

No. D-1-GN-22-000977

IN THE DISTRICT COURT OF TRAVIS COUNTY, TEXAS
353rd JUDICIAL DISTRICT

JANE DOE, individually and as a parent and next friend of MARY DOE, a minor;
JOHN DOE, individually and as a parent and next friend of MARY DOE, a minor;
and DR. MEGAN MOONEY,

Plaintiffs,

vs.

GREG ABBOTT, sued in his official capacity as Governor of the State of Texas;
JAIME MASTERS, sued in her official capacity as Commissioner of the Texas
Department of Family and Protective Services; and the TEXAS DEPARTMENT
OF FAMILY AND PROTECTIVE SERVICES

Defendants.

**BRIEF FOR PROFESSOR RON BEAL AS AMICUS CURIAE IN SUPPORT
OF PLAINTIFFS' APPLICATION FOR TEMPORARY INJUNCTION**

Kennon L. Wooten
State Bar No. 24046624
kwooten@scottdoug.com

Cynthia L. Saiter
State Bar No. 00797367
csaiter@scottdoug.com

**SCOTT DOUGLASS &
McCONNICO LLP**
303 Colorado Street, Suite 2400
Austin, Texas 78701-2589
(512) 495-6300 Phone
(512) 495-6399 Fax

Mark Davis
State Bar No. 24096062
mgdavis@jenner.com

JENNER & BLOCK LLP
1099 New York Ave, NW, Suite 900
Washington, DC 20001-4412
(202) 639-6000 Phone
(202) 639-6066 Fax

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INTEREST OF AMICUS CURIAE

Amicus **Professor Ron Beal** was a member of the faculty at Baylor Law School for 38 years. He has extensively studied, taught, and written about the power of Texas administrative agencies, including the limitation on agencies' rulemaking power set forth in the Texas Administrative Procedures Act (the "APA"). In his scholarship and teaching, Professor Beal has carefully considered the administrative procedures implicated by this case, and submits this brief solely to preserve the integrity of the administrative process in Texas.

Professor Beal submits this brief solely on his own behalf and not as a representative of Baylor Law School. No party authored this brief in whole or in part. Professor Beal has not been paid or otherwise compensated for the submission of this brief. He has no interest, financial or otherwise, in this litigation and does not have a relationship with any of the parties.

Prior to his retirement in 2021, Professor Beal taught courses on Texas administrative law for Baylor Law students, offered training courses for administrative law judges, and lectured in advanced courses for practicing lawyers in Texas. Professor Beal has written extensively on administrative law issues, including the Texas Administrative Procedures Act. In 1997, he completed a treatise, *Texas Administrative Practice and Procedure*, which is considered the "bible" of Texas administrative law. He has also been the contributing editor for

Texas Administrative Law for 25 years. Professor Beal has also been recognized for his contributions to Texas administrative law. In 1991, he was honored by the State Bar of Texas Administrative and Public Law Council for writing the Outstanding Administrative Law Review Article and in 1994, Baylor University conferred upon him the award of Outstanding Research Professor.

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INTRODUCTION AND SUMMARY OF AMICUS' ARGUMENT

Amicus writes solely to address the extraordinary and unprecedented decision of the Texas Department of Family and Protective Services (“DFPS”) and Commissioner Masters to adopt Governor Greg Abbott’s¹ and Attorney General Ken Paxton’s expansive interpretation of “child abuse” under the Texas Family Code and immediately initiate investigations based upon that interpretation without any opportunity for notice and public comment. Amicus does not take a position on whether certain medical procedures provided to transgender children amount to “child abuse” as defined by statute or whether Defendants have violated Plaintiffs’ constitutional or statutory rights. Plaintiffs’ Petition, however, demonstrates that Defendants’ actions have had a substantial and immediate impact on the rights of individuals throughout the state because they violate Texas administrative law. Parents, doctors, teachers, and other caregivers of transgender children throughout Texas now face the prospect of investigation and potential criminal liability—in addition to the potential loss of professional licensure, ability to earn an income, and the loss of parental rights—as a result of unilateral and unauthorized action by DFPS and Commissioner Masters.

Setting aside whether Governor Abbott’s and Attorney General Paxton’s interpretation of the Family Code is correct from a legal or medical perspective,

¹ DFPS, Commissioner Masters, and Governor Abbott are collectively referred to as “Defendants.”

Commissioner Masters’ decision on behalf of DFPS to enforce that interpretation in conducting child abuse investigations runs afoul of Texas administrative law in at least two ways. *First*, DFPS’s and Commissioner Masters’ decision exceeded their authority. As a state agency, DFPS (including the Commissioner) has no authority other than the authority the Texas Legislature has granted to it by statute. That authority does not include the authority to amend or expand the statutory definition of “child abuse.” *Second*, even assuming that DFPS and the Commissioner had the authority to adopt and enforce a novel interpretation of the Family Code, that action constitutes an “interpretive rule” under the Texas Administrative Procedures Act (the “APA”), and that rule is legally ineffective because it was not filed with the Texas Secretary of State. Moreover, all agency rules, including interpretive rules, are subject to mandatory notice, comment, and justification procedures under the Texas APA. None of those required procedures were followed here.

Because the actions of DFPS and Commissioner Masters threaten the integrity of Texas’s procedural and administrative system, amicus supports Plaintiffs’ application for a temporary injunction.

BACKGROUND²

In 2021, various bills were introduced in the Legislature to amend the Family Code to expand the statutory definition of “child abuse” to include certain

² Amicus adopts and assumes as true the facts alleged in Plaintiffs’ Petition

procedures for gender-affirming therapy for minors. Tex. S.B. 1646, 2021 Leg., 87th Reg. Sess. (2021); Tex. H.B. 68, 2021 Leg., 87th Reg. Sess. (2021); Tex. H.B. 1339, 2021 Leg., 87th Reg. Sess. (2021). The Legislature did not pass any of those bills.

Following the failure of those bills, State Representative Matt Krause wrote to Attorney General Paxton on August 23, 2021 inquiring as to whether certain “sex-change procedures” could constitute child abuse under the Family Code when used to treat a transgender child. Pet. ¶15. On February 18, 2022, the Attorney General issued an advisory opinion in response to Representative Krause’s inquiry (the “Paxton Opinion”). *Id.*³ The Attorney General concluded that those procedures—including “puberty-suppression or puberty-blocking drugs, supraphysiological doses of testosterone to females, and supraphysiologic doses of estrogen to males”—did constitute “child abuse” under the Family Code when performed on children. Pet. ¶16.

Shortly after the Paxton Opinion issued, Governor Abbott sent a letter to DFPS Commissioner Masters on February 22, 2022 (the “Abbott Letter”) directing DFPS “to conduct a prompt and thorough investigation of any reported instances” of the “sex-change” procedures identified in the Paxton Opinion as child abuse. Pet.

³ Ken Paxton et al., RE: WHETHER CERTAIN MEDICAL PROCEDURES PERFORMED ON CHILDREN CONSTITUTE CHILD ABUSE, Op. No. KP-0401 (Feb. 18, 2022), <https://texasattorneygeneral.gov/sites/default/files/global/KP-0401.pdf>.

¶ 17.⁴ The Governor claimed the Paxton Opinion made clear that those procedures “constitute child abuse under existing state law” and that the Family Code imposed a duty on DFPS “to investigate the parents of a child who is subjected to these abusive gender-transitioning procedures” and “licensed facilities where such procedures may occur.” *Id.* The Governor further noted that the Family Code imposes “reporting requirements on all licensed professionals who have direct contact with children who may be subject to such abuse, including doctors, nurses, and teachers” with criminal penalties for failure to report. *Id.*

In response to the Abbott Letter, Commissioner Masters issued a statement on behalf of DFPS sent to reporters expressing the Department’s intention to comply with the Governor’s directive to investigate child abuse in accordance with the Paxton Opinion’s interpretation of the Family Code (the “DFPS Statement”):

In accordance with Governor Abbott’s directive today to Commissioner Masters, we will follow Texas law as explained in Attorney General opinion KP-0401. At this time, there are no pending investigations of child abuse involving the procedures described in that opinion. If any such allegations are reported to us, they will be investigated under existing policies of Child Protective Investigations.

Pet. ¶ 18; Ex. A (Feb. 22, 2022 Statement of DFPS Sent to Reporters). Immediately upon issuing that Statement, DFPS began child abuse investigations of families with transgender children. Pet. ¶ 21.

⁴ Greg Abbott, Letter to Hon. Jaime Masters, Comm’r, Tex. Dep’t of Fam. & Prot. Servs. (Feb. 22, 2022), <https://gov.texas.gov/uploads/files/press/O-MastersJaime202202221358.pdf>.

Plaintiffs filed their Petition on March 1, 2022, which included an application for a temporary injunction.

ARGUMENT

I DFPS and Commissioner Masters Do Not Have the Unilateral Authority to Rewrite the Family Code.

Texas agencies, including DFPS, lack any inherent power to affect the rights, duties and obligations of Texas citizens. *See Cadena Comercial USA Corp. v. Tex. Alcoholic Beverage Comm’n*, 518 S.W.3d 318, 334 (Tex. 2017). Agencies have only those powers delegated by the Texas Legislature by statute. *Id.*; *Harris Cnty. Appraisal Dist. v. Tex. Workforce Comm’n*, 519 S.W.3d 113, 130 (Tex. 2017). And the legislature must delegate authority to the agency in “clear and express statutory language.” *City of Houston v. Rhule*, 417 S.W.3d 440, 446 (Tex. 2013) (internal quotations omitted).

The Texas Legislature has set forth DFPS’s powers in its enabling statute, the Texas Human Resources Code. By statute, DFPS is tasked with (among other things) providing: “protective services for children . . . including investigations of alleged abuse, neglect or exploitation,” and “family support and family preservation services that respect the fundamental right of parents to control the education and upbringing of their children.” Tex. Hum. Res. Code. § 40.002(b)(1)–(2). Consistent with the enabling statute, the Family Code empowers DFPS Commissioner Masters to develop rules and standards for the investigation of child abuse at the state or local

level. These rules and standards include procedures for investigations, such as the number of interviews allowed during an investigation, format of interviews, and professional training required for child abuse investigators. *See* Tex. Fam. Code §261.310.

Neither DFPS nor the Commissioner has any express legislative authority to redefine the conduct that constitutes “child abuse” under Texas law. That definition is found in the provisions of the Family Code, which enumerates thirteen specific categories of conduct that constitutes “child abuse” under Texas law. Tex. Fam. Code § 261.001(1)(A)–(M). Although DFPS has promulgated guidance published in the Texas Register clarifying the meaning of certain terms used in the definition of “abuse” under section 260.001(1), that guidance is grounded in the statutory language of the Family Code. *E.g.*, 40 Tex. Admin. Code § 707.457 (clarifying meaning of sexual abuse expressly covered by Tex. Fam. Code § 260.001(1)(E)–(F)); § 707.455 (physical abuse expressly covered by Tex. Fam. Code § 260.001(C)); § 707.463 (forced marriage expressly covered by Tex. Fam. Code § 260.001(M)). Amicus is unaware of any prior instance where DFPS has sought to adopt and enforce an interpretation of “child abuse” to cover conduct beyond that enumerated by the Legislature in section 260.001(1).⁵

⁵ Amicus notes that the Legislature recently considered but did not pass proposed legislation that would have amended the definition of “child abuse” under the Family Code to expressly include

Amicus notes that Chief Judge Worthen of the Twelfth District Court of Appeals recently observed in dicta that the “definitions of abuse and neglect” in the Family Code “may encompass conduct in addition to that statutorily defined.” *In re Berryman*, 629 S.W. 3d 453, 461 (Tex. App.—Tyler 2020, orig. proceeding). However, Judge Worthen cautioned against broad expansion of the statutory language that would “encourage governmental overreach” into the “private realm of the family”:

Due process does not permit a State to infringe on a parent’s fundamental right to make child rearing decisions simply because a state judge believes a “better” decision could be made. The State may legitimately interfere with family autonomy to protect children from genuine abuse and neglect by parents who are unfit to discharge the high duty of broad parental authority over minor children. The State’s responsibility to protect children from abusive parents does not authorize the State to oversee the internal affairs of every family. The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition. Absent a sufficient supporting affidavit, an order in aid of investigation of child abuse or neglect does not authorize a legitimate interference with family autonomy for purposes of protecting children from genuine abuse or neglect. To conclude otherwise would subject a parent’s fundamental right to the care, custody, and control of her children to potential arbitrary governmental interference for any conduct or decision with which the government may disagree or of which it may disapprove.

Id. (citations omitted) (cleaned up).

the medical procedures addressed by Attorney General Paxton’s Opinion and Governor Abbott’s Directive. *See* Tex. S.B. 1646.

II Even If They Had Legislative Authority, DFPS’s and Commissioner Masters’ Novel Interpretation of the Family Code Constitutes an “Interpretive Rule” Subject to Mandatory Notice and Comment Procedures Under the APA.

A. The APA Is Intended to Preserve Fairness and Ensure Public Participation in Agency Rule-Making.

The Legislature passed the Administrative Procedure and Texas Register Act in 1975 (the “1975 Act”), which it later recodified, renumbered, and renamed as the APA in 1993.⁶ Ron Beal, *The APA and Rulemaking: Lack of Uniformity Within a Uniform System*, 56 BAYLOR L. REV. 1, 1–2 (2004). The adoption of the 1975 Act was the result of decades of advocacy by the Texas State Bar to impose a uniform system designed to obtain efficient administration of the laws while affording optimum protection of personal and property rights. *Id.* at 2 (citing Dudley McCalla, *The Proposed Administrative Procedure Act*, 33 TEX. B.J. 965, 965 (1970)). The Bar recognized that administrative agencies in the state were, and would continue to be, significant arms of government. It thus was necessary that the rights of Texans be protected, including (1) the right to notice of all proposed rules and the ability of interested persons to meaningfully participate in the rule-making process; and (2) the right to timely, proper, and reasonable notice to all interested parties so that they would be afforded an opportunity to participate in agency hearings. *Id.* (citing McCalla, 33 TEX. B.J. at 966–67).

⁶ The declared intent of the Legislature in recodifying the law was merely to place it within the Texas Government Code and not to change substantively the provisions of the 1975 Act. *Id.*

The 1975 Act was based on the Revised Model State Administrative Procedure Act of 1961 (“Model Act”). *Id.* (citing John J. Watkins & Debora S. Beck, *Judicial Review of Rulemaking Under the Texas Administrative Procedure and Texas Register Act*, 34 BAYLOR L. REV. 1, 3 (1982)). The Model Act itself was based on the fundamental premise that there are certain basic principles of common sense, justice, and fairness that should prevail in all administrative actions and proceedings. *Id.* at 2–3 (citing 2 F. Cooper, *State Administrative Law* 801–02 (1965)). As to rulemaking, the intent of the Model Act was to ensure that: (1) all agency rules, except in emergencies, would be adopted pursuant to notice provided to all interested persons with the concurrent right to meaningfully submit views and information related to the proposed rules; (2) proper statewide notice for all adopted rules; and (3) pre-enforcement judicial review of the validity and applicability of adopted rules. *Id.*

Consistent with this legislative history, the APA sets forth three express goals: (1) provide minimum standards of uniform practice and procedure for state agencies; (2) provide for public participation in the rulemaking process; and (3) restate the law of judicial review of state agency action. Tex. Gov’t Code § 2001.001.

B. The Actions of DFPS and Commissioner Masters at Issue in This Case Constitute an Interpretive Rule Subject to the APA.

A “rule” under the APA is: (i) an agency statement; (ii) of general applicability; (iii) that “implements, interprets, or prescribes law or policy”; (iv)

“amend[s] or repeal[s] a prior rule; and (v) “affect[s] private rights or procedures” and is not merely “a statement regarding only the internal management or organization of a state agency[.]” Tex. Gov’t Code § 2001.003(6). In assessing whether an agency statement is a “rule,” a court must look to “the intent of the agency, the prescriptive nature of the policy, and the context in which the agency statement was made.” *See Texas State Bd. of Pharmacy v. Witcher*, 447 S.W.3d 520, 533 (Tex. App.—Austin 2014, pet. denied as improvidently granted).

The term “general applicability” as it pertains to APA rules means “statements that affect the interest of the public at large such that they cannot be given the effect of law without public input.” *El Paso Hosp. Dist. v. Texas Health & Hum. Servs. Comm’n*, 247 S.W.3d 709, 714 (Tex. 2008) (quotations omitted). And the agency’s statement about affecting private rights means that it must have “a legal effect or significance” on private parties “independent of” existing statutory or legal obligations such that it constitutes “an amendment or repeal of private rules.” *See John Gannon, Inc. v. Tex. Dep’t of Transp.*, 2020 WL 6018646, at *7 (Tex. App.—Austin Oct. 9, 2020, pet. denied) (citing *Teladoc, Inc. v. Texas Med. Bd.*, 453 S.W.3d 606, 615 (Tex. App.—Austin 2014, pet. denied)).

It is well settled that “rules” under the APA include “interpretive rules”—*i.e.*, an agency’s statement that is: (i) issued to notify similarly situated persons or entities of the agency’s interpretation of a statutory provision, which (ii) was not labeled as

tentative or qualified by arrangement for consideration at a later date. *Combs v. Ent. Publ'ns, Inc.*, 292 S.W. 3d 712, 723 n.6 (Tex. App.—2009, no pet.) (citing Ron Beal, *A Miry Bog Part II: UDJA and APA Declaratory Judgment Actions and Agency Statements Made Outside a Contested Case Hearing Regarding the Meaning of the Law*, 59 BAYLOR L. REV. 267, 270 (2007)); *Teladoc*, 453 S.W.3d at 614-15. In *Combs*, the court held that letters issued by the Texas Comptroller interpreting the sales tax provisions of the Tax Code as applying to the brochure-fundraising firms were “rules” for purposes of the APA. 292 S.W.3d at 721. The court’s holding was also based on its finding that the Comptroller’s statements were “prescriptive” in that they expressed an unambiguous intent to apply its interpretation of the Tax Code to all future cases involving brochure-fundraising firms. *Id.* at 722; *see also Teladoc*, 453 S.W.3d at 615 (state medical board’s interpretation of its own rules and intention to apply such interpretation to all future cases constituted a “rule” under the APA).

The DFPS Statement is an “interpretive rule” subject to the APA. It is generally applicable in that it states DFPS’s intent to follow the Governor’s Directive to adopt the Attorney General’s interpretation of the Family Code in investigating child abuse across Texas. Pet. § 18. In other words, DFPS will investigate reports of any treatment described the Paxton Opinion “regardless of whether the particular circumstances . . . might have resulted in different treatment” under the interpretation of “child abuse” the agency previously applied. *See Combs*, 292 S.W.3d at 722

(holding statements expressing intent to apply interpretation of Tax Code regardless of treatment under prior analysis were prescriptive).

The DFPS Statement also represents an amendment of prior guidance on “child abuse” that departs from the agency’s past position. It indicates that as of February 22, DFPS had “no pending investigations of child abuse involving the procedures” described in the Attorney General’s Opinion, but proclaims that on a go-forward basis, DFPS “will follow Texas law as explained in” the Attorney General’s opinion and “investigate[]” any allegations regarding the procedures described in that opinion. Pet. ¶¶ 18–19. And in a September 3, 2021 letter, Commissioner Masters indicated that she would await Paxton’s opinion before “reaching any final decisions” on whether the Department would investigate those procedures as “child abuse.” *Id.* 20.

Finally, the DFPS Statement undoubtedly affects the “private rights” of Texans statewide and is not directed solely at “the internal management of the organization of the state agency[.]” Tex. Gov’t Code § 2001.003(6)(c). Redefining conduct as child abuse under Texas law has significant implications on the rights and privileges of individuals across Texas. Among other things, the Family Code mandates a registry of individuals who are found by DFPS to have committed child abuse as defined by statute, which can result in the loss of an individual’s ability to work with children or earn a livelihood. *See* Tex. Fam. Code § 261.002; Pet. ¶ 177.

And the general public has a duty to report suspected child abuse, with criminal penalties for failure to report. Tex. Fam. Code §§ 261.101; 109.

These concerns are not merely hypothetical. Plaintiffs' Petition alleges that DFPS has initiated child abuse investigations into families with transgender children since DFPS Statement on February 22. Pet. ¶ 21. And only days ago, Texas Children's Hospital stopped providing any hormone therapies for transgender children. Amir Vera & Gregory Lemos, *Texas Children's Hospital Halts Hormone Therapies for Transgender Children in Response to Governor and AG's Recent Actions*, CNN (Mar. 8, 2022, 10:46 AM), <https://www.cnn.com/2022/03/07/us/texas-childrens-hospital-hormone-therapy-transgender/index.html>.

Because the DFPS statement is "prescriptive" in its intent to investigate as child abuse all allegations of those procedures, and applies statewide, it is a "rule" subject to the APA's mandatory rulemaking procedures. *See Combs*, 292 S.W.3d at 722.

C. DFPS Did Not Comply with the Mandatory Procedures for APA Rules.

Consistent with the legislative intent to ensure public participation in the rulemaking process, *see* Tex. Gov't Code § 2001.001, any agency action that qualifies as a "rule" must comply with certain mandatory procedures set forth in the APA. As an initial matter, the APA provides that a rule is effective only after it has been filed with the Secretary of State, subject to certain exceptions not applicable here. Tex. Gov't Code § 2001.036(a). Because DFPS did not file any rule with the

Secretary of State, its February 22, 2022, Statement is ineffective as a matter of law.

See id.

The APA also sets forth other requirements that must be met before an agency can promulgate a rule. *See* Tex. Gov't Code §§ 2001.0225–034. Any rule that does not substantially comply with those procedures is voidable. Tex. Gov't Code § 2001.035(a). And when the agency wholly fails to comply with the rulemaking procedures, courts have held that the rule is simply void. *El Paso Hosp. Dist.*, 247 S.W.3d at 715–16; *Combs*, 292 S.W.3d at 723. Here, DFPS and Commissioner Masters did not even attempt to comply with any those mandatory procedures, including the following:

Notice: DFPS must give the public at least 30 days' notice of its intention to adopt a rule by filing a notice with the Secretary of State and publishing it on the agency's website. Tex. Gov't Code § 2001.023. The notice must include an explanation of the rule, the agency's authority to adopt it, the public benefits of the bill, and a request for comments from any interested persons. *Id.* § 2001.024.

DFPS did not provide any notice to the public before unilaterally pronouncing its intent to investigate “any” reported instance of gender-affirming care procedures throughout the state. To the contrary, Commissioner Masters merely stated her intention to follow the directive of the Governor and Attorney General without any

explanation of authority, any explanation of the public benefits, or a request for comments.

Comment: DFPS must provide an opportunity for public comment, either in writing or via oral argument. Tex. Gov't Code § 2001.029(a). It must fully consider all written and oral submissions about a proposed rule and must hold a public hearing before adopting the rule if requested by at least 25 persons (or an association with at least 25 members). *Id.* § 2001.029(b)–(c).

DFPS provided no opportunity for public comment before adopting its novel rule. The failure of DFPS to allow for any comment is particularly troubling in this case. Amicus takes no view as to whether gender-affirming procedures for transgender children are or are not child abuse, except to note the wide variety of views on the subject. The Attorney General's Opinion notes the various ways in which such procedures might result in harm to a child. This view, however, conflicts with the responses of numerous pediatric and healthcare organizations and experts condemning Defendants' actions in this case and noting the medical necessity of those procedures. Pet. ¶¶ 25-31. DFPS's abrupt and unilateral change in its interpretation of child abuse under the Family Code ensured that none of those experts' voices would be heard or considered.

Reasoned Justification: Any time DFPS adopts a rule, it must issue a written order setting forth a "reasoned justification" that specifies (a) a summary of the

public comments on the rule, including the identity of the parties who submitted comments and whether they were for or against the rule; (b) a summary of the factual basis for the rule which demonstrates a rational connection between the factual basis for the rule and the rule as adopted; and (c) the reasons why DFPS disagrees with party submissions and proposals. Tex. Gov't Code § 2001.033(a)(1).

Requiring DFPS to demonstrate a rational connection between the facts before it and the agency's rules promotes public accountability and facilitates judicial review. *See Nat'l Ass'n of Ind. Ins. v. Tex. Dept. of Ins.*, 925 S.W.2d 667, 669 (Tex. 1996). It also fosters public participation in the rulemaking process, and allows interested parties to better formulate "specific, concrete challenges" to a rule. *Id.*; *see also* Pieter M. Schenkkan, *When and How Should Texas Courts Review Agency Rules?*, 47 BAYLOR L. REV. 989, 1112 (1995) ("The legislature commands the agency that proposes a rule to give public notice of the rule and its basis, and to receive and consider comments from all interest groups and ideologies who care enough to submit them. The legislature commands any agency to write an explanation of its final rulemaking decision that justifies its choices on the disputed rulemaking issues . . . in terms of the public interest as defined or illuminated or suggested in the relevant organic statute.").

DFPS provided no justification for its abrupt decision to treat gender-affirming care as child abuse. At no point did DFPS (or the Governor or the Attorney

General) consider any opposition to their novel interpretation of Texas law or alternative views as to the appropriateness of the medical procedures they unilaterally deemed abusive under the Family Code. Instead, DFPS enacted its novel rule in a vacuum without any participation by the Texas citizens whose lives will be impacted by this legislation. The Commissioner's total failure to comply with notice and comment rulemaking and to file her alleged "rule" with the Secretary of State renders such statement to be invalid and legally ineffective. It is simply a nullity and wholly lacks the force and effect of law. This unilateral exercise of agency power in a vacuum is precisely the scenario the Legislature sought to avoid in enacting the APA. *See* § II.A, *supra*.

CONCLUSION

The Court should grant Plaintiffs' application for a temporary injunction.

Respectfully submitted,

By: /s/ Kennon L. Wooten

Kennon L. Wooten
State Bar No. 24046624
kwooten@scottdoug.com
Cynthia L. Saiter
State Bar No. 00797367
csaiter@scottdoug.com

**SCOTT DOUGLASS &
McCONNICO LLP**
303 Colorado Street, Suite 2400
Austin, Texas 78701-2589
(512) 495-6300 Phone

Mark Davis
State Bar No. 24096062
mgdavis@jenner.com

JENNER & BLOCK LLP
1099 New York Ave, NW, Suite 900
Washington, DC 20001-4412
(202) 639-6000 Phone
(202) 639-6066 Fax

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief was served by electronic service upon counsel of record on March 11, 2022.

By: /s/ Kennon Wooten
Kennon Wooten

EXHIBIT A

Texans split on Attorney General letter defining gender-change surgeries as child abuse

A San Antonio mom feels the opinion is a scare-tactic, but a local family organization agrees with the Attorney General's opinion issued Tuesday.



Author: Troy Kless
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SAN ANTONIO — This week, Governor Greg Abbott supported Attorney General Ken Paxton's opinion stating transgender youth care is child abuse. Bexar County's District Attorney disagreed with that opinion.

Some families say this care can be necessary and life-saving, but one local organization disagrees and thinks the treatment can be harmful to children.

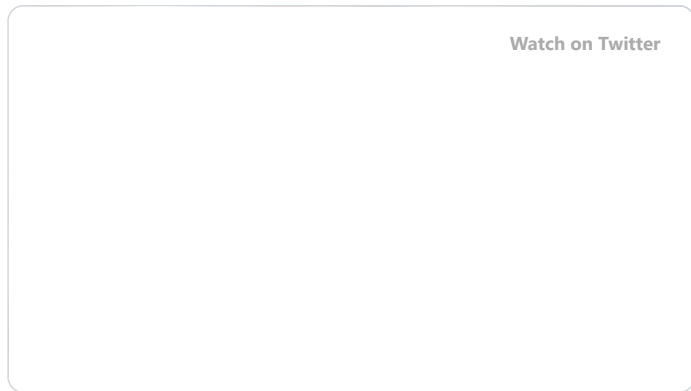


One San Antonio mom feels that all children should be treated equal.

Troy Kless
@TroyKless 

Today I spoke with a [#Texas](#) mom, whose child identifies

as non-binary, getting her thoughts on Ken Paxton's letter defining transgender childcare as abuse. You can hear more of her thoughts @KENS5 right now, and hear from supporters of Paxton's letter. #kens5eyewitness



5:01 PM · Feb 24, 2022



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“All of our children have a right to basic safety, they have the right to go to school without fear of discrimination,” Annaliese Cothron told KENS 5. Cothron’s child identifies as non-binary.

Its why she’s protested legislation last year that she says affects the lives of thousands of Texans in the LGBTQ community.

“Nobody wants to live in a state where they feel like they’re being attacked, but I want to be really clear here. I deserve to be here, my child deserves to be here,” Cothron said.

Attorney General Ken Paxton’s opinion states gender-affirming procedures and treatments constitute child abuse under state law. Due to this opinion, Governor Greg Abbott is ordering CPS to investigate reports of such procedures.

The San Antonio Family Association—which says its goal is to defend families, agrees with the opinion.

“Transitioning children is unnatural. I think efforts made by adults to push drugs and procedures on children, many of whom haven’t hit puberty yet is harmful,” Dina Cortez, public spokesperson for the family association said.

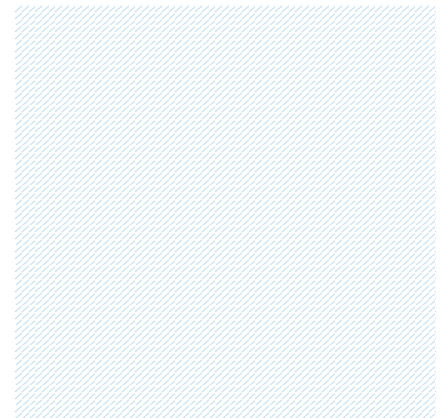
Cothron and the broader medical community disagree with that statement and says, “gender-affirming care is life-saving.”

In 2021, the [American Medical Association stated](#) gender-affirming care is medically necessary, evidence-based care for transgender children and adults.

“When we have leadership who are attacking kids' access to medical care, that’s really unconscionable...Opinions like what the attorney general has put together, threatens [kids'] ability to live safely,” Cothron states.

According to the ACLU of Texas, they say Paxton’s opinion isn’t legally binding, and it remains up to the courts to interpret Texas laws and the Constitution.

The Texas Department of Family and Protective Services tells KENS 5 in a statement they will follow Paxton’s opinion.





"In accordance with Governor Abbott's directive to Commissioner Masters, we will follow Texas law as explained in Attorney General opinion KP-0401.

At this time, there are no pending investigations of child abuse involving the procedures described in that opinion. If any such allegations are reported to us, they will be investigated under existing policies of Child Protective Investigations."

But district attorneys across the state including Bexar County DA Joe Gonzales say they won't prosecute such cases.

DA Gonzales wrote in a statement "we will not threaten to remove your children from your home or interfere in private medical matters for political gain."

Related Articles

[DFPS says it will comply with Abbott, Paxton push to investigate transition procedures as child abuse](#)

['Gender-affirming care is lifesaving': Texas mother, transgender son speak against Abbott, Paxton's gender-affirming directive](#)

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