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 | ADMINISTRATIVE DIRECTIVE |
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TRANSMITTAL: 91 ADM-36

TO: Commissioners of
 Social Services
 Directors of Voluntary Child
 Caring Agencies

DIVISION: Family &
 Children
 Services

DATE: September 16, 1991

SUBJECT: Foster Care and Adoption: HIV-Related Issues and
 Responsibilities

SUGGESTED

DISTRIBUTION: Directors of Services
 Services Staff
 Staff Development Coordinators
 Legal Staff

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ATTACHMENTS:

Appendix A: References to Title 18 Regulations
 Affected by HIV Confidentiality (available on-line)
 Appendix B: Authorization for Rediscovery
 (Model Form) (available on-line)
 Appendix C: Warning Statement in English and
 Spanish (available on-line)

FILING REFERENCES

| Previous ADMs/INFs | Releases Cancelled | Dept. Regs. | Soc. Serve Law & Other Legal Ref. | Manual Ref. | Misc. Ref. |
|------------------------|-----------------------|--------------------------------|--|-------------|------------|
| 85 INF-14 90 ADM-21 | 85 INF 14 | (See list in Appendix A) | SSL 372 373-a 383-b PHL Article 27-F | | |

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I. PURPOSE

The purpose of this directive is to inform you of the requirements of Chapter 584 of the Laws of 1988 and Chapter 592 of the Laws of 1990 concerning confidentiality of AIDS and HIV-related information affecting foster and adoptive children and families. This directive also discusses implementation of Department regulations mandated by Chapter 584.

The directive requires non-discrimination in eligibility determination and provision of services for children and families affected by AIDS or HIV infection; adoption of local procedures to safeguard confidential information related to HIV infection (including AIDS or HIV-related illnesses); and procedures for access to and redisclosure of confidential HIV-related information when authorized by Chapter 584 and by Chapter 592.

II. BACKGROUND

In response to issues resulting from the human immunodeficiency virus (HIV) epidemic, the New York State Legislature enacted Chapter 584, including a new Article 27-F of Public Health Law (PHL), which addressed the issues of disclosure of confidential HIV-related information and administration of HIV-related tests. Chapter 584 also amended Section 373-a of Social Services Law (SSL) to authorize disclosure of confidential HIV-related information to foster parents, prospective adoptive parents and adoptive parents. Chapter 584 became effective on February 1, 1989.

The legislative intent was to assure that confidential HIV-related information is not improperly disclosed and that clear standards exist for disclosing such information. State agencies which receive confidential HIV-related information were required to promulgate regulations to implement the new law. While Chapter 584 applies to HIV-tested and HIV-infected persons of all ages and circumstances, State Department of Social Services regulations were amended to include those individuals and families in need of expanded human services because of HIV infection. These regulations became effective on September 12, 1989.

PLEASE NOTE: According to law, "Confidential HIV-related information means any information in the possession of a person who provides one or more health or social 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..."

By assuring protection of the confidentiality of HIV-related information, the Legislature hoped to encourage voluntary testing for the virus by persons at risk "so that individuals may come forward, learn their health status, make decisions regarding the appropriate treatment," and change at-risk behavior. There was also intent to limit the risk of discrimination which might be caused by unauthorized disclosure of confidential HIV-related information.

Following implementation of Chapter 584 through regulatory amendments, social services agencies and foster parents raised numerous questions regarding the difficult relationship between the law's confidentiality requirements and the foster family's ability to care for and access services for HIV-infected foster children. As a result, the Legislature enacted Chapter 592 of the Laws of 1990, exempting foster parents from the confidentiality provisions of Article 27-F of Public Health Law when disclosure of confidential HIV-related information is necessary "for the purpose of providing care, treatment or supervision" of the foster child. Chapter 592 also exempts from such confidentiality restrictions prospective adoptive parents with whom a child has been placed for adoption. The same law adds the law guardian to the list of those who are authorized to have access to confidential HIV-related information concerning a foster child under specific circumstances.

The number of HIV-infected children in New York State has continued to rise. While the highest percentage of cases is concentrated in New York City, all regions of the State are currently affected. All agencies need to be prepared through staff training and planning to meet the needs of families and children affected by HIV infection and to meet the requirements of the law and regulations. This directive addresses the particular confidentiality issues affecting foster and adoptive children with HIV infection.

III. PROGRAM IMPLICATIONS

A. Access to Confidential HIV-Related Information

Authorized agencies should be aware that access to confidential HIV-related information in the case files of foster or adoptive children must be given to specific persons or agencies. Access is also authorized to governmental agencies, and health or social services providers when it is reasonably necessary for the supervision, monitoring, administration, or provision of services to the child or child's family. The development and oversight of safeguards to the access of confidential HIV-related information in case files are responsibilities of the local district social services commissioner and directors of voluntary agencies.

1. Social Services Law 373-a and Section 357.3(b) of Department regulations require that a child's comprehensive medical history, including HIV-related information, must be provided to the following:
 - a. another authorized agency to whom the care of a foster child is transferred;
 - b. certified foster parents or approved relative foster parents;
 - c. prospective adoptive parents* and adoptive parents;
 - d. the child's parents or guardian when the child is released to their care;
 - e. the child discharged to his or her own care;
 - f. any adopted former foster child, upon request, as required by Chapter 165 of the Laws of 1990.

Prior to placing an HIV-infected child with either foster or prospective adoptive parents, the caseworker should determine whether the parent is willing to care for an HIV-infected child, since children infected with this disease may require substantially more support and care than other children. If the response is positive, then the caseworker will need to make a further assessment of the emotional stability, attitudes and physical ability of the parents to provide the exceptional level of care such children may need. Preliminary discussions concerning placement of an HIV-infected child should be general and should not provide confidential HIV-related information about a child until a specific placement plan is being considered.

EXCEPTION: In the case of placement in an approved relative foster home, which often occurs as an emergency situation, obviously a specific child or children will be involved. In such cases it is essential to inform the relative of the child's condition, if known, and assess prior to placement the relative's willingness and capacity to care for or adopt the HIV-infected child.

*"Prospective adoptive parents" are persons who have met criteria and standards for adoption through screening and home study as specified in Section 421.16 of Department regulations, who have indicated an interest in adopting a particular child, and for whom the authorized agency has begun the placement agreement process described in Section 421.18 of Department regulations.

Certified foster families who are willing to accept responsibility for the care of such children should be informed before the actual time of placement if a child to be placed in their care is known to be an HIV-infected child. Except in extreme emergency situations, persons accepting such children should be offered advance preparation and counseling prior to placement. In any case, Department regulations require that such information must be given to the foster parent at the time of the child's placement.

Again, confidential information on the HIV status of a particular child may not be given to applicants for adoption until the authorized agency has begun the specific placement agreement process described in Section 421.18 of Department regulations. However, caseworkers should determine whether the applicants are willing to accept an HIV-infected child. The general questions of willingness and capacity to care for such a child should always be resolved prior to actual placement. Child-specific HIV-related and other health information may appropriately be given, for example, when visitation prior to placement is being arranged between the prospective adoptive parents and the adoptable HIV-infected child. At that time agency staff should discuss with the prospective adoptive parents the HIV status of the child.

2. The law and Department regulations clearly permit access to confidential HIV-related information in case records when there is a "need to know" in the ordinary course of business and provision of services. Specifically, an authorized employee or agent* of an authorized agency may have access to such information when it is reasonably necessary for the supervision, monitoring, administration, or provision of services to the child or child's family. The same standard is applicable to facilities operated by authorized agencies, including agency boarding homes, group homes, group residences and institutions. The medical history, including any confidential HIV-related information, of each child placed in foster care in such facilities, should be accessible to the caseworker, supervisor, health personnel, treatment team or other persons needing such information in order to supervise, monitor, administer or provide services to the child.

*The law defines "authorized employee or agent" as "any employee or agent who would, in the ordinary course of business of the provider or government agency, have access to records relating to the care of, treatment of, or provision of a health or social service to the protected individual."

Local agency officials will determine which staff persons "need" to have access to this information. Practical, common sense judgment will dictate these decisions. For example, the caseworker assigned to a specific case, as well as the caseworker's supervisor, will need access to the case file which includes records of all medical tests and diagnoses. A support staff person assigned to enter case information into computerized records has a "need to know." The third party reviewer of a case record involving confidential HIV-related information has a "need to know."

In all circumstances when access to confidential HIV-related information is necessary, the authorized agency's administration is responsible for providing to those persons receiving the information the written statement (Appendix C) warning of penalties for unauthorized redisclosure.

The law guardian of the child, appointed to represent the child in legal proceedings, has a "need to know" confidential HIV-related information as authorized by Chapter 592 of the Laws of 1990. However, the law guardian's authority to redisclose such information is limited (see C.1.b. on p. 12).

B. Safeguards to Access

1. In order to ensure that confidential HIV-related information is accessible only to authorized employees and that policies are in place to safeguard access, each authorized agency is responsible for developing a written management plan which will be available for review upon the request of the Department. (See Section 431.7(a)(1) of Department regulations.) Since all child welfare case files are confidential, it is assumed that basic procedures for protection of information are already in place. Such procedures should be reviewed to ensure that access to files is limited to authorized persons and that files are secured. Confidential HIV-related information which is stored electronically must also be protected from access except by authorized individuals.
2. It is essential that authorized agencies provide information and training for all staff in the requirement for confidentiality of HIV-related information and in the legal penalties for unauthorized access and redisclosure. The law requires that the following written warning statement must be provided to all persons with current or past access to such information:

This information has been disclosed to you from confidential records which 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.

(See Appendix C for warning statement in English and Spanish for reproduction and distribution.)

Unauthorized disclosure of confidential HIV-related information, whether through deliberate action or negligence, will result in the person disclosing such information to be subject to civil penalties not to exceed \$5,000 for each occurrence. A person willfully disclosing such information without authorization may also be found guilty of a misdemeanor, according to Article 27-F of the Public Health Law.

C. Redisclosure of Confidential HIV-related Information

Redisclosure of confidential HIV-related information concerning a foster or adoptive child by persons or entities with authorized access to such information is permitted under certain circumstances and when required procedures are followed.

1. Persons who may redisclose without prior written authorization or consent:

a. the local social services commissioner and his/her designated representative when the child lacks capacity to consent and:

- (1) the social services district has taken protective custody of the child; or
- (2) the child has been adjudicated as an abused or neglected child and custody has been transferred to the social services district; or
- (3) the guardianship of the child has been transferred to the social services district after parental surrender or termination of parental rights.

- b. the law guardian of the child "for the sole purpose of representing the minor" child if that child lacks capacity to consent. (See III.C.3 on p. 13 for definition and discussion of capacity to consent.) If a determination has been made that the child has capacity to consent, the law guardian may not redisclose confidential HIV-related information without the child's written consent.
- c. the prospective adoptive parent with whom an HIV-infected child has been placed for adoption.
- d. the foster parent caring for an HIV-infected child when redisclosure is necessary for the purpose of providing care, treatment, or supervision of the foster child.

Persons to whom foster parents redisclose confidential HIV-related information should be provided the warning statement (Appendix C) against further redisclosure.

- 2. The following guidelines indicate acceptable reasons for foster parents to redisclose to otherwise unauthorized persons confidential HIV-related information concerning the foster child in their care:
 - a. to persons living in the household with the child and providing care and/or emotional support for the child;
 - b. to relatives, neighbors or others directly and substantially involved in the care or supervision of the child;
 - c. to other members of a support group for foster parents caring for HIV-infected children. The formation of such support groups of foster parents with a common experience in caring for HIV-infected children is highly desirable and is to be encouraged. Such groups can be essential in sharing information related to the disease and to the care of such children and in providing strong emotional support which will assist in the care, treatment and supervision of the child.
 - d. to in-home services providers when necessary for the medical care of the child or to obtain specialized services. These may include home health aides, homemakers, respite care providers, in-home day care providers, or in-home educational personnel.
 - e. to day care providers and schools only when medical necessity, such as giving a medication prescribed by a physician, requires redisclosure.

PLEASE NOTE: Out-of-home day care providers and schools are not permitted to require confidential HIV-related information as a condition for admission.

Caseworkers are advised to counsel with foster parents of older pre-adolescent or adolescent foster children regarding their planned redisclosure of confidential HIV-related information concerning such children. Foster parents, while given the right to redisclose for the purposes specified above, should be sensitive to children's feelings about redisclosure and should consider how the children and the informed persons are likely to respond. Caseworkers and/or foster parents may find a discussion of this issue with older children appropriate and beneficial.

PLEASE NOTE: A child with capacity to consent* (for example, an adolescent) cannot prohibit access or redisclosure to persons or entities expressly authorized by law to receive confidential HIV-related information (for example, foster parents and authorized agencies).

3. Except as discussed above in Section C.1 and 2, redisclosure of confidential HIV-related information to previously unauthorized persons is not legally permitted without specific written authorization by the person or entity legally authorized to consent to medical care for the child or by the child with capacity to consent.

Persons who may provide written authorization/consent for redisclosure:

- a. The foster/adoptive child himself or herself with "capacity to consent."

* According to law, "capacity to consent" means an individual's ability, determined without regard to the individual's age, to understand and appreciate the nature and consequences of a proposed health care service, treatment or procedure, or of a proposed disclosure of confidential HIV-related information, as the case may be, and to make an informed decision concerning the service, treatment, procedure or disclosure.

The question of capacity to consent to redisclosure requires a determination by the local social services commissioner or designated representative in consultation with other professional staff who may include a physician, psychologist, or caseworker, as well as the foster or adoptive parents. A decision should take into consideration the maturity of the child and the child's ability to fully comprehend and appreciate the consequences and implications of the redisclosure of such information. Even for older children who may be deemed fully able to understand, counseling and interpretation are essential prior to the child's signing an authorization for redisclosure.

b. The birth parent of a child placed voluntarily into foster care.

A signed authorization for redisclosure of confidential HIV-related information concerning the child may be requested from the parent at the time a child is voluntarily placed in care. In the absence of written parental consent where applicable, and when a child lacks capacity to consent, court authorization or conversion of the case to protective custody under Article 10 may be necessary to allow redisclosure to persons or entities not expressly granted access.

c. The social services commissioner or designated representative.

When a local social services commissioner has taken a child into protective custody or has been awarded custody or guardianship of the child by the court, the local commissioner or designated representative may authorize redisclosure to specific, named persons, stating the reason for such redisclosure. Again, this written authorization to redisclose is not required for adoptive parents, for law guardians representing minors, or for foster parents when redisclosure is necessary for the care, treatment and supervision of foster children.

4. When written authorization to redisclose confidential HIV-related information to a specific person is necessary, the local social services commissioner or designated representative is also responsible for providing to the person to whom the information is given the warning statement required by law. A model form for this purpose, "Authorization for Redisclosure of Confidential HIV-related Information," is attached in Appendix B. Please note that this form includes both the authorization and the warning statement and is to be signed by both the person authorizing redisclosure and the person receiving the confidential information.

D. Medical Records

1. In safeguarding medical records within the uniform case record, the authorized agency is obligated to review its continuing practices of maintaining confidentiality of all records. In addition to physical security and protection of files, the agency is responsible for ensuring that only authorized employees (see IV.B. for definition and standard) have access to such records. It is not recommended that the uniform case records of HIV-infected children be set apart in any way from those of other children. Generally, to flag or separate such cases would be to call attention to them and therefore may actually reduce the security of information.
2. Information appropriate for inclusion in the comprehensive health history of the HIV-infected child within the uniform case record includes, but is not limited to, names and addresses of medical providers; actual medical records of treatment and tests provided by physicians, dentists, pharmacists, laboratories, hospitals, or clinics; summaries of medical treatment, psychological testing or counseling, and caseworker observations provided by appropriate professionals; information on health issues provided by parents, relatives, foster parents, school personnel, other persons known to the child; and the progress notes documenting activities such as dates of appointments, dates of consultation with medical providers, dates of transportation provided or arranged for in connection with medical care.
3. Sharing the information in the comprehensive health history of the child with certain persons is mandated by law and regulation (see III.A.1. or IV.C.1.). There is no mandate, however, to turn over copies of the actual medical records of the child.

Authorized agencies may use limited discretion as to whether it is administratively feasible to copy the entire file to present to those persons entitled to the child's medical history. An acceptable alternative may be an informational conference with foster or prospective adoptive parents in which all information is discussed and presented. However, if foster or adoptive parents request copies of documents in the child's health record, copies of those documents should be provided. In such cases, the requirement to safeguard all confidential HIV-related information should be emphasized.

In emergency situations, the caseworker should offer orally to foster parents or residential directors as much information as is available and then follow up with a conference or copied file within the next 72 hours. It is not recommended that agency caseworkers attempt to write summaries of the medical records.

E. Training of Staff

It is essential that each social services district and all other authorized agencies provide information and training for their staff on the law and regulations related to provision of services and confidentiality issues affecting HIV-infected children and families. All those who are involved in the administration, support services, supervision, and casework in the areas of foster care and adoption will need information on policies and procedures required in the care and protection of confidentiality for HIV-infected foster and adoptive children.

Such information and training may be provided through any combination of formal training, informal discussion, and informative materials, so long as all topics required by Section 431.7(c) of Department regulations are covered. (See IV.E. of this directive.)

Some of the required topics are included in an ongoing AIDS training curriculum provided by agencies contracting with the Department or with the New York State Department of Health. Instruction based on local administrative decisions, such as the agency's management plan for safeguarding confidential HIV-related information, will need to be developed locally by staff development personnel. In reviewing the law and regulations governing confidentiality issues, this directive should be utilized so that all staff are aware of the guidelines under which they must perform their tasks. Clearly, it is not necessary for an agency to develop a totally new and comprehensive training curriculum so long as the required topics are covered through one or more training sessions. New staff must be provided with appropriate informational materials and some form of training (formal or informal) on required confidentiality issues within 45 days of employment.

F. HIV Testing of Foster Children

Among issues affected by confidentiality and consent requirements in law and regulation is the question of testing foster children for HIV infection. In view of other policies which may have been established prior to this directive, authorized agencies should review their current practices and policies on HIV testing for compliance with the following Department policy:

1. Testing a child for HIV infection after a child has been placed in foster care is permitted only when, in the judgment of a physician, there is a need for such diagnostic testing on the basis of the child's age, medical history, environmental background, and current physical/developmental condition;

and

when the necessary written, informed consent has been provided.

PLEASE NOTE: Agencies should be aware that commonly available HIV tests for infants are not considered definitive for HIV infection, and that seroconversion from positive to negative often occurs in the first two years of life.

2. Consent for HIV testing of a foster child may be provided by the following persons:

a. the child with capacity to consent (see pages 13 and 14 for definition and discussion);

or

b. the child's parent or legal guardian in cases of voluntary placement or in cases of placement under Articles 3 and 7 (JD and PINS) of the Family Court Act if the child lacks capacity to consent;

or

c. the local social services or health commissioner, if the child lacks capacity to consent, when the child has been taken into protective custody or has been placed in the care and custody of the local social services commissioner as an abused or neglected child under Article 10 of the Family Court Act (FCA).

EXCEPTION: If a physician determines there is immediate and urgent medical necessity for HIV testing of a child in foster care, and if the child lacks capacity to consent, and if the child's birth parents with legal right to consent cannot be located after reasonable effort, the physician may order such testing.

3. The foster child with capacity to consent to HIV testing or the person with legal authority to give consent (e.g., the parent, guardian, commissioner or designated representative), is to receive pre-test information, according to law (PHL Section 2781). The physician who orders the test must certify that written informed consent has been given following provision of information concerning

the test. Such information must include, at a minimum, an explanation of:

- a. the test itself;
- b. the procedures which will be followed;
- c. the confidentiality protections against disclosure except to persons authorized to receive the information;
- d. the nature of AIDS and HIV-related illness;
- e. the possible problems of discrimination if test results are disclosed to unauthorized persons, and the legal protections against such discrimination;
- f. information about behavior which could lead to HIV-infection.

Especially in the case of adolescents in foster care who have been determined to have capacity to consent, the authorized agency should ensure that the child's caseworker or other staff with required training (see III.E.), as well as the child's physician, have made diligent effort to discuss these issues with the adolescent who is to be tested.

Caseworkers should ensure that counseling the adolescent with capacity to consent includes discussion of the requirement for testing information to be recorded in the child's health history which must be given to foster parents. If an adolescent for whom testing is medically indicated refuses to give consent for testing because of this required redisclosure, the worker should refer the adolescent to an anonymous, confidential testing site where counseling and follow-up services are available. The adolescent should be encouraged to reconsider sharing the information in order to receive services and support as needed.

4. Following HIV testing of the foster child, and at the time of giving the test result to the child with capacity to consent, or to the birth parent or guardian, or other person who gave consent for the test, the medical provider who ordered the test and the child's caseworker are responsible for counseling or referring for post-test counseling as appropriate. Such counseling is to include:
 - a. coping with emotional consequences of a positive test result;
 - b. possible discrimination problems that disclosure of test results may cause;
 - c. behavior to prevent transmission or contraction of HIV infection;

- d. available medical treatment;
 - e. in the case of adolescents, the need to notify any sexual contacts;
 - f. an explanation to the tested person of those to whom the test results must be disclosed by law (see IV.C.) and those who are authorized to have access to the foster child's medical record with HIV tests results included.
5. If a physician determines that testing a foster child for HIV infection is necessary, and required consent has been given, the authorized agency placing the child should ensure that the foster parent is given pre-test information and post-test counseling regarding the test implications and results. Such counseling may be given by trained agency staff in consultation with health care providers or may be provided through referrals to other professional counselors. The topics listed in paragraphs 3 and 4 of this section may be used as guidelines.
 6. Results of HIV testing must be included in the child's comprehensive health history in the uniform case record, with access to that information restricted to those who are authorized by law and regulation to have access.

IV. REQUIRED ACTION

In order to comply with Chapter 584 of the Laws of 1988 and Chapter 592 of the Laws of 1990 and related Department regulations, the following actions are required:

A. Eligibility for Services

Authorized agencies must ensure that safeguards are in place to prevent discrimination against HIV-infected children or families in determining eligibility for services. Further, the social services district is responsible for ensuring that no adverse action occurs against any foster or adoptive child because of a test for or a diagnosis of HIV infection, AIDS, or an HIV-related illness. This will require periodic reviews of procedures, training of staff, and adequate supervision.

B. Safeguarding Confidentiality of Records

1. While the confidentiality of all uniform case records must be safeguarded, the authorized agency must take particular care to ensure that the records containing the comprehensive health history of HIV-infected foster and adoptive children are secured from access by unauthorized persons.

2. Each authorized agency must determine which employees will be specifically authorized to have access to confidential HIV-related information on children and families. According to law and Department regulations, only those employees or agents of the authorized agency who have a "need to know" for administration, supervision, monitoring, or provision of services to HIV-infected children and their families may have access to confidential HIV-related information. The local social services commissioner is ultimately responsible for ensuring that procedures are in place to restrict access, both in the local district offices and within any contractor child caring or services agencies.
3. In order to assure such security of access, each authorized agency must develop a written management plan describing procedures for safeguarding records containing the health histories of HIV-infected children. The plan must be available for review by the Department and must include:
 - a. a list by title and/or function of employees authorized to have access to such records because they "need to know" for supervision, monitoring, administration or provision of services;

PLEASE NOTE: In addition to caseworkers, supervisors and administrators who have a "need to know" confidential HIV-related information, support staff involved in record keeping, data entry or accounting are examples of those who may be included in the list of employees authorized to have access and who must be provided with the warning statement (Appendix C) against further redisclosure. Third party reviewers also have a "need to know."
 - b. measures which are in place to ensure the protection of electronically-stored confidential HIV-related information from access by persons not authorized under paragraph a. above;
 - c. assurance that the agency is providing information and training on required topics (see IV.E.) for all appropriate staff annually and for new staff within 45 days of employment.
4. All employees with past or current access to confidential HIV-related information must be given the written statement warning against further disclosure of the information without specific authorization.

(See Appendix C for warning statement in English and Spanish for reproduction and distribution.)

C. Mandated Disclosure of Medical History

1. The comprehensive health history of a child, including any confidential HIV-related information, must be given to designated persons according to Section 373-a of Social Services Law and Section 357.3(b) of Department regulations.

Those persons to whom all available health and medical information must be given include the following:

- a. an authorized agency to which a foster child is transferred from another authorized agency;
- b. certified foster parents or approved relative foster parents;
- c. prospective adoptive and adoptive parents (see definition of prospective adoptive parents on p. 8 of this directive);
- d. birth parents or guardian when the foster child is released to their care;
- e. a foster child discharged to his or her own care;
- f. any adopted former foster child, upon request, as required by Chapter 165 of the Laws of 1990.

PLEASE NOTE: When the birth parents of the child placed in foster care retain guardianship of the child, they should be notified of any HIV-related or any other medical information concerning the child, even if those parents have signed over release/consent for health care to the commissioner.

EXCEPTION: The right of the child who has capacity to consent and who objects to confidential HIV-related information being given to the birth parents overrides the right of parents to receive such information. (Public Health Law Article 27-F)

However, the child with capacity to consent may not prohibit confidential HIV-related information from being given to foster and prospective adoptive and adoptive parents as provided by Section 373-a of Social Services Law.

2. Information which must be included in the comprehensive health history is listed in Section 357.3(b)(6) of Department regulations and in 90 ADM-21, "Medical Services for Children in Foster Care." Among the items to be included in the health history, to the extent available, are results of diagnostic tests, including HIV-related tests, medical treatment and medications prescribed for HIV-infected children.
3. The comprehensive health history of the child must be provided to foster parents at the time of placement, to the extent available. In emergency/crisis situations when placement must be made prior to access to the complete records, the comprehensive health history of the child, to the extent known, must be provided to the foster parents within 72 hours. Moreover, in all cases, a known HIV-infected child should be placed only with foster parents who have previously indicated a willingness to care for such a child.

D. Procedures for Redisdisclosure With Authorization

1. A written and signed authorization for release of confidential HIV-related information concerning a foster child must be provided before redisdisclosure by those persons who have such information except in the following cases:
 - a. A written authorization is not necessary if the person or entity receiving the information is also authorized to have access or is mandated by law to be given such information concerning the specific child.
 - b. In addition, the following persons do not need a written authorization to redisdisclose confidential HIV-related information under certain circumstances:
 - (1) A physician may redisdisclose to the person legally authorized to consent to health care for the foster child when medically necessary to provide timely care and treatment for the child.
 - (2) Foster parents may redisdisclose when redisdisclosure is for the purpose of providing care, treatment or supervision of the foster child placed in their care. (See discussion and guidelines on pp. 11-13.)
 - (3) Prospective adoptive parents with whom the HIV-infected child has been placed for adoption may redisdisclose.

(4) A law guardian may redisclose only when such redisclosure is for the purpose of representing a minor child without capacity to consent or when the child with capacity to consent has given written consent for redisclosure.

2. When an authorization for redisclosure (see Appendix B for model form) of confidential HIV-related information is necessary, it must be written, designated for a specific person or persons and signed by one of the following:

a. the child, if he or she has the capacity to consent and fully understands the implications of such an authorization (see definition of "capacity to consent" on p. 13 of this directive);

or

b. the birth parent or legal guardian of the child if the parent or guardian retains parental rights and can be located;

or

c. the local social services commissioner, or designated representative, when the commissioner is responsible for the health care of the child under conditions specified in Section 383-b of Social Services Law; or has been awarded custody and guardianship of the child by the court, or has assumed guardianship of the child through a voluntary surrender.

A designated representative may be a staff person within the social services district or a voluntary agency, but must function at an administrative level.

3. The written authorization for redisclosure must:

a. be dated;

b. specify the time period during which the release is effective;

c. specify the reason for authorizing redisclosure;

d. include the warning statement (Appendix C) against further redisclosure without written authorization.

A model form incorporating these requirements is attached to this directive as Appendix B. Both the person consenting to release of the confidential HIV-related information and the person receiving the information are required to sign the form which must be retained in the uniform case record.

Example: A commissioner or designated administrative representative signs the authorization form to permit release of confidential HIV-related information concerning a foster child by a caseworker to a counselor working with a special needs child. The staff person must then obtain the counselor's signature indicating receipt of the information and awareness of the warning statement. The signed document is placed in the uniform case record.

4. If, because of some urgent and unforeseen situation, redisclosure becomes immediately necessary for the welfare of the child, the local social services commissioner or a designated representative with authority to redisclose may give oral consent, but must follow up with a written and signed authorization as soon as possible, and in no case later than 10 calendar days from the date of the oral authorization.

E. Training of Staff

1. Each local department of social services and other authorized agencies involved in the care of HIV-infected foster and adoptive children must provide information and training to all staff persons having access to any files or records containing confidential HIV-related information.
 - a. Initial information and training (formal or informal) must be provided within 45 days of employment for all new staff given access to confidential HIV-related information.
 - b. Annually, updated information and refresher training on HIV-related issues must be provided for all staff with access to confidential HIV-related information through any combination of formal training, informal discussion and informative materials, so long as all required topics are covered.
2. Staff information and training must include the following:
 - a. a review of State laws and Department regulations on confidentiality of HIV-related information, including the necessity for written authorization for redisclosure to otherwise unauthorized persons and the warning statement on penalties for unauthorized redisclosure;

- b. a review of the list of persons who have authorized access and those to whom the child's health history, including confidential HIV-related information, must be given by law and regulation (see Section 357.3 of Department regulations and IV.C.1. of this directive);
- c. a review of the agency's written management plan for maintaining security of records;
- d. information on factors (principally blood and semen) and the circumstances which may constitute significant risk of contracting or transmitting HIV infection;
- e. current information which concludes that HIV disease is not transmitted by casual contact or in ordinary home and family care of children;
- f. hygienic measures (universal precautions) recommended to protect persons caring for an HIV-infected child and to protect the HIV-infected child from exposure to other infections. These hygienic measures include:
 - (1) standard practices for thorough cleanliness and infection control; and
 - (2) the use of preventive barriers, such as protective gloves, if the caretaker's skin has open wounds or abrasions, or if there may be presence of blood.

F. Reporting Requirement

All social services districts are required to maintain a tracking file of known HIV-infected children in foster care and to report such children to the Department. Because of the complex issues involved in addressing service needs for these children, discrete tracking information is essential in order to develop resources and to ensure effective program planning for their care. In New York City the tracking file is computerized. All other social services districts must report on DSS Form 3851 (Revised) as soon as information is available concerning HIV infection in a particular child. Information is to be reported by CIN number, not by name, and all information is governed by confidentiality requirements already in place.

G. Purchase of Services

- 1. Social services districts purchasing services and/or foster care maintenance from local public or private non-profit or private proprietary agencies for HIV-infected children must ensure that the written contract includes the following, as well as other requirements of Section 405.3 of Department regulations:

- a. specific procedures to safeguard the child's medical history from unauthorized access or disclosure;
 - b. statements assuring that required information and training will be given annually and to newly employed staff within 45 days of employment;
 - c. statements ensuring that staff who "need to know" confidential HIV-related information for the administration, supervision, monitoring, or provision of services will be fully informed of the penalties for unauthorized redisclosure;
 - d. assurance that any disclosure of confidential HIV-related information will be accompanied by the required warning statement (Appendix C).
2. Foster care maintenance purchased from out-of-state agencies for HIV-infected children must comply with the Interstate Compact On the Placement of Children (see Section 374-a of Social Services Law), and social services districts must ensure that written contracts incorporate the requirements in G.l.a. through d. above.

V. SYSTEMS IMPLICATIONS

None.

VI. ADDITIONAL INFORMATION

Definitions:

- A. The term "handicap" includes being diagnosed as having AIDS, testing positive for HIV infection, or being perceived as susceptible to AIDS or HIV infection. Such persons must be protected from discrimination in accordance with all applicable provisions of Department regulations. (18 NYCRR 303.7)
- B. "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 Services. (Section 2780(1) of PHL and 18 NYCRR 360-8.1)
- C. "HIV infection" means infection with the human immunodeficiency virus or any other related virus identified as a probable causative agent of AIDS. (Section 2780(2) of PHL and 18 NYCRR 360-8.1(a)(2))
- D. "HIV-related illness" means any illness that may result from, or may be associated with, HIV infection. (Section 2780(3) of PHL and 18 NYCRR 360-8.1(a)(3))

- E. "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 AIDS. (Section 2780(4) of PHL and 18 NYCRR 360-8.1(a)(4))

- F. According to law, "capacity to consent" means an individual's ability, determined without regard to the individual's age, to understand and appreciate the nature and consequences of a proposed health care service, treatment or procedure, or of a proposed disclosure of confidential HIV-related information, as the case may be, and to make an informed decision concerning the service, treatment, procedure or disclosure. (Section 2780 (5) of PHL and 18NYCRR 360-8.1 (a)(8))

- G. "Authorized employee or agent" means any employee or agent who, in the ordinary course of business of the provider or government agency, has access to records relating to the care of, treatment of, or provision of a health or social service to the protected individual. (Section 2782(6)(b) of PHL)

VII. EFFECTIVE DATE

The requirements of this release are effective on October 1, 1991, retroactive to February 1, 1989, the effective date of Chapter 584 of the Laws of 1988. This release also incorporates the requirements of Chapter 592 of the Laws of 1990, effective July 18, 1990.

Joseph Semidei
Deputy Commissioner
Division of Family
and Children Services

APPENDIX A

References to
Title 18 Regulations Affected by HIV Confidentiality

| <u>AMENDED</u> | <u>ADDED</u> |
|------------------------------|----------------------------|
| 357.1 | 303.7 |
| 357.3(b)(2), (3) | 357.2(b) |
| 357.3(b)(6) | 357.3(h) |
| 404.1(a) | 360-8.1 |
| 405.1(a) | 403.9 |
| 405.3(g)(12) and (13) | 404.1(c)(5) & (6) |
| 432.2(e)(3)(xxix) & (xxx) | 405.3(g)(14)(15) & (16) |
| 441.22(b)(2)(viii) | 421.1(k) |
| 441.22(c) | 421.2(d) |
| 441.22(i)(1)(ii) & (iii) | 431.7 |
| 441.22(n)(1) | 432.2(e)(3)(xxxi) |
| 444.5(c)(13) & (14) | 441.22(i)(1)(iv) |
| 444.8(c)(13) & (14) | 444.5(c)(15) |
| 487.10(d)(3) | 444.8(c)(15) |
| 488.10(c)(2) | 485.11(g) |
| 489.14(a)(13) | 487.10(d)(4) |
| 491.14(f)(2) | 488.10(d)(4) |
| 507.2(a)(2)(viii) | 489.14(a)(4) |
| | 490.4 and 491.14(f)(3) |
| | 900.3(b)(1)(xxv) |
| | 900.19 |

Authorization for Redisclosure of Confidential HIV-Related Information

[Please Note: This completed form must be returned to the agency responsible for the care of the child.]

Date _____

I. I hereby authorize redisclosure of confidential HIV-related information

by _____
(name of agency)

concerning _____
(child's name)

to _____
(person or agency)

for the following time period (check one):

- a. ___ specific dates: _____
- b. ___ while child remains in care of above-named person(s)
- c. ___ until services are completed

II. The purpose for authorizing redisclosure as permitted by Article 27 F of the Public Health Law and Department regulations:

III. I am legally permitted to authorize redisclosure because I am:

- a. ___ the child named above
- b. ___ the birth parent or legal guardian of the child (where the child lacks capacity to consent)
- c. ___ the social services commissioner
- d. ___ the designated representative of the commissioner (indicate title with signature)

Signature _____

Title (if appropriate) _____

Warning Statement on Redisclosure Except to Authorized Persons

This information has been disclosed to you from confidential records which 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.

Receipt of Confidential HIV-related Information

I have received confidential HIV-related information and have read the warning statement required by law. I understand the penalties for further redisclosure without written permission.

Signature _____ Date _____
(person receiving confidential information in order to provide services)

APPENDIX C

WARNING NOTICE

AGAINST REDISCLOSURE

OF CONFIDENTIAL HIV-RELATED

INFORMATION

This information has been disclosed to you from confidential records which 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.

(See other side for Spanish translation.)

NOTIFICACION DE ADVERTENCIA
CONTRA LA REVELACION DE INFORMACION CONFIDENCIAL
RELACIONADA AL HIV

La información que se le ha revelado proviene de récords confidenciales que están protegidos por la ley del Estado. La ley del Estado le prohíbe a usted proveer más revelaciones con respecto a esta información sin la aprobación específica de la persona a quien se refiere o sin el permiso de la ley. Cualquier revelación adicional que no esté autorizada constituye una violación de la ley del Estado y puede que resulte en una multa o una sentencia de cárcel o ambas. Una autorización general para proveer información médica u otro tipo de datos no constituye una autorización suficiente para hacer más revelaciones.