

DEPARTMENT OF STATE
DIVISION OF PROFESSIONAL REGULATION
3700 BOARD OF SPEECH/LANGUAGE PATHOLOGISTS, AUDIOLOGISTS AND HEARING AID DISPENSERS
Statutory Authority: 24 Delaware Code, Section 3706(a)(1) (24 Del.C. §3706(a)(1))
24 DE Admin. Code 3700

GENERAL NOTICE

3700 Board of Examiners of Speech/Language Pathologists, Audiologists & Hearing Aid Dispensers

Pursuant to 24 Del.C. §3706(a)(1), the Board of Speech/Language Pathologists, Audiologists and Hearing Aid Dispensers ("Board") proposes revisions to its rules and regulations.

On October 1, 2015, proposed revisions to the rules and regulations were published in the Delaware *Register of Regulations*, Vol. 19, Issue 4. Specifically, the Board's proposed amendments struck the current Section 9.2.1.4, which addresses practice by telecommunications, and added a new Section 10.0, pertaining to telepractice. The new Section 10.0 sets forth standards and requirements in order to allow licensees to engage in telepractice while protecting the public.

A public hearing was held on November 17, 2015. The Board deliberated on January 19, 2016, and based on those deliberations, made substantive revisions to the proposed rules and regulations, which were published in the January 1, 2017 *Register of Regulations*, Volume 20, Issue 7. A second public hearing took place on February 21, 2017 at 2:00 p.m., and the Board deliberated on March 21, 2017. Once again, the Board made substantive changes to the proposed rules and regulations. Therefore, the Board strikes the rules and regulations as proposed in the October 1, 2015 *Register of Regulations* and proposes revised rules and regulations attached hereto as Exhibit A.

A public hearing was scheduled for June 20, 2017, but has been rescheduled for September 19, 2017 at 2:00 p.m. in the second floor conference room B of the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware, where members of the public can offer comments. Anyone wishing to receive a copy of the proposed rules and regulations may obtain a copy from the Board of Speech/Language Pathologists, Audiologists and Hearing Aid Dispensers, 861 Silver Lake Boulevard, Dover, Delaware 19904. Persons wishing to submit written comments may forward these to the Board at the above address.

In accordance with 29 Del.C. §10118(a), the final date to receive written comments will be October 4, 2017, which is 15 days following the public hearing. The Board will deliberate on all of the public comment at its next regularly scheduled meeting, at which time it will determine whether to adopt the rules and regulations as proposed or make additional changes due to the public comment.

Nature of the Proceedings

A public hearing was held before the Board on February 21, 2017 in the Cannon Building, 861 Silver Lake Boulevard, Dover, Delaware where members of the public were invited to offer comments on the proposed amendments to the rules and regulations. Members of the public were also invited to submit written comments. In accordance with 29 Del.C. §10118(a), the written public comment period was held open until March 8, 2017, which was 15 days following the public hearing. The Board deliberated on the proposed revisions at its regularly scheduled meeting on March 21, 2017.

Summary of the Evidence

At the February 21, 2017 hearing, the following exhibits were made part of the record:

Exhibit 1: *News Journal* Affidavit of Publication.

Exhibit 2: *Delaware State News* Affidavit of Publication.

Exhibit 3: Written comments from Leia Heckman, President of the Delaware Speech Language Hearing Association, objecting to subsection 10.2.1.2, outlining that the client shall be located within the borders of the State of Delaware during the telepractice treatment session. Ms. Heckman requested a change to the language to reflect the client's legal status as a Delaware resident in order to ensure continuity of care.

Exhibit 4: October 5, 2016 letter from Allison Wils of ERISA Industry Committee. Ms. Wils stated that ERISA is a national association that advocates for large employers on health, retirement and compensation public policies. Ms. Wils noted the benefits of telepractice, including flexibility and accessibility. Ms. Wils requested that the Board strike the proposed requirement that initial evaluations be performed face to face and not through telepractice in favor of permitting licensees to exercise their professional judgment. Ms. Wils also asked that the Board strike the requirement that a patient be located within the boundaries of Delaware during treatment.

Exhibit 5: November 29, 2016 letter from the Federal Trade Commission. The FTC objected to the provision requiring that initial evaluations be performed face to face. The FTC noted the benefits of telepractice in Delaware in terms of increasing competition and access to speech and hearing services and commented that certain health services are

unevenly distributed throughout the state, in particular, audiology services. The FTC stated that telepractice can be used for the diagnostic evaluation of infants who failed a newborn hearing screening test at the birth hospital. This use of telepractice could enhance quality of care and yield benefits for children with hearing loss. The FTC noted that the proposed regulations hold licensees to in-person standards of care and, with the exception of the initial evaluation, entrusts the decision whether to use telepractice to the professional judgment of the licensee. The FTC continued that the proposed restriction on telepractice could discourage the use of telepractice and noted that of the 19 states and District of Columbia with laws, regulations or policies on speech/language pathology or audiology telepractice, only three require an in-person initial evaluation. Finally, the FTC noted that Delaware's Board of Occupational Therapy Practice declined to include an initial in-person evaluation requirement.

Exhibit 6: February 21, 2017 comments to the Board, from Kathryn Tullis, PhD, Delaware Division of Public Health. Dr. Tullis noted the need for infant hearing screening and stated that often families cannot receive the required screening by three months of age due to issues related to access, particularly in Kent and Sussex counties. Dr. Tullis requested that the Board permit audiological testing on infants via telepractice.

Exhibit 7: February 21, 2017 comments from Yell Inverso, AudD, PhD, CCC-A, of Nemours/A.I. duPont Hospital for Children. Dr. Inverso expressed concern with proposed Section 10.2.4.2 stating that initial evaluations must be performed face to face. She continued that because audiologists primarily provide diagnostic services, most evaluations are initial evaluations that may not result in the need to see the patient for further visits. Dr. Inverso stated that initial evaluations are critical, particularly for newborn infants who either did not receive a newborn hearing screening at birth or who failed the newborn screening. Further testing is needed, which is provided at only one location in Kent and Sussex counties. Families are required to travel 2-3 hours to New Castle County for the necessary screening, a trip that may not be feasible given lack of transportation or lost wages with the result of infants lost to follow up. Dr. Inverso further stated that consequences are serious for these infants in terms of potential hearing loss. She concluded that the quality of this screening is comparable to a face to face visit.

Exhibit 8: February 21, 2017 comments from J. Heather Northam, MA, CCC-SLP addressing the shortage of speech and language pathologists in Delaware. She stated that providing services by telehealth provides an excellent method for addressing shortages by "extending the geographic reach" of licensed professionals. Ms. Northam objected to inclusion of the requirement that initial evaluations be performed face to face, stating that in some situations telehealth is not appropriate. However, licensed professionals can exercise professional judgment in deciding whether either initial evaluations or subsequent care can be provided by telehealth.

In addition, testimony was presented, as follows:

Jacqueline Truluck, Director of Clinical Education at the new Graduate Program at the University of Delaware, stated that she has been embracing telehealth for her students. She understands the need to follow the Board's licensing law. However, access is important. Telehealth is not a lesser service. She noted that Regulation 10.2.2.1 pertaining to informed consent mentions "risks and limitations." There are benefits to telehealth too. She is training her students to be professionals who can think critically.

Mike Kurland from Nemours noted that in terms of payment, telehealth is not treated any differently. Clinical care can be provided through telehealth at the same level. Professionals should have the decision making power with respect to the use of telehealth.

Findings and Conclusions

The public was given notice and an opportunity to provide the Board with comments in writing and by testimony at the public hearing on the proposed amendments to the Board's rules and regulations.

Pursuant to 24 **Del.C.** §3706(a)(1), the Board has statutory authority to promulgate rules and regulations. The proposed changes seek to establish standards for the delivery of services by telepractice for the professions regulated by the Board.

During deliberations, the Board considered the testimony of witnesses and the documents marked as exhibits. The Board addressed the concerns presented through this evidence. The Board discussed the objection to proposed Section 10.2.1, which requires that the licensee shall have an active Delaware license, and during telepractice treatment, the client shall be located within the borders of the State of Delaware. Certain individuals offering public comment expressed reservations with respect to continuity of care and limiting access to needed services.

As previously stated in the Public Notice published in the January 1, 2017, *Register of Regulations*, Volume 20, Issue 7, the Board declines to amend Section 10.2.1. Care occurs where the client is physically located. A licensee who is licensed in Delaware only would be engaging in unlicensed practice if permitted to treat a client who has left Delaware and is located in another state. The Board would have no jurisdiction with respect to care provided in another state. Section 10.2.1 serves the interests of public protection by ensuring that clients located in Delaware receive care from practitioners properly licensed by the Board.

The Board also addressed the public comments regarding Section 10.2.4.2, which requires that first time evaluations be done in a face to face setting. The Board weighed the benefits and disadvantages of this requirement. On the benefits side, the practitioner may have enhanced ability to evaluate and make a treatment determination in a face to face setting.

There was also discussion to the effect that an access to care problem does not mean that the Board should lessen treatment standards. However, on balance, the Board determined that the decision to use telepractice for an initial evaluation should be left to the professional judgment of the practitioner, as is the case for all further evaluations or treatment sessions. Telepractice will not be appropriate for all service recipients and individuals always have the option of declining to participate in telepractice. However, as highlighted by the members of the public presenting written comment, telepractice can result in making critical care available to underserved areas in Delaware, in particular, care related to infant hearing screening. Further, as noted by the FTC, provision of services by telepractice has a broader impact in increasing competition and access to services. The Board, therefore, decided to strike "only after an initial face to face evaluation," at the end of subsection 10.2.4.1, and subsection 10.2.4.2 in its entirety.

21 DE Reg. 60 (07/01/17) (Gen. Notice)