



Common Sense Initiative

Mike DeWine, Governor
Jon Husted, Lt. Governor

Sean McCullough, Director

Business Impact Analysis

Agency, Board, or Commission Name: Occupational Therapy, Physical Therapy, and Athletic Trainers Board

Rule Contact Name and Contact Information:

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Regulation/Package Title (a general description of the rules' substantive content):

Telehealth for occupational therapy and physical therapy

Rule Number(s): 4755-7-05, 4755-27-09

Date of Submission for CSI Review: 4/20/2022

Public Comment Period End Date: 5/6/2022

Rule Type/Number of Rules:

New/ X rules

No Change/ rules (FYR?)

Amended/ rules (FYR?)

Rescinded/ rules (FYR?)

The Common Sense Initiative is established in R.C. 107.61 to eliminate excessive and duplicative rules and regulations that stand in the way of job creation. Under the Common Sense Initiative, agencies must balance the critical objectives of regulations that have an adverse impact on business with the costs of compliance by the regulated parties. Agencies should promote transparency, responsiveness, predictability, and flexibility while developing regulations that are fair and easy to follow. Agencies should prioritize compliance over punishment, and to that end, should utilize plain language in the development of regulations.

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Reason for Submission

1. **R.C. 106.03 and 106.031 require agencies, when reviewing a rule, to determine whether the rule has an adverse impact on businesses as defined by R.C. 107.52. If the agency determines that it does, it must complete a business impact analysis and submit the rule for CSI review.**

Which adverse impact(s) to businesses has the agency determined the rule(s) create?

The rule(s):

- a. ☒ **Requires a license, permit, or any other prior authorization to engage in or operate a line of business.**
- b. ☒ **Imposes a criminal penalty, a civil penalty, or another sanction, or creates a cause of action for failure to comply with its terms.**
- c. ☐ **Requires specific expenditures or the report of information as a condition of compliance.**
- d. ☐ **Is likely to directly reduce the revenue or increase the expenses of the lines of business to which it will apply or applies.**

Regulatory Intent

2. **Please briefly describe the draft regulation in plain language.**

Please include the key provisions of the regulation as well as any proposed amendments.

These new rules are being proposed as a result of the passage of [House Bill 122](#) (Fraizer, Holmes), which sets forth the provision of telehealth services effective March 23, 2022. In short, the bill will permit specified health care professionals to provide telehealth services and require telehealth services to be provided according to specified conditions and standards. The bill also sets forth insurance and Medicaid coverage of telehealth services.

The rules reiterate the conditions of standards for providing telehealth contained in House Bill 122. Aside from the provisions of HB 122, the following requirements were added:

- The licensee must verify the identity and physical location of the patient or client at the beginning of the telehealth visit. This requirement will protect the public by ensuring that the license holder knows where to call emergency services should they be needed during the telehealth session. It will also assist personnel with abiding by licensure requirements should treatment occur across state lines.
- Reiterates that if a patient or client is located in Ohio, the practitioner must have an Ohio license or privilege to practice in Ohio via the licensure compact.

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- 3. Please list the Ohio statute(s) that authorize the agency, board or commission to adopt the rule(s) and the statute(s) that amplify that authority.**

Ohio Revised Code 4743.09, 4755.06, 4755.411

- 4. Does the regulation implement a federal requirement? Is the proposed regulation being adopted or amended to enable the state to obtain or maintain approval to administer and enforce a federal law or to participate in a federal program?**

If yes, please briefly explain the source and substance of the federal requirement.

No.

- 5. If the regulation includes provisions not specifically required by the federal government, please explain the rationale for exceeding the federal requirement.**

Not Applicable.

- 6. What is the public purpose for this regulation (i.e., why does the Agency feel that there needs to be any regulation in this area at all)?**

This rule sets clear expectations for care rendered via telehealth.

- 7. How will the Agency measure the success of this regulation in terms of outputs and/or outcomes?**

Clear answers to inquiries related to telehealth and number of complaints filed regarding care rendered via telehealth.

- 8. Are any of the proposed rules contained in this rule package being submitted pursuant to R.C. 101.352, 101.353, 106.032, 121.93, or 121.931?**

If yes, please specify the rule number(s), the specific R.C. section requiring this submission, and a detailed explanation.

No.

Development of the Regulation

- 9. Please list the stakeholders included by the Agency in the development or initial review of the draft regulation.**

If applicable, please include the date and medium by which the stakeholders were initially contacted.

These rules were sent out to all license holders and other stakeholders, including the Ohio Occupational Therapy Association and the Ohio Physical Therapy Association, via listserv. The comment period was 2/8/2022-2/21/2022.

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10. What input was provided by the stakeholders, and how did that input affect the draft regulation being proposed by the Agency?

Please see comments attached at the end. One comment was incorporated. Most comments contradicted House Bill 122.

11. What scientific data was used to develop the rule or the measurable outcomes of the rule? How does this data support the regulation being proposed?

None.

12. What alternative regulations (or specific provisions within the regulation) did the Agency consider, and why did it determine that these alternatives were not appropriate? If none, why didn't the Agency consider regulatory alternatives?

This rule reflects the new legislation – House Bill 122.

13. Did the Agency specifically consider a performance-based regulation? Please explain. *Performance-based regulations define the required outcome, but don't dictate the process the regulated stakeholders must use to achieve compliance.*

Previously, the Board did not have any regulation with regard to telehealth. This rule reflects House Bill 122's provisions.

14. What measures did the Agency take to ensure that this regulation does not duplicate an existing Ohio regulation?

Review of Ohio law. This rule echoes House Bill 122 (ORC 4743.09). The Board felt it best to incorporate these provisions into the rules to raise awareness with practitioners.

15. Please describe the Agency's plan for implementation of the regulation, including any measures to ensure that the regulation is applied consistently and predictably for the regulated community.

Rules will be published on the Board website, along with the Board's telehealth guidance, and advertised on social media and newsletter.

Adverse Impact to Business

16. Provide a summary of the estimated cost of compliance with the rule. Specifically, please do the following:

- a. Identify the scope of the impacted business community; and**
- b. Identify the nature of all adverse impact (e.g., fees, fines, employer time for compliance,); and**
- c. Quantify the expected adverse impact from the regulation.**

The adverse impact can be quantified in terms of dollars, hours to comply, or other factors; and may be estimated for the entire regulated population or for a

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“representative business.” Please include the source for your information/estimated impact.

- a. Occupational therapists, occupational therapy assistants, physical therapists, physical therapist assistants, the businesses for whom they work, and the patients they serve.
- b. A license is required to practice in Ohio. A fee of \$100 is charged for an initial license, plus \$3.50 for eLicense and \$47.25 for a background check. License holders may renew their license for \$70 plus \$3.50 for eLicense and the cost of continuing education courses (varies).
- c. See above.

17. Why did the Agency determine that the regulatory intent justifies the adverse impact to the regulated business community?

A license is required by law and the fees fund the operation of the agency.

Regulatory Flexibility

18. Does the regulation provide any exemptions or alternative means of compliance for small businesses? Please explain.

No. The Board regulates individuals, not businesses.

19. How will the agency apply Ohio Revised Code section 119.14 (waiver of fines and penalties for paperwork violations and first-time offenders) into implementation of the regulation?

The Board's disciplinary guidelines take first time offenses into account as a mitigating circumstance.

20. What resources are available to assist small businesses with compliance of the regulation?

Board website, Board staff are available via phone, email, and in person.

Telehealth Rule Comments

<p>Heather Swain</p>	<p>(C) The standard of care for a patient treated through telehealth is equal to the standard of care for in-person services</p> <p>I just wanted to extend the feedback, that this wording may prevent a patient from receiving telehealth who may benefit from receiving any manual therapy or hands on treatment. This would for example, prevent a patient who during the pandemic preferred not to come in to a clinic for immune related concerns from receiving treatment at all. Especially if they don't qualify for home health, or are unwilling to have a therapist come to their home.</p> <p>Another example would be a patient who needs general strengthening and balance training. The patient may benefit from strengthening which can be performed safely via telehealth, but be unable to receive that service based on the language above because balance training would be done at a higher standard of care in person. If the patient is unwilling to come to an inpatient clinic due to pandemic concerns, or for other reasons, this would limit them from receiving care.</p> <p>It may be better to include a clause indicating that a patient can elect to receive care via telehealth even if an equal standard of care cannot be obtained, in the event they have been educated on the lower level of care to be received, educated on the benefits of in person services, and the patient still elects to decline in person services and requests telehealth instead.</p> <p>This would allow the patient to have the final say in determining the type of care they want to receive, rather than allowing a loop hole in the system which would prevent them from receiving care at all if they are unwilling to seek in person care for some reason. Some care is likely better than no care for the patient. If they want to elect telehealth services at a lower standard of care, they should be allowed to do so.</p>	<p>This language was taken verbatim from House Bill 122: ORC4743.09(B)(2)(a) (2)(a) Except as provided in division (B)(2)(b) of this section, the rules adopted by a health care professional licensing board under this section shall establish a standard of care for telehealth services that is equal to the standard of care for in-person services.</p>
<p>Drew D. Snyder, PT, DPT, JD</p> <p>PT0170 79</p>	<p>I am writing to ask the Physical Therapy Section of the OTPTAT Board (the "Board") not to adopt proposed rule 4755-27-09 because I believe that this rule violates our professional code of ethics and the most fundamental rights that our patients possess. As a licensed physical therapist in the state of Ohio, proposed rule 4755-27-09(F) would likely be very beneficial to me as a provider because it would limit the physical therapists who would be able to provide care to Ohioans. Naturally, this would limit competition for clients, thereby providing greater</p>	<p>Ohio Revised Code 4755.41 requires a license to practice physical therapy in the state of Ohio. This rule reiterates Ohio Revised Code 4743.09.</p>

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	<p>job security. However, O.A.C. R. 4755-27-05(A)(2) requires that license holders “place the best interests of the patient over the interests of the license holder....” I cannot see how proposed rule 4755-27-09(F) puts the patients' interests above my own for the reasons I will list below.</p> <p>Patients have a right to choose their physical therapist, and the government should only regulate that choice if there is a compelling need to do so to protect public health. The breadth of proposed rule 4755-27-09(F) would interfere with our patients’ personal health care choices without any clear benefit to public health. As an example: I frequently travel between Ohio and Illinois (as well as numerous other states). I consult health care providers in both states. The Board does not have a rule that requires that my Illinois health care providers have an Ohio license when I consult the provider in the state of Illinois. (Furthermore, Illinois does not require that my Ohio health care providers have an Illinois license when I consult my providers in Illinois.) So long as I have the financial means to physically travel back and forth between the two states, I can consult whatever healthcare professional I desire without the Board’s (or any other government institution's) interference with that decision. Patients, like myself, should be afforded the same luxury when choosing what healthcare professional to consult via telehealth. Rather than being forced to physically travel, patients should have the right to virtually travel to another state to consult with the health care provider of their choice. (As another example, this rule is harmful to patients who have an established provider-patient relationship with a provider in another state who may need a telehealth consultation while they are in Ohio. This is increasingly important, not just in physical therapy, because medical tourism is growing rapidly, and patients need to have an easy and convenient means to reach their providers who may be in another state – or another country.)</p> <p>Beyond the practical concerns listed above, the Code of ethical conduct for physical therapists and physical therapist assistants (the “Code of Conduct”) states that “a license holder must respect the rights and dignity of all patients....” (See O.A.C. R. 4755-27-05(A)(1).) The Code of Conduct continues to provide that patient’s have the right “to participate fully in their care” including the “right to select the physical therapy provider....” (See O.A.C. R. 4755-27-05(A)(6).) Finally, the Code of Conduct</p>	
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	<p>requires that a license holder obtain a patient’s informed consent from the patient or legal guardian. (See O.A.C. R. 4755-27-05(B)(4).) Beyond the Code, the Ohio State Constitution states that “No federal, state, or local law or rule shall prohibit the purchase or sale of health care or health insurance,” (See Ohio Const. Art. I § 21) and that “all powers, not herein delegated, remain with the people.” (See Ohio Const. Art I § 20.)</p> <p>Beyond Ohio law, the United States Supreme Court has stated that the “fundamental right of privacy protects citizens against governmental intrusion” and affirmed the “principle that personal decisions that profoundly affect bodily integrity...should largely be beyond the reach of government.” (See <i>Planned Parenthood of Se. Pa. v. Casey</i>.) The Court continued by stating that “It is settled now...that the Constitution places limits on a State’s right to interfere with a person’s most basic decisions about... bodily integrity....These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.” (See <i>Planned Parenthood of Se. Pa. v. Casey</i>.) The Court also stated that “Neither the Bill of Rights nor the specific practices of States at the time of adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects.” (Id.) The Court continued to quote a Justice Harlan dissent that claimed that “[T]he full scope of liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution....It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints...and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment.” (Id, citing <i>Poe v. Ullman</i>)</p> <p>The proposed regulation fails to respect the rights and dignity of all patients because it interferes with matters that “are central to personal dignity and autonomy;” namely, the right to select one’s own provider (a right our Code of Conduct requires licensees to respect). In addition to stripping our patients of their dignity, the proposed regulation would violate a patient’s</p>	
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	<p>right to consent. In the landmark case, <i>Schloendorff v. Society of New York Hospital</i>, then Judge Cardozo established the principle of self-determination as a bedrock for the basis of consent when he wrote that “Every human being of adult years and sound mind has a right to determine what shall be done with his own body.” Requiring that therapists be licensed or authorized to provide therapy services to patients located in the state of Ohio denies patients the ability to obtain care from the provider of their choice, and therefore strips them of their right to determine what should be done with their own body. Building on one’s right to self-determination, the American Journal of Public Health’s 1983 Model Act (the “Model Act”) for the Right to Refuse Treatment stated “The most important right that patients possess is the right to self-determination, the right to make the ultimate decision concerning what will or what will not be done to their own bodies. The right, embodied in the informed consent doctrine has a critical and essential corollary: the right to refuse treatment. Unless the right to refuse treatment is honored, the right of self-determination degenerates into a right to ‘agree’ with one’s physician.” Extending these principles, another essential corollary to the right of self-determination is the right to choose treatment (or the right to choose one’s provider). To paraphrase and build further on the Model Act, I would argue that the most important right that patients possess is the right to self-determination, the right to make the ultimate decision concerning what will or what will not be done to their own bodies. The right, embodied in the informed consent doctrine has a critical and essential corollary: the right to choose treatment, or the right to choose one’s provider. Unless the right to choose treatment is honored, the right of self-determination degenerates into a right to “comply” with what our government thinks is best. And if patients only have a right to “comply” with what the government thinks is best, then do patients really have any rights at all? And if our patients don’t have any rights at all, then how can we as licensees respect their rights? If licensees must respect our patients’ right to fully participate fully in their care, and if we must respect their rights, then shouldn’t we also have to respect their right to choose to access a provider via telehealth that is not licensed/authorized by the state of Ohio. Otherwise, the patient doesn’t really have the right to participate fully in their</p>	
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	<p>care. They only have the right to participate to the extent that we agree that they should be allowed to participate.</p> <p>Finally, in seeking to define the outer limits of one's fundamental right to privacy, a federal district court in Texas once stated that decisions protected by the Constitutional right to privacy must be "personal" and "important" decisions that primarily affect one's self or family. (See <i>Andrews v. Ballard</i>, 498 F. Supp. 1038.) The decision of what physical therapist a patient seeks treatment from is clearly a personal and important decision that primarily affects the patient (since physical therapists aren't making decisions such as clearing a patient from quarantine that could have deleterious effects on the broader public's health and safety). Therefore, the Board should have no legitimate interest in interfering with a patient's choice to receive care from a physical therapist licensed in another state (or country). Furthermore, as noted above, Ohio patients already enjoy the right to drive across state lines to receive physical therapy care from providers who are not licensed in Ohio. Unfortunately, rules such as the one proposed, would prevent patients from accessing therapy services from therapists with whom patients already have an established patient-provider relationship with. This is a purposeless and arbitrary restraint that strips patients of their right to privacy. My right to consult my Illinois providers while located in Ohio should be protected by the 9th and 14th Amendment to the United States (as well as Article 1, Section 20 of the Ohio Constitution). Furthermore, the Board should not have the ability to prohibit Ohioans from purchasing healthcare via telehealth from providers licensed in another state. A patient's decision of what healthcare professional to choose to consult for their low back pain, for example, has no effect on their neighbors. This is a personal decision affecting only the individual patient's bodily autonomy. As such, the decision of whom to consult for such a problem is a right that is retained by the patient. Because patients have retained such rights, I would argue that it should be the purpose of the Board to secure such rights, not to violate them.</p> <p>Requiring physical therapists to be licensed in the state of Ohio prior to providing therapy services to Ohioans robs our patients of their most fundamental rights and strips them of their dignity. While the Board may be limited by state statute in its ability to protect our patients' most basic rights, the Board</p>	
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	<p>should exercise as much discretion as possible when defining the healthcare providers that Ohioans are permitted to see. As such, I would propose that Proposed Rule 4755-27-09(F) should be amended to read: “In order to treat a patient or client located in Ohio, a physical therapist or physical therapist assistant must have either an Ohio license or privilege to practice in Ohio, or a license or privilege to practice in any other state, territory, country, or jurisdiction.” Short of this broad rule, the Board should at the very least eliminate Proposed Rule 4755-27-09(F) so as to not further establish a regulation that violates so many of our patients’ most essential individual rights. By doing so, the Board will preserve our patients’ right to access the therapist of their choice (thereby recognizing our patients’ dignity) and protect our patients’ privacy.</p>	
Amanda Sines, OPTA	<p>On behalf of the Ohio Physical Therapy Association (OPTA), please accept these comments on proposed rule 4755-27-29 to enact provisions regarding the delivery of care via telehealth. Generally, the OPTA believes these rules are well crafted and will well serve patients who will utilize physical therapy services through telehealth when appropriate.</p> <p>Based on feedback from members who reviewed the rules, we do have one additional provision to suggest be incorporated. There are some states who have expanded telehealth in a manner that allows patients to receive care from a licensee located outside of the state where they are located. While we understand the licensure board does not have the authority over PT care delivered to patients outside of Ohio borders, we believe this section would clarify that some states do allow this. We also reviewed the proposed telehealth rule from the State Medical Board and believe they have good language to use as a model. Their proposal in draft rule 4721-37-01 (F)(1) states the following: <i>A physician or physician assistant may provide telehealth services to a patient located outside of this state if permitted by the laws of the state in which the patient is located. The physician or physician assistant shall confirm and document in the medical record the location of the patient.</i> We are requesting that the OTPTAT Board add similar language to 4755-27-29.</p>	<p>The language to which you refer in the MED rules is specifically straight out of HB 122, and it only refers to physicians, physician assistants, and APNs. The OTPTAT Board discussed this comment and declines to make the change at this time. The Board does not believe it should make rules based on the laws and regulations of other states. The Board will work to further clarify in a statement that there is nothing in Ohio law that prohibits a therapist from practicing in another state according to its laws.</p> <p><u>(C) With respect to the provision of telehealth services, all of the following apply:</u></p>

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		<p>(4)</p> <p>n the case of a health care professional who is a physician, physician assistant, or advanced practice registered nurse, both of the following apply:</p> <p>(a)</p> <p>he professional may provide telehealth services to a patient located outside of this state if permitted by the laws of the state in which the patient is located.</p>
Chris Readno wer, PTA	Please do not ruin my profession any more than it already has been! Do not allow televisits for any PT or OT treatments on any level no matter the severity of lockdowns or remoteness of patients physical location. We are a physical hands on profession and televisits for any reason are just plain awful!	No comment
E Trame, PT, MBA, MEd	I'm in agreement with both proposed rule changes. Thank you for your continued diligence, particularly in reducing burden.	No comment.
Cindy Hudson, OT	Thank you for the opportunity to review and submit comments on this proposed change. My only possible clarification point would be on Bullet point D. I would suggest verbiage stating the licensee must verify the identity and physical location of the client upon each visit. As it reads now- there may be some who mis-understand and only verify location upon the initial visit. Support for appropriate telehealth visits is a wonderful adjunct to our profession. Thank you!	This suggestion has been incorporated.