



TO: The Honorable Members of the Board of Regents

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: October 5, 2023

AUTHORIZATION(S):

Don M. P. *Bell...*

SUMMARY

Issue for Decision (Consent)

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(s) 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 amendment is presented to the Full Board for adoption as an emergency rule at the October 2023 meeting of the Board of Regents. A copy of the proposed rule (Attachment A) and a statement of facts and circumstances justifying emergency action (Attachment B) are attached.

Procedural History

The proposed amendment was presented to the Professional Practice Committee for discussion at the February 2023 meeting of the Board of Regents. A Notice of Proposed Rule Making was published in the State Register on March 1, 2023, for a 60-day public comment period.

Following publication in the State Register, the Department received numerous comments from multiple commenters. An Assessment of Public Comment is included (Attachment C). Due to the volume and complexity of comments, the Department needed additional time to review them to determine whether revisions to the proposed rule were needed before the final adoption of a permanent rule.

Additionally, emergency action was necessary at the June meeting to ensure that the proposed rule was in place to implement the provisions of Chapter 818 of the Laws of 2021, which became effective June 30, 2023, and Chapter 641 of the Laws of 2022, which became effective November 22, 2022. A Notice of Emergency Adoption was published in the State Register on June 28, 2023.

In response to public comment, a revised proposed rule was presented to the Professional Practice Committee for discussion and recommendation to the Full Board for adoption as an emergency rule at the September 2023 meeting of the Board of Regents. A Notice of Emergency Adoption and Revised Rule Making was published in the State Register on September 27, 2023, for an additional 45-day public comment period.

Because the September emergency action will expire on November 10, 2023, a third emergency action is necessary to ensure the emergency rule remains continuously in effect until it can be permanently adopted at the December 2023 Regents meeting. A Notice of Emergency Adoption will be published in the State Register on November 29, 2023. Supporting materials for the proposed amendments 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 CBAA's 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 examination 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 examination, 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, 2022, 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 CBAA 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 CBAA's, respectively.

LBA applicants must submit satisfactory evidence of the completion of a program in ABA leading to a master's 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 a 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.

Revisions to the Proposed Rule

Since the publication of a Notice of Proposed Rule Making in the State Register on March 1, 2023, and subsequent Notice of Emergency Adoption on June 28, 2023, the proposed rule was revised in response to public comments as follows:

- **Education Requirements for Licensed Behavior Analysts and Certified Behavior Analyst Assistants.** The new added sections 79-17.1 and 79-18.1 of the Commissioner’s regulations have been revised to more closely align with national standards as follows:
 - The internship requirement has been eliminated; and
 - The language has been broadened to more clearly recognize the Verified Course Sequence Process¹ by: (1) replacing references to “accrediting agency” with “credentialing organization”; and (2) broadening the program approval language to include programs “accredited, recognized, or verified by a credentialing organization acceptable to the department” rather than programs “accredited by an accrediting organization acceptable to the department”.
- **Experience Requirements for Licensed Behavior Analysts and Certified Behavior Analyst Assistants.** The new added sections 79-17.2 and 79-18.2 of the Commissioner’s regulations have been revised to more closely align with national standards as follows:
 - The content requirement has been revised to: (1) remove the reference to specific hourly requirements (or “timekeeping”) for full-time and part-time experience; and (2) to specify that the experience content must meet the requirements of a credentialing organization acceptable to the Department;
 - The supervision requirements have been revised to: (1) remove reference to “face-to-face” supervision; (2) authorize group supervision in addition to individual; and (3) provide that such supervision shall be of a duration and frequency that is either acceptable to the department **or** a credentialing organization acceptable to the Department; and
 - References to the standards of a “credentialing organization” have been added.

Related Regent’s Items

February 2023: [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](https://www.regents.nysed.gov/sites/regents/files/223ppcd1.pdf)
(<https://www.regents.nysed.gov/sites/regents/files/223ppcd1.pdf>)

¹ The Verified Course Sequence is one pathway (Pathway 2) to meet the necessary education requirements to take the examination for certification by the ABA national certification body.

June 2023: [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](https://www.regents.nysed.gov/sites/regents/files/623ppca1.pdf)
(<https://www.regents.nysed.gov/sites/regents/files/623ppca1.pdf>)

September 2023: [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](https://www.regents.nysed.gov/sites/regents/files/923ppca2.pdf)
(<https://www.regents.nysed.gov/sites/regents/files/923ppca2.pdf>)

Recommendation

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

VOTED: That section 29.20 of the Rules of the Board of Regents be added, sections 52.44 and 52.45 of the Regulations of the Commissioner of Education be repealed, sections 79-17.1, 79-17.2, 79-18.1, and 79-18.2 of the Regulations of the Commissioner of Education be repealed and new sections 79-17.1, 79-17.2, 79-18.1, and 79-18.2 of the Regulations of the Commissioner of Education be added, and sections 79-17.3, 79-17.5, 79-18.3, and 79-17.5 of the Regulations of the Commissioner of Education be amended and sections 79-17.6 and 79-18.6 of the Regulations of the Commissioner of Education be added, as submitted, effective November 11, 2023, 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 in order to timely implement the requirements of Chapter 641 of the Laws of 2022, which became effective November 22, 2022, and Chapter 818 of the Laws of 2021, which became effective June 30, 2023, and to ensure the emergency action taken at the September 2023 meeting remains continuously in effect.

Timetable for Implementation

If adopted as an emergency rule at the October 2023 meeting, the emergency rule will become effective November 11, 2023. It is anticipated that the revised proposed amendment will be presented to the Board of Regents for permanent adoption at the December 2023 Regents meeting, after publication in the State Register and the expiration of the 45-day public comment period required under the State Administrative Procedures Act for revised rule makings. If adopted at the December meeting, the proposed revised rule will become effective as a permanent rule on December 27, 2023.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 6504, 6507, 8802, 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 credentialing organization shall mean an organization accepted by the department as a reliable authority for the purpose of establishing standards for the practice of applied behavior analysis, as that profession is defined in Education Law, and applying its criteria 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 master's or higher degree that is:

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

(ii) accredited, recognized, or verified by a credentialing organization acceptable to the department; or

(iii) determined by the department to be the equivalent of such a registered, accredited, recognized, or verified 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 by the department as leading to licensure or accredited, recognized, or verified by a credentialing organization acceptable to the department, or determined by the department to be substantially equivalent to such a registered, accredited, recognized, or verified program. Such equivalent program shall 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. The number of acceptable hours shall meet the requirements of a credentialing organization acceptable to the department.

(b) Content. The content shall meet the requirements of a credentialing organization acceptable to the department.

(c) Setting. Experience completed in New York 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 individual or group supervision of a duration and frequency acceptable to the department or a credentialing organization acceptable to the department. Supervision 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 credentialing organization* shall mean an organization accepted by the department as a reliable authority for the purpose of establishing standards for the practice of applied behavior analysis, as that profession is defined in Education Law, and applying its criteria 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 is:

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

(ii) accredited, recognized, or verified by a credentialing organization acceptable to the department; or

(iii) determined by the department to be the equivalent of such a registered, accredited, recognized, or verified 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 accredited, recognized, or verified by a credentialing organization acceptable to the department, or determined by the department to be substantially equivalent to such a registered, accredited, recognized, or verified program. Such equivalent program shall 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 credentialing organization having certification or registration standards acceptable to the department for practice as a certified behavior analyst assistant.

(b) Content. The content shall meet the requirements of a credentialing organization acceptable to the department.

(c) Setting. Experience completed in New York 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 individual or group supervision of a duration and frequency acceptable to the department or a credentialing organization acceptable to

the department. Supervision 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.

**8 NYCRR §§ 29.20, 52.44, 52.45, 79-17.1, 79-17.2, 79-18.1, 79-18.2,
79-17.3, 79-17.5, 79-18.3, 79-18.5, 79-17.6, and 79-18.6**

**STATEMENT OF FACTS AND CIRCUMSTANCES
WHICH NECESSITATE EMERGENCY ACTION**

The proposed rule is necessary to implement Chapter 641 of the Laws of 2022 (Chapter 641), which became effective November 22, 2022, and Chapter 818 of the Laws of 2021 (818), which became effective June 30, 2023. The proposed rule conforms the Regents Rules and the Commissioner's regulation to Chapters 641 and 818, which amend the Education Law by, among other things, reducing the differences that once existed between New York and national standards regarding the applied behavior analysis profession.

Chapter 641 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 a licensed behavior analyst's (LBA) supervision to meet the experience requirements for national certification and entry to the examination. The LBA must notify the Department that they are supervising such a graduate and are responsible for all services provided under supervision, while conforming to standards that are used in almost every other state that licenses LBAs and certified behavior analyst assistants (CBAA).

Chapter 818 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.

Combined, Chapters 641 and 818 will reduce barriers for applicants authorized to practice in other states and assist New York candidates seeking to sit for the national certification examination, which should increase the number of New York LBA and CBAA licensees and improve New Yorkers' access to applied behavior analysis services.

The proposed amendment was presented to the Professional Practice Committee for discussion at the February 2023 meeting of the Board of Regents. Because the Department received substantial comment on the proposed rule, the Department needed additional time to consider whether revisions were needed before presenting the proposed rule to the Board of Regents for permanent adoption.

However, emergency action was necessary at the June 2023 Regents meeting for the preservation of the public health and general welfare in order to enable the State Education Department to timely implement the requirements of Chapter 641, which became effective November 22, 2022, and Chapter 818, which became effective June 30, 2023.

Following the 60-day public comment period, and in response to public comment, at the Board of Regents September 2023 meeting, the Department made substantial revisions to the proposed amendment and took an additional emergency action to

ensure the emergency action taken at the June 2023 meeting remained continuously in effect.

Since the Board of Regents meets at fixed intervals, the earliest that the proposed revised rule can be presented for permanent adoption, after expiration of the 45-day comment period provided for in the State Administrative Procedure Act (SAPA) §201(4a) for revised rule makings, would be the December 2023 Regents meeting. Furthermore, pursuant to SAPA §203(1), the earliest effective date of the proposed rule, if adopted at the December 2023 meeting, would be December 27, 2023 the date the Notice of Adoption would be published in the State Register.

However, the September emergency rule will expire on November 10, 2023). Therefore, a third emergency action is necessary at the October 2023 meeting, effective November 11, 2023, for the preservation of the public health and general welfare in order to timely implement the requirements of Chapter 641, which became effective November 22, 2022 and Chapter 818, which became effective June 30, 2023 and to ensure the emergency action taken at the September 2023 meeting remains continuously in effect.

It is anticipated that the proposed rule will be presented to the Board of Regents for adoption as a permanent rule at the December 2023 meeting, which is the first scheduled meeting after expiration of the 45-day public comment period mandated by SAPA for state agency rule making.

ASSESSMENT OF PUBLIC COMMENT

Following the publication of a Notice of Proposed Rule Making in the State Register on March 1, 2023, the State Education Department received the following comments on the proposed regulation. These comments were previously published as part of the September 2023 Board of Regents item:

1. COMMENT: Several individuals and associations stated that the proposed regulations disadvantage New York programs and students, relative to out-of-state programs and students.

RESPONSE: The Department and the noted stakeholders share a common goal of aligning State and national Applied Behavior Analysis (ABA) standards. Stakeholders helped to identify specific references in the proposed regulations that did not explicitly align with national standards. As a result, the Department has revised the proposed rule to clarify portions of the proposed regulations that define professional study and experience requirements, to align such with national standards.

2. COMMENT: Some commenters suggested that a “supervised internship” requirement would disadvantage New York higher education (HE) institutions because out-of-state institutions have no such requirement. As a result, New York students would need to complete more experience than other states require, leading to increased costs and decreased enrollment at New York HE institutions. Additionally, two commenters stated that it was unclear what “sufficient duration” meant in reference to the internship requirement.

RESPONSE: The Department has revised the proposed rule to remove the supervised internship requirement.

3. COMMENT: An association of colleges proposed that the licensure pathway defined in section 79-17.1(b)(2) of the Commissioner's regulations be available to all applicants.

RESPONSE: The education pathway in section 79-17.1(b)(2) of the Commissioner's regulations is designed for students who hold a master's or higher degree in a related field and complete an additional credit-bearing, graduate program in ABA. Combined, this pathway, as well as the pathway in section 79-17.1(b)(1) of the Commissioner's regulations, cover all education pathways to licensure: those who hold a master's degree in ABA and those who hold a master's degree in a related field. No changes to these sections of the proposed regulation are required as a result of this comment.

4. COMMENT: Commenters urged the adoption of monthly timekeeping under the experience requirement in section 79-17.2(b) of the Commissioner's Regulations to ensure alignment with national credentialing standards.

RESPONSE: The Department has revised the proposed rule to remove the reference to weekly timekeeping and to specify that the experience content shall meet the requirements of a credentialing organization acceptable to the Department, which will ensure alignment with national standards.

5. COMMENT: Some commenters stated that the use of the term "accredited" under the education requirements would exclude the current mechanism through which institutions are recognized by the accrediting and credentialing organizations.

RESPONSE: National certification and accreditation bodies' education standards will continue to evolve over the next several years. The current timeline from those bodies requires program accreditation by 2032; in the meantime, programs seeking

recognition under the national certification standards must meet the latest edition of the national Verified Course Sequence (VCS). In response to these comments, the Department has revised the proposed rule to expand the reference to program approval to include programs “accredited or recognized or verified” by a credentialing organization acceptable to the Department. This more explicitly authorizes the Department to recognize programs that align with the current edition of the VCS.

6. COMMENT: Commenters urged the Department to allow group supervision of experience consistent with the standards of the national certification body.

RESPONSE: The Department has revised the language in sections 79-17.2(d)(6) and 79-18.2(d)(6) of the proposed rule to authorize individual or group supervision of a duration and frequency acceptable to the Department or a credentialing organization acceptable to the Department, aligning the Department’s experience requirements with national standards.

7. COMMENT: One association noted that out-of-state institutions are engaged in “aggressive marketing,” such as advertising that New York students can become licensed in New York if they earn their license in another state.

RESPONSE: The comment is outside the scope of the proposed rule. However, the Department notes that Chapter 641 of the Laws of 2022 establishes a pathway to licensure based on national certification, and it must be implemented as such by the Department. New York candidates will be subject to the same national standards as other states. Students will continue to have the ability to select the preparation program that best suits their needs and preferences. No changes to the proposed regulation are required as a result of this comment.

8. COMMENT: Two commenters requested that students gaining experience in an exempt setting be exempt from the requirement to obtain a prescription from an authorized provider.

RESPONSE: This comment is outside the scope of the proposed amendment. Additionally, the Department notes that Education Law §8802 requires that ABA practitioners obtain a diagnosis and prescription from an authorized provider prior to delivering services. Therefore, the commenters' request would require statutory change beyond the scope of this proposed regulation. No changes in the proposed regulation are required as a result of this comment.

9. COMMENT: Two commenters asked whether there will be rules or exceptions to address licensee supervision of online ABA "program students" who may reside in jurisdictions where behavior analysts are not licensed.

RESPONSE: The commenters' reference to program students appears to describe an in-program experience requirement (e.g., an internship). As noted above, the Department has revised the proposed rule to remove the supervised internship requirement.

10. COMMENT: One institution referenced changes under sections 52.44 and 52.45 of the Commissioner's regulations and asks what is meant by "equivalent of an accredited program with regard to master's program." Specifically, the commenter asks whether their specific program would be considered "an equivalent" program.

RESPONSE: The proposed rule repeals sections 52.44 and 52.45 of Commissioner's regulations. However, the proposed rule's newly added section 79-17.1(b) sets forth the professional education requirements for licensure and provides, in part, that a candidate must hold a master's or higher degree from a program in ABA that

is either (1) registered by the Department; (2) accredited, recognized, or verified by a credentialing organization acceptable to the Department; or (3) determined by the Department to be the equivalent of a department-registered, accredited, recognized, or verified program. The Department cannot opine on the specific institution's program, as such equivalency determinations are made on a case-by-case basis. No changes to the proposed rule are necessary.

11. COMMENT: One institution asked multiple questions about the internship and/or post-graduation experience requirements defined under amended sections 79-17.1 and 79-17.2 of Commissioner's Regulations, including: (1) whether supervised experience hours will be required as part of the mentioned supervised internship; (2) whether the [internship] requirement pertains to students in NYS registered programs only or all individuals working and living in NYS but attending non-NYS registered programs (e.g., in NJ or CT or remotely); (3) how the Department will ensure that all applicants working and residing in NYS meet this requirement; and (4) how individuals accruing hours in NYS but attending programs outside of NYS (e.g., online or crossing the border into NJ or CT) will meet this requirement.

RESPONSE: As stated above, the Department has revised the proposed rule to remove the supervised internship requirement from the regulations.

Experience undertaken in New York must be gained under the supervision of a New York licensed behavior analyst (LBA) and will be reviewed in accordance with the requirements of section 79-17.2 of the Commissioner's regulations. Additionally, sections 79-17.5 and 79-18.5 of the Commissioner's regulations provide a mechanism for lawful practice by students, as well as by program graduates who are seeking to

complete experience and/or examination requirements of an acceptable national certifying body.

Student practice exemptions already exist under sections 79-17.5 and 79-18.5 of the Commissioner's regulations. Experience undertaken in New York must be gained lawfully under the supervision of a New York LBA. No changes to the proposed regulation are required as a result of this comment.

12. COMMENT: One institution of higher education asked if "students" accruing hours outside of New York will meet prescription requirements.

RESPONSE: This comment is outside the scope of the proposed rule. However, the Department notes that Education Law §8802 requires New York ABA practitioners to practice pursuant to a diagnosis and prescription from an authorized provider. This is a requirement for practice in New York and does not affect laws in other states. No changes to the proposed regulation are required as a result of this comment.

13. COMMENT: One institution of higher education asked how institutions will document changes to their New York ABA licensure-qualifying programs.

RESPONSE: The Department will provide guidance to New York ABA licensure-qualifying programs about how to submit program changes for approval. No changes to the proposed regulation are required as a result of this comment.

14. COMMENT: One institution of higher education disagreed with the Department's statement that the cost to education programs would be limited to aligning their programs to the expanded scope of practice. It maintains that it will lose revenue due to students choosing "programs with fewer rules or requirements."

RESPONSE: The proposed regulation's changes to the professional study and experience requirements clarify that New York candidates and institutions will be

subject to the same national standards as other states. Under the proposed rule, New York candidates and institutions will be subject to the same national standards referenced by other states, so it is not clear where or how nationally recognized “programs with fewer rules or requirements” exist.

15. COMMENT: One accreditation body stated that if New York’s education requirements for licensure are inconsistent with national standards, it would negatively affect New York institutions of higher education and service providers. Additionally, it noted that having inconsistency in standards would harm the populace of New York by depriving them of adequately trained and available providers.

RESPONSE: The Department concurs and thanks the accreditation body for its comments. The revisions to the professional study and experience requirements in the proposed regulation clarify that New York candidates and institutions will be subject to the same national standards as other states.

16. COMMENT: One ABA membership organization highlighted the evolving nature of requirements faced by professional preparation programs and stated that programs should have the opportunity to continue to progress and grow toward meeting the stringent requirements of accreditation.

RESPONSE: The Department concurs and thanks the organization for its response. The revisions to the professional study and experience requirements in the proposed regulation are designed to accommodate the evolving requirements.