SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

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In the matter of the Complaint of
STEVEN REISNER,

Petitioner,

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

Index No. 10115400

LOUIS CATONE, Director of the New York Office of Professional Discipline, New York State Department of Education,

THE OFFICE OF PROFESSIONAL DISCIPLINE of the New York State Department of Education, and

THE NEW YORK STATE DEPARTMENT OF EDUCATION,

Respondents.

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MEMORANDUM OF LAW IN SUPPORT OF PETITIONER'S VERIFIED PETITION

INTRODUCTION

In this Article 78 proceeding, Petitioner seeks an order of the Court mandating that Respondent Louis Catone, in his capacity as the Director for the Office of Professional Development ("OPD") of the New York State Department of Education, accept jurisdiction and investigate the Petitioner's complaint against Dr. John Leso, a psychologist licensed in the State of New York. Petitioner's complaint alleges that Dr. Leso violated numerous provisions of New York Education Law and the Department of Education's ("DOE") Rules and Regulations. Specifically, the complaint alleges that he violated Education Law §§ 6509 (2) (practice beyond authorized scope, gross incompetence, gross negligence) and (9) (unprofessional conduct); 8 NYCRR 29.1(b)(5) (conduct exhibiting a moral unfitness to practice the profession) and (11)

(unauthorized treatment); and 8 NYCRR 29.2(a)(1) (neglect of a patient in need of immediate care), (2) (willful abuse and harassment), and (7) (unwarranted treatment) in relation to detainees at at the United States Naval Station at Guantánamo Bay, Cuba.

The OPD's duty to investigate allegations of professional misconduct is mandatory under both New York Education Law and the Respondents' own rules and regulations. *See* Education Law §6510(1)(b); 8 NYCRR 17.1-17.2 (2010). The Complaint against Dr. Leso alleges and documents multiple instances of professional misconduct, imposing a mandatory obligation upon the Respondents' to investigate these instances of possible misconduct. Since this duty is not subject to the judgment and discretion of the office, this Court can and should compel the Agency to perform its statutory duty. Article 78, by its terms, authorizes the issuance of an order of mandamus "where [a] body or officer failed to perform a duty enjoined by law." CPLR §7803(1). That is the circumstance presented here.

In declining to exercise jurisdiction over the Petitioner's complaint and in refusing to investigate the substance of the complaint, the OPD read Education Law § 7601-a in an artificially narrow fashion, unreasonably and unprecedentedly limiting the OPD's definition of the "practice of psychology." It does so by concluding that the ethical standards imposed upon psychologists only apply where the psychologist is involved in a narrowly defined therapist-patient relationship. But Education Law §7601-a neither excludes psychologists from serving including institutional or third party clients where a patient-therapist relationship may not exist, nor does it provide that a consenting therapist-patient relationship is the only context in which professional standards of conduct apply. In fact, New York psychologists regularly serve institutional and "third party" clients and they are at times called upon to apply treatments against their patient's will. There is simply no basis for finding that the Legislature intended to

exclude professionals practicing in such varied circumstances from all ethical guidance or standards of conduct in respect to either their institutional clients or to the non-patient individuals whose behavior they observe, describe, evaluate, interpret, or modify.

Moreover, even assuming *arguendo* that the application of many of the ethical standards depend upon the existence of a therapist-patient relationship, the ethical standards imposed by New York contain two provisions that by their very nature do not require the existence of a therapist-patient relationship. First, Education Law § 6509(2) prohibits the practice of psychology beyond its "authorized scope." Second, 8 NYCRR 29.1(b)(5) prohibits "conduct exhibiting a moral unfitness to practice the profession." The conduct which Dr. Leso is alleged to have undertaken clearly run afoul of these two provisions. For this reason as well, Respondents erroneously declined jurisdiction of Petitioner's complaint.

Each of these matters is addressed in the Argument set forth below. To be clear, this Article 78 proceeding does not, at this juncture, address the question of whether Dr. Leso should be sanctioned for his alleged ethical transgressions, nor does it address the scope of any sanction. At issue here is only whether the Respondents erroneously refused to take jurisdiction and investigate the allegations set forth in the Petitioner's Complaint.

ARGUMENT

I. NEW YORK MANDATES THAT OPD OPEN AN INVESTIGATION INTO WELL-FOUNDED COMPLAINTS OF PSYCHOLOGIST MISCONDUCT

The Department of Education is obligated to investigate instances of possible misconduct by New York licensees, and it is the only agency authorized to do so. Pursuant to Education Law §6510(1)(b), the "department *shall* investigate each complaint which alleges conduct constituting professional misconduct" (emphasis added). Moreover, the rules and regulations of

the OPD as an organ of the Department of Education state that "[a]ll complaints or other information relating to licensees authorized to practice a profession under title VIII of the Education Law shall be referred to the director of the Office of Professional Discipline" and that "the director of the Office of Professional Discipline or that officer's designee *shall*, in matters involving possible professional misconduct, initiate an investigation of each such complaint or other information." 8 NYCRR 17.1-17.2 (emphasis added).

Since the Complaint against Dr. Leso alleges serious professional misconduct, the OPD does not have discretion to refuse an investigation into the matter. Mandamus is a proper remedy to compel a board or official to perform a statutory duty that is not subject to the discretion of the officer. *See Hebel v. West,* 25 A.D.3d 172, 176 (N.Y. App. Div. 2005).

In *Gardner v. Constantine,* 531 N.Y.S.2d 975 (N.Y. Sup., 1988), the District Attorney filed a writ of mandamus to compel the Superintendent of the New York State Police to complete an investigation of alleged police misconduct. The court found that the regulations governing the Superintendent provided that "the Superintendent has a responsibility to cause a prompt, thorough investigation to be made of allegations and complaints received." *Id*. at 977. *See also* 9 NYCRR 479.1. The court ruled on behalf of the petitioner, finding that the Superintendent was bound to complete investigations pursuant to specific mandates in police regulations and statute. *Id.* 978. Similar to the facts in *Gardner*, the OPD is required to initiate an investigation where a *prima facie* case of misconduct is set forth in a complaint submitted. Mandamus is therefore proper to compel the OPD to perform this statutory duty.

II. DR. LESO WAS ENGAGED IN THE PRACTICE OF PSYCHOLOGY WHEN HE COMMITTED THE ACTS ALLEGED IN THE COMPLAINT

The Respondents' erred in determining that Dr. Leso's conduct as alleged in Petitioner's Complaint did not amount to the practice of psychology. The fundamental rule of statutory interpretation is that a court "should attempt to effectuate the intent of the Legislature." *Majewski v. Broadalbin-Perth Cent. School Dist*., 91 N.Y.2d 577, 583 (1998) (internal quotation marks and citation omitted). Since "the clearest indicator of legislative intent is the statutory text, the starting point in any case of interpretation must always be the language itself, giving effect to the plain meaning thereof." *Id*. Further, "it is a well-established rule that resort must be had to the natural signification of the words employed, and if they have a definite meaning, which involves no absurdity or contradiction, there is no room for construction and courts have no right to add to or take away from that meaning." *Id*. (internal quotation marks and citation omitted).

In this case, the OPD purported to rely upon the statutory definition of psychology found in Education Law § 7601-a. *See* Catone Letter (July 28, 2010 (Attached as Exhibit 2 to Pendergrass Affirmation) (Hereinafter "Pendergrass Aff."). Education Law § 7601-a defines psychology, in relevant part, as follows:

> The practice of psychology is the observation, description, evaluation, interpretation, and modification of behavior for the purpose of preventing or eliminating symptomatic, maladaptive or undesired behavior; enhancing interpersonal relationships, personal, group or organizational effectiveness and work and/or life adjustment; and improving behavioral health and/or mental health.

For the reasons explained below, Dr. Leso's duties as a clinical psychologist fall squarely within this definition. The OPD's determination to the contrary is both incorrect and would lead to absurd results in a variety of other contexts involving psychologist misconduct.

A. Dr . Leso's misconduct constituted the practice of psychology as defined by the statute's plain language.

Petitioners' Complaint alleges and documents that Dr. Leso observed, described, evaluated, interpreted, and modified the behavior of detainees at Guantánamo for the purpose of eliminating undesired behavior, especially their resistance to interrogation. This conduct clearly falls within the definition of psychology under Education Law § 7601-a. The Complaint also demonstrates that Dr. Leso obtained his position and discharged his duties by virtue of being a New York-licensed psychologist. Moreover, Dr. Leso was tasked at Guantánamo to provide psychological expertise on "good stress management, morale, cohesion and organizational functioning" of the interrogation operation at Guantánamo. *See* Ex. 11 to Complaint, BSCT SOP 2002 at 1. In this role, Dr. Leso's acts also fall squarely within the definition of psychology contained in Education Law § 7601-a, which includes "enhancing interpersonal relationships, personal, group or organizational effectiveness and work and/or life adjustment."

Furthermore, the Complaint describes that in regard to detainee mental health evaluations and medical care, Dr. Leso's role as psychologist at GTMO included a charge that he "observe a detainee to provide input on the appropriateness of a mental health referral for that individual." *See* Ex. 11 to Complaint, BSCT SOP 2002 at 2. Such actions can be accurately described as "improving behavioral health and or mental health" under the definition of psychology pursuant to Education Law § 7601-a. In addition, the Complaint documents how Dr. Leso's role required that he implement and support positive stress management and morale of those conducting the interrogations at Guantánamo. *Id.* at 1. In this regard, as well, he was practicing psychology within the meaning of New York law.

Dr. Leso's recommendations regarding methods of overcoming detainees' resistance to interrogation involved the "observation, description, evaluation, interpretation, and modification

of behavior for the purpose of preventing or eliminating . . . undesired behavior" and fall squarely within Education Law § 7601-a. In fact, the Complaint records that Dr. Leso not only recommended using psychological techniques to modify detainee behavior, but also how he actively supervised the implementation of these and other psychological techniques and, on at least one occasion, personally participated in their application to a detainee. *See* Complaint §VI.D ("Dr. Leso Personally Supervised and Participated in the Psychological Abuse of Mohammed al Qahtani in violation of New York professional standards."). It is clear that supervising and participating in the application of psychological methods to a detainee in order to overcome that detainees' resistance to interrogation involves "observation, description, evaluation, interpretation, and modification of behavior for the purpose of preventing or eliminating . . . undesired behavior," and thus Dr. Leso's personal participation in the application of psychological techniques on Guantánamo detainees falls squarely within Education Law § 7601-a.

In sum, the Complaint documents and describes in detail how Dr. Leso rendered psychological services in observing, describing, evaluating, interpreting, and modifying behavior for the purposes of preventing or eliminating undesired behavior as well as "enhancing . . . group or organizational effectiveness …; and improving behavioral health and/or mental health" of those conducting the interrogations. *See* NY Educ. Law § 7601-a.

B. The OPD's artificially narrow interpretation unjustifiabily limits the scope of the Legislature's definition of psychology and the conduct it expected to be regulated by Respondents.

In refusing to take jurisdiction over the Complaint against Dr. Leso and investigate Petitioner's claims, the OPD erroneously interpreted "modification of behavior" to require not only a patient-therapist relationship, but also a patient desirous of treatment. Such a cramped

interpretation of the statutory text would totally exclude from professional regulation and oversight both unwanted treatment and treatment to modify behavior undesired by anyone other than that "patient" as defined by OPD. *See* Catone Letter (July 28, 2010) (Attached as Exhibit 2 to Pendergrass Aff.). As consistently stated by the courts, "new language cannot be imported into a statute to give it a meaning not otherwise found therein." *See Matter of Chemical Specialties Mfrs. Assn. v. Jorling*, 85 N.Y.2d 382, 394 (1995) (Quoting McKinney's, Cons. Laws of N.Y., Book 1, Statutes § 94, at 190). The Respondents' interpretation of the statute effectively imports new language in the statute, giving the statute a new—and unjustifiable—meaning that would exclude a whole class of misconduct by psychologists which the OPD can, should, and does regulate.

Nowhere in the statutory or regulatory scheme can support be found for the OPD's restriction of the oversight of the psychology profession to the narrow context requiring a patient-therapist relationship. The OPD's interpretation—that professional standards of conduct for psychologists only apply to situations in which a patient desires the treatment in question—perversely excludes willful misconduct and abuse from regulation altogether. Finally, the OPD's narrow definition ignores the well-established practice of psychology in the context of institutional settings, including forensic and correctional settings.

Nowhere in the language of the statute is there any indication that the practice of psychology is limited to services provided by a therapist to a patient. In fact, a *prima facie* review reveals that neither the term patient nor any requirement of a therapist-patient relationship is mentioned within the statutory definition. Nor can the OPD find any help in common law precedent. New York courts have correctly upheld the OPD's application of professional

standards in several instances where the medical professional asserted there was no provider-patient relationship.

For example, in *Stein v. Sobol*, 557 N.Y.S.2d 697 (1990), the Court of Appeals upheld a finding of willful abuse by a psychologist against an adult patient's parents. The parents in this case had been invited into the patient's sessions as part of a "comprehensive family therapy approach" to help the psychologist "gain further insight into the family's interrelationships and to counsel them on their interaction with their daughter." *Id.* at 786-87. The patient's mother testified that when she declined to attend further sessions, "profanity and vile name-calling were repeated several times during which petitioner stood over her waving his arms and that she thought he would strike her." Noting this testimony the court found that "ample evidence" supported the administrative finding that the psychologist was guilty of professional misconduct. *Id.* at 698-99. *Stein* supports the somewhat obvious proposition that when health care professionals inflict harmful conduct on persons made vulnerable to them by virtue of their professional status and expertise, the Legislature intended that their conduct would be subject to professional discipline regardless of whether the vulnerable person desired such treatment or was considered a "patient" by the professional in question.

C. The OPD's interpretation of the statute is clearly erroneous as demonstrated by the fact that it would completely exclude institutional employees such as correctional and forensic psychologist from professional regulation.

The New York legislature certainly did not intend to exclude psychologists working for institutional employers, such as correctional or forensic psychologists, from professional regulation. Under the OPD's view, however, psychologists who treat court-mandated patients, for example, would not be subject to discipline for professional misconduct.

As Petitioner's letter of August 26, 2010 documents (Attached as Exhibit 3 to Pendergrass Aff.), the American Board of Forensic Psychology defines the practice of forensic psychology as including, *inter alia*:

> Psychological evaluation and expert testimony regarding criminal forensic issues such as trial competency, waiver of Miranda rights, criminal responsibility, death penalty mitigation, battered woman syndrome, domestic violence, drug dependence, and sexual disorders … Assessment, treatment and consultation regarding individuals with a high risk for aggressive behavior in the community, in the workplace, in treatment settings and in correctional facilities … Consultation and training to law enforcement, criminal justice and correctional systems … Court-appointed monitoring of compliance with settlements in class-action suits affecting mental health or criminal justice settings …

In some instances, correctional psychologists may be called upon to administer treatments to inmates without consent for the purpose of modifying behavior undesired by institutional clients. *See* "Standards for Psychology Services in Jails, Prisons, Correctional Facilities, and Agencies," at 775-76, International Association for Correctional and Forensic Psychology, *available at* http://cjb.sagepub.com/content/37/7/749 (Last visited Nov. 12, 2010). In these instances, forensic psychologists are understood to have professional duties both to their institutional clients as well as to the persons evaluated, observed, or whose behavior is to be modified, despite the fact that these persons, by definition, do not desire treatment and may not have formed a patient-therapist relationship with the institutional medical professional.

That these professional functions are clearly subject to professional oversight is made clear by the statutory language describing psychology as "the observation, description, evaluation, interpretation, and modification of behavior for the purpose of preventing or eliminating symptomatic, maladaptive or undesired behavior." *See* Education Law § 7601-a. As Petitioner's letter documents, multiple ethical codes and guidelines have been issued by the American Psychological Association and other professional associations precisely because complex and sensitive ethical judgment is required when psychologists serve multiple or "third

party" clients such as courts, attorneys, opposing parties in litigation, and correctional departments. *See* Roberts Letter (August 26, 2008) (Attached as Exhibit 3 to Pendergrass Aff.). To say that the acts of psychologists performed in these settings requires specific ethical considerations is one thing. To say that those acts are completely excluded from professional oversight, as Respondents assert in this case, is quite another.

In sum, the Respondents' reasoning would completely exempt forensic and correctional psychologists who serve institutional or "third party" clients from professional standards and oversight.[1] Nowhere in the statutory definition of psychology or the legislative history is there any indication that this type of practice was meant to be excluded from professional regulation by the State of New York.

III. THE COMPLAINT ALSO ALLEGES THAT DR. LESO PRACTICED PSYCHOLOGY OUTSIDE ITS AUTHORIZED SCOPE AND IS MORALLY UNFIT TO PRACTICE PSYCHOLOGY

Finally, even if the Respondents' narrow definition of psychology was plausible, even if a patient-therapist relationship is required under New York law before psychologists come under the purview of New York's ethical standards regulating the profession, and even if Dr. Leso established no therapist-patient relationship with individuals at Guantánamo Bay, Dr. Leso's conduct would still be subject to New York's ethical standards and to Respondents' oversight. This is because Education Law § 6509(2) prohibits the practice of psychology beyond its authorized scope. Indeed, if–as Respondents assert–the practice of psychology occurs legitimately only in the context of a therapist-patient relationship, it follows that no therapist-patient relationship is established when the psychologist is engaged in the "unauthorized practice of psychology." So understood, Dr. Leso's conduct, if regarded as not involving a therapist-

[1] Petitioners maintain that individuals who are subjected to treatment, voluntarily or not, are also clients and patients under New York law. Even assuming they are not, however, that does not exempt the acts of psychologists from Respondents' professional oversight.

patient relationship, would quite clearly be "unauthorized" and, therefore, in contravention of Education Law § 6509(2).

Furthermore, the conduct in which Dr. Leso is alleged to have pursued clearly exhibits a moral unfitness to practice the profession—a charge not predicated on the formation of a patient-therapist relationship or acts taken within the "practice of psychology." There is ample evidence in the Complaint that Dr. Leso was involved in the following acts:

- Designing, implementing, and participating in a system of abusive interrogations;
- Recommending the use of psychological stressors such as sleep deprivation, withholding food, isolation, and disorientation of time;
- Recommending the use of psychological methods of abuse to detainees, including sleep deprivation "non-injurious physical consequences," removal of clothing, exposure to cold, threats, prolonged isolation, and sensory deprivation, and;
- Personally supervising the implementation of these and other psychological techniques, and, on at least one occasion, participating in their application to a detainee.

With regard to Dr. Leso's personal supervision of these acts, the Complaint documents that Dr. Leso was present for Mr. al Qahtani's interrogation, including occasions when dogs were used to torment Mr. al Qahtani, when he was forcibly injected with fluid causing his limbs to swell, when he was sleep deprived, when he was denied prayer, and when, as a result, he was evidencing behavior consistent with extreme psychological trauma (talking to non-existent people, reportedly hearing voices, crouching in a corner of the cell covered with a sheet for hours on end). Rather than object to such treatment in this context, Dr. Leso is alleged to have advised

interrogators on how to keep Mr. al Qahtani awake, disoriented, and vulnerable. Psychologists who participate in such practices in New York[2] are plainly unfit to practice their profession.

CONCLUSION

For the foregoing reasons, the relief requested by the Petitioner should be granted.

Dated: November 24, 2010

/s
By: _____
TAYLOR PENDERGRASS
ARTHUR EISENBERG
ANDREW KALLOCH

NEW YORK CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 19th Floor
New York, NY 10004
(212) 607-3300
(212) 607-3329 (facsimile)

-and-

L. KATHLEEN ROBERTS*
NUSHIN SARKARATI*
ANDREA EVANS*

THE CENTER FOR JUSTICE & ACCOUNTABILITY
870 Market Street, Suite 680
San Francisco, CA 94102
(415) 544-0444

Attorneys for Petitioner

*Seeking admission *pro hac vice*

[2] The national professional psychology community has also clearly indicated that such acts would render a person unfit to practice psychology. The American Psychological Association has unequivocally condemned the abusive interrogation tactics that Dr. Leso recommended, including sexual humiliation and exploitation of phobias, tactics that are "utterly inconsistent with Ethical Standard 3.04 in the APA Ethics Code, which obligates psychologists to avoid harm."