

Compensated Gestational Surrogacy in the United States:

Baseline Guiding Principles for Proactive Policy

As the incidence of compensated gestational surrogacy in the United States increases, states are reconsidering their legal and policy approaches to the issue. Compensated gestational surrogacy implicates core human rights of multiple stakeholders, including persons acting as gestational surrogates, children born of such arrangements, and intended parents. In the United States, legislation authorizing and regulating compensated gestational surrogacy has the potential to ensure legal certainty and the respect, protection, and fulfillment of the human rights of all stakeholders. Such legislation also has the potential to recognize and address power dynamics in compensated gestational surrogacy arrangements that may be rooted in gender, economic, and structural inequalities.

The Center for Reproductive Rights' work on compensated gestational surrogacy in the U.S. is part of an effort to advance the full spectrum of reproductive rights rooted in the human rights framework. This document posits a set of considerations critical to ensuring that laws and policies on compensated gestational surrogacy in the United States respect, protect, and fulfill the rights of all stakeholders to a surrogacy arrangement. We urge lawmakers to take the following considerations into account when developing legislation authorizing compensated gestational surrogacy:

Every person has the right to make decisions about their reproductive life.

Consistent with human and constitutional rights, a person acting as a gestational surrogate controls all decisions about their body throughout a compensated gestational surrogacy arrangement, including during attempts to become pregnant, pregnancy, delivery, and post-partum.

Laws and policies must not discriminate against people on prohibited grounds, such as race/ethnicity, gender, sex (including sex stereotypes, gender identity, gender expression, and sexual orientation), marital status, nationality, religion, and/or disability.

Additionally, laws and policies regarding compensated gestational surrogacy must not result in differential treatment based on such distinctions or reflect beliefs about motherhood or parenthood that exclude or discriminate against individuals seeking to enter into a compensated gestational surrogacy arrangement, particularly with regards to single individuals, same-sex couples, transgender people, and people with disabilities.

What is compensated gestational surrogacy?

A practice that involves an intended parent(s) contracting with a person to act as a gestational surrogate and attempt to become pregnant, carry to term, and deliver a child(-ren) using an embryo(s) created via IVF and to receive payment beyond reimbursement for "reasonable" medical expenses. The person who acts as a gestational surrogate neither contributes their own gametes to the creation of the embryo(s) with which they are implanted nor intends to parent the child(-ren) born via gestational surrogacy.

Why use gender-neutral language?

Discussions around compensated gestational surrogacy often center the experience of cisgender women. To acknowledge that people with a range of gender identities may act as gestational surrogates, we use the term "person(s) acting as gestational surrogate(s)."

Governments must ensure that reproductive healthcare information and services are available, accessible, acceptable, and of good quality without discrimination.

All pregnant persons, including persons acting as gestational surrogates, are entitled to dignified, safe, respectful, affordable, and accessible reproductive health care from health professionals of their choice during all stages of pregnancy, including during attempts to become pregnant, pregnancy, delivery, and post-partum.

Every person has the right to make and exercise decisions regarding matters concerning their body and sexual and reproductive health free of violence, coercion, and discrimination.

Persons acting as gestational surrogates must be able to exercise this right at each stage of the process, including birth, with the confidence that their decision will be respected. Health care professionals providing care to a person acting as a gestational surrogate must consider that person their patient to whom they owe a duty of care and must prioritize their physical and mental health throughout a compensated gestational surrogacy arrangement.

Every person has the right to comprehensive, unbiased, and evidence-based information and services and to consent to or refuse treatment.

Informed decision-making based on comprehensive, unbiased, and evidence-based information and services is critical throughout a compensated gestational surrogacy arrangement. To make informed decisions, persons acting as gestational surrogates should be well-informed about risks associated with the reproductive technology used to become pregnant as well as those associated with pregnancy and childbirth.

Rights protections adhere at birth.

Laws and policies concerning compensated gestational surrogacy do not grant pre-natal rights protections to an embryo or fetus. States may not use the regulation of compensated gestational surrogacy as a mechanism by which to apply human rights protections to an embryo or a fetus.

States must ensure laws, policies, and practices guarantee the rights of all children, including but not limited to the right to a name, to be registered at birth, and to a nationality.

Laws and policies concerning parental recognition, guardianship, and adoption must guarantee the rights of children born via compensated gestational surrogacy and center the principle of the best interest of the child.

Every person has the right to decide whether or not to become a parent.

Pre-birth parentage orders (PBPOs) in compensated gestational surrogacy arrangements help establish legal clarity by establishing who the future child's legal parents will be if and once the child is born. The process to petition for a judicial PBPO must include affirmative participation by the intended parent(s) and the person acting as a gestational surrogate or their independent legal representation. PBPOs neither grant fertilized eggs, embryos, or fetuses the status of persons under the law nor grant any party parental rights over them.

Every person has a right to benefit from scientific advancements.

States must ensure that scientific benefits are made physically available and economically affordable on a non-discriminatory basis, particularly for marginalized communities. This right in no way obliges a state to provide an intended parent(s) with access to a person to act as a gestational surrogate for the purposes of having a child via compensated gestational surrogacy. This right also does not provide a guarantee or assurance that an intended parent(s) who contracts with a person to act as a gestational surrogate will ultimately have a child.

States should ensure that persons directly impacted can effectively and meaningfully participate in the development, adoption, and implementation of laws and policies that impact them.

Laws and policies to authorize and regulate compensated gestational surrogacy should be developed with significant and authentic engagement and input from people most impacted, including persons acting as gestational surrogates, children born of compensated gestational surrogacy arrangements, and intended parents.

Public and private actors have a responsibility to respect the human rights of all stakeholders.

States must ensure that laws, policies, and practices on compensated gestational surrogacy promote accountability and transparency in decision-making at the local, state, and federal level and by private actors.