AMA Journal of Ethics®
June 2023, Volume 25, Number 6: E414-420

HEALTH LAW

What's Wrong With Criminalizing Gender-Affirming Care of Transgender Adolescents?

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Abstract
Gender-affirming care (GAC) includes hormonal and surgical interventions. In recent years, many states have criminalized GAC for adolescent patients. This article canvasses states' legal prohibitions and challenges to them and considers consequences for clinicians and patients.

Gender-Affirming Care

Gender-affirming care (GAC) is a "supportive form of health care" for transgender people that "consists of an array of services that may include medical, surgical, mental health, and non-medical services."[1] Such care is critical for the "overall health and well-being" of transgender adolescents, as it helps patients in "aligning their outward, physical traits with their gender identity"[1] and thereby overcome the discomfort or distress caused by the misalignment of the two that defines gender dysphoria.[2] GAC is well established, and "every major US medical association recognizes that gender-affirming health care is medically necessary treatment for dysphoria."[2] Surgical treatment is "essential" for some transgender people experiencing gender dysphoria, as "relief ... cannot be achieved without modification of their primary and/or secondary sex characteristics to establish greater congruence with their gender identity."[3] More common than surgery is hormone therapy, a form of GAC that—like surgery—is necessary treatment for some patients suffering from gender dysphoria. Hormone treatment may "provide significant comfort to patients who do not wish to make a social gender role transition or undergo surgery."[4] Both these methods of GAC—surgery and hormone treatment—are facing growing scrutiny across the United States with regard to their application to adolescent patients.

Effectiveness of GAC

Evidence has shown that surgical GAC can be effective for some minor patients. One study found that top surgery for transmasculine youth reduced chest dysphoria (discomfort with breasts) and concluded that "professional guidelines and clinical practice should consider patients for chest surgery based on individual need rather than chronologic age."[5] Surgery is an important option for some adolescent patients and "may be performed on older adolescents who have shown a consistent and persistent gender identity, are stable with respect to their mental health, and have parental

support."[6] Deciding surgical intervention on a case-by-case or individual basis is key; sometimes surgery may be necessary in light of the "benefit to the adolescent's overall health."[7] Physicians who provide GAC, including surgery, to transgender youth perform such interventions thoughtfully and on an individualized basis. One surgeon explains that she approaches such "decisions about treatment carefully over time, with input from an interdisciplinary team, together with youth and their caregivers, and by established guidelines."[8] By criminalizing physicians for "practicing evidence-based medicine," any new state law "nullifies their expertise" while also interfering with the patient-physician relationship.[9]

Criminalization of GAC

The criminalization of GAC for adolescents is emergent in multiple US states. In the last 2 years, "25 US states have introduced bills to restrict access to gender affirming medical care for minors."[10] For example, in 2021, Arkansas became the first state to outlaw physicians from providing GAC (both hormonal and surgical) to minor patients[11] via an override of the governor's veto of the bill.[12,13] In 2022, the Alabama legislature passed[14,15]—and the governor signed into law[16]—a bill known as the Alabama Vulnerable Child Compassion and Protection Act prohibiting physicians from providing GAC (both hormonal and surgical) to minors.[17] Often the motivation behind such bills is political, a new front on the culture war targeting transgender citizens. For example, in January 2020, the South Dakota House of Representatives passed a bill criminalizing provision of GAC treatment (both hormonal and surgical) to transgender youth under the age of 16, shortly after the legislature's failure to pass a "bathroom bill."[18] Proposed GAC restrictions coming after failure of bathroom bills are not unique and are evidence of political animus. As recently noted in the *Harvard Law Review*: "The shift from the stigmatization and vilification of trans youth in the bathroom bills to the victimization narrative embodied in the gender-affirming care bans illustrates how opponents of trans identity are adapting their rhetoric in response to changing legal and social attitudes towards transgender children."[2]

Although the South Dakota bill is intended as a way for the state government to protect children from harmful medical intrusion, critics note that legislators often are not "using actual evidence" and are "not listening to any health care providers" and are instead "advancing something that's very dangerous to make a statement."[18,19] With regard to similar restrictions in Texas, the Endocrine Society explains that "medical evidence, not politics, should inform treatment decisions" and that medical professionals should not "be punished for providing evidenced-based care that is supported by major international medical groups."[20]

Legal Challenges

The legality of these restrictions is now coming under judicial scrutiny, and laws are being tested in a number of courts. For example, the Alabama law was enjoined by a federal district court, which ordered a preliminary injunction to block the law in part—enjoining Alabama from enforcing the ban on medication treatment but allowing the state to continue blocking surgical treatments.[21,22,23] The court determined that "the imminent threat of harm to Parent Plaintiffs and Minor Plaintiffs [seeking treatment]—ie, severe physical and/or psychological harm—outweighs the harm the State will suffer from the injunction" and reasoned that "enjoining the Act upholds and reaffirms the 'enduring American tradition' that parents—not the States or federal courts—play the primary role in nurturing and caring for their children."[23] The federal district court clearly recognized the harms in blocking youth from receiving GAC. However, the court did limit

its decision (without clear analysis or explanation) to hormonal therapy, leaving the part of the law banning gender-affirming surgeries for youths to remain in effect. While the court may have limited its injunction to only allowing hormonal-based GAC treatments because the plaintiffs were only requesting access to hormonally based GAC and not surgery,[24] the limited injunction is meaningful, as it could also imply that the district court accepted the plaintiff's concerns that surgical treatment is a more severe option to be "avoided"[24] compared to hormonal-based GAC treatments for minor patients.

Unlawful Discrimination and Equal Protection

Recent years have seen a rapid rise in transgender constitutional rights litigation.[25] Many of these cases have been successful in recognizing constitutional protections for transgender citizens. Indeed, "some courts have held that transgender status is a protected class in its own right, while others have found that antitransgender discrimination is sex discrimination."[2] Much of the success has stemmed from equal protection arguments. Katie Eyer explains:

> During the last five years, there has been a wave of decisions in the lower courts developing a jurisprudence of transgender equality: that transgender individuals should be considered a suspect or quasi-suspect class (and thus discrimination against them should be subject to heightened scrutiny), that anti-transgender discrimination should be considered sex discrimination (and thus under established law should receive intermediate scrutiny), and that discrimination against the transgender community is irrational. Collectively these case law developments represent a fundamental shift in the lower courts' approach to the equality rights of the transgender community.[25]

This trend in litigation is extending to the promotion of rights for transgender youth, as there is concern that GAC restrictions for transgender youth are a violation of the US Constitution's Equal Protection Clause. The Department of Justice (DOJ) joined with the plaintiffs in challenging Alabama's and Arkansas's laws restricting GAC for adolescents. The DOJ argues that such restrictions are a violation of the Fourteenth Amendment's Equal Protection Clause and believes that such restrictions are discriminatory on the basis of gender identity.[26,27] In its complaint for the Alabama case, the DOJ states that GAC restrictions discriminate "on the basis of sex and on the basis of transgender status," depriving citizens of equal protection under the Constitution.[28]

As of the end of 2022, the case challenging Alabama's law is still playing out and being heard by the 11th Circuit Court of Appeals.[29] Alabama maintains that it possesses a rational basis to prevent the "sterilization of children" and that the "risks of gender-affirming treatments, which can include loss of fertility, outweigh any benefits," while the DOJ argues that the "law discriminates on the basis of sex by prohibiting certain treatments only for one sex" (eg, prohibiting prescribing testosterone treatment for "children assigned female at birth").[29]

Impact of Restrictions

These laws are poor public policy, as they create a significant conflict between physicians' adherence to the law and adherence to their professional code of ethics and civil law tort duty not to commit medical malpractice. The traditional standard of care with regard to medical malpractice requires that "medical care for a given patient and health care provider is the quality of care that would be provided to any patient in a similar clinical situation, by the average provider in a similar location."[30] In some specific cases, adolescent GAC treatment, including surgery, may be necessary in order for a physician to practice in line with the legal standard of care (thus avoiding malpractice)

and also to satisfy their professional ethical duty to offer safe and effective medical care that promotes the patient's well-being.[31]

As Kraschel et al explain: "these statutes would transform their [physicians'] fiduciary duty into a criminal act."[10] Similarly, Lepore et al argue that the laws are untenable, as they "require that health care workers act against current evidence-based guidelines" such that they are legally mandated to violate their duty to "do no harm."[32] The same tension between professional and legal obligations is observed in new abortion laws being enforced post-*Roe v Wade*, wherein the professional ethical duties of physicians are put in direct conflict with criminal law, forcing physicians to choose between upholding their ethical duties or violating the law.[33] Hence, these new laws prohibiting GAC treatment for minors (including gender-affirming surgery) center on the government's unwillingness to let the medical profession self-regulate—via oversight from state medical boards—or allow civil tort law to regulate physician practice as it does in most other cases.

Conclusion

The recent trend criminalizing GAC for transgender youth is politically motivated and not tethered to evidence-based medicine. The consequences of legally blocking this critical treatment are dire and have life-threatening implications. Many leading medical associations around the country—such as the American Academy of Child and Adolescent Psychiatry, the American Academy of Pediatrics, and the American Medical Association—all agree that GAC is critical lifesaving care for certain transgender youths and that "[b]locking access to timely care has been shown to increase youths' risk for suicidal ideation and other negative mental health outcomes."[34] Additionally, such bans serve to discriminate against transgender patients, raising serious concerns about constitutional equal protection violations. A further consequence of laws that criminalize health care is the undermining of trust in patient-physician relationships, which promotes a chilling effect that harms the practice of medicine more broadly. Ultimately, physician judgment in consultation with the patient and their family should be valued and prioritized. Any potential harms to patients are already mitigated via professional regulation and tort law, and allowing physician judgment to prevail helps strengthen patient autonomy without government discrimination or the injury that may result from restricting vital medical care.

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Citation
AMA J Ethics. 2023;25(6):E414-420.

DOI
10.1001/amajethics.2023.414.

Conflict of Interest Disclosure
The author(s) had no conflicts of interest to disclose.

The viewpoints expressed in this article are those of the author(s) and do not necessarily reflect the views and policies of the AMA.

ISSN 2376-6980