



LEGISLATIVE  
RESEARCH &  
GENERAL COUNSEL



# Conversion Therapy Rules

Victoria Stirling Ashby

Associate General Counsel, Administrative Rules  
Review and General Oversight Committee

August 18, 2022

# Questions for consideration

- Under what authority did the Division of Professional Licensing adopt the conversion therapy rules?
- In light of recent case law, would a court find the conversion therapy rules constitutionally permissible?



# Utah Legislative and Rule History

- 2019
  - HB 399 introduced: Prohibition of the Practice of Conversion Therapy Upon Minors
  - Several substitutes were proposed, the 4<sup>th</sup> substitute was adopted
  - Bill **failed**
- 2020
  - DOPL publishes final amended rules for Mental Health Professional Practice Act and Psychologist Licensing Act
  - Rule language defining and prohibiting conversion therapy is substantially the same as the language in the original (failed) bill





# Rule text: R156-60-102, R156-61-102

(3) (a) "Conversion therapy" means any practice or treatment that seeks to change the sexual orientation or gender identity of a patient or client, including mental health therapy that seeks to change, eliminate, or reduce behaviors, expressions, attractions, or feelings related to a patient or client's sexual orientation or gender identity.

(b) "Conversion therapy" does not mean a practice or treatment that does not seek to change a patient or client's sexual orientation or gender identity, including mental health therapy that:

- (i) is neutral with respect to sexual orientation and gender identity;
- (ii) provides assistance to a patient or client undergoing gender transition;
- (iii) provides acceptance, support, and understanding of a patient or client;
- (iv) facilitates a patient or client's ability to cope, social support, and identity exploration and development;
- (v) addresses unlawful, unsafe, premarital, or extramarital sexual activities in a manner that is neutral with respect to sexual orientation; or
- (vi) discusses with a patient or client the patient or client's moral or religious beliefs or practices.



# R156-60-502; R156-61-502

“Unprofessional conduct” includes:

(2) (a) providing conversion therapy to a patient or client who is younger than 18 years old; and

(b) Subsection (2)(a) does not apply to:

(i) a clergy member or religious counselor who is acting substantially in a pastoral or religious capacity and not in the capacity of a mental health therapist/psychologist; or

(ii) a parent or grandparent who is a mental health therapist and who is acting substantially in the capacity of a parent or grandparent and not in the capacity of a mental health therapist/psychologist.





# DOPL Rule Authority

# Administrative Rule Making Act

- UCA 63G-3-201

(2) In addition to other rulemaking required by law, each agency shall make rules when agency action:

- (a) authorizes, requires, or prohibits an action;
- (b) provides or prohibits a material benefit;
- (c) applies to a class of persons or another agency; and
- (d) is explicitly or implicitly authorized by statute.



# DOPL Rule Authorizing Statutes

## Authorizing statutes cited by CT rules

- **UCA 58-1-106(1)(a) DOPL Act**

(1) The duties, functions, and responsibilities of [DOPL] include the following:

(a) prescribing, adopting, and enforcing rules to administer this title...

- **UCA 58-1-201(1)(a) DOPL Act**

(1) The duties, functions, and responsibilities of each [licensing] board established under this title include the following:

(a) recommending to the director appropriate rules and statutory changes, including changes to remove regulations that are no longer necessary or effective in protecting the public and enhancing commerce...

## Other rule-authorizing statutes

- **UCA 58-60-102 Mental Health Professional Practice Act**

(10) "Unprofessional conduct" is as defined in Sections [58-1-501](#) and [58-60-110](#), and *may be further defined by division rule*.

- **UCA 58-61-102 Psychologist Licensing Act**

(12) "Unprofessional conduct" is as defined in Sections [58-1-501](#) and [58-61-502](#), and *may be further defined by division rule*.







# Applicable Cases on Speech and Conduct

- National Institute of Family and Life Advocates v. Becerra, 138 S. Ct. 2361 (2018)
- Otto v. City of Boca Raton, Fla., 981 F.3d 854 (11th Cir. 2020)

# *NIFLA v. Becerra*, 138 S.Ct. 2361 (2018)

- CA law required licensed pregnancy crisis clinics to notify women of available free or low-cost services, including contraception and abortions. The notice compelled the clinics (some pro-life) to speak a particular state-sponsored message.
- California argued it could regulate professional speech/conduct
- U.S. Supreme Court ruled the regulation violated 1<sup>st</sup> Amendment rights

## *Professional Speech*

- “But this Court has never recognized ‘professional speech’ as a separate category of speech subject to different rules.” Still subject to strict scrutiny (narrowly tailored & compelling government interest).
  - Exceptions:
    - laws requiring “factual, noncontroversial information”
    - laws regulating “professional conduct that incidentally involves speech”

## *Conduct*

- Notice was not tied to a specific medical procedure, was not required of all clinics
- States may not use licensing as a mechanism to suppress speech



# *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854 (11th Cir. 2020)

- Boca Raton “prohibit[ed] [licensed] therapists from engaging in counseling or any therapy with a goal of changing a minor's sexual orientation, reducing a minor's sexual or romantic attractions (at least to others of the same gender or sex), or changing a minor's gender identity or expression...”
- Plaintiffs argued ordinances applied to “purely speech-based therapy” and were unconstitutional under 1<sup>st</sup> Amendment.
- Defendants argued that the ordinances were necessary to “combat increased risk of depression and suicide” (a government interest) and regulated conduct, not speech.
- Decision not binding on Utah



# Holding: Speech

- The ordinances were discriminatory as to content and viewpoint
  - Regulators must look at the speech content, and whether it aligned with the government viewpoint, to determine a violation
- Court applied strict scrutiny: ordinances must be narrowly tailored to serve a compelling state interest
- Government has an interest in protecting children; however, the ordinances did not further a compelling interest and were not narrowly tailored
- Court determined that evidence on the harm of certain therapies was not persuasive, could not overcome strong presumption against content-based restrictions
- “People who actually hurt children can be held accountable, but ‘[b]road, prophylactic rules in the area of free expression are suspect.”





# Holding: Conduct vs. Speech

- Court rejected ordinance as a regulation of conduct: the ordinances regulated speech, not non-expressive conduct
- Ordinances were not a permissible regulation of conduct that incidentally involved speech, but a direct regulation of speech
- Ordinances were “not connected to any regulation of separately identifiable conduct”
- Therapy consists entirely of words



# Questions?

- Victoria Stirling Ashby, [vashby@le.utah.gov](mailto:vashby@le.utah.gov)
- Megan Bolin, [mbolin@le.utah.gov](mailto:mbolin@le.utah.gov)
- Julie Humberstone, [jhumberstone@le.utah.gov](mailto:jhumberstone@le.utah.gov)



# Potential Committee Actions

- Open a committee bill file on DOPL CT rule authority or the licensed practice of CT
- Address CT rules in the annual administrative rules reauthorization legislation
  - The Legislature may specifically exclude CT rules from reauthorization.
  - If Legislature does not reauthorize, governor may extend the rule if he finds 1- the agency has authority to make the rule and 2- a necessity exists.
- Recommend that DOPL amend the conversion therapy rules
- Refer issue to chairs of interim committee that has jurisdiction over agency
- No action/reauthorize the rule
  - (5) The Legislature's reauthorization of a rule by legislation does not constitute legislative approval of the rule, nor is it admissible in any proceeding as evidence of legislative intent. UCA 63G-3-502(5).

