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**Report to New York State Education Department  
Office of the Professions**

**Utilization of Personnel  
Subject to Chapters 130 & 132 of the Laws of 2010**

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## Executive Summary

The New York State Office for People With Developmental Disabilities (OPWDD) provides and coordinates services for people with developmental disabilities and their families and conducts research into the causes and prevention of developmental disabilities. OPWDD provides access to services through a regional system dividing the state into geographic sections that are overseen by Developmental Disabilities Services Offices (DDSOs). OPWDD directly operates thirteen DDSOs and the research component of OPWDD, the Institute for Basic Research in Developmental Disabilities (IBR). It also partners with a network of over 600 OPWDD voluntary not-for-profit agencies to offer approximately 40 different types of individualized and person-centered services to more than 120,000 people with developmental disabilities and their families.

New York State Education Laws that were enacted in 2002 established requirements for professional licensure, including education, examination and experience requirements, and restricted activities that, except for specific temporary exemptions, may only be provided by licensed professionals or persons otherwise authorized under law. Provisions in that law enabled programs that are regulated, funded, operated or approved by certain State agencies, including OPWDD, or local government units to continue offering services utilizing unlicensed staff through an exemption that expired on January 1, 2010. In 2010, at the collaborative urging of the State Education Department and the Executive agencies, the Legislature extended the exemption from January 1, 2010 to July 1, 2013 (Chapters 130 and 132 of the Laws of 2010).

Chapters 130 and 132 of the Laws of 2010 also included a requirement that the affected State agencies submit a report to the Commissioner of Education that the Office of the Professions will use to formulate recommendations to the Legislature regarding how to address the use of non-professionally licensed staff in programs directly operated by the exempt State agencies and indirectly through programs, which are approved, funded or regulated by an exempt State agency, that provide clinical services. The Office of the Professions in collaboration with the exempt State agencies developed a survey to collect the data about the workforce and the tasks and activities performed by both licensed and not-licensed individuals as required by the legislation.

The data analyses by the Office of the Professions draw attention to the following key findings regarding not-licensed individuals who perform restricted activities throughout the OPWDD service delivery system:

- The total number of **not-licensed** employees providing any one of the five identified restricted activities significantly **outnumbers** the number of **licensed** employees;
- Communication to the field is needed to clarify the protected scopes of practice and to clearly identify restricted activities that may **not** be performed by not-licensed or unauthorized individuals;
- Further examination is crucial to determine why unlicensed MSWs who have a pathway to licensure are **not yet** licensed;
- Realignment of job duties and responsibilities of various not-licensed occupational titles and the creation of new State Civil Service titles may be necessary to insure that only individuals licensed or authorized under the law perform restricted activities; and
- A **permanent** (legislative) solution is required to preserve the essential services performed by not-licensed applied behavioral sciences specialist (ABSS) staff who are employed by OPWDD approved, funded or regulated programs.



## Background

The 2002 amendments of New York State Education Law<sup>1</sup> enacted restrictions regarding the practice of psychology, and created the new professions of licensed master social worker (LMSW), licensed clinical social worker (LCSW), and four new categories of mental health practice requiring licensure: licensed creative arts therapist, licensed marriage & family therapist, licensed mental health counselor and licensed psychoanalyst. The amendments provided title and scope of practice protections to those licensed or authorized under the law, and included exemptions from licensure for other licensed professions, certain occupations, students in supervised internships and individuals, schools and organizations providing advice, support, encouragement and information.

Of great importance to agencies that deliver behavioral and mental health services, the 2002 amendments also provided an exemption from licensure until January 1, 2010 for individuals employed in a program regulated, operated, funded or approved by certain state and other agencies, including the New York State Office for People With Developmental Disabilities (OPWDD), local social service and local mental hygiene districts. Chapters 130 and 132 of the Laws of 2010 extended the exemption from licensure until July 1, 2013 and established a collaborative process and timeline for the development of work plans and the submission to the Legislature of recommendations formulated by the Office of the Professions of the State Education Department and the exempt state agencies regarding amendments to law, rule or regulations necessary to fully implement the licensing laws.

In the fall of 2010, a work group comprised of the Office of the Professions and the exempt state agencies, including OPWDD, began meeting and subsequently agreed to develop a survey to be administered by the Office of the Professions in partnership with the exempt state agencies, to collect data about their provider agencies as required by the legislation. The work group identified five activities that, but for the referenced exemptions, are **restricted** to licensed or otherwise authorized persons:

1. **assessment/evaluation**
2. **diagnosis**
3. **assessment-based treatment planning**
4. **psychotherapy, and**
5. **treatment other than psychotherapy**

In early 2011, provider agencies that were determined appropriate by the exempt state agencies were contacted and invited to complete an on-line survey through *Survey Monkey*. The agencies were given the definition and examples of activities and tasks that **do** require licensure and those that **do not** require licensure, and were asked to identify individuals who perform the restricted activities and whether those individuals are licensed or not-licensed. Respondents were also asked to report and to identify by title, individuals not directly employed by the agencies who perform restricted activities, such as volunteer or contracted positions.

OPWDD sent an invitational e-mail, a cover letter from Frank Munoz, then Deputy Commissioner for the Office of the Professions, and a copy of the on-line survey to the Developmental Disabilities Services Office Directors, the Institute for Basic Research Director and over 500 OPWDD voluntary not-for-profit agency executive directors represented in the OPWDD Division of Quality Management Certificate Management System. If known, a contact person familiar with clinical service programs provided by an agency was also

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<sup>1</sup> Chapters 420 and 676 of the laws of 2002, respectively



copied on the e-mail. OPWDD was aware from past survey efforts that not all of its providers may employ individuals who engage in one or more of the five restricted activities. The decision to reach out to as many OPWDD voluntary not-for-profit certified providers as possible was made in an effort to increase the likelihood of a survey response, thereby improving the collection of data and gaining more information about actual clinical practices within the provider network.

No incentives were given to provider agencies to complete the survey. Due to the process employed by the various exempt State agencies to invite their providers to participate, it is difficult to determine an overall accurate response rate to the survey. The Office of Professions reports that the total number of respondents who initiated the on-line survey was about 2,200, and of that number, more than 1,400 (66%) completed the survey. The total number of programs reported as certified, licensed, regulated, approved or funded by an exempt agency totals more than 100% of the total survey respondents, suggesting that some programs may be under the regulation of more than one agency. All survey responses were collected by the Office of the Professions but only complete responses to the survey were included in the report compiled by the Office of the Professions and distributed to the exempt State agencies.



## I. Introduction and Overview

The New York State Office for People With Developmental Disabilities (OPWDD) provides and coordinates services for people with developmental disabilities and their families and conducts research into the causes and prevention of developmental disabilities. OPWDD provides access to services through a regional system dividing the state into geographic sections that are overseen by Developmental Disabilities Services Offices (DDSOs). OPWDD directly operates thirteen DDSOs and the research component of OPWDD, the Institute for Basic Research in Developmental Disabilities (IBR). It also partners with a network of over 600 OPWDD voluntary not-for-profit agencies to offer approximately 40 different types of individualized and person-centered services to more than 120,000 people with developmental disabilities and their families. Section 1.03(22) of the NYS Mental Hygiene Law defines developmental disability and is the legal basis for the determination of eligibility for OPWDD services.

Developmental disability is defined as a disability of a person which:

- (a)
  - (1) is attributable to mental retardation, cerebral palsy, epilepsy, neurological impairment, familial dysautonomia or autism;
  - (2) is attributable to any other condition of a person found to be closely related to mental retardation because such condition results in similar impairment of general intellectual functioning or adaptive behavior to that of mentally retarded persons or requires treatment and services similar to those required for such persons; or
  - (3) is attributable to dyslexia resulting from a disability described in (1) or (2);
- (b) Originates before such person attains age twenty-two;
- (c) Has continued or can be expected to continue indefinitely; and
- (d) Constitutes a substantial handicap to such person's ability to function normally in society.

At least one of the three conditions described in paragraph (a) must occur in combination with (b), (c) and (d) for a person to be eligible for OPWDD-funded services. A functional assessment of the impact of the disability upon the person's ability to perform everyday activities, such as an assessment of adaptive behavior and independence skills, is necessary to determine eligibility regardless of the disability diagnosis.

OPWDD directly operates, and approves, certifies and regulates voluntary not-for-profit agencies that operate programs in which individuals perform one or more of the restricted activities of assessment/evaluation, diagnosis, assessment-based treatment planning, psychotherapy and treatment other than psychotherapy identified in the survey. Both OPWDD state-operated programs and OPWDD approved, funded or regulated voluntary programs are currently covered by the extended exemption from licensure provided in Chapters 130 and 132 of the Laws of 2010 which expires July 1, 2013.

Some examples of tasks and functions included in the survey that are **restricted to licensed personnel** and are performed by non-licensed individuals under the authority of the 2013 exemption in OPWDD state-operated programs and OPWDD approved, funded or regulated voluntary programs include, but are not limited to:

- diagnostic assessment of intellectual and cognitive abilities, emotionality, personality, adaptive behaviors and psychopathology, including necessary assessments/evaluations for OPWDD eligibility determination;
- administration of developmental, neurobehavioral and neuropsychological testing;



- employing standardized measures to assess levels of risk associated with maladaptive and dysfunctional patterns of behavior and/or socially inappropriate and potentially dangerous behaviors;
- conducting clinical diagnostic interviews to establish or modify treatment plan and/or clinical intervention, including psychological and psychosocial assessments/evaluations;
- formulating diagnoses consistent with acceptable classification systems, e.g., Diagnostic and Statistical Manual of Mental Disorders (DSM) IV-TR;
- implementing insight-oriented, behavior-modifying, supportive and/or interactive psychotherapy and treatment, and
- providing individual, group and family behavioral and/or mental health therapy, professional counseling services and/or clinical interventions.

The types of programs that employ individuals who perform restricted activities and are currently operated by OPWDD and/or its voluntary not-for-profit partners may include:

1. Clinic treatment facilities (Article 16 Clinics) that provide outpatient clinical services, including long term therapies such as occupational and physical therapy and speech and language pathology; behavioral and mental health services such as psychology and social work services and/or pharmacologic management by appropriate medical practitioners; and health care services such as dietetics/nutrition and nursing services.
2. Clinically enhanced day and/or residential habilitation services that focus on behavioral interventions and stabilization and/or long term habilitative therapy needs.
3. Family support services that may offer family and/or individual counseling, group therapy, diagnostic and evaluation services and/or crisis intervention.
4. Intensive Behavior (IB) services, a newly available service under the Home and Community Based Services (HCBS) waiver that address behavioral needs before more expensive crisis services are necessary (e.g. psychiatric emergency services, hospitals and/or centers).
5. Day treatment services, which are a planned combination of diagnostic and treatment services provided to persons with developmental disabilities in need of a broad range of clinically supported and structured habilitation services.
6. Intermediate Care Facilities (ICFs) that provide services based on necessary clinical areas and treatment plans that ensure persons receive active treatment to address their identified needs.

In addition to the above types of community-based programs, OPWDD directly operates institutional programs that serve people who are remanded on an involuntary status through the courts or through a clinical determination of need and require specific treatment and/or supervision. The campus-based programs include Developmental Centers (DCs), Multiply Disabled Units (MDUs), Autism Units, Special Behavior Units, and Local and Regional Intensive Treatment Units (LITs and RITs), and Centers for Intensive Treatment (CITs) and provide treatment for fewer than 1,300 people. These inpatient treatment services include behavioral and mental health services and the performance of restricted activities to meet the needs associated with significant risk management issues, mental health services for individuals with dual diagnoses (developmental disability and mental illness) or severe emotional dysfunction; and transitional treatment for persons with autism and severe behavioral challenges.

Other programs operated directly by OPWDD and indirectly through OPWDD approved, funded or regulated voluntary programs provide coordination and/or concrete services, and do **not** typically involve



the performance of restricted activities that require the services of licensed individuals. The following are examples of some of these programs:

1. Service coordination (case management services), which provides observation and information gathering about the person's living situation, health and available support systems to clarify the person's needs; describes and reports a person's behavior to professional team members to identify possible problems and areas of need; and provides access or referral to appropriate services and supports. Service coordination may be part of the residential services provided by Intermediate Care Facilities (ICFs) or through Medicaid Service Coordination (MSC), Plan of Care Support Services (PCSS) or one of the Care at Home (CAH) waivers for children.
2. Certified community residential settings such as individualized residential alternatives (IRAs), family care, and supervised and supportive community residences provide room and board, personal assistance, community integration and inclusion and/or training in activities of daily living.
3. Day, residential and community habilitation services that focus on ability building related to social skills, activities of daily living, and achieving person-centered valued outcomes or providing necessary direct personal assistance.
4. Family support programs that provide respite, recreation, parent to parent networking, information and referral and after school programs.

OPWDD has recently initiated a process for the development of a new services waiver under Section 1115 of the Social Security Act, called the People First Waiver. OPWDD plans to create major programmatic and financial advances in its service delivery system through the implementation of the People First Waiver. These system changes will allow OPWDD to more accurately determine a person's needs for services through a care management model and provide individualized services to best meet those needs.

The new waiver will also allow OPWDD to review how well the current services, including behavioral and mental health services, meet the needs of people with developmental disabilities, and what can be done to promote better personal outcomes for persons who receive these services and their families. OPWDD will continue to meet the same needs for service that are currently met, and will transition existing appropriate services into the People First Waiver while exploring means to better access services, new service options, and innovative ways of organizing care and treatment.

Based on analyses conducted by OPWDD, people with developmental disabilities are living longer and have a lifespan that is nearly comparable to that of the general population. The data shows that in the past twenty years the percentage of people with a psychiatric diagnosis who are served by OPWDD has almost doubled (16 percent in 1989 to more than 30 percent in 2010). In addition, consistent with the national trends, the growth rates of autism diagnoses has reportedly grown five-fold from 3% in 1989 to more than 17% in 2010.

The growing proportion of persons who receive services from OPWDD and who have a mental illness strongly suggests the need for cross system services to provide support to persons currently residing in the community as well as the subpopulation of persons living in institutions who will transition to the community. Through the People First Waiver, OPWDD plans to update and improve how a person's needs are assessed so that a person with greater needs will receive appropriately greater levels of service.

The significant increase in the growth rate of autism and autism spectrum disorders (ASD) challenges OPWDD to develop community-based services that support the range of needs associated with these diagnoses. The People First Waiver will encourage a more efficient service system designed to focus



funding support on individualized services that provide opportunity for people with developmental disabilities and severe behavioral issues to make changes that lead to personal growth, development and an improved overall quality of life.

Behavioral and mental health services are an important part of the framework of supports that allow many people with developmental disabilities and mental illness and/or behavior disturbances to constructively engage in work and other meaningful activities, live in a home of their choice, and develop positive relationships. Reliable and timely access to these essential services is necessary to realize the OPWDD vision of a comprehensive and integrated care management environment for all people with developmental disabilities.

More information about the People First Waiver can be found at:

[http://www.opwdd.ny.gov/2011\\_waiver/index.jsp](http://www.opwdd.ny.gov/2011_waiver/index.jsp)

## II. Snapshot of Staffing

Based on the survey responses received by the Office of the Professions, OPWDD invitees who initiated the on-line survey provided information for approximately 485 programs. OPWDD review of the data indicates that the 485 programs appear to represent 167 distinct respondents; 10 state DDSOs and 157 OPWDD voluntary not-for-profit agencies. The DDSOs provided information for about 32 programs and the not-for-profit agencies for about 453 programs. Some of the respondents provided information that represents staff assigned to more than one program and/or information about one or more related programs. The analysis conducted by the Office of the Professions is based on the combined data of both OPWDD state-operated programs and OPWDD approved, funded or regulated voluntary programs. Approximately 80% of the OPWDD initiated surveys were considered complete by the Office of the Professions, and as with many of the other exempt agency programs, a number of the OPWDD approved, funded or regulated voluntary programs are reported as under the regulation of more than one state agency.

The OPWDD respondents consistently reported that **all** five of the restricted activities are performed by individuals employed and/or working in a majority of their programs. The percentages of affirmative answers for OPWDD respondents are close to the overall percentages for all survey respondents for assessment/evaluation and psychotherapy; and slightly disparate for diagnosis, assessment-based treatment planning and treatment other than psychotherapy, as shown in the following table.

Service provided?	Assessment /Evaluation		Diagnosis		Assessment-based treatment planning		Psychotherapy		Treatment other than psychotherapy	
	All	OPWDD	All	OPWDD	All	OPWDD	All	OPWDD	All	OPWDD
YES	79%	80%	59%	51%	76%	88%	58%	59%	71%	75%
NO	21%	20%	41%	49%	24%	17%	42%	41%	29%	25%

The State-operated DDSOs and the voluntary not-for-profit agencies were asked if each of the five restricted activities was or was not provided in the program identified by the respondent. If the respondent indicated that the restricted activity was not provided, the survey skipped to the next activity. If the



respondent indicated that the restricted activity was provided, the respondent was asked to identify the number of individuals who perform the restricted activity and if they are licensed or not-licensed.

The respondents were also given the opportunity to include write-in information about other employees in occupational titles that were not listed and about non-employee volunteer or contracted positions. Review of the write-in information provided by OPWDD respondents indicates that the occupational titles appear to most often have job responsibilities consistent with the other listed occupational titles that provide behavioral and clinical services and perform restricted activities. Review of the write-in volunteer/contracted positions shows that the majority of individuals appear to be **paid** contracted individuals who may or may not be licensed. In addition, there were a small number of student interns in the write-in volunteer/contracted category. No write-in positions were described as volunteer.

Based on the overall information provided by all exempt State agency survey respondents, the average number of individuals reported per program as performing any of the five restricted activities was approximately 30 full time equivalents (FTEs). More than 75% of these individuals (23 of the 30 FTEs) were reported to be not-licensed. This pattern of **not-licensed** individuals performing the majority of restricted activities is supported in the OPWDD data as well. Approximately 15 FTEs per OPWDD program were reported as providing any restricted activity; about 11 of the 15 FTEs were reported as **not-licensed** individuals.

The data provided by the Office of the Professions indicates that the total number of **not-licensed** employees providing any one of the five restricted activities in OPWDD state-operated programs and OPWDD approved, funded or regulated voluntary programs **outnumbers** the number of **licensed** employees for three of the restricted activities; assessment/evaluation, assessment based treatment planning and treatment other than psychotherapy. Only diagnosis and psychotherapy were more often reported as performed by a licensed employee.

The data also suggests several themes about the individuals who perform restricted activities in OPWDD state-operated programs and OPWDD approved, funded or regulated voluntary programs similar to the over-arching themes reported by the Office of the Professions:

- Unlicensed social workers (MSWs) perform a large number of restricted activities and do not have a permanent exemption from licensure, except in the exempt agencies until July 1, 2013.
- Individuals in the not-licensed occupational title of psychologist employed in a governmental agency (OPWDD state-operated programs) provide significant numbers of restricted services under a permanent statutory exemption.
- Applied behavioral sciences specialists (ABSS) are not-licensed individuals who provide the largest number of restricted activities in OPWDD approved, funded or regulated voluntary programs under the 2013 exemption.
- The not-licensed occupational titles of counselor or residential program aide, mental health aide or assistant, case manager, case worker, service coordinator, social work case manager and social work case worker reportedly perform varying amounts of each of the restricted activities.
- Licensed or authorized persons who perform restricted activities are most often licensed social workers, including licensed master social workers and licensed clinical social workers; psychologists and physicians.
- The subcategories of the four licensed mental health practitioners (licensed creative arts therapist, licensed marriage & family therapist, licensed mental health counselor and licensed psychoanalyst)



under Article 163 of the State Education Law do not account for a large number of individuals who perform restricted activities, either as separate subcategories or when considered as one combined subcategory.

The survey data indicates potentially different ramifications for not-licensed individuals who work in OPWDD state-operated programs versus OPWDD approved, funded or regulated voluntary programs and who provide services under the different scopes of practice of social work and psychology. Based on the survey data, it is not possible to determine the distinct numbers of unlicensed MSWs and the other not-licensed occupational subcategories that are linked to OPWDD state-operated programs versus OPWDD approved, funded or regulated voluntary programs. Therefore, the social work data is combined information from both OPWDD state-operated programs and OPWDD approved, funded or regulated voluntary programs. On the other hand, the data related to services associated with the psychology scope of practice was mainly reported in the two not-licensed subcategories of psychologist employed by a governmental entity and the ABSS. These occupational psychology subcategories are associated respectively with OPWDD state-operated programs and OPWDD approved, funded or regulated voluntary programs; therefore the psychology data is summarized separately below for OPWDD state-operated programs and OPWDD approved, funded or regulated voluntary programs.

#### **A. Social Work**

Based solely on the numbers of individuals reported in the survey, it appears that there are fewer MSWs performing restricted activities than there are individuals in either the not-licensed subcategory of an exempt psychologist employed by OPWDD state-operated programs or an ABSS employed by OPWDD approved, funded or regulated voluntary programs. The Office of Career Mobility of the Department of Civil Service reports that approximately 50 Social Worker 1 State Civil Service titles that do **not** require the MSW to be licensed are assigned to OPWDD state-operated programs. It is possible that there could be additional staff working in other State Civil Service titles listed below who are unlicensed MSWs and perform restricted activities.

In addition to the Social Worker 1 title referenced above, OPWDD state-operated programs also employ a number of individuals in State Civil Service titles that may include job responsibilities that fall under the protected scope of practice of a LMSW, a LCSW or one of the four licensed mental health practitioners (licensed creative arts therapist, licensed marriage & family therapist, licensed mental health counselor and licensed psychoanalyst). These State Civil Service titles include, but are not limited to:

- Social Work Assistant 2
- Social Work Assistant 3
- Rehabilitation Counselor 1
- Rehabilitation Counselor 2
- Supervisor Rehabilitation Services
- Recreation Therapist, including Music, Art & Dance
- Senior Recreation Therapist, including Music
- Head Recreation Therapist
- Chief Recreation Therapist
- Direct Support Assistant



Based on the job responsibilities outlined for some of these titles, such as Social Work Assistant 2 and 3 or Rehabilitation Counselor 1 and 2, it is possible that individuals performing restricted activities may account for some individuals reported under the previously discussed not-licensed combined subcategory of case manager, case worker, service coordinator, social case manager and social case worker. Recreation Therapists, including music, art and dance, who are appropriately licensed may be reported as licensed mental health practitioners. However, as indicated before, the number of individuals reported in the licensed mental health practitioner subcategories is relatively few.

The Direct Support Assistant title is a new State Civil Service title introduced in early 2011 for OPWDD state-operated programs. The Direct Support Assistant title replaces the State Civil Service title of Developmental Aide. The new title requires at least a high school diploma or its equivalent and psychological and fitness testing, mandatory drug testing, and clearance of an applicant through the statewide Central Register of Child Abuse and Maltreatment. These individuals assist people with developmental disabilities with personal hygiene care, toileting, transferring, dining, dressing, and meal preparation. They may also help people with developmental disabilities participate in games and recreational programs; coach and encourage persons to develop daily living skills; and provide a clean, safe, and comfortable environment. Direct Support Assistants may also carry out and record care plans and, in accordance with special instructions, may administer medication. The State Civil Service job responsibilities description **does not** state that a Direct Support Assistant performs restricted activities. For purposes of this analysis, it has therefore been assumed that incumbents in this title do not perform services within the restricted scopes of practice.

Individuals in not-licensed occupational titles of counselor or residential program aide and mental health aide or assistant, are grouped into one subcategory; and case manager, case worker, service coordinator, social case manager and social case worker are grouped into another subcategory. Based on known employment and operations practices, it appears that these positions are generally used interchangeably to provide similar services, including restricted services under the scopes of practice of social work, within a number of OPWDD state-operated programs and OPWDD approved, funded or regulated voluntary programs.

Other individuals in the subcategories of not-licensed occupational titles, such as CASAC, care coordinator, and correction counselor were not regularly identified by OPWDD survey respondents. In most cases, these individuals are not typically employed in OPWDD state-operated programs or OPWDD approved, funded or regulated voluntary agencies to provide restricted services and appear to be specific to employment in other exempt provider agencies, such as OASAS, SOFA or DOCCS.

However, as noted above, the State Civil Service requirements for the Social Worker 1 title **does not** include the requirement that the individual be licensed. If licensure is ultimately to be required, this State Civil Service title, and other titles that allow for current hiring of unlicensed MSWs would no longer be allowed for future hiring of individuals to perform restricted activities. It may therefore be necessary to determine the percentage of staff time expended in performing restricted activities and establish new State Civil Service title(s) (requiring licensure) to perform such duties.



## B. Psychology

### (1) OPWDD state-operated programs

The majority of not-licensed individuals who are employed by OPWDD **state-operated programs** and perform restricted activities are not-licensed psychologists, who are **permanently** exempt from licensure under New York Education Law. The Office of Career Mobility indicates that over 350 Civil Service psychology titles that do not require licensure are assigned to OPWDD operated programs. The survey analysis suggests that only about 50% of these individuals are included in the reported survey data. The apparent under reporting of the exempt psychologists may reflect in part the difference between the number of encumbered positions and additional positions that are vacant, but currently unable to be filled.

The exempt psychologists employed by OPWDD are currently required to have a master's degree in psychology or an earned doctoral degree in a field of psychology from a regionally accredited college or university; and the degree program must have included a psychology practicum or externship. It is estimated that only approximately 10% of the exempt psychologists employed in OPWDD state-operated programs have a doctoral degree. The exempt psychologists work under the general supervision of higher-level **licensed psychologists** and conduct evaluations of intellectual abilities, personality and adaptive functioning; employ standardized measures to assess levels of risk; develop and implement plans of treatment for individuals, groups, and families; provide technical direction to program and direct support staff; maintain records; and write reports.

### (2) OPWDD approved, funded or regulated voluntary programs

The data shows that the **largest overall numbers** of not-licensed individuals who perform restricted activities in the OPWDD service delivery system are identified as an ABSS. This occupational title is almost exclusively used by OPWDD approved, funded or regulated voluntary programs, and refers to an individual who has a master's degree in a clinical and/or treatment field of psychology from an accredited institution and who has training in assessment techniques and behavioral program development. The education and training of an ABSS is comparable to that of the exempt psychologist with a master's degree employed in an OPWDD state-operated program. The ABSS subcategory may also include a number of individuals who are a Board Certified Behavioral Analyst® (BCBA®). The BCBA® designation is based on a national professional credentialing that involves specific requirements related to education, training and experience.

An ABSS provides essentially the same behavioral and mental health services as an exempt psychologist employed by OPWDD state-operated programs. In addition, an ABSS employed in OPWDD-certified Part 679 Clinic Treatment Facilities (Article 16 Clinics) and Part 690 Day Treatment Programs, or in a program that provides intensive behavioral services under the OPWDD HCBS waiver must function under the supervision of a **licensed psychologist**. However, an ABSS who performs restricted services and is employed by an OPWDD approved, funded or regulated voluntary program is only exempt from licensure under the time-limited exemption until July 1, 2013; and is **not** currently included under the permanent exemption from licensure found in Article 153, psychology, as is the exempt psychologist employed in OPWDD state-operated programs.

The lack of a permanent exemption for an ABSS to continue performing restricted activities after July 1, 2013 is especially problematic for OPWDD and its voluntary non-for-profit agencies at a time when OPWDD plans to restructure its system of care and treatment to better support individuals with



developmental disabilities in the community. It is anticipated that a large portion of the current institutional State-operated services will be replaced with a varied array of community-based person-centered services that will increasingly be delivered by OPWDD approved, funded or regulated voluntary programs.

### III. Costs

As indicated in the background section, 13 State DDSOs, IBR and over 500 OPWDD voluntary not-for-profit agencies were invited to participate in the survey; 10 DDSOs and approximately 160 voluntary agencies responded. This is close to double the number of voluntary not-for-profit agencies that responded to a previous survey conducted by OPWDD in 2008 about the fiscal impact of the then anticipated 2010 sunset of the licensure exemptions. However, the 160 voluntary agencies only represents approximately one-third of the voluntary not-for-profit agency providers that OPWDD relies on to meet the needs of people with developmental disabilities.

The data collected from the 2008 survey provided the basis of the projections sent to the Governor's Office in October of 2009 that projected a total cost of \$114 million dollars to the OPWDD delivery system to replace **not-licensed** individuals who perform restricted activities with **licensed** practitioners. The projection included estimates of both the costs related to recruiting and replacing individuals in OPWDD operated programs that may provide services under the scope of practice of a LMSW and perform restricted activities associated with clinical social work, and ABSS staff who perform restricted activities under the scope of practice of psychology in OPWDD approved, funded or regulated voluntary agencies. The 2009 projection did **not** include any loss of Medicaid revenue to New York State due to the inability to provide services to persons pending recruitment of appropriately licensed or authorized individuals.

#### A. Social Work

OPWDD's 2009 projection also did **not** include costs related to replacement of unlicensed MSWs or other not-licensed individuals employed in OPWDD approved, funded or regulated voluntary programs, such as a Counselor/Program Aide/Assistant and Case Manager/Service Coordinator categories. The projection included \$42 million dollars for the cost of recruiting and replacing individuals who may provide services included in the scope of practice of a LMSW and who may perform restricted activities associated with clinical social work practice in OPWDD state-operated programs only.

Based on the starting salary reflected in the current survey data provided by the Office of the Professions, LMSWs are paid on average \$2,000 more per year than unlicensed MSWs, and LCSWs are paid approximately \$8,000 more per year. When comparing the average starting salary of the other occupational titles referenced above, the difference is even greater and appears to vary depending on the individual's education and training.

It is difficult to calculate the precise fiscal impact of replacing not-licensed individuals with licensed social workers given that the starting salary of some of the other occupational titles appear to vary greatly among all OPWDD programs, and it is not known how many individuals are actually associated with OPWDD state-operated programs versus OPWDD approved, funded or regulated voluntary programs. If individuals reported by survey respondents in not-licensed occupational titles other than the exempt psychologist employed in OPWDD state-operated programs and ABSS staff employed in OPWDD approved, funded or regulated voluntary agencies were replaced by LMSWs at an average starting salary of \$44,000, the cost of



the newly-hired staff would be approximately \$66 million dollars. It appears that \$66 million dollars may be a low estimate of cost because it does not include necessary recruitment costs or the cost of required supervision of LMSWs who engage in clinical social work practice, and is based solely on the number of agencies that responded to the survey. If extrapolated over the entire OPWDD voluntary not-for-profit agency service delivery, the costs could potentially triple, to \$198 million dollars.

## B. Psychology

The portion of the OPWDD 2009 projection that was calculated as the cost of recruiting and replacing OPWDD voluntary not-for-profit agency ABSS staff with licensed psychologists was \$72 million dollars. The information collected by the current survey regarding entry level salaries indicates that OPWDD voluntary not-for-profit agencies pay ABSS staff an average starting salary of about \$41,000 annually. According to the survey, the average starting salary for a licensed psychologist who would replace the ABSS staff is about \$76,000, approximately \$35,000 more per year.

If the approximate 600 ABSS staff identified by the survey were replaced by licensed psychologists, the associated increase in salaries to employ 600 licensed psychologists in the 160 OPWDD approved, funded or regulated voluntary programs would be about \$21 million dollars. As indicated above, only less than one-third of the invited OPWDD voluntary not-for-profit agencies participated in the survey. Given this fact, and the fact that the 2009 OPWDD projection also included recruitment costs in addition to salary replacement, it is suspected that \$21 million dollars is an under estimation of fiscal impact to replace **all** not-licensed ABSS staff employed in OPWDD approved, funded or regulated programs with licensed psychologists. Based on the current number of OPWDD voluntary not-for-profit agencies it is possible that the fiscal impact could range between the \$21 million dollars and three times that figure, \$63 million dollars, if all agencies reported similar statistics regarding the individuals who perform restricted activities.

## IV. Implementation and Conclusions

### A. Social Work

In light of the number of unlicensed MSWs and other not-licensed occupational titles providing services under the protected scope of practice of a LMSW and performing restricted activities as defined in the Education Law (diagnosis, assessment-based treatment planning, and psychotherapy) in OPWDD state-operated programs and OPWDD approved, funded or regulated voluntary programs, OPWDD acknowledges the need to identify measures through which compliance with the professional licensure laws may be achieved throughout the OPWDD service delivery system. The permanent exemption contained in Article 154 of the Education Law, governing Social Work, permits both public and private employees who provided clinical social work services on or before September 1, 2004, the effective date of the statute, to continue to provide these services without the requirement to be licensed as a LCSW, as long as the employee does not change his/her job in any way.

The time-limited exemption contained in Article 154, allows employees of agencies operated, regulated, funded or approved by certain state and local governmental agencies, including OPWDD, to perform restricted activities until July 1, 2013, as long as the person does not use the titles LMSW or LCSW. Social workers hired after September 1, 2004 must be appropriately licensed as a LMSW or a LCSW as required by the Education Law unless the individual is covered under the time-limited exemption.



The survey responses collected by the Office of the Professions do not provide specific information regarding the reasons why the MSWs reported in the survey are not licensed under current State Education Law. OPWDD recommends that further examination of the circumstances of the unlicensed MSWs is necessary to determine if individuals are:

1. Covered under the permanent exemption found in Article 154;
2. Working toward licensure during the extension of the time-limited exemption;
3. Employees of OPWDD state-operated programs who meet the Civil Service qualifications at the professional level, but are not required to be licensed for his/her job title under applicable Civil Service standards; and/or
4. Not authorized to provide restricted activities and
  - Must obtain a license and/or the requisite supervision or supervised experience in accordance with Education Law; or
  - Do not have the necessary education, training or experience to become licensed under current Education Law.

Further study of the above circumstances and receipt of guidance from the Office of the Professions and the Department of Civil Service will be necessary to enable OPWDD to develop and implement a policy that will assure compliance with the professional licensure laws for unlicensed MSWs employed in OPWDD state-operated programs and OPWDD approved, funded and regulated voluntary programs, not later than July 1, 2013.

OPWDD recommends more detailed review of the use of counselor/program aide/assistant and case manager/service coordinator titles in OPWDD state-operated programs and OPWDD approved, funded, regulated voluntary programs to provide services under the protected scope of practice of a LMSW and the performance of restricted activities associated with clinical social work practice. OPWDD supports the efforts of the Office of the Professions to clarify the protected scopes of practice and clearly identify restricted activities that may **not** be performed by not-licensed or unauthorized individuals. OPWDD is prepared to work in collaboration with representatives from the Office of the Professions, the Department of Civil Service and State and voluntary agency Human Resources departments to recommend appropriate realignment of job duties and responsibilities to insure that only individuals licensed or authorized under the law provide these services and perform restricted activities, after July 1, 2013.

OPWDD recommends that the Office of the Professions support the following recommendations to address this issue in its report to the Legislature:

1. In cases where individuals can demonstrate experience appropriate and acceptable to SED, OPWDD strongly supports consideration of an alternative pathway to licensure that includes substitution of experience for examination and/or other licensure requirements; and
2. If individuals in the occupational titles of counselor/program aide/assistant and case manager/service coordinator are also unlicensed MSWs, OPWDD supports the same consideration of an alternative pathway to licensure as described above.



## B. Psychology

The permanent exemption found in Article 153, psychology, allows a not-licensed individual in the employ of a federal, state, county or municipal agency, or other political subdivision, or a chartered elementary or secondary school or degree-granting educational institution to engage in *the activities, services, and use of the title of psychologist, or any derivation thereof, insofar as such activities and services are a part of the duties of his/her salaried position*. Based on the survey responses and information from the Office of Career Mobility, OPWDD has a large number of not-licensed individuals assigned to its State-operated programs who perform restricted activities under the permanent exemption in the occupational title of psychologist. The survey responses also indicate that the number of not-licensed ABSS staff employed in OPWDD approved, funded or regulated voluntary programs who perform restricted activities is **greater** than the number of exempt psychologists assigned to OPWDD state-operated programs. These facts along with the trends associated with the number of people with developmental disabilities and mental illness and/or behavioral disturbances, and the lack of licensed psychologists to replace ABSS staff, puts increased demand upon, and points to an urgent need to preserve the pool of individuals who have the necessary skill sets to provide crucial behavioral and mental health services to people with developmental disabilities.

In comparing just the number of OPWDD approved, funded or regulated voluntary programs reported in each county to the number of registered licensed psychologists in the county by the Office of the Professions, it appears that the number of OPWDD approved, funded or regulated voluntary programs **outnumbers or equals** the number of registered licensed psychologists in approximately 27% of the 62 counties of New York State. If the reported **average number of not-licensed** individuals per program currently performing restricted activities (11) is compared to the number of registered licensed psychologists in each county, the percentage of all counties in NYS that **do not** have sufficient number of licensed psychologists to replace the average number of not-licensed individuals in OPWDD approved, funded or regulated programs doubles, to about 56%. These percentages are thought to be conservative in that they are based only on survey responses and are **not** extrapolated to the universe of all OPWDD approved, funded or regulated voluntary programs that may employ not-licensed individuals who perform restricted activities.

OPWDD recommends that the Office of the Professions support the two **permanent solutions** to this issue in its report to the Legislature:

1. Amendment to the Education Law expanding the current permanent exemption from licensure found in Article 153, psychology, for a psychologist in the employ of a federal, state, county or municipal agency, or other political subdivision, or a chartered elementary or secondary school or degree-granting educational institution insofar as such activities and services are a part of the duties of his salaried position to include OPWDD voluntary not-for-profit agencies; and
2. Amendment to the Education Law adding a new Article requiring licensing of behavioral health practitioners. Licensing standards to include having a master's degree in psychology, or having successfully completed at least 60 graduate hours in a program leading to a doctoral degree in psychology; having two years of supervised full-time experience in the delivery of professional behavioral health or psychological services; and passing an examination.

## Attachment 1



Attachment 1 provides information about the numbers and subcategories of individuals reported by OPWDD survey respondents who perform any one or more of the five restricted activities. Category 1 consists of subcategories of not-licensed employees in occupational titles and Category 2 consists of subcategories of licensed employees. The subcategories listed in the table under Category 1 and Category 2 show the occupational titles and professions in which the number of individuals reported is greater than 5% of the total number of individuals performing the restricted activity in Category 1 or 2, respectively. Category 3 is the number of contracted positions listed under each of the restricted activities as reported by OPWDD survey respondents.

<b>Category</b>		<b>Assessment /Evaluation</b>	<b>Diagnosis</b>	<b>Assessment-based treatment planning</b>	<b>Psycho-therapy</b>	<b>Treatment other than psycho-therapy</b>
<b>1.</b>	<b>Total Not-licensed Employees (Occupational Titles)</b>	<b>2,253</b>	<b>620</b>	<b>2,173</b>	<b>753</b>	<b>2,454</b>
<b>S U B C A T E G O R Y</b>	<i>Applied Behavioral Sciences Specialist (ABSS)</i>	584	248	599	426	505
	<i>Counselor/Program Aide/Assistant</i>	533	80	456	55	1,009
	<i>Case Manager/Service Coordinator</i>	213	37	228	< 5% of category	170
	<i>Psychologist Employed by Gov't Entity</i>	171	132	169	137	131
	<i>Unlicensed Social Worker (MSW)</i>	135	< 5% of category	125	71	< 5% of category
<b>2.</b>	<b>Total Licensed Employees</b>	<b>1,722</b>	<b>1,221</b>	<b>1,617</b>	<b>978</b>	<b>798</b>
<b>S U B C A T E G O R Y</b>	<i>Licensed Psychologist</i>	373	294	321	271	203
	<i>Licensed Clinical Social Worker (LCSW)</i>	319	263	319	279	189
	<i>Licensed Master Social Worker (LMSW)</i>	311	167	296	210	196
	<i>Physician</i>	225	241	230	69	97
	<i>Other Professions</i>	325	171	351	< 5% of category	< 5% of category
<b>3.</b>	<b>Contracted Positions</b>	<b>87</b>	<b>53</b>	<b>72</b>	<b>68</b>	<b>33</b>
<b>Total Employees &amp; Contracted Positions</b>		<b>4,062</b>	<b>1,894</b>	<b>3,862</b>	<b>1,799</b>	<b>3,285</b>