



Memorandum

TO: Members of City Council

FROM: City Solicitor's Office

DATE: July 12, 2017

SUBJECT: Review of Proposed Ordinance Prohibiting Conversion Therapy for Minors (Bill 40)
Continuation of Legal Service Request 2017- 045

With respect to the proposed amendments to Bill 40, after collaboration with Mr. Adrian Shanker's attorneys, please consider the following legal explanation for the need for the revisions:

1. Appointment of a Third Party Complaint Administrator: As currently drafted, there is no one person or group charged with investigating complaints for violations of the prohibition in the Ordinance. An Appeals Board is established, as due process requires, but no one is tasked with making the initial decision on whether to issue a Notice of Hearing to a practitioner for the revocation of a business license in the first instance.

The Appeals Board may not lawfully investigate an alleged violation and decide to issue a Notice to a practitioner, while at the same time, acting as the adjudicator of whether a violation has, in fact, occurred.

A violation of due process occurs under the Pennsylvania Constitution when an administrative board both determines that a prosecution should be initiated and then acts as the ultimate fact-finder in determining whether a violation has occurred. Such a commingling of prosecutorial and adjudicative functions within a single multi-member administrative board is inconsistent with the notion of due process embodied in the Pennsylvania Constitution. Lyness, M.D. v. Commonwealth, State Board of Medicine 529 Pa. 535, 605 A.2d 1204 (1992). (three members of the State Board of Medicine who voted to initiate a prosecution against a surgeon to revoke his medical license also participated in a meeting at which the doctor's license was revoked violated the physician's due process rights.), Dussia v. Barger 466 Pa. 152, 351 A.2d 667 (1975) (regulation which vested power in a police commissioner to both initiate court-martial proceedings against a state police officer (a prosecutorial function) and thereafter exercise the ultimate judicial determination as to guilt or innocence was struck down.).

Accordingly, the amendment to establish a person independent of the Appeals Board to determine whether to initiate a notice of violation is legally necessary.

2. Compelling Production of Confidential Records: The doctor-patient and psychiatrist/psychologist-client privileges are established by statute.

Section 5929 of the Judicial Code, 42 Pa.C.S.A § 5929, states: "no physician shall be allowed, in any civil matter, to disclose any information which he acquired in attending the patient in a professional capacity and which is necessary to enable him to act in that capacity... without the consent of that patient..."

Section 5944 of the Code, 42 Pa.C.S.A § 5944, states: “no psychiatrist or person who has been licensed... to practice psychology shall be, without the written consent of his client, examined in any civil... matter as to any information acquired in the course of his professional services in behalf of such client. The confidential relations and communications between a psychologist or psychiatrist and his client shall be on the same basis as those provided or prescribed by law between an attorney and client.”

The records of a social worker who does counseling under the supervision of a psychologist is also privileged. Mitchell v. Sturm, Rugar & Co., Inc. 842 F. Supp. 158 (E.D. Pa. 1994).

The holder of the privilege is the patient and the client. The key is the patient and the client may waive the confidential nature of the communications, memorialized in written patient/client records, by giving consent to the practitioner to disclose information that would otherwise be confidential.

The amendment states neither the Complaint Administrator nor the Appeals Board may compel the disclosure of confidences, but, the complainant may waive the privilege to prove a violation took place.

A minor’s tender age has long been recognized as a legal disability; under the law in Pennsylvania, minors have never been permitted to initiate their own lawsuits. The law prevents minors, simply because of their status as minors, from bringing suit. DeSantis v. Yaw 290 Pa. Super. 535, 434 A.2d 1273 (1981).

Therefore, the parent or legal guardian would bring a complaint and would have authority to waive the privilege for the child.

Accordingly, the amendment with regard to medical records is appropriate and reasonable.

Thank you.