

WEST VIRGINIA LEGISLATURE

SECOND REGULAR SESSION, 1998

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OFFICE OF WEST VIRGINIA
SECRETARY OF STATE

— ● —
ENROLLED

House Bill No. 4503

(By Delegates Hutchins, Compton, Fleischauer, Rowe,
Hubbard, Thomas and Miller)

— ● —
Passed March 13, 1998

In Effect Ninety Days from Passage

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OFFICE OF THE CLERK
STATE OF WEST VIRGINIA

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H. B. 4503

(BY DELEGATES HUTCHINS, COMPTON, FLEISCHAUER, ROWE,
HUBBARD, THOMAS AND MILLER)

[Passed March 13, 1998; in effect ninety days from passage.]

AN ACT to amend and reenact sections one, two and three, article three-c, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, relating to AIDS/HIV-related medical testing, including the authorization for treating physicians to determine bona fide medical emergencies when HIV-related testing for medical diagnostic purposes is necessary; spousal notification regarding contact with a source patient tested positive for HIV; and mandating emergency regulations be proposed pursuant to the provisions of section fifteen, article three, chapter twenty-nine-a of this code on or before the first day of September, one thousand nine hundred ninety-eight, addressing confidentiality, costs associated with testing, documentation, post-test counseling, post-exposure prophylaxis and other matters.

Be it enacted by the Legislature of West Virginia:

That sections one, two and three, article three-c, chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended and reenacted, all to read as follows:

ARTICLE 3C. AIDS-RELATED TESTING AND RECONDS CONFIDENTIALITY ACT.

§16-3C-1. Definitions.

1 When used in this article:

2 (a) "AIDS" means acquired immunodeficiency
3 syndrome.

4 (b) "ARC" means AIDS-related complex.

5 (c) "Bureau" means the bureau of public health.

6 (d) "Commissioner" means the commissioner of the
7 bureau of public health.

8 (e) "Department" means the state department of health
9 and human resources.

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

13 (g) "Convicted" includes pleas of guilty and pleas of
14 nolo contendere accepted by the court having jurisdiction
15 of the criminal prosecution, a finding of guilty following a
16 jury trial or a trial to a court, and an adjudicated juvenile
17 offender as defined in section three, article five-b, chapter
18 forty-nine of this code.

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

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

24 (j) "HIV-related test" means a test for the HIV
25 antibody or antigen or any future valid test approved by
26 the bureau, the federal drug administration or the centers
27 for disease control.

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

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

35 (m) "Infant" means a person under six years of age.

36 (n) "Medical or emergency responders" means paid
37 or volunteer firefighters, law-enforcement officers,
38 emergency medical technicians, paramedics, or other
39 emergency service personnel, providers or entities acting
40 within the usual course of their duties; good samaritans
41 and other nonmedical and nonemergency personnel
42 providing assistance in emergencies; funeral directors;
43 health care providers; commissioner of the bureau of
44 public health; and all employees thereof and volunteers
45 associated therewith.

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

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

53 (q) "Release of test results" means a written
54 authorization for disclosure of HIV-related test results that
55 is signed, dated and specifies to whom disclosure is
56 authorized and the time period the release is to be
57 effective.

58 (r) "Significant exposure" means:

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

62 (2) Exposure of mucous membranes to visible blood
63 or body fluids, to which universal precautions apply
64 according to the national centers for disease control, and
65 laboratory specimens that contain HIV (e.g. suspensions
66 of concentrated virus); or

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

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

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

§16-3C-2. Testing.

1 (a) HIV-related testing may be requested by a
2 physician, dentist or the commissioner for any of the
3 following:

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

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 there is cause to believe that the results of
10 HIV-testing of samples of blood or body fluids from a
11 source patient could provide information important in the
12 care of medical or emergency responders or other
13 persons identified in regulations proposed by the
14 department for approval by the Legislature in accordance
15 with the provisions of article three, chapter twenty-nine-a
16 of this code: *Provided*, That the source patient whose
17 blood or body fluids is being tested pursuant to this section
18 must have come into contact with a medical or emergency
19 responder or other person in such a way that a significant
20 exposure has occurred;

21 (4) When any person voluntarily consents to the test.

22 (b) The requesting physician, dentist or the
23 commissioner shall provide the patient with written
24 information in the form of a booklet or pamphlet
25 prepared or approved by the bureau or, in the case of
26 persons who are unable to read, shall either show a video
27 or film prepared or approved by the bureau to the patient,
28 or read or cause to be read to the patient the information

29 prepared or approved by the bureau which contains the
30 following information:

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

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

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

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

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

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

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

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

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

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

76 (2) The performance of an HIV-related test in
77 documented bona fide medical emergencies, as
78 determined by a treating physician taking into account the
79 nature and extent of the exposure to another person, when
80 the subject of the test is unable or unwilling to grant or
81 withhold consent, and the test results are necessary for
82 medical diagnostic purposes to provide appropriate
83 emergency care or treatment to a medical or emergency
84 responder, or any other person who has come into contact
85 with a source patient in such a way that a significant
86 exposure necessitates HIV-testing or to a source patient
87 who is unable to consent in accordance with regulations
88 proposed by the department for approval by the
89 Legislature in accordance with article three, chapter
90 twenty-nine-a of this code: *Provided*, That necessary
91 treatment may not be withheld pending HIV test results:
92 *Provided, however*, That all sampling and HIV-testing of
93 samples of blood and body fluids, without the expressed
94 written consent of the test subject, shall be through the use
95 of a pseudonym and in accordance with regulations
96 proposed by the department for approval by the
97 Legislature in accordance with article three, chapter
98 twenty-nine-a of this code: *Provided further*, That the
99 department shall propose emergency rules pursuant to the
100 provisions of section fifteen, article three, chapter twenty-
101 nine-a of this code on or before the first day of
102 September, one thousand nine hundred ninety-eight,
103 addressing such matters as, but not limited to:

104 (A) Sampling and testing of blood and body fluids for
105 HIV-related infections including: (i) The taking of
106 samples from source patients; (ii) testing samples; (iii)

107 confidentiality; (iv) documentation; (v) post-test
108 counseling; and (vi) notices to the department by health
109 care providers of: (I) Test results found to be positive and
110 situations where sampling and (II) testing was performed
111 without the written consent of the test subject; and

112 (B) Costs associated with sampling, testing, counseling,
113 initial prophylactic treatment and compliance with this
114 article: *Provided*, That: (i) The ordering of samples of
115 blood or body fluids for HIV-test or testing of available
116 samples by: (I) A treating physician of a medical or
117 emergency responder; or (II) a treating physician of the
118 source patient; and (ii) the disclosure of the results of
119 HIV-testing of the source patient, in accordance with
120 regulations proposed by the department for approval by
121 the Legislature pursuant to article three, chapter twenty-
122 nine-a of this code, shall be deemed within acceptable
123 standards of medical care in the state of West Virginia and
124 shall not create a legal cause of action on the part of the
125 source patient against: (i) The treating physician of the
126 medical or emergency responder; or (ii) the treating
127 physician of the source patient; or (iii) any health care
128 provider or laboratory assisting such treating physicians.

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

133 (f) Mandated testing:

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

137 (2) The court having jurisdiction of the criminal
138 prosecution shall order that an HIV-related test be
139 performed on any persons convicted of any of the
140 following crimes or offenses:

141 (i) Prostitution; or

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

144 (3) HIV-related tests performed on persons convicted
145 of prostitution, sexual abuse, sexual assault, incest or
146 sexual molestation shall be confidentially administered by
147 a designee of the bureau or the local or county health
148 department having proper jurisdiction. The commissioner
149 may designate health care providers in regional jail
150 facilities to administer HIV-related tests on such convicted
151 persons if he or she deems it necessary and expedient.

152 (4) When the director of the department knows or has
153 reason to believe, because of medical or epidemiological
154 information, that a person, including, but not limited to, a
155 person such as an IV drug abuser, or a person who may
156 have a sexually transmitted disease, or a person who has
157 sexually molested, abused or assaulted another, has HIV
158 infection and is or may be a danger to the public health,
159 he may issue an order to:

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

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

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

167 (5) A person convicted of such offenses shall be
168 required to undergo HIV-related testing and counseling
169 immediately upon conviction and the court having
170 jurisdiction of the criminal prosecution shall not release
171 such convicted person from custody and shall revoke any
172 order admitting the defendant to bail until HIV-related
173 testing and counseling have been performed. The HIV-
174 related test result obtained from the convicted person is to
175 be transmitted to the court and, after the convicted person
176 is sentenced, made part of the court record. If the
177 convicted person is placed in the custody of the division
178 of corrections, the court shall transmit a copy of the
179 convicted person's HIV-related test results to the division
180 of corrections. The HIV-related test results shall be closed
181 and confidential and disclosed by the court and the

182 bureau only in accordance with the provisions of section
183 three of this article.

184 (6) A person charged with prostitution, sexual abuse,
185 sexual assault, incest or sexual molestation shall be
186 informed upon initial court appearance by the judge or
187 magistrate responsible for setting the person's condition of
188 release pending trial of the availability of voluntary HIV-
189 related testing and counseling conducted by the bureau.

190 (7) The prosecuting attorney shall inform the victim,
191 or parent or guardian of the victim, at the earliest stage of
192 the proceedings of the availability of voluntary HIV-
193 related testing and counseling conducted by the bureau
194 and that his or her best health interest would be served by
195 submitting to HIV-related testing and counseling. HIV-
196 related testing for the victim shall be administered at his or
197 her request on a confidential basis and shall be
198 administered in accordance with the centers for disease
199 control guidelines of the United States public health
200 service in effect at the time of such request. The victim
201 who obtains an HIV-related test shall be provided with
202 pre- and post-test counseling regarding the nature,
203 reliability and significance of the HIV-related test and the
204 confidential nature of the test. HIV-related testing and
205 counseling conducted pursuant to this subsection shall be
206 performed by the designee of the commissioner of the
207 bureau or by any local or county health department
208 having proper jurisdiction.

209 (8) If a person receives counseling or is tested under
210 this subsection and is found to be HIV infected, the person
211 shall be referred by the health care provider performing
212 the counseling or testing for appropriate medical care and
213 support services. The local or county health departments
214 or any other agency providing counseling or testing under
215 this subsection shall not be financially responsible for
216 medical care and support services received by a person as
217 a result of a referral made under this subsection.

218 (9) The commissioner of the bureau or his or her
219 designees may require an HIV test for the protection of a
220 person who was possibly exposed to HIV infected blood
221 or other body fluids as a result of receiving or rendering

222 emergency medical aid or who possibly received such
223 exposure as a funeral director. Results of such a test of
224 the person causing exposure may be used by the
225 requesting physician for the purpose of determining
226 appropriate therapy, counseling and psychological
227 support for the person rendering emergency medical aid
228 including good Samaritans, as well as for the patient, or
229 individual receiving the emergency medical aid.

230 (10) If an HIV-related test required on persons
231 convicted of prostitution, sexual abuse, sexual assault,
232 incest or sexual molestation results in a negative reaction,
233 upon motion of the state, the court having jurisdiction
234 over the criminal prosecution may require the subject of
235 the test to submit to further HIV-related tests performed
236 under the direction of the bureau in accordance with the
237 centers for disease control guidelines of the United States
238 public health service in effect at the time of the motion of
239 the state.

240 (11) The costs of mandated testing and counseling
241 provided under this subsection and pre- and
242 postconviction HIV-related testing and counseling
243 provided the victim under the direction of the bureau
244 pursuant to this subsection shall be paid by the bureau.

245 (12) The court having jurisdiction of the criminal
246 prosecution shall order a person convicted of prostitution,
247 sexual abuse, sexual assault, incest or sexual molestation to
248 pay restitution to the state for the costs of any HIV-related
249 testing and counseling provided the convicted person and
250 the victim, unless the court has determined such convicted
251 person to be indigent.

252 (13) Any funds recovered by the state as a result of an
253 award of restitution under this subsection shall be paid
254 into the state treasury to the credit of a special revenue
255 fund to be known as the "HIV-testing fund" which is
256 hereby created. The moneys so credited to such fund
257 may be used solely by the bureau for the purposes of
258 facilitating the performance of HIV-related testing and
259 counseling under the provisions of this article.

260 (g) Premarital screening:

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

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

271 (h) The commissioner of the bureau may obtain and
272 test specimens for AIDS or HIV infection for research or
273 epidemiological purposes without consent of the person
274 from whom the specimen is obtained if all personal
275 identifying information is removed from the specimen
276 prior to testing.

277 (i) Nothing in this section is applicable to any insurer
278 regulated under chapter thirty-three of this code:
279 *Provided*, That the commissioner of insurance shall
280 develop standards regarding consent for use by insurers
281 which test for the presence of the HIV antibody.

282 (j) Whenever consent of the subject to the
283 performance of HIV-related testing is required under this
284 article, any such consent obtained, whether orally or in
285 writing, shall be deemed to be a valid and informed
286 consent if it is given after compliance with the provisions
287 of subsection (b) of this section.

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

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

6 (1) The subject of the test;

7 (2) The victim of the crimes of sexual abuse, sexual
8 assault, incest or sexual molestation at the request of the

9 victim or the victim's legal guardian, or of the parent or
10 legal guardian of the victim if the victim is an infant where
11 disclosure of the HIV-related test results of the convicted
12 sex offender are requested;

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

15 (4) A funeral director or an authorized agent or
16 employee of a health facility or health care provider if the
17 funeral establishment, health facility or health care
18 provider itself is authorized to obtain the test results, the
19 agent or employee provides patient care or handles or
20 processes specimens of body fluids or tissues and the
21 agent or employee has a need to know such information:
22 *Provided*, That such funeral director, agent or employee
23 shall maintain the confidentiality of such information;

24 (5) Licensed medical personnel or appropriate health
25 care personnel providing care to the subject of the test,
26 when knowledge of the test results is necessary or useful to
27 provide appropriate care or treatment, in an appropriate
28 manner: *Provided*, That such personnel shall maintain the
29 confidentiality of such test results. The entry on a
30 patient's chart of an HIV-related illness by the attending or
31 other treating physician or other health care provider shall
32 not constitute a breach of confidentiality requirements
33 imposed by this article;

34 (6) The bureau or the centers for disease control of
35 the United States public health service in accordance with
36 reporting requirements for a diagnosed case of AIDS, or a
37 related condition;

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

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

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

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

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

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

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

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

83 (b) No person to whom the results of an HIV-related
84 test have been disclosed pursuant to subsection (a) of this

85 section may disclose the test results to another person
86 except as authorized by said subsection.

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

100 (d) Notwithstanding the provisions set forth in
101 subsections (a) through (c) of this section, the use of HIV
102 test results to inform individuals named or identified as
103 spouses, sex partners or contacts, or persons who have
104 shared needles that they may be at risk of having acquired
105 the HIV infection as a result of possible exchange of body
106 fluids, is permitted: *Provided*, That the bureau shall make
107 a good faith effort to inform spouses, sex partners,
108 contacts or persons who have shared needles that they may
109 be at risk of having acquired the HIV infection as a result
110 of possible exchange of body fluids: *Provided, however*,
111 That the bureau shall have no notification obligations
112 when the bureau determines that there has been no likely
113 exposure of such persons to HIV from the infected test
114 subject within the ten-year period immediately prior to the
115 diagnosis of the infection. The name or identity of the
116 person whose HIV test result was positive is to remain
117 confidential. Spouses, contacts, or sex partners or persons
118 who have shared needles may be tested anonymously at
119 the state bureau of public health's designated test sites, or
120 at their own expense by a health care provider or an
121 approved laboratory of their choice. A cause of action
122 will not arise against the bureau, a physician or other
123 health care provider from any such notification.

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

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

Randy Schriver
Chairman Senate Committee

Nick Frantasia
Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

Carroll E. Adams
Clerk of the Senate

Brian M. Gray
Clerk of the House of Delegates

Carl Ray Tomblin
President of the Senate

[Signature]
Speaker of the House of Delegates

The within *approved* this the *6th*
day of *April*, 1998.

[Signature]
Governor

PRESENTED TO THE

GOVERNOR

Date

5/26/98

Time

10:45 am