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Texas Sunset Advisory Commission
1501 North Congress Avenue
Austin, Texas 78701

RE: TAAOM Comments on Staff Report of Texas Board of Physical Therapy Examiners & Executive Council of Physical Therapy and Occupational Examiners

Dear Sunset Commission Members:

On behalf of the Texas Association of Acupuncture and Oriental Medicine (hereafter “TAAOM”), thank you for the opportunity to provide input to the Texas Sunset Advisory Commission (hereafter “Commission”) on the recently released Staff Report on the Texas Board of Physical Therapy Examiners (hereafter “PT Board”). A professional association whose mission is to preserve the integrity of the practice of acupuncture, TAAOM represents Licensed Acupuncturists and acupuncture students from throughout the state.

TAAOM would like to highlight specific safety and policy concerns its members have about the regulatory environment and exposure created by the PT Board effectively allowing the unlicensed practice of acupuncture by its physical therapist licensees, under treatment names such as “dry needling,” “trigger point dry needling,” and “intramuscular manual therapy.” Throughout this document, any reference to “dry needling” is intended to encompass any and all of the terms listed above, as well as any other terms that may be used or created by the physical therapy advocacy community to attempt to differentiate the insertion of an acupuncture needle by a physical therapist from what in Texas is known and regulated as the “practice of acupuncture.”

TAAOM’s core concern relates to a PT Board regulatory approach that inappropriately permits PT licensees to insert acupuncture needles into physical therapy patients, i.e., to contravene the requirements of the Acupuncture Chapter of the Occupations Code, by simply calling the treatment “dry needling” or some other name intended to distinguish the treatment from the practice of acupuncture.

There are a number of findings in the Sunset Staff Report that underscore the need for members of the Commission to consider and hopefully address policy and management issues related to so-called “dry needling” in the context of its review of the PT Board. We believe important legal, policy, and administrative due process issues raised in regulatory discussions about “dry needling” remain unaddressed, and that these issues are appropriate and timely to be considered and clarified in the Commission’s review of the PT Board and its statutorily-directed and limited regulatory role of licensing, regulating, and overseeing the practice of physical therapy by licensed physical therapists.

We have provided the Commission background and policy information in support of the recommendations TAAOM raises for consideration to address these concerns. We believe information

provided by TAAOM supports a policy conclusion that this issue would most quickly and cost effectively, and therefore most appropriately, be addressed in the Sunset review process through non-statutory management directives issued by the Commission to the PT Board.

We are hopeful that close examination of the information provided will encourage a finding by members of the Commission that the PT Board would benefit from specific management guidance to clarify and remedy what has effectively become a “policy level practice act violation” of both the PT statute and the Acupuncture statute. Because there is no conflicting statutory language or legislative history that forms the basis of this policy dispute, TAAOM does not believe any change in statute would be required to effectuate an appropriate policy remedy.

The PT Board’s approach to the issue of “dry needling” is fundamentally flawed based on a clear reading of both relevant chapters of the Occupations Code and on standard and accepted guidelines for statutory interpretation. It has allowed a situation to develop that threatens the health, safety, and welfare of the public by violating existing statutory provisions and requirements; undermines the policy foundation and structure of the state’s regulatory model; and is likely to increase costs to Texas taxpayers by creating unnecessary litigation exposure for the state and for individual PT licensees.

Overview of Legislative History of Licensed PTs Using Acupuncture Needles in Texas

To put this issue in context, the first paragraph of the introduction to the Staff Report importantly points out that the PT Board has “escaped” Sunset review for 23 years. The last Sunset review of the PT Board was in 1993 – which coincidentally was the exact same year the Texas Legislature created the Texas State Board of Acupuncture Examiners and the Acupuncture Practice Act.

There is no legislative history or action that would support an interpretation or lend credence to an argument or assertion that the Legislature granted, or intended to grant, additional statutory or rulemaking authority to the PT Board that would legally allow its licensees to use acupuncture needles in the practice of physical therapy.

It is clear that the Legislature did not, as it was creating new restrictions, licensing requirements, and exemptions for the lawful use of an acupuncture needle in 1993 in the newly-enacted Acupuncture Practice Act, somehow silently confer an additional exemption in the Acupuncture Act for PTs, or grant additional rulemaking authority to the PT Board that would permit the PT Board to allow its licensees to use acupuncture needles in the practice of physical therapy. Nor has the Legislature taken any such action or provided any such grant of authority since.

Notably, the Acupuncture Practice Act enacted by the Legislature in 1993 provides the exclusive statutory governance in state law for the use of acupuncture needles, and beyond acupuncturists licensed under the Act, it expressly allows only licensed medical doctors to legally practice the regulated treatment of acupuncture in Texas. It sets robust and thorough standards for education, training, and testing under which a licensed acupuncturist may legally practice acupuncture. The requirements to practice acupuncture in Texas require the commitment of significant time and financial resources.

No legislative discussions or changes have occurred or been enacted into law since 1993 that would provide authority for the PT Board to adopt rules to authorize a non-licensed acupuncturist (in this case, a licensed physical therapist) to use an acupuncture needle to perform a physical therapy treatment or any type of treatment that requires the use of an acupuncture needle. Nor has the PT Board been granted authority that would allow it to unilaterally determine at the Board level that practices regulated elsewhere by the Legislature can be legally included or added to the definition of physical therapy.

The PT Board has only very recently taken an official position that “dry needling” is within the scope of

practice for licensed physical therapists, which it did with no apparent public Board discussion or vote in its response to the Acupuncture Board's request for an official AG opinion on this matter late last year. As of this time, no proposed rules have been adopted by the PT Board on "dry needling", and to our knowledge the PT Board has not offered any proposed standards or appropriate training or education requirements for the safe use of acupuncture needles by its practitioners.

The "hands off" manner in which the PT Board has allowed this unauthorized activity to take place by its licensees has created a situation in which Texas citizens are, first and foremost, not being protected by the minimum statutory standards and requirements set out in Texas law for the safe and legal practice of acupuncture. Beyond public safety, there are other important policy considerations relating to the lack of administrative due process that are embedded in the structure and approach of the PT Board's allowance of so-called "dry needling" by its licensees.

No Mention of "Dry Needling" Policy Dispute in PT Board's Self Evaluation Report

It is important to note that the PT Board made no mention of "dry needling" and no mention of any regulatory activities or conversations that have taken place relating to "dry needling" in its SER to the Commission. There is also no mention of the issue of physical therapists engaging in the practice of so-called "dry needling" in the Staff Report, despite the extensive research and analysis performed by the Sunset Commission staff to evaluate the need for, the performance of, and any improvements that might be beneficial to the PT Board.

Regardless, this is a policy dispute that has been taking place for a number of years, and it has generated specific and direct communications between the two governing Boards that regulate the respective practices of acupuncture and physical therapy in Texas. These direct communications officially began with a July 2014 letter from the Acupuncture Board Chair to the Executive Council of Physical Therapy and Occupational Therapy Examiners attempting to address these policy concerns, and culminated in an AG Opinion request by the Acupuncture Board in November of 2015.

We believe it is fair to say that the PT Board has not responded in a meaningful manner to address these disputed areas of policy and law, and that it has failed to date to consider or address the safety and policy concerns that have been raised directly to the PT Board about "dry needling" treatments being performed by licensed PTs who are not legally authorized to use acupuncture needles. Specifically:

- A November, 2013 letter to the PT Board from the National Center for Acupuncture Safety and Integrity (NCASI) stated that the federal Food and Drug Administration strictly regulates the sale of acupuncture needles as Class II prescription medical devices only to qualified and licensed acupuncture practitioners. It also emphasized that regulators that condone the use of acupuncture needles by persons who are not explicitly authorized to practice acupuncture could expose the state board to liability for endorsing a practice in violation of FDA regulations. While the PT board discussed the letter at a public meeting, it declined to take action or seek policy clarifications.
- The Texas State Board of Acupuncture Examiners formally reached out to the Executive Council of Physical Therapy & Occupational Therapy Examiners in July, 2014, attempting to amicably resolve policy differences related to "dry needling" agency-to-agency. In a letter to the Council's executive director, Acupuncture Board Chairman Allen Cline expressed concerns that physical therapists carrying out "dry needling" without an acupuncture license could be subject to cease and desist actions pursuant to Texas Occupations Code 205.362, and offered to enter into a dialogue on these issues.

- While PT regulators agreed to meet with Acupuncture and Medical Board leadership in November 2014, the participants were unable to resolve the Acupuncture board’s concerns – and as noted earlier, these meetings, issues, and concerns were not mentioned or addressed in the SER submitted by the PT Board to the Sunset Commission.
- The Acupuncture Board, which is statutorily directed to address violations of Acupuncture Practice Act, determined through a process that included the participation and approval of the Medical Board that the appropriate next step was to file an official AG Opinion Request, which it did in November 2015. The AG has not issued an Opinion letter on this matter to date.

The PT Board has provided no regulatory standards or oversight for its licensees while it has allowed the expanded practice of “dry needling” on PT patients, nor does TAAOM find any evidence of statutory or rulemaking authority that would provide a legal basis for such activities to be undertaken by the PT Board in order to “authorize” or set standards to allow its licensees to insert acupuncture needles into PT patients as part of a physical therapy treatment.

The PT Board recently posted a meeting of its Rules Committee to discuss the inclusion of dry needling within the definition of physical therapy, but it is unclear from information publicly available how the PT Board intends to approach this discussion. Again, it is important to note that while the PT board has only recently expressed a position that dry needling is within the scope of practice of physical therapy in its formal response to the Acupuncture Board’s recent request for an opinion from the Attorney General, in all the many years since the inception of the Acupuncture Act, the PT Board has not previously proposed, considered, or adopted any rule, education standard, or training requirement relating to the use of acupuncture needles by its licensees to provide so-called “dry needling”.

This means that no standards or regulatory oversight exists or has existed for the estimated 16,000 PTs who are effectively being allowed to engage in the unauthorized, illegal and unsafe practice of acupuncture due to interpretive policy errors and inappropriate regulatory responses by the PT Board. Even worse, it could mean that the 8,300 PT Assistants licensed by the PT Board could also be using acupuncture needles in the practice of physical therapy, because it appears the PT statute allows any activity authorized for a physical therapist to be delegated to a PT Assistant.

What is Dry Needling? Is It Authorized or Mentioned Anywhere in Texas Law?

We want to make sure to clarify that it is TAAOM’s position that “dry needling” is the practice of acupuncture and the PT Board has no statutory or rulemaking authority that would allow it to authorize the use of acupuncture needles by its licensees, or to set educational or practice standards or requirements for the use of acupuncture needles by its licensees.

However, we believe a discussion of the laissez-faire regulatory approach of the PT Board could be helpful to the Commission in understanding the significant ways the health, safety and welfare of the public is being negatively impacted by the lack of adherence to even remotely appropriate standards and requirements for licensed PTs as they are being allowed to use acupuncture needles to illegally practice acupuncture.

Importantly, none of the terminology commonly associated with “dry needling” can be found in Texas statutes or in PT Board rules today. Similarly, none of these terms are recognized as, or supported by, an associated CPT code, which is the coding mechanism used to provide a uniform language that accurately describes medical, surgical, and diagnostic services. There is, however, a CPT code for the insertion of an acupuncture needle, which comports with the Acupuncture Chapter of the Occupations Code’s definition of acupuncture.¹

It is also noteworthy that there are no uniform national standards for education and training in “dry needling” by physical therapists, and that the accreditation process for physical therapy schools does not include any review, standards, or requirements with regard to treatments being marketed and offered to the public as “dry needling”.

Viewed in that context, the Staff Report’s recommendation to remove any statutory guidelines as to the minimum levels of education training and testing necessary for the practice of physical therapy is particularly troubling. This recommendation raises serious concerns about the lack of transparency for the public, and the lack of clear and meaningful educational requirements and standards for medical treatments being regulated by the state under a practice act.

In the case of “dry needling” if the Commission were to recommend such an approach to setting minimum educational and testing standards, the citizens of Texas and the consuming public seeking treatment would be forced to navigate the complex and often opaque websites of national certification entities (that they may not even know exist), or rely exclusively on information provided by advocates for the profession, instead of being able to rely on state regulations or statutes to identify and understand the qualifications of treatment providers licensed by the state.

Threats to Health, Safety & Welfare of Public Raise Legitimate Policy Concerns

Acupuncture is an invasive procedure with known risks.ⁱⁱ Recent high profile incidents of harm in which patients’ lungs were punctured by an acupuncture needle at the hands of practitioners who are not Licensed Acupuncturists drive this point home.ⁱⁱⁱ Beyond these more serious injuries, treatments performed with acupuncture needles by untrained practitioners increase the overall risks of the patient seeking treatment.

The Texas Legislature clearly and appropriately prefers the proactive policy approach of a “practice act” for regulating medical professions and other highly technical and highly skilled professions, where the public’s health, safety and welfare are the policy basis and legal nexus for state regulation. The model and approach that is specified in Texas statutes for the regulation of these types of medical professions is one that attempts to affirmatively protect the public BEFORE harm occurs. As such, the State of Texas has established rigorous standards for the practice of acupuncture, requiring a Licensed Acupuncturist to complete a four-year Master’s level program of at least 2,625 hours, including a *minimum* of 870 clinical hours.^{iv}

By way of contrast, the Physical Therapy Board chairman testified before the House Public Health Committee in 2013 that he did “not know that much about “dry needling”, and cited a series of PT Board Rules that do not mention “dry needling” as the board’s “failsafe” in terms of public protection:^v

- 322.4(b) which pertains to “Practicing in a manner detrimental to the public health and welfare”;
- 322.4(b)(10) “failing to conform to the minimal standards of acceptable prevailing practice” and;
- 322.4(b)(10)(B) “performing or attempting to perform techniques or procedures or both in which the physical therapist or physical therapist assistant is untrained by education or experience”

Yet references made to these general rules are not helpful or particularly responsive, as there are no established “minimal standards of acceptable prevailing practice” when it comes to “dry needling”.

Current Information on Training for “Dry Needling” Provided by PTs

A typical training in dry needling consists of **27 hours** taught over a three-day weekend.^{vi} Practitioners are encouraged to begin using what they learned over the course of a weekend immediately on the following Monday.^{vii} These are individuals who likely had never previously handled an acupuncture needle. Clearly, this has implications for patient safety. One organization even offers a **12-hour dry needling certification course**, claiming, “The 12-hour program will give you all the training necessary to deliver dry needling services safely and effectively in your practice.”^{viii}

Clarification of PT Board Approach to “Dry Needling” Appropriate for Sunset Review

TAAOM recognizes that because AG Opinions are legally non-binding, this dispute will not necessarily be resolved even if the Attorney General issues an Opinion in response to the questions asked by the Acupuncture Board relating to “dry needling”.

Because of this, we urge the Commission to take this opportunity to address important policy and management issues with the PT Board, which would provide the needed level of clarification to: 1) ensure the protection of the health, safety and welfare of the public; 2) remedy the lack of due process associated with the PT Board’s approach to oversight of its practitioners engaging in “dry needling;” 3) reduce regulatory pressures that drive avoidable expenditures and costs associated with enforcement proceedings against individual PT licensees; and 4) reduce the likelihood of significant litigation costs to the state generally associated with judicial remedies such as summary judgement challenges.

The enforcement and due process issues raised, as well as the legal issues laid out in the Acupuncture Board’s AG opinion request, underscore and support the importance of addressing the policy concerns raised by TAAOM. In addition, multiple state and national organizations have expressed concerns with the proliferation and lack of regulation of “dry needling” across the country that has resulted from the advocacy efforts of the PT profession.^{ix}

The important and fundamental issue of whether “dry needling” is statutorily included or authorized in state law remains disputed and unanswered. Clearly opportunities exist to further clarify existing statutes through judicial challenges, but TAAOM believes clarification through the Sunset process is a less costly and more appropriate remedy to address this policy dispute.

We find no legal basis in statute for the position taken and advocated by the PT Board that its licensees are allowed to use acupuncture needles in PT “dry needling” treatments simply because “dry needling” was not affirmatively listed by the Legislature in the PT enabling statute as a treatment excluded in the practice of physical therapy. The very existence of the Acupuncture Practice Act, much less the restrictive provisions expressed in the statute itself, contradicts the interpretation of existing law taken by the PT Board that “dry needling” is within the scope of physical therapy practice.

Recommended Approach to Providing Policy Clarification & Avoiding Potential Litigation

Management directives from the Commission would be the most effective and appropriate remedy to direct the PT Board to adhere more closely and appropriately to the provisions in the Occupations Code established by the Legislature for the legal practice of the professions of acupuncture and physical therapy in Chapters 205 and 453. This option would be consistent with both the statutory mission and policy goals established in the Texas Sunset Act, and with previous Commission decisions that have generated agency management directives to address policy issues that do not necessarily require changes in statute to resolve.

Such an approach would also address the underlying issues such as patient safety, lack of effective administrative due process, and the erosion of appropriate standards and adherence to practice act standards for licensed health care professionals.

Summary of TAAOM Position on “Dry Needling”

The legal and policy position taken by the PT Board is not authorized in the PT enabling statute, is inconsistent with and not supported by a clear reading of the Acupuncture statute, and is contrary to any common understanding of the practice act model used by the state of Texas to regulate the practice of licensed health care professions.

We find no evidence in the statutes governing the practices of acupuncture or physical therapy, or in the legislative history of these statutes, that would support a finding that the Legislature intended for the practice of acupuncture--by any name--to be encompassed under the scope of licensure for Physical Therapists.

We remain extremely concerned that the Physical Therapy Board has effectively authorized its licensees to utilize acupuncture needles in the practice of physical therapy by inappropriately and illegally sanctioning the treatment practice of “dry needling” by physical therapists in Texas in violation of both its statute and the Acupuncture statute, and that it has allowed this to occur with no regulatory oversight and no educational or training standards by its licensees.

In reviewing the issues raised by TAAOM, we urge the Commission to weigh the importance of maintaining the integrity of the practice act model of regulation and the central policy goal of practice act regulation – i.e., protecting the health safety and welfare of the public seeking effective treatments or services from licensed healthcare professionals.

We look forward to continuing to work with the Commission and other members of the Legislature on these important matters, and respectfully ask that the Commission provide clarification and management guidance to the PT Board, through non-statutory management directives, that direct the PT Board to more strictly adhere to existing statutory provisions and limitations set out in the Occupations Code.

We are available to assist or participate in any way that is helpful to the Sunset Commission to address these concerns and the very real threat that exists in the current situation to the health, safety, and welfare of the public, and appreciate very much the opportunity to engage in this important policy discussion on behalf of licensed acupuncturists, acupuncture students, and the consuming public who seek acupuncture as a safe and effective medical treatment from qualified and licensed providers.

Respectfully submitted,

/s/ Wally Doggett, L.Ac.

Wally Doggett, L.Ac.

President - Texas Association of Acupuncture and Oriental Medicine

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- ⁱ The CPT code for treatment with acupuncture needles is “97810: Acupuncture, one or more needles, without electrical stimulation, initial 15 minutes of personal one-on-one contact with the patient.” Despite this, the American Physical Therapy Association seemingly recommends billing for dry needling using code 97799: “unlisted physical medicine/rehabilitation service or procedure”. See APTA Official Statement on The Billing of Dry Needling by Physical Therapists, available at <http://www.iamt.org/wp-content/uploads/2014/04/APTASTatementDryNeedling-2014.pdf>.
- ⁱⁱ See Mayo Clinic, Acupuncture Risks, available at <http://www.mayoclinic.org/tests-procedures/acupuncture/basics/risks/prc-20020778>.
- ⁱⁱⁱ See USA Today, December 14, 2014: ‘Torin Yater-Wallace bounces back from collapsed lung with top run’, available at <http://www.usatoday.com/story/sports/olympics/sochi/2013/12/13/torin-yater-wallace-dew-tour-ion-mountain-championship-halfpipe-qualifying/4019707/> and The National Post, July 4, 2013: ‘Canadian Olympian’s nightmare after acupuncture needle collapses her lung’, available at <http://news.nationalpost.com/news/canada/judo-acupuncture-needle>.
- ^{iv} See National Certification Commission for Acupuncture and Oriental Medicine, Examination Eligibility Requirements (U.S. Requirements), available at <http://www.nccaom.org/applicants/eligibility-requirements>.
- ^v Texas House of Representatives, Public Health Committee Hearing April 10, 2013, at 1:11:32, available at http://tlchouse.granicus.com/MediaPlayer.php?view_id=28&clip_id=6643
- ^{vi} See Myopain Seminars, Dry Needling (DN) Program DN – 1, available at <http://myopainseminars.com/dn-1/>, also KinetaCore, Functional Dry Needling - Level 1 Training, available at <http://www.kinetacore.com/physical-therapy/Functional-Dry-Needling-Level-1-Training/page17.html>, also Dr. Ma’s Integrative Dry Needling, FAQ, How do I get certified in dry needling?, available at <http://integrativedryneedling.com/resources/frequently-asked-questions/>.
- ^{vii} See Dry Needling Course, How our Course is Organized, available at <http://dryneedlingcourse.com/how-our-course-is-organized>.
- ^{viii} See Dry Needling Institute LLC, available at <http://fishkincenter.com/dryneedlinginstitute/>.
- ^{ix} See American Academy of Pain Management & Rehabilitation, AAPM&R Position on Dry Needling, June 2012, available at <http://www.aapmr.org/docs/default-source/protected-advocacy/Position-Statements/aapmr-position-on-dry-needling.pdf> and American Academy of Medical Acupuncture, AAMA Policy on Dry Needling, available at <http://www.medicalacupuncture.org/Portals/2/PDFs/AAMADryNeedlingPolicyOct15.pdf>.