



February 5, 2024

*Submitted via email [ODHrules.odh.ohio.gov](mailto:ODHrules.odh.ohio.gov)<sup>1</sup>*

Ohio Dept. of Health (ODH)  
ATTN: Comments on Gender Transition Care Rules  
246 N High Street  
Columbus, OH 43215

**Re: Rule 3701-3-17 [Reporting Gender-Related Condition Diagnosis and Gender Transition Care], Rule 3701-59-07 [Quality Standards for Gender Transition Treatment at Hospital], and Rule 3701-83-61 [Quality Standards for Gender Transition Treatment at Health Care Facilities]**

I am writing on behalf of Equitas Health, which is headquartered in Columbus, Ohio, to express comments and concerns with administrative rules – Rule 3701-3-17: Reporting Gender-Related Condition Diagnosis and Gender Transition Care, Rule 3701-59-07: Quality Standards for Gender Transition Treatment at Hospital, and Rule 3701-83-61: Quality Standards for Gender Transition Treatment at Health Care Facilities – as proposed by Governor Mike DeWine and the Ohio Dept. of Health (ODH). As noted throughout this public comment, Equitas Health is in strong opposition to all portions of these proposed administrative rules.

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 these proposed rules. As one of the largest providers of gender affirming care in the Midwest, we strongly urge the Ohio Dept. of Health (ODH) to fully and completely rescind all portions of these proposed administrative rules.

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

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

**Overall Recommendation: We strongly urge the Ohio Dept. of Health (ODH) to fully and completely rescind all portions of these proposed administrative rules, given their numerous contradictions to evidence-based and medically recommended standards of transition-related medical care.**

In their current form, the proposed administrative rules fail 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 rules would run counter to such evidence-based and medically recommended standards of care, and they would result in harm to transgender, non-binary, gender expansive, and intersex patients across the state.

Overall, the proposed administrative rules will limit access to gender affirming care services (including both physical and mental health services for youth and adults) 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 draconian administrative rules, which runs counter to evidence-based and medically recommended standards of care, will place medical providers in an unethical situation, and alarmingly, they will also facilitate active harm against patients, given that these practices would go against the medical recommendations that are referenced above.

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

## **1. Rule 3701-3-17 [Reporting Gender-Related Condition Diagnosis and Gender Transition Care]**

- A. Regarding sub-section (A) of Rule 3701-3-17: 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)-(A)(4) 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)(7), 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

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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>

hysterectomies). In addition to limiting access to care for transgender, non-binary, gender expansive, and intersex people, the language set forth in (A)(7)(a) and (A)(7)(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 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 3701-3-17: 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 throughout this comment, the practices described in this portion of the proposed administrative rule raise a number of ethical questions and patient privacy concerns, while also creating an undue reporting burden with an overly restrictive thirty-day timeline for such reporting. As such, this portion of the proposed administrative rule may directly conflict with 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>8</sup> and the Health Insurance Portability and Accountability Act (HIPAA).<sup>9</sup>
- C. Regarding sub-section (C) of Rule 3701-3-17: 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 throughout this comment, the practices described in this portion of the proposed administrative rule raise a number of ethical questions and patient privacy concerns, while also creating an undue reporting burden with an overly cumbersome amount of patient and treatment information. As such, this portion of the proposed administrative rule may directly conflict with areas of federal law, such as 1<sup>st</sup> Amendment of the U.S.

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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 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>

<sup>9</sup> See Health Information Privacy. U.S. Dept. of Health and Human Services (HHS). Available at: <https://www.hhs.gov/hipaa/index.html>

Constitution (i.e. implicit protections related to the right to privacy)<sup>10</sup> and the Health Insurance Portability and Accountability Act (HIPPA).<sup>11</sup>

**D. Regarding sub-section (D) of Rule 3701-3-17: We strongly recommend that all portions of sub-section (D) 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, while also creating an undue reporting burden with an overly cumbersome amount of patient and treatment information. We strongly hold the position that such data should not be collected by the government and/or shared with the General Assembly, given numerous ethical and patient privacy concerns. As such, this portion of the proposed administrative rule may directly conflict with 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>12</sup> and the Health Insurance Portability and Accountability Act (HIPPA).<sup>13</sup>

**E. Regarding sub-section (E) of Rule 3701-3-17: We strongly recommend that all portions of sub-section (E) of the proposed administrative rule be fully and completely rescinded.** In addition to the concerns noted throughout this comment, this portion of the proposed administrative rule still raises a number of concerns. Given the reporting requirements noted in sub-sections (B), (C), and (D), even aggregate data can inadvertently release personally identifiable and protected health information in certain circumstances, such as those described throughout this proposed administrative rule. For instance, aggregate data can be split for the purposes of analysis, and when certain variables (i.e. location, age, sex assigned at birth, gender identity, etc.) are controlled for, this could presumably allow individuals to make inferences that jeopardize the privacy of individual patients within aggregate data samples. As such, this portion of the proposed administrative rule may directly conflict with 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>14</sup> and the Health Insurance Portability and Accountability Act (HIPPA).<sup>15</sup>

## **2. Rule 3701-59-07 [Quality Standards for Gender Transition Treatment at Hospital**

**A. Regarding sub-section (A) of Rule 3701-59-07: 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

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<sup>10</sup> See *supra* note 8.

<sup>11</sup> See *supra* note 9.

<sup>12</sup> See *supra* note 8.

<sup>13</sup> See *supra* note 9.

<sup>14</sup> See *supra* note 8.

<sup>15</sup> See *supra* note 9.

(A)(1).<sup>16</sup> Further, the language in (A)(3)-(A)(4) 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)(7), 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)(7)(a) and (A)(7)(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 of the U.S. Constitution,<sup>17</sup> Section 1557 of the Affordable Care Act (ACA),<sup>18</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>19</sup>

**B. Regarding sub-section (B) of Rule 3701-59-07: 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>20</sup> More specifically, (B)(1) should follow the medically recommended standards of care set forth by WPATH and diagnostic criteria set forth by the American Psychological Association (APA).<sup>21</sup> 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. 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>22</sup> Section 1557 of the Affordable Care Act (ACA),<sup>23</sup> Section 22 of the Bill of Rights of the Ohio Constitution (i.e. “The Right to Reproductive Freedom with Protections for Health

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<sup>16</sup> See *supra* note 4.

<sup>17</sup> See *supra* note 5.

<sup>18</sup> See *supra* note 6.

<sup>19</sup> See *supra* note 7.

<sup>20</sup> See *supra* note 3.

<sup>21</sup> See APA’s *Diagnostic and Statistical Manual of Mental Disorders* 5<sup>th</sup> edition, text revision (DSM-5-TR). 2022. Available at: [https://www.appi.org/Products/DSM-Library/Diagnostic-and-Statistical-Manual-of-Mental-Di-\(1\)?sku=2576](https://www.appi.org/Products/DSM-Library/Diagnostic-and-Statistical-Manual-of-Mental-Di-(1)?sku=2576)

<sup>22</sup> See *supra* note 5.

<sup>23</sup> See *supra* note 6.

and Safety),<sup>24</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>25</sup>

**C. Regarding sub-section (C) of Rule 3701-59-07: 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 information about evidence-based and medically recommended standards of care, while also placing an undue burden on both medical providers and their patients.<sup>26</sup> More specifically, (C)(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. Further, (C)(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, (C)(3) should also be completely struck for the same reasons. Regarding (C)(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>27</sup> Section 1557 of the Affordable Care Act (ACA),<sup>28</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>29</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>30</sup>

**D. Regarding sub-section (D) of Rule 3701-59-07: We strongly recommend that all portions of sub-section (D) of the proposed administrative rule be fully and completely rescinded.** In addition to the concerns noted above, the entirety of sub-section (D) 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>31</sup> As with other portions of this proposed rule,

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<sup>24</sup> See *supra* note 7.

<sup>25</sup> See *supra* note 8.

<sup>26</sup> See *supra* note 3.

<sup>27</sup> See *supra* note 5.

<sup>28</sup> See *supra* note 6.

<sup>29</sup> See *supra* note 7.

<sup>30</sup> See *supra* note 8.

<sup>31</sup> See *supra* note 3.

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>32</sup> Section 1557 of the Affordable Care Act (ACA),<sup>33</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>34</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>35</sup>

**E. Regarding sub-section (E) of Rule 3701-59-07: We strongly recommend that all portions of sub-section (E) of the proposed administrative rule be fully and completely rescinded.** In addition to the concerns noted above, the entirety of sub-section (E) 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>36</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 eighteen years of age.<sup>37</sup> Furthermore, sub-section (E) relies upon information from sub-sections (B) and (C) to which we have already expressed strong opposition. 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>38</sup> Section 1557 of the Affordable Care Act (ACA),<sup>39</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>40</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>41</sup>

**F. Regarding sub-section (F) of Rule 3701-59-07: We strongly recommend that all portions of sub-section (F) of the proposed administrative rule be fully and**

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<sup>32</sup> See *supra* note 5.

<sup>33</sup> See *supra* note 6.

<sup>34</sup> See *supra* note 7.

<sup>35</sup> See *supra* note 8.

<sup>36</sup> See *supra* note 3.

<sup>37</sup> Note: This portion of the proposed administrative rule references “minors,” while other portions of it reference twenty-one years of age or words like “adult.” This clarifying note has been offered to ensure that the reader is aware that these are inconsistent distinctions within the proposed administrative rule, rather than an error in the public comment.

<sup>38</sup> See *supra* note 5.

<sup>39</sup> See *supra* note 6.

<sup>40</sup> See *supra* note 7.

<sup>41</sup> See *supra* note 8.

**completely rescinded.** The entirety of sub-section (F) 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 (F)(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>42</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>43</sup>

**G. Regarding sub-section (G) of Rule 3701-59-07: We strongly recommend that all portions of sub-section (G) of the proposed administrative rule be fully and completely rescinded.** As noted throughout this public comment, there are a number of issues with this proposed administrative rule. Sub-section (G) is completely reliant upon the information in sub-sections (B) and (C), and given the concerns that we have enumerated with both sub-sections (B) and (C), sub-section (G) should be completely struck. In short, this redundant sub-section – because of its reliance upon sub-sections (B) and (C) – pose a number of potential legal concerns. More specifically, this portion of the proposed administrative rule 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>44</sup> Section 1557 of the Affordable Care Act (ACA),<sup>45</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>46</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>47</sup>

**H. Regarding sub-section (H) of Rule 3701-59-07: We strongly recommend that all portions of sub-section (H) of the proposed administrative rule be fully and completely rescinded.** The entirety of sub-section (H) – in addition to much of the language used within the sub-section – would facilitate the creation of medical policies and practices that rely upon outdated information about medical care for intersex patients.<sup>48</sup> If implemented as written, the language used in (H) would allow

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<sup>42</sup> See *supra* note 7.

<sup>43</sup> See *supra* note 8.

<sup>44</sup> See *supra* note 5.

<sup>45</sup> See *supra* note 6.

<sup>46</sup> See *supra* note 7.

<sup>47</sup> See *supra* note 8.

<sup>48</sup> See interAct and Lamda Legal’s *Providing Ethical and Compassionate Health Care to Intersex Patients: Intersex-Affirming Hospital Policies*. 2018. Available at:



intersex minors to access some forms of medical care; however, the language in (H) would specifically also disallow intersex adults to access such forms of medical care. Additionally, (H)(1) has an unusually narrow understanding of intersex identities and variations, and the language in (H)(1) would unfairly restrict access to many intersex patients, so (H)(1) should be completely struck.<sup>49</sup> Similarly, (H)(2) should also be completely struck for the same reasons. Finally, the language used in (H), 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>50</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>51</sup> Section 1557 of the Affordable Care Act (ACA),<sup>52</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>53</sup> and state malpractice law.<sup>54</sup>

### **3. Rule 3701-83-61 [Quality Standards for Gender Transition Treatment at Health Care Facilities]**

- A. Regarding sub-section (A) of Rule 3701-83-61: 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>55</sup> Further, the language in (A)(3)-(A)(4) 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)(7), 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)(7)(a) and (A)(7)(b) would place an undue burden on medical providers. And finally, we remain deeply concerned with how this language specifically targets patients

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[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)

<sup>49</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>50</sup> See Human Rights Watch’s “Intersex Children.” Available at: <https://www.hrw.org/topic/childrens-rights/intersex-children>

<sup>51</sup> See *supra* note 5.

<sup>52</sup> See *supra* note 6.

<sup>53</sup> See *supra* note 7.

<sup>54</sup> See Ohio Revised Code Section 2305.113: Medical Malpractice Actions. Available at: <https://codes.ohio.gov/ohio-revised-code/section-2305.113>

<sup>55</sup> See *supra* note 4.

receiving gender affirming care services, while also placing an undue burden upon those associated with said services. Further, the definitions set forth in (A)(8) are particularly perplexing, particularly in reference to (A)(8)(b) and (A)(8)(e). 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>56</sup> Section 1557 of the Affordable Care Act (ACA),<sup>57</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>58</sup>

- B. Regarding sub-section (B) of Rule 3701-83-61: 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>59</sup> More specifically, (B)(1) should follow the medically recommended standards of care set forth by WPATH and diagnostic criteria set forth by the American Psychological Association (APA).<sup>60</sup> 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. 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>61</sup> Section 1557 of the Affordable Care Act (ACA),<sup>62</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>63</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>64</sup>
- C. Regarding sub-section (C) of Rule 3701-83-61: 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 information about evidence-based and medically recommended standards of care, while also placing an undue burden on both medical providers and their patients.<sup>65</sup> More specifically, (C)(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. Further, (C)(2) should be completely struck, given

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<sup>56</sup> See *supra* note 5.

<sup>57</sup> See *supra* note 6.

<sup>58</sup> See *supra* note 7.

<sup>59</sup> See *supra* note 3.

<sup>60</sup> See *supra* note 21.

<sup>61</sup> See *supra* note 5.

<sup>62</sup> See *supra* note 6.

<sup>63</sup> See *supra* note 7.

<sup>64</sup> See *supra* note 8.

<sup>65</sup> See *supra* note 3.

that it is out-of-line with existing evidence-based and medically recommended standards of care already in practice across the country. Similarly, (C)(3) should also be completely struck for the same reasons. Regarding (C)(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>66</sup> Section 1557 of the Affordable Care Act (ACA),<sup>67</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>68</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>69</sup>

**D. Regarding sub-section (D) of Rule 3701-83-61: We strongly recommend that all portions of sub-section (D) of the proposed administrative rule be fully and completely rescinded.** In addition to the concerns noted above, the entirety of sub-section (D) 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>70</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>71</sup> Section 1557 of the Affordable Care Act (ACA),<sup>72</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>73</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>74</sup>

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<sup>66</sup> See *supra* note 5.

<sup>67</sup> See *supra* note 6.

<sup>68</sup> See *supra* note 7.

<sup>69</sup> See *supra* note 8.

<sup>70</sup> See *supra* note 3.

<sup>71</sup> See *supra* note 5.

<sup>72</sup> See *supra* note 6.

<sup>73</sup> See *supra* note 7.

<sup>74</sup> See *supra* note 8.

- E. Regarding sub-section (E) of Rule 3701-83-61: We strongly recommend that all portions of sub-section (E) of the proposed administrative rule be fully and completely rescinded.** In addition to the concerns noted above, the entirety of sub-section (E) 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>75</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 eighteen years of age.<sup>76</sup> Furthermore, sub-section (E) relies upon information from sub-sections (B) and (C) to which we have already expressed strong opposition. 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>77</sup> Section 1557 of the Affordable Care Act (ACA),<sup>78</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>79</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>80</sup>
- F. Regarding sub-section (F) of Rule 3701-83-61: We strongly recommend that all portions of sub-section (F) of the proposed administrative rule be fully and completely rescinded.** The entirety of sub-section (F) 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 (F)(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>81</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>82</sup>

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<sup>75</sup> See *supra* note 3.

<sup>76</sup> Note: This portion of the proposed administrative rule references “minors,” while other portions of it reference twenty-one years of age or words like “adult.” This clarifying note has been offered to ensure that the reader is aware that these are inconsistent distinctions within the proposed administrative rule, rather than an error in the public comment.

<sup>77</sup> See *supra* note 5.

<sup>78</sup> See *supra* note 6.

<sup>79</sup> See *supra* note 7.

<sup>80</sup> See *supra* note 8.

<sup>81</sup> See *supra* note 7.

<sup>82</sup> See *supra* note 8.

**G. Regarding sub-section (G) of Rule 3701-83-61: We strongly recommend that all portions of sub-section (G) of the proposed administrative rule be fully and completely rescinded.** As noted throughout this public comment, there are a number of issues with this proposed administrative rule. Sub-section (G) is completely reliant upon the information in sub-sections (B) and (C), and given the concerns that we have enumerated with both sub-sections (B) and (C), sub-section (G) should be completely struck. In short, this redundant sub-section – because of its reliance upon sub-sections (B) and (C) – pose a number of potential legal concerns. More specifically, this portion of the proposed administrative rule 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>83</sup> Section 1557 of the Affordable Care Act (ACA),<sup>84</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>85</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>86</sup>

**H. Regarding sub-section (H) of Rule 3701-83-61: We strongly recommend that all portions of sub-section (H) of the proposed administrative rule be fully and completely rescinded.** The entirety of sub-section (H) – in addition to much of the language used within the sub-section – would facilitate the creation of medical policies and practices that rely upon outdated information about medical care for intersex patients.<sup>87</sup> If implemented as written, the language used in (H) would allow intersex minors to access some forms of medical care; however, the language in (H) would specifically also disallow intersex adults to access such forms of medical care. Additionally, (H)(1) has an unusually narrow understanding of intersex identities and variations, and the language in (H)(1) would unfairly restrict access to many intersex patients, so (H)(1) should be completely struck.<sup>88</sup> Similarly, (H)(2) should also be completely struck for the same reasons. Finally, the language used in (H), 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>89</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>90</sup> Section 1557 of the Affordable Care Act (ACA),<sup>91</sup> Section 22 of the

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<sup>83</sup> See *supra* note 5.

<sup>84</sup> See *supra* note 6.

<sup>85</sup> See *supra* note 7.

<sup>86</sup> See *supra* note 8.

<sup>87</sup> See *supra* note 48.

<sup>88</sup> See *supra* note 49.

<sup>89</sup> See *supra* note 50.

<sup>90</sup> See *supra* note 5.

<sup>91</sup> See *supra* note 6.

Bill of Rights of the Ohio Constitution (i.e. “The Right to Reproductive Freedom with Protections for Health and Safety”),<sup>92</sup> and state malpractice law.<sup>93</sup>

**Concluding Remarks: To conclude, we strongly recommend that the Ohio Dept. of Health (ODH) does 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>92</sup> See *supra* note 7.

<sup>93</sup> See *supra* note 54.