

STATE OF NORTH CAROLINA

BEFORE THE NORTH
CAROLINA BOARD OF
PHYSICAL THERAPY
EXAMINERS
DOCKET NO. DR-16-1

In re Request for Declaratory)
Ruling by NORTH CAROLINA)
ACUPUNCTURE LICENSING)
BOARD,)
)
Petitioner.)

DECLARATORY RULING

The North Carolina Board of Physical Therapy Examiners issues this declaratory ruling in response to the May 2, 2016, request by the North Carolina Acupuncture Licensing Board. On May 31, 2016, the Physical Therapy Board notified the Acupuncture Board in writing that the Physical Therapy Board would provide a ruling. The request asks the Physical Therapy Board to issue a declaratory ruling regarding the treatment known as dry needling.

The Acupuncture Board's request is a byproduct of the April 26, 2016, order of the North Carolina Business Court that dismissed the Acupuncture Board's lawsuit against the Physical Therapy Board. In that lawsuit, the Acupuncture Board sought a declaratory judgment that dry needling falls outside of the scope of physical therapy and,

instead, constitutes the unauthorized practice of acupuncture. The lawsuit sought to countermand the Physical Therapy Board's 2010 conclusion that dry needling falls within the scope of physical therapy.

In its April 26 order, the Court concluded that the Acupuncture Board could not proceed with its litigation because the Acupuncture Board had not pursued any available administrative remedy. As the Acupuncture Board itself explains in its May 2 letter, this request is the next step in that litigation.

In response to the request, the Physical Therapy Board reaffirms the conclusion that dry needling constitutes physical therapy. In particular, dry needling satisfies the definition of physical therapy in the North Carolina Physical Therapy Practice Act. Dry needling also falls within the definition of physical therapy in this Board's rules.

In reaffirming these conclusions, the Physical Therapy Board has also considered the points that the Acupuncture Board has advanced in the litigation, as reflected in the materials that the Acupuncture Board

submitted or incorporated in support of its request. Regarding these points, the Physical Therapy Board concludes¹ that:

- the scope of physical therapy under North Carolina law includes dry needling;
- the scope of health professions is dynamic, not static;
- dry needling is distinct from acupuncture;
- the Acupuncture Board's request fails to recognize that health professions are allowed to have overlapping scopes of practice;
- there is no conflict between this ruling and the Rules Review Commission's January 15, 2015, objection to the Board's proposed rule on additional training requirements for dry needling;
- North Carolina public policy favors patient choice in health care; and
- the Acupuncture Board's desired ruling would violate the anti-monopoly provision in the North Carolina Constitution.

¹ This introductory summary of this Board's ruling is illustrative, not exclusive.

In sum, the Physical Therapy Board concludes, as it concluded in 2010, that dry needling is physical therapy.

BACKGROUND

Dry Needling

The Acupuncture Board's request concerns dry needling, a technique used to treat myofascial pain with a solid needle.² Am. Physical Therapy Ass'n, Physical Therapists and the Performance of Dry Needling 2 (2012) [A.R. 1840].³ In dry needling, a small needle is

² Numerous scientific articles, reports, and books address the history, efficacy, and safety of dry needling. See, e.g., Joseph Caramagno et al., Human Res. Research Org., Analysis of Competencies for Dry Needling by Physical Therapists (2015) [A.R. 1851-98]; Trigger Point Dry Needling: An Evidenced and Clinical-Based Approach (Jan Dommerholt & Cesar Fernandez-de-las-Penas, eds., 2013) [A.R. 1899-1913]; Sarah Brady et al., Adverse Events Following Trigger Point Dry Needling: A Prospective Survey of Chartered Physiotherapists, 22 J. Manual & Manipulative Therapy 134 (2014) [A.R. 1843-50]; David Legge, A History of Dry Needling, J. Musculoskeletal Pain, May 27, 2014, at 1 [A.R. 1914-21]; Vanessa Valdes, Dry Needling in the Management of Pain and Physical Dysfunction—Physical Therapy Scope of Practice Issues, 28 Orthopaedic Physical Therapy Practice, no. 1, 2016, at 48 [A.R. 1961-70]; Casey Unverzagt et al., Dry Needling for Myofascial Trigger Point Pain: A Clinical Commentary, 10 Int'l J. Sports Physical Therapy 402 (2015) [A.R. 1943-60].

³ Parallel references to the administrative record (A.R.) in this case, see infra p. 19, are appended to the end of the citations in this declaratory ruling.

inserted into tight bands of muscle, known as trigger points, to relieve pain and restore functionality. Id.; accord, e.g., Flynn Aff. ¶¶ 11-12 [A.R. 2084]; Valdes Aff. ¶¶ 23-25 [A.R. 1832]; Unverzagt et al., supra, at 403 [A.R. 1945].

Physical therapists across the country, and internationally, perform dry needling. Trigger Point Dry Needling, supra, at 59 [A.R. 1903]. In the United States, physical therapists can perform dry needling in at least thirty-two states. Unverzagt et al., supra, at 412-13 [A.R. 1954-55]. Internationally, physical therapists perform dry needling in countries ranging from Canada, Great Britain, and Ireland, to South Africa, Australia, and New Zealand. Valdes Aff. ¶ 26 [A.R. 1832]; Unverzagt et al., supra, at 403, 413 [A.R. 1945, 1955].

Dry needling traces its roots to Dr. Janet Travell, who conducted research in the 1940s on myofascial trigger points. Valdes Aff. ¶ 21 [A.R. 1831]; Legge, supra, at 1-2 [A.R. 1915-16]. Dr. Travell performed her research and advanced the study and practice of myofascial trigger point needling without reference to, or knowledge of, acupuncture. Valdes Aff. ¶ 22 [A.R. 1832]; Trigger Point Dry Needling, supra, at 62 [A.R. 1906].

Dry-needling techniques have evolved over time. Initially, the treatment of trigger points involved injecting substances through needles into those points. Valdes Aff. ¶ 24 [A.R. 1832]; Legge, supra, at 1-2 [A.R. 1915-16]. However, research showed that the needle's mechanical stimulation created a therapeutic effect distinct from the effect attributable to the injected substance. Valdes Aff. ¶ 25 [A.R. 1832]; Legge, supra, at 2-3 [A.R. 1916-17]. The size of the needle used in trigger point needling also became smaller as practice and research evolved. Valdes Aff. ¶ 25 [A.R. 1832].

Scientific data show that dry needling effectively relieves myofascial pain.⁴ Flynn Aff. ¶ 13 [A.R. 2084]; Valdes Aff. ¶¶ 31-33 [A.R. 1833]; see also Am. Physical Therapy Ass'n, supra, at 4 [A.R. 1842]; Valdes, Dry Needling in the Management of Pain, supra, at 48 [A.R. 1962]; Caramagno et al., supra, at 1 [A.R. 1859]; Unverzagt et al., supra, at 411-12 [A.R. 1953-54]. As the literature explains:

⁴ The Acupuncture Board appears to concede the effectiveness of dry needling. See Brief in Support of Motion for Preliminary Injunction at 3, N.C. Acupuncture Licensing Bd. v. N.C. Bd. of Physical Therapy Exam'rs, 2016 WL 1643025, 2016 NCBC 31 (N.C. Bus. Ct. Apr. 26, 2016) (No. 15 CVS 12012) [A.R. 1540]; Reply Brief in Support of Motion for Preliminary Injunction at 1, N.C. Acupuncture Licensing Bd., 2016 WL 1643025, 2016 NCBC 31 (No. 15 CVS 12012) [A.R. 2288].

- “[T]here is mounting evidence that the procedure can be effective at decreasing pain, improving range of motion, reducing the sensitivity of [myofascial trigger points], and ultimately improving quality of life.” Unverzagt et al., supra, at 412 [A.R. 1954].
- “[D]ry needling improves pain control, reduces muscle tension, normalizes biochemical and electrical dysfunction of motor endplates, and facilitates an accelerated return to active rehabilitation.” Am. Physical Therapy Ass’n, supra, at 2 [A.R. 1840]; accord Valdes, Dry Needling in the Management of Pain, supra, at 51 [A.R. 1965].
- “[C]linical research suggests that dry needling helps reduce local and peripheral pain and sensitization, thereby hastening the restoration of muscle function and range of motion.” Caramagno et al., supra, at 1 [A.R. 1859].
- Dry needling effectively treats “neuromusculoskeletal diseases or conditions, including arthritis, tendonitis, carpal tunnel, and chronic pain.” Id.

The literature and data also reflect the safety of dry needling. One 2014 study found zero significant adverse events out of a total of 7629 dry-needling treatments. Brady et al., supra, at 137 [A.R. 1847]. As another example, in Maryland, physical therapists have twenty years of experience performing dry needling without any documented serious health hazards. Trigger Point Dry Needling, supra, at 64 [A.R. 1908]. In sum, as the leading textbook on dry needling explains, “there is no evidence that serious adverse reactions to dry needling are common.” Id.

The Acupuncture Board argues that dry needling by physical therapists is unsafe because two injuries from dry needling have reportedly occurred in North Carolina. See, e.g., Reply Brief in Support of Motion for Preliminary Injunction at 1-2, N.C. Acupuncture Licensing Bd., 2016 WL 1643025, 2016 NCBC 31 (No. 15 CVS 12012) [A.R. 2288-89]. Even if these reports are correct, however, this Board finds that they do not show that dry needling by physical therapists is unsafe.

First, when one considers whether a health treatment is safe, the relevant question is not whether more than zero adverse events have

occurred. All medical treatment “involves inherent risks despite adherence to the appropriate standard of care.” Howie v. Walsh, 168 N.C. App. 694, 698, 609 S.E.2d 249, 251 (2005). Given that point, safety is measured by the rate of adverse events. See, e.g., Jesse A. Berlin et al., Adverse Event Detection in Drug Development: Recommendations and Obligations Beyond Phase 3, 98 Am. J. Pub. Health 1366, 1368 (2008).

Second, the rate of adverse events from dry needling is low—especially when one compares dry needling with other common health care treatments. The rate of significant adverse effects from dry needling is lower than the rate for over-the-counter pain medication like aspirin and ibuprofen. Valdes Aff. ¶ 34 [A.R. 1833]; Brady et al., supra, at 138 [A.R. 1848]; Unverzagt et al., supra, at 411 [A.R. 1953]. Dry needling is also safer than opioids and painkillers, two prevalent and addictive treatments for chronic pain. See Valdes, Dry Needling in the Management of Pain, supra, at 49 [A.R. 1963].

Third, the report of two (or a similarly low number of) adverse events from dry needling in North Carolina does not suggest a higher rate of adverse events than the rate discussed in the above studies.

This Board estimates that over half a million dry-needling treatments per year are performed in North Carolina by physical therapists. See Arney Aff. ¶ 13 [A.R. 2088].

Thus, this Board, applying its experience and expertise, finds that dry needling by physical therapists is safe and effective.

Acupuncturists and counsel for the Acupuncture Board have also argued that physical therapists lack the skills needed to perform dry needling safely. See, e.g., Daoist Traditions College of Chinese Medical Arts, “Dry Needling” by Physical Therapists 3 (Jan. 6, 2015) [A.R. 157]. That argument overlooks several important points.

First, a recent practice analysis concludes that, in entry-level physical therapy education, physical therapists are taught at least eighty-six percent of the knowledge requirements for competency in dry needling. Caramagno et al., supra, at iii [A.R. 1855]. The study reached that conclusion by examining the 117 knowledge requirements for dry needling. Of these 117 knowledge requirements, 101 were requirements that physical therapists acquired during their entry-level education. These requirements include anatomy, evaluation,

assessment, diagnosis, the development of plans of care, documentation, safety, and professional responsibilities. Id. at 13-14 [A.R. 1871-72].

Second, physical therapists obtain the additional competencies needed to perform dry needling. Valdes Aff. ¶¶ 35-36 [A.R. 1833]. Some physical therapists obtain this training in physical therapy school. See id. ¶ 35 [A.R. 1833]. Otherwise, physical therapists obtain these skills through continuing-education programs, which build on the training physical therapists receive in their extensive entry-level curriculum. Id. ¶ 36 [A.R. 1833]. These supplemental programs teach the psychomotor skills needed to perform dry needling, as well as specific dry-needling safety and protection skills. Caramagno et al., supra, at 12 [A.R. 1870].

In summary, dry needling by physical therapists is an effective and safe method “for the evaluation and management of neuromusculoskeletal conditions, pain, movement impairments, and disability.” Id. at 6 [A.R. 1864].

The History of Dry Needling in North Carolina

In 2010, the Physical Therapy Board issued a position statement on dry needling. In the statement, this Board concluded that dry

needling constitutes physical therapy. N.C. Bd. of Physical Therapy Exam'rs, Position Statement on Intramuscular Manual Therapy (Dry Needling), at 1 (rev. Dec. 9, 2010) [hereinafter 2010 Position Statement] [A.R. 1986].

This Board's conclusion rested on several points.

First, as discussed above, published scientific literature has confirmed dry needling's safety and effectiveness. In 2010, this Board cited a resource paper prepared by the Federation of State Boards of Physical Therapy that listed several textbooks and research studies that support the use of dry needling for a variety of conditions. Id. (citing Fed'n of State Bds. of Physical Therapy, Dry Needling Resource Paper 10-11 (Mar. 8, 2010)).

Second, by 2010, dry needling had become much more prevalent nationally. In 2010, at least fifteen other states allowed physical therapists to perform dry needling.⁵ Id. Physical therapists licensed in

⁵ Over eight years earlier, this Board had opined in a newsletter that dry needling was outside the scope of physical therapy. N.C. Bd. of Physical Therapy Exam'rs, Newsletter, Summer 2002, at 4 [A.R. 1985]. At that time, only a few states allowed physical therapists to perform dry needling. 2010 Position Statement, supra, at 1 [A.R. 1986]. By 2010, as described above, circumstances had significantly changed.

those states were moving to North Carolina, bringing their expertise with them. Id.

Before issuing its 2010 dry-needling position statement, this Board studied these developments and provided an opportunity for public comment. At the Physical Therapy Board's invitation, the Acupuncture Board appeared and spoke at one of the Physical Therapy Board's meetings about dry needling. Massey Aff. ¶ 6 [A.R. 1971].

In sum, based on the dramatic expansion of dry needling between 2002 and 2010, as well as the new literature and research on the subject, the Physical Therapy Board concluded that dry needling was within the physical therapy scope of practice. Id. ¶¶ 5, 7 [A.R. 1971]; 2010 Position Statement, supra, at 1-3 [A.R. 1986-88].

Over the next five years, the Acupuncture Board made multiple efforts to countermand this conclusion:

1. The Attorney General opinion. In 2011, the Acupuncture Board asked the North Carolina Attorney General to declare that dry needling is not physical therapy. Letter from E. Ann Christian, Counsel, N.C. Acupuncture Licensing Bd., to Grayson Kelley, Chief Deputy Attorney Gen. 1 (Apr. 15, 2011) [A.R. 1975]. The Attorney

General, however, reached the opposite conclusion. The Attorney General concluded that the General Assembly had delegated to the Physical Therapy Board the authority to decide whether dry needling constitutes physical therapy. Advisory Op. N.C. Att’y Gen., at 3 (Dec. 1, 2011) [A.R. 2000]. The opinion noted that the Physical Therapy Board had thoroughly reviewed the “significant developments in the use of intramuscular manual therapy practice” between 2002 and 2010. Id. The opinion also acknowledged that, as of 2010, there were “numerous scientific studies to support the use of dry needling for a variety of conditions.” Id.

In the same opinion, the Attorney General concluded that dry needling is not acupuncture. This is because, even though dry needling might use the same needles as acupuncture, dry needling is based on Western anatomical and neurophysiological principles, not Chinese medical concepts. Id. at 2 [A.R. 1999].

Finally, the opinion called for the Physical Therapy Board to adopt administrative rules that impose training standards for dry needling. Id. at 3 [A.R. 2000].

2. The Acupuncture Board's cease-and-desist letters. In 2013, the Acupuncture Board sent cease-and-desist letters to licensed physical therapists in North Carolina who performed dry needling. Henry Aff. ¶ 10 [A.R. 2118]; Cease and Desist Letter from David Peters, Chairman, N.C. Acupuncture Licensing Bd., to Elizabeth Henry (Aug. 19, 2013) [A.R. 2121-24]. The letters stated that the Acupuncture Board considered dry needling by physical therapists to be the unauthorized practice of acupuncture—a Class 1 misdemeanor under North Carolina law. Henry Aff. ¶ 10 [A.R. 2118]; Cease and Desist Letter, supra [A.R. 2121-24].

3. The proposed rule on dry-needling training standards. In 2014, the Physical Therapy Board proposed a rule that would have imposed additional training requirements for dry needling. 2014 Proposed Training Rule [A.R. 142]. The Acupuncture Board, along with others in the acupuncture community, opposed the rule. Transcript of Proceedings Before the North Carolina Rules Review Commission at 14:12-35:11 (Jan. 15, 2015) [A.R. 2018-39]. The Rules Review Commission, in January 2015, ultimately objected to the proposed rule. Letter from Abigail M. Hammond, Counsel, N.C. Rules Review Comm'n,

to Ben F. Massey, Jr., Rulemaking Coordinator, N.C. Bd. of Physical Therapy Exam'rs (Jan. 26, 2015) [A.R. 208]. That objection prevented the training standards from going into effect.

On January 16, 2015, the Physical Therapy Board posted a statement on its website to clarify that the proposed training standards had not gone into effect. N.C. Board of Physical Therapy Exam'rs, Notice (Jan. 16, 2015) [A.R. 2]. The statement reminded licensed physical therapists that they could perform dry needling—like any other physical therapy treatment—only if they possess the requisite competence. Id.; see N.C. Gen. Stat. § 90-270.36(7).

The Events That Prompted This Declaratory Ruling

Later in 2015, the Acupuncture Board sued the Physical Therapy Board in state court. The complaint sought to prohibit physical therapists from performing dry needling. The complaint also requested a declaratory judgment that dry needling is not physical therapy.

Verified Complaint, N.C. Acupuncture Licensing Bd., 2016 WL 1643025, 2016 NCBC 31 (No. 15 CVS 12012) [A.R. 214-41]. The case was designated as a mandatory complex business case under N.C. Gen. Stat. § 7A-45.4(b)(2) and assigned to the Honorable Louis A. Bledsoe,

III. Designation Order, N.C. Acupuncture Licensing Bd., 2016 WL 1643025, 2016 NCBC 31 (No. 15 CVS 12012) [A.R. 476]; Assignment Order, N.C. Acupuncture Licensing Bd., 2016 WL 1643025, 2016 NCBC 31 (No. 15 CVS 12012) [A.R. 477].

The Physical Therapy Board filed a motion to dismiss. The Physical Therapy Board argued that, based on sovereign immunity, the Acupuncture Board could not obtain its desired relief in court without first exhausting available administrative remedies. The unexhausted remedies included seeking a declaratory ruling from this Board—the state agency charged with defining the practice of physical therapy. Brief in Support of Motion to Dismiss at 8-13, N.C. Acupuncture Licensing Bd., 2016 WL 1643025, 2016 NCBC 31 (No. 15 CVS 12012) [A.R. 252-57]. In the motion to dismiss, this Board also pointed out that the Acupuncture Board’s requested relief would violate the state constitution’s anti-monopoly clause. Id. at 14-17 [A.R. 258-61].⁶

⁶ After the Physical Therapy Board filed its motion to dismiss, the Acupuncture Board filed an amended complaint. The amended complaint added one new claim and four new defendants. All defendants filed motions to dismiss based on sovereign immunity and the Acupuncture Board’s failure to exhaust administrative remedies. Judge Bledsoe granted these motions to dismiss. Further details about

Judge Bledsoe granted the motion to dismiss. His order explained that, as an arm of the state, the Physical Therapy Board could not be sued in state court without an express waiver of sovereign immunity.⁷ N.C. Acupuncture Licensing Bd., 2016 WL 1643025, at *4-6, 2016 NCBC 31 ¶¶ 22-28 [A.R. 9-11]. Judge Bledsoe further explained that the Administrative Procedure Act constitutes a waiver of sovereign immunity, but that waiver becomes operative only if the party seeking judicial relief has first exhausted the Act's available remedies. Id. at *6-8, 2016 NCBC 31 ¶¶ 29-37 [A.R. 17]. One administrative remedy available under the Act is a declaratory ruling. Id. at *7, 2016 NCBC 31 ¶¶ 30-31 [A.R. 14].

Following Judge Bledsoe's ruling, the Acupuncture Board quickly filed a declaratory-ruling request with the Physical Therapy Board. The Acupuncture Board asked the Physical Therapy Board to issue a

the amendment and related proceedings can be found in the litigation papers that the Acupuncture Board incorporated by reference in its declaratory-ruling request.

⁷ Because he dismissed the case on these grounds, Judge Bledsoe did not rule on whether the Acupuncture Board's requested relief would violate the state constitution's anti-monopoly clause. Id. at *9, 2016 NCBC 31 ¶ 43 [A.R. 19].

ruling “declar[ing] that ‘dry needling’ is not within the scope of the Physical Therapy Act.” N.C. Acupuncture Licensing Bd., Request for Declaratory Ruling (May 2, 2016) [A.R. 1]. The Acupuncture Board also requested that this Board “withdraw [its] position statement of January 16, 2015.” Id.

On May 31, 2016, the Physical Therapy Board notified the Acupuncture Board that the Physical Therapy Board would issue a declaratory ruling. Letter from Ben F. Massey, Jr., Executive Director, N.C. Bd. of Physical Therapy Exam’rs, to Junie Norfleet, Chair, N.C. Acupuncture Licensing Bd. (May 31, 2016) [A.R. 2379]. The Physical Therapy Board now issues that declaratory ruling.

THE ADMINISTRATIVE RECORD

The Acupuncture Board’s request incorporates all filings from the ongoing dry-needling litigation. N.C. Acupuncture Licensing Bd., Request for Declaratory Ruling (May 2, 2016) [A.R. 1]. The board also attached 212 pages of additional material to its declaratory-ruling request. The administrative record for this ruling consists of all of these materials.

RULING

I. DRY NEEDLING IS PHYSICAL THERAPY.

As explained below, dry needling satisfies two definitions of physical therapy. The first definition comes from the Physical Therapy Practice Act, the statute that governs the Physical Therapy Board's powers and duties. The second definition comes from the regulations that the Physical Therapy Board has adopted under the powers that the General Assembly has delegated to this Board.

A. Dry Needling Satisfies the Statutory Definition of Physical Therapy.

The General Assembly has defined the practice of physical therapy broadly. See N.C. Gen. Stat. § 90-270.24(4). The first sentence of the definition provides that physical therapy means “the evaluation or treatment of any person by the use of physical, chemical, or other properties of heat, light, water, electricity, sound, massage, or therapeutic exercise, or other rehabilitative procedures, with or without assistive devices, for the purposes of preventing, correcting, or alleviating a physical or mental disability.” Id.

Dry needling falls within this definition. Under the terms used in the statute, dry needling is a treatment that uses physical or

rehabilitative procedures, with assistive devices, for the purpose of correcting or alleviating myofascial pain, a physical disability. In particular:

- The insertion of needles into trigger points is a physical and rehabilitative treatment. N.C. Gen. Stat. § 90-270.24(4). Dry needling “uses thin, solid filament needles to create a therapeutic effect when the skin is punctured.” Valdes, Dry Needling in the Management of Pain, supra, at 48 [A.R. 1962]. Unlike “wet needling,” no substance is introduced into the body through the needles. Id. Many years ago, research confirmed that the analgesic effect of the presence of the needle is distinct from any effect created by the injectable substance. Unverzagt, et al., supra, at 406 [A.R. 1948].

- Dry needling relieves a physical disability: myofascial pain caused by trigger points. See N.C. Gen. Stat. § 90-270.24(4). Muscle pain “is commonly a primary dysfunction and not necessarily secondary to other diagnoses.” Trigger Point Dry Needling, supra, at 3 [A.R. 1901]. Myofascial trigger points, which are treated by dry needling, “constitute one of the most common musculo-skeletal pain conditions.” Id. The textbook definition of a trigger point is “a hyperirritable spot in

a taut band of skeletal muscle that is painful on compression, stretch, overload or contraction of the tissue which usually responds with a referred pain that is perceived distant from the spot.” Id. at 4 (quoting David G. Simons et al., Travell & Simons’ Myofascial Pain and Dysfunction: The Trigger Point Manual (1999)) [A.R. 1902].

- A needle is an assistive device. See N.C. Gen. Stat. § 90-270.24(4). Physical therapy employs a wide range of assistive devices. This range includes, but is not limited to, ultrasound equipment, crutches, wheelchairs, and the tools involved in instrument-assisted soft-tissue mobilization (IASTM). A needle falls comfortably within this range.

The use of an assistive device can evolve. For example, ultrasound technology was once used exclusively for therapeutic purposes, but today it is also used for evaluation and diagnosis. Similarly, needles have been used by physical therapists for nearly fifty years to perform electromyography studies (studies that assess the electrical activity in muscles).⁸ These evaluative and diagnostic studies

⁸ The Physical Therapy Board’s 2010 position statement recognized this point. 2010 Position Statement, supra, at 2 [A.R. 1987]. The North

require needles to be inserted directly into muscle. Today, dry needling uses needles as an instrument for therapeutic purposes.

Other states have reached the same conclusion. In Kentucky, for example, the phrase “assistive device” in that state’s practice act has been construed to include the needles for dry needling. Op. Ky. Att’y Gen., No. 13-010, at 8, 2013 WL 4873943, at *5 (Sept. 3, 2013). In Maryland and Mississippi, the phrase “mechanical device” in those states’ practice acts has likewise been construed to include the needles for dry needling. Op. Miss. Att’y Gen., No. 2012-00478, 2012 WL 6086335, at *2-3 (Oct. 5, 2012); Op. Miss. Att’y Gen., No. 2012-00428, at 4-5, 2012 WL 6065221, at *3-4 (Sept. 10, 2012); 95 Md. Op. Atty. Gen. 138, 146-48, 2010 WL 3547902, at *6-7 (Aug. 17, 2010). And in Louisiana, the term “device” in the state’s practice act has been found to be “broad enough to include the use of solid filiform needles.”⁹ Op. La. Att’y Gen., No. 14-0216, at 6, 2015 WL 1523857, at *5 (Mar. 19, 2015).¹⁰

Carolina Attorney General opinion on dry needling did so as well. Advisory Op. N.C. Att’y Gen., at 2-3 (Dec. 1, 2011) [A.R. 1999-2000].

⁹ Each of these attorney general opinions went on to conclude that dry needling is physical therapy. The Attorney General of Texas has likewise concluded that dry needling is within the scope of practice of

For all of these reasons, dry needling falls within the statutory definition of dry needling.¹¹

B. Dry Needling Satisfies the Regulatory Definition of Physical Therapy.

Physical therapy is defined not only in the Physical Therapy Practice Act, but also in the rules that this Board has adopted.

The regulatory definition of physical therapy is a byproduct of the Physical Therapy Practice Act itself. This is because, in the Practice Act, the General Assembly has authorized this Board to refine the scope of practice of physical therapy by rule. See N.C. Gen. Stat. § 90-270.24(4). More specifically, the Practice Act says that the “[e]valuation and treatment of patients may involve physical measures, methods, or procedures as are found commensurate with physical therapy education

physical therapy. Op. Tex. Att’y Gen., No. KP-0082, at 4-5, 2016 WL 2771699, at *3 (May 9, 2016).

¹⁰ This Board does not give these opinions from other states controlling or binding weight. It does, however, consider them persuasive.

¹¹ The Physical Therapy Board also notes that, in the Practice Act, the General Assembly expressly excluded four treatments from the definition of physical therapy. N.C. Gen. Stat. § 90-270.24(4). Dry needling is not one of the expressly excluded treatments.

and training and generally or specifically authorized by regulations of the Board.” Id.

Applying this authority, this Board has adopted a rule on the scope of physical therapy practice. Under that rule, physical therapy “is presumed to include any acts, tests, procedures, modalities, treatments, or interventions that [1] are routinely taught in educational programs or in continuing education programs for physical therapists and [2] are routinely performed in practice settings.” 21 N.C. Admin. Code 48C.0101(a). The rule also states that a physical therapist “who employs acts, tests, procedures, modalities, treatments, or interventions in which professional training has been received through education or experience is considered to be engaged in the practice of physical therapy.” Id. r. 48C.0101(b).

Each of these definitions establishes that dry needling is physical therapy.

First, dry needling is routinely taught in continuing-education programs for physical therapists. As described above, physical therapists obtain eighty-six percent of the competencies needed to

perform dry needling in physical therapy school.¹² The additional, specialized knowledge areas “are almost solely related to the needling technique.” Caramagno et al., supra, at 14 [A.R. 1872]. Physical therapists routinely obtain training on these competencies through post-graduate training, including continuing-education courses. Valdes Aff. ¶¶ 35-36 [A.R. 1833]; Flynn Aff. ¶ 8 [A.R. 2084]; Massey Aff. ¶ 8 [A.R. 1972].

Second, dry needling is routinely performed in practice settings. Dry needling has long been performed in many developed nations. Valdes Aff. ¶ 26 [A.R. 1832]. In the United States, physical therapists now perform dry needling in at least thirty-two states. Unverzagt et al., supra, at 412-13 [A.R. 1954-55]. In North Carolina, as recently as 2014, this Board estimates that physical therapists were performing more

¹² Some entry-level physical therapy programs, such as the one at Georgia State University, teach specialized dry-needling competencies. Valdes Aff. ¶ 35 [A.R. 1833]; Am. Physical Therapy Ass’n, supra, at 3 [A.R. 1841]; Unverzagt et al., supra, at 413 [A.R. 1955].

than 500,000 dry-needling treatments per year.¹³ Arney Aff. ¶ 13 [A.R. 2088].

Finally, a physical therapist who performs dry needling is presumed to be engaged in the practice of physical therapy when the therapist has received training through education or experience. See 21 N.C. Admin. Code 48C.0101(b). This rule applies here. At least nine post-graduate physical therapy courses provide training in dry needling. Massey Aff. ¶ 8 [A.R. 1972]. North Carolina physical therapists can enroll in and complete these courses. In addition, some physical therapists have already received training on dry needling in other states before moving to North Carolina. 2010 Position Statement, supra, at 1 [A.R. 1986]. Under Rule 48C.0101(b), each of these licensees is presumed to be engaged in the practice of physical therapy.

As these points show, dry needling is physical therapy as that term is defined in this Board's rules.

¹³ In addition, United States Army physical therapists have been performing dry needling for at least ten years. E-mail from Major Emmanuel Easterling to Abigail Hammond, Staff, Rules Review Comm'n (Jan. 12, 2015) [A.R. 190].

C. Health Care Professions Have Dynamic Scopes of Practice.

Counsel for the Acupuncture Board has argued that the scope of physical therapy is frozen at the point in time when the General Assembly enacted the Physical Therapy Practice Act. See Transcript of Proceedings Before the North Carolina Rules Review Commission at 32:25-34:9 (Jan. 15, 2015) [A.R. 2036-37]. The Physical Therapy Board rejects this argument.

That argument violates one of the seminal features of health professions: The scopes of health professions—to the great benefit of patients and humanity—are inherently dynamic and evolve over time. Valdes Aff. ¶ 29 [A.R. 1832]; Valdes, Dry Needling in the Management of Pain, supra, at 49 [A.R. 1963]. Health professions evolve for many reasons, including but not limited to advances in technology, a need to provide efficient care, advances in research and data, and changing patient demands. See, e.g., Nat'l Council of State Bds. of Nursing, Changes in Healthcare Professions' Scope of Practice: Legislative Considerations 8 (rev. Oct. 2009) [A.R. 1932].

For this reason, most health care practice acts in North Carolina broadly define a profession's scope of practice.¹⁴ The Attorney General emphasized this point in his 2011 opinion letter, explaining that state law "confers extensive discretion on licensing boards to define the scope of a profession within statutory limits." Advisory Op. N.C. Att'y Gen. at 1 (Dec. 1, 2011) [A.R. 1998].

Relevant here, the General Assembly has given the Physical Therapy Board the discretion to define the practice of physical therapy. The General Assembly did not limit physical therapy treatments to particular treatments available at the time that the Act became law. Indeed, the Act does not enumerate any single treatment at all. Instead, the General Assembly used a broad, flexible definition. See supra pp. 20-24. It then authorized the Physical Therapy Board to adopt rules that further define physical therapy. N.C. Gen. Stat. § 90-270.26(8). The General Assembly also directed that this Board's powers

¹⁴ For example, the General Assembly has defined the scope of medical practice as (among other things) "offering or undertaking to prevent or diagnose, correct, prescribe for, administer to, or treat in any manner or by any means, methods, or devices any disease, illness, pain, wound, fracture, infirmity, defect, or abnormal physical or mental condition of any individual, including the management of pregnancy or parturition." N.C. Gen. Stat. § 90-1.1.

in interpreting the Act be “liberally construed.” Id. § 90-270.26. This plain language defeats the Acupuncture Board’s arguments on the scope of practice of physical therapy.

Those arguments would lead to patients losing out on advancements in medical knowledge and improvements in technology. The Physical Therapy Board has never understood its practice act to contain such a harmful limitation. See, e.g., Op. Miss. Att’y Gen., No. 2012-00478, 2012 WL 6086335, at *2 (Oct. 5, 2012) (explaining that it is “not a proper approach to statutory construction” to limit the scope of physical therapy by “lock[ing]” it into the techniques available when the “enabling statutes for physical therapy were codified”).

In sum, the General Assembly anticipated that the scope of physical therapy would evolve over time. The structure and plain language of the Physical Therapy Practice Act thus further support this Board’s conclusion that dry needling constitutes physical therapy.

D. The Physical Therapy Board’s January 16, 2015, Position Statement on its Website Is Correct.

The Physical Therapy Board next addresses the Acupuncture Board’s request for a ruling on whether the Physical Therapy Board’s January 16, 2015, position statement “is in conflict with” the objection

by the Rules Review Commission on the Physical Therapy Board's proposed training rule.¹⁵ N.C. Acupuncture Licensing Bd., Request for Declaratory Ruling (May 2, 2016) [A.R. 1].

There is no conflict. The proposed rule concerned only training standards. It did not declare that dry needling is within the scope of physical therapy.¹⁶ That is because the Physical Therapy Board had already determined, in 2010, that dry needling constitutes physical therapy. See 2010 Position Statement, supra, at 1-3 [A.R. 1986-88]. In

¹⁵ This request might not fall within the scope of the declaratory-ruling statute. A requester may seek a declaratory ruling from an agency concerning a conflict, but only about a conflict "within the agency." N.C. Gen. Stat. § 150B-4(a). In this aspect of its request, however, the Acupuncture Board seeks a ruling on a conflict between the Physical Therapy Board and a different body, the Rules Review Commission.

Out of an abundance of caution, the Physical Therapy Board will nonetheless address the issue.

¹⁶ The proposed rule had four subsections. The first subsection stated what dry needling is. The second subsection described the proposed training requirements that physical therapists must complete to perform dry needling in North Carolina. The third subsection prohibited physical therapy assistants or aides from performing dry needling. The fourth subsection required the Physical Therapy Board to maintain a list of approved dry-needling education programs. 2014 Proposed Training Rule [A.R. 142].

addition, dry needling falls within this Board’s existing rules on scope of practice.¹⁷ See supra pp. 24-27.

For these reasons, when the Rules Review Commission objected to the proposed rule, that objection had no effect on the scope of practice of physical therapy.¹⁸ The Physical Therapy Board’s January 16, 2015, statement correctly tells licensed physical therapists that they can perform dry needling if they possess the requisite competence. That statement is true for any physical therapy treatment.

The Physical Therapy Board therefore declines to remove the January 16, 2015, statement from its website.

¹⁷ The Physical Therapy Board’s counsel made this point before the Commission, saying, “If the rule was denied, I don’t know that anybody would stop what they’re doing now. This [rulemaking] is really being done as a limitation.” Transcript of Proceedings Before the North Carolina Rules Review Commission at 66:19-22 (Jan. 15, 2015) (emphasis added) [A.R. 2070].

¹⁸ This conclusion is also confirmed by the nature of the Rules Review Commission itself. The Commission is a quasi-legislative body. Its authority is limited to approving or rejecting only the specific rules that come before it. N.C. Gen. Stat. § 150B-21.10.

II. DRY NEEDLING IS DISTINCT FROM ACUPUNCTURE.

As one of its key arguments, the Acupuncture Board has argued that dry needling is the unauthorized practice of acupuncture. To the contrary, dry needling is distinct from acupuncture. The points described above, when viewed in contrast with the North Carolina Acupuncture Practice Act, confirm this conclusion.¹⁹

The Acupuncture Practice Act defines acupuncture as a “form of health care developed from traditional and modern Chinese medical concepts.”²⁰ N.C. Gen. Stat. § 90-451(1). Acupuncture uses these Chinese concepts to restore the flow of qi and the balance of yin and yang in a person’s body. Valdes Aff. ¶ 16 [A.R. 1831]. In traditional Chinese medicine, acupuncture points are understood to be the points

¹⁹ The General Assembly enacted the Acupuncture Practice Act in 1993. Act of July 8, 1993, ch. 303, 1993 N.C. Sess. Laws 588 (codified at N.C. Gen. Stat. §§ 90-450 to -459 and 90-18). The Act created the Acupuncture Board and delineated its powers.

²⁰ Unlike the Physical Therapy Practice Act, the Acupuncture Practice Act lacks a provision that the act is to be liberally construed. See N.C. Gen. Stat. ch. 90, art. 30. Thus, the already narrow definition of acupuncture must be strictly construed. See Elliott v. N.C. Psychology Bd., 348 N.C. 230, 235, 498 S.E.2d 616, 619 (1998) (“It is well settled that statutes which are in derogation of the common law and which are penal in nature are to be strictly construed.”); Trayford v. N.C. Psychology Bd., 174 N.C. App. 118, 123, 619 S.E.2d 862, 865 (2005) (same), aff’d, 360 N.C. 396, 627 S.E.2d 462 (2006) (per curiam).

in the body where a person's qi is most easily accessed. Id. ¶ 19 [A.R. 1831].

The definition of acupuncture in the Acupuncture Practice Act has another important aspect: it refers only to health care that “employ[s] acupuncture diagnosis and treatment.” N.C. Gen. Stat. § 90-451(1).

The Acupuncture Board has adopted rules that explain the meaning of acupuncture diagnosis and treatment. 21 N.C. Admin. Code 1.0401(2); accord id. r. 1.0402(5)(a). Under those rules, “[p]arameters for diagnosis and treatment of patients include, Five Elements, Eight Principles, Yin Yang Theory, Channel Theory, Zang Fu Organ Theory, Six Stages and Four Aspects of Disease Progressions.” Id. r. 1.0401(2); accord id. r. 1.0402(5)(a). In addition, acupuncture diagnosis includes questioning a patient about chills and fevers, abnormal sweating, sleep, stools, and urine. Valdes Aff. ¶ 17 [A.R. 1831]. Acupuncturists palpate the pulse of the radial artery. Id. They also inspect the body, shape, and coating of the patient's tongue. Id.

Dry needling does not use and did not evolve from any of these principles or methods. Valdes Aff. ¶ 38 [A.R. 1834]. Dr. Janet Travell independently developed the trigger point theory underlying dry

needling from her work in Western medicine, not from Chinese medical concepts or acupuncture. See supra pp. 5-6; Valdes Aff. ¶ 22 [A.R. 1832]; Trigger Point Dry Needling, supra, at 62-63 [A.R. 1906-07]. Dry needling is based on well-established, Western neuroanatomical concepts and the modern, scientific study of the musculoskeletal and nervous system. Flynn Aff. ¶ 15 [A.R. 2084]; Advisory Op. N.C. Att’y Gen., at 2 (Dec. 1, 2011) [A.R. 1999]. Numerous scientific articles confirm this point. As one article summarizes, “[t]he roots of dry needling, and the theory on which it is based, are quite distinct from the practice of acupuncture.” Legge, supra, at 6 [A.R. 1920].

Dry needling, therefore, does not involve acupuncture diagnosis. Physical therapists who perform dry needling test specifically for firm bands in skeletal muscles, local twitch responses, decreased range of motion, and muscular weakness. Valdes Aff. ¶¶ 41, 45-46 [A.R. 1834-35]. Physical therapists do not use any Chinese principles of acupuncture diagnosis. Id. ¶ 39 [A.R. 1834]; see 21 N.C. Admin. Code 1.0401(2). As one scientific journal article explains, “despite having the same tool, a physical therapist diagnoses . . . pain and dysfunction

completely differently than an acupuncturist.” Unverzagt et al., supra, at 414 [A.R. 1956].

Acupuncture also treats different problems from those treated by dry needling. Dry needling treats a specific kind of pain, known as myofascial or musculoskeletal pain. See, e.g., Valdes Aff. ¶ 23 [A.R. 1832]. Acupuncture, in contrast, is often used to treat maladies for which there is no physical therapy treatment, such as infertility, smoking addiction, allergies, and depression. Unverzagt et al., supra, at 406 [A.R. 1948].

As these points show, dry needling and acupuncture developed from different roots, use different diagnostic methods, and treat different ailments. As one acupuncturist has explained, “Physical therapists and other medical practitioners utilize the same ‘tool’ (solid filiform needles) as acupuncturists use, and they all seek to treat pain, but this is where the similarity ends.” Valdes Aff. ¶ 47 [A.R. 1835]. Both medically and under North Carolina law, dry needling is not acupuncture.

III. THE ACUPUNCTURE BOARD'S DESIRED OUTCOME VIOLATES PUBLIC POLICY.

Even if the Acupuncture Board were right that dry needling and acupuncture bear similarities, the Acupuncture Board seeks a result inconsistent with North Carolina public policy in at least three ways. First, the Acupuncture Board seeks exclusive control over a technique that arguably has features in common with two different health professions. Second, the Acupuncture Board would restrict North Carolina patients from receiving the health treatment of their choice. Third, the outcome being pursued here by the Acupuncture Board would establish an unconstitutional monopoly.

A. Health Professions Share Overlapping Scopes of Practice.

Through its request, the Acupuncture Board seeks exclusive control of a technique that arguably has features in common with two health professions. The notion that one profession can control other professions in areas of arguable overlap, however, is inconsistent with North Carolina public policy on this issue. Under that public policy, the General Assembly did not intend that one profession set the standards of qualification for another. Best v. N.C. State Bd. of Dental Exam'rs, 108 N.C. App. 158, 163, 423 S.E.2d 330, 333 (1992).

The Attorney General elaborated on this public policy in its 2011 opinion letter—an opinion sought by the Acupuncture Board. In that opinion, the Attorney General explained that overlapping scopes of practice among licensed professions are an inherent feature of North Carolina’s occupational licensing regime. Advisory Op. N.C. Att’y Gen., at 3 (Dec. 1, 2011) [A.R. 2000]. The opinion specifically rejected the premise that the “use of acupuncture needles for therapeutic purposes” is “reserved exclusively to licensed acupuncturists or those specifically exempted from the licensing requirement for acupuncturists.” *Id.* at 1 [A.R. 1998].

This analysis of how to handle arguably overlapping scopes of practice mirrors the national view.²¹ *See* Valdes Aff. ¶ 27. Consider these pronouncements in other states, all taken from analyses that considered whether dry needling constitutes physical therapy:

²¹ “Overlap among professions is necessary. No one profession actually owns a skill or activity in and of itself. One activity does not define a profession, but it is the entire scope of activities within the practice that makes any particular profession unique. Simply because a skill or activity is within one profession’s skill set does not mean another profession cannot and should not include it in its own scope of practice.” Nat’l Council of State Bds. of Nursing, *supra*, at 9 [A.R. 1933].

- Maryland: “It is frequently the case that the scopes of practice of two occupations overlap. . . . The licensing statutes presume that there are areas of overlap among the scopes of practice of various health care professions.” 95 Md. Op. Atty. Gen. 138, 144, 145, 2010 WL 3547902, at *4, 5 (Aug. 17, 2010).
- Kentucky: “Even if dry needling by physical therapists could not be distinguished from acupuncture, however, [the Acupuncture Practice Act] would not prohibit its practice by physical therapists as long as it is within the scope of the practice for which they are licensed.” Op. Ky. Att’y Gen., No. 13-010, at 6, 2013 WL 4873943, at *4 (Sept. 3, 2013).
- Texas: “Your literal questions ask whether ‘trigger point dry needling’ is the practice of acupuncture, and, in turn, whether physical therapists may practice acupuncture. As phrased, your questions assume that the scope of practice of physical therapy and the scope of practice of acupuncture are mutually exclusive; however, overlap between the scopes of practice of acupuncture and physical therapy may

exist. . . . It is therefore necessary to answer your questions by analyzing the scope of practice of physical therapy rather than the scope of practice of acupuncture.” Op. Tex. Att’y Gen., No. KP-0082, at 1-2, 2016 WL 2771699, at *1 (May 9, 2016).

- Mississippi: “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. . . . We believe that a contrary conclusion would lead to untoward and unintended consequences.” Op. Miss. Att’y Gen., No. 2012-00428, at 3, 5, 2012 WL 6065221, at *2, 4 (Sept. 10, 2012).
- Louisiana: “[T]he issue of whether dry needling may be performed by physical therapists . . . should not be determined by whether the therapy could also fall under the definition of medicine or acupuncture. The proper analysis is whether dry needling is within the scope of practice of physical therapy [E]ven if the treatments of dry

needling and acupuncture overlap, physical therapists are not precluded from utilizing dry needling if it is allowed by their scope of practice.” Op. La. Att’y Gen., No. 14-0216, at 5, 2015 WL 1523857, at *4 (Mar. 19, 2015).

Every one of these opinions concluded that dry needling falls within the scope of physical therapy.

The Acupuncture Board’s analysis of arguable overlaps would also produce absurd results. One way to illustrate these absurd results is to compare the treatments allowed in the Acupuncture Practice Act with the treatments that other North Carolina statutes allow other health professions to perform. The Acupuncture Practice Act defines acupuncture as including “massage, mechanical, thermal, electrical, and electromagnetic treatment and the recommendation of herbs, dietary guidelines, and therapeutic exercise.” N.C. Gen. Stat. § 90-451(3). These therapies expressly overlap with other health professions, as the following chart shows:

<u>Treatment</u>	<u>Other Profession</u>	<u>See N.C. Gen. Stat. §</u>
Massage Treatment	Physical Therapy	90-270.24(4)
	Massage and Bodywork Therapy	90-622(3)
Mechanical Treatment	Podiatry	90-202.2(a)
	Athletic Training	90-523(2)
	Massage and Bodywork Therapy	90-622(3)
Thermal Treatment	Physical Therapy	90-270.24(4)
	Chiropractic Medicine	90-143.4(a)
	Massage and Bodywork Therapy	90-622(3)
	Athletic Training	90-523(2)
Electrical and Electromagnetic Treatment	Physical Therapy	90-270.24(4)
	Chiropractic Medicine	90-143.4(a)
	Athletic Training	90-523(2)
Dietary Guidelines	Chiropractic Medicine	90-151.1
	Dietetics/Nutrition	90-352(2), (4)
Therapeutic Exercise	Physical Therapy	90-270.24(4)
Use of Herbs	Pharmacy	90-85.3(g)(2)-(3), 90-85.3A(a)-(b)

As this chart illustrates, the General Assembly envisioned that health professions would have overlapping scopes of practice. The Acupuncture Board's request for an exclusive scope of practice would oust multiple health professions from their own scopes of practice.²² There is no indication that the General Assembly intended this result when it adopted the Acupuncture Practice Act in the 1990s.

²² The Mississippi Attorney General made the same point in concluding that dry needling fits within the scope of physical therapy:

In addition to use of needles, “[t]echniques of acupuncture” also include “applications of cold packs, dietary, nutritional and lifestyle counseling, manual therapy (Tui 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.

Op. Miss. Att’y Gen., No. 2012-00428, at 5, 2012 WL 6065221, at *4 (Sept. 10, 2012).

B. North Carolina Public Policy Strongly Favors Patient Choice.

The Acupuncture Board's requested ruling violates another North Carolina policy: the policy in favor of patient choice in health care.

"[T]he policy of the legislature with regard to patient choice in health care in North Carolina is remarkably clear. . . . [B]oth the legislative and judicial branches have made clear that patient choice in health care is fundamentally important to the citizens of North Carolina." CNC/Access, Inc. v. Scruggs, No. 04 CVS 1490, 2006 WL 3350854, at *9, 2006 NCBC 20 ¶ 53 (N.C. Bus. Ct. Nov. 15, 2006).

This policy protects not only choice of treatment, but choice of health professional as well. This is because the "doctor-patient relationship is a personal one." Iredell Digestive Disease Clinic, P.A. v. Petrozza, 92 N.C. App. 21, 31, 373 S.E.2d 449, 455 (1988), aff'd, 324 N.C. 327, 377 S.E.2d 750 (1989); see also Statesville Med. Grp., P.A. v. Dickey, 106 N.C. App. 669, 674, 418 S.E.2d 256, 259 (1992) (refusing to enforce a contract provision that would "substantially impede patients' access to their physician of choice").

Restricting North Carolina patients' right to choose dry needling violates this policy. When a patient chooses dry needling or

acupuncture, the patient is choosing the professional and method that the patient trusts to relieve a range of health problems—including severe pain.

Statements by dry-needling patients confirm this point. Those statements show that (1) patients consider acupuncture and dry needling to be distinct; (2) dry needling has given patients relief from chronic pain; (3) patients depend on the availability of dry needling; and (4) for some patients, acupuncture is not an acceptable substitute for dry needling. See Burkhard-Catlin Aff. ¶¶ 10-24 [A.R. 2081-82]; Purrington Aff. ¶¶ 10-26 [A.R. 2092-93].

The Acupuncture Board’s desired ruling would deprive North Carolina patients of a safe and effective health treatment. Our conclusion that dry needling falls within the scope of physical therapy rejects this untoward result. The conclusion therefore advances our state’s important health policy on patient choice.

C. The Acupuncture Board’s Desired Ruling Would Violate the Anti-Monopoly Provision in the North Carolina Constitution.

As a final point, the ruling sought here by the Acupuncture Board—and the outcome the Acupuncture Board seeks in this overall litigation—would violate the North Carolina Constitution. This is because the Constitution forbids government-granted monopolies: “Perpetuities and monopolies are contrary to the genius of a free state and shall not be allowed.” N.C. Const. art. I, § 34.

This prohibition on monopolies has special meaning as applied to health care. If one profession establishes a monopoly, that monopoly will limit the health treatments available to North Carolina patients. See, e.g., Palmer v. Smith, 229 N.C. 612, 615, 51 S.E.2d 8, 11 (1948).

In Palmer, the Supreme Court warned that “the police power will not be upheld where its use tends only to create a monopoly or special privilege.” Id. There, the state optometry board sought to enjoin an optician, arguing that he was engaged in the unauthorized practice of optometry. However, in reliance on the anti-monopoly clause, the court rejected such a broad reading of the optometry practice act. As the court explained, “the statute under consideration was intended to regulate the practice of optometry, and not the optical trade.” Id. at

616, 51 S.E.2d at 12. Thus, although there was considerable overlap between the two professions, the board was not allowed to lay an exclusive claim on the preparation of lenses for patients.

The North Carolina Supreme Court has explained that an unconstitutional monopoly has four characteristics: “(1) control of so large a portion of the market of a certain commodity that (2) competition is stifled, (3) freedom of commerce is restricted and (4) the monopolist controls prices.” Am. Motors Sales Corp. v. Peters, 311 N.C. 311, 316, 317 S.E.2d 351, 356 (1984).

Those elements would be met if the Acupuncture Board achieved its objectives here:

- If it succeeded in eliminating dry needling, the Acupuncture Board would control the market by exercising the power to exclude a class of competitors.
- Competition would be stifled because physical therapists, as competitors, would be flatly prohibited from entering the market.

- Because physical therapists could not offer dry needling, and because patients could not get the treatment of their choice, freedom of commerce would be restricted.
- When competitors are driven out, supply decreases and prices increase. N.C. State Bd. of Dental Exam'rs v. FTC, 717 F.3d 359, 374 (4th Cir. 2013) (recognizing that excluding providers from a market “has a tendency to increase a consumer’s price for that service”), aff’d, 135 S. Ct. 1101 (2015).

Patient choice is also better served when competition is maximized. See In re Aston Park Hosp., Inc., 282 N.C. 542, 548-50, 193 S.E.2d 729, 734-35 (1973); see also supra pp. 44-45. As the Aston Park court recognized, “it has been the common experience in America that competition is an incentive to lower prices, better service and more efficient management.” 282 N.C. at 549, 193 S.E.2d at 734.

At bottom, if the Acupuncture Board has exclusive regulatory control over dry needling, all competition from physical therapists will effectively be eliminated. The state constitution forbids this result.

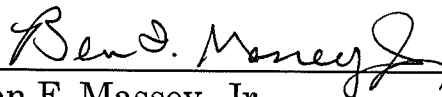
CONCLUSION

This declaratory ruling reaffirms that dry needling falls within the scope of physical therapy in North Carolina. As has been the case since 2010, licensed physical therapists may perform dry needling—just as they may perform every other modality of physical therapy—as long as they do so competently. See N.C. Gen. Stat. § 90-270.36(7).

This ruling also protects the rights of all constituents. The rights of health care professionals are respected: Physical therapists and acupuncturists may all continue practicing the treatments that fall within the scope of their licenses.

Finally, this ruling advances North Carolina public policy: patients may receive the medical treatment of their choice from the provider of their choice.

Approved by the Board
June 27, 2016


Ben F. Massey, Jr.

Executive Director,
North Carolina Board of Physical
Therapy Examiners