

CHAPTER 407
FORMERLY
SENATE BILL NO. 194
AS AMENDED BY
SENATE AMENDMENT NO. 2

AN ACT TO AMEND TITLE 24 OF THE DELAWARE CODE RELATING TO POLYSOMNOGRAPHERS.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF DELAWARE (Three-fifths of all members elected to each house thereof concurring therein):

Section 1. Amend Title 24 of the Delaware Code by making insertions as shown by underlining as follows:

Subchapter XII. Professional Polysomnographers.

§ 1799T. Statement of purpose.

The intent of the General Assembly in enacting this subchapter is to establish minimum standards of education, experience and examination for professional polysomnographers so that the public can readily identify those who meet these minimum standards. In enacting this subchapter the General Assembly intends to provide a licensure process for professional polysomnographers, a scope of practice for polysomnographer services, and to establish "licensed polysomnographer" as the state-recognized legal title for professional polysomnographers. It is also the intent of the General Assembly in enacting this subchapter to assure consumers the right to choose from whom they receive information and advice. Recognition of these goals will protect the health of the public by broadening access to appropriate polysomnography services.

§ 1799U. Definitions.

As used in this subchapter:

(1) "AASM" shall mean the American Academy of Sleep Medicine or an organization that is recognized as equivalent.

(2) "Board" shall mean the Board of Medical Licensure and Discipline.

(3) "BRPT" shall mean the Board of Registered Polysomnographic Technologists or its successor organization.

(4) "Council" means the Polysomnography Advisory Council;

(5) "Direct supervision" means that the Licensed Polysomnographer providing supervision must be present in the area where the polysomnographic procedure is being performed and immediately available to furnish assistance and direction throughout the performance of the procedure;

(6) "General supervision" means that the Licensed Polysomnographer works under the supervision of a person licensed to practice medicine, whether by direct observation and monitoring, by protocols approved by a person licensed to practice medicine, or by orders written or verbally given by a person licensed to practice medicine. A Licensed Polysomnographer may evaluate patients and make decisions within parameters defined by a person certified to practice medicine and by the Board. The Licensed Polysomnographer works under a physician's overall direction and control, but the physician's presence is not required during the performance of the procedure.

(7) "License" shall mean any document which indicates that a person is currently licensed by the Board of Medical Licensure and Discipline to practice polysomnography.

(8) "LPSGT" shall be the abbreviation for the title "licensed polysomnographer".

(9) "NBRC SDS exam" means the National Board for Respiratory Care Sleep Disorders and Therapeutic Intervention Respiratory Care Specialist exam.

(10) "Polysomnographer" means an allied health professional, practicing polysomnography under the direction of a person licensed to practice medicine, who is responsible for direct and indirect services in the treatment, management, diagnostic testing, control, and care of patients with deficiencies and abnormalities associated with the human sleep wake cycle.

(11) "Polysomnographic Student" means a person who is enrolled in an accredited educational program described in Section 1799V and who may provide sleep-related services under the direct supervision of a Licensed Polysomnographer as a part of the person's educational program and is therefore, exempt from the licensure requirement;

(12) "Polysomnographic Trainee" means a person who has completed an accredited educational program described in Section 1799V and who may provide sleep related services under the direct supervision of a licensed Polysomnographer as part of the person's clinical program and is therefore exempt from the licensure requirement;

(13) "Practice of polysomnography" means the performance of any of the following tasks as directly related to the diagnosis and treatment of sleep related disorders, under the general supervision of a licensed physician:

a. Monitoring and recording physiologic data during the evaluation of sleep-related disorders, including sleep-related respiratory disturbances, by applying the following techniques, equipment, and procedures:

1. Titration using approved airway pressure devices and/or other technologies on spontaneously breathing patients using a mask or oral appliance, provided the mask or oral appliance does not extend into the trachea or attach to an artificial airway;

2. Supplemental low flow oxygen therapy (less than or equal to six (6) liters per minute) during a polysomnogram utilizing a nasal cannula or approved airway pressure devices and technologies on spontaneously breathing patients, provided the devices or technologies do not extend into the trachea or attach to an artificial airway;

3. Capnography during a polysomnogram;

4. Cardiopulmonary resuscitation;

5. Pulse oximetry;

6. Gastroesophageal pH monitoring;

7. Esophageal pressure monitoring;

8. Sleep staging (including surface electroencephalography, surface electrooculography, and surface submental electromyography);

9. Surface electromyography;

10. Electrocardiography;

11. Respiratory effort monitoring, including thoracic and abdominal movement;

12. Plethysmography blood flow monitoring;

13. Snore monitoring;

14. Audio and video monitoring;

15. Body movement and body position monitoring;

16. Nocturnal penile tumescence monitoring;

17. Nasal and oral airflow monitoring;

18. Body temperature monitoring;

19. Monitoring the effects that a mask or oral appliance used to treat sleep disorders has on sleep patterns; provided, however, the mask or oral appliance shall not extend into the trachea or attach to an artificial airway;

20. Actigraphy;

b. Observing and monitoring physical signs and symptoms, general behavior, and general physical response to polysomnographic evaluation and recommending whether initiation, modification, or discontinuation of a treatment regimen is warranted;

c. Analyzing and scoring data collected during the monitoring described in subdivisions 1799U (a)1 and 2 for the purpose of assisting a licensed physician in the diagnosis and treatment of sleep and wake disorders;

d. Implementation of a written or verbal order from a licensed physician which requires the practice of polysomnography;

e. Education of a patient regarding sleep disorders and the treatment regimen which assists that patient in improving the patient's sleep.

§1799V. Education

The following qualify as approved educational programs:

(a) A polysomnographic educational program that is accredited by the Commission on Accreditation of Allied Health Education Programs;

(b) A respiratory care educational program that is accredited by the Commission on Accreditation for Respiratory Care and completion of the curriculum for a polysomnography certificate established and accredited by the Commission on Accreditation for Respiratory Care.

(c) An electroneurodiagnostic technologist educational program with a polysomnographic technology track that is accredited by the Commission on Accreditation of Allied Health Education Programs;

(d) An Accredited Sleep Technologist Educational Program (A-STEP) that is accredited by the American Academy of Sleep Medicine; or

(e) Any other educational program incorporating both formal instruction and supervised clinical practice as recommended by the Council and approved by the Board.

§ 1799W. Polysomnography Advisory Council.

(a) The Polysomnographer Advisory Council (Council) consists of 5 voting members. The 5 voting members shall consist of 1 physician member of the Board of Medical Licensure and Discipline, 4 Council members who are credentialed registered polysomnographic technologists and have been primarily employed in the practice of polysomnography in this State for at least 3 years immediately prior to appointment. The 4 polysomnography practicing members shall be licensed pursuant to this Chapter no later than July 1, 2014, and all polysomnography practicing members thereafter shall be licensed pursuant to this Chapter. The Council may elect officers as necessary.

(b) Each Council member is appointed by the Board of Medical Licensure and Discipline for a term of 3 years, and may succeed himself or herself for 1 additional 3-year term; provided, however, that if a member is initially appointed to fill a vacancy, the member may succeed himself or herself for only 1 additional 3-year term. A

person appointed to fill a vacancy on the Council is entitled to hold office for the remainder of the unexpired term of the former member. Each term of office expires on the date specified in the appointment; however, a Council member whose term of office has expired remains eligible to participate in Council proceedings until replaced by the Board. A person who has never served on the Council may be appointed to the Council for 2 consecutive terms, but the person is thereafter ineligible for appointment to the Council except as hereinafter provided. A person who has been twice appointed to the Council or who has served on the Council for 6 years within any 9-year period may not again be appointed to the Council until an interim period of at least 1 year has expired since the person last served. The members of the Council are to be compensated at an appropriate and reasonable level as determined by the Division of Professional Regulation and may be reimbursed for meeting-related travel expenses at the State's current approved rate. A member serving on the Council may not be an elected officer or a member of the board of directors of any professional association of polysomnographers.

(c) The Council shall promulgate rules and regulations governing the practice of polysomnography, after public hearing and subject to the approval of the Board of Medical Licensure and Discipline. The Board must approve or reject proposed rules or regulations submitted to it by the Council within 60 days. If the Board fails to approve or reject the proposed rules or regulations within 60 days, the proposed rules or regulations are deemed to be approved by the Board.

(d) The Council shall meet quarterly, and at such other times as license applications are pending and evaluate the credentials of all persons applying for a license as a licensed polysomnographer in this State, in order to determine whether such persons meet the qualifications for licensing set forth in this chapter. The Council shall present to the Board the names of individuals qualified to be licensed and shall recommend disciplinary action against licensees as necessary, and shall suggest changes in operations or regulations. The Board shall approve or reject these recommendations within a reasonable time period.

(e) License suspension, revocation, or nonrenewal.

(1) The Council, after appropriate notice and hearing, may recommend to the Board that the Board revoke, suspend, or refuse to issue a license, or place the licensee on probation, or otherwise discipline a licensee found guilty of unprofessional conduct. Unprofessional conduct includes, but is not limited to, fraud, deceit, incompetence, negligence, dishonesty, or other behavior in the licensee's professional activity which is likely to endanger the public health, safety, or welfare. The Council may recommend and the Board may take necessary action against a licensed polysomnographer, who is unable to render services with reasonable skill or safety to patients because of mental illness or mental incompetence, physical illness, or the excessive use of drugs including alcohol. Disciplinary action or other action taken against a licensed polysomnographer must be accordance with the procedures for disciplinary and other actions against physicians, including appeals as set forth in subchapter IV of this chapter except that a hearing panel for a complaint against a licensed polysomnographer consists of 3 members; 1 of the 3 shall be a physician member of the Board; 2 of the 3 shall be unbiased members of the Council; and if no conflict exists, 1 of the 2 Council members shall be the Chair of the Council. The Chair of the hearing panel shall be 1 of the Council panel members.

(2)a. In the event of a formal or informal complaint concerning the activity of a licensee that presents a clear and immediate danger to the public health, the Board may temporarily suspend the person's license, pending a hearing, upon the written order of the Secretary of State or the Secretary's designee, with the concurrence of the Board chair or the Board chair's designee. An order temporarily suspending a license may not be issued unless the person or the person's attorney received at least 24 hours written or oral notice before the temporary suspension so that the person or the person's attorney may file a written response to the proposed suspension. The decision as to whether to issue the temporary order of suspension will be decided on the written submissions. An order of temporary suspension pending a hearing may remain in effect for no longer than 60 days from the date of the issuance of the order unless the temporary suspended person requests a continuance of the hearing date. If the temporary suspended person requests a continuance, the order of temporary suspension remains in effect until the hearing is convened and a decision is rendered by the Board. A person whose license has been temporarily suspended pursuant to this section may request an expedited hearing. The Board shall schedule the hearing on an expedited basis, provided that the Board receives the request within 5 calendar days from the date on which the person received notification of the decision to temporarily suspend the person's license.

b. As soon as possible after the issuance of an order temporarily suspending a polysomnographer's license to practice pending a hearing, the Council Chair shall appoint a 3-member hearing panel consisting of 3 members; 1 of the 3 shall be a physician member of the Board; 2 of the 3 shall be unbiased members of the Council; and if no conflict exists, 1 of the 2 Council members shall be the Chair of the Council. The Chair of the hearing panel shall be 1 of the Council panel members; or the complaint may be scheduled before a hearing officer pursuant to 29 Del. C. Section 8735 (t)(1)(d). The hearing shall be convened within 60 days of the date of issuance of the order of temporary suspension to consider the evidence regarding the matters alleged in the complaint. If a polysomnographer requests in a timely manner an expedited hearing, the hearing panel shall convene within 15 days of the receipt of the request by the Council. A decision shall be rendered within 30 days of the hearing.

c. In addition to making findings of fact, the hearing panel or hearing officer shall also determine whether the facts found by it constitute a clear and immediate danger to public health. If the hearing panel or hearing officer determines that the facts found constitute a clear and immediate danger to public health, the order of temporary suspension must remain in effect until the Board deliberates and reaches conclusions of law based upon the findings of fact. An order of temporary suspension may not remain in effect for longer than 60 days from the date of the decision rendered unless the suspended polysomnographer requests an extension of the order pending a final decision of the Board. Upon the final decision of the Board, an order of temporary suspension is vacated as a matter of law and is replaced by the disciplinary action, if any, ordered by the Board.

§ 1799X. Licensure.

(a) On and after July 1, 2014, any person who is engaged in the practice of polysomnography must be licensed as provided in this chapter. It shall be unlawful for any person to engage in the practice of

polysomnography on or after July 1, 2014 unless such person is practicing polysomnography under the provisions of this chapter.

(b) Polysomnographic License.

(1) A Licensed Polysomnographer may provide sleep-related services under the general supervision of a licensed physician;

(2) A person seeking licensure as a Licensed Polysomnographer must present proof that the person meets the following requirements:

a. Must be at least eighteen (18) years of age, and must pay the fees established by the Division of Professional Regulation;

b. The Licensed Polysomnographer applicant must have successfully completed one of the educational requirements in Section 1799V and passed an exam which is accredited by an independent outside agency and recommended by the Council and approved by the Board unless otherwise exempt pursuant to paragraph 3 of this subsection;

c. The Licensed Polysomnographer applicant must meet any additional educational or clinical requirements established by the Board.

(3) Any individual who is engaged in the practice of polysomnography as of July 1, 2011, shall be eligible for licensure under this chapter without meeting the educational requirement in Section 1799V, if the individual has:

a. passed the national certifying examination given by the Board of Registered Polysomnographic Technologists;

b. been credentialed by the Board of Registered Polysomnographic Technologists; and

c. met any additional educational or clinical requirements established by the Council and approved by the Board.

(4) Before practicing polysomnography, an individual must obtain a Polysomnographic License from the Board.

(5) To be eligible for renewal of a license to engage in the practice of polysomnography, a Licensed Polysomnographer must continue to be credentialed by BRPT, or other organization approved by the Council.

(6) Licensure

a. No person shall represent oneself or engage in the practice of polysomnography as a licensed polysomnographer in this State or use the title "polysomnographer", "licensed polysomnographer", "LPSGT", or any combination of above terms and/or abbreviations unless such a person is licensed under this subchapter.

b. This subchapter does not prohibit or restrict:

1. Any person licensed in this State under any chapter of this title who are physicians or other healthcare professionals from engaging in the practice for which that person is licensed;

2. The practice of polysomnography by a person who is employed by the United States or state government or any of its bureaus, divisions, or agencies while in the discharge of the employee's official duties;

3. The supervised practice of polysomnography of a person pursuing a course of study leading to a certificate or degree in polysomnography or an equivalent major, as authorized by the Board, from an accredited school or program approved by the Council, if the activities and services constitute a part of a supervised course of study and if the person is designated by a title that clearly indicates the person's status as a student. This period is not to exceed 2 years unless written approval is provided by the Board. The individual will be supervised by an individual licensed under this subchapter or a physician; or

4. The provision of Diagnostic electroencephalograms conducted in accordance with the guidelines of the American Clinical Neurophysiology Society.

c. The provisions of the Act shall not apply to licensed respiratory care practitioners.

(c) Waiver of requirements. The Polysomnography Advisory Council, by the affirmative vote of 5 of its members and with the approval of the Board within 30 days of the vote, may waive the quarterly meeting requirements of subsection (d) of §1799W of this Title.

(d) License denial. If it appears to the Board that an applicant has been intentionally fraudulent or that an applicant has intentionally submitted, or intentionally caused to be submitted, false information as part of the application process, the Board may not issue a license to the applicant and must report the incident of fraud or submitting false information to the Office of the Attorney General for further action.

(e) An applicant who is applying for licensure under this subchapter shall:

(1) Submit an application prescribed by the Council.

(2) Submit a certified criminal background check pursuant to § 1720(b)(6) of this title.

(3) The applicant may not have an impairment related to the current use of drugs or alcohol which substantially impairs the practice of polysomnography with reasonable skill and safety.

(f) The Board may refuse or reject an applicant, if after hearing, the Board finds that:

(1) The applicant has engaged in activities that are grounds for discipline under § 1799BB of this title.

(2) The applicant has been convicted of a crime substantially related to the practice of polysomnography as determined by the Board of Medical Licensure and Discipline in its rules and regulations.

(3) The applicant has been the recipient of any administrative penalties from any other jurisdiction or jurisdictions regarding the applicant's practice of polysomnography, including but not limited to fines, formal reprimands, license suspensions or revocation (except for license revocations for nonpayment of license renewal fees), probationary limitations, and/or has entered into any "consent agreements" which contain conditions placed by a Board on the applicant's professional conduct and practice, including any voluntary surrender of a license in lieu of discipline.

(g) Waiver of requirements. -- The Council, by the affirmative vote of 3 of its members and with the approval of the Board within a reasonable period of time from the vote, may waive the requirements of §1799X(f)(2) of this Title if it finds all of the following by clear and convincing evidence:

(1) The applicant's education, training, qualifications and conduct have been sufficient to overcome the deficiency or deficiencies in meeting the requirements of this section;

(2) The applicant is capable of practicing as a polysomnographer in a competent and professional manner;

(3) The granting of the waiver will not endanger the public health, safety, or welfare; and

(4) For waiver of a felony conviction, more than 5 years have elapsed since the date of the conviction. At the time of the application the applicant may not be incarcerated, on work release, on probation, on parole or serving any part of a suspended sentence and must be in substantial compliance with all court orders pertaining to fines, restitution and community service;

(5) For waiver of a misdemeanor conviction or violation, at the time of the application the applicant may not be incarcerated, on work release, on probation, on parole or serving any part of a suspended sentence and must be in substantial compliance with all court orders pertaining to fines, restitution and community service.

(h) Where the application of a person has been refused or rejected and such applicant feels that the Board has acted without justification, and imposed higher or different standards for the person than for other applicants or licensees, or has in some other manner contributed to or caused the failure of such application, the applicant may appeal to the Superior Court.

§ 1799Y. Endorsement.

An applicant for licensure by endorsement must possess a current license in a state which has licensing requirements substantially similar to or exceeding the requirements of this subchapter, and there may not be any outstanding or unresolved complaints against the applicant.

§ 1799Z. Continuing education.

The Council, with the approval of the Board, is authorized to adopt regulations specifying continuing education requirements which must be met by a licensee before a licensee will be eligible for renewal of their license.

§ 1799AA. Issuance and renewal of licenses; fees.

(a) The Division of Professional Regulation shall establish reasonable fees for licensing polysomnographers and for biennial license renewal.

(b) The Board shall issue a license to each applicant who meets the requirements of this chapter for licensure as a polysomnographer and who pays the established fees.

(c) Each license shall be renewed biennially, in such manner as is determined by the Division and upon payment of the appropriate fee and submission of a renewal form provided by the Division, and proof that the licensee has met the continuing education requirements established by § 1799Z of this title.

(d) The Council, in its rules and regulation, shall determine the period of time within which a licensee may still renew the licensee's license and determine late fees associated with the license renewal, notwithstanding the fact that such licensee has failed to renew on or before the renewal date, provided, however that such period shall not exceed 1 year.

(e) A licensee, upon written request, may be placed in an inactive status for no more than 5 years. Such person, who desires to reactivate that person's license, shall complete a Board-approved application form, obtain an updated certified criminal background check, submit a renewal fee, and proof of fulfillment of continuing education requirements in accordance with the rules and regulation of the Council.

§ 1799BB. Grounds for discipline, sanctions, or penalties.

(a) The following conditions and actions of a polysomnographer may result in disciplinary action as set forth in subsection (b) of this section if, after a hearing, the Board finds that an applicant or polysomnographer:

(1) Has employed or knowingly cooperated in fraud or material deception in order to be licensed;

or

(2) Has engaged in illegal, incompetent or negligent conduct in the provision of polysomnography; or

(3) Has, in the practice of the profession, knowingly engaged in an act of consumer fraud or deception; or

(4) Has violated the code of ethics as established by the American Academy of Sleep Medicine, BRPT or and other organization approved by the Council; or

(5) Has violated a lawful provision of this subchapter or any lawful rule or regulation established hereunder; or

(6) Has been convicted of a crime substantially related to the practice of polysomnography as determined by the Board of Medical Licensure and Discipline in its rules and regulations; or

(7) Has been convicted of a sexual felony offense.

(b) Persons licensed under this subchapter who have been determined to be in violation of this subchapter shall be subject to the following disciplinary actions:

(1) Issuance of a letter of reprimand.

(2) Censure.

(3) Placement on probationary status.

(4) Denial of license.

(5) Suspension of license.

(6) Revocation of license.

(7) Impose a monetary penalty not to exceed \$500 for each violation.

(c) As a condition of reinstatement of a suspended license or removal from probationary status, the Board may impose such disciplinary or corrective measures as are authorized under this subchapter.

§ 1799CC. Unauthorized practice of polysomnography.

Whoever engages in the practice of polysomnography or attempts to engage in the practice of polysomnography contrary to the provisions of this subchapter shall be guilty of a Class G felony and shall be fined not less than \$500 and not more than \$1,500, or imprisoned not more than 2 years, or both.

§ 1799DD. Procedure or action not described.

This subchapter governs the practice of polysomnography. If a procedure or action is not specifically prescribed in the subchapter, but is prescribed in the subchapters relating to the practice of medicine, and the procedure or action would be useful or necessary for the regulation of polysomnographic practitioners, the Board may, in its discretion, proceed in a manner prescribed for physicians in the practice of medicine.

§ 1799EE. Duty to report conduct that constitutes grounds for discipline or inability to practice.

(a) Every person to whom a license to practice has been issued under this Chapter has a duty to report to the Division of Professional Regulation in writing information that the licensee reasonably believes indicates that any other practitioner licensed under this chapter or any other healthcare provider has engaged in or is engaging in conduct that would constitute grounds for disciplinary action under this chapter or the other healthcare provider's licensing statute.

(b) Every person to whom a license to practice has been issued under this Chapter has a duty to report to the Division of Professional Regulation in writing information that the licensee reasonably believes indicates that any other practitioner licensed under this chapter or any other healthcare provider may be unable to practice with reasonable skill and safety to the public by reason of mental illness or mental incompetence; physical illness, including deterioration through the aging process or loss of motor skill; or excessive abuse of drugs, including alcohol.

(c) Every person to whom a license to practice has been issued under this Chapter has a duty to report to the Division of Professional Regulation any information that the reporting person reasonably believes indicates that a person certified and registered to practice medicine in this State is or may be guilty of unprofessional conduct or may be unable to practice medicine with reasonable skill or safety to patients by reason of mental illness or mental incompetence; physical illness, including deterioration through the aging process or loss of motor skill; or excessive use or abuse of drugs, including alcohol.

(d) All reports required under subsections (a), (b) and (c) of this section must be filed within 30 days of becoming aware of such information. A person reporting or testifying in any proceeding as a result of making a report pursuant to this section is immune from claim, suit, liability, damages, or any other recourse, civil or criminal, so long as the person acted in good faith and without gross or wanton negligence; good faith being presumed until proven otherwise, and gross or wanton negligence required to be shown by the complainant.

Approved September 12, 2012