



**TO:** The Honorable Members of the Board of Regents

**FROM:** Sarah S. Benson *Sarah S. Benson*

**SUBJECT:** Proposed Addition of Section 76.11 to the Regulations of the Commissioner of Education Relating to Occupational Therapists' Authority to Provide Treatment for a Limited Time without a Referral

**DATE:** August 31, 2023

**AUTHORIZATION(S):** *Dom N. J. Bellotti*

#### **SUMMARY**

#### **Issue for Decision (Consent)**

Should the Board of Regents adopt the proposed addition of section 76.11 to the Regulations of the Commissioner of Education relating to occupational therapists' authority to provide treatment for a limited time period without a referral?

#### **Reason for Consideration**

Required by State statute (Section 1 of Chapter 601 of the Laws of 2022).

#### **Proposed Handling**

The proposed amendment is presented to the Full Board for adoption as an emergency rule at the September 2023 Regents meeting. A copy of the proposed rule (Attachment A) and a statement of facts and circumstances justifying emergency action (Attachment B) are attached.

#### **Procedural History**

The proposed amendment was presented to the Professional Practice Committee for discussion and recommendation to the Full Board for adoption as an emergency rule at the July 2023 meeting of the Board of Regents. A Notice of Emergency Adoption and Proposed Rule Making was published in the State Register on August 2, 2023, for a 60-day public comment period.

Because the July emergency rule will expire on October 15, 2023, a second emergency action is necessary to ensure that the emergency rule remains continuously in effect until it can be permanently adopted at the November 2023 Regents meeting. A Notice of Emergency Adoption will be published in the State Register on November 1, 2023. Supporting materials for the proposed amendment are available upon request from the Secretary to the Board of Regents.

### **Background Information**

Chapter 601 of the Laws of 2022 (Chapter 601) amended the Education Law to permit licensed occupational therapists to provide treatment to patients for a limited time period without a referral from a physician or nurse practitioner, as long as certain requirements are met.<sup>1</sup> The intent of Chapter 601, effective March 31, 2023, is to provide greater levels of care to patients by allowing them more direct access to occupational therapy services and reduce costs for both patients and insurance carriers.

As amended by Chapter 601, section 7901 of the Education Law permits licensed occupational therapists to provide treatment to patients for ten visits or thirty days, whichever occurs first, without a referral from a physician or nurse practitioner provided that:

- the licensed occupational therapist has practiced occupational therapy on a full-time basis equivalent to not less than three years; and
- each licensed occupational therapist provides written notice to each patient receiving treatment absent a referral from a physician or nurse practitioner, advising the patient that the occupational therapy may not be covered by the patient's health care plan or insurer without such referral and that such treatment may be a covered expense if rendered pursuant to a referral.

Chapter 601 also requires the occupational therapist to maintain, in a patient's records, a form attesting to the patient's notice of such advice. A copy of this notice of advice form must be provided to the patient, signed and dated by both the licensed occupational therapist and the patient, in a form prescribed by the Commissioner's regulations.

### **Proposed Amendment**

The Department proposes to add a new section 76.11 to the Commissioner's regulations to implement the provisions of Chapter 601. In addition, the proposed amendment requires that all patient notice of advice forms include the following elements:

- a statement of such advice and a statement attesting that the patient has read the notice of advice form;
- the date treatment will begin;
- the patient's name and address;

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<sup>1</sup> Pursuant to section 1 of Chapter 298 of the Laws of 2006, physical therapists have had similar authority since November 11, 2006.

- the patient's signature and date the patient signed the form;
- the treating occupational therapist's name and business address; and
- the treating occupational therapist's signature and the date the occupational therapist signed the form.

### **Related Regents Items**

July 2023: [Proposed Addition of Section 76.11 to the Regulations of the Commissioner of Education Relating to Occupational Therapists' Authority to Provide Treatment for a Limited Time without a Referral](https://www.regents.nysed.gov/sites/regents/files/723ppca1.pdf)

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### **Recommendation**

It is recommended that the Board of Regents take the following action:

VOTED: That section 76.11 of the Regulations of the Commissioner of Education be added, as submitted, effective October 16, 2023, as an emergency action, upon a finding that such action is necessary for the preservation of the public health and general welfare in order to timely implement the provisions of Chapter 601 of the Laws of 2022, effective March 31, 2023 and to ensure that the emergency action taken at the July 2023 meeting remains continuously in effect.

### **Timetable for Implementation**

If adopted as an emergency rule at the September 2023 Regents meeting, the emergency rule will become effective October 16, 2023. It is anticipated that the proposed amendment will be presented to the Board of Regents for permanent adoption at the November 2023 Regents meeting, after publication in the State Register and the expiration of the 60-day public comment period required under the State Administrative Procedures Act. If adopted at the November 2023 meeting, the proposed amendment will become effective as a permanent rule on November 29, 2023.

## Attachment A

### AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 6504, 6506, 6507, 6509, 7901 and 7902 of the Education Law and Chapter 601 of the Laws of 2022.

1. Section 76.11 of the Regulations of the Commissioner of Education is added to read as follows:

#### 76.11 Providing treatment in the practice of occupational therapy without referral

(a) In accordance with subdivision (2) of section 7901 of the Education Law, a licensed occupational therapist may provide a patient with treatment in the practice of occupational therapy without a referral from a physician or nurse practitioner, for 10 visits or 30 days, whichever occurs first, provided that the licensed occupational therapist meets the following requirements:

(1) the licensed occupational therapist has practiced occupational therapy on a full-time basis equivalent to not less than three years prior to beginning such treatment, meaning the licensed occupational therapist has completed at least 4,320 clock hours of occupational therapy practice over a minimum of 36 months anytime prior to beginning such treatment; and

(2) the licensed occupational therapist meets all requirements of subdivision (b) of this section relating to the notice of advice.

(b) Notice of advice. An occupational therapist providing treatment in the practice of occupational therapy without a referral from a physician or nurse practitioner, in accordance with subdivision (2) of section of 7901 of the Education Law and the requirements of this section, shall advise the patient in writing prior to beginning treatment of the possibility that treatment may not be covered by the patient's health

care plan or insurer without a referral from a physician or nurse practitioner and that such treatment may be a covered expense if rendered pursuant to a referral. This notice of advice shall be provided on a form, a copy of which shall be kept on file by the licensed occupational therapist as a patient record. A copy of this notice of advice shall be given to the patient. The notice of advice form shall include the following information:

(1) a statement of such advice and a statement attesting that the patient has read the notice of advice form;

(2) the date treatment will begin;

(3) the patient's name and address;

(4) the patient's signature and date the patient signed the form;

(5) the treating occupational therapist's name and business address; and

(6) the treating occupational therapist's signature and the date the occupational therapist signed the form.

## **Attachment B**

### STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE EMERGENCY ACTION

Historically, licensed occupational therapists could not provide treatment to patients without a referral from a physician or nurse practitioner. This requirement has limited patients' timely access to occupational therapy treatment. Section 1 of Chapter 601 of the Laws of 2022 (Chapter 601), effective March 31, 2023, addresses these issues and others by providing greater levels of care to patients by allowing them more direct access to occupational therapy services and reducing costs for both patients and insurance carriers. Chapter 601 also amended the Education Law to permit licensed occupational therapists to provide treatment to patients for a limited time period without a referral from a physician or nurse practitioner, as long as certain requirements are met.

The proposed amendment adds a new section 76.11 to the Commissioner's regulations to implement the provisions of Chapter 601 by:

- permitting treatment to be rendered by a licensed occupational therapist for 10 visits, or 30 days, whichever occurs first, without a referral from a physician or nurse practitioner, provided that: (1) the licensed occupational therapist has practiced occupational therapy on a full time basis equivalent to not less than 3 years; and (2) each licensed occupational therapy provides written notice to each patient receiving treatment absent a referral from a physician or nurse practitioner that occupational therapy may not be covered by the patient's health care

plan or insurer without such referral and that such treatment may be a covered expense if rendered pursuant to a referral.

In addition, the proposed amendment requires that all patient notice of advice forms include the following elements:

- a statement of such advice and a statement attesting that the patient has read the notice of advice form;
- the date treatment will begin;
- the patient's name and address;
- the patient's signature and date the patient signed the form;
- the treating occupational therapist's name and business address; and
- the treating occupational therapist's signature and the date the occupational therapist signed the form;
- a statement of such advice and a statement attesting that the patient has read the notice of advice form;
- the date treatment will begin;
- the patient's name and address;
- the patient's signature and date the patient signed the form;
- the treating occupational therapist's name and business address; and
- the treating occupational therapist's signature and the date the occupational therapist signed the form.

The proposed amendment was presented to the Professional Practice Committee for recommendation to the Full Board for adoption as an emergency rule at the July 2023 meeting of the Board of Regents, effective July 18, 2023. Since the Board of Regents meets at fixed intervals, the earliest the proposed rule can be presented for

adoption, after expiration of the required 60-day public comment period provided for in the State Administrative Procedure Act (SAPA) sections 202(1) and (5), would be the November 2023 Regents meeting. Furthermore, pursuant to SAPA section 203(1), the earliest effective date of the proposed amendment, if adopted at the November 2023 meeting, would be November 29, 2023, the date the Notice of Adoption would be published in the State Register.

However, the emergency rule will expire on October 15, 2023. Therefore, a second emergency action is necessary at the September 2023 meeting, effective October 16, 2023, for the preservation of the public health and the general welfare in order timely implement the provisions of Chapter 601, which became effective March 31, 2023 and to ensure that the emergency action taken at the July 2023 meeting remains continuously in effect.

It is anticipated that the proposed amendment will be presented for permanent adoption at the November 2023 Regents meeting, which is the first scheduled meeting after the expiration of the 60-day public comment period mandated by SAPA for state agency rule making.