

STATE OF MISSISSIPPI



JIM HOOD
ATTORNEY GENERAL

OPINIONS
DIVISION

September 10, 2012

Debbie Moore DC, LAc
Chair of Mississippi Council of Advisors in Acupuncture
P.O. Box 326
Picayune, MS 39466

and

Mississippi State Board of Medical Licensure
Attn: Mississippi Council of Advisors in Acupuncture
1867 Crane Ridge Drive, Ste. 200B
Jackson, MS 39216

Re: *Authority of State Board of Physical Therapy to Include Dry Needling within the Scope of Practice of Physical Therapy*

Dear Dr. Moore:

Attorney General Jim Hood has received your request for an official opinion and assigned it to me for research and response.

Issue Presented

Your letter generally asks for our opinion on a recent ruling of the Mississippi State Board of Physical Therapy ("Physical Therapy Board"). We understand this ruling to be a proposed rule that has been filed with the Secretary of State. The proposed rule defines intramuscular manual therapy ("IMT"), deems IMT to be within the practice of physical therapy and sets forth the parameters, educational requirements and other requirements for its use by physical therapists. Specifically, your letter asks the following (paraphrased) questions:

1. Is dry needling a form of acupuncture as defined in Mississippi Code Ann. Section 73-71-5?
2. If the answer to question number 1 is yes, are physical therapists performing dry needling in violation of Sections 73-71-15 and 73-71-37?

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3. Does the Physical Therapy Board have the authority to include dry needling/acupuncture in its scope by rule or regulation or must this type of scope change go through the Mississippi Legislature?
4. Must physical therapists be fully qualified and licensed as acupuncturists by the Mississippi State Board of Medical Licensure before performing acupuncture or dry needling?

Brief Response

The questions posed in your letter could be understood to question whether a physical therapist not licensed as an acupuncturist could engage in the "practice of acupuncture" as defined by Mississippi statute. Our understanding, however, is that your questions center on the Physical Therapy Board's authority to adopt the proposed rule and the propriety of physical therapists acting pursuant to such rule. Accordingly, this opinion is limited to the authority of the Physical Therapy Board regarding IMT as defined in the proposed rule and the propriety of physical therapists performing IMT in accordance with the proposed rule and under the licensing requirements of the Physical Therapy Board. With these limitations in mind, this office's opinions on the above-stated questions are

1. It is this office's opinion that the Physical Therapy Board is authorized by state law to properly include IMT, commonly referred to as "dry needling," within the practice of physical therapy. It is our office's opinion that the inclusion of certain types of dry needling within the definition of acupuncture does not reserve the technique exclusively to acupuncturists nor does such inclusion operate to prohibit the Physical Therapy Board from adopting a proposed rule that allows IMT.
2. It is our office's opinion that a physical therapist performing IMT in accordance with the Physical Therapy Board's rules, regulations or interpretation of its enabling statutes relating to performing IMT is not in violation of Sections 73-71-15 and 73-71-37 which, respectively, define and impose penalties for the unlicensed practice of acupuncture.
3. It is our office's opinion that the Physical Therapy Board does have the authority to include IMT and dry needling in its scope by rule or regulation and that legislative approval or enactment is not required.
4. See answers to numbers 1 through 3 above. A physical therapist acting in compliance with the Physical Therapy Board's rules and regulations regarding the practice of physical therapy and IMT or dry needling is not required to be licensed as an acupuncturist by the State Board of Medical Licensure.

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Legal Analysis and Discussion

Certain professions overlap such that certain activities performed under the licensing scheme of a particular licensure board can likewise be performed legally under the licensing scheme of another licensure board. See MS AG Op. Brister (June 12, 2019)(citing *State Bd. of Reg. for Professional Engineers v. Rogers*, 120 So. 2d 772 (Miss. 1960)). This issue of overlapping disciplines appears to be equally present in the healthcare professions. In particular, the issue of IMT or dry needling and whether it is a technique to be performed by physical therapists or acupuncturists has been the subject of debate and discussion throughout the United States. Our research indicates that as of 2010, fifteen (15) state licensing boards had concluded that IMT was within the practice of physical therapy. On the other side of the ledger, at least five (5) state licensing boards had concluded that IMT was not within the practice of physical therapy.

As noted, states have taken various approaches regarding whether IMT or dry needling should be within the scope of acupuncture, physical therapy or both. Georgia law takes the latter approach and demonstrates the overlapping of professions. Section 43-33-3 of the Georgia Code specifically defines "physical therapy" to include "dry needling" while Section 43-34-62 defines "practice of acupuncture" to include "dry needling" as a "technique of acupuncture." Given the various positions taken both legislatively and by licensing boards, a decision by the Physical Therapy Board either excluding or including IMT as a physical therapy technique would be factually supportable. However, the question here turns on statutory construction and whether the Physical Therapy Board is authorized to define IMT as a physical therapy technique and/or whether state statutes governing acupuncture operate to prevent such a determination.

It is the opinion of this office that the relevant statutes give the Physical Therapy Board authority to promulgate the proposed rule on IMT. Section 73-23-43 authorizes the Physical Therapy Board:

(e) To adopt, amend or repeal any rules or regulations necessary to carry out the purposes of this chapter and the duties and responsibilities of the board, in accordance with Section 25-43-1 et seq. Such rules, when lawfully adopted, shall have the effect of law;

* * * * *

(h) To regulate the practice of physical therapy by interpreting and enforcing this chapter;

This section further provides that in order to allow the Physical Therapy Board to safeguard public health, safety and welfare, "[t]he powers and duties enumerated . . . are to be liberally construed to accomplish this objective." The Physical Therapy Board clearly has the authority to interpret the law and carry out the law through regulations.

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It is the opinion of this office that this authority extends to defining through regulations the specific acts that fit within the statutory definition of the practice of physical therapy. See MS AG Op. Brister (June 29, 2012)(Opining that although the Board of Professional Engineers and Surveyors cannot expand the definition of the "practice of engineering," the Board does have the authority to identify which tasks fall within the statutory definition.) Section 75-23-33 defines "practice of physical therapy" to include:

Administering treatment by therapeutic exercise, neurodevelopmental procedures, therapeutic massage, **mechanical devices** and therapeutic agents which employ the physical, chemical and other properties of air, water, heat, cold, electricity, sound and radiant energy for the purpose of correcting or alleviating any physical condition or preventing the development of any physical or mental disability. The use of roentgen rays and radium for any purpose, and the use of electricity for surgical purposes including cauterization, are not part of physical therapy . . . (emphasis added).

The Maryland Attorney General was asked to address nearly the same issues regarding the use of "dry needling" by physical therapists. The Maryland statute, like Mississippi's statute, defined the practice of physical therapy to include "administering treatment with therapeutic exercise, therapeutic massage, mechanical devices, or therapeutic agents that use the physical, chemical, or other properties of air, water, electricity, sound, or radiant energy." MD AG Op. Kaufman, 2010 WL 3547902 (Aug. 17, 2010). In his opinion, the Maryland Attorney General concluded that "[t]he phrase 'mechanical device' appears susceptible to a broad reading" and further concluded that a needle could be a mechanical device used for "purposes related to physical therapy." *Id.* After discussing statutes similar to those in Mississippi regarding the authority of Maryland physical therapy board, the Maryland Attorney General opined as follows:

The reference to the use of "mechanical devices" by physical therapists has been a part of the law since the State first regulated physical therapists in 1947. See Chapter 906, Laws of Maryland 1947. Then, as now, the statute defined physical therapy to include treatment of injuries or disabilities by a variety of means, including exercise, massage, heat, cold, air, and light, among other things. There is no legislative history that sheds light on the range of implements covered by the phrase "mechanical devices." And we have not found a judicial construction of the phrase. But it seems fair to conclude that, in using general terms like "exercise," "heat," "cold," and "mechanical device," the General Assembly did not intend to catalog each particular technique or limit the practice of physical therapy to the particular devices in existence in 1947. The general phrase "mechanical device" could encompass new devices that might be developed for physical therapists to administer treatment. In our view, the General Assembly intended to give the Physical Therapy Board

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substantial discretion to recognize new mechanical devices that might be employed in the practice of physical therapy.

Id. at 6-7. It is the opinion of this office that the Mississippi Legislature's broad definition of physical therapy and the types of devices that may be used coupled with the Physical Therapy Board's statutory grant of interpretative and regulatory authority authorizes the Physical Therapy Board to include IMT as a technique within the field of physical therapy.

Your letter also directs our attention to various statutes governing acupuncture and various related definitions. In particular, you directed our attention to Section 73-71-5(m)(l) which defines "acupuncture" to include "the insertion and manipulation of needles to the body, and the use of Oriental medicine and other modalities and procedures at specific locations on the body, for the prevention or correction of any disease, illness, injury, pain or other condition." Although this definition could certainly include "dry needling" as that term is used in the practice of acupuncture, it is our opinion that this definition does not reserve to acupuncturists the exclusive right to use needles for therapeutic treatment. This is the same conclusion reached by the Maryland Attorney General. See MD AG Op. Kaufman, 2010 WL 3547902 (Aug. 17, 2010).

The possibility for such overlaps was provided for by statute. Section 73-71-17 of the acupuncture statute states "[t]his act shall not be construed to limit, interfere with, or prevent any other class of licensed health care professionals from practicing within the scope of their licenses as defined by each profession's state licensing statute." This statutory language was apparently included to cover a situation such as the instant one in which a health care professional from another discipline is authorized to perform techniques that resemble or overlap with the practice of acupuncture. Thus, it is our opinion that statutory authorization for the use of needles for therapeutic treatment by acupuncturists does not exclude therapeutic use of needles by physical therapist where, as here, the Physical Therapy Board has acted to recognize such use as a physical therapy technique. We believe that a contrary conclusion would lead to untoward and unintended consequences. In addition to use of needles, "[t]echniques of acupuncture" also include "applications of cold packs, dietary, nutritional and lifestyle counseling, manual therapy (Tuí Na), massage, breathing and exercise techniques." If the definition of acupuncture could be used to exclude the use of needles from physical therapists, then similar logic might be used to exclude other professions from use of these various techniques that are also included in the definition of acupuncture.

Both the Mississippi Council of Advisors in Acupuncture and the Physical Therapy Board provided valuable information including studies and positions by various organizations and associations involving both professional disciplines. The literature demonstrates an ongoing debate with many factual issues raised by both sides. One such issue is whether acupuncture is based on Chinese or Oriental techniques as opposed to IMT which is based on Western medical concepts. Indeed, Section 73-71-5(m)(l) in defining acupuncture references Oriental medicine; and the Physical Therapy

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Board's proposed regulation describing IMT references Western medical concepts. We were also provided with information related to standards, training and continuing education requirements. However, under Mississippi law, the resolution of the issues presented turns not on these policy and factual determinations but instead on whether the Physical Therapy Board has the authority to include IMT within the definition of Physical Therapy. It is the opinion of this office that the Physical Therapy Board has this authority.

Your letter cites our opinion in MS AG Op. Vann Craig (March 27, 2009) as support for proposition that the Physical Therapy Board cannot include IMT within the practice of physical therapy. In that situation, the State Board of Pharmacy had proposed regulations which granted pharmacists authority to prescribe certain drugs. Under the Medical Practice Act and the Pharmacy Practice Act the authority to prescribe drugs was reserved exclusively to a defined class of professionals that did not include pharmacists. Thus, our office opined that the State Board of Pharmacy had acted contrary to the express wording of both the Medical Practice Act and the Mississippi Pharmacy Practice Act. Here, the Physical Therapy Board's actions have not violated either the physical therapy or the acupuncture statutes.


Conclusion

In conclusion, it is the opinion of this office that the Physical Therapy Board acted within the scope of its authority when promulgating the proposed rule including the use of needles for therapeutic treatment as a technique within the scope of the statutory definition of the practice of physical therapy. It is also the opinion of this office that the statutes regarding the definitions of acupuncture and the unlicensed practice of acupuncture can not be used to interfere with or limit physical therapists who are performing IMT or dry needling under the licensing authority of the Physical Therapy Board.

If this office can be of further assistance, feel free to contact us.

Sincerely,

Jim Hood, Attorney General



By: Ricky G. Luke
Assistant Attorney General