S T A T E O F N E W Y O R K

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2009-2010 Regular Sessions

I N S E N A T E

May 26, 2009

Introduced by Sen. MONSERRATE -- read twice and ordered printed, and when printed to be committed to the Committee on Health

AN ACT to amend the public health law, in relation to testing for the human immunodeficiency virus

THE PEOPLE OF THE STATE OF NEW YORK, REPRESENTED IN SENATE AND ASSEMBLY, DO ENACT AS FOLLOWS:

Section 1. Section 2781 of the public health law, as added by chapter 584 of the laws of 1988, paragraph (d) of subdivision 6 as added by chapter 220 of the laws of 1996, and subdivision 7 as added by chapter 429 of the laws of 2005, is amended to read as follows:

S 2781. HIV related testing. 1. Except as provided in section three thousand one hundred twenty-one of the civil practice law and rules, or unless otherwise specifically authorized or required by a state or federal law, no person shall order the performance of an HIV related test without first receiving the [written,] informed consent of the subject of the test who has capacity to consent or, when the subject lacks capacity to consent, of a person authorized pursuant to law to consent to health care for such individual. A physician or other person authorized pursuant to law to order the performance of an HIV related test shall certify, in the order for the performance of an HIV related test, that informed consent [required by this section] has been received prior to ordering such test by a laboratory or other facility EITHER PURSUANT TO SUBDIVISION TWO OF THIS SECTION OR IN THE EVENT THAT THE INFORMED CONSENT IS ORAL, SHALL DOCUMENT IN THE MEDICAL RECORD OF THE INDIVIDUAL THAT INFORMED CONSENT HAS BEEN GIVEN. SUCH INFORMED CONSENT SHALL BE IN WRITING AND SIGNED BY THE INDIVIDUAL IN THE EVENT THAT THE PERSON ORDERING THE TEST IS ORDERING A RAPID HIV RELATED TEST AND DOES NOT HAVE THE CAPACITY AT THE SITE OF SUCH RAPID TEST TO PERFORM OTHER MEDICAL CARE.

2. [Informed consent to an HIV related test shall consist of a statement signed by the subject of the test who has capacity to consent or,

EXPLANATION--Matter in ITALICS (underscored) is new; matter in brackets [ ] is old law to be omitted.

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when the subject lacks capacity to consent, by a person authorized pursuant to law to consent to health care for the subject which includes at least the following:

(a) an explanation of the test, including its purpose, the meaning of its results, and the benefits of early diagnosis and medical intervention; and

(b) an explanation of the procedures to be followed, including that the test is voluntary, that consent may be withdrawn at any time, and a statement advising the subject that anonymous testing is available; and

(c) an explanation of the confidentiality protections afforded confidential HIV related information under this article, including the circumstances under which and classes of persons to whom disclosure of such information may be required, authorized or permitted under this article or in accordance with other provisions of law or regulation.

3.] Prior to [the execution of a written] THE OBTAINING OF informed consent, a person ordering the performance of an HIV related test shall provide ORALLY OR IN WRITING to the subject of an HIV related test or, if the subject lacks capacity to consent, to a person authorized pursuant to law to consent to health care for the subject, an explanation of [the nature of AIDS and HIV related illness, information about discrimination problems that disclosure of the test result could cause and legal protections against such discrimination, and information about behavior known to pose risks for transmission and contraction of HIV infection] THE FACTS THAT HIV CAUSES AIDS, THAT THERE IS TREATMENT FOR HIV THAT CAN HELP AN INDIVIDUAL STAY HEALTHY, THAT AN INDIVIDUAL WITH HIV OR AIDS CAN PROTECT THE INDIVIDUALS AROUND HIM OR HER FROM BEING INFECTED, THAT THE TEST IS VOLUNTARY, AND THAT THE RESULTS OF THE TEST WILL BE KEPT CONFIDENTIAL.

3. NOTWITHSTANDING ANY PROVISION OF LAW TO THE CONTRARY, NOTHING SHALL PROHIBIT A HEALTH CARE PROVIDER FROM COMBINING A FORM USED TO OBTAIN INFORMED CONSENT FOR HIV RELATED TESTING WITH FORMS USED TO OBTAIN WRITTEN CONSENT FOR GENERAL MEDICAL CARE OR ANY OTHER MEDICAL TEST OR PROCEDURE. WHERE A WRITTEN CONSENT TO HIV RELATED TESTING IS INCLUDED IN A SIGNED GENERAL CONSENT TO MEDICAL CARE FOR THE SUBJECT OF THE TEST OR IN A SIGNED CONSENT TO ANY HEALTH CARE SERVICE FOR THE SUBJECT OF THE TEST, THE CONSENT FORM SHALL HAVE A CLEARLY MARKED PLACE ADJACENT TO THE SIGNATURE WHERE THE SUBJECT OF THE TEST, OR WHEN THE SUBJECT LACKS CAPACITY TO CONSENT, A PERSON AUTHORIZED PURSUANT TO LAW TO CONSENT TO HEALTH CARE FOR SUCH INDIVIDUAL, SHALL BE GIVEN AN OPPORTUNITY TO SPECIFICALLY DECLINE IN WRITING HIV RELATED TESTING ON SUCH GENERAL CONSENT. AN INFORMED CONSENT FOR HIV RELATED TESTING PURSUANT TO THIS SECTION SHALL BE VALID FOR SUCH TESTING UNTIL SUCH CONSENT IS REVOKED OR EXPIRES BY ITS TERMS. EACH TIME THAT AN HIV RELATED TEST IS ORDERED PURSUANT TO WRITTEN INFORMED CONSENT IN ACCORDANCE WITH THIS SECTION, THE PHYSICIAN OR OTHER PERSON AUTHORIZED PURSUANT TO LAW TO ORDER THE PERFORMANCE OF THE HIV RELATED TEST, OR SUCH PERSON'S REPRESENTATIVE, SHALL ORALLY NOTIFY THE SUBJECT OF THE TEST OR, WHEN THE SUBJECT LACKS CAPACITY TO CONSENT, A PERSON AUTHORIZED PURSUANT TO LAW TO CONSENT TO HEALTH CARE FOR SUCH INDIVIDUAL, THAT AN HIV RELATED TEST WILL BE CONDUCTED AT SUCH TIME, AND SHALL NOTE THE NOTIFICATION IN THE PATIENT'S RECORD.

4. A person authorized pursuant to law to order the performance of an HIV related test shall provide DIRECTLY OR THROUGH A REPRESENTATIVE to the person seeking such test an opportunity to remain anonymous and to provide written, informed consent through use of a coded system with no linking of individual identity to the test request or results. A health

care provider who is not authorized by the commissioner to provide HIV related tests on an anonymous basis shall refer a person who requests an anonymous test to a test site which does provide anonymous testing. The provisions of this subdivision shall not apply to a health care provider ordering the performance of an HIV related test on an individual proposed for insurance coverage.

5. At the time of communicating the test result to the subject of the test, a person ordering the performance of an HIV related test shall, DIRECTLY OR THROUGH A REPRESENTATIVE IN THE CASE OF A TEST INDICATING EVIDENCE OF HIV INFECTION, provide the subject of the test or, if the subject lacks capacity to consent, the person authorized pursuant to law to consent to health care for the subject, with counseling or referrals for counseling: (a) for coping with the emotional consequences of learning the result; (b) regarding the discrimination problems that disclosure of the result could cause; (c) for behavior change to prevent transmission or contraction of HIV infection; (d) to inform such person of available medical treatments; and (e) regarding the [test subject's] need to notify his or her contacts.

5-A. WITH THE CONSENT OF THE SUBJECT OF A TEST INDICATING EVIDENCE OF HIV INFECTION OR, IF THE SUBJECT LACKS CAPACITY TO CONSENT, WITH THE CONSENT OF THE PERSON AUTHORIZED PURSUANT TO LAW TO CONSENT TO HEALTH CARE FOR THE SUBJECT, THE PERSON WHO ORDERED THE PERFORMANCE OF THE HIV RELATED TEST, OR SUCH PERSON'S REPRESENTATIVE, SHALL PROMPTLY PROVIDE OR ARRANGE WITH A HEALTH CARE PROVIDER FOR AN APPOINTMENT FOR FOLLOW-UP MEDICAL CARE FOR HIV FOR SUCH SUBJECT.

6. The provisions of this section shall not apply to the performance of an HIV related test:

(a) by a health care provider or health facility in relation to the procuring, processing, distributing or use of a human body or a human body part, including organs, tissues, eyes, bones, arteries, blood, semen, or other body fluids, for use in medical research or therapy, or for transplantation to individuals provided, however, that where the test results are communicated to the subject, post-test counseling, as described in subdivision five of this section, shall nonetheless be required; or

(b) for the purpose of research if the testing is performed in a manner by which the identity of the test subject is not known and may not be retrieved by the researcher; or

(c) on a deceased person, when such test is conducted to determine the cause of death or for epidemiological purposes[.]; OR

(d) conducted pursuant to section twenty-five hundred-f of this chapter[.]; OR

(E) IN SITUATIONS INVOLVING OCCUPATIONAL EXPOSURES WHICH CREATE A SIGNIFICANT RISK OF CONTRACTING OR TRANSMITTING HIV INFECTION, AS DEFINED IN REGULATIONS OF THE DEPARTMENT AND PURSUANT TO PROTOCOLS ADOPTED BY THE DEPARTMENT, (I) PROVIDED THAT: (A) THE PERSON WHO IS THE SOURCE OF THE OCCUPATIONAL EXPOSURE IS DECEASED, COMATOSE OR IS DETERMINED BY HIS OR HER ATTENDING HEALTH CARE PROFESSIONAL TO LACK MENTAL CAPACITY TO CONSENT TO AN HIV RELATED TEST AND IS NOT REASONABLY EXPECTED TO RECOVER IN TIME FOR THE EXPOSED PERSON TO RECEIVE APPROPRIATE MEDICAL TREATMENT, AS DETERMINED BY THE EXPOSED PERSON'S ATTENDING HEALTH CARE PROFESSIONAL WHO WOULD ORDER OR PROVIDE SUCH TREATMENT; (B) THERE IS NO PERSON AVAILABLE OR REASONABLY LIKELY TO BECOME AVAILABLE WHO HAS THE LEGAL AUTHORITY TO CONSENT TO THE HIV RELATED TEST ON BEHALF OF THE SOURCE PERSON IN TIME FOR THE EXPOSED PERSON TO RECEIVE APPROPRIATE MEDICAL TREATMENT; AND (C) THE EXPOSED PERSON WILL BENEFIT MEDICALLY

BY KNOWING THE SOURCE PERSON'S HIV TEST RESULTS, AS DETERMINED BY THE EXPOSED PERSON'S HEALTH CARE PROFESSIONAL AND DOCUMENTED IN THE EXPOSED PERSON'S MEDICAL RECORD; (II) IN WHICH CASE (A) A PROVIDER SHALL ORDER AN ANONYMOUS HIV TEST OF THE SOURCE PERSON; AND (B) THE RESULTS OF SUCH ANONYMOUS TEST, BUT NOT THE IDENTITY OF THE SOURCE PERSON, SHALL BE DISCLOSED ONLY TO THE ATTENDING HEALTH CARE PROFESSIONAL OF THE EXPOSED PERSON SOLELY FOR THE PURPOSE OF ASSISTING THE EXPOSED PERSON IN MAKING APPROPRIATE DECISIONS REGARDING POST-EXPOSURE MEDICAL TREATMENT; AND (C) THE RESULTS OF THE TEST SHALL NOT BE DISCLOSED TO THE SOURCE PERSON OR PLACED IN THE SOURCE PERSON'S MEDICAL RECORD.

7. In the event that an HIV related test is ordered by a physician or certified nurse practitioner pursuant to the provisions of the education law providing for non-patient specific regimens, then for the purposes of this section the individual administering the test shall be deemed to be the individual ordering the test.

S 2. The public health law is amended by adding a new section 2781-a to read as follows:

S 2781-A. REQUIRED OFFERING OF HIV RELATED TESTING. 1. EVERY INDIVIDUAL BETWEEN THE AGES OF THIRTEEN AND SIXTY-FOUR YEARS (OR YOUNGER OR OLDER IF THERE IS EVIDENCE OR INDICATION OF RISK ACTIVITY) WHO RECEIVES HEALTH SERVICES AS AN INPATIENT OR IN THE EMERGENCY DEPARTMENT OF A GENERAL HOSPITAL DEFINED IN SUBDIVISION TEN OF SECTION TWENTY-EIGHT HUNDRED ONE OF THIS CHAPTER OR WHO RECEIVES PRIMARY CARE SERVICES IN AN OUTPATIENT DEPARTMENT OF SUCH HOSPITAL OR IN A DIAGNOSTIC AND TREATMENT CENTER LICENSED UNDER ARTICLE TWENTY-EIGHT OF THIS CHAPTER OR IN OTHER MEDICAL HEALTH CARE SETTINGS LICENSED UNDER ARTICLE TWENTY-EIGHT OF THIS CHAPTER SHALL BE OFFERED AN HIV RELATED TEST UNLESS THE HEALTH CARE PRACTITIONER PROVIDING SUCH SERVICES REASONABLY BELIEVES THAT: (A) THE INDIVIDUAL IS BEING TREATED FOR A LIFE THREATENING EMERGENCY; OR (B) THE INDIVIDUAL HAS PREVIOUSLY BEEN OFFERED OR HAS BEEN THE SUBJECT OF AN HIV RELATED TEST (EXCEPT THAT A TEST SHALL BE OFFERED IF OTHERWISE INDICATED); OR (C) THE INDIVIDUAL LACKS CAPACITY TO CONSENT TO AN HIV RELATED TEST.

2. AS USED IN THIS SECTION, "PRIMARY CARE" MEANS THE MEDICAL FIELDS OF FAMILY MEDICINE, GENERAL PEDIATRICS, PRIMARY CARE, INTERNAL MEDICINE, PRIMARY CARE OBSTETRICS, OR PRIMARY CARE GYNECOLOGY, WITHOUT REGARD TO BOARD CERTIFICATION.

3. THE OFFERING OF HIV RELATED TESTING UNDER THIS SECTION SHALL BE CULTURALLY AND LINGUISTICALLY APPROPRIATE IN ACCORDANCE WITH RULES AND REGULATIONS PROMULGATED BY THE COMMISSIONER.

4. THIS SECTION SHALL NOT AFFECT THE SCOPE OF PRACTICE OF ANY HEALTH CARE PRACTITIONER OR DIMINISH ANY AUTHORITY OR LEGAL OR PROFESSIONAL OBLIGATION OF ANY HEALTH CARE PRACTITIONER TO OFFER AN HIV RELATED TEST OR TO PROVIDE SERVICES OR CARE FOR THE SUBJECT OF AN HIV RELATED TEST.

S 3. Section 2135 of the public health law, as added by chapter 163 of the laws of 1998, is amended to read as follows:

S 2135. Confidentiality. All reports or information secured by the department, municipal health commissioner or district health officer under the provisions of this title shall be confidential except:

1. in so far as is necessary to carry out the provisions of this title;

2. WHEN USED IN THE AGGREGATE, WITHOUT PATIENT SPECIFIC IDENTIFYING INFORMATION, IN PROGRAMS APPROVED BY THE COMMISSIONER FOR THE IMPROVEMENT OF THE QUALITY OF MEDICAL CARE PROVIDED TO PERSONS WITH HIV/AIDS; OR

3. WHEN USED WITHIN THE STATE OR LOCAL HEALTH DEPARTMENT BY PUBLIC HEALTH DISEASE PROGRAMS TO ASSESS CO-MORBIDITY OR COMPLETENESS OF REPORTING AND TO DIRECT PROGRAM NEEDS, IN WHICH CASE PATIENT SPECIFIC IDENTIFYING INFORMATION SHALL NOT BE DISCLOSED OUTSIDE THE STATE OR LOCAL HEALTH DEPARTMENT.

S 4. Subdivision 4 of section 2780 of the public health law, as added by chapter 584 of the laws of 1988, is amended to read as follows:

4. "HIV related test" means any laboratory test or series of tests [for any virus, antibody, antigen or etiologic agent whatsoever thought to cause or to indicate the presence of AIDS] APPROVED FOR THE DIAGNOSIS OF HIV.

S 5. Subdivision 1 of section 2130 of the public health law, as added by chapter 163 of the laws of 1998, is amended to read as follows:

1. Every physician or other person authorized by law to order diagnostic tests or make a medical diagnosis, or any laboratory performing such tests shall immediately (a) upon [initial] determination that a person is infected with human immunodeficiency virus (HIV), [or] (b) upon [initial] diagnosis that a person is afflicted with the disease known as acquired immune deficiency syndrome (AIDS), [or] (c) upon [initial] diagnosis that a person is afflicted with HIV related illness, report such case to the commissioner.

S 6. Paragraph (a) of subdivision 5 of section 2782 of the public health law, as added by chapter 584 of the laws of 1988, is amended to read as follows:

(a) Whenever disclosure of confidential HIV related information is made pursuant to this article, except for disclosures made pursuant to [paragraph] PARAGRAPHS (a), (D) AND (I) of subdivision one of this section or paragraph (a) or (e) of subdivision four of this section, such disclosure shall be accompanied or followed by a statement in writing which includes the following or substantially similar language: "This information has been disclosed to you from confidential records which are protected by state law. State law prohibits you from making any further disclosure of this information without the specific written consent of the person to whom it pertains, or as otherwise permitted by law. Any unauthorized further disclosure in violation of state law may result in a fine or jail sentence or both. A general authorization for the release of medical or other information is NOT sufficient authorization for further disclosure." An oral disclosure shall be accompanied or followed by such a notice within ten days.

S 7. Subdivision 1 of section 2782 of the public health law is amended by adding a new paragraph (q) to read as follows:

(Q) AN EXECUTOR OR AN ADMINISTRATOR OF AN ESTATE SHALL HAVE ACCESS TO THE CONFIDENTIAL HIV INFORMATION OF A DECEASED PERSON AS NEEDED TO FULFILL HIS OR HER RESPONSIBILITIES/DUTIES AS AN EXECUTOR OR ADMINISTRATOR.

S 8. Subdivision 1 of section 2786 of the public health law, as added by chapter 584 of the laws of 1988, is amended to read as follows:

1. The commissioner shall promulgate rules and regulations concerning implementation of this article for health facilities, health care providers and other persons to whom this article is applicable. The commissioner shall also develop STANDARDIZED MODEL forms to be used for informed consent for HIV related testing and for the release of confidential HIV related information and materials for pre-test counseling as required by subdivision [three] TWO of section twenty-seven hundred eighty-one of this article, and for post-test counseling as required by subdivision five of section twenty-seven hundred eighty-one of this

article. Persons, health facilities and health care providers may use forms for informed consent for HIV related testing, and for the release of confidential HIV related information other than those forms developed pursuant to this section, provided [that the person, health facility or health care provider doing so receives prior authorization from] THE FORMS CONTAINED INFORMATION CONSISTENT WITH THE STANDARDIZED MODEL FORMS DEVELOPED BY the commissioner PURSUANT TO THIS SUBDIVISION. All forms developed or [authorized] USED pursuant to this section shall be written in a clear and coherent manner using words with common, everyday meanings. The commissioner, in consultation with the AIDS institute advisory council, shall promulgate regulations to identify those circumstances which create a significant risk of contracting or transmitting HIV infection; provided, however, that such regulations shall not be determinative of any significant risk determined pursuant to paragraph (a) of subdivision four of section twenty-seven hundred eighty-two or section twenty-seven hundred eighty-five of this article.

S 9. On or before September 1, 2011 the commissioner of health shall evaluate the impact of this act with respect to the number of persons who are tested for HIV infection and the number of persons who access care and treatment. Such report shall be submitted to the governor and to the chairs of the assembly and senate committees on health.

S 10. This act shall take effect September 1, 2009; provided, however, that the commissioner of health is authorized to adopt rules and regulations necessary to implement the provisions of this act prior to such effective date.