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RULE ADOPTIONS

Reporter

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Agency

LAW AND PUBLIC SAFETY > DIVISION OF CONSUMER AFFAIRS > OCCUPATIONAL THERAPY ADVISORY COUNCIL

Administrative Code Citation

Adopted New Rules: N.J.A.C. 13:44K-7

Text

Telemedicine and Telehealth

Proposed: March 15, 2021, at 53 N.J.R. 417(a).

Adopted: August 30, 2021, by Sean P. Neafsey, Acting Director, Division of Consumer Affairs.

Filed: December 14, 2021, as R.2022 d.016, **without change**.

Authority: N.J.S.A. 45:1-61 et seq., and 45:9-37.75.

Effective Date: January 18, 2022.

Expiration Date: February 22, 2023.

Summary of Public Comments and Agency Responses:

The official comment period ended on May 14, 2021. The Director of the Division of Consumer Affairs (Division) and the Occupational Therapy Advisory Council (Council) received comments from Kristen Neville, Manager, State Affairs, American Occupational Therapy Association; comments endorsed by the New Jersey Occupational Therapy Association (NJOTA).

1. COMMENT: The commenter noted that "licensee" is used throughout the proposed rules and requested clarification about the role the occupational therapist and occupational therapy assistant play in

delivering services through telehealth. The commenter questioned whether an occupational therapist, occupational therapy assistant, or temporary licensee can decide if telehealth is the best service delivery method for a client. The commenter believes that if the rules are not made clearer, it will result in confusion and potential harm to clients and the general public.

RESPONSE: The Council determined that the telehealth and telemedicine rules apply to all individuals licensed by the Council, including occupational therapists, occupational therapy assistants, and temporary licensees. Accordingly, the term "licensee" is appropriately used throughout the subchapter. In addition, at N.J.A.C. 13:44K-7.3(b)1, the Council specified that an occupational therapy assistant or any licensee working under supervision is independently responsible for determining whether occupational therapy services can be provided through telemedicine or telehealth in a manner that is consistent with in-person standards of care.

2. COMMENT: The commenter noted that N.J.A.C. 13:44K-7.3(b)1 provides:

"An occupational therapy assistant or any licensee working under supervision shall be responsible for determining whether occupational therapy services can be provided through telemedicine or telehealth in a manner that is consistent with in-person standard[s] of care."

The commenter believes that this provision conflicts with the Council's rule on supervision, N.J.A.C. 13:44K-6.1(c), which states that:

"The supervising occupational therapist shall retain responsibility for the occupational therapy care of the client being treated by the licensed occupational therapy assistant, a temporary licensed occupational therapist, or a temporary licensed occupational therapy assistant."

RESPONSE: The Council disagrees that N.J.A.C. 13:44K-6.1(c) conflicts with N.J.A.C. 13:44K-7.3(b)1. Although the supervising occupational therapist retains the responsibility for the occupational therapy care of the client, N.J.A.C. 13:44K-7.3(b)1 makes it clear that an occupational therapy assistant or any licensee working under supervision is independently responsible for determining whether occupational therapy services can be provided through telemedicine or telehealth in a manner that is consistent with in-person standards of care.

Federal Standards Statement

Requirements at N.J.A.C. 13:44K-7.8 impose the same standards for privacy of communications as are imposed at 45 CFR 160 and 164, which are incorporated by reference into the adopted new rules. There are no other Federal laws or standards applicable to the adopted new rules.

Full text of the adopted new rules follows:

SUBCHAPTER 7. TELEMEDICINE AND TELEHEALTH

13:44K-7.1 Purpose and scope

(a) The purpose of this subchapter is to implement the provisions of P.L. 2017, c. 117 (N.J.S.A. 45:1-61 et seq.), which authorizes healthcare providers to engage in telemedicine and telehealth.

(b) This subchapter shall apply to all persons who are licensed by the Council.

(c) Pursuant to N.J.S.A. 45:1-62, an occupational therapist, occupational therapy assistant, temporary occupational therapist, or temporary licensed occupational therapy assistant must hold a license issued by the Council, if he or she:

1. Is located in New Jersey and provides occupational therapy services to any client located in or out of New Jersey by means of telemedicine or telehealth; or
2. Is located outside of New Jersey and provides occupational therapy services to any client located in New Jersey by means of telemedicine or telehealth.

(d) Notwithstanding N.J.S.A. 45:1-62 and (c) above, a healthcare provider located in another state who consults with a licensee in New Jersey through the use of information and communications technologies, but does not direct client care, will not be considered as providing health care services to a client in New Jersey consistent with N.J.S.A. 45:37-51, et seq., and will not be required to obtain licensure in New Jersey in order to provide such consultation.

13:44K-7.2 Definitions

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

"Asynchronous store-and-forward" means the acquisition and transmission of images, diagnostics, data, and medical information either to or from an originating site or to or from the licensee at a distant site, which allows for the client to be evaluated without being physically present.

"Council" means the Occupational Therapy Advisory Council.

"Cross-coverage" means a licensee engages in a remote occupational therapy evaluation of a client, without in-person contact, at the request of another licensee who has established a proper licensee-client relationship with the client.

"Distant site" means a site at which a licensee is located while providing occupational therapy services by means of telemedicine or telehealth.

"Licensee" means an individual licensed by the Council.

"On-call" means a licensee is available, where necessary, to physically attend to the urgent and follow-up needs of a client for whom the licensee has temporarily assumed responsibility, as designated by the client's primary care licensed occupational therapist or other health care provider of record.

"Originating site" means a site at which a client is located at the time that occupational therapy services are provided to the client by means of telemedicine or telehealth.

"Proper licensee-client relationship" means an association between a licensee and client, wherein the occupational therapist or occupational therapy assistant owes a duty to the client to be available to render professional services consistent with his or her training and experience, which is established pursuant to the requirements at N.J.A.C. 13:44K-7.4.

"Telehealth" means the use of information and communications technologies, including telephones, remote client monitoring devices, or other electronic means, to support clinical health care, provider

consultation, client and professional health-related education, public [page=158] health, health administration, and other services in accordance with the provisions of P.L. 2017, c. 117 (N.J.S.A.45:1-61 et seq.).

"Telemedicine" means the delivery of a health care service, including supportive mental health services, using electronic communications, information technology, or other electronic or technological means to bridge the gap between a health care licensee who is located at a distant site and a client who is located at an originating site, either with or without the assistance of an intervening licensee, and in accordance with the provisions of P.L. 2017, c. 117 (N.J.S.A. 45:1-61 et seq.). "Telemedicine" does not include the use, in isolation, of audio-only telephone conversation, electronic mail, instant messaging, phone text, or facsimile transmission.

13:44K-7.3 Standard of care

(a) Prior to providing services through telemedicine or telehealth, a licensee shall determine whether providing those services through telemedicine or telehealth would be consistent with the standard of care applicable for those services when provided in-person.

(b) If a licensee determines, either before or during the provision of occupational therapy services, that services cannot be provided through telemedicine or telehealth in a manner that is consistent with in-person standards of care, the licensee shall not provide or supervise services through telemedicine or telehealth.

1. An occupational therapy assistant or any licensee working under supervision shall be responsible for determining whether occupational therapy services can be provided through telemedicine or telehealth in a manner that is consistent with in-person standards of care.

(c) A licensee who determines that services cannot be provided through telemedicine or telehealth pursuant to (b) above shall advise the client to obtain services in-person.

(d) A licensee who provides a treatment, or consultation recommendation, including discussions regarding the risk and benefits of a client's treatment options, through telemedicine or telehealth, shall be held to the same standard of care or practice standards as are applicable to in-person settings.

13:44K-7.4 Licensee-client relationship

(a) Prior to providing services through telemedicine or telehealth, a licensee shall establish a licensee-client relationship by:

1. Identifying the client with, at a minimum, the client's name, date of birth, phone number, and address. A licensee may also use a client's assigned identification number, Social Security number, photo, health insurance policy number, or other identifier associated directly with the client; and

2. Disclosing and validating the licensed occupational therapist or occupational therapy assistant's identity, license, title, and, if applicable, specialty and board certifications.

(b) Prior to initiating contact with a client for the purpose of providing services to the client using telemedicine or telehealth, a licensee shall:

1. Review the client's medical history, any available medical records, and any other relevant client records including, but not limited to, educational, vocational, or social records;

2. Determine as to each unique client encounter whether he or she will be able to provide the same standard of care using telemedicine or telehealth as would be provided if the services were provided in-person; and

3. Provide the client the opportunity to sign a consent form that authorizes the licensee to release client records of the encounter to the client's primary care licensee or other health care provider identified by the client.

(c) Notwithstanding (a) and (b) above, occupational therapy services may be provided through telemedicine or telehealth without a proper licensee-client relationship if the provision of occupational therapy services is:

1. For informal consultations with another health care provider performed by a licensee outside the context of a contractual relationship, or on an irregular or infrequent basis, without the expectation or exchange of direct or indirect compensation;

2. During episodic consultations by a health care specialist located in another jurisdiction who provides consultation services, upon request, to a licensee in this State;

3. Related to health care assistance provided in response to an emergency or disaster, provided that there is no charge for the medical assistance; or

4. Provided by a substitute licensee acting on behalf, and at the designation, of an absent licensee in the same specialty on an on-call or cross-coverage basis.

13:44K-7.5 Provision of occupational therapy services through telemedicine or telehealth

(a) As long as a licensee has satisfied the requirements at N.J.A.C. 13:44K-7.4, a licensee may provide occupational therapy services to a client through the use of telemedicine and may engage in telehealth to support and facilitate the provision of occupational therapy services to clients.

(b) Prior to providing services through telemedicine or telehealth, a licensee shall determine the client's originating site and record this information in the client's record.

(c) A licensee providing healthcare services through telemedicine shall use interactive, real-time, two-way communication technologies, which shall include, except as provided at (e) below, a video component which allows a licensee to see a client and the client to see the licensee during the provision of occupational therapy services.

(d) A licensee providing services through telemedicine or telehealth may use asynchronous store-and-forward technology to allow for the electronic transmission of:

1. Images;

2. Diagnostics;

3. Data; and

4. Medical information.

(e) If, after accessing and reviewing the client's records, a licensee determines that he or she is able to meet the standard of care for such services if they were being provided in-person without using the video component described at (c) above, the licensee may use interactive, real-time, two-way audio in combination with asynchronous store-and-forward technology, without a video component.

(f) Prior to providing services through telemedicine or telehealth, a licensee shall review any medical history, or medical records provided by a client as follows:

1. For an initial encounter with a client, medical history, medical records, and any other relevant client records including, but not limited to, educational, vocational, or social records; shall be reviewed prior to the provision of occupational therapy services through telemedicine or telehealth; and

2. For any subsequent interactions with a client, medical history, medical records, and any other relevant client records including, but not limited to, educational, vocational, or social records, shall be reviewed either prior to the provision of occupational therapy services through telemedicine or telehealth or contemporaneously with the encounter with the client.

(g) During and after the provision of occupational therapy services through telemedicine or telehealth, a licensee shall provide his or her name, professional credentials, and contact information to the client. Such contact information shall enable the client to contact the licensee for at least 72 hours following the provision of services, or for a longer period if warranted by the client's circumstances and accepted standards of care.

(h) After the provision of occupational therapy services through telemedicine or telehealth, a licensee shall provide the client, upon request, with his or her records reflecting the services provided.

(i) A licensee shall provide, upon a client's written request, the client's information to the client's primary care provider or to other healthcare providers.

(j) A licensee engaging in telemedicine or telehealth shall refer a client for follow-up care when necessary.

13:44K-7.6 Records

A licensee who provides services through telemedicine or telehealth shall maintain a record of the care provided to a client. Such records shall comply with the requirements at N.J.A.C. 13:44K-10.1, and all other applicable State and Federal statutes, rules, and regulations for recordkeeping, confidentiality, and disclosure of a client's medical record.

[page=159] 13:44K-7.7 Prevention of fraud and abuse

(a) In order to establish that a licensee has made a good faith effort to prevent fraud and abuse when providing services through telemedicine or telehealth, a licensee must establish written protocols that address:

1. Authentication and authorization of users;

2. Authentication of the client during the initial intake pursuant to N.J.A.C. 13:44K-7.4(a)1;

3. Authentication of the origin of information;
4. The prevention of unauthorized access to the system or information;
5. System security, including the integrity of information that is collected, program integrity, and system integrity;
6. Maintenance of documentation about system and information usage;
7. Information storage, maintenance, and transmission; and
8. Synchronization and verification of client profile data.

13:44K-7.8 Privacy and notice to clients

(a) Licensees who communicate with clients by electronic communications other than telephone or facsimile shall establish written privacy practices that are consistent with Federal standards under 45 CFR 160 and 164, which are incorporated herein by reference, relating to privacy of individually identifiable health information.

(b) Written privacy practices pursuant to (a) above shall include privacy and security measures that assure confidentiality and integrity of client-identifiable information. Transmissions, including client email, prescriptions, and laboratory results must be password protected, encrypted electronic prescriptions, or protected through substantially equivalent authentication techniques.

(c) A licensee who becomes aware of a breach in confidentiality of client information, as defined at 45 CFR 164.402, shall comply with the reporting requirements at 45 CFR 164.

(d) Licensees, or their authorized representatives, shall provide a client, prior to evaluation or treatment, with copies of written privacy practices and shall obtain the client's written acknowledgement of receipt of the notice.

(e) Licensees who provide services through telemedicine or telehealth, or their authorized representatives, shall, prior to providing services, give clients notice regarding telemedicine and telehealth, including the risks and benefits of being treated through telemedicine or telehealth and how to receive follow-up care or assistance in the event of an adverse reaction to the treatment or in the event of an inability to communicate as a result of a technological or equipment failure. A licensee shall obtain a signed and dated statement indicating that the client received this notice.

(f) When telemedicine or telehealth is unable to provide all pertinent clinical information that a licensee exercising ordinary skill and care would deem reasonably necessary to provide care to a client, the licensee shall inform the client of this prior to the conclusion of the provision of care through telemedicine or telehealth and shall advise the client regarding the need for the client to obtain an additional in-person medical evaluation reasonably able to meet the client's needs.