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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:

1 Section 1. Legislative findings. Public health authorities, including
2 the Centers for Disease Control and Prevention (CDC), stress the impor-
3 tance of greatly increasing the number of people who receive testing for
4 infection with HIV. The CDC stresses the offering of testing to patients
5 without regard to perceived risk. HIV testing helps infected patients by
6 enabling them to enter health care earlier to monitor their HIV disease
7 and initiate treatment when appropriate. HIV testing provides a unique,
8 important opportunity to discuss behaviors that prevent transmitting the
9 virus to others.
10 Yet many health care professionals miss opportunities to offer an HIV
11 test to their patients for a variety of reasons. Many may be reluctant
12 to bring up what they anticipate will be a difficult topic. They may
13 assume that their patients are not at risk for HIV infection. They may
14 worry that patients will interpret the offer of an HIV test to mean that
15 the practitioner is making negative assumptions about the patient. At
16 the same time, many patients may not perceive themselves to be at risk
17 for HIV and so may not initiate testing discussions themselves. Conse-
18 quently, many patients are highly unlikely to request HIV testing if it
19 is not offered by their provider. Requiring the offer of testing to all
20 patients without regard to perceived individual risk will help simplify,
21 destigmatize, and universalize the offer of HIV testing, and therefore
22 increase the likelihood that individuals will be tested and therefore
23 learn their HIV status. Because the most important reason for expanding
24 HIV testing is bringing HIV infected individuals into care as early as
25 possible, a positive test result must lead to counseling, services, and
26 care.

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

LBD15389-01-0

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

4 Nothing contained in this legislation shall be construed as authoriz-
5 ing any individual to require any person to have an HIV related test or
6 treatment for HIV/AIDS.

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

12 It is important that the offering of testing and arranging for, refer-
13 ring for, and providing of follow-up services be culturally and linguis-
14 tically appropriate.

15 S 2. Section 2781 of the public health law, as added by chapter 584 of
16 the laws of 1988, paragraph (d) of subdivision 6 as added by chapter 220
17 of the laws of 1996 and subdivision 7 as added by chapter 429 of the
18 laws of 2005, is amended to read as follows:

19 S 2781. HIV related testing. 1. Except as provided in section three
20 thousand one hundred twenty-one of the civil practice law and rules, or
21 unless otherwise specifically authorized or required by a state or
22 federal law, no person shall order the performance of an HIV related
23 test without first [receiving] HAVING RECEIVED the written, informed
24 consent of the subject of the test who has capacity to consent or, when
25 the subject lacks capacity to consent, of a person authorized pursuant
26 to law to consent to health care for such individual. [A physician or
27 other person authorized pursuant to law to order the performance of an
28 HIV related test shall certify, in the order for the performance of an
29 HIV related test, that informed consent required by this section has
30 been received prior to ordering such test by a laboratory or other
31 facility.]

32 2. Informed consent to [an] HIV related [test] TESTING shall consist
33 of a statement CONSENTING TO HIV RELATED TESTING signed by the subject
34 of the test who has capacity to consent or, when the subject lacks
35 capacity to consent, by a person authorized pursuant to law to consent
36 to health care for the subject [which includes at least the following:

37 (a) an explanation of the test, including its purpose, the meaning of
38 its results, and the benefits of early diagnosis and medical inter-
39 vention; and

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

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

50 2-A. WRITTEN CONSENT TO HIV RELATED TESTING MAY BE PART OF A SIGNED
51 GENERAL CONSENT TO MEDICAL CARE FOR THE SUBJECT OF THE TEST, PROVIDED
52 THAT THE CONSENT FORM SHALL HAVE A CLEARLY-MARKED PLACE ADJACENT TO THE
53 SIGNATURE WHERE THE SUBJECT OF THE TEST OR, WHEN THE SUBJECT LACKS
54 CAPACITY TO CONSENT, A PERSON AUTHORIZED PURSUANT TO LAW TO CONSENT TO
55 HEALTH CARE FOR SUCH INDIVIDUAL, SHALL BE GIVEN AN OPPORTUNITY TO
56 SPECIFICALLY DECLINE HIV RELATED TESTING IN WRITING ON SUCH GENERAL

1 CONSENT. AN INFORMED CONSENT FOR HIV RELATED TESTING PURSUANT TO THIS
2 SECTION SHALL BE VALID FOR SUCH TESTING UNTIL SUCH CONSENT IS REVOKED OR
3 EXPIRES BY ITS TERMS. EACH TIME THAT AN HIV RELATED TEST IS ORDERED
4 PURSUANT TO WRITTEN INFORMED CONSENT THAT HAS BEEN GIVEN IN ACCORDANCE
5 WITH THIS SECTION, THE PHYSICIAN OR OTHER PERSON AUTHORIZED PURSUANT TO
6 LAW TO ORDER THE PERFORMANCE OF THE HIV RELATED TEST, OR SUCH PERSON'S
7 AGENT, SHALL ORALLY NOTIFY THE SUBJECT OF THE TEST OR, WHEN THE SUBJECT
8 LACKS CAPACITY TO CONSENT, A PERSON AUTHORIZED PURSUANT TO LAW TO
9 CONSENT TO HEALTH CARE FOR SUCH INDIVIDUAL, THAT AN HIV RELATED TEST
10 WILL BE CONDUCTED AT SUCH TIME, AND SHALL NOTE THE NOTIFICATION IN THE
11 PATIENT'S RECORD.

12 3. Prior to the execution of [a] written informed consent, a person
13 ordering the performance of an HIV related test OR SUCH PERSON'S AGENT
14 shall provide to the subject of an HIV related test or, if the subject
15 lacks capacity to consent, to a person authorized pursuant to law to
16 consent to health care for the subject, an explanation [of the nature of
17 AIDS and HIV related illness, information about discrimination problems
18 that disclosure of the test result could cause and legal protections
19 against such discrimination, and information about behavior known to
20 pose risks for transmission and contraction of HIV infection] THAT:

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

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

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

29 (D) TESTING IS VOLUNTARY AND CAN BE DONE ANONYMOUSLY AT A PUBLIC TEST-
30 ING CENTER;

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

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

35 4. A person authorized pursuant to law to order the performance of an
36 HIV related test OR SUCH PERSON'S AGENT shall provide to the person
37 seeking such test an opportunity to remain anonymous and to provide
38 written, informed consent through use of a coded system with no linking
39 of individual identity to the test request or results. A health care
40 provider who is not authorized by the commissioner to provide HIV
41 related tests on an anonymous basis shall refer a person who requests an
42 anonymous test to a test site which does provide anonymous testing. The
43 provisions of this subdivision shall not apply to a health care provider
44 ordering the performance of an HIV related test on an individual
45 proposed for insurance coverage.

46 5. At the time of communicating the test result to the subject of the
47 test, a person ordering the performance of an HIV related test OR SUCH
48 PERSON'S AGENT shall:

49 (A) IN THE CASE OF A TEST INDICATING EVIDENCE OF HIV INFECTION,
50 provide the subject of the test or, if the subject lacks capacity to
51 consent, the person authorized pursuant to law to consent to health care
52 for the subject, with counseling or referrals for counseling:

53 [(a)] (I) for coping with the emotional consequences of learning the
54 result;

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

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

3 [(d)] (IV) to inform such person of available medical treatments; and
4 [(e)] (V) regarding the [test subject's] need to notify his or her
5 contacts[.]; AND

6 (B) IN THE CASE OF A TEST NOT INDICATING EVIDENCE OF HIV INFECTION,
7 PROVIDE THE SUBJECT OF THE TEST OR, IF THE SUBJECT LACKS CAPACITY TO
8 CONSENT, THE PERSON AUTHORIZED PURSUANT TO LAW TO CONSENT TO HEALTH CARE
9 FOR THE SUBJECT, WITH INFORMATION CONCERNING THE RISKS OF PARTICIPATING
10 IN HIGH RISK SEXUAL OR NEEDLE SHARING BEHAVIOR.

11 5-A. WITH THE CONSENT OF THE SUBJECT OF A TEST INDICATING EVIDENCE OF
12 HIV INFECTION OR, IF THE SUBJECT LACKS CAPACITY TO CONSENT, THE PERSON
13 AUTHORIZED PURSUANT TO LAW TO CONSENT TO HEALTH CARE FOR THE SUBJECT,
14 THE PERSON WHO ORDERED THE PERFORMANCE OF THE HIV RELATED TEST, OR SUCH
15 PERSON'S AGENT, SHALL PROVIDE OR ARRANGE WITH A HEALTH CARE PROVIDER FOR
16 AN APPOINTMENT FOR MEDICAL CARE FOR HIV FOR SUCH SUBJECT.

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

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

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

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

32 (d) conducted pursuant to section twenty-five hundred-f of this chap-
33 ter.

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

39 S 3. The public health law is amended by adding a new section 2781-a
40 to read as follows:

41 S 2781-A. REQUIRED OFFERING OF HIV RELATED TESTING. 1. EVERY PHYSI-
42 CIAN, PHYSICIAN ASSISTANT, NURSE PRACTITIONER, OR MIDWIFE PROVIDING
43 PRIMARY CARE, OR CARE IN THE EMERGENCY DEPARTMENT OF A GENERAL HOSPITAL
44 AS DEFINED IN SUBDIVISION TEN OF SECTION TWENTY-EIGHT HUNDRED ONE OF
45 THIS CHAPTER, SHALL OFFER TO PERFORM OR OFFER TO ORDER, OR ARRANGE FOR
46 THE PERFORMANCE OF AN HIV RELATED TEST FOR EACH INDIVIDUAL BETWEEN THE
47 AGES OF EIGHTEEN AND SIXTY-FOUR WHO APPLIES FOR OR RECEIVES HEALTH
48 SERVICES FROM SUCH HEALTH CARE PRACTITIONER, UNLESS THE HEALTH CARE
49 PRACTITIONER REASONABLY BELIEVES THAT (A) THE INDIVIDUAL IS BEING TREAT-
50 ED FOR A LIFE THREATENING EMERGENCY; OR (B) THE INDIVIDUAL HAS RECEIVED
51 AN HIV RELATED TEST IN THE PAST TWELVE MONTHS; OR (C) THE INDIVIDUAL
52 LACKS CAPACITY TO CONSENT TO AN HIV RELATED TEST. AS USED IN THIS SUBDI-
53 VISION, "PRIMARY CARE" MEANS THE MEDICAL FIELDS OF FAMILY MEDICINE,
54 GENERAL PEDIATRICS, PRIMARY CARE INTERNAL MEDICINE, PRIMARY CARE OBSTET-
55 RICS, OR PRIMARY CARE GYNECOLOGY, WITHOUT REGARD TO BOARD CERTIFICATION.

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

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

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

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

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

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

47 S 6. The commissioner of health shall report to the governor and the
48 legislature two years after the effective date of this act, and again
49 four years after the effective date of this act, on the implementation
50 of this act and the affect of this act on the frequency of HIV related
51 testing and other outcomes, and making recommendations relating to this
52 act. The commissioner of health may contract with bona fide organiza-
53 tions seeking to evaluate the implementation and affect of this act,
54 consistent with the protection of the confidentiality of individual
55 identifying information.

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