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Testimony Addressing Disparities in Women's Health

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

Good morning and thank you for convening this critical panel addressing disparities in women's health. 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 national Helpline, our impact litigation, and our policy advocacy, we have seen firsthand how nonconsensual drug testing in health care settings negatively impact pregnant patients and their families, particularly low-income families and families of color.

Sex and Race Disparities

In performing nonconsensual drug tests on pregnant patients, a practice which is rightfully not used on all patients, health care providers make a treatment distinction based on sex and pregnancy, a clear violation of New York's nondiscrimination laws.[1] The consequences of this overtly discriminatory practice has a disproportionate impact on women.[2] Those patients who have a positive toxicology result after nonconsensual drug testing, are most often not provided any medical counseling or treatment. Rather, they are exclusively reported to child protective services. Drug testing pregnant patients not for any medical necessity but for solely punitive purposes amounts to an unlawful search and seizure,[3] and undermines the health and wellbeing of the mother and the child.

Numerous studies and investigative reports have found that Black parents are more likely to be screened, tested, and reported for illicit drugs than their white counterparts, even though race is not associated with a positive result, and despite similar usage rates across racial groups,[4] 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, health care providers often have discretion

[1] 47 R.C.N.Y. § 2-09.
[2] We acknowledge people of all genders have the capacity to become pregnant but that women are disproportionately impacted and that these policies impact people of all genders.
[3] *Ferguson v. Charleston*, 532 U.S. 67, 86 (2001).
[4] Hillary Veda Kunnis et al., *The Effect of Race on Provider Decisions to Test for Illicit Drug Use in the Peripartum Setting*, 16 J. Women's Health 245, 245–255 (2007), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2859171/.

in determining whether or not to screen a pregnant patient, making way for implicit bias and discriminatory practices. From our experience, these discretionary practices have, in fact, disproportionately targeted women of color.

Newly parenting people are met by a child protective services caseworker at their bedside, where they are interrogated, sometimes mere hours after giving birth setting off a cascade of unwarranted intrusion into the families' privacy. The practice of routinely testing pregnant patients and their newborns without informed consent and then reporting them to child protective services has expanded the surveillance responsibilities of health care providers and has made health care providers de facto arms of the family regulation system. 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 services investigation, with nonconsensual perinatal drug testing among the primary examples of disproportionate child welfare surveillance.[5] Based solely on reports of positive perinatal drug tests, child protective services agencies throughout New York launch intrusive, multi-month investigations—some of which are purported to be New York's non-investigative Family Assessment Response (FAR) yet include all the surveillance and intrusion of a traditional investigation. Regardless of whether the response is a formal or informal investigation, even where there is no finding of child abuse or maltreatment, records of the report and associated investigations are maintained and available for future use by child protective services agencies for at least ten years thereafter.

Exacerbation of Health Disparities and Barriers to Health Care Access

This practice of "testing and reporting" has eroded trust between women and their healthcare providers, discouraged women from seeking prenatal and other care and treatment, and instilled fear among many patients and families.[6] In the nation with the highest maternal mortality rate in the industrialized world, with Black women three times more likely to die from pregnancy than white women,[7] it is critical to eradicate the pernicious practices that give pregnant patients more reason to distrust health care providers and avoid seeking critical care. As one Legal Momentum client described, she "could not trust anybody," and felt like the health care providers assisting her while she was in labor were "trying to get [her]," and "wanted to see [her] baby get taken away." Health care providers reported our client for suspected child abuse or maltreatment based on a single unconfirmed toxicology result, taken without her knowledge or consent, and indicating a legal substance. Even though her medical providers had previously drug tested her months prior in her pregnancy without her knowledge and consent, they failed to inform her about her positive results or to provide any medical guidance or treatment during the course of her pregnancy. Instead her initial test was used as a basis to conduct yet another nonconsensual test during labor, with the sole purpose of reporting her to child protective services. After a multi-month investigation despite no evidence of any child abuse or maltreatment, her son's medical records still list her as a drug abuser, and she has been left with a generalized fear and anxiety to seek medical treatment for herself and her young children.

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[5] 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.
[6] National Advocates for Pregnant Women, *Fact Sheet: Clinical Drug Testing of Pregnant Women and Newborns* (March 2019), https://www.nationaladvocatesforpregnantwomen.org/wp-content/uploads/2019/10/NAPW202522Clinical20Drug20Testing20of20Pregnant20Women20and20Newborns252220March202019.pdf.
[7] Latoya Hill, Samantha Artiga & Usha Ranji, Kaiser Family Foundation, *Racial Disparities in Maternal and Infant Health: Current Status and Efforts to Address Them* (2022), https://www.kff.org/racial-equity-and-health-policy/issue-brief/racial-disparities-in-maternal-and-infant-health-current-status-and-efforts-to-address-them/.

Notably, New York law makes clear that a positive toxicology test alone does not in and of itself constitute child abuse or maltreatment.[8] Adding insult to injury, in many instances, including in our client's case, health care providers do not even order and wait for confirmatory toxicology results before reporting patients to child protective services—and the state central registry is accepting these reports. This has led to child welfare surveillance of families coming from drug test results based on consumption of poppy seeds, women seeking drug treatment, and women who were prescribed lifesaving medication for pregnancy-induced symptoms. Among the lasting harms to patients affected by these nonconsensual drug tests, the pregnant patient's and newborn's medical records include notations indicating maternal drug use. These notations are seen by subsequent health care providers and lead to bias in the provision of medical care in perpetuity.

Violation of Bodily Autonomy and Privacy

Subjecting pregnant individuals to drug testing without their informed consent is a clear violation of their bodily autonomy and privacy. Because pregnant patients are carrying a fetus, medical providers uniquely disregard their opinions, choices, and right to information regarding medical care, tests, and procedures to be conducted on their bodies in a way that deviates significantly from their treatment of non-pregnant patients. In doing so, health care providers are depriving women of the right to make their own informed decisions about their health care in a context where the testing is not even used to provide medical care to either the mother, the fetus, or to newborns. Moreover, these reports to child protective services of prenatal drug tests, if even reliable, relate to substance consumption before any child within the legal purview of child protective services in New York actually yet exists and absent any actual indication of abuse or maltreatment to a child. Prioritizing the rights of the fetus over the privacy and bodily autonomy of the mother creates a slippery slope and opens the door to surveil, critique, and penalize women for a range of choices made during the course of pregnancy, including eating foods suspected of causing developmental problems, lifting heavy boxes for work, or working in an environment with toxins. Drug testing pregnant patients without their knowledge or consent deprives them of the right to have information about the purpose, risks, and consequences of the testing and to make an informed decision to testing performed on their bodies and bodily fluids. The condition of being pregnant does not negate your rights as a medical patient to choose and be informed about what can be done to and taken from your body.

Recommendations

It is crucial that patients be fully informed of the consequences of perinatal and newborn drug testing as well as the medical reasons for testing, and that they be provided the opportunity to consent to the drug test without fear they will not receive appropriate medical care as a result. We recommend health care providers to establish a clear written policy that directs relevant staff to refrain from drug testing pregnant patients absent informed consent and absent medical necessity. In providing informed consent, staff must advise patients of all known consequences that may stem from drug testing. In addition, we advise health care providers to maintain the confidentiality of any drug testing and to refrain from reporting pregnant patients to child protective services based on a positive toxicology test alone and absent independent indicia of child abuse or maltreatment. Mandatory training should also be provided to all relevant health care providers on these policies with additional training on racial sensitivity in the context of obstetric care. Changing the practice of routinely drug testing pregnant patients without their

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[8] 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.

informed consent and then reporting them to child protective services is an integral part of improving health outcomes for pregnant patients and their newborns, repairing the provider-patient relationship, and establishing more equitable health care. Thank you.