“Should we call CPS?”

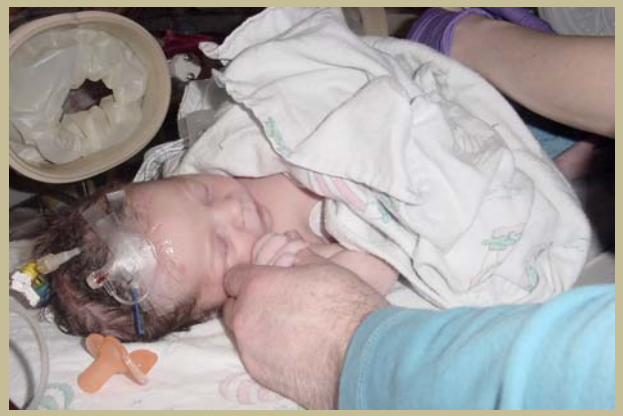
Legal Requirements & Best Practices in Child & Family Advocacy for Medical Providers

Nebraska Medical Association
June 11, 2019

Sarah Helvey, J.D., M.S.
Child Welfare Director
Nebraska Appleseed

Objectives

- Provide an overview of Nebraska's child welfare system, including referrals, safety and risk assessments, service availability and limitations, and case progression
- Describe relevant state and federal laws and best practices, including mandated reporting, drug testing, CAPTA/CARA, and the new Family First Act
- Describe how health care providers can advocate for children and families, particularly infants and pregnant women in situations involving substance use



Legal Disclaimer

This presentation is intended for general information purposes only and does not constitute legal advice. We do not, nor cannot, advise you on how or if to utilize this information in the context of your employment. This information is not intended to substitute for professional legal advice and does not create an attorney-client relationship with Sarah Helvey or Nebraska Appleseed.

NEAPPLESEED.ORG

Nebraska Medical Education Trust disclosure & CME

Policies and standards of the Nebraska Medical Education Trust require that speakers and planners for continuing medical education activities disclose any relevant financial relationships they may have with commercial interests whose products, devices or services may be discussed in the content of a CME activity. The speaker and planning committee have no relevant financial relationships to disclose.

Nebraska Medical Education Trust designates this live activity for a maximum of 1.0 *AMA PRA Category 1 Credit*(s)™. Physicians should claim only the credit commensurate with the extent of their participation in the activity.

Nebraska Medical Education Trust is accredited by the Nebraska Medical Association to provide continuing medical education for physicians.

NEAPPLESEED.ORG

Nebraska's Child Welfare System

- 10,452 kids were in NE's CW system at some point in 2017
  - 7,157 (68.5%) from 3,890 families were court-involved
  - 3,296 (31.5%) from 1,229 families were non-court-involved

- Of *entries* in 2017 (n=5,765), 44% were court-involved/56% were non-court-involved

Voices for Children in Nebraska, Kids Count Report (2018)

NEAPPLESEED.ORG

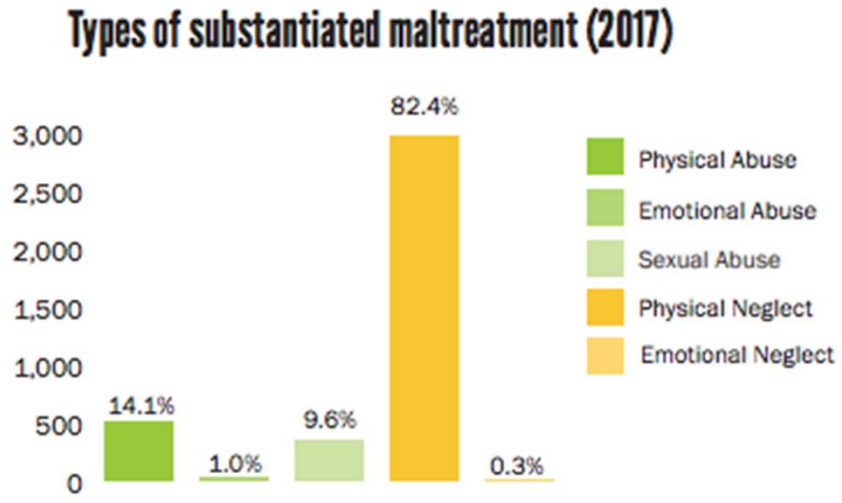
Nebraska's Child Welfare System

- Any involvement by age:
  - Infant (0-1): 1,442 (13.8%)
  - Toddler (2-4): 1,952 (18.7%)
  - School Age (5-12): 4,239 (40.6%)
  - Teen (13-18): 2,820 (27.0%)

Voices for Children in Nebraska, Kids Count Report (2018)

NEAPPLESEED.ORG

Nebraska's Child Welfare System



Voices for Children in Nebraska, Kids Count Report (2018)

Nebraska's Child Welfare System

Removal reasons of children in out-of-home care			
Neglect (alleged/reported)	2,586	Sexual abuse (alleged/reported)	288
Drug abuse (parent/caretaker)	2,192	Mental and emotional Abuse	64
Physical abuse (alleged/reported)	916	Mentally ill and dangerous (child)	54
Domestic violence	590	Death of parent(s)/caretaker(s)	44
Inadequate housing	433	Court determined that reasonable efforts are not required	38
Child's behavior problem	283	Alcohol abuse (child)	24
Abandonment	348	Diagnosed child's disability	23
Incarceration of parent(s)/caretaker(s)	427	Drug abuse (child)	18
Parent's/caretaker's inability to cope due to illness/other	201	Relinquishment	7
Alcohol abuse (parent/caretaker)	249	Safe haven	4
**A child may have more than one reason for removal from their home.*		**Grand total**	**8,789**

Voices for Children in Nebraska, Kids Count Report (2018)

Substance Use in Nebraska Child Welfare

In a study of NE cases that opened in 2009:

- **Majority of CW cases had SA-related problems** (58%)
- **Most SA parents also had mental health problems** (85% of SA parents identified also had a MH problem identified) and **many had DV issues** (40%)
- **SA parents face long delays to start tx** (majority of SA issues identified at entry into the system, but median time to start tx was > 4 months from the petition filing)
- **Many SA parents get a lower level of tx than they need** (approx. 1/3 of mothers were provided outpatient tx)

Nebraska's Response to Substance Abusing Parents in Child Welfare, A Review of Cases that Opened in 2009, Nebraska Court Improvement Project (2011).

NEAPPLESEED.ORG

Nebraska's Child Welfare System

- Of 2017 exits from care, average length of stay was 20 months
- Of exits (2008-2017):
  - Reunification (50.7%)
  - Adoption (25.6%)
  - Other (10.0%)
  - Guardianship (9.7%)
  - Independent Living (4.0%)
- 52% of kids in out-of-home placement live with relatives or kin
- Most of these measures show disproportionality by race/ethnicity

Voices for Children in Nebraska, Kids Count Report (2018)

NEAPPLESEED.ORG

Mandated reporting in Nebraska

- In Nebraska, everyone is a mandated reporter
- This includes physicians, medical institutions, nurses, school employees, social workers **or any other person** who has **reasonable cause to believe that a child has been subjected to abuse or neglect** is required by law to make a report to the CPS hotline or law enforcement

- Willful failure to report is a crime under Nebraska law. Neb. Rev. Stat. § 28-717

Mandated reporting

Neb. Rev. Stat. § 28-711

Child subjected to abuse or neglect; report; contents; toll-free number.

"(1) When any physician, any medical institution, any nurse, any school employee, any social worker…or any other person has reasonable cause to believe that a child has been subjected to child abuse or neglect or observes such child being subjected to conditions or circumstances which reasonably would result in child abuse or neglect, he or she shall report such incident or cause a report of child abuse or neglect to be made to the proper law enforcement agency or to the department on the toll-free number established by subsection (2) of this section..."

Reports & Intakes

- In NE, a **report** can be made to either the Hotline or law enforcement
- The Hotline also **screens** all reports to see if they meet the definition of child abuse and require an investigation
- Screening responses:
  - "Does Not Meet Definition"
  - "Accepted" for DHHS investigation ("initial assessment")
  - Refer for LE investigation
- DHHS uses Structured Decision Making® (SDM), a nationally-recognized set of assessments to measure safety and risk

Nebraska's Child Welfare System

Voices for Children in Nebraska, Kids Count Report (2018)

NEAPPLESEED.ORG

DHHS drug testing protocol

Effective 10/01/18

- When substance use is identified, CFS will refer for an evaluation
- CFS will provide drug testing only if court-ordered
- Otherwise, if recommended in the eval, testing must be arranged by the provider & parent, and paid for by Medicaid/insurance or the parent

Prenatal drug testing

- *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) – violation of 4th AM search & seizure for hospital to involuntarily test pregnant mother's urine w/o a warrant or informed consent and, if positive, turn them over to law enforcement

CAPTA & CARA

- Since 2003, CAPTA has included a state plan requirement that the Governor provide an assurance that the state has policies/procedures to address the needs of substance-exposed infants (SEI), including a requirement that:
  - health care providers involved in the delivery of care of SEIs
  - notify CPS and develop a plan of safe (PoSC) care for the affected infants

- Most recently, on July 22, 2016, CARA amended CAPTA to:
  - Remove the term "illegal" before substance as applied to SEIs, opening up application to opioid and fetal alcohol exposure
  - Require PoSC address the needs of BOTH infants AND their families or caretakers
  - Add data collection and monitoring

42 U.S.C. § 5106a(b)(2)(B)(ii) and (iii)

CAPTA as amended by CARA

42 U.S.C. § 5106a(b)(2)(B)(ii) and (iii)

Grants to States for child abuse or neglect prevention and treatment programs

The state must "submit an assurance in the form of a certificate by the Governor of the State that the State … has in effect and is operating a statewide program, related to child abuse and neglect that includes…."

- ***(ii) policies and procedures*** *(including appropriate referrals to [CPS] systems and for other appropriate services)* ***to address the needs of infants born with and identified as being affected by substance abuse or withdrawal symptoms resulting from prenatal drug exposure, or a Fetal Alcohol Spectrum Disorder****, including a requirement that health care providers involved in the delivery or care of such infants notify the [CPS] system of the occurrence of such condition in such infants, except that such notification shall not be construed to—*
  - ***(I)*** *establish a definition under Federal law of what constitutes child abuse or neglect; or*
  - ***(II)*** *require prosecution for any illegal action;*
- ***(iii) the development of a plan of safe care for the infant*** *born and identified as being affected by substance abuse or withdrawal symptoms, or a Fetal Alcohol Spectrum Disorder to ensure the safety and well-being of such infant following release from the care of health care providers,* ***including through—***
  - ***(I) addressing the health and substance use disorder treatment needs of the infant*** *and affected family or caregiver; and*
  - ***(II)*** *the development and implementation by the State of* ***monitoring systems regarding the implementation of such plans*** *to determine whether and in what manner local entities are providing, in accordance with State requirements, referrals to and delivery of appropriate services for the infant and affected family or caregiver;*

CPS Notification & Plans of Safe Care (PoSC)

- CAPTA/CARA is very broad and non-specific
- States and providers have a fair amount of flexibility to develop guidelines, and jurisdictions vary a lot
- However, federal guidance has clarified that:
  - State must have a law/policy/procedure requiring HC providers to notify CPS of SEI, but a "notification to" or "referral of" a case does not necessarily constitute a report of abuse/neglect.
  - The focus is on identifying infants at risk & developing a PoSC
  - The state may determine which agency or entity (such as hospitals or community-based organizations) will develop the PoSC*
- Note that there may be Federal confidentiality restrictions for the State to consider when implementing this CAPTA provision**

* U.S. Department of Health and Human Services, Administration for Children and Families, Information Memorandum, ACYF-CM-IM-16-05, August 26, 2016

** 45 C.F.R 164.512(b)(1)(ii)

Nebraska law

- Mandatory reporting laws do not apply to unborn children, but does apply after birth
- No specific law states that substance use during pregnancy is child abuse or that HC providers must report drug use during pregnancy

ProPublica report

How States Handle Drug Use During Pregnancy

by Leticia Miranda, Vince Dixon and Cecilia Reyes
Published on September, 30, 2015

Tweet Like 115

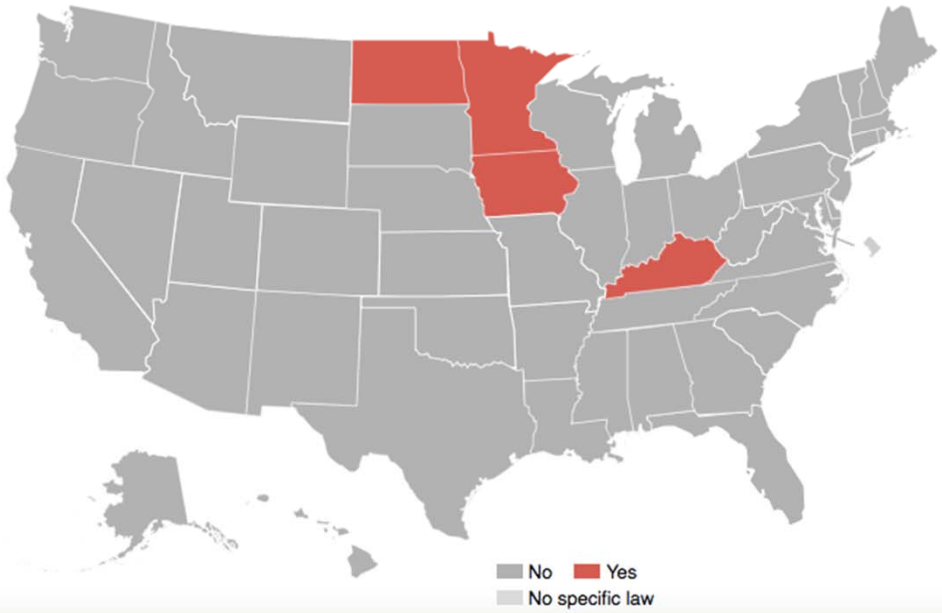
Across the country, hundreds of pregnant women and new mothers have been accused of child abuse or other crimes when they or their newborns tested positive for controlled substances. Laws on drug testing of infants and new mothers vary, but the stakes are always high. In many places, women lose their children or end up in behind bars, sometimes even if the drug was prescribed. Here is a survey of state laws.

Related: How some hospitals are drug testing new mothers without consent, How Alabama's meth lab law is unfairly punishing pregnant women, Mothers: tell us about drug testing at your hospital.

Compare states by

- Substance abuse during pregnancy is a crime
- Women have been prosecuted for drug use during pregnancy
- Substance abuse during pregnancy is child abuse
- Substance abuse during pregnancy is grounds for civil commitment
- Health care workers must report drug abuse during pregnancy
- Testing is required if drug use during pregnancy is suspected

Most states do not have a law that requires hospitals to test infants and new moms for controlled substances. In Minnesota and North Dakota, a test is required if there are drug-related complications at birth.



CAPTA/CARA efforts in Nebraska

- Nebraska Perinatal Quality Improvement Collaborative
- Nebraska DHHS differentiates between “notification” with no patient identifiers for data purposes and “reporting” when safety concerns exist or child abuse/neglect is suspected

NPQIC
Nebraska Perinatal Quality Improvement Collaborative

American College of Obstetrics & Gynecology recommendations

- Universal drug screening (questionnaire not testing) during prenatal care
- If screening indicates risk, drug testing with patient informed consent, including ramifications of positive results including mandatory reporting requirements
- Extent of consent and reporting required before and after is based on state law

ACOG Committee Opinion, Number 711 (Aug. 2017)

American Academy of Pediatrics recommendations

- Consistent with the ACOG

- The AAP first published recommendations on substance-exposed infants in 1990 and reaffirmed its position in 1995 that "*punitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health*"
  - More than 20 national organizations have since published statements against the prosecution and punishment of pregnant women who use illicit substances:
    - including the American Medical Association, the American Academy of Family Physicians, the American Nurses Association, the American Psychiatric Association, and the American Society of Addiction Medicine.

American Academy of Pediatrics Policy Statement
Patrick, S.W., Schiff, D.M, Committee on Substance Use and Prevention
Pediatrics, Volume 139/Issue 3 (March 2017)

The Family First Prevention Services Act (FFPSA)

- Enacted into law on Feb. 9, 2018 as part of The Bipartisan Budget Act of 2018
- Most significant federal child welfare reform in decades
- Among other things, for the first time, permits states the option to receive federal foster care funding for prevention services

FFPSA prevention services

- Who is eligible: children who are "candidates" for foster care (and their parents and kin caregivers) and pregnant or parenting youth in foster care, w/o regard to income
- What is available:
  - (1) **mental health and substance use prevention and treatment services**
  - (2) **in-home parent skill-based services** (i.e. parenting skills training/education, individual and family counseling)
- For a maximum of 12 months
- Services must be **trauma-informed** and meet **evidence-based** requirements

- Also states can receive federal matching funds for a child in foster care who is placed with a parent in a **licensed residential family-based facility for substance use treatment** (e.g., Family Works through HFS)

How can health care providers advocate for pregnant women & new moms?

- **Establish a respectful, empathic, & collaborative relationship**
  - A recent review found this can improve engagement w/ perinatal services
  - If mothers feel stigmatized or guilty, it can impair communication w/ the HC provider
- **Use a nonjudgmental & open-ended approach to interviewing about substance use during pregnancy**
  - This can help facilitate disclosure & increase effectiveness of screening tools
- **Support rooming-in and breastfeeding for mothers who are stable and receiving opioid-substitute treatment**
  - Evidence supports this can improve NAS outcomes
- **Participate in the plan of safe care & be aware of options for treatment and support**

McQueen, K, Murphy-Oikonen, J. Neonatal Abstinence Syndrome. N Engl J Med 2016; 375:2468-2479

How can health care providers advocate for babies?

- **Conduct a comprehensive psychosocial assessment of the family** to ensure adequate support & safety of the newborn
- **Support the mother's participation in the infant's care**
  - Research suggests this can improve the manifestation of NAS & enhance bonding
- **If there are safety concerns, work collaboratively** with CPS, the HC team, & the family
- **Participate in the plan of safe care & help facilitate medical follow up and social services after discharge** (e.g., early-intervention, home visiting, etc.)

McQueen, K, Murphy-Oikonen, J. Neonatal Abstinence Syndrome. N Engl J Med 2016; 375:2468-2479

Discussion

- What challenges do you see in your practice?
- What services and support are most needed for your patients?
- What policies would be most helpful to you and your patients?

Sarah Helvey, J.D., M.S.
Child Welfare Director
Nebraska Appleseed
941 "O" Street, Ste. 920
Lincoln, NE 68508
shelvey@neappleseed.org
(402) 438-8853, ext. 106