



## Licensing Exemption Law Questions

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*Disclaimer: The information contained in this document is for general educational and informational purposes only and is not a substitute for specific legal advice. It represents the opinion of OPWDD. For any questions regarding licensure requirements, it is best to contact NYS Education Department (NYSED) directly and to seek consult with the appropriate legal professional.*

### BACKGROUND

New York State Education Law sets rules about professions or certain types of jobs. For example, it sets rules about who can be a licensed master social worker or marriage and family therapist. Usually, people can be part of that profession if they meet certain requirements to be licensed. In certain circumstances, the Education Law makes exemptions for unlicensed professionals to do the kind of work a licensed professional might do. For many years, the law allowed a broad-based exemption for unlicensed professionals working at OPWDD and other state agencies to do the kind of work a licensed professional would do. This is because the Education Law allowed unlicensed professionals to practice in certain “exempt” settings. These exempt settings included OPWDD certified programs.

In 2018, New York State passed Part Y of Chapter 57 of the Laws of 2018. This is also known as the Licensing Exemption law. This law removed the broad-based exemption for unlicensed professionals. However, it still allows unlicensed professionals in exempt settings to assist a licensed professional with their work. Certain unlicensed professionals can do the work described in OPWDD regulations 14 NYCRR §§ 633.16 and 679 as described below. In some cases, “grandparenting” provisions of the new law affect practice. In other cases, existing or new exemptions will apply.

- Grandparented: This applies to unlicensed professionals who were working in an exempt employment setting on or before June 24, 2022. These unlicensed professionals can continue to work in certain settings without meeting additional licensure requirements. This applies to staff such as Behavior Intervention Specialists (defined by 14 NYCRR 633.16).
- Exempt: This means that the unlicensed professional meets an exemption of the existing NYSED law. This applies to staff such as Applied Behavioral Sciences Specialists (defined by 14 NYCRR 679.99).

After the Licensing Exemption law was passed, New York State’s Education Department (NYSED) issued guidelines to help people understand the Licensing Exemption law. You can see NYSED’s guidelines here: <https://www.op.nysed.gov/sites/op/files/surveys/mhpsw/guidelines-implement-%2520party-chapter57-laws%2520of%25202018.pdf>

The Licensing Exemption law affects unlicensed professionals working in OPWDD programs and settings, What follows is OPWDD’s *opinion* on some frequently asked questions, but it is ultimately the NYSED who oversees and regulates the professions. It is always critical to consult your attorney and NYSED when it comes to questions of what type of activity is permitted without licensure.

### QUESTIONS AND ANSWERS

1. **How does the Licensing Exemption law change what a Behavior Intervention Specialist (BIS) can do?**

OPWDD has regulations about what kind of work a qualified BIS can do. This regulation is 14 NYCRR § 633.16.

- A BIS who is grandparented under the Licensing Exemption Law can continue to do the work of a BIS described in 633.16. For example, a grandparented Level 1 BIS can supervise a Level 2 BIS in Behavior Support Plans (BSP) without restrictive/intrusive interventions.
- A BIS who is not grandparented under the licensing Exemption law can only do the work of a BIS described in 633.16 as part of a multidisciplinary team (MDT). The MDT is equivalent to the definition of a “Program Planning Team” in 633.16. The MDT must include a licensed psychologist, licensed clinical social worker, or psychiatrist.

Note, a BSP with restrictive/intrusive interventions must be supervised by a licensed psychologist, licensed clinical social worker, or psychiatrist.

**2. Are the activities of a BIS the same as the activities of a Licensed Behavior Analyst (LBA) as defined by NYSED?**

No. The activities of BIS, as described in 14 NYCRR 633.16, *do not* constitute the practice of Licensed Behavior Analysts. Therefore, BIS activities do not infringe on scope of practice issues for LBAs.

**3. Can an unlicensed professional give a diagnosis of a developmental disorder?**

No. Unlicensed professionals can help with information gathering, but they can't give a diagnosis.

**4. Do the licensing exemption laws change the qualifications for an Applied Behavioral Sciences Specialist (ABSS)?**

No. The licensing exemption laws do not change the qualifications for an ABSS. The ABSS is exempt from the NYS licensing laws as an exempt person (see Article 153 § 7605(13)).

In Article 16 clinics, the ABSS must continue to meet the requirements in 14 NYCRR 679.99.

**5. Will OPWDD revise the 633.16 regulations to include a Licensed Behavior Analyst as a title that can supervise a BIS developing behavior support plans?**

No. OPWDD is not adding Licensed Behavior Analysts as clinicians who can provide supervision to Behavior Intervention Specialists.

**6. Can a BIS 1 supervise a BIS 2 when developing a non-restrictive/intrusive behavior support plan (BSP)?**

It depends on whether the BIS 1 is grandparented.

- *Grandparented BIS 1*: can supervise a BIS 2 in developing a non-restrictive/intrusive BSP.
- *Non-grandparented BIS 1*: cannot supervise a BIS 2. Instead, the BIS 1 must work on the BSP as part of a multi-disciplinary team that has an appropriately licensed clinician.

Any BSP with restrictive/intrusive interventions must be overseen by an appropriately licensed professional per 633.16, regardless of a BIS' grandparented status.

**7. What options do agencies have for professionals overseeing BSP development?**

For BSPs *with* restrictive/intrusive interventions, agencies must include someone with an appropriate license to participate in the multidisciplinary team. This has always been the requirement in 633.16.

For BSPs *without* restrictive/intrusive interventions, agencies may consider:

- a) Using a Level 1 BIS who is grandparented under the SED licensing requirements.

Most current Level 1 Behavior Intervention Specialists employed on or before of June 24, 2022 will qualify for “grandparenting” under the SED rules. This is because a BIS 1 needs at least 3 years’ experience to qualify for that title. A grandparented BIS 1 can continue their current work in their role consistent with the requirements of the 633.16 regulations.

- b) Elevating a grandparented Level 2 BIS to Level 1 if the person meets the qualifications.

A Level 2 BIS may be elevated to a Level 1 BIS if they meet the requirements in 633.16. If the Level 2 BIS was employed on or before June 24, 2022, they may claim the “grandparenting” privilege under SED rules. Nothing in NYSED guidance prohibits a current BIS 2 who becomes a BIS 1 from claiming licensing exemption (i.e., “grandparenting”).

OPWDD has recently reduced the required years of experience for a BIS 2 to become a BIS 1. This may help more BIS 2s become BIS 1s, who may qualify for grandparenting. See 14 NYCRR 633.16 for more information about BIS requirements.

- c) Hiring a licensed professional.

If the agency is unable to employ a Level 1 BIS who is exempt from the licensing laws, it must hire someone with an appropriate license for the multidisciplinary team.

**8. Developing a Behavior Support Plan has many steps. Which steps can a Behavior Intervention Specialist (BIS) that is *not grandparented* under the licensing requirements do?**

Ultimately, the multi-disciplinary team (MDT) is responsible for developing and monitoring a BSP. The MDT is equivalent to the definition of a “Program Planning Team” in 633.16. The MDT must include a licensed psychologist, licensed social worker, or psychiatrist, operating within the scope of their practice. The BIS is a part of the MDT. Therefore, the BIS (with or without grandparenting) can assist the licensed professional with all aspects of developing and implementing a BSP as described in 633.16.

**9. Does the term “exempt setting” no longer apply for professionals completing licensure supervision hours within an agency? Can OPWDD explain when an individual will need to obtain a limited permit for their supervision hours?**

OPWDD does not oversee licensing supervision hours. Please contact the NYS Education Department Office of Professions for these questions.

**10. Can a non-licensed, non-grandparented BIS work in an OPWDD Home and Community Based Services (HCBS) program under the NYSED licensing laws?**

Yes. A non-licensed, non-grandparented BIS can work in an OPWDD certified HCBS program as part of a multidisciplinary team (MDT). The MDT must include a licensed professional.

**11. Can a non-licensed Applied Behavioral Sciences Specialist (ABSS) work in an Article 16 clinic under the NYSED licensing laws?**

Yes. An ABSS defined by 14 NYCRR 679.99 is exempt from the NYSED licensing laws as an exempt person (see Article 153 § 7605(13)).

**12. It is harder and more expensive to hire licensed professionals than it is Master’s level professionals. Won’t the new licensing requirements make it hard to hire staff?**

Not in the short-term. There are non-licensed professionals working in the field who are exempt/grandparented from SED rules. Agencies can continue working with exempt and grandparented staff who do not require a license.

In some cases, agencies may need to hire a licensed clinician to be part of the multi-disciplinary team (MDT) to oversee staff who are not exempt/grandparented from SED rules. The MDT is equivalent to the definition of a "Program Planning Team" in 633.16. Agencies should assess whether they should hire a licensed clinician to be part of the MDT (whether full time, part time, or as needed). This will depend on the needs of the people agencies serve, the kinds of services the agency provides, and other relevant factors.