



THE STATE EDUCATION DEPARTMENT / THE UNIVERSITY OF THE STATE OF NEW YORK / ALBANY, NY 12234

**TO:** The Professional Practice Committee

**FROM:** Frank Muñoz

**SUBJECT:** Proposed Amendment to the Regulations of the Commissioner of Education Relating to Waivers from Corporate Practice Restrictions for Certain Not-for-Profit and Educational Corporations to Provide Services under Articles 154 or 163 of the Education Law or Psychotherapy Services as Defined in Section 8401(2) of the Education Law and Services Authorized and Provided under Articles 131, 139 or 153 of the Education Law

**DATE:** October 5, 2010

**STRATEGIC GOAL:** Goal 3

**AUTHORIZATION(S):**

### **Summary**

#### **Issue for Decision**

Should the Regents add a new section 59.14 to the Regulations of the Commissioner of Education and a new section 29.18 to the Rules of the Regents relating to waivers from corporate practice restrictions for certain entities to provide services under Articles 154 or 163 of the Education Law or psychotherapy services as defined in section 8401(2) of the Education Law and services authorized and provided under Articles 131, 139 or 153 of the Education Law?

#### **Reason(s) for Consideration**

State statute.

#### **Proposed Handling**

The proposed amendment is before the Professional Practice Committee for approval and will be presented to the Full Board for adoption as an emergency measure at its October 2010 meeting. A statement of facts and circumstances justifying the emergency action is attached.

## Procedural History

A Notice of Proposed Rule Making will be published in the State Register on October 27, 2010. A Notice of Emergency Action will be published in the State Register on November 10, 2010. Supporting materials for the proposed amendment are available upon request from the Secretary to the Board of Regents.

## Background Information

Chapters 130 and 132 of the Laws of 2010 amend the Education Law to address critical issues relating to the authority of certain entities to employ licensed master social workers (LMSW), licensed clinical social workers (LCSW), licensed mental health counselors (LMHC), licensed marriage and family therapists (LMFT), licensed creative arts therapists (LCAT), licensed psychoanalysts (LP), and licensed psychologists and to provide services within the scopes of practice of those professions. Prior to the restrictions on practice of those professions established by laws enacted in 2002, any individual or entity could provide psychotherapy and other services that are now restricted. While the new licensing laws provided exemptions for individuals in certain programs, these exemptions did not extend to thousands of not-for-profit and educational corporations throughout New York that provide essential services. This affected not only access to services for vulnerable persons, but also the ability of new graduates to meet the experience requirements for licensure in authorized settings, thereby restricting access to the licensed professions.

The Board of Regents advocated for amendments to the Education Law to allow qualified entities to overcome the corporate practice prohibitions and to provide services to individuals, families, groups and communities by employing individuals licensed or otherwise authorized to practice under Title VIII of the Education Law. On June 18, 2010, Governor Paterson enacted Chapters 130 and 132 of the Laws of 2010, to authorize the Department to issue waivers authorizing qualified entities to provide certain professional services; to accept supervised experience for licensure completed in settings that are eligible for waivers; to extend the exemption from licensure requirements for individuals in certain programs; and to mandate the Department to recommend, by July 1, 2012, with input from exempt agencies and key stakeholders, any amendments in laws or regulations needed to fully implement licensure by July 1, 2013.

The new section 6503-a of the Education Law authorizes the Department to issue a waiver to certain not-for-profit or educational corporations that were in existence on the effective date of the law, June 18, 2010. An entity must submit a waiver application within 120 days of the applications being posted on the Department's website and may continue to provide services until the application is approved or denied. The law allows entities to continue providing services until July 1, 2012, but if an application is denied by the Department, the entity must cease providing professional services in New York.

The law is very clear that the waiver is not intended to supplant the authority of other State agencies, such as the Department of Health or Office of Mental Health, that have oversight of health and mental health services. In reviewing applications for a waiver, the law requires the Education Department to collaborate with other State agencies to ensure public protection by minimizing the risk of an unqualified entity receiving a waiver to provide professional services. There are also provisions in the law in regard to eligible entities, professional services that may be offered by entities, oversight by the Board of Regents, and attestations by each officer or director of the entity that he or she is of good moral character. An entity that receives a waiver under the law must apply for a renewal every three years and must request a waiver certificate for each site in New York at which professional services are provided.

Section 6503-a identifies a number of entities that do not require a waiver from the corporate practice prohibitions, including any entity with an operating certificate issued under the Public Health Law, Mental Hygiene Law or in accordance with comparable procedures by a State, federal or local government agency; an institution of higher education that provides a program leading to licensure in medicine, nursing, psychology, social work or the mental health professions; an institution of higher education that provides counseling to students, staff and family members of students and staff; and a university faculty practice corporation. The law allows the Regents to identify in regulation other entities that do not require a waiver, provided that such entity is otherwise authorized by law to provide such services.

The proposed regulations implement the provisions of law by setting forth the requirements to be met by a qualified entity in order to receive a waiver. These include, but are not limited to, the submission of the certificate of incorporation or other documentation that authorizes the entity to provide services described in the law and a description of the services that will be offered to the public. The entity must attest to adequate financial resources and that it will comply with section 18 of the Public Health Law in regard to access to patient information and records. Although the granting of a waiver resolves the issue of the authority of the entity to provide professional services, only licensed or authorized persons may provide services, and the entity is responsible for verifying the licensure of providers and the appropriate supervision of interns or permit holders who are only authorized to practice under supervision.

The proposed addition of section 29.18 of the Rules of the Board of Regents implements the Board of Regents disciplinary authority over entities receiving waivers under Education Law section 6503-a. The amendment clarifies that the entity is subject to the same professional misconduct provisions of the Regents Rules as a licensed professional or professional entity, and that the entity has the same due process rights as a licensed professional or professional entity.

These regulations are being presented for adoption as an emergency measure to enable the Department to develop and publish in a timely manner applications necessary for issuing waivers authorized under the law, which became effective on June 18, 2010. If the regulations are adopted as an emergency measure, it is anticipated that applications will be available in January 2011 and posted on the Office of the Professions' website ([www.op.nysed.gov](http://www.op.nysed.gov)). This will provide adequate time for

entities to apply for a waiver and for the application to be processed by the Office of the Professions.

### Recommendation

VOTED: That section 59.14 of the Regulations of the Commissioner of Education be added and that section 29.18 of the Rules of the Regents be added, as submitted, effective October 26, 2010, as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the public health and general welfare to ensure that there is adequate time for eligible entities providing social work, psychological, and mental health practitioner services to apply for a waiver from corporate practice prohibitions under section 6503-a of the Education Law and for the application to be processed by the Office of Professions.

### Timetable for Implementation

If adopted as an emergency measure at the October 2010 Regents meeting, the proposed amendment will become effective October 26, 2010. The regulations will be published for a 45-day period of public comment, and it is anticipated that the proposed amendment will be presented for adoption as a permanent rule at the January 2011 Regents meeting.

## STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE EMERGENCY ADOPTION

The proposed amendments to the Commissioner's regulations and the Rules of the Board of Regents implement amendments to the Education Law that authorize the Department to issue to certain entities a waiver from restrictions on corporate practice for services provided under Articles 154 and 163 of the Education Law and psychotherapy services under section 8401(2) of the Education Law and authorized and provided under Articles 131, 139 or 153 of the Education Law. Chapters 130 and 132 of the Laws of 2010 were signed on June 18, 2010 to address critical issues relating to the authority of certain entities to employ LMSWs, LCSWs, LMHCs, LMFTs, LCATs, LPs, and licensed psychologists to provide services within the scopes of practice of those professions.

The proposed regulations implement the provisions of Chapters 130 and 132, which became effective on June 18, 2010, by setting forth the requirements to be met

by a qualified entity in order to receive a waiver. In order for the Department to develop, publish and review the applications required under the new law in a timely manner, the regulations must be adopted on an emergency basis.

An emergency action is necessary to ensure there is adequate time for eligible entities providing social work, psychological, and mental health practitioner services to apply for a waiver from corporate practice prohibitions under section 6503-a of the Education Law and for the application to be processed by the Office of Professions.

#### AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 6501, 6503, 6503-a, 6504, 6506, 6507, 6508, 6509, 6510, and 6511 of the Education Law.

1. A new section 59.14 of the Regulations of the Commissioner of Education is added, effective October 26, 2010, to read as follows:

§59.14 Waiver for entities providing certain professional services.

(a) Applicability. Section 6503-a of the Education Law authorizes the Department to issue a waiver for certain entities to provide the following services:

(1) services provided under Articles 154 or 163 of the Education Law for which licensure would be required, or

(2) services constituting the provision of psychotherapy as defined in section 8401(2) of the Education Law and authorized and provided under article 131, 139, or 153 of the Education Law.

(b) Eligible entities. To be eligible for a waiver under this section, an entity must be in existence prior to June 18, 2010 and be either:

(1) a not-for-profit corporation formed for charitable, educational, or religious purposes or other similar purposes deemed acceptable by the Department; or

(2) an education corporation as defined in section 216-a of the Education Law.

(c) Application for a waiver.

(1) To provide the services described in subdivision (a) of this section, an eligible entity shall have obtained a waiver from the Department no later than July 1, 2012. The Department may, however, issue a waiver to a qualified entity after July 1, 2012, regardless of the date on which the entity was created, upon a demonstration of need for the entity's services satisfactory to the Department (e.g., the entity provides services to an underserved population or in a shortage area).

(2) Within 120 days after the posting of the application form on the Department's website, any entity described in subdivision (b) of this section providing services described in subdivision (a) of this section on or after June 18, 2010, shall submit an application for a waiver on forms prescribed by the Commissioner. Upon submission of an application for a waiver under this section, the entity may continue to operate and provide services until the Department either denies or approves the entity's application.

(3) An application for a waiver under this section shall include:

(i) the name of the entity;

(ii) evidence that the entity is either:

(a) a not-for-profit corporation that is formed for charitable, educational, or religious purposes, or other similar purposes deemed acceptable by the department; or

(b) an education corporation as defined in section 216-a(1) of the Education Law;

(iii) evidence of the date the entity came into existence;

(iv) the primary address, phone number, website and email address for the entity;

(v) contact information for the individual responsible for submitting the application for a waiver, including phone number and email address;

(vi) the name and address of each director and officer of the entity;

(vii) a copy of the certificate of incorporation or other documentation that authorizes the entity to provide the services described in subdivision (a) of this section;

(viii) a listing of other jurisdictions in which the entity may provide the services described in subdivision (a) of this section;

(ix) the information required in paragraph (1) of subdivision (e) of this section;

and

(x) an attestation by an officer authorized by the entity to make such attestation that:

(a) identifies the scope of services to be provided by the entity;

(b) includes a list of professions under Title 8 of the Education Law in which professional services will be provided by such entity;

(c) includes a statement that only a licensed professional, a person authorized to provide such services, or a professional entity authorized by law to provide such services shall provide such professional services as are authorized under this section;

(d) the entity will comply with section 18 of the Public Health Law relating to patient access to records;

(e) the entity will make available any and all information requested by the Department relating to the entity's eligibility for a waiver and the entity's compliance with the requirements of this section and section 6503-a of the Education Law;

(f) includes a statement as to whether any application by the entity for an operating certificate or license with another state or federal agency, political subdivision, municipal corporation, or local government agency has been granted and such operating certificate or license is currently in effect; whether such application is pending

or was disapproved; whether such a certificate or license was revoked; and whether a written authorization or contract was terminated for cause by one of such agencies;

(g) the entity has adequate fiscal and financial resources to provide such services;

(h) the statements on the application are true and accurate.

(d) Entities that do not require a waiver. In accordance section 6503-a of the Education Law, the following entities do not require a waiver under this section:

(1) any entity operated under an operating certificate appropriately issued in accordance with article sixteen, thirty-one, or thirty-two of the mental hygiene law, article twenty-eight of the public health law, or comparable procedures by a New York state or federal agency, political subdivision, municipal corporation, or local government agency or unit, in accordance with the scope of the authority of such operating certificate;

(2) a university faculty practice corporation duly incorporated pursuant to the not-for-profit corporation law;

(3) an institution of higher education authorized to provide a program leading to licensure in a profession defined under article 131, 139, 153, 154, or 163 of the Education Law, to the extent that the scope of such services is limited to the services authorized to be provided within such registered program;

(4) an institution of higher education providing counseling only to the students, staff, or family members of students and staff of such institution; or

(5) any other entity that is otherwise authorized by law to provide such services and only to the extent that services are authorized under any certificates of incorporation or such other organizing documents as may be applicable.

(e) Provision of professional services.

(1) The entity shall describe in the application the services that will be provided that would otherwise be restricted to individuals licensed or authorized under Articles 153, 154 or 163 of the Education Law. The description shall indicate the profession(s) in which services will be provided and shall include:

(i) An attestation that individuals authorized to provide professional services only under supervision will receive the required supervision;

(ii) A description of how the services will be provided, including a description of whether the services will be provided by licensed or authorized individuals employed by the entity or provided through a contract with licensed professional(s) or a professional entity, as defined in Education Law section 6503-a(5); and

(iii) An attestation that the entity will verify the licensure, limited permit or other authorization of individuals and professional entities providing services as employees of or on behalf of the entity.

(2) Unless otherwise authorized by law, an entity that holds a waiver under this section shall not provide services in any profession other than those authorized in 6503-a of the Education Law and included on the application for a waiver.

(f) Attestation of moral character.

(1) Each director and officer of the entity shall submit on forms prescribed by the Commissioner an attestation regarding whether:

(i) the individual has been found guilty after trial, or pleaded guilty, no contest or *nolo contendere* to a crime (felony or misdemeanor) in any court;

(ii) the individual has criminal charges (felony or misdemeanor) pending in any court;

(iii) any licensing or disciplinary authority has refused to issue a license or has ever revoked, annulled, cancelled, accepted surrender of, suspended, placed on

probation, or refused to renew a professional license or certificate held by the individual now or previously, or has ever fined, censured, reprimanded or otherwise disciplined the individual;

(iv) there are any pending charges against the individual in any jurisdiction for any sort of professional misconduct; or

(v) a hospital or licensed facility has restricted or terminated the individual's professional training, employment or privileges, or whether the individual has ever voluntarily resigned or withdrawn from such association to avoid imposition of such measure.

(2) Any information included in the application that indicates that a director or officer of the entity has committed an act which raises a reasonable question as to the individual's moral character shall be referred to the Director of the Office of Professional Discipline or his or her designee. The determination of whether a director or officer of the entity is of good moral character shall be made in accordance with the procedures specified in Subpart 28-1 of the Rules of the Board of Regents.

(g) Review of waiver applications. The application shall not be deemed acceptable if the entity has not submitted information identified in paragraphs (c), (e), and (f) of this section. The Department may deny an application based on the failure of the applicant to submit the required information within a reasonable period of time, as determined by the department. When, in the determination of the department, all necessary information has been received, a decision to approve or deny the waiver application shall be made within 90 days of such determination. If the waiver application is denied, then the entity shall cease the provision of professional services as defined in section 6503-a(1)(a) of the Education Law. The determination of the Department shall be final, and a copy thereof shall be forwarded to the applicant.

(h) Waiver certificates.

(1) An entity that has been issued a waiver under this section shall apply for a waiver certificate for each setting at which the entity provides professional services in New York.

(2) The application for additional certificates may be made as part of the initial application for a waiver or after the Department has approved the entity for a waiver under section 6503-a of the Education Law.

(3) Each waiver certificate shall display the name of the entity and the address of the site.

(4) Any entity that willfully fails to obtain a certificate of waiver for each site and/or to display the waiver certificate at each site shall be subject to the penalties set forth in section 6511 of the Education Law.

(i) Notification of changes.

(1) An entity that is issued a waiver pursuant to section 6503-a of the Education Law shall notify the Department within 60 days of any change in the information supplied to the department, including but not limited to a change in the:

(i) name and terms of officers or directors;

(ii) site(s) at which professional services are provided; and

(iii) person responsible for filing the waiver application on behalf of the entity or the contact information for such person; and/or

(iv) a transfer or assignment of interest as set forth in subdivision (j) of this section, provided that the entity shall notify the Department immediately of such change.

(2) Notification shall be made in a form prescribed by the department.

(i) Transfer or assignment of waiver. A waiver issued by the Department pursuant to section 6503-a of the Education Law shall not be transferable or assignable.

For purposes of this section, a transfer or assignment shall mean the conveyance of a waiver under this section from one entity to another entity by any means, including but not limited to a merger, consolidation, or a change in control of the entity.

(k) Triennial application. A waiver issued pursuant to this section shall be valid for three years. An entity that is issued a waiver pursuant to this section shall submit to the Department for review an application for renewal of the waiver every three years.

2. A new section 29.18 of the Rules of the Regents is added, effective October 26, 2010, to read as follows:

§29.18 Unprofessional conduct in waived entities.

(a) An entity that is issued a waiver pursuant to section 6503-a of the Education Law and section 59.14 of this Title shall be under the supervision of the Board of Regents and subject to the disciplinary procedures and penalties set forth in subarticle 3 of Article 130 of the Education Law. Any such waiver shall be subject to suspension, revocation or annulment for cause, and any entity holding such a waiver shall be subject to disciplinary proceedings and penalties in the same manner, to the same extent, and for the same reasons as individuals and professional entities practicing the same profession, as provided in Title VIII of the Education Law and this Part. For purposes of this subdivision, a certificate of waiver shall be considered the same as a license to practice a profession.

(b) Failure to disclose information. It shall be unprofessional conduct for an entity issued a waiver pursuant to section 59.14 of this Title to have failed to disclose all information required by the Department in order to make an accurate determination of the entity's waiver application. This shall include the failure to notify the Department that a director or officer of the entity has committed an act which raises a reasonable question as to moral character.

(c) Penalties for professional misconduct. The Board of Regents may impose upon an entity found guilty of unprofessional conduct under this section those penalties and fines authorized in section 6511 of the Education Law.