

May 10, 2024

SENT VIA USPS & EMAIL

Re: The Adult Vaccine Registry Bills S1531 and A7154 Are Unconstitutional and Violate State and Federal Protections Regarding Medical Privacy and Physician-Patient Confidentiality

Dear Majority Leader Stewart-Cousins, Speaker Heastie, Sen. Hoylman-Sigal, Co-Sponsors of S1531, and Members of New York State Senate Health Committee:

It was recently brought to the attention of Children's Health Defense that the New York State Assembly and Senate Health Committees are considering bills [A7154](#) and [S1531](#), respectively, which propose to remove long-standing medical privacy protections regarding vaccinations for adults. These bills amend existing Public Health Law Section 2168 to make reporting of vaccinations mandatory by anyone who administers a vaccine, eliminating a patient's consent as a condition of disclosure. These bills violate state and federal laws regarding physician-patient privilege and the right to privacy and seek to harvest data from unsuspecting patients who may later be targeted through this identifying information.

Respectfully, as set forth herein, these bills should be rejected and withdrawn.

S1531 and A7154 Create a Mandatory Adult Vaccine Registry by Eliminating the Requirement of Informed Consent Before Disclosure

S1531 and A7154 deceptively seek to turn a voluntary reporting system, which requires the consent of the patient, into a mandatory reporting system that violates a patient's right to medical privacy and a physician's duty of confidentiality. Specifically, the *current* version of PHL Section 2168 gives *discretion* to those administering vaccines to report the incidence of vaccination to the Board, but only after obtaining "the consent of the vaccinee." In other words, the administrator can choose to report or not to report an incidence of vaccination, but patient consent is required if the administrator wants to report. The proposed changes to Section 2168, however, turn this standard on its head, requiring that those administering vaccines "*shall* report all such immunizations to the department." (Emphasis supplied.) In other words, the new standard replaces the requirement of consent with a duty to report

unless the vaccinee raises an objection.¹ This standard effectively waives a patient’s right to confidentiality concerning vaccinations by eliminating voluntary and informed consent as a condition to disclosure to the State. Indeed, if vaccine administrators have no duty to seek consent, a patient may never know that he or she has the right to object to this disclosure of private medical information, much less that such information will be reported to the State.

Moreover, the rationale for S1531 and A7154 is disingenuous. Indeed, the stated justification for S1531 is to “assist individuals and their various health care providers by having accurate information on the patient’s vaccination status when considering whether the patient needs a particular vaccination” and “facilitat[ing] public health monitoring of immunization rates, tracking of where people are receiving immunizations, and tailoring public outreach efforts accordingly.” These aims, however, have been served for many years by the current version of the law and, frankly, by a medical provider’s own recordkeeping. The real difference between the current and proposed versions of the law is that the proposed change undermines a patient’s ability to object and to protect the confidentiality of medical care. This is particularly true because the vaccine administrator no longer is required to advise a patient of her right to object. Thus, in many cases, it is only the most knowledgeable patients or those who happen to ask the question who will be able to protect their medical records. Patient confidentiality should not hinge on luck.

Indeed, these bills provide no safeguards against the State retaliating against individuals who refuse to consent to inclusion in the registry (even if vaccinated) or who make the decision not to take a vaccine or vaccines. Moreover, nothing in the bills safeguards against the State sharing or selling patients’ confidential medical information. Given that many New York citizens were recently discriminated against in a variety of ways based upon their vaccination status during the COVID-19 pandemic, many of which were later found to be impermissible, it is disturbingly easy to see how this mandatory registry might be misused. These bills open the door to demanding disclosure of all medical and psychiatric records under the guise of public health. In fact, this mandatory registry is arguably a step towards statewide vaccine passports.

As a practical matter, these bills convert private health information into public information. There is no compelling justification for obliterating patient confidentiality. Any purported public health need to monitor vaccination rates or determine, for example, the geographic distribution of vaccine uptake, could be achieved by statistical reporting that omits a patient’s identifying information. Indeed, to the extent the bills specify a need to “track” patient identity and location of vaccine recipients, use of the term “track” appears to be the point. This registry is ripe for abuse in tracking and surveilling individuals. This validates concerns, for example, of immigrant rights advocates that such information will be used to target and locate undocumented people for deportation.² Contrary to the implication inherent in these bills, adult vaccinations are not mandatory, and neither should the reporting of vaccination status be mandatory. Indeed, state-mandated reporting creates an opportunity for the State and

¹ Proposed Section 2168 states: “no report shall be made...if the person to whom the vaccine is administered or a person authorized to consent to health care for the person, objects to the person who administered the vaccine prior to the making of the report.”

² See, e.g., *NY Red Alert: Recently Passed Bill Clears the Way for a Mandatory Adult Vaccine Database*, March 18, 2023, <https://ny.childrenshealthdefense.org>. Similarly, to the extent this information is used to determine vaccine “compliance” with any new injection, it likely will disproportionately affect black and brown people, given that they had the lowest rate of COVID vaccine uptake among all racial groups.

others to pressure those whose vaccination status is not included in the registry to take vaccines.

S1531 and A7154 Starkly Contrast with Long-Standing Protections in New York Law Regarding the Confidentiality of Medical Information

Well-established New York State legal precedent imposes a duty upon medical practitioners to protect the confidentiality of patient information. Indeed, a physician's Hippocratic Oath requires it.³ "A physician's duty to maintain the confidentiality of information regarding the treatment of his patient is one which is well known and recognized by society in general." *Tighe v. Ginsberg*, 540 N.Y.S.2d 99,101 (4th Dep't 1989)(quoting *Hammonds v Aetna Cas. & Sur. Co.*, 243 F. Supp. 793,801 (N.D. Ohio 1965)("Almost every member of the public is aware of the promise of discretion contained in this Hippocratic Oath, and every patient has a right to rely upon this warranty of silence.")). The "duty not to disclose confidential personal information springs from the implied covenant of trust and confidence that is inherent in the physician patient relationship, the breach of which is actionable as a tort." *Doe v. Community Health Plan-Kaiser Corp.*, 709 N.Y.S.2d 215,217 (3d Dep't 2000)(overruled on other grounds by *Doe v. Guthrie Clinic, Ltd.* 22 N.Y.3d 480 (2014)). In fact, New York courts consistently uphold claims for breach of the common law duty of confidentiality and violations of fiduciary responsibility implicit in, and essential to, the doctor-patient relationship. *Id.*; see also *Harley v. Druzba*, 565 N.Y.S.2d 278, 279 (3d Dep't 1991)(actionable tort based upon confidential relationship between social worker and client); *MacDonald v. Clinger*, 446 N.Y.S.2d 801,802 (4th Dep't 1982).

This concept of medical privacy is also embodied in Section 4504(a) of the N.Y. Civil Practice Law and Rules, which requires consent before disclosure. Section 4504(a) provides: "***Unless the patient waives the privilege***, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic *shall not be allowed* to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity."⁴ (Emphasis supplied.) Moreover, courts have also noted that Public Health Law Section 2803-C constitutes "the declared public policy of the State of New York to protect every individual's right to keep medical treatment private and personal and medical records confidential." *Randi A. J. v. Long Is. Surgi-Ctr.*, 842 N.Y.S.2d. 558,560 (2nd. Dept 2007); *Chanko v. American Broadcasting Cos. Inc.*, 27 N.Y.3d 46, 53 (2016); see also Public Health Law §4410 (mandating confidentiality of medical records maintained by health maintenance organizations, absent waiver by patient).

While there are certain instances in which the Legislature has abrogated this privilege to effectuate some other public policy, such as the detection and prevention of child abuse (See, e.g., Family Ct. Act §1046(a)(vii)), a citizen's medical information may not be disclosed absent a showing that a compelling interest overrides the privilege, or that the interests of justice significantly outweigh the need for confidentiality. See, *Exelbert v. State*, 529

³ See, American Medical Ass'n, Principles of Medical Ethics (Adopted June 1957)("A physician shall respect the rights of patients...and shall safeguard patient confidences and privacy within the constraints of the law."). <https://code-medical-ethics.ama-assn.org/principles>.

⁴ CPLR 4504(a) also states that a physician-patient relationship "shall exist between a medical corporation... professional service corporation... [and] university faculty practice corporation and the patients to whom they... render professional medical services."

N.Y.S.2d 15, 16 (1988); *see also*, *Perry v. Fiumano*, 403 N.Y.S.2d 382 (1978). Currently, there is no compelling justification for passing S1531 and A7154, especially since an opt-in registry already exists to provide public health agencies with vaccination information. Thus, if a patient decides she would like State “assistance” in maintaining this information (referenced above as one of the purposes behind the bill), she may consent to do so. Moreover, as indicated above, to the extent the State seeks information regarding the number, type, and geographic location concerning vaccine administration, the State can obtain such data in a de-identified format. There is no compelling justification or significant State interest warranting the passage of S1531 and A7154, particularly when balanced against the State’s long-standing policy and precedent in protecting patients’ fundamental right to medical privacy and the risk that this mandatory information could be used against New York citizens.

S1531 and A7154 Violate New York Citizens’ 14th Amendment Right to Privacy and Are Unconstitutional

In addition to violating New York State law, S1531 and A7154 likely violate the 14th Amendment of the U.S. Constitution. *See*, U.S. Const. amend. XIV, §2. Specifically, the Supreme Court has recognized “that there exists in the United States Constitution a right to privacy protecting ‘the individual interest in avoiding disclosure of personal matters.’” *Doe v. City of New York*, 15 F.3d 264, 267 (2d Cir. 1994)(quoting *Whalen v. Roe*, 429 U.S. 589, 599 (1977)). This right to privacy and protected interest under the 14th Amendment includes confidentiality regarding the status of one’s health. *Id.* at 267; *O’Connor v. Pierson*, 426 F.3d 187, 201 (2d Cir. 2005)(“As a more general matter, the right to confidentiality includes the right to protection regarding information about the state of one’s health.”). “Extension of the right to confidentiality to personal medical information recognizes there are few matters that are quite so personal as the status of one’s health, and few matters the dissemination of which one would prefer to maintain greater control over.” *Doe v. City of New York*, 15 F.3d at 267. Indeed, the Second Circuit has made it clear that “medical information in general. . . is information of the most intimate kind,” and that patients have a protected privacy right in such information. *O’Connor*, 426 F.3d at 201 (“[W]e easily hold that [Plaintiff] had a protected privacy right in the medical records sought by the Board.”). Moreover, in circumstances where “legislation burdens constitutionally protected privacy rights, [the Court] will apply intermediate scrutiny and uphold the statute only if a substantial government interest outweighs the burdened privacy right.” *Id.* at 202-03.

Based upon the foregoing, S1531 and A7154 face a significant 14th Amendment challenge if passed. As indicated above, an opt-in registry already exists, which aids public health agencies while at the same time protecting the privacy rights of citizens through the requirement of consent to disclose. The burden on citizens caused by the removal of that consent, which effectively waives patients’ rights, is not outweighed by the State’s objectives, which should be consistent with those underlying the existing law and thus already served by that law.

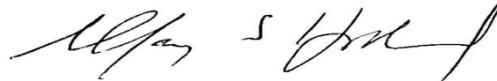
Conclusion

For the foregoing reasons, Children’s Health Defense respectfully requests that you heed our warning that both S1531 and A7154 violate New York State and federal law, including the U.S. Constitution. Please withdraw these ill-considered bills.

Respectfully,



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cc: Attached Service List

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