12/5/2014 3:25:41 PM
Amalia Rodriguez-Mendoza
District Clerk
Travis County
D-1-GN-14-000355

CAUSE NO. D-1-GN-14-000355

TEXAS ASSOCIATION OF ACUPUNCTURE AND ORIENTAL MEDICINE, Plaintiff	§	**IN THE DISTRICT COURT OF**
v.	§	**TRAVIS COUNTY, TEXAS**
TEXAS BOARD OF CHIROPRACTIC EXAMINERS AND YVETTE YARBROUGH, EXECUTIVE DIRECTOR IN HER OFFICIAL CAPACITY, Defendants	§	**201ST JUDICIAL DISTRICT**

ACUPUNCTURE ASSOCIATION'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiff Texas Association of Acupuncture and Oriental Medicine ("Acupuncture Association") files this reply in support of its motion for summary judgment and asks that the Court grant the Acupuncture Association's motion and deny the Chiropractic Board's[1] cross-motion.

ARGUMENT

The Chiropractic Board's response encapsulates the weakness of its central argument—that an amendment to the definition of acupuncture in the Acupuncture Chapter (stating that acupuncture is the "nonincisive, nonsurgical" insertion of an acupuncture needle) somehow reverses the language of the Chiropractic Chapter that prevents chiropractors from performing acupuncture and carves out an exemption for chiropractors from the education, licensing, and oversight requirements of the Acupuncture Chapter. The Board asserts that there are two separate questions for this Court to answer: (1) does the Chiropractic Chapter (Texas Occupations Code,

[1] The Acupuncture Association refers to Defendants Texas Board of Chiropractic Examiners and Yvette Yarbrough, Executive Director in her Official Capacity, collectively as "Chiropractic Board" or "Board."

Chapter 201) permit the practice of acupuncture by chiropractors; and (2) does the Acupuncture Chapter (Texas Occupations Code, Chapter 205) create an exemption from the requirements of that chapter for chiropractors by virtue of the two-word amendment? The answers to these questions are dispositive in favor of the Acupuncture Association. The Chiropractic Chapter's scope of practice provision does not, as a matter of law, authorize chiropractors to practice acupuncture. And the amendment to the Acupuncture Chapter does not exempt chiropractors from being subject to the education, license, and oversight the legislature has mandated is required to safely and effectively perform acupuncture. Thus, chiropractors who wish to perform acupuncture are subject to the requirements of the Acupuncture Chapter.

I.

Because the statutory scope of chiropractic does not include the practice of acupuncture, the Acupuncture Chapter's exemption for professionals acting within the scope of their license does not apply to chiropractors practicing acupuncture. The addition of the words "nonincisive, nonsurgical" to the Acupuncture Chapter also does not exempt chiropractors from that chapter's educational, licensing, and oversight requirements.

A. A two-word addition to the definition of "acupuncture" in the Acupuncture Chapter did not expand the statutory scope of chiropractic in the Chiropractic Chapter, nor create an exemption for chiropractors from the requirements of the Acupuncture Chapter.

Because the Acupuncture Association and Chiropractic Board have filed cross-motions for summary judgment and responses to those motions, the issues in this case have been thoroughly briefed. As such, the Acupuncture Association will not belabor points already made in prior briefing. The Chiropractic Board's response, however, crystalizes the infirmity of its argument. The Chiropractic Board claims "it is clear" that a two-word addition to the definition of acupuncture in the Acupuncture Chapter (made in 1997 by SB 361)—that made no mention of chiropractic or chiropractors—fundamentally changed the law so as to not only allow chiropractors to practice acupuncture, contrary to the Chiropractic Chapter, but also to exempt

chiropractors from the requirements of the Acupuncture Chapter. This is even though the legislation was the Acupuncture Board's (and not the Chiropractic Board's) sunset bill, the Chiropractic Chapter was not amended to authorize chiropractors to practice acupuncture, and nothing in the Acupuncture Chapter was amended to exempt chiropractors from the education, licensing, and oversight requirements of that chapter.

The Chiropractic Board claims the Court must answer two questions—whether chiropractors are exempt from the Acupuncture Chapter, and whether the Chiropractic Chapter permits the practice of acupuncture by chiropractors. Though framed as two questions, they are actually inextricably intertwined. The Acupuncture Chapter includes an exemption that states, as relevant here, that the "chapter does not apply to a health care professional licensed ***under another statute of this state*** and ***acting within the scope of the license***." TEX. OCC. CODE § 205.003(a) (emphasis added). Thus, the only way a chiropractor is exempt from the requirements of the Acupuncture Chapter is if the chiropractor is practicing within the scope of ***chiropractic*** as defined in the chiropractor's licensing statute: ***the Chiropractic Chapter.*** Under the express terms of the Chiropractic Chapter, chiropractors are prohibited from performing procedures involving needles, save for diagnostic blood draws, and are limited to treating the musculoskeletal portion of the body. *See id.* § 201.002. Acupuncture—which by its statutory definition requires the use of needles and treats the entire body—is not permitted.

The Chiropractic Board makes a circular argument, first seeking to borrow the definition of acupuncture in the Acupuncture Chapter to expand the scope of chiropractic, then arguing that the Acupuncture Chapter provision supports that chiropractors are practicing within the scope of their Chiropractic Chapter licenses. As noted, the Acupuncture Chapter does not include any exemption for chiropractors—the only exemption is for professionals acting within the scope of their own licenses. *See, e.g.*, *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 440 (Tex.

2009). And this exemption does not support the circular argument made by the Board. To the contrary, the exemption provision states that a person is only exempt from the chapter if the person practices acupuncture within the scope of a license granted under "another statute of this state." TEX. OCC. CODE § 205.003(a). The Chiropractic Board cannot claim that language in the Acupuncture Chapter creates an exemption from the Acupuncture Chapter because the Acupuncture Chapter is not "another statute."

Regardless of the ***Chiropractic Chapter's*** unambiguous prohibitions against needle use and treatment beyond the musculoskeletal system, the Chiropractic Board posits that SB 361 amended the Acupuncture Chapter so that the ***Acupuncture Chapter's*** "unambiguous" language creates an exemption for chiropractors to not only practice acupuncture, but to do so without a license from or oversight by the Acupuncture Board. The Chiropractic Board argues that the Acupuncture Association's position is that there can never be any overlap between professions and that each profession is limited to its unique, individual scope of practice. But this argument misrepresents the Acupuncture Association's position. The Acupuncture Association has never argued there can be no overlap among professions, nor has it argued that an occupational regulation chapter can never create an exemption for professionals regulated by a separate occupational board. The Association instead argues that the addition of the words "nonincisive, nonsurgical" into the Acupuncture Chapter did not create any exemption or "carve out" for chiropractors from the requirements of that chapter. To have created such an exemption, the legislature would have needed to authorize chiropractors to practice chiropractic by amending the Chiropractic Chapter (something some members of the legislature have unsuccessfully tried to do on several occasions), or else by amending the Acupuncture Chapter to exempt chiropractors from its requirements. SB 361 did neither of these things.

B. The case law relied on by the Chiropractic Board does not support its argument that the two-word amendment to the definition of acupuncture created an exception from the Acupuncture Act for chiropractors.

The primary case the Chiropractic Board relies on highlights a distinctly different circumstance in which the legislature ***has*** carved out an exemption from a profession's licensing requirements. In *Rogers v. Texas State Board of Architectural Examiners*, the issue was whether the Occupations Code chapter regulating architects exempted engineers engaging in certain practices from the requirements of that chapter. 390 S.W.3d 377 (Tex. App.—Austin 2011, no pet.). The Architecture Board issued a cease-and-desist order against engineers it contended were engaging in the unauthorized practice of architecture. The Architecture Chapter's exemption stated: "This chapter and any rule adopted under this chapter do not limit the right of an engineer licensed under [the Engineering Chapter] to perform an act, service, or work within the scope of the practice of engineering as defined by that chapter." TEX. OCC. CODE § 1051.601. The exemption additionally set forth parameters for engineers engaging in practices that overlap with the practice of architecture. *Id.* The court specifically stated that the two chapters "cross-reference each other so that the interpretation of one statute necessarily involves interpretation of the other," and this overlap dictated that the court could not grant deference to either the Engineering Board's or Architecture Board's interpretation of the statutes at issue. *Id.* at 384.

Contrary to the Chiropractic Board's assertions, the same is not true here. There is nothing in either the Chiropractic or Acupuncture Chapter cross-referencing the other or stating that the two chapters are to be referenced together. Further, it is significant that it is precisely because of the significant cross-over between the Architecture and Engineering chapters that the *Rogers* court refused to defer to either agency's interpretation of its governing statutes. *Id.* at 384-85. Here, there is not only no cross-over between the Chiropractic and Acupuncture Chapters, but the issue is the practice of ***acupuncture*** by chiropractors—something clearly

within the domain and expertise of the Acupuncture Board rather than the Chiropractic Board. *See id.* at 384 (courts do not defer to administrative interpretation in regard to questions that do not lie within an agency's administrative expertise). It is also noteworthy that the court concluded that determining whether the engineers exceeded the scope of their licenses should be made by reference to the Engineering Chapter's scope of practice provision, not the Architecture Chapter. *Id.* at 387-88; *see also Harlingen Family Dentistry, P.C. v. Tex. Health & Human Servs. Comm'n*, No. 03-14-00069-CV, 2014 WL _____, at *2 (Tex. App.—Austin Nov. 25, 2014) ("An agency's rules must comport ***with the agency's authorizing statute***") (emphasis added).[2] It is improper for the Board to attempt to insert an additional exemption into the Acupuncture Chapter by latching onto a definition in that chapter that makes no reference to chiropractic or chiropractors (and also does not include the words "except," "exclude," or the like).

The Chiropractic Board also improperly relies on *Texas Association of Psychological Associates v. Texas State Board of Examiners of Psychologists* to support its position that it is permissible to construe the Chiropractic Chapter by latching onto a phrase in an entirely separate statute. There, the court of appeals considered whether the Psychologists Board exceeded its authority in adopting rules requiring psychological associates to practice psychology under the supervision of psychologists. 439 S.W.3d 597 (Tex. App.—Austin 2014, no pet.). Contrary to the Chiropractic Board's assertion, the court did not conclude the rules were valid by importing language from that separate chapter. Instead, it did so because (1) the rules did not contravene specific statutory language in the Psychology Chapter, and (2) the rules did not run counter to the general objectives of the Psychology Chapter. *Id.* at 603-06. And while the court mentioned language in the Insurance Code defining "psychological associate" as someone practicing under

[2] As of the date of filing this reply, the opinion was not yet available in Westlaw.

the supervision of a psychologist, it did not base its holding on the language. *Id.* at 606. Here, the Chiropractic Board not only asks this Court to import a definition from another chapter that makes no mention of chiropractors, but also requests that the Court use that definition as the sole basis for determining that chiropractors may practice acupuncture. *Psychological Associates* provides the Board no support.

C. Legislative history is not relevant to unambiguous statutes and does not support the Board's position.

The Chiropractic Board contends that the legislative history of SB 361 should be considered by this Court, pointing to language in *Rogers* in which the court of appeals described the legislative history in that case "illuminating." 390 S.W.3d at 385. But, importantly, the *Rogers* holding was not premised on legislative history. Instead, the court construed the statutes at issue and reached its conclusion on the basis of the language of those statutes, merely noting that legislative history supported its interpretation. *Id.* at 385-86. It would have been error for the court of appeals to reach its conclusion on the basis of legislative history: the Texas Supreme Court has repeatedly advised that legislative history should not be considered when a statute is unambiguous. *See, e.g.*, *Entergy Gulf States*, 282 S.W.3d at 437, 443; *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 652 n.4 (Tex. 2006). But in any event, as explained in the Acupuncture Association's response, SB 361's legislative history does not support the Board's argument that the bill authorized chiropractors to perform acupuncture and created an exemption for chiropractors from complying with the requirements of the Acupuncture Chapter.[3]

[3] *See* Acupuncture Association's response, pp. 14-16.

D. The unambiguous language of the Chiropractic Chapter prohibits needle use by chiropractors.

The Chiropractic Board also argues that the definition of "incisive" in the Chiropractic Chapter is ambiguous because the chapter does not define that term. This is incorrect. The chapter defines incisive as making an incision into ***any*** tissue or organ by ***any*** person or implement, with only a narrow exception for diagnostic blood draws. TEX. OCC. CODE § 201.002(a)(3). There is no ambiguity: a needle is an "implement" used to make an incision into the skin, which by definition is a "tissue" and "organ." And by virtue of the single exception for needle-use for diagnostic blood draws, the chapter makes clear that needles are "incisive." The Chiropractic Board's reliance on the Austin Court of Appeals' *Texas Board of Chiropractic Examiners v. Texas Medical Association* opinion offers no support. Nothing in that opinion mentions ambiguity. And the Chiropractic Board admits in its response that *Texas Medical Association* did not decide whether acupuncture is within the scope of chiropractic, and that the Texas Medical Association did not challenge the Chiropractic Board's rule defining "incisive" as being inconsistent with the Chiropractic Chapter.[4]

E. The Acupuncture Association's motion for summary judgment is not dependent on factual safety issues.

Finally, the Chiropractic Board argues that the Acupuncture Association has raised factual safety issues that are not susceptible to summary judgment. This is also incorrect. The Association asserts that the legislature has statutorily determined what education and training is required for the safe and effective practice of acupuncture. *See, e.g.*, TEX. OCC. CODE

[4] As in its motion, the Chiropractic Board's response again relies on post-hoc statements of a legislator to support that the Chiropractic Chapter's prohibition against incisive procedures was not intended to prohibit all needle use. But statements of individual legislators are not legislative history and should not be considered by this Court. *Entergy Gulf States*, 282 S.W.3d at 443-44. Further, as explained in the Acupuncture Association's response to the Chiropractic Board's motion, these statements are disproven by the actual legislative history. *See* Acupuncture Association's response, pp. 12-13.

§§ 205.203, 205.206; *see also Andrews v. Ballard*, 498 F. Supp. 1038, 1054 (S.D. Tex. 1980). Indeed, the Austin Court of Appeals recently observed—as it has done many times before—that the purpose of occupational practice statutes is to protect the public from unqualified practitioners. *Psychological Associates*, 439 S.W.3d at 603. As a matter of law, because chiropractors have not completed the statutorily-required education and training for the practice of acupuncture, chiropractors are (as determined by the legislature) unqualified to perform the procedure. And while the Chiropractic Board has attached a conclusory, self-serving affidavit by a chiropractor who practices acupuncture without a license, the affidavit fails to create any relevant fact dispute. The affidavit states the chiropractor's belief that chiropractors may practice acupuncture without the education or training the legislature has declared is necessary for the safe and effective performance of the procedure. The Board points to no authority supporting the proposition that such an individual may second-guess or overrule the legislature—and he cannot, as a matter of law.

II.

Legislation enacting a statutory scheme that purports to authorize chiropractors to practice acupuncture without a license issued by the Acupuncture Board violates Texas Constitution, Article III, Sections 31 and 35(a).

The Chiropractic Board next presents a lengthy response to the Acupuncture Association's alternative constitutional arguments. The Board's response is substantially the same as arguments made in its motion, to which the Acupuncture Association has already responded.[5] The Acupuncture Association incorporates that response here.

The Association also refers the Court to a puzzling statement the Board makes regarding the Association's argument that the legislation purportedly authorizing chiropractors to practice

[5] *See* Acupuncture Association's response, pp. 18-22.

acupuncture without a license violated the one-subject rule of the Texas Constitution. *See* TEX. CONST. art. III, § 35(a). The Board states: "Yet, what was added to the Acupuncture Act was not an amendment that changed the scope of practice of chiropractic, it was a provision that defined the exemption for chiropractors from the requirements to be licensed under that Act in order to practice acupuncture." Chiropractic Board's response, p. 15. This distinction is one without a difference. As explained, the only way chiropractors are exempt from the Acupuncture Chapter is for them to practice within the scope of their license, which is defined in the Chiropractic Chapter. TEX. OCC. CODE § 205.003. If an amendment expanding the scope of chiropractic in the Chiropractic Chapter violates the one-subject rule, so does an amendment amending the Acupuncture Chapter to do the same thing. *See W. Orange-Cove Consol. Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558, 600 (Tex. 2003).

III.

If the Acupuncture Association prevails, the Court should grant an injunction prohibiting the Chiropractic Board from authorizing chiropractors not licensed under the Acupuncture Chapter to practice acupuncture.

The Chiropractic Board next argues that the Acupuncture Association is not entitled to injunctive relief because (1) the Association has not offered proof supporting the elements required for injunctive relief and (2) the Association did not verify its Second Amended Petition, which the Board claims precludes injunctive relief under Texas Rules of Civil Procedure 682. Though the Chiropractic Board has a long history of ignoring legislative and agency instruction,[6] the Acupuncture Association presumes the Board does not mean to imply that, in the absence of an injunction, it will similarly defy this Court's invalidation of the rules by refusing to repeal them.

[6] *See* Acupuncture Association's motion, pp. 11-12.

Nonetheless, there is no fact issue related to the Association's request for injunctive relief that requires proof. Instead, the request is entirely premised on its declaratory claims, which the Chiropractic Board admits should be decided as a matter of law. Similarly, all of the elements for an injunction are satisfied as a matter of law:

- If the Acupuncture Association prevails on its claims, the Court will have determined the existence of a wrongful act.

- The Austin Court of Appeals has concluded that when an agency's rule infringes on a separate medical practice, practitioners of the separate medical practice are harmed because the privilege of the practice is diminished in quality and standards. *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Bad.*, 270 S.W.3d 777, 782 & n.6 (Tex. App.—Austin 2008, no pet.); *Tex. State Bd. of Podiatric Med. Exam'rs v. Tex. Orthopaedic Ass'n*, 2004 WL 2556917, at *3 (Tex. App.—Austin 2004, no pet.). Though these holdings were related to standing, the reasoning applies equally to the harm element for an injunction.

- The Acupuncture Association has no adequate remedy at law. The Acupuncture Association does not seek damages, and in the absence of an injunction the declaratory relief it seeks could potentially be nullified if the Board refuses to comply with the Court's declaration. *Tex. Dep't of State Health Servs. v. Balquinta*, No. 03-13-00063-CV, 2014 WL 1415192, at *14 (Tex. App.—Austin April 9, 2014, pet. filed); *Tex. Dep't of Pub. Safety v. Salazar*, 304 S.W.3d 896, 903-04 (Tex. App.—Austin 2009, no pet.).

Injunctive relief is proper if the Court invalidates the rules or declares the statute at issue unconstitutional. TEX. CIV. PRAC. & REM. CODE § 37.011; *Balquinta*, 2014 WL 1415192, at *14. As such, the Court should grant injunctive relief as a matter of law.

In terms of the absence of a verification to its petition, there are no facts to verify, but the Acupuncture Association nonetheless has amended its petition to include a verification. The scheduling order entered in this case does not set forth a deadline for amending pleadings, and this amendment is being made more than 30 days before this Court's hearing on these motions for summary judgment. The amendment cannot be said to have prejudiced the Board, which has been aware of the Association's injunction claim and the legal arguments supporting it

throughout this extensive summary judgment briefing. Out of an abundance of caution, the Association additionally files a motion for leave to amend its petition.

IV.

The Acupuncture Association is entitled to attorney's fees if it prevails on its alternative claims brought under the Uniform Declaratory Judgment Act.

The Chiropractic Board argues that the Acupuncture Association is not entitled to attorney's fees because (1) attorney's fees are not available for rule challenges brought under the Administrative Procedures Act ("APA") and (2) the Acupuncture Association's alternative, constitutional claims brought under the Uniform Declaratory Judgment Act ("UDJA") are duplicative of its APA claim. The Acupuncture Association does not dispute that attorney's fees are not available for APA rule challenges and the Association is not seeking attorney's fees if it prevails on that claim. TEX. GOV'T CODE § 2001.038; *see also, e.g., Tex. State Bd. of Veterinary Med. Exam'rs v. Giggleman*, 408 S.W.3d 696, 708 (Tex. App.—Austin 2013, no pet.).

Nor does the Acupuncture Association dispute that when a UDJA action is redundant of what could have been brought as an APA rule challenge, the claimant is not entitled to attorney's fees. *See Howell v. Tex. Workers' Compensation Comm'n*, 143 S.W.3d 416, 442 (Tex. App.—Austin 2004, pet. denied). But the Acupuncture Association's ***alternative*** constitutional claims are not redundant of its APA claim. In its APA claim, it asks the Court to declare various rules adopted by the Chiropractic Board invalid because they exceed the Board's statutory scope. Conversely, its alternative UDJA claims are premised on a finding by the Court that the rules do ***not*** exceed the statutory scope of the practice of chiropractic. If the Court declines to invalidate the rules, the Acupuncture Association requests that the Court declare the statutory scheme authorizing chiropractors to practice acupuncture (or a portion of the legislation) unconstitutional. Because these constitutional claims are not redundant of the APA claim, should the Court grant the Acupuncture Association relief on its UDJA claims, it requests that the Court

also award it reasonable and necessary attorney's fees and costs. TEX. CIV. PRAC. & REM. CODE § 37.009.

PRAYER

For these reasons and all the reasons outlined in Plaintiff Texas Association of Acupuncture and Oriental Medicine's motion and response, the Association prays that the Court grant its motion for summary judgment, deny Defendants' motion for summary judgment, and grant any further relief to which Plaintiff may be justly entitled, at law or in equity.

Respectfully submitted,

By: /s/ *Craig T. Enoch*
Craig T. Enoch (SBN 00000026)
cenoch@enochkever.com
Melissa A. Lorber (SBN 24032969)
mlorber@enochkever.com
Shelby L. O'Brien (SBN 24037203)
sobrien@enochkever.com
ENOCH KEVER PLLC
600 Congress Avenue, Suite 2800
Austin, Texas 78701
Phone: (512) 615-1200
Fax: (512) 615-1198

ATTORNEYS FOR PLAINTIFF TEXAS ASSOCIATION OF ACUPUNCTURE AND ORIENTAL MEDICINE

CERTIFICATE OF SERVICE

Counsel for Defendants has been served by electronic service and email on December 5, 2014 as follows:

Joe H. Thrash
Assistant Attorney General
Administrative Law Division
P.O. Box 12548
Austin, Texas 78711
Joe.Thrash@texasattorneygeneral.gov

By: /s/ *Craig T. Enoch*
Craig T. Enoch