



TO: Professional Practice Committee

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

SUBJECT: Proposed Amendment of Section 29.15 of the Rules of the Board of Regents and Sections 79-9.6, 79-10.6, 79-12.6 of the Regulations of the Commissioner of Education Relating to Mental Health Practitioners' Diagnostic Privilege

DATE: March 2, 2023

AUTHORIZATION(S):

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SUMMARY

Issue for Discussion

Should the Board of Regents adopt the proposed amendments of section 29.15 of the Rules of the Board of Regents and sections 79-9.6, 79-10.6, 79-12.6 of the Regulations of the Commissioner of Education relating to mental health practitioners' diagnostic privilege?

Reason(s) for Consideration

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

Proposed Handling

The proposed amendment is presented to the Professional Practice Committee for discussion at its March 2023 meeting. A copy of the proposed rule (Attachment A) is attached.

Procedural History

A Notice of Proposed Rulemaking will be published in the State Register on March 29, 2023, for a 60-day public comment period required under the State Administrative Procedure Act (SAPA). Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

An increased demand for behavioral health services during and after the COVID-19 pandemic has taxed the available resources of the behavioral health profession. Chapter 230 of the Laws of 2022 (Chapter 230) intends to address some of these unmet needs. Chapter 230 authorizes three professions—Licensed Mental Health Counselors (LMHCs), Licensed Marriage and Family Therapists (LMFTs) and Licensed Psychoanalysts (LPs)—to diagnose behavioral health conditions if licensees qualify for the diagnostic privilege issued by the Department.

Although Chapter 230 does not allow the Department to issue a diagnostic privilege until June 24, 2024, the Department is authorized to promulgate regulations prior to that date so eligible applicants can prepare to apply for the privilege when it becomes available. The Board of Regents approved emergency regulations at its July 2022 meeting (effective July 12, 2022) to implement provisions of Chapter 230 that took effect on June 24, 2022. These provisions authorized the issuance of a limited diagnostic permit in an authorized setting to LMHCs, LMFTs or LPs seeking to complete supervised experience in diagnosis, psychotherapy and assessment-based treatment planning to qualify for the diagnostic privilege. The regulations were adopted on a permanent basis on November 30, 2022, following the 60-day public comment period required under SAPA.

Sections 2 and 3 of Chapter 230, become effective June 24, 2024. Section 2 adds a new section 8401-a to the Education Law. Education Law §8401-a(1) sets forth the requirements for the issuance of a diagnostic privilege including: (1) filing an application with the Department; (2) being licensed and registered as a LMHC, LMFT, or LP in New York State; (3) education requirements; (4) experience requirements; and (5) payment of a \$175 fee. Education Law §8401-a(2) provides that a LMHC, LMFT, or LP who engages in diagnosis and the development of assessment-based treatment plans without a privilege may be charged with professional misconduct under Education Law §6509. Additionally, Education Law §8401-a(3) sets forth the duration, oversight, and registration requirements for the privilege. Section 3 of Chapter 230 amends section 8407(1) of the Education Law to provide that a licensee with the privilege does not require a physician's evaluation of a patient with specified mental health diagnosis.

Proposed Amendments

The Department now proposes to implement sections 2 and 3 of Chapter 230 as follows:

Clinical Education:

Consistent with Education Law §8401-a(1)(c), the Department proposes to add new subdivisions 79-9.6(e), 79-10.6(e) and 79-12.6(e) to define clinical content in education programs leading to licensure as an LMHC, LMFT, or LP. The proposed regulation requires that an applicant for the diagnostic privilege must demonstrate satisfactory evidence of receipt of a master's degree or higher in LMHC, LMFT, or LP from a program that includes at least 60-semester hours or the clock-hour equivalent program of study in psychoanalysis. Such program must also contain at least 12 semester hours, or the equivalent, of clinical

content acceptable to the Department that prepares the applicant to engage in diagnosis, psychotherapy and assessment-based treatment planning. An applicant who did not complete acceptable clinical content in a license-qualifying program may complete post-graduate coursework acceptable to the Department to remedy any deficiencies.

Experience:

Consistent with Education Law §8401-a(1)(d), the Department proposes to add new subdivisions 79-9.6(f), 79-10.6(f) and 79-12.6(f) to set forth the experience requirements for the diagnostic privilege. The proposed rule provides two different experience criteria, based upon the applicant's date of licensure in New York:

- An applicant who was licensed on or after June 24, 2024 must submit verification of completion of a supervised experience of at least 2,000 hours of supervised, direct client contact that includes, but is not to be limited to, diagnosis, psychotherapy and the development of assessment-based treatment plans.
- An applicant who was licensed in New York prior to June 24, 2024 must submit an attestation of at least three years of experience engaged in direct client contact that includes diagnosis, psychotherapy and the development of assessment-based treatment plans. The privilege application and fee must be submitted by June 24, 2027.

Application:

Consistent with Education Law §8401(1) the Department proposes to add new subdivisions 79-9.6(g), 79-10.6(g), and 79-12.6(g) to set forth the application requirements for the diagnostic privilege. Candidates must: (1) submit the application and pay the \$175 fee; (2) submit verification of licensure; (3) cause to be submitted verification of acceptable clinical education; and (4) cause to be submitted verification of supervised experience.

Registration:

Consistent with Education Law §8401(3) the Department proposes to add new subdivisions 79-9.6(h), 79-10.6(h), and 79-12.6(h) to set forth registration requirements. The proposed rule requires licensees who hold a diagnostic privilege to certify that they continue to meet the requirements for the privilege each triennial registration period. Additionally, the licensee must pay a \$175 fee in addition to the triennial registration fee for licensure. The registration period for a privilege holder is coterminous with his or her license registration.

Privilege Duration and Oversight:

Consistent with Education Law §8410(3) the Department proposes to add new subdivisions 79-9.6(i), 79-10.6(i), and 79-12.6(i) to set forth provisions regarding duration and oversight of the privilege. The proposed rule provides that a diagnostic privilege is valid for the life of the holder unless revoked, annulled, or suspended by the Board of

Regents. Such privilege is subject to the same oversight and disciplinary provisions as licenses issued under Title VIII of the Education Law.

Professional Misconduct:

Consistent with Education Law §8410(2) the Department proposes to amend section 29.15 of the Rules of the Board of Regents to provide that it shall constitute unprofessional conduct for a LMHC, LMFT or LP to engage in diagnosis and/or the development of assessment-based treatment plans without a diagnostic privilege. Additionally, such section is amended to implement Education Law §8407(1), as amended by Chapter 230, to provide that a licensee with the privilege does not require a physician's evaluation of a patient with specified mental health diagnosis.

Related Regents Actions

November 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/1122ppca1.pdf)
(<https://www.regents.nysed.gov/common/regents/files/1122ppca1.pdf>)

Timetable for Implementation

It is anticipated that the proposed amendment will be presented to the Board of Regents for permanent adoption at the July 2023 Regents meeting, after publication in the State Register and the expiration of the 60-day public comment period required under the State Administrative Procedures Act. If adopted at the July 2023 meeting, the proposed rule will become effective on August 2, 2023.

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 79-9.6 of the Regulations of the Commissioner of Education is amended by adding new subdivisions (e), (f), (g), and (h) to read as follows:

(e) Acceptable clinical education.

(1) To meet the clinical education requirement for the diagnostic privilege, the applicant shall cause to be submitted verification of receipt of a master's degree or higher in mental health counseling from a program which includes at least 60 semester hours or the equivalent, as defined in section 79-9.1 of this Subpart, and clinical content as defined in paragraph (2) of this subdivision, acceptable to the Department.

(2) Clinical coursework. An applicant must demonstrate satisfactory completion of at least 12 semester hours, or the equivalent, of clinical coursework that prepares the individual to diagnose and develop assessment-based treatment plans acceptable to the department that includes coursework such as:

(i) diagnosis and assessment-based treatment planning in the practice of mental health counseling and psychotherapy;

(ii) assessment, evaluation and diagnosis using accepted classification systems in the practice of mental health counseling;

(iii) developing and implementing assessment-based treatment plans for the provision of mental health counseling services; and

(iv) clinical mental health counseling interventions with diverse populations.

(3) Where an applicant has received a master's or higher degree pursuant to paragraph (1) of this subdivision but has not completed the clinical coursework hours required by paragraph (2) of this subdivision, such applicant may satisfy such requirement by taking post-graduate courses to remedy such deficiencies.

(f) Acceptable experience. To meet the experience requirement for the diagnostic privilege an applicant shall complete supervised experience, in accordance with subdivision (d) of this section, in an acceptable setting, as set forth in section 79-9.3(d) of this Subpart, that satisfies paragraphs (1) or (2) of this subdivision.

(1) An applicant who is licensed as a mental health counselor on or after June 24, 2024 shall cause to be submitted, in a form and format acceptable to the Department, verification from a supervisor of the completion of at least 2,000 hours of supervised, direct client contact that shall include, but not be limited to, diagnosis, psychotherapy and the development of assessment-based treatment plans; or

(2) An applicant who is licensed as a mental health counselor prior to June 24, 2024 shall cause to be submitted in a form and format acceptable to the Department an attestation from a supervisor that such licensee has at least three years of experience engaged in direct client contact that shall include diagnosis, psychotherapy and the development of assessment-based treatment plans. Such licensee shall submit the privilege application, fee and all required documentation to the department on or before June 24, 2027.

(g) Application. An applicant for the diagnostic privilege shall:

(1) Submit the application and pay the \$175 fee for issuance of a privilege;

(2) Submit verification of licensure as a mental health counselor in New York;

(3) Cause to be submitted verification of acceptable clinical education, as required by subdivision (e) of this section; and

(4) Cause to be submitted verification or attestation, as applicable, of supervised experience in diagnosis and assessment-based treatment plans, as required by subdivision (f) of this section.

(h) Registration. The holder of a privilege issued under this section shall register with the department as a privilege holder in the same manner and subject to the same provisions as required of a licensee pursuant to Education Law §6502, provided that, at the time of each registration, the privilege holder shall certify that he or she continues to meet the requirements for the diagnostic privilege. The fee for such registration shall be \$175 which shall be paid in addition to the triennial registration fee for the license. The registration period for a privilege holder shall be coterminous with his or her license registration.

(i) Privilege duration and oversight. A privilege issued under this section shall be valid for the life of the holder, unless revoked, annulled, or suspended by the Board of Regents. Such a privilege shall be subject to the same oversight and disciplinary provisions as licenses issued under Title VIII of the Education Law.

2. Section 79-10.6 of the Regulations of the Commissioner of Education is amended with the addition of the following:

(e) Acceptable clinical education.

(1) To meet the clinical education requirement for the diagnostic privilege, the applicant shall cause to be submitted verification of receipt of a master's degree or higher in marriage and family therapy from a program which includes at least 60 semester hours or the equivalent, as defined in section 79-10.1 of this Subpart, and

clinical content as defined in paragraph (2) of this subdivision, acceptable to the Department.

(2) Clinical coursework. An applicant must demonstrate satisfactory completion of at least 12 semester hours or equivalent coursework that prepares the individual to diagnose and develop assessment-based treatment plans acceptable to the department, including coursework such as:

(i) diagnosis and assessment-based treatment planning in the practice of marriage and family therapy and psychotherapy;

(ii) assessment, evaluation and diagnosis using accepted classification systems in the practice of marriage and family therapy;

(iii) developing and implementing assessment-based treatment plans for the provision of marriage and family therapy services; and

(iv) clinical marriage and family therapy interventions with diverse populations.

(3) Where an applicant has received a master's or higher degree pursuant to paragraph (1) of this subdivision but has not completed the clinical coursework hours required by paragraph (2) of this subdivision, such applicant may satisfy such requirement by taking post-graduate courses to remedy such deficiencies.

(f) Acceptable experience. To meet the experience requirement for the diagnostic privilege an applicant shall complete supervised experience, in accordance with subdivision (d) of this section in an acceptable setting, as set forth in section 79-10.3(d) of this Subpart, that satisfies paragraphs (1) or (2) of this subdivision.

(1) An applicant who is licensed as a marriage and family therapist on or after June 24, 2024 shall cause to be submitted, in a form and format acceptable to the Department, verification of the completion of at least 2,000 hours of supervised, direct

client contact that shall include, but not be limited to, diagnosis, psychotherapy and the development of assessment-based treatment plans; or

(2) An applicant who is licensed as a marriage and family therapist prior to June 24, 2024 shall cause to be submitted in a form and format acceptable to the department, an attestation from a supervisor that such licensee has at least three years of experience engaged in direct client contact that shall include diagnosis, psychotherapy and the development of assessment-based treatment plans. Such licensee shall submit the privilege application, fee and all required documentation to the department on or before June 24, 2027.

(g) Application. An applicant for the diagnostic privilege shall:

(1) Submit the application and pay the \$175 fee for issuance of a privilege;

(2) Submit verification of licensure as a marriage and family therapist in New York;

(3) Cause to be submitted verification of acceptable clinical education, as defined in subdivision (e) of this Subpart; and

(4) Cause to be submitted verification or attestation, as applicable, of supervised experience in diagnosis and assessment-based treatment plans, as defined in subparagraph (f) of this Subpart.

(h) Registration. The holder of a privilege issued under this section shall register with the department as a privilege holder in the same manner and subject to the same provisions as required of a licensee pursuant to Education Law §, provided that, at the time of each registration, the privilege holder shall certify that he or she continues to meet the requirements for the diagnostic privilege. The fee for such registration shall be \$175 which shall be paid in addition to the triennial registration fee for the license. The

registration period for a privilege holder shall be coterminous with his or her license registration.

(i) Privilege duration and oversight. A privilege issued under this section shall be valid for the life of the holder, unless revoked, annulled, or suspended by the Board of Regents. Such a privilege shall be subject to the same oversight and disciplinary provisions as licenses issued under Title VIII of the Education Law.

3. Section 79-12.6 of the Regulations of the Commissioner of Education is amended with the addition of the following:

(e) Acceptable clinical education.

(1) To meet the clinical education requirement for the diagnostic privilege, the applicant shall cause to be submitted verification of receipt of a master's degree or higher in psychoanalysis from a program which includes at least 60 semester hours or the clock hour equivalent as defined in section 79-12.1 of this Subpart, and clinical content as defined in paragraph (2) of this subdivision, acceptable to the Department.

(2) Clinical coursework. An applicant must demonstrate satisfactory completion of at least 12 semester hours or the clock work equivalent of coursework that prepares the individual to diagnose and develop assessment-based treatment plans, acceptable to the department that includes coursework such as:

(i) diagnosis and assessment-based treatment planning in the practice of psychoanalysis and psychotherapy;

(ii) assessment, evaluation and diagnosis using accepted classification systems in the practice of psychoanalysis;

(iii) developing and implementing assessment-based treatment plans for the provision of psychoanalysis services; and

(iv) clinical psychoanalysis interventions with diverse populations.

(3) Where an applicant has received a master's or higher degree pursuant to paragraph (1) of this subdivision but has not completed the clinical coursework hours required by paragraph (2) of this subdivision, such applicant may satisfy such requirement by taking post-graduate courses to remedy deficiencies.

(f) Acceptable experience. To meet the experience requirement for the diagnostic privilege an applicant shall complete supervised experience, in accordance with subdivision (d) of this section in an acceptable setting, as set forth in section 79-12.3(d) of this Subpart, that satisfies paragraphs (1) or (2) of this subdivision.

(1) An applicant who is licensed as a psychoanalyst on or after June 24, 2024 shall cause to be submitted, in a form and format acceptable to the Department, verification of the completion of at least 2,000 hours of supervised, direct client contact that shall include, but not be limited to, diagnosis, psychotherapy and the development of assessment-based treatment plans.

(2) An applicant who is licensed as a psychoanalyst prior to June 24, 2024 shall cause to be submitted, in a form and format acceptable to the department, an attestation from a supervisor that such licensee has at least three years of experience engaged in direct client contact that shall include diagnosis, psychotherapy and the development of assessment-based treatment plans. Such licensee shall submit the privilege application, fee and all required documentation to the department on or before June 24, 2027.

(g) Application. An applicant for the diagnostic privilege shall:

(1) Submit the application and pay the \$175 fee for issuance of a privilege;

(2) Submit verification of licensure as a psychoanalyst in New York;

(3) Cause to be submitted verification of acceptable clinical education, as defined in sub-paragraph (e) of this Subpart; and

(4) Cause to be submitted verification or attestation, as applicable, of supervised experience in diagnosis and assessment-based treatment plans, as defined in sub-paragraph (f) of this Subpart.

(h) Registration. The holder of a privilege issued under this section shall register with the department as a privilege holder in the same manner and subject to the same provisions as required of a licensee pursuant to Education Law §6502, provided that, at the time of each registration, the privilege holder shall certify that he or she continues to meet the requirements for the diagnostic privilege set forth in this section. The fee for such registration shall be \$175 which shall be paid in addition to the triennial registration fee for the license. The registration period for a privilege holder shall be coterminous with his or her license registration.

(i) A privilege issued under this section shall be valid for the life of the holder, unless revoked, annulled, or suspended by the Board of Regents. Such a privilege shall be subject to the same oversight and disciplinary provisions as licenses issued under this Title VIII of the Education Law.

4. Subpart 29.15 of the Rules of the Board of Regents is amended, to read as follows:

29.15 Special provisions for the professions of creative arts therapy, marriage and family therapy, mental health counseling, and psychoanalysis.

Unprofessional conduct in the practice of creative arts therapy, marriage and family therapy, mental health counseling and psychoanalysis shall include conduct

prohibited by sections 29.1 and 29.2 of this Part and, in accordance with section 8407 of the Education Law, shall also include:

(a) in the case of treatment of schizophrenia, schizoaffective disorder, bipolar disorder, major depressive disorder, panic disorder, obsessive-compulsive disorder, attention-deficit hyperactivity disorder and autism, providing any mental health service for such illness on a continuous and sustained basis without a medical evaluation of the illness by, and consultation with, a physician regarding such illness, unless such licensed professional has been issued a privilege to diagnose and develop assessment-based treatment plans by the department. Such medical evaluation and consultation shall be to determine and advise whether any medical care is indicated for such illness;

(b) prescribing or administering drugs as a treatment, therapy, or professional service in the practice of his or her profession; [or]

(c) using invasive procedures as a treatment, therapy, or professional service in the practice of his or her profession. For purposes of this subdivision, invasive procedure means any procedure in which human tissue is cut, altered, or otherwise infiltrated by mechanical or other means. Invasive procedure includes, but is not limited to surgery, lasers, ionizing radiation, therapeutic ultrasound, or electroconvulsive therapy; or

(d) a mental health counselor, marriage and family therapist or psychoanalyst who engages in diagnosis and/or the development of assessment-based treatment plans without a diagnostic privilege.