MEMORANDUM

TO: Mayor and City Council

FROM: Diana Grub Frier, City Attorney

DATE: September 12, 2017

SUBJECT: Prohibition of Conversion Therapy on Minors

At the request of Mayor Haynie, attached is a proposed ordinance banning the practice of conversion therapy by licensed professionals within the City. Conversion therapy is the practice of attempting to change a person’s sexual orientation through psychological counseling (and is also known by various other names, such as treatment for “unwanted same-sex attraction”).

The proposed ordinance is based on the Model Conversion Therapy Ban Ordinance (“Model Ordinance”) submitted to the City by the Palm Beach County Human Rights Council (“PBCHRC”). The Model Ordinance relies on, and cites to, numerous scientific articles and studies that conclude conversion therapy and other “sexual orientation change efforts” (“SOCE”) are ineffective, erroneously presume that homosexuality and gender nonconformity are mental diseases or defects, and may, in fact, cause psychological harm, particularly to children. The Model Ordinance is aimed at protecting minors from being exposed to conversion therapy. It contains a blanket prohibition on the practice of conversion therapy on minors by certain state-licensed professionals (physicians, psychotherapists, etc.) defined in the Model Ordinance under the general term “provider.”

The PBCHRC advises that the Model Ordinance has, thus far, been adopted by a number of municipalities throughout Florida, including, in Palm Beach County, the cities of West Palm Beach, Boynton Beach, Delray Beach, Lake Worth, Riviera Beach, and Wellington. PBCHRC has also advised us that Liberty Counsel (a religious organization engaged in legal advocacy) has sent letters to several of these cities threatening litigation challenging the legality of the ordinance, but to date, no case has been filed. Further, it is our understanding that, at this time, no

1 The following materials, referenced in the Model Ordinance, are on file with the City Clerk and are hereby included by reference in the record:
   - http://pediatrics.aappublications.org/content/pediatrics/92/4/631.full.pdf
   - http://www.apsa.org/content/2012-position-statement-attempts-change-sexual-orientation-gender-identity-or-gender
   - https://www.schoolcounselor.org/asca/media/asca/PositionStatements/PS_LGBTQ.pdf

2 Adults would remain free to seek out such therapy if they so choose.
enforcement action has been commenced by any of these cities. However, similar bans have been tested in at least two other jurisdictions.³ It is worth noting that although regulation of health professions occurs through licensure at the state level, there is no express statutory preemption regarding the state's regulation of licensed health professions (nor any case law finding an implied preemption).⁴

As stated above, the attached proposed ordinance is based on the Model Ordinance. Several minor modifications have been made by our office. First, the definition of "provider," has been amended to clarify that the exemption for "clergy" applies to all religious leaders (not just ordained "clergy") while providing religious counseling or instruction, provided they do not "hold themselves out as operating pursuant to" a state-issued license. Second, consistent with current practice, the "Enforcement" section has been replaced with a reference to the City Code's existing code enforcement provision, but specifying that a violation will not be punishable by imprisonment. Finally, please note that although the recitals within the draft ordinance are based, exclusively, on the statements, information, studies, and materials referenced by the PBCHRC and set forth in the Model Ordinance, we have removed the footnote references. As noted in footnote 1, the material in the footnotes is included in the record.

Please feel free to contact me should you have any questions or require additional information.

cc: Leif J. Ahnell, C.P.A., C.G.F.O.

Attachment

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³ State laws subjecting licensed mental health professionals to professional discipline by the state for engaging in SOCE have been upheld by federal appellate courts against challenges on that they violated both the therapist's First Amendment rights and the fundamental rights of parents to make decisions regarding the care, custody, and control of their children. See Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014); King v. Governor of the State of New Jersey, 767 F.3d 216 (3d Cir. 2014), cert. denied, 135 S.Ct. 2048 (2015).

⁴ "Preemption" by the state means regulation of the issue, subject matter, or field is reserved exclusively to the state; preemption may be express (requiring a statement in the relevant statute regarding the scope of the preemption) or implied (a judicial determination that the state's regulation is so pervasive it reflects a legislative intent to fully occupy the regulatory field thereby preempting regulation by any other governmental entity). Here there is no express statutory preemption, and no case law finding an implied preemption. Implied preemption is also generally disfavored by courts. Nevertheless, the PBCHRC has recommended inclusion of an automatic repeal provision in the event of preemption. We believe this language is unnecessary since preemption would render the ordinance unenforceable by operation of law.
ORDINANCE

5407

AN ORDINANCE OF THE CITY OF BOCA RATON
AMENDING CHAPTER 9, CODE OF ORDINANCES, TO
CREATE A NEW ARTICLE VI, "PROHIBITION OF
CONVERSION THERAPY ON MINORS," PROHIBITING
THE PRACTICE OF CONVERSION THERAPY ON
PATIENTS WHO ARE MINORS; PROVIDING FOR
SEVERABILITY; PROVIDING FOR REPEALER; PROVIDING
FOR CODIFICATION; PROVIDING AN EFFECTIVE DATE

WHEREAS, as recognized by major professional associations of mental health
practitioners and researchers in the United States and elsewhere for nearly 40 years, being
lesbian, gay, bisexual, transgender or gender nonconforming, or questioning (LGBTQ) is not a
mental disease, disorder or illness, deficiency or shortcoming; and

WHEREAS, the American Academy of Pediatrics in 1993 published an article in its
Journal, stating: "Therapy directed at specifically changing sexual orientation is contraindicated,
since it can provoke guilt and anxiety while having little or no potential for achieving changes in
orientation;" and
WHEREAS, the American Psychiatric Association in December 1998 published its opposition to any psychiatric treatment, including reparative or conversion therapy, which therapy regime is based upon the assumption that homosexuality is a mental disorder per se or that a patient should change his or her homosexual orientation; and

WHEREAS, the American Psychological Association's Task Force on Appropriate Therapeutic Responses to Sexual Orientation ("APA Task Force") conducted a systematic review of peer-reviewed journal literature on sexual orientation change efforts ("SOCE"), and issued its report in 2009, citing research that sexual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people, including confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources; and

WHEREAS, following the report issued by the APA Task Force, the American Psychological Association in 2009 issued a resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts, advising parents, guardians, young people, and their families to avoid sexual orientation change efforts that portray homosexuality as a mental illness or developmental disorder and to seek psychotherapy, social support, and educational services that provide accurate information on sexual orientation and sexuality, increase family and school support, and reduce rejection of sexual minority youth; and

WHEREAS, the American Psychoanalytic Association in June 2012 issued a position statement on conversion therapy efforts, articulating that "As with any societal prejudice, bias against individuals based on actual or perceived sexual orientation, gender identity or gender expression negatively affects mental health, contributing to an enduring sense of stigma and
pervasive self-criticism through the internalization of such prejudice" and that psychoanalytic

technique "does not encompass purposeful attempts to 'convert,' 'repair,' change or shift an

individual's sexual orientation, gender identity or gender expression," such efforts being

inapposite to "fundamental principles of psychoanalytic treatment and often result in substantial

psychological pain by reinforcing damaging internalized attitudes;" and

WHEREAS, the American Academy of Child & Adolescent Psychiatry in 2012

published an article in its Journal stating that clinicians should be aware that there is "no
evidence that sexual orientation can be altered through therapy and that attempts to do so may

be harmful;" that there is "no medically valid basis for attempting to prevent homosexuality,

which is not an illness;" and that such efforts may encourage family rejection and undermine

self-esteem, connectedness and caring, important protective factors against suicidal ideation

and attempts; and that, for similar reasons cumulatively stated above, carrying the risk of

significant harm, SOCE is contraindicated; and

WHEREAS, the Pan American Health Organization, a regional office of the World

Health Organization, issued a statement in 2012 stating: "'These supposed conversion

therapies constitute a violation of the ethical principles of health care and violate human rights

that are protected by international and regional agreements.'" The organization also noted that

conversion therapies "lack medical justification and represent a serious threat to the health and

well-being of affected people;" and

WHEREAS, in 2014, the American School Counselor Association issued a position

statement that states: "It is not the role of the professional school counselor to attempt to

change a student's sexual orientation or gender identity. Professional school counselors do not

support efforts by licensed mental health professionals to change a student's sexual orientation

or gender as these practices have been proven ineffective and harmful;" and

WHEREAS, a 2015 report of the Substance Abuse and Mental Health Services

Administration, a division of the U.S. Department of Health and Human Services, "Ending
Conversion Therapy: Supporting and Affirming LGBTQ Youth further reiterates based on scientific literature that conversion therapy efforts to change an individual’s sexual orientation, gender identity, or gender expression is a practice not supported by credible evidence and has been disavowed by behavioral health experts and associations, perpetuates outdated views of gender roles and identities, negative stereotypes, stating, importantly, that such therapy may put young people at risk of serious harm, and recognizing that, same-gender sexual orientation (including identity, behavior, and attraction) is part of the normal spectrum of human diversity and does not constitute a mental disorder; and

WHEREAS, the American College of Physicians wrote a position paper in 2015 opposing the use of “conversion,” “reorientation,” or “reparative” therapy for the treatment of LGBT persons, stating that “[a]vailable research does not support the use of reparative therapy as an effective method in the treatment of LGBT persons. Evidence shows that the practice may actually cause emotional or physical harm to LGBT individuals, particularly adolescents or young persons;” and

WHEREAS, at least one federal appeals court found that a prohibition of SOCE does not violate first amendment rights and noted that the subject ordinance only required mental health providers who wish to engage in practices that seek to change a minor’s sexual orientation either to wait until the minor turns 18 or be subject to professional discipline, leaving mental health providers free to discuss or recommend treatment and to express their views on any topic (See Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014)); and

WHEREAS, the City does not intend to prevent mental health providers from speaking to the public about SOCE; expressing their views to patients; recommending SOCE to patients; administering SOCE to any person who is 18 years of age or older; or referring minors to unlicensed counselors, such as religious leaders. This ordinance does not prevent unlicensed providers, such as religious leaders, from administering SOCE to children or adults; nor does it
prevent minors from seeking SOCE from mental health providers in other political subdivisions 
or states outside of the City of Boca Raton, Florida; and

WHEREAS, City of Boca Raton has a compelling interest in protecting the physical 
and psychological well-being of minors, including but not limited to lesbian, gay, bisexual, 
transgender and questioning youth, and in protecting its minors against exposure to serious 
harms caused by sexual orientation and gender identity change efforts; and

WHEREAS, the City Council hereby finds the overwhelming research demonstrating 
that sexual orientation and gender identity change efforts can pose critical health risks to 
lesbian, gay, bisexual, transgender or questioning persons, and that being lesbian, gay, 
bisexual, transgender or questioning is not a mental disease, mental disorder, mental illness, 
deficiency, or shortcoming; and

WHEREAS, the City Council finds minors receiving treatment from licensed therapists 
in the City of Boca Raton, Florida, who may be subject to conversion or reparative therapy are 
not effectively protected by other means, including, but not limited to, other state statutes, local 
ordinances, or federal legislation; and

WHEREAS, the City Council desires to prohibit, within the geographic boundaries of 
the City, the practice of sexual orientation or gender identity change efforts on minors by 
licensed therapists only, including reparative and/or conversion therapy, which have been 
demonstrated to be harmful to the physical and psychological well-being of lesbian, gay, 
bisexual, transgender and questioning persons; now therefore

THE CITY OF BOCA RATON HEREBY ORDAINS:

Section 1. Chapter 9, “Miscellaneous Offenses,” Article VI, “Prohibition of 
Conversion Therapy on Minors,” is created to read:
ARTICLE VI. - PROHIBITION OF CONVERSION THERAPY ON MINORS

Sec. 9-104. - Intent.

The Intent of this Ordinance is to protect the physical and psychological well-being of minors, including but not limited to lesbian, gay, bisexual, transgender and/or questioning youth, from exposure to the serious harms and risks caused by conversion therapy or reparative therapy by licensed providers, including but not limited to licensed therapists. These provisions are exercises of the police power of the City for the public safety, health, and welfare; and its provisions shall be liberally construed to accomplish that purpose.

Sec. 9-105. - Definitions.

(a) "Conversion therapy" or "reparative therapy means," interchangeably, any counseling, practice or treatment performed with the goal of changing an individual's sexual orientation or gender identity, including, but not limited to, efforts to change behaviors, gender identity, or gender expression, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender or sex. Conversion therapy does not include counseling that provides support and assistance to a person undergoing gender transition or counseling that provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, as long as such counseling does not seek to change sexual orientation or gender identity.

(b) "Minor" means any person less than 18 years of age.

(c) "Provider" means any person who is licensed by the State of Florida to provide professional counseling, or who performs counseling as part of his or her professional training under chapters 456, 458, 459, 490 or 491 of the Florida Statutes, as such chapters may be amended, including but not limited to, medical practitioners, osteopathic practitioners, psychologists, psychotherapists, social workers, marriage and family therapists, and licensed counselors. The term "provider" does not include members of the clergy or other religious
leaders who are acting in their roles as clergy or pastoral counselors, or are providing religious
counseling or instruction to congregants, provided they do not hold themselves out as providing
conversion therapy pursuant to any of the aforementioned Florida Statutes licenses.

Sec. 9-106. - Conversion therapy prohibited.

It shall be unlawful for any provider to practice conversion therapy on any individual
who is a minor regardless of whether the provider receives monetary compensation in exchange
for such services.

Sec. 9-107. - Enforcement and civil penalties.

(a) Any person that violates any provision of this article shall be subject to the civil
penalty prescribed in section 1-16 and in no instance shall a violation of this article be
punishable by imprisonment.

Section 2. If any section, subsection, clause or provision of this ordinance is held
invalid, the remainder shall not be affected by such invalidity.

Section 4. All ordinances and resolutions or parts of ordinances and resolutions and
all sections and parts of sections in conflict herewith shall be and hereby are repealed.

Section 5. Codification of this ordinance in the City Code of Ordinances is hereby
authorized and directed.

Section 6. This ordinance shall take effect immediately upon adoption.
PASSED AND ADOPTED by the City Council of the City of Boca Raton this _____
day of ________________, 2017.

CITY OF BOCA RATON, FLORIDA

ATTEST:

__________________________
Susan Haynie, Mayor

__________________________
Susan S. Saxton, City Clerk

Approved as to form:

__________________________
Diana Grub Frieser
City Attorney

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