



Memorandum in Support

April 26, 2012

Re: S.6466-A (Bonacic, Fuschillo, Johnson, Krueger, Montgomery, Savino) / A.9794 (Paulin, Castro, Gottfried, Jaffee, Lavine, Gunther, Maisel, Reilly, P. Rivera, Rosenthal, Weprin, Zebrowski; MS Arroyo, Hikind, Jacobs, Latimer, Lupardo, Millman)

Coalition for the Homeless supports this legislation because it would preserve the right of children's camps to employ health professionals as camp health directors and allow the employment of licensed social workers and other mental health professionals without the risk of employers facing the prospect of being charged with a felony for doing so. Specifically, this legislation would replace Section 6503-a of the Education Law (requiring a waiver to avoid supposed class E felony employment of social workers) with an exemption from the corporate practice ban in relation to social workers and other mental health professionals.

As a community based non-profit organization serving 3,500 homeless people each day through a dozen programs, the Coalition is committed to providing the highest quality services for our clients, and assuring that other organizations are able to do the same. Unfortunately, as interpreted by the NYS Education Department (SED), the law governing the employment of licensed professionals in New York makes it a class E felony for organizations like ours to employ licensed professionals such as social workers, nurses, or doctors unless the agency itself has obtained an operating certificate to do so, or possesses a waiver of that requirement from SED with respect to social workers or other mental health professionals.

This interpretation of the law by SED and the recent establishment of the waiver requirement have proven to be most problematic, and we believe that two changes must be made to ensure that high quality health and social services can continue to be provided to homeless New Yorkers and others in need.

Children's Camps

First, section one of the bill exempts children's camp's from the corporate practice ban so that they may comply with NYS Department of Health requirements to have a health professional as health director. While SED argues that this exemption is not necessary because camps could simply contract with sole practitioners for these services, it has no meaningful answer to address the fact that such practitioners are not available to provide this service, and the reality is that these health professionals seek not contracts but employment opportunities with benefits.

Coalition for the Homeless seeks to continue lawful operation of our children's camps and supports exempting them so that social workers, nurses, and doctors or other health professionals may be employed to offer the very services they are licensed to provide to the children attending camp. Children who may need attention to injuries and supervision of medication as well as the emotional support of trained professionals when they are away from their parents, often for the first time in their lives, should not be placed in harm's way by a legal interpretation that would remove professionals from the employ of agencies offering summer camp services.

Employing Social Workers Interpreted as a Felony

Second, section two of the bill replaces the deeply flawed waiver program with a more straightforward and proven solution: An exemption from the corporate practice ban for social workers and other mental health professionals. (Similar exemptions have been provided for professions such as pharmacists and massage therapists as well as entities such as Health Maintenance Organizations and hospices.)

While we understand that the waiver program is in place and that some organizations have applied for and been granted waivers (roughly 175 as of this writing), we also believe the waiver program is fatally flawed. While we disagree with the SED interpretation of the law, the Department has nevertheless flatly asserted that it is a felony to employ a social worker in the absence of an operating certificate or waiver in New York State.

As an agency that seeks to employ and retain highly skilled people to provide quality services to our clients, we find the waiver program to have created far more problems than it has solved. Indeed we see it as a threat to employment opportunities for licensed professionals, and believe that ***it is working against the objective of encouraging social workers to obtain licenses. People who work in human services are thinking twice both about obtaining licenses and about employing those with licenses. Many employers have decided not to apply for the waiver, while others that have applied did not understand the legal attestations and are considering withdrawing their applications because they may contain false statements.***

We find the waiver program has both statutory flaws and serious problems with its implementation. These include the following, each of which is further described in the attached appendix:

- SED's requirement that the CEO applicant, *under "penalties of perjury,"* make the following attestation: *"The entity will not provide services in any profession other than those identified in this application."* The form does not make provision for noting the employment of professions *not* subject to the waiver that may be lawfully employed at the direction of another state agency, as in the case of children's camps. **Other professions are not subject to this heightened scrutiny.**
- SED's requirement that waiver applicants, *under penalties of perjury,* supply the *home* addresses and *home* telephone numbers for all of their board members in the waiver application and on the moral character attestation forms. **The statute merely requires the board member's name, and not home address and home telephone number.**
- SED's requirement that all board members, *under penalties of perjury,* answer the following question: *"Have you ever been found guilty after trial, or pleaded guilty, no contest, or nolo contendere to a crime (felony or misdemeanor in any court?)"* And, where the answer is affirmative, to *"submit a letter giving a complete explanation. Include copies of any court records..."* **even for decades-old acts of civil disobedience.**
- A statutory requirement that entities formed after June 18, 2010 demonstrate the need for their services to SED in order to qualify for a waiver, **even when SED has no role in funding, regulating, licensing or otherwise supervising the organization seeking to employ social workers or other mental health professionals.**

- A statutory requirement that ***repeals in July of 2013 an exemption from the waiver requirement*** involving “any person in the employ of a program or service operated, regulated, funded, or approved by the department of mental hygiene, the office of children and family services, the department of correctional services, the state office for the aging, the department of health, or a local governmental unit as that term is defined in article 41 of the mental hygiene law or a social services district as defined in section 61 of the social services law.” ***These agencies will also be required to apply for waivers in this flawed program.***

Coalition for the Homeless strongly recommends that the waiver program be scrapped and replaced with a straight-forward exemption from the corporate practice ban.

Everyone – regulators and lawmakers as well as the various professions knew when Social Work was made a licensed profession that the employment of this workforce was not merely taking place within licensed settings but also within a great number and variety of non-profit organizations that do not possess licenses. To this day, SED admits that no one knew how fully integrated into human services social workers are.

At the time the program was created, lobbyists for social workers asserted that the waiver program was only really targeted to agencies providing psychotherapy, but as we now see, SED has stretched far beyond this more reasonable premise to assert that anything that in the restricted scope of Social Work practice triggers the waiver requirement.

This includes, for example, any agency that employs staff under homeless service contracts funded by Housing and Urban Development (HUD) – each of which requires the provider to use an “assessment tool” in serving homeless individuals and families. ***A review of the applications filed to date reveals that the bulk of agencies SED thinks should apply have not done so. This is perhaps the best evidence of all that the program is beyond repair. As well-intentioned as the waiver program is, it is not accomplishing any real degree of public protection, and is clearly not needed to achieve that end.***

Coalition for the Homeless respectfully urges prompt passage of this legislation to protect the welfare of men, women, and children in need of human services and the professional skills of the social workers, nurses, and doctors serving them in children’s camps and community-based programs throughout New York State.

For additional information, please contact Shelly Nortz, Deputy Executive Director for Policy at 518-436-5612.

Appendix – Summary of Concerns with the Waiver Program

Coalition for the Homeless finds the waiver program has both statutory flaws and serious problems with its implementation. These include:

1. SED's requirement that the CEO applicant, under penalties of perjury, make the following attestation: *"The entity will not provide services in any profession other than those identified in this application."* The form does not make provision for noting the employment of professions *not* subject to the waiver that may be lawfully employed at the direction of another state agency, as in the case of children's camps. (Only the following professions are permitted to be identified in the waiver application: Licensed Master Social Work, Licensed Clinical Social Work, Licensed Mental Health Counseling, Licensed Marriage & Family Therapy, Licensed Creative Arts Therapy, Licensed Psychoanalysis, Psychology.)

The statute asks for this statement, *but not under penalties of perjury, and with the caveat that the disclosed employment is not "otherwise authorized by law."* We believe the employment of licensed professionals as camp health directors is authorized by law, but SED has not issued a ruling to that effect.

The CEO of an organization that employs both social workers and a health professional as camp health director cannot sign the waiver application without committing perjury. Perversely, with the exception of certain special school employees for whom there is another new waiver program, *no other profession is subject to this heightened regulation of their employment by community-based agencies.*

The irony is that non-profits (and for profits) widely employ tens of thousands of professionals – doctors, nurses, therapists, etc. without the benefit of possessing operating certificates or being required to obtain a waiver – but with respect to social workers, they are required to either succeed in obtaining a waiver (flaws notwithstanding), or to cease employing social workers and other mental health professionals as the law requires.

2. SED's requirement that waiver applicants, under penalties of perjury, supply the home addresses and home telephone numbers for all of their board members in the waiver application and on the moral character attestation forms. The statute merely requires the board member's name, and not home address and home telephone.

This requirement has been seen as intrusive by public figures who serve on boards of directors. Further, the requirement potentially places people at risk when they serve on boards with organizations that have been targeted for violence, including religious institutions, family planning groups, and civil rights organizations. *A CEO cannot honor a board member's request to use a work address or telephone number in place of the home address or telephone number – even for safety reasons - and then sign this document without committing perjury.*

3. SED's requirement that all board members, under penalties of perjury, answer the following question: *"Have you ever been found guilty after trial, or pleaded guilty, no contest, or nolo contendere to a crime (felony or misdemeanor in any court?)"* And, where the answer is affirmative, to *"submit a letter giving a complete explanation. Include copies of any court records..."*

The statute merely requires a moral fitness attestation, not SED's added requirements for detailed letters and copies of court documents about minor misdemeanors like civil disobedience from any

period in the past without limitation. SED has offered no relief from this requirement notwithstanding the complaints the agency has received about the absurdity of the requirement.

In some cases it will apply to board members, including retired public servants and elected officials, serving on a dozen boards but who have no managerial role with respect to social work services provided by an agency. *Such persons are nevertheless required to sign a dozen forms and send twelve copies of the very same information on decades-old guilty pleas for civil disobedience or teen-age petty crimes to SED.* SED has been clear about the fact that there are insufficient staff to handle this volume of paperwork, but nevertheless has made the waiver program unduly burdensome for both applicants and itself.

4. A statutory requirement that entities formed after June 18, 2010 demonstrate the need for their services to SED in order to qualify for a waiver, even when SED has no role in funding, regulating, licensing or otherwise supervising the organization seeking to employ social workers or other mental health professionals. A legal analysis as well as a Social Work association video advise applicant organizations that their previously approved certificates of incorporation should be reviewed and may require amendment in order to qualify the applicant for waiver approval by SED.

SED Regulations also narrow the characterization of SED determining the need for applicant services to an applicant seeking to provide “services to an under-served population or in a shortage area.” *SED possesses no expertise in being able to determine whether there is a need for a new homeless shelter or head start program or domestic violence service in a given community, but has the power to decide whether one of these services may be established with the expectation of employing social workers.*

5. A statutory requirement that repeals in July of 2013 an exemption from the waiver requirement involving “any person in the employ of a program or service operated, regulated, funded, or approved by the department of mental hygiene, the office of children and family services, the department of correctional services, the state office for the aging, the department of health, or a local governmental unit as that term is defined in article 41 of the mental hygiene law or a social services district as defined in section 61 of the social services law.”

Not only have a fraction of the entities required by law to apply for the waiver by February of this year actually applied, but those exempt from the requirement only until July of 2013 will be expected to participate in the same flawed application process outlined above.