
Invasive Exams without Prior Consent: Recommendations for Legislative Response

A position paper from the New Jersey Coalition Against Sexual Assault, February 2020

In Brief

The New Jersey Coalition Against Sexual Assault:

- **Strenuously opposes** the practice of performing pelvic and other invasive exams without patient consent.
- **Calls for** a ban on invasive examinations on patients who have not given prior consent.

At Issue

At present, medical students across the country continue to perform pelvic examinations on anesthetized and otherwise unconscious patients who have not given consent.¹ This is done as a means of aiding medical students in learning reproductive anatomy. The practice most commonly affects women, but can also affect other people with vaginas, including transgender men, transgender women, and people who identify outside the gender binary. Expert medical organizations, including the [American Medical Association](#) and the [American College of Obstetricians and Gynecologists](#) have affirmed the need for informed consent for medical student involvement in patient care and have renounced the practice of performing pelvic exams on nonconsenting patients. The practice has been banned in ten states, including Delaware, California, Hawaii, Illinois, Iowa, Maryland, New York, Oregon, Utah, and Virginia. Medical students have expressed shame at having participated in the practice and have shared they felt refusing to participate would have a negative impact on their schooling and career.² When polled, between 72 to 100 percent of women said they would want to give

¹ For an overview see: Phoebe Friesen, Why Are Pelvic Exams on Unconscious, Unconsenting Women Still Part of Medical Training?, Slate, Oct. 30, 2018, <https://slate.com/technology/2018/10/pelvic-exams-unconscious-women-medical-training-consent.html>. For discussion in professional, peer-reviewed journals, see: Bibby, J., Boyd, N., Redman, C., & Luesley, D. 1988. "Consent for Vaginal Examination by Students on Anaesthetised Patients." *The Lancet (British Edition)* 2 (8620): 1150; Friesen, Phoebe. 2018.

"Educational Pelvic Exams on Anesthetized Women: Why Consent Matters." *Bioethics* 32 (5): 298–307; Wainberg, Sara, Heather Wrigley, Justine Fair, and Sue Ross. 2010. "Teaching Pelvic Examinations Under Anaesthesia: What Do Women Think?" *Journal of Obstetrics and Gynaecology Canada: JOGC = Journal D'obstetrique et Gynecologie Du Canada: JOGC* 32 (1): 49–53; and, Wilson, Robin Fretwell. 2003. "Unauthorized Practice: Teaching Pelvic Examination on Women under Anesthesia." *Journal of the American Medical Women's Association* 58 (4): 217–20; discussion 221–22.

² Friesen, *ibid.*, <https://slate.com/technology/2018/10/pelvic-exams-unconscious-women-medical-training-consent.html>. See also, Carungo, JA. Practicing pelvic examinations by medical students on women under anesthesia: why not ask first? [letter] *Obstet Gynecol* 2012;120:1479–80.



consent before an educational pelvic exam was performed on them while they were under anesthetic.³ In a legislative memo, the ACLU of New York noted the practice may disproportionately impact poor women and women of color, as safety net hospitals (SNHs) are twice as likely to be teaching hospitals than non SNHs.⁴ Unconsented pelvic exams, while a violation to all patients upon whom they have been practiced, can be particularly traumatic for survivors of sexual assault.

In consideration of these facts, it is long past time to ban this practice in New Jersey.

In-Depth

NJCASA acknowledges the [deep roots of misogyny that run throughout the history of gynecology and medicine](#). We believe recognizing this history, and the practice of unconsented pelvic exams as an abuse primarily faced by women, is critical to dismantling the sexism and misogyny which continue to flourish in our culture and in our professions, including in medicine. We also realize that sexism and misogyny are foundational to homophobia and transphobia and know that LGBTQ people have historically, and presently, faced discrimination and abuse in health care settings. Specifically, numerous surveys of both practitioners and LGBTQ identified patients have found that bias against LGBTQ people continues to persist in healthcare; LGBTQ people, having experienced or anticipated bias, are more likely than their cisgender and heterosexual peers to delay necessary care and to face attendant health disparities; transgender people and LGBTQ people of color face the highest rates of bias and discrimination in healthcare settings; and transgender and non-binary identified people experience heightened anxiety in accessing gynecological care.⁵ Given these realities and the fact that pelvic examinations can be performed on any patient with a vagina, it is important to balance an acknowledgement that women are the majority of patients subjected to these exams, with a call to end the practice for all patients through legislation that is gender-neutral in its proscriptions and prohibitions.

Indeed, we understand that in policy and law making, language must be precise to our intent. As a society, we must decouple the language of anatomy from the language of gender, for the simple reason that it does not represent all of us – that is, not all women have vaginas, and not all men have penises. If, in legislation, we call this a ban on pelvic examinations of female patients, we leave the law open to interpretation when it comes to transgender men, transgender women, and non-binary identified people with vaginas. No one, regardless of gender identity or anatomy, should be subjected to an invasive examination without giving prior consent. **We therefore call for a gender-neutral ban on invasive examinations without prior consent and can only support a bill that uses gender-neutral language in banning this practice.**

When we state that no one should be subjected to an invasive examination without their consent, we include persons who do not have the legal capacity to give consent, a category that includes minors and persons with intellectual disabilities. While we see this as an absolute that requires no rationalization – persons who cannot consent should not have their bodies used for teaching purposes, full stop – we also feel it is important to recognize that persons with intellectual disabilities are disproportionately impacted by sexual violence.

³ See <https://www.ncbi.nlm.nih.gov/pubmed/20370981>; and <https://www.ncbi.nlm.nih.gov/pubmed/2903370>. See also Wainberg, Wrigley, et al., Teaching Pelvic Examinations Under Anaesthesia: What Do Women Think?, 32 J. Obstet. Gynaecolo. Can. 49, 51 (2010).

⁴ See <https://www.nyclu.org/en/legislation/legislative-memo-relates-requiring-consent-perform-pelvic-examination-anesthetized-or>. For characteristics of Safety Net Hospitals and their overlap with teaching hospitals see: <https://www.ncbi.nlm.nih.gov/books/NBK401306/>

⁵ For an overview and additional resources see Center for American Progress, Discrimination Prevents LGBTQ People from Accessing Healthcare: <https://www.americanprogress.org/issues/lgbtq-rights/news/2018/01/18/445130/discrimination-prevents-lgbtq-people-accessing-health-care/>



Specifically, we know that people with intellectual disabilities are seven times more likely than the general public to have experienced sexual assault. Additionally, while most survivors know their attacker, this is doubly true for survivors with intellectual disabilities, with 86 percent reporting that they knew the person who sexually assaulted them.⁶ Unconsented pelvic exams can be especially traumatic for survivors of sexual assault, and persons with intellectual disabilities are more likely to be survivors. Any ban on unconsented exams must explicitly state that consent cannot be given by a party other than the patient, including persons otherwise authorized to give consent for the patient's medical care.

We recognize there is debate and even controversy over how to obtain consent for examination under anesthesia, how to document that consent was given, and whether and how to communicate that consent was given to all parties involved in providing health care to a patient, including to medical students. We realize that processes surrounding consent will continue to vary by institution, and for that reason call for legislation banning the practice to include workable guidelines on obtaining, documenting, and communicating consent (e.g. consent must be given verbally and in writing; the practice must be explained verbally to the patient; the form must be stand alone and not part of a larger consent form).

In recognition of the above concerns, we call on the New Jersey Legislature to draft and pass legislation which:

- Bans the practice of performing invasive examinations on any patient who has not given prior consent;
- Uses gender-neutral language to refer to patients and anatomy;
- Makes explicit that consent cannot be given for the purpose of a teaching examination of any kind by a third party authorized to make medical decisions for a patient; and
- Provides guidelines on obtaining, documenting, and communicating consent to all members of the medical team involved in the patient's care.

⁶ These statistics are drawn from the 2011-2015 Bureau of Justice National Crime Victim Survey. For an overview of this epidemic of violence see: <https://www.npr.org/2018/01/08/570224090/the-sexual-assault-epidemic-no-one-talks-about>

