



TO: Professional Practice Committee

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

SUBJECT: Proposed Addition of Section 29.20 to the Rules of the Board of Regents and Repeal of Sections 52.44 and 52.45, Repeal and Addition of New Sections 79-17.1, 79-17.2, 79-18.1, 79-18.2, Amendment of Sections 79-17.3, 79-17.5, 79-18.3, and 79-18.5, and Addition of Sections 79-17.6 and 79-18.6 to the Regulations of the Commissioner of Education Relating to the Licensure of Applied Behavior Analysts and Certification of Applied Behavior Analyst Assistants

DATE: February 2, 2023

AUTHORIZATION(S):

Don McGreevey *Betsy M...*

SUMMARY

Issue for Discussion

Should the Board of Regents add section 29.20 to the Rules of the Board of Regents and repeal sections 52.44 and 52.45, repeal and add new sections 79-17.1, 79-17.2, 79-18.1, 79-18.2, amend sections 79-17.3, 79-17.5, 79-18.3 and 79-18.5, and add sections 79-17.6 and 79-18.6 to the Regulations of the Commissioner of Education, relating to the licensure of licensed behavior analysts and certification of behavior analyst assistants?

Reason for Consideration

Required by State statute (Chapter 818 of the Laws of 2021 and Chapter 641 of the Laws of 2022) and Review of Policy.

Proposed Handling

The proposed amendments will be presented to the Professional Practice Committee for discussion at the February 2023 meeting of the Board of Regents. A copy of the proposed rule is included (Attachment A).

Procedural History

A Notice of Proposed Rule Making will be published in the State Register on March 1, 2023. Supporting materials for the proposed amendment are available upon request from the Secretary to the Board of Regents.

Background Information

Applied behavior analysts (ABA) are licensed in 36 states. Most states require an applicant to hold appropriate certification from the national credentialing body, the Behavior Analyst Certification Board (BACB), for licensure and/or to practice.

In New York, Chapter 554 of the Laws of 2013 added Article 167 to the Education Law, establishing the credentialing requirements for licensed behavior analysts (LBA) and certified behavior analyst assistants (CBAA). The initial scope of these professions was limited to providing behavioral health treatment to persons with autism and autism spectrum disorders and related disorders. The Board of Regents adopted regulations in 2014 to implement these professions. As of January 1, 2022, there are 2,078 LBAs and 16 CBAs credentialed in New York.

Over time, the BACB standards in this relatively new profession continued to evolve and diverge from New York law and regulations. For example, the Department initially required candidates to pass both the BACB exam and an additional (New York only) examination in autism. After receiving assurances from BACB that the national examination included content on autism, the Board of Regents eliminated the requirement for an autism-specific examination as of March 1, 2022.

Nonetheless, the BACB ultimately advised the Department that it would no longer admit New York candidates to the certification exam, due to the lack of alignment between the national and State credentialing requirements. The Department subsequently worked with the ABA professional association to better align New York with BACB standards and expand the licensure pathways.

Additionally, two laws have reduced the differences that once existed between NYS and national standards as follows:

- Chapter 818 of the Laws of 2021 (Chapter 818), effective June 30, 2023, expands the scope of practice for LBAs by removing the limitation that behavioral health treatment may only be provided to persons with autism and autism spectrum and related disorders. Chapter 818 authorizes licensees to provide ABA services pursuant to a diagnosis and prescription from authorized licensed professionals to treat individuals with behavioral health conditions that appear in the most recent edition of the diagnostic and statistical manual of mental disorders, published by the American Psychiatric Association. Chapter 818 requires licensees to report at least once per year to the prescribing licensed professional.
- Chapter 641 of the Laws of 2022 (Chapter 641), effective November 22, 2023, allows the Department to license an applicant who is of good moral character,

submits an application and fee for licensure, and verification of national certification from a credentialing body acceptable to the Department, without meeting additional requirements as to examination, experience, and education. Chapter 641 also permits a graduate of a qualifying education program to work under an LBA's supervision to meet the experience requirements for national certification and entry to the examination. The LBA must notify the Department that it is supervising such a graduate and is responsible for all services provided under supervision, while conforming to standards that are used in almost every other state that licenses these professions.

Combined, these provisions will reduce barriers for applicants authorized to practice in other states and assist New York candidates seeking to sit for the national certification exam.

Proposed Amendment

The proposed amendment implements the provisions of Chapters 818 and 641, and makes additional amendments to LBA and ABA provisions to align such provisions more closely with national standards, as follows:

Program Registration Requirements. The education requirements for licensure as an LBA or CBAA under sections 52.44 and 52.45 of the Commissioner's regulations are not consistent with the current BACB standards, which are continually revised as these new professions develop. Therefore, the Department proposes to repeal these sections to allow our education standards to align with the evolving national certification requirements, ensure that graduates are prepared to practice under the newly amended scope, and to prepare graduates for the national examination. The New York program will have to meet the general professional education program requirements prescribed in sections 52.1, 52.2 and 52.3 of the Commissioner's regulations to ensure the quality of the program.

Education. The proposed rule repeals the existing text of sections 79-17.1 and 79-18.1 and adds new text that outlines the education requirements for LBAs and CBAAAs, respectively.

LBA applicants must submit satisfactory evidence of the completion of a program in ABA leading to a masters or higher degree of at least 30 semester hours that includes a supervised internship of sufficient duration in the practice of ABA that is: (1) registered by the department as leading to licensure as an LBA; (2) accredited by an acceptable accrediting organization; or (3) determined to be the equivalent of a registered or accredited program. In the alternative, LBA applicants can satisfy the education requirements for licensure by: (1) holding a master's or higher degree upon successful completion of a program in a related field acceptable to the department and registered by the department, or its substantial equivalent; and (2) completing a credit bearing graduate-level program in ABA that is registered as leading to licensure or recognized or verified by an acceptable accrediting organization, or the substantial equivalent of such a recognized or verified program.

CBAA applicants must submit satisfactory evidence of the completion of a program in ABA leading to a bachelor's or higher degree that includes a supervised internship of sufficient duration in the practice of ABA that is either: (1) registered by the department as leading to certification as a CBAA; (2) accredited by an acceptable accrediting organization; or (3) determined to be the equivalent of a registered or accredited program. In the alternative, CBAA applicants can satisfy the education requirements for certification by: (1) holding a bachelor's or higher degree upon successful completion of a program in a related field acceptable to the department and registered by the department, or the substantial equivalent of a department registered program; and (2) completing a credit bearing certificate program in ABA that is registered by the department as leading to certification or recognized or verified by an accrediting organization acceptable to the department, or the substantial equivalent of such a recognized or verified program.

Experience. The proposed rule repeals the existing text of sections 79-17.2 and 79-18.2 and adds new text that outlines the experience requirements for LBAs and CBAA's, respectively. For licensure, LBA and CBAA applicants must present evidence of supervised experience in the practice of ABA acceptable to the Department. Full-time experience must consist of at least 20 hours and a maximum of 32.5 hours per week, while part-time experience must consist of at least 10 hours and a maximum of 19 hours per week. Experience must be completed in a setting that is legally authorized to provide services that constitute the practice of ABA and such experience must be completed under the supervision of a LBA registered to practice in New York State. These sections also contain additional requirements for qualified supervisors.

Examination. Sections 79-17.3 and 79-18.3 of the Commissioner's regulations are amended to remove references to the State Board for Applied Behavior Analysis and to remove the specific examination score requirement. These amendments are consistent with recent statutory changes and provide flexibility to utilize BACB's examination. The regulations continue to require that an applicant pass an examination acceptable to the Department that tests knowledge related to all areas of behavior analysis practice. Although the certification board will not accept candidates based solely on New York's approval, BACB may individually evaluate and admit those New York graduates who meet the BACB education and experience requirements for entry to the examination. There is no other examination in ABA available at this time, and BACB's examination is used for certification and licensure in every other jurisdiction.

Exemptions. To implement Chapter 641, sections 79-17.5 and 79-18.5 of the Commissioner's regulations are amended to provide an exemption to allow graduates of an educational program acceptable to the department to work to meet the experience requirements for national certification and entry to the examination. These graduates must work under the supervision of a LBA who is licensed and registered in New York State and employed in a setting authorized to provide ABA services therein. Additionally, such sections set forth additional requirements for the supervising LBA, consistent with Chapter 641.

Special Provisions. To implement Chapter 641, new sections 79-17.6 and 79-18.6 are added to allow individuals who meet the requirements for licensure as a LBA or the requirements for certification as a CBAA, respectively, except for examination,

experience, and education requirements, and who are certified or registered by a national certifying body having standards acceptable to the commissioner, to be licensed or certified without meeting additional requirements as to examination, experience, and education. Such individuals, however, must be of good moral character and must submit an application and the required fee for licensure or certification (as applicable) and registration.

Unprofessional Conduct. To implement Chapter 818, and to make the Commissioner's regulations consistent with Education Law §8802(1), (3), and (4), a new section 29.20 is added to the Rules of the Board of Regents outlining special provisions of unprofessional conduct for the ABA professions. This section provides that it is unprofessional conduct in the practice of LBA and CBAA to: (1) prescribe or administer drugs or as a treatment, therapy, or professional service in the practice of his or her profession; (2) use invasive procedures as a treatment, therapy, or professional service in the practice of his or her profession; or (3) diagnose a disorder or condition for which ABA may be appropriate or prescribing or ordering ABA for an individual.

Additionally, such section provides that it is unprofessional conduct for an LBA providing services pursuant to a prescription or order to fail to provide a report at least annually regarding the status of the individual served to the licensed person who prescribed or ordered such service, or more frequently, if needed, to report significant changes in the condition of the individual.

Timetable for Implementation

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption at the June 2023 Regents meeting, after publication of the proposed amendment in the State Register and expiration of the 60-day public comment period required under the State Administrative Procedure Act. If adopted at the June meeting, the proposed rule will become effective on June 30, 2023.

Attachment A

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 6504, 6507, 8804, 8805, and 8807 of the Education Law and Chapter 818 of the Laws of 2021 and Chapter 641 of the Laws of 2022.

1. Section 52.44 of the Regulations of the Commissioner of Education is REPEALED.

2. Section 79-17.1 of the Regulations of the Commissioner of Education is REPEALED and a new section 79-17.1 is added to read as follows:

79-17.1 Professional study for licensed behavior analysts

(a) As used in this section, *acceptable accrediting agency* shall mean an organization accepted by the department as a reliable authority for the purpose of accrediting applied behavior analysis programs and applying its criteria for granting accreditation of programs in a fair, consistent, and nondiscriminatory manner.

(b) To meet the professional education requirements for licensure, the applicant shall present satisfactory evidence of:

(1) holding a master's or higher degree awarded upon successful completion of a program in applied behavior analysis leading to a masters or higher degree of at least 30 semester hours that includes a supervised internship of sufficient duration in the practice of applied behavior analysis as defined in section 8802 of the Education Law that is:

(i) registered by the department as leading to licensure as a licensed behavior analyst;

(ii) accredited by an accrediting organization acceptable to the department; or

(iii) determined by the department to be the equivalent of a Department-registered or accredited program that prepares the applicant to practice as a licensed behavior analyst; or

(2) both:

(a) holding a master's or higher degree awarded upon successful completion of a program in a related field acceptable to the department and registered by the department, or its substantial equivalent as determined by the department; and

(b) completing a credit bearing graduate-level program in applied behavior analysis that is registered as leading to licensure or recognized or verified by an accrediting organization acceptable to the department, or determined by the department to be substantially equivalent to such a registered or recognized or verified program.

Such equivalent program must be recognized by the appropriate civil authorities of the jurisdiction in which the program is offered as a program that prepares the applicant for professional practice as a licensed behavior analyst and must be designed and conducted by the degree-granting institution to prepare graduates to practice professional applied behavior analysis independently.

3. Section 79-17.2 of the Regulations of the Commissioner of Education is REPEALED and a new section 79-17.2 is added to read as follows:

79-17.2 Experience requirement for licensed behavior analysts

(a) For licensure, an applicant shall present evidence of supervised experience in the practice of applied behavior analysis acceptable to the department.

(b) Content. Full-time experience shall consist of at least 20 hours and a maximum of 32.5 hours per week. Part-time experience shall consist of at least 10 hours and a maximum of 19 hours per week

(c) Setting. Experience shall be completed in a setting which is legally authorized to provide services that constitute the practice of applied behavior analysis, as defined in section 8802 of the Education Law.

(d) Supervision.

(1) Experience completed in New York shall be under the supervision of a licensed behavior analyst registered to practice in this state.

(2) The supervisor shall be the owner of, be employed by, or be retained by the entity providing the experience opportunities to the applicant who is gaining experience for licensure.

(3) In order to prevent a potential conflict of interest, the supervisor shall not be a member of the applicant's family or an individual who has a close personal relationship with the applicant and/or his or her family and may not be paid by the applicant.

(4) The supervisor shall be responsible for the assessment and treatment of each patient seen under supervision and shall not be employed or compensated by the applicant.

(5) Experience completed in another jurisdiction must be under the supervision of a qualified supervisor, as defined in that jurisdiction, in a setting authorized to provide services that constitute the practice of applied behavior analysis.

(6) Supervision shall be face-to-face individual supervision of a duration and frequency acceptable to the department, which may utilize technology acceptable to the Department, including secure video-technology.

4. Section 79-17.3 of the Regulations of the Commissioner of Education is amended to read as follows:

79-17.3 Licensing examinations for licensed behavior analysts

(a) The licensing examination shall consist of an examination designed to test knowledge related to all areas of applied behavior analysis.

(b) The department may accept scores [satisfactory to the State Board for Applied Behavior Analysis] on an examination acceptable to [the State Board for Applied Behavior Analysis and] the department, or an examination determined by the department to be comparable in content, as meeting the requirement for passing the licensing examination.

(c) The applicant shall pass the examination with a [converted score of at least 75, as determined by the State Board for Applied Behavior Analysis] score acceptable to the department.

5. The title of section 79-17.5 of the Regulations of the Commissioner of Education is amended to read as follows:

79-17.5 [Special provisions] Exemptions

6. Section 79-17.5 of the Regulations of the Commissioner of Education is amended by adding subdivision (i) to read as follows:

(i) Nothing in this Subpart shall be construed as prohibiting the activities and services required of a graduate of an educational program, acceptable to the department, seeking to complete supervised experience and/or examination requirements for certification or registration by a national certifying body having certification or registration standards acceptable to the commissioner; provided, however, that the graduate shall be under the supervision of a licensed behavior analyst who is licensed and registered in New York and employed by a setting authorized to provide applied behavior analysis services in New York, acceptable to the department.

(1) The supervising licensed behavior analyst shall submit, upon commencing the supervision of any graduate, or no later than ninety days after the effective date of this subdivision, on a form prescribed by the department, a sworn statement attesting to compliance with the requirements of this subdivision.

(2) Such use of a graduate shall subject the supervising licensed behavior analyst to the full disciplinary and regulatory authority of the board of regents and the department pursuant to this Title.

(3) The supervising licensed behavior analyst shall notify the patient or the person legally responsible for the patient if the patient is a minor, or other individual incapable of consenting, when services will be provided by a graduate under supervision.

(4) The supervising licensed behavior analyst shall remain responsible for services provided to the patient by the graduate and shall provide the patient or person legally responsible for the patient an opportunity to object to the use of a graduate to provide applied behavior analysis services under supervision.

7. The Regulations of the Commissioner of Education is amended by adding a new section 79-17.6 to read as follows:

79-17.6. Special provisions

As specified in section 8805(1) of the Education Law, an individual who meets the requirements for a license as a licensed behavior analyst, pursuant to section 8804(2) of the Education law, except for examination, experience and education, and who is certified or registered by a national certifying body having certification or registration standards acceptable to the commissioner, may be licensed without meeting additional requirements as to examination, experience and education.

Provided, however, that such individual must submit an application for licensure and the required fee for licensure and initial registration to the department, and must be of good moral character, as determined by the department.

8. Section 52.45 of the Regulations of the Commissioner of Education is REPEALED.

9. Section 79-18.1 of the Regulations of the Commissioner of Education is REPEALED and a new section 79-18.1 is added to read as follows:

79-18.1 Professional study for certified behavior analyst assistant

(a) As used in this section, *acceptable accrediting agency* shall mean an organization accepted by the department as a reliable authority for the purpose of accrediting applied behavior analysis programs and applying its criteria for granting accreditation of programs in a fair, consistent, and nondiscriminatory manner.

(b) To meet the professional education requirements for certification as a certified behavior analyst assistant, the applicant shall present satisfactory evidence of:

(1) holding a bachelor's or higher degree awarded upon successful completion of a program in applied behavior analysis leading to a bachelor's or higher degree that includes a supervised internship of sufficient duration in the practice of applied behavior analysis as defined in section 8802 of the Education Law that is:

(i) registered by the department as leading to certification as a certified behavior analyst assistant;

(ii) accredited by an accrediting organization acceptable to the department; or

(iii) determined by the department to be the equivalent of a Department-registered or accredited program that prepares the applicant for practice as a certified behavior analyst assistant; or

(2) both:

(a) holding a bachelor's or higher degree awarded upon successful completion of a bachelor's or higher degree program in a related field acceptable to the department and registered by the department, or its substantial equivalent as determined by the department; and

(b) completing a credit bearing certificate program in applied behavior analysis that is registered by the department as leading to certification or recognized or verified by an accrediting organization acceptable to the department, or determined by the department to be substantially equivalent to such a registered or recognized or verified program. Such equivalent program must be recognized by the appropriate civil authorities of the jurisdiction in which the program is offered as a program that prepares the applicant for professional practice as a certified behavior analyst assistant and must be designed and conducted by the degree-granting institution to prepare graduates to practice as an applied behavior analyst assistant.

10. Section 79-18.2 of the Regulations of the Commissioner of Education is REPEALED and a new section 79-18.2 is added to read as follows:

79-18.2 Experience requirement for certified behavior analyst assistant

(a) For licensure, an applicant shall present evidence of supervised experience in the practice of applied behavior analysis acceptable to a national certifying body having certification or registration standards acceptable to the commissioner for practice as a certified behavior analyst assistant.

(b) Content. Full-time experience shall consist of at least 20 hours and a maximum of 32.5 hours per week. Part-time experience shall consist of at least 10 hours and a maximum of 19 hours per week.

(c) Setting. Experience shall be completed in a setting which is legally authorized to provide services that constitute the practice of applied behavior analysis, as defined in section 8802 of the Education Law.

(d) Supervision.

(1) Experience completed in New York shall be under the supervision of a licensed behavior analyst registered to practice in this state.

(2) The supervisor shall be the owner of, be employed by, or be retained by the entity providing the experience opportunities to the applicant who is gaining experience for certification.

(3) In order to prevent a potential conflict of interest, the supervisor shall not be a member of the applicant's family or an individual who has a close personal relationship with the applicant and/or his or her family and may not be paid by the applicant.

(4) The supervisor shall be responsible for the assessment and treatment of each patient seen under supervision and shall not be employed or compensated by the applicant.

(5) Experience completed in another jurisdiction must be under the supervision of a qualified supervisor, as defined in that jurisdiction, in a setting authorized to provide services that constitute the practice of applied behavior analysis, as defined in section 8802 of the Education Law.

(6) Supervision shall be face-to-face individual supervision of a duration and frequency acceptable to the department, which may utilize technology acceptable to the Department, including secure video-technology.

11. Section 79-18.3 of the Regulations of the Commissioner of Education is amended to read as follows:

79-18.3 Licensing examination for certified behavior analyst assistant

(a) The licensing examination shall consist of an examination designed to test knowledge related to all areas of applied behavior analysis.

(b) The department may accept scores [satisfactory to the State Board for Applied Behavior Analysis] on an examination acceptable to [the State Board for Applied Behavior Analysis and]the department, or an examination determined by the department to be comparable in content, as meeting the requirement for passing the licensing examination.

[(c) The applicant shall pass the examination with a converted score of at least 75, as determined by the State Board for Applied Behavior Analysis.]

12. The title of Section 79-18.5 of the Regulations of the Commissioner of Education is amended to read as follows:

79-18.5 [Special provisions] Exemptions

13. Section 79-18.5 of the Regulations of the Commissioner of Education is amended by adding a new subdivision (i) to read as follows:

(i) Nothing in this Subpart shall be construed as prohibiting the activities and services required of a graduate of an educational program, acceptable to the department, seeking to complete supervised experience and/or examination requirements for certification or registration by a national certifying body having certification or registration standards acceptable to the commissioner; provided, however, that the graduate shall be under the supervision of a licensed behavior analyst who is licensed and registered in New York and employed by a setting authorized to provide applied behavior analysis services in New York, acceptable to the department.

(1) The supervising licensed behavior analyst shall submit, upon commencing the supervision of any graduate, or no later than ninety days after the effective date of this subdivision, on a form prescribed by the department, a sworn statement attesting to compliance with the requirements of this subdivision.

(2) Such use of a graduate shall subject the supervising licensed behavior analyst to the full disciplinary and regulatory authority of the board of regents and the department pursuant to this title.

(3) The supervising licensed behavior analyst shall notify the patient or the person legally responsible for the patient if the patient is a minor, or other individual incapable of consenting, when services will be provided by a graduate under supervision.

(4) The supervising licensed behavior analyst shall remain responsible for services provided to the patient by the graduate and shall provide the patient or person legally responsible for the patient an opportunity to object to the use of a graduate to provide applied behavior analysis services under supervision.

14. The Regulations of the Commissioner of Education are amended by adding a new section 79-18.6 to read as follows:

79-18.6. Special provisions

As specified in section 8805(1) of the Education Law, an individual who meets the requirements for certification as a certified behavior analyst assistant, pursuant to section 8804(1) of the Education Law, except for examination, experience and education, and who is certified or registered by a national certifying body having certification or registration standards acceptable to the commissioner, may be certified, without meeting additional requirements as to examination, experience, and education.

Provided, however, that such individual must submit an application for certification and the required fee for licensure and initial registration to the department, and must be of good moral character, as determined by the department.

15. The Rules of the Board of Regents is amended by adding a new section 29.20 to read as follows:

§ 29.20. Special provisions for the applied behavior analysis professions

(a) Unprofessional conduct in the practice of licensed behavior analyst and certified behavior analyst assistant shall include conduct prohibited by sections 29.1 and 29.2 of this Part and, in accordance with section 8802 (3) and (4) of the Education Law, shall also include:

(1) Prescribing or administering drugs as defined in the Education Law or as a treatment, therapy, or professional service in the practice of his or her profession;

(2) 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

(3) Diagnosis of a disorder or condition for which applied behavior analysis may be appropriate or prescribing or ordering applied behavior analysis for a particular individual.

(b) In accordance with section 8801(1) of the Education Law, for licensed behavior analysts providing services pursuant to a prescription or order, unprofessional conduct shall also include failing to provide a report at least annually regarding the

status of the individual served to the licensed person who prescribed or ordered such service, or more frequently, if needed, in order to report significant changes in the condition of the individual.