PUBLIC COMMENT

March 21, 2024
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Against proposed rules that will harm trans adults and kids

Public comment on rules proposed by the Ohio Department of Mental Health and Addiction Services and the Ohio Department of Health

Correction (March 22, 2024)
The original version of this comment incorrectly stated the share of participants in a 2022 study who had, within five years of transitioning, transitioned back to the sex they were assigned at birth. The study found just 2.5% of participants "de-transitioned." The full study is available here. We regret the error.

The proposed rules by the Ohio Department of Mental Health and Addiction Services (5122-26-19)[1] and the Ohio Department of Health (3701-3-17)[2] will add harmful new regulations to those already contained in House Bill 68.[3] As a result, transgender and nonbinary youth will face additional barriers to critical health care, and adults will have their private health information collected and shared, likely in violation of state and federal law. When taken together, these rules will endanger the lives, health and privacy of transgender people in Ohio.

In particular, the data reporting requirements create undue burdens for Black trans people. Put simply, American medicine has earned the mistrust of Black people.[4] A long history of abuse, forced sterilization, and state-sponsored medical experiments have given Black Americans ample reason to be skeptical, even fearful, of unnecessary engagement with the health care system.[5] The data requirements also resonate with historic and contemporary over-surveillance of Black communities.[6] While subtler than other barriers to care created by HB 68, these are no less certain to harm trans Ohioans. By activating generational trauma, they target exactly the people on whom bad policies and malpractice have converged for centuries.

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[1] Ohio Department of Mental Health Services Proposed Rule (5122-26-19) can be found at https://mha.ohio.gov/static/AboutUs/RulesandRegulations/DraftRules/5122-26-19-Final_01052024.pdf

[2] Proposed Rule 3701-3-17, Ohio Department of Health 2024. Can be found at: https://odh.ohio.gov/wps/wcm/connect/gov/9b217d95-bcc9-483f-8771-f4786bb93b56/Post+for+Public+Comment+3%2C+59%2C+83.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-9b217d95-bcc9-483f-8771-f4786bb93b56-oPs34Gv

[3] Ohio House Bill 68 (135th GA) As Enrolled Can be Found at: Ohio Legislature HB 68

[4] The Movement for Black Lives (2024). End the War on Black Health. Can be found at: https://m4bl.org/policy-platforms/end-the-war-black-health/

[5] Washington, H. A. (2006). Medical apartheid: the dark history of medical experimentation on Black Americans from colonial times to the present. New York, Doubleday.

[6] BROWNE, S. (2015). Dark Matters: On the Surveillance of Blackness. Duke University Press. https://doi.org/10.2307/j.ctv11cw89p BROWNE, S. (2015). Dark Matters: On the Surveillance of Blackness. Duke University Press. https://doi.org/10.2307/j.ctv11cw89p

Heightened suicide risk for trans youth, disproportionate harm to Black trans youth
Research consistently indicates that transgender youth are at a heightened risk of suicide. According to the Ohio Health Policy Institute, LGBTQ+ youth in Ohio are five times more likely to consider suicide and four times more likely to attempt suicide than heterosexual youth.[7]

The odds are even more stacked against Black trans and gender-diverse children. The Trevor Project's 2022 National Survey on LGBTQ Youth Mental Health found that one in four Black transgender and nonbinary young people reported a suicide attempt in the past year.[8]

Research suggests that receiving gender-affirming care reduces the risk of suicidal thoughts and suicide attempts.[9] The proposed rules would make it harder for trans youth to access this potentially life-saving care.

Being trans or nonbinary does not **cause** young people to be more likely than their peers to consider and commit suicide. This result is the consequence of various factors, including family neglect, social exclusion and mistreatment, and "self-stigma."[10] These conditions are a natural result of a culture that consistently reinforces the belief that trans kids do not belong. The proposed rules — and HB 68 itself — contribute to this culture of cruelty to LGBTQ+ kids. By formalizing practices that reinforce prejudice and impede access to care, the proposed rules are themselves examples of systemic bias against trans kids and adults.

Reporting protected health information violates state and federal law
Changes to the rule's language[11] have done little to address concerns about the type, form, and quantity of medical information being requested, and the ways that information could be used to harm transgender adults and youth.

Requiring medical providers to share a patient's personal health information with health departments and the legislature is a violation of individual medical privacy that goes well beyond what's typically aggregated for the Department of Health, especially in terms of what's considered *protected health information.*[12] Given the detail of the data being provided to the health department, including intimate details like age, medications, and providers, it's likely the data being provided falls under the definition of protected health

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[7] The Ohio Health Policy Institute (2023). Ohio Health Value Dashboard can be found at https://www.healthpolicyohio.org/wp-content/uploads/2023/04/2023HealthValueDashboard_Final.pdf
[8] The Trevor Project (2023) Mental Health of Black Transgender and Nonbinary Young People. Can be found at: https://www.thetrevorproject.org/research-briefs/mental-health-of-black-transgender-and-nonbinary-young-people-feb-2023/
[9] Williams Insitute (2015). Suicide Thoughts and Attempts Among Transgender Adults. Can be found at: https://williamsinstitute.law.ucla.edu/publications/suicidality-transgender-adults/
[10] Austin, A., Craig, S. L., D'Souza, S., & McInroy, L. B. (2022). Suicidality among transgender youth: Elucidating the role of interpersonal risk factors. Journal of interpersonal violence, 37(5-6), NP2696-NP2718. Can be found at https://pubmed.ncbi.nlm.nih.gov/32345113/
[11] Proposed Rule 3701-3-17, Ohio Department of Health 2024. Can be found at: https://odh.ohio.gov/wps/wcm/connect/gov/9b217d95-bcc9-483f-8771-f4786bb93b56/Post+for+Public+Comment+3%2C+59%2C+83.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-9b217d95-bcc9-483f-8771-f4786bb93b56-oPs34Gv
[12] ORC Sec. 3701.17 (A)(2).

information – even when aggregated and deidentified – due to the small population size (especially outside of major city centers).

Protected health information[13] is defined as "information, in any form, including oral, written, electronic, visual, pictorial, or physical that describes an individual's past, present, or future physical or mental health status or condition, receipt of treatment or care, or purchase of health products." The exemption[14] for information that "the (health) director determines…is necessary…to avert or mitigate a clear threat to an individual or to the public health" requires that the information only be released "to those persons or entities necessary to control, prevent, or mitigate disease." *Gender dysphoria* and *gender-related condition[s]* do not meet these simple criteria: They are neither diseases nor do they threaten public health.

The ORC's current definition of *public records,*[15]exempts *medical records,*[16] defined as "any document or combination of documents…that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment." In federal law, *Protected health information*[17] includes "a claim for payment for a health care product, service, or procedure, as well as any other health claims data in another document that reveals the identity of an individual who is the subject of the data or **could be used to reveal that individual's identity.**"[18] Once again, due to the specificity of the data, such as age, a person's individual care plan, medication dosage, sex, and other characteristics being reported, the risk of data triangulation — the practice of matching multiple sources of data to identify an individual — is extremely high, especially in areas with small populations, including rural regions of the state.

The proposed rule specifically states that the records being reported will be released to the general assembly and the public twice a year. While the following line in the proposed rule specifies that the information shared must adhere to the already existing statute about *protected health information*, given the nature and specificity of that data, it will be impossible to comply. The government interest in collecting the medical information of transgender people in Ohio to this level of detail is zero, and it should not supersede Ohioans' medical privacy.

Manipulated data is fodder for a false narrative about transgender Ohioans

While some minor adjustments were made to rules during the revision process, the proposed draft rules published by the Ohio Department of Health (ODH) 3701-3-17[19] still outline extreme reporting requirements for physicians providing gender affirming care

[13] ORC Sec. 3701.17 (A)(2).
[14] ORC Sec. 3701.17 (B)(4).
[15] ORC Sec. 149.43 (A)(1)(a) "Medical Records"
[16] ORC Sec. 5120.21 (C)(1), ORC Sec. 3701.74 (A)(8)
[17] ORC Sec. 149.43 (A)(1)(hh)
[18] 45 C.F.R. 160.103
[19] Proposed Rule 3701-3-17, Ohio Department of Health 2024. Can be found at: https://odh.ohio.gov/wps/wcm/connect/gov/9b217d95-bcc9-483f-8771-f4786bb93b56/Post+for+Public+Comment+3%2C+59%2C+83.pdf?MOD=AJPERES&CONVERT_TO=url&CACHEID=ROOTWORKSPACE.Z18_M1HGGIK0N0JO00QO9DDDDM3000-9b217d95-bcc9-483f-8771-f4786bb93b56-oPs34Gv

that will make data misreporting likely and overcomplicate providing safe, best practice medical care for adults.[20] The patient data collected from physicians could also be misrepresented as evidence of a false narrative about “detransitioning” that is not supported by evidence.[21]

The department’s proposed definition of *sex* within the rule will limit the department’s ability to accurately collect the data in question, since the definition explicitly excludes gender diverse populations, including transgender individuals, nonbinary individuals, and intersex people. This will lead to misclassification, particularly of those whose medical and legal records have already been updated to match their gender identity.

Some patient data that reflects common changes in treatment could be misconstrued or misrepresented as evidence of “detransitioning,” a term misapplied to anyone who pauses or stops medical treatment related to gender affirming care. Along with unusably murky data, this provides fodder for false narratives invented by anti-trans extremists to rationalize further abuse of transgender Ohioans.

Patients and doctors decide to pause treatment, change providers, and adjust dosage for a multitude of reasons, including insurance changes, relocation, changes in a person’s medical history outside of their transition, side effects, and other natural changes over the course of a person’s treatment. These changes in a patient's care plan often do not indicate a change in identity. Many people described as detransitioning still identify as transgender,[22] and many resume transition-related medical care later.

Being transgender can include binary (male to female or female to male) and nonbinary (gender diverse or in-between) experiences that often require exploration with the help of a medical provider over time. But the proposed rules would count **all** of these situations as signs of detransition in their data collection, possibly creating trends where there are none. In **no other situation** would we use a change in someone’s dosage or trying a different medication as an indication that someone is no longer receiving treatment for a diagnosis.

In other cases, “detransitioners” are acting under duress. A study from 2021[23] showed that people who cease treatment typically have an external reason for doing so, such as family or social pressure, or securing employment. Among Black transgender and nonbinary young people, 68% experienced pressure to detransition, stop treatment, or otherwise deny their sexual orientation. Parents and non-LGBTQ+ friends were the most common sources of pressure.[24]

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[20] Matouk and Wald (2022). Gender Affirming Care Saves Lives. Columbia University. Can be found at: https://www.columbiapsychiatry.org/news/gender-affirming-care-saves-lives

[21] James, S. E., Herman, J. L., Rankin, S., Keisling, M., Mottet, L., & Anafi, M. (2016). The Report of the 2015 U.S. Transgender Survey. Washington, DC: National Center for Transgender Equality. Can be found at: https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf

[22] Alfonseca, K. (2022). Former Detransitioner Fights Anti-Transgender Movement. ABC News. Can be found at: https://abcnews.go.com/US/former-detransitioner-fights-anti-transgender-movement-backed/story?id=92597182

[23] Turban, J. L., Loo, S. S., Almazan, A. N., & Keuroghlian, A. S. (2021). Factors leading to “detransition” among transgender and gender diverse people in the United States: a mixed-methods analysis. LGBT health, 8(4), 273-280. Can be found at: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC8213007/

[24] The Trevor Project (2023). Mental Health of Black Transgender Young People. Can be found at: https://www.thetrevorproject.org/research-briefs/mental-health-of-black-transgender-and-nonbinary-young-people-feb-2023/

Detransition remains rare overall. One study from 2022 published by the American Academy of Pediatrics found that the vast majority of youth (94%) who transitioned still identified as transgender five years later, with only 2.5% of patients in the study returning to their assigned sex at birth and others settling on a nonbinary identity.[25]

Detransition does happen, and people who detransition should have access to all the support services they need — but studying detransition should not be the focus of the department's data collection efforts.

Transgender Ohioans deserve to thrive

Gender affirming care saves lives, including care for transgender and nonbinary youth. Ohio should not create obstacles to care. In BIPOC communities especially, the lack of access to basic healthcare can be linked to negative mental health outcomes. People whose trans and Black identities intersect face a pileup of obstacles. Restricting or revoking access to gender-affirming resources jeopardizes the wellbeing of trans and gender diverse people of all races, and does particular harm to Black trans people.

The proposed administrative rules published by the Ohio Department of Mental Health and Addiction Services and the Ohio Department of Health systemically attack so many of our beloved neighbors. Most importantly, these rules attack the future of our communities; the youth represent the right now and the tomorrow.

We urge you to reject the proposed administrative rules, which will continue to target LGBTQ Ohioans, particularly Black transgender people. Transgender people should have the health care that they need to thrive. There is no medical purpose or evidence to support these additional restrictions.[26] Instead, they will stoke anti-LGBTQ fear and moral panic. These restrictions will impede providers from giving best-practice medical treatment, require transgender youth and their families to jump through unnecessary hoops, and further stigmatize safe and effective care.

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[25] Olson, K. R., Durwood, L., Horton, R., Gallagher, N. M., & Devor, A. (2022). Gender identity 5 years after social transition. Pediatrics, 150(2). Can be found at: https://publications.aap.org/pediatrics/article/150/2/e2021056082/186992/Gender-Identity-5-Years-After-Social-Transition?autologincheck=redirected

[26] Sanchez, K. (2021). The bad science behind trans healthcare bans. Can be found at: https://www.theverge.com/22590708/trans-youth-gender-affirming-healthcare-bans-science