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Authors:

[Rhonda B. Schechter](#)

[Catherine E. Robinson](#)

Kentucky Law Regulating Transgender Medical Care May Raise Treatment and Compliance Concerns for Providers

On March 29, the Kentucky legislature voted to override Governor Andy Beshear's veto on Senate Bill 150 (SB150), causing the bill to become law. SB150 addresses the topic of minors and gender identity and includes provisions regulating certain gender-affirming medical care, human sexuality education in schools, and the use of school bathrooms and locker rooms by transgender students. As it relates to the provision of health care, the bill leaves several questions unanswered for health care providers delivering care to minors in Kentucky.

SB150 prohibits health care providers from undertaking certain treatments for minors (i.e., any person under the age of 18) "for the purpose of attempting to alter the appearance of, or to validate a minor's perception of, the minor's sex, if that appearance or perception is inconsistent with the minor's sex." Sex is defined as "the biological indication of male and female as evidenced by sex chromosomes, naturally occurring sex hormones, gonads, and nonambiguous internal and external genitalia present at birth."

SB150 prohibits health care providers from doing any of the following for a prohibited purpose (unless a specific exception applies):

- prescribing or administering any drug to "delay or stop normal puberty";
- prescribing or administering testosterone, estrogen, or progesterone "in amounts greater than would normally be produced endogenously in a healthy person of the same age and sex";
- performing any sterilizing surgeries or sex-change surgeries; and
- removing any "healthy or non-diseased body part or tissue."

SB150 includes certain exceptions to these treatment prohibitions, such as where a minor was born with a “medically verifiable disorder of sex development” or has been diagnosed as lacking “normal” sex hormone production.

The consequences for a health care provider who violates these prohibitions can be severe. SB150 provides that, if a state licensure board determines a provider has violated any of these restrictions, the agency is *required* to revoke the provider’s license. In addition, SB150 permits a “civil action to recover damages for injuries suffered as a result of a violation” of this law. The language of SB150 is ambiguous as to whether the individual alleging damages must be the patient or could, instead, be someone else, such as the patient’s parent, perhaps filing suit without the patient’s knowledge or consent. The statute of limitations for such actions is the later of:

- the date on which “the person” (presumably the patient) reaches the age of 30; or
- three years after “the person” (perhaps a parent?) discovered, or reasonably should have discovered, the injury or damages.

In any case, a minor who consented — and whose parents consented — to a course of treatment in violation of these prohibitions could conceivably later bring a claim against the health care provider, notwithstanding such consent.

These legal prohibitions affecting health care providers go into effect on June 28, 2023.

Politics and policies aside, it appears these prohibitions may create a host of uncertainties. For example, it is unclear how the motivations of providers treating minors with gender identity issues could be ascertained to determine if they have violated the law; i.e., whether the provider did in fact prescribe one of the indicated medications for the purpose of “validating the minor’s perception of the minor’s sex.” Anyone pursuing a potential violation (whether a licensure board or an individual alleging harm) may have to rely on medical records. Patients always have a right to obtain a copy of their own medical records, and licensure boards can access medical records associated with administrative proceedings, notwithstanding the protections of HIPAA. Knowing this, providers

may be motivated to limit documentation in the patient's medical record to the bare minimum required, which could create difficulties for any future provider from whom the patient receives care.

Other potential issues include:

- A "he-said/she-said" situation where, for example, notwithstanding the medical record, a patient may allege that a medication was prescribed in violation of the law while the provider asserts that it was not.
- An individual who wholeheartedly advocated for a certain treatment could later decide (perhaps primarily for purposes of financial compensation) to assert a particular "injury" from that treatment. Further, it is unclear whether the "injury" must be a physical one or could it be solely mental or emotional in nature.
- Parents in a contentious situation such as divorce may be motivated to use the minor child's prior treatment as a basis for contriving claims against one another. One parent might assert that they opposed the treatment but the other parent "got their way." The "opposed" parent could try to bolster their custody claim by seizing upon the idea that the other parent's decision resulted in an injury to the child.

Kentucky providers treating minors will need to have a good understanding of the implications and nuances of SB150. The new law will likely result in a variety of issues for providers treating minors, and their medical judgment may be impacted by the looming threat of lawsuits and the mandatory revocation of their licenses to practice.

For more information, contact any member of Frost Brown Todd's [Health Care Innovation](#) industry team.

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