THE ATTORNEY GENERAL OF TEXAS

May 11, 1988

JIM MATTOX
ATTORNEY GENERAL

Ms. Lois M. Smith
Executive Director
Texas State Board of Physical
Therapy Examiners
313 East Rundberg Lane
Suite 113
Austin, Texas 78753

LO-88-53

Dear Ms. Smith:

You request our opinion concerning the authority of the Board of Physical Therapy Examiners to adopt a rule governing the discipline of a licensee or revocation of a license issued by the board. In a separate request, you ask two questions about the authority of the chairman of the board to adopt an emergency amendment to this rule without the prior approval of the entire board and the status of the original rule after the emergency amendment. Before addressing your questions in detail, we will review the chronology of events that led to your separate requests.

A rider to the General Appropriations Act for the 1987-1989 biennium limits the expenditure of appropriated funds by the board:

> 3. None of the funds appropriated by this Act shall be expended for the enforcement of the provisions of Section 19 of Article 4512e, [V.T.C.S.], except pursuant to rules promulgated by the Board [of Physical Therapy Examiners].

Acts 1987, 70th Leg., ch. 78, art. I, at 710.

Section 19 of article 4512e provides the following in pertinent part:

> **Grounds for denial of a license or discipline of a licensee: competitive bidding and advertising**
>
> Sec. 19. (a) A license may be denied, or after hearing, suspended or revoked, or a

> licensee otherwise disciplined if the applicant or licensee has:
>
> (1) provided physical therapy treatment to a person other than on the referral of a physician licensed to practice medicine by the Texas State Board of Medical Examiners, or by a dentist licensed by the State Board of Dental Examiners, or a doctor licensed to practice chiropractic by The Texas Board of Chiropractic Examiners or a podiatrist licensed by the Texas State Board of Podiatry Examiners, or by any other qualified, licensed health-care personnel who are authorized to prescribe treatment of individuals, or in the case of a physical therapist assistant, has treated a person other than under the direction of a licensed physical therapist. . . .

On December 9, 1987, the board adopted a rule in response to the appropriations act rider quoted above. The new rule contains the following relevant provision:

> (b) A license will be denied, suspended, or revoked for a period of not less than 30 days and a licensee or applicant will be appropriately disciplined if the applicant or licensee:
>
> (1) except as otherwise provided in paragraph (2) of this subsection, provides treatment except upon the request of a physician licensed to practice medicine by the Texas State Board of Medical Examiners, or by a dentist licensed by the State Board of Dental Examiners, or a doctor licensed to practice chiropractic by the Texas Board of Chiropractic Examiners, or a podiatrist licensed by the Texas State Board of Podiatry Examiners, or by any other qualified, licensed health care person authorized to prescribe treatment of individuals; or in the case of a licensed physical therapist assistant, has provided physical therapy treatment other than upon the evaluation and plan of care provided by a licensed physical therapist in accordance with all the applicable Act and rule requirements;

> (2) treats a patient other than upon the request of those indicated in paragraph (1) of this subsection, for more than 20 treatment sessions or 30 consecutive calendar days from the initial evaluation, whichever occurs first, and such treatment fails to indicate objective improvement of the patient's condition as determined by current measurable standards of practice, satisfactory to the board. . . . (Emphasis added.)

12 Tex. Reg. 4683 (Dec. 15, 1987) (to be codified at 22 Tex. Admin. Code §343.1). The board offered this explanation for the rule:

> This new section conforms with a mandate in the Appropriation Act, Article I, Rider 3, 70th Legislature, 1987. That rider indicates the board must promulgate rules that relate to the Physical Therapy Practice Act, §19, in order to expend appropriations on the enforcement of the Act.
>
> The new section offers additional details to the public regarding the investigation and enforcement procedures utilized by the board, as advised by the state Attorney General's Office.
>
> Comment was received from one person who was pleased with the proposed change. . . .

12 Tex. Reg. 4683 (Dec. 15, 1987).

Rule 343.1 was scheduled to take effect on December 30, 1987. However, you inform us that on that date the chairman of the board filed with the Texas Register an emergency rule amending section 343.1 by deleting subsection (b)(2). The amended rule was published on January 8, 1988, and was scheduled to be in effect from December 30, 1987, to April 28, 1988. 13 Tex. Reg. 145 (Jan. 8, 1988). The commentary to the emergency rule makes no mention of the chairman's action, but instead says that the amendment was adopted by the board pursuant to section 3(e) of article 4512e.

Your first question is whether the board had sufficient statutory authority to adopt Rule 343.1(b)(1) and (2). The board misconstrued Rider 3 to the Appropriations Act and exceeded its authority when it adopted section 343.1(b)(2).

Riders to general appropriations acts may detail, limit, or restrict the use of funds appropriated therein. Attorney General Opinions JM-497 (1986); JM-407, JM-343 (1985). They cannot repeal, modify,amend, or conflict with existing general law because these matters are not properly the subject of "appropriations." Tex. Const. art.III, §35; Moore v. Sheppard, 192 S.W.2d 559 (Tex. 1946); Attorney General Opinion JM-391 (1985). See also Jessen Associates, Inc. v. Bullock, 531 S.W.2d 593 (Tex. 1975). Riders that could be interpreted as intending such will be read, if possible, to harmonize with existing law instead. Attorney General Opinion JM-391 (1985).

Also, rules adopted by administrative agencies must be in harmony with the general objectives of the statutes they implement. See Gerst v. Oak Cliff Savings and Loan Ass'n, 432 S.W.2d 702 (Tex. 1968). An administrative agency may fill in details relating to powers or activities granted or proscribed by statute, but it may not by its rules extend or add to powers or activities listed in the statute. Carp v. Texas State Board of Examiners in Optometry, 401 S.W.2d 639 (Tex. Civ. App. - Dallas 1966), aff'd, 412 S.W.2d 307 (Tex. 1967), cert. denied, 389 U.S. 52 (1967).

Rider 3 simply provides that appropriated funds may not be expended for the denial, suspension, or revocation of a license or discipline of a licensee except pursuant to rules promulgated by the board. The rider does no more than limit the use of appropriated funds; it does not constitute a grant of rulemaking power to the board. The board's authority to adopt rules is derived from section 3(e) of article 4512e, and such authority is limited to the adoption of rules "consistent with this Act."

In our opinion, section 343.1(b)(2) is inconsistent with section 19(a)(1) of article 4512e. By providing that licensees may be disciplined and applicants for licenses denied if they provide physical therapy treatment "other than on the referral" of a licensed health care professional, section 19(a)(1) tacitly expresses a policy of requiring licensed physical therapists to provide treatment only upon the referral of the licensed health care professionals enumerated therein.

Further evidence of this policy is found in the bill files to two pieces of legislation offered during the 69th and 70th Legislative Sessions. The first bill, House Bill No. 1940, would have deleted the bulk of section 19(a)(1), leaving only the language relating to licensed physical therapist assistants. See Bill File to H.B. No. 1940, 69th

Leg., Legislative Reference Library. The bill died in committee. See House Bill History Report, 69th Leg., Reg. Sess., at 553. Senate Bill No. 170 was offered at the most recent regular session of the legislature. In its original form, it, too, would have deleted the referral requirement of section 19(a)(1). See Bill File to S.B. No. 170, 70th Leg., Legislative Reference Library. A committee substitute for the bill left the language of section 19(a)(1) intact, but added a provision immediately following that would subject a licensee to discipline for providing physical therapy treatment "without referral to" the designated health care practitioners "if the person being treated shows no improvement as determined by an objective measurable standard within 30 days of the initial evaluation." This bill also met with defeat in the legislature. See Senate Bill History Report, 70th Leg., Reg. Sess.

As we read these bills, both would have greatly expanded the scope of a licensed physical therapist's authority to provide treatment to patients without the prior intervention of other licensed health care professionals. The fact that neither bill was enacted into law is a strong indication that the legislature believes section 19(a)(1) serves a significant and worthwhile public policy. Because section 343.1(b)(2) condones the delivery of physical therapy treatment without the referral of a licensed health care professional, it stands clearly at odds with section 19(a)(1).

Two primary arguments have been advanced in favor of the rule. The first concerns the use of the word "may" in section 19(a). By providing that a license "may" be denied/suspended/revoked or a licensee disciplined, it is argued that the legislature has vested the board with broad discretion to determine when or if a licensee is subject to discipline. The board has a broad range of disciplinary options, including the option of refusing to discipline a licensee for providing treatment without a referral. Rule 343.1(b)(2), it is argued, imposes a stricter standard than section 19(a)(1) because it informs licensees of the conditions under which disciplinary action is assured.

In Bloom v. Texas State Board of Examiners of Psychologists, 492 S.W.2d 460, 462 (Tex. 1973), the supreme court acknowledged that the use of the word "may" means an administrative agency has discretion in the administration of the statute, but cautioned that the word "does not empower the [agency] to make standards which are different from or inconsistent with the statute, even though they may be reasonable and may be administered reasonably." The

previous discussion demonstrates that the rule in question is fundamentally inconsistent with the statutory provision it purports to implement. Thus, the permissive nature of section 19(a) does not authorize the board to adopt a rule like section 343.1(b)(2).

The second argument favoring the rule is that article 4512e does not expressly prohibit the board from adopting the rule. We are directed to sections 7 and 19(b) of the act. Section 7 lists certain prohibited acts, but does not specify the delivery of physical therapy treatment without a referral as such. Section 19(b) prohibits the board from adopting rules restricting competitive bidding or certain forms of advertising by persons regulated by the board. The argument is that if the legislature had intended an outright prohibition of physical therapy treatment except upon the referral of a licensed practitioner, it would have said so in either section 7 or section 19(b).

We believe sections 7 and 19(b) are inapposite to the question of whether the board may adopt a rule such as section 343.1(b)(2). Section 7 indeed specifies certain prohibited acts, but each relates to misrepresentations to the public by persons not licensed under article 4512e about their qualifications to practice physical therapy. This provision is primarily a prohibition on unlicensed persons who offer or provide physical therapy treatment. It is therefore directed in large part at preserving the professional integrity of persons licensed under the act, an interest at which section 19(a)(1) arguably is not directed. Section 19(b), meanwhile, prohibits rules restricting competitive bidding or advertising except those restricting false, misleading, or deceptive practices. This provision protects the commercial interests of licensed physical therapists by confirming their right to engage in certain commercial activities aimed at attracting clients. We think the legislature did not intend these provisions to be cumulative prohibitions on the authority of the board. It is clear that section 19(a)(1) contemplates a further limitation on the authority of licensees or applicants for licenses to provide physical therapy treatment. The board may not adopt a rule circumventing this prohibition.

Your second request concerns the alleged actions of the chairman of the board amending rule 343.1 by deleting subsection (b)(2) without the prior approval of the entire board. Because we have determined that the board had no authority to adopt section 343.1(b)(2) in the first instance, we need not address these subsequent actions in great detail. We do, however, note that section 312.004 of

the Government Code allows joint authority granted to any number of officers or other persons to be executed by at least a majority of them unless expressly provided otherwise. Section 3(e) of article 4512e grants rulemaking authority to the board and not to any other person or persons.

S U M M A R Y

The Board of Physical Therapy Examiners was without authority to adopt the rule designated 22 Texas Administrative Code, section 343.1(b)(2).

Yours very truly,

Steve Aragon
Assistant Attorney General
Opinion Committee

SA/er

ID# 2836, RQ-1348
ID# 3086, RQ-1370