

2023 – 2024 Legislative Memorandum

**Subject: Relates to prohibiting drug or alcohol testing and screening of pregnant women
A.109 (Rosenthal) / S.320 (Salazar)**

Position: SUPPORT

Pregnant people in New York State are often subjected to medically unnecessary drug and alcohol testing by their health care providers without their knowledge or consent. Major medical and public health associations strongly oppose this practice. Indeed, testing deters some pregnant people from seeking vital pre- and perinatal medical care;¹ and for good reason: a positive toxicology result can cause an avalanche of unwarranted and devastating consequences, including a report to Child Protective Services (CPS), family separation, enlistment on the Statewide Central Register of Child Abuse and Maltreatment (SCR), and loss of housing and employment.

Largely conducted at the discretion of health care providers, and accordingly subject to their unconscious bias, drug and alcohol testing disproportionately targets Black and Latinx pregnant people in public hospitals, despite similar rates of substance use by white patients in private facilities.² Women of color already suffer from

¹ National Advocates for Pregnant Women, *Fact Sheet: Clinical Drug Testing of Pregnant Women and Newborns* (March 2019), https://www.astho.org/Webinars/Clinical-Drug-Testing-of-Pregnant-Women-and-Newborns_NAPW/05-16-19/.

² Movement for Family Power, *How the Foster System Has Become Ground Zero For the U.S. Drug War*, NYU Family Defense Clinic and Drug Policy Alliance (Jun. 2020) at 19, <https://static1.squarespace.com/static/5be5ed0fd274cb7c8a5d0cba/t/5eead939ca509d4e36a89277/1592449422870/MFP+Drug+War+Foster+System+Report.pdf> (citing the American College of Obstetricians and Gynecologists).

disproportionately high rates of maternal mortality³ and family separation by CPS⁴—nonconsensual and medically unnecessary drug and alcohol testing exacerbates these inequities.⁵

A.109 (Rosenthal) / S.320 (Salazar) would put an end to this practice, by prohibiting drug or alcohol testing of a pregnant person or newborn unless they give prior written consent or the test is within the scope of the medical care being given. This bill is an important step towards addressing racial disparities in maternal health outcomes and CPS involvement. This would not only empower pre- and perinatal patients to make educated decisions about testing, but also promote trust between doctors and their patients, making both parents and children safer. The NYCLU supports this measure and urges its immediate passage.

Drug & Alcohol Testing Pregnant Patients is Rooted in Racist Stereotypes

In the 1980s and '90s, the federal government's "war on drugs" aggressively advanced a narrative that associated people of color with crack-cocaine.⁶ This led to a massive spike in incarceration within Black and Brown communities and intensified the practice of performing toxicology tests on pregnant patients.⁷ Media and researchers perpetuated the myth of rampant drug use by pregnant women of color and spawned racist tropes such as "crack babies" that put into question Black and Latinx women's capacity for motherhood.⁸ In response to this destructive narrative, Congress passed laws to ostensibly provide drug treatment to pregnant women.⁹ And although the science and media mythology has now been debunked, these laws have led to increased testing, stigma, and reports to CPS.¹⁰ Many states failed to require that pregnant and parent drug users be provided with treatment,

³ New York State Task Force on Maternal Mortality and Disparate Racial Outcomes, *Recommendations to the Governor to Reduce Maternal Mortality and Racial Disparities* (March, 2019), at 5,

https://www.health.ny.gov/community/adults/women/task_force_maternal_mortality/docs/maternal_mortality_report.pdf.

⁴ *The State of New York's Children Data Book*, Schuyler Center for Analysis and Advocacy (2019), at 10, 12, <https://scaany.org/wp-content/uploads/2019/01/State-of-NY-Children-Data-Book-2019.pdf>.

⁵ ACLU of New York, et al., *Jointly-Issued Comments before the New York State Senate Committee on Women's Issues regarding Maternal and Child Health in Upstate New York*, at 1 (Nov. 19, 2020), <https://www.nyclu.org/sites/default/files/20201204-jointtestimony-maternalandchildhealth.pdf>.

⁶ *Id.* at 2.

⁷ Movement for Family Power, *supra* note 2, at 15; *see also* ACLU of New York, *supra* note 5, at 2.

⁸ ACLU of New York, *supra* note 5, at 2-3; *see also* Emma S. Ketteringham, Sarah Cremer, Caitlin Becker, *Healthy Mothers, Healthy Babies: A Reproductive Justice Response to the "Womb-to-Foster-Care Pipeline"*, 20 CUNY L. Rev. 77, 90 (2016).

⁹ ACLU of New York, *supra* note 5, at 3.

¹⁰ Wendy Chavkin et. al., *Mandatory Testing of Pregnant Women and Newborns: HIV, Drug Use, and Welfare Policy*, 24 Fordham Urb. L.J. 749, 750 (1997).

while simultaneously requiring that their toxicology results be reported for criminal prosecution.¹¹ Thus, as the drug war destabilized and disempowered already-marginalized communities, those same groups were increasingly targeted for separation by the so-called child welfare system, more aptly known as family regulation.¹²

New York was one of the states to increase surveillance and punishment of parents while withholding resources.¹³ In 1994, New York City Mayor Giuliani closed existing treatment programs for drug-using mothers, ramped up widespread testing, and installed a practice of presumptive removal of babies born with positive toxicology results.¹⁴ Around the same time, the number of New York City children in foster care hit a record high of 50,000.¹⁵ While fortunately this number has since declined, the legacy of these policies persists today; at least one in four removals of children from their parents' through the family regulation system involves allegations of parental drug use.¹⁶ And Black mothers continue to be targeted. Numerous studies and investigative reports have found that Black mothers and their infants are more likely to be screened or tested for criminalized drugs than their white counterparts, despite similar rates of usage.¹⁷ Just last year, in response to testimony by individuals and advocates about race-based discrimination while seeking prenatal, delivery, and postpartum care, the New York City Commission on Human Rights launched an investigation into three major hospital systems to root out discriminatory policies and practices regarding drug testing of pregnant people and newborns.¹⁸

The Consequences of Drug & Alcohol Testing Pregnant People Are Dire

The threat of drug and alcohol testing is harmful to both parents and their children, disrupting early attachment and deterring parents from seeking medical care.¹⁹ A positive toxicology result is a vastly inadequate measure a parent's ability to care

¹¹ *Id.*

¹² Movement for Family Power, *supra* note 2, at 15.

¹³ Wendy Chavkin, *supra* note 7, at 751.

¹⁴ *Id.*

¹⁵ Movement for Family Power, *supra* note 2, at 58.

¹⁶ *Id.* at 61.

¹⁷ National Advocates for Pregnant Women, *supra* note 1.

¹⁸ New York City 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.

¹⁹ Emma S. Ketteringham, *Test and Report: Bad for Children and Families*, Huffington Post (Apr. 25, 2014, updated Jun. 25, 2014), https://www.huffpost.com/entry/test-and-report-bad-for-children-and-families_b_5175106?utm_hp_ref=politics.

for their child, yet it often triggers an invasive investigation that can result in a finding of neglect, family separation, and enlistment of a parent on the SCR.²⁰ Thus, while a positive toxicology report alone cannot prove neglect in New York, it still carries substantial consequences: traumatic invasion of familial privacy, financial costs of medically unnecessary testing and CPS-mandated treatment programs that are often not targeted to parents' actual needs, and loss of employment in fields for which a SCR record is disqualifying.²¹

Accordingly, “secret” drug testing—testing without informed consent—has been shown to damage the doctor-patient relationship and can deter pregnant people from obtaining prenatal and perinatal care.²² This is especially true for those who struggle with substance use disorder, for whom tailored care is even more critical. Multiple major medical and public health associations, including the American Medical Association, the American College of Obstetricians and Gynecologists, the American Academy of Pediatrics, and the American Society of Addiction Medicine all oppose prosecution of pregnant women based on drug use.²³ Reporting toxicology results to CPS represents a similar violation of physicians' ethical responsibility that undermines patient trust and erects a barrier to the care and support that is needed during pregnancy and into parenthood.²⁴

A.109 / S.320 Will Reduce the Harms of Drug & Alcohol Testing Without Compromising Parent or Child Safety

Given the legal and social consequences of a positive drug or alcohol test during pregnancy, it is essential that patients retain control over this aspect of their medical care. Doing so will allow them to feel safe seeking medical care while making choices in the best interests of themselves and their families.

A.109 / S.320 would go a long way towards ensuring that pregnant patients have both the information and autonomy they need to make informed decisions about toxicology testing. The bill would require that health care providers obtain a patient's written and oral informed consent before they can perform a drug or alcohol test that is outside the scope of the medical care being provided. It would

²⁰ See Movement for Family Power, *supra* note 2. Not one study has conclusively established a causal link between drug use and child maltreatment; however, several studies have documented the harm of foster care, and there is compelling evidence that policy and practice responding to parental drug use is more toxic to children, parents, and families than the alleged effects of the drug use itself. *Id.* at 19.

²¹ ACLU of New York, *supra* note 5, at 9; Movement for Family Power, *supra* note 2, at 36, 63.

²² National Advocates for Pregnant Women, *supra* note 1.

²³ *Id.*

²⁴ ACLU of New York *supra* note 5, at 4, 9.

further empower patients by mandating that they be informed of the potential legal consequences, voluntariness, purpose, and confidentiality of the testing, in a language they understand. A.109 / S.320 would support a more transparent and collaborative doctor-patient relationship, and like all medical care, A.109 / S.320 allows for health care providers to test patients if an emergency arises.

Demanding that pregnant people and their newborns have, at minimum, a knowledge of, and give written consent to, the drug testing of their own body and children is a discrete but significant step forward in ensuring that all members of our community are treated with humanity. The NYCLU strongly supports the passage of A.109 / S.320 and encourages the Legislature to act on it this session.