

Texas Association of Acupuncture and Oriental Medicine

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Texas Board of Chiropractic Examiners

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As you are well aware, the Texas Board of Chiropractic Examiners, in adopting rules pertaining to acupuncture has relied exclusively on amendments made to the Acupuncture Chapter of the Occupations Code in 1997, and the subsequent AG Opinion (DM 471) as the statutory basis of authority to allow Chiropractic licensees to practice acupuncture without meeting the requirements of the Acupuncture Chapter.

These authorities are cited in every acupuncture rule pre-amble as well as your recent Sunset Self Evaluation Report.

I bring to your attention direction from the Legislature in 201.1525 and 201.1526 pertaining to the development of scope of practice rules, of which read:

Sec. 201.1525. RULES CLARIFYING SCOPE OF PRACTICE OF CHIROPRACTIC. The board shall adopt rules clarifying what activities are included within the scope of the practice of chiropractic and what activities are outside of that scope. The rules:

(1) must clearly specify the procedures that chiropractors may perform;

(2) must clearly specify any equipment and the use of that equipment that is prohibited; and

(3) may require a license holder to obtain additional training or certification to perform certain procedures or use certain equipment.

Sec. 201.1526. DEVELOPMENT OF PROPOSED RULES REGARDING SCOPE OF PRACTICE OF CHIROPRACTIC. (a) This section applies to the process by which the board develops proposed rules under Section [201.1525](http://www.statutes.legis.state.tx.us/GetStatute.aspx?Code=OC&Value=201.1525) before the proposed rules are published in the Texas Register and before the board complies with the rulemaking requirements of Chapter [2001](http://www.statutes.legis.state.tx.us/GetStatute.aspx?Code=GV&Value=2001), Government Code. This section does not affect the duty of the board to comply with the rulemaking requirements of that law.

(b) The board shall establish methods under which the board, to the extent appropriate, will seek input early in the rule development process from the public and from persons who will be most affected by a proposed rule. Methods must include identifying persons who will be most affected and soliciting, at a minimum, the advice and opinions of those persons. Methods may include negotiated rulemaking, informal conferences, advisory committees, and any other appropriate method.

(c) A rule adopted by the board under Section [201.1525](http://www.statutes.legis.state.tx.us/GetStatute.aspx?Code=OC&Value=201.1525) may not be challenged on the grounds that the board did not comply with this section. If the board was unable to solicit a significant amount of advice and opinion from the public or from affected persons early in the rule development process, the board shall state in writing the reasons why the board was unable to do so.

Notably, never has the advice or opinions of acupuncture stakeholders been solicited in advance of publication in the Texas Register, nor have other methods such as “negotiated rulemaking, informal conferences, advisory committees, and any other appropriate method” been employed early in the rulemaking process when rules were promulgated relating to acupuncture.

To the contrary, any engagement acupuncture stakeholders have had – and we do consider ourselves relevant stakeholders when it comes to rules pertaining to the practice of acupuncture – has been after the fact of publication, and at times only after significant public outcry. We are unconvinced this is the process the legislature envisioned, and while the rules themselves cannot be challenged on this basis, the integrity of the board’s rulemaking process can be.

Related to this, TAAOM is curious to know too, where the TBCE is on the development of Sec. 201.164. NEGOTIATED RULEMAKING AND ALTERNATIVE DISPUTE RESOLUTION POLICY, which states:

 (a) The board shall develop and implement a policy to encourage the use of:

(1) negotiated rulemaking procedures under Chapter [2008](http://www.statutes.legis.state.tx.us/GetStatute.aspx?Code=GV&Value=2008), Government Code, for the adoption of board rules; and

(2) appropriate alternative dispute resolution procedures under Chapter [2009](http://www.statutes.legis.state.tx.us/GetStatute.aspx?Code=GV&Value=2009), Government Code, to assist in the resolution of internal and external disputes under the board's jurisdiction.

(b) The board's procedures relating to alternative dispute resolution must conform, to the extent possible, to any model guidelines issued by the State Office of Administrative Hearings for the use of alternative dispute resolution by state agencies.

(c) The board shall designate a trained person to:

(1) coordinate the implementation of the policy adopted under Subsection (a);

(2) serve as a resource for any training needed to implement the procedures for negotiated rulemaking or alternative dispute resolution; and

(3) collect data concerning the effectiveness of those procedures, as implemented by the board.

Added by Acts 2005, 79th Leg., Ch. 1020 (H.B. [972](http://www.legis.state.tx.us/tlodocs/79R/billtext/html/HB00972F.HTM)), Sec. 10, eff. September 1, 2005.

Who is the designated trained person? What policies and procedures have been implemented, and what data collected?

As for the rules in question today, our proposed rule change arises from the Third Court of Appeals dismantling of the legal rationale whereby the Chiropractic Board claims regulatory authority from language found in the Acupuncture Code. Without authority from the Acupuncture Chapter, which the Board has relied upon exclusively, TAAOM questions if constrained to its own Chapter of the Occupations Code, by what authority the TBCE claims dominion over the practice of acupuncture?

Both the legislative intent (to “take out any ability by the chiropractors to put needles in people” – Rep. Janek) and the resultant statutory language is clear: an incision into any tissue, cavity, or organ by ANY implement is expressly prohibited. We would urge the Chiropractic Board to now not attempt to utilize indirectly, language found in the Acupuncture Chapter that it can no longer utilize directly, as has been alluded to in recent Court filings.

Regarding the specifics of the TBCE acupuncture rule, 78.14 as it stands:

1. It contains a grandfather clause that is so vague as to be virtually meaningless:

c) Existing licensees that ***have been trained in acupuncture***, ***that have been practicing acupuncture***, and that are in good standing with the Texas Board of Chiropractic Examiners and other jurisdictions where they are licensed, may meet the requirements of subsection (b) of this section by counting each year of practice as ten hours of training in the use and administration of acupuncture.

 2) And secondly, after 2010, the rule presents the option of the NCBE acupuncture exam or the NCCAOM acupuncture exam as requirements for the practice of acupuncture by chiropractors, as if these may be comparable pathways. They in fact are not, and yet I wonder if anyone here today can articulate the differences in these two options?

And last, as for the modification to this rule, which clarifies, “All therapeutic modalities provided by Doctors of Chiropractic in Texas must comply with the chiropractic scope of practice as defined by the Texas Occupations Code §201.002”, while perhaps well intentioned, is virtually impossible to verify or enforce. Even if it *were* possible to confine the effect of the insertion of an acupuncture needle to the chiropractic scope of practice as defined by the Occupations Code §201.002, how exactly does one go about doing this?

One can spend a just few minutes on the internet and find numerous chiropractic clinics around the state offering acupuncture to treat all manner of conditions well beyond the “biomechanical condition of the spine and musculoskeletal system.” And this is going on with all manner of representation and misrepresentation of acupuncture credentialing.

All of which is predicated on the absolutely absurd notion that somehow, as if by magic, when an acupuncture needle breaks the skin, it is somehow non-incisive. And which is defended vigorously – with all due respect – by a regulatory board that simply does not have the expertise to regulate the practice of acupuncture, which is appropriately regulated elsewhere by another regulatory board. Is it any wonder chiropractors misrepresent their credentials around acupuncture?

The NBCE requires CCE accredited acupuncture training, but the CCE doesn’t actually have jurisdiction over acupuncture education. The TBCE requires – or more specifically offers the option of - taking the NBCE exam to practice acupuncture, but the NBCE does not actually “certify” chiropractors in acupuncture, and neither does the TBCE. You ask the NBCE how many chiropractors in Texas have taken their exam, they say ask the TBCE. And yet, TBCE has no idea how many chiropractors are practicing acupuncture or with what level of training, despite having claimed authority to regulate the practice and implementing training requirements

The TBCE’s current litigation pertaining to acupuncture, again, as you all well know, is but one of long string of lawsuits related to statutory overreach on the part of this board.

But I am everly optimistic, and choose to take recent statements from this board which indicate a turn away from its past scope expansive tendencies, as well as statements from chiropractic advocates about the need to stop the senseless litigation that happens at the tax payers expense, at face value.

I thank you for your time and consideration of these important policy issues.



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