

By: Villarreal

H.B. No. 2323

A BILL TO BE ENTITLED

AN ACT

relating to the licensing and regulation of lactation consultants;  
providing penalties.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle M, Title 3, Occupations Code, is  
amended by adding Chapter 704 to read as follows:

CHAPTER 704. LACTATION CONSULTANTS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 704.001. DEFINITIONS. In this chapter:

(1) "Department" means the Department of State Health  
Services.

(2) "Commissioner" means the commissioner of state  
health services.

(3) "Executive commissioner" means the executive  
commissioner of the Health and Human Services Commission.

(4) "Lactation consultant" means a person licensed  
under this chapter who consults with a client for compensation on  
any matter related to breast-feeding and who provides  
breast-feeding assistance to infants and mothers.

Sec. 704.002. LACTATION CONSULTATION AS HEALTH CARE  
SERVICE. (a) Lactation consulting constitutes a health care  
service if the consultation is provided by a licensed health care  
professional or if a physician refers a patient to a lactation  
consultant.

1        (b) Lactation consultant services do not include:

2                (1) the diagnosis or treatment of illness or disease;  
3        or

4                (2) a service or procedure for which a license to  
5        practice medicine or any other health care service is required by  
6        law.

7        Sec. 704.003. APPLICABILITY OF CHAPTER. This chapter does  
8        not apply to a person licensed in this state as a physician or nurse  
9        or to another health care professional licensed by the state and  
10       operating within the scope of the person's license.

11       [Sections 704.004-704.050 reserved for expansion]

12                SUBCHAPTER B. POWERS AND DUTIES

13        Sec. 704.051. GENERAL RULEMAKING AUTHORITY. The executive  
14        commissioner shall adopt rules consistent with this chapter as  
15        necessary for the performance of the department's duties under this  
16        chapter.

17        Sec. 704.052. RULES REGARDING LACTATION CONSULTANTS. Rules  
18        adopted under this chapter relating to a lactation consultant must  
19        contain minimum standards for:

20                (1) the issuance, denial, renewal, suspension,  
21        revocation, or probation of a license under this chapter;

22                (2) the qualifications for licensing as a lactation  
23        consultant that are at least as stringent as the qualifications  
24        established by the International Board of Lactation Consultant  
25        Examiners or its successor;

26                (3) the records to be kept by a lactation consultant;

27                (4) the inspection of the records, equipment, and

conditions of the physical environment used by a lactation consultant in providing lactation consulting services; and

(5) any other aspect of the practice of a lactation consultant necessary to protect the public.

Sec. 704.053. RULES REGARDING ADVERTISING OR COMPETITIVE BIDDING. (a) The executive commissioner may not adopt rules restricting advertising or competitive bidding by a person licensed under this chapter except to prohibit false, misleading, or deceptive practices.

(b) In the executive commissioner's rules to prohibit false, misleading, or deceptive practices, the executive commissioner may not include a rule that:

(1) restricts the use of any medium for advertising;

(2) restricts the use of a licensed person's personal appearance or voice in an advertisement;

(3) relates to the size or duration of an advertisement by the licensed person; or

(4) restricts the licensed person's advertisement under a trade name.

Sec. 704.054. BASIC LACTATION CONSULTANT TRAINING. The department shall establish requirements for basic lactation consultant training.

Sec. 704.055. GENERAL POWERS AND DUTIES OF DEPARTMENT. (a) The department shall:

(1) administer this chapter; and

(2) investigate a person who may be engaging in a practice that violates this chapter.

1       (b) The department may establish an advisory committee  
2 under this chapter to meet as needed to advise the department in  
3 administering this chapter.

4       Sec. 704.056. EXAMINATION. The department shall:

5           (1) contract with a nationally recognized testing  
6 organization to develop and administer at least twice each calendar  
7 year a lactation consultant examination that a person must pass  
8 before receiving a license under this chapter; and

9           (2) establish eligibility requirements for persons  
10 taking a comprehensive lactation consultant examination.

11       Sec. 704.057. NOTIFICATION OF EXAMINATION RESULTS. (a)  
12 Not later than the 30th day after the date a person takes a license  
13 examination under this chapter, the department shall notify the  
14 person of the results of the examination.

15       (b) If the examination is graded or reviewed by a testing  
16 service:

17           (1) the department shall notify the person of the  
18 results of the examination not later than the 14th day after the  
19 date the department receives the results from the testing service;  
20 and

21           (2) if notice of the examination results will be  
22 delayed for longer than 90 days after the examination date, the  
23 department must notify the person of the reason for the delay before  
24 the 90th day.

25       (c) The department may require a testing service to notify a  
26 person of the results of the person's examination.

27       (d) If requested in writing by a person who fails a license

1 examination administered under this chapter, the department shall  
2 provide to the person an analysis of the person's performance on the  
3 examination.

4 Sec. 704.058. REEXAMINATION. (a) An applicant who fails  
5 the examination may take a subsequent examination on payment of the  
6 required examination fee.

7 (b) The department shall establish the criteria under which  
8 an applicant may take a subsequent examination under this section.

9 (c) The executive commissioner may establish a reasonable  
10 examination fee for an applicant requesting reexamination under  
11 this section.

12 Sec. 704.059. INSPECTIONS; INVESTIGATIONS. The department  
13 or its authorized representative may enter the premises of an  
14 applicant for a license at:

15 (1) reasonable times to conduct an inspection  
16 incidental to the issuance of a license; and

17 (2) other times that the department considers  
18 necessary to ensure compliance with this chapter and the rules  
19 adopted under this chapter.

20 [Sections 704.060-704.100 reserved for expansion]

21 SUBCHAPTER C. LICENSURE

22 Sec. 704.101. LICENSE REQUIRED. Unless the person is  
23 exempt from this chapter under Section 704.003, a person may not act  
24 as a lactation consultant or represent that the person is a  
25 lactation consultant unless the person holds a license issued under  
26 this chapter.

27 Sec. 704.102. APPLICATION. An applicant for a license

under this chapter must:

(1) submit an application form provided by the department; and

(2) include with the application the application fee set by the executive commissioner.

Sec. 704.103. GENERAL PROVISIONS RELATING TO LICENSURE.

(a) A license holder may exercise all professional rights, honors, and privileges relating to the practice of lactation consulting.

(b) A license is the property of the department and must be surrendered on demand.

Sec. 704.104. QUALIFICATIONS FOR LACTATION CONSULTANT LICENSE. (a) The department shall issue a license to each qualified applicant for a license as a lactation consultant.

(b) An applicant for a license under this section must be an individual and present evidence satisfactory to the department that the person:

(1) has completed a course of instruction that meets the requirements established by the department under Section 704.054 in preparation to become a lactation consultant; and

(2) has passed an examination described by Section 704.056.

Sec. 704.105. TEMPORARY LICENSE. (a) The department may issue a temporary license to an applicant who has complied with the education and experience requirements for a license.

(b) A temporary license expires on the date the applicant is:

(1) issued a license under Section 704.104 after

1 successful completion of the examination; or

2 (2) notified by the department that the applicant has  
3 failed the examination.

4 (c) The executive commissioner may set a reasonable fee for  
5 a temporary license.

6 Sec. 704.106. APPLICANT LICENSED IN ANOTHER JURISDICTION.

7 (a) The department may waive any prerequisite to obtaining a  
8 license under this chapter for an applicant after reviewing the  
9 applicant's credentials and determining the applicant holds a  
10 license issued by another jurisdiction that has licensing or  
11 registration requirements substantially equivalent to those of  
12 this state.

13 (b) The department may waive any prerequisite to obtaining a  
14 license for an applicant who holds a license issued by another  
15 jurisdiction with which this state has a reciprocity agreement.  
16 The department may make an agreement, subject to the approval of the  
17 governor, with another state to allow for licensure by reciprocity.

18 Sec. 704.107. LICENSE RENEWAL. An applicant for license  
19 renewal must apply annually for renewal before the license  
20 expiration date and comply with any renewal requirements adopted by  
21 rule under this chapter.

22 Sec. 704.108. STAGGERED RENEWAL DATES. (a) The executive  
23 commissioner by rule may adopt a system under which licenses expire  
24 on various dates during the year.

25 (b) For the year in which the license expiration date is  
26 changed, license fees payable on the original expiration date shall  
27 be prorated on a monthly basis so that each licensed lactation

1 consultant pays only that portion of the license fee that is  
2 allocable to the number of months during which the license is valid.

3 (c) On renewal of the license on the new expiration date,  
4 the total license renewal fee is payable.

5 [Sections 704.109-704.150 reserved for expansion]

6 SUBCHAPTER D. LICENSE DENIAL AND DISCIPLINARY PROCEDURES

7 Sec. 704.151. GROUNDS FOR LICENSE DENIAL OR DISCIPLINARY  
8 ACTION. The department may refuse to issue a license to a person  
9 and shall suspend, revoke, or refuse to renew the license of a  
10 person or shall reprimand a person licensed under this chapter if  
11 the person:

12 (1) obtains a license by fraud, misrepresentation, or  
13 concealment of material facts;

14 (2) violates a rule adopted by the executive  
15 commissioner;

16 (3) engages in unprofessional conduct as defined by  
17 department rule that endangers or is likely to endanger the health,  
18 welfare, or safety of the public; or

19 (4) violates this chapter.

20 Sec. 704.152. HEARING ON DENIAL OR DISCIPLINARY ACTION.

21 (a) If the department proposes to deny an application for a  
22 license, suspend or revoke a license, or reprimand a license holder  
23 under this chapter, the license holder is entitled to a hearing  
24 before the department if the person submits a written request to the  
25 department.

26 (b) A hearing under this subchapter is a contested case  
27 under Chapter 2001, Government Code.



1       Sec. 704.153. PROBATION. The department may place on  
2 probation a person whose license is suspended. If a license  
3 suspension is probated, the department may require the person to:

4           (1) report regularly to the department on matters that  
5 are the basis of the probation;

6           (2) limit practice to the areas prescribed by the  
7 department; or

8           (3) continue or review professional education until  
9 the person attains a degree of skill satisfactory to the department  
10 in those areas that are the basis of the probation.

11       Sec. 704.154. EMERGENCY SUSPENSION. (a) The department  
12 shall temporarily suspend the license of a license holder if the  
13 department determines from the evidence or information presented to  
14 it that continued practice by the license holder would constitute a  
15 continuing and imminent threat to the public welfare.

16       (b) A license may be suspended under this section without  
17 notice or hearing on the complaint if:

18           (1) action is taken to initiate proceedings for a  
19 hearing before the State Office of Administrative Hearings  
20 simultaneously with the temporary suspension; and

21           (2) a hearing is held as soon as practicable under this  
22 chapter and Chapter 2001, Government Code.

23       (c) The State Office of Administrative Hearings shall hold a  
24 preliminary hearing not later than the 14th day after the date of  
25 the temporary suspension to determine if there is probable cause to  
26 believe that a continuing and imminent threat to the public welfare  
27 still exists. A final hearing on the matter shall be held not later

1 than the 61st day after the date of the temporary suspension.

2 [Sections 704.155-704.200 reserved for expansion]

3 SUBCHAPTER E. ADMINISTRATIVE PENALTY

4 Sec. 704.201. IMPOSITION OF ADMINISTRATIVE PENALTY. The  
5 department may impose an administrative penalty on a person who  
6 violates this chapter or a rule adopted under this chapter.

7 Sec. 704.202. AMOUNT OF PENALTY. (a) The amount of an  
8 administrative penalty may not exceed \$1,000 for each violation.  
9 Each day a violation continues or occurs is a separate violation for  
10 purposes of imposing a penalty.

11 (b) The amount of the penalty shall be based on:

- 12 (1) the seriousness of the violation;  
13 (2) the history of previous violations;  
14 (3) the amount necessary to deter a future violation;  
15 (4) efforts made to correct the violation; and  
16 (5) any other matter that justice may require.

17 Sec. 704.203. NOTICE OF VIOLATION AND PENALTY. If, after  
18 investigation of a possible violation and the facts surrounding the  
19 possible violation, the department determines that a violation  
20 occurred, the department shall give written notice of the violation  
21 to the person on whom the administrative penalty may be imposed.

22 The notice must:

- 23 (1) include a brief summary of the alleged violation;  
24 (2) state the amount of the recommended penalty; and  
25 (3) inform the person of the person's right to a  
26 hearing on the occurrence of the violation, the amount of the  
27 penalty, or both.

1       Sec. 704.204. PENALTY TO BE PAID OR HEARING REQUESTED. (a)  
2 Not later than the 20th day after the date the person receives the  
3 notice under Section 704.203, the person may:

4           (1) accept the department's determination and  
5 recommended administrative penalty; or

6           (2) make a written request for a hearing on that  
7 determination.

8       (b) If the person accepts the department's determination,  
9 the commissioner or the commissioner's designee by order shall  
10 approve the determination and require the person to pay the  
11 recommended penalty.

12       Sec. 704.205. HEARING ON DEPARTMENT DETERMINATION. (a) If  
13 the person makes a timely request for a hearing, the department  
14 shall:

15           (1) set a hearing;

16           (2) give written notice of the hearing to the person;

17 and

18           (3) designate a hearings examiner to conduct the  
19 hearing.

20       (b) The hearings examiner shall:

21           (1) make findings of fact and conclusions of law; and

22           (2) promptly issue to the commissioner or the  
23 commissioner's designee a proposal for decision as to the  
24 occurrence of the violation, and, if the examiner determines a  
25 penalty is warranted, the amount of the proposed administrative  
26 penalty.

27       Sec. 704.206. DECISION BY COMMISSIONER. (a) Based on the

1 findings of fact, conclusions of law, and recommendations of the  
2 hearings examiner, the commissioner or the commissioner's designee  
3 by order may determine that:

4 (1) a violation occurred and may impose an  
5 administrative penalty; or

6 (2) a violation did not occur.

7 (b) The department shall give notice of the order to the  
8 person. The notice must include:

9 (1) separate statements of the findings of fact and  
10 conclusions of law;

11 (2) the amount of any penalty imposed; and

12 (3) a statement of the right of the person to judicial  
13 review of the order.

14 Sec. 704.207. OPTIONS FOLLOWING DECISION: PAY OR APPEAL.

15 (a) Not later than the 30th day after the date the order issued  
16 under Section 704.206 becomes final, the person shall:

17 (1) pay the administrative penalty;

18 (2) pay the penalty and file a petition for judicial  
19 review contesting the fact of the violation, the amount of the  
20 penalty, or both; or

21 (3) without paying the penalty, file a petition for  
22 judicial review contesting the fact of the violation, the amount of  
23 the penalty, or both.

24 (b) Within the 30-day period, a person who acts under  
25 Subsection (a)(3) may:

26 (1) stay enforcement of the penalty by:

27 (A) paying the penalty to the court for placement

1 in an escrow account; or

2 (B) giving to the court a supersedeas bond that  
3 is approved by the court and that is:

4 (i) for the amount of the penalty; and

5 (ii) effective until judicial review of the  
6 order is final; or

7 (2) request the court to stay the enforcement of the  
8 penalty by:

9 (A) filing with the court a sworn affidavit of  
10 the person stating that the person is financially unable to pay the  
11 penalty and is financially unable to give the supersedeas bond; and

12 (B) sending a copy of the affidavit to the  
13 department by certified mail.

14 (c) If the department receives a copy of an affidavit under  
15 Subsection (b)(2), the department may file with the court a contest  
16 to the affidavit not later than the fifth day after the date the  
17 copy is received.

18 (d) The court shall hold a hearing on the facts alleged in  
19 the affidavit as soon as practicable and stay the enforcement of the  
20 penalty on finding that the alleged facts are true. The person who  
21 files the affidavit has the burden of proving that the person is  
22 financially unable to pay the penalty and to give a supersedeas  
23 bond.

24 Sec. 704.208. DETERMINATION BY COURT. (a) If the court  
25 sustains the finding that a violation occurred, the court may  
26 uphold or reduce the amount of the administrative penalty and order  
27 the person to pay the full or reduced amount.

1        (b) If the court does not sustain the finding that a  
2 violation occurred, the court shall order that a penalty is not  
3 owed.

4        Sec. 704.209. REMITTANCE OF PENALTY AND INTEREST. (a) If,  
5 after judicial review, the administrative penalty is reduced or not  
6 imposed by the court, the court shall, after the judgment becomes  
7 final:

8                (1) order the appropriate amount, plus accrued  
9 interest, be remitted to the person by the department if the person  
10 paid the penalty under Section 704.207(a)(2); or

11                (2) if the person paid the penalty under Section  
12 455.207(b)(1)(A) or posted a supersedeas bond, order the department  
13 to:

14                        (A) execute a complete release of the escrow  
15 account or bond, as appropriate, if the penalty is not imposed; or

16                        (B) release the escrow account or bond, as  
17 appropriate, after the reduced penalty has been paid from the  
18 account or by the person.

19        (b) The interest paid under Subsection (a)(1) is accrued at  
20 the rate charged on loans to depository institutions by the New York  
21 Federal Reserve Bank. The interest shall be paid for the period  
22 beginning on the date the penalty is paid and ending on the date the  
23 penalty is remitted.

24        Sec. 704.210. COLLECTION OF PENALTY. (a) In this section,  
25 "reasonable expenses and costs" includes expenses incurred by the  
26 department and the attorney general in the investigation,  
27 initiation, or prosecution of an action, including reasonable

1 investigative costs, court costs, attorney's fees, witness fees,  
2 and deposition expenses.

3 (b) The department may assess reasonable expenses and costs  
4 against a person in an administrative hearing if, as a result of the  
5 hearing, an administrative penalty is assessed against the person.  
6 The person shall pay expenses and costs assessed under this  
7 subsection not later than the 30th day after the date the order of  
8 the commissioner or the commissioner's designee requiring the  
9 payment of expenses and costs is final. The department may refer  
10 the matter to the attorney general for collection of expenses and  
11 costs.

12 (c) If the person does not pay the administrative penalty  
13 and the enforcement of the penalty is not stayed, the department may  
14 refer the matter to the attorney general for collection of the  
15 amount of the penalty.

16 (d) If the attorney general brings an action against a  
17 person to enforce an administrative penalty assessed under this  
18 chapter and the person is found liable for an administrative  
19 penalty, the attorney general may recover, on behalf of the  
20 attorney general and the department, reasonable expenses and costs.

21 (e) Expenses and costs collected under this section shall be  
22 deposited in the state treasury to the credit of a special account  
23 the amounts in which may be appropriated only to the department.  
24 Section 403.095, Government Code, does not apply to the account.

25 Sec. 704.211. ADMINISTRATIVE PROCEDURE. A proceeding to  
26 assess an administrative penalty under this chapter is subject to  
27 Chapter 2001, Government Code.

[Sections 704.212-704.250 reserved for expansion]

SUBCHAPTER F. OTHER PENALTIES AND ENFORCEMENT PROVISIONS

Sec. 704.251. CIVIL PENALTY. (a) A person is liable for a civil penalty if the person is required to be licensed under this chapter and the person knowingly or intentionally practices:

(1) without a license or while the person's license is suspended or revoked; or

(2) in violation of a department order.

(b) A civil penalty under this section may not exceed \$250 for each violation. Each day of violation may constitute a separate violation for purposes of penalty assessment. In determining the amount of the penalty, the court shall consider:

(1) the person's history of previous violations;

(2) the seriousness of the violation;

(3) any hazard to the health and safety of the public;

and

(4) the demonstrated good faith of the person charged.

Sec. 704.252. INJUNCTIONS. (a) If the commissioner determines that a person has violated this chapter and that the violation creates an immediate threat to the health and safety of the public, the commissioner may request the attorney general or a district, county, or city attorney to bring an action in a district court for a restraining order to restrain the violation.

(b) If a person has violated this chapter, the commissioner may bring an action in a district court for an injunction to prohibit the person from continuing the violation.

Sec. 704.253. VENUE. (a) Venue for a civil action brought



1 under Section 704.251 or 704.252 is in the county in which the  
2 defendant resides or in the county in which the violation occurred.

3 (b) Venue for the civil action may be changed only after a  
4 good faith effort has been made to address the violation in the  
5 county in which venue is proper.

6 SECTION 2. (a) Not later than June 1, 2006, the Department  
7 of State Health Services shall prescribe the forms and procedures  
8 and the executive commissioner of the Health and Human Services  
9 Commission shall adopt the rules necessary to implement Chapter  
10 704, Occupations Code, as added by this Act.

11 (b) Notwithstanding Chapter 704, Occupations Code, as added  
12 by this Act, a person is not required to hold a license under that  
13 chapter before September 1, 2006.

14 SECTION 3. (a) Except as provided by Subsection (b) of this  
15 section, this Act takes effect September 1, 2005.

16 (b) Section 704.101 and Subchapters E and F, Chapter 704,  
17 Occupations Code, as added by this Act, take effect September 1,  
18 2006.