

PREGNANT WOMEN, CHILDREN, AND METHAMPHETAMINE

Prepared for the Children, Families, Health, and Human Services Interim Committee

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From: "State Enactments related to Protecting Children from Methamphetamine 2005", NCSL, January 2005.

Alaska, Arizona, Colorado, Iowa, Minnesota, Montana, North Dakota, Utah, and Washington have expanded their child abuse or endangerment statutes to include manufacturing a controlled substance in the presence of a child.

Arkansas and Washington established a separate criminal offense for exposing a child to an illicit chemical substance. California made grant funds available to counties to establish multiagency drug-endangered child response teams.

Recent legislation:

In 2005, Colorado passed a law concerning defining child abuse to include the circumstances in which a child tests positive at birth for certain controlled substances. (A provision was deleted from the original bill that would have given judges the power to immediately terminate the mother's parental rights.)

In 2005, Arkansas passed a bill to include in the definition of neglect the causing of a newborn child to be born with an illegal substance in his or her system or born with a health problem as a result of the pregnant mother's use before birth of an illegal substance. It also requires data-gathering and reports to legislative committees. The preamble to the bill explains that the child abuse hotline would not accept reports of this nature in the past. The bill limits the acceptance of these reports to only those from specific mandatory reporters, all of whom are health care providers.

In 2006, a senator in Idaho introduced a bill, (S1337) which died in the process, to create a felony crime to prohibit use of controlled substances endangering children (defined as children under 18 years of age, embryos, and fetuses). The bill allowed treatment or drug court where appropriate. Testimony centered around treatment both from law enforcement who were proponents of the bill and from opponents who represented treatment and medical providers, foster parents, and former addicts. Proponents saw the bill as a tool to compel treatment. Many opponents believed that the bill would discourage pregnant women from seeking treatment and prenatal care. Lack of availability of treatment was also cited.

From: "State Policies in Brief: Substance Abuse During Pregnancy" Guttmacher Institute, May

1, 2006.

- 16 states consider substance abuse during pregnancy to be child abuse under civil child-welfare statutes, and 3 consider it grounds for civil commitment.
- 10 states require health care professionals to report suspected prenatal drug abuse, and 4 states require them to test for prenatal drug exposure if they suspect abuse.
- 19 states have either created or funded drug treatment programs specifically targeted to pregnant women, and 7 provide pregnant women with priority access to state-funded drug treatment programs. (The federal block grant requires 5% of the block grant be set aside for pregnant women and they receive priority in Montana.)

No state has enacted a law specifically criminalizing drug use during pregnancy. Prosecutors have relied on laws already on the books such as possession of a controlled substance, delivering drugs to a minor (through an umbilical cord, corruption of a minor, assault with a deadly weapon and manslaughter. Women who have appealed their convictions to their respective state supreme courts have prevailed in all but one instance. The cases have been overturned on grounds that a fetus could not be considered a person, or that the legislature did not intend a law to apply to a pregnant woman and her fetus. Courts have found convictions to be unconstitutional violations of rights to due process because the woman could not have foreseen the law applied in that way.

Only in South Carolina has the state supreme court upheld a conviction in 1997 of a woman charged with criminal child abuse for using cocaine during pregnancy. In that case, the court held that a viable fetus is a person and that maternal acts endangering or likely to endanger the life, comfort, or health of a viable fetus could constitute child abuse. (Guttmacher Institute, December 2000).

In another case from South Carolina, the U.S. Supreme Court ruled in 2001 that it is illegal for birthing hospitals to provide law enforcement agencies the results of drug screens performed in the hospital if the tests were performed without a warrant or consent because it violates their Fourth Amendment right to be free from unreasonable searches. It is unconstitutional for hospital workers to test maternity patients for illegal drug use without consent if the purpose is to alert the police to a crime.

In Ohio, the Ohio Supreme Court ruled that a woman who takes illicit drugs during pregnancy is committing a form of child abuse. The cases involved a child born with signs of addiction. The court found it unnecessary to address the larger issue of whether a fetus is legally a child because under the law an abused child is any child who because of the acts of his parents suffers physical or mental injury that harms or threatens to harm the child's welfare. (Join Together, November 2, 2000)

In Montana, there is a statute on endangering the welfare of children, 45-5-622, MCA. The crime is a misdemeanor and does not specifically address drug use during pregnancy. In the

abuse and neglect statutes, "child" is defined as any person under 18 years of age and "child abuse or neglect" includes substantial risk of physical or psychological harm to a child.

Issues for consideration:

- Seeking protection of a child after birth is covered under existing statute, however, protection of a fetus pre-birth raises the legal status of an unborn fetus.
- Criminal or civil - criminal convictions have not always been upheld when challenged - a legal analysis of the deficiencies of the respective statutes would be advised.
- Treatment is at the heart of much of the concern and the capacity of the treatment system to appropriately treat pregnant women, and potentially women with children is at or above capacity and would need to be expanded. Treatment for pregnant women in a correctional facility may require different programming and medical care. Care of the infant after birth outside of the correctional facility may also require involvement of the child welfare system.
- Prenatal care is vitally important to pregnant women and healthy deliveries. If pregnant women are discouraged from seeking prenatal care for fear of reprisals, it may lead to less healthy births, more abandonment, and fewer women seeking treatment.
- Being mindful in any legislation that the child's needs will still need to be met in terms of health and medical care, permanency, and potential developmental delays into the future.
- Treatment may also mean extended separations from children and keeping the family intact may aid in the success of treatment. Women may fear loss of custody and not seek treatment. Montana has three recovery homes that allow women and children to stay together.
- It may be important to debate whether substance abuse is in and of itself sufficient to prove that a parent is unfit and the necessity to look at the other factors that may mitigate or exacerbate the ability to be a fit parent. The finding of drug exposure may be sufficient to warrant a report or investigation of abuse or neglect, but a proper assessment is needed to determine whether a parent can care for a child and what supports the child needs or what the parent may need to successfully work towards recovery.
- Methamphetamine, and in the recent past, cocaine, have raised interest in use of illegal drugs during pregnancy and the short-term and long-term harm that they cause to the fetus, but legal drugs such as tobacco and alcohol have more widespread use and more scientific evidence of harm to the fetus.
- Any discussion of proposed legislation should include whether legislation should be methamphetamine-specific or reference dangerous drugs in general to be more inclusive and proactive in the event there is a new drug on the horizon that has not yet been contemplated or is not yet seen as a threat.

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