WEST VIRGINIA LEGISLATURE

THIRD EXTRAORDINARY SESSION, 1988

ENROLLED

Com. Sub. for
HOUSE BILL No. 303

(By Mr. Speaker, Mr. Chambers, and Del. Gunn)
[By request of the Executive]

Passed June 28, 1988

In Effect September 1, 1988
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.
When used in this article:

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

(b) "AIDS" means acquired immunodeficiency syndrome.

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

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

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

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

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

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

(i) "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.

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

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

§16-3C-2. Testing.

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

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

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

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

(b) The requesting physician, dentist or the director of the department shall provide the patient with information in the form of a booklet or printed information prepared or approved by the department or, in the case of persons who are unable to read, shall either show a video or film prepared or approved by the department to the patient, or read or cause to be read to the patient the information prepared or approved by the department which contains the following information:

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

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

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

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

(5) An explanation of the nature and current knowledge of asymptomatic HIV infection, ARC and AIDS and the relationship between the test result and those diseases; and

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

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

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

(e) No consent for testing is required and the provisions of subsection (b) of this section do not apply for:

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

(2) The performance of an HIV-related test in documented bona fide medical emergencies when the subject of the test is unable to grant or withhold consent, and the test results are necessary for medical diagnostic purposes to provide appropriate emergency care or treatment, except that post-test counseling or referral for counseling shall nonetheless be required. Necessary treatment may not be withheld pending HIV test results; 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.
(f) Mandated testing:

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

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

   (i) Prostitution;

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

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

(4) When the director of the department 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 may issue an order to:

   (i) Require a person to be examined and tested to determine whether the person has HIV 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.
(g) If a person violates a cease and desist order issued pursuant to this section and it is shown that the person is a danger to others, the director of the department shall enforce the cease and desist order by imposing such restrictions upon the person as are necessary to prevent the specific conduct which endangers the health of others. Any restriction shall be in writing, setting forth the name of the person to be restricted and the initial period of time, not to exceed three months, during which the order shall remain effective, the terms of the restrictions and such other conditions as may be necessary to protect the public health.

(h) Premarital screening:

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

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

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

(j) 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.

(k) 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 deemed to be a valid and informed
consent if it is given after compliance with the provi-
sions of subsection (b) of this section.

§6-3C-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) Any person who secures a specific release of test
results executed by the subject of the test;

(3) 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 such information:
Provided, That such funeral director, agent or employee
shall maintain the confidentiality of such information;

(4) Licensed medical personnel or appropriate health
care personnel providing care to the subject of the test,
when knowledge of the test results is necessary or useful
to provide appropriate care or treatment, in an appro-
priate manner: Provided, That such personnel shall
maintain the confidentiality of such test results. 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 confiden-
tiality requirements imposed by this article;

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

(6) A health facility or health care provider which
provides, processes, distributes or uses: (A) A human
body part from a deceased person with respect to
medical information regarding that person; or (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; (D) human body parts for transplant with respect to medical information regarding the donor or recipient;

(7) 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; and

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

(i) No court of this state may issue such 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 subsection (a).

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

(d) 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
sex partners or 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. The name or identity of the person
whose HIV test result was positive is to remain
confidential. Contacts or identified partners may be
tested anonymously at the state department of health
designated test sites, or at their own expense by a health
care provider or an approved laboratory of their choice.
A cause of action will not arise against the department,
a physician or other health care provider from any such
notification.

(e) 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 will not arise from any failure to make such
§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.

§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 one thousand dollars or actual damages, whichever is greater; or

(2) Against any person who intentionally or maliciously violated a provision of this article, liquidated damages of ten thousand dollars 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.

§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.

§16-3C-7. Department of corrections to conduct AIDS related study.
The commissioner of the department of corrections is authorized and directed to conduct a study at penal institutions (including jails administered by counties and municipalities) to determine whether it would be prudent and reasonable to offer or require of each inmate at such institutions testing, educational classes or counseling related to AIDS and HIV infections. This shall be done in consultation with the department of health. The commissioner shall complete the study and present the findings and recommendations in a report to be filed with the director of the department of health, the President of the Senate and the Speaker of the House of Delegates within six months of the effective date of this article.

§16-3C-8. Administrative implementation.

(a) The director of the department 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 department 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 department 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 department 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 department all positive HIV tests results.

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

Bruce A. Williams
Chairman Senate Committee

Bernard V. Kelly
Chairman House Committee

Originating in the House.

Takes effect September 1, 1988.

Judd C. Hill
Clerk of the Senate

Donald J. Kipps
Clerk of the House of Delegates

Dave Tankersley
President of the Senate

Robert C.耐心
Speaker of the House of Delegates

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

Wade A. Thornburg
Governor