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September 27, 2018

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Texas Board of Chiropractic Examiners  
333 Guadalupe St., Suite 3-825  
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Mr. Burnett,

This letter is regarding the Texas Board of Chiropractic Examiners' ("TBCE" or "the Board") proposed rule TAC §78.14, concerning the use of acupuncture as a chiropractic modality, which was published in the July 20, 2018 edition of the Texas Register.

As you know, the Texas Association of Acupuncture and Oriental Medicine ("TAAOM") sued TBCE in February 2014 over its rules concerning the practice of acupuncture by chiropractors. In March 2017, after a series of legal proceedings, TAAOM requested settlement discussions "intended to generate a negotiated settlement that would lead to the establishment of new enhanced standards and oversight for a licensed chiropractor wishing to use an acupuncture needle within existing statutory scope of practice for chiropractic." TAAOM and TBCE filed a joint motion to abate the lawsuit, which was granted on August 1, 2017. The abatement was granted **for "the parties [to] pursue negotiated rulemaking."**<sup>1</sup>

TBCE convened a series of stakeholder meetings in late 2017 and 2018 for the purpose of crafting a modified rule that would address TAAOM's concerns, while allowing a chiropractor to use an acupuncture needle within chiropractic scope. These meetings were attended by representatives of TAAOM, representatives of TCA, educators, dually-licensed practitioners and other experts. After multiple meetings consisting of approximately 18 hours of in-person discussion and the exchange of hundreds of pages of documents, several "areas of agreement" were reached among the stakeholders regarding training requirements, continuing education hours in acupuncture, informed consent, advertising restrictions to promote clarity, and establishing a process by which TBCE can better regulate chiropractors performing acupuncture as a modality of chiropractic.<sup>2</sup>

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<sup>1</sup> *Texas Ass'n of Acupuncture and Oriental Med. v. Texas Bd. of Chiropractic Exam'rs*, Order Granting Joint Motion to Abate, Cause No. D-1-GN-14-000355 (August 1, 2017) (emphasis added).

<sup>2</sup> Note: the "areas of agreement" language was used by TBCE in its December 12, 2017 email to the stakeholder group and by TAAOM in its January 24, 2018 response to TBCE's email.

To the Board's credit, its proposed rule adheres to the well-documented "areas of agreement" between the stakeholders. TCA supported this rule proposal in its formal comment submitted to TBCE on August 19, 2018 in a good-faith effort to resolve the ongoing litigation brought by TAAOM against the Board.

**TAAOM, however, reversed course by submitting formal comment to TBCE demanding that it "clarify by what authority the Board believes its chiropractic licensees are exempted from the requirements of the [acupuncture statute]." <sup>3</sup> TAAOM now argues that the Board lacks the requisite legal authority to enact *any rule* regarding chiropractic acupuncture. TCA finds this argument especially galling because TAAOM's lawsuit was abated for the explicit purpose of pursuing negotiated rulemaking. <sup>4</sup> It was for this reason that the parties' abatement request was granted by the Court. <sup>5</sup>**

**In summary, TAAOM sued the Board over its acupuncture rule, requested that TBCE broker discussions regarding a revised rule, agreed to abate its lawsuit to pursue negotiated rulemaking, was granted almost every substantive request it made during negotiations, reached multiple "areas of agreement" for a consensus rule...and is now opposing said rule on the grounds that the Board lacks the legal authority *to do the very thing it asked the Board to do.***

As we noted in our August 19, 2018 letter to TBCE, TCA participated in these rulemaking discussions – *which were requested by TAAOM* – solely for the purpose of resolving TAAOM's lawsuit against the Board. It makes little sense for the Board to unilaterally enact sweeping changes that burden its licensees if TAAOM is no longer committed to ending its quixotic legal battle against the Board.

**Given TAAOM's refusal to honor its commitment to negotiate in good faith, and the concerns recently expressed by a prominent elected official regarding the unnecessary and unjustifiable burden imposed on TBCE's licensees by the rule's heightened training requirements, we encourage the Board to reconsider adopting the rule in its current form.**

TCA maintains its support for several components of the rule, including continuing education in acupuncture, clarifications on applicability of informed consent, and TBCE documenting which chiropractors have completed the requisite acupuncture training. However, given our continued position that an elevated training requirement is unnecessary to protect the public, TAAOM's refusal to honor its commitment, and negative feedback from a prominent elected official, we recommend against adopting the provision requiring increased training to perform acupuncture as a modality of chiropractic.

As we have repeatedly noted, it is inconsistent and arbitrary to impose heightened restrictions on Doctors of Chiropractic (who complete at least 4,200 hours of doctoral-level education before being licensed to practice), while physicians, dentists and physical therapists perform acupuncture with little to no additional acupuncture training.

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<sup>3</sup> *TAAOM Comment on Proposed Repeal of TBCE Rule §78.14* (August 5, 2018).

<sup>4</sup> *See Texas Ass'n of Acupuncture and Oriental Med. v. Texas Bd. of Chiropractic Exam'rs.*

<sup>5</sup> *Id.*

TCA encourages the Board to revise its proposed rule to require continuing education in acupuncture, clarify the applicability of informed consent, and document which licensees have completed the requisite acupuncture training. However, without the agreement of TAAOM (and a path towards ending its litigation), TCA sees no rationale for increasing the regulatory burden on Doctors of Chiropractic by elevating training requirements when they serve no public safety purpose.

As always, TCA appreciates the opportunity to provide feedback to the Board. Please do not hesitate to contact our office should you have any questions regarding the foregoing.

Sincerely,

A handwritten signature in black ink, appearing to read 'D. Pettiet', written in a cursive style.

Devin Pettiet, D.C.  
President  
Texas Chiropractic Association