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To: Sexual Assault Programs
Re: OAG Opinion Regarding Child Abuse and Transgender Minors

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

TAASA remains steadfast in our commitment to advocating for all survivors of sexual assault and supporting both children and adults of all gender identities and expression. We share the concerns of minor transgender survivors, as well as their health care providers, parents, counselors and teachers, in light of the recently released Attorney General Opinion which advises that certain medical gender-affirming procedures constitute child abuse.¹ We believe that this Opinion puts transgender survivors and their families at greater risk of abuse, and creates unnecessary and unsafe barriers to their support.

The AG Opinion is advisory only.

Attorney General Opinions offer an interpretation of the law, but they do not create or amend existing laws.

The AG Opinion does not make gender transition or affirming procedures illegal nor does it make the facilitation of these types of procedures illegal or child abuse. Trial courts have the ultimate authority to interpret the law, and they base their decisions upon the facts of a case and binding authority (such as statutes and prior case law). In cases involving minors, trial courts must also decide what is in the best interest of the child. The AG Opinion does not change these basic standards of review nor does it usurp a trial court's authority to render orders in child abuse cases.

While the AG Opinion provides an advisory opinion to courts, courts still have the ultimate authority to decide what constitutes child abuse, based upon statutes and prior court opinions. Once a court makes a finding on a given matter, that judgment is then given deference over an AG Opinion, even if it is contradictory.

The AG Opinion advises that transition procedures can constitute child abuse.

The two questions examined by the Attorney General are:

- whether the performance of certain medical and chemical procedures on children constitute child abuse, and
- whether "providing, administering, prescribing, or dispensing drugs to children that induce transient or permanent infertility" constitutes child abuse.

In analyzing these questions, the Opinion examines the risk of permanent sterilization, mental health outcomes of children undergoing transition, and the potential risk of Munchausen syndrome by proxy. The Opinion ultimately advises that the medical procedures and treatments to enable gender transitioning "can legally constitute child abuse." The Opinion goes on to advise that:

¹ Such procedures include puberty blockers, hormone therapy and gender-affirming surgeries.

[w]hen considering questions of child abuse, a court would likely consider the fundamental right to procreation, issues of physical and emotional harm associated with these procedures and treatments, consent laws in Texas and throughout the country, and existing child abuse standards.

These are theoretical conditions that a court could consider in determining whether child abuse has occurred, but a court is under no obligation to do so.

The AG Opinion puts transgender survivors at risk.

While not binding legal authority, the AG Opinion *does* put thousands of Texans at risk of harm. If the Department of Family and Protective Services pursues child abuse investigations under the precept that gender-affirming procedures are child abuse, this has the deleterious effect of inciting compulsory protracted legal cases, potentially separating transgender youth from their families and support systems and placing them into temporary foster care. The Opinion concocts a grievous plan to lay a heavy burden on mandatory reporters (which includes advocates, teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers, etc.) to report to authorities even the vaguest suspicions of gender-affirming procedures. This divests transgender survivors of their privacy rights and individual bodily autonomy and denies parents their right to make medical care decisions for their children. Texas families and children should feel safe seeking support from service providers and the criminal justice system. However, if they believe that the nurses, police officers and therapists whom they turn to for help in situations of sexual abuse will report on them, or their parents, for gender-related care, they and their families will be reluctant to seek that support and report perpetrators.

Sexual assault programs can and should continue to provide advocacy services to transgender survivors who are considering gender transitioning.

Sexual assault programs have the duty to provide services to all survivors of sexual assault, no matter their gender identity or expression. Advocacy includes crisis intervention, legal accompaniment, and medical accompaniment to forensic exams. These are minimum services notwithstanding any potential duty of mandatory reporting of child abuse.

Advocacy entails providing information and referrals to survivors of domestic and sexual violence to further their safety, healing, and recovery. Empowering survivors about their choices concerning their body is foundational to recovery. 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.

Advocate privilege still applies, and exceptions are narrowly defined.

Victim-advocate privilege laws support victims of sexual assault and family violence.² These laws prohibit disclosure of information shared with staff at sexual assault programs – with few exceptions – and provide that any communication held about a survivor is privileged and confidential.

Mandatory reporting is one of the few exceptions to victim-advocate privilege but only to the extent that there is “cause to believe that a child’s physical or mental health or welfare has been adversely affected by

² Texas Government Code Section 420.071; Texas Family Code Section 93.002, 93.003.

abuse or neglect.” Abuse and neglect are specifically defined in Section 261.001 of the Texas Family Code.³ Neither definition includes gender-affirming procedures or medications.

The Attorney General has no authority to legally define gender transitioning as child abuse. Therefore, an advocate does not have a duty to report information that a child survivor (or a child of a survivor) seeking advocacy services is undergoing gender-affirming procedures. *Notwithstanding language to the contrary in the AG Opinion, failing to report information about a minor gender transitioning is not a criminal offense.*

The courts will interpret what constitutes child abuse. Until a court, or a statute, defines gender transitioning as abuse, there is no duty to report these procedures as suspected child abuse in the state of Texas.

Federal and state health and mental health confidentiality requirements still apply.

In addition to the laws governing privacy for sexual assault advocates, some sexual assault programs may be subject to the federal Health Information Portability and Accountability Act (HIPAA) and their mental health providers are subject to the confidentiality requirements governed by Chapter 611 of the Texas Health and Safety Code.

Advocating for transgender survivors and their families.

Advocates can and should support survivors, and their rights to bodily autonomy, within the bounds of the law.

- ❖ Conversations about safety planning should occur during the very first interaction with a survivor. In light of this Opinion, it is important to assess a transgender survivor’s safety not only from an abuser or rapist, but also from family members, friends or community members who might have information about the survivor’s aspirations to undergo gender-affirming treatments or surgery.
- ❖ Advocates should be prepared to explain how this Opinion might impact health care providers’ decisions to provide medications or treatments.
- ❖ Advocates should affirm parents’ rights to make sound medical health care decisions for their children; both the American Medical Association as well as the American Academy of Pediatrics have released opinions that gender-affirming care is medically necessary and appropriate care for the transgender youth who need it.

As cases involving child abuse move forward in the courts, it will become clearer as to how much weight trial courts will put on the AG Opinion. If courts do rely on the Opinion and find that gender-affirming procedures constitute child abuse, there is a strong likelihood that such a finding would be challenged in the appellate courts. In the meantime, the work of sexual assault programs and advocates are even more important in providing safety and information to survivors. TAASA stands together with advocates to support survivors’ rights over their bodies and their health care.

For questions please email TAASA at policy@taasa.org.

³ Texas Family Code Section 261.001(1) and (4).