

SUBJECT: Continuing Examiners in Fitting and Dispensing of Hearing Instruments

COMMITTEE: Public Health —favorable, without amendment

VOTE: 8 ayes — Kolkhorst, Coleman, S. Davis, V. Gonzales, S. King,
Laubenberg, Schwertner, Truitt

0 nays

3 absent — Naishtat, Alvarado, Zerwas

SENATE VOTE: On final passage, April 11 — 31-0

WITNESSES: *(On House companion bill, HB 2273:)*
For — Carl Isett, Livingston Hearing Centers

Against — Scott Pospisil, Texas Hearing Aid Association; Amy Trost

On — Ken Levine, Sunset Advisory Commission; *(Registered, but did not testify:* Erick Fajardo, Sunset Advisory Commission; Joyce Parsons, State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments)

BACKGROUND: In 1970, the Legislature created the Texas Board of Examiners in the Fitting and Dispensing of Hearing Aids as an independent agency to regulate those who test human hearing and sell hearing loss treatment devices. In 1993, the Legislature discontinued the board as an independent agency and changed its name to the State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments. It was attached administratively to what is now the Department of State Health Services. (DSHS).

The committee regulates hearing instrument fitters and dispensers through the DSHS Professional Licensing and Certification Unit that oversees 22 other licensing programs. The committee consists of nine members appointed by the governor, including six licensed hearing instrument fitters and dispensers, two public members unaffiliated with the retail

hearing instrument or health care industry, and a physician specializing in otolaryngology.

In fiscal 2009, the committee regulated 484 fully licensed hearing instrument fitters and dispensers, 97 temporary training permit holders, and 59 apprentice permit holders. The committee does not receive a direct appropriation, but receives funding through the DSHS administration of the 23 licensing programs. In 2009, the committee spent about \$84,400 and generated revenues of about \$180,600.

The committee last underwent Sunset review in 1993, and its authorization will expire on September 1, 2011, unless it is continued.

DIGEST:

SB 663 would continue the State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments until September 1, 2017, when other agencies within the DSHS Professional Licensing and Certification Unit would undergo Sunset review. The bill also would:

- require separation of the policymaking responsibilities of the committee from the administrative duties of the DSHS staff;
- change the procedures for administering the licensing examination;
- change requirements on continuing education;
- allow out-state-residents to qualify for licenses;
- require criminal history background checks for licensees;
- conform regulations on fitting and dispensing hearing instruments; and
- implement standard Sunset recommendations.

Defining role of committee. SB 663 would require the committee to develop and implement policies that would clearly separate the policymaking responsibilities of the committee from the management responsibilities of the DSHS staff. It would allow the committee final authority to administer Occupations Code, ch. 402, which regulates hearing instruments fitters and dispensers, except for those responsibilities assigned to DSHS by SB 663.

Licensing examination. SB 663 would require the committee to develop and maintain the written, oral, or practical portions of the licensing examination and would require DSHS to administer or monitor the administration of the licensing examination. The department would be

required to assign one or more qualified proctors for a practical examination. The rules for selecting proctors would have to:

- require a proctor to be licensed in good standing as a hearing instrument fitter and dispenser;
- specify the number of years the proctor would have to be licensed; and
- specify the disciplinary actions or other actions that would disqualify a person from serving as a proctor.

Continuing education. The bill would lower the required number of continuing education credits needed to remain licensed from 20 hours each year to 20 hours every two years. It would allow at least 10 hours of continuing education to be completed online. The bill would require the committee to establish reasonable requirements for continuing education sponsors and courses and to define what constituted a manufacturer and nonmanufacturer sponsor. The committee would be required to review sponsor and course applications and establish requirements for approval of online sponsors and courses.

Out-of-state license holders. SB 663 would eliminate the requirement that hearing instrument fitters and dispensers licensed in other states be Texas residents before qualifying for state licenses.

Conforming rules. The bill would require the committee, DSHS, and the State Board of Examiners for Speech-Language Pathology and Audiology to adopt joint rules on hearing instrument sales by May 1, 2012.

The rules would have to address:

- information and other provisions required in each written contract for a hearing instrument sale;
- records retained by those who fitted and sold hearing instruments; and
- guidelines for the 30-day trial period during which a person could cancel a purchase.

Information on the written contract and 30-day trial period would have to be provided to the purchaser in plain language easily understood by the average consumer.

Criminal background checks. SB 663 would require the committee to conduct a fingerprint-based criminal background check for the issuance of a license on or after May 1, 2012. The committee would be required to adopt rules to implement the criminal history background checks by February 1, 2012.

DSHS would be allowed to contract with the Department of Public Safety (DPS) to administer the background checks and could authorize DPS to collect a fee from the applicants to cover the costs.

Each applicant seeking renewal of a license would have to submit to the fingerprint-based background check, but would not have to do so with each subsequent renewal. This provision would expire on February 1, 2015.

Other provisions. SB 663 would require recusal in the final vote on a complaint by a committee member who participated in an investigation of the complaint or in an informal settlement negotiation. The bill would allow the committee to issue a cease-and-desist order and would allow for imposition of civil penalties. The bill also would require that a public member be appointed to any subcommittee .

SB 663 also would add standard Sunset provisions on conflict of interest, training of committee members, public participation at meetings, informal disposition of contested cases, and governor appointment of the presiding officer.

The bill would take effect on September 1, 2011.

**SUPPORTERS
SAY:**

SB 663 would make meaningful changes to a committee that has not always adequately protected either the public or members of its profession. Part of the difficulty stems from the Sunset Advisory Commission and the Legislature not performing a systematic review since 1993. While the number of hearing instrument fitters and dispensers is relatively small, these professionals serve a potentially large number of Texans. In 2005, the Office for Deaf and Hard of Hearing Services estimated that 3.8 million needed its services, and that number can only be expected to grow.

Defining role/licensing examination. SB 663 would provide for a clear delineation of responsibility between committee members and DSHS staff. While DSHS currently administers the written examination for license

holders, members of the committee chosen by the committee president administer the practicum. There is no formal policy for proctor qualifications, which could compromise the objectivity of the licensing process. Some limited safeguards exist to protect the identity of the applicants or require monitoring by DSHS representatives, but in practice these rules are not enforced. Security requirements of the testing facilities often require the applicant to wear a nametag, and DSHS personnel are not always present. Questions remain about existing practitioners scoring practical examinations of potential competitors. The bill would encourage rules and procedures to protect the fairness and integrity of the licensing process.

SB 663 would require the committee to establish formal qualifications for proctors that would ensure their professionalism and objectivity in administering the practical examination. It also would require DSHS staffers to develop written policies and procedures for proctors, volunteers, and candidates to know what to expect during the licensing examination.

Continuing education. SB 663 would remove unduly burdensome continuing education requirements on licensees. The current requirement for 40 hours every two years is significantly higher for other professions with similar education and training requirements. Currently, personal emergency response system providers have no continuing education requirements, and opticians are required only to have 10 hours each biennium. Code enforcement officers and massage therapists need only 12 hours of continuing education every two years.

Provision of online courses could also make it easier for hearing instrument fitters and dispensers to meet the requirements. The current 40-hour requirement means that license holders must attend several continuing education courses a year. These usually are held in Austin, Dallas, and Houston, meaning that many have to travel long distances and miss work to attend. Currently, about half of other 22 DSHS-administered licensing programs permit licensees to obtain all of their continuing education online. SB 633 would be permissive, allowing the committee to permit more than 10 hours of online training.

Out-of-state licenses. SB 663 would prevent possible constitutional or restraint-of-trade challenge to requirements that hearing instrument fitters and dispensers with out-of-state licenses be Texas residents before qualifying for Texas licenses. These professionals should not be required

to establish residency to practice in Texas. Sufficient safeguards already exist to protect the public from potential fly-by-night operators.

Conforming rules. Both licensed hearing instrument fitters and audiologists should adhere to the same set of rules. SB 663 would properly require the State Committee of Examiners in the Fitting and Dispensing of Hearing Instruments, the State Board of Examiners for Speech-Language Pathology and Audiology, and DSHS to work in tandem to protect the public.

The bill would require standard rules in sales contracts on the 30-day trial period so that a customer could adapt to and adjust a hearing aid according to his or her needs. It would help regulators clarify the differences between the 30 consecutive-day standard set by the audiologist board and the 30 days from delivery rule established by the hearing instrument fitter committee. It would help reconcile the differences in the audiologists' and hearing instrument fitters' rules for returning defective or ill-fitting hearing aids.

Precedents exist in Texas and other states for conforming rules for professions that perform similar services. While it is not an exact analogy, barbers and cosmetologists represent two distinct occupations, but both cut and style hair and do waxing. The Texas Department of Licensing and Regulation, which regulates both, led an initiative to create similar rules for overlapping functions such as service delivery, sanitation, and inspections. Other states require uniformity in standards for both audiologists and hearing instrument fitters, even when the two professions are regulated separately. For example, both groups in California, Florida, and New York are subject to common rules.

Criminal background checks. The bill's requirement for criminal background checks would help protect the public against potential fraud. Hearing instruments can be expensive and often are paid by Medicaid, Medicare, and private insurance, making it important to know the backgrounds of people who fit and sell hearing instruments.

SB 663 would require the more accurate fingerprint-based system operated by DPS rather than the name-based system that had been used. Fingerprint-based criminal background checks provide real-time information from other states and the Federal Bureau of Investigation. Instead of renewal checks, the board would receive automatic notice of

subsequent arrests. License holders who submitted to fingerprint-based criminal background checks would not have to pay for additional criminal background checks for future renewals.

OPPONENTS
SAY:

Defining role/licensing examination. SB 663 would go too far in placing specific duties for the DSHS administrative staff into statute. The changes would be overly restrictive and unnecessary. The staff should not select and assign proctors for practical examinations, and the policy should not be set in state law.

Out-of-state licenses. Removing the residency requirement for license holders would encourage people from other states to stay briefly in Texas and not establish permanent business addresses. People could fit and sell hearing instruments and then leave the state without delivering the hearing instrument after being paid, or they could fail to honor the 30-day trial period. Removing the residency requirement could harm vulnerable customers.

OTHER
OPPONENTS
SAY:

SB 663 should require all continuing education courses to be available online, as with other DSHS-administered agencies.

NOTES:

The companion bill, HB 2273 by Anchia, was considered in a public hearing by the House Public Health Committee on April 6 and left pending.

The House was scheduled to consider SB 662 by Nichols, the Sunset bill for the State Board of Examiners for Speech-Language Pathology and Audiology, on the May 18 Major State Calendar.