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RULE PROPOSALS

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

43 N.J.R. 1239(a)

Proposed Amendment: N.J.A.C. 13:44K-5.4

Proposed New Rule: N.J.A.C. 13:44K-5.5

[Click here to view Interested Persons Statement](#)

Use of Physical Agent Modalities; Use of Physical Agent Modalities by a Licensed Occupational Therapy Assistant; Supervisor Responsibilities

Authorized By: Division of Consumer Affairs, Thomas R. Calcagni, Acting Director, in consultation with the Occupational Therapy Advisory Council.

Authority: N.J.S.A. 45:1-15 and 45:9-37.51 et seq.

Calendar Reference: See Summary below for explanation of exception to the calendar requirement.

Proposal Number: PRN 2011-119.

Submit comments by July 15, 2011 to:
Laura Anderson, Executive Director
Occupational Therapy Advisory Council
124 Halsey Street
P.O. Box 45037
Newark, New Jersey 07101

The agency proposal follows:

Summary

The Division of Consumer Affairs (the Division), in consultation with the Occupational Therapy Advisory Council (the Council), is proposing a new rule to permit licensed occupational therapy assistants to use advanced physical agent modalities under the supervision of licensed occupational therapists. In 2009, the Division adopted a new rule, N.J.A.C. 13:44K-5.4, concerning the use of physical agent modalities by licensed occupational therapists. The rule imposed certain requirements with respect to the type of modalities that a licensed occupational therapist could delegate to occupational therapy assistants to be used on clients. Under N.J.A.C. 13:44K-5.4, an occupational therapist can delegate the application of superficial thermal and mechanical device modalities to an occupational therapy assistant, provided the assistant was working under the supervision of the occupational therapist. However, the occupational therapist cannot, under any circumstances, delegate the application of advanced physical agent modalities to an occupational therapy assistant. During the public comment period for the proposed rule, the Division received comments objecting to that part of the rule prohibiting occupational therapy assistants from using advanced physical agent modalities. The commenters noted that this prohibition would result in a significant interruption in occupational therapy services for clients because clients would be required to wait for an occupational therapist to personally apply advanced physical agent modalities during the course of their treatment sessions. The commenters believed that this interruption of client care would lead to significant, negative economic implications for occupational therapy practices throughout the State.

Although the Division did not change N.J.A.C. 13:44K-5.4 on adoption, in response to the public comments, the Division noted that it would undertake a review of education standards for occupational therapy assistants, as well as the modalities requirements in other jurisdictions, to determine whether delegation of advanced physical agent modalities to occupational therapy assistants could be permitted in a manner that would ensure the health, safety and welfare of clients. The notice of adoption summarizing the commenters' objections and the Division's response appeared in the New Jersey Register at 41 N.J.R. 2017(a).

After review, the Division, in consultation with the Council, has determined that the delegation of advanced physical agent modalities to occupational therapy assistants who are properly trained and appropriately supervised will benefit consumers throughout the State who receive occupational therapy services. The Division, therefore, is proposing a new rule, N.J.A.C. 13:44K-5.5, that establishes requirements for the use of advanced physical agent modalities by occupational therapy assistants.

Proposed new rule N.J.A.C. 13:44K-5.5(a) reiterates the provision contained in N.J.A.C. 13:44K-5.4(i), which authorizes the delegation of superficial thermal agents and mechanical device modalities to occupational therapy assistants. The subsection provides that an occupational therapy assistant may use such modalities under the supervision of an occupational therapist consistent with the requirements of N.J.A.C. 13:44K-5.4. Those modalities include hydrotherapy/whirlpool, cryotherapy, fluidotherapy, hot packs, paraffin, water, infrared light and other commercially available heating and cooling technologies and mechanical devices, such as vasopneumatic and continuous passive motion devices, as provided in N.J.A.C. 13:44K-5.4.

Proposed new rule N.J.A.C. 13:44K-5.5(b) authorizes an occupational therapy assistant to use the advanced physical agent modalities set forth in N.J.A.C. 13:44K-5.4(c) for use by trained occupational therapists, that is, diathermy, high-voltage galvanic stimulation, micro current stimulation, transcutaneous electrical nerve stimulation, neuromuscular electrical stimulation, iontophoresis, therapeutic ultrasound, phonophoresis, and cold lasers, under the supervision of an occupational therapist who has been appropriately trained, provided the assistant satisfies the requirements of the new rule.

In order to utilize these advanced modalities, an occupational therapy assistant must complete a 30-hour Council-approved training course that meets the requirements established in N.J.A.C. 13:44K-5.4(e). The Division notes that occupational therapy assistants must complete the same training course that is required of occupational therapists desiring to utilize advanced physical agent modalities. The Division believes that the 30-hour Council-approved course will provide occupational therapy assistants with comprehensive and well-rounded instruction

in the application of such modalities, which will allow assistants to safely and effectively utilize them under the supervision of a qualified occupational therapist. A qualified supervising occupational therapist is one who, pursuant to proposed N.J.A.C. 13:44K-5.5(d), has at least 1200 hours of work experience obtained in no less than one year and in no more than three years of practice, consistent with the current supervisor requirements of N.J.A.C. 13:44K-6.2(g), and who either has completed the 30-hour Council-approved training course or holds a current certification from the Hand Therapy Certification Commission or other [page=1240] national organization, consistent with the current requirements of N.J.A.C. 13:44K-5.4(f).

Proposed new rule N.J.A.C. 13:44K-5.5(e) imposes requirements with respect to the level of supervision that an occupational therapist must provide to occupational therapy assistants using advanced physical agent modalities. Specifically, the rule requires the supervising occupational therapist to provide close supervision, as that term is currently defined in N.J.A.C. 13:44K-1.2, of the licensed occupational therapy assistant. During this period of close supervision, which requires daily, face-to-face contact with and frequent observation of the performance of the assistant at the location where services are being rendered, the occupational therapist must directly observe the occupational therapy assistant's application of each type of modality no fewer than five times. The occupational therapist and occupational therapy assistant must maintain documentation of this supervision consistent with the current requirements of N.J.A.C. 13:44K-6.2(h) and 6.3(c), respectively. Following the five instances of direct observation of the assistant's application of a particular type of modality, the supervising occupational therapist must determine the level of supervision, whether close, routine or general, as those terms are defined in N.J.A.C. 13:44K-1.2, that will be required of the assistant when using the particular type of modality. In making this determination, the supervising occupational therapist must consider the condition of the client, the education, skill and training of the assistant and the nature of the tasks and activities to be performed by the assistant. However, if the occupational therapy assistant has been engaged in the practice of occupational therapy for less than one year on a full-time basis, the supervising occupational therapist must continue to provide close supervision of the assistant, consistent with current supervisory requirements imposed under N.J.A.C. 13:44K-6.2(e).

Proposed new rule N.J.A.C. 13:44K-5.5(f) prohibits a supervising occupational therapist from delegating the close supervision and direct observation of an occupational therapy assistant's use of advanced physical agent modalities to anyone other than a licensed occupational therapist who has met the training requirements established in the rule. Proposed new N.J.A.C. 13:44K-5.5(g) requires a licensed occupational therapy assistant to retain documentation relating to completion of the approved training course. Such documentation must be made available to the Council upon request. N.J.A.C. 13:44K-5.5(h) permits an occupational therapy assistant to apply to the Council for approval of a course in the use of advanced physical agent modalities that has not been pre-approved by the Council, provided the assistant submits course documentation for review.

Proposed new N.J.A.C. 13:44K-5.5(i) provides that a licensed occupational therapy assistant who uses advanced physical agent modalities without having satisfied the requirements of the rule will be deemed to have engaged in professional misconduct and may be subject to penalties. Under proposed new N.J.A.C. 13:44K-5.5(j), notwithstanding the fact that an occupational therapy assistant meets the competency requirements of the new rule, it will be deemed professional misconduct for an assistant to use a specific modality that he or she has not been trained to use until he or she becomes familiar with the device's proper use and contraindications, and until he or she has been directly observed by a supervising occupational therapist applying the modality at least five times in a patient treatment setting. Following such direct observation, the occupational therapy assistant may use the modality under the level of supervision deemed appropriate by the licensed occupational therapist.

In light of proposed new N.J.A.C. 13:44K-5.5, the Division is proposing amendments to N.J.A.C. 13:44K-5.4. In addition to clarifying amendments to the heading of the rule to refer to the delegation of modalities to occupational therapy assistants, subsection (j) of the rule is proposed to be amended to eliminate the current prohibition against delegation of advanced physical agent modalities to licensed occupational therapy assistants. The proposed amendments also provide a cross reference to proposed new N.J.A.C. 13:44K-5.5 for consistency.

The Division has provided a 60-day comment period for this notice of proposal, therefore, this notice is excepted from the rulemaking calendar requirement pursuant to N.J.A.C. 1:30-3.3(a)5.

Social Impact

The Division believes that proposed new rule N.J.A.C. 13:44K-5.5 will have a positive impact on consumers receiving occupational therapy services in the State. By permitting properly trained and appropriately supervised occupational therapy assistants to use advanced physical agent modalities, the Division believes that the new rule will help to increase the number of trained professionals able to provide such services to consumers in occupational therapy treatment settings, thereby decreasing the amount of time consumers must wait to obtain treatment. The Division believes that the new rule will help to ensure that consumers receive occupational therapy services without unnecessary interruption in care.

Economic Impact

Proposed new rule N.J.A.C. 13:44K-5.5 will have an economic impact upon occupational therapy assistants who desire to use advanced physical agent modalities, to the extent that these occupational therapy assistants must bear the costs associated with completing an approved advanced physical agent modalities training course. In addition, the proposed new rule may have an economic impact upon occupational therapy practices in the State, to the extent that the rule may permit occupational therapists to increase the number of clients they treat, in light of the fact that occupational therapy assistants will now be permitted to provide services previously reserved to occupational therapists. The Division, however, believes that this impact will be offset by the increased responsibilities that occupational therapists will bear with respect to the supervision of occupational therapy assistants providing such services.

Federal Standards Statement

A Federal standards analysis is not required because the proposed amendment and new rule are governed by N.J.S.A. 45:9-37.51 et seq., and are not subject to any Federal standards or requirements.

Jobs Impact

The Division does not anticipate that the proposed amendment and new rule will result in an increase or decrease in the number of jobs in the State.

Agriculture Industry Impact

The proposed amendment and new rule will have no impact on the agriculture industry in the State.

Regulatory Flexibility Analysis

Currently, the Division licenses approximately 4,700 occupational therapists and 700 occupational therapy assistants. If these licensees are considered "small businesses," within the meaning of the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., then the following analysis applies.

The proposed amendment and new rule will impose various reporting, recordkeeping and compliance requirements upon occupational therapy assistants who seek to use advanced physical agent modalities, and upon licensed occupational therapists who supervise the provision of these services. These requirements are discussed in the Summary above.

No additional professional services will be needed to comply with the proposed amendment and new rule. The costs of compliance with the proposed amendment and new rule are discussed in the Economic Impact above. The

Division believes that the proposed amendment and new rule should be uniformly applied to all licensed occupational therapists and occupational therapy assistants in order to ensure the health, safety and welfare of the general public in the provision of occupational therapy services. Therefore, no differing compliance requirements for any licensees are provided based upon the size of the business.

Smart Growth Impact

The Division does not believe that the proposed amendment and new rule will have any impact upon the achievement of smart growth or upon the implementation of the State Development and Redevelopment Plan.

Housing Affordability Impact

The proposed amendment and new rule will have an insignificant impact on affordable housing in New Jersey and there is an extreme unlikelihood that the rules would evoke a change in the average costs associated with housing because the proposed amendment and new rule [page=1241] concern the use of advanced physical agent modalities by licensed occupational therapy assistants.

Smart Growth Development Impact

The proposed amendment and new rule will have an insignificant impact on smart growth development and there is an extreme unlikelihood that the rules would evoke a change in housing production in Planning areas 1 or 2, or within designated centers, under the State Development and Redevelopment Plan in New Jersey because the proposed amendment and new rule concern the use of advanced physical agent modalities by licensed occupational therapy assistants.

Full text of the proposal follows (additions indicated in boldface **thus**; deletions indicated in brackets [thus]):

SUBCHAPTER 5. SCOPE OF PRACTICE

13:44K-5.4 Use of physical agent modalities **by a licensed occupational therapist; delegation to licensed occupational therapy assistant**

(a)-(i) (No change.)

(j) A licensed occupational therapist [shall not] **may** delegate the application of the advanced physical agent modalities set forth in (c) above **to a licensed occupational therapy assistant consistent with the requirements of N.J.A.C. 13:44K-5.5**. Delegation of advanced physical agent modalities **to anyone other than a licensed occupational therapy assistant who has satisfied the requirements of N.J.A.C. 13:44K-5.5** shall be deemed professional misconduct and may subject a licensee to the penalties set forth in N.J.S.A. 45:1-21 et seq.

(k)-(m) (No change.)

13:44K-5.5 Use of physical agent modalities by a licensed occupational therapy assistant; supervisor responsibilities

(a) **A licensed occupational therapy assistant may use the superficial thermal agent and mechanical device modalities set forth in N.J.A.C. 13:44K-5.4(b) under the supervision of a licensed occupational therapist consistent with the requirements of N.J.A.C. 13:44K-5.4.**

(b) **A licensed occupational therapy assistant may use the advanced physical agent modalities set forth in**

N.J.A.C. 13:44K-5.4(c) under the supervision of a licensed occupational therapist consistent with the requirements of this section.

(c) Prior to using advanced physical agent modalities, a licensed occupational therapy assistant shall have completed a training course that meets the requirements set forth in N.J.A.C. 13:44K-5.4(e).

(d) A licensed occupational therapy assistant shall use advanced physical agent modalities only under the supervision of a licensed occupational therapist who has:

1. Met the experience requirements of N.J.A.C. 13:44K-6.2(g); and

2. Completed a training course that meets the requirements of N.J.A.C. 13:44K-5.4(e) or who holds a current certification from the Hand Therapy Certification Commission or any other national organization that utilizes substantially similar certification standards consistent with the requirements of N.J.A.C. 13:44K-5.4(f).

(e) A licensed occupational therapist shall supervise the use of advanced physical agent modalities by a licensed occupational therapy assistant consistent with the following:

1. The supervising occupational therapist shall provide close supervision, as defined in N.J.A.C. 13:44K-1.2, of the licensed occupational therapy assistant, during which time the occupational therapist shall directly observe the occupational therapy assistant's application of each type of modality in a patient treatment setting no fewer than five times. Documentation of such supervision shall be maintained by the supervising occupational therapist consistent with the requirements of N.J.A.C. 13:44K-6.2(h) and by the licensed occupational therapy assistant consistent with the requirements of N.J.A.C. 13:44K-6.3(c);

2. Following the five instances of direct observation of the licensed occupational therapy assistant's application of a particular type of modality, the supervising occupational therapist shall determine the level of supervision required of the occupational therapy assistant, consistent with the requirements of N.J.A.C. 13:44K-6.2(e).

i. Notwithstanding (e)2 above, the occupational therapist shall continue to provide close supervision for any occupational therapy assistant who has been engaged in the practice of occupational therapy for less than one year on a full-time basis, consistent with the requirements of N.J.A.C. 13:44K-6.2(e); and

3. The supervising occupational therapist shall satisfy all supervisor responsibilities set forth in N.J.A.C. 13:44K-6.2.

(f) A supervising occupational therapist shall not delegate the close supervision of an occupational therapy assistant's use of advanced physical agent modalities, including the direct observation of the occupational therapy assistant's application of the modalities, to anyone other than a licensed occupational therapist who has met the requirements of (d) and (e) above.

(g) A licensed occupational therapy assistant shall retain documentation relating to his or her completion of the training course and shall make such documentation available to the Council upon request. The documentation shall include, if applicable:

1. The name and address of the person or organization presenting the course;

2. The name and address of the facility where the course was presented;

3. A copy of the course syllabus, which includes a detailed description of the learning objectives and teaching

methods employed in the course and the qualifications of the instructor(s); and

4. A certificate of completion from the course sponsor.

(h) A licensed occupational therapy assistant may apply to the Council for approval of a course in the use of advanced physical agent modalities that has not been pre-approved by the Council. The licensee shall submit the documentation set forth in (g) above to the Council for review.

(i) A licensed occupational therapy assistant who uses advanced physical agent modalities without having satisfied the requirements of this section shall be deemed to have engaged in professional misconduct and may be subject to the penalties set forth in N.J.S.A. 45:1-21 et seq.

(j) Notwithstanding the fact that a licensed occupational therapy assistant is permitted to use advanced physical agent modalities because he or she has satisfied the training requirements of this section, a licensed occupational therapy assistant shall not use a specific advanced physical agent modality that he or she has not been trained to use until he or she is familiar with the device's proper use and contraindications, and until he or she has been directly observed under close supervision by a supervising occupational therapist in the application of the modality at least five times in a patient treatment setting. Following such direct observation, the licensed occupational therapy assistant may use the modality under the supervision of a licensed occupational therapist consistent with the requirements of (e)2 above. Failure to comply with this section shall be deemed professional misconduct and may subject a licensed occupational therapy assistant to the penalties set forth in N.J.S.A. 45:1-21 et seq.