WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1988

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ENROLLED

Com. S. ul. for

HOUSE BILL No. 4493

(1By Mr. Delegates McKinley and

Heavy

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Passed March 12, 1988

In Effect Ninety Days After Passage

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In Effect Ninety Days After Passage
ENROLLED
COMMITTEE SUBSTITUTE
FOR
H. B. 4493
(By Delegates McKinley and Leary)

[Passed March 12, 1988; in effect ninety days from passage.]

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; and to amend and reenact sections twenty-three and thirty-one, article five of said chapter, all relating to AIDS related medical testing and records confidentiality act; defining terms; setting testing requirements; providing for confidentiality of records; prohibiting requiring testing as a condition of employment; providing for remedies, criminal penalties, and private rights of action; prohibiting denial of certain rights; study by department of corrections; providing administrative implementation; and providing for individual banking of blood for elective medical procedures; vital statistics; rules and regulations not to permit extension of time for filing death certificates, etc.; penalties for failure to report suspected contagious disease.

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, and that sections twenty-three and thirty-one, article five of said
chapter be amended and reenacted, all to read as follows:

CHAPTER 16. PUBLIC HEALTH

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 health.
3  (b) "AIDS" means acquired immunodeficiency syndrome.
4  (c) "ARC" means AIDS-related complex.
5  (d) "HIV" means the human immunodeficiency virus identified as the causative agent of AIDS.
6  (e) "HIV-related test" means a test for the HIV antibody or antigen or any future valid test.
7  (f) "Health facility" means a hospital, nursing home, clinic, blood bank, blood center, sperm bank, laboratory or other health care institution.
8  (g) "Health care provider" means any physician, nurse, paramedic, psychologist or other person providing medical, nursing, psychological or other health care services of any kind.
9  (h) "Legal guardian" means a person appointed by a court to assume legal authority for another who has been found incompetent or, in the case of a minor, a person who has legal custody of the child.
10  (i) "Person" includes any natural person, partnership, association, joint venture, trust, public or private corporation or health facility.
11  (j) "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 ordered by a physician or the director of the department when that person has cause to believe that the test will be positive or that the test will provide information important to the care of the patient that cannot be obtained any other way.

(b) If the HIV test does not need to be done in an emergency situation, the ordering physician or the director of the department shall provide the patient with the following which may be in the form of a booklet or printed information prepared by the department:

(1) An explanation of the test, including its purpose, potential uses, limitations and the meaning of its results; and

(2) An explanation of the procedures to be followed, including that the test is voluntary, that consent may be withdrawn at any time and that the test may be obtained anonymously if the subject wishes.

(c) Prior to entering a verbal or written consent agreement, the subject of the test shall receive the following:

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

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

(d) If the definitive HIV series of tests determine a positive result, the patient shall receive from the ordering physician, or his designee, counseling or referrals for counseling for coping with the emotional consequences of learning the test result.

(e) 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 is within a thirty minute drive which shall provide for performance of an HIV-related test and counseling.

(f) At the time of learning the test result, the subject of the test shall be provided with counseling or referrals for counseling for coping with the emotional consequences of learning the result.

(g) The provisions of subsection (c) of this section do not apply for:

(1) A health care provider or health facility to perform an HIV-related test when the health care provider or health facility procures, processes, distributes or uses a human body part (including tissue) donated for a purpose specified under the uniform anatomical gift act, or semen provided for the purpose of artificial insemination and such test is necessary to assure medical acceptability of 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 shall nonetheless be required. Necessary treatment may not be withheld pending HIV test results.

(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:

(1) The director of the department may mandate an HIV test of a person who received or rendered emergency medical aid involving possible exposure or exchange of blood or other body fluids, including morticians. Results of such a test will 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.

(2) 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 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;

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

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

(i) 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.

(j) 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 immune deficiency syndrome (AIDS) informing 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.

(3) The department shall promulgate emergency rules for mandatory HIV-related testing as a condition for obtaining a marriage license when one tenth of one percent of all blood tested in West Virginia blood banks becomes HIV positive.

(k) 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.

(l) Nothing in this section shall be 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.

§16-3C-3. Confidentiality of records.

(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) An authorized agent or employee of a health facility or health care provider if the 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 which need must be documented in writing;

(4) Licensed medical personnel providing care to the
subject of the test, when knowledge of the test results is necessary to provide appropriate care or treatment. Such need to know must be documented in writing;

(5) The department or the center 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 procures, 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;

(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 which may be disserved by disclosure which deters future testing or which may lead to discrimination;

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

(iii) Before granting any such order, the court shall 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 a 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 persons 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, 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 it without the specific written consent of the person to whom it pertains, or as otherwise permitted by said 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, 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 positive partner is to remain confidential. Contacts or identified partners may be tested anonymously at department designated test sites, or at their own expense by a health care provider or an approved laboratory of their choice.

§16-3C-4. Test prohibited as condition of employment.
(a) No person may require an individual to take a HIV-related test as a condition of promotion or continued employment unless the test is a bona fide occupational qualification for the job in question.

(b) No person may discharge any individual, or segregate or classify any individual in any way which would deprive or tend to deprive that individual of employment opportunities or adversely affect his or her status as an employee, or otherwise affect his or her status as an employee, or otherwise discriminate against any individual with respect to compensation, terms, conditions or privileges of employment on the basis of the results of an HIV-related test unless the test is a bona fide occupational qualification of the job in question.

(c) A person who asserts that a bona fide occupational qualification exists for HIV-related testing has the burden of proving that:

(1) The HIV-related test is necessary to ascertain whether an employee is currently able to perform in a reasonable manner the duties of the particular job or whether an employee will present a significant risk of transmitting HIV infection to other persons in the course of normal work activities; and

(2) There exists no means of reasonable accommodation short of requiring the test.

§16-3C-5. Remedies and penalties.

(a) Any person who intentionally or recklessly violates the provisions of sections two and three of this article is guilty of a misdemeanor, and, upon conviction thereof, shall be fined not less than one thousand nor more than three thousand dollars or imprisoned in jail for not less than six nor more than nine months, or both fined and imprisoned: Provided, That it shall not be a violation of this section to issue a marriage license without presenting an informational brochure concerning AIDS: Provided, however, That such brochure is mailed to the applicants by certified mail, return receipt requested, within thirty days of granting the marriage
license.

(b) Such criminal conviction shall not operate to extinguish any private rights of action against a person violating the confidentiality requirements of this section: Provided, That nothing in this section may be construed to impose civil liability or criminal sanction for disclosure of an HIV-related test result made in strict compliance with the provisions of section three of this article.

§16-3C-6. Human rights and 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 medical care, access to public accommodations or services or housing: Provided, That this subsection shall not apply to insurance.

(b) No student of any school or institute of higher learning, public or private, may be excluded from attending said school or institute 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. Inability to attend or participate, 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 institute administrators or medical advisors, in accordance with policies and guidance which may have been established by the entities. Exclusion may only be based on the student representing an accepted risk as agreed to by medical authorities 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 all penal institutions administered by the department of corrections 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. 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 promulgated 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 procedure 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 procedure 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 to the department of 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 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.

ARTICLE 5. VITAL STATISTICS.

§16-5-23. Extension of time for filing death certificates, etc.

(a) The state board of health shall, by rule and regulation and upon such conditions as it may prescribe to assure compliance with the purposes of this article, provide for the extension of the periods prescribed in sections nineteen, twenty and twenty-one of this article for the filing of death certificates, fetal death certificates, medical certifications of the cause of death, and for the obtaining of burial or transit permits, in cases in which compliance with the applicable prescribed period would result in undue hardship.

(b) Rules and regulations of the state board of health shall provide for the issuance of a burial or transit permit under section twenty-one of this article prior to the filing of a certificate of death or fetal death upon conditions designed to assure compliance with the purposes of this article in cases in which compliance with the requirement that the certificate be filed prior to the issuance of the permit would result in undue hardship: Provided, That any rules and regulations promulgated pursuant to this section shall not permit any extension of such periods prescribed if there is any cause to suspect a contagious disease, as documented by the physician completing and signing the required medical certification and any person issuing the burial or transit permit all as provided for in said sections nineteen, twenty and twenty-one, and any such rules and regulations shall provide for a physician's certificate of death form which clearly sets forth the requirements of this subsection.

§16-5-31. Penalties.

(a) (1) Any person who willfully and knowingly makes any false statement in a report, record, or certificate required to be filed under this article, or in an application for an amendment thereof or who
willfully and knowingly supplies false information
intending that such information be used in the prepara-
tion of any such report, record or certificate, or
amendment thereof; or

(2) Any person who without lawful authority and with
the intent to deceive, makes, alters, amends or mutilates
any record, report, or certificate required to be filed
under this article, or any certified copy of such record,
report, or certificate; or

(3) Any person who willfully and knowingly uses or
attempts to use, or furnishes or attempts to furnish to
another for use, for any purpose of deception, any
certificate, record, report, or certified copy thereof so
made, altered, amended, or mutilated; or

(4) Any person who with the intention to deceive
willfully uses or attempts to use any certificate of birth
or certified copy of a record of birth knowing that such
certificate or certified copy was issued upon a record
which is false in whole or in part or which related to
the birth of another person; or

(5) Any person who willfully and knowingly furnishes
a certificate of birth or certified copy of a record of birth
with the intention that it be used by a person other than
the person to whom the record of birth relates, shall be
guilty of a misdemeanor, and, upon conviction thereof,
shall be punished by a fine of not more than one
thousand dollars or by imprisonment for not more than
one year, or by both such fine and imprisonment.

(b) (1) Any person who knowingly transports or
accepts for transportation, interment or other disposi-
tion a dead body without an accompanying permit as
provided in this article; or

(2) Any person who refuses to provide information
required by this article; or

(3) Any person who willfully neglects or violates any
of the provisions of this article or refuses to perform any
of the duties imposed upon him or her by this article,
shall be guilty of a misdemeanor, and, upon conviction
thereof, shall be punished by a fine of not less than
twenty-five dollars nor more than one hundred dollars
or by imprisonment for not more than thirty days, or
by both such fine and imprisonment: Provided, That
where there is cause to suspect a contagious disease, any
person who willfully neglects to provide information
that there is cause to suspect a contagious disease on any
death certificate or burial or transit permit required
pursuant to sections nineteen, twenty, and twenty-one of
this article shall be guilty of a misdemeanor, and, upon
conviction thereof, shall be punished by a fine of not less
than one thousand nor more than three thousand dollars
or by a confinement in jail for not less than six nor more
than nine months, or by both such fine and confinement
in the discretion of the court. Such criminal conviction
shall not operate to extinguish any private rights of
action against a person violating the requirements of
this section.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

Chairman Senate Committee

Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

Clerk of the Senate

Clerk of the House of Delegates

President of the Senate

Speaker of the House of Delegates

The within bill passed this the 31st day of January, 1988.

Governor
PRESENTED TO THE
GOVERNOR
Date 3/3/38
Time 3:32 p.m.