

RECEIVED  
1988 JUL -7 PM 4:21  
OFFICE OF WEST VIRGINIA  
SECRETARY OF STATE

# WEST VIRGINIA LEGISLATURE

THIRD EXTRAORDINARY SESSION, 1988

— ● —

# ENROLLED

Com. Sub. for  
HOUSE BILL No. 303

(By Mr. Speaker, Mr. Chambers, & Del. Swann)  
[By request of the Executive]

— ● —

Passed June 28, 1988

In Effect September 1, 1988 ~~Passage~~

**ENROLLED**  
COMMITTEE SUBSTITUTE  
FOR  
**H. B. 303**

(By MR. SPEAKER, MR. CHAMBERS, and DELEGATE SWANN)  
[By request of the Executive]

[Passed June 28, 1988; in effect September 1, 1988.]

AN ACT to amend chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article three-c, relating to AIDS-related medical testing and records confidentiality act; defining terms; setting testing requirements; providing for confidentiality of records; authorizing substitute consent; providing for remedies and penalties and private rights of action; prohibiting denial of certain rights; requiring study by department of corrections; providing administrative implementation; and providing for individual banking of blood for elective medical procedures.

*Be it enacted by the Legislature of West Virginia:*

That chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article three-c to read as follows:

**ARTICLE 3C. AIDS-RELATED MEDICAL TESTING AND RECORDS CONFIDENTIALITY ACT.**

**§16-3C-1. Definitions.**

1 When used in this article:

2 (a) "Department" means the state department of  
3 health.

4 (b) "AIDS" means acquired immunodeficiency  
5 syndrome.

6 (c) "ARC" means AIDS-related complex.

7 (d) "Funeral director" shall have the same meaning  
8 ascribed to such term in section four, article six, chapter  
9 thirty of this code.

10 (e) "Funeral establishment" shall have the same  
11 meaning ascribed to such term in section four, article  
12 six, chapter thirty of this code.

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

15 (g) "HIV-related test" means a test for the HIV  
16 antibody or antigen or any future valid test approved  
17 by the department, the federal drug administration or  
18 the centers for disease control.

19 (h) "Health facility" means a hospital, nursing home,  
20 clinic, blood bank, blood center, sperm bank, laboratory  
21 or other health care institution.

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

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

29 (k) "Release of test results" means a written author-  
30 ization for disclosure of HIV-related test results which  
31 is signed, dated and which specifies to whom disclosure  
32 is authorized and the time period during which the  
33 release is to be effective.

**§16-3C-2. Testing.**

1 (a) HIV-related testing may be requested by a  
2 physician, dentist or the director of the department for

3 any of the following:

4 (1) When there is cause to believe that the test could  
5 be positive; or

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

9 (3) When any person voluntarily consents to the test.

10 (b) The requesting physician, dentist or the director  
11 of the department shall provide the patient with  
12 information in the form of a booklet or printed infor-  
13 mation prepared or approved by the department or, in  
14 the case of persons who are unable to read, shall either  
15 show a video or film prepared or approved by the  
16 department to the patient, or read or cause to be read  
17 to the patient the information prepared or approved by  
18 the department which contains the following  
19 information:

20 (1) An explanation of the test, including its purpose,  
21 potential uses, limitations, the meaning of its results and  
22 any special relevance to pregnancy and prenatal care;  
23 and

24 (2) An explanation of the procedures to be followed;  
25 and

26 (3) An explanation that the test is voluntary and may  
27 be obtained anonymously; and

28 (4) An explanation that the consent for the test may  
29 be withdrawn at any time prior to drawing the sample  
30 for the test and that such withdrawal of consent may  
31 be given orally if the consent was given orally, or shall  
32 be in writing if the consent was given in writing; and

33 (5) An explanation of the nature and current knowl-  
34 edge of asymptomatic HIV infection, ARC and AIDS  
35 and the relationship between the test result and those  
36 diseases; and

37 (6) Information about behaviors known to pose risks  
38 for transmission of HIV infection.

39 (c) A person seeking an HIV-related test who wishes

40 to remain anonymous has the right to do so, and to  
41 provide written, informed consent through use of a  
42 coded system with no linking or individual identity to  
43 the test requests or results. A health care provider who  
44 does not provide HIV-related tests on an anonymous  
45 basis shall refer such a person to a test site which does  
46 provide anonymous testing, or to any local or county  
47 health department which shall provide for performance  
48 of an HIV-related test and counseling.

49 (d) At the time of learning of any test result, the  
50 subject of the test shall be provided with counseling or  
51 referral for counseling for coping with the emotional  
52 consequences of learning any test result. This may be  
53 done by brochure or personally, or both.

54 (e) No consent for testing is required and the provi-  
55 sions of subsection (b) of this section do not apply for:

56 (1) A health care provider or health facility perform-  
57 ing an HIV-related test on the donor or recipient when  
58 the health care provider or health facility procures,  
59 processes, distributes or uses a human body part  
60 (including tissue and blood or blood products) donated  
61 for a purpose specified under the uniform anatomical  
62 gift act, or for transplant recipients, or semen provided  
63 for the purpose of artificial insemination and such test  
64 is necessary to assure medical acceptability of a  
65 recipient or such gift or semen for the purposes  
66 intended;

67 (2) The performance of an HIV-related test in docu-  
68 mented bona fide medical emergencies when the subject  
69 of the test is unable to grant or withhold consent, and  
70 the test results are necessary for medical diagnostic  
71 purposes to provide appropriate emergency care or  
72 treatment, except that post-test counseling or referral  
73 for counseling shall nonetheless be required. Necessary  
74 treatment may not be withheld pending HIV test  
75 results; or

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

80 (f) Mandated testing:

81 (1) The performance of any HIV-related testing that  
82 is or becomes mandatory shall not require consent of the  
83 subject but will include counseling.

84 (2) An HIV-related test shall be performed on any  
85 persons convicted of any of the following crimes or  
86 offenses:

87 (i) Prostitution;

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

89 (3) The director of the department or his or her  
90 designees may require an HIV test for the protection of  
91 a person who was possibly exposed to HIV infected  
92 blood or other body fluids as a result of receiving or  
93 rendering emergency medical aid or who possibly  
94 received such exposure as a funeral director. Results of  
95 such a test of the person causing exposure may be used  
96 by the requesting physician for the purpose of determin-  
97 ing appropriate therapy, counseling and psychological  
98 support for the person rendering emergency medical aid  
99 including good samaritans, as well as for the patient, or  
100 individual receiving the emergency medical aid.

101 (4) When the director of the department knows or has  
102 reason to believe, because of medical or epidemiological  
103 information, that a person, including, but not limited to,  
104 a person such as an IV drug abuser, or a person who  
105 may have a sexually transmitted disease, or a person  
106 who has sexually molested, abused or assaulted another,  
107 has HIV infection and is or may be a danger to the  
108 public health, he may issue an order to:

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

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

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

117 (g) If a person violates a cease and desist order issued  
118 pursuant to this section and it is shown that the person  
119 is a danger to others, the director of the department  
120 shall enforce the cease and desist order by imposing  
121 such restrictions upon the person as are necessary to  
122 prevent the specific conduct which endangers the health  
123 of others. Any restriction shall be in writing, setting  
124 forth the name of the person to be restricted and the  
125 initial period of time, not to exceed three months, during  
126 which the order shall remain effective, the terms of the  
127 restrictions and such other conditions as may be  
128 necessary to protect the public health.

129 (h) Premarital screening:

130 (1) Every person who is empowered to issue a mar-  
131 riage license shall, at the time of issuance thereof,  
132 distribute to the applicants for the license, information  
133 concerning acquired immunodeficiency syndrome  
134 (AIDS) and inform them of the availability of HIV-  
135 related testing and counseling. The informational  
136 brochures shall be furnished by the department.

137 (2) A notation that each applicant has received the  
138 AIDS informational brochure shall be placed on file  
139 with the marriage license on forms provided by the  
140 department.

141 (i) The director of the department may obtain and test  
142 specimens for AIDS or HIV infection for research or  
143 epidemiological purposes without consent of the person  
144 from whom the specimen is obtained if all personal  
145 identifying information is removed from the specimen  
146 prior to testing.

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

152 (k) Whenever consent of the subject to the perfor-  
153 mance of HIV-related testing is required under this  
154 article, any such consent obtained, whether orally or in  
155 writing, shall be deemed to be a valid and informed

156 consent if it is given after compliance with the provi-  
157 sions of subsection (b) of this section.

**§6-3C-3. Confidentiality of records; permitted disclosure;  
no duty to notify.**

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

6 (1) The subject of the test;

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

9 (3) A funeral director or an authorized agent or  
10 employee of a health facility or health care provider if  
11 the funeral establishment, health facility or health care  
12 provider itself is authorized to obtain the test results, the  
13 agent or employee provides patient care or handles or  
14 processes specimens of body fluids or tissues and the  
15 agent or employee has a need to know such information:  
16 *Provided*, That such funeral director, agent or employee  
17 shall maintain the confidentiality of such information;

18 (4) Licensed medical personnel or appropriate health  
19 care personnel providing care to the subject of the test,  
20 when knowledge of the test results is necessary or useful  
21 to provide appropriate care or treatment, in an appro-  
22 priate manner: *Provided*, That such personnel shall  
23 maintain the confidentiality of such test results. The  
24 entry on a patient's chart of an HIV-related illness by  
25 the attending or other treating physician or other health  
26 care provider shall not constitute a breach of confiden-  
27 tiality requirements imposed by this article;

28 (5) The department or the centers for disease control  
29 of the United States public health service in accordance  
30 with reporting requirements for a diagnosed case of  
31 AIDS, or a related condition;

32 (6) A health facility or health care provider which  
33 procures, processes, distributes or uses: (A) A human  
34 body part from a deceased person with respect to

35 medical information regarding that person; or (B)  
36 semen provided prior to the effective date of this article  
37 for the purpose of artificial insemination; (C) blood or  
38 blood products for transfusion or injection; (D) human  
39 body parts for transplant with respect to medical  
40 information regarding the donor or recipient;

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

45 (8) A person allowed access to said record by a court  
46 order which is issued in compliance with the following  
47 provisions:

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

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

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

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

71 (v) Upon the issuance of an order to disclose test  
72 results, the court shall impose appropriate safeguards  
73 against unauthorized disclosure, which shall specify the

74 person who may have access to the information, the  
75 purposes for which the information may be used and  
76 appropriate prohibitions on future disclosure.

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

81 (c) Whenever disclosure is made pursuant to this  
82 section, except when such disclosure is made to persons  
83 in accordance with subdivisions (1), (3), (4), (5), (6) and  
84 (7), subsection (a) of this section, it shall be accompanied  
85 by a statement in writing which includes the following  
86 or substantially similar language: "This information has  
87 been disclosed to you from records whose confidentiality  
88 is protected by state law. State law prohibits you from  
89 making any further disclosure of the information  
90 without the specific written consent of the person to  
91 whom it pertains, or as otherwise permitted by law. A  
92 general authorization for the release of medical or other  
93 information is NOT sufficient for this purpose."

94 (d) Notwithstanding the provisions set forth in  
95 subsections (a) through (c) of this section, the use of HIV  
96 test results to inform individuals named or identified as  
97 sex partners or contacts or persons who have shared  
98 needles that they may be at risk of having acquired the  
99 HIV infection as a result of possible exchange of body  
100 fluids, is permitted. The name or identity of the person  
101 whose HIV test result was positive is to remain  
102 confidential. Contacts or identified partners may be  
103 tested anonymously at the state department of health  
104 designated test sites, or at their own expense by a health  
105 care provider or an approved laboratory of their choice.  
106 A cause of action will not arise against the department,  
107 a physician or other health care provider from any such  
108 notification.

109 (e) There is no duty on the part of the physician or  
110 health care provider to notify the spouse or other sexual  
111 partner of, or persons who have shared needles with, an  
112 infected individual of their HIV infection and a cause  
113 of action will not arise from any failure to make such

114 notification. However, if contact is not made, the  
115 department will be so notified.

**§16-3C-4. Substituted consent.**

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

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

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

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

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

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

**§16-3C-5. Remedies and penalties.**

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

4 (1) Against any person who recklessly violates a  
5 provision of this article, liquidated damages of one  
6 thousand dollars or actual damages, whichever is  
7 greater; or

8 (2) Against any person who intentionally or mali-  
9 ciously violated a provision of this article, liquidated  
10 damages of ten thousand dollars or actual damages,  
11 whichever is greater; and

12 (3) Reasonable attorney fees; and

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

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

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

21 (d) Nothing in this article may be construed to impose  
22 civil liability for disclosure of an HIV-related test result  
23 in accordance with any reporting guidelines or require-  
24 ments of the department or the centers for disease  
25 control of the United States public health service.

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

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

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

**§16-3C-7. Department of corrections to conduct AIDS  
related study.**

1 The commissioner of the department of corrections is  
2 authorized and directed to conduct a study at penal  
3 institutions (including jails administered by counties  
4 and municipalities) to determine whether it would be  
5 prudent and reasonable to offer or require of each  
6 inmate at such institutions testing, educational classes  
7 or counseling related to AIDS and HIV infections. This  
8 shall be done in consultation with the department of  
9 health. The commissioner shall complete the study and  
10 present the findings and recommendations in a report  
11 to be filed with the director of the department of health,  
12 the President of the Senate and the Speaker of the  
13 House of Delegates within six months of the effective  
14 date of this article.

**§16-3C-8. Administrative implementation.**

1 (a) The director of the department shall immediately  
2 implement and enforce the provisions of this article, and  
3 shall adopt rules to the extent necessary for further  
4 implementation of the article. The rules proposed by the  
5 department pursuant to this article may include  
6 procedures for taking appropriate action with regard to  
7 health care facilities or health care providers which  
8 violate this article or the rules promulgated hereunder.  
9 The provisions of the state administrative procedures  
10 act apply to all administrative rules and procedures of  
11 the department pursuant to this article, except that in  
12 case of conflict between the state administrative  
13 procedures act and this article, the provisions of this  
14 article shall control.

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

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

1 Any person may, in contemplation of elective surgery  
2 or other elective medical procedures for which a blood  
3 transfusion may be required, request the health care

4 provider conducting such surgery or medical procedure,  
5 or any private, public or nonprofit blood bank, to make  
6 or cause to be made appropriate provisions to store and  
7 bank that individual's blood for use during such surgery  
8 or medical procedure. The health care provider or the  
9 private, public or nonprofit blood bank shall, upon such  
10 request, store and bank a person's blood and the health  
11 care provider shall use such blood in the elective surgery  
12 or medical procedure to the extent such blood is  
13 available.

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

*Bruce O. Williams*  
-----  
Chairman Senate Committee

*Barnard V. Kelly*  
-----  
Chairman House Committee

Originating in the House.

Takes effect September 1, 1988.

*Fred C. Nichols*  
-----  
Clerk of the Senate

*Donald L. Kopp*  
-----  
Clerk of the House of Delegates

*Don Tomkins*  
-----  
President of the Senate

*Boyd Rutherford*  
-----  
Speaker of the House of Delegates

The within *approved* this the *6th*  
day of *July*, 1988.

*Arch A. Shivers*  
-----  
Governor

PRESENTED TO THE

GOVERNOR

Date 6/30/88

Time 4:20 p.m.