



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2018-8

Ms. Rebecca Pasternik-Ikard, Chief Executive Officer
Oklahoma Health Care Authority
4345 N Lincoln Blvd.
Oklahoma City, OK 73105

September 11, 2018

Dear Ms. Pasternik-Ikard:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following question:

Is a Physical Therapist a “practitioner of the healing arts” under Oklahoma law when developing a plan of care for a child under an Individualized Education Program in accordance with the federal Individuals with Disabilities Education Act (20 U.S.C. §§ 1400 – 1482)?

I.

BACKGROUND

A. The Individuals with Disabilities Education Act.

The federal Individuals with Disabilities Education Act (“IDEA”), 20 U.S.C. §§ 1400-1482, provides assistance to states for the education of children with disabilities. The purpose of the IDEA is, in pertinent part, “to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education *and related services designed to meet their unique needs* and prepare them for further education, employment, and independent living[.]” 20 U.S.C. § 1400(d)(1)(A) (emphasis added).

The IDEA defines “child with a disability” as a child:

- (i) with intellectual disabilities, hearing impairments (including deafness), speech or language impairments, visual impairments (including blindness), serious emotional disturbance (referred to in this chapter as “emotional disturbance”), orthopedic impairments, autism, traumatic brain injury, other health impairments, or specific learning disabilities; and

(ii) who, by reason thereof, needs special education and *related services*.

20 U.S.C. § 1401(3)(A) (emphasis added). The term “related services” is defined under the IDEA to mean:

transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, *physical* and occupational *therapy*, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualized education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

Id. § 1401 (26)(A) (emphasis added).

Pursuant to the IDEA, a “child with a disability” may receive special education and related services through a combination of federal and state funds. 20 U.S.C. §§ 1400(c)(6), 1401(9). Such related services can include physical therapy. Whether physical therapy services are necessary is determined according to the child’s Individualized Education Program (“IEP”), a written statement developed by the child’s IEP team¹ that includes information regarding the child’s academic achievement and functional performance, the child’s measurable annual academic and functional goals and progress towards meeting those goals, and the special education *and related services* to be provided the child. *See* 20 U.S.C. § 1414(d)(A).

Because the term “related services” is defined to encompass physical therapy services, a child with a disability may receive physical therapy services under the IDEA if such services are included in the child’s IEP.

B. Medicaid Reimbursement for Physical Therapy Provided Pursuant to the Individuals with Disabilities Education Act.

Medicaid is a medical assistance program authorized by Title XIX of the Social Security Act (42 U.S.C. § 1396a, *et seq.*). It is administered jointly by the federal and state governments and provides medical care for various groups in the American population, including children with disabilities. 42 C.F.R. § 430.0. The Oklahoma Health Care Authority (“OHCA”) administers Medicaid in Oklahoma. 63 O.S.2011, §§ 5003(B), 5006(A).

¹ The IEP team may consist of the child’s parents, a regular education teacher if the child participates in the regular education environment, a special education teacher, a local education agency representative, an individual who can interpret the instructional implications of evaluation results, and, at the discretion of the parent or agency, a person who has knowledge or special expertise regarding the child, including related services personnel. *See* 20 U.S.C. § 1414(d)(B). As a result, a physical therapist may, under certain circumstances, participate in a child’s IEP team.

OHCA may reimburse health-related services provided under a child's IEP if the child otherwise meets the qualifications for participation in Medicaid. OAC 317:30-5-1020(a). Reimbursement must conform to Medicaid regulations. OAC 317:30-5-1020(c). Physical therapy services are reimbursable by Medicaid if they are "prescribed by a physician *or other licensed practitioner of the healing arts* within the scope of his or her practice under State law and provided to a beneficiary by or under the direction of a qualified physical therapist." 42 C.F.R. § 440.110(a) (emphasis added).²

II. DISCUSSION

Physical therapists are licensed by the State Board of Medical Licensure and Supervision pursuant to the Physical Therapy Act (the "Act"), 59 O.S.2011 & Supp.2017, §§ 887.1 – 887.18. The Act establishes a therapist's scope of practice³ including conditions under which a therapist can see a patient without a physician referral. *See* 59 O.S.Supp.2017, § 887.17; OAC 435:20-5-10. Specifically with regard to services provided under a child's IEP, the Act states:

A physical therapist may provide services within the scope of physical therapy practice without a physician referral to children who receive physical therapy services pursuant to the [IDEA] . . . Provided further, a plan of care developed by a person authorized to provide services within the scope of the Physical Therapy Practice Act shall be deemed to be a prescription for purposes of providing services pursuant to the provisions of the [IDEA] . . .

59 O.S.Supp.2017, § 887.17(A)(2); *see also* OAC 435:20-5-10(e).

As a result, it is within the scope of a physical therapist's practice to provide services under an IEP without a physician referral. Moreover, the therapist may prescribe a plan of care for a child's IEP. However, the Act makes clear that in so doing the therapist is *not* acting as a practitioner of the healing arts:

² As a result, OHCA may reimburse for physical therapy services provided under an IEP if the services are prescribed by a physician or other licensed practitioner of the healing arts.

³ "Practice of physical therapy" is defined, in pertinent part, as "the use of selected knowledge and skills in planning, organizing and directing programs for the care of individuals whose ability to function is impaired or threatened by disease or injury, encompassing preventive measures, screening, tests in aid of diagnosis by a licensed doctor of medicine, osteopathy, chiropractic, dentistry or podiatry, or a physician assistant, and evaluation and invasive or noninvasive procedures with emphasis on the skeletal system, neuromuscular and cardiopulmonary function, as it relates to physical therapy. Physical therapy includes screening or evaluations performed to determine the degree of impairment of relevant aspects such as, but not limited to, nerve and muscle function including transcutaneous bioelectrical potentials, motor development, functional capacity and respiratory or circulatory efficiency. Physical therapy also includes physical therapy treatment performed including, but not limited to, exercises for increasing or restoring strength, endurance, coordination and range of motion, stimuli to facilitate motor activity and learning, instruction in activities of daily living and the use of assistive devices and the application of physical agents to relieve pain or alter physiological status." 59 O.S.Supp.2017, § 887.2(2).

Nothing in the Physical Therapy Practice Act shall be construed as authorization for a physical therapist or physical therapist assistant to practice any branch of the healing art.

59 O.S.Supp.2017, § 887.17(A)(5).⁴

“The fundamental rule of statutory construction is to ascertain and, if possible, give effect to the intention and purpose of the Legislature as expressed in the statute.” *Jackson v. Indep. Sch. Dist. No. 16*, 1982 OK 74, ¶ 4, 648 P.2d 26, 29. “A cardinal precept of statutory construction is that where a statute’s language is plain and unambiguous, and the meaning clear and unmistakable, no justification exists for the use of interpretative devices to fabricate a different meaning.” *Neer v. State ex rel. Okla. Tax Comm’n*, 1991 OK 41, ¶ 16, 982 P. 2d 1071, 1078. Section 887.17(A)(5) of the Physical Therapy Practice Act states clearly and unambiguously that licensed physical therapists are not practitioners of a branch of the healing art even when seeing patients without a referral from a physician or when developing a plan of care for a child’s IEP.

The clear language of Section 887.17(A)(5) stating that physical therapists are not practitioners of the healing art stands in stark contrast to language contained in the Speech-Language Pathology and Audiology Licensing Act (59 O.S.2011 & Supp.2018, §§ 1601 – 1623) regarding speech pathology and audiology services performed in accordance with the IDEA. For instance, Section 1604 of Title 59 states:

C. Notwithstanding any other provision of this section, a person licensed in this state to perform speech-language pathology or audiology services is **hereby designated to be a practitioner of the healing art** for purposes of making a referral for speech-language pathology or audiology services pursuant to the provisions of the Individuals with Disabilities Education Act[.]

59 O.S.Supp.2018, § 1604(C) (emphasis added). Pursuant to federal regulations, Medicaid may reimburse for services “provided by or under the direction of a speech pathologist or audiologist, for which a patient is **referred by a physician or other licensed practitioner of the healing arts** within the scope of his or her practice under State law.” 42 C.F.R. § 440.110(c) (emphasis added). Unlike Section 887.17 of the Physical Therapy Practice Act, Section 1604 of the Speech-Language Pathology and Audiology Licensing Act makes clear that speech pathologists are acting as practitioners of the healing art when making a referral for services under a child’s IEP.⁵

⁴ The term “healing arts” is not defined in Oklahoma law. In 1937, the Oklahoma legislature enacted the Oklahoma Basic Science Act (then codified at 59 O.S. §§701-724), creating the Board of Examiners in the Basic Sciences. The Act required certification in the basic sciences, namely, anatomy, physiology, chemistry, bacteriology, and pathology, prior to seeking licensure in a healing art. The Act defined “healing art” to include “any system, treatment, operation, diagnosis, prescription or practice for the ascertainment, cure, relief, palliation, adjustment or correction of any human disease, ailment, deformity, injury or unhealthy or abnormal physical or mental condition.” 59 O.S.1971, § 702. The Act was repealed in its entirety in 1973.

⁵ The language of Section 887.17(A)(5) also stands in contrast to provisions of the Occupational Therapy Practice Act (59 O.S.2011 & Supp.2017, §§ 888.1 – 888.15) related to services provided under an IEP. Occupational therapists are authorized to prescribe a plan of care in accordance with the IDEA, *see* 59 O.S.2011, § 888.4(C), but there is no explicit statement that occupational therapists are **not** practitioners of the healing art when doing so.

In sum, although developing a plan of care for a child’s IEP comes within the scope of a physical therapist’s practice, the physical therapist is not acting as a practitioner of a healing art under Oklahoma law when doing so. 59 O.S.Supp.2017, § 887.17(A)(5).

It is therefore the Official Opinion of the Attorney General that:

A licensed physical therapist has authority to develop a plan of care for a child with a disability under an Individualized Education Plan in accordance with the Individuals with Disabilities Education Act (20 U.S.C. §§ 1400 – 1482) pursuant to 59 O.S.Supp.2017, § 887.17(A)(2). However, in doing so, the therapist is not practicing a branch of the healing art under Oklahoma law. *Id.* § 887.17(A)(5).



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