy, as amended by House Bill (HB) 1795, 81st Legislature, 2009, can stand on its own with no negative programmatic effect from repealing this rule.

The purpose of the amendment is to improve readability and clarity of the rule for the public. The amendment to Section 97.138 will comply with the Texas Code of Criminal Procedure, Article 21.31, as amended by HB 1985, 81st Legislature, 2009. The amendment allows the victim of the offenses listed in the statute the right to demand that the accused be tested for HIV/STD within a specific 48-hour time period. Previously, the statute gave discretion to the judge of whether to honor such a request from the victim. The amendment also includes content regarding situations where the accused is not able to be located within the 48-hour time period. New language to the rule adds subsequent testing after a conviction or following an initial positive test result.

Summary of Input from Stakeholder Groups: Stakeholder input will be obtained through announcement of the rules repeal and revision in the Texas HIV/STD Insider, which has a circulation of 1,750 individuals and organizations in Texas. The rule changes were posted for comment on the DSHS HIV/STD program website at www.dshs.state.tx.us/hivstd during the month of December 2009.

DSHS anticipates no issues concerning the rule repeal or amendment.

Proposed Motion: Motion to recommend HHSC approval for publication of rules contained in agenda item #51

Approved by Assistant Commissioner/Director:	Adolfo Valadez, M.D., M.P.H.	Date:	12/15/09		
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Approved by CPCPI:	Carolyn Bivens	Date:	12/16/09		

Title 25. HEALTH SERVICES
Part 1. DEPARTMENT OF STATE HEALTH SERVICES
Chapter 97. Communicable Diseases
Subchapter F. Sexually Transmitted Diseases Including Acquired Immunodeficiency Syndrome (AIDS) and Human Immunodeficiency Virus (HIV)
Repeal §97.135
Amendment §97.138

Proposed Preamble

The Executive Commissioner of the Health and Human Services Commission (commission) on behalf of the Department of State Health Services (department) proposes the repeal of §97.135 and an amendment to §97.138, concerning the testing of Sexually Transmitted Diseases (STD) including Acquired Immunodeficiency Syndrome (AIDS) and Human Immunodeficiency Virus (HIV).

BACKGROUND AND PURPOSE

The department proposes to repeal §97.135 because the department's HIV/STD Program has no additional content needed for the rule beyond that provided in the statute itself, and because a rule is not required by Texas Health and Safety Code, §81.090, Serological Testing During Pregnancy, as amended by House Bill (HB) 1795, passed by the 81st Legislature, 2009. If the rule is repealed, the statutory language can stand on its own with no negative programmatic effect.

Proposed amendments to §97.138 would align the rule with a variety of changes in the underlying statute made by HB 1985, passed by the 81st Legislature, 2009. House Bill 1985 amended the Texas Code of Criminal Procedure, Article 21.31, Testing for AIDS and Certain Other Diseases. The amendments would also improve the readability and clarity of the rule.

SECTION-BY-SECTION SUMMARY

The department proposes amendments to §97.138(a) that would delete the subsection's existing language in its entirety, and replace it with language that complies with recent amendments to Texas Code of Criminal Procedure, Article. 21.31. The proposed new language for the subsection would also improve the readability and clarity of the rule. The statute was substantially amended to, among other things, allow the victim of the listed offenses in the Texas Penal Code, Chapters 21 and 22, an absolute right to demand that the accused be tested for the listed diseases within a specific 48-hour timeframe. Previously, the statute gave discretion to the judge of whether to honor such a request from the victim. The statute was also amended to include content regarding situations where the accused is not able to be located within the 48-hour time period. Also, language was added regarding subsequent testing in certain listed situations. The proposed amendments to the department rule would reflect these statutory amendments. Existing rule language at subsection (b) would be renumbered as subsection (c) so that a new subsection (b) can reflect a separate process under the statute for alleged offenses of Texas Penal Code, §22.11 (as opposed to the procedure dictated for offenses

listed in the statute at Article 21.31(a)). Due to this renumbering, existing subsection (c) is proposed to be renumbered as subsection (d), with one cross-reference wording change necessitated by the restructuring of the previous subsections.

FISCAL NOTE

Casey Blass, Director, Disease Intervention and Prevention Section, has determined that for each year of the first five-year period that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

MICRO-BUSINESSES AND SMALL BUSINESSES IMPACT ANALYSIS

Mr. Blass has also determined that there will be no adverse effect on small businesses or micro-businesses required to comply with the sections as proposed. This was determined by interpretation of the rules that small businesses and micro-businesses will not be required to alter their business practices in order to comply with the sections.

ECONOMIC COST TO PERSONS AND IMPACT ON LOCAL EMPLOYMENT

There are no anticipated economic costs to persons who are required to comply with the sections as proposed. There is no anticipated negative impact on local employment.

PUBLIC BENEFIT

In addition, Mr. Blass has also determined that for each year of the first five years the sections are in effect, the public will benefit from adoption of the sections. The public benefit anticipated will be continued HIV and STD disease intervention, treatment and prevention in Texas, along with the improved efficiency that comes from improving the clarity and readability of these rules.

REGULATORY ANALYSIS

The department has determined that this proposal is not a "major environmental rule" as defined by Government Code, §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

TAKINGS IMPACT ASSESSMENT

The department has determined that the proposed repeal and amendment do not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, do not constitute a taking under Government Code, §2007.043.

PUBLIC COMMENT

Comments on the proposal may be submitted to Todd Logan, HIV/STD Comprehensive Services Branch, TB/HIV/STD Unit, Department of State Health Services, Mail Code 1873, Post Office Box 149347, Austin, Texas 78714-9347, (512) 533-3098 or by email to todd.logan@dshs.state.tx.us. Comments will be accepted for 30 days following publication of the proposal in the *Texas Register*.

LEGAL CERTIFICATION

The Department of State Health Services, General Counsel, Lisa Hernandez, certifies that the proposed rules have been reviewed by legal counsel and found to be within the state agencies' authority to adopt.

STATUTORY AUTHORITY

The repeal and amendment are authorized by Texas Health and Safety Code, Chapters 81 and 85; by Texas Code of Criminal Procedure, Article 21.31; and by Government Code, §531.0055, and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the Health and Human Services Commission to adopt rules and policies necessary for the operation and provision of health and human services by the department and for the administration of Texas Health and Safety Code, Chapter 1001.

The repeal and amendment affect Texas Health and Safety Code, Chapters 81, 85, and 1001; Texas Code of Criminal Procedure, Article 21.31; and Texas Government Code, Chapter 531.

Section for repeal.

§97.135. Serological Testing during Pregnancy and Delivery.

Legend: (Proposed Repeal)
Strikethrough=repealed text

~~§97.135. Serological Testing During Pregnancy and Delivery.~~

~~(a) A pregnant woman shall be serologically tested for syphilis, HIV infection, and hepatitis B infection, once during gestation and again upon admittance for delivery.~~

~~(1) At the time of the first prenatal examination and visit, every physician or other person permitted by law to attend a pregnant woman during gestation shall:~~

~~(A) distribute to the woman printed materials regarding syphilis, HIV, AIDS, and hepatitis B and their affects on pregnancy, provided by the Department of State Health Services, and note on the woman's medical chart or health care record that the distribution of these materials were made;~~

~~(B) verbally notify the woman that an HIV test will be performed if the patient does not object and note on the medical records that verbal notification was given:~~

~~(i) advise the woman that the result of the HIV test taken under this action is confidential, not anonymous, and explain the difference between an anonymous and confidential HIV test; and~~

~~(ii) if the woman objects to the test for HIV infection, the physician or other person may not conduct that test. The physician or other person shall refer the woman to an anonymous HIV testing site or instruct the woman about anonymous HIV testing methods.~~

~~(C) take or cause to be taken a sample of the blood of the woman and submit such sample to a laboratory certified by the federal Clinical Laboratory Improvement Amendments of 1988 (CLIA-88; 42 United States Code §263a), for:~~

~~(i) a standard serological test for syphilis;~~

~~(ii) a standard serological test for HIV infection unless the woman objects to the test; and~~

~~(iii) a standard serological test for hepatitis B infection; and~~

~~(D) persons listed in paragraph (1) of this subsection must keep records of each case for nine months, and must deliver a copy of the report to any subsequent person attending the pregnant woman.~~

~~(2) When a pregnant woman is admitted for delivery, the physician or other person permitted by law to attend a pregnant woman shall:~~

~~(A) distribute to the woman printed materials, provided by the Department of State Health Services, regarding information about syphilis, HIV, AIDS, and hepatitis B, and note on the woman's medical chart or health care record that the distribution of material was made;~~

~~(B) verbally notify the woman that an HIV test will be performed if she does not object and note on the medical records that verbal notification was given:~~

~~(i) advise the woman that the result of the HIV test taken under this section is confidential, not anonymous, and explain the difference between an anonymous and confidential HIV test; and~~

~~(ii) if the woman objects to the test for HIV infection, the physician or other person may not conduct that test. The physician or other person shall refer the woman who objects to the test to an anonymous HIV testing site or instruct the woman about anonymous HIV testing methods.~~

~~(C) take or cause to be taken a sample of the blood of the woman and submit such sample to a laboratory certified by the federal Clinical Laboratory Improvement Amendments of 1988 (CLIA 88; 42 United States Code §263a), for:~~

~~(i) a standard serological test for syphilis;~~
~~(ii) a standard or rapid serological test for HIV infection unless the woman objects to the test; and~~

~~(iii) a standard serological test for hepatitis B infection.~~

~~(3) Every physician or other person required to report births or fetal deaths shall state on each birth or fetal death certificate whether a blood test for syphilis was performed during the pregnancy.~~

~~(4) If a test for syphilis, HIV, or hepatitis B conducted under this section shows that the woman is or may be infected with syphilis, HIV, or hepatitis B, the physician or other person who submitted the sample for the test shall make test results available in a timely manner to allow appropriate medical intervention, and:~~

~~(A) provide or make available to the woman information relating to the specific disease and its treatment, presented such that the patient can understand its contents; or~~

~~(B) refer the woman to an entity that provides treatment for individuals infected with the diagnosed disease.~~

~~(5) provide or make available to the HIV or AIDS infected woman counseling which complies with Texas Health and Safety Code, §81.109.~~

~~(b) A diagnosis of syphilis, HIV infection, AIDS, or hepatitis B shall be reported in accordance with §§97.2—97.5 of this title (relating to Control of Communicable Diseases).~~

Legend: (Proposed Amendment(s))

Single Underline = Proposed new language

[Bold, Print, and Brackets] = Current language proposed for deletion

Regular Print = Current language

(No change.) = No changes are being considered for the designated subdivision

§97.138. Guidelines for Testing Certain Indicted Persons for Certain Diseases.

(a) A person indicted for, or who waives indictment for, an offense under the Texas Penal Code, §§21.02, 21.11(a)(1), 22.011, or 22.021, shall, at direction of the court on the court's own motion or on request of the victim of the alleged offense, undergo a standard diagnostic test for HIV and other sexually transmitted diseases. The standard diagnostic test shall be a type approved by the United States Food and Drug Administration for testing for those diseases. On request of the victim of the alleged offense, the court shall order the defendant to undergo the test not later than 48 hours after an indictment for the offense is presented against the defendant, or not later than 48 hours after the defendant waives indictment. The Texas Code of Criminal Procedure, Article 21.31, provides procedures for situations where the defendant cannot be located within that 48-hour period, as well as procedures for any subsequent testing after a conviction, or as otherwise necessary following an initial positive result.

[(a) The Texas Code of Criminal Procedure, Article 21.31(a), describes medical tests that a judge may order a person to undergo when that person is indicted for, or waives indictment for, a listed offense as described in Texas Code of Criminal Procedure, Article

21.31(a). Under that statutory language tests may be ordered for any of the following, under the described conditions: a sexually transmitted disease; acquired immune deficiency syndrome (AIDS); human immunodeficiency virus (HIV) infection; hepatitis A or B; tuberculosis; and/or any other disease designated as a reportable disease under Texas Health and Safety Code, §81.048. The court may direct the person to undergo the procedure or test on its own motion or on a motion filed pursuant to a request by the victim of the alleged offense. Subsequent tests may also be ordered, as provided by law. Procedures and requirements are outlined at Texas Code of Criminal Procedure, Article 21.31(a). The Texas Code of Criminal Procedure, Article 21.31(b), describes court-ordered testing regarding a person charged with an offense under Texas Penal Code, §22.11.]

(b) A person indicted for, or who waives indictment for, an offense under the Texas Penal Code, §22.11, shall, at direction of the court on the court's own motion or on request of the victim of the alleged offense, undergo a diagnostic test for HIV, Hepatitis A, Hepatitis B, Tuberculosis or any other disease listed as reportable under Texas Health and Safety Code, §81.048. On request of the victim of the alleged offense, the court shall order the defendant to undergo the test not later than 48 hours after an indictment for the offense is presented against the defendant, or not later than 48 hours after the defendant waives indictment. The Texas Code of Criminal Procedure, Article 21.31, provides procedures for situations where the defendant cannot be located within that 48-hour period, as well as procedures for any subsequent testing after a conviction, or as otherwise necessary following an initial positive result. The person charged with the offense shall pay the costs of testing under this subsection.

(c) [(b)] A hospital shall perform the medical procedure or test on a person if a court so orders, as required in Texas Health and Safety Code, §81.094. All aspects of testing, whether performed in a hospital or not, under this section must be conducted in accordance with the Centers for Disease Control and Prevention (CDC) Sexually Transmitted Diseases Treatment Guidelines and with other applicable CDC and department testing guidelines and in accordance with state and federal confidentiality requirements (note that Texas Code of Criminal Procedure, Article 21.31, allows certain specific disclosures).

(d) [(c)] The person performing the procedure or test under [subsection (a) of] this section shall timely submit the test results to the local health authority, following which that local health authority must timely notify the victim of the alleged offense, and the person charged with the offense, of the test result.