

**STATE OF WISCONSIN
OCCUPATIONAL THERAPISTS AFFILIATED CREDENTIALING BOARD**

**IN THE MATTER OF RULEMAKING : REPORT TO THE LEGISLATURE
PROCEEDINGS BEFORE THE : CR 21-033
OCCUPATIONAL THERAPISTS :
AFFILIATED CREDENTIALING :
BOARD :**

I. THE PROPOSED RULE:

The proposed rule, including the analysis and text, is attached.

II. REFERENCE TO APPLICABLE FORMS: N/A

III. FISCAL ESTIMATE AND EIA: The Fiscal Estimate and EIA is attached.

IV. DETAILED STATEMENT EXPLAINING THE BASIS AND PURPOSE OF THE PROPOSED RULE, INCLUDING HOW THE PROPOSED RULE ADVANCES RELEVANT STATUTORY GOALS OR PURPOSES:

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.

Additionally, 2021 Wisconsin Act 121 went into effect on February 5, 2022. This Act provides a statutory definition for “telehealth”, which the Board is required to use when promulgating rules on the subject. Therefore, in addition to any modifications listed below, the Board also updated this rule to align with the new statutory requirement.

V. SUMMARY OF PUBLIC COMMENTS AND THE BOARD’S RESPONSES, EXPLANATION OF MODIFICATIONS TO PROPOSED RULES PROMPTED BY PUBLIC COMMENTS:

The Occupational Therapists Affiliated Credentialing Board held a public hearing on June 8, 2021. The following people either testified at the hearing, or submitted written comments:

- Letter from Gunderson Health System, signed by:
 - Jessica Easterday, Clinical Manager of Virtual Care
 - Jamie Lohrentz, Clinical Manager, Outpatient/Neuro-vestibular/Pediatric Occupational and Physical Therapy
 - Nathan Franklin, Direct, External Affairs
- Letter from OT Leaders and Wisconsin Hospital Association, signed by:
 - Matthew Stanford, General Counsel, Wisconsin Hospital Association
 - Kay Anderson, OT, Service Line Director, Rehabilitation, Ascension Wisconsin
 - Marilyn Bert, OT, Clinical Manager, Mayo Clinic Health System Northwest Wisconsin

- Lisa Morgan, OT, Rehabilitation Manager, May Clinic Health System – Southwest Wisconsin
- David Blair, MD, Chair, Virtual Care Committee, Mayo Clinic Health System – Wisconsin
- Corey Conrath, MD, Medical Director, Occupational Health, Marshfield Clinic Health System
- Chris Meyer, Director of Virtual Care and Telehealth, Marshfield Clinic Health System
- Stephanie Olive, MS, CCC-SLP, Director of Therapies and Developmental Services, Children’s Wisconsin
- Kimberly Cronsell, MD, Medical Director for Digital Health & Experience, Children’s Wisconsin
- Bill Brazeau, MBA, Director, Virtual Health, ThedaCare
- Jessica Easterday, MBA, BSN, RN, Clinical Manager-Virtual Care, Gunderson Health System
- Tom Brazelton, MD, MPH, FAAP, Medical Director, Telehealth Program, UW Health

The Occupational Therapists Affiliated Credentialing Board summarizes the comments received either by hearing testimony or by written submission as follows:

- Letter from Gunderson Health System, proposed changes:
 - Removal of OT 6.06 or have the Board work with stakeholders to come up with new language on informed consent.
- Letter from OT Leaders and Wisconsin Hospital Association, proposed changes:
 - Update OT 6.03 Technology and Equipment to read “An occupational therapist or occupational therapy assistant who provides occupational therapy services using a telehealth visit shall utilize technology that enables the transmission of information via the technology that is of sufficient quality to be functionally equivalent to face-to-face contact. 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 (3) should be removed.
 - Update OT 6.04 (4) to read “Upon scheduling a telehealth visit, clear information shall be provided to the patient that the visit will be a telehealth visit”
 - OT 6.06 Informed Consent should be removed.
 - OT 6.07 Recordkeeping should be removed.

The Occupational Therapists Affiliated Credentialing Board explains modifications to its rule-making proposal prompted by public comments as follows:

- OT 6.03 Technology and Equipment was updated to read “An occupational therapist or occupational therapy assistant who provides occupational therapy services using a telehealth visit shall utilize technology that enables the transmission of information via the technology that is of sufficient quality to be functionally equivalent to face-to-face contact. 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 (3) was removed.

- OT 6.04 (4) was updated to read “Upon scheduling a telehealth visit, clear information shall be provided to the patient that the visit will be a telehealth visit”
- OT 6.06 Informed Consent was removed.
- OT 6.07 Recordkeeping was removed.

VI. RESPONSE TO MEDICAL EXAMINING BOARD AND LEGISLATIVE COUNCIL STAFF RECOMMENDATIONS:

The proposed rule was submitted to the Medical Examining Board on January 20, 2021. The Medical Examining Board expressed support for the proposed rule, and had no comments for the Occupational Therapists Affiliated Credentialing Board to consider.

Legislative Council staff did not make any recommendations for the proposed rule.

VII. REPORT FROM THE SBRRB AND FINAL REGULATORY FLEXIBILITY ANALYSIS:

N/A

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 21-033)

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.

2021 Wisconsin Act 121 added a definition to the statute for “Telehealth” and a requirement that if the Board is going to make rules on this subject, they must use the new definition from the statute.

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:

Nilajah Hardin, Administrative Rules Coordinator, Department of Safety and Professional Services, Division of Policy Development, P.O. Box 8366, Madison, Wisconsin 53708-8366; telephone (608) 267-7139; 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” has the meaning given in s.440.01 (1) (hm), Stats.

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 enables the transmission of information via the technology that is of sufficient quality to be functionally equivalent to face-to-face contact. 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) Upon scheduling a telehealth visit, clear information shall be provided to the patient that the visit will be a telehealth visit.

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 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)

This Proposed Order of the Occupational Therapists Affiliated Credentialing Board is approved for submission to the Governor and Legislature.

Dated 11/9/2022 Agency *Teresa S. Black*
Vice Chairperson
Occupational Therapists
Affiliated Credentialing Board

ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

1. Type of Estimate and Analysis <input checked="" type="checkbox"/> Original <input type="checkbox"/> Updated <input type="checkbox"/> Corrected	2. Date December 28, 2020
3. Administrative Rule Chapter, Title and Number (and Clearinghouse Number if applicable) OT 1 to 6	
4. Subject Telehealth	
5. Fund Sources Affected <input type="checkbox"/> GPR <input type="checkbox"/> FED <input type="checkbox"/> PRO <input type="checkbox"/> PRS <input type="checkbox"/> SEG <input type="checkbox"/> SEG-S	6. Chapter 20, Stats. Appropriations Affected
7. Fiscal Effect of Implementing the Rule <input checked="" type="checkbox"/> No Fiscal Effect <input type="checkbox"/> Increase Existing Revenues <input type="checkbox"/> Increase Costs <input type="checkbox"/> Decrease Costs <input type="checkbox"/> Indeterminate <input type="checkbox"/> Decrease Existing Revenues <input type="checkbox"/> Could Absorb Within Agency's Budget	
8. The Rule Will Impact the Following (Check All That Apply) <input type="checkbox"/> State's Economy <input type="checkbox"/> Specific Businesses/Sectors <input type="checkbox"/> Local Government Units <input type="checkbox"/> Public Utility Rate Payers <input type="checkbox"/> Small Businesses (if checked, complete Attachment A)	
9. Estimate of Implementation and Compliance to Businesses, Local Governmental Units and Individuals, per s. 227.137(3)(b)(1). \$0	
10. Would Implementation and Compliance Costs Businesses, Local Governmental Units and Individuals Be \$10 Million or more Over Any 2-year Period, per s. 227.137(3)(b)(2)? <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	
11. Policy Problem Addressed by the Rule Current administrative rules of the Occupational Therapy 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.	
12. Summary of the Businesses, Business Sectors, Associations Representing Business, Local Governmental Units, and Individuals that may be Affected by the Proposed Rule that were Contacted for Comments. The proposed rule was posted on the Department of Safety and Professional Services' website for 14 days in order to solicit comments from businesses, representative associations, local governmental units, and individuals that may be affected by the rule. No comments were received.	
13. Identify the Local Governmental Units that Participated in the Development of this EIA. No local governmental units participated in the development of this EIA.	
14. Summary of Rule's Economic and Fiscal Impact on Specific Businesses, Business Sectors, Public Utility Rate Payers, Local Governmental Units and the State's Economy as a Whole (Include Implementation and Compliance Costs Expected to be Incurred) The proposed rule will not have a significant impact on specific businesses, business sectors, public utility rate payers, local governmental units, or the state's economy as a whole.	
15. Benefits of Implementing the Rule and Alternative(s) to Implementing the Rule The benefit to implementing the rule is established standards of practice, care, and conduct for providing occupational therapy services using a telehealth visit. If the rule is not implemented, these standards will remain unclear	

ADMINISTRATIVE RULES Fiscal Estimate & Economic Impact Analysis

16. Long Range Implications of Implementing the Rule

The long range implication of implementing the rule is established standards of practice, care, and conduct for providing occupational therapy services using a telehealth visit.

17. Compare With Approaches Being Used by Federal Government

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.

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18. Compare With Approaches Being Used by Neighboring States (Illinois, Iowa, Michigan and Minnesota)

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)

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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.

19. Contact Name	20. Contact Phone Number
Dale Kleven	(608) 261-4472

This document can be made available in alternate formats to individuals with disabilities upon request.

ADMINISTRATIVE RULES
Fiscal Estimate & Economic Impact Analysis

ATTACHMENT A

1. Summary of Rule's Economic and Fiscal Impact on Small Businesses (Separately for each Small Business Sector, Include Implementation and Compliance Costs Expected to be Incurred)

2. Summary of the data sources used to measure the Rule's impact on Small Businesses

3. Did the agency consider the following methods to reduce the impact of the Rule on Small Businesses?

- Less Stringent Compliance or Reporting Requirements
- Less Stringent Schedules or Deadlines for Compliance or Reporting
- Consolidation or Simplification of Reporting Requirements
- Establishment of performance standards in lieu of Design or Operational Standards
- Exemption of Small Businesses from some or all requirements
- Other, describe:

4. Describe the methods incorporated into the Rule that will reduce its impact on Small Businesses

5. Describe the Rule's Enforcement Provisions

6. Did the Agency prepare a Cost Benefit Analysis (if Yes, attach to form)

- Yes No
-