

SENATE THIRD READING
SB 107 (Wiener)
As Amended August 25, 2022
Majority vote

SUMMARY

Enacts various safeguards against the enforcement of out-of-state anti-transgender laws to protect individuals seeking and providing gender affirming care in California.

Major Provisions

- 1) Defines "gender-affirming health care" and "gender affirming mental health care" to mean medically necessary health care that respects the gender identity of the patient, as experienced and defined by the patient, as specified.
- 2) Prohibits a provider of health care, health care service plan, or contractor from releasing medical information related to a person or entity allowing a child to receive gender-affirming care in response to any civil action, including a foreign subpoena, based on another state's law that authorizes a person to bring a civil action against a person or entity that allows a child to receive gender-affirming health care or gender-affirming mental health care.
- 3) Prohibits a provider of health care, health care service plan, or contractor from releasing medical information to persons or entities who have requested that information and who are authorized by law to receive that information if the information is related to a person or entity allowing a child to receive gender-affirming healthcare or mental healthcare, and the information is being requested pursuant to another state's law that authorizes a person to bring a civil action against a person or entity who allows a child to receive gender-affirming health care.
- 4) Prohibits the issuance of a subpoena by a California court, if such a request is based on a foreign subpoena that would require disclosure of medical information related to gender-affirming health care or gender-affirming mental health care or is based on a violation of another state's laws that interfere with a person's right to allow a child to receive gender-affirming health care.
- 5) Prohibits an authorized attorney, as specified, from issuing a subpoena if such a request is based on a foreign subpoena that would require disclosure of medical information related to gender-affirming health care or gender-affirming mental health care or is based on a violation of another state's laws that interfere with a person's right to allow a child to receive gender-affirming health care.
- 6) Provides that a family court of this state has jurisdiction to make an initial child custody determination if the presence of a child in this state is for the purpose of obtaining gender-affirming health care or gender-affirming mental health care.
- 7) Provides that a family court of this state has temporary emergency jurisdiction if the child is present in this state and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to, or threatened with, mistreatment or abuse, or because the child has been unable to obtain gender-affirming health care or gender-affirming mental health care.

- 8) Provides that in a case where the provision of gender-affirming health care or gender-affirming mental health care to the child is at issue, a court of this state cannot determine that it is an inconvenient forum where the law or policy of the other state that may take jurisdiction limits the ability of a parent to obtain gender-affirming health care or gender-affirming mental health care for their child.
- 9) Provides that, in making a determination regarding the jurisdiction of the family court, the court cannot consider as a factor weighing against the petitioner any taking of the child, or retention of the child after a visit or other temporary relinquishment of physical custody, from the person who has legal custody, if there is evidence that the taking or retention of the child was a result of domestic violence against the petitioner or for the purposes of obtaining gender-affirming health care or gender-affirming mental health care.
- 10) Prohibits the application of a law of another state that authorizes a state agency to remove a child from their parent or guardian based on the parent or guardian allowing their child to receive gender-affirming health care from being enforced or applied in a case pending in a court in this state.
- 11) Prohibits California law enforcement agencies from **knowingly** making or participating in the arrest of an individual or participating in a demand for extradition of such an individual if the individual is alleged to have violated another state's law criminalizing the receipt or provision of gender-affirming health care or mental health care if such conduct would be permitted under the law of this state.
- 12) Prohibits a provider of health care, a health care service plan, or a contractor of such entities from releasing medical information related to a person or entity allowing a child to receive gender-affirming care in response to any foreign subpoena that is based on a violation of another state's laws authorizing a criminal action against a person or entity that allows a child to receive gender-affirming health care.
- 13) Adopts chaptering amendments.

COMMENTS

In recent months, several states have taken action to prohibit transgender youth from accessing gender-affirming medical care. Such gender-affirming care can be essential to a minor's physical and emotional wellbeing. Nonetheless, as a result of these state actions, well-meaning parents of transgender minors in those states now face potential sanctions should they seek to assist their children to receive medical care. This bill seek to provide protections from these out of state laws to parents and children who utilize California-based care providers.

United States Constitution Article IV, Section 1, generally referred to as the Full Faith and Credit Clause, requires every state to give full faith and credit to the public acts (statutes), records, and judicial proceedings of every other state. By refusing to recognize the law and judgments of another state, this bill potentially implicates the Full Faith and Credit Clause. In 1813, the United States Supreme Court ruled that, "[A] record duly authenticated shall have such faith and credit as it taken. If in such court it has the faith and credit of evidence of the highest nature...it must have the same faith and credit in every other court," and that "the constitution contemplated a power in Congress to give conclusive effect to such judgments." (*Mills v. Duryee* (1813) 7 Cranch 481, 484-485.)

This bill proposes to limit the ability of California courts to enforce subpoenas issued by out-of-state courts, seeking information about gender-affirming medical care. Because these subpoenas are judicial actions, such a limit likely implicates the provisions of the Full Faith and Credit Clause, most notably the provisions related to out-of-state judgments. However, the United States Supreme Court has surmised that states are not necessarily required to enforce civil judgments rendered based on another state's civil statute if the judgment is aimed at punishing a person for an offense against the "public justice" of that state. (*Huntington v Attrill* (1892) 146 U.S. 657, 673-674.) In other words, if another state's civil laws are essentially criminal laws in disguise, or penal laws, the Supreme Court has suggested that if a civil statute was "intended as a punishment for doing any acts forbidden," then another state may have the ability to refuse to enforce the judgment. (*Id.* at 664.) Although the Supreme Court has never deemed a state law to be a "penal statute" the Huntington decision was just the first of a series of cases in which the court did examine whether or not a statute was aimed at civilly punishing a party for violating the "public justice." (See *Milwaukee County v. M. E. White Company* (1935) 296 U.S. 268.) Unlike some of the restrictions on abortion access that have been enacted alongside the anti-transgender youth laws, the anti-transgender laws directly provide state officials with the authority to act.

This bill also seeks to prevent the medical records of transgender youth from being disclosed by healthcare providers and insurers in California. Existing California law already significantly limits the ability for a healthcare provider or insurer to disclose sensitive medical information to third parties. Typically, medical records can only be disclosed pursuant to a court order or in furtherance of a legal or administrative investigation. To ensure that out-of-state regulators cannot bully California insurers or healthcare providers into disclosing medical information regarding the provision of gender-affirming healthcare services, this bill explicitly prohibits such disclosures. The legal authority for this provision, like the existing laws regarding medical privacy, is rooted in the California Constitution's guarantee of the right to pursue and obtain privacy in one's personal affairs. Accordingly, these provisions should withstand legal review given the long-standing privacy rights afforded to Californians.

In addition to seeking to prevent California courts and healthcare providers from being utilized to obtain information regarding the provision of gender-affirming medical care in California, this bill also seeks to provide transgender youth and their families a refuge from the states passing these draconian laws. This bill would amend several provisions of the Uniform Child-Custody Jurisdiction and Enforcement Act (Act) to grant California courts greater authority to protect transgender youth and their families. The Act is generally designed to provide uniform rules for handling family law matters between states to ensure that parents involved in custody disputes cannot game one state against another in order to keep custody of a minor child. Generally, the Act seeks to ensure that the courts of the child's home state retain jurisdiction over family law matters, even if the child is moved to another state. However, certain exceptions apply, especially in cases of emergencies or when alleged abuse is involved.

This bill would expand upon the emergency provisions in California's codification of the Act to add cases in which a child is in California to obtain, or having previously obtained, gender-affirming healthcare to the list of instances in which California courts may retain jurisdiction over a family law matter. The bill then directs California courts to not apply the anti-transgender laws of other jurisdictions and instead apply California's more protective statutes. Unlike the provisions of this bill regarding subpoenas, this aspect of this bill is simply the Legislature determining which state's laws California courts should apply in family law matters involving

gender-affirming care, a permissible choice of law decision that is wholly within the authority of the Legislature. (*Alaska Packers Association v. Industrial Accident Commission, supra*, 294 U.S. 532.)

According to the Author

SB 107 reduces the harm done to transgender youth and their families by making it clear that other state's laws that punish people for providing or receiving gender-affirming health care is contrary to the public policy of California. SB 107 would prohibit the enforcement of a civil judgment against a person or entity who allows a child to receive gender-affirming health care. Similarly, this bill would also bar health care providers from complying with subpoenas requiring the disclosure of medical information related to gender-affirming health care that interferes with a person's right to allow a child to receive said care. Lastly, SB 107 would prohibit law enforcement agencies from making, or intentionally participating in, the arrest of an individual pursuant to an out-of-state arrest warrant based on another state's law against receiving, or allowing a child to receive, gender-affirming health care.

Arguments in Support

This measure is co-sponsored by Equality California and Planned Parenthood and is supported numerous others. In support of this bill, Equality California notes:

Despite longstanding evidence demonstrating how anti-LGBTQ+ legislation inflicts measurable harm on the health and well-being of the LGBTQ+ community, hundreds of anti-LGBTQ+ bills have been proposed nationally in 2022, and roughly half of those bills target the transgender community. One proposal alleged that gender-affirming care for transgender youth constitutes child abuse and should be grounds to remove children from the parents who support and affirm them. Other states are attempting to classify the provision of gender-affirming health care as a crime warranting prison time and are threatening parents with criminal penalties if they attempt to travel to another state in order to secure life-saving gender-affirming care for their child. While attacks on the transgender community are not new, we are experiencing alarmingly blatant attempts to use legislation, policy, and political rhetoric to restrict or eliminate the autonomy, freedom, and existence of transgender people across the country. SB 107 will move the needle toward a California that is healthy, just, and fully equal for all LGBTQ+ people and for transgender youth in particular.

Arguments in Opposition

This bill is opposed by anti-transgender rights organizations. The California Family Council writes:

Despite what the bill author says, there is no universal agreement within the medical community regarding the best way to provide healthcare to transgender-identified individuals. The governments and medical institutions of the United Kingdom, Sweden, and Finland have rejected prioritizing "gender-affirming" treatment in favor of an emphasis on mental health. The vast majority of minors with gender dysphoria desist by adulthood if they are not transitioned and given puberty blockers and cross-sex hormones. Because of this, many doctors and medical professionals refuse to provide transitioning drugs and surgeries, especially on minors, knowing the long-term side effects and the lack of hard scientific evidence regarding the efficacy of "gender-affirming" treatments.

FISCAL COMMENTS

According to the Assembly Appropriations Committee, cost pressure (Trial Court Trust Fund (TCTF)) possibly in the mid-to-upper thousands of dollars in increased staff workload for family courts to hear and adjudicate child custody matters based on emergency or other jurisdictional bases to ensure a child of another state is able to obtain gender-affirming care. One eight-hour court day costs \$8,000 in workload. If five cases are filed statewide annually requiring family courts to adjudicate specified child custody proceedings requiring 16 hours of court time, the cost to the courts would be \$80,000. Although courts are not funded on the basis of workload, increased pressure on the TCTF and staff workload may create a need for increased funding for courts from the General Fund (GF) to perform existing duties.

VOTES**SENATE FLOOR: 32-0-8**

YES: Archuleta, Atkins, Bates, Borgeas, Bradford, Cortese, Dahle, Dodd, Durazo, Eggman, Gonzalez, Grove, Hertzberg, Hueso, Hurtado, Jones, Leyva, Limón, McGuire, Melendez, Min, Newman, Nielsen, Ochoa Bogh, Pan, Portantino, Roth, Rubio, Skinner, Stern, Wieckowski, Wiener

ABS, ABST OR NV: Allen, Becker, Caballero, Glazer, Kamlager, Laird, Umberg, Wilk

ASM JUDICIARY: 7-1-2

YES: Bloom, Haney, Kalra, Maienschein, Reyes, Robert Rivas, Cooley

NO: Kiley

ABS, ABST OR NV: Cunningham, Davies

ASM PUBLIC SAFETY: 5-2-0

YES: Jones-Sawyer, Mia Bonta, Bryan, Quirk, Santiago

NO: Lackey, Seyarto

ASM APPROPRIATIONS: 11-4-1

YES: Holden, Bryan, Calderon, Carrillo, Mike Fong, Gabriel, Levine, Quirk, Robert Rivas, Akilah Weber, Wilson

NO: Bigelow, Megan Dahle, Davies, Fong

ABS, ABST OR NV: Eduardo Garcia

ASSEMBLY FLOOR: 56-17-7

YES: Aguiar-Curry, Alvarez, Arambula, Bauer-Kahan, Bennett, Berman, Bloom, Boerner Horvath, Mia Bonta, Bryan, Calderon, Carrillo, Cervantes, Cooper, Daly, Mike Fong, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Gray, Grayson, Haney, Holden, Jones-Sawyer, Kalra, Lee, Low, Maienschein, McCarty, McKinnor, Medina, Mullin, Muratsuchi, Nazarian, O'Donnell, Petrie-Norris, Quirk, Quirk-Silva, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Salas, Santiago, Stone, Ting, Villapudua, Ward, Akilah Weber, Wicks, Wilson, Wood, Rendon

NO: Chen, Choi, Cunningham, Megan Dahle, Flora, Fong, Gallagher, Kiley, Lackey, Mathis, Nguyen, Patterson, Seyarto, Smith, Valladares, Voepel, Waldron

ABS, ABST OR NV: Bigelow, Cooley, Davies, Irwin, Levine, Mayes, Ramos

ASSEMBLY FLOOR: 52-18-10

YES: Aguiar-Curry, Arambula, Bauer-Kahan, Bennett, Berman, Bloom, Boerner Horvath, Mia Bonta, Carrillo, Cervantes, Cooper, Daly, Mike Fong, Friedman, Gabriel, Cristina Garcia, Eduardo Garcia, Gipson, Grayson, Haney, Holden, Irwin, Jones-Sawyer, Kalra, Lee, Levine, Low, Maienschein, McCarty, McKinnor, Medina, Mullin, Muratsuchi, Nazarian, O'Donnell, Petrie-Norris, Quirk, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Santiago, Stone, Ting, Villapudua, Ward, Akilah Weber, Wicks, Wilson, Wood, Rendon

NO: Bigelow, Chen, Choi, Cunningham, Megan Dahle, Davies, Flora, Fong, Gallagher, Kiley, Lackey, Mathis, Nguyen, Patterson, Seyarto, Smith, Valladares, Waldron

ABS, ABST OR NV: Alvarez, Bryan, Calderon, Cooley, Gray, Mayes, Rodriguez, Blanca Rubio, Salas, Voepel

UPDATED

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CONSULTANT: Nicholas Liedtke / JUD. / (916) 319-2334

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