

JLAPOC

Status Report

- (1) NC Acupuncture Licensing Board v. NC Board of PT Examiners (State)
- (2) Henry et al. v. NCALB et al. (Federal)

9 January 2018

- Mary “Cissy” Majebe, LAc., ODM
Board Chair, NC Acupuncture Licensing Board
Asheville, NC
- Michael J. Tadych
Board Attorney, NC Acupuncture Licensing Board
Stevens Martin Vaughn & Tadych, PLLC
Raleigh, NC

People

State Court Proceeding

- NCALB
 - State licensing agency for acupuncture
 - Practice Act: G.S. § § 90-450 – 90-459
 - Rules: 21 NCAC 01.0101 - .0711
- NCBPTE
 - State licensing agency for physical therapy
 - Practice Act: G.S. § § 90-270.27 – 90-270.39
 - Rules: 21 NCAC 48A.0101 – 48I.0101
- Additional defendants
 - Elizabeth Henry
 - Aart Schulkopper
 - Cornerstone Physical Therapy, Inc.
 - Jessan Hager

Parties

Dry Needling (“DN”)

- “Dry needling,” “trigger point therapy,” and/or “intramuscular therapy” entails the insertion of solid filament needles through a patient’s skin and muscle tissue up to four inches or more for therapeutic purposes
- NCALB: Patient safety: DN is acupuncture, not physical therapy. PTs do not have sufficient education or supervised, clinical training to perform it safely
- NCBPTE: DN is physical therapy. Board can decide what’s within scope practice for PTs by declaration

Issues



North Carolina Board of Physical Therapy Examiners NEWSLETTER

ISSUE 28

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Forum: Questions and Answers

Question: Is dry needling within the scope of practice of physical therapists in North Carolina?

Answer: NO. Dry needling is a form of acupuncture. In North Carolina, a practitioner who performs acupuncture must have a license from the NC Board of Acupuncture.

36. Neither the definitions of “acupuncture” nor “the practice of acupuncture” stated in N.C. Gen. Stat. § 90-451 nor the definition of “physical therapy” stated in N.C. Gen. Stat. § 90-270.24(4) have been modified by the General Assembly since 2002.

Background Facts

Acupuncture Practice Act

§ 90-450. Purpose.

It is the purpose of this Article to promote the health, safety, and welfare of the people of North Carolina by establishing an orderly system of acupuncture licensing and to provide a valid, effective means of establishing licensing requirements. (1993, c. 303, s. 1.)

§ 90-454. Powers and duties of Board.

The Board may:

- (1) Deny, issue, suspend, and revoke licenses in accordance with rules adopted by the Board, and may collect fees, investigate violations of this Article, and otherwise administer the provisions of this Article.
- (2) Sponsor or authorize other entities to offer continuing education programs, and approve continuing education requirements for license renewal.
- (3) Establish requirements for, collect fees from, and approve schools of acupuncture in this State. The requirements shall be at least as stringent as the core curricula standards of the Council of Colleges of Acupuncture and Oriental Medicine.
- (4) Sue to enjoin violations of G.S. 90-452. The court may issue an injunction even though no person has yet been injured as a result of the unauthorized practice.

NCALB Leg. Mandate

Acupuncture Practice Act

§ 90-452. Practice of acupuncture without license prohibited.

(a) **Unlawful Acts.** - It is unlawful to engage in the practice of acupuncture without a license issued pursuant to this Article. It is unlawful to advertise or otherwise represent oneself as qualified or authorized to engage in the practice of acupuncture without having the license required by this Article. A violation of this subsection is a Class 1 misdemeanor.

(b) **Exemptions.** - This section shall not apply to any of the following persons:

- (1) A physician licensed under Article 1 of this Chapter.
- (2) A student practicing acupuncture under the direct supervision of a licensed acupuncturist as part of a course of study approved by the Board.
- (3) A chiropractor licensed under Article 8 of this Chapter. (1993, c. 303, s. 1; 1994, Ex. Sess., c. 14, s. 48.)

NCALB Leg. Mandate

- 2010 NCBPTE “position statement” on DN
- 2011 NC Attorney General Advisory Letter
- 2014 NCBPTE proposed rule defining DN and training standards
- January 2015 RRC rejects rule; beyond scope of PT statute
- NCBPTE website posting; no judicial review; pulled rule
- February 2015: NCALB learns of pneumothorax by PT doing DN in Asheville
- NCALB attempts investigation; reports to NCBPTE

Background Facts

- Unsuccessful discussions between NCALB and NCPTE regarding potential resolution (exception like MD/Chiro)
- NCALB brings declaratory judgment action
 - DN is acupuncture; DN is not PT; PI to stop NC
- NCBPTE moves to dismiss
- PTs and ballerinas sue NCALB and some Board Members in federal court in Greensboro
- NCALB adds PTs and practices as defendants in declaratory judgment action in State court
- NCALB learns of spinal cord injury by PT doing DN in Cary; reports same to NCBPTE
- Dismissed without prejudice on procedural grounds

Background Facts

- May 2016: NCALB requested NCBTPE issue declaratory ruling per to N.C. Gen. Stat. § 150B-4(a) that DN is not PT per directive from NCBC judge in prior action
- July 2016: NCBPTE issues declaratory ruling that DN IS PT but IS NOT acupuncture
- July 2016: NCALB seeks judicial review of declarations per N.C. Gen. Stat. § 150B-1 *et seq.*
- December 2016: NCBC hearing on review
- August 2017: NCBC issues ruling sustaining PT declaration; NCALB appeals to NCSC
- December 2017: NCALB files opening brief
- January 2018: NCBPTE requests extension; brief due 16 February 2018

New Matter

Federal Court Proceeding

- Plaintiffs
 - Elisabeth Henry, PT Wilmington (DN)
 - Aart Schulklopper, PT Wilmington (DN)
 - Shondell Jones, PT Greenville
 - Eileen Cart, PT Wilson
 - Jan Burkhard-Catlin, Ballerina Raleigh
 - Lindsay Purrington, Ballerina Raleigh
- NCALB
 - Emmylou “Junie” Norfleet, LAc. Asheville (former chair; off Board)
 - M. “Cissy” Majebe, LAc. Asheville (chair)
 - Karen Vaughn, LAc. Wilmington (board member)
 - Chester Phillips, LAc. Raleigh (board member)
 - Marc Cutler, LAc. Raleigh (board member)
 - Vikki Andrews, EdD Fayetteville (off Board; former public member)

Parties

- Antitrust
- Violation of substantive due process

Claims

- Defendants move to dismiss both claims
- Plaintiffs permitted to amend complaint
- Defendants renew motion to dismiss
- Federal court dismisses substantive due process claim for failure to state a claim
- Federal court says complaint states antitrust claim but questions whether facts will support the claim
- July 2017: Plaintiffs dismiss with prejudice all claims against all defendants for actual and treble damages; only issue remaining is antitrust claim
- July 2017: Federal court stays case pending resolution of State case

Status
