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New Hampshire:

The Premarital Testing Debacle

Susan D. Epstein

In 1987, the New Hampshire Division of Public Health Services had a bill introduced in the legislature to improve contact tracing and establish statewide public education on HIV infection, transmission, and disease control. This article traces the bill, and issues surrounding the bill, through the legislative process and focuses on an unexpected intervention by the governor through a proposed amendment to add mandatory premarital testing. Its conclusions offer advice to other states on how best to avoid political exploitation of AIDS/HIV issues.

By the summer of 1987, the AIDS issue in New Hampshire had become devoted to everything but AIDS. It revolved around presidential preferences, a governor's show of strength, and legislative grandstanding. Substantive progress in curbing the further transmission of the virus through education, testing, and behavioral changes had been stymied. How did this issue become so hotly politicized in New Hampshire? Can our sister New England states learn from our experience? Can the issue be better handled?

This article will trace a benign bill from its inception through its demise in the legislature. It will illustrate how the absence of a plan and of consensus can leave this sensitive issue open to political exploitation.

Late in the summer of 1986, top staff in the Division of Public Health's Disease Control Bureau met with the agency's deputy director to ask for any available money to deal with AIDS. The Division's AIDS program was, and still is, financed entirely through federal funds granted for services to the high-risk population: male homosexuals, hemophiliacs, intravenous drug users, and their partners. The number of seropositive AIDS tests was beginning to climb steeply, and transmission had begun to move into the general population. Like many other rural states, New Hampshire had had a slow start-up on AIDS, but recent test results had indicated that the rate was escalating rapidly. The Division was without resources — staff, supplies, equipment, expense money — to deal with this rise.¹

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To carry out its work with the high-risk population, the Division had hired one health educator, one nurse, a part-time laboratory person, and a part-time secretary. Other Disease Control staff had been diverted to deal with the ever expanding cries for help with the disease, and staff energies were stretched dangerously thin. The number of positive tests in 1986 was projected to quadruple from 1985.² No other resources could be redeployed.

The Disease Control staff had other concerns besides money. Through a network of volunteers at five clinic sites and physicians around the state, word had already come back: instances of confidentiality breached, patients attempting suicide after receiving a positive initial test result over the phone, hasty and illogical local policies implemented to deal with fear of AIDS. The Division had received entreaties from local and state prisons, the state's reform school, its mental hospital, drug abuse units, private and public hospitals and specialty hospitals, police units, schools, insurance companies, and others for help in developing policies and guidelines for staff, patients, customers, travelers, and inmates. Nowhere in state law was the Division authorized to take these initiatives, and nowhere had the legislature or the governor made clear whose job it was to handle all the issues around AIDS.

The Bill

Following consultation with the director and the commissioner of the Department of Health and Human Services, a bill was drafted to outline the duties of the Division in dealing with the disease. The governor's staff was notified that an AIDS bill would be added to those bills coming from Public Health. A small AIDS task force, chaired by the commissioner, received the preliminary draft. The chairpersons of both House and Senate Health Committees were notified, as was the state's health/medical community.

Public Health had only three weeks to prepare the bill for submission for a September deadline. The Division felt that the bill should address the duties assigned to Public Health as well as issues relating to those duties, but not tackle those other areas which have been affected by AIDS, such as housing, labor, employment, and civil rights. The Division also determined that the bill would address disease prevention and disease control issues for AIDS but would not discuss those at high risk and the specifics of transmission. In other words, sex, homosexuality, and drug use were not mentioned.

The bill filed in the fall had six major components:

1. The Division of Public Health Services was authorized to develop AIDS-education materials for schools, colleges, health care providers and institutions, state agencies, business and industry, the media, and the public.
2. The Division was to assist all these groups in developing policies and programs to deal with AIDS.
3. The Division was to conduct laboratory testing for HIV infection already in place, but was authorized to certify outside laboratories to conduct further testing and reporting.
4. A highly specific informed-consent provision was included to combat the increasingly prevalent practice of testing someone's blood for HIV without the person's knowledge, a practice leading to some tragic responses.

5. A tight confidentiality plan was included to safeguard test results. Confidentiality provisions were backed up with penalties and liability provisions.
6. A total of \$339,000 was requested for FY'88 and \$325,000 for FY'89, virtually doubling the size of the existing program.

Strategy

The strategy for the bill was based on the assumption that it would take its hardest hits in the financial area, given the New Hampshire State Legislature's traditional reluctance to fund new programs. Further, the Division assumed that the purpose of the bill was so inoffensive that little if any restructuring would be done with its substance.

With this logic, the Division requested sponsors from four key sources: several House sponsors from the House Health and Human Services Committee; one member from House Appropriations; and on the Senate side, Elaine Krasker, the new chairperson of the Senate's Health and Welfare Committee, who was to play a pivotal role, and two members of the Senate's powerful Finance Committee, Sen. Frank Torr and Sen. Ed Dupont, the new majority leader. With support in Appropriations, and with the assurance of key conservative votes to add to more liberal votes in Senate Finance, the Division hoped to pave a smooth passage. The legislative plan had been fashioned by Sen. Elaine Krasker, a seasoned representative and a former Democratic whip in the House, newly elected to the Senate. Through her efforts, Representative Ramsay and Senators Torr and Dupont joined the team.

Legislative Process

The bill was well received at a large hearing before the House Health and Human Services Committee. Chairman Matthew Sochalski had placed some key committee members as sponsors on the bill, in addition to the committee's six-term ranking Democrat, Rep. Marion Copenhaver. A subcommittee headed by a retired pediatrician, Rep. Robert Wilson, met to iron out some of the major issues raised in the committee hearing.

A major point of contention was the penalty provision, aimed at anyone who breached confidentiality concerning a patient tested for HIV infection. For obvious reasons, representatives of the New Hampshire Medical Society and the New Hampshire Hospital Association wanted the provision deleted. The subcommittee needed to weigh their plea against that of the Coalition of Gay and Lesbian Rights (CAGLR), which argued that without this legal protection, they would refuse to be tested. The recommended version was a compromise, maintaining the penalties but stipulating that a person must "purposely" violate confidentiality in order to have them apply. A section was added, requested by the corrections commissioner, to permit testing without informed consent in prisons and mental institutions when the testing would be necessary to place and manage the individual within the facility. A troublesome section specifying at what age a minor's parents must be told of test results was deleted, permitting other statutes already on the books to apply. Having been amended but still intact, the bill sailed through the House Health and Human Services Committee and, some weeks later, through House Appropriations. The issue of mandatory testing was not raised.

By the time of the appropriations hearing, concerns that the bill's budget would be

diced up had vanished. Those who had raised concerns about substantive issues in the bill had their concerns dealt with by the compromises in committee. Appropriations was supportive and sent the bill back to the full House, where it passed on a voice vote.

Then the bomb dropped. The director of Public Health Services received a call on Monday, April 6, from the governor's legal counsel, indicating that the governor was going to hold a press conference on the AIDS bill on the following day and warning the director not to "shoot [them] in the foot." There had been no prior discussion with the director of Public Health Services or with his boss, the commissioner of Health and Human Services. There was no indication as to what the governor was planning to say, and no request for opinion from Public Health — not even an invitation to attend the press conference. Several phone calls ascertained that neither the bill's sponsors nor the medical community had been consulted.

On Tuesday, April 7, a staffer from the Division, armed with a tape recorder, went to the governor's press conference to find out more. At the conference, the governor, flanked by the Speaker of the House and the president of the Senate, Republicans all, said he planned to introduce an amendment to the AIDS bill which would require AIDS testing before couples would be permitted to marry. He indicated that the amendment would reinstate the old syphilis premarital testing requirement, since it could serve as a legal precedent for requiring HIV testing. He repeated several times that AIDS was a legal issue, a political issue, a civil rights issue, but not a medical issue. Finally, to the distress of Public Health staff who had been struggling for three and a half years to quell the spread of the disease, he noted that his measure was a start and a small beginning.³

Of the many questions from the press that followed, only one raised the prescient issue. Veteran State House reporter Donn Tibbetts, of the *Manchester Union Leader*, asked, with due respect to the state's three foremost political leaders, where were the medical people who supported or requested this measure. Governor Sununu simply repeated his claim that AIDS was not a medical issue.⁴

If AIDS had not been a political issue before the governor's press conference, it became one immediately afterward. Legislative sponsors, including Reps. Marion Copenhaver, Trudy Butler, Larry Chase, and Robert Wilson, as well as Senator Krasker, were incensed. The state medical society hastily called together the infectious disease physicians, who prevailed upon the society's Executive Committee to oppose the measure. At Public Health, which had been muzzled by orders not to shoot [the governor's office] in the foot, press calls were passed to the governor's office, and the Division's role in working on its highest priority bill ended.

Press reaction to the proposed premarital testing plan included criticism from medical specialists and no comment from Public Health.⁵ The governor then announced that he would veto the bill unless it came to his desk with his premarital amendment included.⁶ Some local reporters picked up on Vice President George Bush's statement, made a day after Sununu's to *USA Today*, supporting premarital testing and remarked on the coincidence, as Sununu serves as Bush's campaign chairman in New Hampshire.⁷

Criticism of the proposed amendment by the medical community was swift and damning. Using data from Public Health's current testing, the critics pointed out that of 22,000 people who would be required to be tested, only 2 would turn out to be truly positive. All the other people who tested positive — 218 — and their families and friends, would go through hell in that interval between the first positive test and the ultimately negative result. Critics questioned why a low-risk group, monogamous couples already committed to a long-term sexual relationship, should be compelled to be tested. The medical commu-

nity voiced concerns about the premise that premarital testing for syphilis would be reinstated. The law mandating premarital syphilis testing by the state had been repealed in 1981; there had not been a positive test for over five years.⁸

The governor's threat to veto the AIDS bill if it arrived without his amendment drew indictment from newspapers around the state. The *Concord Monitor* headlined its editorial "Cross Power Play" and chastised the governor for "playing a deadly game of chicken with the Legislature."⁹ Dr. Miles McCue, a member of Governor Sununu's hand-picked Task Force on AIDS, editorialized in the *Boston Globe* that the mandatory testing proposal was "reckless with regard to its ignorance."¹⁰ Even the *Manchester Union Leader*, the only statewide daily newspaper, generally supportive of Sununu, criticized the governor's "browbeating politics."¹¹ The press also reported, in a limited way, a "man on the street" sense from the public which indicated a measure of public support for mandatory premarital testing. There seemed to be low recognition of the distinction between consequences of confidentiality leaks for syphilis and AIDS. A breach of confidentiality concerning AIDS causes more than embarrassment. At the present time, it can threaten the loss of one's housing, one's employment, life insurance, health insurance, and potentially one's medical and dental providers. The absence of a public education program — as the bill would have provided — left the public unable to debate the merits of the very issue that had been placed between the bill and its passage.

The New Hampshire Medical Society's Infectious Disease section moved to convince its Executive Committee to take action with the governor. The society directed its action to two fronts: first, to try to deal directly with Governor Sununu, and, second, to try to kill the amendment when it was introduced in the Senate. A meeting between the governor and a group representing the medical society proved inconclusive, and the society's efforts were then directed toward the upcoming hearing in the Senate where the premarital amendment was to be introduced.

In both the House and the Senate some of the debate over the premarital testing plan began to center around which presidential aspirants supported it. Bush supporters, Kemp and Dole supporters, lined up on the side of their candidate to show their relative strength. Having dared the legislature to defy him, the governor's supporters and opponents, Republican and Democrat, fell in line. Having neglected to take any strong positions or to initiate any action in the first four months of the six-month legislative session, and having placed himself firmly in a box on this issue, Governor Sununu had to rally the House and Senate leadership to hew to his position.

The first draft of the amendment was issued from the governor's legal counsel only hours before the Senate hearing was to be held. A copy had to be leaked to Public Health. The draft amendment by the governor's office would have gutted the money needed for education and contact tracing by using most of it for premarital testing. It breached confidentiality and eliminated pre- and post-test counseling. The process for testing and test-results reporting was replete with dead ends. As the result of conversations between the attorney general's office and the Speaker's office, the amendment had been completely rewritten by April 28, the day of the Senate hearing. Provisions were added to allow the testing to be self-supporting, the syphilis provision was quietly deleted, and some of the procedural issues were clarified.

The Senate hearing on April 28 was chaired by Sen. Elaine Krasker, the leading Senate sponsor of the bill. Of the many speakers that morning who addressed the committee, only one urged the adoption of the governor's/Speaker's/Senate president's amendment: an Ernest Schapiro, representing Lyndon LaRouche.

One speaker after the next urged the committee to pass the bill as it arrived from the House and not to include the governor's amendment. The director of the New Hampshire Civil Liberties Union argued that the state would be unable to prove it had a compelling reason to require the invasive procedure of drawing blood, because the state could do nothing with the results of that test; it couldn't offer a cure, stop the marriage, or prevent conception. Dr. James Kahn of Deerfield warned the committee that "many of the people we need to reach are socially ostracized, medically indigent, and otherwise disconnected." He pointed out that these are not the people who are already accepting enough of society's norms to be getting married.

At the close of the hearing, the committee unanimously passed the bill without the premarital amendment. The bill came to the full Senate for a vote on May 5, having been through the Senate Finance Committee without a hearing, and it was there that the governor's staff went to work. They leaned on senators for hours, making promises and threats, "bullying and bartering some members into changing their positions," according to the *Concord Monitor*.¹² On a roll call vote, the bill passed 13 to 11 with the premarital provision attached.

Headed for Conference Committee to resolve the dispute (or kill the bill, as Conference Committee must have unanimous votes and acceptance by both chambers), the pressure increased with the approaching deadline in the Senate. The deadline for bills and committees of conference reports to be heard on the floor of the Senate was May 15. In order to hear a bill or report after that date and vote on it, the House and Senate required a two-thirds vote to suspend the rules.

The Senate vote on May 5 left ten calendar days to have conference committees appointed by both chambers, have the committees meet, deliberate, and concur, and have both houses accept their version of the bill. By this time, national newspapers were reporting on the issue, including the *New York Times* and the *Wall Street Journal*.¹³ The debate was being heard as well from the Cabinet in the White House, where Surgeon General Koop and Education Secretary Bennett were evidently arguing over AIDS testing and AIDS education.¹⁴

At Public Health, an eerie kind of calm had settled in. The state budget bill was headed into Conference Committee; other Division bills were in their final stages of negotiation; press teams roamed the halls; but Division staff had no comment and made only the most necessary, and briefest, forays out.

Since the House had passed the bill without the premarital amendment and the Senate had passed the bill with the amendment, the House Speaker and Senate president appointed a Conference Committee. Despite their position in support of premarital testing, both leaders appointed members on both sides of the issue.

The group met in the basement of the State House, in the cramped offices of Senator Krasker. A fire in the Legislative Office Building days earlier had left many legislators "homeless" and had destroyed a great many files. The Conference Committee, after some rousting about, voted to include a sanitized version of the premarital testing plan. They added funds to conduct the testing so as not to have the costs of the testing be taken from the main AIDS bill. They also worked out a timing mechanism for reporting to town clerks that a couple had taken the test such that the town clerk would not be able to deduce who had had a positive test. Both Senator Krasker and Representative Copenhaver made it clear they didn't much like having to include even a sanitized premarital provision, but they were concerned that the bill would not prevail without it.

On May 13, just two days before the Senate deadline, the Senate approved the Conference Committee's report on a voice vote. The Conference Committee report then had to be adopted by the House.

That day, Representative Copenhaver called the other sponsors, and Public Health, to say she just could not sign the report. She indicated that she would fight against the Conference Committee report on the floor.¹⁵

She then went to the members of the House one by one and explained why it would be wrong to include the premarital provision. She argued the impropriety of the governor's having introduced an amendment after the bill had already been passed by the House; she talked about the anguish of those testing positive who eventually are found to be negative, and graphically depicted the plight of couples and families with their weddings on hold and their reputations ruined. She dared the House members to stand up for what she knew to be right, in spite of possible retribution from the governor and the wishes of their own Speaker. Other House sponsors worked the floor with her, letting members know that they had not been consulted, that the testing was expensive and would yield few positives, that even the U.S. Surgeon General had written to say that mandatory premarital testing was a poor solution.

The House, in an emotional session, rallied to Representative Copenhaver's call and rejected the Senate's version, with a roll call vote of 136 yeas to 165 nays. Then, in a show of strength, the House voted 157 to 138 to convene a new Conference Committee, with instructions that they consider the bill only on the basis of the House-passed version, that is, *without* the premarital provision. The Speaker replaced Marion Copenhaver on the new Conference Committee, but included members who had strongly and eloquently supported the House position. This gesture of support for the House's position, although it was antithetical to his own stance, earned him respect from his colleagues, as he had promised to listen to the House's voice when elected Speaker.

A first moral crusade had been fought and won. A second Committee of Conference on the AIDS bill was to then convene in some haste. The May 15 deadline for bills and reports on the Senate floor had passed; therefore, a two-thirds majority vote would be required to suspend the rules and allow a bill to be voted on. The House had locked itself into a tight position, making negotiation difficult. Sen. Edward Dupont, the new Senate majority leader, was a conferee, and he represented the Senate president. A small room had been located on the first floor of the State House. It was packed and hot, and press were in attendance. A unanimous vote was needed or the bill would die.

Senator Dupont opened by roundly criticizing the House for sending in conferees whose hands were tied. He talked about how committed he was to the premarital testing, indicating that, as an original sponsor of the bill, had he known then what he knew now, the bill would have been introduced with the provision included. He voiced the plea that had been used over and over by the Speaker and Senate president, that "if only one baby is saved by this," then the amendment is worth it. He said he would compromise by allowing anyone who was phobic about needles to be excused from the test by an order of the court. The House members indicated that this really did not represent much of a compromise.

Representative Kerk, a new conferee and House member, proposed an alternative that had been discussed earlier with some of the medical society physicians. Why not, he suggested, have a mandatory premarital questionnaire, and allow people to elect to take the test if they answered yes to some of the questions. Senator Dupont went off to seek guidance on this idea, and returned later to say that it was unacceptable.

An emotional burst from Rep. Ednapearl Parr brought the issue to a head. Why, she shouted, did they demand to test “innocent people” when they should be testing drug addicts and homosexuals and — In a level voice, Senator Krasker silenced her by saying, “Ednapearl, they are *all* innocent. There are no guilty people in this.”

In the quiet that followed, Senator Dupont explained that this was exactly why the premarital group would be so useful. It was precisely their “innocence” that meant their subjection to mandatory testing would open the way for mandatory testing of “other groups.” He did not elaborate. After another break to receive instructions, he returned and announced that he would sign the Conference Committee report without the premarital provision included. But, he added, he would fight its entry onto the floor, and block the necessary two-thirds vote. He concluded, “I have the votes.”

This, then, was the plan. If Dupont could indeed block the bill’s entry onto the floor, the bill would technically die in Conference Committee. No senator would actually have to vote against the AIDS bill, and the governor would not have to fulfill his threat of a veto.

However, in his last plea, Dupont had revealed the purpose of the governor’s amendment. It was clear now why the amendment had been proposed, why the governor had called it “a start, a small beginning,” and why he had repeated that this was a legal issue, a civil rights issue, a political issue, but not a medical issue. For indeed, if you can mandate testing of a low-risk group, even when the results of that test cannot be used by the state for any purpose, then it is a first step to begin testing of *any* group, especially any group that those in power find unacceptable. Using AIDS as a mechanism to curtail a group’s civil rights is certainly a legal issue and a political issue, not a medical issue. But it is exactly this use of medicine to achieve results that have nothing to do with health that is most distressing.

On May 19, Senator Krasker’s motion to suspend the rules and allow the AIDS bill to be heard on the floor failed in a 12–12 Senate vote, and the bill died.

Conclusion

HIV testing is an issue ripe for distortion and political manipulation. Because so much is not known, and since much that is known has not been clearly enunciated, there is widespread public fear. To this is added a growing distrust of the health care community’s truthfulness in assessing the real risks of AIDS. Suspicion that medicine is deliberately understating the risks of transmission and is wrong in its assessment that HIV infection cannot be transmitted through casual contact makes public education a particularly difficult endeavor.

In New Hampshire’s experience last year, the problem stemmed from too little education of the public and elected officials to permit genuine debate and unbiased consideration of the AIDS issue. For our sister New England states, the issue by now may be not too little information, but too much. There are many voices talking, authoritatively, about AIDS testing, and the public and media have little to help them sift through the morass of speculation, hyperbole, and fact. The New Hampshire experience had three bad long-term consequences: (1) it left scarred relationships between decision makers, making future planning difficult; (2) it further confused, and therefore frightened, an already wary public; and (3) by killing the bill, it delayed care, counseling, and public education for at least one year — one year longer for the disease to spread among a poorly informed public.

To avoid New Hampshire's debacle, our sister states need to build a central coalition whose "voice" is reasoned and whose membership represents a broad spectrum of respected medical and community organizations. Without such a coalition, politicians and some media will exploit conflicting opinions and further erode the public's confidence that it is receiving honest information. In concert with governors, a central coalition should establish a plan that considers all the many ramifications of AIDS and HIV infection with respect to states and lays out concrete actions. Then, and only then, should the doors be opened to introduce legislation. A well-informed coalition and a well-informed governor can prevail upon legislators to withhold bills until they have been educated and brought into the fold. With legislative, gubernatorial, and coalition support, bills have not only a better chance of passage, but also a better chance of producing useful information for press and public to consider. Harassment and discrimination have no place in the consideration of disease-control measures. We can and must do better. 🙏

Notes

1. "AIDS in New Hampshire," pamphlet, New Hampshire Division of Public Health Services, May 25, 1987.
2. Ibid.
3. Press Conference, Governor John H. Sununu, April 7, 1987.
4. Ibid.
5. Miles John McCue, M.D., "Premarital AIDS Testing Misdirected," *Boston Globe*, April 19, 1987; James B. Kahn, M.D., "The State Would Be Ill-Served by Premarital AIDS Testing," *Concord Monitor*, May 12, 1987.
6. "Governor Won't Sign Bill Unless Mandatory Amendment Stays: Sununu Lobbies for AIDS Tests," *Manchester Union Leader*, May 7, 1987.
7. "Bush Backs Mandatory Marriage AIDS Test," *Manchester Union Leader*, April 9, 1987; "Politics of AIDS," editorial, *Concord Monitor*, April 10, 1987.
8. Aaron Zitner, "AIDS Test: Doctors Doubt Value of Sununu's Plan," *Concord Monitor*, April 9, 1987.
9. "Cross Power Play," editorial, *Concord Monitor*, May 12, 1987.
10. Miles John McCue, M.D., "Premarital AIDS Testing Misdirected."
11. "AIDS Squabble: Bickering Over Testing Goes On," *Manchester Union Leader*, April 30, 1987.
12. Aaron Zitner, "AIDS Testing: Governor Accused of Forcing Issue," *Concord Monitor*, May 6, 1987.
13. "Forced AIDS Tests; Then What?" editorial, *New York Times*, June 7, 1987.
14. "Evans and Novak," syndicated column, *Manchester Union Leader*, April 30, 1987.
15. Ben Stocking, "Foes of AIDS Tests Plan Fight in the House," *Concord Monitor*, May 14, 1987.

