

Guidelines to end HIV Criminalization In Public Health Practice

Overview

In connection with the release of *Understanding HIV Criminalization Policy: a Summary of Survey Findings (Part II) and Strategic Guidance Towards Ending Criminalization-Related Stigma and Discrimination* (the Criminalization Summary), the National Alliance of State and Territorial AIDS Directors (NASTAD) has developed the following *Guidelines to End HIV Criminalization in Public Health Practice* (the Guidelines) for health departments to examine existing public health policies related to HIV criminalization that have the potential to exacerbate stigma and discrimination and lessen the likelihood that individuals will learn their HIV status. These Guidelines serve as a preliminary resource that can be used in the review and, if needed, modification of state or territorial policies. As noted in the Criminalization Summary, NASTAD is committed to providing technical assistance to those state health departments that need support in this review and modification.

Below are five guidelines for the review and modification of policies and procedures relating to HIV criminalization. Most of the guidelines contain additional points of clarification and many have links to external material that may be useful in the evaluation of these policies and procedures. The first guideline looks to identify those policies or practices that may add to the stigma and discrimination faced by people with HIV. The next two guidelines provide a framework in which to evaluate policies and practices. The final two guidelines establish a framework for remedial measures and follow-up monitoring.

Guidelines

Survey statewide, county and local programs/providers to ensure that current policies and practices (1) protect the privacy of medical information to the maximum extent allowed, and (2) promote prevention and link individuals to appropriate medical treatment. This survey will provide a baseline of information and may assist in the identification of specific policies or practices which need to be modified.

Attached is a copy of a *Sample HIV Criminalization Survey Assessment* (the Sample Criminalization Assessment), which may be used as the basis for a survey of county and local programs/providers.

- Health departments may use the entire Sample Criminalization Assessment, or any portion of it that they see fit, in the survey of programs and providers within their jurisdiction.
- As an alternative, Health departments may use the Sample Criminalization Assessment merely as guidance in creating their own survey instrument.

Regardless of what instrument is used, the survey must request that programs and providers supply copies of counseling protocols and any paperwork given to patients regarding their duty or obligation to disclose their HIV status.

This paperwork takes on many forms and might require:

- Acknowledgement by HIV-positive individuals of potential criminal liability for creating a risk of infecting another person, regardless of whether condoms are used ([click here for a summary of an example of this type of form and a link to a downloadable version](#)); or
- Acknowledgement by HIV-positive individuals of the necessity of informing future sexual partners of their HIV status before sex, even if condoms are used ([click here for an example and a link to a downloadable version](#)).

Provide an overview of privacy laws, such as the Health Insurance Portability and Accountability Act (HIPAA), that apply to individual medical records AND remind programs/providers that medical information, including an individual's HIV status, is protected by these privacy laws.

Health departments should check with legal counsel to see if their jurisdiction has additional state or territorial laws which protect the privacy of medical records.

If there are specific state medical record privacy laws in the jurisdiction, programs and providers will need to follow the enhanced requirements of those laws.

- As an example, in 2009 California enacted new medical record privacy rules which cover more providers than HIPAA and provide for broader legal causes of action if medical records are released without consent. An overview of California's enhanced medical record privacy rules [can be found here](#).
- An overview of state and territorial health policy, provided by the Center for Medical Record Rights and Privacy of Georgetown University's Health Policy Institute, [can be found by here](#).

If there is no special medical record privacy law in the jurisdiction, programs and providers will need to adhere to the baseline HIPAA privacy rule.

In connection with a criminal prosecution, HIPAA's privacy rule allows for release of confidential medical records only pursuant to a court order.

- A complete summary of the requirements of HIPAA's privacy rule [can be found on the U.S. Department of Health and Human Services' \(DHHS\) website here](#) (and then clicking on the link marked "Administrative Requirements"). In general, HIPAA's privacy rule mandates:
 - (1) designation of a person as a "privacy official" responsible for developing and implementing privacy policies and procedures;
 - (2) training of all workforce members on privacy policies and procedures;

- (3) mitigation of any harmful effect caused by use or disclosure of protected health information;
- (4) establishment of data safeguards; and
- (5) creation of procedures for individuals to complain about its compliance with its privacy policies.

- Absent a court order, programs and providers have the right to refuse to disclose any medical information to third parties, even police or prosecutors. Revealing an individual's HIV status to a third party during the course of a conversation could constitute disclosure of medical information, so HIPAA's privacy rule applies broadly.
- A subpoena is not a court order, and programs and providers should never disclose any medical information prior to review of the request by legal counsel.
- Best practice requires notification to the individual whose medical information is being requested by law enforcement, and an opportunity for that individual to secure legal assistance before the information is released.
- A more a complete overview of HIPAA's privacy rule put out by DHHS [can be found here](#).

Regardless of whether there are state medical record privacy laws, there may be relevant common law (i.e., court-made) that governs how and when personal medical information can be released. Each health department's legal counsel/attorney general should provide guidance on this source of law.

Ensure that policies and practices that assist with an individual's understanding of the importance of disclosure of their HIV status (and any potential liability for failure to disclose) are free of inaccurate, misleading or deceptive information. These types of inaccuracies lead to the very stigmatization, discrimination and deterrence that NASTAD and the health departments have committed to minimize.

Verify the health department's understanding of any HIV criminalization laws and advise programs and providers about the extent of such laws.

- Policies and procedures regarding HIV criminalization laws must neither contribute to the stigmatization of HIV nor act as a deterrent to getting individuals tested for HIV (or in obtaining treatment).

While programs and providers sometimes play a role in informing clients or patients about the criminal laws related to HIV status, this is not the advisable method of conveying this information. It is very important that programs and providers do not engage in activity that could compromise the integrity of the patient-provider relationship, or that potentially create actual or perceived conflicting obligations that might lead to a violation of patient confidentiality.

- If providers or programs engage in counseling on legal issues, this could unintentionally result in an appearance of support for (or involvement with) the criminal prosecution of their patients living with HIV and lead to a potential violation of patient confidentiality.

NASTAD will make technical assistance available to members as they review policies and practices for inaccurate, misleading or deceptive information.

If problems are identified as a result of the survey of programs and providers, the State AIDS director should work with those programs and providers to make needed changes as quickly as possible. These efforts can include:

Consulting with NASTAD on the scope of the problem and receiving technical assistance from NASTAD on recommended modifications to policies and procedures used by programs and providers;

Issuing a formal directive to programs and providers regarding required revisions or modifications. For an example of what this type of letter might look like, [click here](#);

Releasing further summaries on HIPAA (or enhanced state) medical record privacy laws or the scope and limit of any HIV criminalization statutes;

Offering formal training sessions related to the policies and procedures in need of modification; or,

Conducting an extensive review (whether independently or in connection with NASTAD) of problem policies or procedures and making specific policy and procure recommendations.

Conduct ongoing monitoring of HIV-related policies and procedures. This ongoing effort can take a variety of approaches, but all should involve ongoing review of policies and procedures at the state, county and local levels.

Ongoing efforts at the state health department level should provide the unequivocal public health leadership envisioned in NASTAD's *National HIV/AIDS Strategy Imperative: Fighting Stigma and Discrimination by Repealing HIV-specific Criminal Statutes*. This monitoring could include any of the following:

- Collaborating with other jurisdictions to identify and share best practices regarding HIV-related policies and procedures;
- Designating an individual/agency as a "watchdog" to oversee HIV-related policies and procedures; or
- Providing periodic bulletins or statements which outline both best practices nationally, as well as best practices within the state.

Encourage county and local programs and providers to periodically review their policies and practices with counsel and to submit copies of all revisions to written information that is provided to newly-diagnosed HIV-positive patients.

- NASTAD can make technical assistance available to health departments for further review of the revisions to these policies and procedures.