

Clearinghouse Rule 21-033

STATE OF WISCONSIN
OCCUPATIONAL THERAPISTS
AFFILIATED CREDENTIALING BOARD

IN THE MATTER OF RULE-MAKING : PROPOSED ORDER OF THE
PROCEEDINGS BEFORE THE : OCCUPATIONAL THERAPISTS
OCCUPATIONAL THERAPISTS : AFFILIATED CREDENTIALING
AFFILIATED CREDENTIALING : BOARD
BOARD : ADOPTING RULES
 : (CLEARINGHOUSE RULE)

PROPOSED ORDER

An order of the Occupational Therapists Affiliated Credentialing Board to amend OT 4.05 (1) and (2) and create ch. OT 6, relating to telehealth.

Analysis prepared by the Department of Safety and Professional Services.

ANALYSIS

Statutes interpreted:

Section 448.965 (1) (c) and (2), Stats.

Statutory authority:

Sections 15.085 (5) (b) and 448.965 (1) (c) and (2), Stats.

Explanation of agency authority:

Section 15.085 (5) (b), Stats., provides that an affiliated credentialing board, such as the Occupational Therapists Affiliated Credentialing Board, “[s]hall promulgate rules for its own guidance and for the guidance of the trade or profession to which it pertains, and define and enforce professional conduct and unethical practices not inconsistent with the law relating to the particular trade or profession.”

Section 448.965 (1) (c), Stats., provides the Occupational Therapists Affiliated Credentialing Board may promulgate rules that establish “[s]tandards of practice for occupational therapy, including a code of ethics and criteria for referral.”

Section 448.965 (2), Stats., provides “[t]he affiliated credentialing board may promulgate rules that define the scope of practice of occupational therapy or the scope of assisting in the practice of occupational therapy.”

Related statute or rule:

Chapter OT 5 establishes the standards of conduct for occupational therapists and occupational therapy assistants. As provided in the proposed rule, these standards of conduct apply regardless of whether occupational therapy services are provided utilizing a telehealth visit or an in-person visit.

Plain language analysis:

Current administrative rules of the Occupational Therapists Affiliated Credentialing Board do not address telehealth practice. The proposed rule updates s. OT 4.05 and creates a new chapter, ch. OT 6, to establish standards of practice, care, and conduct for providing occupational therapy services using a telehealth visit.

Summary of, and comparison with, existing or proposed federal regulation:

The Code of Federal Regulations administers Medicare, including coverage of telehealth services by Medicare Part B (42 CFR § 410.78). Although generally not covered by Medicare Part B, in April of 2020 the Centers for Medicare & Medicaid Services announced it was using its waiver authority to allow occupational therapists and occupational therapy assistants to perform telehealth services for Medicare beneficiaries. The waiver is retroactive to March 1, 2020, and will remain in effect for the remainder of the COVID-19 Public Health Emergency. The federal Medicare regulations do not restrict the Board's authority to establish standards for the provision of occupational therapy services using telehealth.

Federal regulations also administer the Health Insurance Portability and Accountability Act of 1996 (HIPAA). Specifically, the HIPAA Security Rule establishes national standards to protect individuals' electronic personal health information that is created, received, used, or maintained by a covered entity. The Security Rule requires appropriate administrative, physical, and technical safeguards to ensure the confidentiality, integrity, and security of electronic protected health information. The Security Rule is located at 45 CFR Part 160 and Subparts A and C of Part 164. The proposed rule requires an occupational therapist or occupational therapy assistant who provides occupational therapy services using a telehealth visit to utilize technology that is secure and HIPAA-compliant.

Comparison with rules in adjacent states:

Illinois: The Illinois Statutes define "occupational therapy" to include occupational therapy services provided via technology or telecommunication methods, also known as telehealth, and provide that the standard of care is required to be the same whether a patient is seen in person, through telehealth, or other method of electronically enabled health care. (225 ILCS 75/2)

Iowa: Rules of the Professional Licensure Division of the Iowa Public Health Department provide the requirements for utilizing a telehealth visit to provide occupational therapy services. "Telehealth visit" is defined as the provision of occupational therapy services by a licensee to a patient using technology where the licensee and the patient are not at the same physical location for the occupational therapy session. (645 IAC 208.3)

Michigan: Michigan statutes and rules do not specifically address the provision of occupational therapy services using telehealth.

Minnesota: Minnesota statutes and rules do not specifically address the provision of occupational therapy services using telehealth.

Summary of factual data and analytical methodologies:

The proposed rules were developed by using the occupational therapy telehealth rules of the Professional Licensure Division of the Iowa Public Health Department (645 IAC 208.3) as a model, and obtaining input and feedback from the Occupational Therapists Affiliated Credentialing Board.

Analysis and supporting documents used to determine effect on small business or in preparation of economic impact analysis:

The proposed rules were posted for a period of 14 days to solicit public comment on economic impact, including how the proposed rules may affect businesses, local government units, and individuals. No comments were received.

Fiscal Estimate and Economic Impact Analysis:

The Fiscal Estimate and Economic Impact Analysis document is attached.

Effect on small business:

These proposed rules do not have an economic impact on small businesses, as defined in s. 227.114 (1), Stats. The Department’s Regulatory Review Coordinator may be contacted by email at Daniel.Hereth@wisconsin.gov, or by calling (608) 267-2435.

Agency contact person:

Kassandra Walbrun, Administrative Rules Coordinator, Department of Safety and Professional Services, Division of Policy Development, P.O. Box 8366, Madison, Wisconsin 53708-8366; telephone (608) 261-4463; email at DSPSAdminRules@wisconsin.gov.

Place where comments are to be submitted and deadline for submission:

Comments may be submitted to Kassandra Walbrun, Administrative Rules Coordinator, Department of Safety and Professional Services, Division of Policy Development, P.O. Box 8366, Madison, WI 53708-8366, or by email to DSPSAdminRules@wisconsin.gov. Comments must be received at or before the public hearing to be held at 9:30 a.m. on June 8, 2021, to be included in the record of rule-making proceedings.

TEXT OF RULE

SECTION 1. OT 4.05 (1) and (2) are amended to read:

OT 4.05 (1) An occupational therapist or occupational therapy assistant must provide direct supervision of non-licensed personnel at all times. Direct supervision requires that the supervising occupational therapist or occupational therapy assistant be on premises and available to assist, either on premises or through technology and equipment meeting the requirements of s. OT 6.03.

(2) When an occupational therapist or occupational therapy assistant delegates to non-licensed personnel maintenance or restorative services to clients, the occupational

therapist or occupational therapy assistant must be ~~in the immediate area and~~ within audible and visual range of the client and the non-licensed personnel, either on premises in the immediate area or through technology and equipment meeting the requirements of s. OT 6.03.

SECTION 2. Chapter OT 6 is created to read:

CHAPTER OT 6
TELEHEALTH

OT 6.01 Authority and purpose. The rules in this chapter are adopted by the board under the authority of ss. 15.085 (5) (b) and 448.965 (1) (c) and (2), Stats., to establish standards of practice, care, and conduct for providing occupational therapy services using a telehealth visit.

OT 6.02 Definitions. As used in this chapter:

(1) “HIPAA” means the Health Insurance Portability and Accountability Act of 1996, Public Law 104-191.

(2) “Telehealth visit” means the provision of occupational therapy services using technology where the occupational therapist or occupational therapy assistant and the patient are not at the same physical location for the occupational therapy session.

OT 6.03 Technology and equipment. An occupational therapist or occupational therapy assistant who provides occupational therapy services using a telehealth visit shall utilize technology that is secure and HIPAA-compliant and that includes, at a minimum, audio and video equipment that allows two-way real-time interactive communication with the patient. Technology that is not real-time may be utilized to prepare for an occupational therapy session or to communicate with a patient between occupational therapy sessions.

OT 6.04 Standards of practice, care, and conduct.

(1) An occupational therapist or occupational therapy assistant shall be held to the same standards of practice, care, and professional conduct regardless of whether occupational therapy services are provided utilizing a telehealth visit or an in-person visit.

(2) A telehealth visit may not be utilized if the standard of care for the particular occupational therapy services provided cannot be met.

(3) An occupational therapist or occupational therapy assistant may provide an occupational therapy service using a telehealth visit only when the use of technology to provide the service is consistent with the education, training, and experience of the occupational therapist or occupational therapy assistant.

(4) When determining if a telehealth visit should be utilized as a medium for accomplishing the goals of a patient’s occupational therapy program, an occupational therapist shall collaborate, as appropriate, with the occupational therapy assistant, the patient, the patient’s family, other health care professionals, and community resources.

OT 6.05 Wisconsin license required. An occupational therapist or occupational therapy assistant who uses a telehealth visit to provide occupational therapy services to a patient located in this state shall be licensed by the board.

OT 6.06 Informed consent. Prior to an initial telehealth visit, an occupational therapist or occupational therapy assistant shall obtain informed consent from the patient specific to the occupational therapy services that will be provided using a telehealth visit. At a minimum, the informed consent shall specifically inform the patient of all the following:

- (1) The risks and limitations of the use of a telehealth visit to provide occupational therapy services.
- (2) The potential for unauthorized access to protected health information.
- (3) The potential for disruption of technology during a telehealth visit.

OT 6.07 Recordkeeping. An occupational therapist or occupational therapy assistant shall identify in the clinical record when occupational therapy services are provided utilizing a telehealth visit.

OT 6.08 Supervision. Supervision of an occupational therapy assistant or unlicensed personnel providing services to or assisting a client during a telehealth visit shall meet the requirements of s. OT 4.04 or 4.05, as appropriate.

SECTION 3. EFFECTIVE DATE. The rules adopted in this order shall take effect on the first day of the month following publication in the Wisconsin Administrative Register, pursuant to s. 227.22 (2) (intro.), Stats.

(END OF TEXT OF RULE)
