

May 11, 2021

Speaker of the Texas House, Rep. Dade Phelan
Members of the Texas House of Representatives Calendars Committee
Members of the Texas House of Representatives Public Health Committee
Members of the Texas House of Representatives LGBTQ Caucus
Via email

RE: S.B. 1646 - Oppose

Dear Texas Representative:

The [Foster Care Advocacy Center](#)¹ and the [National Association of Counsel for Children](#)² write to share our strenuous opposition to S.B. 1646, a proposal which weaponizes important child protection statutes to advance harmful, discriminatory ideology. If passed, it would fundamentally distort the purpose of the child welfare system and poise Texas's already troubled foster care agency for further, untenable overwhelm.

S.B. 1646 Violates Established Constitutional Protections of the Family Unit

From the moment the child welfare system intervenes in a child's life, everything is at stake – their home, their bonds with parents and siblings, their education, their community, their belongings. In sum, their future. Because the journey through this system is complicated, costly, and deeply traumatic, there is bipartisan agreement that government surveillance and family separation should only occur when absolutely needed to protect child safety.

S.B. 1646 would open the proverbial “front door” to foster care in contravention of this national consensus and decades of established law protecting the right to family integrity. The U.S. Supreme Court has repeatedly held that parents have a fundamental, Constitutional right to care, custody and control of their children that must be afforded great deference.³ “Parents’ fundamental constitutional right to their children is now a pillar of child protection law. It is so well-established that the Supreme Court has described it as being ‘beyond the need for multiple citation,’ and ‘perhaps the oldest of the fundamental liberty interests recognized by this Court.’”⁴

¹ Based in Houston, the Foster Care Advocacy Center (FCAC) provides holistic advocacy inside and outside the courtroom for children and parents involved in the child welfare system. FCAC represents over 250 children and parents annually in the Harris County dependency courts and is a member organization of the National Association of Counsel for Children (NACC).

² Founded in 1977, NACC's mission is to advance the rights, well-being, and opportunities of children impacted by the child welfare system through access to high-quality legal representation. We support a national network of dedicated professionals, including attorneys for youth, parents, and government agencies as well as judges, CASAs, pediatricians and academic experts.

³ See generally, [Meyer v. Nebraska](#), 262 U.S. 390 (1923), [Prince v. Massachusetts](#), 321 U.S. 158 (1944), and [Wisconsin v. Yoder](#), 406 U.S. 205 (1972).

⁴ *Child Welfare Law and Practice: Representing Children, Parents, and State Agencies in Abuse, Neglect, and Dependency Cases* (2016). Chapter 16, Page 391 (quoting from [Lassiter v. Dep't of Soc. Servs.](#), 452 U.S. 18 (1981) and [Troxel v. Granville](#), 530 U.S. 57 (2000)).

Just as parents have the right to care and custody of their children, young people have a reciprocal right to grow up in their own families.⁵ They also have the right to access medical, dental, vision, mental health and behavioral health care from qualified providers, including LGBTQI-affirming care.⁶ This inclusive position is consistent with the U.S. Children’s Bureau’s approach, which has recognized that LGBTQI+ youth are disproportionately overrepresented in foster care and offered gender-affirming resources to states.⁷ The Texas legislature should similarly favor equitable policies to help children and youth access gender-affirming care with the support of their parents, rather than ones that would exacerbate safety and wellbeing concerns by subjecting LGBTQI+ youth and their caregivers to unnecessary government surveillance and intrusion.

S.B. 1646 Presents Inherent Conflicts with Other Parts of Texas Statute

Furthermore, S.B. 1646 would confuse and frustrate the purpose of the Texas Family Code by establishing new law that inherently conflicts with existing law. Specifically, this proposal would expand the definition of “abuse” to include consent to or assistance in accessing gender-affirming medical care, effectively prohibiting parents from facilitating such treatment for their children. However, current Sec. 261.001(1) defines abuse to include “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” and Sec. 261.001(4) defines neglect to include “failing to seek, obtain, or follow through with medical care for a child, with the failure resulting in or presenting a substantial risk of death, disfigurement, or bodily injury or with the failure resulting in an observable and material impairment to the growth, development, or functioning of the child.” Faced with a medical recommendation to pursue gender-affirming care,⁸ S.B. 1646 leaves Texas parents caught between Scylla & Charybdis: unavoidably in violation of one part of the statute, or the other, and exposed to criminal and civil liability.

Texas DFPS is Neither Designed nor Equipped to Accommodate S.B. 1646

The Texas Department of Family and Protective Services (DFPS) is not designed nor equipped to support this proposed expanded scope of responsibilities. To understand this, one need look no farther than the results of the agency’s most recent [Child and Family Services Review](#) (CFSR). This federal audit found that Texas was in substantial conformity with **zero out of the seven** assessed outcomes, and only **three out of seven** systemic factors.⁹ The evaluation identified several cross-cutting deficiencies, including backlogged investigations, lack of placement resources, and insufficient parental engagement. As a result, DFPS is now operating under a binding [Program Improvement Plan](#) as a condition of continued receipt of federal funds.

⁵ *Id.* at 396-398.

⁶ See NACC Policy Agenda, Available at: <https://www.naccchildlaw.org/page/PolicyAgenda>

⁷ “Creating LGBTQ Affirming Agencies Video and Guide.” Available at: <https://capacity.childwelfare.gov/states/focus-areas/workforce/affirming-video/>

⁸ The Texas Pediatrics Social and Texas Medical Association have both offered testimony during this legislative session cautioning the legislature against restrictions on research-based, gender-affirming health care for young people. We similarly oppose other pieces of pending legislation that would restrict access to such, including HB 1399.

⁹ Texas Child and Family Service Review Final Report (2016). Page 3. Available at: https://library.childwelfare.gov/cwig/ws/cwmd/docs/cb_web/Blob/1915.pdf?upp=0&w=NATIVE%28%27DT+ph+is+%27%27CFSR+Final+Report%27%27+and+STATE+%3D+%27%27Texas%27%27+and+RPERIOD+%3D+%27%273rd++Round+CFSR%27%27+and+DOC_AVAILABILITY+%5E%3D+%27%27Not+publicly+available+on+the+Children%27%27%27%27s+Bureau+website%27%27%27%29&m=1

More recently, the comprehensive 2020 Court Monitor’s report in the [M.D. v. Abbott class action lawsuit](#) revealed that DFPS remains unable to meet the needs of children already in its custody. According to the court-appointed Monitors, youth in Texas experience “a disjointed and dangerous child protection system, inefficiently and unsafely divided between two state agencies, where harm to children is at critical times overlooked, ignored, or forgotten.”¹⁰ The Second Court Monitor’s report – released just last week – showed a few areas of progress, yet overall, “serious risks of harm to children persist...DFPS has demonstrated an unwillingness to take steps to fix the broken system.” Among the most tragic of the findings was that 23 children in DFPS custody have died in the past 21 months.¹¹

While full analysis of DFPS’s performance is outside the scope of this letter, the CFSR and Court Monitor’s findings should prompt the legislature to seriously reconsider further opening the “front door” to a system that is woefully failing to meet the needs of children of youth already in its custody, and whose deficiencies have exposed the state to significant, ongoing civil liability.¹²

Conclusion

Decisions about medical treatment are properly within the purview of parents and medical providers, not the legislature. S.B. 1646 would unconstitutionally extend DFPS’s reach in a way the agency is neither intended nor able to meet. Given these concerns, and the relative lack of information about these issues before the legislature, we strongly oppose any further consideration of this bill.

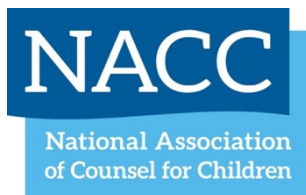
Sincerely,



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¹⁰ *M.D. ex rel Stukenberg v. Abbott*. First Court Monitors’ Report. June 2020. Available at:

<https://www.childrensrights.org/wp-content/uploads/2020/06/Texas-child-welfare-monitors-report-June-2020.pdf>

¹¹ *M.D. v. Abbott*. Second Report of the Monitors. May 2021. Available at:

https://www.ksat.com/news/defenders/2021/05/05/report-23-texas-foster-kids-have-died-in-state-custody-since-july-2019/?utm_medium=email&utm_source=govdelivery

¹² We note with concern and surprise that this bill has moved forward without any public testimony from DFPS. Input from agency leadership would be critical in order to make an informed assessment of DFPS’s interest and capacity to expand the statutory scope of its responsibilities.