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SECRETARY OF STATE

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June 2, 2009

NOTICE OF EMERGENCY RULE DECISION BY THE SECRETARY OF STATE

AGENCY: West Virginia Board of Occupational therapy

RULE: 13CSR5, New Rule, Competency Standards for Advanced Practice for Occupational Therapists and Occupational Therapy Assistants

DATE FILED AS AN EMERGENCY RULE: May 13, 2009

DECISION NO. 4-09

Following review under W. Va. Code §29A-3-15a, it is the decision of the Secretary of State that the above emergency rule is **approved**. A copy of the complete decision with required findings is available from this office.

A handwritten signature in cursive script that reads "Natalie E. Tennant".

NATALIE E. TENNANT
Secretary of State

EMERGENCY RULE DECISION
(ERD 4-09)

AGENCY: West Virginia Board of Occupational Therapy
RULE: 13CSR5, New Rule, Competency Standards for Advanced Practice
by Occupational Therapists and Occupational Therapy Assistants
FILED AS AN EMERGENCY RULE: May 13, 2009

- par. 1 The West Virginia Board of occupational Therapy (Board) has filed the above new rule as an emergency rule.
- par. 2 W. Va. Code §29A-3-15a requires the Secretary of State to review all emergency rules filed after March 8, 1986. This review requires the Secretary of State to determine if the agency filing such emergency rule: 1) has complied with the procedures for adopting an emergency rule; 2) exceeded the scope of its statutory authority in promulgating the emergency rule; or 3) can show that an emergency exists justifying the promulgation of an emergency rule.
- par. 3 Following review, the Secretary of State shall issue a decision as to whether or not such an emergency rule should be disapproved [§29A-3-15a].
- par. 4 (A) Procedural Compliance: W. Va. Code §29A-3-15 permits an agency to adopt, amend or repeal, without hearing, any legislative rule by filing such rule, along with a statement of the circumstances constituting the emergency, with the Secretary of State and forthwith with the Legislative Rule-Making Review Committee (LRMRC).
- par. 5 If an agency has accomplished the above two required filings with the appropriate supporting documents by the time the emergency rule decision is issued or the expiration of the forty-two day review period, whichever is sooner, the Secretary of State shall rule in favor of procedural compliance.
- par. 6 The Board filed this emergency rule with supporting documents with the Secretary of State May 13, 2009 and with the LRMRC May 13, 2009.
- par. 7 It is the determination of the Secretary of State that the Board has complied with the procedural requirements of W. Va. Code §29A-3-15 for adoption of an emergency rule.
- par. 8 (B) Statutory Authority – W. Va. Code §30-28-6 reads:
- (a) The board shall administer, coordinate and enforce the provisions of this article.*
(b) The board shall have the responsibility of evaluating the qualifications of applicants for licensure under this article.
(c) The board shall determine that the applicant successfully completed the academic requirements of an educational program in occupational therapy. For an occupational therapist, such a program shall be accredited by the American medical association in

collaboration with the American occupational therapy association. For an occupational therapy assistant, such program shall be approved by the American occupational therapy association.

(d) The board shall prepare or approve all examinations of applicants for license at least twice a year, determine the qualifications and authorize the issuance of licenses to qualified occupational therapists and occupational therapy assistants; renew, suspend or revoke licenses in the manner provided.

(e) The board shall appoint representatives or contract with qualified testing services to conduct or supervise examinations and designate time and place for examining applicants.

(f) The board shall establish standards for the continuing professional competence of persons subject to this article.

(g) The board shall establish fees and maintain a register of all persons holding a license and a record of all inspections made.

(h) The board shall conduct such hearings and keep such records and minutes as are necessary to carry out its functions. It shall provide reasonable public notice to the appropriate persons of the time and place of all hearings authorized under this article in such a manner and at such times as it may determine by its rules and regulations.

(I) The board shall adopt rules and regulations relating to professional conduct to carry out the policy of this article including, but not limited to, regulations relating to professional licensure and the establishment of ethical standards of practice. Any such rules and regulations so adopted shall be subject to the provisions of chapter twenty-nine-a of this code.

(j) The board may investigate complaints and allegations concerning the violation of provisions of this article and may examine witnesses in connection with these investigations.

(k) The board shall make an annual report to the governor, which report shall contain an account of duties performed, actions taken and appropriate recommendations.

(l) The board is empowered to prescribe and publish reasonable application fees. Such fees shall be commensurate with the cost of fulfilling the duties of the board as defined by this article.

par. 9 It is the determination of the Secretary of State that the Board has not exceeded its statutory authority in promulgating this emergency rule.

par. 10 (C) Emergency – W. Va. Code §29A-3-15(f) defines "emergency" as follows:

(f) For the purposes of this section, an emergency exists when the promulgation of a rule is necessary for the immediate preservation of the public peace, health, safety or welfare or is necessary to comply with a time limitation established by this code or by a federal statute or regulation or to prevent substantial harm to the public interest.

par. 11 There are essentially three classes of emergency broadly presented with the above provision: 1) immediate preservation; 2) time limitation; and 3) substantial harm. An agency need only document to the satisfaction of the Secretary of State that there exists a nexus between the proposal and the circumstances creating at least one of the above three emergency categories.

par. 12 The facts and circumstances as presented by the Board are as follows:

During the 2009 Legislative Session, HB 2309 was passed, amending §30-28, the West Virginia Occupational Therapy Act. In order to ensure passage, one of the provisions we had to include restricts Occupational Therapy Assistants (OTAs) from performing deep thermal or electrical modalities to patients, except under the direct supervision of an Occupational Therapist (OT), until the WV Board of Occupational Therapy promulgates Rules to establish competency standards in this area. Direct supervision requires that an OT be in the building at the time the service is being provided. As this is a service currently provided to patients by OTAs without direct supervision, an emergency rule is required to allow OTAs who are adequately trained and competent in such modalities to continue to provide this service under general supervision. These modalities are most often used with patients in skilled nursing facilities, many of which do not have a full time Occupational Therapist on site to provide direct supervision. Without an emergency rule, patients may not have access to needed treatments until the proposed legislative rule is passed through the normal rule-making process during the 2010 Legislative Session. We hope you will consider the implementation of an emergency rule in this situation in order to prevent substantial harm to preserve the health, safety and welfare to the public.

par. 13 It is the determination of the Secretary of State that this proposal qualifies under the definition of an emergency as defined in §29A-3-15(f). . . "immediate preservation of public peace, health, safety or welfare" and "prevent substantial harm to the public interest."

par. 14 This decision shall be cited as Emergency Rule Decision 4-09 or ERD 4-09 and may be cited as precedent. This decision is available from the Secretary of State and has been filed with the West Virginia Board of Occupational Therapy, the Attorney General and the Legislative Rule Making Review Committee.



NATALIE E. TENNANT
Secretary of State

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