Committee on Hospitals

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**The Council of the City of New York**

**COMMITTEE REPORT OF THE Human SErvices Division**

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**COMMITTEE ON HOSPITALS**

Hon. Carlina Rivera*, Chair*

**July 18, 2019**

**RESOLUTION NO. 746:** By Council Members Rivera, Levin, Rosenthal and Eugene

**TITLE:** 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.

1. **Introduction**

On July 18, 2019, the Committee on Hospitals, chaired by Council Member Carlina Rivera, will hold a hearing on Resolution No. 746, 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. This resolution was originally heard at a joint hearing of this Committee and the Committee on General Welfare, chaired by Council Member Stephen Levin, on April 10, 2019, at which the Committees received testimony from the Administration for Children’s Services (ACS), New York City’s Health + Hospitals (H+H), child welfare advocates, legal service providers, health care providers, drug policy advocates and other interested parties.

1. **Overview of Child Welfare System**

Reports of abuse and neglect go through the Statewide Central Register of Child Abuse and Maltreatment (SCR) hotline, maintained by the New York State Office of Children and Family Services.[[1]](#footnote-1) SCR staff relay information from the calls to the appropriate local child protective services for investigation, which is ACS in New York City. Fifteen percent of the 34,642 allegations that were referred to ACS between July and September of 2018 were for substance abuse.[[2]](#footnote-2) This category includes parental and child drug use.

Certain professionals such as doctors, nurses, teachers, police officers, and child care center workers are mandated by New York State law to report suspected child abuse and neglect to SCR.[[3]](#footnote-3) Mandated reporters must immediately make a report or cause a report to be made (e.g. ensuring that a supervisor makes the report), when in their professional role they are presented with reasonable cause to suspect abuse or neglect. “Reasonable cause” means that based on their observations of the evidence, professional training and experience they believe that the parent or legal guardian has harmed or placed a child in danger of being harmed.[[4]](#footnote-4)

In regards to substance use, current state law states that a “neglected child” means a child “whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired” due to a parent or guardian’s failure to provide minimum care, including “misusing a drug or drugs.”[[5]](#footnote-5)

As previously mentioned, once the SCR believes a report of abuse or neglect warrants an investigation, the SCR will direct ACS to begin a child protective investigation. ACS is required to investigate all reports received to ensure the safety and well-being of every child listed on the report.[[6]](#footnote-6) A Child Protective Specialist (CPS) will make an unannounced visit to the child’s home within 24 – 48 hours of the report.[[7]](#footnote-7) The CPS must see and speak to all children living in the home or with other caretakers, as well as all children/youth that are present in the home during the investigation. The CPS will also check to make sure the home is free of hazards, has adequate food, safe sleeping arrangements, etc. The CPS may also go to the child’s school, talk to family members and other people who may know the child, like a neighbor, building superintendent, teacher, doctor, nurse, the New York Police Department, etc. Within 60 days or fewer, the CPS determines whether or not the report is “indicated,” meaning the CPS found enough evidence to support the claim that a child has been abused or neglected, or “unfounded”.[[8]](#footnote-8) If a case is unfounded or indicated but determined to be a low-risk case, the family can be referred to voluntary preventive services.[[9]](#footnote-9) Higher risk indicated cases can lead to ACS filing a petition in family court, which can result in court-mandated services or removal of the child from the home.[[10]](#footnote-10)

Further, if the CPS did not find enough evidence to support the claim that a child has been abused or neglected, parents receive a letter from the SCR that the report was unfounded.[[11]](#footnote-11) However, even an unfounded report stays in the SCR for 10 years.[[12]](#footnote-12) All reports made to the SCR are kept on record until the youngest child in the family at the time of the investigation turns 28 years old.[[13]](#footnote-13) According to child welfare and parent advocates, ACS investigations target low-income families, especially women who are Black and Latina and those with a history of domestic violence, who may be disproportionately impacted by the SCR report for at least 28 years. Maintaining an SCR record until the youngest child turns 28 years old limits employment opportunities that may cause families to remain in poverty and putting them at risk of ongoing child welfare involvement.

1. **The Impact of Marijuana Use During Pregnancy**

*Prevalence of Marijuana Use During Pregnancy*

The number of women using marijuana during pregnancy has increased in recent years.[[14]](#footnote-14) According to an extensive study based in California, from 2009 through 2016, the adjusted prevalence of prenatal marijuana use among pregnant enrollees in Kaiser Permanente Northern California, based on self-reporting or toxicology, increased from 4.2 percent to 7.1 percent.[[15]](#footnote-15) Individuals below the age of 25 experienced higher usage rates, with 22 percent of pregnant women younger than 18 years old and 19 percent of pregnant women aged 18 to 24 years old screened positive for marijuana use in 2016.[[16]](#footnote-16) Usage was higher based on toxicology than self-report each year.[[17]](#footnote-17)

The increased use of marijuana among pregnant individuals may be linked to the surge of marijuana legalization in the United States.[[18]](#footnote-18) As of November 2018, 32 states have legalized the use of medicinal marijuana, and 10 states and Washington, D.C. have legalized marijuana for recreational use.[[19]](#footnote-19) Marijuana is now easier to obtain legally, and may in some cases be marketed as having the ability to assist with pregnancy-related symptoms.[[20]](#footnote-20) A 2018 study based in Colorado found that, of 400 dispensaries contacted, 70 percent recommended the use of marijuana products to treat nausea in the first trimester, including a majority of dispensaries with medical licenses.[[21]](#footnote-21) While 81.5 percent of dispensaries recommended discussion with a health care provider, only 31.8 percent made the recommendation unprompted.[[22]](#footnote-22)

*Potential Health Consequences*

Despite an increase in use, research on the effects of marijuana during pregnancy is still in its infancy, and the current consensus is that no amount of marijuana use has been shown to be safe during pregnancy. Many medical professionals advise avoiding marijuana during pregnancy, and the research currently available has for the most part reported potentially negative impacts on children who were exposed to marijuana in the womb.[[23]](#footnote-23) According to the American College of Obstetricians and Gynecologists, doctors should advise their patients who are pregnant or looking to become pregnant to stop all marijuana use immediately, and to use other remedies to address any pregnancy-related or other medical symptoms.[[24]](#footnote-24)

Doctors fear the impact tetrahydrocannabinol (THC) can have on a developing fetus. In animals, THC crossed the placenta and produced fetal plasma levels that were approximately 10 percent of maternal levels after acute exposure, and significantly higher fetal concentrations were observed after repetitive exposures.[[25]](#footnote-25) It has been pointed out that many studies about marijuana use are dated, and thus may not accurately measure the amount of THC that can effect a developing fetus, since THC levels have increased in marijuana over time.[[26]](#footnote-26)

Marijuana use has been linked to adverse pregnancy-related outcomes.[[27]](#footnote-27) There is no human research connecting marijuana use to the chance of miscarriage, although research has shown that pregnant people who use marijuana have a 2.3 times greater risk of stillbirth.[[28]](#footnote-28) Marijuana use may also impact the child’s development.[[29]](#footnote-29) If a pregnant person smokes marijuana, the smoke can contain many of the same respiratory disease-causing and carcinogenic toxins as tobacco smoke, and the concentration of such chemicals can be higher in marijuana smoke.[[30]](#footnote-30) Pregnant people using marijuana at least weekly during pregnancy were significantly more likely to give birth to a newborn weighing less than 2,500g (approximately 5.5 pounds).[[31]](#footnote-31) Studies note that children who were exposed to marijuana in utero had lower scores on tests of visual problem solving, visual-motor coordination, and visual analysis than those who were not exposed, and prenatal marijuana exposure has been associated with decreased attention span, early marijuana use, and behavioral problems.[[32]](#footnote-32)

Ultimately, it is hard to determine the true impact marijuana has on pregnancy for numerous reasons. Oftentimes marijuana use is compounded with other drug use and/or tobacco use, which can impact the fetus.[[33]](#footnote-33) In fact, one study from 2016 concluded that marijuana use during pregnancy is not an independent risk factor for adverse neonatal outcomes after adjusting for confounding factors, including tobacco.[[34]](#footnote-34) Poverty and its related socioeconomic conditions, such as malnutrition, can impact a child in ways that may seem similar to prenatal marijuana exposure.[[35]](#footnote-35)

Furthermore, studies examining marijuana use and pregnancy tend to be several years old and conducted on smaller groups, and therefore may not be able to accurately detect correlations between marijuana use and pregnancy outcomes.[[36]](#footnote-36) To further complicate matters, many studies are based on self-reports from participants, which can lead to flawed data collection.[[37]](#footnote-37) Finally, the fact that marijuana is still considered a Schedule 1 substance (a category which also includes heroine) continues to be a barrier to completing large-scale, evidence-based research around marijuana use and pregnancy.[[38]](#footnote-38)

1. **Hospital Policies on Substance Use Among Parents**

*Hospital Policies*

According to a *Rolling Stone* article from November 2018, H+H released a corporate policy in 2014 that outlines criteria for “screening and testing at-risk pregnant women and newborns for alcohol abuse and exposure to other drugs during pregnancy.” These criteria included a list of “risk indicators” to consider.[[39]](#footnote-39) Risk indicators include minimal or no prenatal care, a history of substance abuse or treatment within the previous three months, placental abruption and severe mood swings.[[40]](#footnote-40) H+H’s policy is not public, and information about its enforcement is not publicly accessible.

*Who Receives Drug Tests in Hospital Settings*

Race, class, and other factors play a hand in hospital drug testing and reporting.[[41]](#footnote-41) One study from 2007 used “data from the clinical information system of a 1000-bed urban medical center to examine rates and results of testing for illicit drugs among women admitted with pregnancy-related diagnoses during the years 2002 and 2003 and among the infants born to these women.”[[42]](#footnote-42) The study makes note of research demonstrating the existence of racial disparities in infant referrals to and action by child welfare agencies, as well as findings that women who are Black are more likely to be tested for illicit substances during prenatal care and at delivery.[[43]](#footnote-43)

Of 8,487 cases of women who have had live births, 3 percent, or 244 mother-newborn pairs, were tested for illicit drug use. Women who are Black and their newborns were 1.5 times more likely to be tested than non-Black women.[[44]](#footnote-44) Despite Black women receiving testing more frequently, the study found equivalent positive test rates among Black and non-Black women.[[45]](#footnote-45) In addition to race, the study identified various factors that were correlated with high rates of testing. Testing was significantly associated with “Black maternal race, single or widowed marital status, lower educational status, unemployment, public or absent health insurance, and living in a neighborhood in the poorest quartile” as well as older age.[[46]](#footnote-46) Clinical variables, including more than one hospitalization during the pregnancy, maternal HIV infection, and low birth weight, and obstetrical diagnoses, including placenta previa, abrupted placenta, third-trimester bleeding, and eclampsia, were also associated with drug testing.[[47]](#footnote-47) Finally, absent prenatal laboratory results were also associated with drug testing.[[48]](#footnote-48)

1. **Substance Use and the Child Welfare System**

As mentioned above, ACS has 60 days to determine whether a report is indicated or unfounded. At an October 2018 NYC Council Committee on General Welfare hearing, a representative from ACS stated that ACS workers make at least biweekly visits to the family’s home during the duration of the case being open[[49]](#footnote-49) and there are few cases that are closed before 60 days.[[50]](#footnote-50) This means that even if the case is unfounded in the end, the family is still subjected to two months of government intrusion and invasions of privacy.

At a November 27, 2018 General Welfare Committee hearing, ACS Commissioner David Hansell stated that, “marijuana use per-say would never be the basis for an indicated finding of abuse or neglect” but that “any substance abuse that has an impact on parenting capacity or ability to provide adequate guardianship for a child” could influence a neglect case.[[51]](#footnote-51) When asked, Commissioner Hansell acknowledged that inadequate guardianship is a vague indicator. In a situation where a child has been removed from the home, another representative from ACS at the same hearing stated that marijuana use alone, without a history demonstrating “a substantial impact upon the safety of a child, would not necessarily lead to an argument that the child has to continue to be removed.”[[52]](#footnote-52)

According to the Drug Policy Alliance, even though New York State has a fairly stringent legal definition of caregiver neglect when substance use is a factor, “there is a lack of system-wide fidelity to this legal standard of neglect.”[[53]](#footnote-53) The Drug Policy Alliance further stated, “The subjective interpretation of substance misuse by both ACS and family court is deleterious to caregivers who, on order to maintain custody of their children, must submit to conditions determined by both ACS and the judge.”[[54]](#footnote-54) The Center for Family Representation stated that, despite ACS’s testimony to the contrary, marijuana use alone is used as a basis for removing children from homes, denying an expansion of visitation rights, and refusing to allow a child to return to the home.[[55]](#footnote-55)

When asked about the impact of legalizing marijuana on child welfare policies, Commissioner Hansell stated that policies will need to be reevaluated if legalization becomes a reality and compared the situation to alcohol, which is legal “but there are cases in which use of alcohol in a way that impairs parenting capacity leads to child welfare concerns.”[[56]](#footnote-56)

According to the Drug Policy Alliance, “Neglect accusations raised at Family Court are largely a byproduct of poverty and resource scarcity compounded by benign substance use, such as marijuana use, or problematic substance use that should be addressed compassionately and through non-punitive forms of substance use disorder (SUD) treatment. Racism and classism combine to capture caregivers in cycles of surveillance and mandated unnecessary services that sever families who can’t live up to the expectations of the court. Behaviors deeply scrutinized by ACS and Family Court judges in these cases would largely go unnoticed in more affluent white communities.” [[57]](#footnote-57)

1. **Analysis of Legislation**

**Res. No. 746** - 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.

This resolution calls upon 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. Such legislation should include informing patients of their rights before any discussion of drug use or drug testing. It is unclear how hospitals determine that testing is necessary and such testing appears to disproportionally impact low-income women and women who are Black and Latina.

Res. No. 746

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.

By Council Members Rivera, Levin, Rosenthal and Eugene

Whereas, Currently, hospitals will drug test patients who are giving birth and report those who test positive to the Statewide Central Register of Child Abuse and Maltreatment (SCR); and

Whereas, This testing leads to a child welfare investigation for marijuana use alone because the New York City Administration for Children’s Services is required to investigate all cases in NYC referred from SCR; and

Whereas, It is unclear how hospitals determine that testing is necessary and a Daily News article from 2012 found that testing varied by hospital and disproportionally impacted low-income women and women of color; and

Whereas, It is also unclear whether hospitals ensure that patients are aware of the child welfare ramifications for drug tests and disclosing drug history to their health care provider; and

Whereas, Studies show that marijuana is the most commonly used illicit drug during pregnancy, and its use is increasing; and

Whereas, Women should be encouraged to share their medical history, including drug use, with their health care provider without fear of a child welfare case being opened; and

Whereas, A review of the research has shown that maternal marijuana use during pregnancy is not an independent risk factor for adverse neonatal outcomes after adjusting for confounding factors; and

Whereas, Research on the topic is limited due to relying on self-reporting and the difficulty in conducting direct research with a Schedule I drug; and

Whereas, Current state law states that a “neglected child” means a child “whose physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired” due to a parent or guardian’s failure to provide minimum care, including “misusing a drug or drugs”; and

Whereas, Given the requirement of drug misuse - not just use - as well as evidence establishing that the child's physical, mental or emotional condition has been impaired or is in imminent danger of becoming impaired, one positive drug test arguably does not fit into the definition of neglect, as defined by State law; and

Whereas, While the medical field is continuing to research prenatal marijuana use and marijuana is being legalized across the nation, New York should address marijuana similarly to alcohol and should amend laws, regulations and policies that equate marijuana use with neglectful parenting; now, therefore, be it

Resolved, That the Council of the City of New York calls on the 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.

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3. The full list is § 413 of the New York State Social Services Law [↑](#footnote-ref-3)
4. New York State Social Services Law § 413 [↑](#footnote-ref-4)
5. New York State Family Court Act § 1012 [↑](#footnote-ref-5)
6. Administration for Children’s Services, “A Parent’s Guide to a Child Abuse Investigation,” *available at* <https://www1.nyc.gov/site/acs/child-welfare/parents-guide-child-abuse-investigation.page> [↑](#footnote-ref-6)
7. *Id.* [↑](#footnote-ref-7)
8. *Id.* [↑](#footnote-ref-8)
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13. *Id.* [↑](#footnote-ref-13)
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21. *Id.* [↑](#footnote-ref-21)
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28. *Id.* [↑](#footnote-ref-28)
29. *Id.;* ACOG Committee Opinion [↑](#footnote-ref-29)
30. *Id.*  [↑](#footnote-ref-30)
31. *Id.*  [↑](#footnote-ref-31)
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37. *Id.*  [↑](#footnote-ref-37)
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49. New York City Council General Welfare Committee Hearing Transcript (Oct. 24, 2018) at 61, <https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3691908&GUID=E3337FA3-2952-43F8-8004-7088D722C48> (hereinafter “ACS Preventive Services Transcript”). [↑](#footnote-ref-49)
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52. *Id.* at 101 [↑](#footnote-ref-52)
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57. Family Court Testimony, *supra* note 53 at 32-33 [↑](#footnote-ref-57)