

CALIFORNIA ACUPUNCTURE BOARD

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State of California
Department of Consumer Affairs
Arnold Schwarzenegger, Governor



April 18, 2005

Senator Liz Figueroa
Chair, Joint Committee on Boards,
Commissions, and Consumer Protection
1020 N Street, Room 521
Sacramento, CA 95814

Dear Senator Figueroa:

This is in response to the Joint Committee's (Committee) Final Recommendations for the Acupuncture Board, dated April 12, 2005, which the Committee used as its bases for its action to sunset the Board. This letter address the specific issues raised in the Final Recommendations.

The paper does not accurately reflect Board actions and positions, and discounts the considerable input provided to the Committee in 2002 and 2004. These documents include the Board's September 1, 2004 Sunset Review Report; October 8, 2004 response to the Little Hoover Commission's (LHC) Report; and January 3, 2005 response to the Committee's Background Paper for the January 4, 2005 hearing.

The Board has either past or currently reviewed all of the recommendations of the Committee. Likewise, the Board has repeatedly responded in oral and written testimony to the Committee. For example, in 2002, the Board presented its review and recommendations on many of the issues (i.e., diagnosis, scope of practice, primary health care, educational standards, national exam, and school approval process) to the Committee in written reports, responses and oral testimony. Rather than considering the Board's responses and recommendations, the Committee chose to refer these issues to the LHC to review and to conduct a comprehensive analysis (SB 1951, Chapter 714, Statutes of 2002, added B&P Code Section 4934.1). It appears that the written and oral clarifications and explanations by the Board and the Committee's raising of the same issues leave the Board and the Committee in a position of polite and respectful disagreement. This does not rise to the level of the Board being unresponsive nor does it justify an action as drastic as sunseting the Board.

The Board has continued in good faith to address and respond to each of the issues raised by the Committee. The Board pledges to continue working with this committee and other legislative committees in order to elucidate the reasons of why the Board should be sunrisen, based on its positive actions, both historically and currently on all relevant issues.

The following are the Board's responses in the order they are addressed in the Committee's Final Recommendations, dated April 12, 2005.

Committee's Comment: "The LHC found that the Board has missed significant opportunities to protect the public....one of the most significant examples of this is the Board's failure to promulgate regulations concerning single use needles." "While the Board is now working on regulations on this issue, it seems they are only acting after repeated urging from the Commission and the Joint Committee."

Board's Response:

This issue was addressed for the first time in the LHC's September 2004 report. The Board addressed this issue in both its October 8, 2004 and January 3, 2005 responses and committed to bring this issue before the Board once a quorum was re-established. As soon as a quorum was obtained and as soon as the Board could schedule a meeting this issue was presented for consideration to the Board. The Board took action to adopt proposed regulatory amendments requiring only single-use disposable needles and the emergency regulatory package has been processed with DCA. The Board has proceeded in a timely manner.

The Board has been pro-active in consumer protection on this issue by ensuring strict education requirements on clean needle technique (CNT) and testing the exam applicant on CNT protocol. The Board also enforces state and federal laws relating to standards of care, sterilization, and condition of office (i.e., OSHA, CNT, Hazardous Waste, Health and Safety Codes, etc.). The Board's 2004 revised consumer brochure, released June 2004, contains language addressing single use needles (page 8).

Acupuncture needles are medical devices under federal Food and Drug Administration (FDA) regulations. In 1996, the FDA reclassified the needles from class III to class II, meaning the needles could be used by licensed, registered or certified acupuncture practitioners. As with other class II devices, the needles are required to have proper labeling, and good manufacturing practices must be followed.

Manufacturers must include on the label the statement "for single use only" and provide information about device material sterility and compatibility with the body. The needles must also bear a prescription label restricting use to qualified practitioners as determined by individual states. Foreign manufacturers must meet the same premarket clearance and manufacturing quality requirements as U.S. manufacturers.

Single-use disposable needles are already the norm and have not been an issue. Students are taught this in their theoretical and practical training. The Board's 1996 Occupational Analysis reflected that 99.6% (99.3% English, 100% Chinese and 100% Korean) of licensees 'only' used disposable needles in their practice and few consumer complaints have been filed with the Board involving multiple use needles.

Committee's Comment: "The Board was asked to evaluate the national licensure exam for acupuncture and compare it to the California Acupuncture Licensing Exam."

Board's Response:

The Board did compare and evaluated the use of the national exam and reported its findings in its September 2004 Sunset Review Report, and October 8, 2004 and January 3, 2005 written responses. This was further discussed at the Committee's January 4, 2005 hearing. The LHC has reviewed it as well. Both concluded that the California Acupuncture Licensing Examination is somewhat more robust than the National

Certification Commission for Acupuncture and Oriental Medicine's exam. The California Acupuncture Licensing Examination is developed by the Department of Consumer Affairs Office of Examination Resources according to the Standards for Educational and Psychological Testing (Standards) published by the American Educational Research Association, the American Psychological Association, and the National Council on Measurement in Education. The Standards are the criteria used by the psychometric and legal professions to judge whether examinations are legally defensible and psychometrically sound. The Office of Examination Resources has proven to be a very reliable and professional partner in the development of the licensing examination. Consistent with the Board's policy to ensure a psychometrically sound and valid licensing examination, the Board has and will continue to review and evaluate testing alternatives.

Committee Comments: "The Board was asked to evaluate the acupuncture school approval processes of the Bureau of Private Postsecondary and Vocational Education (BPPVE), the Accreditation Commission for Acupuncture and Oriental Medicine (ACAOM) and the Board." "As of the Board's 2002 sunset review, they had not acted on..."

Board's Response:

The Board did compare and evaluate the acupuncture school approval processes prior to 2002 and reported its findings in its September 2004 Sunset Review Report, and October 8, 2004 and January 3, 2005 written responses. This was further discussed at the Committee's January 4, 2005 hearing. The Board's first review began in 2001 when the Board focused on its site visit manual, policies and regulations relating to school approval, BPPVE's approval process and the Accreditation Commission of Acupuncture and Oriental Medicine's (ACAOM) accreditation process. In addition, BPPVE and ACAOM made presentations about their approval processes and how California could utilize or partner with them. At the request of the Committee, in 2002 the Board again reviewed the other accreditation processes, specifically focusing on the ACAOM accreditation. After both reviews and evaluations, the Board has taken a position to support maintaining its own school approval process. Accreditation is not a replacement for governmental regulation. Public institutions receive their approval to operate through the state Constitution and legislative action. Accreditation is a voluntary, private-sector evaluation. Accrediting bodies cannot force institutions to comply with state and federal laws, and do not view their role as regulatory. There are three types of accrediting bodies, regional associations (e.g., the Western Association of Schools and Colleges [WASC]); national accrediting bodies (e.g., the Association of Independent Colleges and Schools, the National Association of Trade and Technical Schools); and specialized accrediting bodies (e.g., ACAOM, NOMAA, American Bar Association, National Education Association).

National scope, practice or educational standards "do not" exist in this profession, which is largely due to the variance in the scope of practice from state to state. Recognizing other approval or accrediting authorities may limit or compromise the Board's ability to improve educational and approval standards. The Board will continue to evaluate the merit of these various accrediting entities, including ACAOM.

Committee's Comment: "Because the Board has such a relatively small staff, it is not always able to operate efficiently."

Board's Response:

The Board, like every other governmental agency, is limited by the budget approved by the

Governor and the Legislature and must operate within those confines. The Board has regularly submitted budget change proposals for additional staff, which have been rejected. In addition, the Board, like other agencies, has regularly been under hiring freezes. Notwithstanding staff limitations, the results and findings of the two audits performed on the Board in 2001 by the Office of State Audits, disclosed that the Board is operating efficiently, effectively and consistent with all statutory requirements.

Committee's Comment: The Board “misreads its governing statutes concerning the scope of practice of licensees.”

Board's Response:

The Board has given considerable thought and resources into accurately interpreting the Acupuncture Practice Act. Like all other boards in DCA, the Board heavily relies upon Department of Consumer Affairs Legal Division's legal advice and interpretation of its laws and regulations. The Board believes the current scope of practice for a practitioner of acupuncture and Oriental medicine is adequate and depends greatly on the legal interpretations, opinions and guidance of the Board's legal counsel to implement and clarify the laws that regulate the profession.

Acupuncturists were included as primary treating physicians in the Workers Compensation system in 1989 and approved as a Qualified Medical Evaluator (QME)(Labor Code Section 3209.3(a)). An acupuncturist obtained the ability to diagnose independent of a physician, since eliminating the requirement for a physician referral by statute in 1979. Thus an acupuncturist is allowed to diagnose, administer treatment and refer if necessary, in the practice of acupuncture and Oriental medicine, as defined in B&P Code Sections 4927 and 4937.

Legal Opinion 93-11 found that the Legislature in repealing B&P Code Section 2155 (i.e., eliminating the need for a physician referral as a precondition for treatment by an acupuncturist) (Statutes of 1979, Chapter 488, effective January 1, 1980) authorized acupuncturists to diagnose a patient's condition prior to providing any treatment. Since 1980 acupuncturists have been authorized to diagnose within their current scope and in their daily practice. LHC also recognized this in their September 2004 report recently released, wherein on Page ii of the Executive Summary, they state “clear statutory language is needed to affirm that consumers have direct access to acupuncturists who can diagnose patients using traditional Oriental techniques....”, and again on Page v, Recommendation 1, they state, “the scope of practice should include an explicit authorization to conduct traditional Oriental diagnosis.”

Committee's Comment: The Board “seems unable to respond to direction from the Department and the Legislature, or to criticism from any of the many neutral bodies that have examined it and made recommendations for improvement.”

Board's Response:

The Board feels it has been cooperative and will continue to do so. The Committee or DCA has not provided any substantive evidence that the Board has refused to consider, analyze, evaluate or act on any their recommendations. Disagreement does not equate with lack of cooperation. Be assured of the Board's full and earnest cooperation with the Governor and his administration, the Joint Committee, Legislature, and DCA.

Committee's Comment: The Board “seeks to erect significant barriers to new acupuncturists becoming licensed.”

Board's Response:

It appears that the Committee may feel the increase of educational hours from 2,348 to 3,000 constitutes an entry barrier. The Board increased hours solely in the interest of consumer safety and based on the competencies necessary to practice safely and effectively in the state of California as concluded by the 2001 Occupational Analysis. In the future and before Board would ever proceed with any further increases in educational requirements, it would need to evaluate the educational outcomes and practice proficiencies of licensees trained at the 3,000-hour level, as well as the need or justification for any increase and conclusive findings of an occupational analysis. This would be done through a standard regulatory procedure thus allowing public and stakeholder input.

The LHC recommended the Board devote adequate curriculum to patient safety, including coordination (i.e., up-to-date infection control practices, improving coordination with Western medicine) (LHC Regulation of Acupuncture, Executive Summary, page vii). The Board agrees and its main objective is to set a standard that protects the consumer and assures a level of education that is consistent with other first-contact health care professionals. All medical practitioners need a core medical curriculum leading to basic medical understanding and an awareness of the strengths and limitations of other modalities to know when to refer and how best to communicate with other practitioners. It is in the patient's best interest that all medical practitioners possess common core knowledge of medical terminology, promote adequate professional communication, competent patient case management, continuity of care and comprehension of reporting responsibilities. All health care professionals must keep up with constant changes and improvements in modern science and medicine. Acupuncturists, as well as all providers listed in the California Labor Code Section 3209.3 as ‘physicians’, are required to complete accurate, uniform, and replicable evaluations. The procedures require an evaluation of anatomical loss, functional loss, and the presence of physical complaints to be supported, to the extent feasible, by medical findings based on standardized examinations and testing techniques generally accepted by the medical community. The Board feels a licensee should have a core education and knowledge of the biomedical sciences as currently taught in acupuncture schools. Knowing how to establish a working diagnosis, when to refer, and how to communicate and interact with Western trained practitioners ensures the health, safety and welfare of the consumer.

Committee's Comment: “There has been an ongoing debate about whether licensed acupuncturists have the authority to diagnose.... it appears that the ability to diagnose is inherent in any healing art profession such as acupuncture.”

Board's Response:

The Board has never wavered in its position and legal counsel's interpretation about an acupuncturist ability to diagnose. In 2002 and 2004, the Board has requested that the Committee add the term ‘diagnose’ to B&P 4937 for clarification purposes only and recognizes this in no way would expand the scope of practice for a practitioner or change how they practice on a daily basis.

The Board's justification of this request was based on the findings of *Legal Opinion 93-11*,

wherein it found that the Legislature in repealing B&P Code Section 2155 (i.e., eliminating the need for a prior diagnosis or referral as a precondition for treatment by an acupuncturist) (Statutes of 1979, Chapter 488, effective January 1, 1980) authorized acupuncturists to diagnose a patient's condition prior to providing any treatment. Thus, although an acupuncturist is authorized to diagnose, this critical function is not clearly stated in the law. Since 1980 acupuncturists have been authorized to diagnose within their current scope and in their daily practice. Amending Section 4937 would accurately reflect the current scope and practice that acupuncturists assess and diagnose patients in order to provide an effective and quality treatment plan.

In conclusion, the Acupuncture Board should continue in its current structure to provide consumer protection through the licensure and regulation of the profession. Concluding extensive reviews and audits, the Committee and Department of Consumer Affairs supported the continuance of the Board through sunrise legislation in 1998 and again in 2002. The LHC, in their September 2004 report, made suggestions on issues about the practice and regulation of acupuncture, but did not recommend any structural changes to the Board or its status as a Board. The Governor's California Performance Review also recommended retaining the Board in its current structure, but moving it and all medical health professions under the Department of Health Services. The Board also addressed this issue on pages 7-8 of its September 1, 2004, Sunset Review Report. In addition, during the LHC's public hearing on the Governor's Reorganization Plan, the Commission made it quite clear that there are reservations as to whether or not the DCA is equipped to take on the responsibilities of the Board. Moving the Board under a bureau status would deprive the consumer of their right to public participation.

The Board has continued to provide consumer protection by strengthening the enforcement program, increasing the educational requirements, clarifying examination requirements and streamlining licensing requirements. This has been accomplished while working with a group of diverse stakeholders who don't agree, have different visions and interpretations for the scope of practice, educational standards and the concept of medicine, involve different ethnicities, cultural views and values, including stakeholders in this state, and nationally, who have varying goals for the profession. For the reasons stated above, the Board supports the retention of the California Acupuncture Board in its current structure.

The Board has felt this was a productive and constructive dialog and process. The Board will continue to work with the Committees of the Legislature towards the best interest of the consumers of acupuncture and Oriental medicine in California.

Sincerely,

Marilyn Nielsen
Executive Officer

Ccs: Governor Arnold Schwarzenegger
Department of Consumer Affairs