



April 23, 2020

MEMORANDUM

For Dissemination to the General Membership

**NEW YORK STATE
CHIROPRACTIC ASSOCIATION**
777 LISHA KILL ROAD
NISKAYUNA, NY 12309-3132
518 • 785-6346
518 • 785-6352
info@nycsa.com
www.nysca.com

To: NYSCA Officers, Directors, Delegates, District Presidents and General Members

From: Karl C. Kranz, DC, Esq.

Re: Can a DC hire a nurse to perform the COVID-19 IgG/IgM Rapid 10-Minute fingerstick test for antibodies during the current pandemic?

KARL C. KRANZ, DC, ESQ.
Executive Director/Staff Counsel

DRAFTED BUT NOT PROOFREAD

ADMITTED TO THE BAR IN:

- DISTRICT OF COLUMBIA
- MASSACHUSETTS
- NEW YORK

**LICENSED TO PRACTICE
CHIROPRACTIC IN:**

- DISTRICT OF COLUMBIA
- NEW YORK
- VIRGINIA

A member relates, then asks:

In the midst of the current pandemic, I have heard that some enterprising chiropractors in New York State have hired nurses to perform a COVID-19 IgG/IgM Rapid 10 minute fingerstick test on members of the public to see if antibodies to the SARS-CoV2 virus are present in the blood of persons tested and that the DCs are charging persons \$50 per person, per test to have the tests performed and analyzed.

Q1: Is the COVID-19 IgG/IgM Rapid 10 Minute fingerstick test within the scope of chiropractic practice in New York?

Q2: Can a doctor of chiropractic hire a nurse to perform the COVID-19 IgG/IgM Rapid 10 Minute fingerstick test and then analyze these tests on behalf of the individual chiropractor(s) or chiropractic clinics' retaining the nurse?

A_{1&2}: In my estimation, the answer to both of these questions is "no." That is, in my opinion:

- No, the COVID-19 IgG/IgM Rapid 10 Minute fingerstick test does not come within the ambit of the scope of the chiropractic enabling in New York State Education Law, Title VIII – The Professions, Article 132 -- Chiropractic.
- No, a chiropractor may not hire a nurse to perform the COVID-19 IgG/IgM Rapid 10 Minute fingerstick test and a DC could not prescribe or direct a nurse to perform the test or analyze the results of the test on behalf of the chiropractor or chiropractic clinic. A chiropractor might be able to hire and retain a nurse but not in the nurse's professional capacity. A nurse hired by a chiropractor could only perform those duties and functions that an ordinary person in a non-professional capacity could perform under a chiropractor's supervision and direction.



Reasoning:

The Chiropractic Enabling Law

Notwithstanding the national and/or statewide emergency, in my estimation the doctors advertising, performing or and providing a COVID-19 antibody test in her community is clearly practicing outside of the scope of the New York chiropractic enabling law.

First, the chiropractic enabling law prohibits chiropractors from treating infectious or communicable diseases.¹

Second, the chiropractic enabling law defines chiropractic as

“detecting and correcting by manual or mechanical means structural imbalance, distortion, or subluxations in the human body for the purpose of removing nerve interference and the effects thereof, where such interference is the result of or related to distortion, misalignment or subluxation of or in the vertebral column.”²

The foregoing definition is chiropractic’s raison d’etre for licensure and practice in New York state. Everything a licensed chiropractor does in practice in New York has to be devoted to the foregoing definitional mantra. A test that is not designed for, or devoted to “detecting and correcting by manual or mechanical means . . . for the purpose of removing nerve interference and the effects thereof . . . related to distortion, misalignment or subluxation of or in the vertebral column,” is a test, in my estimation, that is outside of the scope of the chiropractic enabling law.

Further, state law prohibits DCs from using:

"diagnostic or therapeutic methods involving chemical or biological means except diagnostic services performed by clinical laboratories which services shall be approved by the board as appropriate to the practice of chiropractic."³

To my knowledge, a fingerstick test performed on members of the public by chiropractors, or persons hired or retained by chiropractors, to measure IgG/IgM antibodies in the blood to determine whether the individual has been exposed to the Severe Acute Respiratory Syndrome Coronavirus 2 (SARS-CoV-2), does not appear to come within a literal meaning of the chiropractic enabling law and it is likely that this test has not been approved by the NYS State Board for Chiropractic as being appropriate for the practice of chiropractic.⁴

Although NYS Governor Andrew Cuomo has issued several Executive Orders on an emergent basis in response to the current COVID-19 pandemic which has modified or amended some facets of the scope of practice of several professions and professional classes in New York, I am not aware of any instance in which Governor Cuomo issued an executive order modifying or suspending state law to allow chiropractors to use or order a COVID-19 IgG/IgM Rapid 10 Minute fingerstick test. Additionally, the fact promoted by some that this test may have been approved by the FDA is immaterial for the purpose of this review. Approved by the FDA or not, an FDA test cannot alter or amend state licensing law or the chiropractic scope of professional practice.

Chiropractic and nurses

- Advanced Practice Registered Nurse (Nurse Practitioner)

A Nurse Practitioner (NP) in New York may be able to perform a COVID-19 IgG/IgM Rapid 10-Minute fingerstick test to detect and analyze a person's exposure to the SARS-CoV-2 vector but not at the direction of or prescription by a chiropractor. Ordinarily, an NP must either have some sort of a collaboration agreement or arrangement with one or more medical physicians (MDs or DOs) in order to practice her craft⁵ or, to practice quasi-independently, the APRN must have some sort of "collaborative relationship" on record with the Education Department with one or medical physicians,⁶ not chiropractors.

- Registered Nurse or Licensed Practical Nurse

The definition of practice of nursing outlining the duties and responsibilities of registered nurses (RNs) and licensed practical nurses (LPNs) are contained in Article 139 – Nursing of NYS Education Law.⁷ NYS Education Law also stipulates that the Commissioner of Education shall have the authority to craft regulations in the administration of the different professions.⁸ The Commissioner of Education promulgated Regulation 64.6 which stipulates:

§64.6 Prescription and direction of nursing services.

- a. Health care providers **authorized to prescribe medical regimens to be executed by a registered professional nurse shall include** persons licensed or authorized to practice pursuant to a limited permit or statutory exemption from the licensure requirement *in the following licensed professions: medicine, including physician's assistant and specialist's assistant; dentistry; podiatry; midwifery; and nurse practitioner.* (Various emphases added.)
- b. Health care providers **authorized to direct the performance of professional services by licensed practical nurses shall include** persons licensed or authorized to practice pursuant to a limited permit or statutory exemption from the licensure requirement *in the following licensed professions: medicine, including physician's assistant and specialist's assistant; dentistry; podiatry; midwifery; and registered professional nursing, including but not limited to nurse practitioners.*⁹ (Various emphases added.)

Chiropractors are not included in the list of professional classes authorized to prescribe or direct the performance of professional services by either registered nurses or licensed practical nurses. As a consequence, chiropractors cannot and should not be directing or prescribing the services of nurses and nurses cannot practice under a chiropractor's direction. And apart from the loose, quasi-independent practice modes of nurse practitioners, RNs and LPNs cannot practice independent of supervision and oversight of the aforementioned licensed professions.

- Chiropractors and multidisciplinary practice

The State Board for Chiropractic has issued guidance concerning multidisciplinary practice warning DCs to practice "within the scope of your license," and to "[a]void employing licensees in medicine or being the controlling entity in a practice with licensees **in medicine or any other profession authorized to perform procedures beyond the scope of your chiropractic license**, which includes physical therapy **or nursing**."¹⁰

- Law and Rules on Unprofessional Conduct

New York State Education Law defines professional misconduct to include, among other things, "practicing the profession beyond its authorized scope,"¹¹ "[p]ermitting, aiding or abetting an unlicensed person to perform activities requiring a license,"¹² and "[c]ommitting unprofessional conduct, as defined by the board of regents in its rules or by the commissioner in regulations approved by the board of regents."¹³

Part 29.1 - General Provisions of the Regent's Rules define professional misconduct, in part, to include: "**practicing or offering to practice beyond the scope permitted by law**, or accepting and performing professional responsibilities which the licensee knows or has reason to know that he or she is not competent to perform, or **performing without adequate supervision professional services which the licensee is authorized to perform only under the supervision of a licensed professional**, except in an emergency situation where a person's life or health is in danger¹⁴; or **delegating professional responsibilities to a person when the licensee delegating such responsibilities knows or has reason to know that such person is not qualified, by training, by experience or by licensure, to perform them.**"¹⁵

In the situation at hand, either the chiropractor hiring the nurses or the nurses taking direction from the chiropractor, or both, may be practicing beyond the individual scope of their lawful licenses and could be subject to disciplinary action of the State Education Department Office of Professional Discipline.

- **Governors Emergency Executive Orders**

Pursuant to Executive Order 202.10, Governor Cuomo suspended the provision for professional oversight of RNs by the aforementioned professions but only with respect to one type of COVID-19 test, and only to the extent that RNs are permitted to collect, order or supervise the collection of certain specimens from individuals. Specifically, Executive Order 202.10 provided, in part:

"Article 139 of the Education Law, Section 576-b of the Public Health Law and Section 58-1.7 of Title 10 of the NYCRR, to the extent necessary to permit registered nurses to order the collection of throat or nasopharyngeal swab specimens from individuals suspected of being infected by COVID-19, for purposes of testing;"¹⁶

To my knowledge, Cuomo has not approved any other kind of COVID-19 test performed by state licensed RNs other than throat or nasopharyngeal swabs. Consequently, it appears that RNs and LPNs can only perform the COVID-19 IgG/IgM Rapid 10-Minute fingerstick test noted at the outset under the direction or prescription of a licensed NYS health care provider authorized by the Commissioner of Education regulations set out above at § 64.6. If nurses are performing these alternative tests under any other circumstances, the nurses involved could be exceeding the scope of their professional license and could be subject to professional discipline as well.

- **Other Areas of Law and Regulation**

The use of "finger sticks" also invokes other areas of practice and law, NYS Public Health law notwithstanding, (e.g., OSHA standards for bloodborne pathogens (BBP, 29 CFR 1910.1030) and personal protective equipment (PPE, 29 CFR 1910 Subpart I) require employers to protect workers from occupational exposure to infectious agents.

In Sum: The upshot is that the use and performance of the COVID-19 IgG/IgM Rapid 10-Minute fingerstick test by either a chiropractor or a nurse hired or retained by a chiropractor appears to be beyond the permissible scope of the enabling law of either professional. Whether or not the test has been

approved by the FDA is immaterial insofar as lawful scope of practice is concerned. No attempt has been made here to evaluate the motives of the professionals involved. Even if the intent was to be helpful – that is, the individuals involved were trying to provide a needed service given the current emergent circumstances, nevertheless, unless excused by an Executive Order, professionals must practice within the scope of their respective licensing laws. To do otherwise, is to invite the scrutiny of the State Education Department Office of Professional Discipline.

References:

¹ New York State Education Law (NYS EdL), Title VIII – The Professions, Article 132 – Chiropractic, § 6551 – Definition of Practice of Chiropractic, Subsection (3):

“3. A license to practice chiropractic shall not permit the holder thereof to treat for any infectious diseases such as pneumonia, any communicable diseases listed in the sanitary code of the state of New York, any of the cardio-vascular-renal or cardio-pulmonary diseases,”

² New York State Education Law (NYS EdL), Title VIII – The Professions, Article 132 – Chiropractic, § 6551 – Definition of Practice of Chiropractic, Subsection (1).

³ New York State Education Law (NYS EdL), Title VIII – The Professions, Article 132 – Chiropractic, § 6551 – Definition of Practice of Chiropractic, Subsection (3).

⁴ Laboratory and other tests approved by the NYS State Board for Chiropractic as appropriate for the practice of chiropractic may be found at: <http://www.op.nysed.gov/prof/chiro/chirolab.htm>.

⁵ NYS EdL Art 132 – Nursing, § 6092 – Definition of practice of nursing, (3)(a).

⁶ NYS EdL Art 132 -- Nursing, § 6902 – Definition of practice of nursing, (3)(b).

⁷ NYS EdL, Art 139, § 6902(1),(2).

⁸ NYS EdL, Art 130 – General Provisions, Subarticle 2 – State Management, § 6507 – Administration by the Education Department.

“§ 6507. Administration by the education department.

“1. The commissioner and the department shall administer the admission to and the practice of the professions.

“2. In administering, the commissioner may:
a. Promulgate regulations,”

⁹ NYS Office of the Professions, Commissioner’s Regulations, Part 64 – Nursing, § 64.6 -- §64.6 Prescription and direction of nursing services. Accessed at: <http://www.op.nysed.gov/prof/nurse/part64.htm#sect64.6>

¹⁰ NYS Office of the Professions, Chiropractic, Practice Alerts, 6. Multidisciplinary Practice. Accessed at: <http://www.op.nysed.gov/prof/chiro/chiroalertmulti.htm>

¹¹ NYS EdL, Art 130 – General Professions, Subarticle 3 – Professional Misconduct, § 6509 – Definitions of Professional Misconduct, (2):

“§ 6509. Definitions of professional misconduct. Each of the following is professional misconduct, and any licensee found guilty of such misconduct under the procedures prescribed in section sixty-five hundred ten shall be subject to the penalties prescribed in section sixty-five hundred eleven:

* * *

“(2) Practicing the profession fraudulently, **beyond its authorized scope**, with gross incompetence, with gross negligence on a particular occasion or negligence or incompetence on more than one occasion, . . . “

¹² NYS EdL, § 6509(7).

¹³ NYS EdL, § 6509(9).

¹⁴ New York State Board of Regents, Rules of the Board of Regents, Part 29 – Unprofessional Conduct, § 29.1 – General Professions, subsection (b), paragraph 9. Accessible at: <http://www.op.nysed.gov/title8/part29.htm>

¹⁵ New York State Board of Regents, Rules of the Board of Regents, Part 29 – Unprofessional Conduct, § 29.1 – General Professions, subsection (b), paragraph 10. Accessible at: <http://www.op.nysed.gov/title8/part29.htm>

¹⁶ NYS Governor Andrew Cuomo, Executive Orders, No. 202.10: Continuing Temporary Suspension and Modification of Laws Relating to the Disaster Emergency. Accessible at: <https://www.governor.ny.gov/news/no-20210-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency>