

IN THE COURT OF APPEALS OF THE STATE OF OREGON

OREGON ASSOCIATION OF  
ACUPUNCTURE AND ORIENTAL  
MEDICINE,

Petitioner,

v.

BOARD OF CHIROPRACTIC  
EXAMINERS,

Respondent.

Appellate Court No. A148924

RESPONDENT BOARD OF  
CHIROPRACTIC EXAMINERS'  
RESPONSE IN OPPOSITION TO  
PETITIONER'S MOTION — STAY

**A. Introduction**

This case is before the court under ORS 183.400 on direct judicial review of an administrative rule. Petitioners have filed a motion to stay a rule adopted by the Oregon Board of Chiropractic Examiners (“OBCE”) that took effect on June 13, 2011. For the following reasons, this court should deny the motion to stay.

**B. The challenged rule**

The OBCE’s rule, OAR 811-015-0036, provides that the scope of chiropractic treatment of myofascial trigger points includes “dry needling.” OAR 811-015-0036(1) 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 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 rule provides Oregon-licensed chiropractic physician “who wishes to practice dry needling” must:

- (a) Register with the Board on the form prescribed by the Board and,
- (b) Provide proof of the basic Board approved course hour requirements before engaging in the practice of dry needling, and
- (c) Perform all aspects of needle insertion and removal.

OAR 811-015-0036(2).

In addition, the chiropractic physician must complete “a minimum of 24 hours of education with practicum specific to dry needling within the curriculum of an accredited chiropractic college, or through post graduate continuing education on dry needling approved by [OBCE].” OAR 811-015-0036(3). The chiropractic physician must obtain from every patient treated with dry needling an approved informed consent form and “must state clearly that dry needling is not acupuncture.” OAR 811-015-0036(4).

Petitioners, the Oregon Association of Acupuncture and Oriental Medicine (“OAAOM”) and individual members of OAAOM, have challenged the rule’s validity under ORS 183.400. They seek a stay of enforcement of the rule pending judicial review.

### **C. Standards for stay of administrative rules pending judicial review**

This court has recognized that the Administrative Procedures Act (APA)

does not authorize it to stay enforcement of agency rules pending judicial review.

*See Northwestern Title Loans v. Division of Finance*, 180 Or App 1, 10, 42 P3d 313, *vacated by order* (2002). Accordingly, in assessing requests to stay agency rules, this court relies on its inherent authority. *Northwestern Title Loans*, 180 Or App at 10, 12. OBCE understands that the court likely will adhere to the reasoning in the majority opinion in *Northwestern Title Loans*. *See Lovelace v. Board of Parole*, 183 Or App 283, 289 n 3, 51 P3d 1269 (2002) (explaining that, although the court withdrew its decision in *Northwestern Title Loans* because the case became moot before it was decided, the court “nonetheless refer[red] to portions of the decision that remain persuasive to us”).

In *Northwestern Title Loans*, the majority declined to decide what standards apply to a requested stay of a rule pending judicial review. *See* 180 Or App at 13 & n 7. In light of the court’s holding that the APA does not authorize a stay of administrative rules, however, the APA standards for a stay should not be exclusive. Rather, if—as this court held—the court’s power to issue a stay stems from its inherent authority, then the standards should be the same as those applicable in a court of equity. *See* 180 Or App at 4-5 (“[W]e have the inherent powers of a court of equity and \* \* \* those powers include the authority to grant provisional, including injunctive, relief”). Those are essentially the standards codified in ORS 19.350(3)(a) through (d) for stays pending appeal:

(3) The trial court shall consider the following factors in deciding whether to grant a stay under this section, in addition to such other factors as the trial court considers important:

(a) The likelihood of the appellant prevailing on appeal.

(b) Whether the appeal is taken in good faith and not for the purpose of delay.

(c) Whether there is any support in fact or in law for the appeal.

(d) The nature of the harm to the appellant, to other parties, to other persons and to the public that will likely result from the grant or denial of a stay.

OBCE assumes for purposes of this motion that “the appeal is taken in good faith and not for the purpose of delay.” For the reasons explained below, this court should conclude that the remaining factors weigh against grant of a stay

**D. There is no basis for a stay of enforcement of the rule pending judicial review.**

**1. There is no support in law or fact for petitioners’ argument, and they are therefore unlikely to prevail on appeal.**

OBCE contends that there is no support in fact or in law for petitioners’ challenge to OAR 811-015-0036. Petitioners argue that the OBCE lacked authority to adopt OAR 811-015-0036 for two reasons. First, petitioners argue that dry needling is acupuncture, defined in ORS 677.757(1)(a), and that only the Oregon Medical Board is authorized to regulate acupuncture. ORS 677.759. Second, they argue that OAR 811-015-0036 exceeds OCBE’s statutory authority

under ORS 684.010(2), ORS 684.025(2), and ORS 684.035. Neither of petitioners' arguments is supported in law.

First, "dry needling," as defined in OAR 811-015-0036(1), is not the same as "acupuncture," as defined in ORS 677.757(1)(a) (acupuncture includes "the treatment method of moxibustion, as well as the use of electrical, thermal, mechanical or magnetic devices, with or without needles"). Both acupuncture and chiropractic may involve the use of needles, but the disciplines are not the same. *See* ORS 684.010(2) (defining "chiropractic" to include various kinds of therapy and the "employment of all rational therapeutic measures as taught in approved chiropractic colleges"). Dry needling is one of the techniques used in chiropractic treatment. OAR 811-015-0036(1) (defining dry needling as "a technique used to evaluate and treat myofascial trigger points that uses a dry needle \* \* \*"). Like other techniques and devices, dry needling may be used by chiropractors, as long as the OCBE has approved its use. *See* OAR 811-015-0070(1) (the OCBE may examine any diagnostic and/or therapeutic examination, test, substance, device or procedure to determine its acceptability for patient care). There is no statutory basis for concluding that practices of acupuncture and chiropractic may not overlap, in that both may involve the use of needles.

Second, nothing in ORS Chapter 684 prevents the OCBE from approving the technique of dry needling. On the contrary, the OCBE has statutory authority to adopt rules “[t]o enforce the provisions of [ORS Chapter 684] and to exercise general supervision over the practice of chiropractic \* \* \*.” ORS 684.155(1)(b).

In short, petitioners’ arguments are not supported in law or fact.

**2. Petitioners have failed to show that harm will likely result, much less that there will be irreparable harm, unless the stay is granted.**

Petitioners have failed to show that any harm—much less irreparable harm—to petitioners, to other persons, or to the public will likely result from the denial of a stay.

This court has held that a petitioner seeking a stay pending review of a challenged rule is required to show, at the least, that the failure to grant a stay will result in irreparable harm to their rights. 180 Or App at 13, *citing Alum. Utensil Co. et al. v. North Bend et al.*, 210 Or 412, 421-23, 311 P2d 464 (1957). *See Bergerson v. Salem-Keizer School District*, 185 Or App 649, 660, 60 P3d 1126 (2003) (injury is irreparable “if the party cannot receive reasonable or complete redress in a court of law”). In *Arlington Sch. Dist. No. 3 v. Arlington Ed. Assoc.*, 184 Or App 97, 55 P3d 546 (2002), this court explained that to make such a “showing,” a party must present “proof”: that is, “evidence that satisfies a burden of production or persuasion placed upon the proponent of a fact.” *Arlington Sch.*

*Dist. No. 3*, 184 Or App at 102. Petitioners have not shown a risk of irreparable injury to them in the absence of a stay. According to petitioners, the rule allows chiropractors to perform acupuncture with inadequate acupuncture training, resulting in irreparable harm to the OAAOM, to individual licensed acupuncturists, and to the public. But, as discussed below, petitioners fail to show that irreparable harm will, or probably will, occur if enforcement of the rule is not stayed.

**a. Petitioners fail to show irreparably harm to OAAOM.**

Petitioners allege that the OAAOM will be harmed by the rule in the following respects:

- OAAOM’s “ability to effectively serve its purpose” will be undermined, because patients will be exposed to the risk of harm from inadequately trained practitioners;
- OAAOM’s “ability to adequately represent and protect the practice of acupuncture in Oregon” will be harmed; and
- OAAOM’s “ability to represent and promote the interests of thoroughly trained medical professionals actually licensed to practice acupuncture” in Oregon will be irreparably undermined.

(Motion 11-13).

Petitioners failed to present any evidence to support those allegations. The declarations of Alfred Thieme, E. Christo Gorawski, Thane W. Tienson, and David Wheeler, on which petitioners rely, do not contain proof of any harmful effect of the rule on the OAAOM's function or practices. At most, petitioners have shown that OAAOM opposes the rule. Petitioners have made no showing, however, that the OAAOM's ability to perform any of the functions listed above will be impaired, much less irreparably harmed, by OAR 811-015-0036.

**b. Petitioners fail to show irreparable harm to individual acupuncturists.**

Petitioners allege that, unless enforcement of the rule is stayed, the professional and economic interests of individual petitioners Thieme and Gorawski and of other individual licensed acupuncture practitioners will be irreparably harmed. They assert that:

- respect for and credibility of individual highly trained acupuncturists will be diminished; and
- the economic interests of petitioners and “the entire profession” of licensed acupuncture practitioners will be “immediately and irreparably” harmed by increased competition from chiropractic physicians.

(Motion 12).

Petitioners fail to present any evidence that the rule will irreparably diminish “respect for and credibility of” licensed acupuncturists with significantly more extensive and specialized training than licensed chiropractors practicing dry needling under OAR 811-015-0036.

What is more, petitioners’ reliance on economic harm to themselves and other acupuncturists is misplaced. Traditionally, mere quantifiable economic harm has not constituted irreparable harm. Rather, harm “is irreparable when it cannot be adequately compensated in damages, or when there exists no certain pecuniary standard for the measurement of damages \* \* \* due to the nature of the injury itself or to the nature of the right or property injured.” *Winslow v. Fleischner et al.*, 110 Or 554, 563, 223 P 922 (1924) (citation omitted). Consequently, petitioners’ assertion that licensed acupuncture practitioners will be faced with increased competition that will “immediately and irreparably dilute the value of their extensive training and specialized skills” will does not establish irreparable harm. *See Northwestern Title Loans*, 180 Or App at 13 (although its business operations in Oregon may become unprofitable, petitioner, a Georgia corporation, would not cease to exist and would be able to continue business as the rule review proceeding progressed).

In sum, petitioners fail to show irreparable harm to any individual acupuncturists will result if the stay is denied.

**c. Petitioners fail to show irreparable harm to the public.**

Petitioners assert that “OAR 811-015-0036 presents immediate and irreparable harm to the public.” (Motion 12). Specifically, they contend that

[b]y allowing chiropractic physicians, unlicensed in the practice of acupuncture, to insert needles into patients’ bodies after a mere 24 hours of training, the Board is placing members of the public at risk.

(*Id.*). Yet petitioners fail to identify what the risk to the public would be. The risk that petitioners do identify in the motion is only to the OAAOM and the interest of licensed acupuncturists: “Such a risk is unacceptable, and *irreparably undermines OAAOM’s ability to represent and promote the interests of* thoroughly trained medical professionals actually licensed to practice acupuncture in the State of Oregon.” (*Id.* at 12-13, emphasis added).

Even assuming that petitioners have asserted some type of harm to public health and safety resulting from OAR 811-015-0036, they fail to support that claim with any evidence that requiring licensed chiropractors to have a minimum of 24 hours of “education with practicum” is so inadequate that it is likely to be harmful to the public.

At most, petitioners have presented some evidence that “there are many potential risks of harm to patients from *inexperienced or untrained practitioners.*”

(Decl. of Thieme at 2, emphasis added). Thieme attested that “[t]hose potential harms, which are well-recognized, include, but are not limited to, pneumothorax (punctured lung); infections from needles; minor bleeding and hematomas.” (*Id.*). But a practitioner can be “inexperienced” regardless of the number of hours of training he or she has had. And OAR 811-015-0036 does not allow “untrained” practitioners to perform dry needling. Thieme’s declaration provides no evidence that a licensed chiropractor with 24 hours of “education with practicum specific to dry needling” is likely to injure patients in the ways Thieme describes.

Similarly, petitioner Gorawski asserts that “24 hours training is still highly inadequate and presents a danger to the public.” (Declaration of Gorawski at 3). He attests that “[i]nadequately trained persons performing acupuncture or dry needling can cause serious and life-threatening adverse effects on patients,” including “small bleedings, hematoma, dizziness, fainting, nausea, an increase in pain symptoms, pneumothorax, as well as additional problems arising from unsterile needles.” (*Id.*) But again, the declaration contains no evidence that those side effects are more likely to occur to patients of licensed chiropractors who perform dry needling as authorized by OAR 811-015-0036.

In sum, petitioners fail to present any proof to make a showing of irreparable harm by if the court denies their request to stay of the OBCE’s rule.

**E. Conclusion**

For the reasons stated above, this court should deny petitioners' motion to stay enforcement of the challenged rule pending judicial review.

Respectfully submitted,

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## NOTICE OF FILING AND PROOF OF SERVICE

I certify that on July 21, 2011, I directed the original Respondent Board of Chiropractic Examiners' Response in Opposition to Petitioner's Motion — Stay to be electronically filed with the Appellate Court Administrator, Appellate Records Section, by using the court's electronic filing system.

I further certify that on July 21, 2011, I directed the Respondent Board of Chiropractic Examiners' Response in Opposition to Petitioner's Motion — Stay to be served upon Thane W. Tienson, attorney for petitioner, by mailing a copy, with postage prepaid, in an envelope addressed to:

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