

# **CALIFORNIA BOARD OF OCCUPATIONAL THERAPY**

## **FINAL STATEMENT OF REASONS**

**Hearing Date:** No public hearing held (No request from the public was received)

**Subject Matter of Proposed Regulations:** Standards of Practice for Telehealth

**Sections Affected:** Title 16, Division 39, California Code of Regulations, Section 4172

### **Updated Information:**

The Initial Statement of Reasons is included in the file. During the rulemaking process the Board made available two modifications to the initially proposed language. The underlying reasons the Board is seeking this proposed action has not changed.

The Board modified initial language proposed in California Code of Regulations, Title 16, Division 39, Section 4172(a), by striking language “in the State or” which was intended to establish an occupational therapy practitioner shall be located in the state at the time when telehealth services are delivered to a California consumer. This modification was made to clarify the scope of practice applies equally to all California licensees.

The Board made a formatting change by moving initially proposed language in Section 4172(b) establishing that occupational therapy practitioners “must exercise the same standard of care when providing services via telehealth as with any other mode of delivering occupational therapy services” to Section 4172(e)(1) where the language is more compatible and relevant to the section.

The Board modified initially proposed language in Section 4172(c) to establish and clarify a record must exist that the consumer has consented to receiving services via telehealth. The intent of the Board’s second modified language was to establish that there must be a written waiver and authorization for the release of records signed by the consumer in the treatment record. The Board’s second modification requires the practitioner document in the record that he or she obtained verbal consent to receive services via telehealth from the consumer. This is consistent with the Business and Professions Code (BPC) Section 2290.5(b). Due to reformatting of the initially proposed language, this language is now in Section 4172(b).

The Board modified initially proposed language in Section 4172(d)(1) which purpose was to establish that prior to providing services via telehealth, an occupational therapist shall determine whether an in-person evaluation is necessary. The Board proposed a modification to augment the initially proposed language to establish that “a local therapist shall be available if an onsite visit was required.” A second modification was made to drop the reference that a “local” therapist must be available to conduct the in-person evaluation. The modification clarifies that it does not matter whether the occupational therapist is local or not, only that an occupational therapist be available if an in-person evaluation by a therapist is necessary. The term “therapist” is used specifically to include occupational therapists and exclude occupational therapy assistants from performing this function, consistent with the scope of practice of both licensing categories. This language establishes that if an in-person evaluation is required, that it is conducted by an occupational

therapist. Due to comments that the Board received modifications have been made to clarify that an occupational therapist must be utilized to perform an in-person evaluation, in the event that an in-person evaluation is deemed necessary based on criteria proposed in Section 4172(d). Due to reformatting of the initially proposed language, this language is now in Section 4172(c)(1).

The Board modified initially proposed language in Section 4172(d)(2) which purpose and design is to establish that prior to providing services via telehealth, the occupational therapist shall determine whether in-person interventions are necessary. Modifications made to this proposed action clarify and establish that if in-person interventions are necessary, they can be provided by another on-site occupational therapist or an occupational therapy assistant. Due to reformatting of the initially proposed language, this language is now in Section 4172(c)(2).

Initial language that identified factors that an occupational therapist must consider when determining whether in-person interventions are necessary and whether in-person interventions should continue during the course of treatment which were initially contained in Section 4172(d)(2) were separated to stand alone. This language was reformatted and modified to clarify the factors are relevant also when an occupational therapist determines whether in-person evaluations are necessary; the initially proposed language did not draw this distinction to evaluations. In the Board's second modification it was decided that the language establishing the occupational therapist is obligated to determine the necessity of providing in-person evaluations or interventions on a continued basis during the course of treatment was redundant and unnecessary. The purpose and design of this section are to identify factors and situations that an occupational therapist must consider in deciding whether services delivered via telehealth will be provided with safety to the consumer and establishes accountability for that decision.

In the Board's second modified text, it added subsection (g) to specify that failure to comply with these regulations shall be considered unprofessional conduct as set forth in the Occupational Therapy Practice Act. The purpose and design of the language is to clearly establish a violation of these standards shall be construed as unprofessional conduct and serve as a basis for the Board to take disciplinary action against a practitioner.

The rest of the initially proposed language has been retained although several minor technical edits have been affected due to the reformatting of the initially proposed text. The Board deleted some unnecessary language in 16 CCR 4170(f)(2) which establishes telehealth services must be provided consistent with section 2570.2(k), the occupational therapy scope of practice, which does not alter the intent or meaning of the initially proposed language.

The Board has also affected three minor technical and grammatical edits to the Initial Statement of Reasons contained in the final rulemaking file that do not alter representations described in the document. On page 1, under Factual Basis/Rational, 1<sup>st</sup> paragraph, 2<sup>nd</sup> sentence, "must possess" was repeated so the duplicative language was deleted. On page 2, Section 4127(d), 2<sup>nd</sup> paragraph, 2<sup>nd</sup> sentence, the Board deleted "s" from the word "practitioners". On page 2, Section 4127(e)(1) and (2), 2<sup>nd</sup> paragraph, 2<sup>nd</sup> sentence, the Board has inserted "to" between "...therapy practitioners" and "provide services."

**Local Mandate:** None

**Business Impact/Finding of Necessity:** This proposed regulatory will not have an adverse impact on business in California. In all likelihood this proposed action will promote expanded

opportunities for hospitals, health care and rehabilitation businesses, and information technology companies.

**Consideration of Alternatives:** No reasonable alternative which was considered or that has otherwise been identified and brought to the attention of the Board would be more effective in carrying out the purpose for which it was proposed or would be as effective and less burdensome to affected private persons than the adopted regulation or would be more cost effective to the affected private persons than the adopted regulation or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law.

**Summary of Public Comments Received During 45-day (August 24, 2012 to October 8, 2012) Comment Period:**

The Board received two written comments during the 45-day comment period:

1. **California Orthopaedic Association (COA)**, correspondence dated September 20, 2012, agreed that occupational therapists needed to consider the nature and complexity of interventions and a patient's condition in delivery of telehealth services. COA urged the Board to consider additional criteria such as: establishing that practitioners shall work collaboratively with the referring physician; practitioners should establish a method to evaluate the progress of treatment delivered via telehealth; and practitioners should be required to notify the ordering physician when services are provided via telehealth 50% of the time or more.

*Board Response: Existing ethical standards of practice establish that practitioners are responsible to refer to and consult with clients and other services providers whenever such referral or consultation is needed. Practitioners are also responsible for continually assessing the progress of treatments. The Board does not believe that specific language is necessary to require telehealth 'utilization' be reported to the physician since other ethical standards and general practice standards are applicable and enforceable. The Board will be monitoring for any trending issues with the increased delivery of services via telehealth and seek modifications to these regulations if needed.*

2. **Occupational Therapy Association of California (OTAC)**, correspondence date October 5, 2012, acknowledged the Board's intent and effort to ensure public safety. OTAC suggested several formatting suggestions to maintain the intent of the initially proposed language and enhance clarity.

*Board Response: The Board made modifications to the initially proposed language to address OTAC's concerns and noticed the modified text.*

**Summary of Public Comments Received During 15-day Comment Period (March 1, 2013 to March 18, 2013):**

The Board received four written comments during the 15-day comment period:

1. **USC Division of Occupational Therapy Science and Occupational Therapy (USC)**, correspondence dated March 8, 2012. USC provided a synopsis of how patients benefit by receiving telehealth services and the types of treatment and intervention they provide.

USC commented on two parts of the proposed language as follows; (1) expressed concern over the Board's proposed language that would allow access to records without a subpoena; and (2) reported it is unreasonable to require an on-site occupational therapist.

*Board Response: The Board considered USC's first point and affected an appropriate modification to the language by deleting language that would have established all records must be provided to the Board upon request. The Board considered USC's second point and rejects it. Section 4172(c)(1) only requires an occupational therapist be onsite to conduct an evaluation if, considering the criteria set forth in Section 4172(d), an in-person evaluation is warranted and medically necessary. Section 4172(c)(2) requires that an occupational therapist or occupational therapy assistant provide interventions in-person only if, after considering the criteria set forth in Section 4172(d), it is determined that in-person interventions are necessary. The regulations do not require an on-site occupational therapist*

2. **Tammy Richmond, Go 2 Care**, correspondence dated March 14, 2013, expressed appreciation for the Board's vision to protect consumers. Ms. Richmond reported concerns over two components of the proposed modified language: (1) language pertaining to informed consent and exposure (access) to medical records (Modified language: 16 CCR 4170(b)(c)); and (2) requirement that a local provider be available to the consumer.

*Board Response: In response to Ms. Richmond's first point, the Board affected a subsequent modification to address her concern by deleting language that would have established the patient record contain a signed consent statement by the patient and authorization for release of records. In response to Ms. Richmond's second point, the Board deleted reference that a "local" occupational therapist must be available for an in-person evaluation or on-site visit. The language now only specifies that if an on-site visit or in-person evaluation is determined to be necessary, that it be conducted by an occupational therapist. Additional comments that she provided were in regard to telehealth legislation and were not specific to these proposed regulations.*

3. **American Occupational Therapy Association and the Occupational Therapy Association of California**, correspondences dated March 18, 2013 (exact replicas). Both organizations acknowledged the Board efforts to ensure public safety. Three concerns were highlighted by the organizations: (1) language pertaining to informed consent and the release for records (Modified Language: 16 CCR 4170(b)(c)); (2) the requirement that a local provider be available onsite to the consumer; and (3) concerns regarding interpretation of the criteria that must be considered by an occupational therapist to determine if telehealth services are in the best interest of the client.

*Board Response: In response to the first point, the Board affected subsequent modifications to address the concerns expressed by deleting language that would have established the patient record contain a signed consent statement by the patient and authorization for release of records. In response to the second point, the Board deleted reference that a "local" occupational therapist must be available for in-person evaluations or on-site visits. The language now only specifies that if an on-site evaluation is determined to be necessary that it be conducted in-person by an occupational therapist. In response to the third point, the Board believes the language that is proposed has the same meaning and intent as the concerns that have been expressed. Language in 16 CCR 4172(d) is meant to be applied broadly. The intent and purpose of this proposed regulatory action is to define and clarify factors that must be considered prior to and during the delivery of telehealth services and*

*whether telehealth services are in the best interest and can be provided with safety to the client.*

### **Public Comment Received Outside Comment Period:**

The Board received a written comment from the **American Occupational Therapy Association** (AOTA) dated on March 22, 2013, and even though this was received outside of the comment period, the Board reviewed it at its May 9, 2013 meeting.

The Board received a written comment from the **Center for Connected Health Policy** (CCHP) that was dated on March 28, 2013. This correspondence is being included in the record because it was reviewed by Board Members at its May 9, 2013, meeting. This correspondence expressed concerns with components of modified language relating to “Informed Consent” and “Release of Records”, very similar in nature to other comments received.

*Board Response: The Board addressed these concerns in a second modified text by deleting language that would have established the patient record contain a signed consent statement by the patient and authorization for the release of records..*

### **Summary of Public Comments Received During Second 15-day Comment Period (May 16, 2013 to May 31, 2013):**

The Board received four written comments during the 15-day comment period:

1. **Tammy Richmond, Go 2 Care**, correspondence dated May 28, 2013. Suggested that proposed language in Section 4172(c) “Prior to providing occupational therapy services via telehealth” be modified by replacing “Prior” with “When”. Her rationale was that “prior” connotes the need to find a health provider before actually providing services. Ms. Richmond also recommended modifications to subsections (1) and (2) of Section 4172, and allowing other health care professionals to conduct onsite evaluations and interventions if they are warranted.

*Board Response: The Board rejects comment #1. The meaning and intent of this language is to establish that prior to providing telehealth services the occupational therapist must first determine whether an in-person evaluation is needed to (safely) provide services to client; if an in-person evaluation is not needed, then the occupational therapist has determined that services can be provided safely via telehealth. Making the determination whether a client can be safely treated via telehealth or requires an in-person evaluation or treatment prior to services is the only way to ensure consumer protection.*

*The Board rejects comment #2. By law, occupational therapy evaluations can only be performed by a licensed occupational therapist. The occupational therapy scope of practice act defines occupational therapy and specifies what duties and functions fall within the occupational therapists responsibility; these duties, including the occupational therapy evaluation, are not interchangeable with any other health care “specialist” or healthcare professional. Amending the language to eliminate reference to “ensure” and replace it with “make every attempt” dilutes the responsibility of the occupational therapist and does not provide clarity or specificity to this requirement and fails to ensure consumer protection.*

*The Board rejects comment #3. By law, occupational therapy services and interventions can only be performed by a licensed occupational therapist or licensed occupational therapy assistant. The occupational therapy scope of practice act defines occupational therapy and specifies what duties and functions fall within the responsibility of both occupational*

*therapists and occupational therapy assistants; these duties are not interchangeable with any other health care “specialist” or healthcare professional. Amending the language to “make every effort to refer” dilutes the responsibility of the treating occupational therapist and fails to ensure consumer protection.*

2. **Center for Connected Health Policy**, correspondence dated May 30, 2013. The comment reported that Section 4172(c)(1) in the second modification “is confusing and appears to be contradictory” and states that it is unclear “how and under what conditions” an occupational therapist would be able to make the determination (1) whether it is appropriate to perform an evaluation in-person or via telehealth, or (2) whether it is appropriate to provide interventions in-person or via telehealth.

*Board Response: The Board rejects the comment. CCHC incorrectly references this section as pertaining to “Local Therapists;” any and all references to a “local” therapist have been deleted. The Board believes the language that is being proposed for adoption in Section 4172(c)(1) is clear. It states “Prior to providing occupational therapy services via telehealth an occupational therapist shall determine whether an in-person evaluation is necessary and ensure that a therapist be available if an onsite visit is required.”*

*The factors that must be considered when making a determination whether an in-person evaluation would be necessary are described in Section 4172(d). The determination whether, in the best interest of the client, particularly the client’s safety, the evaluation could be provided via telehealth or whether the evaluation should be provided in-person, ensures consumer protection.*

*While the Board understands that clients receiving services via telehealth may experience an increased access to care, that care cannot be at the risk of a patient’s safety. Thus, the rationale for the requirement that the occupational therapist determine before providing services whether services, the evaluation, or interventions can be (safely and appropriately) delivered via telehealth or whether services, the evaluation or interventions must be provided in-person.*

3. **Occupational Therapy Association of California**, correspondence dated, May 31, 2013. The comment indicated Section CCR 4172(c) was unclear and OTAC interpreted it to mean that an occupational therapist would need to be available at all times resulting in “tremendous costs and burdens.” *Board Response: The comment was rejected. The Board believes the language and intent of proposed Section 4172(c) is clear. This language would not require an occupational therapist to be present “at all times” with the client; the proposed language requires the occupational therapist determine whether services, including the evaluation or interventions can be (safely and appropriately) delivered via telehealth or whether the evaluation or interventions should be provided in-person. Thus, the suggestion that an “on-site OT” would be at a “tremendous burden and cost” is not accurate. In addition to consideration of the client’s needs, the treating occupational therapist will have to consider the most cost-effective way to practice or render occupational therapy treatments and interventions – whether it’s delivering services via telehealth or in-person – which is an individual business decision.*
4. **American Occupational Therapy Association**, correspondence dated May 31, 2013. The comment indicated proposed Section 4172(c) was “confusing,” could produce “unintended consequences” and “the language related to ensuring a therapist is available for onsite serves seems to create a burden on therapists that is not realistic or enforceable.” *Board*

*Response: These comments are rejected. The Board believes the language and intent of proposed Section 4172(c) is clear. This language would not require an occupational therapist to be present, with the client, unless a determination was made that an in-person evaluation or interventions were necessary. Section 4172(c) requires the occupational therapist, consider the factors set forth in 4172(d) to determine whether services, including the evaluation or interventions can be (safely and appropriately) delivered via telehealth or whether the evaluation or interventions should be provided in-person. The individual responsible for making this determination is the occupational therapist that is considering rendering services, including providing an occupational therapy evaluation and interventions, via telehealth.*

*It is not only realistic to expect an occupational therapist to make a determination whether providing services via telehealth is appropriate, to ensure a patient's safety, but also consistent with Section 4170, the ethical standards of practice, which are designed to ensure consumer protection in setting forth certain responsibilities of occupational therapists and occupational therapy assistants to, among other things: take reasonable precautions to avoid imposing or inflicting harm upon the client, not exploit clients in any manner, avoid relationships or activities that interfere with professional judgment and objectivity, shall collaborate with clients, caretakers or other legal guardians in setting goals and priorities throughout the intervention process, fully inform the client of the nature, risks, and potential outcomes of any interventions, obtain informed consent, respect the client's right to refuse professional services or involvement in research or educational activities, maintain patient confidentiality, perform occupational therapy services only when they are qualified by education, training, and experience to do so, and comply with the Occupational Therapy Practice Act, the California Code of Regulations, and all other related local, state, and federal laws.*

*AOTA also suggests replacing language such as “ensure a therapist is available” with “make a good-faith effort to ensure access to ... services.” While the suggested language may be appropriate for an association policy, a state regulatory agency cannot regulate an occupational therapist's “good faith effort.” Thus, the use of direct and specific language is necessary to ensure compliance and to hold the violating occupational therapist accountable if he or she fails to adhere to these regulations.*

*This language is not intended to “discourage occupational therapists from providing telehealth services” as suggested. The language is intended to ensure that an occupational therapist considering providing services via telehealth take appropriate precautions to prevent patient harm. This language helps the Board fulfill its mandate: regulate the profession to provide consumer protection.*

### **Public Comment Received Outside of Comment Period:**

The Board received correspondence from **Occupational Therapy Association Center**, dated July 24, 2013. OTAC expressed disappointment that the Board did not modify the proposed language of Section 4172(c) as they suggested. OTAC requested that the Board clarify some of their concerns in Questions and Answers (Q&A) on the Board's website. *Board Response: The Board is willing to provide information and clarification relative to this proposed action on its website once the language goes into effect.*