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

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I N S E N A T E

February 2, 2010

Introduced by Sens. HANNON, DeFRANCISCO, LITTLE, MORAHAN, VOLKER -- 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 HIV related testing

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

Section 1. Legislative findings. Public health authorities, including the Centers for Disease Control and Prevention (CDC), stress the importance of greatly increasing the number of people who receive testing for infection with HIV. The CDC stresses the offering of testing to patients without regard to perceived risk. HIV testing helps infected patients by enabling them to enter health care earlier to monitor their HIV disease and initiate treatment when appropriate. HIV testing provides a unique, important opportunity to discuss behaviors that prevent transmitting the virus to others.

Yet many health care professionals miss opportunities to offer an HIV test to their patients for a variety of reasons. Many may be reluctant to bring up what they anticipate will be a difficult topic. They may assume that their patients are not at risk for HIV infection. They may worry that patients will interpret the offer of an HIV test to mean that the practitioner is making negative assumptions about the patient. At the same time, many patients may not perceive themselves to be at risk for HIV and so may not initiate testing discussions themselves. Consequently, many patients are highly unlikely to request HIV testing if it is not offered by their provider. Requiring the offer of testing to all patients without regard to perceived individual risk will help simplify, destigmatize, and universalize the offer of HIV testing, and therefore increase the likelihood that individuals will be tested and therefore learn their HIV status. Because the most important reason for expanding HIV testing is bringing HIV infected individuals into care as early as possible, a positive test result must lead to counseling, services, and care.

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

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This legislation will also simplify and streamline the process of obtaining written informed consent to HIV related testing and the providing of pre- and post-test counseling and information.

Nothing contained in this legislation shall be construed as authorizing any individual to require any person to have an HIV related test or treatment for HIV/AIDS.

Therefore, this legislation will help protect the health of individual patients while supporting health care providers in their efforts to improve the public's health. This legislation is consistent with and a logical extension of New York's laws on HIV testing consent and confidentiality.

It is important that the offering of testing and arranging for, referring for, and providing of follow-up services be culturally and linguistically appropriate.

S 2. 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] HAVING RECEIVED 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.]

2. Informed consent to [an] HIV related [test] TESTING shall consist of a statement CONSENTING TO HIV RELATED TESTING signed by the subject of the test who has capacity to consent or, 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] AFTER THE SUBJECT OR SUCH OTHER PERSON HAS RECEIVED THE INFORMATION DESCRIBED IN SUBDIVISION THREE OF THIS SECTION.

2-A. WRITTEN CONSENT TO HIV RELATED TESTING MAY BE PART OF A SIGNED GENERAL CONSENT TO MEDICAL CARE FOR THE SUBJECT OF THE TEST, PROVIDED THAT 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 HIV RELATED TESTING IN WRITING 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 THAT HAS BEEN GIVEN 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 AGENT, 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.

3. Prior to the execution of [a] written informed consent, a person ordering the performance of an HIV related test OR SUCH PERSON'S AGENT shall provide 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] THAT:

(A) HIV CAUSES AIDS AND CAN BE TRANSMITTED THROUGH SEXUAL ACTIVITIES AND NEEDLE-SHARING AND BY PREGNANT WOMEN TO THEIR FETUSES AND THROUGH BREASTFEEDING INFANTS;

(B) THERE IS TREATMENT FOR HIV THAT CAN HELP AN INDIVIDUAL STAY HEALTHY;

(C) INDIVIDUALS WITH HIV OR AIDS CAN PROTECT PEOPLE IN THEIR LIVES, AND THOSE WHO DO NOT HAVE HIV CAN PROTECT THEMSELVES FROM BEING INFECTED;

(D) TESTING IS VOLUNTARY AND CAN BE DONE ANONYMOUSLY AT A PUBLIC TESTING CENTER;

(E) THE LAW PROTECTS THE CONFIDENTIALITY OF HIV RELATED TEST RESULTS; AND

(F) THE LAW PROHIBITS DISCRIMINATION BASED ON THEIR HIV STATUS AND SERVICES ARE AVAILABLE TO HELP WITH SUCH CONSEQUENCES.

4. A person authorized pursuant to law to order the performance of an HIV related test OR SUCH PERSON'S AGENT shall provide 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 OR SUCH PERSON'S AGENT shall:

(A) 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)] (I) for coping with the emotional consequences of learning the result;

[(b)] (II) regarding the discrimination problems that disclosure of the result could cause;

[(c)] (III) for behavior change to prevent transmission or contraction of HIV infection;

[(d)] (IV) to inform such person of available medical treatments; and

[(e)] (V) regarding the [test subject's] need to notify his or her contacts[.]; AND

(B) IN THE CASE OF A TEST NOT 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 INFORMATION CONCERNING THE RISKS OF PARTICIPATING IN HIGH RISK SEXUAL OR NEEDLE SHARING BEHAVIOR.

5-A. WITH THE CONSENT OF THE SUBJECT OF A TEST INDICATING EVIDENCE OF HIV INFECTION OR, IF THE SUBJECT LACKS CAPACITY TO CONSENT, 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 AGENT, SHALL PROVIDE OR ARRANGE WITH A HEALTH CARE PROVIDER FOR AN APPOINTMENT FOR 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.

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

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 3. 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 PHYSICIAN, PHYSICIAN ASSISTANT, NURSE PRACTITIONER, OR MIDWIFE PROVIDING PRIMARY CARE, OR CARE IN THE EMERGENCY DEPARTMENT OF A GENERAL HOSPITAL AS DEFINED IN SUBDIVISION TEN OF SECTION TWENTY-EIGHT HUNDRED ONE OF THIS CHAPTER, SHALL OFFER TO PERFORM OR OFFER TO ORDER, OR ARRANGE FOR THE PERFORMANCE OF AN HIV RELATED TEST FOR EACH INDIVIDUAL BETWEEN THE AGES OF EIGHTEEN AND SIXTY-FOUR WHO APPLIES FOR OR RECEIVES HEALTH SERVICES FROM SUCH HEALTH CARE PRACTITIONER, UNLESS THE HEALTH CARE PRACTITIONER REASONABLY BELIEVES THAT (A) THE INDIVIDUAL IS BEING TREATED FOR A LIFE THREATENING EMERGENCY; OR (B) THE INDIVIDUAL HAS RECEIVED AN HIV RELATED TEST IN THE PAST TWELVE MONTHS; OR (C) THE INDIVIDUAL LACKS CAPACITY TO CONSENT TO AN HIV RELATED TEST. AS USED IN THIS SUBDIVISION, "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.

2. 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.

3. 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 4. Subdivision 8 of section 2782 of the public health law, as amended by chapter 76 of the laws of 1995, is amended to read as follows:

8. Confidential HIV related information shall be recorded in the medical record of the protected individual. The provisions of this section shall not prohibit the listing of acquired immune deficiency syndrome, HIV related illness or HIV infection in a certificate of death, autopsy report or related documents prepared pursuant to article forty-one of this chapter or other applicable laws, ordinances, rules or regulations relating to the documentation of cause of death, nor shall this section be construed to modify any laws, ordinances, rules or regulations relative to access to death certificates, autopsy reports or such other related documents. Under no circumstances shall confidential HIV related information be disclosable pursuant to article six of the public officers law. Notwithstanding the foregoing, confidential HIV information obtained pursuant to section 390.15 of the criminal procedure law or section 347.1 of the family court act by either court order or consent of the protected individual shall not be recorded in the medical record of the protected individual unless he or she consents to the recording of such information in a written statement containing the relevant information [specified] in [subdivision two of] section [two thousand seven] TWENTY-SEVEN hundred eighty-one of this article.

S 5. Subdivision 2 of section 2785-a of the public health law, as added by chapter 76 of the laws of 1995, is amended to read as follows:

2. At the time of communicating the test results to the subject or the victim, such public health officer shall directly provide the victim and person tested with (a) counseling or referrals for counseling for the purposes specified in [subdivision five of] section [two thousand seven] TWENTY-SEVEN hundred eighty-one of this article; (b) counseling with regard to HIV disease and HIV testing in accordance with law and consistent with [subdivision five of] section [two thousand seven] TWENTY-SEVEN hundred eighty-one of this article; and (c) appropriate health care and support services, or referrals to such available services. If at the time of communicating the test results, the person tested is in the custody of the department of correctional services, division for youth, office of mental health or a local correctional institution, the counseling and services required by this subdivision may be provided by a public health officer associated with the county or facility within which the person tested is confined.

S 6. The commissioner of health shall report to the governor and the legislature two years after the effective date of this act, and again four years after the effective date of this act, on the implementation of this act and the affect of this act on the frequency of HIV related testing and other outcomes, and making recommendations relating to this act. The commissioner of health may contract with bona fide organizations seeking to evaluate the implementation and affect of this act, consistent with the protection of the confidentiality of individual identifying information.

S 7. This act shall take effect on the one hundred eightieth day after it shall become a law; provided that the commissioner of health shall, prior to the effective date of this act, make regulations and take any other actions to implement this act on such date.