CHILDREN AND FAMILIES

HEALTH

CHILD PROTECTION AND PERMANENCY

HEALTH SYSTEMS BRANCH

CERTIFICATE OF NEED AND HEALTHCARE FACILITY LICENSURE PROGRAM

Substance-Affected Infants

Adopted New Rules: N.J.A.C. 3A:26

Adopted Amendments: N.J.A.C. 8:43A-1.3 and 28.7 and 8:43G-1.2 and 2.13

Proposed: August 21, 2017, at 49 N.J.R. 2599(a).

Adopted: December 5, 2017, by Allison Blake, Ph.D., L.S.W., Commissioner, Department of Children and Families, and December 19, 2017, by Christopher R. Rinn, Acting Commissioner, Department of Health, with the approval of the Health Care Administration Board.

Filed: December 7, 2017, as R.2018 d.018, **with non-substantial changes** not requiring additional public notice and comment (see N.J.A.C. 1:30-6.3).

Authority: N.J.S.A. 9:3A-7f, 9:6-8.15, 26:2H-5, and 30:4C-4(h).

Effective Date: January 16, 2018.

Expiration Date: N.J.A.C. 3A:26, January 16, 2025;
N.J.A.C. 8:43A, November 21, 2021; and
N.J.A.C. 8:43G, January 18, 2018.

Summary of Public Comments and Agency Responses:

The Departments received comments from the following:

1. Linda Carroll, MSN, RN-BC, Vice President, Patient Care Services, Chief Nursing Officer, St. Peter's University Hospital, New Brunswick, NJ; and

2. Jill Gresham, Senior Associate, Center for Children and Family Futures, Inc., Lake Forest, CA.

Quoted, summarized, or paraphrased below, are the comments and the Departments' responses. The numbers in parentheses following the comments below correspond to the commenter numbers above.

COMMENT: A commenter states that proposed new N.J.A.C. 3A:26-1.3(a)4, addressing the content of reports, calls for the reporting of the type of substance affecting the infant and any harm caused to the child as a result. The language the Federal Child Abuse Prevention and Treatment Act (CAPTA) uses is "infants affected by substance abuse." Proposed new N.J.A.C. 3A:26-1.3(a)4 uses the language of "harm" experienced by the infant. Asking for reports to include the "affects to the infant" seems to be broader than asking about specific harm. The commenter is not sure "affected by" is synonymous with "harm." This wording may be problematic. (2)

RESPONSE: The Departments agree that the term, "affected by," is not synonymous with the term, "harmed by." Proposed new N.J.A.C. 3A:26-1.3(a)4 would require a report to include information on "any harm" that substance exposure caused a substance-affected infant. If the substance exposure that affected the infant did not cause harm, then the reporter would so indicate in the report.

COMMENT: The commenter states that the proposed new rules and amendments are very clear that any infant exposed to drugs during pregnancy has to be reported. This rulemaking raises concern that this topic now falls under child abuse laws and some of these women are crying for help, yet this now could place them in litigation for child abuse. (1)

RESPONSE: The CAPTA obliges the Departments to require reporting of substance-affected infants. If the Division determines, upon receiving such a report, that the report alleges child abuse or neglect, Federal and State laws oblige the Division to respond appropriately to the allegation. In both cases, the purpose of the reporting is for the Division to ensure the safe care and well-being of the infant. The Departments are without authority to fail either to promulgate the reporting requirement or to respond to reports that allege child abuse or neglect.

COMMENT: The commenter inquires, "Will referrals be expected for infants whose mothers are appropriately prescribed and compliant with their medical care which will knowingly result in withdrawal symptoms?" The commenter suggests the example of a mother who is "on methadone/suboxone prior to or started early in her pregnancy," and who is compliant with her methadone protocol as confirmed by the mother's social worker, and which results in her infant having withdrawal symptoms. The commenter states, "These historically have not been patients we have referred once we have confirmed compliance and that the patient is positive for what she is expected to be positive for." (1)

RESPONSE: The CAPTA, as implemented through the proposed amendments and new rules, requires the Departments to ensure the reporting of all substance-affected infants, regardless of the reasons for which infants may experience substance exposure. While the required reporting can identify potential child abuse or neglect, a substance-affected infant report would not, in and of itself, constitute an allegation of abuse or neglect. Identification of substance-affected infants through required reporting, regardless of the reasons for their exposure, enables the Division to offer care and services to address the effects of substance exposure, to avoid further exposure, and to help them stay safe and healthy.

Therefore, the infant in the example the commenter provides is a "substance-affected infant," pursuant to the definition of that term at proposed new N.J.A.C. 3A:26-1.2, because the infant "displays the effects of prenatal controlled substance exposure or symptoms of withdrawal resulting from prenatal controlled substance exposure." The substance-affected infant would be reportable, but the report, absent other factors, would not constitute an allegation of the mother's child abuse or neglect. The absence of an allegation of abuse or neglect does not diminish the substance-affected infant's need for available services to respond to the substance exposure. Reporting is a means to identify to the State substance-affected infants who may need services that the State can offer.

COMMENT: A commenter states that fetal alcohol spectrum would not be diagnosed in an infant unless a history of alcohol use/abuse was elicited from the mother during pregnancy or a referral was made to the genetics department for microcephaly, IUGR, or congenital heart disease and the history illicit at that time fetal alcohol spectrum is a diagnosis of exclusion and most affected babies present with neurobehavioral effects and poor growth later on, rather than congenital anomalies or craniofacial differences. (1)

RESPONSE: The commenter appears to inquire about the obligation to report infants who meet the definition of "substance-affected infants" at proposed new N.J.A.C. 3A:26-1.2 due to fetal alcohol spectrum disorder (FASD), if FASD indicia present later than at birth.

N.J.A.C. 3A:26-1.2 would define the term "substance-affected infant" to include an infant who "displays the effects of" an FASD. Thus, the obligation to report an infant, who is a "substance-affected infant" because of an FASD, arises if, and when, the infant "displays the effects" thereof. The proposed amendments and new rules would neither establish a time limit

on the obligation to report substance-affected infants, nor extinguish the reporting obligation upon an infant's discharge following labor and delivery. Rather, the reporting obligation would continue throughout the infancy of the substance-affected infant. When an infant "displays the effects of" an FASD to an entity with reporting obligations, the proposed amendments and new rules would require that entity to report the substance-affected infant.

COMMENT: A commenter inquires, "[w]ill providers be required to report a mother who had an initially positive drug screen, if all testing afterwards was negative?" The commenter posits the example of a mother who tests positive for marijuana on her initial prenatal visit at eight to 12 weeks "but all additional testing and meconium is negative thereafter," and the "mother has been educated that any additional positive screen would result in a DCPP referral." (1)

RESPONSE: The amendments and new rules do not require "reporting of mothers." Rather, they require reporting of "substance-affected infants," as N.J.A.C. 3A:26-1.2 defines that term. In the example the commenter provides, at birth, the mother's infant would be a "substance-affected infant," pursuant to N.J.A.C. 3A:26-1.2, because the infant's mother "had a positive toxicology screen for a controlled substance or metabolite thereof during pregnancy," and the substance-affected infant would be reportable, *at birth,* to the Division. Subsequent negative drug screens during the pregnancy would not reverse or negate the infant's qualification as a substance-affected infant and potential need for services to address the effects of the infant's substance exposure. Nonetheless, the fact that the mother had subsequent negative toxicology screens after a positive screen can be included in the report in accordance with N.J.A.C. 3A:26-1.3, as, for example, information (1) about the substances, and the amounts thereof, to which the infant had exposure, or (2) that may bear on the Division's evaluation of the matter.

Moreover, under other existing reporting mandates, and in appropriate circumstances, the fact that an ambulatory care facility or hospital obtains a positive drug screen test result for a parent could be an indicator that, with other indicators, may trigger an obligation to report an allegation of child abuse or neglect to the Division *when the entity obtains the positive result* (that is, without waiting until the birth of a fetus *in utero*), such as if a parent, who happens to be pregnant, has the care of other children who might be at risk due to the substance use.

COMMENT: A commenter states that if "all cases would require referrals … additional economic impact would be a factor as the volume of calls would increase, and if DCPP dispositions are not identified during pregnancy, then the possibility of additional stays at the hospital may be required for the infant pending DCPP determination. If DCPP will now be accepting cases during ... pregnancy, that would increase their workload significantly as well to ensure that effective discharge dispositions are identified prior to delivery." (1)

RESPONSE: The Division anticipates no additional costs, as call screening operations are adequately staffed for unanticipated surges in call volume at any time. There is also no expectation that hospitals will initiate additional hospital holds pursuant to N.J.S.A. 9:6-8.16, as reports under this rule are not per se allegations of child abuse and neglect that would justify such a hold. To the extent that additional reports of child abuse or neglect may be received as a result of these rules, any economic cost is outweighed by the substantial public interest in addressing child abuse and neglect.

Summary of Agency-initiated Changes:

The Departments are making changes on adoption:

1. To improve grammar throughout, for example, by correcting the hyphenation of the term, "substance-affected infant"; eliminating the passive voice; and, at N.J.A.C. 3A:26-1.3(a)4 and 5, removing the redundant use of the term, "information";

2. To add, at N.J.A.C. 3A:26-1.1(a), specific cross-references to the rules in Title 8 of the New Jersey Administrative Code that establish the respective obligations of ambulatory care facilities and hospitals to report substance-affected infants to the Division;

3. To clarify N.J.A.C. 3A:26-1.1(c) to state that the Division shall offer services to the parent of a substance-affected infant and shall provide the services if the parent accepts them in accordance with the Division's rules;

4. To reorganize by internal codification, the definition of the term, "substance-affected infant," at N.J.A.C. 3A:26-1.2, as a means of highlighting the independent nature of the qualifying conditions that trigger the reporting obligation; and

5. To correct syntax and avoid ambiguity potentially resulting from the use of the phrase, "child as a result," at N.J.A.C. 3A:26-1.3(a)4, by removing this phrase and adding in its place the defined term, "substance-affected infant," and the phrase, "resulting from his or her exposure to the substances."

Federal Standards Statement

The Child Abuse Prevention and Treatment Act (42 U.S.C. §§ 5101 et seq.) requires that the health care provider must notify child protective services of infants born, and identified as, affected by substance abuse, withdrawal symptoms resulting from prenatal drug exposure, or a fetal alcohol spectrum disorder, and that states have systems in place for the facilitation of these

reports. The adopted new rules and amendments would ensure New Jersey's compliance with this requirement.

Full text of the adoption follows (additions to proposal indicated in boldface with asterisks, ***thus***; deletions from proposal indicated in brackets with asterisks, *[thus]*):

CHAPTER 26

[SUBSTANCE AFFECTED] ***SUBSTANCE-AFFECTED*** INFANTS

SUBCHAPTER 1. REPORTS OF *[SUBSTANCE AFFECTED]* ***SUBSTANCE-AFFECTED*** INFANTS

3A:26-1.1 Reports of *[substance affected]* ***substance-affected*** infants

(a) The Division of Child Protection and Permanency shall receive reports of *[substance affected]* ***substance-affected***infants *[from]* ***that*** ambulatory care facilities ***[**licensed under]* ***submit pursuant to*** N.J.A.C. 8:43A***-28.7*** and ***that*** hospitals *[licensed under]* ***submit pursuant to*** N.J.A.C. 8:43G***-2.13***.

(b) Upon receipt of a report pursuant to (a) above, the Division shall first determine if *[such]* ***the*** report is an allegation of child abuse or neglect pursuant to N.J.S.A. 9:6-1 et seq., and if a determination that a report is an allegation of child abuse or neglect, respond in accordance with applicable law, including N.J.A.C. 3A:10.

(c) For reports made pursuant to (a) above that are not determined to be allegations of child abuse or neglect, the Division ***representative*** shall *[take steps to provide services to substance affected infants and parents]* ***offer services to the parent*** of *[substance affected]* ***each substance-affected*** infant*[s]* on a voluntary basis *[for the purpose of ensuring that

opportunity is given to implement a plan to ensure the safety of that infant]*. ***If the parent accepts, the Division shall provide the services in accordance with N.J.A.C. 3A:11-1.6(b) and 1.7.***

(d) (No change from proposal.)

3A:26-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings***,*** unless the context clearly indicates otherwise*[.]****:***

…

["Substance affected] ***"Substance-affected*** infant" means an infant: [whose]

1. Whose mother had a positive toxicology screen for a controlled substance or metabolite thereof during pregnancy or at the time of delivery; *[who]*

2. Who has a positive toxicology screen for a controlled substance after birth that is reasonably attributable to maternal substance use during pregnancy; *[who]*

3. Who displays the effects of prenatal controlled substance exposure or symptoms of withdrawal resulting from prenatal controlled substance exposure; or *[who]*

4. Who displays the effects of a fetal alcohol spectrum disorder (FASD).

3A:26-1.3 Content of reports

(a) Reports made pursuant to N.J.A.C. 3A:26-1.1 must include the following information:

1. The name of the *[substance affected]* ***substance-affected*** infant, if known;

2. The names of the *[substance affected]* ***substance-affected*** infant's mother and father, if known;

3. The home address**es*** of the *[substance affected]* ***substance-affected*** infant's mother and father, if known;

4. *[Information on the]* ***The*** types of substances affecting the *[substance affected]* ***substance-affected*** infant, and *[any]* ***the*** harm***, if any,*** caused to the *[child as a result]* ***substance-affected infant resulting from his or her exposure to the substances***; and

5. *[Information on circumstances] ***Circumstances*** known to the reporter that would *[impact upon]* ***affect*** an evaluation of the situation, including, but not limited to, awareness of medications prescribed to the mother of the *[substance affected]* ***substance-affected*** infant.

CHAPTER 43A

MANUAL OF STANDARDS FOR LICENSING OF AMBULATORY CARE FACILITIES

SUBCHAPTER 1. DEFINITIONS AND QUALIFICATIONS

8:43A-1.3 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

…

["Substance affected] ***"Substance-affected*** infant" means the term as defined at N.J.A.C. 3A:26-1.2.

…

SUBCHAPTER 28. BIRTH CENTERS

8:43A-28.7 Additional policies and procedures

(a) – (e) (No change from proposal.)

(f) The birth center shall establish and implement written policies and procedures for the reporting of all *[substance affected]* ***substance-affected*** infants to the Division of Child Protection and Permanency in accordance with N.J.A.C. 3A:26.

CHAPTER 43G

HOSPITAL LICENSING STANDARDS

SUBCHAPTER 1. GENERAL PROVISIONS

8:43G-1.2 Definitions

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise:

…

["Substance affected] ***"Substance-affected*** infant" means the term as defined at N.J.A.C. 3A:26-1.2.

…

SUBCHAPTER 2. LICENSURE PROCEDURE

8:43G-2.13 Child abuse and neglect and *[substance affected]* ***substance-affected*** infants

(a) The facility shall establish and implement written policies and procedures, reviewed by the Department and revised as required by the Department, for reporting all diagnosed and/or suspected cases of child abuse and/or neglect in compliance with N.J.S.A. 9:6-1 et seq., and for

reporting *[substance affected]* ***substance-affected*** infants in accordance with N.J.A.C. 3A:26.

(b) (No change from proposal.)