

# FREQUENTLY ASKED QUESTIONS

## **What will this bill do?**

This bill will prohibit medical care providers who provide healthcare to pregnant people, new mothers and newborns from conducting drug and alcohol testing that is outside the scope of medical care and require all medical professionals who provide healthcare to pregnant people and new mothers to obtain specific and informed consent from their patients before administering a drug or alcohol test to the mother or baby. The bill permits drug and alcohol testing within the scope of medical care without informed consent when a physician determines an emergency exists and the delay posed by obtaining informed consent would increase risk to the patient's life or health. In this instance, the patient must be provided relevant information about the drug test results and how they may be used.

## **What is informed consent?**

Informed consent is an essential component of healthcare practice that fosters a mutual relationship of trust and respect between a patient and medical care provider. It upholds the patient's right to receive information about recommended diagnostic tests, treatments and procedures so that they can make medical decisions about themselves and their family.

## **Why is this necessary?**

Research and the experience of thousands of New Yorkers shows that medical care providers disproportionately drug test poor and Black and Brown pregnant and post partum patients and their newborns without their knowledge or consent. Sometimes these drug and alcohol tests are conducted without medical reason. Since positive toxicologies are often reported to child welfare agencies with sometimes devastating consequences for the child and family, including family separation, it is important that the patient be fully informed of the consequences and the benefits of prenatal/post partum drug and alcohol testing and provided the opportunity to consent to the drug test. Obtaining specific and informed consent prior to administering a biological drug test is recommended by several leading medical associations, including the American College of Obstetricians and Gynecologist, because it is critical to establishing the relationship of trust between the patient and medical care provider that has been compromised by federal and state mandates that encourage reporting of substance using pregnant and post partum people to child protective services.

## **What is the enforcement mechanism?**

This bill clarifies that conducting drug and alcohol testing outside the scope of medical care and/or without informed consent is professional misconduct.

## What's the current practice?

Unfortunately, in New York State, only one hospital network has a unifying pregnancy, drug testing and informed consent policy, and it is not consistently implemented. The policy dictates that all pregnant and/or postpartum women who receive health services at any HHC facilities must provide expressed consent to the medical provider prior to the performance of a toxicology test. Legal offices that represent parents separated from their newborns on account of positive toxicologies overwhelmingly state that this policy is not implemented. Moreover, this policy does not prohibit drug testing outside the scope of medical care, nor does it extend to drug testing of newborns. In hospitals that lack a standard practice and oversight and accountability mechanisms, drug and alcohol testing has become an arbitrary and discretionary practice that has negatively impacted countless poor and Black and Brown pregnant people, new mothers and their babies, creating a relationship of distrust between the medical care provider and patient and dissuading pregnant people and new mothers from seeking healthcare.

## What's the precedent?

The United States Supreme Court has ruled that hospital workers cannot drug test pregnant women for use of illegal drugs without their informed consent or a valid warrant if the purpose is to alert the police to a potential crime. In New York State, the legal doctrine of informed consent is well established in the Public Health and Civil Rights sections of the statutory code and governs all diagnostic testing and medical procedures conducted on adults and minor children. It is also reinforced through the NY State Patient's Bill of Rights.

## Will this harm newborns?

No. Obtaining informed consent prior to administering a drug or alcohol test does not prevent the provider from testing if the patient agrees nor does it prevent the provider from providing prenatal care if the patient declines. Additionally, if the provider determines an emergency exists and testing without consent is necessary, medical professionals may do so. This bill strengthens the medical care provider/patient relationship by seeding the relationship of trust that is fundamental to care.

Kunins, Hillary Veda et al. "The effect of race on provider decisions to test for illicit drug use in the peripartum setting." *Journal of women's health* (2002) vol. 16,2 (2007): 245-55. doi:10.1089/jwh.2006.0070

Gottlieb, S. "Pregnant women cannot be tested for drugs without consent." *BMJ (Clinical research ed.)* vol. 322,7289 (2001): 753.

Section 2781 of the Public Health Law sets out the requirements for obtaining informed consent to perform an HIV test. Section 2504 of the Public Health Law enables parents to consent on behalf of their children. N.Y. Pub. Health Law § 2504(2) (McKinney 2019). A parent's consent is required for any provision of medical services; the only exception is where an emergency exists such that the child is in "immediate need" of medical attention. Id. § 2504(4). If a parent objects to the provision of medical services, a practitioner cannot perform those services. See, e.g., *Alfonso v. Fernandez*, 606 N.Y.S.2d 259, 262 (App. Div. 1993); cf. N.Y. Pub. Health Law § 2504(5) (giving close family members the authority to consent to a child's immunizations unless "he or she has reason to believe that a [parent] . . . objects to the immunization"). New York courts have recognized that "[g]reat deference must be accorded a parent's choice, on behalf of her or his child, as to the mode of medical treatment to be under taken . . . ." *In re AB*, 768 N.Y.S.2d 256, 270 (Sup. Ct. 2003).

Section 79-l of the Civil Rights Law sets out the requirements for obtaining informed consent to perform a genetic test

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