

1 **ENROLLED**

2 COMMITTEE SUBSTITUTE

3 FOR

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5 FOR

6 **Senate Bill No. 488**

7 (SENATORS STOLLINGS, FOSTER, HALL, WILLS, SNYDER, KESSLER (ACTING
8 PRESIDENT), JENKINS, PLYMALE AND MILLER, *original sponsors*)

9 _____
10 [Passed March 12, 2011; in effect ninety days from passage.]
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13 AN ACT to repeal §16-3C-7 of the Code of West Virginia, 1931, as
14 amended; and to amend and reenact §16-3C-1, §16-3C-2 and §16-
15 3C-3 of said code, all relating to HIV testing generally;
16 repealing the authority of the Department of Corrections to
17 conduct AIDS-related study; providing for AIDS-related testing
18 and confidentiality of records; providing definitions;
19 providing who may request testing; providing when testing may
20 be mandated; providing for confidentiality of records;
21 providing enforcement mechanism for orders of the Commissioner
22 of the Bureau of Public Health; eliminating requirements for
23 counseling in certain circumstances; eliminating requirement
24 for information regarding HIV and AIDS be provided to persons
25 applying for marriage licenses; and providing when disclosure
26 is permitted.

27 *Be it enacted by the Legislature of West Virginia:*

28 That §16-3C-7 of the Code of West Virginia, 1931, as amended,

1 be repealed; and that §16-3C-1, §16-3C-2 and §16-3C-3 of said code
2 be amended and reenacted, all to read as follows:

3 **ARTICLE 3C. AIDS-RELATED MEDICAL TESTING AND RECORDS**
4 **CONFIDENTIALITY ACT.**

5 **§16-3C-1. Definitions.**

6 When used in this article:

7 (a) "AIDS" means acquired immunodeficiency syndrome.

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9 (b) "Bureau" means the Bureau for Public Health.

10 (c) "Commissioner" means the commissioner of the Bureau for
11 Public Health.

12 (d) "Convicted" includes pleas of guilty and pleas of nolo
13 contendere accepted by the court having jurisdiction of the
14 criminal prosecution, a finding of guilty following a jury trial or
15 a trial to a court and an adjudicated juvenile offender as defined
16 in sections two and four, article one, chapter forty-nine of this
17 code.

18 (e) "Department" means the State Department of Health and
19 Human Resources.

20 (f) "Funeral director" has the same meaning ascribed to such
21 term in section three, article six, chapter thirty of this code.

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23 (g) "Funeral establishment" has the same meaning ascribed to
24 that term in section three, article six, chapter thirty of this
25 code.

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

28 (i) "HIV-related test" means a test for the HIV antibody or

1 antigen or any future valid test approved by the bureau, the
2 federal drug administration or the Centers for Disease Control and
3 Prevention.

4 (j) "Health facility" means a hospital, nursing home,
5 physician's office, clinic, blood bank, blood center, sperm bank,
6 laboratory or other health care institution.

7 (k) "Health care provider" means any physician, dentist,
8 nurse, paramedic, psychologist or other person providing medical,
9 dental, nursing, psychological or other health care services of any
10 kind.

11 (l) "Health Information Exchange" means the electronic
12 movement of health-related information in accord with law and
13 nationally recognized standards.

14 (m) "High risk behavior" means behavior by a person including,
15 but not limited to: (i) Unprotected sex with a person who is living
16 with HIV; (ii) unprotected sex in exchange for money or drugs;
17 (iii) unprotected sex with multiple partners; (iv) anonymous
18 unprotected sex; (v) or needle sharing; (vi) diagnosis of a
19 sexually transmitted disease; or (vii) unprotected sex or sharing
20 injecting equipment in a high HIV prevalence setting or with a
21 person who is living with HIV.

22 (n) "Medical or emergency responders" means paid or volunteer
23 firefighters, law-enforcement officers, emergency medical
24 technicians, paramedics, or other emergency service personnel,
25 providers or entities acting within the usual course of their
26 duties; good samaritans and other nonmedical and nonemergency
27 personnel providing assistance in emergencies; funeral directors;
28 health care providers; commissioner of the Bureau for Public

1 Health; and all employees thereof and volunteers associated
2 therewith.

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

6 (p) "Permitted purpose" is a disclosure permitted by the
7 Health Insurance Portability and Accountability Act of 1996 as
8 amended, or a disclosure consented to or authorized by a patient or
9 test subject.

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

13 (r) "Release of test results" means a permitted or authorized
14 disclosure of HIV-related test results.

15 (s) "Significant exposure" means:

16 (1) Exposure to blood or body fluids through needlestick,
17 instruments, sharps, surgery or traumatic events; or

18 (2) Exposure of mucous membranes to visible blood or body
19 fluids, to which universal precautions apply according to the
20 national Centers for Disease Control and Prevention, and laboratory
21 specimens that contain HIV (e.g. suspensions of concentrated
22 virus); or

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

26 (t) "Source patient" means any person whose body fluids have
27 been the source of a significant exposure to a medical or emergency
28 responder.

1 (u) "Targeted testing" means performing an HIV-related test
2 for sub-populations at higher risk, typically defined on the basis
3 of behavior, clinical or demographic characteristics.

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

8 **§16-3C-2. Testing.**

9 (a) HIV-related testing on a voluntary basis should be
10 recommended by any healthcare provider in a health facility as part
11 of a routine screening for treatable conditions and as part of
12 routine prenatal and perinatal care. A physician, dentist, nurse
13 practitioner, nurse midwife, physician assistant or the
14 commissioner may also request targeted testing for any of the
15 following:

16 (1) When there is cause to believe that the test could be
17 positive. Persons who engage in high risk behavior should be
18 encouraged to be screened for HIV at least annually;

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

21 (3) When there is cause to believe that the results of HIV-
22 testing of samples of blood or body fluids from a source patient
23 could provide information important in the care of medical or
24 emergency responders or other persons identified in regulations
25 proposed by the department for approval by the Legislature in
26 accordance with the provisions of article three, chapter twenty-
27 nine-a of this code: *Provided*, That the source patient whose blood
28 or body fluids is being tested pursuant to this section must have

1 come into contact with a medical or emergency responder or other
2 person in such a way that a significant exposure has occurred;

3 (4) When there is no record of any HIV-related testing during
4 pregnancy and the woman presents for labor and delivery.

5 (b) A patient voluntarily consents to the test as follows:

6 (1) The patient is informed either orally or in writing that
7 HIV-related testing will be performed as part of his or her routine
8 care, that HIV-related testing is voluntary and that the patient
9 may decline HIV-related testing (opt-out); or

10 (2) The patient is informed that the patient's general consent
11 for medical care includes consent for HIV-related testing.

12 (c) A patient refuses to consent to the test if a patient
13 opts-out of HIV-related testing, the patient is informed when the
14 health care provider in the provider's professional opinion
15 believes HIV-related testing is recommended, and that HIV-related
16 testing may be obtained anonymously at a local or county health
17 department.

18 (d) Any person seeking an HIV-related test in a local or
19 county health department or other HIV test setting provided by the
20 commissioner who wishes to remain anonymous has the right to do so,
21 and to be provided written informed consent through use of a coded
22 system with no linking of individual identity to the test request
23 or results.

24 (e) No option to opt-out of HIV-related testing is required
25 and the provisions of subsection (a) and (b) of this section do not
26 apply for the following:

27 (1) A health care provider or health facility performing an
28 HIV-related test on the donor or recipient when the health care

1 provider or health facility procures, processes, distributes or
2 uses a human body part (including tissue and blood or blood
3 products) donated for a purpose specified under the uniform
4 anatomical gift act, or for transplant recipients, or semen
5 provided for the purpose of artificial insemination and such test
6 is necessary to assure medical acceptability of a recipient or such
7 gift or semen for the purposes intended;

8 (2) The performance of an HIV-related test in documented bona
9 fide medical emergencies, as determined by a treating physician
10 taking into account the nature and extent of the exposure to
11 another person, when the subject of the test is unable or unwilling
12 to grant or withhold consent, and the test results are necessary
13 for medical diagnostic purposes to provide appropriate emergency
14 care or treatment to a medical or emergency responder, or any other
15 person who has come into contact with a source patient in such a
16 way that a significant exposure necessitates HIV-testing or to a
17 source patient who is unable to consent in accordance with rules
18 proposed by the department for approval by the Legislature in
19 accordance with article three, chapter twenty-nine-a of this code:
20 *Provided*, That necessary treatment may not be withheld pending HIV
21 test results: *Provided, however*, That all sampling and HIV-testing
22 of samples of blood and body fluids, without the opportunity for
23 the source patient or patient's representative to opt-out of the
24 testing, shall be through the use of a pseudonym and in accordance
25 with rules proposed by the department for approval by the
26 Legislature in accordance with article three, chapter twenty-nine-a
27 of this code; or

28 (3) The performance of an HIV-related test for the purpose of

1 research if the testing is performed in a manner by which the
2 identity of the test subject is not known and may not be retrieved
3 by the researcher.

4 (f) Mandated testing:

5 (1) The performance of any HIV-related testing that is or
6 becomes mandatory by court order or other legal process described
7 herein does not require consent of the subject but will include
8 counseling.

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

12 (i) Prostitution; or

13 (ii) Sexual abuse, sexual assault, incest or sexual
14 molestation.

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

22 (4) When the Commissioner of the Bureau of Public Health knows
23 or has reason to believe, because of medical or epidemiological
24 information, that a person, including, but not limited to, a person
25 such as an IV drug abuser, or a person who may have a sexually
26 transmitted disease, or a person who has sexually molested, abused
27 or assaulted another, has HIV infection and is or may be a danger
28 to the public health, he or she may issue an order to:

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

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

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

7 (5) If any person violates a cease and desist order issued
8 pursuant to this section and, by virtue of that violation, the
9 person presents a danger to the health of others, the commissioner
10 shall apply to the circuit court of Kanawha County to enforce the
11 cease and desist order by imposing any restrictions upon the person
12 that are necessary to prevent the specific conduct that endangers
13 the health of others.

14 (6) A person convicted of the offenses described in this
15 section shall be required to undergo HIV-related testing and
16 counseling immediately upon conviction and the court having
17 jurisdiction of the criminal prosecution may not release the
18 convicted person from custody and shall revoke any order admitting
19 the defendant to bail until HIV-related testing and counseling have
20 been performed and the result is known. The HIV-related test
21 result obtained from the convicted person is to be transmitted to
22 the court and, after the convicted person is sentenced, made part
23 of the court record. If the convicted person is placed in the
24 custody of the Division of Corrections, the court shall transmit a
25 copy of the convicted person's HIV-related test results to the
26 Division of Corrections. The HIV-related test results shall be
27 closed and confidential and disclosed by the court and the bureau
28 only in accordance with the provisions of section three of this

1 article.

2 (7) The prosecuting attorney shall inform the victim, or
3 parent or guardian of the victim, at the earliest stage of the
4 proceedings of the availability of voluntary HIV-related testing
5 and counseling conducted by the bureau and that his or her best
6 health interest would be served by submitting to HIV-related
7 testing and counseling. HIV-related testing for the victim shall
8 be administered at his or her request on a confidential basis and
9 shall be administered in accordance with the Centers for Disease
10 Control and Prevention guidelines of the United States Public
11 Health Service in effect at the time of such request. The victim
12 who obtains an HIV-related test shall be provided with pre and
13 post-test counseling regarding the nature, reliability and
14 significance of the HIV-related test and the confidential nature of
15 the test. HIV-related testing and counseling conducted pursuant to
16 this subsection shall be performed by the designee of the
17 commissioner of the bureau or by any local or county health
18 department having proper jurisdiction.

19 (8) If a person receives counseling or is tested under this
20 subsection and is found to be HIV infected and the person is not
21 incarcerated, the person shall be referred by the health care
22 provider performing the counseling or testing for appropriate
23 medical care and support services. The local or county health
24 departments or any other agency under this subsection may not be
25 financially responsible for medical care and support services.

26 (9) The commissioner of the bureau or his or her designees may
27 require an HIV test for the protection of a person who was possibly
28 exposed to HIV infected blood or other body fluids as a result of

1 receiving or rendering emergency medical aid or who possibly
2 received such exposure as a funeral director. Results of such a
3 test of the person causing exposure may be used by the requesting
4 physician for the purpose of determining appropriate therapy,
5 counseling and psychological support for the person rendering
6 emergency medical aid including good Samaritans, as well as for the
7 patient, or individual receiving the emergency medical aid.

8 (10) If an HIV-related test required on persons convicted of
9 prostitution, sexual abuse, sexual assault, incest or sexual
10 molestation results in a negative reaction, upon motion of the
11 state, the court having jurisdiction over the criminal prosecution
12 may require the subject of the test to submit to further HIV-
13 related tests performed under the direction of the bureau in
14 accordance with the Centers for Disease Control and Prevention
15 guidelines of the United States Public Health Service in effect at
16 the time of the motion of the state.

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

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

27 (13) Any funds recovered by the state as a result of an award
28 of restitution under this subsection shall be paid into the State

1 Treasury to the credit of a special revenue fund to be known as the
2 "HIV-testing fund" which is hereby created. The moneys so credited
3 to the fund may be used solely by the bureau for the purposes of
4 facilitating the performance of HIV-related testing and counseling
5 under the provisions of this article.

6 (g) Nothing in this section is applicable to any insurer
7 regulated under chapter thirty-three of this code: *Provided*, That
8 the commissioner of insurance shall develop standards regarding
9 consent for use by insurers which test for the presence of the HIV
10 antibody.

11 (h) Whenever consent of the subject to the performance of HIV-
12 related testing is required under this article, any such consent
13 obtained, whether orally or in writing, shall be considered to be
14 a valid and informed consent if it is given after compliance with
15 the provisions of subsection (b) of this section.

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

18 (a) No person may disclose or be compelled to disclose the
19 identity of any person upon whom an HIV-related test is performed,
20 or the results of such a test in a manner which permits
21 identification of the subject of the test, except to the following
22 persons:

23 (1) The subject of the test;

24 (2) The victim of the crimes of sexual abuse, sexual assault,
25 incest or sexual molestation at the request of the victim or the
26 victim's legal guardian, or of the parent or legal guardian of the
27 victim if the victim is a minor where disclosure of the HIV-related
28 test results of the convicted sex offender are requested;

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

3 (4) A funeral director or an authorized agent or employee of
4 a health facility or health care provider if the funeral
5 establishment, health facility or health care provider itself is
6 authorized to obtain the test results, the agent or employee
7 provides patient care or handles or processes specimens of body
8 fluids or tissues and the agent or employee has a need to know that
9 information: *Provided*, That the funeral director, agent or employee
10 shall maintain the confidentiality of this information;

11 (5) Licensed health care providers or appropriate health
12 facility personnel providing care to the subject of the test::
13 *Provided*, That such personnel shall maintain the confidentiality of
14 the test results and may redisclose the results only for a
15 permitted purpose or as permitted by law. The entry on a patient's
16 chart of an HIV-related illness by the attending or other treating
17 physician or other health care provider shall not constitute a
18 breach of confidentiality requirements imposed by this article;

19 (6) The Bureau or the Centers for Disease Control and
20 Prevention of the United States Public Health Service in accordance
21 with reporting requirements for HIV and a diagnosed case of AIDS,
22 or a related condition;

23 (7) A health facility or health care provider which procures,
24 processes, distributes or uses: (A) A human body part from a
25 deceased person with respect to medical information regarding that
26 person; (B) semen provided prior to the effective date of this
27 article for the purpose of artificial insemination; (C) blood or
28 blood products for transfusion or injection; or (D) human body

1 parts for transplant with respect to medical information regarding
2 the donor or recipient;

3 (8) Health facility staff committees or accreditation or
4 oversight review organizations which are conducting program
5 monitoring, program evaluation or service reviews so long as any
6 identity remains anonymous;

7 (9) Claims management personnel employed by or associated with
8 an insurer, health care service contractor, health maintenance
9 organization, self-funded health plan, state-administered health
10 care claims payer or any other payer of health care claims, where
11 the disclosure is to be used solely for the prompt and accurate
12 evaluation and payment of medical or related claims. Information
13 released under this subsection is confidential and may not be
14 released or available to persons who are not involved in handling
15 or determining medical claims payment;

16 (10) Persons, health care providers or health facilities
17 engaging in or providing for the exchange of protected health
18 information among the same in order to provide health care services
19 to the patient, including, but not limited to, disclosure through
20 a health information exchange, disclosure and exchange within
21 health care facilities, and disclosure for a permitted purpose,
22 including disclosure to a legally authorized public health
23 authority; and

24 (11) A person allowed access to the record by a court order
25 that is issued in compliance with the following provisions:

26 (i) No court of this state may issue the order unless the
27 court finds that the person seeking the test results has
28 demonstrated a compelling need for the test results which cannot be

1 accommodated by other means. In assessing compelling need, the
2 court shall weigh the need for disclosure against the privacy
3 interest of the test subject and the public interest;

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

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

13 (iv) Court proceedings as to disclosure of test results shall
14 be conducted in camera unless the subject of the test agrees to a
15 hearing in open court or unless the court determines that the
16 public hearing is necessary to the public interest and the proper
17 administration of justice; and

18 (v) Upon the issuance of an order to disclose test results,
19 the court shall impose appropriate safeguards against unauthorized
20 disclosure, which shall specify the person who may have access to
21 the information, the purposes for which the information may be used
22 and appropriate prohibitions on future disclosure.

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

27 (c) Notwithstanding the provisions set forth in subsections
28 (a) through (c) of this section, the use of HIV test results to

1 inform individuals named or identified as spouses, sex partners or
2 contacts, or persons who have shared needles that they may be at
3 risk of having acquired the HIV infection as a result of possible
4 exchange of body fluids, is permitted: *Provided*, That the Bureau
5 shall make a good faith effort to inform spouses, sex partners,
6 contacts or persons who have shared needles that they may be at
7 risk of having acquired the HIV infection as a result of possible
8 exchange of body fluids: *Provided, however*, That the Bureau has no
9 notification obligations when the Bureau determines that there has
10 been no likely exposure of these persons to HIV from the infected
11 test subject within the ten-year period immediately prior to the
12 diagnosis of the infection. The name or identity of the person
13 whose HIV test result was positive is to remain confidential.
14 Spouses, contacts, or sex partners or persons who have shared
15 needles may be tested anonymously at the State Bureau for public
16 Health's designated test sites, or at their own expense by a health
17 care provider or an approved laboratory of their choice
18 confidentially should the test be positive. A cause of action may
19 not arise against the Bureau, a physician or other health care
20 provider from any such notification.

21 (d) There is no duty on the part of the physician or health
22 care provider to notify the spouse or other sexual partner of, or
23 persons who have shared needles with, an infected individual of
24 their HIV infection and a cause of action may not arise from any
25 failure to make such notification. However, if contact is not
26 made, the Bureau will be so notified.