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From: MCH Consultant, PAIHS

Subject: *Perinatal maternal and neonatal drug and alcohol testing*

To: Women s Health Care Providers
Pediatric Care Providers
Tribal Health Directors
MCH Coordinators
Service Unit Directors
Clinical Directors

Recently, there have been a number of news releases concerning a Supreme Court decision which states that hospitals cannot test pregnant women for drugs, without their consent, and give the results to police. (See attached ACOG press release)

In clarification, it was held that A state hospital s performance of a diagnostic test to obtain evidence of a patient s criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure. The interest in using the threat of criminal sanctions to deter pregnant women from using cocaine cannot justify a departure from the general rule that an official nonconsensual search is unconstitutional if not authorized by a valid warrant . (Ferguson et al. V. City of Charleston et al.)

In this case, the Medical University of South Carolina hospital developed a protocol which included law enforcement prosecution of those pregnant women testing positive for cocaine and not acceptant of counseling and treatment. From inception, the goal of the protocol was to **coerce patients into substance abuse treatment**. The policy prescribed in detail the precise offenses with which a woman could be charged, dependent upon the stage of her pregnancy. If 27 weeks or less, the patient was to be charged with simple possession. If 28 weeks or more, she was charged with possession and distribution to a person under the age of 18 (the fetus). Within the protocol, there was not documentation to support that the nine search criteria* identified were more apt to be caused by cocaine use than other social or medical factors. Finally, other than

(* No prenatal care, Late prenatal care after 24 weeks gestation, Incomplete prenatal care,

Abruptio placentae, Intrauterine fetal death, Preterm labor of no obvious cause , IUGR [intrauterine growth retardation] of no obvious cause , Previously known drug or alcohol abuse, Unexplained congenital anomalies)

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offering substance abuse treatment to women who tested positive, the policy made no mention of any change in the prenatal care of such patients, nor did it prescribe any special treatment for the newborns/infants of these women.

The Supreme Court identified this policy to be a violation of fourth amendment rights because:

These searches were not done by the medical university for independent purposes. If they had been, then they would not implicate the fourth amendment....Normally urine screens and blood tests and that type of thing can be taken by health care providers without having to worry about the fourth amendment. The only reason the fourth amendment is implicated here is that the police came in and there was an agreement reached that the positive screens would be shared with the police. The screen is not done independent of police, it s done in conjunction with the police and that implicates the fourth amendment.

This ruling confirms general guidelines followed in IHS facilities, which were also previously supported by the February 14, 1994 opinion of the Region IX Assistant Regional Counsel. Therefore, all PAIHS facilities are encouraged to continue:

- to perform perinatal (prenatal/labor and delivery/postpartum) drug and alcohol tests in women as **medically indicated** (consistent with routine or common medical practice/treatment). Explicit patient consent is not required, but the medical reason for such testing should be documented within the patient s medical record when the order is written.
- to discuss test results with each perinatal patient and refer patients testing positive into treatment.
- to perform drug tests on newborns as **medically indicated** (consistent with routine or common medical practice/treatment). Explicit consent of the parent and/or guardian is not required, but the medical reason for such testing should be documented within the newborns medical record when the order is written.
- to report positive test results in a newborn to the appropriate authority, as identified in the local Service Unit policy. Primary care providers are strongly encouraged to discuss the report and the significance of the positive test with the newborn s parent(s) and/or

guardian.

Finally, if a drug or alcohol test is performed for a non-medically indicated reason, such as local medical screening practices, **the patient must give consent.**

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It is the impression of many primary care providers that cocaine use is increasing in some American Indian populations. Recent studies do not support cocaine having a greater impact on child development and/or newborn abnormalities than other known teratogens, such as alcohol (which is the #1 cause of preventable birth defects in America). But, it is well documented that, in cocaine users, there is a greater incidence of **placental abruption** during the pregnancy and **SIDS** in the first year of the infant's life. All patients, with identified cocaine use, should be informed of these risks to their infants and themselves.