

# STATE OF NEW YORK

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## IN SENATE

(Prefiled)

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Introduced by Sens. HOYLMAN, KRUEGER, MONTGOMERY -- read twice and ordered printed, and when printed to be committed to the Committee on Health

AN ACT to amend the public health law, the education law and the labor law, in relation to prohibiting participation in torture and improper treatment of prisoners by health care professionals

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

1 Section 1. Legislative policy and intent. This legislation is based  
2 on, and is intended to give effect to, international treaties and stand-  
3 ards; federal, state and local law; and professional standards relating  
4 to torture, improper treatment of prisoners, and related matters. It is  
5 guided by two basic principles: (1) health care professionals shall be  
6 dedicated to providing the highest standard of health care, with  
7 compassion and respect for human dignity and rights; and (2) torture and  
8 improper treatment of prisoners are wrong and inconsistent with the  
9 practice of the health care professions. The legislature finds that the  
10 conduct prohibited by this act violates the ethical and legal obli-  
11 gations of licensed health care professionals. This legislation will  
12 further protect the professionalism of New York state licensed health  
13 care professionals by authorizing and obligating them to refuse to  
14 participate in torture and improper treatment of prisoners, which in  
15 turn will protect the life and health of the people of the state and  
16 those with whom New York licensed health care professionals interact. A  
17 health care professional who comes to the aid of a prisoner should not  
18 be presumed to be in violation when she or he is fulfilling the ethical  
19 principle of beneficence. In contrast, a health care professional who,  
20 for example, attends to a prisoner in order to allow torture or improper  
21 treatment to commence or continue is not acting beneficently. Such  
22 practices are inconsistent with professional ethics and standards and  
23 are violations of this legislation. The legislature is mindful that  
24 ordinarily there are limits on New York state's jurisdiction relating to  
25 conduct outside the state or under federal authority. However, it is

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

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1 proper for the state to regulate health care professional licensure in  
2 relation to a professional's conduct, even where the conduct occurs  
3 outside the state; certain wrongful out-of-state conduct is already  
4 grounds for professional discipline. Therefore, it is the legislature's  
5 intent that this legislation be applied to the fullest extent possible.

6 § 2. The public health law is amended by adding a new section 25 to  
7 read as follows:

8 § 25. Participation in torture or improper treatment of prisoners by  
9 health care professionals. 1. Definitions. As used in this section, the  
10 terms "torture" and "improper treatment" shall be interpreted in accord-  
11 ance with applicable law, including international treaties to which the  
12 United States is a party. However, for the purposes of this section, it  
13 shall not be an element of either "torture" or "improper treatment" that  
14 such acts be committed by a government or non-government actor, entity,  
15 or official; under color of law; or not under color of law. As used in  
16 this section, unless the context clearly requires otherwise, the follow-  
17 ing terms have the following meanings:

18 (a) "Health care professional" means any person licensed, registered,  
19 certified, or exempt to practice under (i) any of the following articles  
20 of the education law: one hundred thirty-one (medicine), one hundred  
21 thirty-one-B (physician assistants), one hundred thirty-one-C (special-  
22 ist assistants), one hundred thirty-two (chiropractic), one hundred  
23 thirty-three (dentistry and dental hygiene), one hundred thirty-six  
24 (physical therapy and physical therapist assistants), one hundred thir-  
25 ty-seven (pharmacy), one hundred thirty-nine (nursing), one hundred  
26 forty (professional midwifery practice act), one hundred forty-one  
27 (podiatry), one hundred forty-three (optometry), one hundred forty-four  
28 (ophthalmic dispensing), one hundred fifty-three (psychology), one  
29 hundred fifty-four (social work), one hundred fifty-five (massage thera-  
30 py), one hundred fifty-six (occupational therapy), one hundred fifty-  
31 seven (dietetics and nutrition), one hundred fifty-nine (speech-language  
32 pathologists and audiologists), one hundred sixty (acupuncture), one  
33 hundred sixty-three (mental health practitioners), one hundred sixty-  
34 four (respiratory therapists and respiratory therapy technicians), one  
35 hundred sixty-five (clinical laboratory technology practice act), or one  
36 hundred sixty-six (medical physics practice), or (ii) article thirty-  
37 five of this chapter (practice of radiologic technology).

38 (b) "Torture" means any intentional act or intentional omission by  
39 which severe pain or suffering, whether physical or mental, is inflicted  
40 on a person for such purposes as obtaining from the person or from a  
41 third person information or a confession, punishing the person for an  
42 act the person or a third person has committed (including the holding of  
43 a belief or membership in any group) or is suspected of having commit-  
44 ted, or intimidating or coercing the person or a third person, or for  
45 any reason based on discrimination of any kind. It does not include  
46 pain or suffering arising only from, inherent in or incidental to lawful  
47 sanction.

48 (c) "Improper treatment" means (i) cruel, inhuman or degrading, treat-  
49 ment or punishment as defined by applicable international treaties and  
50 their corresponding interpreting bodies; or cruel and unusual punishment  
51 as defined in the United States Constitution or the New York state  
52 constitution; or (ii) any violation of subdivision three or four of this  
53 section.

54 (d) "Prisoner" means any person who is subject to punishment,  
55 detention, incarceration, interrogation, intimidation or coercion,  
56 regardless of whether such action is performed or committed by a govern-

1 ment or non-government actor, entity, or official; under color of law;  
2 or not under color of law.

3 (e) To "adversely affect" a person's physical or mental health or  
4 condition does not include causing adverse effects that may arise from  
5 treatment or care when that treatment or care is performed in accordance  
6 with generally applicable legal, health and professional standards and  
7 for the purposes of evaluating, treating, protecting or improving the  
8 person's health.

9 (f) "Interrogation" means the questioning related to law enforcement,  
10 the enforcement of rules or regulations of an institution in which  
11 people are detained through the criminal justice system or for military  
12 or national security reasons (such as a jail or other detention facili-  
13 ty, police facility, prison, immigration facility, or military facility)  
14 or to military and national security intelligence gathering, whether by  
15 a government or non-government actor, entity or official. "Interro-  
16 gation" shall also include questioning to aid or accomplish any illegal  
17 activity or purpose, whether by a government or non-government actor,  
18 entity or official. Interrogations are distinct from questioning used by  
19 health care professionals to assess the physical or mental condition of  
20 an individual.

21 2. Knowledge. It shall be an element of any violation of this section  
22 that the actor knew or reasonably should have known that his or her  
23 conduct is of the kind prohibited under this section. A health care  
24 professional who receives information that indicates that a prisoner as  
25 defined by this section is being, may in the future be, or has been  
26 subjected to torture or improper treatment, must use due diligence, in  
27 order to assess the nature of his or her conduct as covered by this  
28 section.

29 3. General obligations of health care professionals. (a) Every health  
30 care professional shall provide every prisoner under his or her profes-  
31 sional care with care or treatment consistent with generally applicable  
32 legal, health and professional standards to the extent that he or she is  
33 reasonably able to do so under the circumstances, including protecting  
34 the confidentiality of patient information.

35 (b) In all clinical assessments relating to a prisoner, whether for  
36 therapeutic or evaluative purposes, health care professionals shall  
37 exercise their professional judgment independent of the interests of a  
38 government or other third party.

39 4. Certain conduct of health care professionals prohibited. (a) No  
40 health care professional shall apply his or her knowledge or skills in  
41 relation to, engage in any professional relationship with, or perform  
42 professional services in relation to any prisoner unless the purpose is  
43 solely to evaluate, treat, protect, or improve the physical or mental  
44 health or condition of the prisoner (except as permitted by paragraph  
45 (b) or (c) of subdivision five of this section).

46 (b) No health care professional shall engage, directly or indirectly,  
47 in any act which constitutes participation in, complicity in, incitement  
48 to, assistance in, planning or design of, or attempt or conspiracy to  
49 commit torture or improper treatment of a prisoner. Prohibited forms of  
50 engagement include but are not limited to:

51 (i) providing means, knowledge or skills, including clinical findings  
52 or treatment, with the intent to facilitate the practice of torture or  
53 improper treatment;

54 (ii) permitting his or her knowledge, skills or clinical findings or  
55 treatment to be used in the process of or to facilitate torture or  
56 improper treatment;

1 (iii) examining, evaluating, or treating a prisoner to certify whether  
2 torture or improper treatment can begin, be continued, or be resumed;

3 (iv) being present while torture or improper treatment is being admin-  
4 istered;

5 (v) omitting or suppressing indications of torture or improper treat-  
6 ment from records or reports; and

7 (vi) altering health care records or reports to hide, misrepresent or  
8 destroy evidence of torture or improper treatment.

9 (c) No health care professional shall apply his or her knowledge or  
10 skills or perform any professional service in order to assist in the  
11 punishment, detention, incarceration, intimidation, or coercion of a  
12 prisoner when such assistance is provided in a manner that may adversely  
13 affect the physical or mental health or condition of the prisoner  
14 (except as permitted by paragraph (a) or (b) of subdivision five of this  
15 section).

16 (d) No health care professional shall participate in the interrogation  
17 of a prisoner, including being present in the interrogation room, asking  
18 or suggesting questions, advising on the use of specific interrogation  
19 techniques, monitoring the interrogation, or medically or psychologically  
20 evaluating a person for the purpose of identifying potential interro-  
21 gation methods or strategies. However, this paragraph shall not bar a  
22 health care professional from engaging in conduct under paragraph (d) of  
23 subdivision five of this section.

24 5. Certain conduct of health care professionals permitted. A health  
25 care professional may engage in the following conduct so long as it does  
26 not violate subdivision three or four of this section, it does not  
27 adversely affect the physical or mental health or condition of a prison-  
28 er or potential subject, and is not otherwise unlawful:

29 (a) appropriately participating or aiding in the investigation, prose-  
30 cution, or defense of a criminal, administrative or civil matter;

31 (b) participating in an act that restrains a prisoner or temporarily  
32 alters the physical or mental activity of a prisoner, where the act  
33 complies with generally applicable legal, health and professional stand-  
34 ards, is necessary for the protection of the physical or mental health,  
35 condition or safety of the prisoner, other prisoners, or persons caring  
36 for, guarding or confining the prisoner;

37 (c) conducting bona fide human subject research in accordance with  
38 generally accepted legal, health and professional standards where the  
39 research includes safeguards for human subjects equivalent to those  
40 required by federal law, including informed consent and institutional  
41 review board approval where applicable;

42 (d) training related to the following purposes, so long as it is not  
43 provided in support of specific ongoing or anticipated interrogations:

44 (i) recognizing and responding to persons with physical or mental  
45 illness or conditions,

46 (ii) the possible physical and mental effects of particular techniques  
47 and conditions of interrogation, or

48 (iii) the development of effective interrogation strategies not  
49 involving the practice of torture or improper treatment.

50 6. Duty to report. A health care professional who has reasonable  
51 grounds (not based solely on publicly available information) to believe  
52 that torture, improper treatment or other conduct in violation of this  
53 section has occurred, is occurring, or will occur shall, as soon as is  
54 possible without jeopardizing the physical safety of himself or herself,  
55 the prisoner, or other parties, report such conduct to:

1 (a) a government agency that the health care professional reasonably  
2 believes has legal authority to punish or prevent the continuation of  
3 torture or the improper treatment of a prisoner or conduct in violation  
4 of this section and is reasonably likely to attempt to do so; or

5 (b) a governmental or non-governmental entity that the health care  
6 professional reasonably believes will notify such a government agency of  
7 the torture or the improper treatment of a prisoner or conduct in  
8 violation of this section or take other action to publicize or prevent  
9 such torture, treatment or conduct; and

10 (c) in addition to reporting under paragraph (a) or (b) of this subdi-  
11 vision: (i) in the case of an alleged violation by a health care profes-  
12 sional licensed under article one hundred thirty-one, one hundred thir-  
13 ty-one-B or one hundred thirty-one-C of the education law, a report  
14 shall be filed with the office of professional medical conduct; and (ii)  
15 in the case of an alleged violation by any other health care profes-  
16 sional licensed, registered or certified under title eight of the educa-  
17 tion law, a report shall be filed with the office of professional disci-  
18 pline; provided that for the purpose of this paragraph, where a person  
19 holds a license, registration or certification under the laws of a  
20 jurisdiction other than the state of New York that is for a profession  
21 substantially comparable to one listed in paragraph (a) of subdivision  
22 one of this section, the person shall be deemed to be a health care  
23 professional and the person's license, registration or certification  
24 shall be deemed to be under the appropriate article of title eight of  
25 the education law.

26 7. Mitigation. The following may be considered in full or partial  
27 mitigation of a violation of this section by the health care profes-  
28 sional:

29 (a) compliance with subdivision six of this section; or

30 (b) cooperation in good faith with an investigation of a violation of  
31 this section.

32 8. Applicability. This section shall apply to conduct taking place  
33 within or outside New York state, and without regard to whether the  
34 conduct is committed by a governmental or non-governmental entity, offi-  
35 cial, or actor or under actual or asserted color of law.

36 9. Scope of practice not expanded. This section shall not be construed  
37 to expand the lawful scope of practice of any health care professional.

38 § 3. Section 6509 of the education law is amended by adding a new  
39 subdivision 15 to read as follows:

40 (15) Any violation of section twenty-five of the public health law  
41 (relating to participation in torture or improper treatment of prisoners  
42 by health care professionals), subject to mitigation under that section.

43 § 4. Section 6530 of the education law is amended by adding a new  
44 subdivision 50 to read as follows:

45 50. Any violation of section twenty-five of the public health law  
46 (relating to participation in torture or improper treatment of prisoners  
47 by health care professionals), subject to mitigation under that section.

48 § 5. Paragraphs (b) and (c) of subdivision 2 of section 740 of the  
49 labor law, as added by chapter 660 of the laws of 1984, are amended and  
50 a new paragraph (d) is added to read as follows:

51 (b) provides information to, or testifies before, any public body  
52 conducting an investigation, hearing or inquiry into any such violation  
53 of a law, rule or regulation by such employer; ~~or~~

54 (c) objects to, or refuses to participate in any such activity, policy  
55 or practice in violation of a law, rule or regulation~~;~~; or

1 (d) reports or threatens to report any violation of section twenty-  
2 five of the public health law (relating to participation in torture or  
3 improper treatment of prisoners by health care professionals).

4 § 6. Subdivision 3 of section 740 of the labor law, as added by chap-  
5 ter 660 of the laws of 1984, is amended to read as follows:

6 3. Application. The protection against retaliatory personnel action  
7 provided by paragraph (a) of subdivision two of this section pertaining  
8 to disclosure to a public body shall not apply to an employee who makes  
9 such disclosure to a public body unless the employee has brought the  
10 activity, policy or practice in violation of law, rule or regulation to  
11 the attention of a supervisor of the employer and has afforded such  
12 employer a reasonable opportunity to correct such activity, policy or  
13 practice. However, this subdivision shall not apply to any report of a  
14 violation under section twenty-five of the public health law (partic-  
15 ipation in torture or improper treatment of prisoners by health care  
16 professionals).

17 § 7. Paragraphs (a) and (b) of subdivision 2 of section 741 of the  
18 labor law, as added by chapter 24 of the laws of 2002, are amended and a  
19 new paragraph (c) is added to read as follows:

20 (a) discloses or threatens to disclose to a supervisor, or to a public  
21 body an activity, policy or practice of the employer or agent that the  
22 employee, in good faith, reasonably believes constitutes improper quali-  
23 ty of patient care; ~~[e]~~

24 (b) objects to, or refuses to participate in any activity, policy or  
25 practice of the employer or agent that the employee, in good faith,  
26 reasonably believes constitutes improper quality of patient care~~[r]~~; or

27 (c) reports or threatens to report any violation of section twenty-  
28 five of the public health law (participation in torture or improper  
29 treatment of prisoners by health care professionals).

30 § 8. Subdivision 3 of section 741 of the labor law, as added by chap-  
31 ter 24 of the laws of 2002, is amended to read as follows:

32 3. Application. The protection against retaliatory personnel action  
33 provided by subdivision two of this section shall not apply unless the  
34 employee has brought the improper quality of patient care to the atten-  
35 tion of a supervisor and has afforded the employer a reasonable opportu-  
36 nity to correct such activity, policy or practice. This subdivision  
37 shall not apply to an action or failure to act described in paragraph  
38 (a) of subdivision two of this section where the improper quality of  
39 patient care described therein presents an imminent threat to public  
40 health or safety or to the health of a specific patient and the employee  
41 reasonably believes in good faith that reporting to a supervisor would  
42 not result in corrective action. However, this subdivision shall not  
43 apply to any report of a violation under section twenty-five of the  
44 public health law (participation in torture or improper treatment of  
45 prisoners by health care professionals).

46 § 9. The introduction or enactment of this act shall not be construed  
47 to mean that: (a) conduct described by this act does not already violate  
48 state law or constitute professional misconduct; or (b) conduct other  
49 than that described by this act does not violate other state law or  
50 otherwise constitute professional misconduct.

51 § 10. Severability. If any provision of this act, or any application  
52 of any provision of this act, is held to be invalid, that shall not  
53 affect the validity or effectiveness of any other provision of this act  
54 or any other application of any provision of this act.

55 § 11. This act shall take effect on the first of January next  
56 succeeding the date on which it shall have become a law.