



Memorandum

TO: Members of City Council

FROM: City Solicitor's Office

DATE: May 31, 2017

SUBJECT: Review of Proposed Ordinance Prohibiting Conversion Therapy for Minors
Legal Service Request 2017- 045

We reviewed the proposed Ordinance to prohibit conversion therapy for minors. We make the following observations:

1. The proposed Ordinance does not offend the Home Rule Charter Law and may lawfully be adopted.

The City is a home rule municipality. Section 2962(f) of the Home Rule Charter and Optional Plans Law, 53 Pa.C.S.A §2962(f), states, in pertinent part:

(f) Regulation of business and employment. - A municipality which adopts a home rule charter shall not determine duties, responsibilities or requirements placed on business, occupations and employers...

The Court in Hartman v. City of Allentown 880 A.2d 737 (Pa. Cmwlth. 2005) held that Section 2962(f) of the Home Rule Charter and Optional Plans Law did not prohibit the City from enacting an anti-discrimination ordinance and, thus, the ordinance was not *ultra vires*.

In 2002, the City of Allentown adopted an amendment to Article 181 to add sexual orientation and gender identity as prohibited bases of discrimination in employment, housing and public accommodation. The authority to enact anti-discrimination laws derives from a municipality's police powers. The phrase "regulation of business" in Section 2962(f) means affirmative duties being placed on businesses

The Hartman Court cited Smaller Manufactures Council v. Council of the City of Pittsburgh 85 Pa. Cmwlth. 485 A.2d 73 (1984), which interpreted an earlier version of Section 2962(f) to invalidate a Pittsburgh ordinance that required businesses to take specific, affirmative steps, including providing written notice to the Bureau of Business Security and meeting with a committee from the City, if they should ever decide to close a plant, relocate or reduce their operations such that there would be a loss of employment of 15 % or more of their employees.

The Court observed that the ordinance in Smaller was designed and intended to place affirmative duties of business management on businesses in Pittsburgh. The requirement that businesses and employers notify a City-created Bureau if a "business decision" was made (in order for the Bureau to decide if an employer could close, leave the City limits or reduce its work force) went to the heart of business management and usurped the role of management. The Allentown anti-discrimination ordinance was not designed or intended to impose affirmative

duties of business management on businesses. Rather, the ordinance was intended to protect Allentown's citizens from discrimination.

Like the ordinance in Hartman v. City of Allentown, which prohibited discrimination on the basis of sexual orientation and gender identity in employment, housing and public accommodation—telling people what they could not do, not what they had to do—the proposed Ordinance does not put affirmative duties on professionals. As in Hartman, the proposed Ordinance tells professionals not to engage minors in conversion therapy and, as such, does not violate the prohibition against imposing duties on businesses in the Home Rule Charter Law.

2. Due process protections must be added to the Penalty section of the proposed Ordinance.

The Penalty section of the proposed Ordinance states: “The penalty for a violation of 11XX.03 shall be revocation of the licensee’s business license.”

The requirement of notice and an opportunity to be heard applies whenever a local agency renders a final decision affecting personal or property rights. Government licenses to engage in a business or occupation create an entitlement to partake of a profitable activity, and, therefore, are property rights. Consequently, in order for a local agency to revoke a business privilege license, it must provide the licensee with notice of the pending revocation and an opportunity to be heard on that revocation. The preference is to have a prior hearing, in the absence of extenuating private or public interests of overriding significance, in which case, a prompt post-revocation hearing may be held. City of Philadelphia, Board of License and Inspection Review v. 2600 Lewis, Inc. 661 A.2d 20 (Pa. Cmwlth. 1995), Local Agency Law 2 Pa.C.S.A § 553.

A mechanism for notice and an opportunity to be heard before a business license is revoked for violating the Ordinance must be inserted.

3. Drafting Items

A. We suggest this proposed Ordinance may be added as a new section in Article 313 (Business License) of the City Codified Ordinances, rather than in Title 9, the Public Health Code.

B. The definition of “mental health professional” (which, in its current form, is stated twice) should be put in the “Definitions” section with the terms “Conversion Therapy” and “Minor”, not in the “Conversion Therapy Prohibited” section.

C. Consideration might to given to adding Physician Assistants under 49 Pa. Code Chapter 18, Subchapter D and Nurses under 49 Pa. Code Chapter 21, Subchapter A (Registered Nurses) and Subchapter C (Nurse Practicioners) **IF** these professions administer or assist in conversion therapy.

Thank you.

AN ORDINANCE AMENDING TITLE NINE OF THE PUBLIC HEALTH CODE OF THE CITY OF ALLENTOWN, ENTITLED "OTHER REGULATIONS," BY CREATING ARTICLE 11XX, TO BE ENTITLED "CONVERSION THERAPY," TO PROHIBIT LICENSED PROFESSIONALS FROM ENGAGING IN COUNSELING, PRACTICES, OR TREATMENTS THAT SEEK TO CHANGE A MINOR'S SEXUAL ORIENTATION OR GENDER IDENTITY.

WHEREAS, the American Psychiatric Association published a position statement in December 1998 opposing any psychiatric treatment, including reparative or conversion therapy, which therapy regime is based upon the assumption that homosexuality *per se* is a mental disorder 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") concluded that sexual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people, including, among other things, confusion, depression, social withdrawal, suicidality, substance abuse, self-hatred, high-risk sexual behavior, and a feeling of being dehumanized; and

WHEREAS, following the report issued by the APA Task Force, the American Psychological Association issued a resolution in 2009 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 encouraging psychotherapy, social support, and educational services that provide accurate information on sexual orientation and sexuality, increased family and school support, and reduced rejection of sexual minority youth; and

WHEREAS, the American Academy of Child and Adolescent Psychiatry published a statement in 2012 in its journal that, "[g]iven that there is no evidence that efforts to alter sexual orientation are effective, beneficial or necessary, and the possibility that they carry the risk of significant harm, such interventions are contraindicated"; and

WHEREAS, the American Academy of Pediatrics, the American Medical Association Council of Scientific Affairs, the National Association of Social Workers, the American Counseling Association Governing Council, the American School Counselor Association, and the American Psychoanalytic Association have each asserted in reports or position statements that sexual orientation change efforts, including reparative therapy or conversion therapy, are not recommended and may be harmful; and

WHEREAS, the Pan American Health Organization issued a statement in 2012 that "[t]hese 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"; and

WHEREAS, the Substance Abuse and Mental Health Services Administration of the United States Department of Health and Human Services issued a report in 2015 examining the scientific literature on conversion therapy and concluding that "conversion therapy-efforts to change an individual's sexual orientation, gender identity or gender expression-is a practice that is not supported by credible evidence" and that "may put young people at risk of serious harm"; and

WHEREAS, the City of Allentown ("City") has a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, transgender and questioning youth, and in protecting its minors against exposure to serious harms caused by conversion therapy; and

WHEREAS, the City Council hereby finds that being lesbian, gay, bisexual, or transgender is not a disease, disorder, illness, deficiency, or shortcoming, and that research has demonstrated conversion therapy can pose critical health risks to lesbian, gay, bisexual, or transgender persons; and

WHEREAS, it is the desire of the Allentown City Council to prohibit, within the geographic boundaries of the City, the use of conversion therapy with minors, which has been demonstrated to be harmful to the physical and psychological well-being of lesbian, gay, bisexual, and transgender persons.

NOW THEREFORE, BE IT ORDAINED BY THE ALLENTOWN CITY COUNCIL:

SECTION I. That Title Nine of the Allentown Public Health Code is hereby amended to create Article 11XX as follows:

**TITLE NINE
OTHER REGULATIONS
* * ***

ARTICLE IIXX. Conversion Therapy

11XX.01. Definitions.

The following words, terms, and phrases, when used in this Article, shall have the meanings ascribed to them in this Article, except when the context clearly indicates a different meaning:

Conversion therapy means any practices or treatments that seek to change an individual's sexual orientation or gender identity, including efforts to change behaviors or gender expressions or to reduce or eliminate sexual or romantic attractions or feelings toward individuals of the same gender: Conversion therapy does not include counseling that:

- a) Provides assistance to a person undergoing gender transition; or
- b) Provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, if such counseling does not seek to change an individual's sexual orientation or gender identity.

Minor means a person less than eighteen (18) years of age.

11XX.02. Conversion therapy prohibited.

A person who is licensed by the State of Pennsylvania to provide professional counseling, or who performs counseling as part of his or her professional training under Chapters 16, 25, 41, 47, 48, or 49 of Title 49 of the Pennsylvania Code, as such chapters may be amended, including, but not limited to, medical practitioners, osteopathic practitioners, psychologists, social workers, marriage and family therapists, and professional counselors, may not engage in conversion therapy with a minor.

"Mental health professional." An individual who is licensed, certified or otherwise authorized to administer or provide professional mental health care or counseling under the act of March 23, 1972 (P.L. 136, No. 52), known as the Professional Psychologists Practice Act, the act of July 9, 1976 (P.L. 817, No. 143), known as the Mental Health Procedures Act, the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985, or the act of July 9, 1987 (P.L. 220, No. 39), known as the Social Workers, Marriage and Family Therapists and Professional Counselors Act. "Mental health professional." An individual who is licensed, certified or otherwise authorized to administer or provide professional mental health care or counseling under the act of March 23, 1972 (P.L. 136, No. 52), known as the Professional Psychologists Practice Act, the act of July 9, 1976 (P.L. 817, No. 143), known as the Mental Health Procedures Act, the act of December 20, 1985 (P.L. 457, No. 112), known as the Medical Practice Act of 1985, or the act of July 9, 1987 (P.L. 220, No. 39), known as the Social Workers, Marriage and Family Therapists and Professional Counselors Act.

11XX.03. **Penalty.**

The penalty for a violation of 11XX.03 shall be revocation of the licensee's business license.

SECTION 2. SEVERABILITY.

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

SECTION 3. EFFECTIVE DATE.

This Ordinance shall take effect the _____ day of _____, 2017.