



TO: The Honorable Members of the Board of Regents

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

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

DATE: February 1, 2024

AUTHORIZATION(S): *Don McGreevey* *Betsy Clark*

SUMMARY

Issue for Decision (Consent)

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

Reason for Consideration

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

Proposed Handling

The proposed amendment is submitted to the Full Board for adoption as a permanent rule at the February 2024 meeting of the Board of Regents. A copy of the proposed rule (Attachment A) is attached.

Procedural History

The proposed amendment was presented to the Professional Practice Committee for discussion at the March 2023 meeting of the Board of Regents. A Notice of Proposed Rulemaking was published in the State Register on March 29, 2023, for a 60-day public comment period required under the State Administrative Procedure Act (SAPA).

Following publication in the State Register, the Department received numerous comments from multiple commenters and clarification of legislative intent from the sponsors of Chapter 230 of the Laws of 2022. An Assessment of Public Comment

(Attachment B) is attached. Based on the legislative intent, a substantial revision was made to the proposed rule as described below.

A Notice of Revised Rule Making was published in the State Register on November 29, 2023, for a 45-day public comment period. Following publication of the Notice of Revised Rule Making, the Department received further comments from several commenters. An Assessment of Public Comment (Attachment C) is attached. No changes to the proposed amendment are recommended at this time. A Notice of Adoption will be published in the State Register on February 28, 2024. Supporting materials are available upon request from the Secretary to the Board of Regents.

Background Information

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

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

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

Original Proposed Amendment

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

Clinical Education:

Consistent with Education Law §8401-a(1)(c), the Department proposes to add new subdivisions 79-9.6(e), 79-10.6(e), and 79-12.6(e) to define clinical content in education programs leading to licensure as an LMHC, LMFT, or LP. The proposed regulation requires that an applicant for the diagnostic privilege must demonstrate satisfactory evidence of receipt of a master's degree or higher in LMHC, LMFT, or LP from a program that includes at least 60-semester hours or the clock-hour equivalent program of study in psychoanalysis. Such program must also contain at least 12 semester hours, or the equivalent, of clinical content acceptable to the Department that prepares the applicant to engage in diagnosis, psychotherapy and assessment-based 3 treatment planning. An applicant who did not complete an acceptable degree of 60 semester hours or the equivalent and/or the required clinical content in a license-qualifying program may complete post-graduate coursework acceptable to the Department to remedy any deficiencies in the degree or the clinical content.

Experience:

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

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

Application:

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

Registration:

Consistent with Education Law §8401(3) the Department proposes to add new subdivisions 79-9.6(h), 79-10.6(h), and 79-12.6(h) to set forth registration requirements. The proposed rule requires licensees who hold a diagnostic privilege to certify that they continue to meet the requirements for the privilege each triennial registration period.

Additionally, the licensee must pay a \$175 fee in addition to the triennial registration fee for licensure. The registration period for a privilege holder is coterminous with his or her license registration.

Privilege Duration and Oversight:

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

Professional Misconduct:

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

Substantial Revision to the Proposed Amendment

Since publication of the Notice of Proposed Rulemaking, the Department has received legislative intent on the experience requirements in Chapter 230 and, as a result, has made a substantial revision to the proposed rule. The revision clarifies that an applicant who is licensed in New York prior to June 24, 2024, may meet the experience requirement for the diagnostic privilege by either (1) submitting verification of completion of a supervised experience of at least 2,000 hours of supervised, direct client contact that includes, but is not limited to, diagnosis, psychotherapy and the development of assessment-based treatment plans; or (2) submitting an attestation of at least three years of experience engaged in direct client contact that includes diagnosis, psychotherapy and the development of assessment-based treatment plans. The privilege application and fee must be submitted by June 24, 2027.

Additionally, an incorrect reference to experience in section 79-10.6(f) of the Commissioner's regulations was corrected to reference section 79-10.3(e), rather than section 79-10.3(d).

Related Regent's Items

November 2022: [Proposed Repeal of Sections 79-9.6, 79-10.6, 79-12.6, Addition of New Sections of 79-9.6, 79-10.6, 79-12.6 and Amendment of Sections 79-9.4, 79-10.4, 79-12.4 of the Regulations of the Commissioner of Education Relating to Mental Health Practitioners' Diagnosis Privilege](https://www.regents.nysed.gov/sites/regents/files/1122ppca1.pdf)

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

March 2023: [Proposed Amendment of Section 29.15 of the Rules of the Board of Regents and Sections 79-9.6, 79-10.6, and 79-12.6 of the Regulations of the Commissioner of Education Relating to Mental Health Practitioners' Diagnostic Privilege](https://www.regents.nysed.gov/sites/regents/files/323ppcd1.pdf)

(<https://www.regents.nysed.gov/sites/regents/files/323ppcd1.pdf>)

November 2023: [Proposed Amendment of Section 29.15 of the Rules of the Board of Regents and Sections 79-9.6, 79-10.6, and 79-12.6 of the Regulations of the Commissioner of Education Relating to Mental Health Practitioners' Diagnostic Privilege](https://www.regents.nysed.gov/sites/regents/files/1123ppcd2.pdf)

(<https://www.regents.nysed.gov/sites/regents/files/1123ppcd2.pdf>)

Recommendation

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

VOTED: That section 29.15 of the Rules of the Board of Regents and sections 79-9.6, 79-10.6, and 79-12.6 of the Regulations of the Commissioner of Education be amended, as submitted, effective February 28, 2024.

Timetable for Implementation

If adopted at the February 2024 meeting, the proposed rule will become effective on February 28, 2024.

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

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

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

(e) Acceptable clinical education.

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

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

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

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

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

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

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

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

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

(2) Notwithstanding paragraph (1) of this subdivision, an applicant who is licensed as a mental health counselor prior to June 24, 2024 may also satisfy the experience requirement of this subdivision by submitting, in a form and format acceptable to the Department, an attestation from a supervisor that such licensee has at least three years of experience engaged in direct client contact that shall include diagnosis, psychotherapy and the development of assessment-based treatment plans. Such licensee shall submit the privilege application, fee and all required documentation to the department on or before June 24, 2027.

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

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

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

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

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

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

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

2. Section 79-10.6 of the Regulations of the Commissioner of Education is amended by adding new subdivisions (e) through (i) as follows:

(e) Acceptable clinical education.

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

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

(2) Clinical coursework. An applicant must demonstrate satisfactory completion of at least 12 semester hours or equivalent coursework that prepares the individual to diagnose and develop assessment-based treatment plans acceptable to the department, including 8 coursework such as:

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

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

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

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

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

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

(1) An applicant who is licensed as a marriage and family therapist shall cause to be submitted, in a form and format acceptable to the Department, verification of the completion of at least 2,000 hours of supervised, direct client contact that shall include,

but not be limited to, diagnosis, psychotherapy and the development of assessment-based treatment plans.

(2) Notwithstanding paragraph (1) of this subdivision, an applicant who is licensed as marriage and family therapist prior to June 24, 2024 may also satisfy the experience requirement of this subdivision by submitting, in a form and format acceptable to the department, an attestation from a supervisor that such licensee has at least three years of experience engaged in direct client contact that shall include diagnosis, psychotherapy and the development of assessment-based treatment plans. Such licensee shall submit the privilege application, fee and all required documentation to the department on or before June 24, 2027.

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

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

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

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

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

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

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

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

3. Section 79-12.6 of the Regulations of the Commissioner of Education is amended by adding subdivision (e) through (i) as follows:

(e) Acceptable clinical education.

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

(2) Clinical coursework. An applicant must demonstrate satisfactory completion of at least 12 semester hours or equivalent coursework that prepares the individual to diagnose and develop assessment-based treatment plans acceptable to the department, including 8 coursework such as:

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

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

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

(iv) clinical psychoanalysis interventions with diverse populations.

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

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

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

(2) Notwithstanding paragraph (1) of this subdivision, an applicant who is licensed as a psychoanalyst prior to June 24, 2024 may also satisfy the experience requirement of this subdivision by submitting, in a form and format acceptable to the department, an attestation from a supervisor that such licensee has at least three years of experience engaged in direct client contact that shall include diagnosis, psychotherapy and the development of assessment-based treatment plans. Such licensee shall submit the privilege application, fee and all required documentation to the department on or before June 24, 2027.

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

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

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

York;

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

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

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

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

4. Subpart 29.15 of the Rules of the Board of Regents is amended, to read as follows: 29.15 Special provisions for the professions of creative arts therapy, marriage and family therapy, mental health counseling, and psychoanalysis.

Unprofessional conduct in the practice of creative arts therapy, marriage and family therapy, mental health counseling and psychoanalysis shall include conduct prohibited by sections 29.1 and 29.2 of this Part and, in accordance with section 8407 of the Education Law, shall also include:

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

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

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

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

ASSESSMENT OF PUBLIC COMMENT

Following the publication of Proposed Rule Making in the State Register on March 29, 2023, the State Education Department (Department) received the following comments on the proposed regulation. These comments were previously published as part of the November 2023 Regents item:

1. COMMENT: A New York City-based social work association and a statewide association of clinical social workers commented that the proposed regulations comport with the intent and wording of Chapter 230 and no further comment is required.

DEPARTMENT RESPONSE: The Department acknowledges and appreciates the comments.

2. COMMENT: Professional associations commented that “clinical” should be removed from the heading of Acceptable Clinical Education in §79-9.6(e), §79-10.6(e) and §79-12.6(e) to avoid suggesting that all programs leading to licensure must include 12 semester hours of clinical content.

DEPARTMENT RESPONSE: An applicant for licensure and the privilege must complete an acceptable program as defined in §79-9.1, §79-10.1 or §79-12.1. The proposed rule addresses clinical content for the privilege and the requirement that applicants remedy deficiencies in general or clinical content. No change is required.

3. COMMENT: Professional associations commented that regulations should clarify that a licensee who has not met the 60-semester hour or clock hour equivalent degree for the privilege should be allowed to take courses specified in §52.32, §52.33 or §52.35 to meet the deficiency.

DEPARTMENT RESPONSE: An applicant who requires additional coursework may complete courses in the practice of the profession from a license-qualifying program or the equivalent, acceptable to the Department. No change is required.

4. COMMENT: Professional associations commented that the four clinical courses in §79-9.6(e)(2), §79-10.6(e)(2) and §79-12.6(e)(2) should be broader.

DEPARTMENT RESPONSE: The topics in the proposed rule are not exhaustive but illustrative of clinical coursework that prepares the individual to diagnose and develop assessment-based treatment plans. No change is required.

5. COMMENT: Professional associations commented that §79-9.6(f)(1), §79-10.6(f)(1) and §79-12.6(f)(1) should allow an applicant to submit verification of 2,000 hours of supervised experience that includes diagnosis, psychotherapy and assessment-based treatment planning, regardless of the date of licensure.

DEPARTMENT RESPONSE: The comment is consistent with the legislative intent of Education Law §8401-a(d), which would allow an applicant to meet either requirement for the privilege. The Department has made a substantial revision to the proposed rule to reflect this.

6. COMMENT: Associations commented that §79-9.6(g)(4), §79-10.6(g) and §79-12.6(g) should allow a licensed colleague to attest to an applicant's experience if the original supervisor is unavailable.

DEPARTMENT RESPONSE: Department policy allows a licensed colleague to attest to the experience completed under the original supervisor if a supervisor is unavailable. No change is required.

7. COMMENT: Associations commented that §79-9.6(g)(4), §79-10.6(g)(4) and §79-12.6(g)(4) should allow an applicant who completed supervised direct experience for licensure to count those hours toward the 2,000 required for the privilege.

DEPARTMENT RESPONSE: Supervised experience for licensure that included diagnosis and assessment-based treatment planning in an authorized setting under a qualified supervisor could be submitted for this purpose. No change is required.

8. COMMENT: Associations suggested that §79-9.6(2), §79-10.6(2) and §79-12.6(2) should allow a third-party to attest the applicant has met the requirements for licensure in New York, in lieu of a license issued by the Department.

DEPARTMENT RESPONSE: The comment is inconsistent with Chapter 230. No change is necessary.

9. COMMENT: Associations commented that §§79-9.6(f)(2) and 79-10.6(f)(2) should be amended to extend beyond June 24, 2027, the deadline for applicants licensed prior to June 24, 2024, to submit the application and meet all requirements for the privilege.

DEPARTMENT RESPONSE: The deadline is established by statute. No change is required.

10. COMMENT: Associations commented that §79-9.6(f), §79-10.6(f) and §79-12.6(f) do not address instances when an applicant has multiple supervisors during post-graduate practice.

DEPARTMENT RESPONSE: The proposed rule allows experience under multiple supervisors and/or in multiple settings. Each supervisor must submit verification to the Department, which may be combined, in accordance with the statute and regulations. No change is required.

11. COMMENT: Associations commented that §79-9.6(f), §79-10.6(f) and §79-12.6(f) do not allow a licensee to submit supervised hours completed in a practice owned by the applicant who does not hold the privilege.

DEPARTMENT RESPONSE: The proposed arrangement is contrary to NYCRR §79-9.3(e), §79-10.3(e) and §79-12.3(3) defining acceptable settings. The comment is outside the scope of the proposed rule as those regulations were adopted and became effective November 30, 2022, and are not the subject of the proposed amendments at issue here. No change is necessary.

12. COMMENT: Commenters suggested that the regulations should provide alternative pathways toward the privilege.

DEPARTMENT RESPONSE: Chapter 230 does not authorize the Department to consider or develop alternative pathways toward obtaining the privilege. No changes are required.

13. COMMENT: Associations of MFTs commented that §79-10.6(e) will require experienced licensees with 45-semester hour degrees to complete remedial coursework that is not required of recent 60-semester hour licensees suggesting that regulations should deem MFTs licensed with less than 60 semester hours to have met the education requirement.

DEPARTMENT RESPONSE: The comment is inconsistent with the statute, therefore no change is required.

14. COMMENT: Commenters suggested that §79-10.6(e) be amended to define non-credit bearing practicum, courses taught by licensees and other post-graduate training toward the 60-semester hour master's degree.

DEPARTMENT RESPONSE: Chapter 230 requires submission of acceptable evidence of additional graduate coursework in marriage and family therapy at a degree granting institution. No change is required.

15. COMMENT: Associations and providers commented that the \$175 triennial registration fee for the privilege is arbitrary, burdensome, and out-of-line with other professional fees and recommend elimination of the triennial fee.

DEPARTMENT RESPONSE: Chapter 230 establishes the \$175 fee and makes the fee coterminous with the licensee's registration to practice the profession. No change is required.

16. COMMENT: Multiple commenters opined that requirements for the privilege will not increase access to mental health providers; will impose education costs on applicants; and negatively affect reimbursement.

DEPARTMENT RESPONSE: The proposed regulations are consistent with requirements established by Chapter 230. No change is required.

17. COMMENT: Psychoanalytic training programs expressed concern that courses taught in the institute prior to June 24, 2024 will not meet the clinical education requirement in §79-12.6(e).

DEPARTMENT RESPONSE: The applicant's education program(s) must submit Form 2D to verify the completion of required coursework that meets the requirements for the privilege. If there are deficiencies, the applicant will be notified. No change is required.

18. COMMENT: Psychoanalytic training programs expressed concern that experience in diagnosis will not be acceptable under §79-12.6(f) if the institute was not authorized to provide diagnosis.

DEPARTMENT RESPONSE: Experience submitted for the privilege must be completed in a lawful manner and meet the requirements in §79-12.3(d). No change is required.

19. COMMENT: Experienced psychoanalysts are concerned that they must complete additional education and supervised experience to qualify for the privilege.

DEPARTMENT RESPONSE: Chapter 230 requires a licensee seeking the privilege to meet the education and experience requirements. No changes are required.

20. COMMENT: Psychoanalysts asked that an applicant's "private practice" under a supervisor hired by the applicant be acceptable for obtaining the privilege.

DEPARTMENT RESPONSE: An acceptable setting and qualified supervisor are defined in §79-12.6(d), effective November 30, 2022. See response to comment #11 above. No change is required.

21. COMMENT: A psychotherapy institute commented that supervised experience and coursework completed in a license-qualifying program should be acceptable for the privilege.

DEPARTMENT RESPONSE: Verification of clinical coursework and pre-degree experience completed in a license-qualifying program may be submitted in accordance with §79-12.6(g)(3) and (4) for review. No change is required.

22. COMMENT: An institute commented that experience completed prior to June 2024 should be acceptable under §79-12.6(f), even if the supervising psychoanalyst was not authorized to diagnose and develop assessment-based treatment plans.

DEPARTMENT RESPONSE: The supervisor requirements in 79-12.6(d)(2) define a qualified supervisor and became effective on November 30, 2022. See response to comment #11 above. No change is required.

23. COMMENT: Several commenters opined that the regulations would allow "unqualified practitioners to provide services outside their scope of practice" and urged the Department to ensure that only qualified practitioners provide diagnoses.

DEPARTMENT RESPONSE: The comments are inconsistent with Chapter 230 which authorizes three professions—MHCs, MFTs and LPs—to diagnose behavioral health conditions if licensees qualify for the diagnostic privilege issued by the Department. No change is required.

24. COMMENT: A commenter alleged that the proposed rule would remove the diagnostic privilege for mental health providers in New York and would not allow a licensee to be reimbursed for services. The commenter asked that a private practice owned by an applicant be an acceptable setting to qualify for the privilege.

DEPARTMENT RESPONSE: Chapter 230 adds diagnosis and assessment-based treatment planning to the practice for the MHCs, MFTs, and LPs licensed under Article 163, effective June 24, 2024. Creative Arts Therapists (CATs) are not eligible under this law. Neither the regulation nor law address reimbursement, thus this comment is outside the scope of the proposed rule. No change is required.

25. COMMENT: Numerous commenters suggested the regulations should mirror the requirements for licensed clinical social workers.

DEPARTMENT RESPONSE: The proposed regulations for mental health practitioners are consistent with Chapter 230. No changes are required.

26. COMMENT: A coalition of not-for-profit behavioral health provider agencies commented that the Department has not published diagnostic limited permits, application forms, templates, and lists of acceptable education programs.

DEPARTMENT RESPONSE: The documents will be finalized after the proposed rule is adopted. No change is required.

27. COMMENT: A coalition of not-for-profit behavioral health provider agencies commented that a limit of five diagnostic permittees under a single supervisor in 79- 21

9.4(b), 79-10.4(b) and 79-12.4(b) is restrictive and should be expanded to 10 permittees and supervision of one hour per week should be reduced to 30 minutes.

DEPARTMENT RESPONSE: The supervisor is responsible for each patient seen by a permit holder under their supervision and training. These permittees' limit and supervision requirements are consistent across mental health professions and protect public health and safety. No change is required.

28. COMMENT: Agencies commented that licensees will incur additional costs to comply with the education requirements and urge the Department to establish alternative standards, such as three years of post-license experience and 12 hours of clinical content.

DEPARTMENT RESPONSE: Chapter 230 does not authorize the Department to create an alternative pathway. Therefore, no changes are required.

29. COMMENT: Agencies commented that funds should be set aside for tuition assistance and loan forgiveness for licensed MHPs who will have to complete additional education under the law and create a state partnership for reduced cost online education.

DEPARTMENT RESPONSE: The comments are outside the scope of Chapter 230 and the proposed rule. No change is necessary.

30. COMMENT: A coalition of agencies commented that amendments to section 29.15 would take effect on June 24, 2024 although an exemption allows licensed and registered mental health practitioners to engage in diagnosis and assessment-based treatment planning until June 24, 2025.

DEPARTMENT RESPONSE: The regulation is consistent with Chapter 230 and an unqualified person who engaged in restricted activities could be charged with practicing beyond the scope, therefore, no change is required.

31. COMMENT: Agencies commented that a limited diagnostic permit holder could engage in diagnosis and developing assessment-based treatment plans under supervision, although such person is not mentioned in section 29.15 as amended.

DEPARTMENT RESPONSE: A permit holder or other person authorized to practice under supervision is not subject to Part 29 of the Regents Rules, as that person does not hold a professional license. No change is required.

32. COMMENT: Agencies commented that assessment-based treatment planning is in the scope of the MHPs, therefore, that activity should be deleted from the revised section 29.15.

DEPARTMENT RESPONSE: The regulation is based on section 4 of Chapter 230, which defines diagnosis and assessment-based treatment planning by a person without the privilege as unprofessional conduct. No change is required.

ASSESSMENT OF PUBLIC COMMENT

Following the publication of a Notice of Revised Rulemaking in the State Register on November 29, 2023, the State Education Department (Department) received the following public comment on the revised proposed rule:

1. COMMENT: A coalition of not-for-profit behavioral health provider agencies (coalition), whose comments comprise the first eleven comments herein, commented that the limit of five diagnostic permittees per supervisor in sections 79-9.4(b), 79-10.4(b) and 79-12.4(b) of the proposed rule is restrictive and should be expanded to 10 permittees and supervision of one hour per week should be reduced to 30 minutes.

RESPONSE: The supervisor to permittee ratio is designed to ensure permittees and the patients that they serve have appropriate supervisor attention. Expanding the number of permittees would overextend supervisors, which is not in the best interest of permittee training or patient safety. This permittees per supervisor limit and supervision requirements are consistent across all the mental health professions.

2. COMMENT: The coalition suggested establishing a user-friendly portal that lists the permittees registered under each licensee so that supervisors and provider agencies can easily see the filled and available slots and can log-in to remove or add permittees. The coalition further opined that supervisor licensees should be able to remove permittees from their licenses, asserting that this duty presently falls solely on the permittee, which can dramatically slow down the process of supervisors taking on new permittees.

RESPONSE: While the Department appreciates the commenter's suggestion, the Department currently accepts changes in permits submitted by an applicant/permittee or a supervisor. Therefore, no changes are required.

3. COMMENT: The coalition suggested a change to allow licensed mental health practitioners (MHPs) with three or more years of post-license experience to apply for and receive the diagnostic privilege without going back to school, in alignment with the social work licensure expectations for clinical licenses, as long as they have 12 hours of clinical coursework.

RESPONSE: Chapter 230 of the Laws of 2022 (Chapter 230) requires receipt of a master's degree or higher in LMHC, LMFT of at least 60-semester hours, or the clock-hour equivalent program of study in psychoanalysis from an LP institute. Since not all master's programs require 60 semester hours, additional study may be required. No change is required.

4. COMMENT: The coalition suggested that the MHP diagnostic privilege should align more closely with licensed clinical social worker diagnostic privilege regulations.

RESPONSE: The proposed amendments for MHPs' diagnostic privilege are consistent with the requirements of Chapter 230, the applicable State law. No changes are required.

5. COMMENT: The coalition suggested setting aside funds for tuition assistance and loan forgiveness for MHPs, who will now be required to go back to graduate school. The coalition further suggested a state partnership with accredited colleges or universities who can provide virtual classes for MHPs to access at a subsidized rate.

RESPONSE: While the commenter's suggestion is appreciated, it is beyond the scope of Chapter 230. No change is required.

6. COMMENT: The coalition commented that section 29.15 of the proposed amendment should be amended to clarify that those covered under the grandfathering provision will be held harmless from professional misconduct through June 24, 2025, in accordance with Education Law §8410(11).

RESPONSE: The Department cannot make such a representation as a practitioner without the privilege or an exemption who engages in restricted activities, could be charged with practicing beyond their scope of practice under State law. No change is required.

7. COMMENT: The coalition states that Education Law §8407(1) and the proposed amendments to section 29.15 of the Rules of the Board of Regents indicate that misconduct applies to a professional diagnosing and developing assessment-based treatment plans “without a diagnostic privilege.” The coalition suggests that this language could be interpreted to mean that misconduct would apply to a professional engaging in such activities with a limited diagnostic permit under supervision who is gaining experience for the full privilege. The commenter asked that section 29.15 of the proposed rule be revised to ensure that a professional with a limited diagnostic permit cannot be charged with misconduct for diagnosing and developing assessment-based treatment plans under supervision.

RESPONSE: The Department recognizes that a practitioner with a limited permit will be diagnosing and assessment-based treatment planning while being supervised by a practitioner who has the applicable privilege or is engaging in diagnosis and assessment-based treatment planning within their scope of practice. This is consistent with the Education Law and does not constitute misconduct.

8. COMMENT: The coalition commented that the development of assessment-based treatment plans by LMHCs and LMFTs is within the current scope of practice for each license, which specifically authorizes MHPs to assess, evaluate, and treat (Education Law §§8402-8403). Therefore, the coalition urges the Department to remove assessment-based treatment plans from section 29.15 of the proposed rule to ensure

that licensed LMHCs and LMFTs are not penalized for developing such plans in accordance with well-established scope of practice parameters.

RESPONSE: Under the proposed regulations, consistent with Chapter 230, licensed professionals who diagnose and develop assessment-based treatment plans without the privilege to do so are subject to misconduct under section 29.5. No change is required.

9. COMMENT: The coalition commented on the perceived burden of the \$175 fee for the privilege on top of the existing \$175 triennial fee for registration, especially if this fee will be charged at every triennial renewal. The coalition requests clarification that the privilege fee is only charged upon initial application, as it was for LCSW-Rs. The coalition asserts that a triennial fee of \$350 is overly burdensome and incongruent with fees charged for other licensed professionals.

RESPONSE: Chapter 230 establishes the \$175 fee for the initial privilege and the same fee every three years to register and makes the fee coterminous with the licensee's registration to practice the profession. No change is required.

10. COMMENT: The coalition indicates, based on a previous Assessment of Public Comment" published in the November 29, 2023 State Register that the Department intends to produce all forms and documents once the Regulation is adopted. With only five months until professionals can begin applying for the privilege, the coalition urges the expeditious adoption of the rule and the prompt release of documents, forms, and related materials.

RESPONSE: The documents identified by the commenter will be made available soon after the implementing regulations are permanently adopted. No change is required.

11. COMMENT: The coalition commented that, if supervision can be split between two different supervisors (e.g., allowing an LMHC without the privilege to continue a permittee's supervision for the purposes of the license, and an LCSW to supervise for just the privilege), this would effectively cut the available supervision slots in half.

RESPONSE: An applicant may hold one permit authorizing supervised practice in multiple settings under more than one supervisor if approved by the Department. A supervisor is responsible for each patient seen by a permit holder under supervision as well as training the permit holder. The permittee limit and supervision requirements are consistent across all the mental health professions to ensure public safety. The law allows different individuals to serve as supervisors for the diagnosis and assessment-based treatment work. The availability of supervisors will increase over time, as additional licensees qualify for the privilege. No change is required.

12. COMMENT: A commenter proposed that the Department first award the privilege to existing practitioners to ensure there are an appropriate number of qualified supervisors to provide supervision to graduates.

RESPONSE: While the commenter's suggestion is reasonable, this approach is not contemplated by Chapter 230. Applications are otherwise reviewed and processed by Department staff in the order they are received. Thus, no change is required.

13. COMMENT: A commenter suggested waiving the supervision requirement for licensed practitioners because there are thousands of practitioners operating in agencies and private practice throughout New York State who will struggle to secure diagnostic supervision to meet this requirement. The commenter acknowledged the Department's previous response that this credential is not required to practice; however,

that commenter indicates that the privilege is necessary to receive reimbursement and qualify to supervise future applicants.

RESPONSE: While the Department acknowledges the validity of these concerns, Chapter 230 requires supervised experience for a licensed practitioner to obtain the privilege, and the proposed rule is consistent with this requirement.

14. COMMENT: An association of psychoanalytic education programs opined that the current language requires a master's or higher degree in psychoanalysis to obtain the privilege. New York State's licensure-qualifying LP programs do not award master's degrees, but rather a post-master's certificate. If the privilege does not accept a post-master's certificate, this threatens the long-term viability of psychoanalytic education programs approved by the Department.

RESPONSE: Chapter 230 requires applicants for the privilege in psychoanalysis, mental health counseling and marriage and family therapy to demonstrate receipt of a master's or higher degree of 60 semester hours or the clock hour equivalent in the case of psychoanalytic programs. Admission to a psychoanalytic program requires an earned master's or higher degree in any field—and licensure requires completion of the psychoanalytic program defined in law and regulation. Thus, graduates must necessarily hold a master's degree with required coursework in psychoanalysis. This will be clarified in guidance for applicants and programs. No change is required.

15. COMMENT: A psychoanalytic association asks whether the Department will accept all experience that a licensed psychoanalyst has gained toward licensure toward the 2,000-hour diagnostic privilege requirement, including experience in psychoanalysis and psychotherapy supervised by a licensed psychoanalyst that does not have the diagnostic privilege.

RESPONSE: Supervised experience for the privilege, including experience that qualifies for licensure, should be submitted to the Department by the applicant's supervisor(s) and/or attestor(s) for consideration. The Department will review this experience to determine if it meets the requirements in law and regulation for supervised practice, which must include, but is not limited to, diagnosis and assessment-based treatment planning under a qualified supervisor in an authorized setting. The Department's application and instructions will make these requirements clear. No change is required.