

TO: Eva Mayanja

FROM: North Dakota Department of Health & Human Services

Re: Your request for records

DATE: 10/20/2022

Your requested records

<input type="checkbox"/>	The records you requested cannot be provided because no such records exist OR the requested records are not records of this agency ¹ .
<input checked="" type="checkbox"/>	Attached are the records you requested.
<input type="checkbox"/>	Some information is redacted because it is exempt and/or confidential pursuant to N.D.C.C. § _____.
<input type="checkbox"/>	To the extent [requested] [other records] may exist, the records are/would be confidential or exempt in entirety, under N.D.C.C. § _____.
<input type="checkbox"/>	The estimated cost for the requested records is \$_____, calculated as follows: _____ pages @ 25¢ per page \$_____ _____ other copies @ \$_____ each \$_____ _____ hours for locating the records @ \$25/hr each [after the first hour] \$_____ _____ hours for redacting the records @ \$25/hr each [after the first hour] \$_____ _____ hours for extensive use of Information Technology (NDIT) @ \$_____/hr (after first 2 hours), \$_____, NDCC§ 44-04-18(3). _____ hours for extensive use of Information Technology (non NDIT) @ \$_____/hr (after first hour), \$_____, NDCC§ 44-04-18(3).
<input type="checkbox"/>	If the record search exceeds ____ hours, takes additional information technology resources to provide, requires additional redaction of confidential information beyond ____ hours, or requires impressions of paper copies, the Department will require an additional payment before it completes your request. If the cost of the record search and redaction is less than \$_____, the Department will refund any balance due. Estimated costs are payable <i>in advance</i> . We do not waive estimated costs. When we receive a cashier's check/money order to " Department of Human Services " we will begin work on your request. Mail payment to: Department of Human Services ATTN: Fiscal Unit 600 East Boulevard Avenue, Dept. 325 Bismarck, ND 58505-0250
<input type="checkbox"/>	We estimate it will take ____ days to complete your request, <i>after</i> we receive full payment.
<input type="checkbox"/>	Your request did not provide sufficient information for us to identify specific records. We cannot comply with your request without clarification. Please call _____ at (701) _____.
<input type="checkbox"/>	If we do not receive payment/hear from you within ten (10) days from today's date, we will assume you have withdrawn your request.
<input type="checkbox"/>	Your request did not reasonably identify a specific record.

¹A public entity does not have to convert its records to another format, create or compile records that do not exist, or obtain records originating from another public entity that it does not have in its possession. A public entity has no obligation to respond to questions about its duties and functions or to explain the content of its records.

National Family Planning & Reproductive Health Association

MEMORANDUM

TO: NFPRHA Members

FROM: Robin Summers, Vice President and Senior Counsel

DATE: August 25, 2022

RE: Considerations for Risk Assessment by Family Planning Providers and Their Legal Counsel in the Provision of Family Planning Services Following the Supreme Court's Ruling in *Dobbs v. Jackson Women's Health Organization*

The information in this memorandum is intended to help NFPRHA members identify, in conjunction with their legal counsel, organizational risks related to the provision of family planning services amidst a shifting environment of state abortion and related restrictions and prohibitions. This memorandum is not intended to and does not provide legal advice to any entity or individual nor is it intended as a solicitation. Organizations should consult with their own legal counsel as to the impact of any state laws or regulations on their health systems or service sites.

The US Supreme Court's June 24, 2022, ruling in *Dobbs v. Jackson Women's Health Organization* overturns both *Roe v. Wade* and *Planned Parenthood v. Casey* and thus opens the door to states taking steps to significantly restrict and even completely prohibit access to abortion care. Immediately following the ruling, abortion restrictions and prohibitions began to take effect in various states, with more expected to come.

No matter the abortion laws in a particular state, how aggressive government officials and/or private citizens are in seeking to enforce state restrictions or prohibitions, or whether a state seeks to enact additional restrictions in the future, all family planning providers¹ need to understand and manage their potential risks. The following information is provided to NFPRHA members to help inform their risk management discussions with their own legal counsel.

CONSIDERATIONS FOR PROVIDERS IN STATES THAT HAVE RESTRICTED OR PROHIBITED ABORTION

Issue 1: What do state laws and/or state regulations seek to restrict or prohibit, and how might those restrictions or prohibitions be interpreted to impact an entity's provision of services, information, and supplies?

- A. Are the state's restrictions or prohibitions limited to abortion procedures (in-patient, surgical, etc.), or do they include medication abortion?

¹ This memo uses the term "providers" to encapsulate any entity with responsibility in providing family planning services in a geographic area, including entities that administer family planning programs or projects.

- B. Do the state’s abortion restrictions or prohibitions have any gestational limits (such as allowing abortion up to six, 12, 15, or 20 weeks)?
- C. Are there any exceptions to the state’s abortion restrictions or prohibitions, such as for rape, incest, and/or the mother’s life or health? If so, does the state require any kind of documentation to support the exception?
- D. Do the state’s abortion restrictions or prohibitions limit the ability to provide certain services to only specific types of providers (such as the 2019 Title X regulations did in limiting the provision of abortion counseling to physicians and advanced practice providers)?
- E. Do the state’s abortion restrictions or prohibitions explicitly include non-medical services such as information, counseling, or referral? Could they be interpreted to include non-medical services?
- F. Do the state’s abortion restrictions or prohibitions define abortion in a way that explicitly includes or could be interpreted to include contraceptive methods, such as emergency contraception and certain IUDs (even though contraceptive methods are not, in fact, abortifacients)?
- G. Do the state’s abortion restrictions or prohibitions explicitly prohibit “aiding and abetting” an abortion, “assisting in providing or assisting a person in obtaining” an abortion, or something similar?
- H. Is the state seeking to enact or enforce any requirement or restriction that might conflict with any federal requirements, particularly Title X requirements? Examples might include Title X’s requirement that providers offer non-directive options counseling and referrals upon request; Title X’s prohibition on parental consent and/or notification; and Title X’s confidentiality requirements for all patients.
- I. Does the state require documentation or reporting of medical or other information associated with the provision of pregnancy or abortion-related care?
- J. Are the state’s abortion restrictions or prohibitions being challenged in court? If so, have they been enjoined in part or in full?

Why these questions matter: In order to evaluate organizational risks, it is essential for all family planning providers to assess the explicit scope of restrictions or prohibitions in their states, as well as the ways in which such restrictions or prohibitions could potentially be interpreted. To the extent possible, family planning providers should keep an eye on potential and ongoing litigation to help assess whether there may be pockets of time where restrictions or prohibitions do not apply. Injunctions can be issued (and overturned) quickly, so it will be helpful to understand if any injunctions are in place, as well as their scope.

Even if a provider is not providing abortion care, a state or other private actor may assert that other services the entity provides conflict with the state’s restrictions or prohibitions. For example, making referrals for or providing counselling related to abortions could conceivably be interpreted as conflicting with a state law’s prohibition on assisting in the provision of abortions. And state laws that define life as beginning at fertilization could be used to assert that certain drugs or devices, such as emergency contraception and IUDs, qualify as abortion, even though they are not, in fact, abortifacients.

Furthermore, state restrictions and prohibitions are important to understand in the context of patients seeking services, including pregnancy testing, care relating to early pregnancy loss, and post-abortion care. For example, a state might seek to obtain detailed information about pregnant patients from family planning providers or attempt to require specific documentation by providers with regard to any post-pregnancy medical services the providers offer to specific patients.

Understanding a state's restrictions and prohibitions is particularly important for Title X providers, as the regulations governing Title X have requirements that could conflict with a state's restrictions or prohibitions.² As a general matter, federal law preempts state law, so laws that conflict with Title X requirements should be preempted. This argument has been successful historically and could be made in litigation brought to challenge a state's abortion law or regulation that explicitly conflicts with or is being interpreted to conflict with a Title X requirement, or as a defense in legal actions brought against a provider for performing duties required by Title X that conflict with the state's law.

However, the strength of federal preemption challenges or defenses is uncertain, especially because many of the specific issues of state abortion laws conflicting with federal Title X requirements have not yet been litigated. Further, even with favorable settled case law, the federal judiciary has proven itself increasingly willing to stray from established legal precedent, as the *Dobbs* decision illustrates. As a result, providers face uncertainty and the potential for costly litigation.

The US Department of Health and Human Services' Office of Population Affairs (OPA) has issued guidance to help Title X providers understand their obligations under federal law after *Dobbs*. Title X providers should review this guidance and seek clarification from their grantees or project officers as needed. Providers should also consult their own counsel to ensure they understand the potential risks associated with the provision of various services.

Issue 2: What types of liability or other enforcement mechanisms might be imposed for alleged violations of state abortion restrictions or prohibitions?

- Civil penalties imposed by the state on providers? Patients?
- License suspension or revocation for individual providers?
- State-authorized enforcement against providers by private actors (e.g., Texas's SB8 private enforcement mechanism, which gives the public the right to sue people alleged to violate the state's abortion prohibition)? Patients?
- Criminal prosecution of providers? Patients?

Why these questions matter: There may be risks associated with violating a state's abortion restrictions or prohibitions, even if federal laws or regulations, such as Title X, require entities to provide certain services or referrals. Although federal laws and regulations should preempt conflicting state laws, this may not be enough to prevent the state (or private actors) from seeking to enforce the state's rules.

² Title X subrecipients and service sites should continue to consult their grantees about their obligations as Title X-funded entities.

Along with federal preemption, there may be other legal defenses available to providers in potential civil and criminal actions:

1. Are there any federal constitutional protections for the provider's activity, such as First Amendment protections?
2. If the state law creates criminal penalties, what elements must the state prove, and what are the potential defenses?
3. Does the state's constitution provide any legal recourse or defense?

Providers should consult their own counsel to ensure they understand the potential risks associated with the provision of various services.

CONSIDERATIONS FOR PROVIDERS IN STATES NOT RESTRICTING OR PROHIBITING ABORTION

Issue 1: Could a provider be criminally prosecuted under another state's abortion-specific or general laws for providing abortion-related services, including medication abortion, to a resident of a state that has an abortion prohibition or restrictions in place (for example, Missouri's SB603, which seeks to extend the state's abortion restrictions to activities that occur outside of the state)?

Issue 2: Could a provider be subject to civil liability under other states' laws?

Issue 3: If a provider offers IUDs or emergency contraception to someone from another state with restrictions or prohibitions under which those services could be considered unlawful abortion services, is there potential liability?

Issue 4: Does a provider's state have any targeted legal protections for abortion care or other medical providers facing out-of-state prosecutions, investigations, or civil lawsuits (such as exemptions from interstate discovery, witness subpoena laws, or extraditions)?

Why these questions matter: Providers in states without abortion restrictions or prohibitions are likely to see increasing numbers of patients from states with abortion restrictions or prohibitions—whether for abortion services, if provided, or for services that may be interpreted to fall under a particular state's abortion restrictions or prohibitions (such as the provision of emergency contraception and certain IUDs, even they are not abortifacients). There may be constitutional and other conflict-of-laws defenses to raise if another state were to seek to enforce its abortion restrictions or prohibitions against a provider in a state without such restrictions or prohibitions, but the existence of such defenses does not guarantee that the state would not seek to enforce its anti-abortion laws or regulations. It would also be important to assess the likelihood of success for such defenses in the other states' courts.

Understanding the potential impact of other states' anti-abortion laws or regulations, as well as any protections offered by the state in which an entity provides services, can help to assess risks. As noted in the previous section, there may be legal defenses available to providers in potential civil or criminal actions, including federal preemption, federal constitutional protections such as the First Amendment, state criminal law burden-of-proof requirements, and state constitutional protections. Additionally, providers facing liability for services provided to residents of states that have restricted or prohibited abortion may have additional defenses available under protective legislation enacted by the providers' states.

North Dakota Department of Health
North Dakota Family Planning Program Overview
July 21, 2022

North Dakota Family Planning Program Overview

The North Dakota Family Planning Program (ND FPP) is based within the NDDoH's Healthy & Safe Communities Section (HSC), Division of Family Health and Wellness. The mission of the ND FPP is to assist women and men to understand and take responsibility for their reproductive health through education, counseling and medical services.

Selected by the ND FPP through an application process, each subrecipient covers a geographical area of North Dakota and provides services and outreach to outlying areas for individuals in need of family planning services. The NDDoH follows the North Dakota Procurement Guidelines in selection of subrecipients. Subrecipients are required to apply for Title X funds each year and must complete a program work plan, budget expenditures with budget justification and funding sources, service site information, methods and services provided and agreement to comply with requirements of the Title X statute, any legislative mandates and any program or other applicable regulations in effect.

In North Dakota, nine subrecipients assist in carrying out the project and provide family planning services within their agencies. These consist of a variety of agencies ranging from six Local Public Health Units (LPHU), a private non-profit organization, a Federally Qualified Health Center (FQHC), and a university school of medicine and health sciences.

Before receiving funding, all subrecipients must complete an application that states all activities funded must comply with requirements of the Title X statute, any legislative mandates, and any program or other applicable regulations in effect.

All funded activities must comply with additional program guidance issued by the OPA (Office of Population Affairs).

Subrecipients have a site review every three years or more frequently as needed, to assess administrative, financial, and clinical practices.

The ND FPP has policies, procedures and protocols in place, and all family planning staff are required to read the North Dakota FPP Policy and Procedure Manual and Protocol Manual annually. Subrecipient medical directors and all agency staff are required to sign the Policy and Procedure Review form and Protocol Manual Review Form annually following manual revisions. The signature sheet for both manuals is kept on file at the service site and verified by state staff

during on-site program reviews. To assure all staff understand and have reviewed each provision of the regulation (42 CFR Part 59, Subpart A §59.1-§59.11), and with each legislative mandate, the Family Planning Statement of Understanding must be reviewed and signed annually by all project staff.

Subrecipients have the experience and expertise to provide comprehensive clinical family planning and related preventive health services, including a broad range of acceptable and effective family planning methods and services. Service sites are required to provide a broad range of Food and Drug Administration (FDA) approved contraceptive methods, including natural family planning methods either on-site, by prescription or by referral. Counseling and education about all methods, reproductive health and spacing of children are offered directly on-site by clinic personnel.

In addition to offering a broad range of family planning methods, subrecipients offer the following broad range of family planning services including: pregnancy testing and counseling; assistance to achieve pregnancy; basic infertility services; STI services; preconception health services; adolescent friendly health services; and additional screening and health services. Abortion services are not offered by ND FPP. Prohibition of abortion is contained within the assurances of the subrecipient application, family planning statement of understanding and contractual agreements. Details on services and prohibitions are listed below.

Pregnancy Testing and Counseling

Subrecipients offer pregnancy testing and counseling services as part of the core Title X services and in accordance with recommendations of major professional medical organizations. Client education is provided to those with positive pregnancy tests and to those with negative pregnancy tests.

Positive pregnancy test discussion may include:

- Prenatal counseling in accordance with the recommendations of professional medical associations, such as American College of Obstetrics and Gynecologists (ACOG) and American Academy of Family Physicians (AAFP).
- An estimation of gestational age so that appropriate counseling can be provided.
- Information about maintaining the health of the mother and unborn child during pregnancy.
- Normal signs and symptoms of early pregnancy and to report any concerns to a provider for further evaluation.
- Review of pregnancy danger signs (e.g., ectopic and miscarriage).

- Medications that might be contraindicated in pregnancy.
- Encouragement to take a daily prenatal vitamin that includes folic acid.
- Avoidance of smoking, alcohol, and other drugs.
- Review of nutritional advice to follow during pregnancy (e.g., fish that might have high levels of mercury, foods to avoid).
- Avoidance of x-ray exposure.
- Review of medical and social programs available, if applicable, such as WIC, prenatal and parenting public health programs, Medicaid, area adoption agencies, and other social, financial and medical services programs.
- Review of pregnancy support system (e.g., partner, family, friends), with referral to appropriate counseling or other supportive services as needed.
- Referral for needed STI screening (including HIV) and vaccinations if there might be delays in obtaining prenatal care.
- Offer family planning services postpartum.

Negative pregnancy test discussion may include:

- Contraceptive options counseling for those who do not want to become pregnant.
- Reproductive Life Plan.
- Services to help achieve pregnancy or basic infertility services, as appropriate for those trying to become pregnant.
- Preconception health and STI services.

Assistance to Achieve Pregnancy

Clients desiring to become pregnant receive the following education and counseling:

- The need to take a daily supplement containing 0.4-0.8 mg folic acid.
- The impact of nicotine, alcohol, and drug/medication use.
- Information about avoidance of environmental chemicals that could harm a pregnancy.

- Recommendations of immunizations prior to the pregnancy.
- The importance of spacing pregnancies.
- Information regarding referrals for care, as indicated.

Basic Infertility Services

Infertility services include (but are not limited to):

- Review of the length of time the individual has been trying to conceive, medical history, and sexual health assessment with risk reduction in preventing infertility, physical exam (when indicated), counseling and referrals.
- Clinical protocols are followed by clinicians when providing care to clients.

STI Services

Services sites provide education, information, screening and testing for STI and HIV as core Title X services and in accordance with the CDC.

- If the client is at risk or has an STI, risk reduction counseling that encourages sexual risk avoidance and protective factors are provided.
- ND FPP staff utilize the five "P"s approach (**P**artners, **P**ractices, **P**rotection from STIs, **P**ast history of STIs and **P**revention of pregnancy) when counseling regarding the client's sexual health.
- The ND FPP partners with the NDDoH Division of Disease Control to provide current, up-to-date testing, one-on-one counseling, and community education.
- Subrecipient registered nurses utilize universal standing orders to test for and treat chlamydia and gonorrhea when a clinician is not on-site. Expedited Partner Therapy is provided as well.
- Reporting of STIs must be in accordance with North Dakota Century Code (NDCC) 23-07 Reportable Diseases and report the following STIs: HIV/AIDS, Hepatitis, Chlamydia, Gonorrhea and Syphilis.
 - Hepatitis B status of patients is assessed by immunization records or lab testing.
 - Screening for Hepatitis C for clients at risk is provided in cooperation with the NDDoH HIV STD TB Viral Hepatitis program.

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- HIV screening tests and referrals for treatment are provided by service sites.

- The ND FPP works collaboratively with the NDDoH Division of Disease Control in providing information and materials on HIV transmission and how to protect clients from contracting HIV.

Preconception Health Services

Preconception is defined as a time when a reproductive aged female is not pregnant but at risk for becoming pregnant or when a man is at risk for impregnating his female partner.

- The goal of preconception health care for women is to recognize and modify risks that impact health and/or pregnancy outcomes. This includes biomedical, behavioral and social risks.
- For men, addressing their direct contributions to the infant's health as well as recognizing their impact on a woman's health is important.
- Couples or individuals planning a pregnancy, seeking infertility services, or at high risk for an unplanned pregnancy should be offered preconception counseling.

Adolescent Friendly Health Services

Service sites provide counseling specific to the unique needs of adolescent clients.

- All service site staff must complete training on adolescent counseling and involving family members in the decision of minors to seek family planning services annually and have documentation of completion.
- Service sites take steps to make their services youth-friendly, which means they are accessible, equitable, acceptable, appropriate, comprehensive, effective and efficient for youth.
- Required adolescent counseling must be completed and documented at every appointment.
- This includes education and counseling about family involvement, ways to resist sexual coercion, use of condoms, review of methods of contraception, reproductive life planning, abstinence and confidentiality. Adolescents must be informed of mandatory reporting requirements regarding child abuse, child molestation, sexual abuse, rape or incest.

Additional Screening and Health Services

In addition to the above family planning services, service sites also offer services listed below:

- Human Papilloma Virus (HPV) vaccination
- HIV pre-exposure prophylaxis (PrEP)

- Breast and cervical cancer screenings
- Comprehensive screenings (screening for obesity, smoking, drug and alcohol use, mental health and intimate partner violence)
- Laboratory services
- Pharmacy services
- Referral for health services

Prohibitions on Abortion

Abortion services are not offered by ND FPP. Prohibition of abortion is contained within the assurances of the subrecipient application, family planning statement of understanding and contractual agreements.

- Title X recipients are not allowed to provide abortion as a method of family planning as part of the Title X project. (Section 1008, PHS Act; Consolidated Appropriations Act, 2022, Pub. L. No. 117-103, 136 Stat. 49, 444 (2022); 42 CFR § 59.5(a)(5))
- A Title X project may not provide pregnancy options counseling which promotes abortion or encourages persons to obtain abortion.
- Title X recipients are prohibited from providing services that directly facilitate the use of abortion as a method of family planning. Services not allowed include:
 - Providing transportation for an abortion,
 - Explaining and obtaining signed abortion consent forms from clients interested in abortions,
 - Negotiating a reduction in fees for an abortion,
 - Scheduling or arranging for the performance of an abortion,
 - Promoting or advocating abortion within Title X program activities, or failing to preserve sufficient separation between Title X program activities and abortion-related activities. (65 Fed. Reg. 41281 (July 3, 2000))
- Title X recipients are required to offer pregnant clients the opportunity to be provided information and counseling regarding each of the following options: prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination. If requested to provide such information and

counseling, provide neutral, factual information and nondirective counseling on each of the options, and referral upon request, except with respect to any option(s) about which the pregnant client indicates they do not wish to receive such information and counseling. (42 CFR § 59.5(a)(5)).

- While a Title X project may provide a referral for abortion, which may include providing a patient with the name, address, telephone number, and other relevant factual information (such as whether the provider accepts Medicaid, charges, etc.) about an abortion provider, the project may not take further affirmative action (such as negotiating a fee reduction, making an appointment, providing transportation) to secure abortion services for the patient. (65 Fed. Reg. 41281 (July 3, 2000)).
- Where a referral to another provider who might perform an abortion is medically indicated because of the patient's condition or the condition of the fetus (such as where the woman's life would be endangered), such a referral by a Title X project is not prohibited by section 1008 and is required by 42 CFR § 59.5(b)(1). The limitations on referrals do not apply in cases in which a referral is made for medical indications. (65 Fed. Reg. 41281 (July 3, 2000)).

Reference Materials:

- [Title X Statutes, Regulations, and Legislative Mandates | HHS Office of Population Affairs](#)
- [Dobbs v. Jackson Women's Health Organization U.S. Supreme Court Decision: Impact on Title X Program \(govdelivery.com\)](#)
- [Title X Program Handbook_FINAL \(003\).pdf](#)

- [FAMILYPLANNINGSTATEMENTOFUNDERSTANDING.pdf](#)

From: [Rabenberg, Cora A.](#)
To: [Mertz, Kim N.](#); [Askew, Deanna L.](#); [Wilke, Dirk D.](#)
Cc: [Scott, Sarah A.](#)
Subject: FW: NFPRHA Alert: NFPRHA Post-Dobbs Legal Considerations Memo Now Available
Date: Friday, August 26, 2022 6:55:49 AM
Attachments: [2022-08-25---Post-Dobbs-Legal-Considerations-Memo---FINAL.pdf](#)

Good Morning,

Please see link to memo below (if it does not open, I also attached the memo). I am not sure who this should go to exactly, but wanted to share with you to determine. This memo poses lots of questions and considerations, but also states the importance of following what is happening in our states with legal action. How do I follow what is happening with the case here?

Thank you,
Cora

From: NFPRHA <info@nfprha.org>
Sent: Thursday, August 25, 2022 4:02 PM
To: Rabenberg, Cora A. <crabenberg@nd.gov>
Subject: NFPRHA Alert: NFPRHA Post-Dobbs Legal Considerations Memo Now Available

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August 25, 2022

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As family planning providers try to navigate state restrictions and prohibitions, including ones that potentially conflict with federal requirements, it is essential for all family planning providers to assess their organizational risk.

To that end, NFPRHA has worked with external counsel at Zuckerman Spaeder to develop [a memo](#) to help members assess, in conjunction with their own legal counsel, organizational risk related to the provision of family planning services amidst a shifting environment of state abortion restrictions and bans. [The memo](#) is relevant for both Title X and non-Title X family planning providers and administrators.

If you have any questions, please contact Robin Summers, Vice President and Senior Counsel, at 202-552-0150, or rsummers@nfprha.org.

National Family Planning & Reproductive Health Association

1025 Vermont Ave. NW, Suite 800, Washington, DC 20005

Phone: 202-293-3114 | Email: info@nfprha.org



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- F. Do the state’s abortion restrictions or prohibitions define abortion in a way that explicitly includes or could be interpreted to include contraceptive methods, such as emergency contraception and certain IUDs (even though contraceptive methods are not, in fact, abortifacients)?
- G. Do the state’s abortion restrictions or prohibitions explicitly prohibit “aiding and abetting” an abortion, “assisting in providing or assisting a person in obtaining” an abortion, or something similar?
- H. Is the state seeking to enact or enforce any requirement or restriction that might conflict with any federal requirements, particularly Title X requirements? Examples might include Title X’s requirement that providers offer non-directive options counseling and referrals upon request; Title X’s prohibition on parental consent and/or notification; and Title X’s confidentiality requirements for all patients.
- I. Does the state require documentation or reporting of medical or other information associated with the provision of pregnancy or abortion-related care?
- J. Are the state’s abortion restrictions or prohibitions being challenged in court? If so, have they been enjoined in part or in full?

Why these questions matter: In order to evaluate organizational risks, it is essential for all family planning providers to assess the explicit scope of restrictions or prohibitions in their states, as well as the ways in which such restrictions or prohibitions could potentially be interpreted. To the extent possible, family planning providers should keep an eye on potential and ongoing litigation to help assess whether there may be pockets of time where restrictions or prohibitions do not apply. Injunctions can be issued (and overturned) quickly, so it will be helpful to understand if any injunctions are in place, as well as their scope.

Even if a provider is not providing abortion care, a state or other private actor may assert that other services the entity provides conflict with the state’s restrictions or prohibitions. For example, making referrals for or providing counselling related to abortions could conceivably be interpreted as conflicting with a state law’s prohibition on assisting in the provision of abortions. And state laws that define life as beginning at fertilization could be used to assert that certain drugs or devices, such as emergency contraception and IUDs, qualify as abortion, even though they are not, in fact, abortifacients.

Furthermore, state restrictions and prohibitions are important to understand in the context of patients seeking services, including pregnancy testing, care relating to early pregnancy loss, and post-abortion care. For example, a state might seek to obtain detailed information about pregnant patients from family planning providers or attempt to require specific documentation by providers with regard to any post-pregnancy medical services the providers offer to specific patients.

Understanding a state's restrictions and prohibitions is particularly important for Title X providers, as the regulations governing Title X have requirements that could conflict with a state's restrictions or prohibitions.² As a general matter, federal law preempts state law, so laws that conflict with Title X requirements should be preempted. This argument has been successful historically and could be made in litigation brought to challenge a state's abortion law or regulation that explicitly conflicts with or is being interpreted to conflict with a Title X requirement, or as a defense in legal actions brought against a provider for performing duties required by Title X that conflict with the state's law.

However, the strength of federal preemption challenges or defenses is uncertain, especially because many of the specific issues of state abortion laws conflicting with federal Title X requirements have not yet been litigated. Further, even with favorable settled case law, the federal judiciary has proven itself increasingly willing to stray from established legal precedent, as the *Dobbs* decision illustrates. As a result, providers face uncertainty and the potential for costly litigation.

The US Department of Health and Human Services' Office of Population Affairs (OPA) has issued guidance to help Title X providers understand their obligations under federal law after *Dobbs*. Title X providers should review this guidance and seek clarification from their grantees or project officers as needed. Providers should also consult their own counsel to ensure they understand the potential risks associated with the provision of various services.

Issue 2: What types of liability or other enforcement mechanisms might be imposed for alleged violations of state abortion restrictions or prohibitions?

- Civil penalties imposed by the state on providers? Patients?
- License suspension or revocation for individual providers?
- State-authorized enforcement against providers by private actors (e.g., Texas's SB8 private enforcement mechanism, which gives the public the right to sue people alleged to violate the state's abortion prohibition)? Patients?
- Criminal prosecution of providers? Patients?

Why these questions matter: There may be risks associated with violating a state's abortion restrictions or prohibitions, even if federal laws or regulations, such as Title X, require entities to provide certain services or referrals. Although federal laws and regulations should preempt conflicting state laws, this may not be enough to prevent the state (or private actors) from seeking to enforce the state's rules.

² Title X subrecipients and service sites should continue to consult their grantees about their obligations as Title X-funded entities.

Along with federal preemption, there may be other legal defenses available to providers in potential civil and criminal actions:

1. Are there any federal constitutional protections for the provider's activity, such as First Amendment protections?
2. If the state law creates criminal penalties, what elements must the state prove, and what are the potential defenses?
3. Does the state's constitution provide any legal recourse or defense?

Providers should consult their own counsel to ensure they understand the potential risks associated with the provision of various services.

CONSIDERATIONS FOR PROVIDERS IN STATES NOT RESTRICTING OR PROHIBITING ABORTION

Issue 1: Could a provider be criminally prosecuted under another state's abortion-specific or general laws for providing abortion-related services, including medication abortion, to a resident of a state that has an abortion prohibition or restrictions in place (for example, Missouri's SB603, which seeks to extend the state's abortion restrictions to activities that occur outside of the state)?

Issue 2: Could a provider be subject to civil liability under other states' laws?

Issue 3: If a provider offers IUDs or emergency contraception to someone from another state with restrictions or prohibitions under which those services could be considered unlawful abortion services, is there potential liability?

Issue 4: Does a provider's state have any targeted legal protections for abortion care or other medical providers facing out-of-state prosecutions, investigations, or civil lawsuits (such as exemptions from interstate discovery, witness subpoena laws, or extraditions)?

Why these questions matter: Providers in states without abortion restrictions or prohibitions are likely to see increasing numbers of patients from states with abortion restrictions or prohibitions—whether for abortion services, if provided, or for services that may be interpreted to fall under a particular state's abortion restrictions or prohibitions (such as the provision of emergency contraception and certain IUDs, even they are not abortifacients). There may be constitutional and other conflict-of-laws defenses to raise if another state were to seek to enforce its abortion restrictions or prohibitions against a provider in a state without such restrictions or prohibitions, but the existence of such defenses does not guarantee that the state would not seek to enforce its anti-abortion laws or regulations. It would also be important to assess the likelihood of success for such defenses in the other states' courts.

Understanding the potential impact of other states' anti-abortion laws or regulations, as well as any protections offered by the state in which an entity provides services, can help to assess risks. As noted in the previous section, there may be legal defenses available to providers in potential civil or criminal actions, including federal preemption, federal constitutional protections such as the First Amendment, state criminal law burden-of-proof requirements, and state constitutional protections. Additionally, providers facing liability for services provided to residents of states that have restricted or prohibited abortion may have additional defenses available under protective legislation enacted by the providers' states.

From: [Askew, Deanna L.](#)
To: [Mertz, Kim N.](#)
Subject: FW: NFPRHA Alert: NFPRHA Post-Dobbs Legal Considerations Memo Now Available
Date: Thursday, September 1, 2022 10:23:00 AM
Attachments: [2022-08-25---Post-Dobbs-Legal-Considerations-Memo---FINAL.pdf](#)

From: Rabenberg, Cora A. <crabenberg@nd.gov>
Sent: Friday, August 26, 2022 6:55 AM
To: Mertz, Kim N. <kmertz@nd.gov>; Askew, Deanna L. <daskew@nd.gov>; Wilke, Dirk D. <ddwilke@nd.gov>
Cc: Scott, Sarah A. <sarahscott@nd.gov>
Subject: FW: NFPRHA Alert: NFPRHA Post-Dobbs Legal Considerations Memo Now Available

Good Morning,

Please see link to memo below (if it does not open, I also attached the memo). I am not sure who this should go to exactly, but wanted to share with you to determine. This memo poses lots of questions and considerations, but also states the importance of following what is happening in our states with legal action. How do I follow what is happening with the case here?

Thank you,
Cora

From: NFPRHA <info@nfprha.org>
Sent: Thursday, August 25, 2022 4:02 PM
To: Rabenberg, Cora A. <crabenberg@nd.gov>
Subject: NFPRHA Alert: NFPRHA Post-Dobbs Legal Considerations Memo Now Available

***** **CAUTION:** This email originated from an outside source. Do not click links or open attachments unless you know they are safe. *****



August 25, 2022

NFPRHA Post-Dobbs Legal Considerations Memo Now Available

Since the US Supreme Court's June 24, 2022, ruling in *Dobbs v. Jackson Women's Health*

Organization, abortion restrictions and prohibitions have taken effect in a number of states, with more expected to come. Yet the *Dobbs* decision puts a host of essential rights, including the right to contraception, at significant risk, as states try to broadly enforce abortion restrictions and prohibitions as well as target contraception specifically.

As family planning providers try to navigate state restrictions and prohibitions, including ones that potentially conflict with federal requirements, it is essential for all family planning providers to assess their organizational risk.

To that end, NFPRHA has worked with external counsel at Zuckerman Spaeder to develop [a memo](#) to help members assess, in conjunction with their own legal counsel, organizational risk related to the provision of family planning services amidst a shifting environment of state abortion restrictions and bans. [The memo](#) is relevant for both Title X and non-Title X family planning providers and administrators.

If you have any questions, please contact Robin Summers, Vice President and Senior Counsel, at 202-552-0150, or rsummers@nfprha.org.

National Family Planning & Reproductive Health Association

1025 Vermont Ave. NW, Suite 800, Washington, DC 20005

Phone: 202-293-3114 | Email: info@nfprha.org



[Privacy Policy](#) | [Email Preferences](#)

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National Family Planning & Reproductive Health Association

MEMORANDUM

TO: NFPRHA Members

FROM: Robin Summers, Vice President and Senior Counsel

DATE: August 25, 2022

RE: Considerations for Risk Assessment by Family Planning Providers and Their Legal Counsel in the Provision of Family Planning Services Following the Supreme Court's Ruling in *Dobbs v. Jackson Women's Health Organization*

The information in this memorandum is intended to help NFPRHA members identify, in conjunction with their legal counsel, organizational risks related to the provision of family planning services amidst a shifting environment of state abortion and related restrictions and prohibitions. This memorandum is not intended to and does not provide legal advice to any entity or individual nor is it intended as a solicitation. Organizations should consult with their own legal counsel as to the impact of any state laws or regulations on their health systems or service sites.

The US Supreme Court's June 24, 2022, ruling in *Dobbs v. Jackson Women's Health Organization* overturns both *Roe v. Wade* and *Planned Parenthood v. Casey* and thus opens the door to states taking steps to significantly restrict and even completely prohibit access to abortion care. Immediately following the ruling, abortion restrictions and prohibitions began to take effect in various states, with more expected to come.

No matter the abortion laws in a particular state, how aggressive government officials and/or private citizens are in seeking to enforce state restrictions or prohibitions, or whether a state seeks to enact additional restrictions in the future, all family planning providers¹ need to understand and manage their potential risks. The following information is provided to NFPRHA members to help inform their risk management discussions with their own legal counsel.

CONSIDERATIONS FOR PROVIDERS IN STATES THAT HAVE RESTRICTED OR PROHIBITED ABORTION

Issue 1: What do state laws and/or state regulations seek to restrict or prohibit, and how might those restrictions or prohibitions be interpreted to impact an entity's provision of services, information, and supplies?

- A. Are the state's restrictions or prohibitions limited to abortion procedures (in-patient, surgical, etc.), or do they include medication abortion?

¹ This memo uses the term "providers" to encapsulate any entity with responsibility in providing family planning services in a geographic area, including entities that administer family planning programs or projects.

- B. Do the state’s abortion restrictions or prohibitions have any gestational limits (such as allowing abortion up to six, 12, 15, or 20 weeks)?
- C. Are there any exceptions to the state’s abortion restrictions or prohibitions, such as for rape, incest, and/or the mother’s life or health? If so, does the state require any kind of documentation to support the exception?
- D. Do the state’s abortion restrictions or prohibitions limit the ability to provide certain services to only specific types of providers (such as the 2019 Title X regulations did in limiting the provision of abortion counseling to physicians and advanced practice providers)?
- E. Do the state’s abortion restrictions or prohibitions explicitly include non-medical services such as information, counseling, or referral? Could they be interpreted to include non-medical services?
- F. Do the state’s abortion restrictions or prohibitions define abortion in a way that explicitly includes or could be interpreted to include contraceptive methods, such as emergency contraception and certain IUDs (even though contraceptive methods are not, in fact, abortifacients)?
- G. Do the state’s abortion restrictions or prohibitions explicitly prohibit “aiding and abetting” an abortion, “assisting in providing or assisting a person in obtaining” an abortion, or something similar?
- H. Is the state seeking to enact or enforce any requirement or restriction that might conflict with any federal requirements, particularly Title X requirements? Examples might include Title X’s requirement that providers offer non-directive options counseling and referrals upon request; Title X’s prohibition on parental consent and/or notification; and Title X’s confidentiality requirements for all patients.
- I. Does the state require documentation or reporting of medical or other information associated with the provision of pregnancy or abortion-related care?
- J. Are the state’s abortion restrictions or prohibitions being challenged in court? If so, have they been enjoined in part or in full?

Why these questions matter: In order to evaluate organizational risks, it is essential for all family planning providers to assess the explicit scope of restrictions or prohibitions in their states, as well as the ways in which such restrictions or prohibitions could potentially be interpreted. To the extent possible, family planning providers should keep an eye on potential and ongoing litigation to help assess whether there may be pockets of time where restrictions or prohibitions do not apply. Injunctions can be issued (and overturned) quickly, so it will be helpful to understand if any injunctions are in place, as well as their scope.

Even if a provider is not providing abortion care, a state or other private actor may assert that other services the entity provides conflict with the state’s restrictions or prohibitions. For example, making referrals for or providing counselling related to abortions could conceivably be interpreted as conflicting with a state law’s prohibition on assisting in the provision of abortions. And state laws that define life as beginning at fertilization could be used to assert that certain drugs or devices, such as emergency contraception and IUDs, qualify as abortion, even though they are not, in fact, abortifacients.

Furthermore, state restrictions and prohibitions are important to understand in the context of patients seeking services, including pregnancy testing, care relating to early pregnancy loss, and post-abortion care. For example, a state might seek to obtain detailed information about pregnant patients from family planning providers or attempt to require specific documentation by providers with regard to any post-pregnancy medical services the providers offer to specific patients.

Understanding a state's restrictions and prohibitions is particularly important for Title X providers, as the regulations governing Title X have requirements that could conflict with a state's restrictions or prohibitions.² As a general matter, federal law preempts state law, so laws that conflict with Title X requirements should be preempted. This argument has been successful historically and could be made in litigation brought to challenge a state's abortion law or regulation that explicitly conflicts with or is being interpreted to conflict with a Title X requirement, or as a defense in legal actions brought against a provider for performing duties required by Title X that conflict with the state's law.

However, the strength of federal preemption challenges or defenses is uncertain, especially because many of the specific issues of state abortion laws conflicting with federal Title X requirements have not yet been litigated. Further, even with favorable settled case law, the federal judiciary has proven itself increasingly willing to stray from established legal precedent, as the *Dobbs* decision illustrates. As a result, providers face uncertainty and the potential for costly litigation.

The US Department of Health and Human Services' Office of Population Affairs (OPA) has issued guidance to help Title X providers understand their obligations under federal law after *Dobbs*. Title X providers should review this guidance and seek clarification from their grantees or project officers as needed. Providers should also consult their own counsel to ensure they understand the potential risks associated with the provision of various services.

Issue 2: What types of liability or other enforcement mechanisms might be imposed for alleged violations of state abortion restrictions or prohibitions?

- Civil penalties imposed by the state on providers? Patients?
- License suspension or revocation for individual providers?
- State-authorized enforcement against providers by private actors (e.g., Texas's SB8 private enforcement mechanism, which gives the public the right to sue people alleged to violate the state's abortion prohibition)? Patients?
- Criminal prosecution of providers? Patients?

Why these questions matter: There may be risks associated with violating a state's abortion restrictions or prohibitions, even if federal laws or regulations, such as Title X, require entities to provide certain services or referrals. Although federal laws and regulations should preempt conflicting state laws, this may not be enough to prevent the state (or private actors) from seeking to enforce the state's rules.

² Title X subrecipients and service sites should continue to consult their grantees about their obligations as Title X-funded entities.

Along with federal preemption, there may be other legal defenses available to providers in potential civil and criminal actions:

1. Are there any federal constitutional protections for the provider’s activity, such as First Amendment protections?
2. If the state law creates criminal penalties, what elements must the state prove, and what are the potential defenses?
3. Does the state’s constitution provide any legal recourse or defense?

Providers should consult their own counsel to ensure they understand the potential risks associated with the provision of various services.

CONSIDERATIONS FOR PROVIDERS IN STATES NOT RESTRICTING OR PROHIBITING ABORTION

Issue 1: Could a provider be criminally prosecuted under another state’s abortion-specific or general laws for providing abortion-related services, including medication abortion, to a resident of a state that has an abortion prohibition or restrictions in place (for example, Missouri’s SB603, which seeks to extend the state’s abortion restrictions to activities that occur outside of the state)?

Issue 2: Could a provider be subject to civil liability under other states’ laws?

Issue 3: If a provider offers IUDs or emergency contraception to someone from another state with restrictions or prohibitions under which those services could be considered unlawful abortion services, is there potential liability?

Issue 4: Does a provider’s state have any targeted legal protections for abortion care or other medical providers facing out-of-state prosecutions, investigations, or civil lawsuits (such as exemptions from interstate discovery, witness subpoena laws, or extraditions)?

Why these questions matter: Providers in states without abortion restrictions or prohibitions are likely to see increasing numbers of patients from states with abortion restrictions or prohibitions—whether for abortion services, if provided, or for services that may be interpreted to fall under a particular state’s abortion restrictions or prohibitions (such as the provision of emergency contraception and certain IUDs, even they are not abortifacients). There may be constitutional and other conflict-of-laws defenses to raise if another state were to seek to enforce its abortion restrictions or prohibitions against a provider in a state without such restrictions or prohibitions, but the existence of such defenses does not guarantee that the state would not seek to enforce its anti-abortion laws or regulations. It would also be important to assess the likelihood of success for such defenses in the other states’ courts.

Understanding the potential impact of other states’ anti-abortion laws or regulations, as well as any protections offered by the state in which an entity provides services, can help to assess risks. As noted in the previous section, there may be legal defenses available to providers in potential civil or criminal actions, including federal preemption, federal constitutional protections such as the First Amendment, state criminal law burden-of-proof requirements, and state constitutional protections. Additionally, providers facing liability for services provided to residents of states that have restricted or prohibited abortion may have additional defenses available under protective legislation enacted by the providers’ states.



October 5, 2022

VIA EMAIL

North Dakota Department of Health
600 East Boulevard Avenue
Bismarck, ND 58505
dohcommunications@nd.gov

Re: Open Records Law Request

Dear Record Custodian:

Pursuant to the North Dakota Open Records Law, N.D.C.C. §§ 44-04-18 *et seq.*, and Section 6 of Article XI of the North Dakota Constitution, American Oversight makes the following request for records.

Requested Records

American Oversight requests that your office promptly produce the following records:

1. All final decision memoranda, directives, policy interpretations, or guidance provided to, signed, approved, or otherwise adopted by the Department of Health regarding abortion, contraception, or reproductive health following the U.S. Supreme Court's decision in *Dobbs v. Jackson Women's Health*.
2. All email communications (including emails, email attachments, complete email chains, calendar invitations, and calendar invitation attachments) sent by any of the officials listed below containing any of the following key terms:

Key Terms:

- a. Dobbs
- b. Roe
- c. Abortion
- d. Pregnancy
- e. Pregnant
- f. Terminate
- g. Fetus
- h. Unborn
- i. "Planned Parenthood"
- j. "Trigger law"
- k. "Trigger ban"
- l. Contraception
- m. "Birth control"
- n. Abortifacient



- o. Mifepristone
- p. Misoprostol
- q. Ectopic

Officials:

- i. State Health Officer Dr. Nizar Wehbi
- ii. Chief of Staff Dirk Wilke
- iii. Deanna Askew, Family Health and Wellness

In an effort to accommodate your office and reduce the number of potentially responsive records to be processed and produced, American Oversight has limited its request to emails sent by the specified officials. To be clear, however, American Oversight still requests that complete email chains be produced, displaying both sent and received messages. This means, for example, that both State Health Officer Dr. Nizar Wehbi's response to an email containing one of the listed key terms and the initial received message are responsive to this request and should be produced.

Please provide all responsive records from June 24, 2022, through the date the search is conducted.

Please notify American Oversight of any anticipated fees or costs in excess of \$100 prior to incurring such costs or fee.

Guidance Regarding the Search & Processing of Requested Records

In connection with its request for records, American Oversight provides the following guidance regarding the scope of the records sought and the search and processing of records:

- Please search all locations and systems likely to have responsive records, regardless of format, medium, or physical characteristics.
- In conducting your search, please understand the term "record," in its broadest sense, to include all recorded information, regardless of physical form, related to any governmental functions, public business, or public funds.¹ We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions.
- Our request for records includes any attachments to those records or other materials enclosed with those records when they were previously transmitted. To the extent that an email is responsive to our request, our request includes all

¹ N.D.C.C. § 44-04-17.1(16).

prior messages sent or received in that email chain, as well as any attachments to the email.

- Please search all relevant records or systems containing records regarding agency business. Do not exclude records regarding agency business contained in files, email accounts, or devices in the personal custody of your officials, such as personal email accounts or text messages. Records of official business conducted using unofficial systems or stored outside of official files are subject to the Open Records Law.²
- In the event some portions of the requested records are properly exempt from disclosure, please disclose any reasonably segregable non-exempt portions of the requested records.³ If a request is denied in whole, please state specifically why it is not reasonable to segregate portions of the record for release. Furthermore, if a request is denied in whole or in part, please describe the legal authority for the denial or, if applicable, provide a statement that the records do not exist.⁴
- Please take appropriate steps to ensure that records responsive to this request are not deleted by the agency before the completion of processing for this request. If records potentially responsive to this request are likely to be located on systems where they are subject to potential deletion, including on a scheduled basis, please take steps to prevent that deletion, including, as appropriate, by instituting a litigation hold on those records.

If you have any questions regarding how to construe this request for records or believe that further discussions regarding search and processing would facilitate a more efficient production of records of interest to American Oversight, please do not hesitate to contact American Oversight to discuss this request. American Oversight welcomes an opportunity to discuss its request with you before you undertake your search or incur search or duplication costs. By working together at the outset, American Oversight and your agency can decrease the likelihood of costly and time-consuming litigation in the future.

Where possible, please provide responsive material in an electronic format by email. Alternatively, please provide responsive material in native format or in PDF format on a USB drive. Please send any responsive material being sent by mail to American Oversight, 1030 15th Street NW, Suite B255, Washington, DC 20005. If it will accelerate release of responsive records to American Oversight, please also provide responsive material on a rolling basis.

² See N.D.A.G. 2014-O-20 (records contained on public employee's personal device); N.D.A.G. 2014-O-10 (private email account used to generate or receive emails containing "public business"); N.D.A.G. 2008-O-15 (emails on home computers).

³ N.D.C.C. § 44-04-18.10 (1), (2).

⁴ *Id.* § 44-04-18(7).

Conclusion

American Oversight is a 501(c)(3) nonprofit with the mission to promote transparency in government, to educate the public about government activities, and to ensure the accountability of government officials. American Oversight uses the information gathered, and its analysis of it, to educate the public through reports, press releases, or other media. American Oversight also makes materials it gathers available on its public website and promotes their availability on social media platforms, such as Facebook and Twitter.⁵

We share a common mission to promote transparency in government. American Oversight looks forward to working with your agency on this request. If you do not understand any part of this request, please contact Sarah Colombo at records@americanoversight.org or (202) 869-5244.

Sincerely,

/s/ Sarah Colombo
Sarah Colombo
on behalf of
American Oversight

⁵ American Oversight currently has approximately 16,000 followers on Facebook and 119,100 followers on Twitter. American Oversight, Facebook, <https://www.facebook.com/weareoversight/> (last visited Sept. 29, 2022); American Oversight (@weareoversight), Twitter, <https://twitter.com/weareoversight> (last visited Sept. 29, 2022).

From: [Mertz, Kim N.](#)
To: [Rabenberg, Cora A.](#); [Wilke, Dirk D.](#); [Scott, Sarah A.](#); [Askew, Deanna L.](#); [Moe, Marie E.](#); [Hruby, Kimberly R.](#)
Cc: [Wehbi, Nizar MD](#)
Subject: RE: Lawsuit filed to block enforcement of North Dakota's trigger law
Date: Thursday, July 21, 2022 12:44:24 PM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)
[image006.png](#)
[image008.png](#)
[image009.png](#)
[image010.png](#)

That's very helpful, thanks Cora!

From: Rabenberg, Cora A. <crabenberg@nd.gov>
Sent: Thursday, July 21, 2022 12:35 PM
To: Mertz, Kim N. <kmertz@nd.gov>; Wilke, Dirk D. <ddwilke@nd.gov>; Scott, Sarah A. <sarahscott@nd.gov>; Askew, Deanna L. <daskew@nd.gov>; Moe, Marie E. <memoe@nd.gov>; Hruby, Kimberly R. <krhruby@nd.gov>
Subject: RE: Lawsuit filed to block enforcement of North Dakota's trigger law

The way I understand it is that they must offer an "opportunity" to hear about their options. Services are client centered, so depending on a client's personal reaction and history, that will lead the discussion. If someone was undergoing infertility services, it would not be appropriate to talk about termination. If you have a client who was not expecting the pregnancy and seems very upset about it, you would ask what options they would like to hear about. For clients with positive pregnancy tests who are undecided, information on referral sources for further counseling should be provided and offer the opportunity for client to return for further counseling, encourage her to include her partner or family member/friend, as appropriate.

Cora

From: Mertz, Kim N. <kmertz@nd.gov>
Sent: Thursday, July 21, 2022 12:04 PM
To: Rabenberg, Cora A. <crabenberg@nd.gov>; Wilke, Dirk D. <ddwilke@nd.gov>; Scott, Sarah A. <sarahscott@nd.gov>; Askew, Deanna L. <daskew@nd.gov>; Moe, Marie E. <memoe@nd.gov>; Hruby, Kimberly R. <krhruby@nd.gov>
Subject: RE: Lawsuit filed to block enforcement of North Dakota's trigger law

Thank you for all your work on this Cora and Sarah!

Just one quick question to be sure I'm interpreting this correctly. Where it states:

*Title X recipients **are required to offer pregnant clients the opportunity to be provided information and counseling regarding each of the following options:** prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination. If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, and referral upon request, except with respect to any option(s) about which the pregnant client indicates they do not wish to receive such information and counseling. (42 CFR § 59.5(a)(5)).*

The parts I have highlighted: does this mean all the options (prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination) are presented upfront to a women with a positive pregnancy test and information is provided on just the options the client indicates they are interested in. Or does the women actually have to request information on abortion?

Kim

From: Rabenberg, Cora A. <crabenberg@nd.gov>
Sent: Thursday, July 21, 2022 10:21 AM
To: Wilke, Dirk D. <ddwilke@nd.gov>; Scott, Sarah A. <sarahscott@nd.gov>; Askew, Deanna L. <daskew@nd.gov>; Mertz, Kim N. <kmertz@nd.gov>; Moe, Marie E. <memoe@nd.gov>; Hruby, Kimberly R. <krhruby@nd.gov>
Subject: RE: Lawsuit filed to block enforcement of North Dakota's trigger law

Thank you, this looks good. I addressed Dr. Wehbi's question and added a statement.

In addition, not sure if you want to provide links/resources at the bottom but if you do, I would suggest:

- [Title X Statutes, Regulations, and Legislative Mandates | HHS Office of Population Affairs](#)
- [Dobbs v. Jackson Women's Health Organization U.S. Supreme Court Decision: Impact on Title X Program \(govdelivery.com\)](#)
- [Title X Program Handbook_FINAL \(003\).pdf](#)
- [FAMILYPLANNINGSTATEMENTOFUNDERSTANDING.pdf](#)

We refer to contractual language in this document, not sure if you want the actual language, but in case you do, it is:

<p>Scope of Service Grantee will provide voluntary family planning which consists of educational, comprehensive medical and social services necessary to aid individuals to determine freely the number and spacing of their children. Grantee must follow Sections 1001, 1007 and 1008 of the Title X Public Health Service Act: 42 CFR Part 59, subpart A. Grantee must follow the North Dakota Family Planning Program's Policy and Procedure and Protocol manuals as provided. Grantee must follow the approved FY2022-2023 application.</p>

Thank you,
Cora

From: Wilke, Dirk D. <ddwilke@nd.gov>
Sent: Tuesday, July 19, 2022 9:00 AM
To: Rabenberg, Cora A. <crabenberg@nd.gov>; Scott, Sarah A. <sarahscott@nd.gov>; Askew, Deanna L. <daskew@nd.gov>; Mertz, Kim N. <kmertz@nd.gov>; Moe, Marie E. <memoe@nd.gov>; Hruby, Kimberly R. <krhruby@nd.gov>
Subject: RE: Lawsuit filed to block enforcement of North Dakota's trigger law

Thanks Cora, that provided clarity to a question that I know is going to pop up.

From: Rabenberg, Cora A. <crabenberg@nd.gov>
Sent: Tuesday, July 19, 2022 8:50 AM
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Subject: RE: Lawsuit filed to block enforcement of North Dakota's trigger law

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Sarah Scott, RN, BSN
Family Planning & Maternal Nurse Consultant
Family Health & Nutrition
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<https://www.msn.com/en-us/news/us/red-river-women-s-clinic-files-challenge-to-block-north-dakota-s-trigger-law/ar-AA7ktvs?cid=entnewsntp&cid=763bf8aa5f224787ad877a7df9c68ddb>

[Kim Mertz](#)
Section Chief

701.328.4528 • kmertz@nd.gov • Healthy and Safe Communities Section



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From: [Mertz, Kim N.](#)
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Cc: [Wehbi, Nizar MD](#)
Subject: RE: Lawsuit filed to block enforcement of North Dakota's trigger law
Date: Thursday, July 21, 2022 12:44:24 PM
Attachments: [image001.png](#)
[image002.png](#)
[image003.png](#)
[image004.png](#)
[image005.png](#)
[image006.png](#)
[image008.png](#)
[image009.png](#)
[image010.png](#)

That's very helpful, thanks Cora!

From: Rabenberg, Cora A. <crabenberg@nd.gov>
Sent: Thursday, July 21, 2022 12:35 PM
To: Mertz, Kim N. <kmertz@nd.gov>; Wilke, Dirk D. <ddwilke@nd.gov>; Scott, Sarah A. <sarahscott@nd.gov>; Askew, Deanna L. <daskew@nd.gov>; Moe, Marie E. <memoe@nd.gov>; Hruby, Kimberly R. <krhruby@nd.gov>
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The way I understand it is that they must offer an "opportunity" to hear about their options. Services are client centered, so depending on a client's personal reaction and history, that will lead the discussion. If someone was undergoing infertility services, it would not be appropriate to talk about termination. If you have a client who was not expecting the pregnancy and seems very upset about it, you would ask what options they would like to hear about. For clients with positive pregnancy tests who are undecided, information on referral sources for further counseling should be provided and offer the opportunity for client to return for further counseling, encourage her to include her partner or family member/friend, as appropriate.

Cora

From: Mertz, Kim N. <kmertz@nd.gov>
Sent: Thursday, July 21, 2022 12:04 PM
To: Rabenberg, Cora A. <crabenberg@nd.gov>; Wilke, Dirk D. <ddwilke@nd.gov>; Scott, Sarah A. <sarahscott@nd.gov>; Askew, Deanna L. <daskew@nd.gov>; Moe, Marie E. <memoe@nd.gov>; Hruby, Kimberly R. <krhruby@nd.gov>
Subject: RE: Lawsuit filed to block enforcement of North Dakota's trigger law

Thank you for all your work on this Cora and Sarah!

Just one quick question to be sure I'm interpreting this correctly. Where it states:

*Title X recipients **are required to offer pregnant clients the opportunity to be provided information and counseling regarding each of the following options:** prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination. If requested to provide such information and counseling, provide neutral, factual information and nondirective counseling on each of the options, and referral upon request, except with respect to any option(s) about which the pregnant client indicates they do not wish to receive such information and counseling. (42 CFR § 59.5(a)(5)).*

The parts I have highlighted: does this mean all the options (prenatal care and delivery; infant care, foster care, or adoption; and pregnancy termination) are presented upfront to a women with a positive pregnancy test and information is provided on just the options the client indicates they are interested in. Or does the women actually have to request information on abortion?

Kim

From: Rabenberg, Cora A. <crabenberg@nd.gov>
Sent: Thursday, July 21, 2022 10:21 AM
To: Wilke, Dirk D. <ddwilke@nd.gov>; Scott, Sarah A. <sarahscott@nd.gov>; Askew, Deanna L. <daskew@nd.gov>; Mertz, Kim N. <kmertz@nd.gov>; Moe, Marie E. <memoe@nd.gov>; Hruby, Kimberly R. <krhruby@nd.gov>
Subject: RE: Lawsuit filed to block enforcement of North Dakota's trigger law

Thank you, this looks good. I addressed Dr. Wehbi's question and added a statement.

In addition, not sure if you want to provide links/resources at the bottom but if you do, I would suggest:

- [Title X Statutes, Regulations, and Legislative Mandates | HHS Office of Population Affairs](#)
- [Dobbs v. Jackson Women's Health Organization U.S. Supreme Court Decision: Impact on Title X Program \(govdelivery.com\)](#)
- [Title X Program Handbook_FINAL \(003\).pdf](#)
- [FAMILYPLANNINGSTATEMENTOFUNDERSTANDING.pdf](#)

We refer to contractual language in this document, not sure if you want the actual language, but in case you do, it is:

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Kim Mertz
Section Chief

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Version/Date

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benefits. And, while a Title X project may provide a referral for abortion, which may include providing a patient with the name, address, telephone number, and other relevant factual information (such as whether the provider accepts Medicaid, charges, etc.) about an abortion provider, the project may not take further affirmative action (such as negotiating a fee reduction, making an appointment, providing transportation) to secure abortion services for the patient. (65 Fed. Reg. 41281 (July 3, 2000))

Where a referral to another provider who might perform an abortion is medically indicated because of the patient's condition or the condition of the fetus (such as where the woman's life would be endangered), such a referral by a Title X project is not prohibited by section 1008 and is required by 42 CFR § 59.5(b)(1). The limitations on referrals do not apply in cases in which a referral is made for medical indications. (65 Fed. Reg. 41281 (July 3, 2000)).

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From: [Wilke, Dirk D.](#)
To: [Rabenberg, Cora A.](#); [Moe, Marie E.](#); [Mertz, Kim N.](#)
Cc: [Askew, Deanna L.](#)
Subject: RE: OPA Message for Title X Grantees about the Dobbs Supreme Court Decision
Date: Tuesday, July 5, 2022 7:57:00 AM

Thank you Cora. This was a very helpful and informative document.

From: Rabenberg, Cora A. <crabenberg@nd.gov>
Sent: Tuesday, July 5, 2022 7:28 AM
To: Moe, Marie E. <memoe@nd.gov>; Wilke, Dirk D. <ddwilke@nd.gov>; Mertz, Kim N. <kmertz@nd.gov>
Cc: Askew, Deanna L. <daskew@nd.gov>
Subject: FW: OPA Message for Title X Grantees about the Dobbs Supreme Court Decision

Please see FAQ link provided by OPA.
Cora

From: HHS Office of Population Affairs <hhs.opa@public.govdelivery.com>
Sent: Wednesday, June 29, 2022 3:17 PM
To: Rabenberg, Cora A. <crabenberg@nd.gov>
Subject: OPA Message for Title X Grantees about the Dobbs Supreme Court Decision

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OPA Special Bulletin



OPA Message for Title X Grantees about the Dobbs Supreme Court Decision

Dear Title X Grantees:

This message contains important updates regarding the *Dobbs v. Jackson Women's Health Organization* U.S. Supreme Court decision. We know you have questions and concerns and we have been reviewing the Court decision to assess its impact on OPA programs.

Attached you will find two documents developed to help address some of your questions and concerns:

- [A letter from Jessica Swafford Marcella](#), our Deputy Assistant Secretary for Population Affairs, and the Director of the Office of Adolescent Health; and
- [A Q&A guidance document](#) with more information.

We feel an immense responsibility to provide continued and timely support to assist you in providing access to equitable, affordable, client-centered, quality family planning services. Please review these documents and plan to join us on **Friday, July 8, 2022, from 2:30-3:30 p.m. ET** for a Title X grantee call. Please reserve this time to join us to review guidance and any questions you may have.

Your OPA project officer will send out the call-in information to you separately. In the meantime, let your project officer know if you have any questions.

In addition, please check out www.reproductiverights.gov for more information and additional resources.

With sincere regards,
The OPA Title X Team

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From: [Knapp, Caprice A.](#)
To: [Thomasson, Jessica A.](#); [Wilke, Dirk D.](#)
Subject: RE: Roe v Wade
Date: Tuesday, July 19, 2022 7:49:08 AM
Attachments: [image002.png](#)
[image003.png](#)
[image004.png](#)

No. I also have not had luck getting people to think broadly about the lines in the budget that could be impacted. I am wondering if we need to do this ourselves with someone in fiscal.? I am happy to do that.

From: Thomasson, Jessica A. <jthomasson@nd.gov>
Sent: Tuesday, July 19, 2022 6:59 AM
To: Knapp, Caprice A. <cknapp@nd.gov>; Wilke, Dirk D. <ddwilke@nd.gov>
Subject: Re: Roe v Wade

Any luck tracking down population projections?

Sent from my Verizon, Samsung Galaxy smartphone
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From: Wilke, Dirk D. <ddwilke@nd.gov>
Sent: Tuesday, July 12, 2022 2:25:27 PM
To: Thomasson, Jessica A. <jthomasson@nd.gov>; Knapp, Caprice A. <cknapp@nd.gov>
Subject: RE: Roe v Wade

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I am not sure regarding ND Populations projection question, but I will reach back and see. I agree that would be interesting to know.

[Dirk Wilke, J.D., M.B.A.](#)
Chief of Staff

701.328.3256 • ddwilke@nd.gov



600 E. Boulevard Ave., Dept. 301 • Bismarck, ND 58505 • [Provide Feedback](#)



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Sent: Tuesday, July 12, 2022 2:06 PM
To: Wilke, Dirk D. <ddwilke@nd.gov>; Knapp, Caprice A. <cknapp@nd.gov>
Subject: RE: Roe v Wade

Thanks so much Dirk.

While I agree with the assessment that the move to Moorhead will not likely prove to be prohibitive for most women, I don't know that we can assume that our state will refrain from implementing one of the many interstate travel restrictions that are starting to circulate amongst legislators. There seem to be several creative approaches to sealing the "loopholes" the proponents of the change view as unacceptable.

Is it still true that there are about 10,000 live births in ND each year? If yes, I think we could assume perhaps an increase of 500 births due to the law change(s). That gives us a planning number of 5% increase in services, with the probably safe assumption that the majority of the uptick will be in lower income households.

I haven't looked at ND Population projections lately. Does the analytics team happen to have access to that? Or could they get it from State Data Center? Would be interesting to see what the next few years looks like from a straight up population perspective too.

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To: Thomasson, Jessica A. <jthomasson@nd.gov>; Knapp, Caprice A. <cknapp@nd.gov>
Subject: FW: Roe v Wade

FYI. This was the conclusion from our Health Analytics and Vital Records teams. Let me know if there is another way we want to approach this question or need to set up a meeting to discuss.

From: Miller, Tracy K. <tkmiller@nd.gov>
Sent: Tuesday, July 12, 2022 11:41 AM
To: Wilke, Dirk D. <ddwilke@nd.gov>
Subject: Roe v Wade

Dirk –

I met with Darin, Steve and Grace regarding your questions below:

- DHHS leaderships would like to determine the potential increase of births following Roe v Wade reversal
- How many additional births do we expect? Do they have estimates on the number of those births that would be premature and/or have a disability?
- I would also assume that those numbers may increase over time as people figure out how to access services over time. perhaps the birth impact in year 1 would be less than in year 2?
- Medical Services can estimate the disability number if you cannot
- Can we connect to those we would serve? Those need economic assistance, lower income?

The information Vital Record had confirmed and available was:

As of July 28, 2022, abortions will be prohibited in ND. Vital records will most likely continue to receive reports through the first part of August (due to late reporting).

General numbers are as follows:

In 2020 there were 1,171 reports

- 833 among ND residents
- 276 among MN
- 57 among SD
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These reports are primarily coming from one facility, with less than 6 reports from private facilities in the last five years. (This is assumed that these may be under reported from private facilities).

During our discussion on how RvW is going to affect this number along with possible change to the birth cohort in ND, it was agreed by all that the RvW reversal will have minimal effect on the birth cohort.

1. In discussions with the facility, it has been communicated that the facility is going to move its location from Fargo to Moorhead, as MN has no plans to make abortions illegal, plus information provided to us is that the laws will be made with minimal restrictions.
2. The facility has indicated that they are renting a building and following the July 28th cut off date, they should be operational shortly thereafter with minimal disruption to services.
3. They plan to build a new facility, and their Go Fund Me site currently has over 1 million dollars pledged to the building of the new center.

Because these reports are not specific to Fargo residents, and are reported from ND citizens from around the state, at this time, we believe the additional 5 mile drive from the current location to the new Moorhead location will not be a deterrent. We felt that the only change would be from patient level reporting from the facility to aggregated numbers from the facility.

However, we felt that support for family planning and Title 10 may be warranted as they may see an uptick in birth control requests. Additionally, Grace indicated there was an article in the Washington Post about the increase doctors are seeing among men wishing to get vasectomies.

<https://www.washingtonpost.com/health/2022/06/29/abortion-vasectomies-roe-birth-control/>

Let me know if you have other questions,
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Tracy K. Miller, PhD, MPH
State Epidemiologist

701.328.2387(p) • 701.328.2785 (f) • tkmiller@nd.gov



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To: [Rabenberg, Cora A.](#); [Mertz, Kim N.](#); [Askew, Deanna L.](#)
Subject: RE: Supreme Court Decision
Date: Monday, June 27, 2022 9:29:00 AM

I think your response is good. Thanks Cora.

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To: Laura Spicer <laura@myallyhealth.org>
Subject: RE: Supreme Court Decision

Hi Laura,

I have not heard anything other than Governor Burgum's statement below and they are working with the AG office:

[Burgum releases statement on U.S. Supreme Court opinion that returns abortion issue to the states | North Dakota Office of the Governor \(nd.gov\)](#)

Here's a link to [North Dakota Century Code t12.1c31 \(ndlegis.gov\)](#)

As far as Title X funds, the only thing I am aware of is this in which the House *proposes* \$500 million in their *draft* bill:

June 23, 2022

House Appropriations Committee Proposes \$500 Million for Title X

On June 22, the House Appropriations Committee released [text](#) of its draft bill for the Departments of Labor, Health and Human Services, Education, and Related Agencies (Labor-HHS). The bill proposes a record \$500 million for the Title X family planning program for fiscal year (FY) 2023, \$100 million more than the FY 2022 House proposal and the FY 2023 president's budget. NFPRHA put out a [statement](#) praising the funding level.

The bill makes other important improvements for family planning, sexual health, and abortion access, including \$130 million for the Teen Pregnancy Prevention Program and the removal of the Hyde and Weldon amendments. The bill will be considered by the Labor-HHS subcommittee [today](#), June 23, at 5:30 p.m. ET/ 2:30 p.m. PT, and in the full committee on Thursday, June 30, at 10:00 a.m. ET/ 7:00 a.m. PT. NFPRHA will provide a full analysis of the bill and updates on its progress in the coming weeks.

If you have any questions about the appropriations process or want to engage with your representative on the draft bill, please contact Lauren Weiss, Director, Policy & Communications, at lweiss@nfprha.org.

From: Laura Spicer <laura@myallyhealth.org>
Sent: Monday, June 27, 2022 8:47 AM
To: Rabenberg, Cora A. <crabenberg@nd.gov>
Subject: Supreme Court Decision

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Good morning!

Any thoughts if the overturning of Roe v. Wade will impact how the family planning clinics operate? I'm assuming that ND is a trigger state and most likely abortion will be banned within 1 month but does that have any impact on contraception, ECP, etc.? Just curious if you have heard any "buzz" at the state level.

Also, I had a staff member say that NFPRHA stated that we got a ton of money for Title X with this announcement but I haven't seen or heard anything?

Thank you,



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