



THE CENTER FOR JUSTICE & ACCOUNTABILITY

Bringing Human Rights Abusers To Justice.

August 26, 2010

*Via Facsimile (212) 951-6537 and Federal Express*

Louis J. Catone, Director  
New York Office of Professional Discipline  
475 Park Avenue South, 2<sup>nd</sup> Floor  
New York, New York 10016-6908  
Tel. (212) 951-6500

Re: ***Complaint – John Francis Leso, NY License # 013492***

Dear Mr. Catone:

On July 7, 2010, CJA submitted a complaint to this Office on behalf of Dr. Steven Reisner against Dr. John Francis Leso for violations of the New York code governing professional conduct (the Complaint).<sup>1</sup> We have reviewed your letter dated July 28, 2010, in which you express the opinion that this Office does not have jurisdiction because Dr. Leso's conduct does not constitute the profession of psychology as it is understood in New York State. CJA respectfully asks you to reconsider this decision for the following reasons:

- 1) The conduct complained of falls squarely within the definition of psychology that was operable under New York law during the relevant time frame, as well as within New York's statutory definition, which was enacted later. Both definitions contemplate the reality that psychologists can and do serve multiple clients, including institutional or third party clients, as Dr. Leso served at the Naval Station at Guantánamo Bay, Cuba and as forensic and correctional psychologists serve in the State of New York every day (then and now). In addition, Dr. Leso represented himself as a psychologist in his practice at Guantánamo, for which New York law requires a license.
  - 2) Although New York law allows for the practice of psychology outside a provider-patient relationship, Dr. Leso in fact established such a relationship with detainees at Guantánamo when he subjected them to psychological treatments intended to influence and modify their behavior.
  - 3) The New York Office of the Professions is obliged to investigate allegations of misconduct by licensees.
1. ***New York law contemplates that professional psychologists will serve institutional clients and "third parties."***

At all times relevant in the Complaint, Dr. Leso was employed by the Department of Defense as the ranking psychologist on the first Behavioral Science Consultation Team, a team of mental

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<sup>1</sup> The Complaint is available at <http://cja.org/article.php?id=876>.

health professionals, at the U.S. detention facility at Guantánamo Bay, Cuba (GTMO). His mission was to “[p]rovide behavioral science consultation in support of [ ] GTMO interrogation mission.” (Ex. 1, BSCT SOP 2002 at 1).

You state correctly that an employer’s requirement of a license as a condition of employment, without more, is not sufficient to establish that “some or all of the activities performed for that employer constitute the practice of a profession.” Indeed, the profession of psychology is defined by law in New York; and at the time in question, it was defined by the Regulations of the Commissioner of Education, which provides in relevant part:

[t]he practice of psychology includes rendering to individuals, organizations, or the public, any service involving the application of principles, methods or procedures or understanding, predicting or influencing behavior[.]

8 NYCRR §72.6. This definition was utilized by state and administrative courts prior to the statutory definition’s adoption in 2003. *See Fox v. Board of Regents of State of N.Y.*, 527 N.Y.S.2d 651, 653 (N.Y.A.D. 3 Dept. May 05, 1988); *see also People v. R.R.*, 807 N.Y.S.2d 516, 521 (N.Y.Sup. Dec 22, 2005).

New York Education Law section 7601-a came into effect in September 2003, supplanting the regulation that existed at the time of the alleged conduct. Section 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.

You have stated — without providing any justification — that you will apply the statutory definition retroactively rather than the regulation that was in force at the time in question. Further, in your interpretation of that definition, you have stated that you “can only interpret” the phrase “modification of behavior” as applying to service to a patient and not to “third parties.” We are not aware of New York ever taking such a narrow interpretation of this Office’s jurisdiction. There is no support for this narrow interpretation of the law.

By their plain terms, both definitions of the profession of psychology incorporate the expectation that the profession of psychology would include service to organizations and groups as well as individuals. This is not exceptional given the varied roles that psychologists are called upon to play in the course of their profession. For example, forensic and correctional psychologists provide a number of professional psychological services to institutional clients. According to the American Board of Forensic Psychology, the practice of forensic psychology includes, *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

...

(American Board of Forensic Psychology Brochure, *available at* <http://www.abfp.com/brochure.asp>, last visited Aug. 18, 2010.)

In each of these functions, forensic psychologists serve, *inter alia*, clients you refer to in your letter as “third parties.” Similarly, correctional psychologists have obligations to institutional clients within the justice system. Indeed, in limited circumstances, correctional psychologists may be called upon to administer treatment without an inmate’s consent for the purpose of modifying behavior undesired by their institutional client.<sup>2</sup> “Examples of involuntary mental health treatments include, but are not limited to, behavior modification and group pressure/confrontation techniques such as might be used in confrontive drug treatment or military-oriented boot camp programs. Other examples of such techniques are physical restraints, which include but are not limited to locked rooms, handcuffs, and leather restraints.” (“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 Aug. 18, 2010.)

Although forensic and correctional psychologists serve institutional or “third party” clients, they are nonetheless bound to professional standards in respect to both their institutional clients and to the individuals they treat on behalf of those clients.<sup>3</sup> Indeed, such psychological service calls for complex and sensitive ethical judgment and regulation, in part because such psychologists frequently serve multiple clients or “third party” clients such as courts, attorneys, opposing parties in litigation or a correctional department. While the APA Ethical Principles of Psychologists and Code of Conduct explicitly apply to the practice of forensic psychology (see APA Ethical Principles of Psychologists and Code of Conduct, *available at*

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<sup>2</sup> The U.S. Supreme Court has found that the right against unauthorized treatment is a significant liberty interest enshrined in the Constitution. *Sell v. U.S.* 539 U.S. 166, 179 (2003) (citing *Washington v. Harper*, 494 U.S. 210 and *Riggins v. Nevada*, 504 U.S. 127).

<sup>3</sup> We maintain that individuals who are subjected to treatment, voluntarily or not, are also clients and patients under New York law. See “Provider-Patient Relationship” *infra*.

<http://www.apa.org/ethics/code/index.aspx>, last visited Aug. 18, 2010; Redline Comparison of APA Ethical Principles of Psychologists and Code of Conduct, December 1992 and December 2002, §§ 7.01-6, 2.09 *available at* <http://www.apa.org/ethics/code/92-02codecompare.pdf>), the APA has also issued Specialty Guidelines for Forensic Psychologists, stating that “these ethical principles do not relate, in sufficient detail, to current aspirations of desirable professional conduct for forensic psychologists.” (See APA Specialty Guidelines for Forensic Psychologists, *available at* <http://www.ap-ls.org/links/currentforensicguidelines.pdf>, last visited Aug. 18, 2010). Indeed, the International Association for Correctional and Forensic Psychology has recently published additional standards to supplement the APA Guidelines. (“Standards for Psychology Services in Jails, Prisons, Correctional Facilities, and Agencies,” International Association for Correctional and Forensic Psychology, *available at* <http://cjb.sagepub.com/content/37/7/749>, last visited Aug. 18, 2010.)<sup>4</sup> Nowhere in the regulatory scheme, the later enacted statutory scheme, 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.

As noted above, Dr. Leso’s mission at Guantánamo was to “[p]rovide behavioral science consultation in support of [ ] GTMO interrogation mission.” (Ex. 1, BSCT SOP 2002 at 1). His tasks included “consulting on interrogation approach techniques, conducting detainee file reviews to construct personality profiles and provide recommendations for interrogation strategies, observing interrogations and providing feedback to interrogators on detainee behavior, flow of the interrogation process, translator and cultural issues and possible strategies for further interrogation; and providing consultation/training on specific behavioral science interviewing and observational techniques that promote productive interrogation.” (Ex. 2, Senate Armed Services Committee Report at 39.) Tasks also included assisting “in the development of detention facility behavior management plans,” describing “the implications of medical diagnoses and treatment for the interrogation process,” and supporting “good stress management, morale, cohesion and organizational functioning in the [Joint Interrogation Group].” (Ex. 1, BSCT SOP 2002 at 1). All of these services rendered to the DoD GTMO interrogation mission involved Dr. Leso’s psychological expertise, specifically in the application of principles, methods, procedures or understanding, predicting or influencing behavior. (See 8 NYCRR § 72.6.)

Later memoranda regarding BSCT policy and operating procedures described the purpose of these tasks as developing “camp-wide strategies for improving behavioral levels of detainees” and providing information on reducing unwanted behavior in detainees as well as input on the “development of strategies for increasing positive behavior” in detainees. (Ex. 3, BSCT SOP 2005 at 4). Moreover, a BSCT is required to “[m]onitor behavioral trends in the detainee population and integrate findings into consultation in support of interrogation and detention operations” as well as monitor interrogations and provide feedback to command on “issues involving psychological risk factors affecting detainee operations.” (Ex. 4, BSCT Policy Memo

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<sup>4</sup> Moreover, the guidelines require that “Mental health services professionals refuse to participate in [involuntary treatments] if they are inconsistent with their legal, professional, or ethical standards, utilized for disciplinary or punitive purposes, contrary to constitutional rights, or conflict with international agreements regarding the treatment of prisoners or detainees.” (IACFP Standards for Psychology Services 774-775).

2004 at 2). BSCTs, “with their expertise in human behavior” may evaluate the detention environment and how it effects detainees and recommend changes to this environment that will modify detainee behavior to increase positive behavior and compliance with camp rules. (Ex. 5, BSCT Policy memo 2006 10-11). All of these services rendered to the DoD GTMO interrogation mission involved Dr. Leso’s psychological expertise, specifically in the application of principles, methods, procedures or understanding, predicting or influencing behavior. (See 8 NYCRR § 72.6.)

The Complaint documents and describes in detail how Dr. Leso rendered psychological expertise in the application of principles, methods, procedures or understanding, predicting or influencing behavior, as the profession was defined by law at the time. (See 8 NYCRR § 72.6.) Therefore, he is accountable to New York’s professional standards for this conduct.

Even if you were correct to apply the statutory definition retroactively, your interpretation of that statute is overly narrow.

You assert, “I can only interpret the phrase ‘modification of behavior for the purpose of ... eliminating ... undesired behavior’ in the statutory definition of the practice of psychology as referring to behavior undesired by one’s patient, not behavior undesired by third parties.” Not only does this interpretation avoid the broad inclusiveness of the regulatory definition that actually applies to Dr. Leso’s conduct, it also provides an interpretation of the statute that simply cannot be supported.

New York Education Law 7601-a defines psychology to include “the observation, description, evaluation, interpretation and modification of behavior for the purpose of preventing or eliminating symptomatic, maladaptive, or undesired behavior.” As detailed in the Complaint, 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. He did so at the behest of his client, the Department of Defense and the command unit of the interrogation mission at Guantánamo. Thus Dr. Leso’s conduct satisfies the definition of the practice of psychology under New York Education Law 7601-a.

Moreover, New York Education Law 7601-a defines psychology to include “enhancing interpersonal relationships, personal, group or organizational effectiveness and work and/or life adjustment.” (NY Educ. Law 7601-a.) One of Dr. Leso’s tasks at Guantánamo was to provide psychological expertise on “good stress management, morale, cohesion and organizational functioning” of the interrogation operation at Guantánamo. (Ex. 1, BSCT SOP 2002 at 1). Later descriptions of BSCT objectives include providing “psychological expertise...to *enhance the effectiveness of interrogation operations.*”(BSCT Policy Memo 2004 at 2)(emphasis added). A BSCT is tasked with *enhancing* the effectiveness of interrogations in eliciting accurate and reliable information from the detainee. (Ex. 5, BSCT Policy Memo 2006 at 6). In addition, the BSCT psychologist is tasked with increasing positive detainee-guard/staff interactions and consulting command on “detainee issues, staff issues, and camp dynamics and provide[] recommendations on ways to improve camp operations.” (Ex. 4, BSCT Policy Memo 2004 at 2).

Thus the BSCT psychologist functions to enhance interpersonal relationships and organizational effectiveness and thereby satisfies the definition of the practice of psychology under New York Education Law 7601-a.

New York Education Law 7601-a defines psychology to include “improving behavioral health and or mental health.” (NY Educ. Law 7601-a.) The BSCT SOP in 2002 lists that in regard to detainee mental health evaluations and medical care, a BSCT may “observe a detainee to provide input on the appropriateness of a mental health referral for that individual.” (Ex. 1, BSCT SOP 2002 at 2). In addition, the BSCT must also support good stress management and morale within the interrogation group at Guantanamo. (*Id.* at 1). These essential tasks function to improve the behavioral health and or mental health of the interrogation group as well as the detainees at Guantánamo and therefore fit within the narrower, later definition of the practice of psychology.

Finally, your letter opines that if a non-psychologist had developed interrogation techniques for use by the military, that person would not be guilty of practicing psychology without a license. This analogy provides no help. New York Education Law 7601 holds that a person cannot practice psychology, represent him or herself as a psychologist, or describe his or her services as psychological without a license. (NY Educ. Law 7601 (2003).) Thus, if Dr. Leso had performed the tasks detailed in the Complaint and in the Standard Operating Procedures for BSCT psychologists in New York without a license, using the title of psychologist, he would be guilty of practicing the profession without a license. Dr. Leso’s position within the BSCT was clearly labeled as “Clinical Psychologist” and his work fit within the practice of psychology by either definition. (*See* NY Educ. Law 7601; Ex. 1, BSCT SOP 2002 at 1).

## **2. *Provider-Patient Relationship***

Your letter suggests that Dr. Leso’s conduct does not fit within the definition of psychology because a therapist-patient relationship was not established. However, nowhere in New York law 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 listed within either definition of the profession. Nonetheless, we maintain that Dr. Leso established such a relationship with those detainees on whom he applied treatments in order to modify their behavior, as detailed in the Complaint. This includes the population of detainees who were subjected to Dr. Leso’s treatments designed to keep them off balance. It applies to those detainees whose interrogations Dr. Leso personally supervised while his techniques were applied. And it applies to Mohammed al Qahtani, for whom Dr. Leso prescribed specific interventions in the course of his interrogation.

You assert, “I can only interpret the phrase ‘modification of behavior for the purpose of ... eliminating ... undesired behavior’ in the statutory definition of the practice of psychology as referring to behavior undesired by one’s patient[.]” This statement may be read to imply that professional psychologists who abuse persons vulnerable to them by virtue of their professional status may avoid discipline simply by asserting that such persons are not patients, or worse, that an intentionally harmful rather than helpful intervention renders the conduct outside the scope of

professional psychology and therefore immune to discipline. By this logic there would be no unethical behavior that a professional could commit, since such practice would be, *by definition*, outside the scope of the professional practice. Not only does this proposition represent a perversion of the protective purpose of professional standards, it is also demonstrably false under the laws of the State of New York.

New York courts have applied professional standards to harmful conduct where providers asserted there was no provider-patient relationship. In the *Matter of Block v. Ambach*, 73 N.Y.2d 323 (NY Court of Appeals 1989), 140 AD2d 814, a nurse in a psychiatric facility was charged with professional misconduct for inappropriate sexual conduct with a patient after that patient was discharged from the hospital. The nurse argued, *inter alia*, that such conduct was not unprofessional because it involved someone who was no longer his patient. The New York Court of Appeals upheld the Commissioner's finding of professional misconduct, explaining the defendant "exploited a relationship of trust and confidence petitioner developed with his patient, while she was a patient." (*Id.* at 335.)

In a second case, *Ackerman v. Ambach*, 73 N.Y.2d 323 (NY Court of Appeals 1989), 140 AD2d 814, the Court of Appeals rejected a psychiatrist's defense that his sexual activities with individuals did not constitute misconduct since these individuals were not his patients, claiming instead "that the group sessions he led were merely gatherings of people engaged in the discussion of a variety of topics and did not involve any form of psychotherapy treatment." (*Id.* at 330.) The Court found substantial evidence that Dr. Ackerman had been paid for professional services sufficient to render the individuals his patients. (*Id.* at 335.)

Finally, in *Stein v. Sobol*, 557 N.Y.S.2d 697 (NY Court of Appeals 1990), 162 A.D.2d 786, the Court of Appeals upheld a finding of willful abuse by a psychologist against an adult patient's parents and that that the parents were patients despite the fact that the parents did not seek or desire treatment. 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.) Describing the psychologist's behavior when she declined to attend further sessions, the mother testified that "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 noted that "ample evidence" supported the administrative findings. (*Id.* at 698-99.)

Here, as in the *Matter of Block*, *Ackerman*, and *Stein*, Dr. Leso abused persons made vulnerable to him by virtue of his professional status, training, and expertise as a psychologist. As with these other cases, by doing so, he rendered his conduct subject to professional discipline.<sup>5</sup>

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<sup>5</sup> Even the controversial APA Presidential Task Force on Psychological Ethics and National Security rejected this argument and found that when psychologists serve in any position "by virtue of their training experience, and expertise as psychologists, the APA Ethics Code applies." (Report of the APA PENS Taskforce 2005 at 1).

### 3. *Responsibility of the New York Office of the Professions*

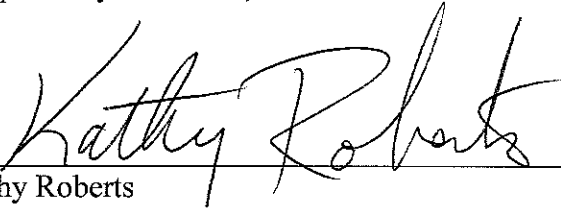
We appreciate your concern that it is not within the purview of this Office to express an opinion as to whether some of the interrogation techniques utilized on detainees at Guantánamo Bay were appropriate, and we have not requested that of you.

This Office is obliged to investigate instances of possible misconduct by New York licensees, and it is the only office authorized to do so. (See NY Ed. Law §6510(1)(b).) Your authority and responsibility in this case stem not only from the State of New York but also from federal law, which requires military psychologists to maintain a valid license issued by a state licensing board. (10 U.S.C. 1094.)<sup>6</sup> The language of the New York statute is also mandatory: New York Education Law §6510(1)(b) states, the “department *shall* investigate each complaint which alleges conduct constituting professional misconduct” (emphasis added.). Since the Complaint details multiple instances in which, in his capacity as a professional psychologist, Dr. Leso crossed the line and committed misconduct, this Office must investigate.

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For the foregoing reasons, we respectfully request that you reconsider your decision not to investigate the Complaint against Dr. Leso.

Respectfully submitted,



Kathy Roberts

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Attorneys for Complainant Dr. Steven Reisner

cc: Kathleen M. Doyle, Executive Secretary

New York Board of Psychology, *via Email: [psychbd@mail.nysed.gov](mailto:psychbd@mail.nysed.gov)*

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<sup>6</sup> As noted in the Complaint, the licensing requirement in the U.S. Code is cited and quoted in the Department of Defense Medical Health System Clinical Quality Assurance Program Regulations (CQA), and states that the “statutory requirement is applicable to all healthcare practitioners practicing independently in military facilities or operational environments.” (CQA Ch4 1.1.1 at p. 2, *citing* 10 U.S.C. §1094.) According to the CQA, a license is only valid where the “issuing authority accepts, investigates, and acts upon quality assurance information, such as practitioner professional performance, conduct, and ethics of practice, regardless of the practitioner’s military status or residency.” (CQA DL1.1.23.2.) Thus, the Department of Defense vests New York with the authority to discipline New York licensees.