

**Legislative #
160200**



MEMORANDUM

Office of the City Attorney

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TO: Mayor and City Commissioners

DATE: December 11, 2017

FROM: Nicolle Shalley, City Attorney *NMS*
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SUBJECT: Prohibiting Conversion Therapy

On July 7, 2016, the City Commission referred the topic of prohibiting the use of conversion therapy to the General Policy Committee. The General Policy Committee then requested the City Attorney's Office report back on this topic. This Office completed legal research and then met with Department of Doing and Code Enforcement staff to discuss the practical issues of whether such activity is occurring in Gainesville and how a prohibition could be enforced. This Memorandum is intended to assist the City Commission in its decision-making process on this matter.

What is the activity? Conversion therapy (which is also referred to as "reparative therapy") is generally defined as any counseling, practice, or treatment performed with the goal of changing a person's sexual orientation or gender identity including, but not limited to, efforts to change behaviors, gender expression, or to reduce or eliminate sexual or romantic attraction or feelings toward a person of the same gender. Definitions of conversion therapy generally exclude counseling that: (a) Provides support 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 is not conducted with the goal of changing the person's sexual orientation or gender identity.

What questions should be answered by the City Commission when considering whether to regulate or prohibit an activity, in this case conversion therapy, within the City?

1) *What is the public purpose for the City to regulate the activity? Or stated another way –how does the activity threaten the general public health, safety or welfare in the City; how prevalent is the activity and what is the extent of the harm?*

Code Enforcement staff has not received complaints or found evidence that conversion therapy is being provided by licensed health professionals locally. Internet research found personal accounts of conversion therapy in Gainesville being done by clergy or religious counselors, not by licensed health professionals.

Internet research regarding how licensed health professionals view conversion therapy found:

- The American Psychiatric Association published position statements in December 1998 and May 2000 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.
- The American Psychological Association's Task Force on Appropriate Therapeutic Responses to Sexual Orientation concluded that sexual orientation change efforts can pose critical health risks, including, among other things, confusion, depression, social withdrawal, suicidality, substance abuse, self-hatred, high-risk sexual behavior, and a feeling of being dehumanized. 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 people 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.
- 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."
- 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 concluded 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."

The Commission may consider these statements and reports and other published materials and testimony in deciding whether a public purpose would be served by opposing or prohibiting conversion therapy in the City.

2) Is the City the most appropriate entity to regulate, or is the activity one that the County, State or Federal Government is better suited to regulate or already regulates?

Prohibiting conversion therapy is not a zoning regulation. As described under 4) below, in the local government ordinances that prohibit conversion therapy, violations impose a monetary penalty on the health professional providing the therapy. The City does not currently regulate health professionals; however, the State of Florida does regulate and issue licenses for health professionals.

There are currently three bills filed in the 2018 State Legislative Session (Senate Bills 68 and 696 and House Bill 717), that seek to define "conversion therapy"; prohibit a person who is licensed to provide professional counseling or practitioner who is licensed under provisions regulating practice of medicine, osteopathic medicine, psychology, clinical social work, marriage and family therapy, or mental health counseling from practicing or performing conversion therapy with an individual who is younger than specified age; and provide that such person or practitioner is subject to specified disciplinary proceedings.

The States of New Jersey, California, Oregon, Illinois, Vermont, New Mexico, Connecticut, Rhode Island and Nevada have enacted state laws prohibiting conversion therapy on minors.ⁱ

3) Are there alternatives, other than City ordinance, that the City could pursue to address the activity?

Given the pending state legislation and the recent litigation challenging a local government ordinance in Florida (summarized in 5 below), the City could adopt a resolution that expresses the view of the Commission on conversion therapy and directs the City's lobbyists to lobby for State and/or Federal prohibition of the practice.

4) If the City were to regulate –what would be the basic scope of the regulations, what are the penalties for violations and will the regulation effectively address the public health, safety and welfare concern that prompted the regulation? What City staff/funding are necessary to administer and enforce the regulations?

If the City Commission decides to prohibit conversion therapy, because of the litigation risks discussed in 5 below, this Office recommends modeling the City ordinance after other Florida local governments that have adopted such ordinances.ⁱⁱ In reviewing such ordinances, it appears they prohibit certain licensed health professionals (not clergy or pastoral counselors providing religious counseling to congregants, who do not hold themselves out as a mental health professional licensed by the State of Florida) from providing conversion therapy to minors. Enforcement is through the statutory code enforcement process, which means issuing a notice of violation and if compliance is not achieved, the case is referred to the local code enforcement board or special magistrate. However, since the licensing of health professionals is preempted to the Stateⁱⁱⁱ, the penalties in local government ordinances do not affect the license held by the health professional, but rather most impose a monetary penalty on the health professional.

5) Are there legal or risk issues issues that should be considered?

Yes, local regulation poses likelihood of litigation. There are a number of reported court decisions challenging state statutes prohibiting licensed counselors from engaging in conversion therapy for clients under 18 years of age. The state statutes have been upheld, including on grounds that the prohibition did not violate the counselors' or minor clients' First Amendment free speech rights, and that it did not violate the due process right of the parents to direct upbringing of their child.

Litigation was filed in federal court in Florida on December 4, 2017 challenging an ordinance adopted by the City of Tampa to prohibit conversion therapy for minors (excluding clergy or pastoral counselors providing religious counseling to congregants, and who do not hold themselves out as a mental health professional licensed by the State of Florida.) The filed complaint includes many of the grounds that were rejected in the out-of-state court decisions, and also includes the basis of preemption of regulation of mental health care professionals to the State of Florida.

ⁱ https://en.wikipedia.org/wiki/List_of_U.S._jurisdictions_banning_conversion_therapy_for_minors

ⁱⁱ Section 23-5.2 Bay Harbour Islands; Chapter 15, Article XIII, Boynton Beach; Section 133.02, Delray Beach; Sec. 42-18, Key West; Chapter 15, Article VII, Lake Worth; Chapter 70, Article VII, Miami Beach; Sections 14-310, Tampa; Chapter 12, Article IV, Wilton Manors.

ⁱⁱⁱ Section 456.003, Florida Statutes