



PROTECTING ALL TEENS

Family Development Foundation 301 West 5400 South, Suite 203 Murray, UT 84107 801-205-1961

September 25, 2019

TRANSMITTED VIA E-MAIL

Larry Marx
Division of Occupational and Professional Licensing
Heber M. Wells Building
160 East 300 South
Salt Lake City, UT 84114

Re: Comments on Proposed Amendments to the Psychologist Licensing Act Rule and the Mental Health Professional Practice Act Rule Regarding “Sexual Orientation Change Efforts” and “Gender Identity Change Efforts” with Minors

Dear Mr. Marx:

On September 1, 2019, the Division of Occupational and Professional Licensing (DOPL) published proposed amendments to the Psychologist Licensing Act rule and the Mental Health Professional Practice Act rule to define “engaging in or attempting to engage in the practice of sexual orientation change efforts or gender identity change efforts with a client who is less than 18 years old” as unprofessional conduct, which would subject a licensed psychologist or other mental health professional to suspension or revocation of his or her license. The proposed amendments would apply to psychologists, licensed clinical mental health professionals, licensed marriage and family therapists, and licensed clinical social workers. These proposed rule amendments have their genesis in a directive from Governor Herbert to Ms. Giani in a letter dated June 17, 2019, to have the Psychologist Licensing Board prepare proposed rules to “ethically regulate psychological interventions for minor children regarding their sexual orientation and gender identity.”

As explained in the attached comments, the proposed rule amendments would give rise to a large variety of troublesome problems. The proposed amendments are not based on objective research or scientific fact. They are profoundly flawed from the viewpoint of logic, policy, and law. They likely would have practical effects that are the opposite of what the licensing boards and DOPL intend. We believe DOPL can take a better approach and propose rules that would be specific, sensible, and legally and constitutionally sound—and that would better meet both the spirit and the letter of the Governor’s instruction.

The comments attached to this letter comprehensively analyze the underlying assumptions and the practical consequences and implications of the proposed rule amendments, as well as the very serious constitutional problems to which they would give rise. The first few pages explain the background and developments that led up to the Governor’s June 17 letter. The next few

pages give a brief summary of the numerous problems and flaws in the proposed amendments. The analysis which follows explains those in greater depth.

It appears to us that DOPL and the licensing boards have acted on the basis of both inadequate information and inaccurate perceptions. It also appears that to the extent the boards may have received legal input from outside sources, the boards are, nonetheless, much less than fully informed regarding controlling legal principles.

The proposed amendments are put forth as measures to protect minors. In reality, however, the likely practical effect of the proposed amendments would be the opposite of what DOPL and the licensing boards intend. The proposed rule changes would actually limit therapists' ability to effectively help minors, and, potentially at least, increase the risk of suicide in minors rather than reduce it. The proposed amendments would make it more difficult for therapists to effectively address trauma resulting from sexual abuse and compulsive sexual thoughts and behaviors. They also would operate to effectively prevent therapists from addressing with minor clients feelings or emotions related to gender confusion or the risks of gender-altering medical procedures.

Further, for reasons explained in the analysis, the proposed amendments are unconstitutional restrictions on the freedom of speech of both therapists and minor clients under the First Amendment. Additionally, the proposed rule amendments are implicitly hostile to the religious convictions of both clients and therapists, and thus would violate the First Amendment's Free Exercise clause. Moreover, because it would be impossible for therapists to ascertain what speech would be forbidden versus what speech would be permitted under the proposed rules, they are impermissibly vague and therefore would be void under the Due Process clause of the Fourteenth Amendment.

Promulgating a final rule identical or similar to the proposed amendments would almost certainly embroil the State in costly and lengthy litigation. Enforcement of such a rule likely would be enjoined while that litigation is pending, and, in the end, we believe the State very likely would lose. In view of the serious problems which these proposals entail, DOPL cannot simply assume that the State Attorney General would be willing to commit the resources of his office to defend a final rule against constitutional challenge. Under the circumstances, it is critically important for DOPL to seek the Attorney General's analysis of these issues and advice before publishing an effective date for these proposed amendments and thereby adopting them as a final rule.

Moreover, if DOPL were to adopt a final rule identical or similar to the proposed amendments, it would unwittingly find itself in a position of effectively attempting to circumvent, by administrative decree, the State Legislature's rejection in the 2019 session of a bill (promoted by gay activists) that in substance is indistinguishable from the proposed amendments.

Finally, the good news is that DOPL's options are not limited to either adopting the proposed amendments or doing nothing. The problems can be solved by publishing a revised proposed rule that is designed to both address real potential abuses and unethical conduct, and at the same time protect the rights of all minors to seek therapy to address issues involving sexuality and gender perception. We believe it is not difficult to craft a proposed rule that is specific, legally and constitutionally sound, avoids the problems inherent in the recommended proposals, and implements the intent and purpose of the Governor's instruction. Moreover, such an approach can and should protect all the minors in Utah who struggle with issues surrounding sexuality and gender perception—not just the gay minors or the self-identified transgender minors.

We have suggested language that we believe would accomplish these objectives in Appendix B to the attached comments. We further believe that when the issue is fully examined and analyzed, all four professional licensing boards could agree on the approach this suggested language reflects.

Each of the persons listed as signatories below has authorized his or her name to be listed as a signatory to this letter and the accompanying comments.

Sincerely,

David Clarke Pruden, M.S.

Geoffrey Heath, J.D., LL.M.

Jeffrey Bennion, LAMFT

Stephen Done

Gayle Ruzicka