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Mental Health

Office of Addiction
Services and Supports

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To: OMH and OASAS Licensed, Certified or Otherwise Authorized Providers

From: NYS OMH, NYS OASAS

Date: June 22, 2022

Re: The effect of the change in State Education Department (SED) licensing exemption laws on activities performed within programs and services regulated, operated, funded or approved by OMH or OASAS.

The following guidance is intended to address provider questions and concerns regarding the impact of the sunset of the Social Work Exemption provisions on the operations of OMH and OASAS programs and services. The sunset is effective June 24, 2022. This guidance supplements Guidance issued by the State Education Department entitled “Guidelines to Implement Part Y of Chapter 57 of the Laws of 2018”¹ (hereinafter “SED Guidance”) and assumes providers and licensed health care professionals are familiar with the SED Guidance and other applicable SED scope of practice laws and rules.

As a part of the state fiscal year 2019 budget,² New York State enacted legislation to amend and clarify the licensing exemptions originally enacted in 2002 related to the practices of psychology, social work, mental health counseling, marriage and family counseling, creative arts therapy, and psychoanalysis by individuals in programs or service operated, regulated, funded, or approved by agencies within the department of mental hygiene. The legislation allows unlicensed individuals to continue to perform many of the direct care tasks and interventions provided in programs and services authorized by OMH and OASAS. The purpose of this memorandum is to provide OMH and OASAS programs with guidance on the impact of the enacted legislation on the various activities that occur within these programs. Please note that this legislation did not alter existing scopes of practice for licensed professionals, other exemptions in the State Education Law which may be applicable to the activities of unlicensed individuals, or any rules regarding the supervised practice of limited permit holders. These topics will not be addressed in this memorandum.

The enacted legislation amended and clarified the social work and mental health practitioner licensing exemption provisions in three ways: First, newly enacted exemption provisions codify current practices and continue to allow unlicensed individuals to independently perform an array of supportive and recovery-oriented services, including home and community-based services for both adults and children, residential rehabilitation, peer support, and skill development services. For example, this would include informal observations, screening, psychosocial rehabilitation, restorative services and peer services.

Next, newly enacted exemption provisions allow unlicensed individuals to participate as part of multi-disciplinary teams and assist licensed professionals on such teams to develop and implement behavioral health treatment or services plans. The new provisions specify that where one or more appropriately licensed professionals is a member of the multi-disciplinary team that is providing services, other professionals or unlicensed individuals on the team may assist the appropriately licensed professionals who are acting within their lawful scope(s) of practice to provide services, including clinical treatment. Team members to whom this exemption applies include professionals with different scopes of practice, unlicensed individuals who are working under appropriate supervision to obtain experience required for licensure, or others performing

¹ See “Guidelines to Implement Part Y of Chapter 57 of the Laws of 2018,” available at <http://www.op.nysed.gov/surveys/mhpsw/guidelines-implement-%20party-chapter57-laws%20of%202018.pdf>

services at the direction of a licensed professional, under supervision appropriate to the individual's level of education and experience. In settings regulated by the agencies within the department of mental hygiene, multi-disciplinary team composition and functionality may be prescribed by regulation and is subject to the oversight of the applicable executive agency.

Lastly, the enacted legislation also provided for the so-called "grandparenting" of individuals who are employed or commence employment in a program or service operated, regulated, funded, or approved by OMH, OASAS, or another human services agency³ on or before June 24, 2022, enabling such individuals to practice under the original exemption provisions as long as they remain employed in settings by such agencies. Additional guidance regarding establishing eligibility under this exemption will be issued separately.

Effective June 24, 2022, there are five specific clinical activities within the scopes of practices of psychology, social work, and mental health counseling that may only be performed by appropriately licensed or permitted professionals or exempt individuals, including individuals who are exempt under the grandparenting provisions. Those restricted activities are (1) the diagnosis of mental, emotional, behavioral, addictive and developmental disorders and disabilities; (2) patient assessment and evaluation; (3) the provision of psychotherapeutic treatment; (4) the provision of treatment other than psychotherapeutic treatment; and (5) the development and implementation of assessment-based treatment plans. As required by the legislation, in 2018, the State Education Department issued guidance for impacted service providers regarding these activities. OMH and OASAS programs should review this guidance and any subsequent amendments thereto.

Tracking Eligibility for Grandparenting Provisions

The enacted legislation requires the State oversight agencies, including OMH, OASAS, OPWDD and OCFS, to maintain a process to verify employment histories of individuals who are exempt under the grandparenting provisions. The affected agencies are working diligently to establish a verification process with forms and instructions that providers may choose to integrate into their employment processes for this purpose. Please note that the State Education Law does not require the state agencies to verify an individual's employment history in order for individuals to rely on this exemption. When onboarding new employees after June 24, 2022, programs will be required to perform their own employment verification activities to determine if candidates for employment are exempted under this provision.

The following FAQs have been developed to address licensed or certified provider and practitioner questions related to the impact of the sunset of the Social Work Exemption provisions on OMH and OASAS program operations. OMH and OASAS are also reviewing other current guidance and FAQ documents to determine if updates are necessary to address this issue. Programs should disregard other OMH or OASAS guidance or FAQ documents that contain information that has not been updated or that conflicts with this guidance.

Frequently Asked Questions

- 1. Q:** The State Education Law indicates unlicensed or individuals not appropriately licensed can "assist" in the development and implementation of behavioral health treatment or services plans. A definition of "assist" includes, but is not limited to, the performance of tasks such as "directly delivering services outlined in the service plan that are not clinical in nature but have been tailored to an individual based

² Pt. Y of Ch.57 of N.Y. Laws of 2018.

³ The exemption also applies to individuals employed in a program or service operated, regulated, funded, or approved by OPWDD, OCFS, DOCCS, OTDA, NYSOFA, DOH, or a or a local governmental unit as that term is defined in section 41.03 of the mental hygiene law or a social services district as defined in section sixty-one of the social services law.

on any diagnoses such individual may have received from a licensed professional.”⁴ **Does this mean that only licensed individuals can perform clinical activities in OMH or OASAS programs?**

A: No. Under the new exemption provisions, assisting may include the performance of clinical tasks directed by appropriately licensed individuals and under clinically appropriate supervision, depending on the unlicensed or inappropriately licensed individual’s training and experience. Some examples of clinical activities provided by unlicensed or inappropriately licensed individuals with appropriate supervision, but not considered restricted activities may include: Crisis intervention, Screening Brief Intervention and Referral to Treatment (SBIRT), and functional/needs assessment services provided in an OMH licensed clinic. However, such individuals may not engage in restricted activities as described in SED Guidance.

There are also multiple other exemptions that may be applicable to the practice of unlicensed individuals, including the grandparenting provisions discussed above as well as other exemptions that permit Credentialed Alcohol and Substance Abuse Counselors (CASAC), LMSWs, limited permit holders, certain students, and individuals with master’s degrees, including master’s degrees required for licensure as a Mental Health Practitioner or a master’s degree in psychology to provide services under appropriate supervision, as specified in the State Education Law and SED regulations and guidance. Individuals so authorized may engage in restricted practices in OMH and OASAS programs.

2. Q: Can Licensed Mental Health Practitioners do assessments and create, revise and execute treatment plans based on a clinical diagnosis in OMH Article 31 licensed or OASAS Article 32 certified programs?

A: Yes, Licensed Mental Health Practitioners can continue to perform all the activities within their current scopes of practice, including but not limited to assessment, evaluation, counseling and psychotherapy to identify, evaluate and treat dysfunctions and disorders. These activities are the foundation of clinical work in OMH licensed and OASAS certified programs. Assessment and treatment planning activities in OMH-licensed and OASAS certified programs are not limited to the act of diagnosis itself or done for the sole purposes of establishing or confirming an individual’s diagnosis, but rather as part of a broader person-centered treatment planning process. The person-centered treatment planning process in OMH licensed and OASAS certified programs is an ongoing process that occurs over the course of treatment and includes the individual’s goals, objectives and appropriate interventions.

Where treatment plans include a specific diagnosis, only individuals who have diagnosis within their scope of practice should be making the final determination about the noted diagnosis within that treatment plan or in any other part of the treatment process (e.g. assessments).

3. Q: Can unlicensed individuals create treatment plans in OMH Article 31 or OASAS Article 32 programs?

A: Newly enacted exemption provisions allow unlicensed individuals to participate as part of multi-disciplinary teams and assist licensed professionals on such teams to develop and implement behavioral health treatment or services plans. While unlicensed individuals may contribute to the development of such plans in OMH or OASAS programs, such plans are required to be reviewed and approved by an appropriately licensed individual who is a part of the multi-disciplinary team and retains clinical responsibility for the services provided to service recipients.

4. Q: What does the term “multi-disciplinary team” mean for purposes of the new exemption provisions in OMH and OASAS programs and services?

⁴ See NYS Education Law §§ 7605(10)(c)(ii)(14), 7706(7)(c)(ii)(14), 8410(8)(c)(ii)(14).

A: The term “multi-disciplinary team” refers to the regulated environment of a program under the jurisdiction of OMH and OASAS, wherein staffing plans, including supervision for all staff providing direct care to service recipients provided by licensed professionals, are subject to the approval of OMH or OASAS as a part of the licensing or certification process.

5. Q: Which disciplines/licensure levels will be permitted to conduct intake assessments that yield a clinical diagnosis?

A: The intake and assessment process includes the collection of information from the individual receiving services, collaterals, or referral source/historical documentation. While the intake process will require the program to ensure an individual meets medical necessity criteria and is appropriate for services, it is not done solely for the purposes of establishing or confirming an individual’s diagnosis. All of the SED restricted activities, including diagnosis, should be performed only by staff operating within scope of practice, and under appropriate supervision where required by the Education Law or SED regulations. Unlicensed individuals functioning as a part of a multi-disciplinary team may also assist the licensed staff to perform the intake and assessment process.

Since diagnosis is only one part of an intake and assessment process and may be pulled over from previous assessments or treatment plans, OMH and OASAS do not require documentation that merely includes or references a diagnosis to be signed by specific practitioners or direct care staff who create records. However, in practice it is expected that consistent with SED scope of practice laws, only authorized individuals may establish or update an individual’s formal diagnosis in an OMH or OASAS setting.

6. Q: What documentation changes will result after the sunset of the social work exemption provisions?

A: If they have not done so already, OMH and OASAS programs should adopt policies and procedures to ensure appropriate supervision is provided to exempt individuals, including unlicensed staff, providing services in their programs. Such policies and procedures may provide for supervision to be documented through supervision policies and procedures, co-signatures on certain documentation where required, or more generally in the individual’s treatment plan or other service records. Other documentation, including signature requirements in any OMH or OASAS program, are dictated by applicable agency program-specific regulations or guidance.

7. Q: Do the new exemption provisions change how OMH or OASAS programs bill for services?

A: No. OMH and OASAS programs should continue to bill for services that meet the respective agency’s regulatory requirements and guidance, as well as Medicaid billing rules for services rendered to Medicaid beneficiaries.

Note that even though Medicaid and other payor claims may contain an individual’s diagnosis which relates to their need for the services rendered, claims themselves do not evidence and are not an attestation that the attending or referring practitioner(s) listed on the claim actually performed the act of diagnosis. For Medicaid, claims should include the NPI of an enrolled practitioner who rendered the service or retains clinical responsibility for the services rendered.

8. Q: How does the sunset of the Social Work Exemption provisions effect specialty mental health programs like PROS and ACT?

A: PROS and ACT programs include multi-disciplinary teams of individuals providing comprehensive services including rehabilitation, care management and treatment services. Psychiatric rehabilitative services, such as skill development, recovery support services and case management may be provided by unlicensed individuals under applicable exemptions currently codified in the NYS education law. To

the extent ACT and PROS programs provide services including restricted activities, programs must ensure staff do not engage in out-of-scope practice. As stated above, unlicensed staff working in these programs may also continue to assist licensed professionals in the development or implementation of behavioral health services plan under appropriate supervision.

Please reach out to the applicable agency responsible for your program or service type if you need further advice about the agency's expectations regarding the provision or recording of or billing for services by individuals within your organization.