Understanding CAPTA and State Obligations

This fact sheet addresses common misconceptions about what states are required to do to comply with the federal Child Abuse Prevention and Treatment Act (CAPTA), with regard to newborn infants' prenatal drug exposure. Many states and local child welfare agencies have assumed that CAPTA – a federal funding provision – requires them to report all substance-exposed newborns to child welfare agencies as being abused or neglected. This assumption is incorrect; **CAPTA does not require this.**

When addressing the topic of child protection, it is particularly important to understand that neither drug use nor having a substance abuse disorder is predictive or determinative of parenting ability.[1] It is also important to note that drug use is not the same as a substance use disorder (SUD) and that SUD is a medical condition. Like other medical and behavioral health conditions, substance use disorder is best addressed through supportive healthcare approaches. Medical knowledge about dependency and treatment demonstrates that patients do not, and cannot, simply stop their drug use as a result of threats of legal charges or other negative consequences. In fact, threat-based approaches do not protect children. They do, however, frighten pregnant and parenting women away from seeking healthcare.[2]

What is CAPTA?

CAPTA is the key federal legislation directing state policy regarding child abuse and neglect. Originally enacted in 1974 (after an act to address child poverty was vetoed by Richard Nixon), the law provides federal funding to states to support the "prevention, assessment, investigation, prosecution, and treatment" of child abuse, in exchange for states' fulfillment of certain requirements.[3] One such requirement is that states enact laws mandating reports of known or suspected child abuse to a child protective services agency.[4] In 2003, in response to alarmist and scientifically inaccurate information about pregnancy and cocaine use,[5] an amendment to CAPTA required that states arrange for

[1] *See generally,* Lisa Sangoi, *"Whatever they do, I'm her comfort, I'm her protector." How the Foster System Has Become Ground Zero for The U.S. Drug War*, Movement for Family Power, June 2020.
[2] Poland, et al., *Punishing Pregnant Drug Users: Enhancing the Flight From Care*, 31 Drug and Alcohol Dependence 199 (1993). See also Rosa Goldensohn & Rachel Levy, The State Where Giving Birth Can be Criminal, The Nation, Dec. 10, 2014, available at https://www.thenation.com/article/state-where-giving-birth-can-be-criminal/, (investigative report documenting that Tennessee's "fetal assault" law in effect from 2014-2016 caused pregnant women to avoid healthcare and flee the state to give birth).
[3] U.S. Dep't of Health and Human Services, Admin. For Children and Families, *About CAPTA: Legislative History* (July 2011), available at https://www.childwelfare.gov/pubPDFs/about.pdf.
[4] 42 U.S.C. § 5106a (2019)
[5] See, e.g. Brett Sigler et. al., *From Crack Babies to Oxytots: Lessons Not Learned*, RetroReport.org (2015). Available at, https://www.retroreport.org/video/from-crack-babies-to-oxytots-lessons-not-learned/; Editors, Slandering the Unborn, New York Times, Dec. 28, 2018. Available at, https://www.nytimes.com/interactive/2018/12/28/opinion/crack-babies-racism.html

"plans of safe care" for infants affected by "illegal" substance use. The scientifically unsupported assumption was that such newborns would need special kinds of healthcare and support and that child protective service agencies would be equipped to provide that support. No hearings were held before this amendment passed, and no additional funding was made available for the presumed additional care that would be needed.

In 2016, another amendment required those "plans of safe care" to be for infants affected by the use of any substances, including ones that are not criminalized. This has been interpreted to mean that notification to CPS is also required for pregnant patients who obtain medically recommended treatment for opioid dependency, methadone, or buprenorphine. The 2016 amendment also indicates that states should anticipate the needs of the whole family, not just the infant. Again, no additional funding was allocated for the care presumed to be needed.

Does CAPTA Characterize or Require States to Characterize Substance Use in Pregnancy as Child Abuse?

No. CAPTA specifically does not "establish a definition under Federal law of what constitutes child abuse or neglect; nor (II) require prosecution for any . . . action."[6]

What Does CAPTA Require?

Under CAPTA, states must have: "policies and procedures (including appropriate referrals to child protection service 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* [FASD], including a requirement that health care providers involved in the delivery or care of such infants notify the child protective services system of the occurrence of such condition in such infants."

Is Testing Positive for a Drug or Alcohol the Same as Being "Affected" or Having FASD?

No. Congress could have used the terms "testing positive" or "drug or alcohol exposed" but instead chose words ("affected," "withdrawal symptoms" "FASD") that make clear some demonstrable health impact beyond a positive drug test is needed.

[6] Id. See also guidance issued by the Administration for Children and Families reiterates this and notes that, "It is ultimately the responsibility of CPS staff to assess the level of risk to the child and other children in the family and determine whether the circumstance constitutes child abuse or neglect under State law." U.S. Dep't of Health and Human Services, Admin. For Children and Families, *Guidance on amendments made to the Child Abuse Prevention and Treatment Act (CAPTA) by Public Law 114-198, the Comprehensive Addiction and Recovery Act of 2016*, (2017), available at https://www.acf.hhs.gov/sites/default/files/cb/pi1702.pdf.

Does CAPTA Require Testing Newborns for Drug Exposure?

No. CAPTA does not require testing of newborn babies.

Does CAPTA Require Filing Abuse Reports on Newborns to Child Protective Services?

No. CAPTA only requires states to have policies in place to "notify" child protective services (CPS) of babies who fall into one of the three enumerated categories:

- being "affected by substance abuse[7]"
- being affected by "withdrawal symptoms resulting from prenatal drug exposure"
- or having Fetal Alcohol Spectrum Disorder" (FASD).[8]

Such notifications are *for the purpose of identifying whether the family is in need of care or services* ("to address the needs of infants") and are not for the purpose of reporting neglect or abuse that triggers an investigation that can lead to surveillance, mandated compliance with inappropriate services and or family separation. These notifications are intended to help the state "determine whether and in what manner local entities are providing, in accordance with State requirements, referrals to and delivery of appropriate services…"[9]

Does CAPTA Require Mandated Notifications to Take the Form of an Allegation of Child Abuse or Neglect?

No. The law specifically states that these notifications are not for the purpose of redefining child neglect or abuse, nor for the purpose of accusing the mother of abuse or neglect, even when newborns receive a diagnosis of neonatal abstinence syndrome or FASD.[10] In fact, it should be noted that the purpose of the federal funds is to assist states in creating programs and services designed to help newborns and their families. CAPTA-based notifications are not required to be and should not be treated in the same manner as a report of suspected neglect or abuse against a parent. CAPTA does not say that a baby's positive toxicology, withdrawal symptoms, or demonstrable affect from exposure

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[7] It should be noted that CAPTA itself does not provide a definition of "affected by substance abuse." In guidance to CPS workers, the Office on Child Abuse and Neglect, which is responsible for administering programs under CAPTA, distinguishes between substance use and "substance use disorders," the term now used by most medical experts instead of "substance abuse." Substance use disorder is defined as: *A pattern of substance use that leads to significant impairment or distress, reflected by one or more of the following: Failure to fulfill major role obligations at work, school, or home (e.g. substance-related absences from work, suspension from school, neglect of a child's need for regular meals); Continued use in spite of physical hazards (e.g., driving under the influence); Trouble with the law (e.g. arrests for substance-related disorderly conduct); Interpersonal or social problems.* U.S. DEP'T OF HEALTH AND HUMAN SVCS. ADMINISTRATION FOR CHILDREN AND FAMILIES, PROTECTING CHILDREN IN FAMILIES AFFECTED BY SUBSTANCE USE DISORDERS (2009), available at https://www.childwelfare.gov/pubPDFs/substanceuse.pdf.

[8] 42 U.S.C. § 5106a (2019).

[9] 42 U.S.C. § 5106a (b)(2)(B)(iii)(II) (2019).

[10] 42 U.S.C. § 5106a (b)(2)(B)(ii)(I) (2019).

are per se evidence of civil child neglect or abuse.[11]

Does CAPTA Require States to Involve CPS in the Plan of Safe Care?

No. CAPTA's grant eligibility criteria require state programs to include "the development of a plan of safe care" for infants identified as affected by substance abuse, withdrawal symptoms, or Fetal Alcohol Spectrum Disorder.[12] It is up to individual states to determine the nature of a Plan of Safe Care.[13] Some states recognize that a Plan of Safe Care is consistent with the kinds of plans/information typically given to patients before they are discharged from the hospital. Plans of Safe Care can be a way to communicate and link people to services that provide support to a family with an identified infant.

It is also up to individual states to determine which agency or entity (such as hospitals, community organizations, or a child protective services department) is responsible for developing or monitoring the plans of safe care.[14] There is no requirement that States rely on the existing child protective services system for the Plan of Safe Care.

Does CAPTA Mandate Notification to Existing CPS Child Abuse Reporting Systems?

No. CAPTA compliant notifications do not need to be processed by the same hotline that processes abuse and neglect reports. States may create a separate process outside of the abuse and neglect reporting process to protect families from intrusive and disruptive investigations, privacy invasive surveillance of indeterminant length, and family separation. In other words, notification and data collection processes may be captured in a separate database administered by separate staff. Significantly, nothing in CAPTA requires that notifications to CPS include patient names. Alternative processes for CAPTA notification may also involve collaboration with another agency to collect the information and "notify" the child protective services system of the aggregate data.[15]

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[11] While workplace drug testing is typically done in accordance with federal regulation and consistent standards, toxicology tests on pregnant women and newborns are not. The tests are often unconfirmed and not preserved for re-testing, so they are not reliable, nor do they provide information about drug dependency or parenting ability.

[12] 42 U.S.C. § 5106a (2019).

[13] Not every infant identified will need a plan of safe care following discharge from the hospital, as affects and withdrawal symptoms are often temporary and best treated with constant parent contact and breastfeeding. MacMillan, et al., *Association of Rooming-in With Outcomes for Neonatal Abstinence Syndrome, A Systematic Review and Meta-analysis*, JAMA Pediatrics 2018, available at https://jamanetwork.com/journals/jamapediatrics/fullarticle/2672042; Saiki, et al., *Neonatal Abstinence Syndrome-Postnatal Ward Versus Neonatal Unit Management*, 169 EUR. J. PEDS. 95 (2010); Welle-Strand, et al., *Breastfeeding Reduces the Need for Withdrawal Treatment in Opioid-Exposed Infants*, 102 FOUNDATION ACTA PAEDIATRICA 1060 (2013).

[14] U.S. Dep't of Health and Human Services, *Admin. For Children and Families, Mandatory Reporters of Child Abuse and Neglect*, (2015), available at https://www.childwelfare.gov/pubPDFs/manda.pdf#page=5&view=Summaries%20of%20State%20laws.

[15] *See* M.H. Lloyd, et. al., Planning for safe care of widening the net? A review and analysis of 51 states' CAPTA policies addressing substance-exposed infants, 99 Children and Youth Services Review 350-351 (2019).

For example, the state's de-identified Pregnancy Risk Assessment Monitoring system could be used to collect data in the three enumerated categories.[16]

CAPTA does require states to have "monitoring systems" so that implementation by local entities and referral sources of Plans of Safe Care can be tracked[17] and annual state data reports need to include numbers of infants[18], but there is nothing in the law requiring individual families be tracked or that patient names be recorded.

How can federal CAPTA funds be used?

The federal funds can be used by states to develop a myriad of ways to offer confidential services and support to families after a baby has been identified outside of the context of a punitive child neglect investigation and proceeding. Providing confidential care can be an important part of harm reduction and has been shown to support infants and their caregivers' wellbeing.[19]

[16] Pregnancy Risk Assessment Monitoring System is a project of the Centers for Disease Control and Prevention (CDC) and state health departments that collects state-specific, population-based data on maternal attitudes and experiences before, during, and shortly after pregnancy. See https://www.cdc.gov/prams/index.htm

[17] 42 U.S.C. § 5106a (b)(2)(B)(iii)(II) (2019).

[18] 42 U.S.C. § 5106a (d)(15) and (18) (2019).

[19] For more information about harm reduction during pregnancy see, *Pregnancy and Substance Use: A Harm Reduction Toolkit*, National Harm Reduction Coalition with the Academy of Perinatal Harm Reduction (2020), available at: https://issuu.com/harmreduction/docs/pregnancy_and_substance_use-_a_harm_2fa242e7fb6684