



TEXAS CHIROPRACTIC ASSOCIATION PUBLIC COMMENT ON THE SUNSET ADVISORY COMMISSION STAFF REPORT OF THE TEXAS BOARD OF CHIROPRACTIC EXAMINERS

INTRODUCTION

The Texas Chiropractic Association (“TCA” or the “Chiropractic Association”) is the essential voice for chiropractic in Texas. It is the oldest and largest professional association of Doctors of Chiropractic in Texas, and represents the interests of thousands of Doctors of Chiropractic and chiropractic patients.

TCA believes that Texans should have adequate access to the health care of their choice and supports the statutory authority of individual practitioners to examine, analyze and diagnose the living human body by any method taught by an accredited chiropractic college and to make use of any method of examination or therapeutics taught by any accredited chiropractic college that is within the legal scope of chiropractic practice.

The Chiropractic Association enjoys a friendly, working relationship with TBCE members and staff. Although TCA believes the vast majority of TBCE’s governing challenges are attributable to deficiencies in the underlying Act (as opposed to poor administration), there are undoubtedly areas in which TBCE can improve and TCA looks forward to working with the Board and the Legislature on those improvements.

TCA appreciates the opportunity to provide feedback on the Sunset Advisory Commission’s Staff Report regarding the Texas Board of Chiropractic Examiners. Listed below are TCA’s positions on each of the recommendations included in the Staff Report and additional issues and recommendations that TCA urges the Sunset Commission to consider.

TCA POLICY POSITIONS ON THE RECOMMENDATIONS IN THE SUNSET STAFF REPORT

1.1 Direct the board to develop a plan to improve its investigative process and reduce complaint resolution timeframes.

- TCA supports this recommendation. TCA believes that TBCE does an adequate job of resolving complaints in a timely manner. However, more expedient case resolution would benefit the public and Texas Doctors of Chiropractic.

1.2 Direct the board to prioritize investigations by risk to the public.

- TCA supports this recommendation.

1.3 Direct the board to revise its penalty matrix to more closely align the severity of penalties with the risk a violation poses to the public.

- TCA supports this recommendation. TBCE conducted a stakeholder meeting to discuss this very topic with interested parties. TCA supports this recommendation and is looking forward to working with TBCE to develop a better penalty matrix.
- That malpractice insurance premiums for Doctors of Chiropractic are lower than those of many other healthcare providers suggests chiropractic is less dangerous than other types of care/treatment.¹

1.4 Direct the board to clearly define grossly unprofessional conduct.

- TCA supports this recommendation.

1.5 Direct the board to maintain complainants' confidentiality when possible.

- TCA is neutral on this recommendation. TCA understands and respects concerns related to patient privacy. However, the Sunset Commission should consider whether this recommendation could encourage spurious complaints made by a doctor's market competitors.

1.6 Direct the board to develop a more user-friendly online complaint form.

- TCA is neutral on this recommendation.

2.1 Discontinue registration of chiropractic facilities.

- TCA supports this recommendation. As the Sunset Advisory Commission has noted, facility registration places an unnecessary burden on TBCE and most facility-related complaints are unrelated to patient safety. Further, the Texas Medical Board does not register the offices of medical physicians, where more invasive and potentially dangerous procedures occur. For these reasons, TCA supports ending facility registration.

3.1 Repeal the local and executive peer review requirements from statute.

- TCA supports this recommendation. TCA agrees that the current statutory language is cumbersome and unnecessary.

3.2 Require the board to develop an expert review process in rule to ensure chiropractic expertise in its enforcement process.

- TCA supports this recommendation. TCA agrees that the proposed expert review system seems preferable to the current statutory language.

4.1 Require the board to conduct fingerprint-based criminal background checks of all licensure applicants and licensees.

- TCA is neutral on this recommendation. As the Sunset Advisory Commission made clear, this recommendation is one of its model standards and does not necessarily flow from an actual, observed problem at TBCE. TCA does not believe that this recommendation is necessary, but does not oppose it.

4.2 Remove unnecessary provisions requiring applicants to be of good moral character.

- TCA supports this recommendation.

4.3 Authorize the board to check for disciplinary actions in other states or from other licensing boards for license applications and renewals, and to pursue any necessary enforcement action.

- TCA supports this recommendation.

4.4 Remove the limitation on the number of times an applicant can take the board's jurisprudence exam.

- TCA is neutral on this recommendation.

4.5 Authorize the board to provide biennial license renewal.

- TCA supports this recommendation. TCA supports this recommendation because it would decrease the administrative burden on Texas Doctors of Chiropractic.

4.6 Remove the statutory limitation currently restricting the agency's authority to lower fees.

- TCA supports this recommendation.

4.7 Direct the board to stop requiring letters of recommendation as part the initial application process.

- TCA supports this recommendation.

4.8 Direct the board to limit its continuing education audit process.

- TCA is neutral on this recommendation.

5.1 Continue the regulation of chiropractors, but postpone the decision on continuation of the Texas Board of Chiropractic Examiners until completion of the Sunset reviews of other health licensing agencies.

- TCA opposes this recommendation. TCA agrees with the Sunset Advisory Commission that there is a continued need for regulating the practice of chiropractic in Texas. However, TCA strongly believes that an independent board is critical to accomplishing this mission. The Staff Report correctly identifies areas in which TBCE can improve, but none of the problems/inefficiencies cited in the report warrant eliminating TBCE and/or stripping the board of its decision-making authority. Further, TCA believes that if such a proposal were appropriate for TBCE, it would be appropriate for all health care regulatory boards. However, TCA respects the work of the Sunset Advisory Commission and will wait to render final judgment until a concrete proposal is published.

5.2 Update the standard across-the-board requirement related to board member training.

- TCA supports this recommendation.

ADDITIONAL ISSUES AND RECOMMENDATIONS SUNSET SHOULD CONSIDER

TCA believes that the majority of TBCE's regulatory challenges stem from deficiencies in the Chiropractic Act itself. The Act is antiquated and unclear and, as a result, it is difficult for Doctors of Chiropractic to understand what is and is not appropriate chiropractic practice. TBCE has even been dragged into litigation over interpretation of the Act. The Act should be modernized to be commensurate with the Doctor of Chiropractic's level of education, training, and experience.

In a recent case involving TBCE related to acupuncture, the Texas 3rd Court of Appeals affirmed that statutory language concerning chiropractic is unclear and needs legislative intervention. "Cases construing the scope of chiropractic vis-a-vis other healthcare fields has been a recurring theme of litigation and decisions in this Court. *See generally TMA I*, 375 S.W.3d at 464-97; *Texas Bd. of Chiropractic Exam'rs v. Texas Med. Assoc.*, No. 03-14-00396-CV, 2014 WL 7014530 (Tex. App.—Austin Dec. 8, 2014, pet. denied) (mem. op.). What this history underscores is that the scope of chiropractic vis-a-vis other healthcare fields is ***a puzzle best solved by the Legislature*** in a clear and precise manner, rather than leaving these policy-laden issues to the Judiciary for a determination of legislative intent from statutory language that is, to say the least, ***not the model of clarity. We respectfully request that the Legislature solve this problem.***" *Texas Assoc. of Acupuncture and Oriental Med. v. Texas Bd. of Chiropractic Exam'rs*, NO. 03-15-00262-CV (Tex. App.—Austin Aug. 18, 2016) (emphasis added).

As TCA has explained to the Sunset Advisory Commission, addressing deficiencies in the Act will provide clarity for not only Doctors of Chiropractic and the public, but for TBCE in regulating the practice and profession – reducing unnecessary lawsuits, increasing access to care, and improving the regulatory landscape. TCA's recommendations are:

1. Define and include the authority of a licensed Doctor of Chiropractic to make a diagnosis within the Chiropractic Act.

The Chiropractic Act allows Doctors of Chiropractic to “analyze, examine, or evaluate the biomechanical condition of the spine and musculoskeletal system of the human body.” Occ. Code § 201.002(b)(1).

Doctors of Chiropractic have been diagnosing in Texas since 1949 when the Chiropractic Act went into effect. Doctors of Chiropractic have extensive education and training on diagnosisⁱⁱ and the National Chiropractic Board of Examiners examination tests Doctors of Chiropractic on general diagnosis, neuromusculoskeletal diagnosis, diagnostic imaging, and diagnosis or clinical impression.ⁱⁱⁱ

In recent years, TBCE has been forced into litigation including the issue of whether the practice of chiropractic includes the ability of a Doctor of Chiropractic to diagnose.^{iv} Following a Texas 3rd Court of Appeals opinion holding that the authority to diagnose did not exceed the statutory scope of chiropractic^v, a suit was brought to again challenge that authority.^{vi} In this most recent case, it appears the district court concluded Doctors of Chiropractic do not have the authority to diagnose, but a statement of findings in support of this decision has not yet been issued and it is anticipated the decision will be appealed.

The lack of clarity in the Chiropractic Act not only puts an unnecessary burden on Doctors of Chiropractic in interpreting their scope, but also costs the state money and human resources through involvement in litigation. It is estimated that one of these lawsuits and its appeals cost TBCE \$325,018.75 (1,244.5 attorney hours at \$250/hr. and 185.25 legal assistant hours at \$75/hr.).

Defining and including the authority of a Doctor of Chiropractic to diagnose within the Chiropractic Act will ensure taxpayer resources do not continue to be wasted in further litigating this issue.

2. Allow Doctors of Chiropractic to advertise specializations and/or special training.

Doctors of Chiropractic often receive specialized training through post-doctoral programs and examinations in fields such as diagnostic imaging, orthopedics, neurology, sports, acupuncture, rehabilitation or pediatrics.^{vii} TBCE previously adopted rules regarding chiropractic specialties such as chiropractic radiology, chiropractic orthopedics, acupuncture, chiropractic neurology and chiropractic nutrition, but the rules have since been repealed.

It is currently unclear whether Doctors of Chiropractic may lawfully advertise their specializations and/or special training, and clarification is needed. This legal ambiguity unreasonably curtails doctors’ First Amendment right to free speech^{viii} and does a disservice to patients looking for Doctors of Chiropractic with specific expertise.

Allowing Doctors of Chiropractic to advertise their specializations and/or special training will protect doctors’ freedom of speech and empower Texans to make informed healthcare choices and more easily access the care they choose.

3. Define and include “neuromusculoskeletal” within the Chiropractic Act.

As with the issue of the authority to diagnose, TBCE has been forced into litigation over the issue of whether the “subluxation complex” referred to in Occ. Code Sec. 201.002(b)(2) includes the *neuromusculoskeletal* system and whether the “musculoskeletal system” referred to in Occ. Code Sec. 201.002(b)(1) and (2) includes nerves.^{ix}

TCA echoes the 3rd Court of Appeals that policy issues related to chiropractic are best resolved by the Legislature and not the Judiciary. Given the lack of clarity within the Chiropractic Act and the resulting litigation, TCA requests that the Legislature define and include “neuromusculoskeletal” in the Chiropractic Act to ensure that taxpayer resources do not continue to be wasted in further litigation.

4. Define and include “chiropractic physician” within the Chiropractic Act.

Thirty-two of the states in the U.S. use the term “chiropractic physician.” The Medicare Program also includes Doctors of Chiropractic within its definition of “physician.”^x Texas’ use of different language leads to confusion across states for chiropractic patients and for Doctors of Chiropractic.

Creating a unified nomenclature for healthcare professionals with physician-level training will: 1) decrease confusion among patients, Doctors of Chiropractic, and the general public; 2) align Texas’ terminology with the widely-accepted federal definition of “physician”; 3) decrease the likelihood of unnecessary disciplinary actions against Doctors of Chiropractic; and 4) increase access to care by removing a disincentive for Doctors of Chiropractic to practice in Texas.

5. Define and include “chiropractic medicine” within the Chiropractic Act.

Despite it being settled law that Doctors of Chiropractic have the authority to practice medicine within their scope, significant confusion continues to exist in the medical and legal worlds and amongst the general public. Such confusion is unnecessary and does a disservice to Texans.

The 3rd Court of Appeals recently stated, “The net effect of the statutory interplay is that a person licensed by TBCE as a chiropractor but not by the TMB to “practice medicine” (i.e., as a physician) can lawfully do things that would otherwise constitute “practicing medicine” as long as he remains within the statutory scope of chiropractic under chapter 201.”^{xi}

Defining “chiropractic medicine” would not be unprecedented in the health care field: the Podiatric Act refers to “podiatric medicine,”^{xii} the Veterinary Licensing Act refers to “veterinary medicine,”^{xiii} and the Dental Practice Act permits the use of the term “Doctor of Dental Medicine.”^{xiv}

Adding a definition of “chiropractic medicine” to the Chiropractic Act would clarify that the practice of chiropractic is the practice of medicine within the confines of chiropractic scope and would prevent needless confusion.

6. Define and include in the Chiropractic Act the authority of a licensed Doctor of Chiropractic to conduct a health assessment and provide counseling on general health matters, wellness and health optimization.

It is unclear if Doctors of Chiropractic have the statutory authority to conduct a health assessment and provide counseling on general health matters, wellness and health optimization under existing law. For example, Department of Transportation examinations may be conducted by a medical examiner who is listed on the National Registry of Certified Medical Examiners (including Doctors of Chiropractic).^{xv} This examination includes an evaluation of issues affecting blood pressure, neurology, and the head and eyes.^{xvi} However, it is unclear as to whether or not Texas' chiropractic scope would permit a Doctor of Chiropractic to perform such an evaluation.

Providing Doctors of Chiropractic with the authority to conduct health screenings and giving TBCE the authority to define and regulate such screenings would be beneficial to the public health and would remove the burdens placed on Doctors of Chiropractic.

7. Place a duty on the TBCE to keep current with scientific, technological and educational changes that impact the practice of chiropractic.

TBCE occasionally seems hesitant to make rule changes that reflect advances in science and technology related to chiropractic care. Such advances in science and technology are regularly followed by advances in the educational instruction received in chiropractic colleges – as these institutions are compelled to educate based on the latest information and innovations.

Placing a duty on TBCE to adopt rules that are current with advances in science, technology and corresponding educational instruction will help protect public safety and promote public health by ensuring Doctors of Chiropractic continuing education keeps pace with the latest developments within chiropractic and medicine. It will also ensure Doctors of Chiropractic have a clear understanding of how TBCE rules apply to new advances, will ensure that patients have access to appropriate care, and will decrease the likelihood that TBCE is drawn into costly litigation over its authority to adopt such rules.

ⁱ Sources: NCMIC and Cunningham Group Insurance Company.

ⁱⁱ <http://www.txchiro.edu/student-services/academics/curriculum.html> and <https://parker.edu/academics/doctor-of-chiropractic/>

ⁱⁱⁱ <http://mynbce.org/prepare/>

^{iv} See Texas Bd. of Chiropractic Exam'rs, et al v. Texas Med. Assoc., et al, 375 S.W.3d 464 (Tex. Third Ct. of App. 2012); Texas Med. Assoc. v. Texas Bd. of Chiropractic Exam'rs., et al., No. D-1-GN-11-000326 (Travis County Dist. Ct.).

^v Texas Bd. of Chiropractic Exam'rs v. Texas Med. Assoc., at 495.

^{vi} See Texas Med. Assoc. v. Tex. Bd. of Chiropractic Exam'rs., et al., No. D-1-GN-11-000326 (Travis County Dist. Ct.).

^{vii} See <https://www.acatoday.org/Communities/Specialty-Councils>

^{viii} See American Acad. Of Implant Dentistry v. Tex. Bd. of Dental Exam'rs (Case No. A-14-CA-191-SS, United States District Court Western District of Texas), in which the U.S. District Court for the Western District of Texas found unconstitutional a Texas Board of Dental Examiners' rule prohibiting "a licensed dentist from advertising as a "specialist" in any area of dentistry not recognized as a "specialty" by the American Dental Association (ADA)".

^{ix} See Texas Bd. of Chiropractic Exam'rs, et al v. Texas Med. Assoc., et al, 375 S.W.3d 464 (Tex. Third Ct. of App. 2012); Texas Med. Assoc. v. Texas Bd. of Chiropractic Exam'rs., et al., No. D-1-GN-11-000326 (Travis County Dist. Ct.).

^x Section 1861(r) of the Social Security Act; *Medicare General Information, Eligibility and Entitlement Manual*, Chapter 5, Section 70.6.

^{xi} Texas Bd. of Chiropractic Exam'rs, et al v. Texas Med. Assoc., et al, 375 S.W.3d 464 at 467.

^{xii} Tex. Occ. Code Section 202.001(a)(4).

^{xiii} Tex. Occ. Code Section 801.002(5).

^{xiv} Tex. Occ. Code Section 251.033(a)(1).

^{xv} 49 C.F.R. Section 391.42.

^{xvi} 49 C.F.R. Section 391.43.