



PAUL DeWOLFE
PUBLIC DEFENDER

KEITH LOTRIDGE
DEPUTY PUBLIC DEFENDER

MELISSA ROTHSTEIN
DIRECTOR OF POLICY AND DEVELOPMENT

KRYSTAL WILLIAMS
DIRECTOR OF GOVERNMENT RELATIONS DIVISION

ELIZABETH HILLIARD
ASSISTANT DIRECTOR OF GOVERNMENT RELATIONS DIVISION

POSITION ON PROPOSED LEGISLATION

BILL: House Bill 1335- Perinatal Care - Drug and Alcohol Testing and Screening - Consent

FROM: Maryland Office of the Public Defender

POSITION: Favorable

DATE: 03/8/2022

The Maryland Office of the Public Defender respectfully requests this Committee issue a favorable report on HB 1335.

Many women belonging to marginalized groups are unknowingly subject to drug and alcohol testing when they deliver their new born babies. Often times their babies are also tested. If a woman test positive she is reported to the Department of Social Services. She is often times forced to enter drug treatment at the threat that her new born baby will be taken from her. And often, newborn babies who have been exposed to drugs in utero are taken from their parents and placed in foster care. Aside from the positive drug screen, there is generally no proof that the mother has a substance use disorder and there is no proof that she is unable to parent her child. Yet and still, positive toxicology screens at birth are the basis for many newborns being ripped away from their parents and placed in the care and custody of the Department of Social Services.

We all have a basic human right to privacy, especially where our bodies are concerned. But for hundreds of mother's that basic privacy right is violated at birth when these women are drug and alcohol tested without their knowledge or consent.

When a mother or infant test positive for substances at the birth, this results in a report to Child Protective Services, which in turn places the infant at high risk of being removed from their parent, an act that we now know traumatizes children and families more than the harm done by substance use alone. Child Protective Services workers often determine that the existence of a positive drug test means that the mother has a substance use disorder (SUD)¹. Mothers who test

¹ Substance Use Disorder is defined as Substance use disorders (SUDs) are characterized by recurrent use of alcohol or drugs (or both) that results in problems such as being unable to control use of the substance; failing to meet obligations at work, home, or school; having poor health; and spending an increased amount of time getting,

positive for substances, if they do not commit to treatment can be adjudicated as having neglected their child with no nexus between a positive drug test and actual harm to the child. Often, barriers to treatment like employment, education or things needed to provide for a family's basic needs are not taken into consideration when mothers are being required to attend treatment or be separated from their child(ren).

A positive drug test is not dispositive proof of a mother's inability to give her child proper care and attention. However, infants are often removed from their mother's care on the basis of their mother testing positive for substances without being given the opportunity to show their ability to properly care for their child out of utero. Furthermore, additional trauma is inflicted on families when these mother's (and father's) rights are terminated within months, if they continue to test positive for drugs despite what other efforts may be made to improve their overall condition. These practices are devastating and don't support the legislature's commitment to keeping families together.

Drug testing of pregnant and perinatal persons is a matter of human rights as it is a practice that is rooted in discriminatory practices against poor and women of color². It has been widely established that hospitals that service predominantly poor women and black and brown women (primarily state and county hospitals) routinely drug test their pregnant patients and their infants without consent at a rate that far outpaces hospitals that service white wealthier women. Further, in a recent study it was seen that Hospitals that serve predominantly white and/ or upper class patients have stricter policies on drug testing in which informed consent has to be obtained. As such, this practice perpetuates the racist structure of the child welfare system that continues to remove black and brown children from their homes at a disproportionate rate than their white counterparts³.

Testing pregnant and perinatal women without their consent is a privacy violation. In addressing a similar issue where pregnant women and their babies were being drug tested without their consent and results were being turned over to the police, the Supreme Court stated:

“In each of those cases, we employed a balancing test that weighed the intrusion on the individual's interest in privacy against the “special needs” that supported the program. As an initial matter, we note that the invasion of privacy in this case is far more substantial than in those cases. In the previous four cases, there was no misunderstanding about the purpose of the test or the potential use of the test results, and there were protections against the dissemination of the results to third parties.¹² The use of an adverse test result to disqualify one from eligibility for a particular benefit, such as a promotion or an opportunity to participate in an extracurricular activity, involves a less serious intrusion on privacy than the unauthorized dissemination of such results to third parties. The reasonable

using, or recovering from the effects of using the substance. Lipari, R and Van Horn, s. (n.d.) Children living with parents with substance use disorders. Substance Use and Mental Health Services Administration.

² Fitzgerald, M. (November 2020) New York City to investigate hospital drug test for black and latino mothers, which can prompt foster care removals. *The Imprint Youth and Family News*.

³ “In 2018 black children represented 14% of the population but 23% of all children in foster care.” Annie E. Casey Foundation (April 13, 2020) Black Children Continue to Be Overrepresented in Foster Care. Kids Count Data.

expectation of privacy enjoyed by the typical patient undergoing diagnostic tests in a hospital is that the results of those tests will not be shared with nonmedical personnel without her consent. See Brief for American Medical Association et al. as *Amici Curiae* 11; Brief for American Public Health Association as *Amicus Curiae* 6, 17–19.¹³ In none **1289 of our prior cases was there any intrusion upon that kind of expectation.¹⁴

Ferguson v. City of Charleston, 532 U.S. 67, 78, 121 S. Ct. 1281, 1288–89, 149 L. Ed. 2d 205 (2001)

In order to receive proper health care treatment for themselves and their babies, pregnant mothers will often have to disclose private and personal information. They rightfully expect that what information they provide and what treatment they receive will be kept confidential. The fact that drug test are done without a woman’s knowledge or consent and then reported to the Department of Social Services is a violation of that woman’s right to privacy.

Additionally, this has become a public health issue as many vulnerable women, understanding the risk that is imposed on their ability to parent their child if they do test positive for substances will forego prenatal and/ or medical treatment for fear that children will be taken.

The practice of drug testing pregnant and perinatal women and their infants is not about the best interest or safety of the child. If it were, there would not be any discrepancy between what population of women are required to provide consent for drug testing and which women are not. Drug testing a woman and her newborn child without consent is a violation of her privacy right and is often times a discriminatory practice. Further it sets in motion a series of events that could permanently displace a child from their natural families, and does not provide any guarantee that the mother or the child will be better off because of it.

I propose that we create a statute that require mother’s to be informed and consent to drug and alcohol testing and screening of themselves and their infants during their pregnancy and at birth.

For these reasons, the Maryland Office of the Public Defender urges this Committee to issue a favorable report on HB 1335.

Submitted by: Government Relations Division of the Maryland Office of the Public Defender.

Authored by: Natasha Khalfani, Esq. Assistant Public Defender, (301) 580-3786, Natasha.Khalfani@maryland.gov