



UNITED STATES OF AMERICA  
FEDERAL TRADE COMMISSION  
WASHINGTON, D.C. 20580

Office of Policy Planning  
Bureau of Competition  
Bureau of Economics

August 3, 2016

Delaware Board of Occupational Therapy Practice  
861 Silver Lake Boulevard  
Dover, DE 19904

The staffs of the Federal Trade Commission’s (“FTC”) Office of Policy Planning, Bureau of Economics, and Bureau of Competition<sup>1</sup> (collectively, “FTC staff”) appreciate the opportunity to respond to the Board of Occupational Therapy Practice’s (“Board”) notice requesting comments on its proposed Telehealth regulation, 24 Del. Admin. Code § 2000-4.<sup>2</sup> The proposed regulation would allow licensed occupational therapists (“OTs”) and occupational therapy assistants (“OTAs”) (collectively, “licensees”) to determine whether telehealth is an appropriate level of care for a patient, and would allow OTs to determine the level of supervision required for the provision of telehealth services by OTAs. By not imposing rigid and unwarranted in-person care and supervision requirements, the proposed telehealth regulation would likely enhance competition and improve access to occupational therapy services, thereby benefiting Delaware consumers. These benefits could be enhanced by clarifying the role of OTAs during telehealth-based interactions, consistent with Delaware’s telemedicine law and in-person care, and by clarifying OTAs’ role in determining whether to use telehealth.<sup>3</sup>

## **I. Interest and Experience of the Federal Trade Commission**

The FTC is charged under the FTC Act with preventing unfair methods of competition and unfair or deceptive acts or practices in or affecting commerce.<sup>4</sup> Competition is at the core of America’s economy,<sup>5</sup> and vigorous competition among sellers in an open marketplace gives consumers the benefits of lower prices, higher quality products and services, and increased innovation. Because of the importance of health care competition to the economy and consumer welfare, anticompetitive conduct in health care markets has long been a key focus of FTC law enforcement,<sup>6</sup> research,<sup>7</sup> and advocacy.<sup>8</sup> In particular, many of our recent state advocacy comments have addressed scope of practice and supervision provisions that unnecessarily limit the range of procedures or services a practitioner may provide, or unnecessarily restrict a particular type of practitioner from competing in the market.<sup>9</sup>

Telehealth is an area of particular interest to the FTC because of its potential to increase practitioner supply, encourage competition, and improve access to affordable, quality health care. In a 2004 report, the federal antitrust agencies considered the competitive effects of state restrictions on the interstate practice of telemedicine,<sup>10</sup> and the central finding of that analysis remains applicable today: “When used properly, telemedicine has considerable promise as a

mechanism to broaden access, lower costs, and improve health care quality.”<sup>11</sup> More recently, FTC staff submitted a comment to the Alaska legislature supporting proposed legislation that would allow Alaska-licensed physicians located out-of-state to provide telehealth services in the same manner as in-state physicians.<sup>12</sup> The conclusions of that report and the prior FTC staff comment, which support reduction of barriers to telemedicine, underpin our comments in this letter.<sup>13</sup>

## **II. Delaware Law and the Proposed Telehealth Regulation for OTs and OTAs**

### **A. Delaware’s Telehealth and Telemedicine Law for OTs and OTAs**

Recognizing telehealth’s potential benefits, in 2015, Delaware’s legislature amended its Insurance and Professions and Occupations codes to enhance the use of telehealth and telemedicine services.<sup>14</sup> The legislation added definitions of telehealth, telemedicine, and related terms to the practice act for each health care occupation,<sup>15</sup> with the intent of providing greater access to health care by encouraging insurers and health care professionals to support and promote the use of telemedicine and telehealth.<sup>16</sup>

The occupational therapy practice act was among those amended by the legislation to include telehealth and telemedicine services.<sup>17</sup> The law’s definition of “telemedicine” broadly sets the stage for both OTs and OTAs to deliver all phases of care remotely, including “assessment, diagnosis, consultation, treatment, education, care management and self-management of a patient’s health care . . . .”<sup>18</sup> The law also calls for a licensee using telemedicine to practice “within his or her scope of practice as would be practiced in-person with a patient and with other restrictions as defined in regulation.”<sup>19</sup>

### **B. Delaware’s Proposed Telehealth Regulation for OTs and OTAs**

Most aspects of the Board’s proposed Telehealth regulation appear to be consistent with the scope of in-person occupational therapy practice, as called for by Delaware law’s definition of telemedicine.<sup>20</sup> In particular, proposed § 2000-4.2.4.2 would hold licensees to existing in-person standards of care.<sup>21</sup> In addition, proposed § 2000-4.2.4.5 imposes supervision requirements comparable to those of in-person care by allowing an OT to determine the appropriate level of supervision for an OTA.<sup>22</sup>

Consistent with the statute’s inclusion of assessment and diagnosis in the definition of telemedicine, the proposed regulation avoids rigid in-person visit requirements for evaluation of a patient.<sup>23</sup> Instead, according to proposed § 2000-4.2.4.1, the judgment of practitioners would determine whether telehealth should be used: “The licensee shall be responsible for determining and documenting that telehealth is an appropriate level of care for the patient.”<sup>24</sup>

The proposed regulation may depart from Delaware’s telemedicine law, however, because it does not expressly state that licensees—both OTs and OTAs—may use electronic communication for assessment and diagnosis.<sup>25</sup> The regulation could potentially limit the ability of OTAs to determine whether telehealth is an appropriate way to treat a patient: “The occupational therapist who screens, evaluates, writes or implements the plan of care is

responsible for determining the need for the physical presence of an occupational therapy practitioner during any interactions with clients.”<sup>26</sup>

### **III. Likely Competitive Impact of Delaware’s Proposed Telehealth Regulation**

#### **A. Potential of Telehealth to Increase Competition and Access to Occupational Therapy Services**

Generally, competition in health care markets benefits consumers by containing health care prices, expanding access and choice, and promoting innovation. Telehealth can potentially increase the supply of practitioners and thereby enhance price and non-price competition, reduce transportation costs, and improve access to quality care.<sup>27</sup>

The Delaware Division of Public Health has recognized that telehealth has the potential to improve access to cost-effective, quality care.<sup>28</sup> Similarly, many health care professionals and expert bodies support the use of telehealth to mitigate challenges in access to health care arising from an aging population, health care workforce shortages, and geographic and other maldistributions of providers that can lead to shortages in urban as well as rural areas.<sup>29</sup> Indeed, the Delaware *State Plan on Aging* acknowledges that older persons and individuals with disabilities could greatly benefit from the use of telehealth.<sup>30</sup> The potential for improved access to cost-effective medical care and better health outcomes was behind the Delaware Medicaid Program’s 2012 decision to reimburse services delivered by telemedicine.<sup>31</sup> The use of telehealth to deliver occupational therapy and other health care services could also help reduce Medicaid’s transportation expenditures as well as individuals’ pecuniary and time costs.<sup>32</sup>

The use of telehealth for occupational therapy could help address anticipated workforce shortages in the health care sector by effectively increasing practitioner supply and facilitating care of an aging population.<sup>33</sup> By doing so, telehealth would likely enhance competition, consumer choice, and access to care. As explained by the American Occupational Therapy Association in its position paper on telehealth, “By removing barriers to accessing care, including social stigma, travel, and socioeconomic and cultural barriers, the use of telehealth as a service delivery model within occupational therapy leads to improved access to care and ameliorates the impact of personnel shortages in underserved areas.”<sup>34</sup> Individuals with poor mobility could especially benefit from the increase in access and competition that could arise from the use of telehealth in occupational therapy, because rehabilitation services are readily provided remotely.<sup>35</sup>

#### **B. The Proposed Regulation Generally Supports the Use of Telehealth for Occupational Therapy**

By generally avoiding special or more burdensome standards of care for telehealth, the proposed regulation may facilitate the delivery of occupational therapy services via telehealth, thereby increasing competition, consumer choice, and access to care. Proposed § 2000-4.2.4.2 would hold licensees to existing in-person standards of care, and § 2000-4.2.4.1 would entrust practitioners with determining whether telehealth is an appropriate level of care. Thus, the proposed rule provides flexibility that could encourage telehealth delivery at all stages of care.<sup>36</sup>

The need for such flexibility, particularly with regard to the initial evaluation of a patient, has been recognized by physicians' organizations that have adopted telehealth policies permitting remote examination of a patient during an initial encounter, so long as a practitioner is held to an in-person standard of care.<sup>37</sup> Occupational therapy organizations and practitioners have taken similar positions, concluding that telehealth may be used throughout the course of care – including for evaluation, intervention, and monitoring – when practitioners are held to existing professional standards of care.<sup>38</sup>

Proposed § 2000-4.2.4.5 appears to avoid any special supervision requirements for OTAs providing telehealth services by allowing an OT to determine the extent of supervision, subject to existing requirements. Those requirements range from “general supervision” of experienced OTAs, allowing them to work from locations where the supervising OT is not present, to “direct supervision,” requiring the supervisor to be on-site.<sup>39</sup>

FTC staff does, however, have reservations about the potential effects of proposed § 2000-4.2.4.4, which appears to restrict the scope of practice of OTAs in two ways: first, by potentially limiting their role in telehealth-based assessment and diagnosis, as set forth in the statutory definition of telemedicine; and second, by potentially limiting their ability to participate in determining whether to use telehealth, as provided at proposed § 2000-4.2.4.1.<sup>40</sup> The apparent exclusion of OTAs from a role in evaluation by proposed § 2000-4.2.4.4 is also in tension with the broad potential for an OT to delegate aspects of evaluation to OTAs in current § 2000-1.0:

The supervisor may assign to a competent occupational therapy assistant the administration of standardized tests, the performance of activities of daily living evaluations and other elements of patient/client evaluation and reevaluation that do not require the professional judgment and skill of an occupational therapist.<sup>41</sup>

Occupational therapy authorities contemplate a role for OTAs in evaluation and assessment, as well as in the determination of whether the use of telehealth is appropriate.<sup>42</sup>

FTC staff recognize that professional scope of practice regulations can be important to ensure quality and patient safety. Competition consistent with patient safety, however, generally benefits consumers by containing health care prices, expanding access and choice, and promoting innovation. For this reason, we generally have encouraged legislatures and regulators to avoid restrictions that are not necessary to address well-founded patient safety concerns.<sup>43</sup> Potential limitations on OTA scope of practice in proposed § 2000-4.2.4.4 could limit the availability of lower-cost providers capable of offering comparable services, thereby restricting competition.<sup>44</sup> A regulatory standard that explicitly allows OTAs to provide telehealth services within the full range of their training and experience, as they do for in-person services, could help alleviate unmet needs for care and support efficient collaboration between OTs and OTAs, while still fulfilling legitimate patient safety objectives.

Accordingly, FTC staff encourages the Board to consider whether the proposed regulation could be improved through the use of a standard that, like Delaware's telemedicine statute, expressly acknowledges that OTAs may contribute to telehealth-based evaluation, and also affirms their role in the determination of whether to use telehealth. Necessary flexibility

could be attained by relying on existing standards of care and supervision by OTs, just as is done already with respect to in-person services.<sup>45</sup> Such a clarification could enhance the availability of telehealth-based occupational therapy services and facilitate the use of lower cost-providers when it is safe and appropriate, thus potentially increasing competition, reducing health care prices, and improving quality.

#### **IV. Conclusion**

To the extent that the proposed regulation facilitates telehealth delivery of occupational therapy services, it could enhance competition, access, and consumer choice, potentially reducing costs. In addition, the quality of care could be improved, especially for patients with limited mobility who have difficulty reaching in-person care. However, ambiguities regarding the role of OTAs in telehealth evaluations and the determination of whether to use telehealth could discourage the participation of OTAs in telehealth care. The Board may wish to consider whether minor clarifications consistent with the enabling statute could improve the effectiveness of the regulation in this regard, thereby encouraging OTAs to participate in telehealth care as they would ordinarily do in person. The proposed regulation appears to be a procompetitive improvement that would benefit Delaware consumers, especially if clarified as suggested.

We appreciate your consideration of FTC staff's views.

Respectfully submitted,

Tara Isa Koslov, Acting Director  
Office of Policy Planning

Ginger Zhe Jin, Director  
Bureau of Economics

Deborah Feinstein, Director  
Bureau of Competition

---

<sup>1</sup> This letter expresses the views of the Federal Trade Commission's Office of Policy Planning, Bureau of Economics, and Bureau of Competition. The letter does not necessarily represent the views of the Federal Trade Commission or of any individual Commissioner. The Commission, however, has voted to authorize staff to submit these comments.

---

<sup>2</sup> 2000 Board of Occupational Therapy Practice, 19 Del. Reg. Regs. 1074 (proposed June 1, 2016) (Telehealth regulation to be codified at 24 DEL. ADMIN. CODE § 2000-4) [hereinafter Proposed Regulation].

<sup>3</sup> We refer to “telemedicine” or “telehealth” as those terms are used in Delaware law and in the proposed regulation that is the subject of this letter. *See infra* note 20. While both terms “describe the use of medical information exchanged from one site to another via electronic communications to improve the patient’s health status,” they are often interchanged. *See* INST. OF MED., NAT’L ACAD. OF SCIENCES, THE ROLE OF TELEHEALTH IN AN EVOLVING HEALTH CARE ENVIRONMENT: WORKSHOP SUMMARY 3 (2012). Accordingly, we follow the approach of the Institute of Medicine and do not attempt to regularize the usage of either term. *Id.*

<sup>4</sup> Federal Trade Commission Act, 15 U.S.C. § 45.

<sup>5</sup> *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951) (“The heart of our national economic policy long has been faith in the value of competition.”).

<sup>6</sup> *See generally* FTC STAFF, OVERVIEW OF FTC ACTIONS IN HEALTH CARE SERVICES AND PRODUCTS (2016), <https://www.ftc.gov/system/files/attachments/competition-policy-guidance/hcupdaterev3.pdf>.

<sup>7</sup> *See, e.g.*, FTC & U.S. DEP’T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION (2004), <http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf>.

<sup>8</sup> FTC and staff advocacy can include letters or comments addressing specific policy issues, Commission or staff testimony before legislative or regulatory bodies, amicus briefs, or reports. *See, e.g.*, Comment from FTC Staff to Valencia Seay, Senator, Ga. State Senate (Jan. 29, 2016), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/ftc-staff-comment-georgia-state-senator-valencia-seay-concerning-georgia-house-bill-684/160201gadentaladvocacy.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/ftc-staff-comment-georgia-state-senator-valencia-seay-concerning-georgia-house-bill-684/160201gadentaladvocacy.pdf) (regarding removal of direct supervision requirements for dental hygienists); Brief of Amicus Curiae FTC in Support of No Party, In re Nexium (Esomeprazole) Antitrust Litig., No. 15-2005 (1st. Cir. Feb. 12, 2016), [https://www.ftc.gov/system/files/documents/amicus\\_briefs/re-nexium-esomeprazole-antitrust-litigation/160212nexiumbrief.pdf](https://www.ftc.gov/system/files/documents/amicus_briefs/re-nexium-esomeprazole-antitrust-litigation/160212nexiumbrief.pdf); FTC STAFF, POLICY PERSPECTIVES: COMPETITION AND THE REGULATION OF ADVANCED PRACTICE NURSES (2014), [https://www.ftc.gov/system/files/documents/advocacy\\_documents/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolycypaper.pdf](https://www.ftc.gov/system/files/documents/advocacy_documents/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolycypaper.pdf).

<sup>9</sup> Many of these competition advocacy comments have focused on proposed state-level changes to statutes and rules governing the scope of practice and supervision of advanced practice registered nurses. The FTC staff report, *Policy Perspective: Competition and the Regulation of Advanced Practice Nurses*, presents an overview of these comments and an in depth analysis of the competitive effects of such statutes and rules. *See* FTC STAFF, POLICY PERSPECTIVES, *supra* note 8.

<sup>10</sup> *See* FTC & U.S. DEP’T OF JUSTICE, *supra* note 7, ch. 2, at 30 (section on “State Restrictions on the Interstate Practice of Telemedicine”). More recently, FTC staff held a workshop series, *Examining Health Care Competition*, where a panel on *Innovations in Health Care Delivery* explored competition issues related to telehealth. *See* Transcript of Examining Health Care Competition Workshop 67-122, Fed. Trade Comm’n (Mar. 20, 2014), [https://www.ftc.gov/system/files/documents/public\\_events/200361/transcriptmar20.pdf](https://www.ftc.gov/system/files/documents/public_events/200361/transcriptmar20.pdf).

<sup>11</sup> FTC & U.S. DEP’T OF JUSTICE, *supra* note 7, Executive Summary, at 23.

<sup>12</sup> *See* Comment from FTC Staff to Steve Thompson, Representative, Alaska State Legislature (Mar. 25, 2016), <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2016/03/ftc-staff-comment-alaska-state-legislature-regarding> (regarding telehealth provisions in Senate Bill 74, which would allow licensed Alaska physicians located out-of-state to provide telehealth services).

<sup>13</sup> This advocacy also draws on knowledge acquired during the *Innovations in Health Care Delivery* panel of the 2014 FTC workshop, *Examining Health Care Competition*, *supra* note 10.

<sup>14</sup> *See* 80 Del. Laws, c. 80, (2015) (Chapter 80, formerly H.B. 69, as amended by House Amendment No. 1, An Act to Amend Title 18 and 24 of the Delaware Code Relating to Telemedicine Services (July 7, 2015)), <http://delcode.delaware.gov/sessionlaws/ga148/chp080.shtml#TopOfPage> (Section 11 amended the occupational therapy practice act, DEL. CODE ANN. tit. 24, § 2002).

---

<sup>15</sup> The 2015 law added telehealth and telemedicine provisions to the practice acts of at least 19 types of health professionals. *See* 80 Del. Laws, c. 80 (2015-16).

<sup>16</sup> *See Committee Report: H.B. 69*, DEL. STATE LEGISLATURE, COMM. ON ECONOMIC DEVELOPMENT/BANKING/INSURANCE/COMMERCE (April 1, 2015), <http://legis.delaware.gov/LIS/lis148.nsf/d81ce478bd9ae572852568730079e2fe/df26340ba3dd31eb85257e1a0074c475?OpenDocument>.

<sup>17</sup> *See* DEL. CODE ANN. tit. 24, § 2002 (2), (6), (7), (10), (13), (14). The law’s definition of telehealth provides for the use of electronic communications to “support clinical health care, provider consultation, patient and professional health-related education, public health, health administration, and other services as described in regulation.” DEL. CODE ANN. tit. 24, § 2002 (13). It defines telemedicine as a “form of telehealth” in which licensees use electronic communications to provide or support clinical care. *See* DEL. CODE ANN. tit. 24, § 2002 (14).

<sup>18</sup> *See* DEL. CODE ANN. tit. 24, § 2002 (14) (“‘Telemedicine’ means a form of telehealth which is the delivery of clinical health-care services by means of real time 2-way audio, visual, or other telecommunications or electronic communications, including the application of secure video conferencing or store and forward transfer technology to provide or support health-care delivery, which facilitate the assessment, diagnosis, consultation, treatment, education, care management and self-management of a patient’s health care by a licensee practicing within his or her scope of practice as would be practiced in-person with a patient and with other restrictions as defined in regulation.”).

<sup>19</sup> *Id.*

<sup>20</sup> The proposed regulation defines telehealth as “the use of electronic communications to provide and deliver a host of health-related information and health-care services, including occupational therapy promotion activities, including consultation, education, reminders, interventions, and monitoring of interventions.” Proposed Regulation, *supra* note 2, § 2000-4.1. Unlike Delaware law, the proposed telehealth regulation does not refer to clinical care or telemedicine (which Delaware law defines as a form of telehealth). *See id.* § 2000-4. However, the regulation’s references to health-care services, interventions, screening, evaluating, and writing or implementing a plan of care indicate that it covers the delivery of clinical services generally characterized as telemedicine. *See id.* §§ 2000-4.1, -4.2.4.4. To make it clear that the regulation covers such services, we suggest that the Board consider revising the proposed regulation to expressly cover clinical care and telemedicine in a manner consistent with the provisions in Delaware statutory law.

<sup>21</sup> *See id.* § 2000-4.2.4.2 (“The licensee shall comply with the Board’s law and rules and regulations and all current standards of care requirements applicable to onsite care.”).

<sup>22</sup> *See id.* § 2000-4.2.4.5 (“Subject to the supervision requirements of subsection 1.2, the occupational therapist will determine the amount and level of supervision needed during telehealth.”). A rigid requirement for in-person supervision on alternating visits in a previous version of the proposed telehealth regulation has been eliminated. *See* 2000 Board of Occupational Therapy Practice, 19 Del. Reg. Regs. 276, 278 (proposed Oct 1, 2015) (proposed to be codified at 24 DEL. ADMIN. CODE § 2000-4.2.4.5 but not adopted).

<sup>23</sup> A requirement of in-person evaluations in a prior version of the proposed regulation has been eliminated. *See* 2000 Board of Occupational Therapy Practice, 19 Del. Reg. Regs. at 278 (2015) (§ 2000-4.2.4.4) (“All evaluations, including initial evaluations, and re-evaluations and scheduled discharges shall be performed face to face and not through telehealth.”).

<sup>24</sup> Proposed Regulation, *supra* note 2, § 2000-4.2.4.1.

<sup>25</sup> *See supra* note 18 and accompanying text.

<sup>26</sup> Proposed Regulation, *supra* note 2, § 2000-4.2.4.4.

<sup>27</sup> *See, e.g.*, Comment from FTC Staff to Steve Thompson, *supra* note 12.

<sup>28</sup> *See, e.g.*, DIV. OF PUB. HEALTH, DEL. HEALTH & SOC. SERVS., DELAWARE PRIMARY CARE HEALTH NEEDS ASSESSMENT 2015, at 60 (2016), [www.dhss.delaware.gov/dph/hsm/files/dephealthneedsassessment2015.pdf](http://www.dhss.delaware.gov/dph/hsm/files/dephealthneedsassessment2015.pdf) (“The use of telehealth in Delaware is supported by state government as an important cost-effective, access improvement tool.”).

---

<sup>29</sup> See generally Rashid L. Bashshur et al., *The Empirical Foundations of Telemedicine Interventions for Chronic Disease Management*, 20 TELEMED. & E-HEALTH 769, 770 (2014) (“Differences in access to care reflect economic, geographic, and functional as well as social, cultural, and psychological factors . . . many residents of the inner city have limited access to medical resources for economic reasons.”); Am. Acad. of Pediatrics, *Policy Statement: The Use of Telemedicine to Address Access and Physician Workforce Shortages*, 136 PEDIATRICS 202, 203 (2015) (urban as well as rural children “face significant disparities in access and time-distance barriers, which could be partly alleviated by the use of telehealth”); Hilary Daniel & Lois Snyder Sulmasy, *Policy Recommendations to Guide the Use of Telemedicine in Primary Care Settings: An American College of Physicians Position Paper*, 163 ANN. INT. MED. 787, app. (2015) (“Limited access to care is not an issue specific to rural communities; underserved patients in urban areas have the same risks as rural patients if they lack primary or specialty care . . .”).

<sup>30</sup> See DIV. OF SERVS. FOR AGING & ADULTS WITH PHYSICAL DISABILITIES, DEL. HEALTH & SOC. SERVS., DELAWARE STATE PLAN ON AGING: OCTOBER 1, 2012 TO SEPTEMBER 30, 2016 (2012), [www.dhss.delaware.gov/dsaapd/files/state\\_plan\\_on\\_aging\\_12\\_15.pdf](http://www.dhss.delaware.gov/dsaapd/files/state_plan_on_aging_12_15.pdf) (telehealth services will improve the lives of older persons and persons with disabilities “by allowing persons to receive some medical care at home, or in other more convenient settings”).

<sup>31</sup> See Press Release, Delaware Health and Social Services & Office of Governor Markell, Delaware Medicaid Program to Reimburse for Telemedicine-Delivered Services Beginning July 1 (June 27, 2012), <http://news.delaware.gov/2012/06/27/delaware-medicaid-program/>.

<sup>32</sup> States that receive federal Medicaid funds are required to ensure transportation for Medicaid beneficiaries to and from medical appointments. See 42 C.F.R. § 431.53. The Delaware Medicaid & Medical Assistance Program pays for nonemergency transportation to covered services. See *Medical Transportation*, STATE OF DEL., <http://www.dhss.delaware.gov/dhss/dmma/medical.html> (last updated June 2, 2016). The program also pays for occupational therapy services. See DELAWARE MEDICAL ASSISTANCE PROGRAM, INDEPENDENT THERAPIST PROVIDER SPECIFIC POLICY MANUAL (2004), <http://www.dmap.state.de.us/downloads/manuals/independent.therapist.provider.specific.pdf>.

<sup>33</sup> See Jeffrey Sparshott, *The U.S. Occupations at Greatest Risk of a Labor Shortage*, WALL ST. J.: REAL TIME ECON. (Apr. 19, 2016, 7:01 AM), <http://blogs.wsj.com/economics/2016/04/19/the-u-s-occupations-at-greatest-risk-of-a-labor-shortage/> (citing Conference Board report) (of 457 occupations, occupational therapy and physical therapy practitioners rank first on labor shortage index).

<sup>34</sup> Am. Occupational Therapy Ass’n, *Telehealth*, 67 AM. J. OCCUP. THER. S69 (2013).

<sup>35</sup> See, e.g., *id.* at S70; Jana Cason, *Telehealth: A Rapidly Developing Service Delivery Model for Occupational Therapy*, 6 INT’L J. TELEREHAB. 29 (2014); World Fed’n of Occupational Therapists, *World Federation of Occupational Therapists’ Position Statement on Telehealth*, 6 INT’L J. TELEREHAB. 37, 38 (2014) (“the World Health Organization and World Bank affirmed the efficacy of telehealth for the delivery of rehabilitation services . . . stating its use ‘leads to similar or better clinical outcomes when compared to conventional interventions’”); AM. OCCUPATIONAL THERAPY ASS’N, ADVISORY OPINION FOR THE ETHICS COMMISSION: TELEHEALTH 1 (2013), <https://www.aota.org/-/media/corporate/files/practice/ethics/advisory/telehealth-advisory.pdf> (“Occupational therapy practitioners are among the rehabilitation health care providers who may use telehealth technologies for service delivery.”).

<sup>36</sup> See *supra* notes 21 and 24 and accompanying text. By contrast, the rigid in-person evaluation and discharge requirements in an earlier version of the proposed regulation could have created a barrier to the delivery of telehealth services. See *supra* note 23.

<sup>37</sup> Although we take no position on the telemedicine policies of the Federation of State Medical Boards (“FSMB”) and the American College of Physicians (“ACP”), we note that under both policies, a physician-patient relationship can be established during a telemedicine encounter. See FED’N OF STATE MED. BDS., MODEL POLICY FOR THE APPROPRIATE USE OF TELEMEDICINE TECHNOLOGIES IN THE PRACTICE OF MEDICINE 5 (2014), [https://www.fsmb.org/Media/Default/PDF/FSMB/Advocacy/FSMB\\_Telemedicine\\_Policy.pdf](https://www.fsmb.org/Media/Default/PDF/FSMB/Advocacy/FSMB_Telemedicine_Policy.pdf) (the physician-patient relationship to “be established using telemedicine technologies so long as the standard of care is met.”); Daniel & Sulmasy, *supra* note 29, at 787, 788, app. (ACP takes the position that “a telemedicine encounter itself can establish

---

a patient-physician relationship,” so long as the physician meets “the standard of care required for an in-person visit”).

<sup>38</sup> See, e.g., Am. Occupational Therapy Ass’n, *supra* note 34 at S70-S72 (AOTA supports the use of telehealth for evaluation, intervention, and monitoring, pursuant to professional standards of care “that apply to in-person delivery of occupational therapy services”); Jana Cason, *An Introduction to Telehealth as a Service Delivery Model within Occupational Therapy*, 17 OCCUP. THERAPY PRAC. CE-1 (2012) (“As it relates to occupational therapy, telehealth is the application of evaluative, consultative, preventative, and therapeutic services delivered through communication and information technologies. . . . [O]ccupational therapists may use telehealth technologies to conduct evaluations remotely” using the same standards as services provided in person); David Brennan et al., *A Blueprint for Telerehabilitation Guidelines*, 2 INT’L J. TELEREHAB. 31, 31-34 (2010) (telerehabilitation may be used “across a continuum of care” and “appropriateness for telerehabilitation should be determined on a case-by-case basis with selections firmly based on clinical judgment, client’s informed choice, and professional standards of care”).

<sup>39</sup> See 24 DEL. ADMIN. CODE § 2000-1.2.

<sup>40</sup> See *supra* note 18 and accompanying text.

<sup>41</sup> 24 DEL. ADMIN. CODE § 2000-1.0. This rule pre-dates Delaware’s telemedicine statute.

<sup>42</sup> See, e.g., Am. Occupational Therapy Ass’n, *supra* note 34 at S72 (“Occupational therapy practitioners [OTs and OTAs] should consider whether the use of technology and service provision through telehealth will ensure the safe, effective, appropriate delivery of services”); AM. OCCUPATIONAL THERAPY ASS’N, *supra* note 35, at 5 (“practitioners should be knowledgeable as to how technology could affect the reliability of assessments when performing client evaluations using telehealth delivery methods”). We also note that telehealth is included in the accreditation standards for OTA education programs as well as those for OTs. See ACCREDITATION COUNCIL FOR OCCUPATIONAL THERAPY EDUC., AM. OCCUPATIONAL THERAPY ASS’N, 2011 ACOTE STANDARDS AND INTERPRETIVE GUIDE 19 (Apr. 2016 ed.), <https://www.aota.org/-/media/corporate/files/educationcareers/accredit/standards/2011-standards-and-interpretive-guide.pdf>.

<sup>43</sup> For example, a 2014 FTC staff policy paper details the competition concerns with unnecessarily broad scope of practice regulations governing advanced practice nurses. See FTC STAFF, POLICY PERSPECTIVES, *supra* note 8.

<sup>44</sup> See, e.g., *id.* at 15 (discussing scope of practice restrictions that eliminate competition from safe, lower-cost providers).

<sup>45</sup> In addition to the health care authorities taking this position, as set forth in notes 37-38, authorities in the use of telehealth who analyzed state telehealth laws and regulations for occupational therapy and physical therapy concluded that the “laws and regulations that are the most likely to facilitate the use of telehealth include language that explicitly permits telehealth, as well as statements that OT and PT tele-practitioners must adhere to the same standards as expected for in-person service delivery.” Christine Calouro et al., *An Analysis of State Telehealth Laws and Regulations for Occupational Therapy and Physical Therapy*, 6 INT’L J. TELEREHAB. 17, 21 (2014).