



TEXAS DEPARTMENT OF STATE HEALTH SERVICES

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COMMISSIONER

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October 24, 2007

The Honorable Patrick Rose
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78769-2910

Dear Representative Rose:

This letter is in further response to the issues raised in your letter of intent as author of HB 2644. The Department of State Health Services (DSHS) had previously responded to inform you that staff is developing rules to implement the changes in hours and examinations required by that legislation.

DSHS deferred comment on the Senate amendments to HB 2644 until appropriate agency legal and program staff fully analyzed all aspects of the bill. The first Senate amendment requires that an individual purporting to provide health benefits via human contact and for compensation obtain one or more licenses from DSHS. This agency is authorized, but not required, to create one or more licensure programs so that affected practitioners can comply with the requirement. The second Senate amendment expands the enforcement mechanisms, such as injunctive relief to prevent further violations and the inclusion of illicit massage therapy services in the statute on public nuisances. The provisions of the second amendment have no direct effect on DSHS. However, the provisions of the first Senate amendment of HB 2644 present a number of challenges to implementation. These issues fall into four areas: (1) applicability to movement therapies; (2) level of specificity regarding the licenses; (3) diversity of stakeholder feedback; and (4) funding to support implementation.

Applicability to Movement Therapies

Your letter clarifies that this amendment is not intended to apply to "movement therapies, such as yoga, pilates, or personal training" because "touch has a primarily indirect effect on the health benefits provided to the client through these types of therapy." In addition, you stated that the amendment should not apply to religious practices that involve touch. DSHS agrees with you that "movement therapies" in which touch is incidental to the purported health benefit and religious practices do not meet the statutory definition that would require an individual to obtain a license under HB 2644.

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Level of Specificity Regarding the Licenses

Generally, in an authorizing statute, the Legislature gives the regulating agency detailed guidance for such matters as licensure requirements, prohibited acts, and sanctions for violations. In the case of programs that regulate health-related occupations, many of which, such as massage therapy, are administered by DSHS, the Legislature generally specifies such requirements as the number of hours of instruction, continuing education, and examinations. For example, HB 2644, in both the filed and enrolled versions, makes changes in the number of required hours of instruction and specifies the examination for massage therapy. The exact licenses to be created are not explicitly defined in statute and do not include the specific requirements that must be met to be eligible for licensure.

Diversity of Stakeholder Feedback

DSHS took into account the comments received from stakeholders during the four months following the legislative session. Those individual practitioners of such affected practices as reiki, Traeger, reflexology, rolfing and Asian bodywork therapy have generally supported the creation of a program specific to their own techniques and educational requirements. That approach is cost-prohibitive given the large number of such practices and the number of licenses and regulations that would have to be created. Most callers have opposed a requirement that they obtain a massage therapy license, which conflicts with their techniques, educational requirements, and underlying philosophy. A number of affected practitioners have contacted their legislators, whose offices have in turn expressed similar concerns to DSHS.

The variety of stakeholder viewpoints poses an obstacle to the adoption of rules. DSHS cannot enforce the provisions of HB 2644 without rules to inform practitioners of the requirements for licensure and violations that would result in a sanction. In drafting proposed rules, DSHS works with stakeholders to resolve differences. Proposed rules must be submitted to the State Health Services Advisory Council and the Health and Human Services Commission for review prior to publication in the *Texas Register*, followed by a 30-day comment period. The agency must then respond to any comments received before forwarding the package for adoption by the executive commissioner of health and human services. Contested rules often result in a lengthy process, and it is unlikely that rules could be adopted before the Legislature returns in January 2009.

Funding to Support Implementation

DSHS estimated the cost of implementing new licensure provisions as proposed by the Senate amendments to HB 2644 and provided that information to the Legislative Budget Board. The agency estimated a cost of approximately \$390,000 for the Fiscal Year 2008-9 biennium, with an increase of 4 FTEs to process applications, conduct inspections, and respond to complaints. Although HB 2644 authorizes fees, that revenue must still be appropriated to an agency before it can be used. Unfortunately, when the Legislature adopted the General Appropriations Act, it chose not to include the appropriation of fees authorized by HB 2644.

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Considering the challenges discussed above, it will be difficult for DSHS to fully implement the provisions of HB 2644 at this time. We are committed to a continuing dialogue about these issues with stakeholders about how to address the concerns targeted by this piece of legislation. If you have concerns or questions regarding this matter, please feel free to contact Kathy Perkins, Assistant Commissioner for Regulatory Services, at (512) 834-6660 or kathy.perkins@dshs.state.tx.us.

Sincerely,



David L. Lakey, M.D.
Commissioner

cc: The Honorable John Carona
The Honorable Troy Fraser
The Honorable Royce West
The Honorable Rafael Anchia
The Honorable Jodie Laubenberg
The Honorable Elliott Naishtat
The Honorable Ken Paxton
The Honorable Joe Straus