



NYCLU

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To: New York City Reproductive Health Facilities
From: Melissa Goodman & Katharine Bodde, New York Civil Liberties Union
Reproductive Rights Project
Date: February 28, 2011
Re: New York City Clinic Access Law

Introduction

In the wake of deadly violence at abortion clinics in the 1990s, Federal, state, and city laws were enacted to protect access to reproductive health care clinics. The law is an important tool in responding to clinic violence and in deterring possible offenders, while appropriately protecting the First Amendment rights of protesters to peacefully express their views.

There are three principal laws that protect clinic access in New York – the Federal Freedom of Access to Clinic Entrances Act (known as FACE), a New York State version of FACE, and a newly revised law in New York City entitled the Access to Reproductive Health Care Facilities Act (ARHCF). The laws differ in some respect with regard to the scope of their protections.

The following information summarizes these laws, with a focus on the new provisions of the ARHCF, which offers some additional protections and expands previously existing definitions of prohibited activities. Being familiar with what the law requires can better equip NYC's reproductive health clinic employees, volunteers and patients to recognize when peaceful protest crosses the line into obstructive misconduct, and to contribute to maintenance of a safe environment. For that reason, after summarizing the law, this memo will include recommendations to clinics on how they can best inform their staff, escorts, and patients to aid enforcement of these laws.

Overview of Clinic Protection Laws

First Amendment Protected Activity

The First Amendment of the Constitution gives everyone the right to demonstrate peacefully on public property outside of reproductive health facilities. Protected activities may include holding signs or images, distributing literature, praying, walking or marching, and attempting to speak with clinic staff, volunteers or patients. Although this may, at times, feel extremely unpleasant or uncomfortable to those entering or leaving the clinic, it is important to remember that the Constitution protects the rights of each of us to engage in peaceful protest to express our views. This right is one of the cornerstones of our democracy, and is a basic element of our system of free expression.

However, the circumstances may be different when protesters cross the line from peacefully communicating their views into taking action to obstruct staff or patients, blockade or interfere with the operation of the clinic, use threats or actual violence, or “follow and harass” people in ways that are threatening and turn those entering a clinic into a “captive audience.” In these circumstances such conduct may not be protected by the First Amendment and may violate City, State, or Federal laws. These circumstances raise complex First Amendment issues, requiring a careful balancing between protesters’ free speech rights and the rights of clinic staff, patients, and volunteers to enter and leave the clinic. Such balancing turns upon a careful assessment of the facts. It also requires an understanding of the various legal standards that will be applied to the particular controversies. To that end, a discussion of the legal standards is set forth below.

Prohibited Activities

Federal law prohibits individuals from intentionally using force, threats of force, or otherwise physically obstructing access to individuals seeking to obtain or provide reproductive health care services;¹ and protects reproductive health care providers’ staff members, patients, and people accompanying patients, such as clinic escorts.² Using almost identical language to the Federal law, New York State law also prohibits interference with reproductive health services.³

In addition, the new ARHCF gives further protections to those entering reproductive health clinics in New York City.⁴ The ARHCF prohibits a person from preventing or attempting to prevent access to reproductive health care services through the following actions:

- physically obstructing or blocking another person from entering the clinic, or attempting to do so;
- to knowingly obstruct or block the premises of a reproductive health care facility, so as to impede access to or from the facility;
- behaving in a way that places another person in reasonable fear of physical harm;
- damaging or attempting to damage a reproductive health care facility;
- interfering with the operation of a reproductive health care facility or attempting to do so;⁵ or
- following and harassing another person within fifteen feet of the facility’s entrance or exit including clinic parking lots (this raises complex First Amendment issues, see discussion below).

The ARHCF broadly defines “reproductive health care facility” as meaning “any building, structure or place, or any portion thereof, at which licensed, certified, or otherwise legally authorized persons provide health care services or health care counseling relating to the human reproductive system.”⁶ Thus, trained professionals who work in credentialed facilities and staff necessary to the safe functioning of a facility,

such as security guards, maintenance staff, and patient escorts, are protected by the law against prohibited activities.

The law prohibits physical assault, as well as other actions that impede the provision of health care within clinics. For example, the law defines “[o]bstruct or block” as meaning “physically striking, shoving, restraining, grabbing, or otherwise subjecting a person to unwanted physical contact. . . .”⁷ Although this type of physical contact is easily identifiable and clearly forbidden under the law, there are other types of activities that also may fall within the prohibited conduct. For example, the law prohibits knowingly interfering with, or attempting to interfere with, the operation of a reproductive health care facility. To illustrate what this means, the law delineates activities that would constitute prohibited conduct, such as interference with “(i) medical procedures being performed at such facility or (ii) the delivery of goods to such facility.”⁸ Thus, for example, blocking delivery of supplies to a clinic would violate the law. Similarly, because patients may not drink water before the procedure, a protester who offers bottled water to a patient in order to forestall their abortion procedure may fall within the law’s definition of prohibited interference.⁹

There are several significant changes from the previous version of the law that may make the ARHCF easier to enforce. First, before the ARHCF’s enactment, it was necessary to prove that the violator *intended* to prevent access to the clinic.¹⁰ Because of the difficulty in proving intent, the law was rarely enforced, leaving some reproductive health care facilities vulnerable. The ARHCF clarifies the law by removing the “intent” requirement and instead makes it unlawful to “knowingly” physically obstruct or block another person from entering or exiting the facility so as to impede the person’s access.¹¹ This standard may be less difficult to prove when enforcing the act in court. Second, the ARHCF makes it easier for clinics to enforce the law against violators who interfere with their operations or damage their facilities by requiring a showing of interference, rather than the more difficult to interpret previous standard of “significant disruption,” with clinic operations.¹² Third, the law makes clearer that it is not necessary for the individual patient to file a complaint in order for criminal charges to be filed.¹³

“Following and Harassing” within 15 feet of the Clinic

NYC’s law creates a 15 foot “buffer zone” around the facility’s premises. The City law defines premises as including the facility’s “driveway, entrance, entryway, [] exit ... and parking lot,”¹⁴ which expands the applicable 15 foot area and is especially important for clinics outside of Manhattan where staff and patients are more likely to drive.

People in the buffer zone may not “follow and harass” any individual entering or exiting the facility’s premises. “Harassment” includes activities that are intended to and that do annoy or alarm the person, and that have no legitimate purpose.¹⁵ It is important to note that while the law prohibits persons from *following and harassing* any individual entering or exiting the facility within the “buffer zone,” protesters may enter and demonstrate peacefully within the 15 foot zone, which may include speaking to the person, holding signs, and handing out literature. While an individual may approach and speak to clinic staff and patients within fifteen feet of the facility’s premises, it is against

the law for an individual to follow and harangue the target if asked to desist or told that their target does not want the individual to continue. In this way, the law protects against turning those who must enter the clinic into a “captive audience.”¹⁶

Enforcement of the Law: Criminal and Civil Penalties

Only the government can file criminal charges under the federal or state law. However, any person or facility that has been the victim of a prohibited action can bring a *civil* lawsuit against a violator under federal law.¹⁷ A person or facility initiating a civil lawsuit may seek money damages and/or a court-ordered injunction limiting the area in which protest may occur or the types of protest activities that may take place.¹⁸

Where there is a violation of the New York City law, the law makes clear that the owner or operator of a reproductive health care facility, the owner of a building in which such a facility is located, or any person whose ability to access a reproductive health care facility has been interfered with may seek an injunction and damages.¹⁹ Thus, clinics, facility staff members, escorts, as well as individuals seeking services, may bring civil complaints in court. This makes enforcement possible in cases where patients may not wish to pursue charges themselves due to privacy concerns, and thus better protects doctors and clinic staff from unlawful, violent, or threatening behavior.

Recommendations for Clinics

Clinic staff and escorts can prove vital to full enforcement of the law. Along with their other responsibilities, employees and clinic escorts may act as the “eyes and ears” of the clinic and its patients, and may be asked to provide descriptions or documentation of their experience of unlawful activity in civil or criminal proceedings. Employees, escorts, and patients should be informed about how the current law protects individuals and clinic staff entering and leaving reproductive health facilities, and be given the tools to aid enforcement of these laws.

With this goal in mind, the NYCLU offers model language for staff and clinic escort handbooks and a model feedback form for NYC clinics to use and adapt to their own circumstances and locations. The recommended clinic feedback form is designed to elicit specific information pertinent to enforcement of the laws.

For example, because the law prohibits following and harassing another person within fifteen feet of the facility’s premises and provides for penalties if the protester is committing prohibited conduct within that “zone”, it is important to describe the specific location of the protesters in relation to the facility’s premises and where the possible misconduct occurred. It is also important to describe the appearance of the protesters for identification purposes; how many protesters were observed; the configuration of the protesters; the protesters’ behavior, and whether the same behavior has occurred in the past. The feedback form provides specific prompts in the form of a check-list describing the protester’s behavior. When staff and patients provide detailed and accurate responses, they support the enforcement of the law, ultimately helping to keep clinic patients and staff safe and free from harassment.

¹Freedom of Access to Clinics Act (hereinafter “FACE”), 18 U.S.C. § 248 (a)(1); FACE prohibits persons who “by force or threat of force or by physical obstruction, intentionally injures, intimidates or interferes with or attempt to injure, intimidate or interfere with any person because that person is or has been, or in order to intimidate such person or other person or any class of persons from, obtaining or providing reproductive health services.” *Id.* at § 248 (a)(1). Depending on the frequency of the violations, the law sets forth different criminal penalties. *Id.* at § 248(b) The law also allows for civil remedies which can be initiated by the reproductive health care facility itself, the U.S. Attorney General or State Attorney General. The civil remedies include temporary, preliminary or permanent injunctive relief and compensatory and punitive damages as well as reasonable fees. *Id.* at § 248(c).

² *See Id.* (Although only the federal government can file criminal charges under FACE, state governments, and/or any person or facility that has been the victim of a prohibited action under FACE can bring a civil lawsuit against a violator of FACE); *See also*, National Abortion Federation, *Freedom of Access to Clinics Act*, found at http://www.prochoice.org/pubs_research/publications/downloads/about_abortion/face_act.pdf (summarizing FACE).

³ Clinic Access Act, N.Y. Penal Law §§ 240.70-240.71; § 240.70 states that a person is guilty of criminal interference with health services when, “by force or threat of force or by physical obstruction, he or she intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with, another person because such other person was or is obtaining or providing reproductive health services.” N.Y. Pen. Law § 240.70 (1)(a) (McKinney’s 2009). Additionally, under state law it is also a violation if “by force or threat of force or by physical obstruction, he or she intentionally injures, intimidates or interferes with or attempts to injure, intimidate or interfere with, another person in order to discourage such other person or any other person or persons from obtaining or providing reproductive health services ... For purposes of this section ... (b) the term “interferes with” means to restrict a person’s freedom of movement; (c) the term “intimidates” means to place a person in reasonable apprehension of physical injury to himself or herself or to another person; (d) the term “physical obstruction” means rendering impassable ingress to or egress from a facility that provides reproductive health services or to or from a place of religious worship, or rendering passage to or from such a facility or place of religious worship unreasonably difficult or hazardous ...” *Id.* at § 240.70 (1)(b) – (3). N.Y. Penal Law § 240.71 establishes the crime of criminal interference in the first degree (class E felony) when a person has been convicted of the first or second degree crime previously. Because of the identical language as the federal FACE, the standards for proving a violation of the state Clinic Access Act are the same as the standards for proving a violation of federal FACE. *See People of the State of New York ex rel. Spitzer v. Kraeger*, 160 F. Supp. 2d 360 (N.D.N.Y. 2001); *New York ex rel. Spitzer v. Cain*, 418 F. Supp. 2d 457 (S.D.N.Y. 2006)(granting injunction to Planned Parenthood for Margaret Sanger Center against two specific individuals); *see also* N.Y. Civ. Rts. Law § 79-m (McKinney’s 2008). Civil Rights § 79 grants the State Attorney General or District Attorney the authority to bring an action to permanently enjoin a past, present, or possible future violation of the NY Clinic Access Act. Section 79-m states:

[w]henver the attorney general or district attorney of the county where the affected health care facility or place of religious worship is located has reasonable cause to believe that any person or group of persons is being, has been, or may be injured by conduct constituting a violation of section 240.70 or 240.71 of the penal law, the attorney general or district attorney may bring an action in the name of the people of the state of New York to permanently enjoin such violation. In such action preliminary and temporary relief may be granted under article sixty-three of the civil practice law and rules.

Id.

⁴ N.Y. Admin. Code § 8-801-805 (Within the legislative intent section of the bill, the NYC Council found that the current federal and state law “does not adequately protect reproductive health care facilities and those who work in or seek services from such facilities.”)

⁵ *Id.* at § 8-803(a)(6) (making it a misdemeanor “to knowingly interfere with the operation of a reproductive health care facility, or attempt to do the same, by activities including, but not limited to, interfering with, or

attempting to interfere with (i) medical procedures being performed at such facility or (ii) the delivery of goods to such facility.”

⁶ *Id.* at § 8-802.

⁷ *Id.* at § 8-803.

⁸ *Id.*

⁹ This was one of the “real life” examples of activities that may amount to harassment that the City Council considered when enacting the bill. See John Toscano, *Queens Gazette*, November 26, 2008, *Quinn- Sears Bill Protects Women's Right To Access Reproductive Health Care*, found at <http://www.qgazette.com/news/2008/1126/features/012.html>. Other examples included:

Patients being offered bottled water by protesters in order to forestall their abortion procedure, endangering the lives and well-being of women seeking pain relief during the abortion procedure; Clinic doctors being knocked to the ground by protesters and called “baby killer”; Protesters physically blocking patients, clinic staff, postal workers and delivery workers from entering clinics; Protesters standing in front of clinic doors saying that there were no doctors inside and directing women down the block or around the corner, and putting women into cabs to take them to a “real” clinic; . . . hanging posters and signs on NYPD-owned barricades outside clinics; offering free sonograms to patients, but instead showing graphic anti-abortion propaganda and protesters shouting at patients that they were desecrating the legacy of Dr. Martin Luther King.

Id.

¹⁰ Committee Report of the Governmental Affairs Divisions on Proposed Int. No. 826-A, at 17 (April 1, 2009) (hereinafter “Committee Report”).

¹¹ N.Y. Admin. Code at § 8-803(a)(2).

¹² *Id.* at § 8-803; see also Committee Report at 17.

¹³ *Id.* at § 8-803(b); see also Committee Report at 17.

¹⁴ *Id.* at § 8-802(c).

¹⁵ N.Y. Penal Law §§ 240.25, 240.26 (the crime of harassment is defined as, among other things, subjecting a person to physical contact with the “intent to harass, annoy or alarm another person”); see also Committee Report at 10 (stating “The word ‘harass’ has its ordinary meaning in Proposed Int. No. 826-A just as it does when used in the crime of ‘harassment’ in the State Penal Law.”).

¹⁶ The First Amendment protects listeners as well as speakers. The government has the ability to limit speech that would otherwise be protected if that speech is being imposed on a “captive audience”, which occurs when it would be impractical for the listener to be able to escape that speech such as in a person’s home. See e.g. *Rowan v. Post Office Dep’t*, 397 U.S. 728, 738 (1970). While the NYCLU believes that individuals walking down the street should not be regarded as a “captive audience” for First Amendment purposes even if they are the intended target of protest, when clinic patients and staff are physically prevented from “walking away” they are, in a very literal sense, “captives” of the hostile demonstrators who stand in their path. The “captive audience” theory as applied to those entering clinics has not been endorsed by a court and the NYCLU does not believe it should be applied to stop peaceful protest, indeed we believe that great care must be taken to both protecting the right to access reproductive health care services and First Amendment guarantees.

¹⁷ See FACE *supra*, at § 248(b)-(c).

¹⁸ *Id.*

¹⁹ N.Y. Admin. Code at § 8-804.