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OPINION	:	No. 81-215
	:	
of	:	<u>JUNE 9, 1981</u>
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The Honorable Alfred E. Alquist, State Senator, Eleventh Senatorial District,
has requested an opinion on the following question:

May a person who is not licensed as a physical therapist but who is engaged
in the practice of occupational therapy or adaptive physical education use, in the course of
such practice, utilize any of the physical therapy procedures or modalities described in
Business and Professions Code section 2620?

CONCLUSION

A person who is not licensed as a physical therapist but who is engaged in
the practice of occupational therapy or adaptive physical education may not utilize the
physical therapy procedures or modalities described in Business and Professions Code
section 2620 in the course of his or her practice in connection with the physical or
corrective treatment or rehabilitation of a bodily or mental condition but may use the same
for other lawful purposes.

ANALYSIS

Section 2620 of the Business and Professions Code¹ defines the art and science of physical therapy as follows:

“Physical therapy means the art and science of physical or corrective rehabilitation or of physical or corrective treatment of any bodily or mental condition of any person *by the use of the physical, chemical and other properties of heat, light, water, electricity, sound, massage, and active, passive, and resistive exercise*, and shall include physical therapy evaluation, treatment planning, instruction and consultative services. The use of roentgen rays and radioactive materials, for diagnostic and therapeutic purposes, and the use of electricity for surgical purposes, including cauterization, are not authorized under the term “physical therapy” as used in this chapter, and a license issued pursuant to this chapter does not authorize the diagnosis of disease,”

The term is synonymous with “physiotherapy” (§ 2622).

We see from section 2620 that the practice of physical therapy entails the use of various modalities (or therapeutic agencies (Webster’s Third New International Dictionary (1971 ed.) p. 1431, def. 4a)) and *procedures*. For our elucidation, we have been furnished with examples of their use in physical therapy as follows: the properties of *heat* (including cold as a relative value of amount of heat), we are told, are used through infra-red radiation, through conduction (as in direct contact with the body in paraffin baths, hot packs, whirlpools and ice treatment) and through inductive electrical current (as in diathermy); those of *light* entail the use of ultra-violet or infra-red or any part of the visible spectrum; those of *water* are used in hydrotherapy including whirlpool, hubbard tank, or any other external use of water or fluids for heat, resistance or buoyancy; those of *electricity* entail the use of electrical muscle stimulators, transcutaneous nerve stimulators, devices that measure muscle activity or nerve conduction such as biofeedback or electromyography or any electric device used on the exterior of the body as physical treatment, such as the use of direct current to force chemical ions through the skin; those of *sound* are used in ultra sound which involves the use of sound waves of a frequency greater than audible sound for its effect of increased molecular motion or heat; those of massage are designed to therapeutically contribute to increasing the body’s ability to heal itself; and the use of exercises includes therapeutic *exercises* or exercise systems designed to increase range of motion, increase strength or endurance, and improve performance of single muscles or muscle groups. (Memorandum from D. Wheeler, RPT, Executive Officer, Physical

¹ All statutory references shall be to the Business and Professions Code unless otherwise stated.

Therapy Examining Committee, State Board of Medical Quality Assurance dated April 2, 1981.²

We are asked whether a person who is not licensed as a physical therapist but who is engaged in the practice of occupational therapy or adaptive physical education may use, in the course of his or her practice, any of these physical therapy procedures or modalities. We conclude that insofar as those procedures or modalities are employed in connection with the physical or corrective rehabilitation or treatment of a bodily or mental condition they may not be utilized by a person engaged in occupational therapy or adaptive physical education who is not licensed as a physical therapist.

Physical therapists are licensed by the Division of Allied Health Professions of the Board of Medical Quality Assurance in conjunction with its Physical Therapy Examining Committee (§§ 2632, 2609; cf. §§ 2601, 2602). Following licensure, the licensee as a registered physical therapist (§ 2632) ~'may use the title 'physical therapist' or the letters 'P.T.' or any other words, letters or figures which indicate that the person using same is a licensed physical therapist" (§ 2633). No other person may be so designated or use the term licensed or registered physical therapist, licensed or registered physiotherapist, licensed or registered physical therapy technician, or the letters "L.T.P.", "R.T.P." or "P.T." (*Ibid.*) And, as we shall see, section 2630 forbids any person who is not licensed as a physical therapist³ from holding himself or herself out as such and from practicing or offering to practice physical therapy. Before proceeding to analyze that section however, we ought to set forth our understanding of occupational therapy and adaptive physical education.

Occupational therapists are not "licensed" as such by any state agency, nor is the scope of their practice defined in the law. The Business and Professions Code does provide, however, that occupational therapists must meet certain qualifications (i.e., those

² Explaining the other factors mentioned in section 2620 we are also told that the practice also includes evaluations (to determine a base line of performance or capability or to measure progress to date), *treatment planning* (to determine the most appropriate method of dealing with the patient's problem(s)), *instruction* (gait and transfer training, activities of daily living, and use of adaptive procedures or devices), and *consultation* with other health workers or families to involve them with activities or treatment appropriate to their level of expertise—to *rehabilitate* or *treat* a condition or circumstances resulting from disease, injury, or congenital defects. We understand that physiotherapy may treat the pathology directly, as in a low back strain, or indirectly, as in stroke rehabilitation (*Wheeler Memorandum, supra.*)

³ As discussed in footnote 9, post, section 2630 does not restrict persons licensed under other provision of the Business and Professions Code or any initiative act from engaging in activities otherwise within the scope of their licensure.

prescribed by the regulations of the State Department of Health Services governing Medi-Cal's reimbursement of their services under section 14100 *et seq.* (div. 9, pt. 3, ch. 7) of the Welfare and Institutions Code (§ 2570, subd. (a)) and it makes it a misdemeanor for anyone not meeting those qualifications to use certain titles or insignia associated therewith (*id.*, subd. (c)).⁴ The Department's regulations define occupational therapy to mean:

“—services prescribed by a physician, dentist or podiatrist, to restore or improve a person's ability to undertake activities of daily living when those skills are impaired by developmental or psycho-social disabilities, physical illness or advanced age.” (22 Cal. Admin. Code § 51085.)

and provide that

“An occupational therapist shall be a graduate of a curriculum in occupational therapy approved by the Council on Education of the American Medical Association in collaboration with the American Occupational Therapy Association, and shall be registered by the American Occupational Therapy Association.” (22 Cal. Admin. Code § 51203.1.)

In addition, in order to perform functions in a “health facility,” occupational therapists must meet certain qualifications prescribed by the Department of Health Services pursuant to its authority to define “the standards of adequacy . . . of staffing with duly qualified licensed personnel, and of services, based upon the type of health facility and the needs of the persons served thereby.” (Health & Saf. Code § 1276; see also § 208, subd. (a).) (A license to a health care facility may not be issued unless both its professional and nonprofessional staffing meet the qualifications specified in the Department's regulations. *Id.*, § 1277, subd. (a).) In setting personnel standards for licensed health facilities, the Department is given authority to adopt them itself or to “adopt them by reference to named standard-setting [private] organizations.” (*Id.*, § 1276.1.) The Department has again chosen the latter alternative in defining the qualifications for occupational therapists to practice in the various types of health facilities by referring in the main to certification or registration (or eligibility therefor) by the American Occupational Therapy Association (“A.O.T.A.”) and to graduation from an occupational therapy curriculum accredited jointly by the Council on Medical Education of the American Medical Association and the A.O.T.A. (E.g. 22 Cal. Admin. Code § 70055, subd. (a)(20) (general acute care hospitals); *id.*,

⁴ California is one of two states (the other, Hawaii) which has enacted a so called trademark law” to protect the professional title of the O.T. (American Occupational Therapy Association, 1980 *Supplement to Handbook on Licensures*). Thirteen states and the District of Columbia and Puerto Rico presently have occupational therapy *licensure* laws, which place restriction on both the use of the title and the practice of the profession (*ibid.*).

§ 72071 (skilled nursing facilities); *id.*, § 73073 (intermediate care facilities); and *id.*, § 76109 (intermediate care facilities for the developmentally disabled.) The Department has done the same with respect to occupational therapists practicing in home health agencies (*id.*, § 74633) and adult day health centers. (*Id.*, § 78067.)⁵ The Department has also defined occupational therapy vis-a-vis the various facilities. Thus, for example:

—With respect to general acute care hospitals, the Department’s regulations provide:

“ . . . Occupational therapy services means those services provided to a patient by or under the supervision of an occupational therapist with appropriate staff, space, equipment and supplies. These services are used to restore the functional capacity of those individuals whose abilities to cope with tasks of daily living are threatened or impaired by developmental deficits, the aging process, physical illness or injury or psychosocial disabilities. Occupational therapy services include but are not limited to.” (22 Cal. Admin. Code § 70515, subd. (a).)

—With some variation on that definition, the regulation for skilled nursing facilities (*id.*, 5 72473) and that for intermediate care facilities (*id.*, 5 73469) each provides:

“ . . . Occupational therapy is a medically prescribed service in which selected purposeful activity is used as treatment *in the rehabilitation of persons* with a physical or emotional disability.” (Emphasis added.)⁶

These definitions are similar to those used by private organizations dealing with occupational therapy which speak of the discipline as being the restoration of the functional capacity or rehabilitation of a person whose functions have been impaired by physical illness or injury, by emotional disorder, by congenital or developmental disability or by the

⁵ These are not strictly “health facilities” as defined by Health and Safety Code section 1250 and the fount of the Departments authority to regulate the qualifications for their staffing is separately found. (*Id.*, §§ 1727 and 1734 (home health agencies), §1580 (adult day health centers).)

⁶ Similar definitional specificity is not provided for occupational therapy vis-a-vis home health agencies, intermediate care facilities or intermediate care facilities for the developmentally disabled, although mention is made of its availability at the first two. (*Id.* §§ 74711, 76337, subd. (d)(I)(C), respectively.) (With respect to adult day health centers see Welf. & Inst. Code § 14551) (rehabilitation services include occupational therapy as an adjunct to treatment designed to restore impaired function of patients with physical or mental limitations’) and 22 Cal. Admin. Code §§ 54129, 54309(a)(I)(B), 54315.)

aging process, so that he or she may lead a constructive lifestyle and achieve optimum functioning in the community.⁷ (See e.g., Amer. O.T. Assn., *Occupational Therapy Product Output Reporting System and Uniform Terminology for Reporting Occupational Therapy Services*; Univ. of S. Calif., Dept. of O.T., *Graduate Studies in Occupational Therapy* (1980); Long Beach Veterans Adm. Hosp., *O.T., Key To Living*.)

From the foregoing we distill that occupational therapy is directed both toward the adaptation to daily living by a person with a disability and toward the restoration of certain functions or the rehabilitation of bodily conditions. Thus in certain areas the practices of physical therapy and occupational therapy are bound to overlap. We are also informed that the latter often constitutes a ‘fine tuning’ of a ‘gross’ correction or rehabilitation of a condition achieved by the former, especially where a prosthesis is involved. Be that as it may some aspects of occupational therapy contemplate the physical or corrective rehabilitation or treatment of bodily or mental conditions. (See e.g., 22 Cal. Admin. Code §§ 54309, 54315, 54329, 70515, 72473, 73469; see also Welf. & Inst. Code § 14550.) The question is thus posed as to whether an occupational therapist who is unlicensed as a physical therapist may properly utilize the procedures and modalities described in Business and Professions Code section 2620 in the course of his or her effort. Before answering it however, we must briefly describe our understanding of adaptive physical education.

Adaptive physical education is a term of relatively recent vintage that refers to physical education instruction which has been specially designed to meet the unique needs of “handicapped” children or “individuals with exceptional needs” and which is mandated by law to be provided them in the educational system. (See generally Ed. Code, pt. 30, § 56000 *et seq.*; *id.*, § 56031 (“special education”), 56360 (“program options”), 56361, 56363(b)(5); *cf.* §§ 56800 (“handicapped”), 56026 (“individuals with exceptional needs”); see also the Education For All Handicapped Children Act of 1975, P.L. 94–142, 20 U.S.C.A., ch. 33, § 1401 *et seq.*; and especially *id.*, § 1401(16) (“special education”), and see 34 C.F.R. § 300.1 (purpose generally); *id.*, § 300.14(B)(2)(ii) (“adapted physical education”).) Section 56360 of the Education Code provides that “each district, special education services region or county office shall ensure that a continuum of program options is available to meet the needs of individuals with exceptional needs for special education.” Provision is also made for those “program options” to be made available to children in nonpublic schools. (*Id.*, pt. 30, ch. 1, Art. 3, §§56030–56042.) The program options spoken of include designated instruction and services in adaptive physical education (*id.*, §§ 56361, 56363(b)(5)). Instruction and services for adaptive physical education must meet standards

⁷ Rather than referring to a person’s *employment*, the term “occupation” in “occupational therapy” means one’s being occupied in meaningful day to day living activities including work, leisure and play. (Long Beach Veterans Adm. Hosp. *O.T., Key To Living*.)

adopted by the State Board of Education (*id.*, § 56363(a); *cf. id.*, § 56021) and as appropriate are provided by the regular class teacher, the special class teacher, or by a ‘resource specialist’ who must be properly credentialed. (*Id.*, §§ 56363(a), 56362.5, 56368; 5 Cal. Admin. Code § 3632, subd. (c); *cf.* 34 C.F.R., § 300.12).)

We understand that adaptive physical education is not likely to be directed towards the physical or corrective⁸ treatment or rehabilitation of a bodily or mental condition. Rather, its primary purpose, as its name implies, is the modification, adjustment, alteration or accommodation of physical education to make it suitable to meet the conditions presented by the exceptional circumstances (*cf. Webster’s Third New International Dictionary* (1971 ed.) pp. 23–24, “adapt”), that is, to adapt physical education to the limitations created by the exceptional circumstances. (Letter from C.J. Barkert, Consultant, State Department of Education, dated March 26, 1981.) And while adaptive physical education instructors do use normal exercise or exercise adapted for the handicapped student to help strengthen the body (*ibid.*), their main concern is the development and teaching of play/leisure (recreational) and movement (motor) skills in order to enhance a child’s ability to function *within his or her exceptionality*. (See e.g., 34 C.F.R., § 300.14(a)(2).) We also understand that a person teaching adaptive physical education would not be as likely to employ the procedures and modalities mentioned in section 2620 as would an occupational therapist. (letter of C.J. Barkett.) Nevertheless the question remains for resolution of whether, when adaptive physical education involves those procedures or modalities, they may be used by a person who is not licensed as a physical therapist. We now proceed to resolve it and its counterpart respecting occupational therapists.

Section 2630 prohibits the unlicensed practice of physical therapy, thus:

“It is unlawful for any person or persons to practice, or offer to practice, physical therapy in this state for compensation received or expected, or to hold himself or herself out as a physical therapist, unless at the time of so doing such person holds a valid unexpired and unrevoked license issued under this chapter.

“Nothing in this section shall restrict the activities authorized by their

⁸ We are told that even where the term “correction” is used in adaptive physical education, it is used in a generic sense, that is, a correction” undertaken in A.P.E. is not directed to changing a condition or a physiological exceptionality itself, but rather takes that bodily or mental condition as a given and attempts to correct the manifestations of the limitations as far as possible, as by ‘correcting’ a poor throw or a faulty dive. In this sense it is no different from the correction’ made by physical education instructors with nonhandicapped persons. (Letter of C.J. Barkett, *infra*.)

licenses on the part of any persons *licensed under this code* or any initiative act, or the activities authorized to be performed pursuant to the provisions of Article 4.5 (commencing with Section 2655) [i.e., physical therapist assistants] or chapter 7.7 (commencing with Section 3500) [i.e., physician's assistants].

“A person licensed pursuant to this chapter may utilize the services of an aide to assist the licentiate in his or her practice of physical therapy. Such aide shall at all times be under the orders, direction, and immediate supervision of the licentiate. Nothing in this section shall authorize such an aide to independently perform physical therapy or any physical therapy procedure.

“The administration of massage, external baths or normal exercise no: a part of a physical therapy treatment shall not be prohibited by this section.” (Emphasis added.)

We assume that the persons mentioned in the request are engaged in the practice of occupational therapy or adaptive physical education” for compensation. We also assume that they are not otherwise licensed pursuant to any of the provisions mentioned in the second paragraph of section 2630.⁹ Under such circumstances, a first reading of the terms of section 2630 would seem to prohibit those persons from using any of the physical therapy procedures or modalities mentioned in section 2620, i.e., the use of the physical, chemical, and other properties of heat, light, water, electricity; sound, massage, and active, passive, and resistive exercise, in the performance of any of their functions with the exception of massage, external baths or normal exercise when not part of a physical therapy

⁹ Again, while the Business and Professions Code provides that occupational therapists must meet certain qualifications (i.e., those prescribed by the regulations of the State Department of Health Services) governing reimbursement of such services under the provisions of Chapter 7 of Part 3 of Division 9 (§ 14000 *et seq.*) of the Welfare and Institutions Code (§ 2570, subd. (a)) and while it declares it unlawful and a misdemeanor for anyone not meeting those qualifications to use certain titles or insignia associated therewith (*id.*, subd. (c)), it does *not* provide for licensure of occupational therapists. Were they so licensed they could use physical therapy modalities in the course of their licensed professional activities under section 2630. (*Cf.* 23 Ops. Cal. Atty. Gen. 179, 184 (1954).) Similarly, while persons engaged in adaptive physical education might have to have an appropriate credential or certificate (Ed. Code §§ 56368, 56363(a), 56362.5) they too are not licensed under the Business and Professions Code.

It must also be noted that when the Legislature has seen fit to exempt occupational therapists from the strictures of another professional licensing law *it has specifically done* so as with the Psychiatric Technicians Law. Business and Professions Code, division 2, chapter 10 (sections 4500–4548) (*id.* § 4507, subd. (h)).

treatment. But the latter section must be analyzed further. Proceeding to do so we see that the definition of physical therapy focuses on two particulars: (1) the purpose or reason for its administration (i.e., “physical or corrective *rehabilitation* or physical or corrective *treatment* of any bodily or mental condition of any person”) and (2) the means by which that is to be achieved (i.e., “by the use of the physical, chemical, and other properties of heat, light, water, electricity, sound, massage and active, passive and resistive exercise.”)

We believe each focus merits equal attention, and that they should be read together, i.e., that physical therapy embraces certain procedures and modalities only when used in the course of certain activity. (58 Ops. Cal. Atty. Gen. 595, 596 (1980) (physical therapist’s use of hydrotherapy is limited to situations set forth in § 2620); *cf. Crees v. California State Board of Medical Examiners* (1963) 213 Cal. App. 2d 195, 214 (chiropractor’s use of light, air, water, rest, heat, diet, exercise, massage and physical culture must be in connection with an incident to the practice of chiropractic).) Viewing section 2620 as such, we conclude that section 2630 prohibits the unlicensed use of the physical, chemical and other properties of heat, light, water, electricity, sound, massage and active and resistive exercise *only when they are used in conjunction with the physical or corrective rehabilitation or the physical or corrective treatment of any bodily or mental condition of any person*. It would appear then that a person engaged in the practice of occupational therapy or adaptive physical education may utilize the physical, chemical and other properties of heat, light, water, electricity, sound, massage and active and resistive exercise, when not employed in connection with physical or corrective rehabilitation or treatment. But again, the final answer requires further scrutiny of section 2620.

The procedures and modalities mentioned in section 2620 are divided in three parts: (1) utilization of the physical, chemical and other properties of heat, light, water, electricity and sound; (2) the utilization of massage; and (3) the utilization of active and resistive exercise. Section 2630 itself states that it does not prohibit “the administration of massage, external baths or normal exercise not part of a physical therapy treatment. . .” Thus the section itself excepts from its prohibition on the unlicensed practice of physiotherapy the utilization of the second and third types of procedures or modalities described therein (massage and *normal*, active and resistive exercise) when they are not used as part of physical therapy treatment, but it does not except the first. We are therefore faced with the question of whether a person not licensed as a physical therapist may use the physical or chemical properties of heat, light, water, electricity and sound even when not part of a physical therapy treatment? We thus reach the Rubicon, for while we have viewed the practice of physical therapy to be the utilization of any of the three types of procedures or modalities in *connection* with a course of physical or corrective treatment of rehabilitation, the section prohibiting its unlicensed practice seems to have exempted the utilization of only two of those when not so connected.

We must construe the exemption from the requirement for licensure in section 2630 *in its statutory context i.e., regulation of the practice of physical therapy* (cf. *Griffith v. Gibson* (1977) 73 Cal. App. 3d 465, 470; *People v. Colver* (1980) 107 Cal. App. 3d 277, 285) and we do not ascribe to the Legislature an intent to regulate by that licensure the utilization of the physical or chemical properties of heat, light, water, electricity or sound, when their use is not employed as part of that practice. Indeed we must eschew such an interpretation for it would lead to absurd results such as to prohibit the unlicensed playing of music in dance exercises or the use of the buoyancy property of water in swimming exercises or lessons even when that activity is not part of a course of treatment or rehabilitation. (Cf. *California Mfrs. Assn. v. Public Utilities Com.* (1979) 24 Cal. 3d 836, 844; *People v. Ventura Refining Co.* (1928) 204 Cal. 286, 292.)

The notion of treatment or rehabilitation is central to the practice of physical therapy. (§ 2620; 45 Ops. Cal. Atty. Gen. 116, 117 (1965).) We deem it essential also to the prohibition in section 2630 on the unlicensed utilization of the physical or chemical properties of heat, light, water, electricity or sound. Accordingly we conclude that a person who is not licensed as a physical therapist may also use those modalities in the course of his or her profession as long as that use does not involve the physical or corrective treatment or rehabilitation of a bodily or mental condition.

Inversely stated we conclude that a person who is not licensed as a physical therapist but who is engaged in the practice of occupational therapy or adaptive physical education may not utilize in the course of his or her practice any of the procedures or modalities described in section 2620 of the Business and Professions Code in connection with the physical or corrective treatment or rehabilitation of a bodily or mental condition but may use the same for other lawful purposes.
