



TO: The Professional Practice Committee

FROM: Douglas E. Lentivech

SUBJECT: Proposed Amendment to the Regulations of the Commissioner of Education Relating to Occupational Therapy Assistants, Occupational Therapy Assistant Students and Holders of Limited Permits in Occupational Therapy

DATE: April 16, 2012

AUTHORIZATION(S):

SUMMARY

Issue for Decision

Should the Board of Regents amend Part 76 of the Regulations of the Commissioner of Education relating to occupational therapy assistants, occupational therapy assistant students and holders of limited permits in occupational therapy?

Reason(s) for Consideration

Required by State Statute.

Proposed Handling

The proposed amendment (Attachment 1, starting on page 5 of this item) will come before the Professional Practice Committee at its April 2012 meeting for discussion. It is anticipated that the proposed amendment will then be presented for action by the Board of Regents at an upcoming meeting. In addition, amendments that were adopted at the February 2012 meeting of the Board of Regents as an emergency measure to partially implement Chapter 460 of the Laws of 2011 (Attachment 2, starting on page 12 of this item) will be presented to the Committee and the Full Board for a second emergency action to retain them in effect until the new regulations take effect. A

statement of the facts and circumstances which necessitate emergency action (Attachment 3, starting on page 16 of this item) is attached.

Procedural History

Emergency regulations were adopted by the Board of Regents at its February 2012 meeting which amended those portions of Part 76 of the Rules of the Board of Regents described below relating to the renewal of a limited permit, the definition of practice of an occupational therapy assistant, the requirements for authority to practice as an occupational therapy assistant, and the exemption to the practice requirements for an occupational therapy assistant student. These emergency regulations became effective on February 14, 2012.

A Notice of Proposed Rule Making was published in the State Register on March 14, 2012 for a 45-day period of public comment which provides for the permanent adoption of regulations governing the topics referenced above, and in addition, the supervision of holders of limited permits in occupational therapy and supervision of occupational therapy assistants.

Supporting materials for the proposed amendment are available upon request from the Secretary to the Board of Regents.

Background Information

The proposed amendments to Part 76 of the Regulations of the Commissioner of Education implement the provisions of Chapter 460 of the Laws of 2011 relating to the profession of occupational therapy. Chapter 460, which became effective on February 13, 2012, amended the Education Law to modify the scope of practice of occupational therapists, change the composition of the State Board for Occupational Therapy, require the direct supervision of holders of limited permits in occupational therapy, and authorize occupational therapy assistant students to provide services as exempt individuals under the direct supervision of an occupational therapist. It also authorized occupational therapy assistants to provide services as exempt individuals and required the Commissioner to define occupational therapy assistants and to promulgate regulations governing their eligibility to practice.

Emergency Regulations (page 12 below)

The amendments described in this section are those adopted on an emergency basis in February. They are proposed for emergency adoption again in April to keep them in effect until the proposed regulations described in the next section can be adopted on a permanent basis in May.

The proposed amendment of section 76.4(b) of the Regulations of the Commissioner of Education eliminates the provision that bars a holder of a limited permit in occupational therapy from receiving a renewal in the event the holder has failed the licensing examination.

Proposed section 76.6 of the Regulations of the Commissioner defines the practice of an occupational therapy assistant (OTA). In accordance with new section 7906(7) of the Education Law, that definition requires OTAs to practice under the supervision of an occupational therapist or physician. Section 76.6 also restricts the use of the title “occupational therapy assistant” to those authorized by the Department to do so.

Proposed section 76.7 of the Regulations of the Commissioner sets forth requirements for authorization to practice as an OTA, including requirements relating to education, experience, and examination.

Finally, proposed section 76.9 of the Regulations of the Commissioner establishes the requirements for OTA students to qualify under the statutory exemption authorizing them to practice prior to licensure. That section also requires that they be supervised by an occupational therapist in accordance with standards established by a national accreditation agency acceptable to the Department.

Proposed Permanent Regulations (page 5 below)

The proposed permanent regulations to implement Chapter 460 of the Laws of 2011 include the amendments described above and the following additional amendments. The entire package will be submitted for approval by the Board of Regents in May.

The proposed amendment of section 76.4(c) of the Regulations of the Commissioner defines the direct supervision of holders of limited permits in occupational therapy, requires the development of a written supervision plan and documentation of formal supervision contacts, and limits to five the number of holders of a limited permit that can be supervised by an occupational therapist or physician.

The proposed section 76.8 of the Regulations of the Commissioner of Education establishes the requirements for the supervision of OTAs, requires the development of a written supervision plan and documentation of formal supervision contacts, and limits to five the number of occupational therapy assistants that can be supervised by an occupational therapist or physician.

A previous version of proposed section 76.9 of the Regulations of the Commissioner, establishing the requirements for OTA students to qualify for the statutory exemption authorizing them to practice prior to licensure, was included in the emergency regulation. It has been modified in the proposed permanent regulation to clarify the role of the OTA in the supervision of an OTA student.

These regulations are being presented for discussion. They were published in the State Register on March 14, 2012 for a 45-day comment period. We anticipate that the regulations will be brought to this Committee for approval at your meeting in May 2012.

Recommendation

VOTED: That subdivision (b) of section 76.4 of the Regulations of the Commissioner of Education be amended; that section 76.5 be repealed and section 76.7 be renumbered as section 76.5; that section 76.6 be renumbered as section 76.8 and that new sections 76.6, 76.7, and 76.9 be added, all as submitted, effective May 15, 2012, as an emergency action upon a finding by the Board of Regents that such action is necessary for the preservation of the public health and general welfare in order to ensure that the emergency rule adopted at the February Regents meeting remains continuously in effect until the effective date of proposed regulations to implement Chapter 460 of the Laws of 2011, as published in the March 14, 2012 State Register.

Timetable for Implementation

The February emergency amendments became effective on February 14, 2012 and will expire on May 14, 2012. If adopted at the April 2012 Board of Regents meeting, the proposed emergency amendments will become effective May 15, 2012. It is anticipated that such emergency amendments will remain in effect until the effective date of the newly proposed regulations, which will be submitted for approval by the Board of Regents at an upcoming meeting.

ATTACHMENT 1

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 6504, 6507, 7905 and 7906 of the Education Law.

1. Section 76.4 of the Regulations of the Commissioner of Education is amended, effective June 13, 2012, as follows:

(a) ...

(b) Limited permits may be renewed once for a period not to exceed one year at the discretion of the department because of personal or family illness or other extenuating circumstances which prevented the permittee from becoming licensed[, provided that the permittee has not failed the licensing examination in occupational therapy].

(c) Supervision.

(1) The occupational therapist providing direct supervision required by section 7905(2) of the Education Law shall develop a written supervision plan for each permittee. The written supervision plan shall specify the names, professions and other credentials of the persons participating in the supervisory process, the frequency of formal supervisory contacts; the methods (e.g. in-person, by telephone) and types (e.g. review of charts, discussion with permittee) of supervision; the content areas to be addressed; how written treatment notes and reports will be reviewed, including, but not limited to, whether such notes and reports will be initialed or co-signed by the supervisor; and how professional development will be fostered.

(2) Documentation of supervision shall include the date and content of each formal supervisory contact as identified in the written supervision plan and evidence of the review of all treatment notes and reports.

(3) The determination of the level and type of supervision shall be based on the ability level and experience of the permittee providing the delegated occupational therapy services, the complexity of client needs, and the setting in which the permittee is providing the services.

The supervision plan shall require that the supervisor be notified whenever there is a clinically significant change in the condition or performance of the client, so that an appropriate supervisory action can take place.

(4) Direct supervision shall mean that the supervisor:

(i) initiates, directs and participates in the initial evaluation, interprets the evaluation data, and develops the occupational therapy services plan with input from the permittee;

(ii) participates, on a regular basis, in the delivery of occupational therapy services;

(iii) is responsible for determining the need for continuing, modifying, or discontinuing occupational therapy services;

(iv) takes into consideration information provided by the permittee about the client's responses to and communications during occupational therapy services; and

(v) is available for consultation with the permittee in a timely manner, taking into consideration the practice setting, the condition of the client and the occupational therapy services being provided.

(5) In no event shall the occupational therapist or licensed physician supervise more than five permittees, or its full time equivalent, provided that the total number of permittees being supervised by a single occupational therapist or licensed physician shall not exceed ten.

2. Sections 76.5 and 76.6 of the Regulations of the Commissioner of Education are repealed, and 76.7 of the Regulations of the Commissioner of Education is renumbered 76.5, effective June 13, 2012.

3. The Regulations of the Commissioner of Education are amended by the addition of new sections 76.6, 76.7, 76.8, and 76.9, effective June 13, 2012, to read as follows:

76.6 Definition of occupational therapy assistant practice and the use of the title occupational therapy assistant.

(a) An "occupational therapy assistant" shall mean a person authorized in accordance with this Part who provides occupational therapy services under the direction and supervision of an occupational therapist or licensed physician and performs client related activities assigned by the supervising occupational therapist or licensed physician. Only a person authorized under this Part shall participate in the practice of occupational therapy as an occupational therapy assistant, and only a person authorized under this Part shall use the title "occupational therapy assistant."

(b) As used in this section, client related activities shall mean:

(1) contributing to the evaluation of a client by gathering data, reporting observations and implementing assessments delegated by the supervising occupational therapist or licensed physician;

(2) consulting with the supervising occupational therapist or licensed physician in order to assist him or her in making determinations related to the treatment plan, modification of client programs or termination of a client's treatment;

(3) the utilization of a program of purposeful activities, a treatment program, and/or consultation with the client, family, caregiver, or other health care or education providers, in keeping with the treatment plan and under the direction of the supervising occupational therapist or licensed physician;

(4) the use of treatment modalities and techniques that are based on approaches taught in an occupational therapy assistant educational program registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department, and that the occupational therapy assistant has demonstrated to the occupational therapist or licensed physician that he or she is competent to use; or

(5) the immediate suspension of any treatment intervention that appears harmful to the client and immediate notification of the occupational therapist or licensed physician.

76.7 Requirements for authorization as an occupational therapy assistant.

To qualify for authorization as an occupational therapy assistant pursuant to section 7906(7) of the Education Law, an applicant shall fulfill the following requirements:

(a) file an application with the Department;

(b) have received an education as follows:

(1) completion of a two-year associate degree program for occupational therapy assistants registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department; or

(2) completion of a postsecondary program in occupational therapy satisfactory to the Department and of at least two years duration;

(c) have a minimum of three months clinical experience satisfactory to the state board for occupational therapy and in accordance with standards established by a national accreditation agency which is satisfactory to the Department;

(d) be at least eighteen years of age;

(e) be of good moral character as determined by the Department;

(f) register triennially with the Department in accordance with the provisions of subdivision (h) of this section, sections 6502 and 7906(8) of the Education Law, and sections 59.7 and 59.8 of this Subchapter;

(g) pay a fee for an initial license and a fee for each triennial registration period that shall be one half of the fee for initial license and for each triennial registration period established in Education law for occupational therapists; and

(h) except as otherwise provided by Education Law section 7907(2), pass an examination acceptable to the Department.

76.8 Supervision of occupational therapy assistant.

(a) A written supervision plan, acceptable to the occupational therapist or licensed physician providing direction and supervision, shall be required for each occupational therapy assistant providing services pursuant to section 7906(7) of the Education Law. The written supervision plan shall specify the names, professions and other credentials of the persons participating in the supervisory process, the frequency of formal supervisory contacts, the methods (e.g. in-person, by telephone) and types (e.g. review of charts, discussion with occupational therapy assistant) of supervision, the content areas to be addressed, how written treatment notes and reports will be reviewed, including, but not limited to, whether such notes and reports will be initialed or co-signed by the supervisor, and how professional development will be fostered.

(b) Documentation of supervision shall include the date and content of each formal supervisory contact as identified in the written supervision plan and evidence of the review of all treatment notes, reports and assessments.

(c) Consistent with the requirements of this section, the determination of the level and type of supervision shall be based on the ability level and experience of the occupational therapy assistant providing the delegated occupational therapy services, the complexity of client needs, the setting in which the occupational therapy assistant is providing the services, and consultation with the occupational therapy assistant.

(d) The supervision plan shall require that the occupational therapist or licensed physician be notified whenever there is a clinically significant change in the condition or performance of the client, so that an appropriate supervisory action can take place.

(e) Direction and supervision means that the occupational therapist or licensed physician:

(i) initiates, directs and participates in the initial evaluation occupational therapy assistant under the authority of, interprets the evaluation data, and develops the occupational therapy services plan with input from the occupational therapy assistant;

(ii) participates, on a regular basis, in the delivery of occupational therapy services;

(iii) is responsible for determining the need for continuing, modifying, or discontinuing occupational therapy services, after considering any reports by the occupational therapy assistant of any changes in the condition of the client that would require a change in the treatment plan;

(iv) takes into consideration information provided about the client's responses to and communications during occupational therapy services; and

(v) is available for consultation with the occupational therapy assistant in a timely manner, taking into consideration the practice setting, the condition of the client and the occupational therapy services being provided.

(f) In no event shall the occupational therapist or licensed physician supervise more than five occupational therapy assistants, or its full time equivalent, provided that the total number of occupational therapy assistants being supervised by a single occupational therapist or licensed physician shall not exceed ten.

76.9 Occupational therapy assistant student exemption. To be permitted to practice as an exempt person pursuant to section 7906(4) of the Education Law, an occupational therapy assistant student shall be enrolled in a program as set forth in section 76.7(b)(1) of this Part and shall be directly supervised by an occupational therapist in accordance with standards established by a national accreditation agency which is satisfactory to the Department. Direct supervision, as required by section 7906(4) of the Education Law, may be provided in conjunction with an occupational therapy assistant who is designated as a fieldwork educator by a program that meets

the requirements of section 76.7(b)(1) of this Part. Any such work performed by an occupational therapy assistant as a fieldwork educator shall be subject to the supervision requirements of section 76.8 of this Part.

ATTACHMENT 2

AMENDMENT TO THE REGULATIONS OF THE COMMISSIONER OF EDUCATION

Pursuant to sections 207, 6504, 6507, 7905 and 7906 of the Education Law.

1. Section 76.4 of the Regulations of the Commissioner of Education is amended, effective May 15, 2012, as follows:

(a) ...

(b) Limited permits may be renewed once for a period not to exceed one year at the discretion of the department because of personal or family illness or other extenuating circumstances which prevented the permittee from becoming licensed[, provided that the permittee has not failed the licensing examination in occupational therapy].

2. Section 76.5 of the Regulations of the Commissioner of Education is repealed, and 76.7 of the Regulations of the Commissioner of Education is renumbered 76.5, effective May 15, 2012.

3. Section 76.6 of the Regulations of the Commissioner of Education is renumbered 76.8, and new sections 76.6, 76.7, and 76.9, are added, effective May 15, 2012, to read as follows:

76.6 Definition of occupational therapy assistant practice and the use of the title occupational therapy assistant.

(a) An "occupational therapy assistant" shall mean a person authorized in accordance with this Part who provides occupational therapy services under the direction and supervision of an occupational therapist or licensed physician and performs client related activities assigned by the supervising occupational therapist or licensed physician. Only a person authorized under this Part shall participate in the practice of occupational therapy as an occupational therapy assistant, and only a person authorized under this Part shall use the title "occupational therapy assistant."

(b) As used in this section, client related activities shall mean:

(1) contributing to the evaluation of a client by gathering data, reporting observations and implementing assessments delegated by the supervising occupational therapist or licensed physician;

(2) consulting with the supervising occupational therapist or licensed physician in order to assist him or her in making determinations related to the treatment plan, modification of client programs or termination of a client's treatment;

(3) the utilization of a program of purposeful activities, a treatment program, and/or consultation with the client, family, caregiver, or other health care or education providers, in keeping with the treatment plan and under the direction of the supervising occupational therapist or licensed physician;

(4) the use of treatment modalities and techniques that are based on approaches taught in an occupational therapy assistant educational program registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department, and that the occupational therapy assistant has demonstrated to the occupational therapist or licensed physician that he or she is competent to use; or

(5) the immediate suspension of any treatment intervention that appears harmful to the client and immediate notification of the occupational therapist or licensed physician.

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To qualify for authorization as an occupational therapy assistant pursuant to section 7906(7) of the Education Law, an applicant shall fulfill the following requirements:

(a) file an application with the Department;

(b) have received an education as follows:

(1) completion of a two-year associate degree program for occupational therapy assistants registered by the Department or accredited by a national accreditation agency which is satisfactory to the Department; or

(2) completion of a postsecondary program in occupational therapy satisfactory to the Department and of at least two years duration;

(c) have a minimum of three months clinical experience satisfactory to the state board for occupational therapy and in accordance with standards established by a national accreditation agency which is satisfactory to the Department;

(d) be at least eighteen years of age;

(e) be of good moral character as determined by the Department;

(f) register triennially with the Department in accordance with the provisions of subdivision (h) of this section, sections 6502 and 7906(8) of the Education Law, and sections 59.7 and 59.8 of this Subchapter;

(g) pay a fee for an initial license and a fee for each triennial registration period that shall be one half of the fee for initial license and for each triennial registration period established in Education law for occupational therapists; and

(h) except as otherwise provided by Education Law section 7907(2), pass an examination acceptable to the Department.

76.9 Occupational therapy assistant student exemption. To be permitted to practice as an exempt person pursuant to section 7906(4) of the Education Law, an occupational therapy assistant student shall be enrolled in a program as set forth in section 76.7(b)(1) of this Part and may work with an occupational therapy assistant who is acting as a fieldwork educator. Such student shall be directly supervised by an occupational therapist in accordance with standards established by a national accreditation agency which is satisfactory to the Department. Any such work performed

by an occupational therapy assistant as a fieldwork educator shall be subject to the supervision requirements of section 76.8 of this Part.

ATTACHMENT 3

STATEMENT OF FACTS AND CIRCUMSTANCES WHICH NECESSITATE EMERGENCY ACTION

The proposed amendment to the Regulations of the Commissioner of Education is necessary to conform the Commissioner's Regulations to the requirements of Chapter 460 of the Laws of 2011. Chapter 460 amended Article 156 of the Education Law to amend the scope of practice of occupational therapists, to provide for the supervision of limited permittees in occupational therapy, to provide for practice as exempt individuals by occupational therapy assistant students, to authorize and provide for the definition of practice of occupational therapy assistants, to provide that occupational therapist assistants shall be subject to the disciplinary and regulatory authority of the Board of Regents and the Department, and to make various technical changes to these sections of the Education Law.

The proposed amendment is necessary to implement the new law. The Board of Regents adopted the proposed amendment as an emergency rule at their February meeting, with an effective date of February 14, 2012, consistent with the effective date of the law. A Notice of Proposed Rule Making was published in the State Register on March 14, 2012. The earliest the proposed rule can be presented for permanent adoption is at the May 21-22, 2012 Regents meeting, after expiration of the 45-day public comment period on April 30, 2012. However, the February emergency rule will expire on May 14, 2012. A lapse in the rule could potentially disrupt the practice of occupational therapy pursuant to Chapter 460 of the Laws of 2011. Emergency action is necessary for the preservation of the public safety and general welfare in order to ensure that the emergency rule remains continuously in effect until the rule proposed in

the March 14, 2012 State Register can be adopted and made effective as a permanent rule.

It is anticipated that the proposed rule will be presented for adoption as a permanent rule at an upcoming Regents meeting, following expiration of the 45-day public comment period on proposed rule makings required by the State Administrative Procedure Act.