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IN ASSEMBLY

(Prefiled)

January 6, 2021

Introduced by M. of A. GOTTFRIED, CAHILL, J. RIVERA, GLICK, PAULIN, COOK, PERRY, ENGLEBRIGHT, O'DONNELL, L. ROSENTHAL, HEVESI, BRONSON, FAHY, DICKENS, TAYLOR, SIMON, SAYEGH, CRUZ, REYES, ABINANTI, DARLING, FERNANDEZ, GALLAGHER, GRIFFIN, SEAWRIGHT, BURDICK, KELLES, JACKSON, LAVINE, GONZALEZ-ROJAS, BICHOTTE HERMELYN, OTIS -- 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 -- ordered to a third reading, amended and ordered reprinted, retaining its place on the order of third reading

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

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

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

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

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

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

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

1 carried out, or intimidating or coercing the person or a third person,
2 or for any reason based on discrimination of any kind.

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

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

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

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

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

55 3. General obligations of health care professionals. (a) Every health
56 care professional shall provide every incarcerated person under his or

1 her professional care with care or treatment consistent with generally
2 applicable legal, health and professional standards to the extent that
3 he or she is reasonably able to do so under the circumstances, including
4 protecting the confidentiality of patient information.

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

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

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

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

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

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

31 (iv) being present while torture or improper treatment is being admin-
32 istered;

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

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

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

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

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

1 (a) appropriately participating or aiding in the investigation, prosecution, or defense of a criminal, administrative or civil matter;
2

3 (b) participating in an act that restrains an incarcerated person or
4 temporarily alters the physical or mental activity of an incarcerated
5 person, where the act complies with generally applicable legal, health
6 and professional standards, is necessary for the protection of the phys-
7 ical or mental health, condition or safety of the incarcerated person,
8 other incarcerated persons, or persons caring for, guarding or confining
9 the incarcerated person;

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

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

17 (i) recognizing and responding to persons with physical or mental
18 illness or conditions,

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

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

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

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

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

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

7. Mitigation. The following may be considered in full or partial mitigation of a violation of this section by the health care professional:

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

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

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

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

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

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

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

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

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

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

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

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

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

3. Application. The protection against retaliatory action provided by paragraph (a) of subdivision two of this section pertaining to disclosure to a public body shall not apply to an employee who makes such disclosure to a public body unless the employee has made a good faith effort to notify his or her employer by bringing the activity, policy or practice to the attention of a supervisor of the employer and has afforded such employer a reasonable opportunity to correct such activity, policy or practice. Such employer notification shall not be required where: (a) there is an imminent and serious danger to the public health or safety; (b) the employee reasonably believes that reporting to the supervisor would result in a destruction of evidence or other concealment of the activity, policy or practice; (c) such activity, policy or practice could reasonably be expected to lead to endangering the welfare of a minor; (d) the employee reasonably believes that reporting to the supervisor would result in physical harm to the employee or any other person; or (e) the employee reasonably believes that the supervisor is already aware of the activity, policy or practice and will not correct such activity, policy or practice. However, this subdivi-

sion 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).

§ 7. Paragraphs (a) and (b) of subdivision 2 of section 741 of the labor law, as amended by chapter 117 of the laws of 2020, are amended 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.