

NEW MEXICO MASSAGE THERAPY BOARD

Regular Meeting
Hearing Room One at 2550 Cerrillos Road
Santa Fe, New Mexico
November 19, 2004 at 1:00 p.m.

FINAL AGENDA

(Sign Travel Forms)

- I. CALL TO ORDER**
- II. APPROVAL OF AGENDA**
- III. APPROVAL OF MINUTES**
 - A. August 20, 2004
 - B. September 21, 2004
- IV. CORRESPONDENCE**
 - A. Question: Where Is Authority In Rules For Teach-out Policy?
 - B. Question: May MTs Order Lab Tests in New Mexico?
 - C. Question: What is the Board's Position on Swedish Gymnastics?
 - D. Which NCBTMB Exam Will The Board Be Requiring After June 2005?
 - E. Is An MT Allowed To Use Physical Therapy Modalities?
 - F. Does a Shiatsu Practitioner Need To Obtain An MT License?
- V. COMMITTEE REPORTS**
 - A. Chair's Report
 - B. Schools and Business Inspection Committee Report
 - C. Rules and Statute Committee (K. Egenes & Q. Lopez)
 - D. Education, Examination & Licensing Compliance Committee (R. Barnes & Q. Lopez)
 - E. Complaint Committee (P. Lane & E. Kaul)
- VI. SCHEDULE NEXT MEETING**
- VII. ADMINISTRATOR'S REPORT**
 - A. FY05 Renewal Report
 - B. Malpractice Insurance Statistics
 - C. License Statistics Report
 - D. FY05 Budget Status Report
- VIII. EXECUTIVE SESSION AND ACTION**
 - A. Case #'s 02-04-04 and 03-04-006 – Jeffrey Books (Follow-up on Stipulated Agreement)
 - B. Case # 01-11-05 - Robert Bookwalter (Follow-up on Final Order)
 - C. Case #'s 02-07-08, 03-01-01 and 03-03-004 - Michel Cartegena (Follow-up on Final Order)
 - D. Case #'s 03-07-010 and 03-07-011 - Gilbert Rivera & Apollo College (Follow-up on Agreement)
- IX. ADJOURNMENT**

NEW MEXICO MASSAGE THERAPY BOARD

Regular Meeting
2550 Cerrillos Road
Hearing Room One
Santa Fe, New Mexico
November 19, 2004 @ 1:00 p.m.

MEETING MINUTES

MEMBERS PRESENT: Kathleen (McCafferty) Egenes, LMT and Chair
Randy Barnes, LMT
W. D. "Peter" Lane, LMT
Ed Kaul, Public Member
Claudio "Quinn" Lopez, Public Member

STAFF PRESENT: Carmen E. Payne, Board Director
Geraldine Mascarenas, B&C Compliance Section

OTHERS PRESENT: Mona Valicenti, Assistant Attorney General
Donald F. Schiff, LMT
Virginia Anthony Barrow, LMT
Dan R. Barrow, LMT
Pamela Berben, LMT
Susan L. Barnes, LMT
Tom Stromei
Darlene Stone, LMT
Ellen Trabka
Linnea Murray
Linda Delker
Connie McCoy
Gwynne Unrult
Lonnie Howard
Phillip Townsend
Ellen Applebaum
John Deckebach
Essie Shisk
Jennifer Thomas
Lorin Parrish, LMT

I. CALL TO ORDER

At 1:10 p.m. the Board Chair, Kathleen Egenes, called the meeting of the New Mexico Massage Therapy Board to order. The meeting had been duly and properly noticed and upon a roll call of the Board members, it was determined that a quorum present to conduct business.

II. APPROVAL OF AGENDA

Mr. Lane **MOVED** for the Board to approve the meeting agenda as proposed. Mr. Lopez **SECONDED** the motion, which was **PASSED** by **UNANIMOUS APPROVAL**.

III. APPROVAL OF MINUTES

A. August 20, 2004

Mr. Lane **MOVED** for the Board to approve the minutes of the August 20, 2004 meeting as presented. Mr. Quinn **SECONDED** the motion, which was **PASSED** by **UNANIMOUS APPROVAL**.

B. September 21, 2004

Mr. Lane **MOVED** for the Board to approve the minutes of the September 21, 2004 meeting as presented. Mr. Quinn **SECONDED** the motion, which was **PASSED** by **UNANIMOUS APPROVAL**.

IV. CORRESPONDENCE

A. Question: Where Is Authority In Rules For Teach-out Policy?

Wanita Thompson wrote and asked the Board to identify the Board rule that is the basis for the teach-out policy that has been a requirement for renewal of the massage therapy school registrations since last year. Ms. Thompson added in her e-mail that she felt a teach-out policy

rule is very necessary since there have been schools that have closed down literally overnight, but she was unable to find authority for a teach-out requirement in the Board's regulations and felt that since the requirements for this policy have not been communicated to the schools until last year, the Board cannot justify requiring the schools to supply this information all the way back into the school's history. She asked that the Rules Committee consider including a teach-out policy rule in its proposed regulations.

The Chair stated that in one case a school closed overnight leaving the students without a teach-out policy, but fortunately The Medicine Wheel stepped in to help out. As a result, the Board's Rules and Regulations Committee is working on proposed regulations to require a teach-out policy.

Mr. Lopez said it appeared Ms. Thompson was asking about the Board's authority to require a teach-out policy. He said his understanding is that the Massage Therapy Act grants the Board the general authority to register massage schools and to establish requirements for these schools, including contingency plans if a school closes.

The Board asked that AAG Valicenti take a look at this and confirm whether this understanding is correct.

B. Question: May MTs Order Lab Tests in New Mexico?

The Board received e-mail from Earlene Clark, Director of Human Resources and Corporate Compliance at Genova Diagnostics, stating that she was trying to determine whether licensed massage therapists are authorized to order laboratory tests in New Mexico.

Mr. Lopez said that if the question was being asked in the context of the Board's enforcement power, the Board has wide latitude and can order that lab tests be conducted in cases involving substance or alcohol abuse as a condition of discipline.

Mr. Lane stated that there is nothing that specifically denies an MT from ordering a lab test, but that begs a larger question, "What would the MT be testing for?"

Pam Berbon, Director of Education at Universal Therapeutic Massage, said she has not ordered lab tests, but that she has been a nurse for a long time. She asked, "If MTs order lab tests, at what level are they qualified to read the tests? What can they read? They can't read an x-ray because it's out of the scope of the LMT's practice." According to the massage therapy scope of practice, she added, LMT's don't have the authority to diagnose.

Another member of the audience commented that it was his experience as a Social Worker that even therapists such as PT's or OT's can *suggest* that perhaps some sort of test should be done, but it is still up to the primary care physician to order the test. The usual experience is that licensed physicians order tests and only qualified medical personnel interpret those tests.

AAG Valicenti had not yet arrived, but the Board decided that this question should be referred to her for advice.

C. Question: What is the Board's Position on Swedish Gymnastics?

AAG Valicenti arrived just as the Board began discussion on the e-mail received from Alison Owens, New Mexico School of Natural Therapeutics. Ms. Owens stated that "non-specific stretches or Swedish gymnastics" were included in the Massage Practice Act in 1992, but she had recently been told that this modality had been deleted from the massage therapy practice Act a few years ago. She asked what had been changed because this modality has always been taught at her school and she wanted to make sure the school was in compliance with the Board's requirements.

The Chair said this has been brought up before. Mr. Barnes said it was in the original law and he wasn't certain why it was removed. He said he hasn't had a class in Swedish gymnastics so he wasn't sure what it is exactly.

Mr. Lane said that it was his understanding that part of Swedish gymnastics is that it dealt with actual adjustments of the cervical, thoracic, and lumbar spine and closely resembled a direct thrust chiropractic adjustment, and that was the reason for the concern and possibly the reason it was removed from the practice act.

Ms. Anthony-Barrow said it was her understanding that Swedish gymnastics related to stretching, balancing, and range of motion to see where range of motion is restricted to determine what muscles to treat. She said it's not so much a matter of trying to reposition the structures.

The Board **DIRECTED** Ms. Payne to ask Ms. Owens to describe in greater detail what specifically she means by "Swedish gymnastics". In the meantime, the Board agreed they would research specifically when this term was removed from the Massage Practice Act.

D. Which NCBTMB Exam Will The Board Be Requiring After June 2005?

The second part of Alison Owen's e-mail related to the upcoming (June 2005) changes to National Certification Board for Therapeutic Massage and Bodywork (NCBTMB) test. She asked which test the Board would require for licensure: the "Therapeutic Massage & Bodywork test including oriental modalities", or the "Therapeutic Massage only" test."

Mr. Lane said the Board had, at the last meeting, asked the Rules Committee to look at changing the "hour" requirement. The new NCBTMB tests increases certain hours and he asked if the Committee had come up with any findings or decisions that might direct the Board as to which test the Board would ultimately require.

The Chair stated that what the Committee did was acknowledge the fact that registered New Mexico school programs are 650+ hours. If the National continues to change its requirements, the Board is not going to continually attempt to change its requirements to comply with the National. The Board will continue to require a minimum of 650 hours for the schools with a few structural changes in the number of hours required, as will be recommended by the Committee in the upcoming proposed rule changes. However, the Chair said, the Committee's position is that if the schools want their students to be prepared to take the National exam, the schools are going to have to comply with the National's hourly requirements in the specific study courses. For instance, she continued, if the National requires 40 hours in pathology, the schools will have to have 40 hours of pathology on the school transcript in order for the graduate to be approved by the National to take the exam.

The Rules Committee was asked if they considered the Asiatic test and the Chair answered that it had not yet looked at it but would do so in future. The Board was told that this is a serious crux point for the Board because it appears that the Board is conceding its authority to the National. The Chair responded that if the Board is going to accept the National exam then the schools would have to adapt. The Board's primary concern is protecting the public and addressing the disciplinary issues.

Mr. Lopez said that the Rules Committee challenged the other Board members to pinpoint any serious concerns and received no feedback. The Committee also took into consideration previous discussions on the need for reciprocity and the fact that persons taking the National will have better mobility from state to state. Therefore, he added, the Committee is going to recommend tracking with the National requirements, which doesn't mean the Board is yielding authority at all.

Don Schiff said the Board might have to "roll over on this one, this time", but his recommendation was that the Board ought to accept *any* test that is psychometrically valid so that one organization isn't creating standards for the whole profession from its own perspective. He encouraged the Board not to let this kind of thing happen again. His opinion was that the NCE needs to understand that it is working for the states and the states aren't working for the NCE.

The Board was asked if it was safe to assume that a school must satisfy the Board's requirements while still offering a curriculum that prepares its students to pass the NCE.

Mr. Kaul summarized by saying the Board is accepting the National and thus is accepting the criteria changes the National is making to its exam. In order for a school's students to be prepared to pass the National, the school might have to change its curriculum depending on what its current curriculum is. Any curriculum changes must be submitted to the Board for approval, which is part of the Board's regulations. Mr. Kaul continued, saying that the Board is not dictating specifically to the schools because each school has to determine how the National changes will affect its own curriculum and whether it has to change its curriculum in order to ensure that its students are prepared to pass the National exam while still complying with the Board's requirements. Instead of trying to rule by minutia, the Board is saying there are some global factors which can be problematic, but the Board is supporting those global factors and is putting the onus on the each school as to how it will manage those global factors within its own private enterprise.

Mr. Lane said New Mexico schools are already in compliance with the Board's current Rules and Regulations. The Board's rules are going to be tracking with the changes the National is implementing, so initially what will be required is for the schools is to alter their curriculum to meet the NCBTMB standard as it applies to taking the National certification exam, which is what the Board uses for licensure. Eventually, the Board will adjust and make changes to the curriculum standards and that might take a while.

E. Is An MT Allowed To Use Physical Therapy Modalities?

The Board received e-mail from David Higham, MPT, Triad Hospitals, asking if it is lawful under the Massage Therapy Practice Act for a massage therapist to use physical therapy modalities to treat his/her patients. Mr. Lane said that there appears to be an underlying concern in the e-mail that relates to financial questions. Currently there is no law that prevents a licensed massage therapist from billing insurance for the treatment of a patient, and the common procedural CPT codes that a licensed massage therapist uses to bill for services are wide and varied. Traditionally they all have a "97" prefix and there is some overlap with what is considered by some to be physical therapy codes. Fact of the matter is, there is still some soft tissue manipulation that can be used by a licensed massage therapist. If the question has arisen because of insurance billing, Mr. Lane said, the simple answer is, 'Yes, it is lawful', because there is nothing that denies licensed massage therapists to bill using those insurance codes.

After a brief discussion, Mr. Lane said he would call Mr. Higham and find out specifically what Mr. Higham's concerns are and this item was **TABLED** until the next regular Board meeting.

F. Does a Shiatsu Practitioner Need To Obtain An MT License?

The Board received an e-mail asking if a Shiatsu practitioner currently practicing in Illinois is required to obtain a massage therapy license to practice Shiatsu in New Mexico, and the Board's unequivocal and unhesitant answer was "Yes". Ms. Payne was **DIRECTED** to respond to the inquirer and send him the Board's statute.

V. COMMITTEE REPORTS

A. Chair's Report

The Chair had nothing to report.

B. Schools and Business Inspection Committee Report

The Committee had nothing to report.

C. Rules and Statute Committee (K. Egenes & Q. Lopez)

The drafts of the proposed rules had been previously distributed to everyone on the Board's "Interested Parties" in keeping with an open communication policy. Mr. Lopez reported that the Board received e-mail comments specifically on the preliminary draft changes proposed to Part 2, "Professional Conduct", but because the Committee needs more time to work on Part 2, it is recommending that rule making on Part 2 be postponed.

Mr. Lopez reported that the Rules and Statute Committee met with Ms. Mascarenas and Ms. Payne to discuss possible changes to the Board's rules. As a result, both Ms. Mascarenas and Ms. Payne have been working on drafting clean-up and substantive changes to the rules based on those discussions. The Committee is recommending that the proposed changes to the Board's rules, Part 1, 3, 4, 5, 6, 10, 11, and 12 be moved forward in the rule making process. Some of the changes are technical, some are clearing up ambiguities, others are to approach things in a different way based on issues that have come before the Board. Mr. Lopez asked Ms. Mascarenas and Ms. Payne to assist him in talking generally about the proposed changes and to explain what the Committee is trying to accomplish, which they did.

NCBTMB Candidate Concerns: During the review of the proposal to change the temporary license period from six months to three months, Ms. Payne reported that the Board office has received many complaints from license applicants that the National Board is failing to respond to and communicate with exam applicants in a timely manner and that the exam application process is very slow. The Chair said she would write to the National Board about this.

Rule Making Process: The Chair explained that the Board welcomes comments from interested parties and asked them to send written comments on the rules as soon as possible so that the Rules Committee can review them and consider them and possibly incorporate them into the final draft to be presented for public comment.

Mr. Barrow suggested that perhaps someone could be designated to set up an on-line forum where everyone can easily review the comments before the hearing. Mr. Schiff offered to set up a Yahoo group where everyone could access comments on the proposed rules.

There was discussion on the rule making process, possible time frames for implementation of the proposed rules if they are adopted, New Mexico register deadlines, legal notice requirements, and possible effective dates of the rules.

Sunset Review Progress: There were questions about the Sunset Review process and whether the Board will be extended. Mr. Lopez reported that everything went well at the Sunset Hearings and the Sunset Review Subcommittee's recommendation is to extend the life of the Board. He also reported that Senator Griego was very interested in the percentage of licensees that carry liability insurance. The Board actually conducted a survey of the licensees and registrants that renewed in 2003 and again in 2004. Mr. Lopez reviewed the 2004 statistics. He also reported that he spoke to a Legislative Finance Committee (LFC) analyst and discussed the liability insurance issue with her.

Worker's Compensation Administration Letter: Mr. Lopez said he was copied with a letter from the Worker's Compensation Administration written in answer to a question from a licensee and someone who works at the Insurance Division asking for clarification as to whether massage therapists working in certain spas are considered independent contractors and whether they must obtain their own Worker's Comp coverage versus those considered to be "employees". Some spas are passing those costs on to the massage therapists who may or may not be independent contractors. This puts them at a competitive disadvantage to other places or individuals that absorb those costs for the therapists that work there. Worker's Comp provided a long letter indicating what they look at in distinguishing an independent contractor versus an employee.

Mr. Lopez said the Board needs to be supportive of massage therapists working in those places, and should advise them that it may not be appropriate for them to absorb those costs when they work in these establishments. They should understand that they can complain to Worker's Comp and there may be some redress for them. He said that he would think that establishments that are playing fair and providing those coverages for their employees appropriately would be upset about those establishments that try to characterize their employees as "independent contractors" and push those costs off on the therapists.

After discussion about how best to pass this information on to the licensees, Mr. Lopez asked if AAG Valicenti could review the letter and determine whether it would be appropriate for the Board to post the Workers Compensation guidelines on the Board's Website.

D. Education, Examination & Licensing Compliance Committee (R. Barnes & Q. Lopez)
The Committee had nothing to report.

E. Complaint Committee (P. Lane & E. Kaul)
The Committee Chair stated that the Committee had nothing to report in this portion of the meeting, but would address specific issues when the Board goes into Executive Session.

VI. SCHEDULE NEXT MEETING

The Board set the following tentative meeting schedule for 2005:

March 24, 2005, at 10 a.m. for the public rule hearing followed by a regular meeting in Santa Fe;
June 24, 2005, at 10 a.m. in Albuquerque; and
September 23, 2005, at 10 a.m. in Santa Fe

VII. ADMINISTRATORS REPORT

A. FY05 Renewal Report

The 2004 renewal cycle statistics as of November 10, 2004 are as follows:

Licensees or Registrants	Renewal Notices Mailed	Number Renewed - 72%
Massage Therapists	1,416	1,008
Massage Therapy Independent Instructors	45	40
Massage Therapy School-Based Instructors	54	36
Massage Therapy Schools	17	16
Totals	1,532	1100

B. Malpractice Insurance Statistics

A count taken up through November 10, 2004, of those surveyed during the 2004 renewal cycle to determine what percentage of those renewing carry malpractice or liability insurance is as follows:

Licensee or Registrants	YES	NO	Unknown
Massage Therapists	605	381	22
Massage Therapy Instructors	58	17	1
Totals	663	398	23
Percentage with insurance	61%		

C. License Statistics Report

As of November 10, 2004, the Board's license statistics are as follows:

	Active	Expired	Inactive	Lapsed Null & Void	Pending Applications	Revoked	Surrendered	Suspended	Withdrawn
Massage Therapists (MT)	2,687	1,901	294	417	391	4	1	5	70
MT - Independent Instructors	80	65	27	5					2
MTI - School-Based Instructors	97	10	22	2	2				
MT Schools	17	5		2	1				
Temporary Licensees	193	437		985	21				1
Grand Total	3,074	2,418	343	1,411	415	4	1	5	73

D. FY05 Budget Status Report (7/1/04 through 6/30/05)

The Board has received a total of \$145,245.00 in revenues as of November 10, 2004. The amounts received are broken down by revenue code as follows:

\$ 17,625	Application and Licensure Fees
\$ 121,651	Renewal Fees
\$ 150	Exam Fees
\$ 900	Miscellaneous Fees (Administrative Fees)
\$ 319	Miscellaneous Fees (Copies, Lists, Labels)
\$ 3,100	Late Renewal Penalty Fees
\$ 1,500	Fines and Penalties

As of October 31, 2004, the Board's FY05 approved operating budget of \$216,400, has been reduced by \$48,164 in expenditures and \$9,395 in pending encumbrances, leaving an unencumbered budget balance of \$158,841.

VIII. EXECUTIVE SESSION AND ACTION

Mr. Lane **MOVED** for the Board to enter into Executive Session to discuss licensing and disciplinary matters related to agenda items VIII. A, B, C, and D, with the authority for closure being Section 10-15-1.H. (1) and (3). Mr. Kaul **SECONDED** the motion. A roll call vote was taken and Mr. Kaul, Mr. Lopez, Mr. Lane, Mr. Barnes, and Ms. Egenes voted to enter into closed session and the motion **PASSED**. The time was 2:45 p.m. and the recorder was turned off.

At 3:30 p.m. the recorder was turned back on and the Board came back into open session. The Chair stated that only matters pertaining to the cases listed in the motion to enter into Executive Session were discussed. The following action was taken in open session.

A. Case #'s 02-04-04 and 03-04-006 – Jeffrey Books (Follow-up on Stipulated Agreement)

No action taken. Respondent is in compliance with the *Stipulated Agreement*.

B. Case # 01-11-05 -- Robert Bookwalter (Follow-up on Final Order)

Mr. Quinn **MOVED** for the Board (1) to **AUTHORIZE** AAG Valicenti to proceed in accordance with the law against the Respondent, Robert Bookwalter with regard to his violation of the Board's *Final Order* and to issue an *Order To Show Cause* for the Respondent to appear before the Board to explain why he has not complied with the Board's *Final Order*; and (2) to **DIRECT** Ms. Payne to contact the Boards & Commissions Compliance Section to investigate reports that the Respondent is continuing to practice in violation of the *Final Order* and pursuant to a suspended license. Mr. Kaul **SECONDED** the motion, which was **PASSED** by **UNANIMOUS APPROVAL**.

C. Case #'s 02-07-08, 03-01-01 and 03-03-004 - Michel Cartegena (Follow-up on Final Order)

The Respondent, Michel Cartegena, has surrendered his license to the Board and has begun to submit payments on the fine assessed in the Board's *Final Order*. Mr. Lane **MOVED** for the Board to **DIRECT** Ms. Payne to contact the Boards & Commissions Compliance Section to investigate whether the Respondent, Michel Cartegena is, in fact, in compliance with the *Stipulated Agreement*. Mr. Kaul **SECONDED** the motion, which was **PASSED** by **UNANIMOUS APPROVAL**.

D. Case #'s 03-07-010 and 03-07-011 - Gilbert Rivera & Apollo College (Follow-up on Agreement)

The Respondents, Gilbert Rivera and Apollo College have paid the disciplinary penalty fines assessed by the Board and are in compliance with the *Stipulated Agreement*. Therefore, no further action is needed with regard to these cases and the cases are closed.

IX. ADJOURNMENT

There being no other business to come before the Board, Mr. Lane **MOVED** for adjournment of the Board meeting. Mr. Kaul **SECONDED** the motion, which was **PASSED** by **UNANIMOUS APPROVAL**. The time was 3:35 p.m.

Respectfully submitted by Carmen E. Payne, Board Director
Approved by the Board on March 24, 2005
Signed by Kathleen Egenes, Board Chair on March 24, 2005