

WEST VIRGINIA #4.20  
SECRETARY OF STATE  
KEN HECHLER  
ADMINISTRATIVE LAW DIVISION

Form #1

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OFFICE OF THE SECRETARY OF STATE

4.20

NOTICE OF PUBLIC HEARING ON A PROPOSED RULE

AGENCY: Health Department TITLE NUMBER: 64

RULE TYPE: Legislative; CITE AUTHORITY: §16-3C-8

AMENDMENT TO AN EXISTING RULE: YES \_\_\_ NO X

IF YES, SERIES NUMBER OF RULE BEING AMENDED: \_\_\_\_\_

TITLE OF RULE BEING AMENDED: \_\_\_\_\_

IF NO, SERIES NUMBER OF NEW RULE BEING PROPOSED: 64

TITLE OF RULE BEING PROPOSED: AIDS-Related Medical Testing and Confidentiality

DATE OF PUBLIC HEARING: November 15, 1988 TIME: 9:00 a.m.

LOCATION OF PUBLIC HEARING: Room 522  
1800 Washington Street, East  
Charleston, West Virginia

COMMENTS LIMITED TO: ORAL \_\_\_, WRITTEN X, BOTH \_\_\_

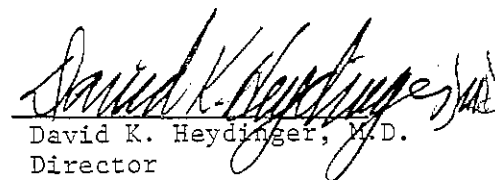
COMMENTS MAY ALSO BE MAILED TO THE FOLLOWING ADDRESS: Regulatory Development

The Department requests that persons wishing to make comments at the hearing make an effort to submit written comments in order to facilitate the review of these comments.

The issues to be heard shall be limited to the proposed rule.

ATTACH A **BRIEF** SUMMARY OF YOUR PROPOSAL

Health Department  
1800 Washington Street, East  
Charleston, WV 25305

  
David K. Heydinger, M.D.  
Director

## FISCAL NOTE FOR PROPOSED RULES

Rule Title: AIDS-Related Medical Testing and Confidentiality

Type of Rule:  Legislative  Interpretive  Procedural

Agency Health Address 1800 Washington Street, East  
Charleston, West Virginia 25305

1. Effect of Proposed Rule	ANNUAL		FISCAL YEAR		
	Increase	Decrease	Current	Next	Thereafter
Estimated Total Cost	\$	\$	\$	\$ 308,000	\$ 301,000
Personal Services				138,200	143,000
Current Expense				149,800	155,000
Repairs and Alterations					
Equipment				20,000	3,000
Other					

### 2. Explanation of above estimates.

The estimated cost of rule implementation and maintaining support activities includes personnel funding for a coordinator, a field investigator, a lab technician, two health educators, a secretary and a data entry person. Current expenses reflect monies for travel (\$12,000), supplies (\$13,000), a contracted expense for HIV testing and associated counseling and follow-up (\$100,000) and other expense costs of \$22,800 for such costs as postage (\$2,000), printing (\$3,000), office space (\$8,300), telephone (\$500) and utilities (\$3,000), etc. Equipment estimate includes laboratory and office needs.

### 3. Objectives of these rules:

- Ensure appropriate notification and education of persons having an HIV test.
- Monitor physician and laboratory reporting of positive HIV tests.
- Provide public health follow-up on persons infected with HIV.
- Ensure quality control of laboratories conducting HIV tests.
- Ensure confidentiality of HIV records.
- Implementation generally of the provisions of House Bill 303 (1988).

4. Explanation of Overall Economic Impact of Proposed Rule.

A. Economic Impact on State Government.

The implementation and maintenance of the rules associated with House Bill 303 will require more than \$300,000 a year in State funding. These funds will support the laboratory quality assurance system and the HIV laboratory and health care provider reporting and follow-up program. The statute also requires educational programs and materials for medical providers and patients.

B. Economic Impact on Political Subdivisions; Specific Industries; Specific groups of citizens.

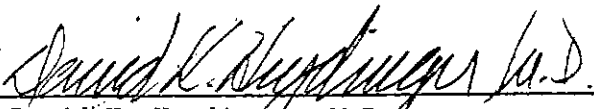
Laboratories seeking approval for HIV testing will incur an annual cost of \$300 for proficiency testing.

C. Economic Impact on Citizens/Public at Large.

NONE

Date September 30, 1988

Signature of Agency Head or Authorized Representative

  
\_\_\_\_\_  
David K. Heydinger, M.D.  
Director of Health

WEST VIRGINIA BOARD OF HEALTH  
RULE ABSTRACT

Title: AIDS-Related Medical Testing and Confidentiality

CSR Title and Series: 64 CSR 64

Type: Legislative

Summary: This legislative rule establishes specific standards and procedures concerning AIDS-related medical testing; record confidentiality and disclosure; substituted consent for testing; exclusion from schools; reporting requirements for physicians, laboratories and other health care providers; the approval of laboratories for HIV testing; and other matters pertinent and necessary for the implementation of the AIDS-Related Medical Testing and Records Confidentiality Act.

This rule supplements the AIDS-Related Medical Testing and Records Confidentiality Act, W. Va. Code §16-3C-1 et seq. and should be read in conjunction with the Code.

For further information contact: Regulatory Development Section, telephone 348-3223 or Loretta Haddy, Director, Division of Surveillance and Disease Control, telephone 348-5358, Health Department, 1800 Washington Street, East, Charleston, WV 25305.

[PROPOSED]

TITLE 64  
LEGISLATIVE RULES

AIDS-RELATED MEDICAL TESTING AND CONFIDENTIALITY

SERIES 64

198\_

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For Public Hearing  
November 15, 1988

[PROPOSED]  
LEGISLATIVE RULES  
DEPARTMENT OF HEALTH  
AIDS-RELATED MEDICAL TESTING AND CONFIDENTIALITY

64 CSR 64

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(PROPOSED)  
TITLE 64  
WEST VIRGINIA LEGISLATIVE RULES  
DEPARTMENT OF HEALTH  
SERIES 64  
AIDS-RELATED MEDICAL TESTING AND CONFIDENTIALITY

**§64-64-1. General**

1.1. **Scope** - This legislative rule establishes specific standards and procedures concerning AIDS-related medical testing; record confidentiality and disclosure; substituted consent for testing; exclusion from schools; reporting requirements for physicians, laboratories and other health care providers; the approval of laboratories for HIV testing; and other matters pertinent and necessary for the implementation of the AIDS-Related Medical Testing and Records Confidentiality Act.

This rule supplements the AIDS-Related Medical Testing and Records Confidentiality Act, W. Va. Code §16-3C-1 et seq, and should be read in conjunction with the Code.

1.2. **Authority** - §16-3C-8 of the West Virginia Code. Related - §16-3C-1 et seq of the West Virginia Code.

1.3. **Filing Date** -

1.4. **Effective Date** -

1.5. **Final Approval** - This rule was approved by the Director of the State Department of Health on August 31, 1988.

1.6. **Supersession and Repeal of Former Rules** - None.

**§64-64-2. Application and Enforcement**

2.1. **Application** - This rule shall apply to:

- a) health facilities;
- b) health care providers;
- c) funeral service providers and personnel;
- d) persons issuing marriage licenses;
- e) persons with access to or in charge of medical records or other sources of information regarding AIDS-related testing information; and
- f) laboratories seeking approval to conduct AIDS-related tests to be utilized in this State.

2.2. **Enforcement** - This rule shall be enforced by the Director of the State Department of Health.

**864-64-3. Definitions**

3.1. "AIDS" means acquired immunodeficiency syndrome.

3.2. "ARC" means AIDS-related complex.

3.3. "Department" means the State Department of Health.

3.4. "Director" means the Director of the State Department of Health or his or her lawful designee.

3.5. "Funeral director" means any person engaged, or holding himself out as engaged, in the business of funeral directing as defined in Article 6, Chapter 30 of the West Virginia Code, and who uses in connection with his name or business the words or terms "funeral director," "undertaker," "mortician," or any other word, term, or title to imply or designate him as a funeral director, undertaker, or mortician.

3.6. "Funeral establishment" means a place of business maintained and operated by a person, partnership, association, corporation, or other organization, conducted in a building, or series of buildings, or a separate portion of a building having a specific street address or location, and devoted to such activities as are incident, convenient, or related to the preparation and arrangements, financial and otherwise, for the embalming, funeral, transportation, burial or other disposition of dead human bodies.

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

3.8. "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.

3.9. "HIV" means the human immunodeficiency virus identified as the causative agent of AIDS.

3.10. "HIV-infected person" means a person who has been diagnosed with AIDS or ARC or who has a positive confirmatory test for HIV.

3.11. "HIV-related illness" means a diagnosis of AIDS or ARC.

3.12. "HIV-related test" means a test for the HIV antibody or antigen or any future valid test approved by the Department, the Federal Drug Administration or the Centers for Disease Control.

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

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

**§64-64-4. Testing**

4.1. HIV-related testing may be requested by a physician, dentist, or the Director for any of the following:

a) Where there is cause to believe that the test could be positive from high-risk behavior, or risk-exposure with an HIV-infected individual or exposure to blood products that were reported to be from an individual with a positive HIV-related test, or

b) When there is documented evidence giving reason to believe the person may have a positive HIV-related test and such a condition would affect the decision on the type of patient care recommended: Provided, That the person being tested shall be informed of the reason for the test and voluntarily consent to the test if at all feasible, or

c) When any person voluntarily consents to the test.

4.2. Consent for HIV-related testing is required for both recipients and donors of routine blood transfusions, and the provisions of W. Va. Code §16-3C-2(e)(1) do not apply to such transfusions.

4.3. The Director may require upon written request 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 of persons who possibly received such exposure in the performance of their work. Exposure must be deemed by the Director to pose a significant risk for transmission of the HIV to the person concerned about infection for a test to be ordered on the individual causing exposure.

4.4. The Director shall establish a list of health care providers who are approved to authorize HIV testing in emergency medical aid circumstances.

**§64-64-5. Review of Marriage License** - The Department will periodically review marriage licenses in order to determine compliance with the requirements of W. Va. Code §16-3C-2(h) regarding documentation of the provision of information concerning AIDS and HIV-related testing and counseling.

**§64-64-6. Charting Information** - Health care providers shall be permitted to enter in a patient's medical chart a diagnosis of an HIV-related illness, but may only enter the results of an HIV-related test in the chart of a patient if the following statement is printed on that test result: "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."

**§64-64-7. Confidentiality**

7.1. Any laboratory performing an HIV-related test in West Virginia

shall have the following statement of confidentiality appear on the report form or as an attachment to the report form returned to the health care provider: "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."

7.2. No person who obtains information protected by the provisions of W. Va. Code §16-3C-1 et seq and this rule may convey such protected information to any other person except in strict compliance with W. Va. Code §16-3C and this rule. Unauthorized disclosure will subject such person to full penalties available.

**§64-64-8. Contact Notification** - When a health care provider of an HIV-infected person notifies the Department of a sexual or intravenous (IV) drug contact that has not been advised of their exposure, the Director shall review the identifying, locating and related epidemiologic information and specify follow-up recommendations. Contact notification will be initiated at the discretion of the Director. Notification will include an explanation of exposure, HIV prevention messages and information on accessibility to HIV counseling and testing services to the person with a reported HIV exposure. The name or identity of the person whose HIV test result was positive shall remain confidential.

**§64-64-9. Substituted Consent**

9.1. If the person whose consent is necessary under the provisions of Article 3C, Chapter 16 of the West Virginia Code or this rule for HIV-related testing or for the authorization of the release of test results is unable to give such consent or authorization because of mental incapacity or incompetency, the consent or authorization shall be obtained from another person in the following order of preference:

- a) A person holding a durable power of attorney for health care decisions;
- b) The person's duly appointed legal guardian or guardian ad litem; or
- c) The person's next-of-kin in the following order of preference: spouse, parent, adult child, sibling, uncle or aunt, grandparent.

9.2. The person's inability to consent shall not be permitted to result in delay or denial of necessary medical treatment.

9.3. The information and pre- and post-test counseling required to be provided to the person pursuant to W. Va. Code §16-3C-2(b) and §16-3C-2(d) shall be provided to the person giving substituted consent.

9.4. Minors will be treated as established under W. Va. Code §16-4-10.

**§64-64-10. School Exclusion** - Exclusion of an HIV-infected student from school or participation in school sponsored activities will be determined on a case by case basis through consultation with a committee which may include the student's parents or guardians, medical care provider, health authorities, school or institution administrators or medical advisors in accordance with policies and guidelines which may have been established by the entities. The exclusion must be based on the student representing an unacceptable risk for transmission of the HIV infection. If the student is under the jurisdiction of a protection or advocacy agency, a representative from that agency may be included. Any finding of unacceptable risk by the local committee must be approved by the Director prior to the student's exclusion.

**§64-64-11. Requirement for All Health Care Providers to Report Positive Serologic and Other Tests for the Human Immunodeficiency Virus**

11.1. All health care providers in West Virginia who perform, or cause to have performed, serologic or other tests for HIV shall make a report of all laboratory tests that are positive or results that are indicative of the HIV infection to the Director on forms provided by the Director for that purpose as follows:

- a) All positive (reactive) serologic antibody tests for HIV;
- b) All positive (reactive) laboratory tests for the identification of HIV; and
- c) All other positive laboratory test results which identify the presence of HIV.

11.2. These reports shall include:

- a) The name and full address of the laboratory;
- b) The name of the test, the date performed and the result;
- c) The legibly printed or typed name and location of the health care provider reporting the positive HIV laboratory results;
- d) The name or identification code of the individual tested and, if available, his or her sex, age and address; and
- e) The signature of the health care provider.

11.3. Reports of the above named laboratory tests shall be submitted within fifteen (15) days of the receipt of such test results.

11.4. The Director shall work with an individual's health care provider for any follow-up of the reports of positive laboratory tests.

11.5. The reports of all positive tests submitted in compliance with this rule are deemed confidential and are exempt from public disclosure under the exemption for medical records contained in Chapter 29B of the West

Virginia Code, the Freedom of Information Act: Provided, That they shall be subject to the provisions of Article 3C, Chapter 16 of the West Virginia Code. Such information shall not be used except as is necessary to enforce State public health laws and rules and to analyze the magnitude of HIV infection in the State for assisting in the development of adequate safeguards against its spread.

**§64-64-12. Requirement for Laboratories to Report Positive Serologic and Other Tests for the Human Immunodeficiency Virus**

12.1. All laboratories conducting HIV testing in West Virginia or providing HIV testing results for use in this State shall make a report of all laboratory tests that are positive or results that are indicative of the HIV infection to the Director on forms provided by the Director for that purpose as follows:

- a) All positive (reactive) serologic antibody tests for HIV;
- b) All positive (reactive) laboratory tests for the identification of HIV; and
- c) All other positive laboratory test results which identify the presence of HIV.

12.2. These reports shall include:

- a) The name and full address of the laboratory;
- b) The name of the test, the date performed, and the result;
- c) The name and location of the health care provider who submitted the specimen;
- d) The name of the patient (or identification code) and (if available) the sex, age and address;
- e) The signature of the supervisor of the laboratory.

12.3. Reports of the above named laboratory tests shall be submitted on the first and fifteenth days of each month.

12.4. If no reportable tests are performed during a reporting period, a statement to this effect shall be submitted by the supervisor of the laboratory.

12.5. The Director shall work with an individual's health care provider in any follow-up of the reports of positive laboratory tests.

12.6. The reports of all positive tests submitted in compliance with this rule are deemed confidential and are exempt from public disclosure under the exemption for medical records contained in Chapter 29B of the West Virginia Code, the Freedom of Information Act: Provided, That they shall be

subject to the provisions of Article 3C, Chapter 16 of the West Virginia Code. Such information shall not be used except as is necessary to enforce State public health laws and rules and to analyze the magnitude of HIV infection in the State for assisting in the development of adequate safeguards against its spread.

**§64-64-13. Quality Control of Laboratories Conducting HIV Tests.**

**13.1. Laboratories Required to be Approved**

13.1.1. All laboratories conducting HIV testing in this State or providing HIV testing results for use in this State shall be approved by the Department.

13.1.2. A laboratory located in West Virginia and seeking approval shall:

a) Show that it complies with the applicable requirements of Article 3C, Chapter 16 of the West Virginia Code and this rule; and

b) Complete application forms when seeking initial approval or when there is a change of ownership, the laboratory director, or location.

13.1.3. A laboratory located outside the boundaries of West Virginia will be eligible for approval only if it is licensed by the Federal Government under the Clinical Laboratories Improvement Act (CLIA) of 1967.

**13.2. Quality Control**

13.2.1. Director and Personnel Qualifications - The laboratory director and personnel shall meet the qualifications set forth by the Federal Government under the conditions of Coverage of Services of Independent Laboratories [for participation in Medicare], found at 42 CFR 405.1310 through 405.1315, 1987, inclusive, and the aforesaid qualifications are hereby adopted by reference.

13.3. Quality Control Standards - A laboratory requesting approval must demonstrate that a quality control program acceptable to the Department is in effect for verification and assessment of accuracy, measurement of precision, and detection of error. Such demonstration shall be evidenced, when applicable, in part by:

a) Selection of test method(s) appropriate to the needs of those served by the laboratory;

b) Use of controls and calibrating standards;

c) Recording of the acceptable limits and the results of controls and calibrating standards;

d) Recording of maintenance and calibration of equipment and instruments;

e) Labeling and dating of all reagents, solutions, standards, and control materials;

f) Maintaining a manual containing all procedures and policies currently in use, which shall include action to be taken when control results are outside the acceptable limits and the procedure for reporting positive HIV test results to the Department.

**13.4. Proficiency Testing** - Laboratories shall participate in a proficiency testing program approved by the Department. Such testing shall be conducted on a regular basis and satisfactory performance by the laboratory is mandatory. The laboratory shall be responsible for forwarding proficiency testing survey results to the Department.

**13.5. On-site Inspection** - On-site inspection to determine compliance with this rule shall be conducted initially prior to approval, and on an annual basis thereafter. The Department shall have the right of entry upon proper identification at such times as deemed necessary during operating hours in order to conduct such inspections.

**13.6. Certificate of Approval; Revocation**

**13.6.1.** Certificates of approval for the performance of HIV testing shall be issued upon initial approval and on an annual basis thereafter pursuant to the conditions listed herein. Certificates issued will contain the name and location of the laboratory, a laboratory code number, the name of the laboratory director and the date of expiration of the certificate.

**13.6.2.** Laboratories shall notify the Department when there is a change in ownership, laboratory director, technical personnel or location of the laboratory.

**13.6.3.** Approval shall be revoked upon:

- a) Unsatisfactory performance in on-site inspections;
- b) Failure to comply with this rule;
- c) Failure to report positive test results to the Department according to W. Va. Code §16-3C-8B and this rule; or
- d) Closure of the laboratory.

**§64-64-14. Banking Blood** - The health care provider or a private, public, or nonprofit blood bank shall, upon request, store and bank a person's blood and the health care provider shall use such blood in the elective surgery or medical procedure to the extent such blood is available.

**§64-64-15. Administrative Due Process** - Those persons adversely affected by the enforcement of this rule desiring a contested case hearing to determine any rights, duties, interests or privileges shall do so in a manner prescribed

in the Rules of Procedure for Contested Case Hearings and Declaratory Rulings,  
West Virginia Department of Health Procedural Rules, 64 CSR 1.

§64-64-16. Severability - The provisions of this rule are declared to be severable. If any provision of this rule shall be held invalid, the remaining provisions shall remain in effect.

**ENROLLED**  
**COMMITTEE SUBSTITUTE**  
**FOR**

**H. B. 303**

(By MR. SPEAKER, MR. CHAMBERS, and DELEGATE SWANN)  
[By request of the Executive]

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[Passed June 28, 1988; in effect September 1, 1988.]

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AN ACT to amend chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, by adding thereto a new article, designated article three-c, relating to AIDS-related medical testing and records confidentiality act; defining terms; setting testing requirements; providing for confidentiality of records; authorizing substitute consent; providing for remedies and penalties and private rights of action; prohibiting denial of certain rights; requiring study by department of corrections; providing administrative implementation; and providing for individual banking of blood for elective medical procedures.

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

That chapter sixteen of the code of West Virginia, one thousand nine hundred thirty-one, as amended, be amended by adding thereto a new article, designated article three-c to read as follows:

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

§16-3C-1. Definitions.

1 When used in this article:

2 (a) "Department" means the state department of  
3 health.

4 (b) "AIDS" means acquired immunodeficiency  
5 syndrome.

6 (c) "ARC" means AIDS-related complex.

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

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

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

15 (g) "HIV-related test" means a test for the HIV  
16 antibody or antigen or any future valid test approved  
17 by the department, the federal drug administration or  
18 the centers for disease control.

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

22 (i) "Health care provider" means any physician,  
23 dentist, nurse, paramedic, psychologist or other person  
24 providing medical, dental, nursing, psychological or  
25 other health care services of any kind.

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

29 (k) "Release of test results" means a written author-  
30 ization for disclosure of HIV-related test results which  
31 is signed, dated and which specifies to whom disclosure  
32 is authorized and the time period during which the  
33 release is to be effective.

§16-3C-2. Testing.

1 (a) HIV-related testing may be requested by a  
2 physician, dentist or the director of the department for

3 any of the following:

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

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

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

10 (b) The requesting physician, dentist or the director  
11 of the department shall provide the patient with  
12 information in the form of a booklet or printed infor-  
13 mation prepared or approved by the department or, in  
14 the case of persons who are unable to read, shall either  
15 show a video or film prepared or approved by the  
16 department to the patient, or read or cause to be read  
17 to the patient the information prepared or approved by  
18 the department which contains the following  
19 information:

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

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

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

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

33 (5) An explanation of the nature and current knowl-  
34 edge of asymptomatic HIV infection, ARC and AIDS  
35 and the relationship between the test result and those  
36 diseases; and

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

39 (c) A person seeking an HIV-related test who wishes

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

49 (d) At the time of learning of any test result, the  
50 subject of the test shall be provided with counseling or  
51 referral for counseling for coping with the emotional  
52 consequences of learning any test result. This may be  
53 done by brochure or personally, or both.

54 (e) No consent for testing is required and the provi-  
55 sions of subsection (b) of this section do not apply for:

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

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

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

80 (f) Mandated testing:

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

84 (2) An HIV-related test shall be performed on any  
85 persons convicted of any of the following crimes or  
86 offenses:

87 (i) Prostitution;

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

89 (3) The director of the department or his or her  
90 designees may require an HIV test for the protection of  
91 a person who was possibly exposed to HIV infected  
92 blood or other body fluids as a result of receiving or  
93 rendering emergency medical aid or who possibly  
94 received such exposure as a funeral director. Results of  
95 such a test of the person causing exposure may be used  
96 by the requesting physician for the purpose of determin-  
97 ing appropriate therapy, counseling and psychological  
98 support for the person rendering emergency medical aid  
99 including good samaritans, as well as for the patient, or  
100 individual receiving the emergency medical aid.

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

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

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

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

117 (g) If a person violates a cease and desist order issued  
118 pursuant to this section and it is shown that the person  
119 is a danger to others, the director of the department  
120 shall enforce the cease and desist order by imposing  
121 such restrictions upon the person as are necessary to  
122 prevent the specific conduct which endangers the health  
123 of others. Any restriction shall be in writing, setting  
124 forth the name of the person to be restricted and the  
125 initial period of time, not to exceed three months, during  
126 which the order shall remain effective, the terms of the  
127 restrictions and such other conditions as may be  
128 necessary to protect the public health.

129 (h) Premarital screening:

130 (1) Every person who is empowered to issue a mar-  
131 riage license shall, at the time of issuance thereof,  
132 distribute to the applicants for the license, information  
133 concerning acquired immunodeficiency syndrome  
134 (AIDS) and inform them of the availability of HIV-  
135 related testing and counseling. The informational  
136 brochures shall be furnished by the department.

137 (2) A notation that each applicant has received the  
138 AIDS informational brochure shall be placed on file  
139 with the marriage license on forms provided by the  
140 department.

141 (i) The director of the department may obtain and test  
142 specimens for AIDS or HIV infection for research or  
143 epidemiological purposes without consent of the person  
144 from whom the specimen is obtained if all personal  
145 identifying information is removed from the specimen  
146 prior to testing.

147 (j) Nothing in this section is applicable to any insurer  
148 regulated under chapter thirty-three of this code:  
149 *Provided*, That the commissioner of insurance shall  
150 develop standards regarding consent for use by insurers  
151 which test for the presence of the HIV antibody.

152 (k) Whenever consent of the subject to the perfor-  
153 mance of HIV-related testing is required under this  
154 article, any such consent obtained, whether orally or in  
155 writing, shall be deemed to be a valid and informed

156 consent if it is given after compliance with the provi-  
157 sions of subsection (b) of this section.

**§6-3C-3. Confidentiality of records; permitted disclosure;  
no duty to notify.**

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

6 (1) The subject of the test;

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

9 (3) A funeral director or an authorized agent or  
10 employee of a health facility or health care provider if  
11 the funeral establishment, health facility or health care  
12 provider itself is authorized to obtain the test results, the  
13 agent or employee provides patient care or handles or  
14 processes specimens of body fluids or tissues and the  
15 agent or employee has a need to know such information:  
16 *Provided*, That such funeral director, agent or employee  
17 shall maintain the confidentiality of such information:

18 (4) Licensed medical personnel or appropriate health  
19 care personnel providing care to the subject of the test,  
20 when knowledge of the test results is necessary or useful  
21 to provide appropriate care or treatment, in an appro-  
22 priate manner: *Provided*, That such personnel shall  
23 maintain the confidentiality of such test results. The  
24 entry on a patient's chart of an HIV-related illness by  
25 the attending or other treating physician or other health  
26 care provider shall not constitute a breach of confiden-  
27 tiality requirements imposed by this article;

28 (5) The department or the centers for disease control  
29 of the United States public health service in accordance  
30 with reporting requirements for a diagnosed case of  
31 AIDS, or a related condition;

32 (6) A health facility or health care provider which  
33 procures, processes, distributes or uses: (A) A human  
34 body part from a deceased person with respect to

35 medical information regarding that person; or (B)  
36 semen provided prior to the effective date of this article  
37 for the purpose of artificial insemination; (C) blood or  
38 blood products for transfusion or injection; (D) human  
39 body parts for transplant with respect to medical  
40 information regarding the donor or recipient;

41 (7) Health facility staff committees or accreditation or  
42 oversight review organizations which are conducting  
43 program monitoring, program evaluation or service  
44 reviews so long as any identity remains anonymous; and

45 (8) A person allowed access to said record by a court  
46 order which is issued in compliance with the following  
47 provisions:

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

55 (ii) Pleadings pertaining to disclosure of test results  
56 shall substitute a pseudonym for the true name of the  
57 test subject of the test. The disclosure to the parties of  
58 the test subject's true name shall be communicated  
59 confidentially, in documents not filed with the court;

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

65 (iv) Court proceedings as to disclosure of test results  
66 shall be conducted in camera unless the subject of the  
67 test agrees to a hearing in open court or unless the court  
68 determines that the public hearing is necessary to the  
69 public interest and the proper administration of justice;  
70 and

71 (v) Upon the issuance of an order to disclose test  
72 results, the court shall impose appropriate safeguards  
73 against unauthorized disclosure, which shall specify the

74 person who may have access to the information, the  
75 purposes for which the information may be used and  
76 appropriate prohibitions on future disclosure.

77 (b) No person to whom the results of an HIV-related  
78 test have been disclosed pursuant to subsection (a) of this  
79 section may disclose the test results to another person  
80 except as authorized by subsection (a).

81 (c) Whenever disclosure is made pursuant to this  
82 section, except when such disclosure is made to persons  
83 in accordance with subdivisions (1), (3), (4), (5), (6) and  
84 (7), subsection (a) of this section, it shall be accompanied  
85 by a statement in writing which includes the following  
86 or substantially similar language: "This information has  
87 been disclosed to you from records whose confidentiality  
88 is protected by state law. State law prohibits you from  
89 making any further disclosure of the information  
90 without the specific written consent of the person to  
91 whom it pertains, or as otherwise permitted by law. A  
92 general authorization for the release of medical or other  
93 information is NOT sufficient for this purpose."

94 (d) Notwithstanding the provisions set forth in  
95 subsections (a) through (c) of this section, the use of HIV  
96 test results to inform individuals named or identified as  
97 sex partners or contacts or persons who have shared  
98 needles that they may be at risk of having acquired the  
99 HIV infection as a result of possible exchange of body  
100 fluids, is permitted. The name or identity of the person  
101 whose HIV test result was positive is to remain  
102 confidential. Contacts or identified partners may be  
103 tested anonymously at the state department of health  
104 designated test sites, or at their own expense by a health  
105 care provider or an approved laboratory of their choice.  
106 A cause of action will not arise against the department,  
107 a physician or other health care provider from any such  
108 notification.

109 (e) There is no duty on the part of the physician or  
110 health care provider to notify the spouse or other sexual  
111 partner of, or persons who have shared needles with, an  
112 infected individual of their HIV infection and a cause  
113 of action will not arise from any failure to make such

114 notification. However, if contact is not made, the  
115 department will be so notified.

**§16-3C-4. Substituted consent.**

1 (a) If the person whose consent is necessary under this  
2 article for HIV-related testing or the authorization of  
3 the release of test results is unable to give such consent  
4 or authorization because of mental incapacity or  
5 incompetency, the consent or authorization shall be  
6 obtained from another person in the following order of  
7 preference:

8 (1) A person holding a durable power of attorney for  
9 health care decisions;

10 (2) The person's duly appointed legal guardian;

11 (3) The person's next-of-kin in the following order of  
12 preference: spouse, parent, adult child, sibling, uncle or  
13 aunt, and grandparent.

14 (b) The person's inability to consent shall not be  
15 permitted to result in prolonged delay or denial of  
16 necessary medical treatment.

17 (c) The information required to be provided to the  
18 patient pursuant to subsections (b) and (d), section two  
19 of this article, shall be provided to the person giving  
20 substituted consent hereunder.

**§16-3C-5. Remedies and penalties.**

1 (a) Any person aggrieved by a violation of this article  
2 has right of action in the circuit court and may recover  
3 for the violation:

4 (1) Against any person who recklessly violates a  
5 provision of this article, liquidated damages of one  
6 thousand dollars or actual damages, whichever is  
7 greater; or

8 (2) Against any person who intentionally or mali-  
9 ciously violated a provision of this article, liquidated  
10 damages of ten thousand dollars or actual damages,  
11 whichever is greater; and

12 (3) Reasonable attorney fees; and

13 (4) Such other relief, including an injunction, as the  
14 court may consider appropriate.

15 (b) Any action under this article is barred unless the  
16 action is commenced within five years after the violation  
17 occurs.

18 (c) Nothing in this article limits the rights of the  
19 subject of an HIV-related test to recover damages or  
20 other relief under any other applicable law.

21 (d) Nothing in this article may be construed to impose  
22 civil liability for disclosure of an HIV-related test result  
23 in accordance with any reporting guidelines or require-  
24 ments of the department or the centers for disease  
25 control of the United States public health service.

§16-3C-6. Prohibiting certain acts; HIV tests results.

1 (a) A positive HIV test report, or the diagnosis of  
2 AIDS related complex (ARC), or the diagnosis of the  
3 AIDS syndrome or disease, may not constitute a basis  
4 upon which to deny the individual so diagnosed, access  
5 to quality health care: *Provided*, That this subsection  
6 does not apply to insurance.

7 (b) No student of any school or institution of higher  
8 learning, public or private, may be excluded from  
9 attending the school or institution of higher learning, or  
10 from participating in school sponsored activities, on the  
11 basis of a positive HIV test, or a diagnosis of ARC, or  
12 AIDS syndrome or disease. Exclusion from attendance  
13 or participation, as described above, shall be determined  
14 on a case by case basis, in consultation with the  
15 individual's parents, medical care provider, health  
16 authorities, school or institution administrators or  
17 medical advisors, in accordance with policies and  
18 guidelines which may have been established by the  
19 entities. Exclusion may only be based on the student  
20 representing an unacceptable risk as agreed to by the  
21 department for the transmission of the HIV to others  
22 because of the stage or nature of the illness.

§16-3C-7. Department of corrections to conduct AIDS  
related study.

1 The commissioner of the department of corrections is  
2 authorized and directed to conduct a study at penal  
3 institutions (including jails administered by counties  
4 and municipalities) to determine whether it would be  
5 prudent and reasonable to offer or require of each  
6 inmate at such institutions testing, educational classes  
7 or counseling related to AIDS and HIV infections. This  
8 shall be done in consultation with the department of  
9 health. The commissioner shall complete the study and  
10 present the findings and recommendations in a report  
11 to be filed with the director of the department of health,  
12 the President of the Senate and the Speaker of the  
13 House of Delegates within six months of the effective  
14 date of this article.

**§16-3C-8. Administrative implementation.**

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

15 (b) The department shall promulgate rules to assure  
16 adequate quality control for all laboratories conducting  
17 HIV tests and to provide for a reporting and monitoring  
18 system for reporting to the department all positive HIV  
19 tests results.

**§16-3C-9. Individual banking of blood by health care  
providers for elective surgery or medical  
procedures.**

1 Any person may, in contemplation of elective surgery  
2 or other elective medical procedures for which a blood  
3 transfusion may be required, request the health care

4 provider conducting such surgery or medical procedure,  
5 or any private, public or nonprofit blood bank, to make  
6 or cause to be made appropriate provisions to store and  
7 bank that individual's blood for use during such surgery  
8 or medical procedure. The health care provider or the  
9 private, public or nonprofit blood bank shall, upon such  
10 request, store and bank a person's blood and the health  
11 care provider shall use such blood in the elective surgery  
12 or medical procedure to the extent such blood is  
13 available.