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SECRETARY OF STATE

WEST VIRGINIA LEGISLATURE

THIRD EXTRAORDINARY SESSION, 1988

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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

Bernard V. Kelly
Chairman House Committee

Originating in the House.

Takes effect September 1, 1988.

Jack C. Nichols
Clerk of the Senate

Donald L. Kipp
Clerk of the House of Delegates

Dan Tamm
President of the Senate

Boyd R. Kuntz
Speaker of the House of Delegates

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

Arch A. Moore
Governor

PRESENTED TO THE

GOVERNOR

Date 6/30/88

Time 4:20 p.m.