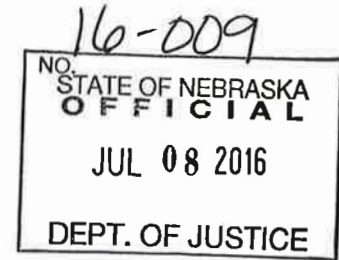




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DOUGLAS J. PETERSON
ATTORNEY GENERAL



SUBJECT: Whether "Dry Needling" is within the scope of practice of Nebraska physical therapists, occupational therapists and athletic trainers; Role and authority of professional licensing boards to advise practitioners as to scope of practice

REQUESTED BY: Courtney N. Phillips, MPA
Chief Executive Officer
Department of Health and Human Services

WRITTEN BY: Douglas J. Peterson, Attorney General
Lynn A. Melson, Assistant Attorney General

You have requested an opinion from this office regarding the definition of dry needling and whether this technique or procedure falls within the current scope of practice of physical therapists, occupational therapists and athletic trainers in Nebraska. In addition, you have asked "what is the role and limit of authority of a professional licensing board designated in the Uniform Credentialing Act to advise practitioners of whether a technique is within the scope of practice to be used by practitioners licensed in the area."

1. What is the definition of dry needling as it applies to the Physical Therapy Practice Act?

You have explained in your opinion request letter that a dispute has existed for several years concerning dry needling and that both the Nebraska Board of Chiropractic and the Nebraska Board of Physical Therapy have stated that the technique of dry needling falls within that profession's scope of practice. We begin by noting that the term

“dry needling” is not defined in any Nebraska statute or regulation. Indeed, we found no references at all to dry needling in Nebraska statutes and only one reference to dry needling in regulations, which occurs in the regulations governing the licensure of animal therapists at 172 NAC 182. Section 182-004.02 lists dry needling as one of the modalities which may be used by an “Animal Therapist in Acupuncture.”

First, while you ask our office to define the term “dry needling”, we do not ordinarily attempt to define such specialized terms as we have no expertise in the health care field. We generally rely on the expertise of the Department and individual professional boards in such matters. Your staff has forwarded to our office various materials regarding the topic of dry needling, including letters from the chairperson of the Nebraska Board of Physical Therapy (Scott Edwards, PT, OCS, February 21, 2016) and the chairperson of the Nebraska Board of Chiropractic (David W. Lauer, D.C., February 22, 2016) which express the views of those boards with respect to dry needling and copies of the minutes of the Board of Physical Therapy.

The Board of Physical Therapy gave an opinion during its meeting of June of 2011 that dry needling is within the scope of practice of physical therapists. The minutes of the June 20, 2011 meeting state as follows:

After discussion, including the review of 172 NAC 137-007 Fine-Wire Electromyography and reviewing documents provided during testimony, Mr. Edwards moved, seconded by Ms. Reiman that it is the opinion of the Nebraska Board of Physical Therapy that a Nebraska licensed physical therapist may perform dry needling as long as he/she can competently perform such a procedure. . . . Dry needling is a mechanical modality technique used to treat myofascial pain that uses a dry needle, without medication, that is inserted into a trigger point with the goal of releasing/inactivating the trigger points.

Mr. Edwards, the chairperson of the Nebraska Board of Physical Therapy, states in his letter of February 21, 2016, that some Nebraska physical therapists have been using dry needling in their practices since the Board voted on its opinion in 2011.

We have also reviewed a definition provided by The American Physical Therapy Association in a 2013 resource paper which describes dry needling as “a skilled intervention that uses a thin filiform needle to penetrate the skin and stimulate underlying myofascial trigger points, muscular, and connective tissues for the management of neuromusculoskeletal pain and movement impairments.” *Description of Dry Needling In Clinical Practice: An Educational Resource Paper*, February 2013 at page 2. This definition appears consistent with that provided by the Nebraska Board of Physical Therapy.

For purposes of determining whether the dry needling procedure falls within the statutory scope of practice for physical therapists in Nebraska, we will employ these two definitions. Our opinion is, therefore, limited to whether physical therapists may perform a procedure which fits this description.

We note that the Nebraska Board of Chiropractic takes a different position and has stated that dry needling is synonymous with acupuncture. In his letter of February 22, 2016, Dr. Lauer, chairman of the Board, is of the opinion that there is but one procedure, acupuncture, and that only medical doctors, osteopathic doctors, acupuncturists, and doctors of chiropractic are licensed for that procedure in Nebraska. Our review of this question reveals that the issue of dry needling is currently the subject of debate throughout the United States with both factual issues and policy considerations raised. There seems to be no consensus whether or not dry needling is synonymous with acupuncture. Recognizing that this office has no particular expertise in the health care field, the definitions of dry needling which were provided to us do not appear to be clearly synonymous with the statutory definition of acupuncture which is found at Neb. Rev. Stat. § 38-2006 (2008). In any event, there may be occasions in which the scopes of practice of certain health care professions may overlap. In other words, a particular activity or task could fall within the scope of practice of two or more separate health occupations. For example, the definition of acupuncture references “the recommendation of therapeutic exercises, dietary guidelines, and nutritional support” which is not exclusive to the practice of acupuncture.

In addition, many of the practice acts found within the Uniform Credentialing Act at Chapter 38 of the Nebraska statutes provide that the provisions of that Act do not apply to another health care practitioner practicing within the scope of his or her profession. As an example, Neb. Rev. Stat. § 38-2057(1) states that the provisions of the Medicine and Surgery Practice Act relating to acupuncture “do not apply to any other health care practitioner credentialed under the Uniform Credentialing Act practicing within the scope of his or her profession”. This suggests that certain other Nebraska practitioners may perform procedures which fall within the definition of acupuncture if those practitioners are practicing within the scope of practice of their respective professions. This leads us to your second question.

2. Does the dry needling procedure fall within the scope of practice of physical therapists in Nebraska?

The practice of physical therapy has been statutorily defined in Nebraska to include:

Alleviating impairment, functional limitation, or disabilities by designing, implementing, or modifying therapeutic interventions which may include any of the following: Therapeutic exercise; functional training in home, community, or work integration or reintegration related to physical movement and mobility; therapeutic massage; mobilization or manual therapy; recommendation, application, and

fabrication of assistive, adaptive, protective, and supportive devices and equipment; airway clearance techniques; integumentary protection techniques; nonsurgical debridement and wound care; physical agents or modalities; mechanical and electrotherapeutic modalities; and patient-related instruction; but which does not include the making of a medical diagnosis.

Neb. Rev. Stat. § 38-2914(2) (2008).

The statutory definition is somewhat general in nature. Rather than listing specific tasks or practices for physical therapists, the Legislature has employed general terminology such as “mechanical modalities” and “physical agents or modalities.” At its June, 2011 meeting, the Nebraska Board of Physical Therapy described dry needling as a “mechanical modality technique.” The question is then whether the term “mechanical modality” includes the use of needles in the dry needling technique. One definition of the term “modality” is “a method of application or the employment of any therapeutic agent; limited usually to physical agents.” Taber’s Cyclopedic Medical Dictionary (1989) (16th ed.) at 1138.¹

This office has previously issued opinions on other scope of practice issues. We have determined that “the performance of internal pelvic exams, electrocardiograms and rectal examinations by chiropractors is within the scope of chiropractic practice to the extent such procedures are part of a ‘physical and clinical examination or routine procedure’ which is conducted for the ‘diagnosis and analysis of the living human body for the purpose of detecting ailments, disorders and disease.’” Op. Att’y Gen. No. 91055 (June 17, 1991) (quoting pertinent parts of the statutory definition of the practice of chiropractic then codified at Neb. Rev. Stat. § 71-177). At a time when the topic of acupuncture had not yet been addressed by the Legislature, we opined that the practice of acupuncture was included within the broader term “chiropractic physiotherapy,” a term found in the same statutory definition of the practice of chiropractic. Op. Att’y Gen. No. 99026 (May 28, 1999). More recently we have addressed whether joint manipulation is within the scope of practice for physical therapists. Op. Att’y Gen. No. 09005 (February 9, 2009). We noted therein that the terms “manipulation” and “joint manipulation” were not defined in the Physical Therapy Practice Act, but that the term “mobilization or manual therapy” was statutorily defined to be limited to the normal physiological range of motion. “Therefore, if manipulation is defined as treatment which moves joints beyond their normal physiological range of motion, it is not within the current scope of practice for physical therapists” *Id.* at 2. Utilizing a similar approach to the current question about dry needling, we think that a colorable argument can be made that the broad term

¹ We note that the regulations found at 172 NAC 137 § 015.02(15) provide that a physical therapist “must not provide services for which s/he is not trained or experienced.” To the extent an argument can be made that dry needling falls within the scope of practice for physical therapists, the dry needling technique could be employed only by those with adequate training and experience. A factual determination of what training and experience would be necessary is beyond the scope of this opinion.

“mechanical modality”, as used in the statutory definition of physical therapy at § 38-2914(2), includes the use of needles in the dry needling technique.

Because the topic of dry needling has not been addressed by Nebraska statutes or cases, we have also looked at other jurisdictions. While there is a split of authorities from other jurisdictions on this question, it appears that the majority of state Attorneys General who have addressed the issue have concluded that dry needling may be within the scope of practice for physical therapists and that the board of physical therapy for that state has authority to make that determination. While these opinions are based upon the language of each state’s statutes, and those statutes may differ from the provisions of the Nebraska Physical Therapy Practice Act, they do tend to support the position that dry needling is within the scope of practice for physical therapy.

Maryland’s Attorney General stated that the Maryland statute defining the practice of physical therapy did not clearly answer the question whether dry needling is within the scope of practice of physical therapy, but that the term “mechanical device” as used in the statute could be read broadly to include any tool designed for purposes related to physical therapy and could include acupuncture needles. Thus, in the view of the Maryland Attorney General, the Physical Therapy Board there had discretion to determine by regulation whether dry needling is within the scope of practice of physical therapy. 95 Md. Att’y Gen. Op. No. 138 (2010).

Mississippi’s Attorney General focused on the statutory authority of the Mississippi Physical Therapy Board to interpret and enforce the practice act and concluded that the Physical Therapy Board there acted within the scope of its statutory authority when promulgating rules including the use of needles for therapeutic treatment as a technique within the statutory definition of physical therapy. Mississippi also defined physical therapy to include administering treatment by mechanical devices. Miss. Att’y Gen. Op. No. 2012-00428 (2012).

Noting that the Kentucky statutory definition of physical therapy included “invasive or noninvasive procedures” and the use of “assistive devices” and “physical agents” to relieve pain or alter physiological status, Kentucky’s Attorney General opined that those are categories which may include needles. Therefore, “we agree with the Board of Physical Therapy that the definition in KRS 327.010(1) is broad enough to include ‘dry needling’ by a physical therapist with adequate training and skill to perform the procedure competently.” Ky. Att’y Gen. Op. No. 13-010 (2013) at 5. Louisiana’s Attorney General has agreed with the states listed above and opined that dry needling is within the scope of practice of both physical therapy and chiropractic. La. Att’y Gen. Op. No. 14-0216 (2015).

The Texas Attorney General has recently opined that “a court would likely conclude that the board of Physical Therapy Examiners has authority to determine that trigger point dry needling is within the scope of practice of physical therapy.” Finding that trigger point dry needling is a “treatment . . . to reduce the incidence or severity of . . . pain,” the Texas

Attorney General stated that it likely falls with the Texas broad statutory definition of physical therapy. And, "it would seem consistent with the Board's rules to conclude that trigger point dry needling involves the 'utilization of . . . physical agents . . . in the aid of diagnosis or treatment.'" Tex. Att'y Gen. Op. No. KP-0082 (2016). On the other hand, Tennessee's Attorney General concluded that trigger point dry needling was not within the scope of practice of physical therapy, finding that nothing in that state's practice act indicated a legislative intent to include the invasive use of needles for therapeutic purposes. Tenn. Att'y Gen. Op. 14-62 (2014).

As discussed above, in our view, a colorable argument can be made that dry needling falls within the general terms of § 38-2914(2). However, the answer is not clear. In addition, we are aware that this is a controversial issue throughout the United States and that there is pending litigation on this issue in other jurisdictions. And, to the extent that factual determinations and policy considerations as to training and experience are required, this is a matter that would be more appropriately decided by the Legislature. For these reasons, the best approach may be for the Department to seek legislation to clarify which health care professions may perform dry needling.

3. Is dry needling within the scope of practice of Nebraska occupational therapists?

Occupational therapy is defined at Neb. Rev. Stat. § 38-2510(2) (2008), in pertinent part, as follows:

Occupational therapy encompasses evaluation, treatment, and consultation and may include (a) remediation or restoration of performance abilities that are limited due to impairment . . . , (b) adaptation of task, process, or the environment, or the teaching of compensatory techniques, (c) disability prevention methods and techniques. . . , and (d) health promotion strategies and practices which enhance performance abilities.

Authorized services of an occupational therapist are also listed at Neb. Rev. Stat. § 38-2526. Here, we note that subsection (5) provides that an occupational therapist may, if certified pursuant to section 38-2530, "apply physical agent modalities as an adjunct to or in preparation for engagement in occupations . . ." "Physical agent modalities" are, in turn, defined in this act, as modalities which use water, temperature, sound, electricity, or mechanical devices. Neb. Rev. Stat. § 38-2513. And, the term "mechanical devices" is defined, for purposes of the Occupational Therapy Practice Act, as meaning intermittent compression devices. Neb. Rev. Stat. § 38-2508.

We have found no language of the Occupational Therapy Practice Act that we would construe to include dry needling. Therefore, it is our opinion that dry needling does not fall within the scope of practice for occupational therapy.

4. Is dry needling within the scope of practice of Nebraska athletic trainers?

We have also reviewed the Athletic Training Practice Act. "Athletic training" is defined as "the prevention, evaluation, emergency care, first aid, treatment, and rehabilitation of athletic injuries utilizing the treatments set out in section 38-408." Neb. Rev. Stat. § 38-405. Section 38-408 then lists the following physical modalities that Nebraska athletic trainers are authorized to use under guidelines established with a licensed physician: electrotherapy, ultrasound, medical diathermies, infrared light and ultraviolet light. A "medical diathermy" has been defined as the use of heating agents in the treatment of ailments. *Webster's New World Dictionary* (3rd ed. 1988) at 381. None of the statutorily authorized modalities appear to us to include dry needling. In our view, dry needling does not fall within the scope of practice for athletic trainers.

5. What is the role and limit of authority of a professional licensing board designated in the Uniform Credentialing Act to advise practitioners whether a technique is within the scope of practice to be used by practitioners licensed in the area?

It is our understanding from a review of the minutes of the Board of Physical Therapy, and other boards appointed by the State Board of Health pursuant to Neb. Rev. Stat. §38-158, that at least some of those boards discuss questions they have received from practitioners, including questions concerning scope of practice, at their meetings. Individual boards then, at times, vote to adopt a particular opinion or decision in answer to those questions. The minutes of the Board of Physical Therapy reflect that the Board voted to adopt an opinion regarding whether dry needling is within the scope of practice for physical therapists at its June 20, 2011 meeting. At its September 26, 2011 meeting, the Board had further discussion on this issue and the Board voted to adopt training requirements for the practice of dry needling.

While a general discussion of such issues is likely helpful to practitioners, the adoption of a decision or opinion at a board meeting is not legally binding and has no legal effect. It appears that only the Board of Nursing has specific statutory authority to issue advisory opinions concerning scope of practice and those opinions are not binding. "Such opinions shall be considered informational only and are non-binding." Neb. Rev. Stat. § 38-2216(2). We found no similar statutory authority for other Boards to issue advisory opinions.

Pursuant to Neb. Rev. Stat. § 38-161, the duties of each board are primarily providing recommendations to the Division of Public Health of the Department of Health and Human Services and its Director with regard to the issuance, denial or reinstatement of credentials, disciplinary action and changes in legislation. Neb. Rev. Stat. § 38-126 provides that each board, along with the Division of Public Health, may adopt regulations in such areas as minimum standards required for a credential, continuing competency requirements for persons seeking renewal of credentials, and specification of acts that constitute unprofessional conduct. Most such regulations must be approved and adopted

by the individual Board, the State Board of Health and the Director of the Division of Public Health. Regulations properly promulgated under the Administrative Procedure Act have the force of law. *Nucor Steel v. Leuenberger*, 233 Neb. 863, 448 N.W.2d 909 (1989); *State v. Grosshans*, 270 Neb. 660, 707 N.W.2d 405 (2005).

As we have discussed in prior opinions, administrative boards and agencies may express their interpretation of laws they are charged with administering through the rulemaking procedure. "The primary function of a regulation is to interpret an ambiguous statute and clarify its meaning." *Northern Natural Gas Co. v. O'Malley*, 277 F.2d 128, 134 (8th Cir. 1960). An agency has "considerable discretion to interpret and flesh out these statutory provisions." Op. Att'y Gen. No. 95096 (December 14, 1995). However, any regulation must be consistent with the statutes. While the Legislature may delegate the power to adopt regulations to implement the policy of a statute, the agency "is limited in its rulemaking authority to powers granted to the agency by the statutes which it is to administer, and it may not employ its rulemaking power to modify, alter, or enlarge portions of its enabling statute." *Scofield v. State*, 276 Neb. 215, 225, 753 N.W.2d 345, 354 (2008).

For these reasons, it is our opinion that, while a professional licensing board may discuss practitioners' questions at its meetings, it has no authority to issue a binding advisory opinion or set practice requirements through a decision at its meetings. Only regulations, adopted in conjunction with the State Board of Health and Director of Public Health, have legal effect. Further, those regulations must be consistent with the enabling statutes.

Conclusion

It is our understanding that there are differing views as to the definition of dry needling. If dry needling is defined using the descriptions provided to this office by the Board of Physical Therapy and the American Physical Therapy Association, it is our opinion that a reasonable legal argument can be made that dry needling is a "mechanical modality" or a "physical agent or modality" and, therefore, falls within the statutory definition of physical therapy. In our view, dry needling is not within the current scope of practice of occupational therapists or athletic trainers.

With regard to the authority of a professional licensing board to provide advice as to the scope of practice, we conclude that such boards lack statutory authority to issue

binding advisory opinions. Only regulations, adopted in conjunction with the State Board of Health and Director of Public Health, have the force of law.

Sincerely,

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Attorney General


Lynn A. Melson
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Approved by:


Attorney General