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**CAVALIER JOHNSON**  
ALDERMAN, 2ND DISTRICT

# Conversion therapy ban allows for free faith counseling

**Statement by Alderman Cavalier ‘Chevy’ Johnson  
March 26, 2018**

As the Common Council is set to take up a proposal to ban conversion therapy for minors - the practice of trying to change a person’s sexual orientation - in the City of Milwaukee, I would like to clarify its role with regard to faith counseling.

This legislation of which I am the sponsor does not affect the faith-based community. The measure only affects therapists that charge a fee for service, imposing a \$500 to \$1,000 fine for each violation, with each day practicing conversion therapy being considered a separate violation. If someone would like to seek free counseling from their faith leader, that remains possible under the legislation. This proposal also would not prohibit churches from preaching, ministering or otherwise speaking about the issue.

The Office of the City Attorney has reviewed the legislation. In its attached letter, the Office’s opinion states the legislation “would be found by a reviewing court to be constitutionally sound.”

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February 15, 2018

Alderman Cavalier Johnson  
Alderman, 2<sup>nd</sup> District  
200 East Wells Street, Room 205  
Milwaukee, WI 53202

Re: Prohibiting the Practice of Conversion Therapy

Dear Alderman Johnson:

This opinion is in response to your request regarding prohibiting the practice of conversion therapy. This opinion discusses the ramifications of an outright ban of “gay conversion therapy” and the City’s options in its regulation.

“Conversion therapy” also known as “Sexual Orientation Change Efforts (SOCE)” is a process by which practitioners attempt to eliminate same-sex attraction among their patients. There is “little basis that SOCE has any effect on sexual orientation.” American Psychological Association, *Appropriate Therapeutic Responses to Sexual Orientation*, 34 (2009). In some instances, former patients have sued their conversion therapy providers alleging fraud. This was the case in New Jersey when Jews Offering New Alternatives to Healing was sued for violating the New Jersey Consumer Fraud Act. *Ferguson v. JONAH (Jews Offering New Alternatives for Healing f/k/a Jews Offering New Alternatives to Homosexuality)*, 445 N.J.Super 129 (2014). In this case, former clients sued JONAH for offering fraudulent services alleging that they could be “cured” of homosexuality. *Id.* The New Jersey Court found that the therapy was fraudulent and the cost of reparative therapy for the former patients was a valid consideration under the New Jersey Fraud Consumer Fraud Act. *Id.*

In 2012, the State of California prohibited state licensed mental health providers from engaging in SOCE. 2012 Cal. Legis. Serv. Ch. 835 (West). The California law passed constitutional muster and was upheld by the Ninth Circuit Court of Appeals in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). A brief review of online records indicates as many as eight other states ban conversion therapy for minors. Wisconsin lawmakers have also considered such a ban but it has not passed to date.



In 2015, the White House Office of Communications released a communication in support of banning conversion therapy titled. "Why Conversion Therapy Hurts All of Us." 2015 WL 1594081 (2015). A copy of the White House Communication is attached. In recent months, several municipalities throughout the country have enacted ordinances prohibiting conversion therapy for minors. In late 2017, New York City Common Council banned conversion therapy across all ages for those practitioners who collect a fee. Clergy and those practitioners who provide free services would be exempt. New York City is the first municipality that we are aware of that expanded its prohibition beyond just minors.

Much of the litigation about conversion therapy involves claims of improperly limiting the free speech rights of the mental health professionals that are practicing conversion therapy. The case law seems to suggest that mental health professionals have lesser expectation in this regard. For example, the limited case law on regulations of conversion therapy suggests that the therapists' first amendment right to free speech "is somewhat diminished." *Pickup v. Brown*, 740 F.3d 1208, 1228 (9th Cir. 2014). "Moreover, doctors are routinely held liable for giving negligent medical advice to their patients, without serious suggestion that the First Amendment protects their right to give advice that is not consistent with the accepted standard of care." *Id.* The cases available are not from this jurisdiction and may only serve as guidance as to how a local court would rule. Also, the cases on conversion therapy only relate to the legislation for minors. The research suggests that this is because minors are a particularly vulnerable subset of the population and there have been studies as to the detrimental effects of conversion therapy to minors. The research on adults is less clear.

In Wisconsin, the state regulates the licensing of mental health professionals. See generally, Wis. Stat. sec. 440.310 (Behavior Analysts), Chp. 455 (Psychology Examining board), Chp. 457 (Marriage and family therapy, professional counseling, and social work examining board). Under Wis. Stat. sec. 66.0408 a municipality "may not impose any occupational fee or licensing requirement on any profession" unless those regulations were in effect on November 13, 2015. Wis. Stat. sec. 66.0408 (2015-2016). We contacted counsel to the State of Wisconsin Department of Safety and Professional Services to see if the Psychology Examining Board has ever taken a position on conversion therapy. The department, and the Psychology Examining Board, has not. However, the licensing board for social workers is proposing a new administrative rule prohibiting conversion therapy.

Based upon state preemption, the City of Milwaukee may not place additional requirements on mental health professionals relating to their licensing. However, an ordinance banning some forms of conversion therapy could be a valid use of the City's police power if it was intended to protect the wellbeing of the public. A legislative history

Alderman Cavalier Johnson  
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would have to establish the way in which conversion therapy harms the public and its detrimental effects.

The proposed ordinance attached to your opinion request appears to be very similar to the New York City Ordinance. It limits the prohibition of conversion therapy only to those treatments offered to consumers for a fee. This means that those entities/persons that offer free services to individuals, minors or adults, would be able to continue to do so under the current ordinance. In addition, the definition of conversion therapy would have to be refined. We recommend that the definition of "conversion therapy" be narrowed to mirror the California law and eliminate the references to "spiritual counseling."

The limited body of law related to prohibiting conversion therapy with minors has consistently confirmed its enforceability. It is our opinion that your ordinance proposal prohibiting the practice of conversion therapy with minors would be found by a reviewing court to be constitutionally sound. Since New York City was one of the first to apply this ban to both minors and adults, there is no case history at this time.

Please contact our office if you have any further questions or concerns.

Very truly yours,



GRANT E. LANGLEY  
City Attorney



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