



666 Broadway, 7th Floor
New York, New York 10012
212-614-6464
ccrjustice.org

Hearing on the Impact of Marijuana Policies on Child Welfare Before the Committees on Hospitals and General Welfare

Testimony of Nahal Zamani, Advocacy Program Manager,
Center for Constitutional Rights

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I. INTRODUCTION

We would like to thank the Committees on Hospitals and on General Welfare of the New York City Council for holding this critical hearing today. The Center for Constitutional Rights works with communities under threat to fight for justice and liberation through strategic litigation, advocacy and communications.¹

In our testimony today, we focus on the practice of disproportionate drug testing of Black women in New York City hospitals, the exposure to potentially devastating collateral consequences for them and their families, including the potential for family separation. We applaud efforts by the City Council to would increase public reporting on the prevalence of this practice and for two resolutions which urge policy and legislative changes which would end the harmful impact of this practice.

¹ Since 1966, we have taken on oppressive systems of power, including structural racism, gender oppression, economic inequity, and governmental overreach. Learn more at <https://ccrjustice.org>.

JUSTICE TAKES A FIGHT.

As the two Committees are well aware, the practice of exposing mothers and their newborn infants for testing for drug use in New York City hospitals targets Black mothers. Investigations for marijuana use alone can then compel unnecessary interventions.

Several actors play a key role in this phenomenon. Health workers and hospital staff engage in racially biased testing for illicit drug use, and their actions lead to involvement of the Statewide Central Register of Child Abuse and Maltreatment (SCR) and the New York City Administration for Children's Services (ACS) and related interventions.² This multi-layered practice evokes discrimination, stigmatization, and failing government interventions divorced from the realities of science and harm reduction.

Today, our testimony highlights the discriminatory targeting of drug testing for new mothers and their newborns; the impacts of ACS investigations and potential removals on the basis of mere marijuana usage among mothers; the need for a harm reduction approach in the health care setting which reduces and ultimately ends stigma; and the disconnect between this practice and the national conversation to legalize marijuana.

II. RACIAL IMPACTS AND DISPARITIES: FROM PREGNANCY TO THE POSTPARTUM SETTING

The role of the government, and its agencies – at all levels – impacts peoples' lives in profound ways. Government practices and interventions must be grounded in the empowerment of people to live a life with dignity and freedom from harm. In the instances where government policies are outright harmful and / or enforced in a discriminatory manner, they must be ended immediately. The intersection of government actions on Black women's lives is profound during pregnancies and in the postpartum setting.

Despite the comparable use of marijuana in general among Blacks and Whites, racial disparities are profound in the healthcare settings. Black women are already more likely to be tested for drug use during their pregnancies,³ and they face severe racial disparities in the postpartum setting, further compounding exposure to “adverse consequences from intervention by legal or social service agencies.”⁴ The combined impact of health workers and child protective service

² As the Daily News reports, this phenomenon has been documented in the public hospital setting (of which the City Council exercises oversight), but also occurs in private hospitals which service populations on uninsured patients or those who are on Medicaid. Yaniv, Oren, *WEED OUT: More than a dozen city maternity wards regularly test new moms for marijuana and other drugs*, New York Daily News, December 29, 2012, available: <https://www.nydailynews.com/new-york/weed-dozen-city-maternity-wards-regularly-test-new-mothers-marijuana-drugs-article-1.1227292> (hereinafter “NY Daily News: Weed Out”).

³ Neuspiel DR. Racism and perinatal addiction. *Ethnicity and Disease*. 1996; at 47–55, available <https://www.ncbi.nlm.nih.gov/pubmed/8882835>; Kunin, Hillary Veda., et al., The Effect of Race on Provider Decisions to Test for Illicit Drug Use in the Peripartum Setting, *J Womens Health (Larchmt)*. April 24, 2010, available: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2859171/> (hereinafter “The Effect of Race on Provider Decisions to Test for Illicit Drug Use”).

⁴ The Effect of Race on Provider Decisions to Test for Illicit Drug Use at 6.

agencies' interventions, at its worst, can lead to findings of child neglect, loss of parental rights and threats of or instances of family separation.

While this is surely a national phenomenon, New York should be innovative in reducing stigma and addressing racial disparities in the healthcare setting. We can take necessary steps to expose racial disparities and closing the gaps which allow for these unnecessary interventions. The bill package promoted by the City Council represents a crucial first step.

III. CURRENT CHILD WELFARE INTERVENTIONS ARE OUT OF STEP WITH HARM REDUCTION APPROACH AND MARIJUANA LEGALIZATION EFFORTS

As the City Council and the media have discussed at length,⁵ pursuing child neglect cases merely on the basis of marijuana usage by parents reflected a misguided government intervention. It is both divorced from the discussion to legalize marijuana as well as the growing precedent to embrace harm reduction in health care settings.

The State of New York is on the cusp of legalizing marijuana. And yet, ACS plays a critical role in contributing to the criminalization of mothers who are perceived to have engaged in marijuana use. Investigations which lead to the removals of children based solely on positive toxicology at birth of marijuana are clearly harmful and unnecessary. As advocates and experts have testified today, these policies are out of step with recent efforts to reduce the stigma of drug use and with the growing understanding about the less detrimental effects of such use on fetuses during pregnancy.

In recent years, there have been great strides towards the integration of a harm reduction approach in the health setting. As such, doctors and health workers can best guarantee the wellbeing of their patients during their pregnancies and deliveries by maintaining open

⁵ New York City Council Committee on Hospitals, jointly with Committee on General Welfare, Hearing T2019-3915, Oversight - Impact of Marijuana Policies on Child Welfare, April 10, 2019, Hearing and related legislative package (including Intro 1161-2018 [A Local Law to amend the administrative code of the city of New York, in relation to enhanced reporting on the child welfare system], Intro 1426-2019 [A Local Law to amend the administrative code of the city of New York, in relation to reporting on investigations initiated by the administration for children's services resulting from drug screenings performed at facilities managed by the New York city health and hospitals corporation], Resolution 740-2019 [Resolution calling upon the New York City Administration for Children's Services to implement a policy finding that a person's mere possession or use of marijuana does not by itself create an imminent risk of harm to a child, warranting the child's removal] and Resolution 746-2019 [Resolution calling on the New York State Legislature to pass, and the Governor to sign, legislation requiring the New York State Department of Health to create clear and fair regulations for hospitals on drug testing those who are pregnant or giving birth, including informing patients of their rights before any discussion of drug use or drug testing]), available: <https://legistar.council.nyc.gov/MeetingDetail.aspx?ID=684838&GUID=8588C279-C87B-4CF6-BF63-03F964CD1787&Options=info&Search=>; NY Daily News: NY Daily News: Weed Out; Secret, Mosi, *No Cause for Marijuana Case, but Enough for Child Neglect*, August 17, 2011, available: <https://www.nytimes.com/2011/08/18/nyregion/parents-minor-marijuana-arrests-lead-to-child-neglect-cases.html>; Lawson, Kimberly, *Black Mothers Share the Devastating Impact of Racism in Maternal Health Care*, VICE, available: https://broadly.vice.com/en_us/article/43bp43/black-maternal-health-care-racism-stories.

communication about the circumstances that shape their patients' lives. Committing to harm reduction and to the reduction of stigma means identifying and ending health interventions which promulgate racial disparities and negative health outcomes.

This draconian approach of conflating child welfare with marijuana usage is the opposite of the harm reduction approach – it is actually *harmful*. Accordingly, Resolution 746 recognizes the need for the sharing of one's medical history with their health care provider without fear of the opening of a child welfare case. The resolution also questions the utility of inclusion of a positive drug test into the legal definition of neglect.

We also must reduce harm and stigma in health services. There are clear disparities in practices at hospitals around who is subjected to drug testing , the obtaining of patient consent, the adequate informing of patients of potential impacts of such testing, as well as policies around newborn testing in cases of parent refusal. These disparities, along with their ramifications for parents, should be addressed. Taken together, these disparities compound health and social outcomes for communities of color.⁶ Wherever possible, as Resolution 746 implies, best practices in health settings which center the wellbeing of parents and their families and which reduce stigma and harm must prevail.

While our colleagues have highlighted the necessity not to further stigmatize parents who use drugs beyond marijuana, we do uplift however, the uniqueness of marijuana use and impacts stemming from positive toxicology tests from its usage for new parents. Accordingly there is growing acknowledgement of a less harmful impact from marijuana use on fetal health.⁷ Despite this, ACS's policies, and the actions of health workers and providers who decide to test for drug use, ultimately equate marijuana use alone with neglect and abuse. Therefore, as the City Council rightfully recognizes in their bills, while there has been greater public acceptance of the marijuana use, the prevailing mechanisms around child welfare are greatly falling behind.

Moreover, as my fellow advocates have testified regarding their clients who have had loved ones removed from a simple positive drug test for marijuana usage -- is this really the most effective and sound intervention that health workers, ACS and New York City can make? Are these the most crucial examples of neglect and child welfare which ACS should focus on? And do these practices simply promulgate stigma and spread harm? These questions underline the need for stronger protections, better laws, and guided policies which reduce harm and are in line with our national conversations.

⁶ NY Daily News: Weed Out.

⁷ NY Daily News: Weed Out.

IV. DISCUSSION OF BILL PACKAGE

To be sure, the practice of testing new mothers for drug use is common across the country, as is the disproportionate impact and consequences on black women.⁸ However, if NYC wants to truly be a progressive, national leader for policy setting, we can and must do better.

Anecdotal evidence confirms the discriminatory impact here in New York, and we need more public reporting to shed a light on this practice.⁹ To that aim, Intro 1426 (which increases public reporting on ACS investigations resulting from positive drug tests at New York City Health and Hospitals Corporation [HHC] facilities) will help ensure reporting on ACS' initiating or prolonging of child welfare investigations and such investigations' intersection with the use of marijuana. With regards to this bill, it is crucial to compel reporting on race, a greater understanding the implications of unsubstantiated findings, the circumstances under which parents may remain on the SCR lists, and the ramifications on their lives for such inclusion.

Intro 1161 (which promotes enhanced reporting on allegations which lead to opening of cases of child abuse or neglect in the child welfare system) is equally important. The bill should also consider the outcomes of cases wherein the allegations include substance use, marijuana or otherwise; the factors contributing to the termination of parental rights; and whether the primary justification for such termination is continued substance use.

We support Resolution 740 (calling on ACS to implement a policy finding that a person's mere possession or use of marijuana does not by itself create an imminent risk of harm to a child, warranting the child's removal), and call on ACS to reconsider its policies which conflate drug use in and of itself as a factor of neglect, to come into line with applicable state laws and to embrace instead interventions that support harm reduction and family preservation.

Last, with regards to Resolution 746, we commend the bill sponsors for urging the state legislature and the governor to take concrete steps towards streamlining hospital procedures including addressing disparities in testing and basis for testing throughout hospitals; determining why and how hospitals communicate with SCR, and ensuring such communications are grounded in law and harm reduction approaches; ensuring that consent is always obtained and that patients are informed of potential outcomes when giving such consent; and to enshrining and mandating best practices.

V. FAMILY PRESERVATION: THE NEED FOR UNINTERRUPTED BONDING AND ATTACHMENT AS A CRUCIAL ELEMENT OF THE POSTPARTUM AND PERINATAL SETTING

We draw the City Council's attention to key issues in the postpartum or perinatal setting. The prevailing literature indicates that bonding, particularly in this period is essential for a multitude

⁸ The Effect of Race at 6.

⁹ NY Daily News: Weed Out.

of reasons for the wellbeing of mother and child. Any potential interruptions for bonding, including the threat of or an actual interruption or separation, has incredible ramifications.

Childbirth and the immediate period thereafter is an incredible and complicated experience. We should question the utility of adding a layer of the threat of or an actual interruption in the bonding period with a newborn. For example, a crucial element of bonding at this stage is the establishment of breastfeeding. One of the best known health outcomes for infants is their access to and ability to breastfeed. For mothers who chose to breastfeed, the ability to establish adequate milk supply in the first few days after birth is crucial and dependent on a range of factors, including unfettered access to their newborns.

Removals – whether they last three days or several weeks – has serious ramifications for bonding, the ability to establish breastfeeding, and the wellbeing of infants. The threat of and actual separations can greatly damage such bonding. We should ensure all families have access to the best health outcomes possible at this crucial time.

VI. CONCLUSION

In light of the incredible strides to embrace harm reduction, to legalize marijuana, and to reduce stigma, New York can improve families' lives. We urge the City Council to consider taking the crucial steps we have underlined in our testimony. We thank you for hearing our testimony today.