

STATE OF FLORIDA
DEPARTMENT OF HEALTH
BOARD OF OSTEOPATHIC MEDICINE

IN RE: THE PETITION FOR RULEMAKING OF
THE FLORIDA ACADEMY OF
PHYSICIAN ASSISTANTS, INC.

PETITION FOR RULEMAKING

COMES NOW, Petitioner, Florida Academy of Physician Assistants, Inc. (FAPA), by and through its undersigned counsel, and pursuant to §120.54(7), F.S. files this Petition for the Initiation of Rulemaking, and in support thereof states as follows:

1. FAPA is a Florida Corporation and the largest professional association of physician assistants in the State of Florida, whose business address is 222 S. Westmonte Drive, Suite 101, Altamonte Springs, Florida 32714. For purposes of this proceeding, Petitioner's address and phone number shall be those of the undersigned legal counsel.

2. FAPA hereby seeks to have the Board of Osteopathic Medicine (Board) initiate rulemaking to amend rule, 64B15-6.010, F.A.C., entitled "Physician Assistant Performance." FAPA specifically requests the repeal of subparagraphs (2)(a) and (2)(b)1. through 6., which currently state:

(a) The following duties are not permitted to be delegated at all, except where expressly authorized by statute:

1. Prescribing, dispensing, or compounding medicinal drugs.
2. Final Diagnosis.

(b) The following duties are not permitted to be performed under indirect supervision:

1. Routine insertion of chest tubes and removal of pacer wires or left atrial monitoring lines.
2. Performance of cardiac stress testing.
3. Routine insertion of central venous catheters.
4. Injection of intrathecal medication without prior approval of the supervising physician.
5. Interpretation of laboratory tests, X-ray studies and EKG's without the supervising physician interpretation and final review.
6. Administration of general, spinal, and epidural anesthetics; this may be performed under direct supervision only by physician assistants who graduated from Board approved programs for the education of anesthesiology assistants.

3. The subject rule provision was promulgated by the Board of Osteopathic Medicine to implement §459.022, F.S. as provided in §§459.002(4), F.S., which states that the boards (meaning the Boards of Osteopathic Medicine created pursuant to chapter 459, F.S. and allopathic medicine pursuant to chapter 458, F.S.) shall adopt, by rule general principles that supervising osteopathic physicians must use in developing the scope of practice of a physician assistant under direct and indirect supervision. The specific Legislative Intent for such regulation is set forth in §459.022(1), F.S., which states that the purpose of the statute is to encourage more effective utilization of the skills of osteopathic physicians or groups of osteopathic physicians by enabling them to delegate health care tasks to qualified physician assistants when such a delegation is consistent with the patient's health and welfare.

4. Although the Legislature delegated authority to the boards to set forth in administrative rules “general principles that supervising osteopathic physicians must use in developing the scope of practice of a physician assistant under direct and indirect supervision,” the Legislature addressed specific aspects of such principles in the statute. In §459.022(2)(f), F.S., the Legislature defines the term “supervision” as it applies to the relationship between an osteopathic physician and a physician assistant to mean responsible supervision and control requiring only that there be easy availability or physical presence of a licensed osteopathic physician for consultation and direction of the actions of the physician assistant and specifically provides that the ability to communicate by way of telecommunication is sufficient for purposes of establishing the easy availability of the supervising osteopathic physician. In addition, in §459.022(3), F.S., the Legislature requires that the supervising osteopathic physician, be qualified in the medical areas in which the physician assistant is to perform, shall be individually or collectively responsible and liable for the performance and the actions or omissions of the physician assistant, may not supervise more than four (4) currently licensed physician assistants at any one time, and that a supervising osteopathic physician may not be required to review and cosign charts or medical records prepared by the supervised physician assistant.¹

5. The grant of rulemaking authority in §459.022(4), F.S. is specifically and clearly restricted to stating “general principles that supervising physicians must use in developing the scope of practice of a physician assistant under direct and indirect supervision.” It does not authorize the Board to determine under what circumstances

¹ The Legislature also chose in §459.022(4)(e), F.S., to specify the list of requirements for a supervising physician’s delegation of authority to a physician assistant to prescribe or dispense medications.

a supervising osteopathic physician must provide direct supervision or may be permitted to allow a physician assistant to practice under indirect supervision. Under the statutory scheme created in §459.022, F.S., this is clearly the purview and responsibility of the supervising osteopathic physician, guided by “general principles” established by administrative rules adopted by the boards.

6. An examination of the four numbered paragraphs contained in the Board’s administrative rule 64B15-6.010, F.A.C., reveals that the Board effectively established appropriate “general principles” to be used by supervising physicians in developing the scope of practice of a physician assistant under direct or indirect supervision. However, in the subparagraphs of paragraph (2) of the rule, the Board has gone far beyond establishing “general principles” to be used by the supervising osteopathic physician and instead purports to prohibit certain delegations of authority in subparagraphs (2)(a)1. and 2.² and to prohibit delegation of authority to a physician assistant to perform certain duties³ except in the physical presence of the supervising osteopathic physician in subparagraphs (2)(b)1. through 6.⁴

7. Delegating the prescribing and dispensing of medications, as prohibited by rule 64B15-6.010(2)(a)1., F.A.C., is a common practice between supervising osteopathic physicians and physician assistants and osteopathic physicians have been

² Prescribing, dispensing or compounding medicinal drugs and final diagnosis.

³ Routine insertion of chest tubes, removal of pacer wires or left atrial monitoring lines, performance of cardiac stress testing, routine insertion of central venous catheters, injection of intrathecal medication without prior approval of the supervising physician, interpretation of laboratory tests, X-rays and EKG’s without the supervising physician interpretation and final review, and administration of general, spinal and epidural anesthetics.

⁴ Although there is no applicable statutory definition of direct or indirect supervision as those terms might apply to physician assistants, the Board has promulgated rule 64B15-6.001(4) and (5), F.A.C., defining these terms in such a way as to contravene the specific description of supervision of physician assistants set forth in §459.022(2)(f), F.S., which allows specifically for either easy availability (without a limitation on distance) or physical presence. (emphasis added)

expressly authorized by statute to make such delegation. *See*, §459.022(4)(e), F.S. Establishing an appropriate diagnosis so as to determine an appropriate course of treatment or further examination is an integral part of the duties of a physician assistant who has been delegated the authority to examine, care for and treat patients. The Board's prohibition against "Final Diagnosis" set forth in rule 64B6-6.010(2)(a)2., F.A.C., is both ambiguous and in direct contradiction of the statutory scheme established in §459.022, F.S., which specifically permits the delegation of authority to a physician assistant to see, examine, treat and prescribe for a patient, without the need for the supervising osteopathic physician to concur in, review and approve of or see the patient and make their own determination of an appropriate diagnosis before the physician assistant can actually provide any care, treatment or prescription for the patient's condition or illness. The term "Final Diagnosis" is not defined in any statute or rule applicable to the practice of physician assistants, but to the extent that an appropriate diagnosis is necessary prior to determining and providing an appropriate course of treatment, it would arguably be prohibited for a physician assistant to initiate any care, treatment or prescription for a patient without first obtaining a "Final Diagnosis" from the supervising osteopathic physician. This is clearly not the intention of the statutory scheme created by §459.022, F.S. *See*, §459.022(1), F.S. (Legislative Intent). Individual physician assistants are either sufficiently trained and experienced in the performance of the various specific duties set forth in rule 64B15-6.010(2)(b)1.-6., F.A.C. to do them with the easy availability of the supervising osteopathic physician or the physical presence of the supervising osteopathic physician or they are not. By statute, this is a determination to be made by the supervising osteopathic physician, using the "general principles" adopted by

the Board, not by the Board through the adoption of a rule. *See*, §459.022(4), F.S. In that subparagraphs (2)(b)1. through 6., purport to usurp the supervising osteopathic physician's authority to make that determination, the rule far exceeds the authority granted to the Board to adopt "general principles" to guide that determination by the supervising osteopathic physician.

8. FAPA respectfully submits that the provisions of subparagraphs (a)1. and 2. and (b)1. - 6. of the Board's administrative rule 64B8-30.012(2), F.A.C. are not consistent with the current version of the law it purports to implement and far exceed the delegated rulemaking authority of the statute it purports to implement. As such, they should be deleted from the Board's existing rule.

9. FAPA further submits that the existing paragraphs (1), (2), (3) and (4) of the rule, without the subparagraphs of paragraph (2) of the rule, adequately and appropriately provide the "general principles" intended by the statute for providing guidance to supervising osteopathic physicians as they determine the appropriate scope of practice under the direct or indirect supervision of the supervising osteopathic physician.

10. Substantially all of FAPA's members are licensed and authorized to practice as physician assistants in Florida and as such have their scope of practice and level of supervision curtailed by the restrictions set forth in the above referenced and discussed rule provisions. Substantially all of FAPA's members are regulated by the Board and this administrative rule and substantially all of whom thereby also have a substantial interest in the rule. FAPA asserts in the name of and in the stead of its members, standing to make this request for the initiation of rule making pursuant to §120.54(7), F.S. *See, NAACP, Inc. v. Board of Regents*, 863 So.2d 294 (Fla.

2003); *Florida League of Cities, Inc. Department of Environmental Protection*, 603 So.2d 1363 (Fla. 1st DCA 1992); and *Florida Home Builders Association v. Department of Labor and Employment Security*, 412 So.2d 351 (Fla. 1982).

WHEREFORE, Petitioner, Florida Academy of Physician Assistants, respectfully requests that the Board of Osteopathic Medicine initiate rulemaking pursuant to Section 120.54, F.S., for the purpose of amending rule 64B15-6.010, F.A.C. by repealing subparagraphs (2)(a) and (b) as set forth in this Petition.

Respectfully submitted this _____ day of May, 2015.

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On Behalf Of
Florida Academy of Physician Assistants, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by e-mail transmission and U.S. Mail to Claudia Kemp, Executive Director, Florida Board of Osteopathic Medicine, 4052 Bald Cypress Way, Bin C-06, Tallahassee, Florida 32399-3257 and at claudia.kemp@flhealth.gov and to the Florida Board of Medicine's legal counsel,, Senior Assistant Attorney General Donna McNulty, by

electronic mail only at donna.mcnulty@myfloridalegal.com on this ____ day of
October, 2015.

Allen R. Grossman