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HEALTH

Clinical Laboratories: Amend Provisions for the Disclosure of AIDS Confidential Information and for the Ordering of HIV Tests

CODE SECTIONS: O.C.G.A. §§ 24-9-47(bb) (new), 31-22-9.2(e) (amended), 31-22-9.2(g) (new)

BILL NUMBER: HB 842

ACT NUMBER: 1187

SUMMARY: The Act creates a new exception to nondisclosure of AIDS confidential information by providing for disclosure of such information in certain proceedings pertaining to incapacitated adults and the mentally ill, mentally retarded, alcoholic, or drug dependent person. Also, the Act provides for additional conditions under which an HIV test may be administered without the patient's consent.

EFFECTIVE DATE: April 14, 1990

History

In 1988, the General Assembly passed the much debated and controversial Omnibus AIDS Act.¹ The 1988 Act provides for mandatory AIDS testing in specified situations, criminal sanctions for AIDS battery, reporting requirements, and nondisclosure of HIV test results with various exceptions.² Dissatisfaction with certain aspects of that Act led to the introduction of HB 842 in 1990.³

HB 842 was introduced to address the concerns of the probate courts regarding disclosure of AIDS confidential information in certain guardianship proceedings and in proceedings concerning mentally ill, mentally retarded, and alcoholic or drug dependent individuals.⁴ Probate judges were interested in correcting the discrepancies between the guardianship and mental health statutes and the Omnibus AIDS Act.⁵

1. Legislative Review, *Omnibus AIDS Bill*, 5 GA. ST. U.L. REV. 397, 398 (1988).

2. *Id.* at 399.

3. Telephone interview with Representative Tommy Chambless, House District No. 133 (Mar. 28, 1990) [hereinafter Chambless Interview].

4. *Id.*

5. Telephone interview with Judge Floyd Propst, Probate Court of Fulton County (Apr. 25, 1990).

Adherence to the notice requirements under guardianship and mental health statutes appeared to violate the nondisclosure mandates of the Omnibus AIDS Act.⁶

In addition to the probate courts' concerns, the health community's growing discontent with the consent requirements for HIV testing set forth in the Omnibus AIDS Act prompted the amendment to HB 842.⁷ Physicians from around the state submitted petitions requesting relaxed consent requirements for HIV testing in cases in which the physician is at risk of exposure to a patient's body fluids.⁸ Previously, physicians were required to obtain a court order permitting HIV testing should a patient deny consent.⁹ In order to avoid the cumbersome process of obtaining a court order, Georgia physicians requested an alternative procedure.¹⁰ Although HB 842 did not originally address consent requirements for HIV testing, a House floor amendment was adopted to cover physicians' concerns.¹¹

HB 842

HB 842 addresses two distinct AIDS-related issues. First, the Act amends the provisions relating to the disclosure of AIDS confidential information¹² by adding another exception to the statute's already numerous exceptions to nondisclosure of such information.¹³ Second, the Act amends the provisions relating to ordering HIV tests by authorizing the order of an HIV test without the patient's consent.¹⁴

6. *Id.*

7. Letter from Representative Bobby E. Parham, House District No. 105, to Kimberly Lewis (Apr. 16, 1990) (available in Georgia State University College of Law Library). O.C.G.A. § 31-22-9.2 states that a health care provider may order an HIV test *only* after counseling the patient. Unless exempted by the statute, a person "shall have the opportunity to refuse the test." A patient, however, shall not have the opportunity to refuse testing if the patient is a minor or is incompetent and the patient's parent or guardian permits testing, or the patient is "unconscious, temporarily incompetent, or comatose and the next of kin permits the test." Further, provisions for counseling and for refusing an HIV test do not apply "to emergency or life-threatening situations" or "if the physician ordering the test is of the opinion that the person to be tested is in such a medical or emotional state that disclosure of the test would be injurious to the person's health." O.C.G.A. § 31-22-9.2 (b)-(d) (Supp. 1989).

8. Chambless Interview, *supra* note 3.

9. Telephone Interview with Dr. Douglas Skelton, Dean of Mercer Medical School (Apr. 18, 1990) [hereinafter Skelton Interview].

10. *Id.*

11. *Id.* HB 842, sections 2 and 3, authorize a health care provider to administer an HIV test without the patient's consent when the health care provider may be exposed to any of the patient's body fluids. O.C.G.A. § 31-22-9.2(g) (Supp. 1990). Originally, sections 2 and 3 were introduced as HB 1789. HB 1789, as introduced, 1990 Ga. Gen Assem. HB 1789 was appended to HB 842 by a House floor amendment. HB 842 (HCSFA), 1990 Ga. Gen Assem.

12. O.C.G.A. § 24-9-47 (Supp. 1989).

13. O.C.G.A. § 24-9-47(bb) (Supp. 1990).

14. O.C.G.A. § 31-22-9.2(g) (Supp. 1990).

Disclosure of AIDS confidential information is permitted in any proceeding "regarding a person who is alleged to be or who is mentally ill, mentally retarded, or alcoholic or drug dependent . . ." ¹⁵ The proper procedures for the disclosure of AIDS confidential information include the provision of a cover page on the document indicating only the type of proceeding, the court adjudicating the proceeding, and the words "Confidential Information." ¹⁶ No names may be disclosed. ¹⁷ The information may be released only with written consent of the person tested or of that person's guardian or by order of the court. ¹⁸

Should consent not be obtained, the court receiving the information must either obtain written consent, ¹⁹ return the petition to its filer, ²⁰ delete all references to AIDS-related information, ²¹ or, in cases of compelling need, petition a superior court for permission to disclose that information. ²² In cases involving a superior court's authorization to disclose, the superior court must determine, *in camera*, by clear and convincing evidence that there is a compelling need to disclose the AIDS confidential information. ²³ The superior court must balance the State's interest in safeguarding public health and the patient's right to privacy. ²⁴ This balancing test must include a consideration of the public's interest in voluntary HIV tests. ²⁵ Unwarranted disclosures of AIDS confidential information may deter voluntary testing. ²⁶

Finally, the House floor amendment relating to disclosure ²⁷ requires the court handling the procedure in which AIDS confidential information is requested to take appropriate measures to maintain confidentiality. ²⁸ These measures include, but are not limited to, ensuring nonpublic proceedings and sealed records. ²⁹

The bill, as originally introduced, provided for disclosure of AIDS confidential information in proceedings regarding the mentally ill, mentally retarded, alcoholic, or drug dependent person without providing specific protections of confidentiality. ³⁰ In an attempt to limit the

15. O.C.G.A. § 24-9-47(bb) (Supp. 1990).

16. O.C.G.A. § 24-9-47(bb)(1) (Supp. 1990).

17. *Id.*

18. O.C.G.A. § 24-9-47(bb)(2) (Supp. 1990).

19. O.C.G.A. § 24-9-47(bb)(3) (Supp. 1990).

20. O.C.G.A. § 24-9-47(bb)(3)(A) (Supp. 1990).

21. O.C.G.A. § 24-9-47(bb)(3)(B) (Supp. 1990).

22. O.C.G.A. § 24-9-47(bb)(3)(C)(i) (Supp. 1990).

23. O.C.G.A. § 24-9-47(bb)(3)(C)(ii) (Supp. 1990).

24. *Id.*

25. *Id.*

26. *Id.*

27. O.C.G.A. § 24-9-47(bb) (Supp. 1990).

28. O.C.G.A. § 24-9-47(bb)(4) (Supp. 1990).

29. *Id.*

30. HB 842, as introduced, 1990 Ga. Gen. Assem.

circumstances under which AIDS confidential information could be released, the Georgia AIDS Coalition and the Fulton County Probate Court concerted their efforts and made recommendations to the House Judiciary Committee.³¹

The House Judiciary Committee presented a substitute which delineated the persons to whom AIDS confidential information may be released.³² Those included were the person identified by the AIDS confidential information, the guardian ad litem of that person, the counsel appointed to that person, and the health care provider providing services to that person.³³

The Department of Human Resources (DHR) joined the efforts of the Georgia AIDS Coalition and the Fulton County Probate Court.³⁴ The DHR was concerned with preventing the unnecessary release of AIDS-related information.³⁵ Recommendations were made to the Senate Governmental Operations Committee.

The Senate Governmental Operations Committee substitute deleted the list of persons specified to receive AIDS confidential information and replaced that list with a consent requirement.³⁶ The consent requirement mandates written consent from the person identified by the AIDS information, that person's parent or guardian, or a court order.³⁷ Without written consent, the court may obtain AIDS confidential information only by petitioning a superior court for permission.³⁸ The superior court must determine whether "there is clear and convincing evidence of a compelling need for the AIDS confidential information."³⁹

The Act also amends provisions for reporting and ordering HIV tests, and for patient counseling.⁴⁰ A new Code section authorizes an HIV test when a health care provider might be at risk of becoming infected.⁴¹ The test may be administered if the patient does not refuse.⁴² If the patient does refuse, it may still be administered when another health care provider, who is authorized to order an HIV test, "concur[s] in writing to the testing . . ."⁴³ The patient must be provided counseling

31. Telephone interview with J. Patrick McCrary, Georgia AIDS Coalition (Apr. 25, 1990).

32. HB 842 (HCS), 1990 Ga. Gen. Assem.

33. *Id.*

34. Telephone interview with Beth Chadwick, Forensic Services Officer, Department of Human Resources (May 15, 1990).

35. *Id.*

36. HB 842 (SCS), 1990 Ga. Gen. Assem.

37. O.C.G.A. § 24-9-47(bb)(2) (Supp. 1990).

38. O.C.G.A. § 24-9-47(bb)(3)(C)(i) (Supp. 1990).

39. O.C.G.A. § 24-9-47(bb)(3)(C)(ii) (Supp. 1990).

40. O.C.G.A. § 31-22-9.2 (Supp. 1990).

41. O.C.G.A. § 31-22-9.2(g) (Supp. 1990).

42. O.C.G.A. § 31-22-9.2(g)(1) (Supp. 1990).

43. O.C.G.A. § 31-22-9.2(g)(2) (Supp. 1990).

when informed of the test results. Negative test results do not become a part of the patient's medical record.⁴⁴

In its original form, HB 842 did not address the provisions allowing the ordering of HIV tests.⁴⁵ A floor amendment was adopted which permitted health care providers to order an HIV test without the patient's consent in certain "emergency medical" situations.⁴⁶ Originally, this floor amendment was introduced as HB 1789.⁴⁷

The House floor amendment permitted testing without a patient's consent in emergency medical situations in which "absence of immediate medical attention could reasonably be expected" to result in serious jeopardy, serious impairment to bodily functions, or "serious dysfunction of any bodily organ or part."⁴⁸ Further, the floor amendment expressly removed all notification and counseling requirements.⁴⁹ Realizing a need to provide protections from arbitrary and unnecessary HIV testing, a Senate committee substitute was offered, which replaced the "emergency medical" criterion with one based on the Centers for Disease Control guidelines or the infectious disease standards of the health care facility.⁵⁰ In an effort to avoid regressive legislation and to encourage HIV testing, the Senate Governmental Operations Committee reinstated notification and counseling requirements.⁵¹ The substitute further altered the House bill by requiring a second health care provider to agree in writing to the HIV testing.⁵²

A Senate floor amendment deleted one line from the committee substitute: "Nothing in this subsection shall authorize any person forcibly to obtain a sample of a patient's body fluids for the purposes of obtaining an HIV test thereof."⁵³ The House agreed to the Senate substitute and amendment.⁵⁴

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44. *Id.*

45. HB 842, as introduced, 1990 Ga. Gen. Assem.

46. HB 842 (HCSFA), 1990 Ga. Gen. Assem.

47. HB 1789, as introduced, 1990 Ga. Gen. Assem.; Chambless Interview, *supra* note 3. See also *supra* note 11 and accompanying text.

48. HB 842 (HCSFA), 1990 Ga. Gen. Assem.

49. *Id.*

50. Skelton Interview, *supra* note 9. See HB 842 (SCS), 1990 Ga. Gen. Assem.

51. *Id.* Under O.C.G.A. § 31-22-9.2, a physician is required to counsel the patient before ordering an HIV test. There are, however, several exemptions to mandatory counseling. See *supra* note 7 and accompanying text.

52. HB 842 (SCS), 1990 Ga. Gen. Assem.

53. Compare HB 842 (SCS), 1990 Ga. Gen. Assem. with HB 842 (HCSFA), 1990 Ga. Gen. Assem.

54. Final Composite Status Sheet, Mar. 9, 1990.