THA Guidance: Directive on Investigation of Gender-Affirming Treatment as Child Abuse

The Texas Hospital Association offers guidance on Gov. Greg Abbott's Feb. 22, 2022, directive (the "Directive") to the Texas Department of Family and Protective Services to investigate any reported instance of gender-affirming treatment provided to minors as child abuse.

1. What is the Directive based on?

The Directive is based on an interpretation of existing child abuse laws as embodied in a written opinion issued by Attorney General Ken Paxton on Feb. 18, 2022 ("KP-0401"), discussed in more detail below.

2. What is covered by the Directive?

The Directive requires DFPS to conduct a prompt and thorough investigation of any reported instances of "so-called 'sex change' procedures" as a violation of existing Texas child abuse laws. According to the Directive, these procedures include reassignment surgeries that can cause sterilization, mastectomies, removals of otherwise healthy body parts, and administration of puberty-blocking drugs or supraphysiologic doses of testosterone or estrogen. While not explicit, the Directive is aimed at the medical professionals who provide or prescribe such treatment, and the parents of transgender children.

In addition, the Directive notes that Texas law "imposes reporting requirements upon all licensed professionals who have direct contact with children who may be subject to such abuse, including doctors, nurses, and teachers, and provides criminal penalties for failure to report such child abuse." There are similar reporting requirements and criminal penalties for members of the general public. These requirements are discussed further below.

Finally, the Directive indicates that Texas law also imposes a duty on DFPS to investigate the parents of a child who is subjected to these abusive gender-transitioning procedures, "and on other state agencies to investigate licensed facilities where such procedures may occur."

"To protect Texas children from abuse," the Directive concludes, "DFPS and all other state agencies must follow the law as explained in (Office of the Attorney General) Opinion No. KP-0401."

3. How did KP-0401 come about?

KP-0401 was issued in response to a request dated Aug. 23, 2021, by State Representative Matt Krause in his capacity as chair of the House Committee on General Investigating. Under Texas law, a legislative committee may request an attorney general opinion on a question affecting the public interest or concerning the official duties of the requesting person. Chair Krause's request read as follows (emphasis added):

- According to legislative testimony and other sources, medical practitioners perform various sex-change procedures on children. These procedures include (1) sterilization through castration, vasectomy, hysterectomy, oophorectomy, metoidioplasty, orchiectomy, penectomy, phalloplasty, and vaginoplasty; (2) mastectomies; and (3) removing from children otherwise healthy or non-diseased body part or tissue. ***Do these procedures constitute "genital mutilation" … and thus constitute "abuse" under Texas Family Code Chapter 261?***
- Additionally, medical practitioners are providing, administering, prescribing, or dispensing drugs to children that induce transient or permanent infertility, including: (A) puberty-suppression or puberty blocking drugs, (B) supraphysiologic doses of testosterone to females; and (C) supraphysiologic doses of estrogen to males. ***Do these chemical procedures constitute "abuse" under Texas Family Code Chapter 261?***

4. What does KP-0401 say?

In summary, KP-0401 contains a legal analysis of the definition of child abuse contained in the Texas Family Code as applied to the types of gender affirming treatment described above, and concludes that this treatment can constitute child abuse under existing Texas law.

KP-0401 begins with an executive summary containing the provisions of existing law that support the opinion that gender-affirming treatment can constitute child abuse, specifically Texas Family Code §261.001(1)(A) through (D). Those subsections of the existing definition of "child abuse" read as follows:

> (1) "Abuse" includes the following acts or omissions by a person:
>
> (A) mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning;
>
> (B) causing or permitting the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning;
>
> (C) physical injury that results in substantial harm to the child, or the genuine threat of substantial harm from physical injury to the child, including an injury that is at variance with the history or explanation given and excluding an accident or reasonable discipline by a parent, guardian, or managing or possessory conservator that does not expose the child to a substantial risk of harm;
>
> (D) failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child;…

KP-0401 then goes on to provide a contextual basis for its conclusion by discussing aspects of federal constitutional law and the fundamental right to procreate, concepts of the right of parental consent to medical treatment, the evidence on the benefits or lack of benefits of gender-affirming treatment and intervention, and the state's role in protecting children.

The opinion concludes by stating that the gender-affirming treatments, both medical and surgical, can constitute abuse under Texas Family Code §261.001(1)(A), (B), (C), or (D). In so doing, Gen. Paxton notes that courts have held that an unnecessary surgical procedure that removes a healthy body part from a child can constitute a real and significant injury or damage to the child, and that an unnecessary medical procedure may cause serious bodily injury, supporting a charge of injury to a child under section 22.04 of the Penal Code. One of the cases discussed involved a victim of medical child abuse, "sometimes referred to as Munchausen Syndrome by Proxy."

Further, even where the procedure or treatment does not involve the physical removal or alteration of a child's reproductive organs, e.g., puberty-suppressing medications, these procedures and treatments can cause "mental or emotional injury to a child that results in an observable and material impairment in the child's growth, development, or psychological functioning" by subjecting a child to the mental and emotional injury associated with lifelong sterilization—an impairment to one's growth and development. Therefore, a court could find these procedures and treatments to be child abuse under section 261.001(1)(A).

As for parental consent, according to KP-0401 attempts by a parent to consent to these procedures and treatments on behalf of their child may, if successful, "cause or permit the child to be in a situation in which the child sustains a mental or emotional injury that results in an observable and material impairment in the child's growth, development, or psychological functioning[,]" and could be child abuse under section 261.001(1)(B). Additionally, the failure to stop a doctor or another parent from conducting these treatments and procedures on a minor child can constitute a "failure to make a reasonable effort to prevent an action by another person that results in physical injury that results in substantial harm to the child[,]" and this "failure to make a reasonable effort to prevent" can also constitute child abuse under section 261.001(1)(D).

KP-0401 concludes its substantive discussion by noting the child abuse reporting requirements found in Texas Family Code section 261.101, and that a failure to report is a criminal offense under Texas Family Code section 261.109.

5. Is KP-0401 "binding" on judges and appellate courts?

No. Attorney General Opinions are not binding on any court that is ultimately considering whether gender-affirming treatment is child abuse. Courts sometimes reference attorney general opinions and the reasoning in those opinions when coming to conclusions about how to interpret a law or, as in this case, whether specific acts fall within the scope of existing statutory language. Some court opinions have even characterized AG opinions as persuasive authority. However, if the question considered by KP-0401 is ultimately ever the subject of an appellate court decision, that appellate court would not be bound in any sense by KP-0401 and would make its own determination of whether gender-affirming treatment constitutes child abuse under the current language found in the Texas Family Code. The Texas Supreme Court noted as much in a lawsuit filed as a result of KP-0401 and the Directive (discussed further in the following section), concluding that "it is well-settled that an Attorney General opinion interpreting the law cannot alter the pre-existing legal obligations of state agencies or private citizens." Attorney General

opinions are "not controlling", nor does the Attorney General have any formal legal authority to direct the investigatory decisions of DFPS.

Likewise, the judge in a trial court where a child abuse case is pending would not be bound by the language or reasoning of KP-0401 in determining whether to allow the case to move forward.

6. Have there been any court challenges to the Directive or KP-0401, and if so, what is the status of those challenges?

Yes. Not long after the Directive was issued, a lawsuit was filed in Travis County on behalf of the parents of a transgender child and a mental health professional who counsels transgender children against Gov. Abbott, DFPS, and Jaime Masters, Commissioner of DFPS. The lawsuit challenges the Directive and attacks the reasoning found in KP-0401.

After some early procedural wrangling, on March 11 Judge Amy Clark Meachum entered an injunction in the case. The injunction restrained the following acts by the defendants:

> (1) taking any actions against Plaintiffs based on the Governor's directive and DFPS rule, both issued February 22, 2022, as well as Attorney General Paxton's Opinion No. KP-0401 which they reference and incorporate;
> (2) investigating reports in the State of Texas against any and all persons based solely on alleged child abuse by persons, providers or organizations in facilitating or providing gender-affirming care to transgender minors where the only grounds for the purported abuse or neglect are either the facilitation or provision of gender-affirming medical treatment or the fact that the minors are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment;
> (3) prosecuting or referring for prosecution such reports; and
> (4) imposing reporting requirements on persons in the State of Texas who are aware of others who facilitate or provide gender-affirming care to transgender minors solely based on the fact that the minors are transgender, gender transitioning, or receiving or being prescribed gender-affirming medical treatment.

Judge Meachum's injunction was affirmed by the Third Court of Appeals based in Austin, but was partially overturned by the Texas Supreme Court on May 13. Specifically, the Supreme Court:

> (1) overturned the injunction to the extent that it applied statewide, and limited it to the specific plaintiffs in the case, finding that judge and the court of appeals lacked any authority to apply the injunction to nonparties throughout the state;
> (2) overturned the injunction against the Governor; and
> (3) upheld the injunction in all other respects.

In issuing its ruling, the Supreme Court noted that unlike some executive orders of the Governor that are afforded binding legal effect by statute, the Governor's directive to DFPS cites no legal authority that would empower the Governor to bind state agencies with the instruction contained in the letter. Thus, the injunction against Gov. Abbott was inappropriate because the Governor had no authority to direct DFPS to do what he purported to do in the letter.

Similarly, the Supreme Court noted that it is well-settled that an Attorney General opinion interpreting the law cannot alter the pre-existing legal obligations of state agencies or private citizens. Nor does the Attorney General have any formal legal authority to direct the investigatory decisions of DFPS. In summary, the Supreme Court noted that there is no source of law obligating DFPS to base its investigatory decisions on the Governor's letter or the Attorney General's Opinion. Instead, the Legislature has granted to DFPS, not to the Governor or the Attorney General, the statutory responsibility to make a prompt and thorough investigation of a report of child abuse or neglect. And, when deciding whether and how to exercise that authority, DFPS—not the Governor or the Attorney General—naturally must assess whether a report it receives is actually "a report of child abuse or neglect" under existing law.

As for overturning the statewide injunction, the Supreme Court noted that procedural rules limit a court's ability to apply an injunction beyond the parties to the case. It left in place the injunction blocking the investigation of the particular plaintiffs, but overturned the injunction as it relates to investigations by DFPS based on existing state law.

It is worth noting that an injunction is not a final pronouncement on the merits of the case; it is a tool used by courts to preserve the status quo until a trial on the merits can be held. In a similar but separate case, another district judge in Travis County issued an injunction on July 5 against Commissioner Masters and DFPS, restraining those parties from implementing or enforcing DFPS's investigatory policy and from implementing Governor Abbott's Directive and the Attorney General's opinion. Regardless of how the trials of these cases turn out, the Texas Supreme Court will likely have the final say unless the Texas Legislature enacts legislation bearing on how gender-affirming treatment is treated under state child abuse laws.

7. Has the academic community weighed in on KP-0401 or the Directive?

Yes, several advocacy organizations have criticized the reasoning in KP-0401 and the action taken by Gov. Abbott. The most comprehensive academic response we are aware of is contained in a report issued on April 28, 2022 by faculty members at Yale University and the University of Texas Southwestern entitled "Biased Science: The Texas and Alabama Measures Criminalizing Medical Treatment for Transgender Children and Adolescents Rely on Inaccurate and Misleading Scientific Claims" (the "Report").

In the Report, the authors conclude that the medical claims in KP-0401 are not grounded in reputable science and are full of errors of omission and inclusion, and that these errors, taken together, "thoroughly discredit the AG Opinion's claim that standard medical care for transgender children and adolescents constitutes child abuse." The details of the Report are beyond the scope of this Guidance, however it is worth noting that the authors conclude that the "Texas Attorney General either misunderstands or deliberately misstates medical protocols and scientific evidence"; that KP-0401 makes "exaggerated and unsupported claims about the course of treatment for gender dysphoria, specifically claiming that standard medical care for pediatric patients includes surgery on genitals and reproductive organs" which is untrue with respect to the recommended treatment of minors; and that KP-0401 "ignore[s] the mainstream scientific evidence showing the significant benefits of gender-affirming care and exaggerate[s] potential

risks." According to the Report, "[t]hese are not close calls or areas of reasonable disagreement. The AG Opinion…ignore[s] established medical authorities and repeat[s] discredited, outdated, and poor-quality information. The AG Opinion also mischaracterizes reputable. sources and repeatedly cites a fringe group whose listed advisors have limited (or no) scientific and medical credentials and include well-known anti-trans activists."

8. Should I report as child abuse a medical provider who has provided gender-affirming treatment? Or a parent who has consented to gender-affirming treatment for their child?

These are complicated questions made even more so by KP-0401, the Directive, and the court challenge. The relevant statutory provisions related to reporting are discussed below. Additionally, the Report and aspects of the Supreme Court opinion in the litigation (discussed above) are additional factors that we believe provide useful context in arriving at a decision whether to make a report. Providers should consult with legal counsel regarding their obligations under existing law.

Texas Family Code section 261.101(a) requires any person who has "reasonable cause to believe that a child's physical or mental health or welfare has been adversely affected by abuse or neglect by any person" to immediately make a report. Subsection (b) of the section requires professionals, including physicians, nurses, teachers, and others, who have "reasonable cause to believe that a child has been abused or neglected or may be abused or neglected," to make a report.

As discussed above, KP-0401 concluded that "sex change" procedures and treatments, "when performed on children, can legally constitute child abuse under several provisions of chapter 261 of the Texas Family Code." Both the Directive and KP-0401 make a point of noting the reporting requirements referenced above and the fact that failing to make a required report is a criminal offense. However, as noted above the Texas Supreme Court has made it clear that both the Directive and KP-0401 are merely the stated opinions of the governor and the attorney general and do not change existing law, and that neither has the authority to direct DFPS to take any particular action nor, by extension, effectuate a prosecution based on a failure to report child abuse under section 261-101. As we noted in prior versions of this Guidance, local prosecutors apply the law without direction or involvement of DFPS, the governor, or the attorney general. Those prosecutors could come to the same conclusion as embodied by KP-0401, i.e., that gender-affirming treatment on a minor is child abuse that must be reported. However, in considering whether a report is required, i.e., whether there is "reasonable cause to believe" that child abuse has occurred, we believe a potential reporter is entitled to consider, and indeed must consider, all relevant facts and circumstances including the credible statements of the medical community on gender-affirming care such as those contained in the Report.

As noted previously, until an appellate court provides an interpretation of the definition of abuse in this specific context, prosecutors in each jurisdiction will determine based on the facts and circumstances of each case whether a report was required. Any person or professional should be prepared to defend the decision to report or not report under the language in 261.101(a) and (b).

9. What are the consequences of not reporting child abuse as required by law?

Texas Family Code section 261.109 indicates that a person commits a criminal offense if the person is required to make a report under Section 261.101(a) or (b) and knowingly fails to make a report. An offense under subsection 261.101(a) (the general reporting requirement) is a Class A misdemeanor, except that the offense is a state jail felony if it is shown on the trial of the offense that the child was a person with an intellectual disability who resided in a state supported living center, the ICF-IID component of the Rio Grande State Center, or a facility licensed under Chapter 252, Health and Safety Code, and the actor knew that the child had suffered serious bodily injury as a result of the abuse or neglect.

An offense under subsection 261.101(b) (related to professionals) is a Class A misdemeanor, except that the offense is a state jail felony if it is shown on the trial of the offense that the actor intended to conceal the abuse or neglect.

10. Has the federal government weighed in on the Directive and KP-0401?

Yes. On March 2, the U.S. Department of Health and Human Services issued a "Notice and Guidance on Gender-Affirming Care, Civil Rights, and Patient Privacy". The Notice and Guidance does not specifically reference the Guidance or KP-0401, however the discussion clearly implicates the actions taken by Gov. Abbott and Gen. Paxton. The Notice and Guidance starts out by stating that attempts to restrict, challenge, or falsely characterize gender-affirming care, which it characterizes as "potentially lifesaving care," as abuse is dangerous. Moreover, such attempts block parents from making critical health care decisions for their children, create a chilling effect on health care providers who are necessary to provide care for these youth, and ultimately negatively impact the health and well-being of transgender and gender nonconforming youth.

The Notice and Guidance then provides an overview of antidiscrimination laws that apply to health care, including Section 1557 of the Affordable Care Act and Section 504 of the Rehabilitation Act, and indicates that HHS Office for Civil Rights (OCR) will continue working to ensure that transgender and gender nonconforming youth are able to access health care free from the burden of discrimination. It goes on to say that OCR is investigating and, where appropriate, enforcing Section 1557 of the Affordable Care Act in cases involving discrimination on the basis of sexual orientation and gender identity in accordance with all applicable law, and invites filing complaints with the OCR on the basis of such discrimination. It concludes by taking aim at mandatory reports of abuse, reminding reporters that HIPAA limits what information can be disclosed to the minimum necessary to comply with such mandatory reporting requirements, and that disclosing more protected health information that would be required could be a violation of HIPAA.

Additionally, on March 31, the U.S. Dept. of Justice issued a letter to all state attorneys general "reminding them of federal constitutional and statutory provisions that protect transgender youth against discrimination, including when those youth seek gender-affirming care." In the letter, the DOJ indicates that "[i]ntentionally erecting discriminatory barriers to prevent individuals from receiving gender-affirming care implicates a number of federal legal guarantees", and "[s]tate laws and policies that prevent parents or guardians from following the advice of a healthcare professional regarding what may be medically necessary or otherwise appropriate care for transgender minors may infringe on rights protected by both the Equal Protection and the Due Process Clauses of the Fourteenth Amendment (to the U.S. Constitution)." It also discusses some

of the laws and the restrictions on discrimination cited by HHS as discussed above. The DOJ letter was among a number of initiatives announced on March 31 as described in a Fact Sheet entitled "Biden-Harris Administration Advances Equality and Visibility for Transgender Americans."