

Filed 11-27-2019

NOTICE OF PROPOSED RULE

TYPE OF RULE: Amendment

Utah Admin. Code Ref (R no.):

R156-61

Filing No. 52388

Agency Information

1. Department: Commerce
Agency: Occupational and Professional Licensing
Building: Heber M. Wells Building
Street address: 160 East 300 South
City, state: Salt Lake City UT 84111-2316
Mailing address: PO Box 146741
City, state, zip: Salt Lake City UT 84114-6741
Contact person(s):
Name: Phone: Email:
Larry Marx 801-530-6254 lmarx@utah.gov

Please address questions regarding information on this notice to the agency.

General Information

2. Rule or section catchline:

Psychologist Licensing 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 rule amendment. The previous drafts were published as DAR File No. 43994 in the September 1, 2019, issue of the Utah State Bulletin, Vol. 2019, No. 17, at pages 13 -18, and DAR File No. 44032 in the September 15, 2019, issue of the Utah State Bulletin Vol. 2019, No. 18, at pages 21-25. 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 R156-61-102, the proposed amendments to this section update references, and define the term "conversion therapy".

In Section R156-61-502, 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 psychologist, or to a parent or grandparent who is a psychologist and who is acting substantially in the capacity of a parent or grandparent and not in the capacity of a psychologist. The proposed amendments also update references.

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 psychologists 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 psychologists to experience any measurable fiscal impacts.

C) Small businesses ("small business" means a business employing 1-49 persons):

These proposed amendments will regulate licensed psychologists practicing in Utah, which may indirectly affect the estimated 1,132 small businesses in Utah comprising establishments of licensees engaged in the practice of psychology, or who may employ licensed psychologists, 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, the amendments update the rule in accordance with input 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 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 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 licensed psychologists practicing in Utah, which may indirectly affect the estimated 72 non-small businesses in Utah comprising establishments of licensees engaged in the practice of psychology or who may employ licensed psychologists, 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 input 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 above 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**):

There are approximately 1,058 licensed psychologists and 36 licensed psychology residents in Utah that will be affected by these proposed amendments. No measurable fiscal impact to 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 this rule in accordance with clear practice guidelines and position statements already existing in the industry, 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 rule 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.

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

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)

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 these rule amendments 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 R156-61-102, the proposed amendments to this section update references, and define the term "conversion therapy."

In Section R156-61-502, 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 psychologist, or to a parent or grandparent who is a psychologist and who is acting substantially in the capacity of a parent or grandparent and not in the capacity of a psychologist.

Small Businesses (less than 50 employees): These proposed amendments will regulate licensed psychologists practicing in Utah, which may indirectly affect the estimated 1,132 small businesses in Utah comprising establishments of licensees

engaged in the practice of psychology or who may employ licensed psychologists, 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 businesses.

Non-Small Businesses (50 or more employees): These proposed amendments will regulate licensed psychologists practicing in Utah, which may indirectly affect the estimated 72 non-small businesses in Utah comprising establishments of licensees engaged in the practice of psychology or who may employ licensed psychologists, 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 non-small businesses.

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

Francine A. Giani, Executive Director

Citation Information

7. 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):

Subsection 58-1-106(1)(a) Subsection 58-1-202(1)(a) Section 58-61-101

Incorporations by Reference Information

(If this rule incorporates more than two items by reference, please include additional tables)

8. A) This rule adds, updates, or removes the following title of materials incorporated by references (a copy of materials incorporated by reference must be submitted to the Office of Administrative Rules; if none, leave blank):

First Incorporation

Official Title of Materials Incorporated Ethical Principles of Psychologists and Code of Conduct
(from title page)

Publisher American Psychological Association (APA)

Issue, or version January 1, 2017

B) This rule adds, updates, or removes the following title of materials incorporated by references (a copy of materials incorporated by reference must be submitted to the Office of Administrative Rules; if none, leave blank):

Second Incorporation

Official Title of Materials Incorporated ASPPB Code of Conduct
(from title page)

Publisher Association of State and Provincial Psychology Boards (ASPPB)

Date Issued January 1, 2018

Public Notice Information

9. The public may submit written or oral comments to the agency identified in box 1. (The public may also request a hearing by submitting a written request to the agency. The agency is required to hold a hearing if it receives requests from ten interested persons or from an association having not fewer than ten members. Additionally, the request must be received by the agency not more than 15 days after the publication of this rule in the Utah State Bulletin. See Section 63G-3-302 and Rule R15-1 for more information.)

A) Comments will be accepted until (mm/dd/yyyy): 01/14/2020

10. This rule change MAY become effective on (mm/dd/yyyy): 01/21/2020

NOTE: The date above is the date on which this rule MAY become effective. It is NOT the effective date. After the date designated in Box 10, the agency must submit a Notice of Effective Date to the Office of Administrative Rules to make this rule effective. Failure to submit a Notice of Effective Date will result in this rule lapsing and will require the agency to start the rulemaking process over.

Agency Authorization Information

To the agency: Information requested on this form is required by Sections 63G-3-301, 302, 303, and 402. Incomplete forms will be returned to the agency for completion, possibly delaying publication in the *Utah State Bulletin*, and delaying the first possible effective date.

Agency head or designee, and title: Mark B. Steinagel, Director

Date (mm/dd/yyyy): 11/27/2019

R156. Commerce, Occupational and Professional Licensing.

R156-61. Psychologist Licensing Act Rule.

R156-61-102. Definitions.

In addition to the definitions in Title 58, Chapters 1 and 61, as used in Title 58, Chapters 1 and 61 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-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) "CoA" means Committee on Accreditation of the American Psychological Association.

(3)(a) "Conversion therapy" means any practice or treatment that seeks to change the sexual orientation or gender identity of a patient or client, including mental health therapy that seeks to change, eliminate, or reduce behaviors, expressions, attractions, or feelings related to a patient or client's sexual orientation or gender identity.

(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 58-61-304(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 40 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~~ "On-the-job training program approved by the Division", as used in Subsection 58-61-301(1)(b), means a program that meets the standards established in Section R156-61-601.

~~{5}6~~(a) "Predoctoral internship" refers to a formal training program that meets the minimum requirements of the Association of Psychology Postdoctoral and Internship Centers (APPIC) offered to culminate a doctoral degree in clinical, counseling, or school psychology.

(b) A training program may be a full-time one year program or a half-time two year program.

~~{6}7~~(a) "Program accredited by the CoA", as used in Subsections R156-61-302a(1), means a psychology department program that, as of the date on which a student completes a doctoral psychology degree program:

(i) has obtained an accreditation from the CoA; or

(ii)(A) has applied to the CoA for accreditation;

(B) has been approved by the CoA for a site visit, which is to occur within the ensuing six years; and

(C) has not previously been denied accreditation by the CoA.

~~{7}8~~(a) "Program of respecialization", as used in Subsection R156-61-302a(3), is a formal program designed to prepare someone with a doctoral degree in psychology with the necessary skills to practice psychology.

(b) The respecialization activities shall include substantial requirements that are formally offered as an organized sequence of course work and supervised practicum leading to a certificate (or similar recognition) by an educational body that offers a doctoral degree qualifying for licensure in the same area of practice as that of the certificate.

~~(9)~~(a) "Psychology training", as used in Subsection 58-61-304(1)(e), means practical training experience providing direct services in the practice of mental health therapy and psychology under supervision. All activities in full-time internships and full-time post-doctoral positions devoted solely to mental health delivery meet this definition.

(b) Activities not directly related to the practice of psychology, even if commonly performed by psychologists, do not meet the definition of psychology training under Subsection 58-61-304(1)(e). Examples of ineligible activities include psychology coursework, analog clinical activities (e.g. role plays), activities required for business purposes (e.g. billing), supervision of others engaged in activities other than practice of psychology (e.g. supervising adolescents in wilderness settings), and activities commonly performed by non-psychologists (e.g. teaching of psychology on topics not of a professional nature).

~~{8}10~~ "Qualified faculty", as used in Subsection 58-1-307(1)(b), means a university faculty member who provides pre-doctoral supervision of clinical or counseling experience in a university setting who:

(i) is licensed in Utah as a psychologist; and

(ii) is training students in the context of a doctoral program leading to licensure.

~~{9}11~~ "Residency program", as used in Subsection 58-61-301(1)(b), means a program of post-doctoral supervised clinical training necessary to meet licensing requirements as a psychologist.

(b) "Psychology training", as used in Subsection 58-61-304(1)(e), means practical training experience providing direct services in the practice of mental health therapy and psychology under supervision. All activities in full-time internships and full-time post-doctoral positions devoted solely to mental health delivery meet this definition.

(c) Activities not directly related to the practice of psychology, even if commonly performed by psychologists, do not meet the definition of psychology training under Subsection 58-61-304(1)(e). Examples of ineligible activities include psychology coursework, analog clinical activities (e.g. role plays), activities required for business purposes (e.g. billing), supervision of others engaged in activities other than practice of psychology (e.g. supervising adolescents in wilderness settings), and activities commonly performed by non-psychologists (e.g. teaching of psychology on topics not of a professional nature).

R156-61-502. Unprofessional Conduct.

"Unprofessional conduct" includes:

- (1) violation of any provision of the "Ethical Principles of Psychologists and Code of Conduct" of the American Psychological Association (APA) as adopted by the APA, ~~June 1, 2010~~ January 1, 2017 edition, which is adopted and incorporated by reference;
- (2) violation of any provision of the "ASPPB Code of Conduct" of the Association of State and Provincial Psychology Boards (ASPPB) as adopted by the ASPPB, ~~2005~~ January 1, 2018 edition, which is adopted and incorporated by reference;
- (3) acting as a supervisor or accepting supervision of a supervisor without complying with or ensuring the compliance with the requirements of Sections R156-61-302d and R156-61-302e;
- (4) engaging in and aiding or abetting conduct or practices which are dishonest, deceptive or fraudulent;
- (5) engaging in or aiding or abetting deceptive or fraudulent billing practices;
- (6) failing to establish and maintain appropriate professional boundaries with a client or former client;
- (7) engaging in dual or multiple relationships with a client or former client in which there is a risk of exploitation or potential harm to the client;
- (8) engaging in sexual activities or sexual contact with a client with or without client consent;
- (9) engaging in sexual activities or sexual contact with a former client within two years of documented termination of services;
- (10) engaging in sexual activities or sexual contact at any time with a former client who is especially vulnerable or susceptible to being disadvantaged because of the client's personal history, current mental status, or any condition which could reasonably be expected to place the client at a disadvantage recognizing the power imbalance which exists or may exist between the psychologist and the client;
- (11) engaging in sexual activities or sexual contact with client's relatives or other individuals with whom the client maintains a relationship when that individual is especially vulnerable or susceptible to being disadvantaged because of his personal history, current mental status, or any condition which could reasonably be expected to place that individual at a disadvantage recognizing the power imbalance which exists or may exist between the psychologist and that individual;
- (12) physical contact with a client when there is a risk of exploitation or potential harm to the client resulting from the contact;
- (13) engaging in or aiding or abetting sexual harassment or any conduct which is exploitive or abusive with respect to a student, trainee, employee, or colleague with whom the licensee has supervisory or management responsibility;
- (14) failing to render impartial, objective, and informed services, recommendations or opinions with respect to custodial or parental rights, divorce, domestic relationships, adoptions, sanity, competency, mental health or any other determination concerning an individual's civil or legal rights;
- (15) exploiting a client for personal gain;
- (16) using a professional client relationship to exploit a client or other person for personal gain;
- (17) failing to maintain appropriate client records for a period of not less than ten years from the documented termination of services to the client;
- (18) failing to obtain informed consent from the client or legal guardian before taping, recording or permitting third party observations of client care or records;
- (19) failure to cooperate with the Division during an investigation
- (20) participating in a residency program or other post degree experience without being certified as a psychology resident for post-doctoral training and experience;
- (21) supervising a residency program of an individual who is not certified as a psychology resident: ~~or~~
- (22) when providing services remotely:
 - (a) failing to practice according to professional standards of care in the delivery of services remotely;
 - (b) failing to protect the security of electronic, confidential data and information; or
 - (c) failing to appropriately store and dispose of electronic, confidential data and information~~]; or~~
- (23)~~(a) providing conversion therapy to a patient or client who is younger than 18 years old; and~~
 - (b) Subsection (23)(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 psychologist; or
 - (ii) a parent or grandparent who is a psychologist and who is acting substantially in the capacity of a parent or grandparent and not in the capacity of a psychologist.

KEY: licensing, psychologists

Date of Enactment or Last Substantive Amendment: ~~June 15, 2015~~ 2020

Notice of Continuation: September 18, 2018

Authorizing, and Implemented or Interpreted Law: 58-1-106(1)(a); 58-1-202(1)(a); 58-61-101

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