

April 22, 2022

Comment submitted via email to publichealth.rules@dhsosha.state.or.us

OHA, Public Health Division
Administrative Rules Coordinator
800 NE Oregon Street, Suite 930
Portland, Oregon 97232

Re: Proposed Permanent Rulemaking – OAR chapter 333, division 333, “Psilocybin Products, Training Curriculum and Testing Rules”

To Whom it May Concern:

Hello. I am writing to provide several comments to the proposed Psilocybin Products, Training Curriculum and Testing Rules (OAR chapter 333, division 333) (the “Proposed Rules”).

My comments are as follows:

1. General Comment on Scope of Practice

As the Oregon Health Authority (the “OHA”) is aware, ORS 475A.325(3) provides that the OHA may not require a psilocybin service facilitator to have a degree from a university, college, post-secondary institution, or institution of higher education.

Consequently, it would be unlawful for the OHA to promulgate rules that would *require* a facilitator to engage in the practice of *some other licensed profession* that, itself, would require a degree from an institution of higher education.

Example: An individual cannot practice psychology in Oregon without being licensed by the Oregon Board of Psychology. And an individual cannot be licensed by the Oregon Board of Psychology without holding a degree from an institution of higher education. ORS 675.010(4) provides in relevant part that the “practice of psychology” means rendering or offering to render supervision, consultation, evaluation or therapy services to individuals, groups or organizations for the purpose of diagnosing or treating behavioral, emotional or mental disorders. Consequently, the OHA cannot promulgate rules that would *require* a facilitator to diagnose or treat a client’s behavioral, emotional, or mental disorder. To do so would be tantamount to requiring that every facilitator be a licensed psychologist, which in turn would be tantamount to requiring that every facilitator hold a degree from an institution of higher education.

In addition to the practice of psychology, the OHA should consider all other conceivably relevant licensed professions that require a degree from an institution of higher education to ensure that the OHA’s rules do not *require* a facilitator to practice another such licensed profession. Such professions should include, but not be

limited to, the practice of medicine (defined in ORS 677.085) and the practice of naturopathic medicine (defined in ORS 685.010(4)).¹

2. Specific Proposed Rules to Review and Potentially Revise

The Proposed Rules recognize and address the scope of practice issue in several places. OAR 333-333-3005(16) defines the term “scope of practice” to mean the practice boundaries related to psilocybin facilitation and avoiding the unlicensed practice of other disciplines. The term “scope of practice” is then used in several of the rules in OAR 333-333-3060 (Psilocybin Curriculum Modules).

However, several other rules in OAR 333-333-3060(6) (Preparation and Orientation Module) appear to tread dangerously close to potentially encroaching on other licensed professions, especially the practice of psychology and the practice of medicine, both of which include “diagnosing” a person’s mental condition. If an otherwise-unlicensed facilitator is required to ask detailed questions about a client’s mental health condition and then make *subjective* determinations based on the client’s responses, one could argue that the facilitator is diagnosing the client’s mental health condition for purposes of determining: (i) whether the client can proceed with the psilocybin services; and (ii) if so, how.

Specifically, the OHA should review and potentially revise the following rules:

- 3060(6)(c) – Identifying clients in need of referral to specialized treatment services
- 3060(6)(e) – Trauma informed interview techniques
- 3060(6)(f) – Evaluation of client safety concerns, including medical history, contra-indication medication and psychological instability
- 3060(6)(g) – Appropriate mitigation strategies to address client safety concerns, including assessment of client’s support system
- 3060(h) – Client’s suitability for psilocybin services
- 3060(i) – Safety planning to address safety concerns

3. Suggestions

I realize that the Proposed Rules in OAR 333-333-3060 only address the psilocybin training curriculum modules and that the rules addressing the actual preparation, administration, and integration sessions will not be proposed until later in the year. Nevertheless, the OHA should consider the following suggestions.

First and foremost, and as stated above, the OHA should not make any rules that would *require* a facilitator to engage in the practice of *some other licensed profession* that, itself, would require a degree from an institution of higher education.

Additionally, the OHA should:

- (a) Expressly permit facilitators to combine the practice of providing psilocybin services with the practice of one or more other certain specific other licensed professions, provided that, in each case: (i) the facilitator

¹ The practice of “occupational therapy” is defined in ORS 675.210(3). However, ORS 675.220 provides that ORS 675.210 to ORS 675.340 do not apply to persons licensed under any other laws of this state to do any acts included in the definition of occupational therapy in ORS 675.210. Consequently, the OHA could require (or at least permit) facilitators to practice occupational therapy.

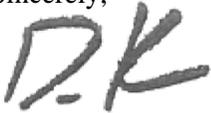
is properly licensed to practice the other profession; and (ii) such combination is not prohibited by the governing body that regulates the other profession.

- (b) If a facilitator is combining the practice of providing psilocybin services with the practice of another licensed profession, make clear that the rules governing the practice of the other licensed profession also apply during the provision of psilocybin services (in addition to the rules that govern all facilitators).
- (c) Require facilitators who *are not* combining the practice of psilocybin services with the practice of another licensed profession to conspicuously disclose to clients: (i) that the facilitator only holds a facilitator license; (ii) that the facilitator does not hold a license to practice _____, _____, or _____ [list other conceivably relevant professions]; and (iii) that the facilitator is prohibited by law from _____, _____, or _____ [list things that the facilitator cannot do].²
- (d) Require facilitators who *are* combining the practice of psilocybin services with the practice of another licensed profession to conspicuously disclose to clients: (i) that the facilitator holds both a facilitator license and a _____ license; and (ii) that the facilitator will be combining those professions during the provision of psilocybin services.
- (e) With respect to physical or mental health conditions, make the required client information form such that it only requires the client to provide “check the box” (rather than narrative) responses.
- (f) For otherwise-unlicensed facilitators, make rules so that the facilitator can *objectively* determine: (i) whether the client can proceed with psilocybin services; and (ii) if so, how. Specifically, the OHA should have a not-to-be-deviated-from flow chart that *requires* such a facilitator to do one thing or another based on the client’s responses to any physical or mental health-related questions in the client information form.
- (g) Require an extremely robust informed consent form that is tailored to the above. Specifically, the OHA itself (via the informed consent form) should make “universal” recommendations and risk disclosures to clients. This will establish by rule a standard of care for otherwise-unlicensed facilitators, which will be helpful to facilitators, clients, and the industry as a whole.

Finally, please note that I am submitting these comments in my individual capacity and not on behalf of my law firm or any client.

Thank you.

Sincerely,



Dave Kopilak

Attorney

² This language could be modified if a facilitator *does* hold another professional license, but voluntarily elects to not practice that other profession during the provision of psilocybin services.