

State of Utah
Administrative Rule Analysis

NOTICE OF PROPOSED RULE

- * The agency identified below in box 1 provides notice of proposed rule change pursuant to Utah Code Section 63G-3-301.
- * Please address questions regarding information on this notice to the agency.
- * The full text of all rule filings is published in the Utah State Bulletin unless excluded because of space constraints.
- * The full text of all rule filings may also be inspected at the Division of Administrative Rules.

DAR file no: 44031 Date filed: 9-3-2019
State Admin Rule Filing Id: Time filed:

	Agency No.	Rule No.	Section No.
Utah Admin. Code Ref (R no.):	R 156	- 60	-
Changed to Admin. Code Ref. (R no.):	R	-	-

1. **Agency:** Commerce/Division of Occupational and Professional Licensing
Room no.:
Building: Heber M. Wells Building
Street address 1: 160 East 300 South
Street address 2:
City, state, zip: Salt Lake City UT 84111-2316
Mailing address 1: PO Box 146741
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City, state, zip: Salt Lake City UT 84114-6741
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(Interested persons may inspect this filing at the above address or at the Division of Administrative Rules during business hours)

2. **Title of rule or section (catchline):**
Mental Health Professional Practice Act Rule
3. **Type of notice:**
New ___; Amendment XXXX Repeal ___; Repeal and Reenact ___
4. **Purpose of the rule or reason for the change:**

After further research and for purposes of clarification of the language at issue, the Division makes this filing to substitute the proposed amendments for the proposed amendments published as OAR File No. 43993 in the September 1, 2019 issue of the Utah State Bulletin, Vol 2019, No. 17, at pages 9-13. As stated in the previous filing, on June 17, 2019, Governor Herbert directed Francine Giani, the Executive Director of the Utah Department of Commerce who oversees the Division of Occupational and Professional Licensing, to have the Psychologist Licensing Board provide guidance, based on the best available science, for rules on the ethical and professional practice of psychology concerning interventions for minor children regarding their sexual orientation and gender identity. To avoid duplication of efforts and confusion, Governor Herbert directed the Psychologist Licensing Board to take the lead, after which the three other boards that advise the licensing of the mental health professions in Utah -- the Social Worker Licensing Board, the Clinical Mental Health Counselor Licensing Board, and the Marriage and Family Therapist Licensing Board -- were to take up this issue. In July 2019, the Psychologist Licensing Board conducted an extensive review of the professional literature, consulted with national experts, and coordinated with the American Psychological Association to draft amendments to their Rule R156-61. These amendments defined, clarified, and established current professional definitions and standards with respect to sexual orientation and gender identity, and in particular defined as unprofessional conduct the practice of sexual orientation change efforts or gender identity change efforts with a client who is less than 18 years old. Thereafter, the Social Worker Licensing Board, the Clinical Mental Health Counselor Licensing Board, and the Marriage and Family Therapist Licensing Board each separately reviewed these draft rules and language in light of each Board's professional field of study and any guidelines, position statements, studies, etc. considered by their own professional associations. On August 1, 2019, the Social Worker Licensing Board met and conducted an extensive review and discussion of professional literature and research, including the National Association of Social Workers (NASW) May 2015 Position Statement against sexual orientation change efforts and conversion therapy. The Board approved of the language drafted by the Psychologist Licensing Board and voted to file similar proposed amendments to their own Rule R156-60. (The Social Worker Licensing Board also voted to expand their Rule R156-60's definition of "unprofessional conduct" to include referring clients to practitioners or programs claiming therapies and treatments designed to change sexual orientation or gender identity. However, for consistency and to avoid confusion, the Division has not included in the subject filing this expanded definition of unprofessional conduct to include SOCE or GICE referrals.) On August 7, 2019, the Clinical Mental Health Counselor Licensing Board met to review these issues, and after discussion that Board also approved of the language drafted by the Psychologist Licensing Board, and voted in favor of filing similar proposed amendments to Rule R156-60. On August 8, 2019, the Marriage and Family Therapist Licensing Board met to review these issues. After an extensive review and discussion, the Board voted to accept the language put forward by the Psychologist Licensing Board for filing similar proposed amendments to Rule R156-60. (Additionally, that Board voted to further review these issues in subsequent meetings, to find a way to support what was put forward but to do it in a way that is mindful in a systemic nature of the issues as they impact families.)

5. This change is a response to comments from the Administrative Rules Review Committee.

No XXXX Yes

6. Summary of the rule or change:

Section R156-60-102: The proposed amendments to this section update references, and define the terms "gender identity", "sexual orientation", "gender identity change efforts" (GICE), and "sexual orientation change efforts" (SOCE). Section R156-60-502: The proposed amendments to this section update references, and add to the definition of unprofessional conduct "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".

7. Aggregate anticipated cost or savings to:

A) State budget:

Affected: No ; Yes XXXX

The Division estimates that these proposed amendments may result in a potential increase of two additional complaints of unprofessional conduct each year, requiring two investigations consisting of approximately 20 hours per investigation. This may result in a cost to Division investigations of approximately \$1,000 per fiscal year ongoing. The amendments are not expected to impact existing Division practices or procedures or other state practices or procedures. Additionally, as described below in the analysis for small business and non-small business, the Division does not expect any state agencies that may be acting as employers of licensed individuals engaging in the practice of mental health therapy to experience any measurable fiscal impacts. Except as described above, the Division estimates that these proposed amendments will have no measurable impact on state government revenues or expenditures, beyond a minimal cost to the Division of approximately \$75 to disseminate the rule once the proposed amendments are made effective.

B) Local government:

Affected: No XXXX Yes _____

The Division estimates that these proposed amendments will have no measurable impact on local government revenues or expenditures. None of these amendments are expected to impact local government practices or procedures. Additionally, as described below in the analysis for small business and non-small business, the Division does not expect any local governments that may be acting as employers of licensed individuals engaging in the practice of mental health therapy to experience any measurable fiscal impacts.

C) Small businesses ("small business" means a business employing fewer than 50 persons)

Affected: No XXXX; Yes _____

These proposed amendments will regulate individuals licensed under Title 58 who are practicing within their respective licensing acts and engage in the practice of mental health therapy. These amendments may therefore indirectly affect the estimated 1,132 small businesses in Utah comprising establishments of licensees engaged in the practice of mental health therapy or who may employ those engaged in the practice of mental health therapy, such as private or group practices, hospitals, or medical centers (NAICS 621112, 621420, 621330, 622210, 623220, 624190). However, these proposed amendments are not expected to result in any measurable fiscal impact for small business. First, the amendments update the rule in accordance with clear practice guidelines and position statements already existing in the industry, including from the American Psychological Association, the American Psychiatric Association, the National Association of Social Workers, and the Substance Abuse and Mental Health Services Administration. The practices of most small businesses are, or should be, already consistent with these existing professional practice guidelines and position statements. Second, the proposed amendments will only affect licensees who violate the rules and are disciplined for unprofessional conduct, and as described below for other persons it is estimated that for the typical licensee, the proposed amendments will have no direct or indirect fiscal impact. Accordingly, any impact from non-compliance will never be uniformly felt across the industry, and most small businesses will never be impacted. Finally, although a small business employing a licensee who is disciplined for unprofessional conduct may face indirect financial costs for such noncompliance, it is impossible to estimate what such indirect costs might be with any accuracy at present, not only because any such violations are unforeseeable, but because any indirect costs from such unforeseen violations that any small business may potentially experience from any potential sanctions will vary widely depending on the unique characteristics of the employer and the individual characteristics and actions of each licensee. This relevant data is unavailable and the cost of acquiring any such data is prohibitively expensive. In sum, the scope of these proposed amendments is so narrow that they will not affect the vast majority of small business, and will not result in a measurable fiscal impact to small business.

D) Persons other than small businesses, businesses, or local government entities ("person" means any individual, partnership, corporation, association, governmental entity, or public or private organization of any character other than an agency):

Affected: No XXXXX Yes _____

The following individuals licensed under Title 58 may be affected by these proposed amendments: Approximately 4,209 licensed clinical social workers, 1,384 licensed certified social workers, and 30 licensed certified social worker interns. Approximately 1,485 licensed clinical mental health counselors, 2 licensed volunteer clinical mental health counselors, 382 licensed associate clinical mental health counselors, and 7 licensed associate clinical mental health counselor externs. Approximately 787 licensed marriage and family therapists, 181 licensed associate marriage and family therapists, and 3 associate marriage and family therapist externs. Finally, approximately 135 APRNs (advanced practice registered nurses) specializing in psychiatric mental health nursing, 1,198 osteopathic physicians (DOs) of which 25 are DO psychiatrists, and 11,221 physicians and surgeons (MDs) of which 290 are MD psychiatrists. However, no measurable fiscal impact to any of these persons is expected. First, the proposed amendments will only affect licensees who violate the rules and are sanctioned, so that most licensees will never be impacted. The amendments update the rule in accordance with practice guidelines and position statements already existing across the mental health professions, and the practices of most licensees are or should be already consistent with existing professional practice guidelines and position statements. Further, the goal of the rules is to provide a deterrent, such that there is a \$0 net impact on all parties involved and minimal occasions to sanction a licensee for noncompliance. Therefore, for the typical licensee, the proposed amendments are expected to have no direct or indirect fiscal impact. Second, although a licensee who is disciplined for unprofessional conduct may experience a fiscal impact, it is impossible to estimate what such costs might be with any accuracy at present, both because they would apply only in cases of unforeseeable violations, and because any potential costs would depend on the unique characteristics and actions of each individual licensee. This relevant data is unavailable and the cost of acquiring any such data is prohibitively expensive.

8. Compliance costs for affected persons:

As described above for other persons, the Division does not anticipate any compliance costs for any affected persons from these proposed amendments.

9. A) Comments by the department head on the fiscal impact the rule may have on businesses:

Section R156-60-102: The proposed amendments to this section update references, and define the terms "gender identity", "sexual orientation", "gender identity change efforts" (GICE), and "sexual orientation change efforts" (SOCE). Section R156-60-502: The proposed amendments to this section update references, and add to the definition of unprofessional conduct "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". Small Businesses: These proposed amendments will regulate individuals licensed under Title 58 who are practicing within their respective licensing acts and engage in the practice of mental health therapy. These amendments may therefore indirectly affect the estimated 1,132 small businesses in Utah comprising establishments of licensees engaged in the practice of mental health therapy or who may employ those engaged in the practice of mental health therapy, such as private or group practices, hospitals, or medical centers (NAICS 621112, 621420, 621330, 622210, 623220, and 624190). However, these proposed amendments are not expected to result in any measurable fiscal impact for small business. Non-Small Businesses: These proposed amendments will regulate individuals licensed under Title 58 who are practicing within their respective licensing acts and engage in the practice of mental health therapy. These amendments may therefore indirectly affect the estimated 72 non-small businesses in Utah comprising establishments of licensees engaged in the practice of mental health therapy or who may employ those engaged in the practice of mental health therapy, such as private or group practices, hospitals, or medical centers (NAICS 621112, 621420, 621330, 622210, 623220, and 624190). However, these proposed amendments are not expected to result in any measurable fiscal impact.

B) Name and title of department head commenting on the fiscal impacts:

Francine A. Giani, Executive Director

10 This rule change is authorized or mandated by state law, and implements or interprets the following state and federal laws.

State code or constitution citations (required) (e.g., Section 63G-3-402; Subsection 63G-3-601(3); Article IV):

Subsection 58-1-106(1)(a)

Subsection 58-1-202(1)(a)

Section 58-60-101

Appendix 1: Regulatory Impact Summary Table*

Fiscal Costs	FY 2020	FY 2021	FY 2022
State Government	\$1,075	\$1,000	\$1,000
Local Government	\$0	\$0	\$0
Small Businesses	\$0	\$0	\$0
Non-Small Businesses	\$0	\$0	\$0
Other Person	\$0	\$0	\$0
Total Fiscal Costs:	\$1,075	\$1,000	\$1,000
Fiscal Benefits			
State Government	\$0	\$0	\$0
Local Government	\$0	\$0	\$0
Small Businesses	\$0	\$0	\$0
Non-Small Businesses	\$0	\$0	\$0
Other Persons	\$0	\$0	\$0
Total Fiscal Benefits:	\$0	\$0	\$0
Net Fiscal Benefits:	(\$1,075)	(\$1,000)	(\$1,000)

*This table only includes fiscal impacts that could be measured. If there are inestimable fiscal impacts, they will not be included in this table. Inestimable impacts for State Government, Local Government, Small Businesses and Other Persons are described above. Inestimable impacts for Non-Small Businesses are described below.

Appendix 2: Regulatory Impact to Non-Small Businesses

These proposed amendments will regulate individuals licensed under Title 58 who are practicing within their respective licensing acts and engage in the practice of mental health therapy. These amendments may therefore indirectly affect the estimated 72 non-small businesses in Utah comprising establishments of licensees engaged in the practice of mental health therapy or who may employ those engaged in the practice of mental health therapy, such as private or group practices, hospitals, or medical centers (NAICS 621112, 621420, 621330, 622210, 623220, 624190). However, these proposed amendments are not expected to result in any measurable fiscal impact for non-small business. First, the amendments update the rule in accordance with clear practice guidelines and position statements already existing in the industry, including from the American Psychological Association, the American Psychiatric Association, the National Association of Social Workers, and the Substance Abuse and Mental Health Services Administration. The practices of most non-small businesses are, or should be, already consistent with existing

professional practice guidelines and position statements. Second, the proposed amendments will only affect licensees who violate the rules and are disciplined for unprofessional conduct, and as described for other persons it is estimated that for the typical licensee, the proposed amendments will have no direct or indirect fiscal impact. Accordingly, any impact from non-compliance will never be uniformly felt across the industry, and most non-small businesses will never be impacted. Finally, although a non-small business employing a licensee who is disciplined for unprofessional conduct may face indirect financial costs for such noncompliance, it is impossible to estimate what such indirect costs might be with any accuracy at present, not only because any such violations are unforeseeable, but because any indirect costs from such unforeseen violations that any non-small business may potentially experience from any potential sanctions will vary widely depending on the unique characteristics of the employer and the individual characteristics and actions of each licensee. This relevant data is unavailable and the cost of acquiring any such data is prohibitively expensive. In sum, the scope of these proposed amendments is so narrow that they will not affect the vast majority of non-small business, and will not result in a measurable fiscal impact to non-small business.

Include agency head sign-off here. The head of the Department of Commerce, Francine Giani, has reviewed and approved this fiscal analysis.

R156. Commerce, Occupational and Professional Licensing.

R156-60. Mental Health Professional Practice Act Rule.

R156-60-102. Definitions.

In addition to the definitions in Title 58, Chapters 1 and 60, as used in Title 58, Chapters 1 and 60, or this rule:

(1) "Approved diagnostic and statistical manual for mental disorders" means the following:

(a) Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition: DSM-5 [~~or Fourth Edition: DSM-IV~~] published by the American Psychiatric Association;

(b) [~~2013~~]2015 ICD-~~[9]~~10-CM for Physicians, [~~Volumes 1 and 2~~] Professional Edition published by the American Medical Association; or

(c) ICD-10-CM [~~2013~~]2019: The Complete Official Draft Code Set published by the American Medical Association.

(2) "Client or patient" means an individual who, when competent requests, or when not competent to request is lawfully provided professional services by a mental health therapist when the mental health therapist agrees verbally or in writing to provide professional services to that individual, or without an overt agreement does in fact provide professional services to that individual.

(3) "Direct supervision" of a supervisee in training, as used in Subsection 58-60-205(1)(f), 58-60-305(1)(f), and 58-60-405(1)(f), means:

(a) a supervisor meeting with the supervisee when both are physically present in the same room at the same time; or

(b) a supervisor meeting with the supervisee remotely via real-time electronic methods that allow for visual and audio interaction between the supervisor and supervisee under the following conditions:

(i) the supervisor and supervisee shall enter into a written supervisory agreement which, at a minimum, establishes the following:

(A) frequency, duration, reason for, and objectives of electronic meetings between the supervisor and supervisee;

(B) a plan to ensure accessibility of the supervisor to the supervisee despite the physical distance between their offices;

(C) a plan to address potential conflicts between clinical recommendations of the supervisor and the representatives of the agency employing the supervisee;

(D) a plan to inform a supervisee's client or patient and employer regarding the supervisee's use of remote supervision;

(E) a plan to comply with the supervisor's duties and responsibilities as established in rule; and

(F) a plan to physically visit the location where the supervisee practices on at least a quarterly basis during the period of supervision or at a lesser frequency as approved by the Division in collaboration with the Board;

(ii) the supervisee submits the supervisory agreement to the Division and obtains approval before counting direct supervision completed via live real-time methods toward the 100 hour direct supervision requirement; and

(iii) in evaluating a supervisory agreement, the Division shall consider whether it adequately protects the health, safety, and welfare of the public.

(4) "Employee" means an individual who is or should be treated as a W-2 employee by the Internal Revenue Service.

(5) "Gender expression" means an individual's presentation and behaviors that express aspects of gender including gender identity or gender role.

(6) "Gender identity" means an individual's experience of their gender, including one's view of oneself as a man, woman, or any other gender.

(7) "Gender identity change efforts" means methods, practices, procedures, or techniques with the goal of changing an individual's gender identity or gender expression.

([5]8) "General supervision" means that the supervisor is available for consultation with the supervisee by personal face to face contact, or direct voice contact by telephone, radio, or some other means within a reasonable time consistent with the acts and practices in which the supervisee is engaged.

([6]9) "On-the-job training program" means a program that:

(a) is applicable to individuals who have completed all courses required for graduation in a degree or formal training program that would qualify for licensure under this chapter;

(b) starts immediately upon completion of all courses required for graduation;

(c) ends 45 days from the date it begins, or upon licensure, whichever is earlier, and may not be extended or used a second time;

(d) is completed while the individual is an employee of a public or private agency engaged in mental health therapy or substance use disorder counseling; and

(e) is under supervision by a qualified individual licensed under this chapter which includes supervision meetings on at least a weekly basis when the supervisee and supervisor are physically present in the same room at the same time.

(10) "Sexual orientation" means an individual's gendered patterns in attraction, feelings, or behavior, or identity related to these patterns.

(11) "Sexual orientation change efforts" means methods, practices, procedures, or techniques with the goal of changing an individual's sexual orientation, including gendered patterns in attraction, feelings, or behavior, or identity related to these patterns.

(12)(a) Methods, practices, procedures, or techniques that are neutral with respect to the sexual orientation and gender identity of the individual do not constitute "sexual orientation change efforts" or "gender identity change efforts".

(b) Methods, practices, procedures, or techniques that are neutral with respect to the sexual orientation and gender identity of the individual include, but are not limited to, the following interventions, as

long as the interventions do not have the goal of changing an individual's sexual orientation or gender identity:

- (i) reducing an individual's internalized stigma;
- (ii) providing acceptance, support, and comprehensive assessment of an individual;
- (iii) facilitating an individual's active coping, social support, and identity exploration and development;
- (iv) assisting an individual considering or undergoing gender transition; or
- (v) preventing or addressing an individual's unlawful conduct or unsafe sexual practices.

R156-60-502. Unprofessional Conduct.

"Unprofessional conduct" includes:

- (1) when providing services remotely:
 - ([1]a) failing to practice according to professional standards of care in the delivery of services remotely;
 - ([2]b) failing to protect the security of electronic, confidential data and information; or
 - ([3]c) failing to appropriately store and dispose of electronic, confidential data and information; or
- (2) 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.

KEY: licensing, mental health, therapists

Date of Enactment or Last Substantive Amendment: [~~September 21, 2015~~]2019

Notice of Continuation: February 26, 2019

Authorizing, and Implemented or Interpreted Law: 58-1-106(1)(a); 58-1-202(1)(a); 58-60-101