

**NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE
BOARD OF HEALTH**

**Notice of Adoption of Amendments to
Article 203 of the New York City Health Code**

In compliance with section 1043(b) of the New York City Charter (“the Charter”) and pursuant to the authority granted to the New York City Board of Health (“Board of Health”) by section 558 of the Charter, a notice of intention (“NOI”) to amend Article 203 of the New York City Health Code (“the Health Code”) was published in the New York City Record on February 17, 2023, and a public hearing was held on March 21, 2023. No one testified at the hearing. However, four written comments were received, one of which was the basis for two changes to the proposed amendment of Article 203. At its meeting on June 15, 2023, the Board of Health adopted the following resolution.

Statement of Basis and Purpose

Since 2019, the New York State (“NYS”) Reproductive Health Act (NYS Public Health Law Article 25-a) has protected the right to an abortion throughout the State. The Act permits abortions when the patient is within twenty-four weeks from the commencement of pregnancy, there is an absence of fetal viability, or the abortion is necessary to protect the patient’s life or health. NYS Public Health Law § 2599-bb(1).

In contrast and as a result of the U.S. Supreme Court’s decision in *Dobbs v. Jackson Women’s Health Organization*, No. 19-1392, 597 U.S. ____ (2022), abortions are mostly banned in 12 states and have been severely restricted in many other states.¹ Some of these anti-abortion laws make it more difficult to receive standard surgical procedures or medication for the loss of desired pregnancies. There are reports of providers in the affected states refusing to perform procedures needed to fully evacuate the uterus after a spontaneous termination of pregnancy, *e.g.*, a dilation and curettage (“D&C”), lest they be accused of performing an abortion. Women have faced life-threatening infections and other complications as a result.² In addition, some lawmakers in states that have mostly banned abortions have considered targeting people traveling to other states to seek abortion care.³ Whether state abortion-restricting laws can apply extraterritorially is an open constitutional question.⁴

¹ For an analysis of each state’s policies, see Guttmacher Institute, “Interactive Map: US Abortion Policies and Access After Roe,” <https://states.guttmacher.org/policies/> (last accessed on November 10, 2022).

² See, Mendez, M., “Texas laws say treatments for miscarriages, ectopic pregnancies remain legal but leave lots of space for confusion,” *The Texas Tribune* (July 20, 2022), accessible online at <https://www.texastribune.org/2022/07/20/texas-abortion-law-miscarriages-ectopic-pregnancies/>; Belluck, P., “They Had Miscarriages, and New Abortion Laws Obstructed Treatment,” *New York Times* (July 17, 2022), accessible online at <https://www.nytimes.com/2022/07/17/health/abortion-miscarriage-treatment.html>; Rubin, R., “How Abortion Bans Could Affect Care for Miscarriage and Infertility,” *JAMA*. 2022;328(4):318-320. doi:10.1001/jama.2022.11488, accessible online at <https://jamanetwork.com/journals/jama/fullarticle/2793921>.

³ See, generally, David S. Cohen, Greer Donley & Rachel Rebouché, *The New Abortion Battleground*, 123 Columbia L. Rev. 1, (2022) (Draft), 17-23, available online at

In anticipation of the *Dobbs* decision, New York State and New York City took legislative action in 2022 to protect abortion patients and those helping patients access abortions. The State adopted laws generally prohibiting (1) courts and county clerks from issuing subpoenas in connection with out-of-state proceedings related to abortions lawfully performed in New York;⁵ and (2) State and local law enforcement agencies from cooperating with, or providing information to, any individual or out-of-state agency or department regarding abortions lawfully performed in New York.⁶ The City separately adopted a law prohibiting the use of City resources to cooperate with, or provide information to, any individual or out-of-state agency or department that would confirm, deny, or identify any person associated with an abortion that has been lawfully performed.⁷ This local law defines “abortion” as “the procedure to terminate a pregnancy for purposes other than producing a live birth, including a termination using pharmacological agents, and any services related to such procedure, including pre-procedure and post-procedure counseling.”

In New York City, fetal deaths must be reported to the Department as part of its vital records-keeping function.⁸ The Department is not permitted to include in its records of fetal deaths the name or any identifying information about an individual whose termination of pregnancy was induced unless the individual requests it to be collected.⁹ Rather, the Department uses unique, confidential identifiers to “monitor the quality of care provided by any individual or entity licensed to perform an abortion in this state and to permit coordination of data concerning the medical history of the woman for purposes of conducting surveillance scientific studies and research.”¹⁰ In addition, the City’s Administrative Code provides that records of fetal death “shall be issued upon request unless it does not appear to be necessary or required for a proper purpose.”¹¹

In New York City, Health Code Section 203.03(a) requires that all terminations of pregnancy be reported to the Department. “Termination of pregnancy” (“TOP”) is defined in Health Code § 203.01(a) as “the expulsion or extraction of a conceptus, regardless of the duration of pregnancy, other than a live birth ... , and includes fetal death.” Section 203.01(b) defines “spontaneous termination of pregnancy,” commonly referred to as a miscarriage, as the “unplanned termination of a pregnancy,” while section 203.01(c) defines “induced termination of pregnancy,” commonly referred to as an abortion, as “the purposeful interruption of an intrauterine pregnancy with the intention other than to produce a live-born infant and which does not result in a live birth.” Health Code § 203.07(a) and 203.07(c) relate to the

https://scholarship.law.pitt.edu/cgi/viewcontent.cgi?article=1515&context=fac_articles.

⁴ *See id.*

⁵ NYS Civil Practice Law and Rules §§ 3102(e), 3119(g).

⁶ NYS Executive Law § 837-w.

⁷ NYC Administrative Code § 10-184(b)(2).

⁸ *Id.* § 17-166(a).

⁹ *Id.* § 17-166(e).

¹⁰ *Id.*

¹¹ *Id.* § 17-169(b).

confidentiality of information pertaining to the spontaneous and induced termination of a pregnancy, respectively. Section 203.07(c) requires that the certificate of induced TOP “be confidential and not subject to compelled disclosure or to inspection by persons other than the Commissioner or authorized personnel of the Department.” By contrast, Health Code § 203.07(a) offers *less protection* to confidential medical reports of spontaneous TOPs by allowing disclosure of the records “in a criminal action or criminal proceeding, or for official purposes by a federal, State, county or municipal agency charged by law with the duty of detecting or prosecuting crime. The Commissioner may, however, approve the inspection of such medical reports for scientific purposes.”

The lesser protections afforded spontaneous TOPs by Health Code § 203.07(a) are no longer compatible with the State and City laws enacted in 2022 and described above. Under the current Code provisions, it is possible that an out-of-state law enforcement agency could try to access spontaneous TOP records of an out-of-state resident in order to commence an action against an alleged “illegal abortion” under that state’s laws. The Board is therefore amending Health Code § 203.07 to afford both induced and spontaneous TOPs the same level of protection and to allow the Department to assess any subpoenas or other requests for spontaneous TOP records to determine whether the underlying use is permitted by federal, State and City law.

Four written comments were received regarding these proposed Health Code amendments. One comment was not responsive and two were general notes in support of the proposed rule.

The fourth comment suggested two changes to the proposed amendments. The first proposed change was to make clear that an inspection of medical reports and certificates allowed for a “lawful purpose” be lawful in accordance with the laws of New York State and New York City specifically. This proposed change actually echoed comments made by two Board members at the February 9 Board meeting. The second proposed change was to impose a requirement that all records disclosed for scientific purposes be deidentified.

The Board is adopting the first suggested change with a slight modification, by adding a reference to federal law. The Board is also adopting the second suggested change, so it is clear that an inspection of medical reports and certificates for scientific purposes will still preclude the disclosure of identifiable information.

The proposed amendment is as follows:

New material is underlined.

[Deleted material is in brackets.]

Asterisks (***) indicate unamended text.

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

RESOLVED, that section 203.07 of Article 203 of the New York City Health Code, set forth in Title 24 of the Rules of the City of New York, be amended to read as follows:

§ 203.07 Confidential medical report of spontaneous termination of pregnancy and certificate of induced termination of pregnancy; not subject to [compelled disclosure or] inspection.

- (a) The confidential medical report of a spontaneous termination of pregnancy and the certificate of induced termination of pregnancy shall be confidential and not subject to [compelled] disclosure or to inspection by persons other than the Commissioner or authorized personnel of the Department[, except in a criminal action or criminal proceeding, or for official purposes by a federal, State, county or municipal agency charged by law with the duty of detecting or prosecuting crime]. The Commissioner or the Commissioner's designee may, however, approve the inspection by others of such medical reports and certificates for scientific purposes or in accordance with federal, New York State, or New York City law.
- (b) Within the context of this section, scientific purposes shall mean epidemiologic surveillance and investigation by a governmental public health agency, research, or the compilation of statistics relating factors bearing on disease incidence, prevalence, mortality or treatment, provided that, in no instance shall personally identifiable information be released.
- [(c) The certificate of induced termination of pregnancy shall be confidential and not subject to compelled disclosure or to inspection by persons other than the Commissioner or authorized personnel of the Department.]