STATE OF NEW YORK

4863--A

2023-2024 Regular Sessions

IN ASSEMBLY

February 24, 2023

Introduced by M. of A. KELLES, GLICK, PAULIN, COOK, L. ROSENTHAL, HEVESI, BRONSON, FAHY, DICKENS, TAYLOR, SIMON, SAYEGH, CRUZ, REYES, DARLING, GALLAGHER, SEAWRIGHT, BURDICK, JACKSON, LAVINE, GONZALEZ-ROJAS, BICHOTTE HERMELYN, OTIS, ZINERMAN, BURGOS, MAMDANI, ARDILA, SHIMSKY, LEVENBERG, AUBRY, GIBBS -- Multi-Sponsored by -- M. of A. CARROLL, DINOWITZ, EPSTEIN, HUNTER, LUPARDO, PEOPLES-STOKES, PRETLOW -- read once and referred to the Committee on Higher Education -- 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 individuals by health care professionals

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

Section 1. Legislative policy and intent. This legislation is based on, and is intended to give effect to, international treaties and standards; federal, state and local law; and professional standards relating to torture, improper treatment of incarcerated individuals, and related matters. It is guided by two basic principles: (1) health care professionals shall be dedicated to providing the highest standard of health care, with compassion and respect for human dignity and rights; and (2) torture and improper treatment of incarcerated individuals are wrong and inconsistent with the practice of the health care professions. The legislature finds that the conduct prohibited by this act violates the ethical and legal obligations of licensed health care professionals. This legislation will further protect the professionalism of New York state licensed health care professionals by authorizing and obligating them to refuse to participate in torture and improper treatment of incarcerated individuals, which in turn will protect the life and health of the people of the state and those with whom New York licensed health care professionals interact. A health care professional who comes to

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

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the aid of an incarcerated individual should not be presumed to be in violation when they are fulfilling the ethical principle of beneficence. In contrast, a health care professional who, for example, attends to an incarcerated individual in order to allow torture or improper treatment to commence or continue is not acting beneficently. Such practices are inconsistent with professional ethics and standards and are violations of this legislation. The legislature is mindful that ordinarily there are limits on New York state's jurisdiction relating to conduct outside the state or under federal authority. However, it is proper for the state to regulate health care professional licensure in relation to a professional's conduct, even where the conduct occurs outside the state; certain wrongful out-of-state conduct is already grounds for professional discipline. Therefore, it is the legislature's intent that this legislation be applied to the fullest extent possible.

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

§ 25. Participation in torture or improper treatment of incarcerated individuals by health care professionals. 1. Definitions. As used in this section, unless the context clearly requires otherwise, the following terms have the following meanings:

(a) "Health care professional" means any person licensed, registered, certified, or exempt to practice under (i) any of the following articles of the education law: one hundred thirty-one (medicine), one hundred thirty-one-B (physician assistants), one hundred thirty-one-C (specialist assistants), one hundred thirty-two (chiropractic), one hundred thirty-three (dentistry, dental hygiene, and registered dental assisting), one hundred thirty-six (physical therapy and physical therapist assistants), one hundred thirty-seven (pharmacy), one hundred thirty-nine (nursing), one hundred forty (professional midwifery practice act), one hundred forty-one (podiatry), one hundred forty-three (optometry), one hundred forty-four (ophthalmic dispensing), one hundred fifty-three (psychology), one hundred fifty-four (social work), one hundred fifty-five (massage therapy), one hundred fifty-six (occupational therapy), one hundred fifty-seven (dietetics and nutrition), one hundred fifty-nine (speech-language pathologists and audiologists), one hundred sixty (acupuncture), one hundred sixty-three (mental health practitioners), one hundred sixty-four (respiratory therapists and respiratory therapy technicians), one hundred sixty-five (clinical laboratory technology practice act), or one hundred sixty-six (medical physics practice), or (ii) article thirty-five of this chapter (practice of radiologic technology).

(b) "Torture" means any intentional act or intentional omission by which severe pain or suffering, whether physical or mental, is inflicted on a person for no lawful purpose or for such purposes as obtaining from the person or from a third person information or a confession, punishing or disciplining or retaliating against the person for an act the person or a third person has carried out (including the holding of a belief or membership in any group) or is suspected of having or perceived to have carried out, or intimidating or coercing the person or a third person, or for any reason based on discrimination of any kind. For the purposes of this section, it shall not be an element of torture that such acts be committed by a government or non-government actor, entity, or official; under color of law; or not under color of law.

(c) "Improper treatment" includes any cruel, inhuman or degrading treatment or punishment as those terms are defined in and applied by applicable international treaties including but not limited to the

Convention Against Torture, and Other Cruel, Inhumane, or Degrading Treatment or Punishment, the International Covenant on Civil and Political Rights, the United Nations Standard Minimum Rules for Treatment of Prisoners, the Body of Principles for the Protection of All Persons Under Any Form of Detention or Imprisonment, the Basic Principles for the Treatment of Prisoners and, the United Nations Standard Minimum Rules for the Administration of Juvenile Justice and their corresponding interpreting bodies. Improper treatment also includes any cruel and unusual punishment as defined in the United States Constitution or the New York state constitution. Improper treatment also includes any violation of subdivision three or four of this section, any form of physical brutality, improper use of force, deprivation of food, water, basic hygiene materials and access, or other basic human needs or living conditions, or any violation of applicable New York state law governing the proper treatment of incarcerated individuals. For the purposes of this section, it shall not be an element of improper treatment that such acts be committed by a government actor, entity, or official or by a non-government actor, entity, or official; or that such acts be committed under color of law or not under color of law. The commissioner shall provide guidance to health care professionals regarding acts or omissions that constitute improper treatment under this section and post the guidance on the department's website.

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

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

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

2. Knowledge. A health care professional who receives information that indicates that an incarcerated individual as defined by this section is being, may in the future be, or has been subjected to torture or improper treatment, must use due diligence in fulfilling all of their responsibilities under this section.

3. General obligations of health care professionals. (a) Every health care professional shall provide every incarcerated individual under their professional care with care or treatment consistent with generally applicable legal, health and professional standards to the extent that they are reasonably able to do so under the circumstances, including protecting the confidentiality of patient information.

(b) In all clinical assessments relating to an incarcerated individual, 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 knowingly, recklessly, or negligently apply their knowledge or skills in relation to, engage in any professional relationship with, or perform professional services in relation to any incarcerated individual unless the purpose is solely to evaluate, treat, protect, or improve the physical or mental health or condition of the incarcerated individual (except as permitted by paragraph (b) or (c) of subdivision five of this section).

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

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

(ii) knowingly, recklessly, or negligently permitting their knowledge, skills or clinical findings or treatment to be used in the process of or to facilitate torture or improper treatment;

(iii) knowingly, recklessly, or negligently examining, evaluating, or treating an incarcerated individual 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 knowingly, recklessly, or negligently apply their knowledge or skills or perform any professional service in order to assist in the punishment, detention, incarceration, intimidation, or coercion of an incarcerated individual when such assistance is provided in a manner that may adversely affect the physical or mental health or condition of the incarcerated individual (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 individual, 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 being present for the interrogation of a minor under paragraph (a) of subdivision five of this section or 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 individual 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, including presence during the interrogation of a minor at the request of the minor or the minor's parent or guardian and for the purpose of supporting the health of the minor;

(b) participating in an act that restrains an incarcerated individual or temporarily alters the physical or mental activity of an incarcerated individual, where the act complies with generally applicable legal, health and professional standards, is necessary for the protection of the physical or mental health, condition or safety of the incarcerated individual, other incarcerated individuals, or persons caring for, guarding or confining the incarcerated individual;

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

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

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

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

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

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

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

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

(c) in addition to reporting under paragraph (a) or (b) of this subdivision: (i) in the case of an alleged violation by a health care professional licensed under article one hundred thirty-one, one hundred thirty-one-B or one hundred thirty-one-C of the education law, a report shall be filed with the office of professional medical conduct; and (ii) in the case of an alleged violation by any other health care professional licensed, registered or certified under title eight of the education law, a report shall be filed with the office of professional discipline; provided that for the purpose of this paragraph, where a person holds a license, registration or certification under the laws of a jurisdiction other than the state of New York that is for a profession substantially comparable to one listed in paragraph (a) of subdivision one of this section, the person shall be deemed to be a health care

professional and the person's license, registration or certification shall be deemed to be under the appropriate article of title eight of 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 individuals 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 individuals 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 individuals 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~~] their 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 employ-

ee 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**; or (f) such activity, policy, or practice constitutes a violation under section twenty-five of the public health law (participation in torture or improper treatment of incarcerated individuals 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 individuals 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**; or to any report of a violation under section twenty-five of the public health law (participation in torture or improper treatment of incarcerated individuals 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.