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WEST VIRGINIA LEGISLATURE

REGULAR SESSION, 1993



ENROLLED

Com. Sub. for
SENATE BILL NO. 423

(By Senator *Jones*)



PASSED *April 10,* 1993
In Effect *90 days from* Passage

E N R O L L E D

COMMITTEE SUBSTITUTE

FOR

Senate Bill No. 423

(SENATORS JONES, PLYMALE, HOLLIDAY AND
ANDERSON, *original sponsors*)

[Passed April 10, 1993; in effect ninety days from passage.]

AN ACT to amend article two, chapter fifteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new section, designated section twenty-four-a; and to amend sections one, two, three and eight, article three-c, chapter sixteen of said code, all relating to serological testing generally; providing for the notification of certain individuals and entities of test results; and providing for confidentiality of test results.

Be it enacted by the Legislature of West Virginia:

That article two, chapter fifteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new section, designated section twenty-four-a; and that chapter sixteen of said code be amended by adding thereto a new article, designated article three-c, all to read as follows:

CHAPTER 15. PUBLIC SAFETY.

ARTICLE 2. DEPARTMENT OF PUBLIC SAFETY.

§15-2-24a. Establishment of centralized database of DNA identification records in division of public safety.

1 (a) A centralized database of DNA (deoxyribonucleic
2 acid) identification records for convicted felons, shall
3 be established in the division of public safety under
4 the direction, control and supervision of the division of
5 public safety criminal identification bureau forensic
6 laboratory. The established system shall be compatible
7 with the procedures set forth in a national DNA
8 identification index to ensure data exchange on a
9 national level.

10 (b) The purpose of the centralized DNA database is
11 to assist federal, state and local criminal justice and
12 law-enforcement agencies within and outside the state
13 in the identification, detection or exclusion of individ-
14 uals who are subjects of the investigation or prosecu-
15 tion of sex-related crimes, violent crimes or other
16 crimes and the identification and location of missing
17 and unidentified persons.

18 (c) In any trial conducted in this state after the first
19 day of July, one thousand nine hundred ninety-three,
20 when the defendant is convicted and when evidence of
21 the DNA of the defendant is introduced, the prosecu-
22 ting attorney shall forward the results of the test to
23 the division of public safety for entry in the database.

24 (d) Records produced from the samples shall be used
25 only for law-enforcement purposes.

26 (e) A person whose DNA profile has been included
27 in the data bank pursuant to this section may request
28 expungement on the grounds that the felony convic-
29 tion on which the authority for including the DNA
30 profile was based has been reversed and the case
31 dismissed. The division of public safety shall expunge
32 all identifiable information in the data bank pertaining
33 to the person and destroy all samples from the person
34 upon receipt of:

35 (1) A written request for expungement pursuant to
36 this section; and

37 (2) A certified copy of the court order reversing and
38 dismissing the conviction or providing for ex-
39 pungement.

40 (f) The superintendent of the division of public
41 safety shall promulgate administrative rules necessary
42 to carry out the provisions of the DNA database
43 identification system to include procedures for the
44 database system usage and integrity.

45 (g) Any person who disseminates, receives or other-
46 wise uses or attempts to use information in the
47 database, knowing that such dissemination, receipt or
48 use is for a purpose other than authorized by law, is
49 guilty of a misdemeanor, and, upon conviction thereof,
50 shall be fined not less than fifty dollars nor more than
51 five hundred dollars, or imprisoned in the county jail
52 not more than one year, or both fined and imprisoned.

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) "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
9 health and human resources.

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

13 (g) "Convicted" includes pleas of guilty and pleas of

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

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

22 (i) "HIV" means the human immunodeficiency
23 virus 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
26 by the bureau, the federal drug administration or the
27 centers for disease control.

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

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

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

36 (n) "Patient" means the person receiving the HIV-
37 related testing.

38 (o) "Person" includes any natural person, partner-
39 ship, association, joint venture, trust, public or private
40 corporation or health facility.

41 (p) "Release of test results" means a written autho-
42 rization for disclosure of HIV-related test results that
43 is signed, dated and specifies to whom disclosure is
44 authorized and the time period the release is to be
45 effective.

46 (q) "Victim" means the person or persons to whom
47 transmission of bodily fluids from the perpetrator of
48 the crimes of sexual abuse, sexual assault, incest or
49 sexual molestation occurred or was likely to have
50 occurred in the 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
5 be positive;

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

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

10 (b) The requesting physician, dentist or the commis-
11 sioner shall provide the patient with written informa-
12 tion in the form of a booklet or pamphlet prepared or
13 approved by the bureau or, in the case of persons who
14 are unable to read, shall either show a video or film
15 prepared or approved by the bureau to the patient, or
16 read or cause to be read to the patient the information
17 prepared or approved by the bureau which contains
18 the following information:

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

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

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

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

31 (5) An explanation of the nature and current know-
32 ledge of asymptomatic HIV infection, ARC and AIDS
33 and the relationship between the test result and those
34 diseases; and

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

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

47 (d) At the time of learning of any test result, the
48 patient shall be provided with counseling or referral
49 for counseling for coping with the emotional conse-
50 quences of learning any test result. This may be done
51 by brochure or personally, or both.

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

55 (1) A health care provider or health facility perform-
56 ing an HIV-related test on the donor or recipient
57 when the health care provider or health facility
58 procures, processes, distributes or uses a human body
59 part (including tissue and blood or blood products)
60 donated for a purpose specified under the uniform
61 anatomical gift act, or for transplant recipients, or
62 semen provided for the purpose of artificial insemina-
63 tion and such test is necessary to assure medical
64 acceptability of a recipient or such gift or semen for
65 the purposes intended;

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

75 (3) The performance of an HIV-related test for the
76 purpose of research if the testing is performed in a

77 manner by which the identity of the test subject is not
78 known and may not be retrieved by the researcher.

79 (f) Mandated testing:

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

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

87 (i) Prostitution; or

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

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

99 (4) When the director of the department knows or
100 has reason to believe, because of medical or epidemi-
101 ological information, that a person, including, but not
102 limited to, a person such as an IV drug abuser, or a
103 person who may have a sexually transmitted disease,
104 or a person who has sexually molested, abused or
105 assaulted another, has HIV infection and is or may be
106 a danger to the public health, he may issue an order
107 to:

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

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

113 (iii) Direct a person with HIV infection to cease and

114 desist from specified conduct which endangers the
115 health of others.

116 (5) A person convicted of such offenses shall be
117 required to undergo HIV-related testing and counsel-
118 ing immediately upon conviction and the court having
119 jurisdiction of the criminal prosecution shall not
120 release such convicted person from custody and shall
121 revoke any order admitting the defendant to bail until
122 HIV-related testing and counseling have been per-
123 formed. The HIV-related test result obtained from the
124 convicted person is to be transmitted to the court and,
125 after the convicted person is sentenced, made part of
126 the court record. If the convicted person is placed in
127 the custody of the division of corrections, the court
128 shall transmit a copy of the convicted person's HIV-
129 related test results to the division of corrections. The
130 HIV-related test results shall be closed and confiden-
131 tial and disclosed by the court and the bureau only in
132 accordance with the provisions of section three of this
133 article.

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

141 (7) The prosecuting attorney shall inform the victim,
142 or parent or guardian of the victim, at the earliest
143 stage of the proceedings of the availability of voluntary
144 HIV-related testing and counseling conducted by the
145 bureau and that his or her best health interest would
146 be served by submitting to HIV-related testing and
147 counseling. HIV-related testing for the victim shall be
148 administered at his or her request on a confidential
149 basis and shall be administered in accordance with the
150 centers for disease control guidelines of the United
151 States public health service in effect at the time of
152 such request. The victim who obtains an HIV-related
153 test shall be provided with pre and post-test counseling
154 regarding the nature, reliability and significance of the

155 HIV-related test and the confidential nature of the
156 test. HIV-related testing and counseling conducted
157 pursuant to this subsection shall be performed by the
158 designee of the commissioner of the bureau or by any
159 local or county health department having proper
160 jurisdiction.

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

171 (9) The commissioner of the bureau or his or her
172 designees may require an HIV test for the protection
173 of a person who was possibly exposed to HIV infected
174 blood or other body fluids as a result of receiving or
175 rendering emergency medical aid or who possibly
176 received such exposure as a funeral director. Results
177 of such a test of the person causing exposure may be
178 used by the requesting physician for the purpose of
179 determining appropriate therapy, counseling and
180 psychological support for the person rendering emer-
181 gency medical aid including good samaritans, as well
182 as for the patient, or individual receiving the emer-
183 gency medical aid.

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

194 (11) The costs of mandated testing and counseling

195 provided under this subsection and pre and post-
196 conviction HIV-related testing and counseling provid-
197 ed the victim under the direction of the bureau
198 pursuant to this subsection shall be paid by the
199 bureau.

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

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

216 (g) Premarital screening:

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

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

228 (h) The commissioner of the bureau may obtain and
229 test specimens for AIDS or HIV infection for research
230 or epidemiological purposes without consent of the
231 person from whom the specimen is obtained if all
232 personal identifying information is removed from the
233 specimen prior to testing.

234 (i) Nothing in this section is applicable to any
235 insurer regulated under chapter thirty-three of this
236 code: *Provided*, That the commissioner of insurance
237 shall develop standards regarding consent for use by
238 insurers which test for the presence of the HIV
239 antibody.

240 (j) Whenever consent of the subject to the perfor-
241 mance of HIV-related testing is required under this
242 article, any such consent obtained, whether orally or
243 in writing, shall be deemed to be a valid and informed
244 consent if it is given after compliance with the
245 provisions 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
3 HIV-related test is performed, or the results of such a
4 test in a manner which permits identification of the
5 subject of the 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
9 the victim or the victim's legal guardian, or of the
10 parent or legal guardian of the victim if the victim is
11 an infant where disclosure of the HIV-related test
12 results of the convicted 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
17 the funeral establishment, health facility or health
18 care provider itself is authorized to obtain the test
19 results, the agent or employee provides patient care or
20 handles or processes specimens of body fluids or
21 tissues and the agent or employee has a need to know
22 such information: *Provided*, That such funeral direc-
23 tor, agent or employee shall maintain the confidential-
24 ity of such information;

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

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

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

49 (8) Health facility staff committees or accreditation
50 or oversight review organizations which are conduct-
51 ing program monitoring, program evaluation or ser-
52 vice reviews so long as any identity remains any-
53 mous; and

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

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

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

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

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

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

86 (b) No person to whom the results of an HIV-related
87 test have been disclosed pursuant to subsection (a) of
88 this section may disclose the test results to another
89 person except as authorized by said subsection.

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

104 (d) Notwithstanding the provisions set forth in
105 subsections (a) through (c) of this section, the use of
106 HIV test results to inform individuals named or
107 identified as sex partners or contacts or persons who
108 have shared needles that they may be at risk of having
109 acquired the HIV infection as a result of possible
110 exchange of body fluids, is permitted. The name or
111 identity of the person whose HIV test result was
112 positive is to remain confidential. Contacts or identi-
113 fied partners may be tested anonymously at the state
114 bureau of public health's designated test sites, or at
115 their own expense by a health care provider or an
116 approved laboratory of their choice. A cause of action
117 will not arise against the bureau, a physician or other
118 health care provider from any such notification.

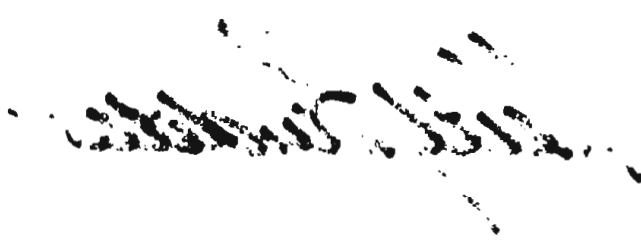
119 (e) There is no duty on the part of the physician or
120 health care provider to notify the spouse or other
121 sexual partner of, or persons who have shared needles
122 with, an infected individual of their HIV infection and
123 a cause of action will not arise from any failure to
124 make such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

§16-3C-8. Administrative implementation.

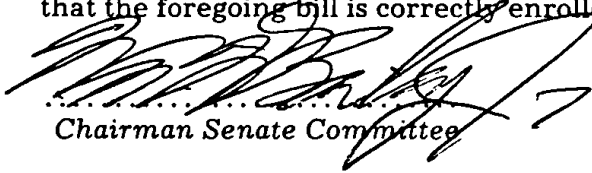
1 (a) The commissioner of the bureau shall immedi-
2 ately implement and enforce the provisions of this
3 article, and shall adopt rules to the extent necessary
4 for further implementation of the article. The rules
5 proposed by the bureau pursuant to this article may
6 include procedures for taking appropriate action with
7 regard to health care facilities or health care providers
8 which violate this article or the rules promulgated
9 hereunder. The provisions of the state administrative
10 procedures act apply to all administrative rules and
11 procedures of the bureau pursuant to this article,
12 except that in case of conflict between the state
13 administrative procedures act and this article, the
14 provisions of this article shall control.

15 (b) The bureau shall promulgate rules to assure
16 adequate quality control for all laboratories conducting
17 HIV tests and to provide for a reporting and monitor-

18 ing system for reporting to the bureau all positive HIV
19 tests results.



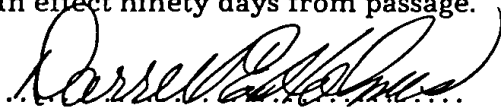
The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.


.....
Chairman Senate Committee

Ernest C. Moore
.....
Chairman House Committee

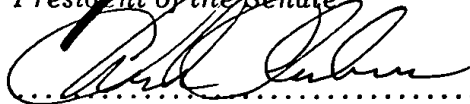
Originated in the Senate.

In effect ninety days from passage.

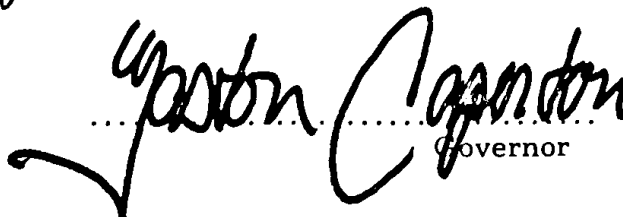

.....
Clerk of the Senate

Donald T. Hoop
.....
Clerk of the House of Delegates


.....
President of the Senate


.....
Speaker House of Delegates

The within is approved.....this the 12th
day of May....., 1993.


.....
Governor

PRESENTED TO THE

GOVERNOR

Date 4/24/93

Time 1:37 PM