



January 19, 2024

*Submitted via email MH-SOT-rules@mha.ohio.gov<sup>1</sup>*

Ohio Dept. of Mental Health and Addiction Services (MHAS)  
ATTN: Comments on Gender Transition Care Rules  
30 East Broad Street, 36<sup>th</sup> floor  
Columbus, OH 43215

**Re: Rule 5122-26-19 [Gender Transition Care]**

I am writing on behalf of Equitas Health, which is headquartered in Columbus, Ohio, to express comments and concerns with administrative rule – Rule 5122-26-19: Gender Transition Care – as proposed by Governor Mike DeWine and the Ohio Dept. of Mental Health and Addiction Services (MHAS). As noted throughout this public comment, Equitas Health is in strong opposition to all portions of this proposed administrative rule.

As you may be aware, Equitas Health is a non-profit community health center and one of the largest LGBTQ+ and HIV/AIDS serving healthcare organizations in the country. Each year, we serve tens of thousands of patients in Ohio, Texas, Kentucky, and West Virginia, and since 1984, we have been working to advance “care for all.” Our mission is to be the gateway to good health for those at risk of or affected by HIV; for the lesbian, gay, bisexual, transgender, and queer/questioning (LGBTQ+) community; and for those seeking a welcoming healthcare home. In doing so, we offer primary and specialized medical care, pharmacy services, dentistry, mental health and recovery services, HIV/STI prevention and treatment services, Ryan White HIV case management, overall care navigation, and a number of community health initiatives.<sup>2</sup> Regarding this public comment, our agency, our patients, and our broader community are concerned about this proposed rule. As one of the largest providers of gender affirming care in the Midwest, we strongly urge the Ohio Dept. of Mental Health and Addiction Services (MHAS) to fully and completely rescind all portions of this proposed administrative rule.

**Overall Recommendation: We strongly urge the Ohio Dept. of Mental Health and Addiction Services (MHAS) to fully and completely rescind all portions of this proposed administrative rule, given its numerous contradictions to evidence-based and medically recommended standards of transition-related medical care.**

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<sup>1</sup> Document prepared by Rhea Debussy, Ph.D. (she/her), Director of External. Document reviewed by Sam Brinker (he/him), General Counsel and Sarah Green (they/she), Administrative Assistant – Advancement.

<sup>2</sup> <https://equitashealth.com/about-us/>

In its current form, the proposed administrative rule fails to meet the standards of care, as outlined by leading medical associations like the World Professional Association of Transgender Health (WPATH).<sup>3</sup> As such, the proposed administrative rule would run counter to such evidence-based and medically recommended standards of care, and it would result in harm to transgender, non-binary, gender expansive, and intersex patients across the state.

Overall, the proposed administrative rule will limit access to gender affirming care services (including both physical and mental health services) and related medications that are necessary for transition-related care (i.e. hormone replacement therapy or HRT). If implemented as currently written, this proposed administrative rule will enact a *de facto* or shadow ban that dramatically impacts existing access to life-saving care and medically recommended medications, such as testosterone, estrogen, progesterone, etc. Such a draconian administrative rule, which runs counter to evidence-based and medically recommended standards of care, will place medical providers in an unethical situation, and alarmingly, it will also facilitate active harm against patients, given that this practice would go against the medical recommendations that are referenced above.

**As noted above, we strongly recommend that all portions of this proposed administrative rule be fully and completely rescinded. Below, we have provided additional details about our concerns related to each sub-section of this proposed administrative rule.**

- A. Regarding sub-section (A) of Rule 5122-26-19: We strongly recommend that all portions of sub-section (A) of the proposed administrative rule be fully and completely rescinded.** In addition to the concerns noted above, sub-section (A) relies upon a number of outdated terms (i.e. ‘biological sex,’ and ‘birth sex’) in (A)(1).<sup>4</sup> Further, the language in (A)(3) unfairly targets evidence-based healthcare services for transgender, non-binary, and gender expansive people, while also containing provisions that will indirectly impact access to care for intersex people among others. There are similar concerns with the language used in (A)(6), and such issues – which largely stem from a hastily and poorly crafted set of proposed administrative rules – would also create unintended impacts on other people (i.e. cisgender people receiving reproductive surgical like vasectomies and hysterectomies). In addition to limiting access to care for transgender, non-binary, gender expansive, and intersex people, the language set forth in (A)(6)(a) and (A)(6)(b) would place an undue burden on medical providers. And finally, we remain deeply concerned with how this language specifically targets patients receiving gender affirming care services, while also placing an undue burden upon those associated with said services. Given all of this, this portion of the proposed administrative rule may directly conflict with several areas of existing federal and state law, such as the Equal Protection Clause of the 14<sup>th</sup> Amendment

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<sup>3</sup> See WPATH’s *Standards of Care for the Health of Transgender and Gender Diverse People*, version 8. 2022. Taylor and Francis Group. Available at: <https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644>

<sup>4</sup> See GLAAD’s *GLAAD Media Reference Guide*, 11<sup>th</sup> edition. Available at: <https://glaad.org/reference/trans-terms>

of the U.S. Constitution,<sup>5</sup> Section 1557 of the Affordable Care Act (ACA),<sup>6</sup> and Section 22 of the Bill of Rights of the Ohio Constitution (i.e. “The Right to Reproductive Freedom with Protections for Health and Safety”).<sup>7</sup>

- B. Regarding sub-section (B) of Rule 5122-26-19: We strongly recommend that all portions of sub-section (B) of the proposed administrative rule be fully and completely rescinded.** In addition to the concerns noted above, the entirety of sub-section (B) relies upon outdated information about evidence-based and medically recommended standards of care, while also placing an undue burden on both medical providers and their patients.<sup>8</sup> More specifically, (B)(1) should follow the medically recommended standards of care set forth by WPATH, and mental health requirements should not extend beyond those already in place for surgical care. Further, (B)(2) should be completely struck, given that it is out-of-line with existing evidence-based and medically recommended standards of care already in practice across the country. Similarly, (B)(3) should also be completely struck for the same reasons. Regarding (B)(3), this portion of the proposed rule would place an exceptional undue burden on medical providers and patients, given the lack of readily available bioethicists/medical ethicists in the state. This portion of the proposed rule would have a particularly harmful impact on individual people’s health, medical providers’ ability to practice, and Ohio’s economy (i.e. because it would almost certainly force smaller practices to close for business). In addition to this, it would also have a disparate impact on transgender, non-binary, gender expansive, and intersex people of color, people in rural communities, and people with a lower socioeconomic status. Given all of this, this portion of the proposed administrative rule may directly conflict with several areas of existing federal and state law, such as the Equal Protection Clause of the 14<sup>th</sup> Amendment of the U.S. Constitution,<sup>9</sup> Section 1557 of the Affordable Care Act (ACA),<sup>10</sup> Section 22 of the Bill of Rights of the Ohio Constitution (i.e. “The Right to Reproductive Freedom with Protections for Health and Safety”),<sup>11</sup> and the 1<sup>st</sup> Amendment of the U.S. Constitution (i.e. freedom of speech in the form of symbolic speech and expression).<sup>12</sup>
- C. Regarding sub-section (C) of Rule 5122-26-19: We strongly recommend that all portions of sub-section (C) of the proposed administrative rule be fully and completely rescinded.** In addition to the concerns noted above, the entirety of sub-section (C) relies upon outdated

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<sup>5</sup> See 14<sup>th</sup> Amendment to the U.S. Constitution. National Archives and Records Administration (NARA). Available at: <https://www.archives.gov/milestone-documents/14th-amendment>

<sup>6</sup> See Section 1557 of the Patient Protection and Affordable Care Act. U.S. Dept. of Health and Human Services (HHS). Available at: <https://www.hhs.gov/civil-rights/for-individuals/section-1557/index.html>

<sup>7</sup> See Article I, Section 22 (The Right to Reproductive Freedom with Protections for Health and Safety) of the Ohio Constitution. Ohio Legislative Service Commission. Available at: <https://codes.ohio.gov/ohio-constitution/section-1.22#:~:text=Article%20I%2C%20Section%2022%20%7C%20The,Protections%20for%20Health%20and%20Safety>

<sup>8</sup> See *supra* note 3.

<sup>9</sup> See *supra* note 5.

<sup>10</sup> See *supra* note 6.

<sup>11</sup> See *supra* note 7.

<sup>12</sup> See 1<sup>st</sup> Amendment to the Bill of Rights of the U.S. Constitution. National Archives and Records Administration (NARA). Available at: <https://www.archives.gov/founding-docs/bill-of-rights-transcript>

information about evidence-based and medically recommended standards of care, while also placing an undue burden on both medical providers and their patients.<sup>13</sup> As with other portions of this proposed rule, we also question what compelling governmental interest exists for the government to restrict access to evidence-based and medically recommended care simply because a patient is under twenty-one years of age. Finally and as with other portions of this proposed administrative rule, this language may directly conflict with several areas of existing federal and state law, such as the Equal Protection Clause of the 14<sup>th</sup> Amendment of the U.S. Constitution,<sup>14</sup> Section 1557 of the Affordable Care Act (ACA),<sup>15</sup> Section 22 of the Bill of Rights of the Ohio Constitution (i.e. “The Right to Reproductive Freedom with Protections for Health and Safety”),<sup>16</sup> and the 1<sup>st</sup> Amendment of the U.S. Constitution (i.e. freedom of speech in the form of symbolic speech and expression).<sup>17</sup>

**D. Regarding sub-section (D) of Rule 5122-26-19: We strongly recommend that all portions of sub-section (D) of the proposed administrative rule be fully and completely rescinded.** The entirety of sub-section (D) relies upon outdated information about evidence-based and medically recommended standards of care, since the surgeries in question are not occurring in the state of Ohio. As such, this portion of the proposed administrative rule is completely redundant and unnecessary, so it should be completely struck. Further, the language in (D)(1) may be interpreted as a ‘gag order’ for medical providers, and in addition to placing an undue burden upon them, this would both unfairly restrict speech and limit the information provided to patients. Given this, the language may directly conflict with several areas of existing federal and state law, such as Section 22 of the Bill of Rights of the Ohio Constitution (i.e. “The Right to Reproductive Freedom with Protections for Health and Safety”)<sup>18</sup> and the 1<sup>st</sup> Amendment of the U.S. Constitution (i.e. freedom of speech in the form of both direct speech and/or symbolic speech and expression).<sup>19</sup>

**E. Regarding sub-section (E) of Rule 5122-26-19: We strongly recommend that all portions of sub-section (E) of the proposed administrative rule be fully and completely rescinded.** The entirety of sub-section (E) – in addition to much of the language used within the sub-section – would facilitate the creation of medical policies that rely upon outdated information about medical care for intersex patients.<sup>20</sup> If implemented as written, the language used in (E) would allow intersex minors to access some forms of medical care; however, the language in (E) would specifically also disallow intersex adults to access such forms of medical care. Additionally, (E)(1) has an unusually narrow understanding of intersex

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<sup>13</sup> See *supra* note 3.

<sup>14</sup> See *supra* note 5.

<sup>15</sup> See *supra* note 6.

<sup>16</sup> See *supra* note 7.

<sup>17</sup> See *supra* note 12.

<sup>18</sup> See *supra* note 7.

<sup>19</sup> See *supra* note 12.

<sup>20</sup> See interAct and Lamda Legal’s *Providing Ethical and Compassionate Health Care to Intersex Patients: Intersex-Affirming Hospital Policies*. 2018. Available at:

[https://legacy.lambdalegal.org/sites/default/files/publications/downloads/resource\\_20180731\\_hospital-policies-intersex.pdf](https://legacy.lambdalegal.org/sites/default/files/publications/downloads/resource_20180731_hospital-policies-intersex.pdf)

identities and variations, and the language in (E)(1) would unfairly restrict access to many intersex patients, so (E)(1) should be completely struck.<sup>21</sup> Similarly, (E)(2) should also be completely struck for the same reasons. Finally, the language used in (E), as currently written, would also protect medical providers and surgeons, who perform medically unnecessary and often non-consensual surgeries on intersex newborns and children.<sup>22</sup> Given all of this, this portion of the proposed administrative rule may directly conflict with several areas of existing federal and state law, such as the Equal Protection Clause of the 14<sup>th</sup> Amendment of the U.S. Constitution,<sup>23</sup> Section 1557 of the Affordable Care Act (ACA),<sup>24</sup> Section 22 of the Bill of Rights of the Ohio Constitution (i.e. “The Right to Reproductive Freedom with Protections for Health and Safety”),<sup>25</sup> and state malpractice law.<sup>26</sup>

**F. Regarding sub-section (F) of Rule 5122-26-19: We strongly recommend that all portions of sub-section (F) of the proposed administrative rule be fully and completely rescinded.** In addition to the concerns noted throughout this comment, the practices described in this portion of the proposed administrative rule raise a number of ethical questions and patient privacy concerns. As such, this portion of the proposed administrative rule may directly conflict with further areas of federal law, such as 1<sup>st</sup> Amendment of the U.S. Constitution (i.e. implicit protections related to the right to privacy)<sup>27</sup> and the Health Insurance Portability and Accountability Act (HIPAA).<sup>28</sup>

**G. Regarding sub-section (G) of Rule 5122-26-19: We strongly recommend that all portions of sub-section (G) of the proposed administrative rule be fully and completely rescinded.** Most notably, the language crafted in (G) appears to be ill-advised, as it would create a grandparent clause for only existing patients who are twenty years of age or younger (i.e. not for those who are twenty-one years of age or older). If enacted as currently written, the proposed administrative rule would disallow existing transgender, non-binary, gender expansive, and intersex patients – who are twenty-one years of age or older – from continuing their existing medical care without any undue burdens from the state. As such, (G) should be completely struck. In addition to being bewildering in nature, this portion of the proposed administrative rule may directly conflict with several areas of existing federal and state law, such as the Equal Protection Clause of the 14<sup>th</sup> Amendment of the U.S.

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<sup>21</sup> See the Intersex Society of North America’s (ISNA’s) “What is Intersex?” Available at: [https://isna.org/faq/what\\_is\\_intersex/](https://isna.org/faq/what_is_intersex/); see also interAct’s “Intersex Variations Glossary.” 2022. Available at: <https://interactadvocates.org/wp-content/uploads/2022/10/Intersex-Variations-Glossary.pdf>

<sup>22</sup> See Human Rights Watch’s “Intersex Children.” Available at: <https://www.hrw.org/topic/childrens-rights/intersex-children>

<sup>23</sup> See *supra* note 5.

<sup>24</sup> See *supra* note 6.

<sup>25</sup> See *supra* note 7.

<sup>26</sup> See Ohio Revised Code Section 2305.113: Medical Malpractice Actions. Available at: <https://codes.ohio.gov/ohio-revised-code/section-2305.113>

<sup>27</sup> See *supra* note 12.

<sup>28</sup> See Health Information Privacy. U.S. Dept. of Health and Human Services (HHS). Available at: <https://www.hhs.gov/hipaa/index.html>

Constitution,<sup>29</sup> Section 1557 of the Affordable Care Act (ACA),<sup>30</sup> Section 22 of the Bill of Rights of the Ohio Constitution (i.e. “The Right to Reproductive Freedom with Protections for Health and Safety),<sup>31</sup> and the 1<sup>st</sup> Amendment of the U.S. Constitution (i.e. freedom of speech in the form of symbolic speech and expression).<sup>32</sup>

**Concluding Remarks: To conclude, we strongly recommend that the Ohio Dept. of Mental Health and Addiction Services (MHAS) do the following:**

- 1) Fully and completely rescind all portions of this proposed administrative rule, given its numerous contradictions to evidence-based and medically recommended standards of transition-related medical care.**

Equitas Health would like to thank you for this opportunity to present comments and concerns on the proposed administrative rule. Should you have any questions about our comments, please feel free to contact Dr. Rhea Debussy (she/her), Director of External Affairs at Equitas Health.

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<sup>29</sup> See *supra* note 5.

<sup>30</sup> See *supra* note 6.

<sup>31</sup> See *supra* note 7.

<sup>32</sup> See *supra* note 12.