

To: Rape Crisis and Family Violence Centers

Re: Reproductive Healthcare for Survivors

The following information is not meant to serve as legal advice.

Two decades ago, TAASA's membership resoundingly adopted a resolution to support legislation that protects the right of sexual assault and incest survivors to make choices with regard to abortion. In 2019, TAASA reaffirmed its stance as a pro-choice coalition, noting that legislation to restrict abortion brings harmful consequences to sexual assault survivors. Today, TAASA remains unequivocal in its support of survivors of sexual assault, and advocates strongly for their dignity, justice and bodily autonomy.

The Texas Council on Family Violence (TCFV) similarly understands that this elimination of a health care option greatly diminishes safety and gravely exacerbates risks for survivors. Removing abortion care as an option for survivors in Texas, where reproductive coercion occurs at a higher rate than the national average and where health disparities are acute—particularly for BIPOC, LGBTQ+, low income and other vulnerable groups – will have devastating effects.

Dobbs v. Jackson Women's Health: The U.S. Supreme Court abdicated to the states to decide whether a person has a right to reproductive healthcare.

On June 24, 2022, the United States Supreme Court decided that the right to an abortion is not a recognized Constitutional right overturning 50 years of legal precedent stating otherwise. This decision delegated to states the exclusive authority to either permit or deny provision of essential reproductive healthcare to its citizens. As a result, the *Dobbs* decision triggered several restrictive laws that had been codified in Texas to take effect, dating from 1925 through 2021. These laws have the potential to put survivors at risk. We provide this guidance to you to offer accurate information as you advocate for survivors' rights and safety.

Most abortions are now illegal in Texas.

Since at least 1925, Texas has had a law that has banned abortion. During the years that *Roe v. Wade* was in effect, that ban was invalid. However, in the aftermath of the *Dobbs* decision, it was revived and today applies to criminalize the act of abortion in Texas.

In addition, in 2021 the Texas Legislature passed a law during a special session, entitled the Human Life Protection Act. This law also criminalizes abortion and will take effect on

the 30th day after the issuance of the *Dobbs* judgment.¹ When the law takes effect, it will mirror many of the same prohibitions from the 1925 law with some additional clarifications.²

Both of these laws impose criminal penalties on abortion providers who administer drugs, medication, devices or any means with intent to cause a person to abort a fetus or embryo. The laws do not contain an exception for rape or incest.

Both laws do contain exceptions when the pregnancy poses health risks to the mother, (ie, if a pregnant woman is at "serious risk of substantial impairment of a major bodily function" unless an abortion is performed).³ Abortions of ectopic pregnancies are also excepted, as are abortions performed to "remove a dead, unborn child whose death was caused by spontaneous abortion."⁴ This aligns with the federal Emergency Medical Treatment and Labor Act (EMTALA) that directs hospital emergency departments to provide medical treatment for emergency medical conditions, to include ectopic pregnancy, hypertension and preeclampsia. The EMTALA preempts any state's laws that contradict it. Guidance was recently released by the Department of Health and Human Services that states "If a physician believes that a pregnant patient presenting at an emergency department is experiencing an emergency medical condition as defined by EMTALA, and that abortion is the stabilizing treatment necessary to resolve that condition, the physician must provide that treatment."⁵ Texas' Attorney General's Office has since filed a lawsuit challenging this guidance, and that suit is currently pending.

¹ While the *Dobbs* opinion was published on June 24, 2022, this is not the date of the issued judgment. We would expect the *Dobbs* judgment to be issued sometime in late July or early August.

² Each of these laws focus on criminalizing abortion, but they work in concert with the Heartbeat Act that was also passed in 2021, which imposes civil liability on providers who induce an abortion (and on third parties who aid and abet such an abortion) that are provided after a heartbeat is detected.

³ "Nothing in this chapter applies to an abortion procured or attempted by medical advice for the purpose of saving the life of the mother." Tex. Rev. Civ. Stats. Ann. Art 1196; "The prohibition under Subsection (a) does not apply if...(2) in the exercise of reasonable medical judgment, the pregnant female on whom the abortion is performed, induced or attempted has a life-threatening physical condition aggravated by, caused by, or arising from a pregnancy that places the female at risk of death or poses a serious risk of substantial impairment of a major bodily function unless the abortion is performed or induced." Tex. Health & Safety Code § 170A.002.

⁴ See <https://www.npr.org/sections/health-shots/2022/05/10/1097734167/in-texas-abortion-laws-inhibit-care-for-miscarriages>

⁵ See Reinforcement of EMTALA Obligations specific to Patients who are Pregnant or are Experiencing Pregnancy Loss (UPDATED JULY 2022) <https://www.cms.gov/medicareprovider-enrollment-and-certificationsurvey/certificationgeninfo/policy-and-memos-states-and/reinforcement-emtala-obligations-specific-patients-who-are-pregnant-or-are-experiencing-pregnancy-0>.

Abortion is illegal in Texas from the moment of conception.

The 2021 law makes clear that abortion of an “unborn child” (defined in the law as an individual from fertilization until birth) is illegal. While the Heartbeat Act imposes civil liability beginning at 6 weeks after conception, the Human Life Protection Act applies much earlier.

Abortion medications are illegal in Texas.

For years, physicians outside of Texas have offered reproductive healthcare access to Texas residents via telehealth and prescription of abortion medications. In response to this, the Texas Legislature passed a law in 2021 that criminalizes providing abortion medications through telehealth or mail and imposes new criminal penalties and reporting requirements on physicians who provide such drugs.⁶

With regard to the criminal penalties in this law, it is unlikely that Texas authorities would have success prosecuting providers who operate out of state. Regarding the reporting requirements, however, HIPAA regulations offer some, but not complete, protection. While HIPAA allows providers to refuse to disclose a patient’s health information, it *does allow* providers to disclose private healthcare information if “required by law.”

On July 8, 2022, President Biden signed an Executive Order directing that Health and Human Services provide guidance related to the HIPAA Privacy Rule to clarify that doctors and medical providers are in most cases not required – and in many instances not permitted – to disclose the private information of patients, including to law enforcement. However, depending on how these rules are interpreted by courts, it seems to still be an open question in the state of Texas whether a person may legally protect their private healthcare decisions when it comes to abortion care. This uncertainty poses a salient risk for survivors seeking an abortion (or medications) out of state, due to the reporting requirements of this law.

Penalties are imposed against providers, not the person who is pregnant.

It is important to clarify that each of these abortion laws direct criminal and civil liability against providers, and specifically state that they *do not apply* to the person who is pregnant. It is not illegal for a person to seek an abortion, it is only illegal for a provider in Texas to perform one, or administer measures or medications to induce an abortion. Though some overzealous prosecutors may attempt to bring a case against a person

⁶ Abortion medications are specifically defined in the law, and *do not include* contraception or preventative medications, such as Plan B.

who miscarries, or attempts to terminate a pregnancy themselves, the law specifically exempts them from criminal prosecution.

The criminal penalties for an abortion range widely; a provider can be imprisoned for two years up to life (if the fetus would have been born alive but for the abortion).

Civil penalties also range widely; a provider can be fined from \$100 to \$1,000 pursuant to the 1925 law, a minimum of \$100,000 pursuant to the 2021 law, and can be sued by a third party for a minimum of \$10,000 pursuant to the Texas Heartbeat Act.⁷ Providers can lose their licenses as a penalty as well.

Service providers have a duty to support survivors.

The right to privacy, and indeed the right to make choices about a person's health and body, is uniquely significant for survivors of sexual assault and intimate partner violence (IPV), as the very nature of their victimization deprives them of both. Recovery and healing demands the restoration and protection of these rights. An advocate's role is to support, inform and speak up with and for survivors, and in this new era where survivors' privacy rights have been assailed, it is more important than ever to stand with survivors and speak out against oppression of their reproductive choices and incursions against their privacy.

Advocates should remember their unique role in a survivor's life, apart and distinct from law enforcement, and support what a survivor chooses, regardless of what the advocate would choose. As we have noted in previous guidance on restrictive reproductive laws, advocacy entails providing information and referrals to survivors of domestic and sexual violence to further their safety, healing, and recovery. It includes discussions about reproductive coercion--an extremely prevalent tactic used by IPV perpetrators--and empowering survivors to engage in autonomous planning and decision-making regarding reproduction. Advocacy centers conversations with survivors about their choices concerning their body. It also can include information about terminating an unwanted pregnancy or a pregnancy that presents even more safety risks for a survivor. Inherent to an advocate's role is the recognition and support of survivors as the experts of their own safety and wholly autonomous decision makers in their life choices.

Now more than ever, survivors need timely and accessible information about their reproductive rights and options. Advocates can and should support survivors and their right to bodily autonomy. Conversations about reproductive health and pregnancy should

⁷ The Texas Heartbeat Act imposes civil liability against providers and individuals who "aid and abet" an abortion conducted after a fetal heartbeat is detected. See TAASA/TCFV guidance on SB 8.

occur with the survivor during intake and throughout the course of service provision so that advocates can offer information about the law and engage in ongoing conversations regarding reproductive life planning. Residential and non-residential programs should consider stocking over-the-counter pregnancy tests and emergency contraception that is readily available and easily accessible to clients⁸

Contraception, including pills such as Plan B, is still legal in Texas, and should be offered to survivors as soon as possible after an assault. Per the Food and Drug Administration: *"Plan B works like other birth control pills to prevent pregnancy. Plan B acts primarily by stopping the release of an egg from the ovary (ovulation). It may prevent the union of sperm and egg (fertilization)."* Plan B is *not* an abortion-inducing drug, and is *not* subject to the restrictions on abortion medication. It is, however, important to administer early after unprotected sex, ideally within three days. Advocates should be prepared to explain how this emergency contraception works, and the timing for its effective use.

Survivors are legally entitled to privacy within sexual assault and family violence programs.

While the status of a survivor's privacy rights are at risk in our state, Texas law *does* afford a survivor very strong privacy protections when seeking help from a sexual assault or family violence program. Texas law prohibits disclosure of information that a survivor shares with an advocate and only offers limited exceptions for disclosure (such as when a survivor waives the privilege). The decision to terminate a pregnancy or to seek emergency healthcare is not an exception under either of the victim advocate privilege laws in Texas and as such does not release advocates from their obligation to keep a survivor's communications confidential. Advocates should protect a survivor's privacy in all instances, in particular with regard to their healthcare decisions.

Additionally, advocates are required to maintain records that include only the minimum amount of information necessary to serve a survivor's needs and maintain only those needed under the laws or rules that pertain to their funding source, which does not include health information. Advocates should help survivors make informed decisions about whether and how they share private information.

⁸ Per the Texas Administrative Code, survivors are to have direct access to medication and staff should make medication available but not actually dispense medication to a survivor.