

STATE OF NEW YORK

1192

2019-2020 Regular Sessions

IN ASSEMBLY

January 14, 2019

Introduced by M. of A. GOTTFRIED, CAHILL, RIVERA, GLICK, PAULIN, JAFFEE, LIFTON, COOK, PERRY, ENGLEBRIGHT, O'DONNELL, ARROYO, L. ROSENTHAL, HEVESI, BRONSON, FAHY, MOSLEY, WEPRIN, OTIS, STECK, PICHARDO, AUBRY, ORTIZ, SEAWRIGHT, LAVINE, D'URSO, SIMOTAS, DICKENS, TAYLOR, RAIA, SIMON, BARRON -- Multi-Sponsored by -- M. of A. CARROLL, DINOWITZ, EPSTEIN, GALEF, HUNTER, LUPARDO, PEOPLES-STOKES, PRETLOW -- read once and referred to the Committee on Higher Education

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,

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

LBD03431-01-9

1 for example, attends to a prisoner in order to allow torture or improper
2 treatment to commence or continue is not acting beneficently. Such
3 practices are inconsistent with professional ethics and standards and
4 are violations of this legislation. The legislature is mindful that
5 ordinarily there are limits on New York state's jurisdiction relating to
6 conduct outside the state or under federal authority. However, it is
7 proper for the state to regulate health care professional licensure in
8 relation to a professional's conduct, even where the conduct occurs
9 outside the state; certain wrongful out-of-state conduct is already
10 grounds for professional discipline. Therefore, it is the legislature's
11 intent that this legislation be applied to the fullest extent possible.

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

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

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

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

54 (c) "Improper treatment" means (i) cruel, inhuman or degrading, treat-
55 ment or punishment as defined by applicable international treaties and
56 their corresponding interpreting bodies; or cruel and unusual punishment

1 as defined in the United States Constitution or the New York state
2 constitution; or (ii) any violation of subdivision three or four of this
3 section.

4 (d) "Prisoner" means any person who is subject to punishment,
5 detention, incarceration, interrogation, intimidation or coercion,
6 regardless of whether such action is performed or committed by a govern-
7 ment or non-government actor, entity, or official; under color of law;
8 or not under color of law.

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

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

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

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

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

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

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

1 (i) providing means, knowledge or skills, including clinical findings
2 or treatment, with the intent to facilitate the practice of torture or
3 improper treatment;

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

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

9 (iv) being present while torture or improper treatment is being admin-
10 istered;

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

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

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

22 (d) No health care professional shall participate in the interrogation
23 of a prisoner, including being present in the interrogation room, asking
24 or suggesting questions, advising on the use of specific interrogation
25 techniques, monitoring the interrogation, or medically or psychological-
26 ly evaluating a person for the purpose of identifying potential interro-
27 gation methods or strategies. However, this paragraph shall not bar a
28 health care professional from engaging in conduct under paragraph (d) of
29 subdivision five of this section.

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

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

37 (b) participating in an act that restrains a prisoner or temporarily
38 alters the physical or mental activity of a prisoner, where the act
39 complies with generally applicable legal, health and professional stand-
40 ards, is necessary for the protection of the physical or mental health,
41 condition or safety of the prisoner, other prisoners, or persons caring
42 for, guarding or confining the prisoner;

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

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

50 (i) recognizing and responding to persons with physical or mental
51 illness or conditions,

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 (b) provides information to, or testifies before, any public body
2 conducting an investigation, hearing or inquiry into any such violation
3 of a law, rule or regulation by such employer; [~~or~~]

4 (c) objects to, or refuses to participate in any such activity, policy
5 or practice in violation of a law, rule or regulation[~~+~~]; or

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

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

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

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

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

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

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

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

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

51 § 9. The introduction or enactment of this act shall not be construed
52 to mean that: (a) conduct described by this act does not already violate
53 state law or constitute professional misconduct; or (b) conduct other
54 than that described by this act does not violate other state law or
55 otherwise constitute professional misconduct.

1 § 10. Severability. If any provision of this act, or any application
2 of any provision of this act, is held to be invalid, that shall not
3 affect the validity or effectiveness of any other provision of this act
4 or any other application of any provision of this act.

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