



Texas Association of Acupuncture and Oriental Medicine  
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August 5, 2018

Christopher Burnett, General Counsel  
Texas Board of Chiropractic Examiners  
333 Guadalupe St. Suite 3-825  
Austin, Texas 78701-3942

Re: TAAOM comments on proposed repeal of TBCE rule §78.14, Texas Register July 6, 2018

Mr. Burnett,

The Texas Association of Acupuncture and Oriental Medicine (TAAOM) appreciates the opportunity to provide comments to the Texas Board of Chiropractic Examiners (TBCE) on the proposed repeal of TBCE rule 78.14 as published in the Texas register July 6, 2018.

TAAOM supports the repeal of §78.14 and commends TBCE's efforts to comport its rules to be within the statutorily allowed scope of practice for chiropractic as provided in Texas Occupations Code Chapter 201. TAAOM believes it is appropriate for TBCE to repeal current rule 78.14 given that the Board lacks clear statutory authority to allow its chiropractic licensees to "practice acupuncture" broadly, as this rule allows, and also because rule 78.14 was adopted referencing rulemaking authority that has been invalidated by the Third Court of Appeals. (NO. 03-15-00262-CV, Opinion issued 8/18/2016)

The APA record on the adoption of TBCE's acupuncture rule 78.14 reflects a long history of statutory misapplication and we believe the Board's approach of removing this rule will be helpful in providing clarity to its licensees with regard to any future consensus rules that might authorize the use of an acupuncture needle within the statutory scope of practice of chiropractic.

For example, in the preamble to rule 78.14 adopted in 2009 (and in the Board's related Scope of Practice rule 78.13 (e)(2)(C) adopted in 2006), TBCE cites changes made to Occupations Code §205.003 in 1997 as exempting chiropractors from the requirements of the Acupuncture Chapter:

*"...the practice of acupuncture by chiropractors has been authorized since the Legislature amended the Acupuncture Act in 1997 to allow chiropractors and other health care practitioners to practice acupuncture when they are acting within the scope of their licenses (See Texas Occupations Code §205.003)"*

TAAOM would like to clarify that there were no changes made to §205.003 in 1997, and in fact, §205.003 has existed without amendment in the Acupuncture Chapter since its enactment. Just as there was no exemption for chiropractors from the requirements of the Acupuncture Chapter when it was enacted in 1993, there is no exemption now.

TAAOM also urges consideration of another important clarification relating to the Board's previous assertions of acupuncture rulemaking authority based on 1997 amendments to §205.001(2)(A), which added the words "nonsurgical, nonincisive" to the definition of acupuncture in Chapter 205. Based on this amendment to the Acupuncture chapter, Attorney General Dan Morales was asked to reverse his previous ruling in DM 415. Morales then issued a new contradictory Opinion, DM-471 (1998), which reasoned that by reading the Chiropractic Chapter and Acupuncture Chapter of the Occupations Code together ("in pari materia"), acupuncture could be construed as within the scope of the practice of chiropractic. By effectively allowing the Board the "borrow" language outside its statute (Chapter 201), DM 471 had historically been asserted by the Board as a grant of rulemaking authority allowing it to adopt rules that permit chiropractic licensees to practice acupuncture without meeting the requirements set out in Chapter 205 of the Occupations Code. DM 471, however, has now been invalidated as a legitimate interpretation of statute by the Third Court of Appeals.

With no change made to §205.003 which would have created an exemption from the Acupuncture Chapter for chiropractors; with no change made to the Chiropractic Chapter which would have authorized the practice of acupuncture by chiropractors (despite numerous attempts); and with the statutory interpretation of DM-471 having been invalidated by the Court, TAAOM respectfully requests that TBCE clarify by what authority the Board believes its chiropractic licensees are currently exempted from the requirements of the Acupuncture Chapter.

As the Board considers these important issues, TAAOM respectfully directs the Board's attention to §205.201 which clearly states:

*"LICENSE REQUIRED. Except as provided by Section 205.303, a person may not practice acupuncture in this state unless the person holds a license to practice acupuncture issued by the acupuncture board under this chapter."*

Neither Chapters 201 or 205 have been amended to provide an exemption for licensed chiropractors from the Acupuncture Chapter if they are practicing acupuncture, and no amendments have been made to Chapter 201 to grant new rulemaking authority to the Board now that DM 471 has been invalidated. TAAOM therefore supports the repeal of §78.14 and commends TBCE's efforts to conform its rules to statutorily allowed scope of practice. However, as we did in our 2016 petition to the TBCE rules committee, TAAOM encourages the Board to also repeal Scope of Practice Rule §78.13 (e)(2)(C) as pertains to acupuncture.

The Third Court's decision invalidating DM 471 makes clear that no legal grant of rulemaking authority could have been given to the Board through amendments made to Chapter 205, because Chapter 205 very clearly grants exclusive rulemaking authority to the Texas Medical Board to adopt rules regarding the practice of acupuncture in Texas. The invalidation of DM 471 as a legal grant of rulemaking

authority highlights the importance of the Board reviewing and repealing rules such as §78.14, as well as any other rules (such as §78.13 (e)(2)(C)) that were adopted by the Board in APA rulemaking proceedings while referencing Chapter 205 of the Occupations Code as a grant of rulemaking authority to the Board.

TAAOM continues to be supportive of additional meetings that could provide the basis for joint dismissal of pending litigation as initially discussed and envisioned by the parties. And TAAOM again urges the Board to recognize the rulemaking implications of the Court's finding regarding DM-471, and to work with TAAOM, stakeholders, and the Texas State Board of Acupuncture Examiners to discuss, evaluate, and refine proposed rule revisions that would ensure that all rules adopted by the Board conform with authority granted to the Board in Occupations Code Chapter 201.

TAAOM remains committed to continuing to work with the Board and other stakeholders to address the policy reforms needed to protect the health, safety, and welfare of the public while considering rules related to the lawful and safe use of an acupuncture needle by a licensed chiropractor. To that end, we resubmit for the record in this rule making TAAOM's letter to the Board dated March 17, 2017 expressing clearly our policy goals and our commitment to a consensus rulemaking that would result in joint dismissal of current litigation.

A handwritten signature in blue ink, appearing to read 'Wally Doggett', is positioned above the typed name.

Wally Doggett L.Ac. – TAAOM president