

# ASSEMBLY, No. 3244

## STATE OF NEW JERSEY 220th LEGISLATURE

INTRODUCED MARCH 7, 2022

**Sponsored by:**

**Assemblywoman PAMELA R. LAMPITT**

**District 6 (Burlington and Camden)**

**SYNOPSIS**

Clarifies that apologies by health care facilities and professionals to patients or their representatives for adverse events disclosed under “Patient Safety Act” are excluded from discovery and inadmissible in legal actions involving facilities and professionals.

**CURRENT VERSION OF TEXT**

As introduced.



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2

1 AN ACT concerning acts of apology for certain adverse health care  
2 events disclosed pursuant to the "Patient Safety Act," and  
3 amending P.L.2004, c.9.

4  
5 **BE IT ENACTED** by the Senate and General Assembly of the State  
6 of New Jersey:

7  
8 1. Section 3 of P.L.2004, c.9 (C.26:2H-12.25) is amended to  
9 read as follows:

10 3. a. As used in this act:

11 "Adverse event" means an event that is a negative consequence  
12 of care that results in unintended injury or illness, which may or  
13 may not have been preventable.

14 "Anonymous" means that information is presented in a form and  
15 manner that prevents the identification of the person filing the  
16 report.

17 "Commissioner" means the Commissioner of Health.

18 "Department" means the Department of Health.

19 "Event" means a discrete, auditable, and clearly defined  
20 occurrence.

21 "Health care facility" or "facility" means a health care facility  
22 licensed pursuant to P.L.1971, c.136 (C.26:2H-1 et seq.) and a State  
23 psychiatric hospital operated by the Department of Human Services  
24 and listed in R.S.30:1-7.

25 "Health care professional" means an individual who, acting  
26 within the scope of the individual's licensure or certification,  
27 provides health care services, and includes, but is not limited to, a  
28 physician, dentist, nurse, pharmacist, or other health care  
29 professional whose professional practice is regulated pursuant to  
30 Title 45 of the Revised Statutes.

31 "Near-miss" means an occurrence that could have resulted in an  
32 **[averse] adverse** event but the adverse event was prevented.

33 "Preventable event" means an event that could have been  
34 anticipated and prepared against, but occurs because of an error or  
35 other system failure.

36 "Serious preventable adverse event" means an adverse event that  
37 is a preventable event and results in death or loss of a body part, or  
38 disability or loss of bodily function lasting more than seven days or  
39 still present at the time of discharge from a health care facility.

40 b. In accordance with the requirements established by the  
41 commissioner by regulation, pursuant to this act, a health care  
42 facility shall develop and implement a patient safety plan for the  
43 purpose of improving the health and safety of patients at the  
44 facility.

45 The patient safety plan shall, at a minimum, include:

**EXPLANATION** – Matter enclosed in bold-faced brackets **[thus]** in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

- 1 (1) a patient safety committee, as prescribed by regulation;
- 2 (2) a process for teams of facility staff, which teams  
3 are comprised of personnel who are representative of the facility's  
4 various disciplines and have appropriate competencies, to conduct  
5 ongoing analysis and application of evidence-based patient safety  
6 practices in order to reduce the probability of adverse events  
7 resulting from exposure to the health care system across a range of  
8 diseases and procedures;
- 9 (3) a process for teams of facility staff, which teams are  
10 comprised of personnel who are representative of the facility's  
11 various disciplines and have appropriate competencies, to conduct  
12 analyses of near-misses, with particular attention to serious  
13 preventable adverse events and adverse events; and
- 14 (4) a process for the provision of ongoing patient safety training  
15 for facility personnel.

16 The provisions of this subsection shall not be construed to  
17 eliminate or lessen a hospital's obligation under current law or  
18 regulation to have a continuous quality improvement program.

19 c. A health care facility shall report to the department or, in the  
20 case of a State psychiatric hospital, to the Department of Human  
21 Services, in a form and manner established by the commissioner,  
22 every serious preventable adverse event that occurs in that facility.

23 d. A health care facility shall assure that the patient affected by  
24 a serious preventable adverse event or an adverse event specifically  
25 related to an allergic reaction, or, in the case of a minor or a patient  
26 who is incapacitated, the patient's parent or guardian or other family  
27 member, as appropriate, is informed of the serious preventable  
28 adverse event or adverse event specifically related to an allergic  
29 reaction, no later than the end of the episode of care, or, if  
30 discovery occurs after the end of the episode of care, in a timely  
31 fashion as established by the commissioner by regulation. The time,  
32 date, participants, and content of the notification shall be  
33 documented in the patient's medical record in accordance with rules  
34 and regulations adopted by the commissioner. The content of the  
35 documentation shall be determined in accordance with the rules and  
36 regulations of the commissioner. If the patient's physician  
37 determines that the disclosure would seriously and adversely affect  
38 the patient's health, then the facility shall assure that the family  
39 member, if available, is notified in accordance with rules and  
40 regulations adopted by the commissioner. In the event that an adult  
41 patient is not informed of the serious preventable adverse event or  
42 adverse event specifically related to an allergic reaction, the facility  
43 shall assure that the physician includes a statement in the patient's  
44 medical record that provides the reason for not informing the  
45 patient pursuant to this section.

46 e. (1) A health care professional or other employee of a health  
47 care facility is encouraged to make anonymous reports to the  
48 department or, in the case of a State psychiatric hospital, to the

1 Department of Human Services, in a form and manner established  
2 by the commissioner, regarding near-misses, preventable events,  
3 and adverse events that are otherwise not subject to mandatory  
4 reporting pursuant to subsection c. of this section.

5 (2) The commissioner shall establish procedures for and a  
6 system to collect, store, and analyze information voluntarily  
7 reported to the department pursuant to this subsection. The  
8 repository shall function as a clearinghouse for trend analysis of the  
9 information collected pursuant to this subsection.

10 f. Any documents, materials, or information received by the  
11 department, or the Department of Human Services, as applicable,  
12 pursuant to the provisions of subsections c. and e. of this section  
13 concerning serious preventable adverse events, near-misses,  
14 preventable events, and adverse events that are otherwise not  
15 subject to mandatory reporting pursuant to subsection c. of this  
16 section, shall not be:

17 (1) subject to discovery or admissible as evidence or otherwise  
18 disclosed in any civil, criminal, or administrative action or  
19 proceeding;

20 (2) considered a public record under P.L.1963, c.73 (C.47:1A-1  
21 et seq.) or P.L.2001, c.404 (C.47:1A-5 et al.); or

22 (3) used in an adverse employment action or in the evaluation of  
23 decisions made in relation to accreditation, certification,  
24 credentialing, or licensing of an individual, which is based on the  
25 individual's participation in the development, collection, reporting  
26 or storage of information in accordance with this section. The  
27 provisions of this paragraph shall not be construed to limit a health  
28 care facility from taking disciplinary action against a health care  
29 professional in a case in which the professional has displayed  
30 recklessness, gross negligence, or willful misconduct, or in which  
31 there is evidence, based on other similar cases known to the facility,  
32 of a pattern of significant substandard performance that resulted in  
33 serious preventable adverse events.

34 The information received by the department, or the Department  
35 of Human Services, as applicable, shall be shared with the Attorney  
36 General in accordance with rules and regulations adopted pursuant  
37 to subsection j. of this section, and may be used by the department,  
38 the Department of Human Services, and the Attorney General for  
39 the purposes of this act and for oversight of facilities and health  
40 care professionals; however, the departments and the Attorney  
41 General shall not use the information for any other purpose.

42 In using the information to exercise oversight, the department,  
43 Department of Human Services, and Attorney General, as  
44 applicable, shall place primary emphasis on assuring effective  
45 corrective action by the facility or health care professional,  
46 reserving punitive enforcement or disciplinary action for those  
47 cases in which the facility or the professional has displayed  
48 recklessness, gross negligence, or willful misconduct, or in which

1 there is evidence, based on other similar cases known to the  
2 department, Department of Human Services or the Attorney  
3 General, of a pattern of significant substandard performance that  
4 has the potential for or actually results in harm to patients.

5 g. (1) Any documents, materials, or information developed  
6 by a health care facility as part of a process of self-critical analysis  
7 conducted pursuant to subsection b. of this section concerning  
8 preventable events, near-misses, and adverse events, including  
9 serious preventable adverse events, **[**and any document or oral  
10 statement that constitutes the disclosure provided to a patient or the  
11 patient's family member or guardian pursuant to subsection d. of  
12 this section,**]** shall not be:

13 **[(1)]** (a). subject to discovery or admissible as evidence or  
14 otherwise disclosed in any civil, criminal, or administrative action  
15 or proceeding; or

16 **[(2)]** b. used in an adverse employment action or in the  
17 evaluation of decisions made in relation to accreditation,  
18 certification, credentialing, or licensing of an individual, which is  
19 based on the individual's participation in the development,  
20 collection, reporting, or storage of information in accordance with  
21 subsection b. of this section. The provisions of this paragraph shall  
22 not be construed to limit a health care facility from taking  
23 disciplinary action against a health care professional in a case in  
24 which the professional has displayed recklessness, gross negligence  
25 or willful misconduct, or in which there is evidence, based on other  
26 similar cases known to the facility, of a pattern of significant  
27 substandard performance that resulted in serious preventable  
28 adverse events.

29 (2) Any document or oral statement that constitutes the  
30 mandatory disclosure of any adverse event to a patient or the  
31 patient's family member or guardian pursuant to subsection d. of  
32 this section, and any document, gesture, or oral statement to the  
33 patient, family member, or guardian associated with that disclosure  
34 expressing benevolence, regret, apology, sympathy, commiseration,  
35 condolence, or compassion shall not be:

36 (a) subject to discovery or admissible as evidence or otherwise  
37 disclosed in any civil, criminal, or administrative action or  
38 proceeding; or

39 (b) used in an adverse employment action or in the evaluation of  
40 decisions made in relation to accreditation, certification,  
41 credentialing, or licensing of a health care professional, which is  
42 based on the professional's participation in the development,  
43 collection, reporting, or storage of information for self-critical  
44 analyses conducted in accordance with subsection b. of this section.  
45 However, the provisions of this paragraph shall not be construed to  
46 limit a health care facility from taking disciplinary action against a  
47 health care professional in a case in which the professional has  
48 displayed recklessness, gross negligence or willful misconduct, or

1 in which there is evidence, based on other similar cases known to  
2 the facility, of a pattern of significant substandard performance that  
3 resulted in serious preventable adverse events, and shall not be  
4 construed to limit the discovery, admissibility, or use of any  
5 document, gesture, or oral statement, or part thereof, expressing  
6 negligence or fault concerning the adverse event disclosed.

7 h. Notwithstanding the fact that documents, materials, or  
8 information may have been considered in the process of self-critical  
9 analysis conducted pursuant to subsection b. of this section, or  
10 received by the department or the Department of Human Services  
11 pursuant to the provisions of subsection c. or e. of this section, the  
12 provisions of this act shall not be construed to increase or decrease,  
13 in any way, the availability, discoverability, admissibility, or use of  
14 any such documents, materials, or information if obtained from any  
15 source or context other than those specified in this act.

16 i. The investigative and disciplinary powers conferred on the  
17 boards and commissions established pursuant to Title 45 of the  
18 Revised Statutes, the Director of the Division of Consumer Affairs  
19 in the Department of Law and Public Safety and the Attorney  
20 General under the provisions of P.L.1978, c.73 (C.45:1-14 et seq.)  
21 or any other law, rule, or regulation, as well as the investigative and  
22 enforcement powers conferred on the department and the  
23 commissioner under the provisions of Title 26 of the Revised  
24 Statutes or any other law, rule, or regulation, shall not be exercised  
25 in such a manner so as to unduly interfere with a health care  
26 facility's implementation of its patient safety plan established  
27 pursuant to this section. However, this act shall not be construed to  
28 otherwise affect, in any way, the exercise of such investigative,  
29 disciplinary, and enforcement powers.

30 j. The commissioner shall, pursuant to the "Administrative  
31 Procedure Act," P.L.1968, c.410 (C.52:14B-1 et seq.), adopt such  
32 rules and regulations necessary to carry out the provisions of this  
33 act. The regulations shall establish: criteria for a health care  
34 facility's patient safety plan and patient safety committee; the time  
35 frame and format for mandatory reporting of serious preventable  
36 adverse events at a health care facility; the types of events that  
37 qualify as serious preventable adverse events and adverse events  
38 specifically related to an allergic reaction; the circumstances under  
39 which a health care facility is not required to inform a patient or the  
40 patient's family about a serious preventable adverse event or  
41 adverse event specifically related to an allergic reaction; and a  
42 system for the sharing of information received by the department  
43 and the Department of Human Services pursuant to subsections c.  
44 and e. of this section with the Attorney General. In establishing the  
45 criteria for reporting serious preventable adverse events, the  
46 commissioner shall, to the extent feasible, use criteria for these  
47 events that have been or are developed by organizations engaged in  
48 the development of nationally recognized standards.

1 The commissioner shall consult with the Commissioner of  
2 Human Services with respect to rules and regulations affecting the  
3 State psychiatric hospitals and with the Attorney General with  
4 respect to rules and regulations regarding the establishment of a  
5 system for the sharing of information received by the department  
6 and the Department of Human Services pursuant to subsections c.  
7 and e. of this section with the Attorney General.

8 k. Nothing in this act shall be construed to increase or decrease  
9 the discoverability, in accordance with **【Christy v. Salem, No. A-  
10 6448-02T3 (Superior Court of New Jersey, Appellate Division,  
11 February 17, 2004)(2004 WL291160)】** Christy v. Salem, 366 N.J.  
12 Super. 535 (App. Div. 2004), of any documents, materials or  
13 information if obtained from any source or context other than those  
14 specified in this act.

15 (cf: P.L.2012, c.17, s.190)

16  
17 2. This act shall take effect immediately, and apply to any  
18 event that falls within the scope of the “Patient Safety Act,”  
19 P.L.2004, c.9 (C.26:2H-12.23 et seq.), as defined therein, occurring  
20 on or after the effective date.

#### 21 22 23 STATEMENT

24  
25 This bill would clarify that apologies by health care facility  
26 representatives and health care professionals to patients or their  
27 parents or guardians for adverse events subject to patient disclosure  
28 under the “Patient Safety Act,” P.L.2004, c.9 (C.26:2H-12.23 et  
29 seq.), are generally excluded from discovery and inadmissible in  
30 legal actions or proceedings involving those facilities and  
31 professionals.

32 In accordance with the bill’s provisions, any document, gesture,  
33 or oral statement to a patient, family member, or guardian  
34 associated with the adverse event disclosure expressing  
35 benevolence, regret, apology, sympathy, commiseration,  
36 condolence, or compassion would not be: subject to discovery or  
37 admissible as evidence or otherwise disclosed in any civil, criminal,  
38 or administrative action or proceeding; or used in an adverse  
39 employment action or in the evaluation of decisions made in  
40 relation to accreditation, certification, credentialing, or licensing of  
41 the apologizing health care professional. However, any document,  
42 gesture, or oral statement, or part thereof, expressing negligence or  
43 fault concerning the adverse event disclosed would be subject to  
44 discovery and admissible in any action or proceeding, and could be  
45 used by a health care facility to take disciplinary action against a  
46 health care professional in a case in which the professional had  
47 displayed recklessness, gross negligence or willful misconduct, or  
48 in which there was evidence, based on other similar cases known to

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- 1 the facility, of a pattern of significant substandard performance that
- 2 resulted in serious preventable adverse events.