

By: Villarreal

H.B. No. 703

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 703 to read as follows:

CHAPTER 703. LACTATION CONSULTANTS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 703.001. DEFINITIONS. In this chapter:

(1) "Advisory committee" means the advisory committee created under this chapter.

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

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

(4) "Lactation consultant" means a health care professional licensed under this chapter who specializes in the clinical management of breast-feeding and works in a variety of settings.

Sec. 703.002. APPLICABILITY OF CHAPTER. As long as the person does not use the title "lactation consultant" to describe the person's activities, this chapter does not apply to:

(1) a person licensed in this state as a physician or nurse;

1 (2) a health care professional licensed by the state
2 and operating within the scope of the person's license; or

3 (3) a person acting as a paid or volunteer peer
4 counselor, breast-feeding consultant, La Leche League Leader,
5 doula, or childbirth educator.

6 [Sections 703.003-703.050 reserved for expansion]

7 SUBCHAPTER B. ADVISORY COMMITTEE

8 Sec. 703.051. ADVISORY COMMITTEE. (a) The advisory
9 committee shall advise the department and the executive
10 commissioner on:

11 (1) the adoption of rules under this chapter; and

12 (2) the implementation of a licensing program under
13 this chapter.

14 (b) The advisory committee is an informal advisory
15 committee to the department and is not subject to Chapter 2110,
16 Government Code.

17 (c) The advisory committee has no independent rulemaking
18 authority.

19 Sec. 703.052. APPOINTMENT OF ADVISORY COMMITTEE. (a) The
20 advisory committee consists of five members appointed by the
21 executive commissioner as follows:

22 (1) three members who are lactation consultants; and

23 (2) two members who represent the public.

24 (b) Appointments to the advisory committee shall be made
25 without regard to the race, color, disability, sex, religion, age,
26 or national origin of the appointees.

27 Sec. 703.053. TERMS; VACANCY. (a) Members of the advisory

1 committee are appointed for staggered six-year terms. The terms of
2 one or two members expire on February 1 of each odd-numbered year,
3 as appropriate.

4 (b) If a vacancy occurs during a member's term, the
5 executive commissioner shall appoint a new member to fill the
6 unexpired term.

7 [Sections 703.054-703.100 reserved for expansion]

8 SUBCHAPTER C. POWERS AND DUTIES

9 Sec. 703.101. GENERAL RULEMAKING AUTHORITY. The executive
10 commissioner shall adopt rules consistent with this chapter as
11 necessary for the performance of the department's duties under this
12 chapter.

13 Sec. 703.102. RULES REGARDING LACTATION CONSULTANTS. Rules
14 adopted under this chapter relating to a lactation consultant must
15 contain minimum standards for:

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

18 (2) the qualifications for licensing as a lactation
19 consultant;

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

21 (4) the inspection of the records, equipment, and
22 conditions of the physical environment used by a lactation
23 consultant in providing lactation consulting services;

24 (5) development of an approved program of mandatory
25 continuing education and the manner in which attendance at all
26 approved courses, clinics, forums, lectures, programs, or seminars
27 is monitored and recorded; and

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

3 Sec. 703.103. RULES REGARDING ADVERTISING OR COMPETITIVE
4 BIDDING. (a) The executive commissioner may not adopt rules
5 restricting advertising or competitive bidding by a person licensed
6 under this chapter except to prohibit false, misleading, or
7 deceptive practices.

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

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

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

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

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

18 Sec. 703.104. GENERAL POWERS AND DUTIES OF DEPARTMENT. The
19 department shall:

20 (1) administer this chapter; and

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

23 Sec. 703.105. COMPLAINTS. (a) The executive commissioner
24 shall establish methods by which consumers and service recipients
25 are notified of the name, mailing address, and telephone number of
26 the department for the purpose of directing complaints under this
27 chapter to the department. The department shall provide to the

1 person filing the complaint and to each person who is a subject of
2 the complaint information about the department's policies and
3 procedures relating to complaint investigation and resolution.

4 (b) The department shall maintain a file on each written
5 complaint filed with the department under this chapter. The file
6 must include:

7 (1) the name of the person who filed the complaint;

8 (2) the date the complaint is received by the
9 department;

10 (3) the subject matter of the complaint;

11 (4) the name of each person contacted in relation to
12 the complaint;

13 (5) a summary of the results of the review or
14 investigation of the complaint; and

15 (6) an explanation of the reason the file was closed,
16 if the department closed the file without taking action other than
17 to investigate the complaint.

18 (c) The department, at least quarterly and until final
19 disposition of the complaint, shall notify the person filing the
20 complaint and each person who is a subject of the complaint of the
21 status of the investigation unless the notice would jeopardize an
22 undercover investigation.

23 (d) The executive commissioner shall adopt a procedure for
24 documenting complaints to the department under this chapter from
25 the time of the submission of the initial complaint to the final
26 disposition of the complaint. The executive commissioner shall
27 publish the procedure in the Texas Register.

1 Sec. 703.106. INSPECTIONS; INVESTIGATIONS. The department
2 or its authorized representative may enter the premises of an
3 applicant for a license at:

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

6 (2) other times that the department considers
7 necessary to ensure compliance with this chapter and the rules
8 adopted under this chapter.

9 [Sections 703.107-703.150 reserved for expansion]

10 SUBCHAPTER D. LICENSURE

11 Sec. 703.151. LICENSE REQUIRED. Unless the person is
12 exempt from this chapter under Section 703.002, a person may not
13 represent that the person is a lactation consultant unless the
14 person holds a license issued under this chapter.

15 Sec. 703.152. APPLICATION. An applicant for a license
16 under this chapter must:

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

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

21 Sec. 703.153. GENERAL PROVISIONS RELATING TO LICENSURE.

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

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

26 Sec. 703.154. QUALIFICATIONS FOR LACTATION CONSULTANT
27 LICENSE. (a) The department shall issue a license to each

1 qualified applicant for a license as a lactation consultant.

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

5 (1) has the following qualifications:

6 (A) has completed at least 45 contact hours of
7 education specific to lactation consulting in the three years
8 preceding the date the application is filed;

9 (B) has completed at least:

10 (i) 500 hours of supervised clinical
11 practice as part of an accredited education program; or

12 (ii) 1,500 hours of supervised clinical
13 practice outside of an accredited education program; and

14 (C) holds a license or registration to practice a
15 health profession in this state or has completed at least four hours
16 of postsecondary education in each of the following areas:

17 (i) anatomy and physiology;

18 (ii) sociology;

19 (iii) psychology, counseling, or
20 communication skills;

21 (iv) child development;

22 (v) nutrition; and

23 (vi) medical terminology; and

24 (2) has passed an examination described by Section
25 703.155.

26 Sec. 703.155. EXAMINATION. (a) The department shall
27 contract with a nationally or internationally recognized testing

1 organization to develop and administer at least once each calendar
2 year a lactation consultant examination.

3 (b) An examination administered under this section must:

4 (1) be developed by a panel of experts in lactation
5 consulting with the assistance of a qualified psychometrician;

6 (2) be professionally constructed, validated, and
7 administered;

8 (3) be criterion-referenced; and

9 (4) have content based on the results of a
10 comprehensive lactation consultant role delineation study
11 conducted by the department within 10 years of the date on which the
12 examination is administered.

13 Sec. 703.156. NOTIFICATION OF EXAMINATION RESULTS. (a)
14 Not later than the 30th day after the date a person takes a license
15 examination under this chapter, the department shall notify the
16 person of the results of the examination.

17 (b) If the examination is graded or reviewed by a testing
18 service:

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

23 (2) if notice of the examination results will be
24 delayed for more than 120 days after the examination date, the
25 department must notify the person of the reason for the delay before
26 the 120th day.

27 (c) The department may require a testing service to notify a

1 person of the results of the person's examination.

2 (d) If requested in writing by a person who fails a license
3 examination administered under this chapter, the department shall
4 provide to the person an analysis of the person's performance on the
5 examination.

6 Sec. 703.157. REEXAMINATION. (a) An applicant who fails
7 the examination may take a subsequent examination on payment of the
8 required examination fee.

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

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

14 Sec. 703.158. TEMPORARY LICENSE. (a) The department may
15 issue a temporary license to an applicant who has complied with the
16 education and experience requirements for a license.

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

19 (1) issued a license under Section 703.154 after
20 successful completion of the examination; or

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

23 (c) The executive commissioner may set a reasonable fee for
24 a temporary license.

25 Sec. 703.159. APPLICANT LICENSED IN ANOTHER JURISDICTION.
26 The department may waive any prerequisite to obtaining a license
27 under this chapter for an applicant after reviewing the applicant's

1 credentials and determining that the applicant holds a license
2 issued by another jurisdiction that has licensing or registration
3 requirements substantially equivalent to those of this state.

4 Sec. 703.160. LICENSE EXPIRATION AND RENEWAL. (a) A
5 license issued under this chapter expires on the second anniversary
6 of the date of issuance.

7 (b) An applicant for license renewal must apply for renewal
8 before the license expiration date and comply with any renewal
9 requirements adopted by rule under this chapter.

10 Sec. 703.161. STAGGERED RENEWAL DATES. (a) The executive
11 commissioner by rule may adopt a system under which licenses expire
12 on various dates during the year.

13 (b) For the year in which the license expiration date is
14 changed, license fees payable on the original expiration date shall
15 be prorated on a monthly basis so that each licensed lactation
16 consultant pays only that portion of the license fee that is
17 allocable to the number of months during which the license is valid.

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

20 [Sections 703.162-703.200 reserved for expansion]

21 SUBCHAPTER E. LICENSE DENIAL AND DISCIPLINARY PROCEDURES

22 Sec. 703.201. GROUNDS FOR LICENSE DENIAL OR DISCIPLINARY
23 ACTION. The department may refuse to issue a license to a person
24 and shall suspend, revoke, or refuse to renew the license of a
25 person or shall reprimand a person licensed under this chapter if
26 the person:

27 (1) obtains a license by fraud, misrepresentation, or

1 concealment of a material fact;

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

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

7 (4) violates this chapter.

8 Sec. 703.202. HEARING ON DENIAL OR DISCIPLINARY ACTION.

9 (a) If the department proposes to deny an application for a
10 license, suspend or revoke a license, or reprimand a license holder
11 under this chapter, the license holder is entitled to a hearing
12 before the department if the person submits a written request to the
13 department.

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

16 Sec. 703.203. PROBATION. The department may place on
17 probation a person whose license is suspended. If a license
18 suspension is probated, the department may require the person to:

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

21 (2) limit practice to the areas prescribed by the
22 department; or

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

26 Sec. 703.204. EMERGENCY SUSPENSION. (a) The department
27 shall temporarily suspend the license of a license holder if the

1 department determines from the evidence or information presented to
2 it that continued practice by the license holder would constitute a
3 continuing and imminent threat to the public welfare.

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

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

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

11 (c) The State Office of Administrative Hearings shall hold a
12 preliminary hearing not later than the 14th day after the date of
13 the temporary suspension to determine if there is probable cause to
14 believe that a continuing and imminent threat to the public welfare
15 still exists. A final hearing on the matter shall be held not later
16 than the 61st day after the date of the temporary suspension.

17 [Sections 703.205-703.250 reserved for expansion]

18 SUBCHAPTER F. ADMINISTRATIVE PENALTY

19 Sec. 703.251. IMPOSITION OF ADMINISTRATIVE PENALTY. The
20 department may impose an administrative penalty on a person who
21 violates this chapter or a rule adopted under this chapter.

22 Sec. 703.252. AMOUNT OF PENALTY. (a) The amount of an
23 administrative penalty may not exceed \$1,000 for each violation.
24 Each day a violation continues or occurs is a separate violation for
25 purposes of imposing a penalty.

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

27 (1) the seriousness of the violation;

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

Sec. 703.253. NOTICE OF VIOLATION AND PENALTY. If, after investigation of a possible violation and the facts surrounding the possible violation, the department determines that a violation occurred, the department shall give written notice of the violation to the person on whom the administrative penalty may be imposed.

The notice must:

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

Sec. 703.254. PENALTY TO BE PAID OR HEARING REQUESTED. (a) Not later than the 20th day after the date the person receives the notice under Section 703.253, the person may:

- (1) accept the department's determination and recommended administrative penalty; or
- (2) make a written request for a hearing on that determination.

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

Sec. 703.255. HEARING ON DEPARTMENT DETERMINATION. (a) If

1 the person makes a timely request for a hearing, the department
2 shall:

- 3 (1) set a hearing;
4 (2) give written notice of the hearing to the person;
5 and
6 (3) designate a hearings examiner to conduct the
7 hearing.

8 (b) The hearings examiner shall:

- 9 (1) make findings of fact and conclusions of law; and
10 (2) promptly issue to the executive commissioner or
11 the executive commissioner's designee a proposal for decision as to
12 the occurrence of the violation, and, if the examiner determines a
13 penalty is warranted, the amount of the proposed administrative
14 penalty.

15 Sec. 703.256. DECISION BY EXECUTIVE COMMISSIONER. (a)
16 Based on the findings of fact, conclusions of law, and
17 recommendations of the hearings examiner, the executive
18 commissioner or the executive commissioner's designee by order may
19 determine that:

- 20 (1) a violation occurred and may impose an
21 administrative penalty; or
22 (2) a violation did not occur.

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

- 25 (1) separate statements of the findings of fact and
26 conclusions of law;
27 (2) the amount of any penalty imposed; and

1 (3) a statement of the right of the person to judicial
2 review of the order.

3 Sec. 703.257. OPTIONS FOLLOWING DECISION: PAY OR APPEAL.

4 (a) Not later than the 30th day after the date the order issued
5 under Section 703.256 becomes final, the person shall:

6 (1) pay the administrative penalty;

7 (2) pay the penalty and file a petition for judicial
8 review contesting the fact of the violation, the amount of the
9 penalty, or both; or

10 (3) without paying the penalty, file a petition for
11 judicial review contesting the fact of the violation, the amount of
12 the penalty, or both.

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

15 (1) stay enforcement of the penalty by:

16 (A) paying the penalty to the court for placement
17 in an escrow account; or

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

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

21 (ii) effective until judicial review of the
22 order is final; or

23 (2) request the court to stay the enforcement of the
24 penalty by:

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

1 (B) sending a copy of the affidavit to the
2 department by certified mail.

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

7 (d) The court shall hold a hearing on the facts alleged in
8 the affidavit as soon as practicable and stay the enforcement of the
9 penalty on finding that the alleged facts are true. The person who
10 files the affidavit has the burden of proving that the person is
11 financially unable to pay the penalty and to give a supersedeas
12 bond.

13 Sec. 703.258. DETERMINATION BY COURT. (a) If the court
14 sustains the finding that a violation occurred, the court may
15 uphold or reduce the amount of the administrative penalty and order
16 the person to pay the full or reduced amount.

17 (b) If the court does not sustain the finding that a
18 violation occurred, the court shall order that a penalty is not
19 owed.

20 Sec. 703.259. REMITTANCE OF PENALTY AND INTEREST. (a) If,
21 after judicial review, the administrative penalty is reduced or not
22 imposed by the court, the court shall, after the judgment becomes
23 final:

24 (1) order the appropriate amount, plus accrued
25 interest, be remitted to the person by the department if the person
26 paid the penalty under Section 703.257(a)(2); or

27 (2) if the person paid the penalty under Section

1 703.257(b)(1)(A) or posted a supersedeas bond, order the department
2 to:

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

5 (B) release the escrow account or bond, as
6 appropriate, after the reduced penalty has been paid from the
7 account or by the person.

8 (b) The interest paid under Subsection (a)(1) is accrued at
9 the rate charged on loans to depository institutions by the New York
10 Federal Reserve Bank. The interest shall be paid for the period
11 beginning on the date the penalty is paid and ending on the date the
12 penalty is remitted.

13 Sec. 703.260. COLLECTION OF PENALTY. (a) In this section,
14 "reasonable expenses and costs" includes expenses incurred by the
15 department and the attorney general in the investigation,
16 initiation, or prosecution of an action, including reasonable
17 investigative costs, court costs, attorney's fees, witness fees,
18 and deposition expenses.

19 (b) The department may assess reasonable expenses and costs
20 against a person in an administrative hearing if, as a result of the
21 hearing, an administrative penalty is assessed against the person.
22 The person shall pay expenses and costs assessed under this
23 subsection not later than the 30th day after the date the order of
24 the executive commissioner or the executive commissioner's
25 designee requiring the payment of expenses and costs is final. The
26 department may refer the matter to the attorney general for
27 collection of expenses and costs.

1 (c) If the person does not pay the administrative penalty
2 and the enforcement of the penalty is not stayed, the department may
3 refer the matter to the attorney general for collection of the
4 amount of the penalty.

5 (d) If the attorney general brings an action against a
6 person to enforce an administrative penalty assessed under this
7 chapter and the person is found liable for an administrative
8 penalty, the attorney general may recover, on behalf of the
9 attorney general and the department, reasonable expenses and costs.

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

14 Sec. 703.261. ADMINISTRATIVE PROCEDURE. A proceeding to
15 assess an administrative penalty under this chapter is subject to
16 Chapter 2001, Government Code.

17 [Sections 703.262-703.300 reserved for expansion]

18 SUBCHAPTER G. OTHER PENALTIES AND ENFORCEMENT PROVISIONS

19 Sec. 703.301. CIVIL PENALTY. (a) A person is liable for a
20 civil penalty if the person is required to be licensed under this
21 chapter and the person knowingly or intentionally practices:

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

24 (2) in violation of a department order.

25 (b) A civil penalty under this section may not exceed \$250
26 for each violation. Each day of violation may constitute a separate
27 violation for purposes of penalty assessment. In determining the

1 amount of the penalty, the court shall consider:

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

3 (2) the seriousness of the violation;

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

5 and

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

7 Sec. 703.302. INJUNCTIONS. (a) If the executive
8 commissioner determines that a person has violated this chapter and
9 that the violation creates an immediate threat to the health and
10 safety of the public, the executive commissioner may request the
11 attorney general or a district, county, or city attorney to bring an
12 action in a district court for a restraining order to restrain the
13 violation.

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

17 Sec. 703.303. VENUE. (a) Venue for a civil action brought
18 under Section 703.301 or 703.302 is in the county in which the
19 defendant resides or in the county in which the violation occurred.

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

23 Sec. 703.304. CRIMINAL PENALTY. (a) A person commits an
24 offense if the person is required to be licensed under this chapter
25 and the person knowingly practices lactation consulting without a
26 license.

27 (b) An offense under this section is a Class B misdemeanor.

1 SECTION 2. (a) Not later than June 1, 2008, the Department
2 of State Health Services shall prescribe the forms and procedures
3 and the executive commissioner of the Health and Human Services
4 Commission shall adopt the rules necessary to implement Chapter
5 703, Occupations Code, as added by this Act.

6 (b) Notwithstanding Chapter 703, Occupations Code, as added
7 by this Act, a person is not required to hold a license under that
8 chapter before September 1, 2008.

9 SECTION 3. (a) Except as provided by Subsection (b) of this
10 section, this Act takes effect September 1, 2007.

11 (b) Section 703.151 and Subchapters F and G, Chapter 703,
12 Occupations Code, as added by this Act, take effect September 1,
13 2008.