



New York State Broadcasters Association, Inc. Memorandum in Opposition to A.520

Imposes Liability for Reporting at Medical Facilities Without Prior Patient Consent

The New York State Broadcasters Association, Inc. (NYSBA), representing television and radio stations throughout New York State, opposes A.520. There is no “same as” legislation in the Senate because the new S.484A contains provisions not found in A.520. This legislation, A.520, is inconsistent with the public interest and suffers from significant constitutional problems.

The legislation harms the public by threatening news coverage at medical facilities

Last year, S.1693B – which has been re-introduced in 2021 at S.484A - passed the New York State Senate. That bill contained a carefully crafted provision regarding newscasts.

(E) Nothing in this section shall apply where the recognizable image or speech is produced by a news department or news division and is Broadcast or conveyed as part of a newscast, investigative news program or news report in any electronic or printed form. This section shall not apply to images or speech that has been obtained by professional journalists, newscasters or other individuals or entities recognized by section seventy-nine-h of the civil rights law.

THIS IMPORTANT PROVISION HAS BEEN REMOVED FROM A.520. It is included in S.484A. Striking this provision renders the legislation unconstitutional. Moreover, it will effectively preclude news coverage of medical facilities during the COVID pandemic.



As drafted, A.520 creates liability for any journalist that covers news from inside a medical facility. The risk of liability created by this legislation would require a hospital to obtain a separate permission agreement from all patients. Such a requirement is unrealistic. The public loses. New York hospitals are confronting enormous challenges during the COVID-19 pandemic. The greatest concern is exceeding capacity. These images convey essential information.

Policy makers and the public must see the situations that confront local hospitals. The images help to direct resources and convince the public to comply with COVID rules. The videos and pictures that we see every day, like the one seen above, would no longer be available. There are countless examples. Here are just a few:

- Jamaica Hospital Center Queens <https://nypost.com/2020/03/27/coronavirus-in-ny-video-shows-disturbing-crowded-hospital-er/>
- Elmhurst <https://www.nytimes.com/video/nyregion/100000007052136/coronavirus-elmhurst-hospital-queens.html>
- Maimonides Medical Center <https://www.youtube.com/watch?v=Pg-kd945arA>
- Brookdale Hospital: <https://www.youtube.com/watch?v=TzVfskOCxH4>

The legislation creates an incentive not to broadcast stories about people being vaccinated for COVID, even at a temporary medical facility such as a tent. Given the need to encourage people to be vaccinated, it is essential that citizens see their neighbors being vaccinated.

The problem is not limited to the COVID crisis. News coverage triggers important changes in healthcare. Several years ago news coverage of a woman dying in a Kings County hospital forced changes in patient care. <https://www.youtube.com/watch?v=FOCpOZ4txvs>

Geraldo Rivera's 1972 report on the Willowbrook State School led to systemic changes in treatment and completely overhauled the mental health system in New York. <https://www.youtube.com/watch?v=bpVEjzO6Dd0>

The legislation will effectively prevent a substantial amount of medical reporting from health care facilities including nursing homes, VA Hospitals and mental health facilities. Stories about abuse and unlivable conditions may never be broadcast because under the legislation the medical facility must obtain express written consent from patients that appear in a photograph or film.

Facing the possibility of significant liability, news organizations will refrain from covering stories about medical facilities. Because medical facilities may become liable if they permit filming, they will simply ban all news reporters in an effort to reduce litigation risks.

The legislation does not protect journalists

There is a new provision that purports to protect journalists. It does not:

33 (e) Nothing in this section shall apply where such recognizable image
 34 or speech is broadcast or conveyed as part of the news gathering process
 35 among professional journalists, newscasters or other individuals or
 36 entities, including those defined in subdivision (a) of section seven-
 37 ty-nine-h of the civil rights law, and their agents and legal advisers,
 38 **but not broadcast to the public** (*emphasis supplied*)

This provision attempts to use language similar to the "news exemption" contained in last year's Senate bill, S. 1693B, and this year's S.484A. The provision is very different. IT IS NOT A NEWS EXEMPTION. It only covers internal communications among journalists and their news rooms. Liability would still attach if the information is broadcast to the public. Thus, a journalist may cover and produce a story, but cannot make it available to the public without incurring liability. This new provision makes no sense.

**The legislation is unconstitutionally vague and
creates a significant chilling effect on news coverage**

The definition of “broadcasting” in the legislation chills news coverage. Here is the language

19 (d) "broadcasting" of an image **or speech** shall mean transmission by
20 broadcast, cable, closed circuit, internet or other television or visual
21 medium, social media, or other system by which it can be viewed in
22 violation of the privacy rights and expectations of a patient. Provided
23 however, **that broadcasting shall not include *incidental transmission of***
24 **the image or speech of an individual** being treated, transported or
25 otherwise cared for or attended to by an ambulance service as defined in
26 subdivision two of section three thousand one of this chapter or by a
27 voluntary ambulance service as defined in subdivision three of section
28 three thousand one of this chapter, at an ambulance response scene,
29 public area or during delivery or admission to a health care facility,
30 that is captured by news media, bystanders or others who do not have the
31 written consent of such ambulance service or voluntary ambulance
32 service. (*emphasis supplied*)

First, the legislation not only creates liability for video images, it gives rise to liability where an individual’s “speech” is broadcast without the person’s permission. Even where a person’s image is protected, liability would attach if the voice was recorded and broadcast. Such a policy is impossible to manage. This makes reporting live events nearly impossible.

Second, liability turns on whether a recorded image or speech is considered to be an “*incidental transmission*.” This is unworkable. What does “*incidental*” mean? How long does a video camera have to remain on a person before it moves from “*incidental*” to coverage that will trigger liability? One second? Thirty seconds? How loud does a person’s voice have to be on a recording to trigger liability? With respect to photojournalists, any picture of an individual would not be “*incidental*.” Faced with such liability risks, news reporters will simply not cover medical related events. THESE CONCERNS LED THE SENATE TO STRIKE THE WORD “INCIDENTIAL” FROM S.1693B LAST YEAR AS WELL AS THIS YEAR’S S484A.

Third, we remain concerned that liability could attach to news coverage on a public street. The new legislation narrows the right to patient privacy, by defining a medical facility to include treatment within the confines of an ambulance “with all door closed.” This was an attempt to limit liability when covering news events in public places. However, the provision referenced above implies that there may be liability reporting from public places where the image or voice that is recorded is not an “*incidental transmission*.” In other words, there is a conflict between two provisions in the legislation.

When providing on the spot live coverage, broadcast reporters do not have the ability separate out images of people receiving treatment. Video reports from 9/11, AMTRAK derailments, auto accidents and terrorist attacks demonstrate that this is impossible. Indeed it is precisely these images that are newsworthy. Facing potential liability, stations will cut back on live reports.

Fourth, it appears that liability would attach not only to broadcast journalists but anyone who takes a video or records a patient's voice in a medical facility. For example, assume a person visiting a relative takes a video of the relative and posts it on line. If the video happens to include the image or voice of another patient in the room, the person taking the video could be sued. To avoid being dragged into a law suit, medical facilities will have to enact policies banning mobile phones.

**There is no need for legislation as medical facilities
have already been held accountable for violations of patient privacy**

The legislation seeks to remedy a unique situation that occurred more than four years ago in a New York City Hospital. Litigation was initiated against the hospital, doctors and ABC. The claims filed against ABC were dismissed. Courts correctly found that the hospital violated the patient's right to privacy. The decision was upheld by the NY Court of Appeals. See Chanko v. Am. Broad. Cos. Inc., 2016 NY Slip Op 02478, 27 N.Y.3d 46, 29 N.Y.S.3d 879, 49 N.E.3d 1171 (2016). The hospital in question was subject to a \$2.2 million fine.

The courts have already protected a patient's privacy by holding the hospital responsible. It is unlikely that this situation will arise again in New York. Letters sent from the New York City Hospitals to the New York City Council demonstrate that this situation will not be repeated.

The legislation violates the First Amendment

New York State's interest in protecting patient privacy rests on the relationship between the patient, medical personnel and the medical facilities providing such care. New York has already achieved its objective without infringing on the First Amendment by holding the hospitals accountable. If additional protections are needed they should be directed at the relationship between the patient and provider of medical services. This legislation incorrectly seeks to protect a patient's privacy by holding a third party - the media - liable for broadcasting truthful information. Such an approach is a clear violation of the First Amendment, because it is not narrowly tailored to achieve the state's objective. Moreover, the potential for liability in this legislation goes well beyond the facts presented in the *Chanko* case.

The New York State Broadcasters Association opposes A.520. It is a step backwards from the carefully crafted legislation, S.1693B, which passed the New York State Senate last year and this year's S.484A.

Respectfully submitted

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