

# Professional Licensing Report

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## US 2nd Circuit - New York

### **Second Circuit upholds New York's reinstated restrictions on out-of-state counseling**

#### *Issue: Telehealth*

The US Court of Appeals for the Second Circuit, in an April decision, upheld New York State's restrictions on mental health

counseling by out-of-state licensees following the expiration of a pandemic waiver that temporarily allowed such licensees to provide services in the state. The Court ruled that the in-state licensure requirements were not a violation of free speech or due process protections (*Brokamp v. James*, 66 F.4th 374).

Elizabeth Brokamp, the counselor licensee in the case, is licensed in Virginia, but she began offering online services during the early stages of the pandemic. During that time, New York allowed out-of-state licensees to provide mental health counseling in the state, and Brokamp was able to continue counseling a client that moved to the state until that waiver expired in June 2021.

Brokamp filed suit in federal court challenging New York's restriction on out-of-state licensees as a violation of constitutional protections of free speech and due process. After a district court dismissed the case, Brokamp appealed, and the case went up to the Second Circuit, which issued a decision in favor of the state on April 27.

In its decision, the Court of Appeals first addressed the question of whether Brokamp had standing to challenge New York rules. The district court had ruled against her on the grounds that she had never actually applied for a license or alleged that a license application would be futile; as such, she had no injury as the basis for her case. The Court of Appeals disagreed with that ruling, noting that Brokamp was challenging the licensure rules as an unconstitutional restriction of speech. "[A]n application requirement is apt when a party complains that he is being denied a benefit that is not itself constitutionally guaranteed - e.g. a club membership, admission to a private school, a job, a parking permit - for unconstitutional (or other unlawful) reasons," Judge Reena Raggi wrote. "In those circumstances, because there is no legally cognizable injury until there is a denial, a party must apply for the benefit or allege that application would be futile to plead the injury element of standing."

However, in Brokamp's case, her "injury arises from the very fact of a licensure requirement which presently silences Brokamp - under pain of criminal prosecution - from engaging in the professed protected speech."

Further, Brokamp alleged that the current rules were preventing her from engaging in speech, giving her claim standing. Judge Raggi agreed, writing, "It is the present chilling effect of that requirement on Brokamp's speech that demonstrates actual injury sufficient for standing without need to submit a license application."

The court did limit Brokamp's challenge to New York's relatively streamlined process for allowing out-of-state licensees to practice in the state by way of endorsement, noting that the more general licensing requirements for new applicants - including extensive coursework and supervised counseling - would not apply to her because of the possibility of gaining licensure through the easier path.

Analyzing the substance of Brokamp's free speech claim, the Court first held that the licensing requirement was a content-neutral regulation and not one aimed at restricting particular contents of speech. As a result, the requirement is subject to a lesser standard of scrutiny while being defended against a First Amendment challenge. "New York's mental health counseling license requirement does not turn on the content of what a person says," wrote Judge Raggi. "Specifically, it does not license 'views it finds acceptable,' while refusing to license 'less favored or more controversial views' . . . It does not condemn 'certain ideas or viewpoints' . . . Rather, New York's license requirement applies - regardless of what is said - only to speech having a particular purpose, focus and circumstance."

"Brokamp may disagree with New York's determination that mental health counselors licensed in other states, such as herself, must make some (streamlined) showing of competency to be licensed to treat New York residents. But that does not alter the fact that New York's license-by-endorsement requirement for such counselors places no limits or conditions on what a licensed counselor may hear and say in providing mental health counseling."

"New York law does not condition its mental health licensing requirement on the topics or subject matters discussed. Indeed, for purposes of licensure, it matters not at all whether a counselor speaks to a client about personal relationships, professional anxieties, medical challenges, world events, planned travel, hobbies, sports, favorite movies, or any other subject. All that matters is that the conversations be for one of the statutorily identified therapeutic purposes, in addressing a mental disorder or problem, in the context of a private practice, group, or organized setting."

After concluding that licensure requirements further the government's interest in public health and welfare, the court rejected an argument from Brokamp that specific exceptions to the licensure requirement - meant to allow non-licensed individuals and groups from providing some counseling - undermined its rationale. Judge Raggi wrote that the state could reasonably find that the benefits of allowing that sort of limited counseling outweigh the risks to public health. The Court also held that the requirement was sufficiently narrow to withstand scrutiny, citing the limited scope of the behavior that requires licensure.

Last, the Court rejected Brokamp's due process claim. She had argued that the statutorily-delineated activities requiring licensure are too similar to counseling activities that are exempted, making the restrictions impermissibly vague. Judge Raggi disagreed and wrote that the requirements were sufficiently particular as to allow a reasonable person to understand the distinction between activities that require licensure and those that do not. Raggi noted that Brokamp, herself, advertises as a "licensed professional counselor," indicating that Brokamp understood the distinction between her practice and allowable unlicensed counseling. "In short, she recognizes that she is no mere life coach, mentor, or self-help guru, but a professional mental health counselor."

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