WEST VIRGINIA CODE: §16-3C-2

§16-3C-2. HIV-related testing; methods for obtaining consent; billing patient health care providers.

(a) HIV-related testing should be recommended by healthcare providers as part of a routine screening for treatable conditions and as part of routine prenatal and perinatal care. A physician, dentist, nurse practitioner, nurse midwife, physician assistant or the commissioner may also request targeted testing for any of the following:

(1) When there is cause to believe that the test could be positive. Persons who engage in high risk behavior should be encouraged to be screened for HIV at least annually;

(2) When there is cause to believe that the test could provide information important in the care of the patient; or

(3) When there is cause to believe that the results of HIV-testing of samples of blood or body fluids from a source patient could provide information important in the care of medical or emergency responders or other persons identified in rules proposed by the department for approval by the Legislature in accordance with the provisions of article three, chapter twenty-nine-a of this code: Provided, That the source patient whose blood or body fluids is being tested pursuant to this section must have come into contact with a medical or emergency responder or other person in such a way that a significant exposure has occurred;

(4) When there is no record of any HIV-related or other sexually transmitted disease testing during pregnancy and the woman presents for labor and delivery.

(b) All health care providers, the bureau or a local health department that routinely bill insurance companies or other third-party providers may bill for HIV-related testing and treatment.

(c) A patient consents to HIV-related testing when:

(1) The patient is informed either orally or in writing that:

(A) HIV-related testing will be performed as part of his or her routine care;

(B) HIV-related testing is voluntary; and

(C) He or she may decline HIV-related testing (opt-out); or

(2) The patient is informed that the patient’s general consent for medical care includes consent for HIV-related testing.

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(d) A patient who opts-out of HIV-related testing must be informed that HIV-related testing may be obtained anonymously at a local or county health department.

(e) Any person seeking an HIV-related test in a local or county health department or at other HIV test setting provided by the commissioner who wishes to remain anonymous has the right to do so and must be provided written informed consent through the use of a coded system with no linking of individual identity to the test request or results.

(f) County or local health departments that routinely bill insurance companies or other third-party payers for service may bill for an HIV-related test if the person requesting the test does not request anonymity. No person may be refused a test at a local health department due to a lack of insurance or due to a request to remain anonymous.

(g) A person may not decline or opt-out of HIV-related testing and the provisions of subsections (a) and (c) of this section do not apply when:

(1) A health care provider or health facility procures, processes, distributes or uses:

(A) A human body part, including tissue and blood or blood products, donated for:

(i) A purpose specified under the uniform anatomical gift act; or

(ii) Transplant recipients;

(B) Semen provided for the purpose of artificial insemination and an HIV-related test is necessary to ensure medical acceptability of a recipient or such gift or semen for the purposes intended;

(2) A person is unable or unwilling to grant or withhold consent as the result of a documented bona fide medical emergency, as determined by a treating physician taking into account the nature and extent of the exposure to another person and the HIV-related test results are necessary for medical diagnostic purposes to provide appropriate emergency care or treatment to a medical or emergency responder, or any other person who has come into contact with a source patient in such a way that a significant exposure necessitates HIV testing or to a source patient who is unable to consent in accordance with rules proposed by the department for approval by the Legislature in accordance with article three, chapter twenty-nine-a of this code: Provided, That necessary treatment may not be withheld pending HIV test results: Provided, however, That all sampling and HIV testing of samples of blood and body fluids, without the opportunity for the source patient or patient’s representative to opt-out of the testing, shall be through the use of a pseudonym and in accordance with rules proposed by the department for approval by the Legislature in accordance with article three, chapter twenty-nine-a of this code; or

(3) The performance of an HIV-related test for the purpose of research if the testing is performed in a manner by which the identity of the test subject is not known and may not be retrieved by the researcher.

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(h) Mandated testing:

(1) The performance of any HIV-related testing that is or becomes mandatory by court order or other legal process described herein does not require consent of the subject but will include counseling.

(2) The court having jurisdiction of the criminal prosecution shall order that an HIV-related test be performed on any persons charged with any of the following crimes or offenses:

(i) Prostitution; or

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

(3) HIV-related tests performed on persons charged with prostitution, sexual abuse, sexual assault, incest or sexual molestation shall be confidentially administered by a designee of the bureau or the local or county health department having proper jurisdiction. The commissioner may designate health care providers in regional jail facilities to administer HIV-related tests on such persons if he or she determines it necessary and expedient.

(4) Costs associated with tests performed on persons charged with prostitution, sexual abuse, sexual assault, incest or sexual molestation may be charged to the defendant or juvenile respondent unless a court determines that the person charged with prostitution, sexual abuse, sexual assault, incest or sexual molestation is pecuniary unable to pay.

(A) If a person charged with prostitution, sexual abuse, sexual assault, incest or sexual molestation who is ordered to be tested is unable to pay, the cost of the HIV testing may be borne by the regional jail or other correctional or juvenile facility, the bureau or the local health department.

(B) If persons charged with prostitution, sexual abuse, sexual assault, incest or sexual molestation who is ordered to be tested has health insurance, the local health department or other providers performing the test may bill the health insurance of the person charged with prostitution, sexual abuse, sexual assault, incest or sexual molestation for the cost of the test.

(C) A person charged with prostitution, sexual abuse, sexual assault, incest or sexual molestation ordered to submit to a HIV-related test may not be permitted to remain anonymous and a local health department may administer and bill for the test.

(5) When the Commissioner of the Bureau of Public Health knows or has reason to believe, because of medical or epidemiological information, that a person, including, but not limited to, a person such as an IV drug abuser, or a person who may have a sexually transmitted disease, or a person who has sexually molested, abused or assaulted another, has HIV infection and is or may be a danger to the public health, he or she may issue an order to:

(i) Require a person to be examined and tested to determine whether the person has HIV

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infection;

(ii) Require a person with HIV infection to report to a qualified physician or health worker for counseling; and

(iii) Direct a person with HIV infection to cease and desist from specified conduct which endangers the health of others.

(6) If any person violates a cease and desist order issued pursuant to this section and, by virtue of that violation, the person presents a danger to the health of others, the commissioner shall apply to the circuit court of Kanawha County to enforce the cease and desist order by imposing any restrictions upon the person that are necessary to prevent the specific conduct that endangers the health of others.

(7) A person convicted of the offenses described in this section shall be required to undergo HIV-related testing and counseling immediately upon conviction and the court having jurisdiction of the criminal prosecution may not release the convicted person from custody and shall revoke any order admitting the defendant to bail until HIV-related testing and counseling have been performed and the result is known. The HIV-related test result obtained from the convicted person is to be transmitted to the court and, after the convicted person is sentenced, made part of the court record. If the convicted person is placed in the custody of the Division of Corrections, the court shall transmit a copy of the convicted person's HIV-related test results to the Division of Corrections. The HIV-related test results shall be closed and confidential and disclosed by the court and the bureau only in accordance with the provisions of section three of this article.

(8) The prosecuting attorney shall inform the victim, or parent or guardian of the victim, at the earliest stage of the proceedings of the availability of voluntary HIV-related testing and counseling conducted by the bureau and that his or her best health interest would be served by submitting to HIV-related testing and counseling. HIV-related testing for the victim shall be administered at his or her request on a confidential basis and shall be administered in accordance with the Centers for Disease Control and Prevention guidelines of the United States Public Health Service in effect at the time of such request. The victim who obtains an HIV-related test shall be provided with pre and post-test counseling regarding the nature, reliability and significance of the HIV-related test and the confidential nature of the test. HIV-related testing and counseling conducted pursuant to this subsection shall be performed by the designee of the commissioner of the bureau or by any local or county health department having proper jurisdiction.

(9) If a person receives counseling or is tested under this subsection and is found to be HIV infected and the person is not incarcerated, the person shall be referred by the health care provider performing the counseling or testing for appropriate medical care and support services. The local or county health departments or any other agency under this subsection may not be financially responsible for medical care and support services.

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(10) The commissioner of the bureau or his or her designees may require a person to undergo an HIV or other sexually transmitted disease test if a person was possibly exposed to HIV or other sexually transmitted disease infected blood or other body fluids as a result of receiving or rendering emergency medical aid, providing funeral services or providing law-enforcement services. The commissioner of the bureau or his or her designees may use the results to determine the appropriate therapy, counseling and psychological support for the exposed person.(11) If an HIV-related test required on persons convicted of prostitution, sexual abuse, sexual assault, incest or sexual molestation results in a negative reaction, upon motion of the state, the court having jurisdiction over the criminal prosecution may require the subject of the test to submit to further HIV-related tests performed under the direction of the bureau in accordance with the Centers for Disease Control and Prevention guidelines of the United States Public Health Service in effect at the time of the motion of the state.

(12) The costs of mandated testing and counseling provided under this subsection and pre and postconviction HIV-related testing and counseling provided the victim under the direction of the bureau pursuant to this subsection shall be paid by the by the individual to be tested or counseled or his or her medical insurance provider, if possible.

(13) The court having jurisdiction of the criminal prosecution shall order a person convicted of prostitution, sexual abuse, sexual assault, incest or sexual molestation to pay restitution to the state or the victim for the costs of any HIV-related testing and counseling provided the convicted person and the victim, unless the court has determined the convicted person to be indigent.

(14) Any funds recovered by the state as a result of an award of restitution under this subsection shall be paid into the State Treasury to the credit of a special revenue fund to be known as the HIV-testing Fund which is hereby created. The moneys so credited to the fund may be used solely by the bureau for the purposes of facilitating the performance of HIV-related testing and counseling under the provisions of this article.

(i) Nothing in this section is applicable to any insurer regulated under chapter thirty-three of this code: Provided, That the commissioner of insurance shall develop standards regarding consent for use by insurers which test for the presence of the HIV antibody.

(j) Whenever consent of the subject to the performance of HIV-related testing is required under this article, any such consent obtained, whether orally or in writing, shall be considered to be a valid and informed consent if it is given after compliance with the provisions of subsection (c) of this section.

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