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
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 RECORDS CONFIDENTIALITY ACT.

§16-3C-1. Definitions.
When used in this article:

(a) "AIDS" means acquired immunodeficiency syndrome.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(r) “Significant exposure” means:

1. Exposure to blood or body fluids through needlestick, instruments, sharps, surgery or traumatic events; or

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

3. Exposure of skin to visible blood or body fluids, when the exposed skin is chapped, abraded or afflicted with dermatitis or the contact is prolonged or involving an extensive area.
(s) "Source patient" means any person whose body fluids have been the source of a significant exposure to a medical or emergency responder.

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

§16-3C-2. Testing.

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

1. When there is cause to believe that the test could be positive;

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

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

4. When any person voluntarily consents to the test.

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

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

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

(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;

(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 patient 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 the following:
66 (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;

76 (2) The performance of an HIV-related test in documented bona fide medical emergencies, as determined by a treating physician taking into account the nature and extent of the exposure to another person, when the subject of the test is unable or unwilling to grant or withhold consent, and the test results are necessary for medical diagnostic purposes to provide appropriate emergency care or treatment to a medical or emergency responder, or any other person who has come into contact with a source patient in such a way that a significant exposure necessitates HIV-testing or to a source patient who is unable to consent in accordance with regulations proposed by the department for approval by the Legislature in accordance with article three, chapter twenty-nine-a of this code: Provided, That necessary treatment may not be withheld pending HIV test results: Provided, however, That all sampling and HIV-testing of samples of blood and body fluids, without the expressed written consent of the test subject, shall be through the use of a pseudonym and in accordance with regulations proposed by the department for approval by the Legislature in accordance with article three, chapter twenty-nine-a of this code: Provided further, That the department shall propose emergency rules 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 such matters as, but not limited to:

104 (A) Sampling and testing of blood and body fluids for HIV-related infections including: (i) The taking of samples from source patients; (ii) testing samples; (iii)
confidentiality; (iv) documentation; (v) post-test counseling; and (vi) notices to the department by health care providers of: (I) Test results found to be positive and situations where sampling and (II) testing was performed without the written consent of the test subject; and

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

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

(i) Prostitution; or

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

(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.

(5) A person convicted of such offenses shall be required to undergo HIV-related testing and counseling immediately upon conviction and the court having jurisdiction of the criminal prosecution shall not release such convicted person from custody and shall revoke any order admitting the defendant to bail until HIV-related testing and counseling have been performed. The HIV-related test result obtained from the convicted person is to be transmitted to the court and, after the convicted person is sentenced, made part of the court record. If the convicted person is placed in the custody of the division of corrections, the court shall transmit a copy of the convicted person's HIV-related test results to the division of corrections. The HIV-related test results shall be closed and confidential and disclosed by the court and the
bureau only in accordance with the provisions of section three of this article.

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

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

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

(9) The commissioner of the bureau 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.

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

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

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

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

(g) 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 bureau.

(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 bureau.

(h) The commissioner of the bureau 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.

(i) 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.

(j) 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 provisions of subsection (b) of this section.

§16-3C-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) The victim of the crimes of sexual abuse, sexual assault, incest or sexual molestation at the request of the
victim or the victim's legal guardian, or of the parent or legal guardian of the victim if the victim is an infant where disclosure of the HIV-related test results of the convicted sex offender are requested;

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

(4) 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;

(5) 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 appropriate 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 confidentiality requirements imposed by this article;

(6) The bureau 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;

(7) 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; (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; or (D) human body parts for transplant with respect to medical information regarding the donor or recipient;
(8) 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

(9) 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 said subsection.

(c) Whenever disclosure is made pursuant to this section, except when such disclosure is made to persons in accordance with subdivisions (1) and (6), 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 spouses, 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: Provided, That the bureau shall make a good faith effort to inform spouses, sex partners, 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: Provided, however, That the bureau shall have no notification obligations when the bureau determines that there has been no likely exposure of such persons to HIV from the infected test subject within the ten-year period immediately prior to the diagnosis of the infection. The name or identity of the person whose HIV test result was positive is to remain confidential. Spouses, contacts, or sex partners or persons who have shared needles may be tested anonymously at the state bureau of public health's 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 bureau, 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 notification. However, if contact is not made, the bureau will be so notified.
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

[Signature]
Chairman Senate Committee

[Signature]
Chairman House Committee

Originating in the House.

Takes effect ninety days from passage.

[Signature]
Clerk of the Senate

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Clerk of the House of Delegates

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President of the Senate

[Signature]
Speaker of the House of Delegates

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

[Signature]
Governor