Memorandum in Opposition
Office of Professional Misconduct
(Article VII, HMH, S7507-A/A9507-A, Part L)

The New York American College of Emergency Physicians (New York ACEP) strongly opposes the Executive Budget proposal to make changes to the Office of Professional Misconduct (OPMC) disciplinary proceedings. New York ACEP is opposed to provisions that would:

- Allow the New York State Department of Health (NYS DOH) to summarily suspend a physician’s license if the Commissioner deems that physician to be at risk to the health of the people (current law requires that the individual be an imminent danger to do so).
- Make OPMC investigations and non-disciplinary actions public by allowing the NYS DOH to immediately publish charges upon investigative requests.

New York ACEP fully supports the goal of this proposal to ensure that the State’s disciplinary process moves swiftly when necessary to remove individuals from practice that present a serious threat to the public. However, the laws governing the OPMC process have long recognized the need for an appropriate balance. There are enormous adverse professional implications when a disciplinary action is taken against a physician, or even when there has been an accusation, including loss of reputation and the risk of being dropped by Medicaid and other insurers. With Google, Yahoo and other search functions, an unproven allegation released to the public could linger forever in cyberspace, and permanently and unfairly scar a reputation. Even worse is the crippling impact that making accusations public would have on the trusted relationship physicians have with their patients, creating mistrust and fear.

An accusation does not prove wrongdoing. In fact, most complaints to OPMC of alleged misconduct do not become actual findings of misconduct. Most complaints do not even advance to a formal Investigation Committee review. According to the 2018 OPMC Annual Report, while over 9,000 complaints were received by OPMC, and 8,782 complaints closed, only 210 cases resulted in the filing of actual charges. Only 2% of filed complaints ended in actual charges.

Given the significant disparity between the number of complaints and the number of cases where there is ultimately some finding of misconduct, it is critical to limit the bypassing of these important due process protections to circumstances where it is clear that the delay of going through these procedures threatens the safety of the public. A subjective assessment that a physician may be a “risk” as proposed in this legislation is not enough to merit bypassing these long-standing due process protections.

Furthermore, the current law (PHL, S. 230 (12)(a)) already grants power to the NYS DOH to summarily suspend a physician from medical practice without an otherwise required hearing and pre-hearing where there is a “determination that a licensee is causing, engaging in, or maintaining a condition or activity which in the commissioner’s opinion constitutes an imminent danger to the health of the people.” This power was expanded through a 2018 law that gives the Commissioner of Health the power to summarily suspend a physician’s license if they have been accused (not convicted) of a felony charge and, in the commissioner’s opinion, the physician’s “alleged conduct constitutes an imminent danger to the health of the people.”
With respect to making charges public, Public Health law, Section 10(a)(iv) provides for the ability of the Commissioner of Health to make charges against a physician public once it is determined that there is enough evidence to warrant a formal hearing. Since there are still a relatively small number of cases each year that lead to formal charges being brought, it is completely unfair to enable the release of enormously prejudicial information with little if any review process to determine that formal charges are warranted.

New York ACEP believes that this proposal goes far beyond what is necessary to protect the public from aberrant health care practitioners. It will take away long-standing due process protections and could unfairly destroy professional reputations and the trusted patient-physician relationship which is so essential for providing high quality care.

**New York ACEP urges the New York State Legislature to reject this proposal.**
authorized to issue a warrant. Such warrant shall authorize the commis-

sioner and any person authorized by him to have the authority to inspect

grounds, erections, vehicles, structures, apartments, buildings,

places and the contents therein and to remove any books, records,
papers, documents, computers, electronic devices and other physical

objects.

§ 6. Subdivision 1 of section 230 of the public health law, as amended

by chapter 537 of the laws of 1998, is amended to read as follows:

1. A state board for professional medical conduct is hereby created in

the department in matters of professional misconduct as defined in

sections sixty-five hundred thirty and sixty-five hundred thirty-one of

the education law. Its physician members shall be appointed by the

commissioner at least eighty-five percent of whom shall be from among

nominations submitted by the medical society of the state of New York,

the New York state osteopathic society, the New York academy of medi-
cine, county medical societies, statewide specialty societies recognized

by the council of medical specialty societies, and the hospital associ-

ation of New York state. Its lay members shall be appointed by the

commissioner with the approval of the governor. The board of regents

shall also appoint twenty percent of the members of the board. Not less

than sixty-seven percent of the members appointed by the board of

regents shall be physicians. Not less than eighty-five percent of the

physician members appointed by the board of regents shall be from among

nominations submitted by the medical society of the state of New York,

the New York state osteopathic society, the New York academy of medi-
cine, county medical societies, statewide medical societies recognized

by the council of medical specialty societies, and the hospital associ-

ation of New York state. Any failure to meet the percentage thresholds
stated in this subdivision shall not be grounds for invalidating any
action by or on authority of the board for professional medical conduct
or a committee or a member thereof. The board for professional medical
conduct shall consist of not fewer than eighteen physicians licensed in
the state for at least five years, two of whom shall be doctors of
osteopathy, not fewer than two of whom shall be physicians who dedicate
a significant portion of their practice to the use of non-conventional
medical treatments who may be nominated by New York state medical asso-
ciations dedicated to the advancement of such treatments, at least one
of whom shall have expertise in palliative care, and not fewer than
seven lay members. An executive secretary shall be appointed by the
chairperson and shall be a licensed physician. Such executive secretary
shall not be a member of the board, shall hold office at the pleasure
of, and shall have the powers and duties assigned and the annual salary
fixed by[, the chairperson. The chairperson shall also assign such
secretaries or other persons to the board as are necessary] the commis-
sioner.

§ 7. Clause (C) of subparagraph (iii) of paragraph (a) of subdivision
10 of section 230 of the public health law, as amended by chapter 477 of
the laws of 2008, is amended to read as follows:

(C) If the director determines that the matter shall be submitted to
an investigation committee, an investigation committee shall be convened
[within ninety days of any interview of the licensee]. The director
shall present the investigation committee with relevant documentation
including, but not limited to: (1) a copy of the original complaint; (2)
the report of the interviewer and the stenographic record if one was
taken; (3) the report of any medical or scientific expert; (4) copies of
reports of any patient record reviews; and (5) the licensee's submissions.

§ 8. Subparagraph (v) of paragraph (a) of subdivision 10 of section 230 of the public health law, as amended by chapter 477 of the laws of 2008, is amended to read as follows:

(v) The files of the office of professional medical conduct relating to the investigation of possible instances of professional misconduct shall be confidential and not subject to disclosure at the request of any person, except as provided by law in a pending disciplinary action or proceeding. The provisions of this paragraph shall not prevent the office from sharing information concerning investigations within the department and, pursuant to subpoena, with other duly authorized public agencies responsible for professional regulation or criminal prosecution. Nothing in this subparagraph shall affect the duties of notification set forth in subdivision nine-a of this section or prevent the publication of charges or of the findings, conclusions, determinations, or order of a hearing committee pursuant to paragraphs (d) or (g) of this subdivision. In addition, the commissioner may, in his or her sole discretion, disclose [the] any information [when, in his or her professional judgment, disclosure of such information would avert or minimize a public health threat] relating to the investigation of possible instances of professional misconduct. Any such disclosure shall not affect the confidentiality of other information in the files of the office of professional medical conduct related to the investigation.

§ 9. Subparagraphs (i) and (ii) of paragraph (d) of subdivision 10 of section 230 of the public health law, as amended by chapter 477 of the laws of 2008, are amended to read as follows:
(i) A copy of the charges and the notice of the hearing shall be served on the licensee either: (A) personally [by the board] at least thirty days before the hearing[.] or (B) [If personal service cannot be made after due diligence and such fact is certified under oath, a copy of the charges and the notice of hearing shall be served] by registered or certified mail to the licensee's [last known] current residential or practice address [by the board] mailed at least fifteen days before the hearing; (C) by registered or certified mail to the licensee's most recent mailing address pursuant to section sixty-five hundred two of the education law or the licensee's most recent mailing address on file with the department of education pursuant to the notification requirement set forth in subdivision five of such section, mailed at least forty-five days before the hearing; or (D) by first class mail to an attorney, licensed to practice in the state, who has appeared on behalf of the licensee and who has been provided with written authorization of the licensee to accept service, mailed at least thirty days before the hearing.

(ii) The charges shall be made public, consistent with subparagraph (iv) of paragraph (a) of this subdivision, [no earlier than five business days] immediately after they are served, and the charges shall be accompanied by a statement advising the licensee that such publication will occur; [provided, however, that] charges may be made public immediately upon issuance of the commissioner's order in the case of summary action taken pursuant to subdivision twelve of this section and no prior notification of such publication need be made to the licensee.

§ 10. Subparagraph (ii) of paragraph (m) of subdivision 10 of section 230 of the public health law, as amended by chapter 606 of the laws of 1991, is amended to read as follows:
Administrative warning and consultation. If the director of the office of professional medical conduct, after obtaining the concurrence of a majority of a committee on professional conduct, and after consultation with the executive secretary, determines that there is substantial evidence of professional misconduct of a minor or technical nature or of substandard medical practice which does not constitute professional misconduct, the director may issue an administrative warning and/or provide for consultation with a panel of one or more experts, chosen by the director. Panels of one or more experts may include, but shall not be limited to, a peer review committee of a county medical society or a specialty board. Administrative warnings and consultations shall be [confidential and] made public, but shall not constitute an adjudication of guilt or be used as evidence that the licensee is guilty of the alleged misconduct. However, in the event of a further allegation of similar misconduct by the same licensee, the matter may be reopened and further proceedings instituted as provided in this section.

§ 11. Paragraph (p) of subdivision 10 of section 230 of the public health law, as amended by chapter 599 of the laws of 1996, is amended to read as follows:

Convictions of crimes or administrative violations. Except for good cause shown, a licensee shall notify the department within twenty-four hours of having been charged with a crime in any jurisdiction or of any event meeting the definitions of professional misconduct set forth in subdivision nine of section sixty-five hundred thirty of the education law. In cases of professional misconduct based solely upon a violation of subdivision nine of section sixty-five hundred thirty of the education law, the director may direct that charges be prepared and served and may refer the matter to a committee on professional conduct
for its review and report of findings, conclusions as to guilt, and
determination. In such cases, the notice of hearing shall state that the
licensee shall file a written answer to each of the charges and allega-
tions in the statement of charges no later than ten days prior to the
hearing, and that any charge or allegation not so answered shall be
deemed admitted, that the licensee may wish to seek the advice of coun-
sel prior to filing such answer that the licensee may file a brief and
affidavits with the committee on professional conduct, that the licensee
may appear personally before the committee on professional conduct, may
be represented by counsel and may present evidence or sworn testimony in
his or her behalf, and the notice may contain such other information as
may be considered appropriate by the director. The department may also
present evidence or sworn testimony and file a brief at the hearing. A
stenographic record of the hearing shall be made. Such evidence or sworn
testimony offered to the committee on professional conduct shall be
strictly limited to evidence and testimony relating to the nature and
severity of the penalty to be imposed upon the licensee. Where the
charges are based on the conviction of state law crimes in other juris-
dictions, evidence may be offered to the committee which would show that
the conviction would not be a crime in New York state. The committee on
professional conduct may reasonably limit the number of witnesses whose
testimony will be received and the length of time any witness will be
permitted to testify. The determination of the committee shall be served
upon the licensee and the department in accordance with the provisions
of paragraph (h) of this subdivision. A determination pursuant to this
subdivision may be reviewed by the administrative review board for
professional medical conduct.
§ 12. Subdivision 12 of section 230 of the public health law, as amended by chapter 627 of the laws of 1996, paragraph (a) as amended by chapter 477 of the laws of 2008 and paragraph (b) as amended by section 3 of part CC of chapter 57 of the laws of 2018, is amended to read as follows:

12. Summary action. (a) Whenever the commissioner, (i) after being presented with information indicating that a licensee is causing, engaging in or maintaining a condition or activity which has resulted in the transmission or suspected transmission, or is likely to lead to the transmission, of communicable disease as defined in the state sanitary code or HIV/AIDS, by the state and/or a local health department and if in the commissioner's opinion it would be prejudicial to the interests of the people to delay action until an opportunity for a hearing can be provided in accordance with the prehearing and hearing provisions of this section; [or] (ii) after requiring that a licensee produce documents in accordance with subdivision four of section two hundred six of this chapter, and such licensee has failed to produce the required documents within ten days, or within such shorter period as may have been specified in the commissioner's written demand for documents; or (iii) after an investigation and a recommendation by a committee on professional conduct of the state board for professional medical conduct, based upon a determination that a licensee is causing, engaging in or maintaining a condition or activity which in the commissioner's opinion [constitutes an imminent danger] presents a risk to the health of the people, and that it therefore appears to be prejudicial to the interests of the people to delay action until an opportunity for a hearing can be provided in accordance with the prehearing and hearing provisions of this section; the commissioner may order the licensee, by written
notice, to discontinue such dangerous condition or activity or take

certain action immediately and for a period of [ninety] one hundred
twenty days from the date of service of the order. Within [ten] thirty
days from the date of service of the said order, the state board for
professional medical conduct shall commence and regularly schedule such
hearing proceedings as required by this section, provided, however, that
the hearing shall be completed within [ninety] one hundred twenty days
of the date of service of the order. To the extent that the issue of
[imminent danger] risk to the health of the people can be proven without
the attorney representing the office of professional medical conduct
putting in its entire case, the committee of the board shall first
determine whether by a preponderance of the evidence the licensee is
causing, engaging in or maintaining a condition or activity which
[constitutes an imminent danger] presents a risk to the health of the
people. The attorney representing the office of professional medical
conduct shall have the burden of going forward and proving by a prepon-
derance of the evidence that the licensee's condition, activity or prac-
tice [constitutes an imminent danger] presents a risk to the health of
the people. The licensee shall have an opportunity to be heard and to
present proof. When both the office and the licensee have completed
their cases with respect to the question of [imminent danger] risk to
the health of the people, the committee shall promptly make a recommend-
dation to the commissioner on the issue of [imminent danger] risk to the
health of the people and determine whether the summary order should be
left in effect, modified or vacated, and continue the hearing on all the
remaining charges, if any, in accordance with paragraph (f) of subdivi-
sion ten of this section. Within ten days of the committee's recommenda-
tion, the commissioner shall determine whether or not to adopt the
committee's recommendations, in whole or in part, and shall leave in
effect, modify or vacate his summary order. The state board for profes-
sional medical conduct shall make every reasonable effort to avoid any
delay in completing and determining such proceedings. If, at the conclu-
sion of the hearing, (i) the hearing committee of the board finds the
licensee guilty of one or more of the charges which are the basis for
the summary order, (ii) the hearing committee determines that the summa-
ry order continue, and (iii) the ninety day term of the order has not
expired, the summary order shall remain in full force and effect until a
final decision has been rendered by the committee or, if review is
sought, by the administrative review board. A summary order shall be
public upon issuance.

(b) When a licensee has pleaded or been found guilty or convicted of
committing an act constituting a felony under New York state law or
federal law, or the law of another jurisdiction which, if committed
within this state, would have constituted a felony under New York state
law, or when a licensee has been charged with committing an act consti-
tuting a felony under New York state or federal law or the law of anoth-
er jurisdiction, where the licensee's alleged conduct, which, if commit-
ted within this state, would have constituted a felony under New York
state law, and [in the commissioner's opinion the licensee's alleged
conduct constitutes an imminent danger] where the licensee's alleged
conduct may present a risk to the health of the people, or when the duly
authorized professional disciplinary agency of another jurisdiction has
made a finding substantially equivalent to a finding that the practice
of medicine by the licensee in that jurisdiction [constitutes an immi-
ient danger] presents a risk to the health of its people, or when a
licensee has been disciplined by a duly authorized professional disci-
plenary agency of another jurisdiction for acts which if committed in
this state would have constituted the basis for summary action by the
commissioner pursuant to paragraph (a) of this subdivision, the commis-
sioner, after a recommendation by a committee of professional conduct of
the state board for professional medical conduct, may order the licen-
see, by written notice, to discontinue or refrain from practicing medi-
cine in whole or in part or to take certain actions authorized pursuant
to this title immediately. The order of the commissioner shall consti-
tute summary action against the licensee and become public upon issu-
ance. The summary suspension shall remain in effect until the final
conclusion of a hearing which shall commence within ninety days of the
date of service of the commissioner’s order, end within [ninety] one
hundred eighty days thereafter and otherwise be held in accordance with
paragraph (a) of this subdivision, provided, however, that when the
commissioner’s order is based upon a finding substantially equivalent to
a finding that the practice of medicine by the licensee in another
jurisdiction [constitutes an imminent danger] presents a risk to the
health of its people, the hearing shall commence within thirty days
after the disciplinary proceedings in that jurisdiction are finally
concluded. If, at any time, the felony charge is dismissed, withdrawn or
reduced to a non-felony charge, the commissioner’s summary order shall
terminate.

§ 13. Paragraph (a) of subdivision 1 of section 2803-e of the public
health law, as amended by chapter 294 of the laws of 1985, is amended to
read as follows:

(a) Hospitals and other facilities approved pursuant to this article
shall make a report or cause a report to be made within thirty days of
the occurrence of any of the following: the suspension, restriction,