National Advocates for Pregnant Women

N A P W

August 1, 2018

Rodney J. Cummings, Prosecuting Attorney
Steve Koester, Chief Deputy Prosecutor
Office of the Madison County Prosecutor
16 E. 9th Street
Anderson, IN 46016

Dear Mr. Cummings and Mr. Koester:

As professionals and experts in public health, law, and reproductive rights, we are calling on you to drop the charges against Kelli Leever-Driskel, an Anderson woman who remains in jail for having experienced a stillbirth, and was arrested and charged with feticide and involuntary manslaughter after seeking medical assistance. While we believe pregnancy, pregnancy outcomes, and attempts to receive medical care should never be the basis for a criminal prosecution or incarceration, it is particularly troubling that this arrest has occurred despite the fact that Indiana's legislature has clarified that these laws may not be used to prosecute pregnant women.[1] Nevertheless, Kelli Leever-Driskel remains in jail.[2]

Our commitment to the rights and health of pregnant women requires us to speak out against this dangerous and counterproductive prosecution.

As every leading medical organization to address this issue has concluded, including the American Medical Association, the American College of Obstetricians and Gynecologists, the American College of Nurse-Midwives, the American Academy of Pediatrics, and the March of Dimes, issues related to pregnancy, pregnancy outcomes, as well as alcohol and drug use are health issues best addressed through education and evidence-based treatment, not through the criminal justice system.[3]

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[1] Indiana's law on murder, voluntary manslaughter, involuntary manslaughter, and feticide has been amended to include a new section clarifying that these charges "do not apply to a pregnant woman who terminates her own pregnancy or kills a fetus that she is carrying." IN. St. 35-42-1-6.6, 2018 Ind. Legis. Serv. P.L. 203-2018 (Effective July 1, 2018).

[2] *See e.g.,* TheIndyChannel.com Staff, *Woman charged with baby's death after police say she admitted to drug use during pregnancy,* The Indy Channel, February 15, 2018, *available at* https://www.theindychannel.com/news/local-news/madison-county/woman-charged-with-babys-death-after-police-say-she-admitted-to-drug-use-during-pregnancy

[3] *See* "Medical and Public Health Group Statements Opposing Prosecution and Punishment of Pregnant Women-Revised June 2018", attached to letter.

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The arrest in this case assumes that pregnant women can guarantee healthy birth outcomes and they should be held criminally liable if they do not. Increasingly, research is showing that pregnancy outcomes have far more to do with the economic and social conditions a woman has experienced in the course of her life, rather than with anything she does or does not do while pregnant.[4] Likewise, we know that 15 to 20 percent of all pregnancies end in miscarriages and stillbirths, whether or not a pregnant woman smokes cigarettes, drinks alcohol, uses drugs or engages in many of the life activities popularly thought to impact pregnancy outcomes.[5] More specifically, evidence-based research does not support the contention that any of the drugs Ms. Leever-Driskel is alleged to have used cause stillbirth.[6]

Moreover, a substance use disorder is a medical condition - not a crime. Pregnant women do not experience drug dependencies because they want to harm their fetuses or because they don't care about their children. Like other medical and behavioral health conditions, substance use disorder is best addressed through treatment. Medical knowledge about dependency and treatment demonstrates that patients do not, and cannot, simply stop their drug use as a result of threats of arrest or other negative consequences. In fact, threat-based approaches and criminal charges do not protect children. They have, however, been shown to deter pregnant and parenting women from seeking healthcare rather than from using drugs.[7]

Unfortunately, many people with alcohol or drug use disorders find it difficult to obtain the help they need and want. There is also a general lack of available and affordable substance use disorder treatment in Indiana, especially in Anderson, and especially for pregnant women.[8]

We therefore ask you, in the interests of maternal, fetal, and child health, to drop this dangerous and counter-productive prosecution that the laws of Indiana clearly do not support.

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[4] *See* World Health Organization, *Social Determinants of Health,* 2017, http://www.who.int/social_determinants/sdh_definition/en/ ("social determinants of health are the conditions in which people are born, grow, live, work and age."); Kim Krisberg, American Public Health Association, *Transforming Public Health Works: Targeting Causes of Health Disparities,* 46 The Nation's Health, July 2016 ("at least 50% of health outcomes are due to the social determinants . . .").

[5] *Id.*

[6] *See* Mishka Terplan et al., *The Effect of Cocaine and Amphetamine Use During Pregnancy on the Newborn: Myth versus Reality,* 30 Journal of Addictive Diseases 1, 3 (2011); *see also* American College of Obstetricians and Gynecologists, *Information About Methamphetamine Use In Pregnancy* (March 2006); Claudia Malacrida, *Complicating Mourning: The Social Economy of Perinatal Death,* 9 Qualitative Health Res. 504, 505 (July 1999).

[7] *See* Poland, et al., *Punishing Pregnant Drug Users: Enhancing the Flight From Care,* 31 Drug and Alcohol Dependence 199 (1993). *See also* Rosa Goldensohn & Rachel Levy, The State Where Giving Birth Can be Criminal, The Nation, Dec. 10, 2014, *available at* https://www.thenation.com/article/state-where-giving-birth-can-be-criminal/, (investigative report documenting that Tennessee's "fetal assault" law in effect from 2014-2016 caused pregnant women to avoid healthcare and flee the state to give birth).

[8] According to Indiana's state website, there are two treatment providers in Anderson, and none specifically for pregnant women. *Available at* https://www.in.gov/fssa/addiction/.

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Signed,

National Advocates for Pregnant Women, and:

All-Options/All-Options Pregnancy Resource Center (Bloomington, IN)
Indiana National Organization for Women (NOW), Indianapolis, IN
Indiana Recovery Alliance, Bloomington, IN
Indiana Religious Coalition for Reproductive Justice, Indianapolis, IN
Indiana Section of the American College of Obstetricians and Gynecologists
Indy Feminists
Northwest Indiana National Organization for Women (NOW)
Planned Parenthood Advocates of Indiana and Kentucky
Planned Parenthood of Indiana and Kentucky
Terre Haute National Organization for Women (NOW), Terre Haute, IN
The Gender, Women and Sexuality Studies Program at Butler University, Indianapolis, IN

**Individuals listed below have signed this letter in their personal capacities, institutional affiliations are noted for identification purposes only.*

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Co-chair, Monroe County Opioid Commission, Monroe County, IN

Michelle Adler*, President of Terre Haute National Organization for Women (NOW)
Terre Haute, IN

John Hamilton*, Mayor
City of Bloomington, IN

Betsy Hunt*, Volunteer Patient Escort Coordinator
Planned Parenthood-Merrillville Health Center, Merrillville, IN

Julie Storbeck*, President of Northwest Indiana National Organization for Women (NOW)
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Heather Wildrick-Holman*, State President
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Medical and Public Health Group Statements Opposing Prosecution and Punishment of Pregnant Women

Revised June 2018

American Medical Association

"Transplacental drug transfer should not be subject to criminal sanctions or civil liability . . . In particular, support is crucial for establishing and making broadly available specialized treatment programs for drug-addicted pregnant and breastfeeding women wherever possible. . ." American Medical Association, Policy Statement - H-420.962, *Perinatal Addiction - Issues in Care and Prevention* (last modified 2017).

"Pregnant women will be likely to avoid seeking prenatal or open medical care for fear that their physician's knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment." Report of American Medical Association Board of Trustees, Legal Interventions During Pregnancy: Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women, JAMA Vol. 264, No. 20 p.2667 (1990).

"Judicial intervention is inappropriate when a woman has made an informed refusal of a medical treatment designed to benefit her fetus. If an exceptional circumstance could be found in which a medical treatment poses an insignificant or no health risk to the woman, entails a minimal invasion of her bodily integrity, and would clearly prevent substantial and irreversible harm to her fetus, it might be appropriate for a physician to seek judicial intervention. However, the fundamental principle against compelled medical procedures should control in all cases which do not present such exceptional circumstances. The physician's duty is to provide appropriate information, such that the pregnant woman may make an informed and thoughtful decision, not to dictate the woman's decision." American Medical Association, Policy Statement - H-420.969, *Legal Interventions During Pregnancy* (2016).

"Our AMA supports language recently adopted by the New Mexico legislature that 'an adult or juvenile correctional facility, detention center or local jail shall use the least restrictive restraints necessary when the facility has actual or constructive knowledge that an inmate is in the 2nd or 3rd trimester of pregnancy. No restraints of any kind shall be used on an inmate who is in labor, delivering her baby or recuperating from the delivery unless there are compelling grounds to believe that the inmate presents: an immediate and serious threat of harm to herself, staff or others; or a substantial flight risk and cannot be reasonably contained by other means.'" American Medical Association, Policy Statement - H-420.957, *Shackling of Pregnant Women In Labor* (2010).

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American College of Obstetricians and Gynecologists

"Pregnancy is not an exception to the principle that a decisionally capable patient has the right to refuse treatment, even treatment needed to maintain life. Therefore, a decisionally capable pregnant woman's decision to refuse recommended medical or surgical intervention should be respected… The College opposes the use of coerced medical interventions for pregnant women, including the use of the courts to mandate medical intervention for unwilling patients." American College of Obstetricians and Gynecologists Committee on Ethics, Committee Opinion 664, *Refusal of Medically Recommended Treatment During Pregnancy* (2016).

"Drug enforcement policies that deter women from seeking prenatal care are contrary to the welfare of the mother and fetus. Incarceration and the threat of incarceration have proven to be ineffective in reducing the incidence of alcohol or drug abuse …The use of the legal system to address perinatal alcohol and substance abuse is inappropriate." American College of Obstetricians and Gynecologists Committee on Health Care for Underserved Women, Committee Opinion 473, *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist* (2011, reaffirmed 2014).

"The American College of Obstetricians and Gynecologists (ACOG) opposes the prosecution of a pregnant woman for conduct alleged to have harmed her fetus, including the criminalization of self-induced abortion…Obstetrician-gynecologists should protect patient autonomy, confidentiality, and the integrity of the parent-physician relationship with regard to self-induced abortion attempts and should advocate against mandated reporting." American College of Obstetricians and Gynecologists, Position Statement: "Decriminalization of Self-Induced Abortion" (2017).

"Seeking obstetric–gynecologic care should not expose a woman to criminal or civil penalties, such as incarceration, involuntary commitment, loss of custody of her children, or loss of housing. These approaches treat addiction as a moral failing. Addiction is a chronic, relapsing biological and behavioral disorder with genetic components. The disease of substance addiction is subject to medical and behavioral management in the same fashion as hypertension and diabetes." American College of Obstetricians and Gynecologists Committee on Health Care for Underserved Women, Committee Opinion 473, *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist* (2011, reaffirmed 2014).

"…[I]t is important to advocate for this often-marginalized group of patients (patients with substance use disorders) particularly in terms of working to improve availability of treatment and to ensure that pregnant women with opioid use disorder who seek prenatal care are not criminalized. Finally, obstetric care providers have an ethical responsibility to their pregnant and parenting patients with substance use disorder to discourage the separation of parents from their children solely based on substance use disorder, either suspected or confirmed. In states that mandate reporting, policy makers, legislators, and physicians should work together to retract punitive legislation and identify and implement evidence-based strategies outside the legal system to address the needs of women with addictions." American College of Obstetricians and Gynecologists Committee on Obstetric Practice, Committee Opinion 524, *Opioid Use and Opioid Use Disorder in Pregnancy* (2017).

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National Perinatal Association

"Treating this personal and public health issue (perinatal substance use) as a criminal issue-or a deficiency in parenting that warrants child welfare intervention-results in pregnant and parenting people avoiding prenatal and obstetric care and putting the health of themselves and their infants at increased risk…The threats of discrimination, incarceration, loss of parental rights, and loss of personal autonomy are powerful deterrents to seeking appropriate prenatal care. Perinatal providers promote better practices when they adopt language, attitudes, and behaviors that reduce stigma and promote honest and open communication about perinatal substance use." National Perinatal Association, Position Statement, *Perinatal Substance Use* (2017).

"The National Perinatal Association opposes any legal measures that involve the criminal justice system for drug use during pregnancy. Any statute which criminalizes substance use during pregnancy is inherently discriminatory in addition to being counterproductive to the goal of improving maternal and neonatal outcomes. Criminalization and incarceration are ineffective and harmful to the health of the pregnant person and their infant." National Perinatal Association, Position Statement, *Perinatal Substance Use* (2017).

"As clinicians, mental health, and community care providers, it is imperative that we understand the nature of perinatal substance use disorders and provide interventions and care that preserve the parent-infant dyad, promote parenting potential, and support the baby's health and development." National Perinatal Association, Position Statement, *Perinatal Substance Use* (2017).

"The National Perinatal Association opposes legislation that defines personhood as beginning at or after viability…The NPA encourages its members to oppose any legislation defining fetal personhood at conception and encourages its members to support legislators in favor of leaving this discussion to the medical sphere." National Perinatal Association, Position Statement, *Supporting The Legal Autonomy of Pregnant Women* (2013).

American Academy of Family Physicians

"[T]he AAFP supports public and individual education about the risks of any substance use and abuse during pregnancy. The AAFP opposes imprisonment or other criminal sanctions of pregnant woman solely for substance abuse during pregnancy, but encourages facilitated access to an established drug and alcohol rehabilitation program for such women." American Academy of Family Physicians, Policy, *Substance Abuse and Addiction,* section entitled "*Pregnant Women, Substance Use and Abuse by"* (2003, 2016 COD).

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American Society of Addiction Medicine

"Criminal prosecution of chemically dependent women will have the overall result of deterring such women from seeking both prenatal care and chemical dependency treatment, thereby increasing, rather than preventing, harm to children and to society as a whole." American Society of Addiction Medicine, *Public Policy Statement on Chemically Dependent Women and Pregnancy* (1989).

"In order to prevent harm to mothers and infants, ASAM recommends the following: …Substance use disorder treatment services able to meet the specific needs of women, including pregnant and parenting women, and their families: Preservation of the physician-patient relationship, so that laws or regulations should not require physicians to violate confidentiality by reporting their pregnant patients with current or past history of substance use to legal authorities and/or child welfare services in the absence of evidence of child abuse or neglect." American Society of Addiction Medicine, *Public Policy Statement on Women, Alcohol and Other Drugs, and Pregnancy* (2011).

"It is inappropriate to reflexively move from the possibility to an alleged certainty of defective parenting or danger to the child simply because of evidence of substance use . . . Sanctions against parents under child protective services interventions should be made only when there is objective evidence of danger, not simply evidence of substance use." American Society of Addiction Medicine, *Public Policy Statement on Substance Use, Misuse, and Use Disorders During and Following Pregnancy, with an Emphasis on Opioids* (2017).

"State and local governments should avoid any measures defining alcohol or other drug use during pregnancy as 'child abuse or maltreatment,' and should avoid prosecution, jail, or other punitive measures as a substitute for providing effective health care services for these women." American Society of Addiction Medicine, *Public Policy Statement on Substance Use, Misuse, and Use Disorders During and Following Pregnancy, with an Emphasis on Opioids* (2017).

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American Public Health Association

"Recognizing that pregnant drug-dependent women have been the object of criminal prosecution in several states, and that women who might want medical care for themselves and their babies may not feel free to seek treatment because of fear of criminal prosecution related to illicit drug use . . . [the Association] recommends that no punitive measures be taken against pregnant women who are users of illicit drugs when no other illegal acts, including drug-related offenses, have been committed…" American Public Health Association, Policy Statement No. 9020, *Illicit Drug Use by Pregnant Women* (1990).

American Nurses Association

"ANA opposes laws that may result in punitive legal actions and result in incarceration of pregnant women because of substance use disorder." American Nurses Association, Position Statement, *Non-punitive Treatment for Pregnant and Breast-feeding Women with Substance Use Disorders* (2017).

"ANA supports the fact that substance use disorders are diseases that require treatment, not incarceration." American Nurses Association, Position Statement, *Non-punitive Treatment for Pregnant and Breast-feeding Women with Substance Use Disorders* (2017).

"Criminalization of pregnant women with substance use disorder often results in more harm than good. The threat of criminal prosecution prevents many pregnant women from seeking prenatal care and treatment for their substance problems (Schempf & Strobino, 2009). Prisons are not prepared to provide for the specialized needs of pregnant women (Cardaci, 2013; Skerker, Dickey, Schonberg, Macdonald, & Venters, 2015)." American Nurses Association, Position Statement, *Non-punitive Treatment for Pregnant and Breast-feeding Women with Substance Use Disorders* (2017).

"Contrary to claims that prosecution and incarceration will deter pregnant women from substance use, the greater result is that fear of detection and punishment poses a significant barrier to treatment (Stone, 2015)." American Nurses Association, Position Statement, *Non-punitive Treatment for Pregnant and Breast-feeding Women with Substance Use Disorders* (2017).

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Association of Women's Health, Obstetric and Neonatal Nurses

"The Association of Women's Health, Obstetric and Neonatal Nurses (AWHONN) opposes laws and other reporting requirements that result in incarceration or other punitive legal actions against women because of a substance abuse disorder in pregnancy. . . [t]he threat of incarceration has been shown to be an ineffective strategy for reducing the incidence of substance abuse, while medication and behavioral therapies serve as important elements of an over-all therapeutic process." Association of Women's Health, Obstetric and Neonatal Nurses, *Criminalization of Pregnant Women with Substance Use Disorders* (2015).

"The Association of Women's Health, Obstetric and Neonatal Nurses (AWHONN) believes that any woman's reproductive health care decisions are best made by the informed woman in consultation with her health care provider. AWHONN believes these personal and private decisions are best made within a health care system whose providers respect the woman's right to make her own decisions according to her personal values and preferences and to do so confidentially." Association of Women's Health, Obstetric and Neonatal Nurses, *Health Care Decision Making for Reproductive Care* (revised 2016).

American College of Nurse Midwives

"ACNM supports a health care system in which women with substance addictions in pregnancy are treated with compassion, not punishment. Women should not be deterred from seeking care during pregnancy due to fear of prosecution. Optimal care for women with addiction occurs within a multidisciplinary environment in which holistic care is provided that considers the context of her social environment and her unique health risks. In the health policy and legislative arena, efforts should be directed towards comprehensive approaches to promoting addiction recovery." American College of Nurse Midwives, Position Statement, *Addiction in Pregnancy* (updated 2013).

"It is the position of the American College of Nurse Midwives (ACNM) that: Physiologic vaginal birth is the optimal mode of birth for most women and babies. Cesarean birth is valued as a surgical procedure when there are maternal, fetal, or obstetric indications . . . Women have the right to accurate, balanced and complete information regarding the risks, benefits and potential harms of both vaginal and cesarean birth." American College of Nurse Midwives, Position Statement, *Elective Primary Cesarean Birth* (updated 2016).

"It is the position of the American College of Nurse-Midwives (ACNM) that: Women who have experienced cesarean births have the right to safe and accessible options for subsequent births. Women should receive evidence-based information to guide their decision making when they consider labor after cesarean versus elective repeat cesarean." American College of Nurse Midwives, Position Statement, *Vaginal Birth After Cesarean Delivery* (Revised and reapproved 2017).

American Academy of Pediatrics

"The American Academy of Pediatrics (AAP) first published recommendations on substance-exposed infants in 1990 and reaffirmed its position in 1995 that 'punitive measures taken toward pregnant women, such as criminal prosecution and incarceration, have no proven benefits for infant health' and argued that 'the public must be assured of nonpunitive access to comprehensive care that meets the needs of the substance-abusing pregnant woman and her infant.' . . . The AAP reaffirms its position that punitive measures taken toward pregnant women are not in the best interest of the health of the mother-infant dyad." American Academy of Pediatrics, Committee on Substance Use and Prevention, Policy Statement, *A Public Health Response to Opioid Use in Pregnancy* (2017).

"The existing literature supports the position that punitive approaches to substance use in pregnancy are ineffective and may have detrimental effects on both maternal and child health . . . [T]he AAP supports an approach toward substance use in pregnancy that focuses on a public health approach of primary prevention, improving access to treatment, and promoting the provider-patient relationship rather than punitive measures through the criminal justice system." American Academy of Pediatrics, Committee on Substance Use and Prevention, Policy Statement, *A Public Health Response to Opioid Use in Pregnancy* (2017).

March of Dimes

"The March of Dimes opposes policies and programs that impose punitive measures on pregnant women who use or abuse drugs. . . The March of Dimes believes that targeting women who used or abused drugs during pregnancy for criminal prosecution or forced treatment is inappropriate and will drive women away from treatment vital both for them and the child." March of Dimes, Fact Sheet, *Policies and Programs to Address Drug-Exposed Newborns* (2014).

American Psychological Association

"…[T]he American Psychological Association [a]ffirms its view that alcohol and drug abuse by pregnant women is a public health problem and that laws, regulations and policies that treat chemical dependency primarily as a criminal justice matter requiring punitive sanctions are inappropriate…[The APA a]ffirms the use of health care strategies to foster the welfare of chemically dependent women and their children by expanding access to prenatal care and to reproductive health care generally. . ." American Psychological Association, Policy, *Resolution on Substance Abuse by Pregnant Women* (1991).

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National Organization on Fetal Alcohol Syndrome

"NOFAS opposes any law or policy that would impose a criminal penalty on pregnant women for drinking alcohol. Alcohol use during pregnancy is a serious problem, yet criminalization is not a solution. Criminalizing alcohol use during pregnancy interferes with the private patient/doctor relationship and intrudes on the rights of women. Such laws could result in pregnant women choosing not to disclose their alcohol use to medical and allied health providers out of fear of criminal sanction. As a result, women with alcohol dependence or an alcohol use disorder could go unidentified and untreated. Alcoholism is a primary, chronic disease with genetic, psychosocial, and environmental factors and should be treated accordingly." National Organization on Fetal Alcohol Syndrome, Position Statement, *NOFAS Opposes Criminalizing Alcohol Use by Pregnant Women* (2014).

American Psychiatric Association

"The use of the legal system to address perinatal alcohol, tobacco, and other substance use disorders is inappropriate. APA opposes the criminal prosecution and incarceration of pregnant and/or newly delivered women on child abuse charges based on the use of substances during pregnancy. (Social services and legal actions may be appropriate if positive evidence of substance use or neglect is found following the birth of a child)." American Psychiatric Association, Position Statement, *Assuring the Appropriate Care of Pregnant and Newly-Delivered Women with Substance Use Disorders* (2016).

"Subsequent incarceration in jails or prisons or in locked psychiatric units deprives the mother of her liberty and disrupts the incipient or nascent maternal-infant bond. This vulnerable patient population needs comprehensive care for both immediate and long-term symptoms in order to restore a healthy maternal-infant relationship and improved functioning in the mother." American Psychiatric Association, Position Statement, *Assuring the Appropriate Care of Pregnant and Newly-Delivered Women with Substance Use Disorders* (2016).

"The American Psychiatric Association opposes all constitutional amendments, legislation, and regulations curtailing family planning and abortion services to any segment of the population; The American Psychiatric Association reaffirms its position that abortion is a medical procedure for which physicians should respect the patient's right to freedom of choice. . . The American Psychiatric Association affirms that the freedom to act to interrupt pregnancy must be considered a mental health imperative with major social and mental health implications." American Psychiatric Association, Position Statement, *Abortion and Women's Reproductive Health Care Rights* (reaffirmed 2014).

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National Association of Public Child Welfare Administrators

The National Association of Public Child Welfare Administrators has stated that "laws, regulations, or policies that respond to addiction in a primarily punitive nature, requiring human service workers and physicians to function as law enforcement agents are inappropriate." National Association of Public Child Welfare Administrators, *Guiding Principles for Working With Substance-Abusing Families and Drug-Exposed Children: The Child Welfare Response* (1991).

National Council on Alcoholism and Drug Dependence

"[A] punitive approach is fundamentally unfair to women suffering from addictive diseases and serves to drive them away from seeking both prenatal care and treatment for their alcoholism and other drug addictions. It thus works against the best interests of infants and children by involving the sanctions of the criminal law in the case of a health and medical problem." National Council on Alcoholism and Drug Dependence, Policy Statement, *Women, Alcohol, Other Drugs and Pregnancy* (1990).

Association of Maternal and Child Health Programs

"The threat of criminal prosecution prevents many women from seeking prenatal care and early intervention for their alcohol or drug dependence, undermines the relationship between health and social service workers and their clients, and dissuades women from providing accurate and essential information to health care providers. The consequence is increased risk to the health and development of their children and themselves." Association of Maternal and Child Health Programs, Law and Policy Committee, *Statement Submitted to the Senate Finance Committee Concerning Victims of Drug Abuse: Resolution on Prosecution* (1990).

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