



TO: Montana Board of Physical Therapy Examiners
FROM: Montana Board of Medical Examiners
DATE: June 10, 2015
RE: MAR Notice No. 24-177-32

The Board of Medical Examiners (BOME) respectfully makes the following comments to the Board of Physical Therapy Examiners (BOPTE) regarding its proposed NEW RULE I Dry Needling (New Rule) as currently drafted in MAR Notice No. 24-177-32.

BOME COMMENTS:

- 1. The New Rule exceeds BOPTE's rulemaking authority to regulate the scope of physical therapy practice currently allowed by statute, and does not comply with the Secretary of State's requirements under the Montana Administrative Procedure Act.**

Each licensing board is charged to adopt and enforce administrative rules governing the licensing and conduct of the professionals over whom each board has jurisdiction. Mont. Code Ann. § 37-1-131(1)(a)(i). The BOPTE's rulemaking authority related to the scope of physical therapy practice is limited to implementing the provisions of Title 37, Chapter 11 "Physical Therapy." See Mont. Code Ann. § 37-11-201(1).

The Montana Secretary of State's Model Rules for Organizational and Procedural Rules Required by the Montana Administrative Procedure Act dictate that all rules adopted by BOPTE serve one of the following purposes:

1.3.307 RULEMAKING, INTRODUCTION

...

(3) Substantive rules must implement either:

- (a) a statute which clearly and specifically includes the subject matter of the rule as a subject upon which rules can be adopted;
- (b) subject matter which is clearly and specifically included in a statute to which the agency's rulemaking authority extends; or
- (c) an agency function which is clearly and specifically included in a statute to which the agency's rulemaking authority extends, per 2-4-305, MCA.

(Emphasis added.)

The New Rule cites Mont. Code Ann. §§ 37-11-131, 101, and 104 as authority authorizing dry needling in physical therapy practice. None of statutes cited, nor any other, "clearly and specifically" permit invasive treatment methods generally, nor dry needling or the insertion of needles specifically, as subject matter within the BOPTE's authority to promulgate administrative rules.

The substantive statutes cited as authority for the New Rule read as follows:

“Physical therapy” means the evaluation, treatment, and instruction of human beings to detect, assess, prevent, correct, alleviate, and limit physical disability, bodily malfunction and pain, injury, and any bodily or mental conditions by the use of therapeutic exercise, prescribed topical medications, and rehabilitative procedures for the purpose of preventing, correcting, or alleviating a physical or mental disability. Mont. Code Ann. § 37-11-101(7).

Physical therapy -- evaluation and treatment.

(1) Physical therapy evaluation includes the administration, interpretation, and evaluation of tests and measurements of bodily functions and structures; the development of a plan of treatment; consultative, educational, and other advisory services; and instruction and supervision of supportive personnel.

(2) Treatment employs, for therapeutic effects, physical measures, activities and devices, for preventive and therapeutic purposes, exercises, rehabilitative procedures, massage, mobilization, and physical agents including but not limited to mechanical devices, heat, cold, air, light, water, electricity, and sound.

(3) The evaluation and treatment procedures listed in subsections (1) and (2) may be performed by a licensed physical therapist without referral. Mont. Code Ann. § 37-11-104.

Neither of these substantive statutes articulating the scope of physical therapy practice specifically and clearly authorizes physical therapists to perform invasive procedures of any kind, including the penetration of skin by inserting needles into tissue and muscle. Defining “dry needling” in BOPTE’s administrative rules as a “manual therapy technique” that uses a needle as a “mechanical device” – *i.e.* mirroring the statutory language to create authorization for dry needling practice without acknowledgment of the invasive nature of the practice resulting from penetration of skin, tissue, and muscle – is insufficient to overcome the deficiency in the BOPTE’s authority to promulgate this rule when there is neither specific nor clear statutory authority for physical therapists to utilize invasive procedures.

The Montana legislature has codified under current law its finding and declaration that the insertion of solid needles for treatment and correction of human ailments affects public health, safety and welfare and therefore should be regulated and controlled in the public interest, and practiced by licensed professional acupuncturists under the jurisdiction of the BOME. Mont. Code Ann. § 37-13-102. The deviation from current legal requirements proposed by BOPTE through its New Rule to include invasive treatment in the practice of physical therapy should be determined by the legislature.

2. The New Rule definition for “dry needling” inaccurately defines dry needling as a “manual therapy technique” and should be amended to accurately reflect that “dry needling” involves penetration of skin, tissue, and muscle by means of inserting needles, or the definition should be stricken.

The New Rule at section (1) asserts that “dry needling is a ‘manual therapy technique.’”

The American Academy of Orthopaedic Manual Physical Therapists defines “orthopedic manual physical therapy” (OMPT) as follows:

OMPT is any “hands-on” treatment provided by the physical therapist. Treatment may include moving joints in specific directions and at different speeds to regain movement (joint mobilization and manipulation), muscle stretching, passive movements of the

affected body part, or having the patient move the body part against the therapist's resistance to improve muscle activation and timing. Selected specific soft tissue techniques may also be used to improve the mobility and function of tissue and muscles.

Contrary to "manual physical therapy" techniques as defined by the Academy, it is undisputable that the practice of "dry needling" involves penetration of the skin and the insertion of needles into underlying tissue and muscle. The New Rule definition of dry needling as a "manual therapy" is inaccurate. If the BOPTe intends to authorize physical therapy licensees to penetrate human skin and insert needles in the course of treatment, the New Rule should plainly say what it means rather than mislabel the practice to authorize new regulations and practices for which no statutory authority currently exists.

3. If the BOPTe proceeds with NEW RULE I, subsection (1)(b) should be amended for clarification.

New Rule at section (1)(b) as drafted asserts that "dry needling does not include the stimulation of auricular or distal acupuncture points or acupuncture meridians." It is unclear how the practice of dry needling by physical therapists untrained in acupuncture may avoid stimulation, even if unintentional, of auricular or distal acupuncture points or acupuncture meridians.

It is also unclear what BOPTe means by terms included in the New Rule – *i.e.*, "distal" points, "auricular" points, and "acupuncture meridians" which have particular meaning within the training and practice of licensed acupuncture, but which are undefined as to physical therapy and undefined by BOPTe in its New Rule.

4. If the BOPTe proceeds with NEW RULE I, licensees practicing dry needling should be required to submit verification of training in a credentialed educational program for dry needling at the time of their next licensing renewal, or prior to engaging in the practice of dry needling.

New Rule at section (2) as drafted provides:

(2) Licensed physical therapists performing dry needling must be able to demonstrate they have received training in dry needling that meets the standards of continuing education as set forth by the board's continuing education rules.

(a) Dry needling courses must include, but not be limited to, training in indications, contraindications, potential risks, proper hygiene, proper use and disposal of needles, and appropriate selection of clients.

(b) Initial training in dry needling must include hands-on training, written examination, and practical examination.

The New Rule articulates no specific minimum requirements regarding hours of instruction, instructor credentials or accreditation of training programs. Section (2) also does not specify what is involved in "hands-on" training or "practical examination." There is no stated requirement that physical therapists receive any specified amount of training or gain any specified amount of experience in the actual insertion of needles into human patients. The section also does not identify testing entities for the written and practical examination.

BOPTE should specify minimum training, education and accreditation requirements for physical therapy licensees. BOPTE should require completion of a specified number of training hours and certification in an accredited program approved by BOPTE before a physical therapist can engage in the practice of dry needling.

As drafted, Section (5) requires that a physical therapist performing dry needling provide written documentation substantiating appropriate training at the request of the BOPTE. Section (5) should be amended to require licensees currently engaged in dry needling to provide documentation of training received at the time of the licensees next renewal if the licensee is already performing dry needling, and the New Rule should require licensees to provide verification of training and qualification prior to adding dry needling to their practice. Such submission should be a mandatory prerequisite to engaging in, or continuing to perform dry needling.

As currently drafted, the New Rule does not require training in dry needling within—or equal to that provided within—an accredited academic institution. In contrast, BOPTE ARM 24.177.707 APPLICATION AND ADMINISTRATION OF TOPICAL MEDICATION requires that these medications “be applied or administered in accordance with generally accepted practices in the physical therapy field and in keeping with educational techniques in use at schools properly accredited by the commission on accreditation in physical therapy education (CAPTE).” The New Rule should be amended to include similarly specific requirements for accredited training in dry needling.

5. If the BOPTE proceeds with NEW RULE I, licensees practicing dry needling should be required to submit verification of continuing education (CE) specific to dry needling in each CE reporting period.

BOPTE should articulate specific continuing education requirements in safe dry needling technique for all licensees practicing dry needling in treatment of physical therapy patients. As currently drafted, the New Rule does not specify any required continuing education in dry needling technique, but rather cross references to BOPTE’s Continuing Education rule in its current form. BOPTE’s general continuing education requirements are insufficient to insure licensees’ continued competencies in dry needling, and should require a specified minimum number of CE hours in dry needling specific education for licensees in each reporting period.

6. If the BOPTE proceeds with NEW RULE I, licensees practicing dry needling should be required to pass a clean needle techniques exam before engaging in dry needling.

New Rule at Section (3) provides:

(3) A licensed physical therapist must perform dry needling in a manner consistent with generally acceptable standards of practice, including clean needling techniques, relevant standards of the Centers for Disease Control and Prevention, and Occupational Safety and Health Administration blood borne pathogen standards as per 29 CFR 1910.1030, et.seq.

Section (3) should be amended to include an additional requirement that physical therapists pass the Council of Colleges of Acupuncture and Oriental Medicine (CCAOM) Clean Needle Exam prior to engaging in the practice of dry needling.

7. If the BOPTe proceeds with NEW RULE I, Section (4) should be amended to clearly prohibit delegation of dry needling to unlicensed persons by replacing “may” with “shall.”

As drafted, New Rule section (4) regarding delegation is permissive and should be amended to prohibit delegation of dry needling to unlicensed persons. Section (4) currently says dry needling “*may* only be performed by a licensed physical therapist and *may not* be delegated to a physical therapist assistant.” “May” should be amended to “shall” in this section.

8. If the BOPTe proceeds with NEW RULE I, BOPTe’s rule regarding unprofessional conduct should be amended to include provisions corresponding to the requirements and prohibitions related to dry needling contained in the New Rule.

Disciplinary mechanisms for enforcing New Rule requirements and prohibitions should be added to ARM 24.156.1412, to address dry needling practices including but perhaps not limited to: failure to follow clean needle techniques; improper acquisition or use of filiform needles; failure to complete dry needling specific CE; delegation of dry needling treatment by a licensee to unlicensed persons, etc.