

S. 8227

A. 11487

S E N A T E - A S S E M B L Y

June 17, 2010

IN SENATE -- Introduced by Sen. DUANE -- read twice and ordered printed,
and when printed to be committed to the Committee on Rules

IN ASSEMBLY -- Introduced by COMMITTEE ON RULES -- (at request of M. of
A. Gottfried, Towns) -- read once and referred to the Committee on
Health

AN ACT to amend the public health law, in relation to HIV testing

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

1 Section 1. Section 2781 of the public health law, as added by chapter
2 584 of the laws of 1988, paragraph (d) of subdivision 6 as added by
3 chapter 220 of the laws of 1996 and subdivision 7 as added by chapter
4 429 of the laws of 2005, is amended to read as follows:
5 S 2781. HIV related testing. 1. Except as provided in section three
6 thousand one hundred twenty-one of the civil practice law and rules, or
7 unless otherwise specifically authorized or required by a state or
8 federal law, no person shall order the performance of an HIV related
9 test without first [receiving] HAVING RECEIVED the written OR, WHERE
10 AUTHORIZED BY THIS SUBDIVISION, ORAL, informed consent of the subject of
11 the test who has capacity to consent or, when the subject lacks capacity
12 to consent, of a person authorized pursuant to law to consent to health
13 care for such individual. [A physician or other person authorized pursu-
14 ant to law to order the performance of an HIV related test shall certi-
15 fy, in the order for the performance of an HIV related test, that
16 informed consent required by this section has been received prior to
17 ordering such test by a laboratory or other facility.] WHEN THE TEST
18 BEING ORDERED IS A RAPID HIV TEST, SUCH INFORMED CONSENT MAY BE
19 OBTAINED ORALLY AND SHALL BE DOCUMENTED IN THE SUBJECT OF THE TEST'S
20 MEDICAL RECORD BY THE PERSON ORDERING THE PERFORMANCE OF THE TEST.
21 2. [Informed] EXCEPT WHERE SUBDIVISION ONE OF THIS SECTION PERMITS
22 INFORMED CONSENT TO BE OBTAINED ORALLY, INFORMED consent to [an] HIV
23 related [test] TESTING shall consist of a statement CONSENTING TO HIV
24 RELATED TESTING signed by the subject of the test who has capacity to
25 consent or, when the subject lacks capacity to consent, by a person

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

LBD17746-03-0

1 authorized pursuant to law to consent to health care for the subject
2 [which includes at least the following:

3 (a) an explanation of the test, including its purpose, the meaning of
4 its results, and the benefits of early diagnosis and medical inter-
5 vention; and

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

9 (c) an explanation of the confidentiality protections afforded confi-
10 dential HIV related information under this article, including the
11 circumstances under which and classes of persons to whom disclosure of
12 such information may be required, authorized or permitted under this
13 article or in accordance with other provisions of law or regulation]
14 AFTER THE SUBJECT OR SUCH OTHER PERSON HAS RECEIVED THE INFORMATION
15 DESCRIBED IN SUBDIVISION THREE OF THIS SECTION.

16 2-A. WHERE A WRITTEN CONSENT TO HIV RELATED TESTING IS INCLUDED IN A
17 SIGNED GENERAL CONSENT TO MEDICAL CARE FOR THE SUBJECT OF THE TEST OR IN
18 A SIGNED CONSENT TO ANY HEALTH CARE SERVICE FOR THE SUBJECT OF THE TEST,
19 THE CONSENT FORM SHALL HAVE A CLEARLY MARKED PLACE ADJACENT TO THE
20 SIGNATURE WHERE THE SUBJECT OF THE TEST, OR, WHEN THE SUBJECT LACKS
21 CAPACITY TO CONSENT, A PERSON AUTHORIZED PURSUANT TO LAW TO CONSENT TO
22 HEALTH CARE FOR SUCH INDIVIDUAL, SHALL BE GIVEN AN OPPORTUNITY TO
23 SPECIFICALLY DECLINE IN WRITING HIV RELATED TESTING ON SUCH GENERAL
24 CONSENT.

25 2-B. A WRITTEN OR ORAL INFORMED CONSENT FOR HIV RELATED TESTING
26 PURSUANT TO THIS SECTION SHALL BE VALID FOR SUCH TESTING UNTIL SUCH
27 CONSENT IS REVOKED OR EXPIRES BY ITS TERMS. EACH TIME THAT AN HIV
28 RELATED TEST IS ORDERED PURSUANT TO INFORMED CONSENT IN ACCORDANCE WITH
29 THIS SECTION, THE PHYSICIAN OR OTHER PERSON AUTHORIZED PURSUANT TO LAW
30 TO ORDER THE PERFORMANCE OF THE HIV RELATED TEST, OR SUCH PERSON'S
31 REPRESENTATIVE, SHALL ORALLY NOTIFY THE SUBJECT OF THE TEST OR, WHEN THE
32 SUBJECT LACKS CAPACITY TO CONSENT, A PERSON AUTHORIZED PURSUANT TO LAW
33 TO CONSENT TO HEALTH CARE FOR SUCH INDIVIDUAL, THAT AN HIV RELATED TEST
34 WILL BE CONDUCTED AT SUCH TIME, AND SHALL NOTE THE NOTIFICATION IN THE
35 PATIENT'S RECORD.

36 2-C. THE PROVISIONS OF THIS SECTION REGARDING ORAL INFORMED CONSENT
37 FOR A RAPID HIV TEST SHALL NOT APPLY TO TESTS PERFORMED IN A FACILITY
38 OPERATED UNDER THE CORRECTION LAW.

39 3. Prior to the execution of [a] written, OR OBTAINING AND DOCUMENTING
40 ORAL, informed consent, a person ordering the performance of an HIV
41 related test shall provide EITHER DIRECTLY OR THROUGH A REPRESENTATIVE
42 to the subject of an HIV related test or, if the subject lacks capacity
43 to consent, to a person authorized pursuant to law to consent to health
44 care for the subject, an explanation [of the nature of AIDS and HIV
45 related illness, information about discrimination problems that disclo-
46 sure of the test result could cause and legal protections against such
47 discrimination, and information about behavior known to pose risks for
48 transmission and contraction of HIV infection.] THAT:

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

52 (B) THERE IS TREATMENT FOR HIV THAT CAN HELP AN INDIVIDUAL STAY HEAL-
53 THY;

54 (C) INDIVIDUALS WITH HIV OR AIDS CAN ADOPT SAFE PRACTICES TO PROTECT
55 UNINFECTED AND INFECTED PEOPLE IN THEIR LIVES FROM BECOMING INFECTED OR
56 MULTIPLY INFECTED WITH HIV;

(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;

(F) THE LAW PROHIBITS DISCRIMINATION BASED ON AN INDIVIDUAL'S HIV STATUS AND SERVICES ARE AVAILABLE TO HELP WITH SUCH CONSEQUENCES; AND

(G) THE LAW ALLOWS AN INDIVIDUAL'S INFORMED CONSENT FOR HIV RELATED TESTING TO BE VALID FOR SUCH TESTING UNTIL SUCH CONSENT IS REVOKED BY THE SUBJECT OF THE HIV TEST OR EXPIRES BY ITS TERMS.

PROTOCOLS SHALL BE IN PLACE TO ENSURE COMPLIANCE WITH THIS SECTION.

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 OR AUTHORIZE DOCUMENTATION OF ORAL 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:

(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 (IN A MANNER WHICH MAY CONSIST OF ORAL OR WRITTEN REFERENCE TO INFORMATION PREVIOUSLY PROVIDED) 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, 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 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 FROM A PHYSICIAN, PHYSICIAN ASSISTANT, NURSE PRACTITIONER, OR MIDWIFE PROVIDING PRIMARY CARE SHALL BE OFFERED AN HIV RELATED TEST UNLESS THE HEALTH CARE PRACTITIONER PROVIDING SUCH SERVICES REASONABLY BELIEVES THAT (A) THE

1 INDIVIDUAL IS BEING TREATED FOR A LIFE THREATENING EMERGENCY; OR (B) THE
2 INDIVIDUAL HAS PREVIOUSLY BEEN OFFERED OR HAS BEEN THE SUBJECT OF AN HIV
3 RELATED TEST (EXCEPT THAT A TEST SHALL BE OFFERED IF OTHERWISE INDI-
4 CATED); OR (C) THE INDIVIDUAL LACKS CAPACITY TO CONSENT TO AN HIV
5 RELATED TEST.

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

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

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

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

19 S 2135. Confidentiality. All reports or information secured by the
20 department, municipal health commissioner or district health officer
21 under the provisions of this title shall be confidential except: (A) in
22 so far as is necessary to carry out the provisions of this title; (B)
23 WHEN USED IN THE AGGREGATE, WITHOUT PATIENT SPECIFIC IDENTIFYING INFOR-
24 MATION, IN PROGRAMS APPROVED BY THE COMMISSIONER FOR THE IMPROVEMENT OF
25 THE QUALITY OF MEDICAL CARE PROVIDED TO PERSONS WITH HIV/AIDS; OR (C)
26 WHEN USED WITHIN THE STATE OR LOCAL HEALTH DEPARTMENT BY PUBLIC HEALTH
27 DISEASE PROGRAMS TO ASSESS CO-MORBIDITY OR COMPLETENESS OF REPORTING AND
28 TO DIRECT PROGRAM NEEDS, IN WHICH CASE PATIENT SPECIFIC IDENTIFYING
29 INFORMATION SHALL NOT BE DISCLOSED OUTSIDE THE STATE OR LOCAL HEALTH
30 DEPARTMENT.

31 S 4. Subdivision 4 of section 2780 of the public health law, as added
32 by chapter 584 of the laws of 1988, is amended and a new subdivision 4-a
33 is added to read as follows:

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

38 4-A. "RAPID HIV TEST OR TESTING" MEANS ANY LABORATORY SCREENING TEST
39 OR TESTS APPROVED FOR DETECTING ANTIBODIES TO HIV, THAT PRODUCE RESULTS
40 IN SIXTY MINUTES OR LESS, AND ENCOMPASSES A CONFIRMATORY HIV RELATED
41 TEST IF THE SCREENING TEST IS REACTIVE.

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

44 1. Every physician or other person authorized by law to order diagnos-
45 tic tests or make a medical diagnosis, or any laboratory performing such
46 tests shall immediately (a) upon [initial] determination that a person
47 is infected with human immunodeficiency virus (HIV), [or] (b) upon
48 [initial] diagnosis that a person is afflicted with the disease known as
49 acquired immune deficiency syndrome (AIDS), [or] (c) upon [initial]
50 diagnosis that a person is afflicted with HIV related illness, AND (D)
51 UPON PERIODIC MONITORING OF HIV INFECTION BY ANY LABORATORY TESTS report
52 such case OR DATA to the commissioner.

53 S 6. Subdivision 1 of section 2782 of the public health law is amended
54 by adding a new paragraph (q) to read as follows:

55 (Q) AN EXECUTOR OR AN ADMINISTRATOR OF AN ESTATE SHALL HAVE ACCESS TO
56 THE CONFIDENTIAL HIV INFORMATION OF A DECEASED PERSON AS NEEDED TO

1 FULFILL HIS OR HER RESPONSIBILITIES/DUTIES AS AN EXECUTOR OR ADMINISTRA-
2 TOR.

3 S 7. Paragraph (a) of subdivision 5 of section 2782 of the public
4 health law, as added by chapter 584 of the laws of 1988, is amended to
5 read as follows:

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

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

23 1. The commissioner shall promulgate rules and regulations concerning
24 implementation of this article for health facilities, health care
25 providers and other persons to whom this article is applicable. The
26 commissioner shall also develop STANDARDIZED MODEL forms to be used for
27 informed consent for HIV related testing and for the release of confi-
28 dential HIV related information and materials for pre-test counseling as
29 required by subdivision three of section twenty-seven hundred eighty-one
30 of this article, and for post-test counseling as required by subdivision
31 five of section twenty-seven hundred eighty-one of this article.
32 Persons, health facilities and health care providers may use forms for
33 informed consent for HIV related testing, and for the release of confi-
34 dential HIV related information other than those forms developed pursu-
35 ant to this section, provided [that the person, health facility or
36 health care provider doing so receives prior authorization from] THEY
37 CONTAIN INFORMATION CONSISTENT WITH THE STANDARDIZED MODEL FORMS DEVEL-
38 OPED BY the commissioner. All forms developed or [authorized] USED
39 pursuant to this section shall be written in a clear and coherent manner
40 using words with common, everyday meanings. The commissioner, in consul-
41 tation with the AIDS institute advisory council, shall promulgate regu-
42 lations to identify those circumstances which create a significant risk
43 of contracting or transmitting HIV infection; provided, however, that
44 such regulations shall not be determinative of any significant risk
45 determined pursuant to paragraph (a) of subdivision four of section
46 twenty-seven hundred eighty-two or section twenty-seven hundred eighty-
47 five of this article.

48 S 9. On or before September 1, 2012 the commissioner of health shall
49 evaluate the impact of this act with respect to the number of persons
50 who are tested for HIV infection and the number of persons who access
51 care and treatment. Such report shall be submitted to the governor and
52 to the chairs of the assembly and senate committees on health.

53 S 10. This act shall take effect September 1, 2010; provided, however,
54 that the commissioner of health is authorized to adopt rules and regu-
55 lations necessary to implement this act prior to such effective date.