

April 27, 2024

Sarah S. Benson
Deputy Commissioner
NYS Education Department
Office of the Professions
89 Washington Avenue
2nd Floor Education Building
Albany, NY 12234

RE: Proposed Rule Making on Dispensing Self-Administered Hormonal Contraception, EDU-09-24-0012-P



125 Broad Street
19th Floor
New York NY 10004
(212) 607-3300
nyclu.org

Donna Lieberman
Executive Director

Wendy Stryker
President

Dear Deputy Commissioner Benson,

The New York Civil Liberties Union (NYCLU) advances civil rights and civil liberties so that all New Yorkers can live with dignity, liberty, justice, and equality. Founded in 1951 as the state affiliate of the national ACLU, we marshal an expert mix of litigation, policy advocacy, field organizing, and strategic communications. Informed by the insights of our communities and coalitions and powered by 90,000 member-donors, we work across complex issues to create more justice and liberty for more people. The NYCLU strives to ensure that New York remains a beacon for equality and bodily autonomy and the full range of reproductive rights.

The ability to decide whether and when to have a child is essential to people's health and ability to participate equally in the economic, political, and social life of the nation. Access to contraception is associated with improved birth outcomes and child health, reductions in morbidity and mortality rates, and a decreased risk of developing several reproductive cancers, and contraception is used to treat various menstrual disorders.¹

Despite this, many people with reproductive capacity are unable to access contraceptive health care that is right for them. For this reason, the NYCLU welcomes to proposed rule and offers the following suggestions to strengthen it to better achieve its promised goal of expanding access to contraception for as many people as possible.

Patient Confidentiality

In the post-*Roe v. Wade* world, many people are rightly concerned about who has access to their reproductive health information and how that information may be used. People have deleted period tracking apps² and refused to share the date of

¹ Kavanaugh, Megan and Ragnar Anderson. *Contraception and Beyond: The Health Benefits of Services Provided at Family Planning Centers*. GUTTMACHER INSTITUTE (2013), <https://www.guttmacher.org/pubs/health-benefits.pdf>.

² E.g. Kristen V. Brown, *Is My Period Tracking App Safe in Post-Roe America?*, BLOOMBERG, Mar. 26, 2023, <https://www.bloomberg.com/news/newsletters/2023-03-26/is-my-period-tracking-app-safe-in-post-roe-america>.

their last menstrual period with their doctor.³ And, the *Dobbs v. Jackson Women’s Health* decision overturning *Roe v. Wade* provides ample reason to fear that the U.S. Supreme Court may use the same rationale to invalidate the constitutional right to contraception.⁴ Against this backdrop, one of the reasons that an individual may seek contraception at the pharmacy directly rather than through their primary health care practitioner is the fear that their primary health care practitioner may not support the use of contraception and may discriminate against them for using contraception. And, yet, few people read the paperwork they are handed at the pharmacy counter.⁵

For that reason, the rule should be modified to require pharmacists to orally inform people, in a language that they speak, that their primary health care practitioner will be notified of their contraception use within 72 hours, unless they opt out and to affirmatively provide people with the opportunity to opt-out. Such oral notification is necessary to make the opt out contemplated in the proposed rule meaningful.



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Young People’s Access to Contraception

Decisionally-capable young people in New York have long been able to consent to contraception without involving a parent or guardian.⁶ Permitting young people to consent to their own care advances important health goals, because the data demonstrate that in many cases, young people will not seek health care if they are required to involve a parent or their confidentiality is compromised.⁷

For these reasons, the Commissioner of Health’s non-individual specific prescription (standing order) for self-administered hormonal contraceptives by pharmacists rightly describes the individuals who are eligible to receive contraception under the standing order as all “[p]ersons who may become pregnant.”⁸

Because some pharmacists may not be aware that decisionally-capable young people are able to consent to contraception without involving a parent or guardian, the training required in Section 63.16(c)(1) of the proposed rule should make clear that

³ EmeraldGirl, *Declined to give my LMP at the doctor’s office*, REDDIT, https://www.reddit.com/r/TwoXChromosomes/comments/w5aal1/declined_to_give_my_lmp_at_the_doctors_office/ (last visited Apr. 11, 2024).

⁴ *Dobbs v. Jackson Women’s Health*, 597 U.S. __ (2022) (Breyer, Sotomayor, & Kagan, JJ, dissenting) (“And no one should be confident that this majority is done with its work. The right *Roe* and *Casey* recognized does not stand alone. To the contrary, the Court has linked it for decades to other settled freedoms involving bodily integrity, familial relationships, and procreation. Most obviously, the right to terminate a pregnancy arose straight out of the right to purchase and use contraception.”).

⁵ Cf. Alexis C. Madrigal, *Reading the Privacy Policies You Encounter in a Year Would Take 76 Work Days*, THE ATLANTIC, Mar. 1, 2012, <https://www.theatlantic.com/technology/archive/2012/03/reading-the-privacy-policies-you-encounter-in-a-year-would-take-76-work-days/253851/>.

⁶ *Carey v. Population Services Int’l*, 431 U.S. 678 (1977).

⁷ Jonathan Klein et al., “Access to medical care for adolescents: Results from the 1997 Commonwealth Fund Survey of the Health of Adolescent Girls,” 25 J. OF ADOLESCENT HEALTH 120 (1999).

⁸ New York Department of Health, *Non-Individual Specific Prescription for Self-Administered Hormonal Contraceptives with Pharmacy Dispensing Protocol* (Mar. 19, 2024).

young people are eligible to receive contraception under the standing order, and it should include guidance and best practices on how to obtain informed consent from a young person, as well as the pharmacist's obligations under both state⁹ and federal law¹⁰ to keep information about contraception a young person consents to themselves confidential unless the young person also consents to the disclosure. These obligations apply both with respect to medical records and with respect to billing.¹¹

Language Access

New York has one of the lowest literacy rates in the country; nearly a quarter of the state's population is functionally illiterate.¹² The average American reads at a seventh or eighth grade reading level.¹³ More than 30% of New York households speak a language other than English at home,¹⁴ and more than 45% of foreign-born and nearly 4% of U.S.-born New Yorkers have limited English proficiency.¹⁵ Low literacy and language barriers impede people from understanding information distributed at pharmacy counters.¹⁶

For these reasons, the final rule should require that the self-screening risk assessment questionnaire contemplated in Section 63.16(d)(1)(i) of the proposed rule be available in the top twelve most commonly spoken non-English languages in New York based on the most recent census data.¹⁷ Similarly, pharmacists should be trained and required to support New Yorkers with limited English proficiency and/or low literacy levels to understand and complete the questionnaire.

Expanding Access to Care

Notwithstanding the federal Affordable Care Act's requirements, as well as the requirements of the Comprehensive Contraception Coverage Act of 2019 and the Women's Health and Wellness Act of 2002, people still face cost barriers that impede

⁹ 10 N.Y.C.R.R. 300.1(h) (2017); *see also* 10 N.Y.C.R.R. § 300.5(b)(4) (2017).

¹⁰ 45 C.F.R. § 164.502(g)(3)(i)(A) (2017).

¹¹ 10 N.Y.C.R.R. § 23.4 (2017) ("When a health care provider diagnoses, treats or prescribes for a minor, without the consent or knowledge of a parent or guardian as permitted by section 2305 of the Public Health Law, neither medical nor billing records shall be released or in any manner be made available to the parent or guardian of such minor without the minor patient's permission.").

¹² *Literacy Rate by State*, WISE VOTER, <https://wisevoter.com/state-rankings/literacy-rate-by-state/#new-york> (last visited Apr. 15, 2024).

¹³ *What is readability and why should content editors care about it?*, CENTER FOR PLAIN LANGUAGE, Mar. 22, 2017, <https://centerforplainlanguage.org/what-is-readability/>.

¹⁴ *New York*, MIGRATION POLICY INSTITUTE, 2022, <https://www.migrationpolicy.org/data/state-profiles/state/language/NY>.

¹⁵ *Id.*

¹⁶ *E.g.* Terry C. Davis, Michael S. Wolf, Pat F. Bass, III, Mark Middlebrooks, Estela Kennen, David Banker, Charles L. Bennett, Ramon Durazo-Arvizu, Anna Bocchini, Stephanie Savory, & Ruth M. Parker, *Low Literacy Impairs Comprehension of Prescription Drug Warning Labels*, 21 J. GEN INTERN. MED. 847 – 51 (2006); M.G.C.A. Manchanayake, G.R.W.S.K. Bandara, & N.R. Samaranayake, *Patients' ability to read and understand dosing instructions of their own medicines – a cross sectional study in a hospital and community pharmacy setting*, 18 BMC HEALTH SERVICES RESEARCH 425 (2018).

¹⁷ *Cf. New York State Language Access Law*, NEW YORK STATE OFFICE OF GENERAL SERVICES, <https://ogs.ny.gov/new-york-state-language-access-law> (last visited Apr. 15, 2024).



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access to contraception. Some, particularly those who are enrolled in self-funded insurance plans or whose insurance is otherwise regulated by the federal rather than state government, continue to see prohibitively expensive cost-sharing for contraception or find that their insurer omits coverage for various methods of contraception. Others grapple with confidentiality and safety concerns that preclude them from using their health insurance, particularly where they receive that insurance through a partner or a parent. It is therefore important that the training required in Section 63.16(c)(1) of the proposed rule equip pharmacists to inform people of the Family Planning Benefit Program (FPBP), a public health insurance program for New Yorkers who need confidential family planning care.¹⁸ Although pharmacists are not able to directly enroll people in FPBP, they should be prepared to refer people to settings that can enroll where the need arises.



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Similarly, people may seek contraception at a pharmacy because they do not have a primary care practitioner. The proposed rule requires that “[i]f the patient does not have a primary health care practitioner or is unable to provide contact information for their primary health care practitioner, the pharmacist shall provide the patient with a written record of the self-administered hormonal contraceptives dispensed and advise the patient to consult an appropriate health care practitioner.”¹⁹ This misses an opportunity to channel people into future care. The Department, in conjunction with the Department of Health, should, at a minimum, provide pharmacists with a list of federally-qualified health clinics, Title X clinics, and other health care practitioners in their regions, and pharmacists should be required to offer these lists to people who do not have a primary care practitioner. Such an approach is more likely to support people in accessing primary care than simply sending them home with a recommendation that they find a practitioner.

* * * *

The NYCLU is grateful to the Department for proposing this rule and appreciates the opportunity to submit these comments. If you have any questions or need more information, please contact NYCLU senior policy counsel, Allie Bohm, at abohm@nyclu.org.

Thank you,

A handwritten signature in black ink that reads "Katharine Bodde".

Katharine Bodde
Interim Co-Policy Director
New York Civil Liberties Union

A handwritten signature in black ink that reads "Allie Bohm".

Allie Bohm
Senior Policy Counsel
New York Civil Liberties Union

¹⁸ See generally *Family Planning Benefit Program*, NEW YORK STATE DEP'T OF HEALTH, Feb. 2024,

https://www.health.ny.gov/health_care/medicaid/program/longterm/familyplanbenprog.htm.

¹⁹ Sec. 63.16(d)(2).