September 23, 2021

Via Email: Opinion.Committee@oag.texas.gov

Honorable Ken Paxton
Office of Attorney General
Attn: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: Gender-Affirming Care of Transgender Youth, RQ-0426-KP

Dear Attorney General Paxton,

On behalf of our collectively more than 55,000 physician and medical student members, the Texas Medical Association (TMA) and the Texas Pediatric Society (TPS) appreciate the opportunity to submit briefing in response to the Honorable Matt Krause's August 24, 2021 Opinion Request, RQ-0426-KP ("Opinion Request"). TMA and TPS oppose the criminalization of evidence-based, gender-affirming care for transgender youth and adolescents.[1] As discussed below, the full range of evidence recognizes gender-affirming support and care as medically necessary and appropriate. This brief is limited to a discussion of medical care and does not address the issue of gender affirming surgical care for minors.

The Opinion Request asks whether gender-affirming care of transgender youth and adolescents constitutes "abuse" under Texas Family Code Chapter 261. The definition of "abuse" includes physical injury that results in substantial harm to a child. Gender-affirming care of transgender youth and adolescent patients reduces emotional distress, improves their sense of well-being, and reduces the risk of suicide. As a general matter, gender-affirming care reduces and prevents harms and therefore does not constitute "abuse" under Chapter 261. An allegation that a specific instance of treatment resulted in harm to a particular patient would be inherently factual. Respectfully, such factual questions should not be resolved by the opinion process of the Attorney General's Office, in accordance with the office's long-standing precedent.

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[1] See TEXAS MEDICAL ASSOCIATION. Policy 55.066, Opposition to Criminalization of Gender-Affirming Care for Transgender Youth (Res. 332 2021) ("The Texas Medical Association opposes efforts to criminalize evidence-based, gender-affirming care for transgender youth"); Policy 55.058, Sexual Orientation Change Efforts and Gender-Affirmation Therapies for Minors (CM-CAH & TF Rep. 4-A-17; amended Res. 332 2021) ("(1) The Texas Medical Association supports treatment and therapies rooted in acceptance and support regarding an individual's sexual orientation and gender identification and therefore opposes practices aimed at changing an individual's sexual orientation, including conversion therapy; (2) TMA supports physician efforts to provide medically appropriate therapies relating to gender identity and opposes the criminalization of these practices; (3) TMA supports the prohibition of any person licensed to provide mental health counseling from engaging in sexual orientation change efforts with patients younger than 18 years of age. TMA supports the practice of evidence-based therapies and will aggressively oppose the use of potentially harmful, unproven therapies for children. In addition, the association supports any regulatory changes to prohibit coverage for conversion therapy under the state's Medicaid program as well as any health insurers in the state; (4) TMA encourages physicians to stay informed on the potential harms associated with sexual orientation change efforts and the criminalization of gender-affirming therapies.").

I. Gender-Affirming Care

The full range of evidence and the current recommendations developed by the American Academy of Pediatrics,[2] and affirmed by every major American medical association, supports the medical necessity and appropriateness of providing gender-affirming support and care to transgender youth and adolescents.

Medical care for transgender youth and adolescents is evidence-based and has proven effectiveness. Guidelines for appropriate treatment have been carefully developed and endorsed by the American Academy of Pediatrics,[3] the American College of Obstetrics and Gynecology,[4] the Pediatric Endocrine Society,[5] the American College of Physicians,[6] the World Professional Association for Transgender Health,[7] and the American Psychological Association.[8] Moreover, in 2020 the American Psychiatric Association affirmed its support for access to "affirming and supportive treatment for trans and gender diverse youth and their families," including mental health and other appropriate medical treatments.[9]

The decision of whether and when to initiate gender-affirming treatment is personal and involves careful consideration of risks, benefits, and other factors unique to each patient and family. These are medical decisions reached in consultation between the patients, parents, physicians, therapists, and other members of the health care team. The process involves repeated psychological and medical evaluation, with the participation and consent of the youth or adolescent's parents.

Gender-affirming care is provided to reduce distress and prevent harm. Transgender youth and adolescents are particularly at risk of feeling unsafe and reporting suicidal ideations—over 50 percent have suicidal ideations and one third attempt suicide.[10] When transgender youth and adolescents are provided with appropriate gender-affirming care, including puberty suppressors, the risk of lifetime suicidal ideation falls dramatically.[11]

II. Gender-Affirming Care is not "Abuse"

Chapter 261 should not be interpreted to classify gender-affirming medical treatments as "abuse." Whether conduct constitutes "abuse" is a factual question, requiring examination on a case-by-case basis. This is

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[2] Rafferty J. Ensuring Comprehensive Care and Support for Transgender and Gender-Diverse Children and Adolescents. Committee on Psychosocial Aspects of Child and Family Health, Committee on Adolescence and Section on Gay, Lesbian, Bisexual and Transgender Health and Wellness. Pediatrics. Oct 2018, 142 (4) e20182162.
[3] Id.
[4] Care for Transgender Adolescents. Committee on Adolescent Health Care, American College of Obstetricians and Gynecologists. Committee Opinion No. 685, January 2017 (Reaffirmed 2020).
[5] Hembree W, Cohen-Kettenis P, Gooren L, Hannema S, Meyer W, Murad M, Rosenthal S, Safer J, Tangpricha V, T'Sjoen T. Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline. The Journal of Clinical Endocrinology & Metabolism, Volume 102, Issue 11, 1 November 2017, Pages 3869–3903.
[6] Safer J, Tangpricha V. Care of the Transgender Patient. Annals of Internal Medicine. July 2, 2019.
[7] Standards of Care for the Health of Transsexual, Transgender and Gender Nonconforming People. The World Professional Association for Transgender Health. 2011.
[8] Guidelines for Psychological Practice with Transgender and Gender Nonconforming People. American Psychological Association. American Psychologist, December 2015. Vol. 70, No. 9, 832–864.
[9] Position Statement on Treatment of Transgender (Trans) and Gender Diverse Youth. American Psychiatric Association, July 2020.
[10] Jones B, Arcelus J, Bouman W, Haycraft E. Sport and Transgender People: A Systematic Review of the Literature Relating to Sport Participation and Competitive Sport Policies. Sports Med. 2017; 47(4): 701–716.
[11] Turban JL, King D, Carswell JM, Keuroghlian AS. Pubertal Suppression for Transgender Youth and Risk of Suicidal Ideation. Pediatrics. Jan. 2020.

particularly true where the conduct involves complex medical care, such as the treatment of transgender youth and adolescents. Texas law does not support an interpretation of Chapter 261 as defining medically necessary care as per se "abuse."

The Attorney General's Office does not engage in fact-finding in its opinions. Respectfully, the opinion process is not the appropriate venue for resolving these questions.

The Opinion Request also contains an unestablished factual premise—that medically unnecessary care is being provided to transgender youth and adolescents. While an opinion of the Attorney General's Office may presume the truth of the facts presented, an opinion based on presumed facts should note this limitation.

A. "Abuse" under Chapter 261 is a Question of Fact

The Opinion Request asks whether gender-affirming medical care of youth and adolescents constitutes "abuse" under Chapter 261 of the Texas Family Code. Whether questioned conduct—medical or otherwise—is "abuse" under Chapter 261 is a factual question. As such, it should not be answered by an opinion of the Attorney General's Office.

The fact-specific nature of what constitutes "abuse" makes it inappropriate to determine whether certain medical treatments constitute per se abuse under Chapter 261. As discussed above, gender-affirming medical care may be provided to transgender youth or adolescents to reduce their distress, improve their sense of well-being, and reduce the risk of suicide. As such, the result of this care is the reduction and prevention of mental or physical injury. Thus, gender-affirming medical care would generally not be considered as resulting in "substantial harm to the child." An allegation that a specific instance of treatment resulted in harm to a particular patient would be inherently factual.

The Attorney General's Office opinion process has long deferred from addressing questions of fact,[12] including whether "abuse" has occurred under Chapter 261.[13] And fact-finding is particularly necessary when applying Chapter 261 to medical care. Medically necessary care may involve physicians and their patients proceeding with a treatment to obtain a desired benefit in the face of potential harms.[14] Evaluating whether such conduct results in injury or harm would need to account for the circumstances of each individual patient.

The same fact-finding would be necessary for gender-affirming medical care. As discussed above, the decision to undertake gender-affirming care involves a thorough review of clinical guidelines, the patient's

[12] Tex. Att'y Gen. Op. No. GA-1027 (2013) ("Whether any particular set of circumstances will result in liability is a fact question beyond the purview of an attorney general opinion."); Tex. Att'y Gen. Op. No. DM-333 (1995) ("We note too, with regard to your question about liability, that, given their highly fact-specific nature, we do not generally speculate in an attorney general opinion about such matters.").

[13] Tex. Att'y Gen. Op. No. GA-0106 (2003) (citations omitted) (Whether a specific person has cause to believe that a child has been a victim of sexual abuse depends upon the facts within that person's knowledge. Questions about whether a person has a duty to report child sexual abuse under specific circumstances must be answered on a case-by-case basis by applying the law to the facts). Texas courts have similarly treated findings of abuse or neglect as questions of fact. See *Lucas v. Tex. Dep't of Protective & Regulatory Services*, 949 S.W.2d 500, 502 (Tex. App.—Waco 1997, pet. denied) (treating the trial court's conclusions that the father endangered the physical and emotional well-being of his children and sexually abused his children as findings of fact.); *Melton v. Dallas County Child Welfare Unit of Tex. Dep't of Human Res.*, 602 S.W.2d 119, 122 (Tex. Civ. App.—Dallas 1980, no writ) ("The question of whether the mother's conduct endangered the emotional well-being of the children was a question of fact rather than a question of law."); *Weston v. Weston*, 241 S.W.2d 753, 753 (Tex. Civ. App.—El Paso 1951, no writ) ("Whether or not a child is a dependent or neglected child within the meaning of [the statute] is a question of fact.").

[14] An obvious example is chemotherapy, where destruction of cancerous cells may also damage healthy cells.

individual conditions, and the potential benefits and risks of treatment. Whether a particular treatment results in "substantial harm" to a patient—or other injurious conduct within the meaning of "abuse" under Chapter 261—would necessarily require inquiry into the patient's initial condition, response to treatments through the clinical course of care, and subsequent well-being. Such a case-by-case inquiry requires fact-finding ill-suited to the Attorney General opinion process.

B. Per Se "Abuse"

As discussed above, the determinations sought by the Opinion Request—whether gender-affirming treatments constitute "abuse" under Chapter 261—require consideration and resolution of questions of fact. There is no basis in Chapter 261—or other Texas law[15]—to avoid this necessary fact-finding by interpreting Chapter 261 to include certain medical treatments within the meaning of "abuse" as a matter of law (i.e., per se "abuse").

The primary goal of statutory construction is ascertaining and effectuating the Legislature's intent, without unduly restricting or expanding the statute's scope.[16] Intent is derived from the plain meaning of the text.[17] In enacting a statute, it is presumed that constitutional compliance is intended.[18]

There is nothing in the language of Chapter 261 to support per se inclusion of medical treatments within the definition of "abuse." Section 261.001 contains the definition of "abuse."[19] Though containing 13 subsections setting forth conduct and omissions included within the definition of "abuse", there are no references to medical care. Conversely, the failure to obtain medical care is included within the definition of "neglect."[20]

Additionally, construing the meaning of "abuse" to include certain medical procedures as a matter of law would interfere with parents' fundamental rights. Parents have the right to make decisions regarding the medical treatment of their children.[21] This is based on recognition "that natural bonds of affection lead parents to act in the best interests of their children."[22] Opponents of gender-affirming care have argued, however, that the treatments pose risks meriting their wholesale prohibition. The validity of those claimed

[15] Chapter 167 of the Health and Safety Code may seem a plausible basis for finding that gender-affirming care is statutorily prohibited, and thus conduct constituting per se abuse under Chapter 261. Chapter 167 prohibits genital mutilation of a female child. Under Chapter 167, "[a] person commits an offense if the person… knowingly circumcises, excises, or infibulates any part of the labia majora or labia minora or clitoris of another person who is younger than 18 years of age." However, section 167.001(c) also contains a specific exception for conduct performed by a licensed health care professional for medical purposes. Additionally, the legislative history of Chapter 167 also shows that the prohibited conduct was not intended to encompass medical care. The bill analysis specifically notes that the conduct the legislature intended to address "usually is performed by a nonmedical practitioner in a home or other nonclinical setting." House Research Organization, H.B. 91 Bill Analysis (May 4, 1999). The bill analysis indicates that it was meant to apply to the cultural practice of female circumcision in immigrant communities. Additionally, if the statute was meant to encompass gender-affirming care, its prohibition would not have been limited to female anatomy. Thus, Chapter 167 does not provide a basis in law to treat gender-affirming care as per se harm within Chapter 261's definition of "abuse."

[16] See, e.g., *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560, 572 (Tex. 2016).

[17] Id.

[18] Tex. Gov't Code §311.021.

[19] Tex. Family Code §261.001(1).

[20] Tex. Family Code §261.001(4)(A)(ii)(b).

[21] *Parham v. J. R.*, 442 U.S. 584, 602 (1979); see also *Miller ex rel. Miller v. HCA, Inc.*, 118 S.W.3d 758, 766 (Tex. 2003) (Citing to *Parham* and noting that "[t]he Texas Legislature has likewise recognized that parents are presumed to be appropriate decision-makers, giving parents the right to consent to their infant's medical care and surgical treatment.").

[22] *Parham*, 442 U.S. at 603.

risks aside, the possibility that a treatment involves risks does not nullify a parent's right to make treatment decisions.[23] The Texas legislature has also codified this right in the Texas Family Code.[24]

In analyzing a statute, "[i]f it is possible reasonably to construe statutory language so as to render the statute constitutional, [the Attorney General's Office], like a court, is compelled to do so."[25] An interpretation of "abuse" to include, as a matter of law, gender-affirming treatment(s) would interfere with parents' decisions to initiate gender-affirming care for their children. It is true, of course, that government also has an interest in children's safety. However, without fact-finding, the state would be unlikely to show its infringement on the parents' fundamental right is narrowly tailored.[26] Therefore, this interference with parents' rights to make treatment decisions for their children would likely be found unconstitutional.[27]

As such, the Attorney General's Office should not construe §261.001 to include gender-affirming medical care as per se "abuse."

III. Medical Necessity

The Opinion Request contains an unestablished factual premise: that gender-affirming medical care is being provided without medical necessity. For example, the Opinion Request subject line asks "[w]hether sex change procedures performed on children without medical necessity constitute child abuse." Additionally, the Opinion Request's final paragraph—discussing genetic disorders of sex development or lack of normal sex chromosome structure—references "instances of medical necessity." However, no such reference is made in the preceding two paragraphs' discussions of gender-affirming care. Referencing "medical necessity" when discussing treatment of sex development or chromosomal disorders but not when discussing gender-affirming treatments implies that the request does not consider the latter to be medically necessary, an unsubstantiated implication.

Whether a treatment is medically necessary is a question of fact, requiring consideration of accepted medical standards/guidelines and the circumstances of a specific patient. [28] The Attorney General's Office has previously noted that questions of medical necessity are factual, which, again, cannot be resolved in the opinion process.[29]

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[23] *Parnham*, 442 U.S. at 603 ("Simply because the decision of a parent… involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state.").
[24] Tex. Family Code §151.001(a)(6).
[25] Tex. Atty. Gen. Op. No JC-0012 (1999); see also *Brady v. Fourteenth Court of Appeals*, 795 S.W.2d 712, 715 (Tex. 1990) ("Statutes are given a construction consistent with constitutional requirements, when possible, because the legislature is presumed to have intended compliance with state and federal constitutions.")
[26] This is not to say that fact-finding necessarily renders infringement on a fundamental right constitutional; rather, that the absence of fact-finding is a factor weighing against constitutionality.
[27] See *Brandt v. Rutledge*, 4:21CV00450 JM, Supplemental Order, p. 10 (E.D. Ark., Aug. 2, 2021) (Finding that an Arkansas law prohibiting medical or surgical gender-transition procedures for children would infringe on a fundamental parental right—and thus be subject to strict scrutiny—but would be unlikely to even withstand either heightened scrutiny or rational basis review.).
[28] See, e.g., *Moore ex rel. Moore v. Reese*, 637 F.3d 1220, 1252 (11th Cir. 2011) ("[W]hen the state's and a patient's experts disagree, material questions of fact arise as to whether a treatment is medically necessary."); *Rodriguez v. City of New York*, 72 F.3d 1051, 1063 (2d Cir. 1995) ("[W]hat the [medical community's] generally accepted standards were is a question of fact."); *U. S. v. Kaadt*, 171 F.2d 600, 603-04 (7th Cir. 1948) ("[A] consensus of medical opinion is a question of fact.").
[29] Tex. Atty. Gen. Op. No. JM-746 (1987) ("The determination of what specific services are medically necessary is a question of fact and cannot be resolved in the opinion process.").

Unsubstantiated facts do not necessarily preclude the Attorney General's Office from responding to the request, as the office may assume the facts presented are true and answer the legal questions presented based on those facts.[30] However, if the Attorney General's Office issues an opinion based on the presumed facts, the opinion should make clear that it is limited only to the factual scenario presented in the request (i.e., medically unnecessary gender-affirming care). This is consistent with the office's precedent and will limit confusion regarding the opinion's broader applicability.

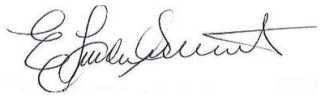
IV. Treatment of Sex Development or Chromosome Structure Disorders

As with medical gender-affirming treatment for youth, the appropriateness of particular treatment for a genetic disorder of sex development or sex chromosome structure is factually dependent. The determination requires consideration of accepted medical standards/guidelines and the circumstances of a specific patient. Respectfully, it is inappropriate to resolve this inquiry via an opinion of the Attorney General's Office.

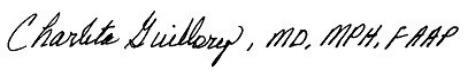
V. Conclusion

TMA and TPS appreciate the opportunity to submit this letter brief in response to the request for an Attorney General opinion regarding gender-affirming treatment for transgender youth and adolescents. If you have any questions, please do not hesitate to contact Donald P. "Rocky" Wilcox, Vice President and General Counsel, at rocky.wilcox@texmed.org; Kelly Walla, Associate Vice President and Deputy General Counsel, at kelly.walla@texmed.org; or Eamon Reilly, Assistant General Counsel, at eamon.reilly@texmed.org.

Sincerely,



E. Linda Villarreal, MD
President, Texas Medical Association



Charleta Guillory, MD, MPH, FAAP
President, Texas Pediatric Society

[30] See, e.g., Tex. Atty Gen. Op. No. KP-0143 (2017).