

STATE OF NEW YORK

794--A

2021-2022 Regular Sessions

IN SENATE

(Prefiled)

January 6, 2021

Introduced by Sens. HOYLMAN, BIAGGI, KAVANAGH, KRUEGER, RIVERA, SALAZAR, SEPULVEDA -- read twice and ordered printed, and when printed to be committed to the Committee on Health -- recommitted to the Committee on Health in accordance with Senate Rule 6, sec. 8 -- committee discharged, bill amended, ordered reprinted as amended and recommitted to said committee

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 incarcerated persons 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 incarcerated persons, and related
5 matters. It is guided by two basic principles: (1) health care profes-
6 sionals shall be dedicated to providing the highest standard of health
7 care, with compassion and respect for human dignity and rights; and (2)
8 torture and improper treatment of incarcerated persons are wrong and
9 inconsistent with the practice of the health care professions. The
10 legislature finds that the conduct prohibited by this act violates the
11 ethical and legal obligations of licensed health care professionals.
12 This legislation will further protect the professionalism of New York
13 state licensed health care professionals by authorizing and obligating
14 them to refuse to participate in torture and improper treatment of
15 incarcerated persons, which in turn will protect the life and health of
16 the people of the state and those with whom New York licensed health
17 care professionals interact. A health care professional who comes to
18 the aid of an incarcerated person should not be presumed to be in
19 violation when she or he is fulfilling the ethical principle of benefi-

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

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

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

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

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

46 (b) "Torture" means any intentional act or intentional omission by
47 which severe pain or suffering, whether physical or mental, is inflicted
48 on a person for no lawful purpose or for such purposes as obtaining from
49 the person or from a third person information or a confession, punishing
50 or disciplining or retaliating against the person for an act the person
51 or a third person has carried out (including the holding of a belief or
52 membership in any group) or is suspected of having or perceived to have
53 carried out, or intimidating or coercing the person or a third person,
54 or for any reason based on discrimination of any kind.

55 (c) "Improper treatment" means (i) cruel, inhuman or degrading, treat-
56 ment or punishment as defined by applicable international treaties

1 including but not limited to the Convention Against Torture, and Other
2 Cruel, Inhumane, or Degrading Treatment or Punishment, the International
3 Covenant on Civil and Political Rights, the United Nations Standard
4 Minimum Rules for Treatment of Prisoners, the Body of Principles for the
5 Protection of All Persons Under Any Form of Detention or Imprisonment,
6 the Basic Principles for the Treatment of Prisoners and, the United
7 Nations Standard Minimum Rules for the Administration of Juvenile
8 Justice and their corresponding interpreting bodies; and applicable New
9 York state law governing the proper treatment of incarcerated persons
10 including, but not limited to, subdivisions twenty-three, thirty-three
11 and thirty-four of section two, sections forty-five and one hundred
12 thirty-seven, subdivision seven of section one hundred thirty-eight, and
13 sections four hundred one, four hundred one-a and five hundred-k of the
14 correction law, or applicable state or local law; or cruel and unusual
15 punishment as defined in the United States Constitution or the New York
16 state constitution; or (ii) any violation of subdivision three or four
17 of this section; or (iii) any form of physical brutality, improper use
18 of force, or deprivation of food, water, basic hygiene materials and
19 access, or other basic human needs or living conditions.

20 (d) "Incarcerated person" means any person who is subject to punish-
21 ment, detention, incarceration, interrogation, intimidation or coercion,
22 regardless of whether such action is performed or committed by a govern-
23 ment or non-government actor, entity, or official; under color of law;
24 or not under color of law.

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

31 (f) "Interrogation" means the questioning related to law enforcement,
32 the enforcement of rules or regulations of an institution in which
33 people are detained through the criminal justice system or for military
34 or national security reasons (such as a jail or other detention facility
35 or police facility, prison, immigration facility, or military facility)
36 or to military and national security intelligence gathering, whether by
37 a government or non-government actor, entity or official. "Interro-
38 gation" shall also include questioning to aid or accomplish any illegal
39 activity or purpose, whether by a government or non-government actor,
40 entity or official. Interrogations are distinct from questioning used by
41 health care professionals to assess the physical or mental condition of
42 an individual.

43 2. Knowledge. It shall be an element of any violation of this section
44 that the actor knew or reasonably should have known that his or her
45 conduct is of the kind prohibited under this section. A health care
46 professional who receives information that indicates that an incarcerat-
47 ed person as defined by this section is being, may in the future be, or
48 has been subjected to torture or improper treatment, must use due dili-
49 gence, in order to assess the nature of his or her conduct as covered by
50 this section.

51 3. General obligations of health care professionals. (a) Every health
52 care professional shall provide every incarcerated person under his or
53 her professional care with care or treatment consistent with generally
54 applicable legal, health and professional standards to the extent that
55 he or she is reasonably able to do so under the circumstances, including
56 protecting the confidentiality of patient information.

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

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

(b) No health care professional shall engage, directly or indirectly, in any act which constitutes participation in, complicity in, incitement to, assistance in, planning or design of, cover up of, failure to document, or attempt or conspiracy to commit torture or improper treatment of an incarcerated person. Prohibited forms of engagement include but are not limited to:

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

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

(iii) examining, evaluating, or treating an incarcerated person to certify whether torture or improper treatment can begin, be continued, or be resumed;

(iv) being present while torture or improper treatment is being administered;

(v) omitting or suppressing indications of torture or improper treatment from records or reports; and

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

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

(d) No health care professional shall participate in the interrogation of an incarcerated person, including being present in the interrogation room, asking or suggesting questions, advising on the use of specific interrogation techniques, monitoring the interrogation, or medically or psychologically evaluating a person for the purpose of identifying potential interrogation methods or strategies. However, this paragraph shall not bar a health care professional from engaging in conduct under paragraph (d) of subdivision five of this section.

5. Certain conduct of health care professionals permitted. A health care professional may engage in the following conduct so long as it does not violate subdivision three or four of this section, it does not adversely affect the physical or mental health or condition of an incarcerated person or potential subject, and is not otherwise unlawful:

(a) appropriately participating or aiding in the investigation, prosecution, or defense of a criminal, administrative or civil matter;

(b) participating in an act that restrains an incarcerated person or temporarily alters the physical or mental activity of an incarcerated

1 person, where the act complies with generally applicable legal, health
2 and professional standards, is necessary for the protection of the phys-
3 ical or mental health, condition or safety of the incarcerated person,
4 other incarcerated persons, or persons caring for, guarding or confining
5 the incarcerated person;

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

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

13 (i) recognizing and responding to persons with physical or mental
14 illness or conditions,

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

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

19 6. Duty to report. A health care professional who has reasonable
20 grounds (not based solely on publicly available information) to believe
21 that torture, improper treatment or other conduct in violation of this
22 section has occurred, is occurring, or will occur shall, as soon as is
23 possible without jeopardizing the physical safety of himself or herself,
24 the incarcerated person, or other parties, report such conduct to:

25 (a) a government agency that the health care professional reasonably
26 believes has legal authority to punish or prevent the continuation of
27 torture or the improper treatment of an incarcerated person or conduct
28 in violation of this section and is reasonably likely to attempt to do
29 so; or

30 (b) a governmental or non-governmental entity that the health care
31 professional reasonably believes will notify such a government agency of
32 the torture or the improper treatment of an incarcerated person or
33 conduct in violation of this section or take other action to publicize
34 or prevent such torture, treatment or conduct; and

35 (c) in addition to reporting under paragraph (a) or (b) of this subdi-
36 vision: (i) in the case of an alleged violation by a health care profes-
37 sional licensed under article one hundred thirty-one, one hundred thir-
38 ty-one-B or one hundred thirty-one-C of the education law, a report
39 shall be filed with the office of professional medical conduct; and (ii)
40 in the case of an alleged violation by any other health care profes-
41 sional licensed, registered or certified under title eight of the educa-
42 tion law, a report shall be filed with the office of professional disci-
43 pline; provided that for the purpose of this paragraph, where a person
44 holds a license, registration or certification under the laws of a
45 jurisdiction other than the state of New York that is for a profession
46 substantially comparable to one listed in paragraph (a) of subdivision
47 one of this section, the person shall be deemed to be a health care
48 professional and the person's license, registration or certification
49 shall be deemed to be under the appropriate article of title eight of
50 the education law.

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

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

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

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

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

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

9 (15) Any violation of section twenty-five of the public health law
10 (relating to participation in torture or improper treatment of incarcer-
11 ated persons by health care professionals), subject to mitigation under
12 that section.

13 § 4. Section 6530 of the education law is amended by adding a new
14 subdivision 51 to read as follows:

15 51. Any violation of section twenty-five of the public health law
16 (relating to participation in torture or improper treatment of incarcer-
17 ated persons by health care professionals), subject to mitigation under
18 that section.

19 § 5. Paragraphs (b) and (c) of subdivision 2 of section 740 of the
20 labor law, as amended by chapter 522 of the laws of 2021, are amended
21 and a new paragraph (d) is added to read as follows:

22 (b) provides information to, or testifies before, any public body
23 conducting an investigation, hearing or inquiry into any such activity,
24 policy or practice by such employer; ~~[ex]~~

25 (c) objects to, or refuses to participate in any such activity, policy
26 or practice~~[+]~~; or

27 (d) reports or threatens to report any violation of section twenty-
28 five of the public health law (relating to participation in torture or
29 improper treatment of incarcerated persons by health care profes-
30 sionals).

31 § 6. Subdivision 3 of section 740 of the labor law, as amended by
32 chapter 522 of the laws of 2021, is amended to read as follows:

33 3. Application. The protection against retaliatory action provided by
34 paragraph (a) of subdivision two of this section pertaining to disclo-
35 sure to a public body shall not apply to an employee who makes such
36 disclosure to a public body unless the employee has made a good faith
37 effort to notify his or her employer by bringing the activity, policy or
38 practice to the attention of a supervisor of the employer and has
39 afforded such employer a reasonable opportunity to correct such activ-
40 ity, policy or practice. Such employer notification shall not be
41 required where: (a) there is an imminent and serious danger to the
42 public health or safety; (b) the employee reasonably believes that
43 reporting to the supervisor would result in a destruction of evidence or
44 other concealment of the activity, policy or practice; (c) such activ-
45 ity, policy or practice could reasonably be expected to lead to endan-
46 gering the welfare of a minor; (d) the employee reasonably believes that
47 reporting to the supervisor would result in physical harm to the employ-
48 ee or any other person; or (e) the employee reasonably believes that the
49 supervisor is already aware of the activity, policy or practice and will
50 not correct such activity, policy or practice. However, this subdivi-
51 sion shall not apply to any report of a violation under section twenty-
52 five of the public health law (participation in torture or improper
53 treatment of incarcerated persons by health care professionals).

54 § 7. Paragraphs (a) and (b) of subdivision 2 of section 741 of the
55 labor law, as amended by chapter 117 of the laws of 2020, are amended
56 and a new paragraph (c) is added to read as follows:

(a) discloses or threatens to disclose to a supervisor, to a public body, to a news media outlet, or to a social media forum available to the public at large, an activity, policy or practice of the employer or agent that the employee, in good faith, reasonably believes constitutes improper quality of patient care or improper quality of workplace safety; ~~or~~

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

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

§ 8. Subdivision 3 of section 741 of the labor law, as amended by chapter 117 of the laws of 2020, is amended to read as follows:

3. Application. The protection against retaliatory personnel action provided by subdivision two of this section shall not apply unless the employee has brought the improper quality of patient care or improper quality of workplace safety to the attention of a supervisor and has afforded the employer a reasonable opportunity to correct such activity, policy or practice. This subdivision shall not apply to an action or failure to act described in paragraph (a) of subdivision two of this section where the improper quality of patient care or improper quality of workplace safety described therein presents an imminent threat to public health or safety or to the health of a specific patient or specific health care employee and the employee reasonably believes in good faith that reporting to a supervisor would not result in corrective action. However, this subdivision shall not apply to any report of a violation under section twenty-five of the public health law (participation in torture or improper treatment of incarcerated persons by health care professionals).

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

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

§ 11. This act shall take effect on the first of January next succeeding the date on which it shall have become a law; provided, however, that if chapter 522 of the laws of 2021 shall not have taken effect on or before such date, then sections five and six of this act shall take effect on the same date and in the same manner as such chapter of the laws of 2021 takes effect.