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Leadership Forum on the Professions

New York's system of professional regulation, which is recognized as a model for public protection, has grown from its initial responsibility in 1891 of overseeing the medical profession to encompass nearly 750,000 practitioners and over 30,000 professional practice business entities in 47 professions defined in state law.

The professions – ranging from acupuncture to veterinary medicine – are within New York State's unified system of education – The University of the State of New York – thus recognizing the key role education plays in both preparing licensed professionals and in ensuring their continuous development. The State Education Department (SED), under direction of the State Board of Regents (BOR), administers professional regulation through its Office of the Professions (OP), assisted by the 29 State Boards for the Professions.

The Office of the Professions provides a number of services to the public and the professions, including the following:

- Licensure and Registration;
- Reviewing over 3,300 programs that prepare students for professional licensure;
- Designing and administering licensing examinations;
- Processing applications, reviewing qualifications, and issuing credentials;
- Evaluating the educational credentials of candidates from over 100 countries;
- Registering entities such as professional corporations, pharmacies, continuing education providers, providers of courses in infection control and the identification and reporting of child abuse, and others;
- Professional Discipline;
- Investigating and prosecuting professional misconduct and unlicensed practice throughout New York State;
- Maintaining a hotline for reporting professional misconduct and unlicensed practice;
- Assisting professionals who have substance abuse problems;
- Public and Professional Education and Information;
- Advising the public on professional services through the consumer brochures on the professions, the Consumer's Bill of Rights, and more;
- Assisting professionals in staying current with regulatory developments and emerging issues through advisories, publications, and events;
- Verifying and archiving licensure and professional disciplinary actions; and
- Offering information and services for licensure applicants, licensed professionals, and the general public.

Professional Leadership Forum

On November 29, 2007, the OP sponsored Professional Leadership Forum, the focus of which was based on responses the agency received from a survey it sent to professional associations and their representatives. The survey requested input on such questions as:

- The top issue facing the respondent's profession;
- Rating the OP's performance;
- What regulations should be revised or eliminated;
- Early education (P-16) on the professions;
- Multi-jurisdiction or portability of licensing; and
- Resources for civil prosecution of illegal practice.

Based on survey response, the Forum's primary focus was on the following performance goals for 2008:

1. *OP's efficient performance of registration processing, discipline and communication.* This will be accomplished through the introduction of state-of-the-art technology, including on-line registry and application status are available at all hours; and reducing excessive paper to electronic storage.¹
2. *Bringing the regulations it is tasked with enforcing up to date.* This will be done through review of relevant rules and regulations to determine whether they reflect contemporary professional practices, improving the practice clarification process, and establishing the necessary processes to ensure that licensees complete required continuing education.² The guiding principles behind regulation review will be whether a) a provision is contemporary, b) a provision is clear and understandable, and c) a provision achieves its goal of protecting the public.
3. *Establishing a state-of-the-art disciplinary system.* This will be accomplished by increasing the use of the Summary Suspension process and implementation of Part 31 of the Rules of the Board of Regents.³
4. *Maximizing efforts to contribute to P-16 early education programs.* P-16 programs are designed to educate young minds about the professions. OP's focus is on enhancing student achievement by encouraging and enabling familiarity with them. In doing so, students will become more interested in pursuing careers in the professions and teaching, particularly in those professional areas that are experiencing shortages.
5. *Collaboration with all stakeholder by ensuring they are included in the process.* Stakeholders include the Regents, State Boards, Consumers, Professional Associations, Legislators, Agencies and Educators.

Disciplinary System and Illegal Practice

One of the most significant goals of the OP for the upcoming year is a stronger enforcement of illegal practice rules. The OP urges reporting of illegal practices whenever someone appears to be making judgments they are not legally qualified to make.

With regard to non-licensed corporate ownership, OP's view is that whenever such corporations have direct control over the licensee, the independent professional responsibility of the licensee is compromised.

The disciplinary process unfolds through the following procedure:

- *Investigation:* OP will investigate the initial complaint;
- *Cease and Desist Order:* if the investigation yields evidence that illegal practice had been committed, OP will issue a cease and desist order; the respondent can request a stay of that order if it can cite extraordinary circumstances, such as irreparable harm;
- *Hearing:* a hearing officer will be appointed from outside the SED; again, the respondent can request a stay;
- *Hearing Officer Report*
- *Appeal by Either Side to the Regents Review Committee (RRC)*
- *RRC Report to the Board of Regents (BOR)*
- *BOR Determination*
- *Enforcement of the Cease and Desist Order*
- *Civil Penalties and Restitution*

¹ The OP currently handles an estimated 1.6 million pieces of paper a year, generated, in part, by the 250,000 re-licensing applications filed annually. The OP responds to 900,000 inquiries annually from the public, licensees, employers and professional programs.

² The SED has opposed in the past due to the high cost and lack of resources. It has stopped opposing continuing education bills in the Legislature because the Legislature understands the impact that diverting resources to continuing education has on other programs.

³ See the Amendment to the Rules of the Board of Regents (below), which establishes a new Part 31 that allows the OP to implement the provisions of Section 6516 of the Education Law by specifying the requirements for the submission of complaints, investigations, hearing requests and stay requests; the contents of a cease and desist order; the standards for the imposition of civil penalties and restitution and the procedures for hearings and appeals. The rule was approved for a November 15, 2007 effective date, though it will take several months to be fully implemented. Part 31 is provided on Page 4.

Communication

OP is working to facilitate timely, effective and accurate communication regarding the licensing, practice and discipline of the professions. It is creating and disseminating an electronic newsletter (OPNEWS Online) to provide updates on the activities of the office, and is encouraging professional associations to sign up. It is making the OP website more user-friendly and encourages all associations to provide links to the office at www.op.nysed.gov for their membership on their websites.

A list of contacts at the Office of Professions is provided below.

NYSED Office of the Professions, 2nd Floor, West Wing, 89 Washington Avenue, Albany, NY 12234

Associate Commissioner Frank Munoz: 518-486-1765; fmunoz@mail.nysed.gov

Sarah Benson, Coordinator, Legislation and Special Projects: 518-473-4963; sbenson@mail.nysed.gov

Louis Catone, Director, Office of Professional Discipline: 212-951-6400; lcatone@mail.nysed.gov

Tony Lofrumento, Director, Professional Licensing: 518-474-3817, ext. 340; tlofrume@mail.nysed.gov

Leonard Lapinski, Director, Professional Education: 518-474-3817, ext. 300; llapinsk@mail.nysed.gov

Claudia Alexander, Executive Secretary, State Boards for Ophthalmic Dispensing, Physical Therapy and Podiatry: 518-474-3817, ext. 180; calexand@mail.nysed.gov

Jane Blair, Executive Secretary, State Boards for Engineering and Land Surveying and Interior Design: 518-474-3817, ext. 140; jblair@mail.nysed.gov

Lawrence DeMers, Executive Secretary, State Boards of Acupuncture, Occupational Therapy and Speech-Language Pathology and Audiology: 518-474-3817, ext. 100; ldemers@mail.nysed.gov

Kathleen Doyle, Executive Secretary, State Boards of Massage Therapy, Occupational Therapy and Clinical Laboratory Technology: 518-474-3817, ext. 150; kdoyle2@mail.nysed.gov

Daniel Dustin, Executive Secretary, State Boards for Certified Shorthand Reporting and Public Accountancy: 518-474-3817, ext. 160; ddustin@mail.nysed.gov

David Hamilton, Executive Secretary, State Boards for Mental Health Practitioners and Social Work: 518-474-3817, ext. 450; dhamilto@mail.nysed.gov

Douglas Lentivech, Assistant Counsel and Executive Secretary, State Board for Chiropractic: 518-474-3817, ext. 190; dlentive@mail.nysed.gov

Robert Lopez, Executive Secretary, State Boards for Architecture and Landscape Architecture: 518-474-3817, ext. 110; rlopez@mail.nysed.gov

Lawrence Mokhiber, Executive Secretary, State Boards for Midwifery and Pharmacy: 518-474-3817, ext. 130; lmokibe@mail.nysed.gov

Susan Naccarato, Manager, Professional Assistance Program: 518-474-3817, ext. 480; snaccara@mail.nysed.gov

Walter Ramos, Executive Secretary, State Boards for Medicine, Dietetics and Nutrition, Veterinary Medicine, Athletic Trainers Committee and Medical Physics Committee: 518-474-3817, ext. 560; wramos@mail.nysed.gov

Barbara Zittel, Executive Secretary, State Boards for Nursing and Respiratory Therapy: 518-474-3817, ext. 120; bzittel@mail.nysed.gov

AMENDMENT TO THE RULES OF THE BOARD OF REGENTS

Pursuant to sections 207, 6506, 6512, 6513 and 6516 of the Education Law.

Part 31 of the Rules of the Board of Regents is added, effective November 15, 2007, as follows:

Part 31

PROCEEDINGS RELATING TO THE UNAUTHORIZED PRACTICE OF THE PROFESSIONS OR THE UNAUTHORIZED USE OF A PROFESSIONAL TITLE

§31.1 Application of this Part.

The provisions of this Part shall apply to all proceedings commenced pursuant to section 6516 of the Education Law, relating to the unauthorized practice of a profession or the unauthorized use of a professional title.

§31.2 Complaints and Investigations.

(a) Any person or organization who has reasonable cause to believe that a person has violated any provision of section 6512 or 6513 of the Education Law may file a written complaint, on a form prescribed by the Commissioner, with the Professional Conduct Officer, New York State Education Department, 475 Park Avenue South, 2nd Floor, New York, NY 10016 or to any regional office of the Office of Professional Discipline. The complaint shall describe, with particularity, the alleged unauthorized practice and/or unauthorized use of a professional title, including the date or dates on which an alleged violation occurred. Such complaint shall be sufficiently clear to advise the department of the nature of the specific act or acts complained of.

(b) When appropriate, the department shall investigate the complaint. The department may also commence an investigation, without having received a complaint, based on information indicating that a violation of section 6512 or 6513 of the Education Law may have occurred. The results of such investigation shall be referred to the professional conduct officer, or his or her designee. After consultation with a professional member or members of the applicable state board for the profession, the professional conduct officer, or his or her designee, shall determine whether there is substantial evidence of unauthorized practice of a profession or unauthorized use of a professional title and whether further action pursuant to section 6516 of the Education Law is warranted.

§31.3 Cease and desist order.

(a) Whenever the department has reasonable cause to believe that a person has violated any provision of section 6512 or 6513 of the Education Law, the department may issue a written order to cease and desist from such violation, on a form prescribed by the commissioner.

(b) Contents of cease and desist order. Cease and desist orders issued pursuant to this Part shall:

(1) describe with particularity the alleged unauthorized practice and/or unauthorized use of a professional title, including the date or dates on which the alleged violation or violations occurred, with a specific reference to the provision or provisions of law alleged to have been violated;

(2) order the respondent to cease the specified unauthorized activity; and

(3) provide respondent with written notification of the following:

(i) respondent's right to request a hearing before a hearing officer designated by the department, within thirty days of receipt of the cease and desist order, if respondent desires to contest the cease and desist order;

- (ii) where respondent can obtain a form to request a hearing;
- (iii) respondent's right to request a stay of the cease and desist order at the time a hearing is requested;
- (iv) where respondent can obtain a form to request a stay;
- (v) respondent's right to personally appear at the hearing;
- (vi) respondent's right to be represented by counsel at the hearing;
- (vii) respondent's right to produce witnesses and evidence on his or her behalf at the hearing;
- (viii) respondent's right to cross-examine witnesses and examine evidence produced against him or her at the hearing;
- (ix) respondent's right to issue subpoenas in accordance with section 304 of the State Administrative Procedure Act;
and
- (x) respondent's right to file a written answer to the cease and desist order no later than five days prior to the first scheduled hearing date.

(c) Service of cease and desist order. A cease and desist order shall be personally served on the respondent by the department. If personal service cannot be made after due diligence and such fact is certified under oath, service of a copy of the order shall be made by certified mail, return receipt requested, to the person's last known address by the department.

(d) Notice of intention to seek restitution and/or civil penalty. Whenever the department concludes that civil penalties and/or restitution may be warranted pursuant to section 31.4 of this Part, the department shall serve a notice of the allegations of the unauthorized activity and the department's intention to impose a civil penalty and/or order the respondent to make restitution. The department shall include in such notice a notice of hearing regarding the civil penalty and/or restitution sought, unless a hearing is currently pending. The notice of hearing shall be on a form prescribed by the commissioner and shall specify the civil penalty sought for each violation.

§31.4 Civil Penalties and Restitution.

(a) Civil Penalties. Whenever the department concludes that civil penalties may be warranted, it may seek to impose a civil penalty of up to five thousand dollars for each violation.

(1) Factors to be considered in determining whether to impose a civil penalty may include, but need not be limited to:

- (i) the nature of the violation and of any injury resulting therefrom;
- (ii) the degree of danger to the public caused by the unauthorized conduct;
- (iii) whether the unauthorized conduct was inadvertent, or was committed with knowledge that the conduct was unauthorized;
- (iv) the duration and frequency of the unauthorized conduct;
- (v) any past history or findings of unauthorized practice by the respondent; and
- (vi) respondent's failure to comply with any cease and desist order previously issued.

(2) In the event that respondent violates a cease and desist order during the course of a hearing or appeal, the department may deem such violation to constitute sufficient cause upon which to seek a civil penalty under this section.

(b) Restitution. Respondent may be ordered to make restitution to any person who has an interest in any money or property, either real or personal, acquired by the respondent as a result of the unauthorized practice of a profession or the unauthorized use of a professional title.

(1) Factors the department may consider in determining whether to order restitution include, but need not be limited to:

(i) the nature of the violation and of any injury resulting therefrom;

(ii) the degree of danger to the public caused by the unauthorized conduct;

(iii) whether the unauthorized conduct was inadvertent or was committed with knowledge that the conduct was unauthorized;

(iv) the duration and frequency of the unauthorized conduct;

(v) any past history or findings of unauthorized practice by respondent;

(vi) respondent's failure to comply with any cease and desist order previously issued; and

(vii) whether the loss suffered by the claimant is sufficiently identifiable and quantifiable to enable an order of restitution to be made.

(2) Claim for restitution. Any person who seeks to make a claim for restitution based upon respondent's unauthorized practice or unauthorized use of a professional title shall submit a written claim for restitution to the department, on a form prescribed by the commissioner. The claim for restitution shall describe, with particularity, the circumstances of the alleged unauthorized practice and/or unauthorized use of a professional title, and shall describe the specific money or property, either real or personal, acquired by the respondent for which the claimant seeks restitution.

§31.5 Request for a hearing.

(a) If a respondent to a cease and desist order contests the cease and desist order, the respondent shall request a hearing conducted by the department within 30 days of respondent's receipt of such cease and desist order.

(b) A request for a hearing shall be in writing, on a form prescribed by the commissioner, and shall contain the following information:

(1) an address and phone number designated by respondent for receipt of all correspondence;

(2) the name, address, and phone number of respondent's attorney, if respondent chooses to be represented by an attorney;

(3) a request for a stay, on a form prescribed by the commissioner, if respondent requests a stay of such cease and desist order pursuant to section 31.6 of this Part; and

(4) the basis for respondent's objection to the cease and desist order and to any civil penalty or restitution being sought, if any.

(c) All requests for a hearing shall be submitted to the Professional Conduct Officer, New York State Education Department, 475 Park Avenue South, 2nd Floor, New York, NY 10016.

(d) The respondent may also file with the designated hearing officer a written answer to the cease and desist order no later than five days prior to the first scheduled hearing date, together with proof of service on the Office of Prosecutions, New York State Education Department, 475 Park Avenue South, 2nd Floor, New York, NY 10016. The answer shall contain a clear and concise statement of respondent's defenses to each alleged violation in the cease and desist order and to any civil penalty or restitution imposed.

§ 31.6 Request for a stay of the cease and desist order. If the respondent desires a stay of the cease and desist order, he or she shall submit a written application to the professional conduct officer, on a form prescribed by the commissioner, stating the facts and the law upon which such stay should be granted.

(a) A request for a stay of a cease and desist order shall:

(1) be filed together with respondent's request for a hearing on the cease and desist order or, in the event that the hearing process is initiated by a notice of hearing served in accordance with subdivision (3) of section 6516 of the Education Law, at any time prior to the completion of a pending hearing;

(2) clearly state at the top of the first page of the document that respondent requests a stay of the cease and desist order;

(3) contain an address and phone number designated by respondent for receipt of all correspondence and notice related to the request for a stay;

(4) contain the name, address, and phone number of respondent's attorney, if respondent chooses to be represented by an attorney; and

(5) state the factual and legal basis upon which a stay should be granted.

(b) Decision on the request for a stay. The hearing officer may grant a stay of the cease and desist order pending an ultimate determination, if in his or her judgment a stay is necessary, upon consideration of respondent's likelihood of success on the merits, any irreparable harm and a balancing of the equities. The hearing officer shall make such determination within five business days of the request for a stay. The date of the request for a stay is the date on which the professional conduct officer receives the stay request.

§31.7 Hearing.

(a) Within fifteen days of receipt of the request for a hearing and after consultation with the parties to the hearing, the hearing officer shall take action to schedule a date for the hearing and notify the parties of such date. If more than one date is necessary for completion of a hearing, the hearing officer shall set additional hearing dates following consultation with the parties and/or their legal representatives and notify the parties of such additional dates.

(b) Adjournments of the hearing dates may be granted by the hearing officer for good cause, upon a written request by a party.

(c) The parties shall exchange evidence and witness lists not less than five days prior to the initial hearing date. However, additional evidence and witnesses may be allowed at the discretion of the hearing officer.

(d) Evidence in support of the cease and desist order shall be presented by an attorney for the department. Respondent may appear personally or may be represented by counsel at the hearing.

(e) Any post-hearing submissions shall be authorized in advance of submission by the hearing officer.

(f) The department has the burden of proving by a preponderance of the evidence the facts and circumstances constituting a violation of section 6512 or 6513 of the Education Law.

(g) Results of the hearing. At the conclusion of the hearing, the hearing officer shall issue a written report, which shall include the following:

(1) findings of fact;

(2) a determination on each violation alleged in the cease and desist order;

(3) a determination as to whether to accept, reject, or modify any of the terms of the cease and desist order in whole or in part; and

(4) the civil penalty and/or restitution imposed, if any.

(h) A copy of the hearing officer's written report shall be served upon the parties within ten days of the conclusion of the hearing, together with a notice setting forth the parties' right to an administrative appeal. A hearing shall be deemed concluded upon the hearing officer's receipt of the transcript and any post hearing submissions authorized by the hearing officer.

(1) Content of notice of appeal. The hearing officer's written report shall contain a notice of the right to an administrative appeal, which shall read as follows:

Notice:

You are hereby notified that you have the right to appeal the decision of the hearing officer to a Regents Review Committee. To initiate such an appeal, you are required to file a notice of appeal, on a form that may be obtained from the Professional Conduct Officer, New York State Education Department, 475 Park Avenue South, 2nd Floor, New York, NY 10016, within twenty days of the receipt of the hearing officer's report. The notice of appeal shall include a statement of the issues to be considered on appeal and a statement of any errors alleged to have been made by the hearing officer, and shall include any other supporting papers and an affidavit of service attesting that such notice and supporting papers were served on all other parties to the proceeding. The notice of appeal and any accompanying documents shall be filed with the Office of Legal Services, New York State Education Department, 475 Park Avenue South, 2nd Floor, New York, NY 10016.

(2) Service. Service of the written report and notice of the right to an administrative appeal shall be made by United States Postal Service or any other delivery service providing proof of delivery to the addresses specified by the parties.

(i) The report of the hearing officer shall be final, unless it has been appealed to a Regents Review Committee within twenty days of the receipt of the hearing officer's report, as provided in section 31.8 of this Part.

§31.8 Administrative appeal.

(a) Notice of appeal. Either party may appeal the hearing officer's report to the Regents Review Committee by filing a notice of appeal, on a form prescribed by the Commissioner. The notice of appeal shall include a statement of the issues to be considered on appeal, a statement of any errors alleged to have been made by the hearing officer, any other supporting papers and an affidavit of service attesting that such notice of appeal and any supporting papers were served on all other parties to the proceeding by United States Postal Service or other delivery service providing proof of delivery to the addresses specified by the parties within 20 days of receipt of the hearing officer's report.

(b) Members of the Regents Review Committee. The Regents Review Committee shall be comprised of three members, at least one of which shall be a Regent.

(c) Notification of Regents Review Committee Meeting. Respondent has the right to appear at the meeting with the Regents Review Committee, or the Regents Review Committee may require respondent to appear. The department shall notify respondent at least 10 day prior to the meeting of the following:

- (1) the time and place of the meeting;
- (2) respondent's right to appear at the meeting;
- (3) respondent's right to be represented by counsel;
- (4) whether or not respondent is required to appear at the meeting; and
- (5) such other information as may be considered appropriate.

(d) Review by the Regents Review Committee. The Regents Review Committee shall review the hearing officer's report and determine whether the department has met its burden of proving by a preponderance of the evidence the facts and circumstances constituting a violation of section 6512 or 6513 of the Education Law and/or supporting an order of restitution and/or whether the civil penalty imposed by the hearing officer, if any, was arbitrary and capricious. A review by the Regents Review Committee shall be based on:

- (1) the transcript of the hearing, which shall include the cease and desist order; any stay request submitted by respondent; any answer submitted by the respondent; the stenographic record of the hearing and all exhibits admitted at the hearing; and
- (2) the report of the hearing officer.

(e) Board of Regents Review. Following the Regents Review Committee meeting, the Regents Review Committee shall transmit a written report of its review and recommendation to the Board of Regents. The Board of Regents shall review the written report and recommendation of the Regents Review Committee and shall determine whether respondent has violated each charge identified in the cease and desist order and determine what penalties and/or restitution, if any, to impose, and shall issue an order to carry out such decisions. Such decisions shall require the affirmative vote of a majority of the members of the Board of Regents.

(1) A review by the Board of Regents shall be based on:

- (i) the transcript of the hearing, which shall include the cease and desist order, any stay request submitted by respondent, any answer submitted by the respondent, the stenographic record of the hearing and all exhibits admitted at the hearing;
- (ii) the report of the hearing officer; and
- (iii) the report and recommendation of the Regents Review Committee.

(2) The order of the Board of Regents shall be personally served upon respondent or served by certified mail to the respondent's last known address. Such service shall be effective as of the date of the personal service or five days after mailing by certified mail. The order shall also contain the following written notice:

Notice:

You are hereby notified that the decision of the Board of Regents is final and binding. Review of such order may be obtained in a proceeding pursuant to Article 78 of the Civil Practice Law and Rules commenced in Supreme Court, Albany County. This decision shall not be stayed or enjoined unless you apply to the Supreme Court pursuant to Article 63 of the Civil Practice Law and Rules and you provide notice to the New York State Education Department and Attorney General of such application.

(f) Either the Regents Review Committee or the Board of Regents may remand a proceeding to the hearing officer for further proceedings.