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February 9, 2017

Steve Lee, Acting Director
Division of Consumer Affairs
124 Halsey Street, 7th Floor
Newark, New Jersey 07101

Re: 13-0024 - Scope of Physical Therapy Practice -
Dry Needling

Dear Director Lee:

You have requested an opinion as to whether the Physical Therapist Licensing Act of 1983, N.J.S.A. 45:9-37.11 to -37.34f, authorizes physical therapists to engage in the practice of "dry needling" (also referred to as "intramuscular stimulation" or "IMS").¹ For the reasons expressed below, under the current

1 Other states have grappled with the same issue and there is a split among the states as to whether dry needling is within the scope of practice of a physical therapist. A number of Attorneys General opinions have addressed the issue, as have Boards of Physical Therapy and Acupuncture in some states. At least five states have issued opinions suggesting that dry needling may be within the scope of practice of a physical therapist and at least six states, including New York and Pennsylvania, have either Attorney General or Board determinations that indicate the physical therapists cannot engage in dry needling.



statutory construct, physical therapists are not authorized to engage in the practice of dry needling.

At the outset, answering the question posed requires an understanding of what "IMS/dry needling" is. In short, the term "IMS/dry needling" is used to describe a technique that involves the insertion of needles, without the injection of any substance or medication, into or through the skin, at various trigger points on the body in an effort to achieve a neurophysiological effect, in the alleviation of pain and discomfort.

A review of N.J.S.A. 45:9-37.13 provides the definition of "physical therapy":

"Physical therapy" and "physical therapy practice" mean the identification of physical impairment or movement-related functional limitation that occurs as a result of injury or congenital or acquired disability, or other physical dysfunction through examination, evaluation and diagnosis of the physical impairment or movement-related functional limitation and the establishment of a prognosis for the resolution or amelioration thereof, and treatment of the physical impairment or movement-related functional limitation, which shall include, but is not limited to, the alleviation of pain, physical impairment and movement-related functional limitation by therapeutic intervention, including treatment by means of manual therapy techniques and massage, electro-therapeutic modalities, the use of physical agents, mechanical modalities, hydrotherapy, therapeutic exercises with or without assistive devices, neurodevelopmental procedures, joint mobilization, movement-related functional training in self-care, providing assistance in community and work integration or reintegration, providing training in techniques for the prevention of injury, impairment, movement-related functional limitation, or dysfunction, providing consultative, educational, other advisory services, and collaboration with other health care providers in connection with patient care, and such other treatments and functions as may be further defined by the board by regulation. [Id.] (Emphasis added.)

Thus, there is no express recognition of dry needling or intramuscular stimulation within the definition of "physical therapy". Nor does anything in the statute's legislative history address whether invasive procedures generally, or the use of needles in particular, are to be included or prohibited. Accordingly, if it is to be viewed as a permissible technique, it must be recognized within the context of the other enumerated treatments and functions. In construing a statute, the goal is to effectuate legislative intent in light of the language used and the object sought to be achieved. McCann v. Clerk of Jersey City, 167 N.J. 311, 320 (2001). In discerning legislative intent, courts look first to the statute's plain language, and "examine that language sensibly, in the context of the overall scheme in which the Legislature intended the provision to operate". N.J. Dep't of Env'tl. Prot. v. Huber, 213 N.J. 338, 365 (2013) (citation omitted); see also N.J.S.A. 1:1-1 (in statutory construction, "words and phrases shall be read and construed with their context, and shall, unless inconsistent with the manifest intent of the legislature or unless another or different meaning is expressly indicated, be given their generally accepted meaning, according to the approved usage of the language.") If the literal words give rise to an unclear or ambiguous meaning, with more than one plausible interpretation, or to an absurd result, courts look to extrinsic evidence, including legislative history and contemporaneous construction. Burnett v. County of Bergen, 198 N.J. 408, 421 (2009).

Traditionally, the modalities used in physical therapy have not involved the piercing of the skin, witness the treatments delineated in the definition above which do not involve invasive procedures. There has been a longstanding understanding that the scope of practice has specifically excluded needle electromyography. Indeed, in 2005, the Legislature enacted N.J.S.A. 45:9-5.2, which restricted the performance of needle electromyography to persons licensed to practice medicine and surgery.²

² N.J.S.A. 45:9-5.2 does exclude some other licensed health care providers from performing needle EMG's, even though their scopes of practice otherwise permitted them to employ invasive devices such as hypodermic needles.

The only reference in the definition that has any correlation to the use of instruments is the inclusion of the "mechanical modalities." But that term, when viewed in the context of the other enumerated modes of treatment within the statutory definition of physical therapy practice, cannot be relied upon to provide the basis for the Board of Physical Therapy Examiners to view "IMS/dry needling" to be within the scope of practice. If needles were to be recognized as a "mechanical modality", it is hard to see where the line could be drawn. If a needle is a "mechanical modality", a scalpel or knife or a laser might also be so classified. Had the Legislature intended to authorize treatment using invasive measures, it could have done so with clarity. Zabilowicz v. Kelsey, 200 N.J. 507, 517 (2009).

Nor is it reasonable to conclude that the Board possesses the authority to so significantly expand the scope of practice to include dry needling through the regulatory process. The identification of tasks to be authorized through the promulgation of a rule under the definitional catch-all, identified above -- "such other treatments and functions as may be further defined by the board by regulation" -- must be informed by the nature of the activities that are recognized to be within the scope of practice. "When specific words follow more general words in a statutory enumeration, we can consider what additional items might also be included by asking whether those items are similar to those enumerated." Board of Chosen Freeholders v. State, 159 N.J. 565, 576 (1999).

Two bills introduced in the New Jersey State Legislature last year, Assembly Bill No. 1839, introduced on January 27, 2016, and Senate Bill No. 1315, introduced on February 8, 2016, would add to the recognized types of treatment that physical therapists would be authorized to initiate, "intramuscular techniques", with the stated intention of expanding the scope of physical therapy practice. If enacted as initially drafted, the inclusion of the phrase "intramuscular techniques" into the definition of "physical therapy practice" would countenance the use of needles, and resolve the issue you have raised. However, the Assembly Bill was referred to the Regulated Professions Committee which in a statement dated February 22, 2016, reported on an amendment removing all references to "intramuscular manual therapy." Additionally, the fact that such an amendment is viewed as necessary to expand the scope of practice speaks in some measure to the absence of a present authority. A similar amendment was introduced in the 2014

legislative session (Assembly Bill 1648 and Senate Bill 874) and the 2012 legislative session (Assembly Bill No. 4303 and Senate Bill No. 2923) all which did not advance to enactment. While it may be difficult to definitely reach a determination based on these inconclusive legislative efforts, as the New Jersey Supreme Court has noted, "The stricture against drawing an inference one way or the other from legislative acquiescence in judicial and administrative interpretation of legislative enactments atrophies with every such unsuccessful introduction." Garfield Trust Co. v. Dir. of Div. of Taxation 102 N.J. 420, 431 (1986).

The conclusion that dry needling is not within the scope of physical therapy practice is not based on a determination that the Legislature only intended to recognize the use of needles being within the scope of practice of acupuncture, as that term is defined in the statute regulating the practice of acupuncture, at N.J.S.A. 45:2C-2a. That statute specifically authorizes licensed acupuncturists to engage in practice that involves "the stimulation of a certain point or points on or near the surface of the body by the insertion of needles to prevent or modify the perception of pain or to normalize physiological functions, including pain control, for the treatment of diseases or dysfunction of the body." Id.

Because these tools are within the scope of practice of acupuncturists does not foreclose their use by other practitioners if the Legislature has clearly signaled its intention to allow such practice. The Acupuncture Act itself, at N.J.S.A. 45:2C-8, recognizes an overlap between the scope of practice of acupuncturists and the scopes of practice of physicians and surgeons, or dentists, by providing that:

Nothing in this act shall be construed to prevent the practice of acupuncture by a person licensed in New Jersey as a physician and surgeon or dentist and is in good standing, provided his course of training has included acupuncture. The course of training in acupuncture shall be for a minimum of 300 hours and shall include a clinical training program of not less than 150 hours. [Id.]

Significantly N.J.S.A. 45:2C-8 does not include physical therapists among the practitioners authorized to engage in acupuncture -- a practice that explicitly involves the insertion of needles. It would be anomalous to conclude that legislatively recognized practitioners (physicians and dentists) would be authorized to engage in the practice, but only if they have met specific training requirements, but physical therapists could embark on the same activity without such recognition or training. For the purpose of this opinion we need not address the differences in the philosophical underpinning for the respective practices of physical therapy and acupuncture. That the purposes for which needles are used in acupuncture have a theoretical basis in Oriental medicine, distinct from the purposes that advocates for the inclusion of "IMS/dry needling" in physical therapy practice would claim is not determinative. The activity itself -- the insertion of needles in points in the body -- as with most medical procedures, has risks and contraindications, for which training is required.³

Our courts have long recognized situations in which the scopes of practice of licensed health care professionals overlap, see Sanzari v. Rosenfield, 34 N.J. 128, 136 (1961). By virtue of the plenary license granted to physicians and surgeons, they are authorized to utilize a wide range of modalities, equipment and instruments within their scope of practice -- including needles. Physical therapists utilize the modalities that the Legislature has identified for them, acupuncturists do likewise. Each board can, through rulemaking, recognize heretofore unrecognized techniques so long as they are informed by the context of and consistent with the existing parameters of practice. Neither board, however, could authorize its licensees to embark on

³ Upon its review of Assembly Bill No. 4303, in open public session at its September 2013 meeting, the Board of Medical Examiners opposed the "addition of intramuscular techniques to the physical therapist's scope of practice inasmuch as it questioned whether or not physical therapists were sufficiently educated and trained to perform such procedures, which could include 'dry needling.' Intramuscular techniques are not appropriately defined or limited and without sufficient training or experience, or the limiting definition, the danger for a pneumothorax, chest pain, shortness of breath, rapid heart rates, for example, are probable outcomes." Minutes of the New Jersey State Board of Medical Examiners, September 2013.

providing therapies that involve techniques or procedures that are not enumerated by the Legislature, or consistent with and of a similar nature to those identified. Accordingly you are advised that under the current statute, physical therapists are not authorized to engage in dry needling or intramuscular stimulation.

Sincerely yours,

CHRISTOPHER S. PORRINO
ATTORNEY GENERAL OF NEW JERSEY

By: _____
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