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. 115400-10
Oral Argument Requested

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

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

THE NEW YORK STATE DEPARTMENT OF EDUCATION,

Respondents.

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MEMORANDUM OF LAW IN OPPOSITION TO RESPONDENTS' CROSS-MOTION TO DISMISS THE VERIFIED PETITION

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INTRODUCTION

The question at the heart of this case concerns Respondents' mandatory duty to investigate allegations of grievous misconduct committed by Dr. John Leso, a psychologist licensed by the State of New York. At the time of the misconduct, Dr. Leso had been hired as a licensed psychologist, was employed as a licensed psychologist, was required to maintain a valid psychologist's license during the course of his employment, was granted access to vulnerable individuals because he was a licensed psychologist, and acted as a licensed psychologist in modifying the behavior of individuals under his supervision. It is undisputed that all of Dr. Leso's acts were possible only because he possessed a license to practice psychology issued by Respondent New York State Department of Education (NYSED). Yet when the Petitioner, psychologist Dr. Steven Reisner, filed a complaint with the Respondents alleging that Dr. Leso's professional conduct violated the most fundamental and basic ethical standard of the practice of psychology—do no harm—the Respondents refused to even investigate the complaint.

The Respondents justify their refusal to investigate based upon a strained statutory interpretation that Dr. Leso's conduct could not legally constitute the "practice of psychology." Respondents' conclusion is not supported by law, or by common sense. It is true, as Respondents note, that the complaint alleges misconduct which is "singular" and "unprecedented." Yet the conclusion that Respondents appear to draw in light of this fact—that they have "no legal basis" for investigating the complaint—is fundamentally perverse. The complainant alleges that a psychologist relied upon the power and authority of a license issued to him by Respondent NYSED to gain access to vulnerable individuals and inflict harm upon them. Contrary to the Respondents' assertion, it is precisely the extraordinary nature of the misconduct alleged that supports the modest relief Petitioner requests here—that Respondents be required to investigate the complaint. Respondents' sweeping and unsupportable legal interpretation is contrary to the

plain language of the statute and New York's long history of robust and thorough oversight of the psychological profession. In addition, Respondents' reasoning would dramatically restrict their oversight authority and serve to preclude investigatory review of all manner of complaints of misconduct which are far from "singular" or "unprecedented."

This Petition does not require a determination regarding whether the professional misconduct alleged by a complainant is true, nor is it a case where the complainant is disputing the result of an investigation completed by Respondents or the manner in which it was conducted. Instead, the Petition seeks the court's review of Respondents' failure to perform a basic investigative duty enjoined upon them by law and of Respondents' erroneous determination that there was "no legal basis" for investigating the Petitioner's complaint. New York law is clear that "any person" has a statutory right to have a complaint of professional psychological misconduct investigated. The Respondents have denied the Petitioner his statutory right. As such, the Petitioner has standing bring this Petition, and Article 78 provides for an appropriate remedy.

STATEMENT OF FACTS

Respondents direct this Court to a number of facts irrelevant to the issues raised by their Motion to Dismiss. The only facts relevant to the Motion however, are undisputed: (1) Petitioner filed a complaint with Respondents alleging that New York psychologist Dr. John Leso committed professional misconduct while he was employed at the United States Naval Station at Guantánamo Bay, Cuba (Guantánamo); (2) Respondents refused to investigate the complaint because they concluded, based on an interpretation of N.Y. Educ. Law § 7601-a, that none of the conduct complained of constituted "the practice of psychology as understood in the State of New York." Petition (Pet.) at ¶ 22.

STANDARD OF REVIEW

In considering a motion to dismiss for failure to state a claim, the Court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Whether the plaintiff can ultimately establish the allegations "is not part of the calculus." *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005).

ARGUMENT

Respondents move to dismiss Petitioner's claims based upon the following arguments: (1) no investigation of Petitioner's complaint was required as a matter of law since the alleged misconduct did not constitute the "practice of psychology"; (2) even if investigation was legally permissible, the Respondents' failure to investigate was a discretionary decision that is unreviewable in an Article 78 proceeding; and (3) the Petitioner lacks standing to pursue his claims. The motion to dismiss the petition should be denied, as Respondents fail to meet their burden on any of these three arguments.

First, Petitioner has clearly stated a claim for relief under N.Y. CPLR § 7803(1). By refusing to investigate Petitioner's complaint, Respondents have failed to perform a duty enjoined upon them by law, and Article 78 provides an appropriate remedy in the form of mandamus to compel. While Respondents need not investigate a complaint that fails to allege "professional misconduct" or conduct beyond the scope of the "practice of psychology" as defined by state law, Respondents' conclusion that, as a matter of law, the "practice of psychology" does not include the type of misconduct alleged is in direct contravention of the plain meaning of the statute, and would lead to absurd results. As a result, Respondents failed to

properly investigate the complaint as required by law. The Petitioner has stated a claim for relief on these grounds.

Second, the Petitioner has also clearly stated a claim for relief under N.Y. CPLR § 7803(3). Even if the Respondents' threshold decision regarding whether the complaint alleges "professional misconduct" involved some modicum of discretionary decision-making, Petitioner's allegations show that Respondents' exercise of that discretion was based wholly on an error of law and was arbitrary and capricious. The Petitioner has also stated a claim for relief on these grounds as well.

Finally, it is clear that New York law protects the right of "any person" to have a complaint of professional psychological misconduct investigated, and the Petitioner clearly articulates an injury-in-fact: the denial of his statutory right to have his complaint of professional misconduct investigated by Respondents. The Petitioner has standing to seek redress of this injury. Furthermore, given Respondents' failure to perform their most basic investigatory duties, the potentially wide-reaching effects of their erroneous interpretation of the statute, and the fact that their failure to investigate effectively erects an impenetrable barrier to judicial scrutiny of the alleged misconduct, Petitioner also has standing to seek relief under New York's public interest standing doctrine.

I. PETITIONER HAS STATED CLAIMS THAT RESPONDENTS REFUSED TO PERFORM A DUTY ENJOINED UPON THEM BY LAW AND MADE A DETERMINATION THAT WAS ARBITRARY AND CAPRICIOUS AND AFFECTED BY AN ERROR OF LAW.

A. Respondents Have a Mandatory Duty to Investigate Complaints Made by "Any Person" Alleging Professional Misconduct Committed by New York-Licensed Psychologists.

The Respondents' argument that the investigation of a complaint is a discretionary decision is without merit. Here, the legislature has unambiguously mandated that "any person"

may make a professional misconduct complaint and that the State Education Department "*shall* investigate each complaint which alleges conduct constituting professional misconduct." N.Y. Educ. Law § 6510 (emphasis added). Therefore, the Respondents' duty to investigate is ministerial, not discretionary. The duty to investigate is mandatory and ministerial, and the statute contemplates discretion only *after* an investigation has been opened by a conduct officer. N.Y. Educ. Law § 6510.[1]

While Respondents may decide, after an investigation, that no further proceedings are warranted, the statute clearly requires that Respondents embark on the initial investigation. *See Klostermann v. Cuomo*, 61 N.Y.2d 525, 531 (1984) ("[I]f a statutory directive is mandatory, not precatory, it is within the courts' competence to ascertain whether an administrative agency has satisfied the duty that has been imposed on it by the Legislature and, if it has not, to direct that the agency proceed forthwith to do so."); *see also Hebel v. West,* 803 N.Y.S.2d 242 (3d Dep't 2005), *app denied* 7 N.Y.3d 706 (2006); *Grzyb v. Constantine*, 582 N.Y.S.2d 298, 300 (3d Dep't 1992).

Whether the Respondents fulfilled this statutory duty is a claim adequately pled by the Petitioner under Article 78 and squarely before this Court. In *Klosterman*, the Court of Appeals explained that where the "[l]egislature has mandated certain programs and that the executive branch has failed to deliver the services . . . [t]he appropriate forum to determine the respective rights and obligations of the parties is in the judicial branch." 61 N.Y.2d at 536. Where state law mandates an investigation, courts have been clear that the agency has a nondiscretionary duty to undertake that investigation. *See, e.g., Grant v. Cuomo*, 518 N.Y.S. 2d 105, 117 (1st Dep't

[1] "If such officer decides that there is not substantial evidence of professional misconduct or that further proceedings are not warranted, no further action shall be taken. If such officer, after consultation with a professional member of the applicable state board for the profession, determines that there is substantial evidence of professional misconduct, and that further proceedings are warranted, such proceedings shall be conducted pursuant to this section."

1987), *aff'd* 73 N.Y.2d 820 (1988) ("child protective services caseworkers have a nondiscretionary duty to timely investigate all reports of abuse or maltreatment" on the basis of a similar mandatory regulatory scheme); *Hill v. Lyman*, 126 N.Y.S.2d 286, 289 (1st Dep't 1953) (under N.Y. City Mun. Ct. Code § 7(7), which requires that the presiding judge "shall cause to be investigated all complaints presented to him pertaining to the court or to the justices, officers or employees thereof," there was a mandatory duty to investigate a complaint in the form of a letter to the editor); *Gardner v. Constantine,* 531 N.Y.S.2d 975, 977 (Sup. Ct. St. Lawrence Cty. 1988) (holding that under similar statutory regime required agency "to cause a prompt, thorough investigation to be made of allegations and complaints received.").

Finding no support in the relevant statutory scheme for their argument that the duty to investigate is discretionary, Respondents turn to cases that are clearly distinguishable from the present case and that do not involve mandatory investigatory schemes such as the one at issue. *See, e.g., NYCLU v. State*, 4 N.Y.3d 175, 183-84 (2005) (dismissing petitioner's claim that agency had a duty to complete investigation, under statutory regime which explicitly conditioned review on threshold discretionary determination made by agency); *Clouden v. Lieberman*, 1992 WL 54370 (E.D.N.Y. 1992) (dismissing a claim against a judicial officer because it was expressly disallowed by federal law); *Iocovello v. City of New York,* 708 N.Y.S.2d 294 (1st Dep't 2000) (not reaching the merits of underlying Article 78 proceeding).

Among all the authorities Respondents cite for the proposition that their duty to investigate is discretionary, only one even addresses a statutory scheme containing mandatory language: *Sassower v. Comm'n on Judicial Conduct of State*, 734 N.Y.S.2d 68 (1st Dep't 2001). However, like other authorities cited by Respondents, the *Sassower* decision concerned a statutory scheme that provided for agency discretion. While the scheme at issue in that case, N.Y. Judiciary Law § 44, contained mandatory language ("shall investigate") and a limitation on

the type of complaints ("complaints with respect to the conduct, qualifications, fitness to perform, or performance of official duties of any judge") similar to N.Y. Educ. Law § 6510, the Judiciary Law also specifically allows for dismissal upon receipt of the complaint if it is determined that "the complaint on its face lacks merit." N.Y. Jud. Law § 44. No such provision exists in the scheme imposed upon Respondents by the Education Law. Further, the opinion in *Sassower* provides no indication regarding the agency's basis for determining that the underlying complaint lacked merit, which is not the same as a determination that the complaint fell outside the agency's jurisdiction and suggests that it was a fact-based decision. Nothing in that decision indicates that the *Sassower* court found the complaint fell outside the bounds of the statutory mandate. Nor does the case make a distinction between the relief provided under Article 78 subsection (1) and subsection (3). *Sassower* is not controlling.

In sum, it is clear that Respondents have a mandatory, ministerial duty to investigate a complaint made by "any person" alleging professional misconduct, and that Petitioner has a "clear legal right" to compel that investigation. Respondents argue that any duty to investigate was not triggered in this case, because the misconduct alleged by the Petitioner was not "professional misconduct" under Respondents' interpretation of the statute. As discussed below, Respondents' statutory interpretation is due no deference from the court, and is clearly erroneous.

B. Petitioner Complaint Alleges Professional Misconduct Which Requires An Investigation

Respondents chose not to investigate the complaint because they concluded that the complaint was devoid of conduct concerning the "practice of psychology," as defined by state law. *See* Affirmation of Taylor Pendergrass in Support of Petitioner's Verified Petition (hereafter "Pendergrass Aff."), Ex. 2, at p.1 (letter from Respondent Catone to Petitioner). Contrary to Respondents' assertions, which are due no deference by this Court, Dr. Leso's alleged conduct

falls squarely within the statutory definition of professional misconduct and the practice of psychology.

1. Respondents' Determination Was a Matter of Statutory Interpretation Not Entitled to Any Deference by the Court.

Respondents' refusal to discharge their statutorily mandated duty to investigate was premised, in part, on their interpretation of N.Y. Educ. Law § 7601-a, which defines the "practice of psychology." According to Respondents, there was "**no legal basis for instituting an investigation**" of Petitioner's complaint based upon their interpretation of this statutory provision. Pendergrass Aff. Ex. 2 at 1 (letter from Respondent Catone to Petitioner) (emphasis added). In other words, Respondents' determined that an investigation of this matter would exceed their jurisdiction, and be legally improper. Thus, the question before this Court is clearly a question of law, not a matter committed to the agency's discretion.

Where, as here, an agency determines that it lacks jurisdiction to act, the agency's conclusions of law are merely advisory and need not be accorded any weight by the court. *See* 10 *West 66th Street Corp. v. New York State Div. of Housing and Community Renewal*, 591 N.Y.S.2d 148, 149 (1st Dep't, 1992). It is a well-established principle that where "the question is one of pure statutory reading and analysis, dependent only on accurate apprehension of legislative intent, there is little basis to rely on any special competence or expertise of the administrative agency." *Kurcsics v. Merchants Mut. Ins. Co.,* 49 N.Y.2d 451, 459 (1980). "In such a case, courts are 'free to ascertain the proper interpretation from the statutory language and legislative intent.'" *Seittelman v. Sabol*, 91 N.Y.2d 618, 625 (1998) (quoting *In re Claim of Gruber,* 89 N.Y.2d 225, 231-232 (1996)); *see also Smith v. Donovan*, 878 N.Y.S.2d 675 (1st Dep't 2009) ("Courts are the final authorities on issues of statutory construction on issues of retroactivity and statute of limitations, and in such matters, need not defer to the agency's

determination, even when that statute is within the special competence or expertise of the administrative agency.").

To be sure, Respondents are required to make some threshold determination regarding whether a complaint they receive involves professional misconduct. But the determination in his case was a matter of statutory jurisdictional interpretation, not the exercise of agency discretion regarding a factual determination. A discretionary act "involve[s] the exercise of reasoned judgment which could typically produce different acceptable results whereas a ministerial act envisions direct adherence to a governing rule or standard with a compulsory result." *NYCLU*, 4 N.Y.3d at 184 (quoting *Tango by Tango v. Tulevech*, 61 N.Y.2d 34, 41 (1983)). The question at issue is clearly ministerial: the court is being asked to determine what the "governing rule" is in the situation. *See id.* In this case, there cannot be "different acceptable results" regarding this question of law—either Respondents' interpretation of the law is correct, and New York's regulatory and oversight regime does not reach psychologists in these circumstances, or it is not. Thus, this Court is empowered to interpret the law without deference to Respondents, including a determination that the underlying complaint was facially valid.

In this case, Respondents' legal error arises from their strained misinterpretation of N.Y. Educ. Law § 7601-a. As discussed below, Petitioner's complaint clearly alleges professional misconduct committed in the practice of psychology, falling squarely within the Respondents' oversight authority and triggering their mandatory duty to investigate.

2. Petitioner's Complaint Alleges Professional Misconduct as Defined by the Statute and Regulations.

Petitioner's complaint alleges that Dr. Leso violated the following professional standards set forth by New York law for licensed psychologists: N.Y. Educ. Law § 6509(2) (practice beyond authorized scope, gross incompetence, gross negligence) and § 6509(9) (unprofessional

conduct), 8 NYCRR § 29.1(b)(5) (conduct exhibiting a moral unfitness to practice the profession), § 29.1 (b)(11) (unauthorized treatment), § 29.2(a)(1) (neglect of a patient in need of immediate care), § 29.2(a)(2) (willful abuse and harassment), and § 29.2(a)(7) (unwarranted treatment). *See* Pendergrass Aff. Ex. 1 (Licensing Complaint Against Dr. John Francis Leso, State of New York, License 013492). A plain reading of the statute and the legislative intent animating it clearly shows that Dr. Leso's alleged conduct fits precisely within the statutory definition of "practice of psychology." Respondents must contort both language and reason to arrive at the opposite conclusion.

The fundamental rule of statutory interpretation is that a court "should attempt to effectuate the intent of the Legislature." *Majewski v. Broadalbin-Perth Cent. Sch. Dist.*, 91 N.Y.2d 577, 583 (1998) (internal 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 citation omitted); *see also Matter of Chemical Specialties Mfrs. Assn. v. Jorling*, 85 N.Y.2d 382, 394 (1995) ("[N]ew language cannot be imported into a statute to give it a meaning not otherwise found therein" (quoting McKinney's, Cons. Laws of N.Y., Book 1, Statutes § 94, at 190)).

The statutory provision at issue here, N.Y. Educ. Law § 7601-a, defines psychology, in relevant part, as follows:

> 1. 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. The practice includes, but is not limited to … the diagnoses and treatment of mental, nervous,

emotional, cognitive or behavioral disorders ... and the use of accepted classification systems.

2. ... Treatment includes, but is not limited to counseling, psychotherapy, marital or family therapy, psychoanalysis, and other psychological interventions, including verbal, behavioral, or other appropriate means as defined in regulations promulgated by the commissioner.

Dr. Leso is alleged to have been hired and employed as a New York licensed clinical psychologist, and was acting in that capacity when he observed, described, evaluated, interpreted and modified the behavior of detainees at Guantánamo Bay for the purpose of eliminating undesired behavior. *See* Pet. at ¶ 29. Dr. Leso's role also included the role of supporting "good stress management, morale, cohesion and organizational functioning" for the interrogation mission, and determining whether detainees should be given a mental health referral. *Id.* Each of these functions falls within the plain language of the statute defining psychology. *See* N.Y. Educ. Law § 7601-a; *see also* Pet. at ¶¶ 28-29.

Further, Dr. Leso's alleged conduct at Guantánamo, whereby he used using his New York-issued psychological credentials and expertise to gain access to vulnerable individuals and subject them to "psychological stressors" and other harmful techniques, also fits within the plain meaning of the term "psychological intervention," and hence, "treatment," as defined by §7601-a(2). Pet. at ¶ 2; *see also* "Intervention," Webster's Online Dictionary (available: http://www.merriam-webster.com/medical/intervention) (accessed Jan. 29, 2011) (defining intervention as "the act or fact or a method of interfering with the outcome or course especially of a condition or process as to prevent harm or improve functioning."). The underlying complaint alleges that Dr. Leso's psychological methods were designed to "disrupt the cognitive function of detainees," that is, to interfere with their cognitive condition or process. Pendergrass Aff. Ex. 1 (Cover Letter to Initial Complaint); *see also* Pet. at ¶ 19. Thus, the alleged conduct falls

squarely within the plain language of the definition of the practice of psychology as defined by the Legislature.

Respondents rely on two equally implausible statutory interpretations to cobble together an argument that the complaint falls outside their jurisdictional oversight. First, they argue that the alleged conduct is excluded from the purview of this statute because the detainees at Guantánamo were not "patients" within the meaning of the regulatory regime. Resp't Cross-Motion to Dismiss (hereafter Resp't Cross-Motion), p. 19-20. The Respondents support this contention by reading into the statute a requirement that the alleged misconduct must involve "therapeutic, healing type" activity. *Id.* The interpretation is erroneous, and should be rejected.

As an initial matter, the word "patient" does not appear anywhere in the statutory definition of the practice of psychology. *See* N.Y. Educ. Law § 7601-a. A survey of the regulatory scheme reveals that some regulations use the word "patient" as a term to describe the individual who is the subject of psychological misconduct, *see* 8 NYCRR §§ 29.1(2), 29.1(7), 29.1(11), whereas other regulations do not, *see* N.Y. Educ. Law § 6509(2) and 8 NYCRR § 29.1(b)(5). Thus, even assuming *arguendo* that the Respondents' statutory interpretation is correct, Petitioner's Complaint nevertheless alleges serious violations of New York's standards for professional psychologists not even arguably subject to Respondents' cramped statutory interpretations. Respondents' motion to dismiss Petitioner's claims should be rejected on these grounds alone.

In addition, even a cursory exploration of Respondents' strained logic reveals that it is in conflict with the most basic understanding of New York's oversight regime and the language of the statute. With regard to the first argument, Respondents note that the term "patient" appears in a number of the regulations Dr. Leso is alleged to have violated. Resp't Cross-Motion at 20. Seizing upon the word "patient," Respondents' attempt to contort the obvious meaning of the

word to argue that their jurisdiction does not extend to situations where a psychologist did not form a technical "patient/provider therapeutic relationship" with the alleged victim of the psychologist's misconduct. Resp't Cross-Motion at 20. No such limitation is contained in the plain language of the statute.

The vulnerable individuals Dr. Leso gained access to and acted upon by virtue of his status as a licensed psychologist were clearly "patients" within the meaning of the statute, regulations, and the usual and customary use the term "patient": 1. an individual awaiting or under medical care and treatment or the recipient of any of various personal services; 2. one that is acted upon. "Patient," Webster's Online Dictionary, (available: http://www.merriam-webster.com/dictionary/patient) (accessed on Jan. 28, 2011). The statutory regime is meant to protect any person, or "patient," acted upon by a New York licensed psychologist. The Petition alleges that Dr. Leso recommended various psychological treatments to be applied to detainees and that these treatments were applied under his supervision. The detainees on whom Dr. Leso's treatments were applied were "patients" within the plain meaning of the regulations.

Respondents argue that Dr. Leso did not establish a therapist-patient relationship with the detainees because it is alleged that he intended to harm them, rather than to provide therapeutic, healing services. Resp't Cross-Motion at 19. Respondents' argument that the statute requires a "therapeutic" relationship with "patients" is unsupportable, and turns the protection meant to be provided to individuals subject to abuse by psychologists on its head. If the intention to harm were sufficient to exclude conduct from professional regulation, then professional standards would have little meaning with regard to the most serious abuses committed by psychologists—those committed intentionally. New York courts have already ruled out such a conclusion, finding that disciplinary action is appropriate in the context of intentional abuse and an absence of desire for treatment on the part of a patient or the current existence of any formal "patient-

therapist" relationship. *See Block v. Ambach*, 73 N.Y.2d 323 (1989); *Stein v. Sobol*, 557 N.Y.S.2d 697 (3rd Dep't 1990).

To accept Respondents' interpretation would also lead to absurd results, in contravention of the clear language of the statute and the legislature's intent. *See Lau Ow Bew v. United States*, 144 U.S. 47, 59 (1892) ("Nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion."). Respondents attempt to stretch the statutory and regulatory definitions of the profession of psychology beyond their plain meaning, using Dr. Leso's alleged misconduct *as evidence* that the detainees were not patients. Resp't Cross-Motion at 19. If such an interpretation were accepted, it would have the perverse result of excluding from the Respondents' oversight authority all New York licensed psychologists who use their status and expertise as licensed psychologists to harm individuals, so long as the psychologist could claim no therapeutic relationship was established. Of course, the lack of a traditional, formalized therapeutic relationship may often be the very hallmark of a situation where a psychologist intentionally harms an individual. It is beyond cavil, however, that these individuals are unquestionably "patients" New York intends to protect from abuse. While the statute may be read to anticipate that professional misconduct will typically arise in situations where psychologists have initially developed a therapeutic relationship, this does not imply, as Respondents suggest, that intentionally harmful conduct requires such a relationship in order to fall within Respondents' purview.

C. Even If the Respondents' Determination was a Discretionary Act, Respondents' Exercise of that Discretion was Arbitrary and Capricious.

As shown above, Petitioner has stated a claim for mandamus to compel administrative action pursuant to N.Y. CPLR § 7803(1). In addition, and in the alternative, Petitioner has also

stated a claim under N.Y. CPLR § 7803(3) that any discretionary decision made by Respondents in refusing to investigate was arbitrary and capricious and affected by an error of law.

Respondents argue that their failure to investigate Petitioner's Complaint was a discretionary decision that is not reviewable in this Article 78 proceeding. Even assuming that the Respondent's failure to investigate involved some allowable discretion, however, Respondents ignore Petitioner's claim that the decision was also arbitrary and capricious and affected by an error of law, for all the same reasons stated above. *See* Pet. at ¶ 3.

In sum, Respondents erroneously concluded that there was "no legal basis" to review the alleged misconduct. Their decision was based upon an unsupportable reading of the N.Y. Educ. Law § 7601-a that would require a therapeutic patient-therapist relationship as a predicate to an investigation, and an erroneous finding that the misconduct described in Petitioner's complaint does not trigger the mandatory investigation required under § 7601-a. Thus, Petitioner has stated a claim pursuant to CPLR § 7803(1) that these conclusions were in contravention of Respondents' mandatory ministerial duty to perform an investigation, and has also stated a claim pursuant to CPLR § 7803(3) that Respondents' conclusions were affected by errors of law and arbitrary and capricious. Respondents' motion to dismiss Petitioner's claims should be denied.

II. PETITIONER HAS STANDING TO SEEK RELIEF UNDER ARTICLE 78

Petitioner has standing to seek relief under Article 78 because he has been deprived of a statutory right to have his complaint alleging professional misconduct investigated by Respondents. Petitioner also has standing to seek Article 78 relief under the public interest standing doctrine. Moreover, denying Petitioner standing in this matter would erect an impenetrable barrier to the review of decisions by Respondents and other state agencies assigned mandatory duties by the Legislature, weighing in favor of a finding that Petitioner has standing in this matter.

A. Petitioner Has Been Deprived of His Statutory Right to Have His Complaint of Professional Misconduct Investigated by Respondents

Petitioner has suffered an injury-in-fact as a result of Respondents' failure to investigate his complaint, and this injury is within the zone of interest protected by the statutes at issue. *See Dairylea Cooperative, Inc. v. Walkley*, 38 N.Y.2d 6, 9 (1975) ("A petitioner need only show that the administrative action will in fact have a harmful effect on the petitioner and that the interest asserted is arguably within the zone of interest to be protected by the statute."); *Soc'y of Plastics Indus. v. County of Suffolk*, 77 N.Y.2d 761, 773 (1991) ("[A] party must show that the in-fact injury of which it complains (its aggrievement, or the adverse effect upon it) falls within the 'zone of interests,' or concerns, sought to be promoted or protected by the statutory provision under which the agency has acted.").

N.Y. Educ. Law § 6510 states that "any person" may make a professional misconduct complaint, and that the State Education Department "shall investigate each complaint which alleges conduct constituting professional misconduct." The language therefore plainly requires the Department to investigate Petitioner's complaint which alleges professional psychological misconduct, as shown above. *See* I.A, *supra*. Because Petitioner has been deprived of a clear legal right afforded by the legislature, he has suffered an injury in fact. *See Weisshaus v. New York*, 2009 WL 2579215, 4 (S.D.N.Y. Aug 20, 2009) (Holding that the invasion of a right created by statute is sufficient for standing). As a person who has filed a complaint, Petitioner plainly stands within the zone of interest protected by N.Y. Educ. Law § 6510.

Further, in *Dairylea Coop., Inc.*, 38 N.Y.2d at 11, the Court of Appeals held that Article 78 standing should be granted unless there is "a clear legislative intent negating review" or lack of injury-in-fact within the zone of interests protected by the statute. The "any person" language in § 6510 is fundamentally inconsistent with Respondents' unsupported argument that the legislature intended to preclude review of such determinations. There is no evidence that the

legislature intended to negate judicial review, in fact, the plain language of the statute indicates just the opposite when it comes to complaints of psychological misconduct.

Respondents' reliance on various authorities for the proposition that "individuals do not have standing to compel investigation of misconduct complaints about other individuals" misses the thrust of Petitioners' claim in this case, since none of those cases speak to the issue of an agency's erroneous legal interpretation of its own legal oversight authority when depriving an individual of a statutorily guaranteed right to have a misconduct complaint investigated. The cases cited by Respondent are inapposite and do not address the issues raised in this case. *See, e.g.*, *Mantell v. New York State Comm'n on Judicial Conduct*, 715 N.Y.S.2d 316 (1st Dep't 2000) (investigation of judicial misconduct was purely within the discretion of the state Commission on Judicial Conduct); *Sassower*, 734 N.Y.S.2d at 69 (investigation of judicial misconduct was purely within the discretion of the state Commission on Judicial Conduct and thereby not a legislative right afforded to petitioner); *Morrow v. Cahill,* 718 N.Y.S.2d 315 (1st Dep't 2000) (petitioner did not have a legislative right to investigation of allegations of professional misconduct against former counsel); *Matter of Wade v. Suffolk County Med. Soc'y,* 449 N.Y.S.2d 769 (2d Dep't 1982) (No legislative right to investigation of claims).

Respondents' reliance on *Weisshaus* is similarly inapposite. In *Weisshaus*, the petitioner sought review of the State's decision not to investigate an allegation of attorney misconduct. The Court found that "[t]he violation of a right conferred by a statute may create an injury-in-fact: 'In certain situations, the actual or threatened injury required by Article III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing.'" 2009 WL 2579215 at *4 (quoting *Kendall v. Employees Retirement Plan of Avon Products,* 561 F.3d 112, 118 (2d Cir. 2009)). In contrast to the case at bar, the relevant statute in *Weisshaus*— N.Y. Jud. Law §

90(2)—did not grant complainants a right to have their complaint investigated. 2009 WL 2579215 at *4.

While some individuals challenging licensure have been found to lack standing absent an injury "different in kind from that suffered by the public at large," *Parkland Ambulance Serv., Inc. v. State Dep't of Health*, 689 N.Y.S.2d 769 (3d Dep't 1999) (ambulance corps volunteer lacked standing to challenge grant of license to a second ambulance company), others have not, *Freidus v. Guggenheimer*, 394 N.Y.S.2d 199 (1st Dep't 1977) (petitioner had standing to challenge discretionary grant of newsstand license to competitor where commissioner acted in violation of its own rules). The rule then is not about whether an individual has standing to challenge an administrative determination in the abstract, but whether the statutory scheme grants such an individual a right and whether that right has been denied, as here. Because a right conferred by a statute has been denied, Petitioner has standing in the instant matter.

B. Petitioner Has Standing to Bring This Article 78 Petition under the Public Interest Standing Doctrine

In addition to having standard pursuant to a direct injury-in-fact, Petitioner has standing to bring this Article 78 Petition pursuant to public interest standing. The public interest at stake in this matter is reflected in the law and legislative history of the State of New York and in the public's interest in avoiding treatment by abusive psychologists. Further, the public interest would be served by recognizing standing in this case, since Respondents are the only authority with oversight of Dr. Leso's professional conduct and since denial of such standing would erect an impenetrable barrier to judicial scrutiny. Individual citizens have standing to sue despite the absence of a strict injury in fact "where the matter is one of general public interest." *Police Conference of N.Y. v. Municipal Police Training Council,* 405 N.Y.S.2d 511, 512 (3rd Dep't 1978). In particular, courts have found that citizens have standing to file Article 78 proceedings

to enforce mandatory duties imposed on public officials, where that citizen shares a concern with all other citizens to have a public body or officer perform a duty enjoined upon them by law. *Id.*[2]

Professional regulation of health services providers in New York, including psychologists, is a matter of great public interest. The New York Constitution provides:

> The protection and promotion of the health of the inhabitants of the state are *matters of public concern* and provision therefore shall be made by the state and by such of its subdivisions and in such manner, and by such means as the legislature shall from time to time determine.

N.Y. Const. art. XVII, § 3 (emphasis added).

The legislative history behind the constitutional provision warrants Petitioner's public interest standing in this case. For instance, Thomas Corsi, chair of the Committee on Social Welfare that drafted the provision at Mayor La Guardia's request, opined that "[e]ffective control of disease and promotion of the health of the citizens of the State are impossible if the scope of health service and the administrative structure is left entirely to the judgment of the local

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[2] "As a general rule, where a citizen, in common with all other citizens, is interested in having some act of a general public nature done, devolving as a duty upon a public body or officer refusing to perform it, the performance of such act may be compelled by a proceeding brought by such citizen against a body or officer. This is especially so where the matter involved is one of great public interest, and granting the relief requested would benefit the general public." *Albert Elia Bldg. Co. v. New York State Urban Dev. Corp.*, 388 N.Y.S.2d 462, 466 (4th Dep't 1976) (holding that awarding contracts for a public project is "a matter of acknowledged public interest which relieves petitioner of obligation to show that it is an aggrieved party"); *see, e.g.*, *Police Conference of New York, Inc. v. Municipal Police Training Council*, 405 N.Y.S.2d at 512 (holding that standards for physical fitness for police officers is a matter of public interest); *Schenectady County Sheriff's Benevolent Ass'n v. McEvoy*, 508 N.Y.S.2d 663, 665 (3d Dep't 1986) (involving a union's Article 78 petition against county for failure to provide disability benefits hearing); *Gardner v. Constantine*, 531 N.Y.S.2d at 979 (involving a district attorney's mandamus to compel state police superintendent to complete internal investigation into possible officer misconduct); *Hebel v. West*, 803 N.Y.S.2d at 245 (involving a village board of trustee's mandamus to enjoin village mayor from performing same-sex marriages); *Morgenthau v. Cooke*, 448 N.Y.S.2d 480 (1st Dep't 1982), *aff'd* 56 N.Y.2d 24 (finding that a prosecutor had standing to bring an Article 78 proceeding to stop the Unified Court System from implementing a certain plan regarding temporary appointment of judges because "petitioner [would] bring the kind of interest that leads to full and vigorous presentation and exploration of the issues involved [due to his interest being] "not abstract, but personal, direct and substantial.") (internal citations omitted).

political subdivision." Alan Jenkins and Sabrineh Ardalan, *Positive Health: the Human Right to Health Care under the New York State Constitution*, 491 Fordham Urb. L.J. 479 (2008) (quoting the Revised Record of the Constitutional Convention of the State of New York 2126 at 2133).

New York courts consistently describe the legislative history of the New York licensing statute as supporting the proper regulation of the field of psychology as a matter of public interest. *See National Psychological Ass'n for Psychoanalysis, Inc. v. University of State of New York,* 8 N.Y.2d 197, 200-02 (1960) (finding that Article 153, N.Y. Educ. Law §§7601-7614 governing the certification of psychologists, was designed to give official recognition of the practice of psychology, and to "help to protect the public against charlatans and quacks"). By failing to investigate allegations of professional misconduct, Respondents put the public at the mercy of health professionals who may have used their skills in supporting acts of torture and inhumane treatment in clear conflict with both the statute but also its legislative purpose. Thus, Respondents' failure to investigate Dr. Reisner's claims violates their duty to safeguard the public from unprofessional conduct.

C. Respondents are the Only Authority with Oversight of Dr. Leso's Professional Conduct.

To deny Petitioner standing in this case would erect an impenetrable barrier to judicial scrutiny. New York Courts have long recognized standing under such circumstances. *See Boryszewski v. Brydges*, 37 N.Y.2d 361, 364 (1975) ("We are now prepared to recognize standing where, as in the present case, the failure to accord such standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action."); *Bradford Cent. Sch. Dist. v. Ambach*, 56 N.Y.2d 158, 164 (1982) (same); *Wilkins v. Perales*, 487 N.Y.S.2d 961, 964 (Sup. Ct. N.Y. Cty. 1985), *aff'd* 501 N.Y.S.2d 549 (1st Dep't 1986) (finding standing because "where the administrative action complained of is a determination by the agency not to enforce

its own regulations, the failure to accord standing to those affected would in effect raise an impenetrable barrier to any judicial scrutiny.").

The New York Department of Education is the only agency authorized to determine whether Dr. Leso has committed professional misconduct in accordance with New York standards. Contrary to Respondents' assumption, both the U.S. military and the American Psychological Association (APA) rely on New York to ensure to that its licensees, including Dr. Leso, abide by New York's professional standards. The military has no process by which it could enforce professional standards, and the APA's longstanding policy is to defer to the state licensing authority before considering complaints against its members. *See* APA Ethics Committee Guidelines, § 5.5 Concurrent Litigation.[3]

The Department of Defense (DOD) relies on the state licensing authority to investigate and discipline cases of unethical conduct, regardless of the location where the misconduct occurs. DOD psychologists such as Dr. Leso are required to maintain valid state licenses authorizing them to practice. *See* Pendergrass Aff. Ex. 1 at 2. DOD regulations further state that 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." Department of Defense Directive 6025.13-R "Medical Health System Clinical Quality Assurance Program Regulations Ch. DL1.1.23.2 (June 11, 2004). The military thus relies on New York's representation that its licensees are qualified and responsible to its professional standards.

Respondents also err in assuming that the American Psychological Association's (APA) support for the involvement of its members in interrogations implies a lack of ethical constraint in such contexts. In fact, the APA Presidential Task Force on Psychological Ethics and National

[3] The APA Ethics Committee has stayed current complaints against Dr. Leso pending the outcome of the present litigation.

Security (PENS Taskforce) specifically rejected this argument, finding 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 (available http://www.apa.org/pubs/info/reports/pens.pdf). The Taskforce also stated that "[r]egardless of whether an individual is considered a client, psychologists have an ethical obligation to ensure that their activities in relation to the individual are safe, legal, and ethical." *Id.* at 7.[4]

Given the circumstances of this case, Dr. Reisner may be the only party that can seek judicial scrutiny of Respondents' determination. All parties involved in or affected by Dr. Leso's misconduct—his employers and coworkers, the detainees at GTMO, the general public—would either be unaware of Dr. Leso's conduct, unaware of the procedures available to them, uninterested in ensuring that his conduct is properly investigated, or unable to pursue such a complaint. If Dr. Reisner does not have standing, then the manner by which Respondents enforce N.Y. Educ. Law § 6510 will be insulated from judicial scrutiny.

CONCLUSION

Petitioner has clearly stated a claim for relief under CPLR § 7803(1). By refusing to investigate Petitioner's complaint, Respondents have failed to perform a duty enjoined upon them by law, and Article 78 provides an appropriate remedy. Further, Respondents' conclusion that the "practice of psychology" does not include the type of misconduct alleged is not entitled to deference, conflicts with the plain meaning of the statute, and would lead to absurd results.

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[4] Not stopping there, the APA has gone so far as to submit a letter supporting a complaint against a psychologist similarly accused of misconduct in the context of interrogations by the Central Intelligence Agency. *See* Morgan Smith, *Complaint Against Terror War Psychologist Proceeding*, The Texas Tribune, Jan. 11, 2011 (available http://www.texastribune.org/texas-politics/george-w-bush/complaint-against-terror-psychologist-proceeding/) (accessed Jan. 30, 2011). The Texas Board of Examiners has accepted jurisdiction over that case, which is ongoing. *See id.*

Petitioner has also clearly stated a claim for relief under CPLR § 7803(3). Petitioner's allegations show that Respondents' decision not to investigate the underlying complaint was based wholly on an error of law and was arbitrary and capricious.

Finally, Petitioner clearly articulates an injury-in-fact within the zone of interest protected by N.Y. Educ. Law § 6510: the denial of his statutory right to have his complaint of professional misconduct investigated by Respondents. The case at bar represents a great public interest to the people of the State of New York, and Petitioner standing in this case would erect an impenetrable barrier to judicial scrutiny.

For all these reasons, Respondents' Motion to Dismiss the Verified Petition should be denied.

Respectfully Submitted,

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