

## Summary of Hearing on Proposed Rules on Pregnancy, Childbirth, and Related Medical Conditions - November 12, 2020

### **Ground Rules**

Deputy Commissioner for Intergovernmental Affairs and Policy, Dana Sussman, outlined the ground rules for the hearing. Participants were reminded that written comments should be sent to [policy@cchr.nyc.gov](mailto:policy@cchr.nyc.gov) by November 19, 2020.

### **Summary of Oral Comments/Testimony Made During Hearing**

The Commission received verbal testimony from eight people. Summaries are listed in the order of testimony.

#### **Sarah Brafman – Senior Policy Counsel at A Better Balance (ABB)**

- Sarah Brafman, Senior Policy Counsel at A Better Balance, testified to highlight significant improvements that could be made to the proposed rule. Brafman noted how ABB is concerned about opacity and impracticability of parts of the rule. Her testimony identified four specific areas: 1. Medical documentation; 2. The cooperative dialogue; 3. Notice; and 4. Retaliation. Brafman testified that the new medical documentation standard is unworkable, as it would, among other issues, require employers to make a judgment as to what constitutes a pregnant worker's obvious need. There should not be a need for medical notes in order to obtain accommodations. On cooperative dialogue, Brafman urged the Commission to include: discussion in the proposed rules of how the cooperative dialogue is an individualized process; an explicit ban on categorical refusals of accommodations; and language that temporary excusal of essential requisites is a form of reasonable accommodation. For notice, Brafman testified that the rules should indicate how notice should be accessible to employees. Last, Brafman urged the rules to also include examples of what constitutes retaliation as it relates to discrimination based on pregnancy, childbirth, or related medical conditions.

#### **Allie Bohm – Policy Counsel at New York City Liberties Union (NYCLU)**

- Allie Bohm, who serves as Policy Counsel at NYCLU, testified in support of the proposed rule. Bohm indicated that the proposed rules take important steps to reduce discrimination based on pregnancy, lactation, and reproductive health decision-making; ensure that pregnant workers have the same career opportunities as their peers; and ensure that every New Yorker has the right to make confidential family planning and reproductive health care decisions without fear of unfair scrutiny or penalty by employers. Bohm focused on two main points during her testimony: first, it is critical for the proposed rules to underscore how pregnancy accommodations separate from other kinds of accommodations and should be addressed on their own terms. Second, the rules forbid using concerns for maternal or fetal safety as a basis for discriminatory treatment. Bohm testified there are other examples of pregnancy discrimination that would be helpful to include, such as including examples from healthcare settings. Pregnant people

are often coerced into unwanted interventions in childbirth, and sometimes doctors explicitly interfere. Bohm indicated these changes in language and additions to the proposed rules would strengthen the rules and ensure they accomplished their intent.

**Indra Lusero – Staff Attorney at National Advocates for Pregnant Women (NAPW)**

- Indra Lusero, Staff Attorney at NAPW, testified in support of the proposed rule. Lusero framed her testimony in international and local human rights standards: 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,” and highlighting the case of *Dray v. Staten Island University Hospital*. Lusero discussed the Hospital’s policy, “Managing Maternal Refusals of Treatment Beneficial for the Fetus” that set out circumstances in which medical procedures could be performed on nonconsenting pregnant patients and when this action could occur without seeking court approval for doing so. A major surgery was performed on Ms. Dray in reliance on this policy. Lusero testified to how critical the proposed rules at Section 2-07(b) are with regard to “Policies that Facially Discriminate Against People Based on Pregnancy, Childbirth, or Related Medical Conditions.” Lusero continued to say that pregnancy discrimination, especially in a form that constitutes medical mistreatment or punishment undermines legitimate state interest in protecting public health. Maternal, fetal and child health are best advanced by protecting the health and rights of pregnant people, not by circumscribing them. NAPW urged the Commission to include an example like Ms. Dray’s.

**Rashika Rakibullah – CUNY Law School Human Rights and Gender Law Clinic**

- Rashika Rakibullah, a student at CUNY Law School Human Rights and Gender Law Clinic testified in support of the proposed rule. Rakibullah discussed the Commission’s hearing on pregnancy and caregiver discrimination that was held in January 2019, and how specific themes and helpful recommendations came out of that hearing. Rakibullah also emphasized the role that international human rights law has played in securing pregnant people’s rights during childbirth.

**Elise Benusa – Policy Intern at Planned Parenthood of Greater New York**

- Elise Benusa, who serves as a Policy Intern at Planned Parenthood of Greater New York, testified in support of the proposed rule. Benusa testified to the importance of the rules to clarify protections with respect to pregnancy, childbirth, and related medical conditions; sexual and reproductive health decisions; and accommodations for employees who need to express breast milk while at work. Benusa also testified to the continuous need of holding employers to their obligations under the law towards their employees experiencing pregnancy or related medical conditions.

**Farah Diaz-Tello – Associate Legal and Policy Director at If/When/How**

- Farah Diaz-Tello, Associate Legal and Policy Director at If/When/How, testified in support of the proposed rule. Diaz-Tello discussed the special significance of the section in the proposed rules that states a covered entity cannot use its concerns about maternal

or fetal safety as a reason for discrimination. Diaz-Tello also discussed a case in Staten Island, *Dray v. Staten Island Univ. Hosp.*, where a pregnant woman was forced to have a procedure without her consent, and how medical settings may discriminate against pregnant people. Diaz-Tello also highlighted that international human rights doctrine recognizes mistreatment in birth as a serious human rights violation.

**Leticia Rios – Nurse educator and lactation consultant**

- Leticia Rios, who is a nurse educator and lactation consultant, testified in support of the proposed rule. Rios testified to witnessing the effects of discrimination and racism she sees mothers experience in her work. Rios stressed that the proposed rules would help address a lot of the issues pregnant women face at work and would reduce the rates of maternal and infant mortality, as the rules would help support pregnant people in search of the workplace accommodations they need. The majority of the individuals affected by discrimination are people of color. Rios shared that she, too, experienced discrimination in the workplace while she was pregnant and was unable to ask for accommodations based on her pregnancy. The proposed changes provide plain language and clarity that accommodations must be made, if possible, for pregnant woman in the work force.

**Alanna Sakovits – Member of the New York City Bar Association’s Sex & Law Committee**

- Alanna Sakovits, who is an attorney of Virginia & Ambinder, LLP and testified in her capacity as a member of the NYCBA’s Sex & Law Committee, testified in support of the proposed rule, though pointed out improvements that could be made. Sakovits noted that discrimination on the basis of pregnancy, childbirth, and related medical conditions is among the most invidious and prolific forms of discrimination, and it’s necessary to have robust anti-discrimination laws. Sakovits urged the Commission to add language to the rule that will ensure the right to receive reasonable accommodations without medical documentation, without invasive or unwanted employer-led conversations, without retaliation, and to provide for clear and timely notice on lactation accommodation rights. The Committee also urges the Commission to include examples in the rule that include gender non-conforming employees.