



November 12, 2020

Office of the Chair
New York City Commission on Human Rights
22 Reade Street
New York, New York 10007
policy@cchr.nyc.gov

RE: Comment on Proposed Rules

To the Office of the Chair:

National Advocates for Pregnant Women offers the following comments on the Commission’s Proposed Rules on Discrimination Based on Pregnancy informed by our decades of experience with laws and policies focused on pregnant people. Our most salient observation in general is that pregnant people are regularly discriminated against as a result of pregnancy, childbirth, related conditions (including lactation), and their sexual and reproductive health decisions.¹ As a result of pervasive discrimination, these Rules are necessary to clarify the myriad ways unlawful discrimination manifests.

As the Special Rapporteur on violence against women reported to the United Nations in July 2019, “... violence against women in childbirth is so normalized that it is not (yet) considered violence against women.”² One of the most egregious examples we have recorded of this normalized discrimination took place at Northwell Health’s Staten Island University Hospital (SIUH). This Hospital maintained a policy called “Managing Maternal Refusals of Treatment Beneficial for the Fetus” that set out the circumstances in which medical procedures could be performed on nonconsenting pregnant patients and when this extraordinary violation of patient

¹ See Jeanne Flavin and Lynn M. Paltrow. Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women’s Legal Status and Public Health. *Journal of Health Politics, Policy and Law*, Vol. 38, No. 2, April 2013 (documenting one form of discrimination pregnant people face, arrests and forced interventions, in media reports and court records). This research is being updated for 2005-present and early data suggests that the trend identified in this report continues.

² Dubravka Šimonović, Report of the U.N. Special Rapporteur on Violence Against Women: Its Causes and Consequences on a Human Rights-Based Approach to Mistreatment and Violence Against Women in Reproductive Health Services with a Focus on Childbirth and Obstetric Violence, United Nations General Assembly, July 11, 2019.

rights could occur without even seeking court approval for doing so. Doctors at SIUH relied on this policy to perform major surgery on Ms. Dray without her consent and without a court order.³ Her doctor was unambiguous in his notes in Ms. Dray's medical chart, writing "The woman has decisional capacity. I have decided to override her refusal to have a c-section. Her physician Dr. Gorelick and hospital attorney Mr. Fried are in agreement."⁴

The law of the State of New York is unequivocal that this is not allowed and has been since 1914 when the New York Court of Appeals held that "Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages."⁵ There is no exception to this principle for pregnant people. Yet, time and again pregnancy has been the excuse for denying civil and human rights.

This is why the proposed rules at 2-07(b) with regard to "Policies that Facially Discriminate Against People Based on Pregnancy, Childbirth, or Related Medical Conditions" are so important. It is necessary to make it plain that "A covered entity cannot use its concerns about maternal or fetal safety as a reason for discrimination," because it is precisely those concerns that were used in Ms. Dray's case and that are consistently used in many others to disguise, justify and excuse what is unlawful discrimination.

Northwell's SIUH Managing Maternal Refusal's policy explicitly authorizes discrimination. Moreover, despite a finding by the New York State Department of Health that this policy violated the Patient Bill of Rights, Northwell's SIUH maintains their commitment to discrimination against pregnant patients as necessary for the good of the fetus. They claim that not being able to override pregnant patient refusals "would deprive those viable, unborn fetuses of their right to live."⁶

This is a false claim because there is no basis for perpetrating a human rights violation against one person, even if it would bring about a benefit to someone else.⁷ Indeed, no newborn, infant, or child has the right to require another person, including a parent, to undergo surgery or even minor medical interventions for their benefit.⁸ But it is also a false claim because a fetus does not have a right to overcome the natural constraints to life that mammalian gestation and birth

³ A copy of the policy is attached to this letter.

⁴ A copy of this notation in her chart is attached to this letter.

⁵ *Schloendorff v. Society of New York Hospital*, 105 N.E. 92 (1914).

⁶ Brief for Defendants-Respondents, filed July 2020 in *Dray v. Staten Island Univ. Hosp.*, No. 2019-12617, 57 (2d Dept. 2019).

⁷ *Supra* note 2 and 5. *See also In re Fetus Brown*, 689 N.E.2d 397 (Ill. App. 1997), *In re Baby Boy Doe*, 632 N.E.2d 326, 393 (Ill. App. Ct. 1994), *Cruzan v. Director, Missouri Department of Health*, 497 U.S. 261 (1990), *In re A.C.*, 573 A.2d 1235 (1990), *McFall v. Shimp*, 10 Pa. D. & C.3d 90 (Pa. Com. Pl., July 26, 1978), *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251(1891).

⁸ *See Stallman v. Youngquist*, 531 N.E.2d 355, 360 (Sup. Ct. Ill. 1988) ("A legal right of a fetus to begin life with a sound mind and body assertable against a mother would make a pregnant woman the guarantor of the mind and body of her child at birth. A legal duty to guarantee the mental and physical health of another has never before been recognized in law.")

presents. There is no place on earth where a fetus is guaranteed any birth outcome, not because of laws or individual choices, but because of biology.⁹

Furthermore, pregnancy discrimination, especially in a form that constitutes medical mistreatment or punishment undermines legitimate state interest in protecting public health.¹⁰ Maternal, fetal and child health are best advanced by protecting the health and rights of pregnant people, not by circumscribing them.

Because concerns about fetal safety are so pervasively accepted as justification for discrimination in the context of health care related to pregnancy, we feel it is important to include an additional example at 2-07(b)(1) that illustrates the impact on individual patients. Some possible examples are: A hospital or an individual provider makes an exception to standard rules on behalf of a fetus but at the expense of a pregnant patient; A hospital or an individual provider forces or coerces a pregnant patient into something on the basis of concerns for fetal safety; A hospital or an individual provider justifies mistreatment of a pregnant patient on the basis of concerns for fetal safety.

NAPW strongly urges adoption of the Commission's Proposed Rule so that these kinds of violations can be recognized, addressed and eliminated.

Sincerely,

Indra Lusero
Staff Attorney
National Advocates for Pregnant Women

⁹ It is estimated that miscarriage occurs in 15-20% of pregnancies. Raj Rai & Lesley Regan, Recurrent Miscarriage, 368 *Lancet* 601, 601 (2006). Stillbirths occur in about 1% of pregnancies. Ruth C. Fretts, Etiology and Prevention of Stillbirth, 193 *American Journal of Obstetrics & Gynecology* 1923, 1924 (March 2005). See also Sarah DiGregorio, *Early: An Intimate History of Premature Birth and What It Teaches Us About Being Human* (2020).

¹⁰ See Amicus Brief for Birth Rights Bar Association and the Birth Place Lab, filed November 2020 in *Dray v. Staten Island Univ. Hosp.*, No. 2019-12617, 57 (2d Dept. 2019) and Amicus Brief for VBAC Facts and Evidence Based Birth, filed November 2020 in *Dray v. Staten Island Univ. Hosp.*, No. 2019-12617, 57 (2d Dept. 2019).