IN THE COURT OF APPEALS OF THE STATE OF OREGON

OREGON ASSOCIATION OF ACUPUNCTURE AND ORIENTAL MEDICINE, ALFRED TIEME AND E. CHRISTO GORAWSKI, Petitioners, v. BOARD OF CHIROPRACTIC EXAMINERS, Respondent, and, UNIVERSITY OF WESTERN STATES AND JOHN L. V. PLATT, D.C., P.C. dba WOODSTOCK CHIROPRACTIC CLINIC, Interveners-Respondents.	CA A148924

RESPONDENT BOARD OF CHIROPRACTIC EXAMINERS' ANSWERING BRIEF

Petition for Judicial Review of the Final Order of the
Board of Chiropractic Examiners

Continued…

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RESPONDENT BOARD OF CHIROPRACTIC EXAMINERS' ANSWERING BRIEF

STATEMENT OF THE CASE

Respondent the Oregon Board of Chiropractic Examiners ("OBCE") accepts the statement of the case of petitioner Oregon Association of Acupuncturists and Oriental Medicine ("OAAOM"). OBCE sets out OAAOM's question presented below, for convenience.

Question presented

Did the OBCE exceed its statutory authority by promulgating OAR 811-015-0036, the dry needling rule, in contravention of ORS chapter 684 and ORS chapter 677, thus rendering the rule invalid?

Summary of arguments

This is a facial rule challenge under ORS 183.400 to a rule adopted by the OBCE. OAR 811-015-0036 provides that the scope of chiropractic treatment of myofascial trigger points includes "dry needling," which the rule defines as:

> a technique used to evaluate and treat myofascial trigger points that uses a dry needle, without medication, that is inserted into a trigger point that has been identified by examination * * * with the goal of releasing/inactivating the trigger points, relieving pain and/or improving function.

OAAOM contends that the rule exceeds the OBCE's statutory authority because it "departs from the legal standard * * * in the particular law being

administered," and because it "contravene[s] some other applicable statute." On the contrary, nothing in the law being administered, ORS chapter 684, suggests that dry needling departs from the legal standards governing the practice of chiropractic.

In addition, OAR 811-015-0036 does not contravene another "applicable statute." OAAOM asserts that the rule contravenes ORS 677.759(1), which prohibits the unauthorized practice of acupuncture. That argument fails, because ORS chapter 677, which governs the practice of medicine (including acupuncture) is expressly made not applicable to the practice of chiropractic by ORS 677.060. ORS 677.060(6) unambiguously provides that ORS chapter 677 "does not affect or prevent" the practice of chiropractic by any authorized person. And the Oregon appellate courts have repeatedly distinguished the practice of medicine from the practice of chiropractic. Thus, OBCE's rule does not and cannot contravene ORS 677.759(1).

Even if ORS 677.759(1) were somehow applicable to the OBCE's rule, there is no conflict between that statute and the dry needling rule. Contrary to OAAOM's underlying premise, dry needling is not "acupuncture." The practice of acupuncture, like chiropractic, has many components. The therapeutic use of needles is only one treatment modality—and no statute prohibits two separately regulated areas of practice from using the same treatment modality.

The use of dry needles to release trigger points may overlap the practice of acupuncture, but no statute makes that modality exclusive to acupuncturists. OAR 811-015-0036 does not contravene the legal standards expressed in the statutes governing chiropractic. The OBCE did not exceed its statutory authority in adopting the dry needling rule.

ANSWER TO ASSIGNMENT OF ERROR

The OBCE did not exceed its statutory authority in adopting the dry needling rule.

Preservation of error

This is an original proceeding in the Court of Appeals under ORS 183.400. There are no applicable preservation requirements.

Standard of review

This court explained the standards it applies in a rule challenge under ORS 183.400(4) in *Industrial Customers of Northwest Utilities v. Oregon Dept. of Energy*, 238 Or App 127, 129-130, 241 P3d 352 (2010). The court may invalidate a rule only if it finds that, in adopting the rule, the agency violated the constitution, exceeded its statutory authority, or failed to comply with applicable rulemaking procedures. ORS 183.400(4). OAAOM challenges the rule only on the ground that it exceeds the OBCE's statutory authority. ORS l83.400(4)(b). The court's review is confined to that legal issue.

When the court examines whether an agency exceeded its statutory authority, the record on review "consists of two things only: the wording of the rule itself (read in context) and the statutory provisions authorizing the rule." *Wolf v. Oregon Lottery Commission*, 344 Or 345, 355, 182 P3d 180 (2008) (citing ORS 183.400(3)).

The court considers whether the agency's adoption of the rule exceeded the authority granted by statute and, after that, whether the agency "departed from a legal standard expressed or implied in the particular law being administered, or contravened some other applicable statute." *Friends of Columbia Gorge v. Columbia River*, 346 Or 366, 377, 213 P3d 1164 (2009) (quoting *Planned Parenthood Ass'n v. Dept. of Human Res.*, 297 Or 562, 565, 687 P2d 785 (1984) (internal quotation marks omitted)). "The question in determining if a rule exceeds statutory authority is whether the rule corresponds to the statutory policy as we understand it." *Managed Healthcare Northwest v. DCBS*, 338 Or 92, 96, 106 P3d 624 (2005) (quoting *Planned Parenthood Ass'n*, 297 Or at 573 (internal quotation marks and brackets omitted)).

ARGUMENT

A. OBCE's rule does not exceed its statutory authority.

The court's analysis begins with the wording of OAR 811-015-0036 and the authorizing statutory provisions. *Friends of Columbia Gorge*, 346 Or at 377.

ORS 684.155 grants the board broad authority to adopt rules:

> In addition to any other powers granted by this chapter, the State Board of Chiropractic Examiners may:
>
> (1) Adopt necessary and proper rules:
>
> (a) Establishing standards and tests to determine the moral, intellectual, educational, scientific, technical and professional qualifications of applicants for licenses to practice in this state.
>
> (b) To enforce the provisions of this chapter and to exercise general supervision over the practice of chiropractic within this state.
>
> * * * * *

OAR 811-015-0036 provides that "[d]ry needling is within the chiropractic physicians' scope of practice for the treatment of myofascial triggerpoint pursuant to ORS 684.010(2)." OAR 811-015-0036 defines "dry needling" as "a technique used to evaluate and treat myofascial trigger points that uses a dry needle, without medication, that is inserted into a trigger point * * * with the goal of releasing/inactivating the trigger points, relieving pain and/or improving function."

The question on judicial review is whether OAR 811-015-0036 "corresponds to the statutory policy as [the court] understand[s] it." *Planned Parenthood Ass'n*, 297 Or at 573. To the extent that a rule "departs from the statutory policy directive, it 'exceeds the statutory authority of the agency' within the meaning of those words in ORS 183.400(4)(b)." 297 Or at 573.

OAAOM asserts that OBCE's rule exceeds its statutory authority in three ways. First, OAAOM argues that the rule departs from the statutory policy because dry needling does not fall within the statutory definition of "chiropractic," in ORS 684.010(2). Second, OAAOM claims that the rule departs from the policy expressed in ORS 684.025(2). Third, OAAOM asserts that the rule contravenes the policy expressed in ORS 684.035. All of OAAOM's arguments fail, for the reasons explained below.

1. The dry needling rule does not fall outside the definition of "chiropractic" in ORS 684.010(2).

OAAOM contends that OAR 811-015-0036 is invalid because dry needling does not fall within the statutory definition of "chiropractic." ORS 684.010(2) defines "chiropractic" as:

> (a) That system of adjusting with the hands the articulations of the bony framework of the human body, and the employment and practice of physiotherapy, electrotherapy, hydrotherapy and minor surgery.
>
> (b) The chiropractic diagnosis, treatment and prevention of body dysfunction; correction, maintenance of the structural and functional integrity of the neuro-musculoskeletal system and the effects thereof or interferences therewith by the utilization of all recognized and accepted chiropractic diagnostic procedures and the employment of all rational therapeutic measures as taught in approved chiropractic colleges.

In contending that dry needling is outside that definition, OAAOM simply asserts, without explanation, that dry needling does not involve physiotherapy, electrotherapy, hydrotherapy or minor surgery, under ORS 684.010(2)(a). Based on its unexplained conclusion that dry needling is

not physiotherapy under ORS 684.010(2)(a), OAAOM asserts that dry needling is not chiropractic "treatment * * * of bodily dysfunction," under ORS 684.010(2)(b).

OAAOM offers no reason for excluding dry needling from the category of "physiotherapy." The dictionary definition of "physiotherapy" is "physical therapy." *Webster's Third New Int'l Dictionary* 1707 (unabridged ed 2002). "Physical therapy," in turn, is defined as "the treatment of disease, injury, or disability by physical and mechanical means (as massage, regulated exercise, water, light, heat, electricity)." *Id*. Dry needling falls within the category of treatment by physical or mechanical means, *i.e*., of physiotherapy.

What is more, OAAOM's argument contravenes ORS 684.010(2)(b), which includes within "chiropractic" "the employment of all rational *therapeutic measures* as taught in approved chiropractic colleges." ORS 684.010(2)(b). (Emphasis added.) *See Nickila v. Board of Chiropractic Examiners*, 124 Or App 380, 382, 862 P2d 555 (1993) (The court ruled that the activities in which petitioner engaged fell squarely within the plain meaning of "diagnosis," "treatment," "prevention" and "employment of * * * therapeutic measures.").

OAAOM fails to differentiate between a category of therapy or treatment (listed in subsection (2)(a)), and a therapeutic "measure," or modality (authorized by subsection (2)(b)). A therapeutic "modality" is "any of several

agencies used in physical therapy (as diathermy, high-frequency currents, or massage)." *Webster's* at 1451. Dry needling is a modality—*i.e.*, a measure—used in physiotherapy. The OBCE refers to the diagnostic and therapeutic procedures and measures in ORS 684.010(2)(b) as "ETSDP" (examination, test, substance, device or procedure). The OBCE's administrative rule provides, in pertinent part: "A Chiropractic physician may use any diagnostic and/or therapeutic ETSDP which is considered standard." OAR 811-015-0070(2) (defining a standard ETSDP). Examples of ETSDP include diagnostic x-rays, phototherapy (laser light therapy), electrolysis, and venipuncture (drawing blood). *See*, *e.g.*, *Educational Manual for Diagnostic Chiropractic*, Ch 2, "Diagnostic Imaging";[1] OAR 811-030-0020 (defining scope of radiography in chiropractic); *Guide to Policy and Practice Questions*, 15, 16-17, 20.[2] Under OAR 811-015-0036, dry needling is an approved ETSDP.

Finally, OAAOM contends that evidence at the rulemaking hearings "made clear" that "the dry needling treatment modality" was not being taught in

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[1] OCBE asks to the court to take judicial notice of this publication. http://www.oregon.gov/OBCE/publications/final_dx_imaging.pdf

[2] OCBE asks to the court to take judicial notice of this publication. Note that the publication's provisions on acupuncture pre-date the rule at issue, OAR 811-015-0036. http://www.oregon.gov/OBCE/publications/Guide_to_Policy_Practice.pdf

any OBCE-approved chiropractic college. Pet Br 13-14. That argument lacks merit, under *Wolf v. Oregon Lottery Commission*. When the court examines whether an agency exceeded its statutory authority, the record on review "consists of two things only: the wording of the rule itself (read in context) and the statutory provisions authorizing the rule." 344 Or at 355 (citing ORS 183.400(3)). A reviewing court may not "consider, in addition to the relevant statutes and the wording of the rule (read in context), particular evidence that was offered in the course of the rulemaking proceeding * * *." 344 Or at 355.

OAAOM mistakenly relies on *Waterwatch of Oregon, Inc. v. Water Resources Com'n*, 199 Or App 598, 614-15, 112 P3d 443 (2005), as creating an exception to the *Wolf* rule. It does not. *Waterwatch* was decided before *Wolf*, and in *Wolf* the court emphatically prohibited the use of the rulemaking record in a facial rule challenge under ORS 183.400. Overruling the Court of Appeals' analysis that relied on *Waterwatch*, the Supreme Court wrote:

> It was error for the court to consider the record in the way that it did, and further error to utilize that record as a justification for striking down the Lottery's rule. The governing statute, ORS 183.400(3), could not be phrased more plainly.

In particular, the court ruled, ORS 183.400 did not permit the reviewing court to consider "particular evidence that was offered in the course of the

rulemaking proceeding or the comments of individual rulemakers concerning that evidence and their thoughts about their rulemaking task." 344 Or at 355.

OAAOM improperly asks this court to consider evidence in the rulemaking record. That is something the court is expressly prohibited from doing under ORS 183.400 and *Wolf*.

In sum, OAR 811-015-0036 corresponds to the statutory policy in ORS 684.010(2). The rule is not invalid on its face, as OAAOM claims.

2. The dry needling rule does not authorize administration of a "substance" by penetrating the skin, contrary to ORS 684.025(2).

ORS 684.025(2) provides:

> Neither this section nor ORS 684.010 authorizes the administration of any substance by the penetration of the skin or mucous membrane of the human body for a therapeutic purpose.

ORS 684.025 has no bearing on the validity of OAR 811-015-0036, because the needles used in dry needling are not a "substance" "administered" for a therapeutic purpose. The most pertinent dictionary definition of "administer" is "to give remedially <as medicine>[.]" *Webster's* at 27.

The dictionary definitions of "substance" include:

> 4 a: a material from which something is made and to which it owes it characteristic qualities <the special ~s of nerve tissues> <a fabric of unknown ~) b (1): a distinguishable kind of physical matter (2) a piece of mass of such substance <struck by some hard ~> <an oily ~> <cork is a ~ of distinctive properties> c: a matter of definite or known chemical composition: an identifiable chemical element, compound, or mixture – sometimes restricted to compounds and elements * * *

Webster's at 2279. The Merriam-Webster online dictionary offers the following variation:

> 3. *a* **:** physical material from which something is made or which has discrete existence *b* **:** matter of particular or definite chemical constitution *c* : something (as drugs or alcoholic beverages) deemed harmful and usually subject to legal restriction <possession of a controlled substance> <substance abuse>

http://www.merriam-webster.com/dictionary/substance

OAAOM's attempt to fit a needle within the definition of "substance" is strained, at best. Using OAAOM's proffered definitions, "substance" means "a material from which something is made and to which it owes its characteristic qualities," "a piece or mass of such substance," "that which has mass and occupies space; matter," and "[a] material of a particular kind or constitution." Pet Br 15. A needle *has* substance and *has* mass, and it is *made of* matter. But a needle is not, as OAAOM asserts, "a 'mass' that 'occupies space.'" Pet Br 15. OAAOM's argument that "the tip of an acupuncture needle is a 'substance' under ORS 684.025(2)" is simply not plausible.

The policy underlying ORS 684.025(2) is suggested by the prohibition on "administering drugs" in ORS 684.015(3): " No person practicing under this chapter shall *administer* or write prescriptions for, or dispense *drugs*, practice optometry or naturopathic medicine or do major surgery. ORS 684.010(4) defines "drugs": "'Drugs' means all medicines and preparations and *all*

substances, *except* over-the-counter nonprescription *substances*, food, water and nutritional supplements *taken orally*, used or intended to be used for the diagnosis, cure, treatment, mitigation or prevention of diseases or abnormalities of humans[.]" (Emphasis added.) ORS 684.025(2)'s prohibition on administering substances by penetrating the skin or mucous membrane seems to be of a piece with those two statutes, and to express the same policy: a chiropractor may not administer "drugs" by needle.

Consistently with that policy, OAR 811-015-0036(1) defines "dry needling" as follows:

> Dry Needling is a technique used to evaluate and treat myofascial trigger points that uses a dry needle, without medication, that is inserted into a trigger point that has been identified by examination in accordance with OAR 811-015-0010 with the goal of releasing/inactivating the trigger points, relieving pain and/or improving function.

The dry needles used in dry needling, without medication, are neither a "substance" nor "administered," under the ordinary meaning of those words. Accordingly, the rule does not contravene ORS 684.025(2) or the policy it expresses.

3. OBCE's rule does not "interfere with" acupuncture, contrary to ORS 684.035.

ORS 684.035 provides: "Nothing in this chapter shall be construed to interfere with any other method or science of healing in this state." The dry needling rule does not "interfere with" acupuncture, as OAAOM claims.

Formerly numbered ORS 684.120, and before its amendment in 1919, that statute provided:

> Any person who shall practice or attempt to practice, or any person who shall buy, sell or fraudulently obtain a diploma or license, or who shall use the title chiropractic DC or any person who shall violate any provisions of this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not less than fifty dollars nor more than two hundred dollars of by imprisonment in the county jail for not less than thirty days or more than one year the same being at the direction of the court. Nothing in this act shall be construed to interfere with any other method or science of healing in this state.

Former ORS 684.120.

ORS 684.035 does not define "interfere." The most pertinent dictionary meaning of "interfere" is "to come in collision : to be in opposition: to run at cross-purposes: clash * * * 3: to enter into or take a part in the concerns of others: intermeddle, interpose, intervene[.]" *Webster's* at 1178. In view of its original text, ORS 684.035 can reasonably be read to mean that the OBCE lacked disciplinary authority over non-chiropractic practitioners acting within the scope of their own professions.

Although acupuncture and chiropractic both use dry needles as a treatment modality, there is no statutory reason that both disciplines may not

share that modality.[3] To the contrary, the Oregon Supreme Court has held that two different disciplines may lawfully overlap. In *Sutton v. Cook*, 254 Or 116, 120, 458 P2d 402 (1969), the court held: "The fact, then, that the diagnosis or treatment of a fracture constitutes the practice of medicine under ORS 677.085 does not make unlawful the diagnosis or treatment of a fracture by a chiropractor." And in *Zeh v. National Hospital Ass'n*, 233 Or 221, 231-32, 377 P2d 852 (1963), that court held that the chiropractor's services were covered by the plaintiff's insurance policy, because "it [was] clear that the services which were rendered to the plaintiff by the chiropractor to whom he resorted were of the same kind that medical doctors render. In other words, had they been performed by a medical doctor they would have been deemed medical care."

In the context of expert evidence, that court has long recognized that different branches of the healing arts may use the same techniques, methods, practices, and tools. *See Creasey v. Hogan*, 292 Or 154, 156, 162, 637 P2d 114 (1981) (the admissibility of testimony from practitioners from other disciplines turns on "whether the procedures, practices, precepts, methods, treatments or techniques which are at issue are identical or generally similar") (discussing

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[3] Because this is a facial challenge to the rule under ORS 183.400, there is necessarily no showing of actual "interference." An argument that the

Footnote continued…

cases); *Wemmett v. Mount*, 134 Or 305, 313, 292 P 93 (1930) (the record showed "the use of a diathermy machine * * * is common to both regular physicians and chiropractors").

OBCE includes within the scope of chiropractic other procedures that are shared by practitioners in other disciplines, such as diagnostic x-rays, phototherapy (laser light therapy), electrolysis, and venipuncture (drawing blood). *See*, *e.g.*, *Educational Manual for Diagnostic Chiropractic*, Ch 2, "Diagnostic Imaging";[4] OAR 811-030-0020 (defining scope of radiography in chiropractic); *Guide to Policy and Practice Questions*, 15, 16-17, 20.[5]

Accordingly, OAAOM has failed to establish that OAR 811-015-0036 departs from the policy expressed in ORS 684.035.

B. OBCE's rule does not contravene "another applicable statute."

OAAOM contends that dry needling, as authorized by OAR 811-015-0036, falls within the statutory definition of acupuncture. ORS 677.759(1)

(…continued)
practice of chiropractic interferes with the practice of acupuncture, as a factual matter, would have to be made in an as-applied challenge to the rule.

[4] OCBE asks to the court to take judicial notice of this publication. http://www.oregon.gov/OBCE/publications/final_dx_imaging.pdf

[5] OCBE asks to the court to take judicial notice of this publication. Note that the publication pre-dates the rule at issue, OAR 811-015-0036. http://www.oregon.gov/OBCE/publications/Guide_to_Policy_Practice.pdf

authorizes the OMB to regulate acupuncture. Therefore, OAAOM asserts, the dry needling rule "usurps" the OMB's authority and "circumvents" ORS 677.759(1).

At the outset, OAAOM's underlying premise is wrong. Dry needling is not "acupuncture," even though both involve the use of needles inserted into the skin. ORS 677.757 defines acupuncture as follows:

> (1)(a) "Acupuncture" means an Oriental health care practice used to promote health and to treat neurological, organic or functional disorders by the stimulation of specific points on the surface of the body by the insertion of needles. "Acupuncture" includes the treatment method of moxibustion, as well as the use of electrical, thermal, mechanical or magnetic devices, with or without needles, to stimulate acupuncture points and acupuncture meridians and to induce acupuncture anesthesia or analgesia.
>
> (b) The practice of acupuncture also includes the following modalities as authorized by the Oregon Medical Board:
>
> (A) Traditional and modern techniques of diagnosis and evaluation;
>
> (B) Oriental massage, exercise and related therapeutic methods; and
>
> (C) The use of Oriental pharmacopoeia, vitamins, minerals and dietary advice.

As discussed above, the therapeutic use of dry needles is a modality shared by the practices of chiropractic and acupuncture. In other words, the practice acupuncture includes the insertion of needles, but the insertion of dry needles is not, as a matter of law, the practice of acupuncture.

More importantly, OAAOM's reliance on ORS 677.759 is misplaced. Contrary to OAAOM's apparent assumption, the statutes in Chapter 677 are not "other applicable statutes," within the meaning of ORS 183.400. That is, the statutes in ORS chapter 677 do not apply to the OBCE's rule. The purpose of ORS chapter 677 is the regulation and licensing of "the practice of medicine." ORS 677.015.[6] OAAOM's argument is dispositively refuted by ORS 677.060(6), which expressly provides that Chapter 677 does not "affect" the practice of chiropractic.[7] *Sutton v. Cook*, 254 Or 116, 119-20, 458 P2d

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[6] ORS 677.015 provides:

> Recognizing that to practice medicine is not a natural right of any person but is a privilege granted by legislative authority, it is necessary in the interests of the health, safety and welfare of the people of this state to provide for the granting of that privilege and the regulation of its use, to the end that the public is protected from the practice of medicine by unauthorized or unqualified persons and from unprofessional conduct by persons licensed to practice under this chapter.

[7] ORS 677.060(6) provides:

> This chapter does not *affect* or prevent the following:
>
> * * * * *
>
> (6) The practice of dentistry, pharmacy, nursing, optometry, psychology, regulated social work, *chiropractic*, naturopathic medicine or cosmetic therapy, by any person authorized by this state[.]
>
> * * * * *

Footnote continued…

402 (1969) (limitation on the application of Chapter 677 is made specific in ORS 677.060(6) and (7)); *see State v. Smith*, 127 Or 680, 686, 273 P 343 (1929) (statute prohibiting practice of medicine without a license did not regulate the practice of naturopathy); *see also Farr v. Myers*, 343 Or 681, 685, 174 P3d 1012 (2007) ("Under current law, the boards that oversee health care professionals establish educational and training requirements as a prerequisite for obtaining a license or other credential to practice their respective professions.").

Thus, contrary to OAAOM's claim, the board's rule does not "usurp" the OBME's authority. In particular, the OBCE's rule is not affected by ORS 677.759(1), which provides:

> (1) No person shall practice acupuncture without first obtaining a license to practice medicine and surgery or a license to practice acupuncture from the Oregon Medical Board * * * .

Neither ORS 677.759 nor any other provision in ORS chapter 677 governs chiropractic or the OBCE, which are governed by ORS chapter 684.

(…continued)

> (10) The practice of physiotherapy, electrotherapy or hydrotherapy carried on by a duly licensed practitioner of medicine, naturopathic medicine or *chiropractic* * * *.

(Emphasis added.)

Thus, OAR 811-015-0036 does not contravene ORS 677.759, and it cannot "usurp" the authority of the OBME, as OAAOM claims.

C. OBCE is not bound by its past policy decisions in adopting a new rule.

OAAOM contends, in effect, that the OBCE is bound by its prior interpretation of the scope of chiropractic under ORS 684.010(2). That argument is incorrect. OAAOM cites to no authority that prevents the OBCE from reconsidering and correcting its prior interpretation of the law. Under OAAOM's argument, the agency would be compelled to abide by a standard it believed to be unlawful.

But agency interpretations of statutes can and do change when the agency determines that the agency's earlier interpretation does not adequately reflect the legislative policy embodied in the statute either in general or under the particular facts of the case. *See e.g., Realty Group, Inc. v. Department of Revenue*, 299 Or 377, 382 n 3, 702 P2d 1075 (1985) ("If a party convinces an agency that its interpretation of a statute is wrong, the agency is not bound to persist in the error."); *Martini v. Oregon Liquor Control Com'n*, 110 Or App 508, 513, 823 P2d 1015 (1992) (OLCC may make policy refinements, including changing its interpretation of an administrative rule, in deciding contested cases). The OBCE was entitled to change its interpretation of the scope of the practice of chiropractic by adopting OAR 811-015-0036.

CONCLUSION

Contrary to OAAOM's underlying premise, dry needling is not "acupuncture." The therapeutic use of dry needles is a treatment modality that may be shared by more than one regulated practice. The OBCE's rule authorizing dry needling does not exceed the statutory scope of chiropractic. The Board of Medical Examiners, which regulates acupuncture, does not regulate chiropractic. Thus, the OBCE's rule does not contravene any statute governing the practice of acupuncture. Although the therapeutic use of dry needles has traditionally been associated with the practice of acupuncture and Oriental medicine, there is no legal barrier to the use of dry needles by chiropractors, within the applicable statutory and regulatory limits.

Respectfully submitted,

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on June 27, 2012, I directed the original Respondent Board of Chiropractic Examiners' Answering Brief to be electronically filed with the Appellate Court Administrator, Appellate Records Section, and to be electronically served upon Thane W. Tienson and Patrick T. Foran, attorneys for petitioners, Andrew T. Reilly, attorney for John L.V. Platt, D.C., P.C. dba Woodstock Chiropractic Clinic, and Jona J. Maukonen, attorney for University of Western States, by using the court's electronic filing system.

CERTIFICATE OF COMPLIANCE WITH ORAP 5.05(2)(d)

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05(2)(b) and (2) the word-count of this brief (as described in ORAP 5.05(2)(a)) is 4,213 words. I further certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(4)(f).

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