

## **MEMORANDUM**

DATE: March 30, 2017

TO: R. Max Lohman, City Attorney

FROM: Janice Rustin, Assistant City Attorney

SUBJECT: Legal Memo Regarding an Ordinance Banning the Use of Conversion Therapy on Minors

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The City has received a request to adopt an ordinance banning the practice of Conversion Therapy on minors within the City. Conversion Therapy (also known as sexual orientation change efforts or "SOCE") is a form of therapy and/or counselling aimed at changing a person's sexual orientation or gender identification. Presently, the City of West Palm Beach, the City of Lake Worth, and the City of Boynton Beach have adopted similar ordinances. Palm Beach County has declined to move forward with a Conversion Therapy ordinance at this time.

The proposed ordinance bans persons licensed by the state including medical practitioners, psychologists, and social workers ("Providers") from using Conversion Therapy on minors within the City limits. Providers found in violation of the ordinance will receive a fine of \$250 for the first violation and \$500 for a repeat violation. The ordinance does not apply to members of the clergy or other pastoral counselors that provide religious counselling to their congregants.

### **Legal Analysis**

The State of Florida has not adopted legislation banning or otherwise regulating Conversion Therapy. A bill banning this controversial therapy has been introduced in the 2017 legislative session (Senate Bill 578). Similar bills failed in 2016 and 2015. Section 456.003, *Florida Statutes*, which regulates health professions and occupations, does not pre-empt the City from regulating in this area.

Five states have adopted legislation banning Conversion Therapy: California, New Jersey, Illinois, Oregon, Vermont, and the District of Columbia.

## 1. Constitutional issues

### a. Free Speech

Many cities in south Florida have adopted Conversion Therapy bans, but Florida courts have yet to address the constitutionality of these bans. New Jersey and California have faced First Amendment challenges on the grounds that Conversion Therapy bans impermissibly regulate speech based on viewpoint and content.

The District Court of New Jersey determined that the state's Conversion Therapy ban regulated professional speech and thus applied an intermediate level of scrutiny.<sup>1</sup> It upheld the ban finding that the government has a substantial interest in protecting clients from ineffective and/or harmful professional services and that the ban directly advances this interest. In contrast, the Ninth Circuit (California) determined that the state's Conversion Therapy ban did not regulate speech and therefore did not violate the First Amendment.<sup>2</sup> Instead, it found that the ban regulated a health care practice, which is within the traditional powers of the state, and upheld the ban finding that it was rationally related to a legitimate governmental interest of protecting minors.

Despite the divergent approaches in the two circuits, the U.S. Supreme Court has declined to review this issue.

### b. Substantive Due Process

In the California case, the plaintiffs who were parents also challenged the ban on the grounds that it infringed on their substantive due process rights of "care, custody, and control" over their minor children and interfered with their right to make medical decisions for their minor children.<sup>3</sup> The court disagreed, finding that people (adults and children) do not have a constitutional right to obtain a particular treatment.

### c. Free Exercise of Religion

Conversion therapy bans have been challenged as a violation of the Free Exercise and Establishment clauses of the First Amendment. The basis for this challenge is that the ban imposes special burdens on the basis of religious views or religious status and unfairly targets religiously motivated conduct.

Under the Free Exercise clause, laws that impact religious conduct are subject to strict scrutiny unless the law is neutral with respect to religion or has only an incidental effect on burdening a religious practice. Secondly, a law violates the Establishment clause unless: (1) it has a secular legislative purpose; (2) its primary effect neither advances nor inhibits religion; and (3) it does not foster excessive government entanglement with religion.

The Ninth Circuit (California) recently held that the state's conversion therapy band did not violate the Free Exercise clause solely because a group motivated by religious reasons may be more

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<sup>1</sup> *King v. Christie*, 981 F. Supp. 2d 296 (D.N.J. 2013)

<sup>2</sup> *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014)

<sup>3</sup> *Id.*

likely to engage in Conversion Therapy than others. Also, it did not find sufficient support for a violation of the Establishment clause because the bill text and legislative history made clear that the legislature clearly understood the problem of SOCE to encompass not only those who seek SOCE for religious reasons, but also those who do so for secular reasons of social stigma, family rejection, and societal intolerance for sexual minorities.<sup>4</sup>

Because the proposed ordinance expressly exempts clergy and religious personnel from practicing conversion therapy, it would be difficult for a plaintiff to argue that the ordinance targets religion. Also, the legislative findings in the whereas clauses indicate that the ordinance has a secular purpose.

## *2. Enforcement issues*

### *a. Free Exercise of Religion*

The proposed Conversion Therapy ordinance exempts members of the clergy and other pastoral or religious counselors from performing Conversion Therapy. If adopted, the City must be careful to not to enforce the ordinance against religious counsellors who are exempt as such conduct could be found to be a restriction of religious practices and is therefore unconstitutional. It may be difficult for the enforcement agent to determine whether a suspected therapist is clergy or a pastor as many religious counsellors are also licensed therapists. In addition, groups committed to offering this kind of therapy hire clergy or pastors in an effort to skirt the bans.

### *b. Privacy*

Further, if the proposed ordinance is adopted, City enforcement agents, whether Code officers or Police officers, must be trained to ensure that any enforcement measures strictly comply with the Health Information Privacy Act (HIPAA).

## **Conclusion**

As no conversion bans have been challenged in Florida, it is not known whether the local courts would analyze a Conversion Therapy ban as a health care regulation or as speech regulation, which is subject to a higher level of scrutiny. However, by limiting the ban to therapy on minors and by exempting religious clergy, the ordinance has a better chance of being upheld if challenged.

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<sup>4</sup> *Welch v. Brown*, 834 F. 3d 1041 (9<sup>th</sup> Cir. 2016)