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September 27, 2023

## Testimony on the Status of Mandated Reporters of Child Abuse or Maltreatment in New York State

*Submitted by Dorea "Kyra" Batté, Legal Momentum, The Women's Legal Defense and Education Fund*

Good afternoon and thank you for convening this critical panel that examines the Status of Mandated Reporters of Child Abuse or Maltreatment in New York State. My name is Dorea "Kyra" Batté and I am an attorney at Legal Momentum, The Women's Legal Defense and Education Fund.

As the nation's first and longest-serving legal advocacy organization for women, one of Legal Momentum's focus areas is to protect women and their families from being penalized for their pregnancies and pregnancy outcomes by combating discrimination in the systems that serve them. Through our Helpline, our litigation, and our advocacy, we have seen firsthand how the lack of training and/or biases and discriminatory practices of mandated reporters in health care settings negatively impact low-income families and families of color. These practices often stem from misguided policies of state and local child protective service agencies and the excessive discretion afforded to these agencies in crafting these policies.

### Child Abuse or Maltreatment Reporting in Health Care Settings

Based on studies and our direct client work, we have seen that across New York, women, particularly Black, Latinx, Indigenous, and low-income pregnant people and newborns are drug tested in health care settings without their knowledge or consent. People who test positive, even for legal substances, are subsequently reported to child protective services and subjected to surveillance and the risk of family separation. This is a widespread practice across the state where health care providers are in possession of toxicology results that they believe they are required to report.

Health care staff, such as physicians and nurses, are mandated reporters and are required to report suspected child abuse or maltreatment if they find reasonable cause.<sup>1</sup> Necessarily that would require information about a living child and a specific reasonable suspicion of child abuse or maltreatment. By law a positive toxicology result of a parent and/or a newborn is not in itself a basis for reporting child abuse or maltreatment.<sup>2</sup> In reality, in addition to the fact that many of these toxicology reports are done without knowledge or consent of the pregnant patient, the subsequent reports to the state central

<sup>1</sup> N.Y. Soc. Serv. Law § 413.

<sup>2</sup> David A. Hansell, Commissioner & Dr. Dave A. Chokshi, Commissioner, *Reporting and Planning Requirements for Newborns Prenatally Exposed to Substances and Their Caregivers*, City of N.Y. (Nov. 12, 2020), [https://www1.nyc.gov/assets/acs/pdf/child\\_welfare/2020/PositiveToxicology.pdf](https://www1.nyc.gov/assets/acs/pdf/child_welfare/2020/PositiveToxicology.pdf).

registry involve prenatal conduct—that is conduct before any actual child within the legal purview of child protective services even yet exists. In our clients’ experiences, these nonconsensual drug tests are not serving any medical purpose as they receive no provider-patient counseling or related care. It is the policies and practices of the Office of Children and Family Services (“OCFS”) and local child protective service agencies that encourage health care providers to engage in this pernicious practice of drug testing pregnant patients, making health care providers de facto arms of the family regulation system.

## Gender and Racial Disparities

Black and Brown families are disproportionately surveilled by the family regulation system, with disproportionate rates of being reported, investigated, and separated.<sup>3</sup> Numerous studies and investigative reports have found that Black parents and their newborns are more likely to be drug tested than their white counterparts, despite similar usage rates,<sup>4</sup> and we have found that these practices are often more prevalent in hospitals serving lower-income Black and Brown communities. Because drug screening criteria are not standardized across hospitals, these mandated reporters often have discretion in determining whether or not to screen a pregnant parent, leaving a great deal of room for bias and discriminatory practices, and has disproportionately targeted women of color. Some health care providers have a categorical policy to drug test only pregnant persons, making a treatment distinction based on sex and pregnancy, discriminating particularly women.<sup>5</sup> These policies penalize birthing parents, but not similarly situated non-birthing parents to unwarranted child abuse or maltreatment investigations.

In some cases, health care providers are reporting suspected child abuse or maltreatment based on a false-positive and/or single preliminary toxicology result which typically warn providers of the need for separately ordered confirmatory testing. Notwithstanding the fact that substance exposure does not in itself demonstrate reasonable cause to suspect child abuse or maltreatment,<sup>6</sup> in many instances mandated health care reporters are not even ordering and waiting for the confirmatory toxicology results and the state central registry is accepting such reports. Once a report of suspected child abuse or maltreatment is made, Black and Brown children are more likely to be subjected to a child protective investigation. For example, Black and Brown children comprise only 61.3% of the total New York City population, but they constitute 87.8% of the children in investigations.<sup>7</sup> Both OCFS<sup>8</sup> and the Administration for Children’s Services (“ACS”)<sup>9</sup> have acknowledged that racial disparities exist in their investigations and practices. More specifically, Black families are disproportionately likely to be subject to an ACS investigation based on perinatal drug testing, leading to disproportionate surveillance of these families.<sup>10</sup> Despite certain changes in policy, child protective service agencies in New York continue to investigate Black and Brown families under the auspices of a so-called non-investigative track program that

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<sup>3</sup> Andy Newman, *Is N.Y.’s Child Welfare System Racist? Some of Its Own Workers Say Yes.*, N.Y. Times (Nov. 23, 2022), <https://www.nytimes.com/2022/11/22/nyregion/nyc-acr-racism-abuse-neglect.html>.

<sup>4</sup> Movement for Family Power, *Drug War Foster System Report* 19 (2020), <https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eed939ca509d4e36a89277/1592449422870/MFP+Drug+War+Foster+System+Report.pdf>.

<sup>5</sup> We acknowledge the pregnancy capacity of other gender identities.

<sup>6</sup> *Supra* note 2.

<sup>7</sup> N.Y. State Bar Ass’n, *Report and Recommendations of the Committee on Families and the Law Racial Justice and Child Welfare* 15 (2022), <https://nysba.org/app/uploads/2022/03/Committee-on-Families-and-the-Law-April-2022-approved.pdf>.

<sup>8</sup> *Id.* at 13.

<sup>9</sup> *Racial Equity & Cultural Competence Committee*, NYC Admin. for Child.’s Servs., <https://www1.nyc.gov/site/acs/about/racial-equity-cultural-competence.page> (last visited Feb. 9, 2023).

<sup>10</sup> *Supra* note 7.

proclaims to provide voluntary support services but instead imposes de facto investigations and the same surveillance as traditional investigations.

### **The Collaborative Assessment, Response, Engagement & Support (“CARES”) Approach**

In New York City, it is the Collaborative Assessment, Response, Engagement & Support (“CARES”) Approach, which purports to be an “alternative, non-investigatory child protection response” to child maltreatment reports.<sup>11</sup> Further, CARES alleges to be a “racial equity strategy” because participating parents will not have a record of the case that can be found by their employer.<sup>12</sup> However, in reality, it has all the same components of a formal investigation; is not truly voluntary as it is typically presented as a choice between participation in the program or formal investigation; and creates records which are maintained and permissibly used in any future ACS involvement for ten years. In some respects it can be more harmful in that a family subjected to an investigation which is eventually unsubstantiated has an avenue to expunge that record whereas participation in the CARES program reaches no determination and excises this option for families.

### **Recommendations**

Prenatal conduct should not constitute child abuse or maltreatment since there is no child to abuse or maltreat. Reporting pregnant patients denies women autonomy to consent to medical care, validates the surveillance and policing of pregnant people and the decisions they make during pregnancy, and is a tacit—if not explicit—acceptance of the notion of fetal personhood.

The practice of health care providers reporting toxicology results to child protective service agencies has eroded trust between families and health care providers, discouraged people from seeking prenatal care and treatment, and instilled fear among many patients.<sup>13</sup> A report to child protective services results in traumatic investigations and unnecessary family intervention in the critical days following birth, not in support to children and their families. We must do a better job of training mandated reporters on when to report—and when it’s better to provide help to a family in need instead. Moving forward, we need clear policies preventing health care providers from becoming arms of police and child welfare agencies. Child protective services agencies should proactively issue guidance making clear that a positive drug test (regardless of the drug) alone is not grounds for health care providers to report child abuse or maltreatment. Thank you.

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<sup>11</sup> *The Collaborative Assessment, Response, Engagement & Support (CARES) Approach*, NYC Admin. for Child.’s Servs., <https://www1.nyc.gov/site/acs/child-welfare/cares.page> (last visited Feb. 9, 2023).

<sup>12</sup> *Id.*

<sup>13</sup> Press Release, NYC Commission on Human Rights, New York City Commission on Human Rights Launches Investigations Into Three Major Private Hospital Systems’ Practices of Drug Testing Newborns and Parents (Nov. 16, 2020), [https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/Hospitals\\_Press\\_Release\\_11-16-2020.pdf](https://www1.nyc.gov/assets/cchr/downloads/pdf/press-releases/Hospitals_Press_Release_11-16-2020.pdf).