

Filed 11-27-2019

**NOTICE OF PROPOSED RULE**

TYPE OF RULE: Amendment  
Utah Admin. Code Ref (R no.):

R156-60

Filing No. 52391

**Agency Information**

1. Department: Commerce  
 Agency: Occupational and Professional Licensing  
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Please address questions regarding information on this notice to the agency.

**General Information**

**2. Rule or section catchline:**

Mental Health Professional Practice Act Rule

**3. Purpose of the new rule or reason for the change** (If this is a new rule, what is the purpose of the rule? If this is an amendment, repeal, or repeal and reenact, what is the reason for the filing?):

After careful consideration of the numerous individual comments submitted regarding the Division of Occupational and Professional Licensing's (Division) first drafts of a rule regulating conversion therapy, Governor Herbert has directed the Division to file this new rule amendment. The previous drafts were published as DAR File No. 43993 in the September 1, 2019, issue of the Utah State Bulletin, Vol. 2019, No. 17, at pages 9 -13, and DAR File No. 44031 in the September 15, 2019, issue of the Utah State Bulletin Vol. 2019, No. 18, at pages 17-21. This current rule filing takes into account input from many stakeholders on specific, technical aspects of the language in the previous drafts, and has been created around the carefully crafted and effective language of H.B. 399, passed in the 2019 General Session.

**4. Summary of the new rule or change:**

In Section R156-60-102, the proposed amendments to this section update references, and define the term "conversion therapy".

In Section R156-60-502, the proposed amendments to this section add to the definition of unprofessional conduct "providing conversion therapy to a patient or client who is younger than 18 years old", and specify that this definition does not apply to a clergy member or religious counselor who is acting substantially in a pastoral or religious capacity and not in the capacity of a mental health therapist, or to a parent or grandparent who is a mental health therapist and who is acting substantially in the capacity of a parent or grandparent and not in the capacity of a mental health therapist.

**Fiscal Information**

**5. Aggregate anticipated cost or savings to:**

**A) State budget:**

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 businesses and non-small businesses, 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 governments:**

The Division estimates that these proposed amendments will have no measurable impact on local governments' revenues or expenditures. None of these amendments are expected to impact local governments' practices or procedures. Additionally, as

described below in the analysis for small businesses and non-small businesses, 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 1-49 persons):

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 businesses.

First, these amendments update the rule in accordance with guidance from multiple stakeholders, including 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 rule 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 businesses, and will not result in a measurable fiscal impact to small businesses.

**D) Non-small businesses** ("non-small business" means a business employing 50 or more persons):

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 businesses.

First, the amendments update the rule in accordance with guidance from multiple stakeholders and 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 businesses, and will not result in a measurable fiscal impact to non-small businesses.

**E) Persons other than small businesses, non-small businesses, state, 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*):

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. 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, these 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.

**F) 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.

**G) Regulatory Impact Summary Table** (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 will be included in narratives above.)

**Regulatory Impact Summary Table**

<b>Fiscal Costs</b>	<b>FY 2020</b>	<b>FY 2021</b>	<b>FY 2022</b>
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
<b>Total Fiscal Costs:</b>	<b>\$1,075</b>	<b>\$1,000</b>	<b>\$1,000</b>
<b>Fiscal Benefits</b>			
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
<b>Total Fiscal Benefits:</b>	<b>\$0</b>	<b>\$0</b>	<b>\$0</b>
<b>Net Fiscal Benefits:</b>	<b>(\$1,075)</b>	<b>(\$1,000)</b>	<b>(\$1,000)</b>

**H) Department head sign-off on regulatory impact:**

I have reviewed the proposed filing for the above-referenced rule and considered the fiscal impact that the rule may have on businesses. I direct that my comments about the rule's fiscal impact on businesses be inserted at the appropriate place on the notice form to be filed with the Office of Administrative Rules for publication of this rulemaking action. Francine A. Giani, Executive Director, Department of Commerce

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

In Section R156-60-102, the proposed amendments to this section update references, and define the term "conversion therapy."

In Section R156-60-502, the proposed amendments to this section add to the definition of unprofessional conduct "providing



(b) "Conversion therapy" does not mean a practice or treatment that does not seek to change a patient or client's sexual orientation or gender identity, including mental health therapy that:

(i) is neutral with respect to sexual orientation and gender identity;

(ii) provides assistance to a patient or client undergoing gender transition;

(iii) provides acceptance, support, and understanding of a patient or client;

(iv) facilitates a patient or client's ability to cope, social support, and identity exploration and development;

(v) addresses unlawful, unsafe, premarital, or extramarital sexual activities in a manner that is neutral with respect to sexual orientation; or

(vi) discusses with a patient or client the patient or client's moral or religious beliefs or practices.

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

([5]6) "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]7) "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.

#### **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)(a) providing conversion therapy to a patient or client who is younger than 18 years old; and

(b) Subsection (2)(a) does not apply to:

(i) a clergy member or religious counselor who is acting substantially in a pastoral or religious capacity and not in the capacity of a mental health therapist; or

(ii) a parent or grandparent who is a mental health therapist and who is acting substantially in the capacity of a parent or grandparent and not in the capacity of a mental health therapist.

**KEY: licensing, mental health, therapists**

**Date of Enactment or Last Substantive Amendment: ~~September 21, 2015~~2020**

**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**

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