WEST VIRGINIA CODE CHAPTER 16 ARTICLE 3C

WV Legislature

§16-3C-1. Definitions.

When used in this article:

(a) "AIDS" means acquired immunodeficiency syndrome.

(b) "Bureau" means the Bureau for Public Health.

(c) "Commissioner" means the Commissioner of the Bureau for Public Health.

(d) "Convicted" includes pleas of guilty and pleas of nolo contendere accepted by the court having jurisdiction of the criminal prosecution, a finding of guilty following a jury trial, or a trial to a court and an adjudicated juvenile offender as defined in §49-1-202 of this code.

(e) "Department" means the Department of Health.

(f) "Funeral director" has the same meaning ascribed to that term in §30-6-3 of this code.

(g) "Funeral establishment" has the same meaning ascribed to that term in §30-6-3 of this code.

(h) "HIV" means the human immunodeficiency virus identified as the causative agent of AIDS.

(i) "HIV-related test" means a test for the HIV antibody or antigen or any future valid test approved by the bureau, the federal drug administration, or the Centers for Disease Control and Prevention.

(j) "Health facility" means a hospital, nursing home, physician’s office, clinic, blood bank, blood center, sperm bank, laboratory, or other health care institution.

(k) "Health care provider" means any physician, dentist, nurse, paramedic, psychologist, or other person providing medical, dental, nursing, psychological, or other health care services of any kind.

(l) "Health Information Exchange" means the electronic movement of health-related information in accord with law and nationally recognized standards.

(m) "High risk behavior" means behavior by a person including, but not limited to: (i) Unprotected sex with a person who is living with HIV; (ii) unprotected sex in exchange for money or drugs; (iii) unprotected sex with multiple partners; (iv) anonymous unprotected sex; (v) or needle sharing; (vi) diagnosis of a sexually transmitted disease; or (vii) unprotected sex or sharing injecting equipment in a high HIV prevalence setting or with a person who is living with HIV.

(n) "Medical or emergency responders" means paid or volunteer firefighters, law-

WV Legislature

enforcement officers, emergency medical technicians, paramedics, or other emergency service personnel, providers, or entities acting within the usual course of their duties; good samaritans and other nonmedical and nonemergency personnel providing assistance in emergencies; funeral directors; health care providers; the commissioner of the Bureau for Public Health; and all of their employees and volunteers.

(o) "Patient" or "test subject" or "subject of the test" means the person upon whom an HIV test is performed, or the person who has legal authority to make health care decisions for the test subject.

(p) "Permitted purpose" is a disclosure permitted by the Health Insurance Portability and Accountability Act of 1996 as amended, or a disclosure consented to or authorized by a patient or test subject.

(q) "Person" includes any natural person, partnership, association, joint venture, trust, public or private corporation, or health facility.

(r) "Release of test results" means a permitted or authorized disclosure of HIV-related test results.

(s) "Significant exposure" means:

(1) Exposure to blood or body fluids through needlestick, instruments, sharps, surgery, or traumatic events;

(2) Exposure of mucous membranes to visible blood or body fluids, to which universal precautions apply according to the national Centers for Disease Control and Prevention, and laboratory specimens that contain HIV (e.g. suspensions of concentrated virus); or

(3) Exposure of skin to visible blood or body fluids, when the exposed skin is chapped, abraded, or afflicted with dermatitis or the contact is prolonged or involving an extensive area.

(t) "Source patient" means any person whose body fluids have been the source of a significant exposure to a medical or emergency responder.

(u) "Targeted testing" means performing an HIV-related test for sub-populations at higher risk, typically defined on the basis of behavior, clinical, or demographic characteristics.

(v) "Victim" means the person or persons to whom transmission of bodily fluids from the perpetrator of the crimes of sexual abuse, sexual assault, incest, or sexual molestation occurred or was likely to have occurred in the commission of such crimes.

WV Legislature

§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.

(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.

WV Legislature

(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.

(h) Mandated testing:

WV Legislature

(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 infection;

WV Legislature

(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.

(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

WV Legislature

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.

WV Legislature

§16-3C-3. Confidentiality of records; permitted disclosure; no duty to notify.

(a) No person may disclose or be compelled to disclose the identity of any person upon whom an HIV-related test is performed, or the results of such a test in a manner which permits identification of the subject of the test, except to the following persons:

(1) The subject of the test;

(2) The victim of the crimes of sexual abuse, sexual assault, incest or sexual molestation at the request of the victim or the victim's legal guardian, or of the parent or legal guardian of the victim if the victim is a minor where disclosure of the HIV-related test results of the convicted sex offender are requested;

(3) Any person who secures a specific release of test results executed by the subject of the test;

(4) A funeral director or an authorized agent or employee of a health facility or health care provider if the funeral establishment, health facility or health care provider itself is authorized to obtain the test results, the agent or employee provides patient care or handles or processes specimens of body fluids or tissues and the agent or employee has a need to know that information: Provided, That the funeral director, agent or employee shall maintain the confidentiality of this information;

(5) Licensed health care providers or appropriate health facility personnel providing care to the subject of the test: Provided, That such personnel shall maintain the confidentiality of the test results and may redisclose the results only for a permitted purpose or as permitted by law. The entry on a patient's chart of an HIV-related illness by the attending or other treating physician or other health care provider shall not constitute a breach of confidentiality requirements imposed by this article;

(6) The Bureau or the Centers for Disease Control and Prevention of the United States Public Health Service in accordance with reporting requirements for HIV and a diagnosed case of AIDS, or a related condition;

(7) A health facility or health care provider which procures, processes, distributes or uses: (A) A human body part from a deceased person with respect to medical information regarding that person; (B) semen provided prior to the effective date of this article for the purpose of artificial insemination; (C) blood or blood products for transfusion or injection; or (D) human body parts for transplant with respect to medical information regarding the donor or recipient;

(8) Health facility staff committees or accreditation or oversight review organizations which are conducting program monitoring, program evaluation or service reviews so long as any identity remains anonymous;

(9) Claims management personnel employed by or associated with an insurer, health care

WV Legislature

service contractor, health maintenance organization, self-funded health plan, state-administered health care claims payer or any other payer of health care claims, where the disclosure is to be used solely for the prompt and accurate evaluation and payment of medical or related claims. Information released under this subsection is confidential and may not be released or available to persons who are not involved in handling or determining medical claims payment;

(10) Persons, health care providers or health facilities engaging in or providing for the exchange of protected health information among the same in order to provide health care services to the patient, including, but not limited to, disclosure through a health information exchange, disclosure and exchange within health care facilities, and disclosure for a permitted purpose, including disclosure to a legally authorized public health authority; and

(11) A person allowed access to the record by a court order that is issued in compliance with the following provisions:

(i) No court of this state may issue the order unless the court finds that the person seeking the test results has demonstrated a compelling need for the test results which cannot be accommodated by other means. In assessing compelling need, the court shall weigh the need for disclosure against the privacy interest of the test subject and the public interest;

(ii) Pleadings pertaining to disclosure of test results shall substitute a pseudonym for the true name of the test subject of the test. The disclosure to the parties of the test subject's true name shall be communicated confidentially in documents not filed with the court;

(iii) Before granting any such order, the court shall, if possible, provide the individual whose test result is in question with notice and a reasonable opportunity to participate in the proceedings if he or she is not already a party;

(iv) Court proceedings as to disclosure of test results shall be conducted in camera unless the subject of the test agrees to a hearing in open court or unless the court determines that the public hearing is necessary to the public interest and the proper administration of justice; and

(v) Upon the issuance of an order to disclose test results, the court shall impose appropriate safeguards against unauthorized disclosure, which shall specify the person who may have access to the information, the purposes for which the information may be used and appropriate prohibitions on future disclosure.

(b) No person to whom the results of an HIV-related test have been disclosed pursuant to subsection (a) of this section may disclose the test results to another person except as authorized by said subsection.

(c) Notwithstanding the provisions set forth in subsections (a) through (c) of this section, the use of HIV test results to inform individuals named or identified as spouses, sex partners or

WV Legislature

contacts, or persons who have shared needles that they may be at risk of having acquired the HIV infection as a result of possible exchange of body fluids, is permitted: Provided, That the Bureau shall make a good faith effort to inform spouses, sex partners, contacts or persons who have shared needles that they may be at risk of having acquired the HIV infection as a result of possible exchange of body fluids: Provided, however, That the Bureau has no notification obligations when the Bureau determines that there has been no likely exposure of these persons to HIV from the infected test subject within the ten-year period immediately prior to the diagnosis of the infection. The name or identity of the person whose HIV test result was positive is to remain confidential. Spouses, contacts, or sex partners or persons who have shared needles may be tested anonymously at the State Bureau for public Health's designated test sites, or at their own expense by a health care provider or an approved laboratory of their choice confidentially should the test be positive. A cause of action may not arise against the Bureau, a physician or other health care provider from any such notification.

(d) There is no duty on the part of the physician or health care provider to notify the spouse or other sexual partner of, or persons who have shared needles with, an infected individual of their HIV infection and a cause of action may not arise from any failure to make such notification. However, if contact is not made, the Bureau will be so notified.

WV Legislature

§16-3C-4. Substituted consent.

(a) If the person whose consent is necessary under this article for HIV-related testing or the authorization of the release of test results is unable to give such consent or authorization because of mental incapacity or incompetency, the consent or authorization shall be obtained from another person in the following order of preference:

(1) A person holding a durable power of attorney for health care decisions;

(2) The person's duly appointed legal guardian;

(3) The person's next-of-kin in the following order of preference: spouse, parent, adult child, sibling, uncle or aunt, and grandparent.

(b) The person's inability to consent shall not be permitted to result in prolonged delay or denial of necessary medical treatment.

(c) The information required to be provided to the patient pursuant to subsections (b) and (d), section two of this article, shall be provided to the person giving substituted consent hereunder.

WV Legislature

§16-3C-5. Remedies and penalties.

(a) Any person aggrieved by a violation of this article has right of action in the circuit court and may recover for the violation:

(1) Against any person who recklessly violates a provision of this article, liquidated damages of $1,000 or actual damages, whichever is greater; or

(2) Against any person who intentionally or maliciously violated a provision of this article, liquidated damages of $10,000 or actual damages, whichever is greater; and

(3) Reasonable attorney fees; and

(4) Such other relief, including an injunction, as the court may consider appropriate.

(b) Any action under this article is barred unless the action is commenced within five years after the violation occurs.

(c) Nothing in this article limits the rights of the subject of an HIV-related test to recover damages or other relief under any other applicable law.

(d) Nothing in this article may be construed to impose civil liability for disclosure of an HIV-related test result in accordance with any reporting guidelines or requirements of the department or the centers for disease control of the United States Public Health Service.

WV Legislature

§16-3C-6. Prohibiting certain acts; HIV tests results.

(a) A positive HIV test report, or the diagnosis of AIDS related complex (ARC), or the diagnosis of the AIDS syndrome or disease, may not constitute a basis upon which to deny the individual so diagnosed, access to quality health care: Provided, That this subsection does not apply to insurance.

(b) No student of any school or institution of higher learning, public or private, may be excluded from attending the school or institution of higher learning, or from participating in school sponsored activities, on the basis of a positive HIV test, or a diagnosis of ARC, or AIDS syndrome or disease. Exclusion from attendance or participation, as described above, shall be determined on a case by case basis, in consultation with the individual's parents, medical care provider, health authorities, school or institution administrators or medical advisors, in accordance with policies and guidelines which may have been established by the entities. Exclusion may only be based on the student representing an unacceptable risk as agreed to by the department for the transmission of the HIV to others because of the stage or nature of the illness.

WV Legislature

§16-3C-7.

Repealed.

Acts, 2011 Reg. Sess., Ch. 87.

WV Legislature

§16-3C-8. Administrative implementation.

(a) The commissioner of the bureau shall immediately implement and enforce the provisions of this article, and shall adopt rules to the extent necessary for further implementation of the article. The rules proposed by the bureau pursuant to this article may include procedures for taking appropriate action with regard to health care facilities or health care providers which violate this article or the rules promulgated hereunder. The provisions of the state administrative procedures act apply to all administrative rules and procedures of the bureau pursuant to this article, except that in case of conflict between the state administrative procedures act and this article, the provisions of this article shall control.

(b) The bureau shall promulgate rules to assure adequate quality control for all laboratories conducting HIV tests and to provide for a reporting and monitoring system for reporting to the bureau all positive HIV tests results.

WV Legislature

§16-3C-9. Individual banking of blood by health care providers for elective surgery or medical procedures.

Any person may, in contemplation of elective surgery or other elective medical procedures for which a blood transfusion may be required, request the health care provider conducting such surgery or medical procedure, or any private, public or nonprofit blood bank, to make or cause to be made appropriate provisions to store and bank that individual's blood for use during such surgery or medical procedure. The health care provider or the private, public or nonprofit blood bank shall, upon such request, store and bank a person's blood and the health care provider shall use such blood in the elective surgery or medical procedure to the extent such blood is available.

WV Legislature