



NEW JERSEY LAW REVISION COMMISSION

Draft Tentative Report to Clarify the Meaning of “Physical Examination” in the Context of Public Entity Immunity Granted Under N.J.S. 59:6-4

March 11, 2019

The New Jersey Law Revision Commission is required to “[c]onduct a continuous examination of the general and permanent statutory law of this State and the judicial decisions construing it” and to propose to the Legislature revisions to the statutes to “remedy defects, reconcile conflicting provisions, clarify confusing language and eliminate redundant provisions.” *N.J.S. 1:12A-8*.

This Report is distributed to advise interested persons of the Commission's tentative recommendations and to notify them of the opportunity to submit comments. Comments should be received by the Commission no later than **May 10, 2019**.

The Commission will consider these comments before making its final recommendations to the Legislature. The Commission often substantially revises tentative recommendations as a result of the comments it receives. If you approve of the Report, please inform the Commission so that your approval can be considered along with other comments. Please send comments concerning this Report or direct any related inquiries, to:

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Executive Summary

In *Parsons v. Mullica Twp. Bd. of Educ.*, the New Jersey Supreme Court examined whether public entities and their employees are immune under the New Jersey Tort Claims Act (“TCA”) when they fail to “report the results of a preventative public health examination.”¹ While the Court ultimately held that reporting the results of an examination constitutes an “adequate physical examination” under N.J.S. 59:6-4², it only did so after extensive review of extrinsic sources and official legislative histories to determine the meaning of this term.³ After examining this opinion in conjunction with N.J.S. 59:6-4, the Commission determined this provision could benefit from additional language clarifying the meaning of the term “physical examination.”

Background

Rachel Parsons was a student at Mullica Township Elementary School from 2001 through 2004.⁴ As part of the school’s obligation to comply with state public health mandates, Parsons, along with the rest of the student body, underwent visual acuity testing.⁵ Parsons was tested during the 2001-2002 academic year and again in 2004.⁶ She failed both tests with regard to her right eye but her parents were not notified of the results until after the second test in 2004.⁷ Afterwards, she was diagnosed with amblyopia⁸ (commonly referred to as lazy eye).⁹

In 2013, Parsons and her parents (Plaintiffs) filed suit against the Mullica Hill Township Board of Education and the school nurse (Defendants) alleging they “breached their duty to timely notify Parsons’s parents of the earlier test results pursuant to N.J.A.C. 6A:16-2.2(1)(6),” the statute requiring parents be notified whenever public school vision examinations deviate from expected results.¹⁰ In response, the Board moved for summary judgment and argued that it was immune from suit pursuant to N.J.S. 59:6-4 of the TCA¹¹ which states:

Except for an examination or diagnosis for the purpose of treatment, neither a public entity nor a public employee is liable for injury caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination, of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health or safety of himself or

¹ *Parsons ex rel. Parsons v. Mullica Twp. Bd. of Educ.*, 226 N.J. 297, 299 (2016).

² *Id.* at 312.

³ *Id.* at 308-12.

⁴ *Id.* at 301.

⁵ *Parsons ex rel. Parsons v. Mullica Twp. Bd. of Educ.*, 226 N.J. 297, 301 (2016).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 301.

⁹ Cleveland Clinic, <https://my.clevelandclinic.org/health/diseases/10707-amblyopia-lazy-eye> (Last visited Dec. 11, 2018).

¹⁰ N.J.A.C. 6A:16-2.2(1)(6)

¹¹ *Parsons*, *supra* note 1, at 302.

others. For the purposes of this section, “public employee” includes a private physician while actually performing professional services for a public entity as a volunteer without compensation.¹²

In response to this motion, Plaintiffs argued that there was no immunity under N.J.S. 59:6-4 because reporting results of an examination was not within the definition of “physical examination.”¹³ According to them, “failure to disclose the results of the visual acuity test was a separate and distinct act from the physical examination”.¹⁴ The Trial Court denied Defendants’ motion for summary judgment and ruled it was not immunized under the TCA for its failure to report the results of a visual acuity test because it was “an examination or diagnosis for the purpose of treatment.”¹⁵

The Appellate Division reversed, holding that visual acuity tests were a “physical examination” under N.J.S. 59:6-4.¹⁶ It first noted that when courts analyze the liabilities of public entities, immunity is the general rule while liability is the exception.¹⁷ With this in mind, the Court suggested that “common experience” dictated that a physical examination consisted of 3 parts: (1) arranging, (2) conducting, and (3) reporting the results.¹⁸ Acknowledging the exception advanced by the Plaintiffs would, the Court found, eliminate a necessary step in conducting an examination.¹⁹

On appeal to the New Jersey Supreme Court, Plaintiffs argued the Appellate Division essentially “rewrote” N.J.S. 59:6-4 by introducing a three part definition of “physical examination” which disregarded the plain language of the statute.²⁰ In their own review of medical reference materials, Plaintiffs found that notification or reporting results of a physical examination were not considered part of said examination.²¹ Plaintiffs suggested it was clear that the statute only granted immunity from inadequate physical examinations and therefore it was improper for the Appellate Division to resort to anything beyond the plain language of the statute.²²

Defendants argued that they were immune from suit arguing that the definition of “physical examination” included visual acuity tests and the communication of their results.²³ They emphasized that by adopting Plaintiffs’ argument and thereby excluding reporting from the

¹² N.J.S. 59:6-4.

¹³ *Parsons*, *supra* note 1 at 302.

¹⁴ *Id.*

¹⁵ *Id.* at 303.

¹⁶ *Id.* (Quoting N.J.S. 59:6-4).

¹⁷ *Id.* (Quoting *Parsons*, *supra*, 440 N.J. Super. at 89).

¹⁸ *Parsons ex rel. Parsons v. Mullica Twp. Bd. of Educ.*, 226 N.J. 297, 303 (2016).

¹⁹ *Id.* at 304.

²⁰ *Id.*

²¹ *Id.* at 304-05.

²² *Id.* at 305.

²³ *Parsons ex rel. Parsons v. Mullica Twp. Bd. of Educ.*, 226 N.J. 297, 306 (2016).

definition of a “physical examination,” the Court risked articulating a definition that ran “contrary to a patient’s common expectation of discussing their results with a medical professional.”²⁴ In further support of their position, they cited N.J.S. 59:6-4’s legislative history which included a report demonstrating how reporting the results of a physical examination were included in the definition of “physical examination.”²⁵

Analysis

The issue before the Supreme Court was whether, for purposes of granting immunity to public entities, the definition of “physical examination” in N.J.S. 59:6-4 included reporting results of a visual acuity examination.²⁶ The Court first noted that this case would be “guided by the principal that ‘immunity for public entities [under the TCA] is the general rule and liability is the exception.’”²⁷ It then reviewed the legislative history of the TCA, observing that this legislation was enacted to compensate victims while preventing interference with government functions and placing an undue burden on taxpayers.²⁸ While the TCA was being drafted, the New Jersey Attorney General submitted a “Task Force Report” to the Legislature (later added to the statute as a comment to N.J.S. 59:6-4) which noted that the immunity granted in the bill pertained to inadequate public health examinations and provided a non-exhaustive list of examinations covered under this provision.²⁹ Looking to the types of public health examinations listed in the comment (examinations for tuberculosis, athletes, motor vehicle applicants), in addition to other examinations added in a later amendment (scoliosis, hearing, eye, and mental examinations), the Court found that a visual acuity test is very similar to an eye examination.³⁰

After determining that a visual acuity examination could be considered a “physical examination”, the Court then considered whether an “adequate physical examination” includes reporting the results to patients or their guardians.³¹ The Court noted the TCA did not define “physical examination” or its constituent parts, so resorting to secondary sources was necessary.³² It first considered the American Medical Association’s definition of “physical examination” and found that this definition took into account the taking of a patient’s medical history, something that means communicating with the patient.³³ The Court also consulted materials from the Mayo Clinic for how it defines a complete eye examination.³⁴ Relevant to the Court’s inquiry, the Mayo Clinic’s definition appeared to contemplate communication of results when it stated a complete eye examination entails “discuss[ing] the results of all testing,

²⁴ *Id.*

²⁵ *Id.* at 306.

²⁶ *Id.* at 304-09.

²⁷ *Id.* at 308 (Quoting *Kemp v. State*, 147 N.J. 294, 299 (2013)).

²⁸ *Parsons ex rel. Parsons v. Mullica Twp. Bd. of Educ.*, 226 N.J. 297, 308 (2016).

²⁹ *Id.* at 310.

³⁰ *Id.*

³¹ *Id.* at 311.

³² *Id.*

³³ *Parsons ex rel. Parsons v. Mullica Twp. Bd. of Educ.*, 226 N.J. 297, 311 (2016).

³⁴ *Id.*

including an assessment of your vision, your risk of eye disease and preventative measures you can take....”³⁵

Ultimately, the Court held that an “‘adequate physical examination’ under N.J.S.A. 59:6-4 includes reporting the results of an examination.”³⁶ As a result, Defendants were deemed immune from liability for their failure to report the results to Plaintiffs.³⁷ The Court suggested that this conclusion was buttressed by public policy and logic.³⁸ Public policy considerations warranted granting immunity given that a failure to do so would likely lead to a decrease in the number of public entities that conduct public health examinations and thwart efforts to promote public health and wellness.³⁹ It also seemed illogical to the Court to grant immunity for performing examinations while declining to extend it for reporting the results.⁴⁰

Legislative History

N.J.S. 59:6-4 is a part of the New Jersey Tort Claims Act and was introduced by the State Senate as S-969 in May 1972.⁴¹ In passing this bill, the legislature modified the traditional doctrine of sovereign immunity⁴² by imposing liability on public entities whose employees cause injuries in carrying out their duties while preserving it for:

- High-level discretionary activities
- The issuance, denial, suspension or revocation of permits, licenses, etc.
- The failure to inspect or negligent inspection of property
- Actual fraud, malice or willful misconduct of public employees
- Injuries occurring on unimproved property.⁴³

The New Jersey Attorney General’s Task Force Report

Prior to enactment of the TCA, the New Jersey Attorney General assembled a task force exploring the impact of abolishing traditional sovereign immunity and replacing it with a Tort Claims Act.⁴⁴ The report produced by the Task Force discussed immunities granted to those performing public health examinations.⁴⁵ In what would later become a comment to N.J.S. 59:6-4, the report explained that the immunity described in this provision “pertains to the failure to perform adequate public health examinations such as public tuberculosis examinations, physical

³⁵ *Id.* at 312 (Quoting Mayo Clinic, *Eye Exam*, Mayo Clinic (Dec. 13, 2018, 10:07 AM) <https://www.mayoclinic.org/tests-procedures/eye-exam/about/pac-20384655>).

³⁶ *Id.* at 312.

³⁷ *Id.*

³⁸ *Parsons ex rel. Parsons v. Mullica Twp. Bd. of Educ.*, 226 N.J. 297, 312 (2016).

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ S969, 195th Leg., Reg. Sess. (N.J. 1972)

⁴² N.J.S. 59:1-2.

⁴³ Statement of Governor Cahill on the Signing of S-969 (June 1, 1972).

⁴⁴ Report of the Attorney General’s Task Force on Sovereign Immunity, 4-5 (May 1972).

⁴⁵ *Parsons supra* note 1 at 309-10.

examinations to determine the qualifications of boxers and other athletes, and eye examinations for vehicle operator applicants.”⁴⁶

Statement of the Senate Labor, Industrial, and Professions Committee

In addition to the kinds of examinations mentioned in the Task Force Report, later statements by the Senate Labor, Industrial, and Professions Committee amended the Comment to include “tuberculosis, scoliosis, hearing, eye, mental, and other examinations for public health purposes.”⁴⁷ Later, the New Jersey Supreme Court noted that the listed examinations were by no means exhaustive.⁴⁸ Rather, they served as “general descriptions” allowing the provision to “be construed to embrace only other illustrations that are similar in nature to those enumerated.”⁴⁹

Statutory Text

The *Parsons* case involved defining the term “physical examination” as it is used in N.J.S. 59:6-4. That statute states:

Except for an examination or diagnosis for the purpose of treatment, neither a public entity nor a public employee is liable for injury caused by the failure to make a *physical* [] *examination*, or to make an adequate *physical* [] *examination*, of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health or safety of himself or others. For the purposes of this section, “public employee” includes a private physician while actually performing professional services for a public entity as a volunteer without compensation.

Provisions in Other States

During preliminary research on sovereign immunity laws in other states, it was discovered that California and Illinois were the only two with provisions nearly identical to N.J.S. 59:6-4. This research was conducted in an effort to determine whether other states had been presented with the issue of defining “physical examination” and, if so, how this issue was resolved statutorily.

The language of the Illinois and New Jersey provision borrow heavily from the earlier enacted California statute, and California likely served as a template for both states.⁵⁰

⁴⁶ *Id.* at 310.

⁴⁷ *S. Labor, Indus. & Professions Comm. Statement to S. No. 524* (1982).

⁴⁸ *Kemp by Wright v. State*, 147 N.J. 294, 303 (1997).

⁴⁹ *Id.*

⁵⁰ West’s Ann. Cal. Gov. Code § 855.6; 745 ILCS 10/6-105. California passed § 855.6 in 1963 while Illinois passed § 6-105 in 1965.

Neither California nor Illinois have a statutory definition of “physical examination” but the California Law Revision Commission’s comments on the matter are instructive. Section 855.6 of the California Government Code states:

Except for an examination or diagnosis for the purpose of treatment, neither a public entity nor a public employee acting within the scope of his employment is liable for injury caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination, of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health or safety of himself or others.⁵¹

Relevant to defining the term “physical examination,” the California Law Revision Commission discussed the types of public health examinations covered by the statute.⁵² Specifically, “public tuberculosis examinations, physical examinations to determine the qualifications of boxers and other athletes, and eye examinations for vehicle operator applicants []” were examples of a physical examination.⁵³

In contrast to California, the Illinois statute provides immunity for *all* types of examinations, not just those conducted in pursuit of public health initiatives.⁵⁴ This is reflected in § 6-105 of Illinois Compiled Statutes:

Neither a local public entity nor a public employee acting within the scope of his employment is liable for injury caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health or safety of himself or others.⁵⁵

Defining “Physical Examination”

Medical Definitions

In *Parsons*, the Court looked to extrinsic aids to ascertain the definition of a physical examination. First, it consulted a medical encyclopedia written by the American Medical Association which defined “physical examination” as:

[a] thorough study of a person's state of health. The physical examination typically follows history-taking, in which a doctor listens to a person's concerns

⁵¹ West’s Ann. Cal. Gov. Code § 855.6.

⁵² 4 Cal.L.Rev.Comm. Reports 801 (1963)

⁵³ *Id.*

⁵⁴ *Michigan Ave. Nat’l Bank v. County of Cook*, 191 Ill. 2d 493, 508 (2000).

⁵⁵ 745 ILCS 10/6-105.

and asks questions. Examination usually includes inspection, palpation (direct feeling with the hand), percussion (striking parts of the body with short, sharp taps and feeling and listening to subsequent vibrations), and auscultation (listening with a stethoscope). If a person reports symptoms, the doctor will attempt to determine their cause. Tests may also be ordered to aid in diagnosis. One main objective of regular physical examinations, conducted at frequent intervals even when a person is feeling well, is the early detection of disease.⁵⁶

Next, the Court reviewed a medical definition of “eye examination.” According to a description obtained from the Mayo Clinic, a complete eye examination is:

...a series of tests designed to evaluate your vision and check for eye diseases. Your eye doctor may use a variety of instruments, shine bright lights directly at your eyes and request that you look through an array of lenses. Each test during an eye exam evaluates a different aspect of your vision or eye health.⁵⁷

As it read this description further, the Court noted that communicating the results of an eye examination to a patient was mentioned:

[a]t the end of your eye exam, you and your doctor will discuss the results of all testing, including an assessment of your vision, your risk of eye disease and preventive measures you can take to protect your eyesight.⁵⁸

“Physical Examination” in Workers’ Compensation Law

Given the limited legislative history and case law defining this term, examining how it has been construed in the workers’ compensation context may assist in the formulation of a definition for N.J.S. 59:6-4. Initially, New Jersey’s case law was examined but preliminary research did not uncover any cases specifically addressing the definition of “physical examination.” After the inquiry was expanded to other states, Pennsylvania case law in the area of workers’ compensation was found to have provided analysis that might inform the Commission’s work.

The Pennsylvania Supreme Court has interpreted the meaning of “physical examination” as it was used in the state’s workers’ compensation act. In *Coleman v. W.C.A.B.*, the issue before the Court was “whether a ‘physical examination’ pursuant to [the Pennsylvania Workers’ Compensation Act] includes diagnostic testing.”⁵⁹ A claimant injured her shoulder while lifting heavy items at work.⁶⁰ Despite undergoing surgery and receiving therapy, she continued to

⁵⁶ *Am. Med. Ass’n Complete Med. Encyc.* 531 (20th ed.2003).

⁵⁷ Mayo Clinic, Eye Exam, Mayo Clinic (Dec. 13, 2018, 10:07 AM) <https://www.mayoclinic.org/tests-procedures/eye-exam/about/pac-20384655>.

⁵⁸ *Id.*

⁵⁹ *Coleman v. W.C.A.B.*, 577 Pa. 38, 40 (2004).

⁶⁰ *Id.* at 41.

report to her doctors that she was in pain.⁶¹ After submitting a claim for workers' compensation benefits, she underwent an independent medical evaluation (IME) where the treating physician determined claimant was fabricating her symptoms.⁶² To complete the evaluation, the doctor requested claimant undergo a bone scan and an MRI.⁶³

Claimant refused to undergo the diagnostic tests and when her employer submitted a petition to the Workers' Compensation Judge, she argued the tests were outside the scope of a "physical examination."⁶⁴ In support of her argument, she submitted a letter from a doctor who explained that diagnostic and imaging studies like x-rays, ultrasounds, CT scans and MRIs were outside the scope of a physical examination.⁶⁵ Instead, the term referred only to "trained use of the senses to personally look, listen, touch, etc."⁶⁶ This definition was ultimately rejected by the Workers' Compensation Judge and the claimant was compelled to undergo the requested scans.⁶⁷

In the Supreme Court's review of the applicable statute, it first noted that in the workers' compensation context, it has historically not embraced using medical definitions for undefined terms.⁶⁸ By way of example, the Court stated that the term "disability" is not defined under the Pennsylvania Workers' Compensation Act but is not defined according to its medical definition and is instead defined as a loss of earning power rather than having a physical disability.⁶⁹ In employing a similar technique, the Court held that the term "physical examination" cannot be restricted just to its medical definition either.⁷⁰ Adopting the medical definition for "physical examination" would exclude the use of modern diagnostic tools and run contrary to the statute's overarching purpose of ascertaining the true extent of a claimant's injury.⁷¹ To ensure this purpose would be realized, the Court ultimately defined "physical examination" as "all reasonable medical procedures and tests necessary to permit a provider to determine the extent of a claimant's disability."⁷²

Proposed Revisions

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Coleman v. W.C.A.B.*, 577 Pa. 38, 41 (2004).

⁶⁵ *Id.* at 42

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.* at 45.

⁶⁹ *Coleman*, 577 Pa. 38, 45 (2004).

⁷⁰ *Id.*

⁷¹ *Id.* at 45-46.

⁷² *Id.* at 46; By defining "physical examination" this way, the Court adopted a similar definition used by the Delaware Supreme Court in *Slingwine v. Industrial Accident Bd.*, 560 A.2d 998, 1000 (Del. 1989) (Defining "examination" to mean "all proper medical techniques and tests reasonably necessary to facilitate an educated diagnosis of an injury, but which are not unreasonably invasive.")

The term “physical examination” is rarely defined by statute or interpreted by the courts. A number of provisions use the term but do not feature a definition⁷³ and in the one instance where a definition was found, it was largely unhelpful.⁷⁴ The options described here and in the appendix reflect the suitable definitions articulated in medical encyclopedias and case law:

Option 1: The Medical Definition

Define “physical examination” according to the medical definitions discussed in *Parsons* and clarify that reporting results of an examination is included in that term. Insert the definition after the current text of the statute and paraphrase the extrinsic medical sources used by the Court.⁷⁵ It is noted that the statute could also be reorganized to create a separate definitions section while introducing gender-neutral language into the text.

Option 2: The Workers’ Compensation Definition

Define “physical examination” according to the definitions articulated in *Coleman* and *Slingwine* and tailor it to public health examinations. Consistent with *Parsons*, clarify that reporting the results of a physical examination are included in the term. Similar to Option 1, the statute could be reorganized to create a definitions section while introducing gender-neutral language.

Option 3: Hybrid

Define “physical examination” by combining the definitions used in *Parsons*, *Coleman*, and *Slingwine*, also reorganize the statute to create a separate definitions section, and introduce gender-neutral language.

Conclusion

In its current form, N.J.S. 59:6-4 does not define the meaning of “physical examination.” In order to clarify the exact contours of municipal tort liability and place both public entities and members of the general public on proper notice, this provision would greatly benefit from the addition of a statutory definition.

The options listed on the following page propose defining the term “physical examination” to reflect the principles set out in *Parsons v. Mullica Twp. Bd. of Educ.*

⁷³ See F.R.C.P 35; NY Work Comp L § 19; IL R.S. Ct. Rule 215; Pa. R.C.P No. 4010; M.R.Civ.P.; Rule 35; I.C.A. Rule 1.515; K.S.A. 60-235; ME R.C.P. 35; A.R.C.P 35; Ky. St. R.C.P. 35.01; M.R.C.P. 35; C.R.C.P. 35.

⁷⁴ 440 IAC 10-1-41 (“Physical examination’ means a full medical examination, including laboratory analyses”).

⁷⁵ For convenience, the definition used by the New Jersey Supreme Court is reproduced below:

[Physical examination is a] thorough study of a person's state of health. The physical examination typically follows history-taking, in which a doctor listens to a person's concerns and asks questions. Examination usually includes inspection, palpation, percussion, and auscultation. If a person reports symptoms, the doctor will attempt to determine their cause. Tests may also be ordered to aid in diagnosis. One main objective of regular physical examinations, conducted at frequent intervals even when a person is feeling well, is the early detection of disease (Am. Med. Ass'n Complete Med. Encyc. 531 (20th ed.2003)).

Appendix

Option 1:

N.J.S. 59:6-4. Failure to make physical or mental examination or to make adequate physical or mental examination

(a) Except for an examination or diagnosis for the purpose of treatment, neither a public entity nor a public employee is liable for injury caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination, of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health or safety of ~~himself~~ him or herself or others.

(b) For the purposes of this section:

i. “Public employee” includes a private physician while actually performing professional services for a public entity as a volunteer without compensation;

ii. “Physical examination” is a thorough study of person’s state of health conducted pursuant to public health objectives. It includes the taking of medical history, a thorough inspection of all or part of the patient’s body, determining the cause of reported symptoms, administering required tests, and prompt notification of test results to the patient and/or patient’s legal guardians.

Comment: This option is based on the medical definition used in *Parsons (Am. Med. Ass'n Complete Med. Encyc. 531 (20th ed.2003))*

Option 2:

N.J.S. 59:6-4. Failure to make physical or mental examination or to make adequate physical or mental examination

(a) Except for an examination or diagnosis for the purpose of treatment, neither a public entity nor a public employee is liable for injury caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination, of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health or safety of ~~himself~~ him or herself or others.

(b) For the purposes of this section,

i. “Public employee” includes a private physician while actually performing professional services for a public entity as a volunteer without compensation;

ii. “Physical examination” includes all reasonable medical procedures and tests allowing a public entity and its employees the opportunity to conduct a proper public health examination and promptly reporting those results to the patient and/or the patient’s legal guardians.

Comment: This option is based on the definitions developed by the Pennsylvania and Delaware Supreme Courts in *Coleman v. W.C.A.B.*, 577 Pa. 38, 46 (2004) and *Slingwine v. Industrial Accident Bd.*, 560 A.2d 998, 1000 (Del. 1989)

Option 3:

N.J.S. 59:6-4. Failure to make physical or mental examination or to make adequate physical or mental examination

(a) Except for an examination or diagnosis for the purpose of treatment, neither a public entity nor a public employee is liable for injury caused by the failure to make a physical or mental examination, or to make an adequate physical or mental examination, of any person for the purpose of determining whether such person has a disease or physical or mental condition that would constitute a hazard to the health or safety of ~~himself~~ him or herself or others.

(b) For the purposes of this section:

i. “Public employee” includes a private physician while actually performing professional services for a public entity as a volunteer without compensation;

ii. “Physical examination” refers to all reasonable medical procedures and tests allowing a public entity and its employees the opportunity to conduct a proper public health examination. This can include the taking of medical history, a thorough inspection of all or part of the patient’s body, determining the cause of reported symptoms, administering any diagnostic tests, and prompt reporting of test results to the patient and/or patient’s legal guardians.

Comments: This is a “hybrid” option incorporating the definitions from Options 1 and 2