

**STATEMENT OF CONSIDERATION  
RELATING TO 201 KAR 9:290**

**General Government Cabinet  
Kentucky Board of Medical Licensure  
(Not Amended After Comments)**

- I. The public hearing on 201 KAR 9:290, scheduled for June 22, 2021, at 9:30 a.m. at the Kentucky Board of Medical Licensure was canceled; however, written comments were received during two public comment periods, the first ending January 31, 2021 and the second ending June 30, 2021. (The proposed regulation was initially filed as 201 KAR 9:280 on October 23, 2020; after the public comment period ended on January 31, 2021, the Board pulled the regulation in order to review and consider the comments submitted. Because the process was lengthy, the regulation was assigned a new number, 201 KAR 9:290, when refiled on March 26, 2021.)
- II. The following individuals submitted written comments during two public comment periods ending January 31 and June 30, 2021:

<u>Name and Title</u>	<u>Affiliation</u>
Shannon Fleming, MA, AT Ret. Vice President of Credentialing	Board of Certification (BOC)
Beth Ennis, PT, EdD, PCS President	Kentucky Chapter of the American Physical Therapy Association (KY-APTA)
Charlie Workman, MSPT, MBA President	Kentucky Chapter of the American Physical Therapy Association (KY-APTA)
Rhonda Tapp Edwards, MS, OTR/L President	Kentucky Occupational Therapy Association (KOTA)

- III. The following people from the promulgating administrative body reviewed and responded to the comments the comment periods:

**Board Members:**

Sandra R. Shuffett, M.D., Board President  
Waqar Saleem, M.D., Chair of Panel A

William C. Thornbury, M.D., Chair of Panel B  
Mary Nan Mallory, M.D.  
Jay S. Grider, D.O.  
Dana C. Shaffer, D.O.  
Heidi Koenig, M.D.  
Mark A. Schroer, M.D.  
Bill Webb, D.O.  
Caren L. Daniels, M.D.  
David W. Wallace, M.D.  
Kristin Turner, Esq.  
Philip D. Williamson, Esq.

Athletic Trainers Advisory Council Sub-Committee:

Phillip Hurley, M.D.  
Mary Lloyd Ireland, M.D.  
Rob Revelette, M.D.  
Scott Helton, MBA, LAT, ATC  
Eric J. Fuchs, ATC, NRAEMT, SMTTC  
Aaron Sciascia, PhD, ATC, PES, SMTTC, FNAP

Staff:

Michael S. Rodman, Executive Director  
Leanne K. Diakov, General Counsel

IV. Summary of Comments and Responses

(1) Subject Matter: Section 1, Definitions.

(a) Comments: At the end of the first comment period, which ended January 31, 2021, KY-APTA recommended inclusion of a definition for “athletic injury” and to clarify how oral orders would be documented.

(b) Response: When the proposed regulation was refiled in its current form, “athletic injury” was defined in Section 1(1) and Section 9(c) was amended to include a provision requiring that oral orders from a supervising physician be documented and maintained in the patient’s medical records by the athletic trainer. No further amendments on this matter were requested after close of the second comment period.

(2) Subject Matter: Section 2, Eligibility and Credentialing for US-Trained and Foreign-Trained Athletic Trainers.

(a) Comment: KY-APTA asserts that the educational requirements of an accredited athletic training program should be set forth in regulation in order to avoid any changes that may be made and automatically incorporated by credentialing organizations, such as the BOC.

(b) Response: In KRS 311.905, the General Assembly has set forth the qualifications and certifications necessary for licensure and re-licensure, including certification

by the BOC or its successor organization. It is beyond the Board's statutory authority to create additional hurdles to licensure or to set requirements that will conflict with the statutory provisions.

(3) Subject Matter: Section 5, Ethical Standards.

(a) Comment: The Board of Certification ("BOC") did not object to Section 5, requiring that athletic trainers conform to the National Athletic Trainers' Association's ("NATA") Code of Ethics; however, it was commented that athletic trainers are not required to be members of NATA.

(b) Response: During the 2020 legislative session, through SB 125, the General Assembly amended the athletic trainer statutes to require that the Board promulgate regulations adopting a code of ethical standards. The Board notes that the General Assembly requires physician (MD/DO) licensees to conform to the principles of medical ethics of the American Medical Association and the code of ethics of the American Osteopathic Association, even though physician licensees are also not required to be members of those associations. The Board believes that the NATA Code of Ethics is the most comprehensive and universal code of ethics known by and applied to those in the profession.

(4) Subject Matter: Section 6, Standards of Practice.

(a) Comments: Both the Kentucky Chapter of the American Physical Therapy Association ("KY-APTA") and the Kentucky Occupational Therapy Association ("KOTA") object to the adoption and incorporation by reference of standards set forth in specific documents created by outside sources/organizations, such as the BOC.

(b) Response: During the 2020 legislative session, through SB 125, the General Assembly amended the athletic trainer statutes to require that the Board promulgate regulations setting forth standards of practice for athletic trainers. The best defined and universally understood standards of practice among the profession of athletic trainers is that set forth in the BOC Standards of Professional Practice. The Board has not delegated the task of setting forth standard of practice to the BOC but rather has reviewed and determined that the standards of practice specifically set forth by in a BOC document, *Standards of Professional Practice* (2018), accurately states the standards of practice meant to be applied to athletic trainers in Kentucky.

Incorporation of standards set forth in specific documents by reference is not uncommon in statutory and regulatory acts in the Commonwealth of Kentucky. The Board notes, for example, that in 201 KAR 20:057 the Kentucky Board of Nursing adopted by reference the following sixteen (16) documents from outside sources to establish the scope of practice and standards of practice for APRNs: "AACN Scope and Standards for Acute Care Nurse Practitioner Practice", 2017 Edition, American Association of Critical-Care Nurses; "ACCN Scope and Standards for Acute Care Clinical Nurse Specialist Practice", 2014 Edition, American Association of Critical-Care Nurses; "Neonatal Nursing: Scope and Standards of Practice", 2013 Edition, American Nurses Association/ National Association of Neonatal Nurses; "Nursing: Scope and Standards of Practice", 2015 Edition, American Nurses Association; "Pediatric Nursing: Scope and Standards of Practice", 2015 Edition, American Nurses Association/ Society of Pediatric Nursing/ National Association of Pediatric Nurse Practitioners; "Psychiatric-Mental Health Nursing: Scope and Standards of Practice", 2014, American Nurses Association/ American Psychiatric Nursing

Association; "Scope of Practice for Nurse Practitioners", 2019 Edition, American Association of Nurse Practitioners; "Standards of Practice for Nurse Practitioners", 2019 Edition, American Association of Nurse Practitioners; "Scope of Nurse Anesthesia Practice", 2013 Edition, American Association of Nurse Anesthetists; "Standards for Nurse Anesthesia Practice", 2019 Edition, American Association of Nurse Anesthetists; "Office Based Anesthesia", 2019 Edition, American Association of Nurse Anesthetists; "Standards for the Practice of Midwifery", 2011 Edition, American College of Nurse Mid-Wives; "Oncology Nursing Scope and Standards of Practice", 2019 Edition, Oncology Nursing Society; "The Women's Health Nurse Practitioner: Guidelines for Practice and Education", 2014 Edition, Association of Women's Health, Obstetric and Neonatal Nurses/Nurse Practitioners in Women's Health; "Definition of Midwifery and Scope of Practice of Certified Nurse-Midwives and Certified Midwives", 2012 Edition, American College of Nurse Midwives; and "Standards for Professional Nursing Practice in the Care of Women and Newborns", 2019 Edition, Association of Women's Health, Obstetric and Neonatal Nurses. In addition, in 201 KAR 20:600 the following two (2) outside sources were incorporated by reference to establish the training and curriculum standards for mid-wives in Kentucky: "The Midwives Alliance of North America Core Competencies", (December 2014) and "Standards and Qualifications for the Art and Practice of Midwifery", Midwives Alliance of North America,(October 2005). Thus, it is appropriate for the profession of athletic trainers to adopt and incorporate by reference into its regulation the standards of practice set forth in a specific document such as the BOC *Standards of Professional Practice* (2018).

(5) Subject Matter: Section 7, Objectives of Athletic Training.

(a) Comment: KY-APTA suggests that the language be amended to state that an athletic trainer shall practice under the supervision of a physician "with current relevant expertise to manage athletic conditions."

(b) Response: The General Assembly has set forth in statute (KRS 311.900(6)) the qualifications for an athletic trainer's supervising physician, which requires only that he/she be a physician (MD/DO) licensed by the Kentucky Board of Medical Licensure. The Board cannot (and declines to attempt to) usurp or constrain the legislative intent regarding supervising physician qualifications. No further amendments on this matter were requested after close of the second comment period.

(6) Subject Matter: Section 8, Name and Contact Information Changes.

(a) Comment: KY-APTA and KOTA object that there is only a provision for the athletic trainer to identify his/her supervising physician but does not include any qualifications for who may be a supervising physician. KY-APTA points out that KRS 311.901(2) allows for the Board's Athletic Trainers Advisory Council to make recommendations concerning "approval of supervising physicians" and recommends that this section be amended to set forth a process and requirements for approval of supervising physicians.

(b) Response: The General Assembly has set forth in statute (KRS 311.900(6)) the qualifications for an athletic trainer's supervising physician, which requires only that he/she be a physician (i.e. MD/DO) licensed by the Kentucky Board of Medical Licensure. The Board cannot (and declines to attempt to) usurp or constrain the legislative intent regarding supervising physician qualifications. The General Assembly did not grant the Board authority to impose any

other qualifications on supervising physicians. In comparison, the General Assembly set forth a detailed scheme delineating qualifications and approval of supervising physicians of physician assistants (see KRS 311.854); a corresponding scheme is completely absent in the athletic trainer statutes and thus indicates that the Board does not have statutory authority to approve/disapprove supervising physicians, as long as the supervising physician is a physician licensed by the Kentucky Board of Medical Licensure. The KRS 311.901(2) provision allowing that the Board's Athletic Trainers Advisory Council may make "recommendations" concerning "approval of supervising physicians" is effectively meaningless because the Board has not been granted authority to act upon any recommendations (i.e. approve or disapprove) if the supervising physician meets the statutory definition/qualifications ("a physician licensed by the Kentucky Board of Medical Licensure").

(7) Subject Matter: Section 9, Documentation Standards.

(a) Comments: During the first comment period, which ended January 31, 2021, KY-APTA recommended that documentation standards be delineated in regulation rather than by adoption by reference of standards set forth in the National Athletic Trainers' Association's Best Practice Guidelines for Athletic Training Documentation (August 2017). During the second comment period, KY-APTA stated that it appreciated the standards now reflected in Section 9 but generally stated the regulation should state the "frequency and content" of required documentation.

(b) Response: In order to thoroughly review and consider comments, the Board pulled the proposed regulation in February 2021 and the currently submitted (re-filed) proposed regulation now delineates specific documentation standards in Section 9. In addition, the now proposed regulation addresses "frequency" when it states that documentation must include the "evaluation" and "follow up care and/or ongoing treatment" and it addresses the "content" in detail to include "evaluation," "medical history," "oral orders," "description of services," "plan of care," "referral to other medical providers," "follow up care and/or ongoing treatment," and "significant changes in patient status."

(8) Subject Matter: Section 10, Formulary of Legend Medications Which May Be Obtained, Transported, Provided and Administered When Providing Athletic Training Services.

(a) Comments: (1) KOTA recommends that the regulation be amended to clarify that athletic trainers shall not administer the identified legend drugs without express parental consent, unless in the event of risk of death, disability or impairment.

(2) KY-APTA recommends that flu vaccine, lidocaine (topical or injectable), and bupivacaine be withdrawn from the list of approved legend drugs which may be obtained, transported, provided and administered by an athletic trainer, because they do not believe that athletic trainers are educated on administration, side effects and infection control to safely carry out administration of these legend drugs.

(b) Responses: (1) No amendment is necessary because the recommended statement is already included in Section 10(3): "Unless there is a risk of death, physical disability or impairment to the athlete, an athletic trainer licensed to practice in the Commonwealth of Kentucky shall not administer a legend drug or OTC medication to a person under the age of eighteen."

(2) It is appropriate to include flu vaccine, lidocaine (topical or injectable), and bupivacaine on the list of approved legend drugs which may be obtained, transported, provided and administered by an athletic trainer, because athletic trainers are educated and trained in the use of these medications and they have been included in the curricula of core competencies required to be taught to athletic trainers in accordance with NATA and CAATE Standards since 2012 (the curricula was written in 2011).

(9) Section 11, Invasive Procedures

(a) Comment: KOTA objects to the inclusion of dry needling in the list of invasive procedures which may be performed by an athletic trainer. KY-APTA objects to any of the listed procedures unless it is clear that that athletic trainer has been specifically trained in and demonstrated competency in the procedure and a supervising physician signs off of the competency of the athletic trainer and his/her willingness to supervise the athletic trainer's performance of that procedure.

(b) Response: Dry needling by athletic trainers has been a routine and common practice within the profession for several decades. Although athletic trainers receive training and education on dry needling, it is a procedure less likely to be used by athletic trainers in modern practice. Still, given that many athletic trainers have been educated and trained in this procedure over prior decades, it should be included in the list of permissible invasive procedures.

As to all other procedures, they are included in the core competencies taught to athletic trainers as required for certification by BOC (required for licensure in the Commonwealth of Kentucky, KRS 311.905(1)(c)). The Board notes that such specific attestation to certain procedures and competencies is not required for other licensees. For example, a physician who meets qualifications for license to practice medicine in the Commonwealth of Kentucky is not limited to a license to practice only those procedures in which they have demonstrated competency to perform.

(10) Subject Matter: Criminal Background Checks and Exams.

(a) Comment: KY-APTA recommends that the regulation be amended to require a criminal background check on all applicants, as well as a jurisprudence exam prior to initial licensure and subsequent exams each time an athletic trainer applies for re-licensure.

(b) Response: By law, an agency cannot obtain a criminal background on an individual without express statutory authority. The General Assembly has not granted the Board statutory authority to require a criminal background check on athletic trainer applicants. Compare the athletic trainer statutes, KRS 311.900-.928, with statutes governing licensure of physicians, specifically KRS 311.565(1)(t). In regard to examinations, in KRS 311.905, the General Assembly has set forth the qualifications and certifications necessary for licensure and re-licensure. It is beyond the Board's statutory authority to create additional hurdles to licensure.

## V. Summary of Statement of Consideration and Action Taken by Promulgating Body

The public hearing on this administrative regulation was canceled; however written comments were received. The Kentucky Board of Medical Licensure withdrew the proposed regulation in February 2021 in order to fully review and consider the public comments. On March

26, 2021, it re-filed an amended regulation incorporating some of the recommendations. The Board declines to further amend the regulation for the reasons stated within this statement of consideration.