



# **Guidelines for Healthcare Providers**

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**Healthcare providers have an obligation to act in the best interests of their patients. This includes an “ethical responsibility to place patients’ welfare above the physician’s own self-interest or obligations to others.”<sup>216</sup>**

**And yet, there is a long history of healthcare providers reporting pregnant women, predominantly women of color, to state authorities for things they think might be illegal or that they otherwise disapprove of.**

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Healthcare providers have abused their positions of trust and power to report pregnant women for all sorts of behavior. They have reported women who have delivered healthy babies but admitted to taking a substance during pregnancy, women who have sought emergency medical care after experiencing physical trauma, women who have not consented to certain procedures based on their religious beliefs, women who have disagreed with a doctor’s advice to undergo cesarean surgery, and women who were coping with the heartbreak of pregnancy loss, all based on the suspicion that the women played a role in harming, or attempting to harm, their pregnancies.<sup>217</sup> These reports have led to arrests, detentions in hospitals, forced surgery to which the pregnant patient did not consent, civil child welfare investigations, family separation, and termination of parental rights.

And against the backdrop of an unprecedented swell of anti-abortion legislation and the anticipated end of a constitutional right to

abortion, healthcare providers have even voiced concerns about performing emergency procedures for pregnant women—like ending an ectopic pregnancy<sup>218</sup>—despite an “ethical obligation to provide care in cases of medical emergency.”<sup>219</sup>

Laws in certain states demand that healthcare providers intervene when they believe that a pregnant woman has exposed a fetus to some risk of harm.<sup>220</sup> In other cases, doctors may feel personally obligated to report.<sup>221</sup> Regardless of the motive, the result is the same—healthcare providers inadvertently become agents of law enforcement, and in “the worst circumstances, this leads people to be treated as suspects instead of patients, subject to bedside interrogations and legal scrutiny.”<sup>222</sup>

The involvement of healthcare providers in punitive measures against pregnant women generates far-reaching negative health outcomes for pregnant women, their fetuses, and newborns alike. When healthcare providers report their patients to state authorities for pregnancy loss, positive toxicology results, suspected substance use, or any other acts or omissions that create a perceived risk of harm during pregnancy, it sends a powerful message to pregnant women everywhere that they cannot trust their healthcare providers, they should not be honest with them, and they should avoid seeking medical help—even in an emergency.<sup>223</sup>

Far from protecting the health or wellbeing of a pregnant woman or her fetus, these decisions by healthcare providers create dangerous and life-threatening barriers to access, which only serve to exacerbate the entrenched and well-documented racial disparities in maternal health outcomes.<sup>224</sup> But healthcare providers, especially doctors, are an incredibly powerful lobby, and the more they push to disentangle their work from the criminal and civil child welfare systems, the more they can distance themselves from being de facto agents of law enforcement and family regulation systems.

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To do this, healthcare providers should consider the following guidelines:

**1. Be familiar with mandated state reporting laws and applicable hospital guidance on drug testing and understand the potential consequences of reporting the results of such tests to state authorities.**

- » The practice of drug testing labor and delivery patients and reporting test results to state authorities is pervasive, despite the fact that testing is rarely clinically indicated and reporting is often not legally required.<sup>225</sup> To the extent possible, healthcare providers should not test pregnant and postpartum women. Drug testing pregnant and postpartum women, with or without informed consent, exposes patients to needless trauma, potential family separation, and potential incarceration for seeking necessary medical care.
- » Many hospitals and providers wrongly assume that the Child Abuse Prevention and Treatment Act (“CAPTA”) and the Comprehensive Addiction and Recovery Act (“CARA”) require the reporting of all substance-exposed newborns to child welfare agencies. CAPTA/CARA requires states, in order to receive federal child abuse

prevention funds, to develop policies for the “notification” to child welfare agencies of infants who are (i) affected by substance abuse; (ii) affected by withdrawal symptoms resulting from prenatal substance exposure; or (iii) have Fetal Alcohol Spectrum Disorder. The “notification” requirement does not require testing and referral for an abuse investigation.<sup>226</sup> Rather, notification requires only de-identified, aggregate data about the number of children born who fall under the relevant categories and should be done in a way that does not make the family vulnerable to child welfare involvement.

- » Healthcare providers should review their internal hospital guidance to determine whether the hospital has protocols addressing urine and biologic testing and should familiarize themselves with the mandatory reporting laws of their state. The following additional resources offer more specific information on state-by-state requirements:
  - The Guttmacher Institute has published *State Policies on Substance Use During Pregnancy*, an up-to-date chart outlining state law requirements, available here.<sup>227</sup>
  - Elephant Circle has also published *Mandatory Reporting, A Guide for Practitioners*, which is a comprehensive summary of state mandatory reporting laws, available here.<sup>228</sup>
- » Unless otherwise required by specific state law or hospital policy (see recommendation #5 below), providers should not report positive toxicology of a newborn or mother to authorities absent other indications of abuse/neglect. The fact that someone uses or has used drugs is not an indication of a person’s ability to parent, and reporting such

information to state authorities can subject women to criminalization or result in the termination of parental rights, which is more harmful to children than the alleged effects of drug use on parenting.<sup>229</sup>

- » Consider the obligations of healthcare providers to maintain patient privacy pursuant to the Health Insurance Portability and Accountability Act (“HIPAA”).<sup>230</sup> Unless specifically permitted by an exemption to HIPAA’s privacy rule, healthcare providers should not provide results of screening or biologic testing to any state agency without informed consent of the patient.

**2. Understand that urine and/or biologic testing is not an effective means to diagnose potential substance abuse.**

- » The fact of pregnancy itself does not provide a medical justification for testing. The limited circumstances in which it may be medically necessary for providers to obtain information

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about substance use include when such information is essential to a differential diagnosis and/or when it would change the course of medical treatment. Even in such circumstances, providers should give patients the opportunity to voluntarily disclose substance use through a confidential conversation in lieu of submitting to drug testing. Penalizing pregnant women for drug use “makes medical care less accessible as pregnant women are more afraid to seek help for fear of state involvement, losing custody of their children, or losing their parental rights.”<sup>231</sup>

- » ACOG provides that a positive drug test only assesses current or recent substance use, and therefore

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it does not necessarily indicate whether a person has a substance use disorder. Moreover, "false positive test results can occur within immune-assay testing and the legal consequences can be devastating to the patient and her family."<sup>232</sup>

- » The U.S. Department of Health and Human Services likewise states, "[a] diagnosis of [neonatal abstinence syndrome] or [neonatal opioid withdrawal syndrome] does not imply harm, nor should it be used to assess child social welfare risk or status. It should not be used to prosecute or punish the mother or as evidence to remove a neonate from parental custody."<sup>233</sup>
- » ACOG also recommends that healthcare providers "be aware of their laboratory's test characteristics and request that confirmatory testing with mass spectrometry and liquid or gas chromatography be performed as appropriate."<sup>234</sup> In states in which reporting is required, healthcare providers should never report patients on the basis of a presumptive positive

without conducting a confirmatory test.<sup>235</sup> They should also ensure that their testing thresholds are not below those endorsed by the federal government to avoid false positives.<sup>236</sup>

**3. Seek information about substance use only when medically necessary.**

- » Healthcare providers should never seek information about substance use when there is not a specific medical need for that information to make a differential diagnosis or because it would change the scope of care. Instead of seeking information about substance use from all pregnant women as a matter of course, healthcare providers should make an individualized assessment, ask themselves if and how information about substance use would alter their patients' care, and, when necessary, seek this information through open and confidential communication (known as screening), rather than testing.
- » ACOG recommends identifying patients with substance use disorders using validated screening tools, offering brief intervention (such as having a brief conversation, and providing feedback and advice), and referring for specialized care, as needed.<sup>237</sup> Healthcare providers should also prioritize evidence-based interventions that keep the maternal-infant dyad together and are proven to shorten hospital stays and reduce the need for pharmacological care. These interventions include "rooming in," skin-to-skin contact, and breastfeeding.<sup>238</sup>
- » In hospitals at which screening for substance use disorder is employed by healthcare providers, ACOG states that "it is essential that screening be universal"<sup>239</sup> and be applied to all people, regardless of age, sex, ethnicity, or socio-economic status.<sup>240</sup> Screening pregnant women for substance use based only on factors such as poor adherence to prenatal care (which is often a proxy for poverty) or prior

adverse pregnancy outcomes, can lead to stereotyping and stigma.<sup>241</sup>

- » Prior to engaging in any screening questions, patients should be informed of the risks, benefits, and alternatives to any recommended tests or procedures. They should also be informed of their right to refuse to answer any questions and their right to request full, accurate information before or after any test or procedure is performed. Finally, they should be informed of the potential legal ramifications of informed consent, including possible child abuse and neglect proceedings.<sup>242</sup>
- » It is important to note that screening is distinct from testing. Screening questions should be asked by providers while maintaining a caring and nonjudgmental approach, and should be asked in a manner that protects patient autonomy, confidentiality, and the integrity of the patient-physician relationship to the extent allowable by applicable law.<sup>243</sup> Testing, as discussed below, should only be performed when required by statute. Both screening and testing should only be performed after obtaining a patient's written informed consent.

#### **4. If medically necessary, urine and other biologic testing should only be performed with the patient's written informed consent.**

- » In the rare circumstances in which a provider determines urine or other biologic testing of the mother or baby is a medical necessity, such testing should be performed only with the mother's written consent, and in compliance with applicable state law.<sup>244</sup> Providers should seek written informed consent irrespective of whether the test is being performed on the mother or the newborn. In seeking a patient's written informed consent, providers should assess

the patient's ability to understand relevant medical information in the patient's native language, the implications of treatment alternatives, and their right to make an independent, voluntary decision.

- » If healthcare providers do not seek their patient's informed consent and conduct a toxicology screen, it may be an illegal search of the patient under federal law if the results are turned over to law enforcement.<sup>245</sup>
- » Pregnant women should be informed of the potential ramifications of a positive test result, including any mandatory reporting requirements and the possibility that a positive test can lead to abuse or neglect proceedings. For example, in Massachusetts, Angela, who was eight months pregnant, disclosed on a hospital intake form that she used marijuana to treat her anxiety.<sup>246</sup> She and her husband, Chris, wanted to be honest with doctors in order to receive the most appropriate care possible.<sup>247</sup> After giving birth, medical staff took a meconium and urine sample from the baby, but did not explain what they would be used for or seek Angela's written consent.<sup>248</sup> When one of the newborn's samples came back positive for marijuana, the result was shared with child welfare authorities. In the months that followed, Angela and Chris received numerous home visits from the Department of Children and Families and were constantly fearful about losing their children to the system.<sup>249</sup>
- » When documenting the informed consent or lack thereof, healthcare providers should consider and be intentional with the language they use when charting interactions with patients. For example, consider writing "patient did not consent to urine testing," or "patient declined to consent to urine testing" as opposed to "patient refused drug testing." As with any other recommended



medical procedure or test, a patient has the right to decline a drug test for any reason.<sup>250</sup>

**5. Healthcare providers should engage with their hospitals' risk management teams to assess appropriate guidelines/reporting.**

- » Healthcare providers play a critical role in establishing or revising existing hospital protocols to ensure that pregnant women's autonomy and privacy are protected. Healthcare personnel should get involved in the appropriate advisory boards at their hospitals, seek review of existing guidance (within their hospital and state), and/or establish hospital guidance to oppose mandatory testing and reporting policies because these practices compromise the clinical relationship between the provider and patient, undermine confidentiality, and erode trust in the medical system.<sup>251</sup> ACOG states that providers "have an ethical responsibility to their pregnant and parenting patients"<sup>252</sup> and "should protect patient autonomy, confidentiality, and the integrity of the patient-physician relationship to the extent allowable by law."<sup>253</sup>
- » Healthcare providers should also seek to establish hospital guidance to prevent the testing of pregnant patients in the absence of medical necessity and informed consent. Urine and other biologic testing should be performed only with the patient's informed consent and in compliance with applicable state

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law. Informed consent should be obtained from the patient prior to any testing and such consent should be documented in writing. Guidelines should require providers to discuss the basis for testing with patients; with whom the test results can be shared; the consequences of a positive test result; and if applicable, the provider's obligations under applicable reporting law(s).

- » Healthcare personnel should work to develop clear policies against the involvement of law enforcement or use of the legal system as a mechanism for getting people into drug treatment. ACOG has stated that "[c]lear evidence exists that criminalization and the incarceration for substance use disorder during pregnancy are ineffective as behavioral deterrents and harmful to the health of the pregnant person and their infant."<sup>254</sup> For example, empirical research found that Tennessee's fetal assault law, which specifically targeted women for using drugs while pregnant, "resulted in twenty fetal deaths and sixty infant deaths" in 2015 alone."<sup>255</sup> Therefore, "it is important to advocate for patients, particularly in terms of working to improve availability of treatment and to ensure that pregnant women with substance abuse who seek prenatal care are not criminalized."<sup>256</sup>
- » In developing these policies, doctors should also understand the role of discrimination and bias in urine and biologic testing and subsequent reporting to state authorities. Overt racism as well as unconscious biases contribute to women of color being disproportionately subjected to drug testing and subsequent reporting to state authorities for perceived or actual substance use disorders. This leads to the over-reporting of women and families of color into the family regulation system, which can result in the permanent separation of children from their parents and/or surveillance and monitoring of families for years.<sup>257</sup>

Healthcare providers should work with hospital leadership to implement unconscious bias, antiracist, and cultural humility trainings of providers and all healthcare staff to improve the ways in which substance use and pregnancy are addressed and assessed on a universal basis.

**6. If required to make a report to child welfare authorities, healthcare providers should understand the consequences of such reporting, be familiar with community resources that may be able to assist the family, and be cognizant of implicit and explicit biases.**

- » Healthcare providers should never make reports to child welfare authorities as a way to connect a patient with community resources. Child welfare authorities have an investigatory role and will rely heavily on mandated reports, particularly from healthcare providers, when making determinations of abuse or neglect. Instead, healthcare providers should get to know the resources in their communities so they can make direct referrals for their patients. This is true even for ICU or ER providers—while they often have limited relationships with pregnant patients compared to pediatricians or OBGYNs, they can significantly reduce harm to families by connecting patients with resources directly.
- » Healthcare providers should also become acquainted with the resources in their community that may be able to assist a family facing a child welfare investigation. If required to make a report to child welfare authorities, healthcare providers can reduce harm to families by being up front about making the report and sharing such resources with the family.
- » When making a report, healthcare

providers should be mindful of both explicit and implicit biases. In reality, even mandatory reporting decisions involve a certain amount of discretion, which is often exercised favorably for white communities and not for communities of color. Healthcare providers should also be careful not to conflate poverty with neglect.

- » It is important to communicate any positive information about a patient when making a report. As discussed above, child welfare authorities often rely heavily on reports made by healthcare providers. Reporting only that which is believed to constitute neglect may give a skewed representation of the patient. For example, if a patient has a positive toxicology result that necessitated a report to child welfare authorities but that patient went to all of her prenatal appointments and was in contact with the doctor throughout her pregnancy, it would be important to communicate that when making the report.
- » When making a report, healthcare providers should also ask the person receiving the report to repeat the information back to them. Given the long-lasting and traumatic impact a report can have on a family, it is important to ensure that the information being communicated is correct.
- » Many healthcare providers may feel like they should not speak with a patient's legal representation in order to remain neutral. However, it can be difficult for a defense attorney to adequately advise their client if parts of the narrative are missing. Healthcare providers can provide defense attorneys with important background information that, in the end, may help to prevent a family from being separated or a patient from being criminally punished.