Legal Threats and Barriers to Treatment for Women Affected by Substance Use in Pregnancy

Karol Kaltenbach PhD

Overview

Issues specific to NAS
Recommendations and considerations

Overview: First Historical Markers

Child Abuse Prevention Act (CAPTA) was initially enacted in 1974 to provide funding to states in support of child protective services

- Amended in 2003 requiring states to have policies for notifying CPS of newborns exposed to illicit substances in utero and establishing a plan of care for newborns affected by illicit substance use or withdrawal symptoms

Overview

Pregnant women with substance use disorders present a complex and difficult challenge to those concerned with ensuring the safety of their children
As a result they often face inconsistent interpretation of regulations; demands that are at odds with medical care they are receiving; and/or subjected to criminal prosecution

Disclosure

Karol Kaltenbach PhD does not have any financial arrangement or affiliations with a commercial entity.

Dr. Kaltenbach will not be discussing the unlabeled use of a commercial product in her presentation.
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Overview

NCANDS 2012 data
- 3.8 million children reported for maltreatment
- 80.9% were unsubstantiated
- Of those substantiated
  - 78.3% neglect
  - 18.3% physically abused
  - 9.3% sexually abused
  - 10.6% other (abandonment, threats of harm, or prenatal drug exposure)

Overview: Second Historical Marker

In the late 1980’s in response to the “cocaine epidemic” and the fear that a “crack baby” was irredeemably harmed, legal measures against pregnant women with substance use disorders began to be implemented
- Anti-drug distribution laws and existing child abuse statutes that were extended to include the fetus were used to prosecute pregnant women

Overview

South Carolina case
- 1989 MUSC hospital began UDS on maternity patients - referring anyone who tested positive for drug treatment
- Police arresting pregnant women who used cocaine on the theory that the fetus was being harmed which constitute child abuse
- 1990 hospital offered to identify and assist in the prosecution of pregnant women
- Police appended patients within hours of delivery transporting them to jail in handcuffs and leg shackles
- Ten women sued hospital and city; jury found in favor of city and hospital; 2001 US Supreme Court in Ferguson vs City of Charlestown ruled in favor of the women

Overview

Prosecutors have continued to use existing criminal laws to charge pregnant women with a range of crimes, including possession of a controlled substance, delivering drugs to a minor, assault with a deadly weapon, etc.
Most convictions have been overturned on appeal including a 2013 NJ State Supreme Court ruling that positive drug tests on pregnant women and newborns do not alone established neglect
Two recent affirmative rulings
- The South Carolina State Supreme Court upheld the fetus is a person under the state’s criminal child endangerment act
- The Alabama Supreme Court upheld the conviction of a woman charged under the chemical endangerment law

Overview

State policies as of August 2014
- One state has a criminal law specific to drug use during pregnancy
- 18 states define substance use during pregnancy as child abuse under civil-child welfare statutes
  Of these 18 states, 3 consider it grounds for civil commitment

Overview

State policies (cont.)
- To date, 19 states have created or funded drug treatment programs for pregnant women including 8 of the 18 states that define substance use during pregnancy as child abuse
- 11 states provide priority access for pregnant women to state funded programs

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Issues Specific to NAS: Understanding the “Opioid Epidemic”

During the past 20 years there has been a strong movement to improve treatment for non-malignant pain.
This has resulted in a liberalization by state medical boards of the use of opioids in the treatment of non-cancer pain.
The Joint Commission introduced new pain management standards.
The significant increase in the use of opioids for non-cancer pain has led to significant increases in diversion, misuse and abuse.

Understanding the Opioid Epidemic

The percentage of ED visits in which an opioid was prescribed increased from 20.8% to 31% while the percentage of visits for a painful condition increased by 4%.
Oxycodone and hydrocodone had the highest increase for discharge prescription.

Understanding the Opioid Epidemic

Study by Montana Department of Public Health (2011)
16% of adults reported using prescription opioid pain medication in past 12 months.
50% had unused medication of which 76% kept the medication.
50% used the medication for short term pain.
28% for long term pain.
22% for both long and short term pain.

Understanding the Opioid Epidemic

- 21.8% filled at least 1 prescription for an opioid during pregnancy.
- Reasons for medication: abdominal pain, lower back pain, headache syndrome, joint pain, and migraine.
- Regional variance by states range from 9.5% to 41.8%.

Issues Specific to NAS

The increase use and abuse of prescription opioids has led to an increase of NAS.
Significant community, state and national attention has focused on this increase.
Focus is only on the occurrence of NAS – not the context in which it occurs.

Contexts of NAS

Presentation and severity differ within opioids:
- Heroin: onset 4-24 hours, less severe than methadone.
- Methadone*: 48-72 hours.
- Buprenorphine*: on average almost 24 hrs. later than methadone, less severe than methadone.
- *Has not been found to be related to maternal dose.
- Oxycodone/hydrocodone: No data.
- Morphine: average 34 hrs.
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**Contexts of NAS**

Presentation and severity of NAS is also related to:
- Other prenatal drug exposure both illicit (cocaine), licit (alcohol, nicotine) and non-opioid prescription medications (SSRIs and benzodiazepines)*
- Genetics
- Maternal physiology
- Gestational age

**Contexts of NAS**

Illicit opioid use:
- Heroin, prescription misuse which may include methadone, buprenorphine, oxycodone, hydrocodone
- Appropriate opioid use: Medication
- Methadone and buprenorphine for the treatment of opioid dependent pregnant women
- The use of oxycodone, hydrocodone for pain management when necessary

**Contexts of NAS and Consequences**

Illicit opioid use
- Fetus subjected to repeated episodes of withdrawal increasing morbidity and mortality
- Mother may receive little/no prenatal care and have untreated medical/obstetrical complications
- Increased risk of prematurity

**National Survey on Drug Use and Health 2011/2012**

Among pregnant women on the US, approximately 18% smoked, 9.4% drank alcohol, and 5% used illicit drugs in the past month
- 0.2% used heroin
- 0.9% used prescription opioids

**Contexts of NAS and Consequences**

The use of methadone and buprenorphine for the treatment of opioid dependent pregnant women
- Prevents erratic maternal opioid levels and protects the fetus from repeated episodes of withdrawal
- Associated with improved obstetrical care, increased fetal growth, and reduced fetal and neonatal mortality and morbidity
- Supports and sustains recovery
## Legal Threats and Barriers to Treatment for Mothers Receiving Medication Assisted Treatment

Although mothers are under a physician’s care and are doing what is necessary to provide for the well being of their child, the simple fact of that they are receiving medication assisted treatment often subjects them to ultimatums by Family Court judges and/or DHS regarding continuation of medication and breastfeeding, child custody/reunification.

### NAS and Public Policy

**FL, KT, TN, OH, IN** require hospitals to report any diagnosis of NAS, regardless of context.

- Diagnosis of NAS often generates a report to CPS, even if mother is in recovery receiving medication as part of treatment.
- In civil cases such as CPS, state is not required to provide an attorney.

### Current case before NJ Supreme Court

- Lower court ruling upheld that the state’s civil abuse law was applicable to women who receive prescribed opioid medication while pregnant.
- Lower court maintained that it was irrelevant that mother was receiving treatment under a physician's care.

### In April 2014, TN became the first state to criminalize women for the use of illegal drugs during pregnancy.

- Woman can face charges of aggravated assault which carries a penalty of up to 15 years in prison. Charge may be expunged if mother receives “appropriate treatment” but law precludes medication assisted treatment for opioid dependence which is defined as the gold standard by the WHO, DHHS, and ACOG.

## NAS and Public Policy

Cases of examples of reporting NAS without considering context:

- Pregnant woman who entered treatment for dependence on pain medication, was maintained on buprenorphine; in recovery for 6 months when she delivered a healthy boy. At birth her son tested positive for buprenorphine and required treatment for NAS. Report was filed with CPS. Initially parents were told the investigation would be closed since she was in treatment. Three months later charges were filed for child abuse and neglect based on the premise that buprenorphine is an opioid and as such was no different than heroin or oxycodone.
- Charges eventually dismissed after she was able to obtain legal assistance.

## When Legislators Address Medical Issues

May be well intentioned but have unintended negative consequences.

- May be driven to achieve constituent support rather than by an understanding of medical research and established standards of care.
- Often ignore medical input, e.g., AAP, International Doctors for Healthier Drug Policy, National Perinatal Association, ACOG all lobbied against the TN bill.
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When Legislators Address Medical Issues

These babies are born addicted and their lives are totally destroyed”  TN state representative Terri Lynn Weaver introduced SB1391 criminalizing adverse pregnancy outcomes

President of TMA commentary on SB1391
“last year 855 infants spent their first few days, weeks and even months of life in agonizing withdrawal from prescription and non-prescription drugs

When Legislators Legislate

The devil is in the details

- Although the TN law was amended to a misdemeanor, it does not limit prosecutors to filing misdemeanor charges
- Women who suffer pregnancy loss or have an infant with health problems may be subjected to intrusive questioning or criminal investigation
- Law will “sunset” in 2 years. Proponents state will provide time to obtain data to evaluate its effect

Ignore existing data that punitive approaches drive women away from prenatal care

What then if not Legislation?

Public health issues require medical and behavioral management
Maternal opioid dependence requires treatment and support necessary to be successful in her recovery and in her role as a mother
Does not negate the need to report risk of abuse and/or neglect

Recommendations and Considerations

We must differentiate NAS as a result of illicit drug use and NAS that occurs from appropriate medical treatment

Perinatal outcomes of the infant are often significantly different

Recommendations and Considerations

We must provide access to women centered, trauma informed treatment that includes medication assisted treatment
We must support and advocate for women who are engaged in treatment

Recommendations and Considerations

We must ensure that we have standardized procedures for assessing and treating NAS
We need to include the environment of care when identifying best practices for the treatment of NAS

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Recommendations and Considerations

- We need research that informs
  - The assessment of NAS for different populations, i.e. prematurity, infants >30 days of age
  - Which medications are most effective for different drug exposures
  - The efficacy of non-pharmacological interventions

The well being of the infant is improved with the well being of the mother
We need to provide support and care for both mother and infant