BY MARY KELLY PERSYN

The Quality *of* Mercy

In a contest between an individual's right to follow medical science's conclusions about compassionate care and society's desire to adhere to traditional mores about parental rights, where does justice lie?

IN 2020 AND 2021, legislators in 22 states considered bills restricting and prohibiting gender-affirming care for transgender youth. In January 2023 alone, state lawmakers dropped over 6 dozen such bills in 23 states. Although only five states have signed bans into law and every court to hear challenges to such statutes has enjoined or otherwise ruled against them, the controversy around minors' rights to gender-affirming care continues to gather steam. Unlike many of her sister states, California not only protects the right to access gender-affirming care but also offers sanctuary to out-of-state families who seek it. However, heated rhetoric and misinformation have consumed the public "debate" on whether gender-affirming care should be available to minors, which in turn, has the potential to skew or undermine effective and candid client advocacy for California lawyers involved in disagreements between parents about access to gender-affirming care, protection of out-of-state families who come to California seeking care, and managing claims by minors seeking care when parents refuse their consent.

The term "gender-affirming care" is a broad concept encompassing a range of medical, mental health, surgical, and nonmedical services.[1] The American Academy of Pediatrics (AAP) has built a gender-affirmative care model (GACM) to advise pediatric health care providers on "developmentally appropriate care" of transgender and gender-diverse (TGD) youth.[2] From a GACM perspective, transgender identities and expressions are not disorders; rather, they are part of normal variations in human diversity that are not always adequately defined by the gender binary. Rather than being absolute, gender identities evolve, reflecting biology, development, socialization, and culture.[3] Mental health issues among TGD people most frequently result from social stigma and negative experiences, sometimes including rejection by the family and community of origin.[4]

"Puberty blockers"—gonadotrophin-releasing hormones—are one medical option for youth who have entered puberty. These medications have been used since the 1980s to treat central precocious puberty.[5] Cross-sex hormones are another option to affirm gender by allowing "adolescents who have initiated puberty to develop secondary sex characteristics of the opposite biological sex."[6] As with all medical interventions and treatments, these medications have risks and benefits to be appropriately evaluated by the health care team, including pediatric patients and their families. Surgical interventions are typically limited to adults.

The goal of the GACM is to treat gender dysphoria by affirming gender identity. According to the AAP, gender

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dysphoria is "a clinical symptom that is characterized by a sense of alienation to some or all of the physical characteristics or social roles of one's assigned gender"; also, gender dysphoria is listed in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), focusing on the "distress that stems from the incongruence between one's expressed or experienced (affirmed) gender and the gender assigned at birth."[7] Expressed or experienced gender, or gender identity, is "one's internal sense of who one is, which results from a multifaceted interaction of biological traits, developmental influences, and environmental conditions."[8] Children who are transgender and gender-diverse "report first having recognized their gender as 'different' at an average age of 8.5 years; however, they did not disclose such feelings until an average of 10 years later."[9] The AAP's GACM recommends individually tailoring interventions and treatments to the particular child. The model relies on relevant research asserting that prepubertal TGD children know their gender identity just as surely as do children who identify as cisgender. The model therefore rejects "watchful waiting" because it withholds critical support for the child and pathologizes transgender and gender-diverse identities.[10] The GACM regards the decision whether to intervene medically as a very personal one that "involves careful consideration of risks, benefits, and other factors unique to each patient and family" in the context of a collaborative, ongoing, multidisciplinary approach within the care team.[11]

Many, including legislators, who reject the GACM argue that youth who receive doctor- and parent or guardian-approved gender-affirming care are victims of medical child abuse. Those who accept the GACM argue that youth who are deprived of the GACM by state legislative or executive action are victims of state-sponsored medical neglect, which is another form of child maltreatment.[12]

State statutes and regulations that characterize gender-affirming care as child abuse rely on prejudice and misinformation as an objective matter.[13] Child abuse has a specific definition in the medical context. A diagnosis of "medical child abuse" (MCA), listed as "Factitious Disorder Imposed on Another" (FDIA) in the DSM-5 and formerly called "Munchausen's syndrome by proxy," identifies a type of child maltreatment that relies fundamentally on deceptive conduct by the parent or guardian.[14] In the case of gender-affirming care, the physician who must evaluate the need for such care renders an independent assessment, raising the question whether parent or guardian deception is possible. The remaining possibility, which appears to be the one intended by legislators attempting to eliminate gender-affirming care, is to claim that the professional medical consensus is malfeasant—that is, pediatricians, pediatric endocrinologists, and other professionals on the health care team either actively wish to cause their patients harm or are reckless in their disregard for patient safety. No evidence supports this view. Indeed, all leading medical professional associations support and promote access to gender-affirming care.[15] Further, the AAP and the American Professional Society on the Abuse of Children, a leading child protection and child abuse professional association, have stated that gender-affirming care is not child abuse; rather, it is necessary care.[16]

State Regulation

The current legal battle over the safety and efficacy of gender-affirming care began in Texas in October 2019 as the result of a custody dispute between a mother who wished to affirm her child and a father who battled to prevent his child from accessing gender-affirming care, in part by accusing his child's mother of "emotional abuse" in the form of gender affirmation.[17] Cultural conservatives, politicians, and legislators in several states jumped on the bandwagon, and the battle was joined.

To date, Alabama, Arizona, Arkansas, Florida, Tennessee, Texas, and Utah have banned gender-affirming care for minors in various forms. Arizona bans only gender-affirming surgeries, which are generally not provided to minors.[18] Tennessee bans gender-affirming puberty blockers and hormone therapy for prepubertal minors; the law has little effect since these medications are not part of the standard of care for prepubescent people.[19] Statutes banning gender-affirming care for minors in Alabama and Arkansas are currently under federal court injunction.[20] Utah's ban was signed into law on January 28, 2023.[21] Florida and Texas, where statutes banning such care failed to make it through state legislatures, banned gender-affirming care for minors by recourse to the Board of Medicine and the governor, respectively, and the Texas directive is under partial injunction.[22]

Nevertheless, the drumbeat of state legislation for the 2023 sessions is unrelenting. Legislatures in more than half of the states have considered bills banning gender-affirming care for minors.[23] The number of anti-transgender bills continues to grow, session by session.

Constitutional Law

Americans do not have a constitutional right to health care, let alone gender-affirming care. Rather, the sources of constitutional law that potentially establish a minor's right to gender-affirming health care, and their guardians' right to consent on their behalf, are equal protection and substantive due process.

The Biden Administration has interpreted the Supreme Court case of *Bostock v. Clayton County* to include transgender people in the protected class "sex."[24] The law cannot make distinctions impacting a protected class of people absent strict scrutiny.[25] Yet, many of the laws and rules that ban gender-affirming care exclude specific therapies for transgender youth only, while permitting treatment for intersex youth, youth experiencing precocious puberty, and any other minor who needs gender-affirming health care for any reason other than treatment of gender dysphoria.[26] When plaintiffs sue the government for discrimination, the government's burden is to show that the law is narrowly tailored to meet a compelling government interest. The injunctions currently in place against Alabama and Arkansas come as little surprise because the statutes unlawfully single out transgender youth as follows: Gender-affirming care and hormone therapy is available to cisgender adolescents with certain health conditions but not transgender youth with gender dysphoria; irreversible surgeries that sometimes affect fertility are performed on intersex infants but refused to transgender youth. Cisgender girls can elect breast reduction or augmentation; transgender youth cannot.

The Supreme Court has recognized parents' fundamental rights to custody and care of their children, which includes decisions about health care.[27] Parental rights to make medical decisions are not absolute, especially when they are not grounded in religious objections. However, courts will generally recognize parental rights to make health care decisions when they rely on recognized standards of care. Given the practically unanimous support among medical associations for World Professional Association for Transgender Healthcare standards supporting gender-affirming care,[28] a parent's decision to consent to such care on behalf of their child likely falls within the ambit of parental fundamental rights.

Transgender minors, parents, and health-

care professionals are challenging the Alabama ban in *Eknes-Tucker v. Marshall*[29] and the Arkansas ban in *Brandt v. Rutledge*.[30] In *Eknes-Tucker*, the court found that the parents had a fundamental right to make medical decisions, including gender-affirming health care, for their child. Because the care in question was "subject to accepted medical standards," prohibiting this care was likely unconstitutional. The question was not whether the care had any risk associated with it; rather, the court questioned the appropriateness of the care in the eyes of medical professionals.[31]

Plaintiffs in *Rutledge* sued Arkansas for violations of Fourteenth Amendment rights to equal protection—discrimination on the basis of sex—and due process—unconstitutional limitation of parental rights to follow medical advice for their children. The district court enjoined the statute and the Eighth Circuit Court of Appeals upheld the ruling. First, the court applied heightened scrutiny to the statute's classification according to sex. It affirmed that the statute was "not substantially related to Arkansas' interests in protecting children from experimental medical treatment and regulative medical ethics" because "there is substantial evidence to support the district court's conclusion that the Act prohibits medical treatment that conforms with the recognized standard of care."[32]

No federal or state judicial precedent to date has enabled or approved prohibitions of gender-affirming care.

Evolution of Federal Law and Policy

There is currently no federal statutory law of gender-affirming care.[33] Under President Joe Biden, the executive branch has issued executive orders and comments clarifying U.S. support for gender-affirming care. On January 20, 2021, the first day of the new administration, President Biden issued an executive order "preventing and combating discrimination on the basis of gender identity or sexual orientation," citing *Bostock*.[34] In June 2021, the Biden Administration Department of Education confirmed its support for the Title IX rights of transgender youth.[35] In August 2021, the Department of Health and Human Services used its power to clarify Section 1557 of the Affordable Care Act protection for the rights of transgender individuals.[36]

The Biden Administration has issued multiple statements in support of transgender youth and in opposition to state legislative attacks on the right to appropriate healthcare. In June 2022, the president signed an executive order protecting transgender children and signaling support for a ban on "conversion therapy" in response to Texas state actions to limit gender-affirming health care by characterizing it as child abuse.[37] The Department of Health and Human Services, with and through its Administration on Children, Youth, and Families and its Office of Civil Rights, has made multiple statements opposing the Texas actions and supporting transgender youth.

In June 2021 and April 2022, the United States participated in the Arkansas and Alabama cases, respectively. The United States makes clear its position on gender-affirming care bans in its Complaint in Intervention in *Eknes-Tucker v. Alabama*, a case challenging the state's ban.[38] Recognizing that Senate Bill 184 "denies necessary medical care to children based solely on who they are," the United States "files this complaint in intervention to enforce the Constitution's guarantee of equal protection." The law criminalizes care for transgender minors that it permits for all others, forcing doctors, guardians, and minors old enough to make medical decisions to "choose between forgoing medically necessary procedures and treatments or facing criminal prosecution."[39]

Texas Governor Abbott's Directive

In the spring of 2021, SB 1646, which would have characterized gender-affirming care for minors as child abuse and therefore criminalized it, passed through the Texas Senate but died in the House.[40] Political opposition to minors' ability to access gender-affirming care was undeterred. Soon after, Representative Matt Krause asked Attorney General Ken Paxton to issue an opinion on whether gender-affirming care is child abuse. On February 18, 2022, Paxton obliged, stating unequivocally that gender-affirming care is child abuse. On February 22, Governor Greg Abbott published a letter to Jaime Masters, Commissioner of the Texas Department of Family and Child Services (DFCS), purporting to confirm their August 2021 conversation characterizing gender-affirming care as child abuse. In his letter, Abbott issues a directive to DFCS agents. Relying on Paxton's opinion, Abbott instructs agents to investigate every incident of gender-affirming care as child abuse, indicating that agents should open investigations on every affirming family.[41] Such investigations carry the possible consequence of child removal.

Paxton's blunt and one-sided letter does not analyze the question of who actually perpetrates the alleged abuse, leaving the reader to conclude that the abusers—the criminals—are doctors and other health care professionals performing the abusive act under the guise of assent by likewise-criminal parents. If true, parents would be guilty of medical child abuse, or factitious disorder imposed on another, a rare and serious form of child abuse.[42] Doctors would be guilty of a serious crime. Abbott makes room for this accusation by characterizing gender-affirming care as not medically necessary (counter to professional standards of care).[43] In effect, Paxton is not arguing that parents are imposing an actual disorder on children to get unnecessary care. He is arguing that the disorder itself is not real—that gender dysphoria is a fiction and transgender youth do not actually exist. Health care focused on gender dysphoria is therefore unnecessary in his view, and all outcomes Paxton perceives as negative constitute child abuse.

The point is important because legislators continue to file bills criminalizing gender-affirming care as child abuse in states across the nation. Where child abuse is not the gravamen of the bill, it remains the underlying accusation.[44] Medical care that aligns with professional standards of care is not child abuse.[45] Treating physicians must take into account risks and benefits of particular care plans for specific patients, meaning that risks are understood and factored into medical decisions. Skipping over the fact that gender-affirming care is part of medical standards of care means that legislators and politicians do not grapple with this necessary risk-benefit analysis; they can simply use scare tactics to amplify risks—ignoring the fact that all medical care involves risk—and ignore or categorically deny known, evidence-based benefits of this care.

The Texas Medical Association (TMA) makes several of these points in its Third Court of Appeals amicus brief filed in support of the plaintiff-appellees in Doe v. Abbott, the Texas state court challenge to Abbott's Directive, in September 2022. The TMA restates its prior opposition to "the criminalization of evidence-based, gender-affirming care for transgender youth and adolescents." The brief also rebuts Paxton's core premise: that gender-affirming care is medically unnecessary.[46] Rather, "[p]roviding gender-affirming care is consistent with accepted clinical standards for the treatment of adolescents with gender dysphoria," and criminalizing or stigmatizing it "worsen[s] existing barriers to care for transgender youth, an already vulnerable population."[47] In its amicus brief in the same case before the

Texas Supreme Court, the American Professional Society on the Abuse of Children and allied organizations state that gender-affirming care is not child abuse but that deprivation of medically necessary care may be medical neglect.[48]

The Texas Third Court of Appeals is currently reviewing the statewide injunction initially issued by the district court in March and partially blocked by the Texas Supreme Court in June 2022.

Lessons for California Lawyers

Legislative and executive attempts to criminalize gender-affirming care in Texas and more than two dozen other states have shifted the ground for California lawyers in ways that are already playing out in our state legislature. What can be learned from the warning of the Texas example?

First, California actively protects in-state transgender youth and their access to health care.[49] An array of California laws and policies prohibit discrimination against LGBTQ+ youth, including the Civil Rights Act of 2007;[50] Nondiscrimination in State Programs and Activities;[51] Juvenile Justice Safety and Protection Act;[52] Omnibus Hate Crimes Act;[53] Providing Safe, Supportive Homes for LGBT Youth;[54] California Foster Care Nondiscrimination Act;[55] School Success and Opportunity Act;[56] and California Student Safety and Violence Prevention Act. California lawyers who represent minors in juvenile dependency proceedings must demonstrate cultural competency and sensitivity in relating to, and discerning best practices for, "providing adequate care to lesbian, gay, bisexual, and transgender youth in out-of-home placement."[57] The same standard applies in juvenile court, where the requirement of adequate training to represent minors includes "[c]ultural competency and sensitivity relating to, and best practices for, providing adequate care to lesbian, gay, bisexual, and transgender youth in out-of-home care."[58]

Second, California has taken significant legislative steps to protect out-of-state transgender youth who come to the state for health care.[59] Senate Bill 107, which goes into effect on January 1, 2023, has three main parts.[60] First, it prohibits health care providers, service plans, and contractors from releasing medical information related to gender-affirming care in response to subpoenas based on state laws authorizing civil actions against people who allow children to receive it. It likewise prohibits California law enforcement from making arrests based on a foreign state's criminalization of gender-affirming care. Second, the law essentially reopens and comments on the Uniform Child Custody Jurisdiction and Enforcement Act, which already provides California with exclusive jurisdiction for making an initial child custody determination when there is a dispute involving a parent in a foreign state.[61] The law prohibits enforcement of an order from a foreign state to remove a child solely due to that state's prohibition of gender-affirming care; in general, it instructs courts to protect the ability of a custodial parent or guardian to provide a child with gender-affirming care in the state, unless the noncustodial parent or guardian can present evidence sufficient to show that such care is not in the best interests of the child.[62]

Third, and relatedly, California attorneys representing parents in in-state custodial disputes based on parental disagreement about gender-affirming care for a child can infer legislative intent from SB 107 and draw on other California laws that protect transgender youth. Attorneys representing an affirming parent in dispute with a parent opposed to gender-affirming care for a youth with gender dysphoria should ensure that the court appoints a minor's counsel to best represent the minor's interests.[63]

Despite the widespread volatility of the current debate over transgender youth rights and gender-affirming care, California law is straightforward on the issue. State law strongly protects transgender youth rights to health care and now protects the rights of out-of-state transgender youth and their families who come to our state to access necessary care. Practitioners of family law in California may encounter disputes between co-parents who disagree over whether gender-affirming care is appropriate for their child. In these cases, lawyers can petition for appointment of minor's counsel to protect transgender youth rights and, in the case of an out-of-state parent, make use of SB 107 to shield gender-affirming care from foreign subpoenas and criminal warrants.

Regardless of specialty or practice, all California lawyers can and should participate in the public discussion of transgender youth rights to necessary medical care. As officers of the California courts, attorneys of the state have an ethical obligation to responsibly describe the laws relevant to accessing gender-affirming care and those that define child maltreatment. That obligation extends to the way in which attorneys discuss the court rulings in multiple states that so far have rejected statutes that outlaw this care. California attorneys, as defenders of the rule of law, have a duty to avoid usurping the role that medical expertise must play when assessing the best interests of the child. ■

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[1] Jill Wagner et al., *Psychosocial Overview of Gender-Affirmative Care*, 32 J. Pediatric Adolescent Gynecology 567-573 (2019) [hereinafter Wagner et al.].

[2] Jason Rafferty, AAP Comm. on Adolescence, AAP Section on Lesbian, Gay, Bisexual, and Transgender Health and Wellness, *Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents* 142 Pediatrics 1 (2018) [hereinafter Rafferty].

[3] Wagner et al., *supra* note 1, at 568 ("[G]ender identity is one's inner sense of self, which arises from many factors, including biology, socialization, and culture, and is distinct from assigned sex[.]").

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Rafferty, *supra* note 2.

[8] *Id.*

[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] Am. Prof'l Soc'y on the Abuse of Child., APSAC Statement: Gender-Affirming Care is Not Child Abuse (2022) [hereinafter Am. Prof'l Soc'y on the Abuse of Child.].

[13] For example, Texas Attorney General Ken Paxton's opinion letter classifying gender-affirming care as child abuse characterizes such care as "seek[ing] to destroy a fully functioning sex organ in order to cosmetically create the illusion of a sex change," though clinical guidelines exclude genital surgery for minors. Ken Paxton, Op. Ltr. No. KP-0401, 3 (Feb. 18, 2022) [hereinafter Paxton Op. Ltr.]. Without evidence or justification, Paxton finds that gender-affirming care is not medically necessary, a finding counter to the overwhelming majority of American professional health care associations. *Id.* at 2.

[14] Factitious Disorder Imposed on Another is a very serious and sometimes lethal form of child abuse in which "the perpetrator, usually the mother, invents symptoms or causes real ones in order to make her child appear sick." Examples include a child hospitalized nine times, with several invasive procedures, prior to FDIA diagnosis; and a child who was hospitalized several times with headache, abdominal pain, seizures, and other maladies prior to FDIA diagnosis. Noemi Faedda et al., *Don't Judge a Book by Its Cover: Factitious Disorder Imposed on Children-2 Cases*, 6 Frontiers Pediatrics 110 (Apr. 18, 2018). The Cleveland Clinic identifies FDIA as criminal child abuse. *See* Cleveland Clinic, Factitious Disorder Imposed on Another, https://my.clevelandclinic.org/health/diseases/9834-factitious-disorder-imposed-on-another-fdia (last visited Jan. 24, 2023).

[15] The Transgender Legal Defense & Education Fund collects them here: https://transhealthproject.org/resources/medical-organization-statements.

[16] Am. Prof'l Soc'y on the Abuse of Child., *supra* note 12.

[17] Anon., *Outlawing Trans Youth: State Legislatures and the Battle Over Gender-Affirming Healthcare for Minors*, 134 Harv. L. Rev. 2172 (April 2021).

[18] Devan Cole, *Arizona Governor Signs Bill Outlawing Gender-Affirming Care for Transgender Youth and Approves Anti-Trans Sports Ban*, CNN (Mar. 30, 2022), https://www.cnn.com/2022/03/30/politics/arizona-transgender-health-care-ban-sports-ban/index.html.

[19] Allyson Waller, *Tennessee Bans Hormone Treatments for Transgender Children*, N.Y. Times, May

20, 2021, *available at* https://www.nytimes.com/2021/05/20/us/tennessee-transgender-hormone-treatment.html.

[20] Assoc.Press, *A Judge Blocks Part of an Alabama Law That Criminalizes Gender-Affirming Medication*, NPR (May 14, 2022), https://www.npr.org/2022/05/14/1098947193/a-judge-blocks-part-of-an-alabama-law-that-criminalizes-gender-affirming-medicat; Associated Press, *First Trial over a State Ban on Gender-Affirming Care Begins in Arkansas*, MONTGOMERY ADVISOR, Oct. 17, 2022, *available at* https://www.montgomeryadvertiser.com/story/news/local/alabama/2022/10/17/gender-affirming-care-arkansas-trial-over-state-ban/69569458007.

[21] S. Res. 16, Gen'l Sess. (Utah 2023).

[22] Amanda D'Ambrosio, *Florida Medical Boards Ban Gender-Affirming Care for Kids*, MEDPAGE TODAY (Nov. 7, 2022), https://www.medpagetoday.com/special-reports/features/101624; María Luisa Paúl & Casey Parks, *Judge Partially Blocks Texas Gov. Greg Abbott's Order to Treat Gender-Affirming Care as Child Abuse*, WASH. POST, Mar. 2, 2022, *available at* https://www.washingtonpost.com/dc-md-va/2022/03/02/texas-transgender-child-abuse-injunction.

[23] Koko Nakajima & Connie Hanzhang Jin, *Bills Targeting Trans Youth Are Growing More Common—and Radically Reshaping Lives*, NPR (Nov. 28, 2022), https://www.npr.org/2022/11/28/1138396067/transgender-youth-bills-trans-sports.

[24] Memorandum from Dep't of Just. Civ. Rts. Div. 2 (Mar. 10, 2022) (quoting Bostock v. Clayton County, 140 S. Ct. 1731, 1742 (2020)) ("[B]eing gay or transgender is 'inextricably' bound up with sex.").

[25] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (holding that suspect classes receive strict scrutiny).

[26] *See, e.g.*, Hum. Rts. Watch, Mapping the Intersex Exceptions, https://www.hrw.org/feature/2022/10/26/mapping-the-intersex-exceptions (last visited Jan. 27, 2023).

[27] Troxel v. Granville, 530 U.S. 57, 65 (2000) (holding that parents have fundamental rights to care, custody, and control of their children).

[28] *See, e.g.*, Eknes-Tucker v. Marshall, No. 2:22-cv-184-LCB, 2022 WL 1521889, at *1-*2 (M.D. Ala. May 13, 2022) (referencing gender dysphoria diagnosis and citing to WPATH standards).

[29] *Id*.

[30] Brandt v. Rutledge, 47 F. 4th 661 (8th Cir. Aug. 25, 2022).

[31] *See, e.g.*, Eknes-Tucker, 2022 WL 1521889, at *16 ("To be sure, the parental right to autonomy is not limitless; the State may limit the right and intercede on a child's behalf when the child's health or safety is in jeopardy. Bendiburg v. Dempsey, 909 F.2d 463, 470 (11th Cir. 1990). But the fact that a pediatric treatment 'involves risks does not automatically transfer the power' to choose that treatment 'from the parents to some agency or officer of the state.' Parham, 442 U.S. 603.").

[32] Rutledge, 47 F. 4th at 671.

[33] Representative Marjorie Taylor Greene (R-GA) has proposed the Protect Children's Innocence Act, which would make gender-affirming care a federal felony. H.R. 8731, 117th Cong. (2022).

[34] Exec. Order No. 13988, 86 Fed. Reg. 7023 (Jan. 20, 2021), https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/20/executive-order-preventing-and-combating-discrimination-on-basis-of-gender-identity-or-sexual-orientation.

[35] Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County, 86 Fed. Reg. 32673 (June 22, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/202106-titleix-noi.pdf (subject to preliminary injunction in certain states).

[36] Nondiscrimination in Health Programs and Activities, 87 Fed. Reg. 47824 (Aug. 4, 2022), https://www.govinfo.gov/content/pkg/FR-2022-08-04/pdf/2022-16217.pdf.

[37] Exec. Order No. 14075, 87 Fed. Reg. 37189 (June 15, 2022), https://www.whitehouse.gov/briefing-room/presidential-actions/2022/06/15/executive-order-on-advancing-equality-for-lesbian-gay-bisexual-transgender-queer-and-intersex-individuals.

[38] The enrolled version of Alabama SB 184 can be downloaded at https://legiscan.com/AL/text/SB184/id/2566425.

[39] "S.B. 184 prohibits transgender minors from obtaining care that is well recognized within the medical community as medically appropriate and necessary, while imposing no comparable limitation on medically necessary care by cisgender minors." Compl. at ¶ 49, Eknes-Tucker v. Marshall, 2:22-cv-184-LCB, 2022 WL 1521889 (M.D. Ala. May 13, 2022).

[40] Tex. Senate, S. 1646, 87th Legis., Reg. Sess. (Tex. 2021), https://legiscan.com/TX/bill/SB1646/2021.

[41] Letter from Greg Abbott, Governor of Texas, to Jaime Masters, Commissioner, Texas Dep't of Fam. & Child Servs. (Feb. 22, 2022) (the Opinion of Attorney General Ken Paxton from Feb. 18, 2022, is attached), chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf.

[42] This syndrome was formerly known as Munchausen Syndrome by Proxy, the name that Abbott uses in his letter. For practice guidelines and more information related to FDIA, *see* AM. PROF'L SOC'Y ON THE ABUSE OF CHILD., MUNCHAUSEN BY PROXY: CLINICAL AND CASE MANAGEMENT GUIDANCE (2017), *available at* https://www.apsac.org/guidelines.

[43] Paxton Op. Ltr., *supra* note 13, at 3 ("In other words, in rare circumstances, some of the procedures you list are borne out of medical necessity. For example, a minor male with testicular cancer may need an orchiectomy. This opinion does not address or apply to medically necessary procedures."). While Paxton does not specify why he finds gender-affirming care medically unnecessary, it may be that, counter to the DSM-V and professional medical standards of care, he either believes that gender dysphoria does not exist or that such a diagnosis does not warrant health care for some unstated reason.

[44] The text of Rep. Greene's bill, which criminalizes all forms of gender-affirming care, does not characterize it as child abuse; it directly names this form of care a felony. Under this bill, persons seeking care for gender dysphoria are victims and physicians providing such care are felons. Protect Children's Innocence Act, H.R.8731, 117th Cong. (2022), https://www.congress.gov/bill/117th-congress/house-bill/8731/text. Greene's public commentary frequently states that gender-affirming care is child abuse. *See, e.g.*, Kelly Rissman, "*Disgusting and Appalling": Rep. Marjorie Taylor Greene Introduced a Bill That Criminalizes Performing Transgender Medical Care*, VANITY FAIR, Aug. 20, 2022, *available at* https://www.vanityfair.com/news/2022/08/rep-marjorie-taylor-greene-wants-to-criminalizes-transgender-medical-care.

[45] *See, e.g.*, In re Abbott, 645 S.W. 3d 276, 287 n.3 (Tex. 2022) (Lehrmann, J., concurring) ("By essentially equating treatments that are medically accepted and those that are not, the OAG Opinion raises the specter of abuse every time a bare allegation is made that a minor is receiving treatment of any kind for gender dysphoria. In my view, a parent's reliance on a professional medical doctor for medically accepted treatment simply would not amount to child abuse.").

[46] Brief for Texas Medical Association as Amici Curiae Supporting Appellees, Abbott v. Doe, No. 03-22-00126-CV, at 5 (Tex. 3d Ct. Apps., Sept. 7, 2022). For a statement of facts in the case, *see* 5-11.

[47] *Id*. at 18–19 ("As set forth below, these standards have been recognized and endorsed in the clinical guidance and publications of every American medical association that has addressed this area, as well as the in [sic] guidelines of the American Psychological Association."). Texas Medical Association excludes the position of the American College of Pediatricians, a fringe medical group categorized as a hate group by the Southern Poverty Law Center. *See* Raymond Wolfe, *President of American College of Pediatricians Slams Transgender Drugs as 'Child Abuse,'* RIGHT EDITION (Dec. 18, 2021), https://rightedition.com/2021/12/18/president-of-american-college-of-pediatricians-slams-transgender-drugs-as-child-abuse/; SPLC, American College of Pediatricians, https://www.splcenter.org/fighting-hate/extremist-files/group/american-college-pediatricians.

[48] Brief for American Professional Society on the Abuse of Children and Nineteen Professional Child Welfare as Amici Curiae Supporting Appellees, Doe v. Abbott, No. 22-0229, at 26 ff (Tex. 3d Ct. Apps., Aug. 25, 2022) ("Withholding or reversing gender-affirming care is harmful to the adolescent patient; either action can be a dangerous and even lethal form of medical neglect. TEX. FAM. CODE §261.001(4)(A)(ii)(b); 40 TEX. ADMIN. CODE §700.46.").

[49] California law defines "gender-affirming care" as "medically necessary health care that respects the gender identity of the patient, as experienced and defined by the patient[.]" WELF. & INST. CODE §16010.2(b)(3)(A). The same standard applies to mental and behavioral health care.

[50] California's fundamental civil rights law defines "sex" as inclusive of gender, gender identity, and gender expression. CIV. CODE §51(e)(5).

[51] GOV'T CODE §11135 (defines "sex" to include gender, gender identity, and gender expression).

[52] WELF. & INST. CODE §224.70 (2021) (youth bill of rights; includes gender, gender identity, gender expression).

[53] S. 1234, Reg. Sess. (Cal. 2004) (defines "hate crime" and includes gender).

[54] Assemb. 1856, Reg. Sess. (Cal. 2012) (establishes the right of foster youth to have adult caregivers trained in cultural competency related to LGBT identity).

[55] Assemb. 458, Reg. Sess. (Cal. 2003) (establishes the right of foster children and foster caregivers to fair and equal access to services; includes protections for gender identity).

[56] Assemb. 537, Reg. Sess. (Cal. 1999) (amending the California Education Code by adding actual or perceived sexual orientation and gender identity to existing nondiscrimination policy); Assemb. 1266 [Number of Legislative Body], [Number of Legislative Session] (Cal. 2013) (amending EDUC. CODE §221.5 and establishes the right of transgender youth to participate in sex-segregated programs aligned with their gender identity).

[57] CAL. R CT. 5.660(d)(3)(A)(iii).

[58] WELF. & INST. CODE §317(c)(5)(B).

[59] Minors must obtain parental consent to receive most forms of medical care in California, including gender-affirming care.

[60] Gender-Affirming Health Care, S. 107, Reg. Sess. 2021-2022 (Cal. 2022), https://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml?bill_id=202120220SB107.

[61] FAM. CODE, §3400 *et. seq*.

[62] For extensive analysis of SB 107 by the California legislature, *see* the bill analyses available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=202120220SB107#.

[63] *See* CAL. R CT. 5.240 (appointment of counsel to represent a child in family law proceedings).