



**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:** June 11, 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 amendments will be presented to the Professional Practice Committee meeting for recommendation and to the Full Board for action at the June Regents meeting, for a third emergency action to keep the emergency rule adopted at the February Regents meeting, and readopted at the April Regents meeting, continuously in effect until a full set of regulations may be presented for adoption as a permanent rule. A statement of the facts and circumstances which necessitate emergency action is attached.

## **Procedural History**

Emergency regulations were adopted by the Board of Regents at its February 2012 meeting, effective February 14, 2012, and readopted as an emergency rule at the April Regents meeting. The emergency rule amended those portions of Part 76 of the Regulations of the Commissioner of Education 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.

A Notice of Proposed Rule Making was published in the State Register on March 14, 2012 for a 45-day period of public comment. The proposed rule includes provisions governing the emergency rule topics referenced above, and in addition, provisions governing the supervision of holders of limited permits in occupational therapy and supervision of occupational therapy assistants. These provisions were discussed by the Professional Practice Committee at the April Regents meeting.

Further revisions to the proposed rule are anticipated in response to public comment. Pursuant to the State Administrative Procedure Act, the revised proposed rule cannot be adopted as a permanent rule until after its publication in the State Register and expiration of a 30-day public comment period for revised rule makings. However, the April emergency rule will expire on July 14, 2012. Therefore, another emergency adoption is necessary at the June Regents meeting to ensure that the emergency rule remains continuously in effect until the revised proposed rule can be presented for permanent adoption at the September Regents meeting.

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.

The proposed amendment of section 76.4(b) of the Regulations of the Commissioner of Education implements a provision of the new law that eliminated language that barred a holder of a limited permit in occupational therapy from receiving a renewal in the event the holder 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.

### **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 July 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, and readopted at the April Regents meeting, remains continuously in effect until a revised proposed rule can be presented for adoption and made effective as a permanent rule.

### **Timetable for Implementation**

The February emergency amendments became effective on February 14, 2012. The April emergency amendments became effective on May 15, 2012 and will expire on July 14, 2012. If adopted at the June Regents meeting, the proposed emergency amendments will become effective July 15, 2012 and will expire on September 11, 2012. Further revisions to the proposed amendment published in the March 14, 2012 State Register are being considered in response to public comment. It is anticipated that the revised proposed amendment will be presented for adoption as a permanent rule at the September 10-11, 2012 Regents meeting, after its publication in the State Register and expiration of the 30-day public comment period for revised rule makings.

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 its February meeting, with an effective date of February 14, 2012, consistent with the effective date of the law, and readopted the emergency rule at the April Regents meeting to ensure the rule remains continuously in effect until it can be presented for adoption as a permanent rule.

A Notice of Proposed Rule Making was published in the State Register on March 14, 2012. The proposed rule includes provisions governing the topics of this emergency rule, as described above and, in addition, provisions governing the supervision of holders of limited permits in occupational therapy and supervision of occupational therapy assistants. The 45-day public comment period expired on April 30, 2012.

Further revisions to the proposed rule are anticipated in response to public comment. Pursuant to the State Administrative Procedure Act, the revised proposed

rule cannot be adopted as a permanent rule until after its publication in the State Register and expiration of a 30-day public comment period. However, the April emergency rule will expire on July 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 at the June 18-19, 2012 Regents meeting is necessary for the preservation of the public health and general welfare in order to ensure that the emergency rule remains continuously in effect until the revised proposed rule can be adopted and made effective as a permanent rule.

It is anticipated that the revised proposed rule will be presented for adoption as a permanent rule at the September 10-11, 2012 Regents meeting, following its publication in the State Register and expiration of the 30-day public comment period for revised rule makings required under the State Administrative Procedure Act.

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 July 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 July 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 July 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.

#### 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.

76.9 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.