



## **UNDERSTANDING CAPTA AND STATE OBLIGATIONS** **September 2018**

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 note that drug use is not the same as a substance use disorder (SUD) and that SUD is a medical condition – not a form of child neglect or abuse. Pregnant women do not experience drug dependencies because they don't care about their children. Like other medical and behavioral health conditions, substance use disorder is best addressed through treatment. 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.<sup>i</sup>

### **What is CAPTA?**

CAPTA is the key federal legislation addressing child abuse and neglect. Originally enacted in 1974, the law provides federal funding to states to support the “prevention, assessment, investigation, prosecution, and treatment” of child abuse, in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.<sup>ii</sup> One such requirement is that states enact laws mandating that certain professionals report known or suspected child abuse to a child protective services agency.<sup>iii</sup> In 2003, in response to alarmist and scientifically inaccurate information about pregnancy and cocaine use, Congress required that states arrange for “plans of safe care” for infants affected by “illegal” substance use, and in 2016, Congress enacted the Comprehensive Addiction and Recovery Act, including amendments to CAPTA requiring those “plans of safe care” be for infants affected by use of any substances, as well as for their parents. No funding was allocated for the added care presumed to be needed.

### **Does CAPTA 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; or (II) require prosecution for any . . . action.”<sup>iv</sup>

## 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*, 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."

## Does CAPTA Require Testing All Newborns for Drug Exposure?

**No.** CAPTA does not require testing of all newborn babies.

## Does CAPTA Require Reporting All Substance-Exposed Newborns to Child Protective Services?

**No.** CAPTA only requires states to have policies in place to "notify" child welfare agencies of babies who fall into one of the three enumerated categories: being "affected by substance abuse"<sup>vii</sup> affected by "withdrawal symptoms resulting from prenatal drug exposure" or having Fetal Alcohol Spectrum Disorder" (FASD).<sup>vi</sup> Such notifications or reports are *for the purpose of identifying whether the family is in need of care or services* ("to address the needs of infants").

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

**No.** The law specifically states that these reports 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. In fact, it should be noted the purpose of the federal funds is to assist states in creating programs and services designed to help newborns and their families. CAPTA-based reports 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 result is *per se* evidence of civil child neglect or abuse.<sup>vii</sup>

## Does CAPTA Require States to Mandate CPS Involvement with All Babies After a Report?

**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.<sup>viii</sup> It is up to individual states to determine when and if a plan is needed<sup>ix</sup> and which agency or entity (such as hospitals, community organizations, or a child protective services department that is established to receive CAPTA reports separate from reports of child neglect/abuse) is responsible for developing the plan of care.<sup>x</sup> It does not have to be and should not be the existing child welfare agency.

Ideally, states should create a separate reporting and data collection process outside the child welfare system to receive CAPTA reports. 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 in a report, outside of the context of a punitive child neglect investigation and proceeding. At a minimum, separate reporting and data collection processes should include a separate database, separate staff, and separate contact person/office. They could also include collaborating with another agency to collect the information and “notify” the child welfare agency. For example, the state’s de-identified Pregnancy Risk Assessment Monitoring system could be used to collect data in the three enumerated categories.

<sup>i</sup> 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).

<sup>ii</sup> 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>.

<sup>iii</sup> 42 U.S.C. § 5106a (2017).

<sup>iv</sup> *Id.* 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, *Mandatory Reporters of Child Abuse and Neglect*, (2015), available at <https://www.childwelfare.gov/pubPDFs/manda.pdf#page=5&view=Summaries%20of%20State%20laws>.

<sup>v</sup> 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>.

<sup>vi</sup> 42 U.S.C. § 5106a (2017).

<sup>vii</sup> 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.

<sup>viii</sup> 42 U.S.C. § 5106a (2017).

<sup>ix</sup> 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 Pediatr.* 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).

<sup>x</sup> 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>.