



TO: Professional Practice Committee

FROM: Sarah S. Benson *Sarah S. Benson*

SUBJECT: Proposed Repeal of Sections 79-9.6, 79-10.6, 79-12.6, Addition of New Sections of 79-9.6, 79-10.6, 79-12.6 and Amendment of Sections of 79-9.4, 79-10.4, 79-12.4 of the Regulations of the Commissioner of Education Relating to Mental Health Practitioners' Diagnosis Privilege

DATE: November 3, 2022

AUTHORIZATION(S): *Don McG... Bell...*

SUMMARY

Issue for Decision

Should the Board of Regents adopt the proposed repeal of sections 79-9.6, 79-10.6, 79-12.6, addition of new sections 79-9.6, 79-10.6, 79-12.6 and amendment of sections 79-9.4, 79-10.4, 79-12.4 of the Regulations of the Commissioner of Education relating to mental health practitioners' diagnosis privilege?

Reason(s) for Consideration

Required by statute (Chapter 230 of the Laws of 2022).

Proposed Handling

The proposed amendment is being presented to the Professional Practice Committee for recommendation to the Full Board for adoption at the November 2022 meeting of the Board of Regents. A copy of the proposed rule is attached (Attachment A).

Procedural History

The proposed rule was presented to the Professional Practice Committee for discussion and to the Full Board for adoption as an emergency rule at the July 2022 meeting of the Board of Regents. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on July 27, 2022.

Because the July emergency action as set to expire on October 9, 2022, a second emergency action was necessary at the September 2022 Regents meeting to ensure that the emergency rule remained continuously in effect until it could be permanently adopted at the November 2022 Regents meeting. Additionally, a non-substantial revision was made to the proposed rule to correct effective dates of certain provisions. A Notice of Emergency Adoption was published in the State Register on October 26, 2022.

Following the 60-day public comment period required under the State Administrative Procedure Act, the Department received approximately 135 comments. An Assessment of Public Comment is included (Attachment B). No changes to the proposed amendment are recommended at this time based on the public comment.

Background Information

Licensed mental health counselors (LMHCs), licensed marriage and family therapists (LMFTs) and licensed psychoanalysts (LPs) do not currently have the authority to diagnose. The Legislature determined that there was a need to increase the number of licensed mental health professionals authorized to diagnose in order to address critical workforce shortages and ensure that programs and services providing addiction and mental health services to children, adults and communities have the appropriate staff to provide comprehensive services, including diagnosis. On June 24, 2022, the Governor signed Chapter 230 of the Laws of 2022 (Chapter 230), which allows LMHCs, LMFTs and LPs to earn a diagnostic privilege by meeting specified requirements. These professions did not previously have the authority to diagnose. Except for two provisions that take effect June 30, 2024,¹ Chapter 230 is immediately effective.

This Chapter amends Education Law §8401 by adding a new subdivision (3), which defines the term “diagnosis” and a new subdivision (4), which defines the term “development of assessment-based treatment plans.” Chapter 230 also adds a new section 8401-a to the Education Law which, effective June 24, 2024, establishes a process and requirements for eligible LMHCs, LMFTs and LPs, to apply to the Department for the issuance of a privilege to diagnose and to develop assessment-based treatment plans.

Additionally, Chapter 230 amends:

- Subdivision (1) of Education Law §8407 (boundaries of professional competency), effective June 24, 2024, to recognize licensed professionals who have obtained the diagnostic privilege from the Department.

¹ Sections 2 and 3 of Chapter 230 become effective June 24, 2024. These sections will be addressed in subsequent proposed amendments to the Commissioner’s regulations.

- Education Law §8409 to authorize the Department to issue limited permits to applicants who are gaining experience for the diagnostic privilege; and
- Education Law §8410 to authorize LMHCs, LMFTs and LPs to diagnose and develop assessment-based treatment plans through June 24, 2025, in certain settings approved by the Department.

Proposed Amendments

The proposed amendments of sections 79-9.4, 79-10.4 and 79-12.4 of the Commissioner’s regulations implement the provisions of Chapter 230 by:

- establishing the requirements for the Department’s issuance of limited diagnostic permits to applicants for the diagnostic privilege in mental health counseling, marriage and family therapy and psychoanalysis;
- allowing applicants, with limited diagnostic permits, to practice under a qualified supervisor in an authorized setting, while they gain the required experience for the diagnostic privilege;
- authorizing applicants with limited diagnostic permits, who are licensed on or after June 24, 2024, to engage in supervised practice while meeting the additional requirements for the diagnostic privilege; and
- changing the titles of sections 79-9.4, 79-10.4 and 79-12.4 from limited permits to limited permits for licensure and limited diagnostic permits.

Additionally, the proposed amendment implements Chapter 230 by repealing current sections 79-9.6, 79-10.6 and 79-12.6 of the Commissioner’s regulations and adding new sections 79-9.6, 79-10.6 and 79-12.6 which:

- establish the requirements to be met by LMHCs, LMFTs or LPs who are completing supervised experience in diagnosis and assessment-based treatment planning under the exemption in Education Law §8410(11);
- define the terms “diagnosis,” “assessment-based treatment planning” and “general supervision” of the licensee providing those services;
- define an acceptable setting, as defined in sections 79-9.3, 79-10.3 and 79-12.3 of the Commissioner’s regulations, for the practice of mental health counseling, marriage and family therapy and psychoanalysis, respectively; and
- define acceptable supervisors of clinical experience in diagnosis and assessment-based treatment planning for LMHCs, LMFTs and LPs, such as licensed clinical social workers, psychologists or psychiatrists or, on or after June 24, 2024, LMHCs, LMFTs or LPs who hold the diagnostic privilege pursuant to Education Law §8401-a.

Related Regents Items

July 2022: [Proposed Repeal of Sections 79-9.6, 79-10.6, 79-12.6, Addition of New Sections of 79-9.6, 79-10.6, 79-12.6 and Amendment of Sections of 79-9.4, 79-10.4, 79-12.4 of the Regulations of the Commissioner of Education Relating to Mental Health Practitioners’ Diagnosis Privilege](https://www.regents.nysed.gov/common/regents/files/722ppca1.pdf)
(<https://www.regents.nysed.gov/common/regents/files/722ppca1.pdf>)

September 2022: [Proposed Repeal of Sections 79-9.6, 79-10.6, 79-12.6, Addition of New Sections of 79-9.6, 79-10.6, 79-12.6 and Amendment of Sections of 79-9.4, 79-10.4, 79- 12.4 of the Regulations of the Commissioner of Education Relating to Mental Health Practitioners' Diagnosis Privilege](https://www.regents.nysed.gov/common/regents/files/922brca20.pdf)

(<https://www.regents.nysed.gov/common/regents/files/922brca20.pdf>)

Recommendation

It is recommended that the Board of Regents take the following action:

VOTED: That sections 79-9.6, 79-10.6 and 79-12.6 of the Regulations of the Commissioner of Education be repealed and new sections 79-9.6, 79-10.6, and 79-12.6 of the Regulations of the Commissioner of Education be added and sections 79-9.4, 79-10.4, 79-12.4 of the Regulations of the Commissioner of Education be amended, as submitted, effective November 30, 2022.

Timetable for Implementation

If adopted as a permanent rule at the November 2022 Regents meeting, the rule will become effective November 30, 2022.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 6504, 6507, 8401, 8402, 8403, 8405, 8409, 8410, 8401-a of the Education Law and Chapter 230 of the Laws of 2022.

1. Section 79-9.4 of the Regulations of the Commissioner of Education is amended, to read as follows:

Section 79-9.4 Limited permits for licensure and limited diagnostic permits.

As authorized by section 8409 of the Education Law, the department may issue a limited permit for licensure or a limited diagnostic permit to practice mental health counseling in accordance with the requirements of this section, to allow an applicant to practice under supervision while meeting the experience and/or examination requirements for licensure or while meeting the experience for the diagnostic privilege pursuant to section 8401-a of the Education Law.

(a) Limited permits for licensure.

[(a)](1) An applicant for a limited permit to practice mental health counseling shall:

[(1)](i) file an application for a limited permit with the department and pay the application fee, as prescribed in section 8409(3) of the Education Law;

[(2)](ii) meet all requirements for licensure as a mental health counselor, including but not limited to the moral character and education requirements, except the examination and/or experience requirements; and

[(3)](iii) be under the supervision of a supervisor acceptable to the department in accordance with the requirements of section 79-9.3 of this Subpart.

[(b)](2) In accordance with the requirements of section 79-9.3 of this Subpart, the limited permit in mental health counseling shall be issued for specific employment setting(s), acceptable to the department and the permit shall identify a qualified supervisor acceptable to the department.

[(1)](i) The supervisor shall be responsible for appropriate oversight of all services provided by a permit holder under his or her general supervision.

[(2)](ii) No supervisor shall supervise more than five permit holders at one time.

[(c)](3) The limited permit in mental health counseling shall be valid for a period of not more than 24 months, provided that the limited permit may be extended for no more than two additional 12-month periods at the discretion of the department if the department determines that the permit holder has made good faith efforts to successfully complete the examination and/or experience requirements but has not passed the licensing examination or completed the experience requirement, or has other good cause as determined by the department for not completing the examination and/or experience requirement, and provided further that the time authorized by such limited permit and subsequent extensions shall not exceed 48 months total.

(b) Limited diagnostic permits.

(1) An applicant for a limited diagnostic permit to practice mental health counseling under supervision while gaining experience for the diagnostic privilege pursuant to section 8401-a of the Education Law shall:

(i) file an application for a limited diagnostic permit with the department and pay the application fee, as prescribed in section 8409(3) of the Education Law;

(ii) meet all the requirements for the mental health counselor diagnostic privilege prescribed in section 8401-a of the Education Law, including, but not limited to,

licensure and registration in New York State as a mental health counselor except for the education and/or experience requirements required for the diagnostic privilege; and

(iii) be under the supervision of a supervisor acceptable to the department in accordance with the requirements of section 79.9-6 of this Subpart.

(2) In accordance with the requirements of section 79-9.6 of this Subpart, the limited diagnostic permit in mental health counseling shall be issued for specific employment setting(s), acceptable to the department and shall identify a qualified supervisor acceptable to the department.

(i) The supervisor shall be responsible for appropriate oversight of all services provided by a limited diagnostic permit holder under his or her general supervision.

(ii) No supervisor shall supervise more than five limited permit holders of any type at one time.

(3) The limited diagnostic permit in mental health counseling shall be valid for a period of not more than 24 months, provided that the limited diagnostic permit may be extended for no more than two additional 12 month periods at the discretion of the department if the department determines that the limited diagnostic permit holder has made good faith efforts to successfully complete the education and/or experience requirements but has not completed such education and/or experience requirements, or has other good cause, as determined by the department, for not completing the education and/or experience requirements, and provided further that the time authorized by such limited diagnostic permit and subsequent extensions shall not extend 48 months in total.

2. Section 79-9.6 of the Regulations of the Commissioner of Education is REPEALED and a new section 79-9.6 is added to read as follows:

79-9.6 Diagnostic privilege

(a) Definitions. As used in this section:

(1) "Diagnosis" means the process of distinguishing, beyond a general assessment, between similar mental, emotional, behavioral, developmental, and addictive disorders, impairments, and disabilities within a psychosocial framework on the basis of their similar and unique characteristics consistent with accepted classification systems.

(2) "Development of assessment-based treatment plans" means the development of an integrated plan of prioritized interventions, that is based on the diagnosis and psychosocial assessment of the client, to address mental, emotional, behavioral, developmental, and addictive disorders, impairments, and disabilities.

(3) "General supervision" means that a qualified supervisor shall be available for consultation, diagnosis and evaluation when professional services are being rendered by an applicant and the supervisor shall exercise the degree of supervision appropriate to the circumstances.

(4) "Face-to-face supervision" means in-person supervision provided, however, that it may also be satisfied by utilizing technology acceptable to the department, including secure video-conferencing to protect confidentiality.

(b) General provisions. As authorized by subdivision (11) of section 8410 of the Education Law, effective June 24, 2022, a mental health counselor licensed and registered pursuant to Article 163 of the Education Law, may engage in diagnosis and the development of assessment-based treatment plans in accordance with the provisions of this section.

(c) Acceptable setting. The experience shall be completed in a setting acceptable to the department, as described in subdivision (d) of section 79-9.3 of this Subpart.

(d) Supervision of experience. The experience shall be supervised in accordance with the requirements of this subdivision:

(1) An applicant shall obtain experience under this section while under the general supervision of a qualified supervisor. The supervisor shall provide an average of one hour per week or two hours every other week of face-to-face individual or group supervision wherein such supervisor shall:

(i) review the applicant's diagnosis and treatment of each client under his or her general supervision; and

(ii) provide oversight, guidance and direction to the applicant in developing skills in diagnosis, psychotherapy and assessment-based treatment planning.

(2) The supervisor shall be authorized to diagnose, provide psychotherapy and assessment-based treatment plans and shall be licensed and registered in New York State to practice as:

(i) a licensed clinical social worker licensed under Article 154 of the Education Law or the equivalent, as determined by the department; or

(ii) a psychologist licensed under Article 153 of the Education Law who was educated and trained in psychotherapy through the completion of a program in psychology registered pursuant to Part 52 of this Title or a program in psychology accredited by the American Psychological Association; or

(iii) a physician licensed under Article 131 of the Education Law who, at the time of the supervision of the applicant, was a diplomate in psychiatry of the American Board

of Psychiatry and Neurology, Inc. or had the equivalent training and experience as determined by the department; or

(iv) on or after June 24, 2024, a mental health counselor licensed and registered under Article 163 of the Education Law who holds the diagnostic privilege authorized under section 8401-a of the Education Law or the equivalent, as determined by the department.

3. Section 79-10.4 of the Regulations of the Commissioner of Education is amended, to read as follows:

Section 79-10.4 Limited permits for licensure and limited diagnostic permits.

As authorized by section 8409 of the Education Law, the department may issue a limited permit for licensure or a limited diagnostic permit to practice marriage and family therapy in accordance with the requirements of this section, to allow an applicant to practice under supervision while meeting the experience and/or examination requirements for licensure or while meeting the experience for the diagnostic privilege pursuant to section 8401-a of the Education Law.

(a) Limited permits for licensure

[(a)](1) An applicant for a limited permit to practice marriage and family therapy shall:

[(1)](i) file an application for a limited permit with the department and pay the application fee, as prescribed in section 8409(3) of the Education Law;

[(2)](ii) meet all requirements for licensure as a marriage and family therapist, including but not limited to the moral character and education requirements, except the examination and/or experience requirements; and

[(3)](iii) be under the supervision of a supervisor acceptable to the department in accordance with the requirements of section 79-10.3 of this Subpart.

[(b)](2) In accordance with the requirements of section 79-10.3 of this Subpart, the limited permit in marriage and family therapy shall be issued for specific employment setting(s), acceptable to the department and the permit shall identify a qualified supervisor, acceptable to the department.

[(1)](i) The supervisor shall be responsible for appropriate oversight of all services provided by a permit holder under his or her general supervision.

[(2)](ii) No supervisor shall supervise more than five permit holders at one time.

[(c)](3) The limited permit in marriage and family therapy shall be valid for a period of not more than 24 months, provided that the limited permit may be extended for no more than two additional 12-month periods at the discretion of the department if the department determines that the permit holder has made good faith efforts to successfully complete the examination and/or experience requirements but has not passed the licensing examination or completed the experience requirement, or has other good cause as determined by the department for not completing the examination and/or experience requirement, and provided further that the time authorized by such limited permit and subsequent extensions shall not exceed 48 months total.

(b) Limited diagnostic permits

(1) An applicant for a limited diagnostic permit to practice marriage and family therapy under supervision while gaining experience for the diagnostic privilege pursuant to section 8401-a of the Education Law shall:

(i) file an application for a limited diagnostic permit with the department and pay the application fee, as prescribed in section 8409(3) of the Education Law;

(ii) meet all the requirements for the marriage and family therapist diagnostic privilege prescribed in section 8401-a of the Education Law, including, but not limited to, licensure and registration in New York State as a marriage and family therapist, except for the education and/or experience requirements required for the diagnostic privilege;
and

(iii) be under the supervision of a supervisor acceptable to the department in accordance with the requirements of section 79.10-6 of this Subpart.

(2) In accordance with the requirements of section 79-10.6 of this Subpart, the limited diagnostic permit in marriage and family therapy shall be issued for specific employment setting(s), acceptable to the department and shall identify a qualified supervisor acceptable to the department.

(i) The supervisor shall be responsible for appropriate oversight of all services provided by a limited diagnostic permit holder under his or her general supervision.

(ii) No supervisor shall supervise more than five limited permit holders of any type at one time.

(3) The limited diagnostic permit in marriage and family therapy shall be valid for a period of not more than 24 months, provided that the limited diagnostic permit may be extended for no more than two additional 12 month periods at the discretion of the department if the department determines that the limited diagnostic permit holder has made good faith efforts to successfully complete the education and/or experience requirements but has not completed such education and/or experience requirement, or has other good cause as determined by the department, for not completing the education and/or experience requirements, and provided further that the time authorized

by such limited diagnostic permit and subsequent extensions shall not extend 48 months in total.

4. Section 79-10.6 of the Regulations of the Commissioner of Education is REPEALED and a new section 79-10.6 is added to read as follows:

79-10.6 Diagnostic privilege

(a) Definitions. As used in this section:

(1) "Diagnosis" means the process of distinguishing, beyond a general assessment, between similar mental, emotional, behavioral, developmental, and addictive disorders, impairments, and disabilities within a psychosocial framework on the basis of their similar and unique characteristics consistent with accepted classification systems.

(2) "Development of assessment-based treatment plans" means the development of an integrated plan of prioritized interventions, that is based on the diagnosis and psychosocial assessment of the client, to address mental, emotional, behavioral, developmental, and addictive disorders, impairments, and disabilities.

(3) "General supervision" means that a qualified supervisor shall be available for consultation, diagnosis and evaluation when professional services are being rendered by an applicant and the supervisor shall exercise the degree of supervision appropriate to the circumstances.

(4) "Face-to-face supervision" means in-person supervision provided, however, that it may also be satisfied by utilizing technology acceptable to the department, including secure video-conferencing to protect confidentiality.

(b) General provisions. As authorized by subdivision (11) of section 8410 of the Education Law, effective June 24, 2022, a marriage and family therapist licensed and

registered pursuant to Article 163 of the Education Law may engage in diagnosis and the development of assessment-based treatment plans in accordance with the provisions of this section.

(c) Acceptable setting. The experience shall be completed in a setting acceptable to the department, as described in subdivision (d) of section 79-10.3 of this Subpart.

(d) Supervision of experience. The experience shall be supervised in accordance with the requirements of this subdivision:

(1) An applicant shall obtain experience under this section while under the general supervision of a qualified supervisor. The supervisor shall provide an average of one hour per week or two hours every other week of face-to-face individual or group supervision wherein the supervisor shall:

(i) review the applicant's diagnosis and treatment of each client under his or her general supervision; and

(ii) provide oversight, guidance and direction to the applicant in developing skills in diagnosis, psychotherapy and assessment-based treatment planning.

(2) The supervisor shall be authorized to diagnose, provide psychotherapy and assessment-based treatment plans and shall be licensed and registered in New York State to practice as:

(i) a licensed clinical social worker under Article 154 of the Education Law or the equivalent as determined by the department; or

(ii) a psychologist licensed under Article 153 of the Education Law who was educated and trained in psychotherapy through the completion of a program in psychology registered pursuant to Part 52 of this Title or a program in psychology accredited by the American Psychological Association; or

(iii) a physician licensed under Article 131 of the Education Law who, at the time of the supervision of the applicant, was a diplomate in psychiatry of the American Board of Psychiatry and Neurology, Inc. or had the equivalent training and experience as determined by the department; or

(iv) on or after June 24, 2024, a marriage and family therapist licensed and registered under Article 163 of the Education Law who holds the diagnostic privilege authorized under section 8401-a Education Law or the equivalent as determined by the department.

5. Section 79-12.4 of the Regulations of the Commissioner of Education is amended, to read as follows:

Section 79-12.4 Limited permits for licensure and limited diagnostic permits.

As authorized by section 8409 of the Education Law, the department may issue a limited permit for licensure or a limited diagnostic permit to practice psychoanalysis in accordance with the requirements of this section, to allow an applicant to practice under supervision while meeting the experience and/or examination requirements for licensure or while meeting the experience for the diagnostic privilege pursuant to section 8401-a of the Education Law.

(a) Limited permits for licensure

[(a)](1) An applicant for a limited permit to practice psychoanalysis shall:

[(1)](i) file an application for a limited permit with the department and pay the application fee, as prescribed in section 8409(3) of the Education Law;

[(2)](ii) meet all requirements for licensure as a psychoanalyst, including but not limited to the moral character and education requirements, except the examination and/or experience requirements; and

[(3)](iii) be under the supervision of a supervisor acceptable to the department in accordance with the requirements of section 79-12.3 of this Subpart.

[(b)](2) In accordance with the requirements of section 79-12.3 of this Subpart, the limited permit in psychoanalysis shall be issued for specific employment setting(s), acceptable to the department and the permit shall identify a qualified supervisor, acceptable to the department.

[(1)](i) The supervisor shall be responsible for appropriate oversight of all services provided by a permit holder under his or her general supervision.

[(2)](ii) No supervisor shall supervise more than five permit holders at one time.

[(c)](3) The limited permit in psychoanalysis shall be valid for a period of not more than 24 months, provided that the limited permit may be extended for no more than two additional 12-month periods at the discretion of the department if the department determines that the permit holder has made good faith efforts to successfully complete the examination and/or experience requirements but has not passed the licensing examination or completed the experience requirement, or has other good cause as determined by the department for not completing the examination and/or experience requirement, and provided further that the time authorized by such limited permit and subsequent extensions shall not exceed 48 months total.

(b) Limited diagnostic permits

(1) An applicant for a limited diagnostic permit to psychoanalysis under supervision while gaining experience for the diagnostic privilege pursuant to section 8401-a of the Education Law shall:

(i) file an application for a limited diagnostic permit with the department and pay the application fee, as prescribed in section 8409(3) of the Education Law;

(ii) meet all the requirements for the psychoanalyst diagnostic privilege prescribed in section 8401-a of the Education Law, including, but not limited to, licensure and registration in New York State as a psychoanalyst, except for the education and/or experience requirements required for the diagnostic privilege; and

(iii) be under the supervision of a supervisor acceptable to the department in accordance with the requirements of section 79.12-6 of this Subpart.

(2) In accordance with the requirements of section 79-12.6 of this Subpart, the limited diagnostic permit in psychoanalysis shall be issued for specific employment setting(s), acceptable to the department and shall identify a qualified supervisor acceptable to the department.

(i) The supervisor shall be responsible for appropriate oversight of all services provided by a limited diagnostic permit holder under his or her general supervision.

(ii) No supervisor shall supervise more than five limited permit holders of any type at one time.

(3) The limited diagnostic permit in psychoanalysis shall be valid for a period of not more than 24 months, provided that the limited diagnostic permit may be extended for no more than two additional 12 month periods at the discretion of the department if the department determines that the limited diagnostic permit holder has made good faith efforts to successfully complete the education and/or experience requirements but has not completed such education and/or experience requirement, or has other good cause as determined by the department, for not completing the education and/or experience requirements, and provided further that the time authorized by such limited diagnostic permit and subsequent extensions shall not extend 48 months in total.

6. Section 79-12.6 of the Regulations of the Commissioner of Education is REPEALED and a new section 79-12.6 is added to read as follows:

79-12.6 Diagnostic privilege

(a) Definitions. As used in this section:

(1) "Diagnosis" means the process of distinguishing, beyond a general assessment, between similar mental, emotional, behavioral, developmental, and addictive disorders, impairments, and disabilities within a psychosocial framework on the basis of their similar and unique characteristics consistent with accepted classification systems.

(2) "Development of assessment-based treatment plans" means the development of an integrated plan of prioritized interventions, that is based on the diagnosis and psychosocial assessment of the client, to address mental, emotional, behavioral, developmental, and addictive disorders, impairments, and disabilities.

(3) "General supervision" means that a qualified supervisor shall be available for consultation, diagnosis and evaluation when professional services are being rendered by an applicant and the supervisor shall exercise the degree of supervision appropriate to the circumstances.

(4) "Face-to-face supervision" means in-person supervision provided, however, that it may also be satisfied by utilizing technology acceptable to the department, including secure video-conferencing to protect confidentiality.

(b) General provisions. As authorized by subdivision (11) of section 8410 of the Education Law, effective June 24, 2022, a psychoanalyst licensed and registered pursuant to Article 163 of the Education Law may engage in diagnosis and the

development of assessment-based treatment plans in accordance with the provisions of this section.

(c) Acceptable setting. The experience shall be completed in a setting acceptable to the department, as described in subdivision (d) of section 79-12.3 of this Part.

(d) Supervision of experience. The experience shall be supervised in accordance with the requirements of this subdivision:

(1) An applicant shall obtain experience under this section while under the general supervision of a qualified supervisor. The supervisor shall provide an average of one hour per week or two hours every other week of face-to-face individual or group supervision wherein the supervisor of such experience shall:

(i) review the applicant's diagnosis and treatment of each client under his or her general supervision; and

(ii) provide oversight, guidance and direction to the applicant in developing skills in diagnosis, psychotherapy and assessment-based treatment planning.

(2) The supervisor shall be authorized to diagnose, provide psychotherapy and assessment-based treatment plans and shall be licensed and registered in New York State to practice as:

(i) a licensed clinical social worker licensed under Article 154 of the Education Law or the equivalent as determined by the department; or

(ii) a psychologist licensed under Article 153 of the Education Law who was educated and trained in psychotherapy through the completion of a program in psychology registered pursuant to Part 52 of this Title or a program in psychology accredited by the American Psychological Association; or

(iii) a physician licensed under Article 131 of the Education Law who, at the time of the supervision of the applicant, was a diplomate in psychiatry of the American Board of Psychiatry and Neurology, Inc. or had the equivalent training and experience as determined by the department; or

(iv) on or after June 24, 2024, a psychoanalyst licensed and registered under Article 163 of the Education Law who holds the diagnostic privilege authorized under section 8401-a of the Education Law or the equivalent as determined by the department.

ASSESSMENT OF PUBLIC COMMENT

Since publication of a Notice of Emergency Adoption and Proposed Rule Making in the State Register on July 27, 2022, the State Education Department received the following comments on the proposed rule:

1. COMMENT: Two social work associations and an association of psychiatrists stated that clear distinctions should be drawn between the mental health counselor, marriage & family therapist, and psychoanalyst who earn the privilege to diagnose, in order to protect the public. They suggested designations similar to the Licensed Master Social Worker (LMSW) and the Licensed Clinical Social Worker (LCSW), where only the latter can independently diagnose.

RESPONSE: An individual licensed and registered under Education Law §8401-a who earns the privilege will receive a designation on their registration record. This designation, which will be included on the State Education Department's (Department) online verification system, will allow the public and employers to identify who can diagnose under the law. No changes to the proposed regulation are necessary based on these comments.

2. COMMENT: Statewide associations for LCSWs and psychiatrists supported the portion of the rule that would not allow a licensed mental health counselor, marriage & family therapist, or psychoanalyst to engage in diagnosis in a practice owned by that licensee.

RESPONSE: A licensed professional may form a practice to offer services in the profession in which they are licensed as defined in the Education Law, which, in the case of the professions established under Article 163, does not include diagnosis.

Therefore, such licensee could not offer to perform diagnosis and assessment-based treatment planning in that practice. The law does not require licensees to seek and earn the privilege; such individuals may decide to restrict their practice to the traditional definition in Article 163 or work part-time in an authorized setting to complete the required experience to obtain the privilege. No changes to the proposed rule are required.

3: COMMENT: Two statewide clinical social work associations and a statewide psychiatric association commented that supervised hours and duration of supervised experience for mental health practitioners should be aligned to the 36 months of supervised experience required for LCSW applicants.

RESPONSE: Education Law §8401-a(1)(d)(i) requires an applicant to complete 2,000 supervised hours in diagnosis and assessment-based treatment planning; it is silent on the duration of such experience. An amendment to the law would be required to implement a minimum duration. No changes to the proposed rule are required.

4. COMMENT: A government agency and several individuals commented that one category of mental health practitioner, such as a mental health counselor (MHC), should be qualified to supervise another category of mental health practitioner in another discipline, such as marriage and family therapist (MFT), who seeks the diagnostic privilege.

RESPONSE: The Education Law defines four mental health practitioner (MHP) professions, each with a unique orientation and perspective, under a common State Board. Each profession has specific education, experience, and examination requirements therefore, they are not interchangeable in practice nor supervision. No changes to the proposed rule are required.

5. COMMENT: Two organizations of providers support the definition of face-to-face supervision as including both in-person and video-conferencing options but expressed concern about the quality of supervision. They further suggested the need for clear guidance regarding the quality of supervision.

RESPONSE: The Department appreciates the response and directs the commenter to current practice guidance for supervision of licensed MHPs (www.op.nysed.gov/prof/mhp/mhppg10.htm). The Department will consider additional guidance for those supervising applicants for the privilege.

6. COMMENT: A government agency expressed concern that “group” supervision for individuals seeking the diagnostic privilege could be interpreted to include large staff meetings and suggested a limit of five participants in a supervisory group.

RESPONSE: The Department has made reference to limits similar to those described by the commenter in guidance. The supervisor is responsible for each patient seen under his or her supervision. The Department will continue to stress this responsibility, potentially in future guidance, for supervising applicants for the privilege to ensure appropriate supervision for patient protection.

7. COMMENT: A licensee asked if she could apply for and receive the privilege now, in order to supervise staff who will seek the privilege. Another licensee suggested grandparenting in existing licensees and then awarding current and former permit holders the privilege if the supervisor receives the privilege in 2024 or later. Another commenter opines that licensed counselors with a doctoral degree from a CACREP accredited institution and those licensed counselors who hold the Approved Clinical Supervisor (ACS) certification from the Center for Credentialing and Education (CCE)

would fully qualify for the diagnostic privilege and could supervise candidates if they were given a provisional privilege.

RESPONSE: There are no provisions in Education Law §8401-a that permit the Department to create additional pathways to obtain the privilege. Individuals who might qualify for the privilege must submit an application, pay a fee, and meet all legal requirements to receive the privilege in order to engage in diagnosis and create assessment-based treatment plans in New York. A privilege or license is only issued when all requirements have been met and cannot be backdated. Additionally, the law does not allow the Department to issue privileges until June 24, 2024. No changes to the proposed rule are required.

8 COMMENT: Two provider organizations commented that a limit of five permit holders per supervisor for the limited diagnostic privilege is restrictive and contrary to the legislative intent of increased access to quality mental health services.

RESPONSE: A licensed supervisor is responsible for the diagnosis, assessment, and treatment of each patient seen under his or her supervision. If each permit holder treats 100 clients, the supervisor is personally and professionally responsible for each of those 100 clients. The five-supervisee limit, which applies to current limited permit supervisors, would mean that a supervisor is responsible for 500 clients, in addition to any duties and other clients that the supervisor might see. Therefore, it is in the public interest to limit the number of supervisees to ensure appropriate diagnosis, treatment, and assessment-based treatment planning for each patient. No changes to the proposed rule are required.

9. COMMENT: A local government agency (NYC) suggested that the fee for limited permits be waived, due to the costs incurred for initial application and examination.

RESPONSE: The Office of the Professions (OP) is funded solely by fees paid by applicants and licensees. Fees for limited permits are set in the Education Law and reflect the OP staff work needed to review, approve and issue limited permits. No changes to the proposed rule are required.

10. COMMENT: A social work association asked for clarification between the proposed limited permits for each profession and suggested that the timeframes should be reduced.

RESPONSE: The proposed rule implements a provision in Education Law §8409(1) that authorizes the Department to issue a limited diagnostic permit to a licensee seeking to complete supervised experience for the privilege. This is in addition to the permit available to a graduate completing experience and examination requirements for licensure. The two-year duration of the permits is consistent with Education Law §8409(2) with the possibility of two one-year extensions, upon receipt of an application and the \$70 fee required in §8409(3). No changes to the proposed rule are required.

11. COMMENT: Several individuals and associations questioned the fee required from applicants for the initial privilege and every three years to continue the authorization, in addition to the triennial registration fee for these professions. One applicant asked why the insurance privilege available to certain LCSWs pursuant to 8 NYCRR 74.5 does not require triennial registration.

RESPONSE: The fee is established in Education Law §8401-a(1)(e) for the initial application and in Education Law §8401-a(3) for the triennial registration. The law requires that the registration fee be paid at the same time as the license registration.

The proposed rule does not address fees or registration periods, which are set forth in statute. No changes to the proposed rule are required.

12. COMMENT: A local government agency (NYC) suggested adequate and sufficient guidelines and instructions be put in place as soon as possible to help applicants and employers follow the requirements.

RESPONSE: The Department is currently developing such guidance, which will be informed by the law, regulations, and public and stakeholder comments. No changes to the proposed rule are required.

13. COMMENT: Two marriage and family therapist associations, one national and one Statewide, disagree with the diagnosis privilege requirements for individuals licensed prior to June 2024, including the 60-semester credit hour degree in the appropriate field.

RESPONSE: Education Law §8401-a(c) establishes the education requirement for the diagnosis privilege, which cannot be changed or eliminated by regulation. Each applicant will have to meet those requirements to qualify for the privilege. Any change in the requirements for those licensed prior to June 24, 2024, including alternative pathways, would require a statutory change. No changes to the proposed rule are needed.

14. COMMENT: Associations of marriage and family therapists, mental health counselors, and psychoanalysts, as well as other organizations and interested parties, seek amendment to the proposed rule to allow an applicant for the privilege to complete the experience in a private practice owned by the licensee.

RESPONSE: In order to complete experience in their own professional practice, a licensee would have to employ a qualified supervisor, as defined in the regulation.

The commenter's proposed solution is inconsistent with the law and public protection, which require a degree of supervisory independence. No change in the proposed rule is required.

15. COMMENT: An association of psychoanalysts commented that psychoanalysts primarily practice in sole proprietorships and would not have the ability to close down such practices and seek supervised experience in an authorized setting. The association cites provisions that allow a LCSW to consult with a supervisor to qualify for the insurance privilege authorized under 8 NYCRR §74.5 as justification for the request.

RESPONSE: A currently licensed mental health practitioner cannot perform a diagnosis or create an assessment-based treatment plan; therefore, those services cannot be provided in a business offered by the licensee, as it would be considered offering services beyond the licensee's scope and competence. Since the proprietorship and licensee cannot offer those services, they cannot hire a supervisor to provide services beyond their scope without engaging in unauthorized practice.

A LCSW licensed and registered under the Education Law is authorized to diagnose and create assessment-based treatment plans. While the LCSW does not require supervision to practice, Insurance Law §3221(l)(4)(d) and/or §4305(n) and 8 NYCRR §74.5 require three years of post-LCSW supervised experience to qualify for the insurance privilege. This situation is different from the psychoanalyst seeking to qualify for the diagnostic privilege. No changes to the proposed rule are required.

16. COMMENT: A social work association stated that the clinical education requirements for clinical social work, including coursework in diagnosis, psychotherapy, and assessment-based treatment planning in addition to a supervised clinical internship, should be replicated in the proposed regulations. The Department also received

comments from organizations, education programs, and prospective applicants regarding the education requirement in Education Law §8401-a(1)(c), including what constitutes clinical content and whether an applicant can remedy a deficiency in total coursework or content.

RESPONSE: Education Law §8401-a(2) requires a mental health counselor, marriage and family therapist, or psychoanalyst licensed under Article 163, to complete 60-semester hours of clinical education, acceptable to the Department. The proposed regulations implement provisions of the law that took effect immediately; the Department will promulgate regulations to implement the other provisions of the law, which are not yet in effect. No changes to the proposed rule are required.

17. COMMENT: Comments from associations and individuals stated that individuals licensed prior to June 2024 should not have to complete additional education to meet the 60-semester hour degree requirement. Commenters encouraged the Department to accept experience in lieu of additional graduate education to avoid additional costs to applicants. A social work association commented that mental health counselors, marriage and family therapists, and psychoanalysts who have been in the field at least five years and have supervised experience in diagnosing, psychotherapy, and the development of assessment-based treatment plans should be allowed to apply for the diagnostic privilege.

RESPONSE: Education Law §8401-a (1)(c) requires all applicants, including those licensed prior to June 24, 2024, to document the completion of a 60-semester hour degree, or the clock hour equivalent in psychoanalysis. The Board of Regents cannot establish alternative pathways or waive statutory requirements. Any such

change would require a statutory amendment. No changes to the proposed rule are needed.

18. COMMENT: A licensed mental health counselor commented that many applicants prior to 2010 were licensed on the basis of a 48-semester hour masters in mental health counseling² and will require 12 additional semester hours to meet the education requirement for the privilege. The commenter asked if training in a Regents-chartered psychoanalytic institute would be acceptable for the diagnosis privilege. Other organizations and individuals similarly inquired as to applicants who do not meet the education requirements m.

RESPONSE: The law requires an applicant to have a 60-semester hour degree for licensure and the privilege. In the case of a deficiency, Education Law §8401-a(c) allows an applicant to complete additional graduate education, as required by the Department, during or after receipt of the qualifying degree. Coursework must be in that profession, such as mental health counseling, from a degree-granting program and reported on an official transcript. Coursework in another field, such as psychoanalysis, would not be acceptable for mental health counseling, as that is a different profession. A mental health counselor who offers to practice psychoanalysis without a license in that profession would be practicing beyond the authorized scope of practice in violation of Education Law §6509.

When regulations are adopted to define acceptable clinical content necessary for the privilege, OP will review applications from New York MHP licensure qualifying programs seeking to offer such coursework. Applicants from out-of-state schools will have to submit verification from the degree-granting program, including official

² Effective January 1, 2010, 8 NYCRR 52.32 (b) increased a license-qualifying program that leads to licensure as a mental health counselor from 48 to at least 60 semester hours, or the equivalent, of study.

transcripts for individual review, unless the Department determines that an accrediting organization has standards acceptable to the Department for 12 semester hours of clinical coursework. No changes to the proposed rule are required.

19. COMMENT: A licensed mental health counselor suggested that all licensees who did not take a course in psychopathology in their master's program for social work or mental health practitioners should be required to take such a course, as was done in Georgia.

RESPONSE: The comment is outside the scope of the proposed rule; thus, no response is required.

20. COMMENT: An association of psychoanalysts represented that New York programs are planning to offer an advanced certificate in psychoanalysis that is equivalent to a 60-semester hour master's degree. They asked if a student who completes that program can complete the 2,000 hours of supervised experience in diagnosis- and assessment-based treatment planning as part of the experience for licensure and the privilege?

RESPONSE: The requirements for a limited permit to practice under supervision while meeting the experience and examination requirements for licensure have not changed. If experience completed in the program and under a limited permit meets the requirements for the diagnostic privilege (i.e., under a qualified supervisor in an authorized setting as defined in the proposed rule), such experience could be submitted post-licensure for the privilege authorized by Education Law §8401-a. No changes to the proposed rule are required.

21. COMMENT: Several individuals and organizations suggested that continuing education coursework should be accepted to meet the education requirements.

RESPONSE: The Education Law defines credit-bearing coursework as courses offered by Department-approved institutions that may award a master's or higher degree—or, in the case of psychoanalysis, a certificate of completion for equivalent clock-hour coursework—acceptable to the Department. Continuing education does not meet this standard and is not consistent with the intent of Education Law §8401-a(1)(c). No changes to the proposed rule are required.

22. COMMENT: A national association of counselors asserted that all programs are accredited by the Commission on Accreditation of Counseling and Related Professions (CACREP), including those in New York, and, therefore, all graduates are qualified to engage in diagnosis and training without further review.

RESPONSE: New York institutions that offer a master's or higher degree license-qualifying program must meet the requirements in Education Law §8402(3) and 8 NYCRR §52.32 for course content. Those programs, however, are not required to meet the standards of CACREP or another entity in order to offer the degree in New York. The Department may accept graduation from a CACREP accredited program in another state for licensure as a mental health counselor, but such applicants will require individual evaluation when applying for the privilege. No changes to the proposed rule are required.

23. COMMENT: A licensed psychoanalyst stated that license-qualifying programs already have a 45-clock hour course in the content area of diagnosis that should count toward the clinical content requirement in Education Law §8401-a (1)(c).

RESPONSE: The current rule implements provisions of law that took effect on June 24, 2022. The Department will review the content of license-qualifying programs, as well as those authorized to provide additional coursework in diagnosis and

assessment-based treatment planning, to verify that at least 12 semester hours or 180 clock hours are in a psychoanalytic training program. No changes to the proposed rules are required.

24. COMMENT: An association of children’s behavioral health providers suggested that the Department increase the frequency of licensing examinations to keep pace with anticipated growth in the field.

RESPONSE: The comment is outside the scope of the proposed rule; thus, no response is required.

25. COMMENT: Organizations and individuals suggested that experience completed for licensure prior to June 24, 2024 should be acceptable to meet the diagnostic privilege.

RESPONSE: Education Law §8401-a (d)(ii) establishes the experience requirements for licensure of an individual licensed prior to June 24, 2024. If a licensee engaged in diagnosis and assessment-based treatment planning, as defined in Education Law §8401(3) and (4) as added by Chapter 230 of the Laws of 2022 (“Chapter 230”), in a lawful manner under a qualified supervisor in an exempt setting, such experience may be submitted, whether it was originally completed for licensure or subsequently completed for the privilege, for review by the Department. No changes to the proposed rule are necessary.

26. COMMENT: National and state associations of licensees and other interested parties asked about the process by which an individual licensed in another jurisdiction could qualify for the privilege in New York.

RESPONSE: Education Law §8401-a(b) requires all applicants for the privilege to be licensed and registered in New York in order to apply for the privilege. An

individual licensed in another state must meet the requirements in Education Law §§8402, 8403 or 8405 for mental health counselors, marriage and family therapists or psychoanalysts, respectively for licensure in New York, or the provisions under 8 NYCRR §§79-9.7, 79-10.7, or 79-12.7 for endorsement of a license in mental health counseling, marriage and family therapy, or psychoanalysis, respectively, issued by another state with comparable standards. After licensure in New York, such individual must submit verification of 2,000 hours of acceptable experience for the privilege, as set forth in Education Law §8401-a in a lawful manner in another jurisdiction or in New York under a limited diagnostic permit.

27. COMMENT: The national and statewide associations of marriage and family therapists seek an expedited process for licensees employed at a certain upstate program, so that they may supervise other licensees seeking the privilege to avoid a disruption in service.

RESPONSE: Chapter 230 does not allow the Department to issue a privilege prior to June 24, 2024, although applications may be received and reviewed prior to that date. All applications are processed in the order received. The Education Law was amended, effective June 24, 2022, to provide an exemption from licensure until June 24, 2025 for certain programs and services. Entities with questions regarding this exemption should refer to that section of law to determine its applicability. No changes to the proposed rule are required.

28. COMMENT: Two marriage and family therapy associations seek clarification as to whether a LMFT without the diagnostic privilege may use classification systems, such as the Diagnostic and Statistical Manual (DSM).

RESPONSE: Chapter 230 did not amend Education Law §8411(3), which allows an individual licensed under Article 163 to use the DSM or similar classification systems, as defined in regulation. No changes to the proposed rule are necessary.

29. COMMENT: The Department received comments from an organization of provider agencies, professional associations and individuals asking whether a student who graduates from a program that meets the education requirements for licensure and the diagnostic privilege can simultaneously gain experience for the license and privilege.

RESPONSE: An applicant completing supervised experience for licensure may perform diagnosis and assessment-based treatment planning only in an authorized setting under a qualified supervisor, as defined in the law and regulations. If the applicant for licensure completes supervised hours under a qualified supervisor that meets the requirements for the privilege, either prior to the effective date or after, those hours may be submitted toward the privilege after licensure. It should be noted that the requirements for the privilege exceed those for licensure in marriage and family therapy and psychoanalysis, so the applicant may need additional supervised experience to meet both requirements. No changes to the proposed rule are required.

30. COMMENT: Organizations and individuals commented that mental health practitioners licensed under Article 163 were qualified to diagnose but denied the opportunity by other professions—specifically, social workers. Several commenters suggested the privilege is a step back, as licensed MHPs were allowed to diagnose in exempt settings until June 24, 2022 but now have to meet additional requirements. Commenters urged the creation of a simple path to grandparent in currently licensed mental health practitioners seeking the diagnostic privilege.

RESPONSE: Diagnosis is a specific function that was not included in Chapter 676 of the Laws of 2002 that established the four mental health practitioner professions under Article 163; the diagnosis privilege will provide an opportunity for certain licensees who meet the education and experience requirements to diagnose and develop assessment-based treatment plans, as defined in Education Law §8401-a. No changes to the proposed rule are required.

31. COMMENT: A commenter characterized the requirements for those licensed prior to June 24, 2024 as restrictive. The commenter further alleged that the requirements are inequitable due to the costs of compliance with the requirements and the risk of reducing the number of qualified supervisors.

RESPONSE: The requirements for the privilege for this group of licensees are established in law. The proposed rule implements provisions of law that took effect on June 24, 2022. No changes to the proposed rule are required.

32. COMMENT: A State Senator and several commenters suggested that individuals licensed in New York under grandparenting provisions in Education Law §8411 (from 2005 to 2006) met lower education requirements for licensure and should not have to meet the 60-semester hour education requirement. It was suggested that years of experience or continuing education courses could substitute for 12 or more hours of supplemental education to remedy educational deficits. Individuals and organizations also suggested creating generous grandparenting provisions for long-time practitioners who cannot meet the requirements in Education Law §8401-a.

RESPONSE: Chapter 230 does not allow the Department to propose alternative pathways that are not authorized by statute. All applicants must meet the requirements for application, fee, and 60-semester hour graduate degree, either upon application or

after completing additional coursework. Education Law 8401-a(d)(ii) requires individuals, licensed prior to June 24, 2024, to have supervised experience of 36 months, acceptable to the Department, as opposed to the standard requirement of 2,000 hours of supervised experience in diagnosis, psychotherapy, and assessment-based treatment planning, acceptable to the Department. A licensee is not required to hold the privilege to practice their profession; such privilege only pertains to making diagnoses and creating assessment-based treatment plans. No changes to the proposed rule are required.

33. COMMENT: A State Senator commented that, if additional education is required of those licensed as a LMHC from 2005-2006, such individuals should be able to fulfill additional content areas without financial hardship.

RESPONSE: The Education Law does not authorize the Department to waive required clinical education or the cost of such education offered by approved degree-granting institutions. As indicated above in response to comment 21, continuing education courses cannot substitute for graduate coursework in the profession. No change to the proposed rule is required.

34. COMMENT: A statewide association of mental health counselors commented that the 60-day public comment period should be extended due to a typographical error in the address for submitting comments on the proposed rule.

RESPONSE: The error on the Department's website was corrected when brought to the Department's attention. As a result, the July 27, 2022 State Register publication provided the correct address for submitting comments. The State Administrative Procedure Act (SAPA) requires a 60-day public comment period, which

started on July 27, 2022 and ended on September 26, 2022. The correct address was provided during this entire time period. No changes in the proposed rule are required.

35. COMMENT: Several licensees commented that a mental health counselor should be able to contract with a LCSW or other professional to supervise to them as they gain the experience needed for the diagnosis privilege, while protecting patient confidentiality and they should be trusted to form an ethical partnership.

RESPONSE: The commenter implies that the patient will not be seen by the LCSW supervisor and patient information will be shared without consent. In fact, the supervisor is the only person authorized to diagnose and treat the patient and must have access to the patient and their records. Additionally, a patient must know how to reach the supervisor with any questions. The suggestion would not protect patients and is inconsistent with the Education Law. No changes to the proposed rule are necessary.

36. COMMENT: The Department received numerous comments about the qualifications for supervisors, including a suggestion that licensees who are supervising in an exempt setting should be an acceptable supervisor for the privilege. It was also suggested that clinical faculty in programs registered by the Department or approved by an accrediting organization acceptable to the Department, should be qualified supervisors. Finally, several commenters asked to receive the privilege prior to the effective date in statute, June 24, 2024, so they can supervise individuals who will apply for the privilege.

RESPONSE: A qualified supervisor is defined in the regulation as a licensed professional who is qualified by law to make behavioral health diagnoses, that is, a LCSW, licensed psychologist or physician credentialed as a psychiatrist. These are the professions identified in the Insurance Law §§3221(l)(4)(d) and 4305(n) and 8 NYCRR

74.6 as qualified supervisors of social workers completing experience toward licensure as a LCSW. Legislation would be needed to permit other professions, such as psychiatric nurse practitioners, or individuals whose authorization to supervision is an exemption from licensure, to be qualified supervisors. No changes are required to the proposed rule.

37. COMMENT: A commenter stated that a licensed MHP who supervised an applicant prior to receipt of the privilege should be deemed a qualified supervisor based on subsequent issuance of the privilege.

RESPONSE: The diagnostic privilege, like a professional license, is only issued when all requirements have been met. Therefore, suggesting that the license or privilege applies before it is awarded is neither consistent with the law nor in the interest of public protection. No changes to the proposed rule are required.

38. COMMENT: A professional counselor in Connecticut, who completed the master's degree and experience for licensure in New York, asks why he can diagnose in Connecticut but not in New York. He asserts that counselors have been "unofficially diagnosing clients for years in New York State."

RESPONSE: Professional practice is defined separately by each state; Article 163 has never authorized an individual licensed under that law to make a mental health diagnosis or create an assessment-based treatment plan. Exempt settings, as defined in New York Education Law, allowed any person to practice the profession without licensure until June 24, 2022. Chapter 230 amended Education Law §8401-a(5) to provide an exemption for licensed and registered mental health counselors, marriage and family therapists, and psychoanalysts to engage in diagnosis and assessment-based treatment planning until June 24, 2025 under supervision in acceptable settings

as defined by the Department. Those settings and supervisors are defined in 8 NYCRR §79-9.6 of the proposed rule. No changes to the proposed rule are required.

39. COMMENT: A commenter interpreted the law to define making a diagnosis without a privilege a form of professional misconduct under Education Law §6509.

RESPONSE: The commenter is correct that a licensee without the privilege who makes a diagnosis or assessment-based treatment plan would be practicing beyond their scope of practice. No changes to the proposed rule are required.

40. COMMENT: Several individuals asked if an LMHC with the diagnostic privilege would be qualified to supervise a Master of Social Work (MSW) or LMSW seeking to become a LCSW.

RESPONSE: In order to supervise a profession, the licensee's scope of practice must encompass that of the supervisee. No changes to the proposed rule are required.

41. COMMENT: A counseling association asked specific questions about scope of practice; documentation of experience; and Department review and approval of education programs offering clinical content. Several commenters submitted questions about the process by which applicants will qualify and other activities that are outside the subject of the proposed rule.

RESPONSE: The comments are outside the scope of the proposed rule. However, the Department intends to address many or all of these issues in forthcoming guidance to the field. No changes to the proposed rule are necessary.

42. COMMENT: Professional organizations and individuals complained about eligibility for insurance reimbursement; diagnostic practice in other states; and concern that insurers may restrict panel participation to LMHCs with the diagnostic privilege.

RESPONSE: These comments are outside the scope of the proposed rule; thus, no response is required.