

TEXAS BOARD OF CHIROPRACTIC EXAMINERS
William P. Hobby Building
333 Guadalupe, Suite 3-825
Austin, Texas 78701

Committee Meetings: 8:30 a.m. – Noon
(See Committee Agendas for Times and Room Numbers)
Board Meeting: 1:00 p.m. – Adjournment
Hobby Building, Tower 2, Room 225

MINUTES FROM THE
November 17, 2011
BOARD MEETING

BOARD MEETING AGENDA

The Texas Board of Chiropractic Examiners will consider and act, if necessary, on matters within the jurisdiction of the Board which are listed on this agenda. The Board may meet from time-to-time in executive session with respect to the agenda items as authorized by the Texas Open Meetings Act, Chapter 551 of the Government Code.

1. CALL TO ORDER, ROLL CALL & ESTABLISHMENT OF A QUORUM

Cynthia Tays, D.C., President

Call to Order, Roll Call and Establishment of a Quorum. Vote as necessary on excusing any absent board members.

Action Taken: Board President Dr. Cynthia Tays called the meeting to order at 1:07 PM. All members were present with the exception of Mr. Thomas Turner. Mr. Turner's absence was approved as excused.

Others present were:

1. Yvette Yarbrough, Executive Director
2. Hal ten Brink, General Counsel
3. Scott Parker, Director of Enforcement
4. Mary Feys, Admin Assistant for Enforcement
5. Joe Thrash, Assistant Attorney General
6. Jennifer Hertsenberg, Director of Licensure
7. Arlethia Middleton, Chief Financial Officer

2. APPROVAL OF MINUTES

Cynthia Tays, D.C.

Approval of Minutes from July 28, 2011 Board Meeting

Action Taken: Dr. Montgomery **MOVED** and Dr. Champion **SECONDED** the motion to approve the minutes from the July 28, 2011 Board Meeting. After

consideration, the Board **APPROVED** without changes the minutes from the July 28, 2011 meeting.

3. PUBLIC COMMENTS

Cynthia Tays, D.C.

Forum for licensees, the general public or other interested stakeholders to address the Board

Action Taken: Dr. Tays opened the floor to public comments. There were multiple comments made by members of the public:

- *Gary Brettmann, D.C. – regarding a Board member possibly practicing outside the scope of practice allowed in Texas*

4. EXECUTIVE COMMITTEE BUSINESS

Cynthia Tays, D.C.

4.1 President's Report (*Cynthia Tays, D.C.*)

Dr. Cynthia Tays may make a brief oral report to the Board on matters of current interest.

Action Taken: None. This item was for informational purposes only.

4.2 Executive Director's Report (*Yvette Yarbrough*)

Executive Director Yvette Yarbrough will present written and oral reports to the Board concerning recent agency activities, statistical reports, audit outcomes, revenues and expenditures, licensing information, enforcement information and issues from the past legislative session. Mrs. Yarbrough will answer questions from the board members concerning any agency operations, legislative issues and other matters of concern to the Board.

Action Taken: None. This item was for informational purposes only.

4.3 Consideration of adoption of proposed Operating Budget for FY 2012

Action Taken: Dr. Thomas **MOVED** and Ms. Woodruff **SECONDED** the motion to approve the FY 2012 agency operating budget. After consideration, the Board **APPROVED** the agency operating budget.

5. LICENSURE AND EDUCATIONAL STANDARDS COMMITTEE BUSINESS

Patrick Thomas, D.C.

5.1 Request for Approval to Sit for the Jurisprudence Exam:

5.1.1 Marissa Ann Baker, Applicant\

Action Taken: The Board **APPROVED** Ms. Baker's request to sit for the jurisprudence exam, with the condition that upon issuance, Ms. Baker's license will be suspended for two and a half (2.5) years, fully probated, and that her license will be revoked if she is convicted of any offense during her period of probated suspension.

5.1.2 James Edward Stubbs, Applicant

Action Taken: Mr. Elizarde **MOVED**, Ms. Woodruff **SECONDED** and the Board **APPROVED** Mr. Stubbs' request to sit for the jurisprudence exam, with the condition that upon issuance, Mr. Stubbs' license will be suspended for two (2) years, fully probated, during which time he must undergo random alcohol/drug testing one (1) time per month.

5.1.3 Justin Kenneth Helm, Applicant

Action Taken: Dr. Thomas **MOVED**, Dr. McCullough **SECONDED** and the Board **APPROVED** Mr. Helm's request to sit for the jurisprudence exam, with the condition that upon issuance, Mr. Stubbs' license will be suspended for two (2) years, fully probated, during which time he must undergo random alcohol/drug testing once every three (3) months for the first year and once every six (6) months for the second year..

5.1.4 Kevin Wayne Crump, Applicant

Action Taken: Dr. Thomas **MOVED**, Ms. Woodruff **SECONDED** and the Board **APPROVED** Mr. Crump's request to sit for the jurisprudence exam.

5.2 Consideration to recommend changes to Rule 71.15 Recognized Specialties to reflect requirements for Acupuncture as a recognized Chiropractic Specialty as approved at the May 19, 2011 Board Meeting.

5.2.1 Suggested Acupuncture Requirements for Chiropractic Specialty Recognition

Action Taken: None.

5.3 Consideration to recommend changes to Rule 71.15 Recognized Specialties to reflect requirements for Nutrition as a recognized Chiropractic Specialty as approved at the May 19, 2011 Board Meeting.

5.3.1 Suggested Nutrition Requirements for Chiropractic Specialty Recognition

Action Taken: None.

5.4 Comments from Committee Chair concerning Committee business, activities or issues.

5.4.1 Approved Seminar Complaint

Action Taken: None.

5.4.2 Medicare Continuing Education Evaluation Summaries

Action Taken: None.

6. RULES COMMITTEE BUSINESS

Janette Kurban, D.C.

6.1 Consideration of Previously Proposed New Rules or Rule Amendments Eligible for Adoption

6.1.1 Consideration to adopt amendments to Rule 71.13 regarding Chiropractic Specialties to eliminate the fee charged in an application for recognition of a specialty. The proposed amendment was published in the September 16, 2011, edition of the Texas Register. No comments on the proposed amendment were received during the comment period.

Action Taken: After consideration, the Board **APPROVED** the motion to adopt the proposed Rule 71.13 without changes.

6.1.2 Consideration to adopt amendments to Rule 75.1 regarding Grossly Unprofessional Conduct to add “or may result” into the rule prohibiting overtreating/overcharging, to make the rules on sexual misconduct more clear, and to add a requirement that licensees provide gowns/draping for patients disrobing. The proposed amendment was published in the September 30, 2011, edition of the Texas Register. One comment on the proposed amendment was received during the comment period.

Action Taken: Dr. Kurban **MOVED** and Ms. Woodruff **SECONDED** that the proposed Rule 75.1 be adopted with the following changes in response to comments: 1) deletion of the word “may” and replacement with “are intended to” in the proposed language of subsection (a)(4); 2) insertion of the phrase “and/or draping” after the phrase “and should provide appropriate gowns” in subsection (e); 3) deletion of the sentence “A licensee should not be present in the room when a patient is dressing or undressing” in subsection (e). After consideration, the Board **APPROVED** the motion to adopt the proposed Rule 75.1 with the changes noted.

- 6.1.3 Consideration to adopt amendments to Rule 77.2 regarding Publicity to make the rules regarding advertising more specific. The proposed amendment was published in the September 30, 2011, edition of the Texas Register. No comments were received during the comment period.

Action Taken: Dr. Kurban **MOVED** and Ms. Woodruff **SECONDED** that the proposed Rule 77.2 be withdrawn and republished with the following changes: 1) deletion of subsection (i)(4); and 2) insertion of an effective date for subsection (i) of June 1, 2012. After consideration, the Board **APPROVED** the motion to withdraw and re-propose Rule 77.2 with the changes noted.

- 6.1.4 Consideration to adopt amendments to Rule 80.1 regarding Delegation of Authority to clarify that, in subsection (c)(2), a DC needs to be on-site, even though he/she does not need to be in the treatment room. The proposed amendment was published in the October 7, 2011, edition of the Texas Register. No comments were received during the comment period.

Action Taken: Dr. Kurban **MOVED** and Ms. Woodruff **SECONDED** that the proposed Rule 80.1 be adopted without changes. After consideration, the Board **APPROVED** the motion.

- 6.1.5 Consideration to adopt new Rule 81.1 regarding Definitions and new Rule 81.3 regarding Petition for Adoption of Rules to promulgate rules required the Administrative Procedures Act, § 2001.021 outlining the form of such a petition and the procedure for its submission, consideration, and disposition. The proposed amendment was published in the October 7, 2011, edition of the Texas Register. No comments were received during the comment period.

Action Taken: Dr. Kurban **MOVED** and Ms. Woodruff **SECONDED** that the proposed Rules 81.1 and 81.3 be adopted without changes. After consideration, the Board **APPROVED** the motion.

- 6.1.6 Discussion of and consideration to adopt proposed amendments to Rule 75.2 Proper Diligence and Efficient Practice of Chiropractic. The proposed amendment was published in the June 24, 2011, edition of the Texas Register. Multiple comments on the proposed amendment were received during the comment period. Multiple “work sessions” have been held to discuss further amendments to the rule with the public, licensees, and stakeholders.

Action Taken: None.

- 6.1.7 Discussion of and consideration to adopt proposed amendments to Rule 75.17 Scope of Practice. The proposed amendment was published in the June 24, 2011, edition of the Texas Register. Multiple comments on the proposed amendment were received during the comment period. Multiple “work sessions” have been held to discuss further amendments to the rule with the public, licensees, and stakeholders.

Action Taken: None.

6.2 Consideration of Proposals for New Rules or Amendments to Existing Rules

- 6.2.1 Consideration to propose amendments to Rule 71.15 regarding Recognized Specialties to outline the specialty requirements for Chiropractic Neurology, Acupuncture, and Nutrition

Action Taken: Regarding acupuncture, Dr. Kurban **MOVED** and Ms. Woodruff **SECONDED** that the proposed Rule 71.15 be published for comment. After consideration, the Board **APPROVED** the motion. The Board tabled discussion regarding chiropractic neurology and nutrition.

- 6.2.2 Consideration to propose new Rule 75.27 regarding Animal Chiropractic

Action Taken: None.

- 6.2.3 Consideration to propose amendments to Rule 77.5 regarding Misleading Claims to make the rules regarding advertising more specific

Action Taken: Dr. Kurban **MOVED** and Ms. Woodruff **SECONDED** that the proposed Rule 77.5 be published for comment. After consideration, the Board **APPROVED** the motion.

- 6.2.4 Consideration to propose amendments to Rule 80.1 regarding Delegation of Authority to define “on-call” in subsection (i).

Action Taken: Dr. Kurban **MOVED** and Ms. Woodruff **SECONDED** that the proposed Rule 80.1 be published for comment. After consideration, the Board **APPROVED** the motion.

6.3 Discussion Items

- 6.3.1 Discussion of issues seen by Enforcement Committee members concerning overtreatment/overcharging complaints submitted by TDI, Workers Comp, and insurance companies. Members of the Enforcement Committee would like to discuss their concerns with the current rule.

Action Taken: None.

- 6.3.2 Discussion of what training/courses are approved by the Board pursuant to Rule 75.17(c)(3)(A) for a licensee to perform EMG and NCV.

Action Taken: After consideration, the Board stated that the Board-approved training consisted of training by CCE-approved schools and diplomate programs.

- 6.3.3 Discussion of proposed amendment to Rule 75.7 regarding fee increases. This proposed amendment was published in the *Texas Register* on October 21, 2011, and will be eligible for adoption on November 20, 2011.

Action Taken: None.

6.4 Scope of Practice Questions

- 6.4.1 Question regarding whether the use of non-needle auriculotherapy (using the Jimar bi-polar auriculotherapy equipment developed by Dr. Paul Nogier) is permitted under our rules.

Action Taken: The Board directed staff that non-needle auriculotherapy falls under the same rules as physical medicine modalities. The Board also stated that they do not endorse specific machines or instruments.

- 6.4.2 Question regarding whether the Bio-Energetic Synchronization Technique (BEST) is within the chiropractic scope of practice in Texas.

Action Taken: The Board directed staff to answer the questioner that the March 9, 2004 policy letter regarding BEST is not current. Additionally, the Board directed staff to answer that “the challenges currently directed toward the scope of practice in Texas” will not affect BEST utilization in Texas.

- 6.4.3 Follow-up on question from July 28 Board meeting regarding question about the online advertisement of the sale of nutritional products and whether this implies a “diagnosis”

Action Taken: The Board directed staff to answer that anytime a licensee consults with a patient, he/she is practicing. Therefore, anytime the licensee consults with an individual, he/she must comply with the scope of practice of Texas chiropractic. If the licensee is in Texas but the patient is not in Texas, the licensee is practicing in Texas but no rules would be violated.

6.5 Update on other issues under consideration by the Committee

Comments from Committee chair Dr. Janette Kurban concerning Committee business, activities or issues.

Action Taken: None.

7. ENFORCEMENT COMMITTEE BUSINESS

Larry Montgomery, D.C.

7.1 Consideration of SOAH Proposals for Decisions

There are no SOAH Proposals for Decision for consideration

Action Taken: None.

7.2 Consideration of Accepted Agreed Orders: The Board will consider approval of the following Agreed Orders that have been recommended by the Enforcement Committee and accepted by the Respondents.

- 7.2.1 Case #108-242
- 7.2.2 Case #110-139
- 7.2.3 Case #110-266
- 7.2.4 Case #111-012
- 7.2.5 Case #111-013
- 7.2.6 Case #111-021/111-031
- 7.2.7 Case #111-090/111-091
- 7.2.8 Case #111-114
- 7.2.9 Case #111-147
- 7.2.10 Case #111-162
- 7.2.11 Case #111-217
- 7.2.12 Case #111-230
- 7.2.13 Case #111-232
- 7.2.14 Case #111-239
- 7.2.15 Case #111-244
- 7.2.16 Case #111-150/111-152/111-189
- 7.2.17 Case #110-220
- 7.2.18 Case #111-069

Action Taken: Dr. Montgomery **MOVED** and Dr. Kurban **SECONDED** that the above Agreed Orders be approved. After consideration, the Board **APPROVED** the motion.

7.3 Recommendations to Approve or Deny Requests to Expunge Records

- 7.3.1 Case #101-670
- 7.3.2 Case #103-157
- 7.3.3 Case #104-167

Action Taken: Dr. Kurban **MOVED** and Ms. Woodruff **SECONDED** that the above expungement requests be approved. After consideration, the Board **APPROVED** the motion.

7.4 Statutory Suspensions or Revocations for Felony Convictions and/or Imprisonment

7.4.1 Case #108-142/110-048/110-049/110-195/110-196

Action Taken: Dr. Montgomery **MOVED** and Dr. Champion **SECONDED** that the Statutory Revocation be approved. After consideration, the Board **APPROVED** the motion.

7.4.2 Case #111-268

Action Taken: Dr. Montgomery **MOVED** and Dr. Champion **SECONDED** that the Statutory Suspension be approved. After consideration, the Board **APPROVED** the motion.

7.5 Comments from Enforcement Chair Dr. Larry Montgomery on any Committee business, activities or issues.

Action Taken: None.

8. EXECUTIVE SESSION

Cynthia Tays, D.C.

The Board may meet in Executive Session for:

Consultation with counsel pursuant to Section 551.071, Government Code wherein the Board and essential staff will receive a briefing from assigned Assistant Attorney General and General Counsel concerning pending or contemplated litigation and settlement offers and personnel issues including but not limited to:

- 8.1 Texas Medical Association lawsuit against the Board, including Board's appeal, concerning MJA, Needle EMG and Diagnosis.
- 8.2 Texas Medical Association lawsuit against the Board regarding Rule 75.17 Scope allowing DCs to perform Vestibular-Ocular-Nystagmus testing.
- 8.3 TBCE vs. Abbott regarding disclosure of some contents of Board investigative files
- 8.4 Michael Maddox vs. TBCE and Board Members – Lawsuit brought by Mr. Maddox challenging the Board's decision to dismiss his case at SOAH regarding his relicensure

The Board will reconvene in open session after Executive Session to vote on items considered in Executive Session as necessary.

Action Taken: None. The Board went into Executive Session at 4:47 PM and reconvened in public session at 5:16 PM. The above listed agenda items were discussed in Executive Session. No action was taken on the agenda items while in Executive Session.

9. CONSIDERATION OF MOTIONS RELATED TO ITEMS DISCUSSED IN EXECUTIVE SESSION

Cynthia Tays, D.C.

Board members will have the opportunity to offer motions related to any items discussed in Executive Session.

9.1 Consideration of Motions Related to Executive Session

Action Taken: Dr. Montgomery **MOVED** and Ms. Woodruff **SECONDED** to direct legal staff to pursue an appeal regarding Agenda Item 8.3. The Board **APPROVED** this motion.

10. CALL FOR FUTURE ITEMS for discussion and/or consideration by the Board

Cynthia Tays, D.C.

Action Taken: None.

11. MEETING DATES & ADJOURNMENT

Cynthia Tays, D.C.

11.1 The planned Board meeting dates for the remainder of Calendar Years 2011 & 2012 are:

- | | |
|-----------------------|-----------------------|
| (1) February 23, 2012 | (5) February 21, 2013 |
| (2) May 24, 2012 | (6) May 23, 2013 |
| (3) August 16, 2012 | (7) August 15, 2013 |
| (4) November 15, 2012 | (8) November 21, 2013 |

*Note: All planned board meeting dates through November 2015 may be found on the agency's website (under "Calendar") at: www.tbce.state.tx.us. All dates are tentative until posted in the Texas Register.

11.2 The next Enforcement Committee dates apart from the board meetings are scheduled for:

- (1) January 10, 2012
- (2) March 13, 2012
- (3) July 10, 2012
- (4) September 11, 2012

11.3 Adjournment at: 5:18 PM.

Note: Persons with disabilities who plan to attend this meeting and who may need auxiliary aids, services, or special accommodations should contact Ms. Mary Feys at 512-305-6901 a minimum of two (2) working days prior to the meeting so that appropriate accommodations can be made.

Action Taken: Dr. Tays reminded members of the next board meeting date and adjourned the meeting at approximately 5:18 PM.

Statement: I affirm that the above is a true and correct rendering of the minutes for the Texas Board of Chiropractic Examiners Board Meeting held on the above referenced date. These minutes from the board meeting held on November 17, 2011 were approved by the Texas Board of Chiropractic Examiners at its next regularly scheduled board meeting held on February 23, 2012.

Yvette Yarbrough
Executive Director
Texas Board of Chiropractic Examiners

February 23, 2012
Date