

Memorandum in Support

SECTION ON WOMEN IN LAW

Women #3

June 17, 2019

S. 1092-D
A. 6325-C

By: Senator Persaud
By: M. of A. Solages

Senate Committee: Health
Assembly Committee: Codes
Effective Date: 180th day after it shall have
become a law

AN ACT to amend the public health law and the education law, in relation to prohibiting the performance of a pelvic examination on an anesthetized or unconscious person.

LAW AND SECTIONS REFERRED TO: Section 2504 of the public health law and section 6530 of the education law.

The Women in Law Section (WILS) supports this bill, which would amend the Education Law to include in the definition of professional misconduct performing a pelvic examination without consent on an anesthetized or unconscious person, unless the examination is within the scope of a surgical procedure or diagnostic exam to be performed for which informed consent has otherwise been obtained, or in the case of an unconscious patient, required for diagnostic purposes and is medically necessary.

BACKGROUND

Performing a pelvic exam on an unconscious or anesthetized patient without their consent and without any medical purpose or benefit to the patient is a common practice in teaching hospitals throughout the United States.¹ Such exams are performed by medical students or residents under the supervision of licensed physicians to ostensibly instruct the students how to properly perform the exam. Often, the patient is never informed that she has undergone such an exam.²

¹ See e.g. Schniederjan S., Donovan GK., *Ethics versus education: pelvic exams on anesthetized women*. J Okla. State Med Assoc. 2005 Aug. 98(8):386-8, "In a survey of junior and senior medical students at the University of Oklahoma, a large majority of respondents reported having performed pelvic exams on anesthetized gynecologic surgery patients. Nearly three-quarters also reported believing that these patients had not specifically consented to undergo exams by students during their surgical procedures." See also Barnes, Shawn S, *Practicing Pelvic Examinations by Medical Students on Women Under Anesthesia: Why Not Ask First?*, *Obstetrics & Gynecology*: October 2012 - Volume 120 - Issue 4 - p 941-943.

² Schniederjan, *supra* note 1.

This practice properly has been called into question as a violation of a woman's bodily autonomy and dignity.

Article VIII of the New York State Education Law regulates the admission to practice in various professions, including medicine, in the state of New York.³ It also establishes the requirements of professional conduct in such professions by identifying behaviors that qualify as professional misconduct. This bill would amend the Education Law by including in the definition of professional misconduct performing or supervising a pelvic examination without consent on an anesthetized or unconscious person, unless the examination is within the scope of a surgical procedure or diagnostic exam to be performed for which informed consent has otherwise been obtained, or in the case of an unconscious patient, the pelvic exam is required for diagnostic purposes and is medically necessary.

LEGISLATIVE INTENT

The intent behind this statute is to ensure that a patient's bodily autonomy and dignity is not violated when she receives medical treatment that requires anesthesia or is otherwise rendered unconscious. The bill's sponsors referred to pelvic exams performed on unconscious patients as doctors "taking advantage" of women's bodies and "a pure violation."⁴

ANALYSIS

Under this bill, it would be considered professional misconduct to perform or supervise the performance of a pelvic examination on an anesthetized or unconscious patient without first obtaining the patient's informed consent to the pelvic examination, unless the exam is within the scope of the surgical procedure or diagnostic examination to be performed on the patient for which informed consent has otherwise been obtained, or in the case of an unconscious patient, the pelvic examination is required for diagnostic purposes and is medically necessary. Allegations of professional misconduct by a medical professional are investigated and enforced by the Office of Professional Medical Conduct (OPMC), which then maintains a public list of all practitioners who have been subject to disciplinary investigations or orders. Penalties may include suspension or revocation of the license to practice, fines of up to \$10,000, a requirement to receive additional training or a requirement to perform community service.⁵

Sociological research indicates that pelvic examinations can provoke discomfort in women due to the procedure's "intimate relationship between sex, power, and medical knowledge" and that the patient's concerns can be abated by practices which empower

³ NY Educ L § 6520 (2012); available at: <http://www.op.nysed.gov/prof/med/article131.htm>.

⁴ Eisenberg, A. *New bills would ban pelvic exams without consent.*, Politico, 2019 Mar. 14, <https://www.politico.com/states/new-york/albany/story/2019/03/13/new-bills-would-ban-pelvic-exams-without-consent-910976>.

⁵ New York's Professional Misconduct Enforcement System, www.op.nysed.gov/opd.

women by “acknowledging the specific context of the procedure, listening to the voice of the individual patient and respecting the inherent ambivalence of the situation.”⁶ Surveys have shown that the majority of women understandably expect and prefer that their consent be required prior to a medical student or resident performing a pelvic examination on them.⁷ Many women reasonably have reported that they would feel “physically assaulted” if they were to receive a pelvic exam without first providing their consent.⁸

This practice also has a disparate impact on underserved populations, including minorities and the uninsured, who are more likely to frequent public teaching hospitals.⁹

Viable alternatives are available, such as eliciting explicit consent from patients prior to administering anesthesia or hiring paid volunteers to receive exams from medical trainees. For example, NYU Langone Health employs women to undergo exams, called “employed pelvic trainers” as the primary mode of teaching pelvic exams.¹⁰

OTHER STATES AND PROFESSIONAL ORGANIZATIONS SUPPORT PROHIBITIONS AGAINST PELVIC EXAMS WITHOUT CONSENT

This practice is explicitly outlawed in Hawaii, California, Illinois, Virginia, and Oregon.¹¹ And many professional medical organizations have condemned it, including the American College of Obstetricians and Gynecologists’ Committee on Ethics.¹² The Association of American Medical Colleges has also denounced pelvic exams without specific consent as “unethical and unacceptable.”¹³

⁶ Larsen M, Oldeide CC, Malterud K., *Not so bad after all..., Women's experiences of pelvic examinations.* Fam Pract. 1997 Apr. 14(2):148-52.

⁷ Wainberg S., Wrigley H., Fair J., and Ross S. *Teaching pelvic examinations under anaesthesia: what do women think?*, J Obstet Gynaecol Can. 2010 Jan. 32(1):49-53.

⁸ Friesen, P., *Educational pelvic exams on anesthetized women: Why consent matters.* Bioethics, 2018 June: 32(5): 298-307.

⁹ Robin F. Wilson, *Autonomy Suspended: Using Female Patients to Teach Intimate Exams Without Their Knowledge or Consent*, 8 J. Health Care L. & Pol'y 240, 248 (2005), <http://digitalcommons.law.umaryland.edu/jhclp/vol8/iss2/5>.

¹⁰ Eisenberg, A., *supra* note 4.

¹¹ Cal. Bus. & Prof. Code § 2281 (2003); Haw. Rev. Stat. § 453-28 (2012); 410 Ill. Comp. Stat. 50/7 (2004); Or. Rev. Stat. § 676.360 (2011); Va. Code Ann. § 54.1-2959 (2007).

¹² Professional Responsibilities in Obstetric-Gynecologic Medical Education and Training, Comm. Opinion (Amer. College of Obstetricians and Gynecologists), Aug. 2011, reaffirmed 2017, at 1., (“Pelvic examinations on an anesthetized woman that offer her no personal benefit and are performed solely for teaching purposes should be performed only with her specific informed consent obtained before her surgery.”).

¹³ Press Release, Am. Ass'n of Med. Colls., AAMC Statement on Patient Rights and Medical Training (June 12, 2003), <http://www.aamc.org/newsroom/pressrel/2003/030612.htm> (last visited Mar. 16, 2005).
13. AM. COLL.

CONCLUSION

Based on the foregoing, the NYSBA's Women in Law Section **STRONGLY SUPPORTS** the enactment of this legislation.