



January 30, 2008

To: DSHS Council  
David Lakey, MD - Commissioner

From: Raul Flores  
President, Texas Association of Massage School Owners (TAMSO)

Re: HB 2644  
Subchapter H Massage Therapy §140 Proposed Rules

My name is Raul Flores. I am the President of the Texas Association of Massage School Owners (TAMSO). TAMSO is the only Massage Therapy School Association in Texas. Our membership consists of approximately 25 privately owned Massage Therapy Schools whose graduates represent a combined total of about 55% to 60% of all massage therapy school graduates annually. I am commenting today on behalf of TAMSO as well as a private Massage School Owner.

I and the many people represented in my comments have grave concerns about and strongly oppose many of the proposed rules being considered today. Specifically:

- The proposed rules related to the curriculum and internship of the new 500 hour program are not in keeping with the letter or intent of HB 2644 and will cause many of the privately owned massage schools across Texas to go out of business – Appendix A
- The proposed rules related to testing for licensure violate the Occupations Code and will cause severe harm and monetary hardship to future massage therapy exam candidates – Appendix B
- The proposed rules related to massage establishment application, licensure, and operations will endanger the public and put at risk licensed massage therapists working in unlicensed massage establishments
- We have other concerns of a more technical nature as well, but they are not as grave as the first three concerns

We ask you to consider the proposed rules that we are submitting today – Appendix C – instead of those presented by the agency. Our proposals satisfy the letter and intent of HB 2644, have the support of an overwhelming majority of stakeholders, protect massage therapy students, protect the public from illegal practices, and protect small business. Our proposed rules have been rejected by the department without good cause or any real explanation. I thank this Council and the Commissioner for considering our comments today, and it is our sincere hope that the Department would, at the very minimum, postpone any action until the matter is more carefully considered and the impacts understood. We stand ready and willing to work with you in the best interest of the citizens of Texas.

Respectfully,

Raul S Flores – San Antonio  
President, Texas Association of Massage School Owners

Victor Terrazas, Licensed Massage Therapist & Instructor – El Paso

Carolyn Scott Naile – Dallas/Mesquite  
President, Texas Coalition of Massage Schools & Instructors

Naomi Morton – School Owner - McAllen

cc: Governor Rick Perry  
Albert Hawkins, Executive Commissioner – Health & Human Services  
Representative Patrick Rose  
Representative Bill Callegari, Chair – Government Reform Committee  
Representative Frank Corte  
Representative Nathan Macias  
Representative Jim Jackson  
Representative Carl Isett  
Senator Jane Nelson, Chair – Health & Human Services Committee  
Senator Royce West

## Appendix A

We are strongly opposed to DSHS proposed rules §140.338(j),(k), and (l), and 140.339 (d)(e)

We recommend the following alternate language for §140.338(j),(k):

TAMSO, TCMSI, and AMTA propose a rule setting a maximum number consistent with ACCSCT accreditation standards:

(j) The maximum number of hours a student may accumulate in an internship before the student is required to be licensed may not exceed a number that is equal to one-third of the entire length of the massage therapy educational program.

In addition, in order to ensure that the content of advanced programs was in keeping with advanced coursework guidelines for the protection of the student, TAMSO, TCMSI, and AMTA propose:

(k) The educational program is state-approved if it includes at least the minimum 500 hour course of instruction required for licensure, it does not exceed internship hours in accordance with §140.338(j) of this title, and it complies with §140.339(a)(b)(c) of this title related to advanced coursework.

I would like to point out that general rule making guidelines in Occupations Code § 455 are intended to set standards to protect the public. All rules being proposed or considered need to be viewed in this context. In particular:

- § 455.053. RULES REGARDING MASSAGE SCHOOLS. Rules adopted under this chapter relating to a massage school must contain minimum standards for:
  - (11) the massage school's curriculum and educational material;
  - (13) any other aspect of the operation of a massage school that the executive commissioner considers necessary to protect students, massage school personnel, or the public

I would also like to point out that any rules being proposed must include a complete economic impact statement and analysis. This was not done with respect to all of the proposed rules.

Excerpt from the DSHS proposed preamble:

### SMALL AND MICRO-BUSINESS IMPACT ANALYSIS

*"Ms. Bourland has also determined that there will be an effect on small businesses or micro-businesses required to comply with the sections as proposed. This determination was made because additional fees will be required for the issuance and renewal of massage therapy establishment licenses to businesses formerly exempt from licensure. Regarding §140.364, there is an anticipated economic cost to businesses which are required to comply with the sections as proposed of \$300 every two years. There is no anticipated negative impact on local employment."*

### ECONOMIC IMPACT STATEMENT

*"Regarding §140.364, the purpose of the rule is to clearly set forth any exemptions to the requirement for a business to hold a massage establishment license. The rule language as proposed exactly repeats the language in HB 2644, which also eliminated the department's authority to adopt rules granting additional exemptions. An estimated 900 small or micro-businesses will be required to comply with the rules as proposed. Less than 100 of these small businesses are already licensed as massage schools."*

Unfortunately, these statements and analysis are incomplete. They do not include the adverse economic impact some of these rules would have on massage therapy schools; the backbone of massage therapy in Texas. Specifically, proposed rules 140.338(j),(k),(l),and (m) as well as others highlighted later in this document will have a very serious adverse economic impact on massage schools and future massage therapists as well. These proposed rules are new and are not in the interest of public protection; they are being proposed for purposes of harassment and in bad faith.

## Background

We understand that Occupations Code 455.053(7) requires the agency to set a maximum number of internship hours a student may complete in a massage school's internship program before the student is required to be licensed. We merely disagree with the number that the department is proposing. For 15 years, From September 1, 1991 until October 2006, such a rule did not exist, even though the statute required it. During that time there were no abuses, nor were there any public protection issues as a result of the absence of a rule.

In May 2004, a frivolous complaint was filed against a massage therapy school in San Antonio, Academy for Massage Therapy Training. The complaint alleged that this school, my school, was allowing unlicensed persons, students, to provide services to the public for which a license to practice massage was required. These students were providing massage therapy to the public without being compensated as part of a voluntary extended internship program. Under the Occupations Code 455:

*§ 455.158. STUDENT EXEMPTION FROM LICENSING REQUIREMENTS. A student who provides massage therapy as part of an internship program or without compensation is exempt from licensing under this chapter if the student is enrolled in a state-approved course of instruction that consists of at least 300 hours*

This language is still in the Occupations Code 455 today. DSHS claimed in the complaint that by my school allowing students to provide massage therapy to the public beyond the minimum 50-hour internship, I was in violation of rule 141.5(m) which was in effect at that time which states:

*(m) A licensee shall not allow an unlicensed person to engage in activity for which licensure is required.*

I disagreed because a student was exempt from licensure requirements I and asked for a SOAH hearing and an ALJ opinion.

As a result of the SOAH hearing, Docket Number 537-06-0538, conducted in February 2006, it was determined by Administrative Law Judge (ALJ), Honorable Amy Larson, that massage therapy schools are in fact allowed to offer more internship hours than what is minimally required for licensure. Counsel for DSHS was then and is still Mr. Dan Meador. Subsequent to this decision, in October 2006, DSHS adopted rule 141.34(j), which set a maximum number of internship hours at 50, even though it had been finally decided by an ALJ that more internship hours were allowed under the statute and rules. DSHS did so without completing and adverse economic analysis and statement.

Since it was decided that this practice was considered an acceptable way to business under the law, proposed rule 141.34(j), adopted in October 2006, would have created an adverse economic impact on massage therapy schools and provision should have been made to minimize that impact. No provision was made to minimize the impact. In fact, the analysis was not even performed. Unfortunately, rule 141.34(j) was adopted irrespective of the Government Code Chapter 2006 which requires an adverse economic impact analysis be conducted and provision made to reduce the adverse economic effect on small and micro-businesses, it was adopted irrespective of overwhelming stakeholder input opposing the rule, and it was adopted to harass and otherwise retaliate against Academy for Massage Therapy Training and other massage schools as a result of the ALJ decision.

An overwhelming majority of massage schools in Texas are micro-businesses. The adverse economic impact to massage schools which were affected by the rule has been a reduction in revenues of almost 40% annually. We have not yet calculated what the trickle down effect has been with respect to layoffs, loss of hours of work for instructors, and even the possibility of some schools going out of business. These adverse economic effects could have been prevented and would have been prevented if the agency had applied Government Code Chapter 2006 to the area of school operations. DSHS did not follow Government Code Chapter 2006 in this instance because the DSHS representatives who wrote the proposed rules made this a personal issue and in doing so, lost their objectivity. The adverse economic effects mentioned earlier will continue and become more severe if these proposed rules offered by the agency are adopted because tuition has also increased due to the increase in number of required hours for licensure.

This irresponsible, brazen, zealous, and harassing attitude is apparent in this 2007-2008 rulemaking process and it must stop now. Government Code Chapter 2006 is being ignored again, and the current rule 141.34(j) should have never been adopted. There is no cause for this type of over-regulation which goes beyond the authority given by the legislature. There is also no legal reason to oppose what this industry has proposed – what we in the industry refer to as “the 1/3 rule” (later in this document). Even Mr. Meador, Counsel for DSHS, stated in an email to one of our members and in person:

October 30, 2007

*"It is true that I said I had no problem with a 1/3 internship. However, I am not the person who makes that decision"*

Dan Meador, Assistant General Counsel  
Office of General Counsel

The purpose and intent of HB 2644 was to create an environment where massage schools would be able to offer even more flexibility in educational programs while bringing the minimum educational standards up and at the same time allowing massage schools to offer effective ways to create win-win opportunities for massage students, consumers, and massage schools. The benefits to the student of allowing schools to offer a voluntary extended internship program are two-fold: Experiential & Financial.

#### Student Benefits

- **Experiential.** The student gains more experience and confidence in working with a much wider array of different types of clients with different needs and conditions. Massage therapists are expected to effectively work with clients that present with various pathologies and conditions ranging from headaches, carpal tunnel syndrome, back surgery, sprains, strains, back pain, fibromyalgia, pregnancies, multiple sclerosis, muscular dystrophy, paralysis, TMJ, cancer, etc. It is impossible in a 50 hour internship program to give the student the opportunity to experience all of the different types of conditions and expectations the average 21<sup>st</sup> century massage client has, not to mention the need for the student to master all of the skills objectives set forth in the required curriculum. It has been argued by the program representatives, ignorantly so, that the students can gain this experience by working with fellow students in class. This argument shows just how out of touch the program is with the realities of massage education. First of all, massage therapy students are generally healthy. They don't have the types of conditions or pathologies that some in the general population seeking massage therapy would have. Second, most massage schools have very small classes – usually between 6 and 14 students. There is no way that a real world setting can be created, with conditions and pathologies mentioned above, with such a small number of relatively healthy individuals.
- **Financial.** Massage schools are allowed by statute to charge a fee to the clients for massage services performed by the student. The student is not allowed to be paid for the massage services provided. The school, however, utilizes the clinic revenue to cover its overhead and expenses. Schools, such as mine, choose to allow students to receive their education and added experience at little to no cost to the student, and with NO TAXPAYER dollars. The ALJ agreed that this practice did not constitute compensation for the massage services, and the ALJ viewed the practice for what it was – clients of the massage school pay the students tuition. Why is the practice of waiving tuition viewed as such a horrible practice by these agency representatives? The only obvious reason for their opposition is to harass and retaliate for losing the SOAH hearing regarding this practice!

Comparatively speaking, it is the most fiscally responsible way to offer the vocational education necessary for licensure as compared to what is currently required under other vocational educational programs such as Cosmetology, Esthetician (skin care), nail technician, medical assistant, dental assistant, and others which require a substantial portion of the education experience to be in clinic/internship. For example, to obtain a Cosmetology license, a person must complete 1500 hours of training, 1350 of which is spent in CLINIC where the school charges for services but the student is not paid AND the school collects tuition for all of those hours as well, usually in the form of tax payer funded grants or student loans for \$10,000 to \$15,000. To obtain an Esthetician license, a person must complete 750 hours of training, 675 of which is spent in CLINIC where the school charges for services but the student is not paid AND the school collects tuition for all of those hours as well, usually in the form of tax payer funded grants or student loans. To obtain a Nail Technician license, a person must complete 600 hours of training, 540 of which is spent in CLINIC where the school charges for services but the student is not paid AND the school collects tuition for all of those hours as well, usually in the form of tax payer funded grants. All that just to learn how to do someone's nails!?!?

Conversely, massage schools don't charge tuition if the student completes an extended internship program. The student tuition is waived upon completion. The program length is substantially shorter than the ones mentioned above – 675 hours, the extended program is voluntary, and it gives meaningful and valuable experience to the massage student. Income opportunities are far greater for a massage therapist - \$29,250\* to \$31,474\*\* annually - than they are for a Cosmetologist - \$21,904\*\*\* annually, especially those massage therapists with the kind of experience that is gained through an extended internship program. Moreover, the ALJ concurred that the practice of waiving student tuition through this extended internship program did not violate any law or rule.

From a public protection standpoint, it would seem to me that it would be far more important to allow massage schools to offer to students an opportunity to gain more experience as part of a structured massage educational program than it is to require 540 hours of "clinic" for someone who simply wants to do manicures. Wouldn't you agree? In doing so, massage schools should have the flexibility to offer programs that meet the needs of the industry and the student at the same time.

Finally, during the 2007 legislative session, when HB 2644 was being considered, I and several of my colleagues were given assurances by Heather Muehr, then Program Director for the Massage Therapy Program, that we would be able to, by rule, set a number of internship hours that was consistent with what the majority of schools agreed upon. The number at the time was a number equal to one-third of the entire massage program. In real numbers, that would mean a program with 450 classroom hours would include internship hours of up to 225 internship hours, for a total of 675 hours, but as the classroom hours offered increased, so would the internship hours proportionately. In a 500 classroom hour program, there would be a voluntary extended internship of no more than 250 hours for a total of 750 hours of education in the program. Anything offered by a school which was beyond the minimum requirement for licensure would be completely voluntary on the part of the student.

Instead, Yvonne Feinleib, Stephen Mills, and Dan Meador have chosen to continue to harass law abiding, upstanding, tax paying massage schools and their owners by proposing an even more restrictive set of rules affecting massage schools and their owners and administrators irrespective of the intent, purview, and purpose of HB 2644, irrespective of Government Code Chapter 2006, irrespective of the promises made and assurances given by Heather Muehr, and irrespective of overwhelming stakeholder input opposing such unnecessary restrictions. Moreover, they are attempting to undermine the decision of an ALJ by proposing these rules. At the very least, schools that have been operating the way the ALJ said was legal should be allowed to continue to do so without any further harassment.

FYI

§ 2006.002. ADOPTION OF RULES WITH ADVERSE ECONOMIC EFFECT.

- (a) A state agency considering adoption of a rule that would have an adverse economic effect on small businesses or micro-businesses shall reduce that effect if doing so is legal and feasible considering the purpose of the statute under which the rule is to be adopted.
- (b) To reduce an adverse effect on small businesses, an agency may:
  - (1) establish separate compliance or reporting requirements for small businesses;
  - (2) use performance standards in place of design standards for small businesses; or
  - (3) exempt small businesses from all or part of the rule.
- (c) Before adopting a rule that may have an adverse economic effect on small businesses, a state agency shall prepare:
  - (1) an economic impact statement that estimates the number of small businesses subject to the proposed rule, projects the economic impact of the rule on small businesses, and describes alternative methods of achieving the purpose of the proposed rule;
  - and
  - (2) a regulatory flexibility analysis that includes the agency's consideration of alternative methods of achieving the purpose of the proposed rule.
  - (c-1) The analysis under Subsection (c) shall consider, if consistent with the health, safety, and environmental and economic welfare of the state, using regulatory methods that will accomplish the objectives of applicable rules while minimizing adverse impacts on small businesses. The state agency must include in the analysis several proposed methods of reducing the adverse impact of a proposed rule on a small business.
  - (d) The agency shall include the economic impact statement and regulatory flexibility analysis as part of the notice of the proposed rule that the agency files with the secretary of state for publication in the Texas Register and shall provide copies to the standing committee of each house of the legislature that is charged with reviewing the proposed rule.
  - (e) This section does not apply to a rule adopted under Title 2, Tax Code.
  - (f) To reduce an adverse effect of rules on micro-businesses, a state agency shall adopt provisions concerning micro-businesses that are uniform with those outlined in Subsections (b)-(d) for small businesses.
  - (g) The attorney general, in consultation with the comptroller, shall prepare guidelines to assist a state agency:
    - (1) in determining a proposed rule's potential adverse economic effects on small businesses; and
    - (2) in identifying and evaluating alternative methods of achieving the purpose of a proposed rule.

We strongly oppose requiring accreditation for massage schools wanting to offer more than 500 hours because:

1. Competitor "career" schools are already accredited, giving them a huge competitive advantage over smaller private schools, and these schools also receive Title IV Federal Financial Aid
2. Even if a school were to become accredited, Federal financial aid would not become available to privately owned massage schools until some time after accreditation
3. It was not the intent of HB 2644

4. It is not required in HB 2644
5. This requirement would drive up the cost of massage education by at least 20%
6. Of the approximately 55 privately owned Massage Therapy Schools in Texas, only 3 are accredited by an accrediting agency such as what is being proposed by rule
7. Accreditation should be optional
8. Accreditation is very expensive (\$15,000 to \$20,000) and takes a minimum two years to obtain

The TAMSO supported HB 2644 with the understanding that:

1. The minimum educational hours consisted of meaningful coursework to benefit the massage therapy student
2. Additional coursework beyond the minimum 500 hours would be allowed as long as it met current statutory and administrative criteria, providing the student the opportunity to specialize in any aspect of massage therapy practice or simply to allow the student the opportunity to gain more experience and confidence in a school clinical setting prior to licensure. This position was upheld by an Administrative Law Judge in February 2006 resulting from a SOAH hearing with respect to additional or advanced coursework.
3. A student providing massage therapy to the public as part of an internship program is NOT the unlicensed practice of massage therapy. This activity is exempted by statute (see below)
4. Internship can in fact be more than the minimum 50 hours. A plain reading of the law shows that the intent was to allow more under certain conditions:

*§ 455.158. STUDENT EXEMPTION FROM LICENSING REQUIREMENTS. A student who provides massage therapy as part of an internship program or without compensation is exempt from licensing under this chapter if the student is enrolled in a state-approved course of instruction that consists of at least 300 hours*

*§ 455.001. DEFINITIONS. In this chapter:*

(6) "Massage school" means an entity that:

(A) teaches at a minimum the course of instruction required for a massage therapist license

*§ 455.159. STUDENT INTERNSHIP PROGRAM. (a) An internship program must:*

(2) provide a student with a minimum of 40 hours of hands-on massage therapy experience

*§ 455.053. RULES REGARDING MASSAGE SCHOOLS. Rules adopted under this chapter relating to a massage school must contain minimum standards for:*

(7) *the maximum number of hours a student may accumulate in a massage school's internship program before the student is required to be licensed under this chapter;*

If the intent was for the minimum to be the maximum, why would there need to be a separate rule specifying a maximum? In fact, the intent was to allow for more hours of internship than what is minimally required, and that number should be set:

- Using some rational basis
- Recognizing stakeholder input
- Recognizing the needs of the industry
- With proper protections built in for the student (enrollment agreements and course end dates)

Internship would be expanded by rule, with proper stakeholder input and consideration, to a number that was agreeable to a consensus of the massage school industry. At the time we testified for the bill, we had agreed that this could be handled through rulemaking.

In summary, we are strongly opposed to DSHS proposed rules §140.338(j),(k), and (l)

§140.338. Massage School Curriculum Outline and Internship

(j) The department does not approve more than 50 internship hours. Individuals who have completed the required minimum 500-hour supervised course of instruction, including the 50-hour internship, are eligible for examination and licensure and are no longer considered to be students. For the purposes of Texas Occupations Code §455.053(7), 50 hours is the maximum number of hours a student can accumulate in an internship before the student is required to be licensed.

(k) A massage school shall not allow an unlicensed student to receive any form of compensation for massage therapy or other massage therapy services. Compensation includes discounted or reduced student fees for tuition, books, supplies, or other educational expenses.

(l) A massage school may not allow, authorize or contract with an unlicensed student enrolled in any course or portion of a course offered by the school to provide massage therapy or other massage therapy services to the public in excess of the 50 hour internship

Proposed rule (j) was proposed after the SOAH hearing proved that additional internship hours were allowed. Proposed (k) and (l) below are written specifically to go against what the SOAH judge ruled *is allowed* under the statute and rules. The agency must not be allowed to change the way schools do business by writing rules that are clearly written to be vindictive and are outside of the authority given to them by the legislature!

In addition, we are strongly opposed to DSHS proposed rules §140.339 (d)(e)

(d) A massage school may not represent that advanced course work is approved by the department.

(e) Unlicensed students enrolled in advanced coursework may not provide massage therapy or other massage therapy services to the public.

The proposed rules §140.339 (d)(e) are being proposed in contradiction to what was decided by the judiciary in a SOAH hearing in February of 2006.

5. The intent of HB 2644 was to create an environment whereby massage schools in Texas could offer programs that would allow for the most opportunity for portability and reciprocity:

*"Currently, a massage therapy instructional program in Texas is required to include a 300 hour mandated curriculum. Under this curriculum, Texas graduates are prohibited from qualifying for national certification as a minimum of 500 hours is required by the National Certificate Examination for Therapeutic Massage and Bodywork Program, accredited by the National Commission for Certifying Agencies. Because of this, Texas graduates currently have no licensing reciprocity when moving to other states and the District of Columbia. All other states that regulate the curriculum and practice of massage therapy instruction require a minimum of 500 hours, with many states exceeding that number with programs that include up to 1000 hours of training to be licensed or recognized."*

Chairman Patrick Rose, Author HB 2644  
Letter of Intent HB 2644 7/18/2007

6. Placing a maximum on what schools can offer goes against the intent of HB 2644. In addition, it is criminal to attempt to do so because it violates the Occupations Code with respect to rule making authority.

§ 455.053. RULES REGARDING MASSAGE SCHOOLS. Rules adopted under this chapter relating to a massage school must contain minimum standards for:

(11) the massage school's curriculum and educational material;

The intent of HB 2644 was to allow Texas massage schools the ability to offer more hours in massage education without any other approvals or accreditation so that Texas massage school graduates could be prepared to move to other states if they so chose and practice massage therapy because they were able to obtain in Texas the education needed to move to virtually any other state. In addition, other states DO NOT PLACE a maximum number of hours that can be taught, with or without accreditation, and most state massage laws don't place a maximum number of internship hours either. For example:

- New York requires a minimum 1000 hours of massage education for licensure as a massage therapist with no maximum
  - Nebraska law requires a minimum 300 hours of clinic as part of the minimum 1000 hour program with no maximum (30%)
  - Louisiana law allows for up to 325 hours of the minimally required 500 to be clinical practicum with no maximum (65%)
  - North Carolina law allows for a minimum of 150 hours of clinic as part of the minimum 500 hours required for licensure with no maximum (30%)
  - Oregon law allows up to 300 hours of clinical practical application as part of the minimum 500 hour program with no maximum (60%)
  - Utah law requires a minimum of 600 hours of training, 400 hours of which must be massage technique and clinic practicum with no maximum (66%)
  - New Mexico law allows up to 150 of the required minimum 650 hours to be internship hours
  - Florida law, in addition to a traditional classroom experience, allows for an apprentice training program of 1678 hours, 700 of which are clinic practice supervised by a licensed massage therapist in a massage establishment (42%)
7. The intent of HB 2644 was to allow currently licensed, non-accredited, privately owned massage schools an opportunity to continue to be competitive in the free market with other vocational schools by allowing those private schools the ability to offer extended internship programs in lieu of becoming eligible for federal financial aid programs. This practice of offering extended internship programs was proven to be perfectly legal and acceptable under the statute, as ruled by an ALJ in February 2006. This is one of the reasons why TAMSO supported HB 2644.
  8. The intent was never to require accreditation of schools nor place a limit on the number of hours a massage school could offer.

## Appendix B

We strongly oppose the proposed change to the examination for licensure!

We are strongly opposed to the requirement of any "national" exam because:

1. It violates the Occupations Code.

The Occupations Code §455.101 states:

§ 455.101. GENERAL DUTIES OF DEPARTMENT. The department shall:

(4) prepare and administer a state examination under this chapter.

HB 2644 states:

Section 455.156(b), Occupations Code, is amended to read as follows:

(b) An applicant for a license under this section must be an individual and:

(2) pass the [practical and] written [portions of the] state examination; and

2. The Occupations Code does not give the department the authority to adopt a "national" exam.
3. The proposed "national" exam tests on information not included in the curriculum allowed to be taught by schools.
4. There are no checks and balances for the test candidate with respect to timely processing of the application, available test dates and sites.
5. None of the proposed "national" exams are available in any language other than English.
6. The "national" exam fee is three times the current testing fee.
7. The applicant must test within 3 months or they forfeit the examination fee as compared to one year under the current system.
8. Passing the "national" exam doesn't "certify" you "nationally" – it's deceptive trade on the part of the "national" organization.
9. The current testing contractor submitted a proposal to DSHS to develop a new state exam at no expense to the state, and offer a rebate to the state for every person taking the new exam.
10. If DSHS is allowed to break the law and require the "national" exam, candidates will still have to take a Texas jurisprudence exam prior to licensure. The jurisprudence could be and should be part of the statute required state exam. Why would DSHS want to require candidates take two exams?
11. Currently, it takes a massage therapist candidate approximately 5 weeks from the time she/he submits her/his application for testing and licensure to the time she actually receives a license. Under the new "national" proposal, that process will take an average of 6 to 7 months.
12. Texas massage therapists stay in Texas. Less than 1000 therapists have been nationally certified out of the more than 20,000 therapists licensed in the state. The national exams should be optional, while a Texas-based examination would ultimately fulfill the needs of this regulated community.

In closing, DSHS and its representatives have ignored the letter and intent of HB 2644, ignored the will, input, and needs of the industry, and have resorted to Gestapo-like tactics to intimidate, control, and destroy small business, and they must be stopped!

We strongly encourage this council to step in and do what the law and relevant codes require, and stop these rules from moving forward. We ask you to adopt the rules that the industry has offered to the agency, all of which meet statutory requirements, are consistent with the intent of HB 2644, provide public protection while addressing the needs of the industry, the needs of prospective massage students, the needs of the public, and which consider the expertise of those who make massage therapy a successful, highly regarded part of this state's economy and way of life every day.

\* US Department of Labor, Bureau of Labor & Statistics

\*\* Payscale.com

\*\*\* Salary.com

## **Appendix C**

HB 2644

Subchapter H Massage Therapy §140 Proposed Rules

**With Stakeholder Consideration**

The sections underlined and highlighted in yellow are the sections that either replace or build on the DSHS proposals, strengthen language already in the law, or clarify any ambiguities which may exist in the law.

Subchapter H. Massage Therapy.

§140.300. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise. Words and terms defined in the Texas Occupations Code, Chapter 455 (the Act relating to the regulation of massage therapy) shall have the same meaning in this chapter as assigned in the Act.

- (1) Act--Texas Occupations Code, Chapter 455, relating to the regulation of massage therapists, massage therapy instructors, massage schools and massage establishments.
- (2) Anatomy--The study of the structure of the human body including the following areas: bones, joints and muscles, the skin, blood and blood vessels, cells, tissues and membranes, the heart, the brain, spinal cord and nerves, the lymphatic system, the digestive system, the respiratory system, the urinary system, the reproductive system, glands and hormones.
- (3) Business practices and professional ethics standards--The study of standard bookkeeping and accounting practices, office practices, and advertising, and ethical guidelines for massage therapists, massage establishments, massage instructors, continuing education providers, and massage schools established by law or the department.
- (4) Client--An individual or patron seeking or receiving massage therapy services.
- (5) Commissioner--The Commissioner of the Department of State Health Services.
- (6) Department--Department of State Health Services.
- (7) Executive Commissioner--The Executive Commissioner of the Health and Human Services Commission.
- (8) Health and hygiene--The study of recognized methods of sanitation and cleanliness including prophylaxis or disease prevention as applied to massage therapy services and current knowledge of elements of healthy life styles.
- (9) Hydrotherapy--The use of generally accepted methods of external application of water for its mechanical, thermal, or chemical effect.
- (10) Instructor--A person employed at a licensed massage school who instructs one or more students in any section of the course of instruction, other than massage therapy techniques, manipulation of soft tissue, or the internship.

(11) Kinesiology-- The study of the anatomy, physiology, and mechanics of movement of the human body.

(12) Licensee--A person or entity licensed under the Act as a massage therapist, massage school, massage therapy instructor, or massage establishment.

(13) Massage therapy--The manipulation of soft tissue by hand or through a mechanical or electrical apparatus for the purpose of body massage. The term includes effleurage (stroking), petrissage (kneading), tapotement (percussion), compression, vibration, friction, nerve strokes, and Swedish gymnastics. Massage therapy may include the use of oil, lubricant, salt glows, heat lamps, hot and cold packs, or tub, shower, jacuzzi, sauna, steam or cabinet baths. Equivalent terms for massage therapy are massage, therapeutic massage, massage technology, myo-therapy, body massage, body rub, or any derivation of those terms. Massage therapy is a health care service when the massage is for therapeutic purposes. The terms "therapy" and "therapeutic" do not include diagnosis, the treatment of illness or disease, or any service or procedure for which a license to practice medicine, chiropractic, physical therapy, or podiatry is required by law. Massage therapy does not constitute the practice of chiropractic.

(14) Massage therapy educational program--The minimum 500 hour supervised course of instruction described in the Act, §455.156, required for licensure and provided by a licensed massage school.

(15) Massage therapy establishment--A place of business that advertises or offers massage therapy or other massage services unless specifically exempted by the Act. The term includes a place of business that advertises or offers any service described by a derivation of the terms "massage therapy" or "other massage services" as defined by the Act.

(16) Massage therapy instructor--A licensed massage therapist who provides to one or more students instruction approved by the department in massage therapy or manipulation of soft tissue and who holds a license issued by the department as a massage therapy instructor.

(17) Owner--An owner is, in the case of a massage therapy school or establishment, an individual, a partnership and any partners, a corporation, or any other legal business entity.

(18) Pathology--The scientific study of the nature of disease and its causes, processes, development, and consequences.

(19) Physiology--The study of the normal vital processes of the human body including the processes of cells, tissues, and organs including the contractibility of muscle tissue; coordination through the nervous system; digestion; circulatory; reproduction; and secretions.

(20) State approved educational institution--An institution which is approved by the Texas Education Agency or which is an institution of higher education as defined in the Texas Codes Annotated, Texas Education Code, Chapter 61 or a higher education institution approved by a similar agency in another state.

(21) Swedish gymnastics--Passive and active joint movements, nonspecific stretches, passive and active exercise, or any combination of these.

(22) Swedish massage therapy techniques--The manipulation of soft tissue utilizing effleurage (stroking), petrissage (kneading), tapotement (percussion), compression, vibration, friction, nerve stroke, and Swedish gymnastics.

§140.301. Fees.

(a) All fees are non-refundable and shall be submitted in the form of a personal check, certified check or money order made payable to the Department of State Health Services.

(b) For all applications and renewal applications, the department is authorized to collect subscription and convenience fees, in amounts determined by the Texas Online Authority, to recover costs associated with application and renewal application processing through Texas Online.

(c) The fees related to the licensure of massage therapists are as follows:

(1) application fee--\$106;

(2) examination fee--to be determined by the testing agency approved by the department to administer the examination plus an administrative fee determined by the department at the time the applicant is scheduled for an examination;

(3) re-examination fee--to be determined by the testing agency approved by the department to administer the examination plus an administrative fee determined by the department at the time the applicant is to be rescheduled for an examination;

(4) fee for a renewal license issued for a two-year period--\$100;

(5) late renewal fees;

(A) a fee that is equal to one and one-half times the normally required renewal fee when renewed on or within 90 days of expiration; or

(B) a fee that is equal to two times the normally required renewal fee when renewed more than 90 days, but less than one year after expiration.

(d) The fees related to massage establishments are as follows:

(1) massage establishment application fee:

(A) for each massage school primary instructional location or approved additional location--\$100;

(B) for all other applicants--\$300;

(2) fee for a renewal license issued for a two-year period;

(A) for each massage school primary instructional location or approved additional location--\$100;

(B) for all other renewal applicants--\$300;

(3) late renewal fees;

(A) a fee that is equal to one and one-half times the normally required renewal fee when renewed on or within 90 days of expiration; or

(B) a fee that is equal to two times the normally required renewal fee when renewed more than 90 days, but less than one year after expiration.

(e) The fees related to massage schools offering the minimum 500-hour supervised course of instruction for licensure are as follows:

(1) application and licensure fee (includes initial inspection and any subsequent inspections)--\$2,800;

(2) fee for a renewal license issued for a two-year period (includes inspections)--\$2,000;

(3) late renewal fees:

(A) a fee that is equal to one and one-half times the normally required renewal fee when renewed on or within 90 days of expiration; or

(B) a fee that is equal to two times the normally required renewal fee when renewed more than 90 days, but less than one year after expiration.

(4) change of instructional address for main campus (includes inspections)--\$375; and

(5) application and renewal fee for an additional educational program location separate from the main campus (includes initial inspection and any subsequent inspections)--\$750.

(f) The fees related to massage therapy instructors are as follows:

- (1) application and licensure fee--\$200;
- (2) fee for a renewal license issued for a two-year period--\$200;
- (3) late renewal fees for massage therapy instructors;

(A) a fee that is equal to one and one-half times the normally required renewal fee when renewed on or within 90 days of expiration; or

(B) a fee that is equal to two times the normally required renewal fee when renewed more than 90 days, but less than one year after expiration.

(g) The fees related to pre-approved providers for continuing education are as follows:

- (1) application fee--\$200;
- (2) fee for a renewal license issued for a two-year period--\$200.

(h) License and identification card replacement fee--\$20.

(i) Returned check fee--\$25.

(j) Fee for name change--\$20.

#### §140.302. Processing Applications

(a) The following periods of time shall apply from the date of receipt of an application until the date of issuance of a written notice that the application is complete and accepted for filing or that the application is deficient and additional specific information is required. A written notice stating that the application has been approved may be sent in lieu of the notice of acceptance of a complete application. The time periods are as follows:

- (1) letter of acceptance of application for massage therapist license--20 working days;
- (2) letter of application or renewal deficiency--20 working days;
- (3) issuance of license renewal after receipt of documentation of all renewal requirements--10 working days; and

(4) letter of acceptance or notice of deficiency of application for massage school, massage therapy instructor, or massage establishment license--30 working days.

(b) The following periods of time shall apply from the receipt of the last item necessary to complete the application until the date of issuance of written notice approving or denying the application. The time periods for denial include notification of the proposed decision and of the opportunity, if required, to show compliance with the law and of the opportunity for a formal hearing. An application is not considered complete until the required examination has been successfully completed by the applicant. The time periods are as follows:

(1) notice of approval for examination--20 working days;

(2) initial letter of approval for licensure--30 days;

(3) letter of denial of licensure--30 days; and

(4) issuance of license renewal after receipt of documentation of all renewal requirements--10 working days.

(c) In the event an application is not processed in the time periods stated in subsection (a) of this section, the applicant has the right to request reimbursement of all fees paid in that particular application process. If the department does not agree that the time period has been violated or finds that good cause existed for exceeding the time period, the request will be denied. Good cause for exceeding the time period is considered to exist if the number of applications for licensure and licensure renewal exceeds by 15% or more the number of applications processed in the same calendar quarter the preceding year; another public or private entity relied upon by the department in the application process caused the delay; or any other condition exists giving the department good cause for exceeding the time period.

(d) If a request for reimbursement under subsection (c) of this section is denied by the department, the applicant may appeal to the commissioner of the department for a timely resolution of any dispute arising from a violation of the time periods. The applicant shall give written notice to the commissioner at the address of the department that he or she requests full reimbursement of all fees paid because his or her application was not processed within the applicable time period. The department shall submit a written report of the facts related to the processing of the application and of any good cause for exceeding the applicable time period. The commissioner shall provide written notice of the commissioner's decision to the applicant. An appeal shall be decided in the applicant's favor if the applicable time period was exceeded and good cause was not established. If the appeal is decided in favor of the applicant, full reimbursement of all fees paid in that particular application process shall be made.

(e) The time periods for contested cases related to the denial of licensure or licensure renewals are not included within the time periods stated in subsection (a) of this

section. The time period for conducting a contested case hearing runs from the date the department receives a written request for a hearing and ends when the decision of the department is final and appealable. A hearing may be completed within one to four months, but may extend for a longer period of time depending on the particular circumstances of the hearing.

#### §140.303. General Ethical Requirements.

(a) A licensee shall not make deceptive, untrue, or fraudulent representations in the practice of massage therapy or employ a trick or scheme in the practice of massage therapy, including, but not limited to, warranty of results of such services and false claims of proficiency in any field.

(b) A licensee shall not use a work area, equipment or clothing that is unclean or unsanitary.

(c) A licensee shall not practice massage therapy fraudulently, with gross incompetence, with gross negligence on a particular occasion, or with negligence or incompetence on more than one occasion.

(d) A licensee shall bill clients or third parties for only those services actually rendered or as agreed to by mutual understanding at the beginning of services or as later modified by mutual agreement. A licensee must either honor an unexpired gift certificate issued by that licensee or provide a full refund.

(e) For each client, a licensee shall keep accurate records of the dates of massage therapy services, types of massage therapy and billing information. Such records must be maintained for a minimum of two years.

(f) A licensee must obtain the written consent of a parent or guardian to provide massage therapy services to a person under the age of 17.

(g) On the written request of a client, a client's guardian, or a client's parent if the client is under the age of 17, a licensee shall provide a written explanation of the charges for massage therapy services previously made on a bill or statement of the client. This requirement applies even if the charges are to be paid by a third party.

(h) A licensee shall not abuse alcohol or drugs in any manner which detrimentally affects the provision of massage therapy or massage therapy instruction.

(i) A licensee may not persistently or flagrantly overcharge or over treat a client.

(j) A licensee shall not practice in an unlicensed massage establishment or massage school.

(k) A licensee shall not allow an unlicensed person to engage in activity for which licensure is required.

(l) A licensee shall not provide false information on material submitted to the department.

(m) A licensee shall not interfere with a department investigation by the willful misrepresentation of facts to the department or its authorized representative, or by the use of threats, retaliation, or harassment against any person.

(n) A licensee shall comply with any formal order issued by the department relating to the licensee.

(o) A licensee shall be subject to disciplinary action by the department if the licensee is issued a public letter of reprimand, is assessed a civil penalty by a court, or has an administrative penalty imposed by the attorney general's office under the Texas Code of Criminal Procedure, §56.31.

(p) A licensee shall notify each client of the name, mailing address, and telephone number of the department for the purpose of directing complaints to the department by providing notification:

(1) on each written contract for services of a licensee; or

(2) on a sign prominently displayed in the primary place of business of each licensee; or

(3) on a bill for service provided by a licensee to a client or third party; or

(4) by another written and documented method.

(q) A licensee shall keep his or her licensure file updated by notifying the department, in writing, of changes of names, address, telephone number and employment.

(r) A licensee shall be subject to disciplinary action for failure to truthfully respond in a manner that fully discloses all information in an honest, materially responsive, and timely manner to a complaint filed with or by the department.

#### §140.304. Consultation Document.

(a) A licensee shall provide an initial consultation to each client(s) prior to the first massage therapy session and obtain the signature of the client on the consultation document. The consultation document shall include:

(1) the type of massage therapy services or techniques the licensee anticipates using during or the massage therapy session;

(2) the parts of the client's body that will be treated or the areas of the client's body that will be avoided during the session, including indications and contraindications;

(3) a notification to the client that the licensee shall not touch the breasts of a female client without the written consent of the client;

(4) a statement that draping will be used during the session;

(5) a statement that if uncomfortable for any reason, the client may ask the licensee to cease the massage and the licensee will end the massage session; and

(6) the signature of both the client and the licensee.

(b) If the client's reason for seeking massage therapy changes at any time and any of the information in subsection (a)(1) - (4) of this section is modified, the licensee must provide an updated consultation reflecting any changes and modifications to the techniques used or the parts of the client's body to be treated.

#### §140.305 Sexual Misconduct.

(a) A licensee shall not engage in sexual contact during a session with a client. For the purposes of this section, sexual contact includes:

(1) any touching of any part of the genitalia or anus;

(2) any touching of the breasts of a female without the written consent of the female;

(3) any offer or agreement to engage in any activity described in subsection (a)(1) or (2) of this section;

(4) kissing;

(5) deviate sexual intercourse, sexual contact, sexual intercourse, indecent exposure, sexual assault, prostitution, and promotion of prostitution as described in the Texas Penal Code, Chapters 21, 22, and 43, or any offer or agreement to engage in any such activities; or

(6) any behavior, gestures, or expressions which may reasonably be interpreted as inappropriately seductive or sexual;

(7) inappropriate sexual comments about or to a client, including making sexual comments about a person's body.

(b) A licensee shall not allow any individual, including a client, student, licensee, employee, participant in a continuing education program, or one's self to engage in sexual contact on the premises of any massage school, massage establishment, or the licensee's own place of business.

(c) A licensee shall not allow any individual, including a student, licensee, employee, or one's self to practice massage therapy or provide other massage therapy services in the nude, while partially nude, or in clothing designed to arouse or gratify the sexual desire of any individual.

(d) A licensee shall not perform massage therapy, whether or not for compensation, at or for a sexually oriented business.

(e) A licensee shall immediately discontinue the massage therapy session, activity or the professional relationship when a client initiates any verbal or physical contact with the licensee that is intended to arouse or gratify the sexual desire of either person.

#### §140.306. Advertising.

(a) A person, including a massage therapy instructor, a massage school, a massage therapist, or massage establishment, who is not licensed under the Act, shall not use the word "massage" or the word "spa" on any sign, display, or other form of advertising unless the person is expressly exempt from the license requirements of the Act. Under no circumstances may a sexually oriented business use the word "massage" or "bath" on any sign or other form of advertising.

(b) A licensee shall not use advertising that is false, misleading, or deceptive or that is not readily subject to verification. False, misleading, or deceptive advertising or advertising that is not readily subject to verification includes advertising that:

(1) makes a material misrepresentation of fact or omits a fact necessary to make the statement as a whole not materially misleading;

(2) makes a representation likely to create an unjustified expectation about the results of a health care service or procedure;

(3) compares a health care professional's services with another health care professional's services unless the comparison can be factually substantiated;

(4) contains a testimonial;

(5) causes confusion or misunderstanding as to the credentials, education, or licensure of a health care professional;

(6) advertises or represents that health care insurance deductibles or copayments may be waived or are not applicable to health care services to be provided if the deductibles or copayments are required;

(7) advertises or represents that the benefits of a health benefit plan will be accepted as full payment when deductibles or copayments are required;

(8) makes a representation that is designed to take advantage of the fears or emotions of a particularly susceptible type of client; or

(9) advertises or represents in the use of a professional name, title or professional identification that is expressly or commonly reserved to or used by another profession or professional.

(c) A licensee shall not use advertising that is considered provocative. Provocative advertising is advertising that includes language, photos, or other media that may be reasonably interpreted as inappropriate, seductive, or sexual.

(d) When an assumed name is used in a person's practice as a massage therapist, the full legal name of the massage therapist or license number of the massage therapist must be listed in each advertisement and each time the business name or assumed name appears in writing. An assumed name used by a massage therapist must not be false, misleading, or deceptive.

(e) A massage school shall not make false, misleading, or deceptive statements concerning the activities or programs of another massage school.

(f) A massage school shall not maintain, advertise, solicit for or conduct any course of instruction intended to qualify a person for licensure as a massage therapist without first obtaining licensure from the department.

(g) Advertisements by a massage therapy educational program seeking prospective students must clearly indicate that training is being offered, and shall not, either by actual statement, omission, or intimation, imply that prospective employees are being sought.

(h) Advertisements seeking prospective students must include the full and correct name and license number of the massage therapy educational program and massage school.

(i) No statement or representation shall be made to prospective or enrolled students that employment will be guaranteed upon completion of any program or that falsely represents opportunities for employment.

(j) No statement shall be made by a massage therapy educational program or a massage school that it has been accredited unless the accreditation is granted from a nationally recognized accrediting agency or organization. The name of the accrediting agency or organization must be used in any accreditation statement.

(k) No massage therapy educational program shall advertise as an employment agency under the same name or a confusingly similar name or at the same location as the educational program. No representative shall solicit students for a program through an employment agency.

#### §140.307 Massage Therapy Licenses.

(a) The department will send each applicant whose application for licensure has been approved a license containing a license number. Individual licensees will also be sent an identification card. Licenses and identification cards remain the property of the department and must be surrendered to the department on demand.

(b) A license must be displayed in an appropriate and public manner at the business location of the licensed business, or in the primary office or place of employment of the licensed individual. In the absence of a primary office or place of employment, the licensed individual shall carry a current identification card.

(c) Business licenses may not be sold or transferred to another address. If a licensed business is sold, or is closed at a particular address, the license certificate shall be returned to the department.

(d) Neither the licensee nor anyone else shall display a photocopy of a license or carry a photocopy of an identification card in lieu of the original document.

(e) Neither the licensee nor anyone else shall make any alteration on a license or identification card issued by the department.

(f) The department will replace a lost, damaged, or destroyed license or identification card upon written request from a licensee and payment of the appropriate replacement fee. The request shall include a statement detailing the loss or destruction of the original license or identification card, or be accompanied by the damaged license or card.

(g) Licenses and cards that were issued but may have not been received by a licensee may be replaced at no charge if the licensee notifies the department in writing and within 30 days of the date the license or card was issued.

#### §140.310. Qualifications for Licensure as a Massage Therapist.

(a) Each applicant for licensure as a massage therapist must be at least 18 years old and present evidence satisfactory to the department that the person:

(1) if first enrolled in a massage therapy training program prior to September 1, 2007, has successfully completed a 300-hour supervised course of instruction in massage studies provided by a licensed massage therapy instructor, licensed massage school, a state approved educational institution, or a combination of any of these. The 300-hour supervised course of instruction must include:

- (A) 125 hours of Swedish massage therapy techniques;
- (B) 50 hours of anatomy;
- (C) 25 hours of physiology;
- (D) 15 hours of hydrotherapy;
- (E) 15 hours of business practices and professional ethics;
- (F) 20 hours of health and hygiene; and
- (G) a 50 hour internship;

(2) if first enrolled in a massage therapy training program on or after to September 1, 2007, has successfully completed a minimum of a 500-hour supervised course of instruction in massage studies provided by a licensed massage school, a massage therapy instructor, a state approved educational institution, or a combination of any of these. The minimum 500-hour supervised course of instruction must include at least:

- (A) 200 hours of massage therapy techniques and theory and the practice of manipulation of soft tissue, with at least 125 hours of Swedish massage therapy techniques;
- (B) 50 hours of anatomy;
- (C) 25 hours of physiology;
- (D) 50 hours of kinesiology;
- (E) 40 hours of pathology;
- (F) 20 hours of hydrotherapy;
- (G) 45 hours of massage therapy laws and rules, business practices and professional ethics;

(H) 20 hours of health, hygiene, first aid, universal precautions, and cardiopulmonary resuscitation (CPR); and

(I) a 50 hour internship; or

(3) has been licensed or registered in good standing as a massage therapist in another jurisdiction, including a foreign country, that has licensing or registration requirements substantially equivalent to those listed in subsection (a)(2) of this section.

(b) Applicants who began massage therapy studies prior to January 1, 1992, may be eligible for licensure by documenting completion of a 250-hour supervised course of instruction and are not required to have completed a 50-hour internship in accordance with subsection (a)(1) of this section.

(c) Degrees, certificates, diplomas, and course work received at other institutions, American or foreign, shall be accepted only if such institution is approved by an education agency in that state or country and the curriculum or course of studies meets the criteria set out by the Act and this chapter. Course descriptions, school catalogs or bulletins may be required by the department to substantiate the curriculum.

(d) In the event that a deficiency is present in course work, the applicant may have up to one year to complete additional course work acceptable to the department; otherwise, the application may be voided.

#### §140.311. Massage Therapist Application Procedures and Documentation.

(a) Unless otherwise indicated, an applicant for licensure as a massage therapist must submit all required information and documentation of credentials on official department forms.

(b) The application fee must accompany the application form. The department will not consider an application as officially submitted until the applicant pays the application fee.

(c) If the application is incomplete, the department will send a notice listing any additional materials required to complete the application. An application not completed within 30 days after the date of the department's notice may be voided.

(d) Applicants must provide the following information on official department forms, unless otherwise requested by the department:

(1) specific information regarding personal data, social security number, birth date, place of employment, other state licenses and certifications held, misdemeanor and felony convictions, educational and training background, and work experience;

(2) a statement that the applicant has read the Act and this chapter and agrees to abide by them;

(3) a statement that the applicant, if issued a license, shall return the license and identification cards to the department upon the expiration, revocation or suspension of the license;

(4) a statement that the applicant understands that fees and materials submitted in the licensure process are nonrefundable and nonreturnable;

(5) a statement that the information in the application is truthful and that the applicant understands that providing false and misleading information on items which are material in determining the applicant's qualifications may result in the voiding of the application and failure to be granted a license or the revocation of any licenses issued; and

(6) the applicant's signature.

(e) Applicants must submit official transcript(s) of all relevant course work. A copy of an official transcript that has been notarized as a true and exact copy of an original may be submitted in lieu of the official transcript.

#### §140.312. Provisional Massage Therapist License.

(a) The department may issue a provisional license to an applicant for licensure as a massage therapist or massage therapy instructor who is at least 18 years old and is currently licensed or registered in another jurisdiction and who:

(1) has been licensed or registered in good standing as a massage therapist or massage therapy instructor, as applicable, for at least two years in another jurisdiction, including a foreign country, that has licensing or registration requirements substantially equivalent to the requirements of the Act;

(2) has passed a national or other examination recognized by the department, relating to the practice of massage therapy, for licensure or registration as a massage therapist or massage therapy instructor; and

(3) is sponsored by a person licensed by the department under the Act with whom the provisional licensee will practice during the time the person holds a provisional license.

(b) The department may waive the sponsorship requirement of subsection (a)(3) of this section if the department determines that compliance would be a hardship to the applicant.

(c) A provisional license is valid until the date the department approves or denies the provisional licensee's application for licensure. The department shall issue a license, without examination, to a person submitting the documentation set out in subsection (a) of this section.

(d) The department must approve or deny a provisional licensee's application for licensure not later than the 180th day after the date the provisional license is issued. The department may extend the 180-day period if the results of an examination have not been received by the department before the end of that period.

§140.313. Examinations Required for Licensure as a Massage Therapist.

(a) An applicant meeting the requirements of §140.310(a)(1) or (2) is allowed to take the state written massage therapy examination provided the person complies with the requirements of this section.

(b) The department or its designee shall send an examination approval notice to each applicant who is eligible to sit for the written examination.

(c) Approved examination candidates must complete the examination registration process and submit the examination fee by the established deadlines. Forms which are received incomplete or late may cause the applicant to miss the examination deadline.

(d) The department shall void the application of any applicant who fails to schedule and take an examination within one year after the examination approval notice is mailed to the applicant. To be eligible for subsequent examination(s), the applicant will be required to file another application and meet requirements in effect at that time.

(e) The examination will be conducted in the English language. Exceptions will be made when English is not the native or first language of the applicant. The written exam may be taken in a person's native language if the person notifies the department at least 60 days in advance, so that the written test can be available. The applicant will be responsible for any fee or consideration to be paid to an acceptable interpreter and/or translator whose services are necessary for the examination.

(f) Applicants with disabilities must inform the department, in advance, of special accommodations requested for examination.

(g) Exam candidates must sign a statement agreeing to maintain the confidentiality of the exam.

(h) Examinations will be held in locations to be announced by the department.

(i) Examinations will be graded by the department or its designee. The department or its designee shall notify each examinee of the results of the examination within 30

calendar days of the date of the examination.

(j) A person who fails the written examination may retest by registering for another examination and paying another examination fee. The department will void the application of a person who fails to pass the written examination within one year of the initial approval for examination.

(k) No refunds will be made to examination candidates who fail to appear for an examination.

(l) Jurisprudence Examination. Effective September 1, 2008, all new applicants for licensure as a massage therapist must also pass the department's jurisprudence examination before a license will be issued. A person is exempt from the massage therapist Jurisprudence Examination if the person has passed the state massage therapist examination.

#### §140.314. Massage Therapist License Renewal.

(a) When issued, an initial license is valid until the last day of the licensee's birth month in the following year, as determined by the department, and must be renewed on or before the expiration date. Renewal licenses will be issued for a two-year period and expire on the last day of the licensee's birth month. The expiration date is noted on each license.

(b) Each licensee is responsible for renewing the license before the expiration date and shall not be excused from paying late renewal fees. Failure to receive notification from the department prior to the expiration date of the license will not excuse failure to file for renewal or late renewal.

(c) At least 30 days prior to the expiration date, the department will send a notice to each licensee at the licensee's last known address according to the records of the department. The notice shall include the expiration date of the license and the amount of the renewal fee.

(d) The department may request specific information for renewal including the licensee's preferred mailing address, primary employment address and telephone number, category of employment, all names or titles under which the licensee engages in the practice of massage therapy, and a statement of all misdemeanor and felony convictions or offenses for which deferred adjudication was received or for which a plea of nolo contendere or guilty was entered.

(e) For all renewals, licensees shall report continuing education required for renewal in accordance with §140.320 of this chapter (relating to Hour Requirements for Continuing Education for Massage Therapists).

(f) A licensee may renew by mailing the renewal fee and required documentation to the department or by electronic methods on or before the expiration date. The postmark date or the date of electronic renewal shall be considered in determining whether any late fees apply.

(g) The department shall not renew a license until it receives the fee and required documentation for renewal or notice of electronic renewal.

(h) A person whose license has expired for 90 days or less may renew by paying a fee that is equal to one and one-half times the normally required renewal fee.

(i) A person whose license has expired for more than 90 days but less than one year may renew by paying a fee that is equal to two times the normally required renewal fee.

(j) A person whose license has expired for more than one year may not renew. The person may obtain a new license by complying with the then current requirements and procedures for obtaining a license, including the examination.

(k) A person who was licensed in this state, moved to another state, and is currently registered or licensed as a massage therapist and has been in the practice of massage therapy in the other state for the two years preceding the date of application may obtain a license without reexamination. The person must pay to the department a fee that is equal to two times the normally required renewal fee for licensure.

(l) A person whose license has expired may not engage in the activities of a massage therapist and may not hold himself or herself out as a massage therapist, imply that he or she has the title of "licensed massage therapist" or "massage therapist", or use "RMT", "LMT", or "MT" or any facsimile of those titles in any manner.

(m) The department shall deny renewal of the license of a licensee if renewal is prohibited by the Education Code, §57.491 (relating to Loan Default Ground for Nonrenewal of Professional or Occupational License).

(n) The department shall not renew a license if renewal is prohibited by a court order or attorney general's order issued pursuant to the Family Code, Chapter 232 (relating to Suspension of License).

#### §140.315.Active Military Duty.

(a) If a licensed massage therapist fails to timely renew his or her license because the licensee is or was on active duty with the armed forces of the United States of America, the licensee may renew the license pursuant to this section.

(1) Renewal of the license may be requested by the licensee, the licensee's spouse, or an individual having power of attorney from the licensee. The renewal form

shall include a current address and telephone number for the individual requesting the renewal.

(2) Renewal may be requested before or after expiration of the license.

(3) A copy of the official orders or other official military documentation showing that the licensee is or was on active duty shall be filed with the department along with the renewal form.

(4) A copy of the power of attorney from the licensee shall be filed with the department along with the renewal form if the individual having the power of attorney executes any of the documents required in this subsection.

(b) A licensee renewing under this section shall pay the applicable renewal fee, but not a late renewal fee.

#### §140.320. Hour Requirements for Continuing Education for Massage Therapists.

(a) Licensees must successfully complete at least 12 hours of acceptable continuing education to renew a two-year license.

(b) One hour of credit will be awarded for each clock hour of attendance at acceptable continuing education activities, except as follows:

(1) one semester hour of academic credit will constitute fifteen clock hours of continuing education;

(2) one quarter hour of academic credit will constitute ten clock hours of continuing education; and

(3) 0.1 continuing education unit will constitute one clock hour of continuing education.

(c) A clock hour is equal to 50 minutes.

#### §140.321. Acceptable Continuing Education for Massage Therapists.

(a) Acceptable continuing education includes attendance at and completion of department approved or recognized programs (other than the minimum 500 hour course of instruction required for licensure), institutes, seminars, workshops, state or national conferences, advanced course work, or college and university academic courses that are:

(1) directly related to the theory or clinical application of theory pertaining to the practice of massage therapy and the manipulation of soft tissue, massage therapy laws and rules, business practices, professional ethics, anatomy, physiology, hydrotherapy, kinesiology, pathology, or health and hygiene; or

- or
- (2) first aid and/or CPR, not to exceed six hours total each renewal period;
- and
- (3) advanced massage therapy techniques acceptable to the department;
- (4) designed to increase and enhance professional knowledge, skills, or competence in the practice of massage therapy.

(b) Continuing education approved or recognized by the department must be developed and presented by qualified persons.

(1) Massage therapy techniques and courses involving the manipulation of soft tissue must be taught or presented by a licensed massage therapy instructor. Advanced massage therapy techniques must be taught or presented by persons with licensure, registration, or education in the technique being presented.

(2) Courses, other than techniques, may be taught or presented by persons with licensure, registration, education or practical experience in the subject being presented.

(3) Out-of-state instructors or presenters offering continuing education in Texas on massage therapy techniques or involving the manipulation of soft tissue must be in compliance with any licensure, registration or certification requirements for massage therapists and massage therapy instructors in the instructor or presenter's home state or be licensed to practice medicine, occupational therapy, chiropractic, athletic training, physical therapy, or nursing. If the instructor or presenter's home state does not have licensure, registration or certification requirements for massage therapists and massage therapy instructors, the instructor or presenter must provide documentation of education or practical experience specific to the continuing education being offered.

(c) Continuing education which otherwise meets the standards of this section but is offered or presented online or by correspondence is acceptable only if the subject matter is not massage therapy techniques or manipulation of soft tissue.

#### §140.322. Activities Unacceptable as Continuing Education for Massage Therapists.

The department shall not give continuing education credit for:

(1) education incidental to the regular professional activities of a massage therapist, such as learning occurring from experience or research;

(2) professional organizational activity, such as serving on committees or councils or as an officer in a professional organization;

(3) college academic courses which are audited or not taken for credit;

(4) independent study except online or correspondence courses in accordance with §140.321 (c) (relating to Acceptable Continuing Education for Massage Therapists); or

(5) any experience which does not fit the types of acceptable continuing education in this section.

#### §140.323. Pre-approved Continuing Education Providers

(a) Individuals wishing to provide approved continuing education course work may apply for provider pre-approval on department forms. Approval of provider applications will be determined by review of the application and course syllabus and determination of applicants' ability to comply with department rules. Approved applications are effective for two years from the date of approval.

(b) Pre-approved providers of continuing education must comply with department requirements set out in §140.320 of this title (relating to Hour Requirements for Continuing Education for Massage Therapists) and §141.321 of this title (relating to Acceptable Continuing Education for Massage Therapists).

(c) Pre-approved providers of continuing education must maintain attendance records of all continuing education activities for a period of three years.

(d) Each pre-approved provider of continuing education must pass the written juris prudence examination administered by the department prior to approval.

(e) Each pre-approved provider of continuing education shall develop and implement a cancellation and refund policy which must provide a full refund of all monies paid by a participant if:

(1) the enrollment of the participant was procured as the result of any misrepresentation in advertising, in promotional materials of the continuing education provider;  
or

(2) the continuing education activity is cancelled or postponed to a date that is different than the for which the participant was enrolled

(f) all course work fees paid shall be refunded within 30 days of cancellation, postponement, or discontinuance of the continuing education activity.

(g) the cancellation and refund policy must be included in any advertisement, brochure, or postcard for the continuing education course work.

(h) all course work fees paid shall be refunded if the participant is not provided with a transcript of all successfully completed hours within 30 days of completion of the continuing education activity.

(i) A continuing education provider is considered to have made a good faith effort to consummate a refund if the participant's file contains evidence of the following attempts:

(1) certified mail to participant's last known address;

(2) certified mail to the participant's permanent address; and

(j) The department may take disciplinary action against the continuing education provider for a violation of this section; however, the department has no authority to recover a refund on behalf of a participant.

(k) Pre-approved providers shall issue a verification of attendance to each participant in a program. The verification of attendance shall contain:

(1) the name of the pre-approved provider and approval number;

(2) the name of the participant;

(3) the title of the program;

(4) the number of credit hours given;

(5) the subject(s) included in the program;

(6) the date and place of the program; and

(7) the signature of the provider.

(l) Continuing education providers must renew the approval prior to the expiration date. Renewed approvals will be issued for a two-year period as determined by the department.

(m) The department may audit pre-approved providers for compliance with this section.

#### §140.324. Reporting Continuing Education

(a) The department will monitor a licensee's compliance with continuing education requirements by the use of a random audit system. Licensees selected for audit will receive notification along with the renewed license. Supporting documentation of participation in continuing education activities need not be submitted at the time of license renewal.

(b) Continuing education supporting documentation includes:

- (1) verification of attendance or completion;
- (2) transcripts of academic work or approved course work; or
- (3) any other documentation acceptable to the department.

(c) Licensees who receive an audit form with the renewal notice or at any other time shall submit all appropriate documentation to substantiate compliance with the department's continuing education requirements.

(d) Licensees are responsible for maintaining continuing education records for a period of three years.

#### 140.330. Massage School General Provisions and Inspections.

(a) Unless exempt, a person or entity who provides at a minimum the course of instruction required for licensure to one or more students constitutes a massage therapy educational program and must obtain licensure as a massage school.

(b) Minimum standards of operation must be maintained by all massage therapy educational programs to ensure educational programs of high quality which will be of benefit to the student, the school, and the public.

(c) If a massage school suspends enrollments or closes, the program shall not advertise, solicit, or in any way advise prospective students, either directly or indirectly, of the program offerings. If a massage school suspends or closes, it must give written notice to the department within 10 days of the suspension or closure. The department shall be furnished with the names and addresses of any students who were prevented from completion by reason of the discontinuance of the program.

(d) All massage therapy educational programs shall notify the department in writing of any legal action (civil or criminal) which may concern the operation of the educational program and which is filed against the educational program, its officers, directors, or any employee within ten working days after the educational program, its officers, directors, or any employee has commenced the legal action or been served with legal process. The educational program shall submit a file-marked copy of the petition or complaint that has been filed with the court with the written notice.

(e) There will be at least one unannounced inspection at the primary instructional location of each massage therapy educational program and at each additional location every two years.

(1) Other inspections may be performed, announced or unannounced, at the discretion of the department.

(2) If deficiencies are found, the massage therapy educational program shall be notified at the end of the inspection of the deficiencies. If deficiencies are not serious or do not raise health and safety concerns, the department shall give the educational program 30 days to correct the deficiencies.

#### §140.331. Massage School Application Procedures and Documentation.

(a) An application shall be submitted to the department at least 60 days prior to the proposed starting date of the massage therapy educational program. An application must be submitted on official department forms and signed by the owner or authorized representative of the massage therapy educational program.

(b) No educational program shall be operated or instruction given and no student shall be solicited or enrolled until the department has conducted an inspection and approved the application.

(c) An original of the entire application and supporting documentation must be submitted with all pages clearly legible. Applications which are received incomplete may cause postponement of the educational program's starting date.

(d) The department shall conduct an inspection of an instructional site prior to an educational program beginning operation. No educational program may be operated or instruction given at any location which has not been approved by the department.

(e) The license must be displayed in an appropriate and public manner at the location of the educational program.

(f) The effective date of the license shall be the date the license is issued.

#### §140.332. Massage School Administrative Personnel.

(a) Each massage therapy educational program shall notify the department of the name of the person designated as the director of the educational program. The director is responsible for the educational program, the organization of classes, the maintenance of the physical location and the instructional site(s), the maintenance of proper administrative records and all other procedures related to the administration of the educational program.

(b) The director shall designate an individual to perform all the functions of, and succeed to, the authority of the named director when the director is unavailable or absent from the educational program. The director shall notify the department of the name of the designated individual.

(c) The director or his or her designee must be available during scheduled inspections by the department.

§140.333. Massage School Instructors.

(a) A licensed massage therapy instructor shall instruct the 125 hours of Swedish massage therapy, any other instruction in massage techniques or manipulation of soft tissue, and the internship portion of the required course of instruction.

(b) To qualify for licensure as a massage therapy instructor, a person shall:

(1) be a licensed massage therapist;

(2) have a high school diploma, a general equivalence diploma or a transcript from an accredited college or university showing successful completion of at least 12 semester hours;

(3) submit a statement of assurance that the licensee has been engaged in the practice of massage therapy for at least one-year and has conducted at least 500 hours of hands-on experience (does not include internship hours). Hours accumulated while holding a provisional license can be applied to the requirements of this paragraph; and

(4) complete a 30-hour course on teaching adult learners. Courses attended may include an instructional certification program, a college level course in teaching adult learners, a continuing education course in teaching adult learners, or an advanced program approved by the department in teaching the course of instruction.

(c) Persons qualified to instruct courses other than massage therapy technique or manipulation of soft tissue courses are not required to hold a massage therapy instructor license. These persons must hold:

(1) a baccalaureate or higher degree from an accredited college or university that includes:

(A) satisfactory completion of nine semester hours or 12 quarter hours in subjects related to the subject area to be taught; or

(B) have a minimum of one year of practical experience within the last ten years in the subject area to be taught;

(2) an associate degree from an accredited college, university, or recognized post-secondary institution and must have:

(A) a minimum of one year of practical experience within the last ten years in the subject area to be taught and the associate degree must include satisfactory completion of nine semester hours or 12 quarter credit hours in subjects

related to the subject area to be taught; or

(B) a minimum of two years of practical experience within the last 10 years in the subject area to be taught; or

(3) a high school diploma, general equivalency degree (GED), or proof of satisfactory completion of relevant subject(s) from a recognized post-secondary institution and practical experience of a minimum of two years within the last ten years in the subject area to be taught.

(d) Instructors teaching CPR must be certified as CPR instructors by the American Heart Association, the American Red Cross, or the National Safety Council.

(e) Instructors teaching First Aid must be certified as First Aid instructors by the American Red Cross, the American Heart Association, Medic First Aid, or the National Safety Council.

(f) Each instructor employed by a licensed massage school shall be evaluated by the school annually. A report of the evaluation shall be available for review by the department.

(g) Licensed massage schools shall ensure continuity of instruction through the reasonable retention of qualified instructors.

#### §140.334. Massage School Financial Stability.

(a) Applicants for initial licensure of a massage school shall furnish the department with complete and correct financial statements or documents, sufficient to demonstrate the massage therapy educational program is financially stable and capable of fulfilling its commitments for training.

(1) Applicants must submit the following:

(A) for a school owned by a sole proprietor, a personal balance sheet reviewed by a certified public accountant or public accountant registered with the State Board of Public Accountancy with notes that disclose the amount of payments for the first five years of operation to meet debt agreements as required by generally accepted accounting principles (GAAP); or

(B) for all other ownership structures, a balance sheet consistent with GAAP and generally accepted auditing standards (GAAS) that has been audited and certified by a certified public accountant or public accountant.

(2) Additional documents required for initial licensure include:

(A) a list of the expected operation-related expenses for the first three months of operation of the educational program;

(B) a sworn statement signed by the prospective owner affirming the availability of sufficient cash to cover projected expenses, which may include:

(i) total salaries, including withholding, unemployment taxes, and any other related expenses or benefits;

(ii) lease payments for equipment listed by the name of the equipment;

(iii) lease payments for facilities;

(iv) accounting, legal, and other specifically identified professional fees;

(v) an estimate of other expenses such as advertising, travel, textbooks, office supplies, classroom supplies, printing, telephone, utilities, taxes, and sales commissions; and

(C) other evidence as may be deemed appropriate by the department to establish financial stability.

(b) All financial documents must identify the name of the certified public accountant or public accountant preparing the documents and be in accordance with GAAP.

(c) A corporate applicant must file a statement from the Comptroller of Public Accounts that its franchise taxes are current, that the corporation is exempt from payment of the franchise tax, or that it is an out-of-state corporation that is not subject to the franchise tax.

(d) A massage therapy educational program that participates in federal financial aid programs must submit a copy to the department of each audit completed in accordance with reporting requirements of "Government Auditing Standards", the most current edition, issued by the Comptroller General of the United States, at the same time the audit report is submitted to the United States Department of Education.

(e) Financial statements for the most recent fiscal year are required at the time of renewal in accordance with §140.314 of this title (relating to Massage Therapist License Renewal).

§140.335. Change of Massage School Ownership.

(a) The license of a massage school may not be sold or transferred to another person or owner.

(b) The department may consider the addition or deletion of any person defined as an owner in §140.300(17) of this title (relating to Definitions) as a change in ownership. The massage school must notify the department of the change in ownership a minimum of 60 days before the change in ownership to request that the department, in lieu of a full application, accept a partial application. All fees for initial application will apply.

(c) The department may require submission of a complete application for licensure if:

(1) the department has a reasonable basis to believe the change in ownership of the school may significantly affect the massage therapy educational program's continued ability to meet the criteria for approval; or

(2) the educational program fails to file notice of the change of ownership at least 60 days prior to the ownership transfer.

(d) The department may require a partial application for licensure if the department reasonably believes the change in ownership will not significantly affect the educational program's continued ability to meet the criteria for approval.

(e) Prior to a change in ownership of a massage school, the purchaser shall furnish the department a balance sheet meeting the requirements for initial licensure outlined in §140.334(a) of this title (relating to Massage School Financial Stability), excluding the sufficient cash requirement for initial expenses. The purchaser shall furnish any other evidence deemed appropriate by the department to establish financial stability.

(f) The purchaser of a massage school shall accept responsibility for all refund liabilities.

(g) The department may issue a new license, resulting from a change of ownership, without conducting an inspection if an inspection of the facility has been conducted within the previous year and if the new owner verifies that no changes will be made to existing facilities.

#### §140.336. Massage School License Renewal.

(a) When issued, the license of a massage school is valid for a two-year period beginning on the date of issuance of the initial license. A licensee must renew the license prior to the expiration of the license.

(b) The expiration date of a license shall be the last day of the month in which the license was originally issued.

(c) A complete application for renewal of a license shall consist of:

- (1) the renewal fee;
- (2) the completed application for renewal;
- (3) the complete annual financial statements for the most recent fiscal year, demonstrating the massage therapy educational program is financially stable and capable of fulfilling its commitments for instruction; and
- (4) any other information deemed necessary by the department to determine compliance with the Act and this chapter.

(d) At least 30 days prior to the license expiration date, the department shall send a notice of the expiration date and the amount of the renewal fee due. The notice will be mailed to the address in the department's records. Each massage school must complete and return the license renewal form to the department with the required renewal fee.

(e) The renewal forms for massage schools shall require the address, the names of the owner/operator of the school, a statement of all misdemeanor and felony offenses for which the licensee or owner or operator have been convicted, entered a plea of nolo contendere or guilty, or received deferred adjudication.

(f) A massage school has renewed the license when it has mailed the renewal form and the required renewal fee to the department prior to the expiration date of the license. The postmark date shall be considered the date of mailing. Massage schools should allow three to four weeks for the department to receive the license renewal fees and documentation, and print the certificate.

(g) The department shall issue a renewal license to a massage school once all requirements for renewal are met.

(h) A massage school whose license has been expired for 90 days or less may renew by submitting all required documentation and paying a fee that is equal to one and one-half times the normally required renewal fee.

(i) A massage school whose license has been expired for more than 90 days but less than one year may renew by submitting all required documentation and paying a fee that is equal to two times the normally required renewal fee.

(j) A massage school which operates a massage therapy educational program with an expired license may be subject to disciplinary action. Course hours taught during the time the license is expired will not apply toward the minimum 500 hour course of instruction. For the purpose of establishing the date of late renewal, the postmark date shall be considered the date of mailing.

(k) A massage school may not renew a license that has been expired for more than one year.

§140.337. Massage School Locations.

(a) A license shall be issued for each approved instructional location(s). Instruction shall not be provided at an additional location until the department has issued a license for the additional location.

(b) A massage school shall obtain approval for any additional location(s) where the massage therapy educational program will be offered. All policies and curriculum of the original location apply to an additional location(s).

(c) A request for licensure of an additional location shall include the appropriate fee and the following documents:

(1) fire inspection report, if required by the city or county;

(2) certificate of occupancy stating that the use of the facility is for massage therapy or education;

(3) lease agreement; and

(4) detailed floor plan; and

(5) inventory.

(d) A request for a change of instructional location of a massage therapy educational program must be filed and approved by the department before the new location is used. Upon approval of a change of instructional location, no course work may be provided at the previous location.

(e) Any refunds due under the cancellation and refund policy must be made before the department will approve an additional location or a change of location.

(f) The department may issue an emergency approval for a change of instructional location or additional location on the basis of documented circumstances beyond the massage therapy educational program's control (e.g. fire, flood, breach of lease, etc.).

(1) All required documents must be submitted before the emergency approval will be considered.

(2) All required fees for the change of location or approval of additional location must be submitted to the department within 10 days of issuance of the emergency approval unless the new location is only used once.

§140.338. Massage School Curriculum Outline and Internship.

(a) Each massage therapy educational program shall follow the curriculum outline prescribed by the department for the minimum 500 hour supervised course of instruction.

(b) A student must successfully complete the first 250 hours of the supervised course of instruction, including the successful completion of at least 100 hours of massage therapy techniques and theory, before the student is eligible to enter the internship program.

(c) A classroom hour shall include at least 50 clock minutes of actual classroom time and may include a maximum of 10 minutes of break time. Break time for hours which are taught consecutively in one sitting (i.e., in one evening) may be aggregated into a single break time during those consecutive hours, not to exceed 3 hour blocks of instruction, but not at the end of those hours. The 10 minutes of break time may not be accumulated and used in lieu of lunch or dinner breaks.

(d) An instructor must be physically present with the student(s) during the classroom hours taught by that instructor, including make-up work.

(e) An internship program must provide a student with a minimum of 40 hours of hands-on massage therapy experience at the location of the student's enrollment. A student enrolled at an additional location shall not be required to travel to another location to complete the internship.

(f) During the hands-on experience, a massage therapy instructor must be available on the premises of the educational program and be immediately available to the student(s).

(g) A massage therapy educational program shall not require a student to advertise for clients or to obtain clients as part of the internship program. At the student's option and with the educational program's permission, a student may obtain clients for the student's hands-on massage therapy experience.

(h) A massage therapy educational program must provide all of the minimum 500 hours of the supervised course of instruction at the site where the student enrolled, unless otherwise agreed to by both the student and the massage therapy educational program.

(i) A massage therapy educational program shall schedule classes and internship clients so that the students will be able to complete the program during the length of time stipulated in the preenrollment information. No evening class may be scheduled to extend beyond a reasonable time.

(j) The maximum number of hours a student may accumulate in an internship before the student is required to be licensed may not exceed a number that is equal to one-third of the entire length of the massage therapy educational program.

(k) The educational program is state-approved if it includes at least the minimum 500 hour course of instruction required for licensure, it does not exceed internship hours in accordance with §140.338(j) of this title, and it complies with §140.339 of this title related to advanced coursework.

(l) prior to enrollment, the massage therapy school must;

(A) provide the student with a department form designed to inform the student that the massage therapy educational program exceeds the minimum number of hours required by law for licensure;

(B) obtains the student's signature on the form prior to enrollment;

(C) provide a copy of the signed form to the student; and

(D) maintain a copy of the signed form in the student's file.

(G) Failure to comply with this subsection shall constitute grounds for the department to take disciplinary action against a massage school, including imposition of an administrative penalty and/or denial of approval for the massage school to continue offering a massage therapy educational program that exceeds the 500 hour minimum required for licensure.

#### §140.339. Advanced Course Work.

(a) Advanced course work offered by a massage school which is beyond the minimum 500 hour course of instruction must be:

(1) directly related to the theory or clinical application of theory pertaining to the practice of massage therapy and the manipulation of soft tissue, business practices, professional ethics, massage therapy laws and rules, universal precautions, anatomy, physiology, kinesiology, pathology, hydrotherapy, and health and hygiene; and

(2) designed to increase and enhance professional knowledge, skills, or competence in the practice of massage therapy or other massage therapy services.

(b) A massage school shall not offer advanced course work which authorizes the practice of diagnosis, the treatment of illness or disease, or any service or procedure for which a license to practice medicine, chiropractic, physical therapy or podiatry is required by law.

(c) Massage schools shall maintain academic transcripts of advanced course work permanently and shall retain all other student records for at least three years from the last date attended for students of advanced course work. Financial records will be retained as required by federal retention requirements, if applicable.

§140.340. Massage School Admission Requirements.

(a) Each massage therapy educational program shall submit a copy of its admission requirements for the department's approval or disapproval. Justification shall be submitted for each of the admission requirements.

(b) Evidence shall be maintained in each student's file to show that the admission requirements have been met.

(c) Each massage therapy educational program must maintain a written record of the previous education and training of a student which meets any portion of the course of instruction required for licensure. The record shall include, if applicable, proof of current CPR and/or First Aid certification from the American Heart Association, American Red Cross, or National Safety Council, for a maximum of six hours of credit. Official transcripts and documentation of course work obtained at colleges, universities, or out of state institutions must be placed in the student's file along with a copy of the department's written evaluation.

(d) A massage therapy educational program may not require a student to take subjects the student has already successfully completed and which meet the requirements for licensure.

§140.341. Massage School Enrollment Procedures.

(a) Prior to enrollment, each massage therapy educational program shall provide each prospective student copies of the following:

- (1) a program outline;
- (2) the admission requirements;
- (3) a schedule of tuition, fees, and other charges;
- (4) a cancellation and refund policy;
- (5) the length of time for completion of program, including a target end date for internship hours;
- (6) a class schedule including estimated break and meal times;
- (7) the attendance and progress policies, including requirements and fees for make-up hours;
- (8) grievance policies;

- (9) the pupil-teacher ratio;
  - (10) the conduct policy;
  - (11) the written and verbal explanations of the difference between a loan and a grant, if the school participates in a loan or grant program;
  - (12) a copy of the enrollment agreement;
  - (13) a notice that clearly states the number of course hours which must be successfully completed before a student can be licensed as a massage therapist under this chapter;
  - (14) a list of instructors, their qualifications, and the subject area taught by each;
  - (15) information indicating how a prospective student may obtain copies of the Massage Therapy Act, Texas Occupations Code, Chapter 455 and this chapter; and
  - (16) a statement that the Act sets out that a person is ineligible for licensure:
    - (A) if the person has been convicted of, entered a plea of nolo contendere or guilty to, or received deferred adjudication to crimes or offenses involving prostitution or another sexual offense;
    - (B) until the fifth anniversary of the date of a conviction for a misdemeanor involving moral turpitude or a felony; or
    - (C) until the fifth anniversary of the date of a conviction of a violation of the Act.
- (b) Each prospective student shall be given a reasonable time to review the material in subsection (a) of this section and offered the opportunity to tour the instructional facility and inspect equipment prior to signing an enrollment agreement. The prospective student may decline the tour.
- (c) Each massage therapy educational program shall use an acknowledgment form approved by the department to verify the prospective student's receipt of the information required in subsection (a) of this section. A signed copy of the form shall be given to the prospective student and the original shall be maintained in the student's file. The form shall include the following or similar statements.
- (1) "I have been furnished information disclosing my previous education, training, and work experiences. I understand this will be evaluated and may result in the program length being shortened and the cost reduced."

(2) "I further realize that complaints may be made to the massage therapy educational program and the Department of State Health Services, Massage Therapy Licensing Program, 1100 West 49th Street, Austin, Texas 78756-3183, (512) 834-6616."

(3) "I have been offered the opportunity to read the Massage Therapy Act and the rules of the department included in 25 Texas Administrative Code, Chapter 140."

(4) "I have been made aware that the state of Texas requires only the minimum 500 hour course of instruction for licensure as a massage therapist, and anything beyond that is strictly voluntary".

(d) Each massage therapy educational program shall develop an enrollment agreement which shall be used to enroll each student. The agreement shall include but is not limited to:

(1) the full and correct name and location of the massage school, massage therapy educational program, and the massage school director(s) and owner(s);

(2) the program title, tuition, fees, reasonable estimated cost of books and supplies, any other expenses, total cost of the program, items subject to cost change, method of payment and payment schedule, disclosure statement (if interest is charged on more than three payments), student's right to cancel;

(3) the number of classroom and clinic hours included in the program;

(4) the date the program is to begin, the course length and course schedule;

(5) the name and address of the student; and

(6) a statement that the student has received a copy of the information in subsection (a) of this section.

(e) Each student shall be given a copy of his or her executed enrollment agreement and a copy shall be kept in the student's file maintained by the school along with a copy of the acknowledgment form required by subsection (c) of this section.

#### §140.342. Massage School Tuition and Fees.

(a) A massage therapy educational program shall develop and implement a written policy relating to method(s) of payment available to enrolling students. If student financing is available through any form of arrangement or agreement between the educational program and a lending institution, the complete terms of the arrangement or agreement must be disclosed in the policy. In addition, if any form of financing is available at or through the educational program, all charges, the true annual percentage rate and the name(s) and address(es) of the lending institution(s) shall be disclosed in the policy.

(b) A student shall not be held liable for any tuition, fees, or other charges not disclosed in the policy at the time of enrollment.

(c) Scholarships may be offered, provided the terms of the scholarships are published and disclosed in the policy.

(d) Any funds received from, or on behalf of, a student shall be recorded in a format that is current and readily accessible to department representatives. Receipts shall be issued to the student. The funding source and the reason for the charges shall be clearly identified on both the school's record and the receipt.

#### §140.343. Massage School Conduct Policy.

A massage therapy educational program shall develop and implement a written policy pertaining to the conduct of students. The policy shall include:

(1) conditions for dismissal; and

(2) conditions for re-entrance of those students dismissed for violating the conduct policy.

#### §140.344. Massage School Cancellation and Refund Policy.

(a) Each massage therapy educational program shall develop and implement a cancellation and refund policy which must provide a full refund of all monies paid by a student if:

(1) the student cancels the enrollment agreement within 72 hours (until midnight of the third day excluding Saturdays, Sundays, and legal holidays) after the enrollment contract is signed by the prospective student;

(2) the enrollment of the student was procured as the result of any misrepresentation in advertising, in promotional materials of the massage therapy educational program or by the owner, the massage school, or massage therapy instructor; or

(3) the student was not provided ample opportunity to read the information provided in §140.341(a) of this title (relating to Massage School Enrollment Procedures).

(b) The policy must provide for the refund of the unused portion of tuition, fees, and other charges in the event the student, after expiration of the 72-hour cancellation privilege, fails to enter, withdraws from, or is terminated from the program at any time prior to completion. The policy must provide that:

(1) refunds for each program will be based on the program time expressed in clock hours;

(2) refunds must be consummated within 30 days after the earliest of:

(A) the effective date of termination if the student is terminated;

(B) the date of receipt of written notice from the student of withdrawal; or

(C) 10 instructional days following the first day of the program if the student fails to enter;

(3) if tuition is collected in advance of the first day of the program, and if, after expiration of the 72-hour cancellation privilege, the student does not enter the program, not more than \$200 shall be retained by the massage therapy educational program;

(4) if a student enters a massage therapy educational program and is terminated or withdraws, the minimum refund of the tuition will be:

(A) during the first week or one-tenth of the program, whichever is less, 90% of the remaining tuition;

(B) after the first week or one-tenth of the program, whichever is less, but within the first three weeks of the program, 80% of the remaining tuition;

(C) after the first three weeks of the program, but within the first quarter of the program, 75% of the remaining tuition;

(D) during the second quarter of the program, 50% of the remaining tuition;

(E) during the third quarter of the program, 10% of the remaining tuition; and

(F) during the last quarter of the program, the student may be considered obligated for the full tuition;

(5) refunds of items of extra expense to the student, such as instructional supplies, books, student activities, laboratory fees, service charges, rentals, deposits, and all other such ancillary miscellaneous charges, where these items are separately stated and shown in the pre-enrollment information, will be made in a reasonable manner;

(6) if a program is discontinued by the massage school and this prevents the student from completing the program:

(A) all tuition and fees paid shall be refunded if the student is not provided with a transcript of all successfully completed hours within 30 days of discontinuance of the program; or

(B) in the event an additional or changed location is 10 miles or more from the previously approved location of instruction and an enrolled student is unable to complete the program at the additional or changed location as determined by the department:

(i) all tuition and fees paid shall be refunded if the student is not provided with a transcript of all successfully completed hours within 30 days of the change of location; or

(ii) all unearned tuition and fees shall be refunded if a transcript of all successfully completed hours is provided within 30 days of the change of location.

(7) If a student did not meet the admission requirements of a program and the student does not complete the program for any reason, all tuition and fees shall be refunded.

(c) In all refund computations, leaves of absence, suspensions, school holidays, days when classes are not offered, and summer vacations shall not be counted as part of the elapsed time for purposes of calculating a student's refund.

(d) A massage therapy educational program is considered to have made a good faith effort to consummate a refund if the student's file contains evidence of the following attempts:

(1) certified mail to student's last known address;

(2) certified mail to the student's permanent address; and

(3) certified mail to the address of the student's parent, if different from the permanent address and if known.

(e) If the department determines that the method used to calculate refunds is not in compliance with this section and if the massage therapy educational program does not provide the correct refund promptly, the educational program shall submit a report of an audit conducted by a certified public accountant or public accountant of the refunds due former students. The audit report shall be accompanied by a schedule of student refunds due which shall disclose the following information for the previous four years for each former student:

(1) the name, address(es), and social security number;

(2) the last date of attendance and date of termination;

(3) the amount of refund with principal and interest separately stated, date and check number of payment if payment has been made, and any balance due; and

(4) the reason for refund.

(f) The department may take disciplinary action against the license of a massage school for a violation of this section; however, the department has no authority to recover a refund on behalf of a student.

#### §140.345. Massage School Minimum Progress Standards.

(a) Appropriate standards must be implemented to ascertain the progress of the students enrolled. Each massage therapy educational program shall have a progress evaluation system of a type and nature to reflect whether the student is making satisfactory progress to the point of being able to complete all subjects within the allotted time provided in the pre-enrollment information.

(b) The progress evaluation system shall be based on grading periods. A grading period shall not cover more than 25% of the required program hours.

(c) A student who is making unsatisfactory progress at the end of a grading period shall be placed on probation for the next grading period. If the student on probation achieves satisfactory progress for the subsequent grading period but has not achieved the required grades for overall satisfactory progress, the student may be continued on probation for one more grading period.

(d) When a student is placed on probation, that student will be counseled prior to returning to class, and the date, action taken, and terms of the probation shall be clearly indicated on the appropriate permanent records.

(e) If the student on probation fails to achieve satisfactory progress for the first probationary grading period, the student's enrollment may be terminated.

(f) The enrollment of a student who fails to achieve overall satisfactory progress for the program at the end of two successive probationary grading periods shall be terminated.

(g) A student whose enrollment was terminated for unsatisfactory progress may reenter after a minimum of one grading period.

(h) Refunds shall be made in accordance with §140.344 of this title (relating to Massage School and Cancellation and Refund Policy). The effective date of termination for purposes of refunds shall be the last day of the last probationary grading period.

(i) A student who returns after the enrollment was terminated for unsatisfactory progress shall be placed on probation for the next grading period. The student shall be advised of this action and the student's file documented accordingly. If the student does not maintain satisfactory progress during or by the end of this probationary period, the student will be terminated.

§140.346. Massage School Attendance Standards.

(a) Each massage school shall develop and implement a written policy relating to attendance for students enrolled in a massage therapy educational program or any portion of the course of instruction.

(b) The policy shall include requirements and fees for make-up work.

(c) An absence shall be charged for a full day when a student attends none of the scheduled classes on that day. A partial day of absence shall be charged for any period of absence during the day.

(d) School holidays shall not be considered as days of absence.

(e) The attendance policy shall require the termination of students who accumulate absences of:

(1) more than 10 consecutive school days; or

(2) more than 15% of the total clock hours in a program, or 15% of a portion of the program if a student enrolls in less than the total minimum 500 hours.

(f) Refunds shall be made in accordance with §140.344 of this title (relating to Massage School Cancellation and Refund Policy). The effective date of termination for purposes of refunds shall be the last date of absence under subsection (e) of this section. A student whose enrollment is terminated for violation of the attendance policy may not reenter before the start of the next grading period.

(g) A massage therapy educational program may not start students after 10% of the program has been taught except in those cases where appropriate credit for previous education has been given by the department.

(h) Make-up work shall not be authorized for the purpose of removing an absence under subsection (e) of this section.

(i) A leave of absence for reasonable purposes acceptable to the massage therapy educational program shall not exceed the lesser of 30 school days or 60 calendar days.

(1) A student shall be granted only one leave of absence for each 12-month period.

(2) Attendance records shall clearly show the dates for which the leave of absence was granted. A written statement as to why the leave of absence was granted, signed by both the student and the director of the massage therapy educational program indicating approval, shall be placed in the student's file.

(3) If the student fails to return from leave, the student will be automatically terminated and a refund made in accordance with §140.344 of this title. The effective date of termination shall be the last day of the leave of absence.

(j) Each massage therapy educational program must maintain a master record of attendance which clearly indicates the number of scheduled hours each day and the hours of absence for each student. Entries to the attendance log must indicate whether or not a student was in attendance and must be permanent.

#### §140.347. Massage School Equipment and Facility Requirements.

(a) Each massage therapy education program shall provide adequate equipment in good working order. The equipment required for instruction shall be determined by the program objective(s). The equipment shall be comparable to that commonly found in the practice of massage therapy.

(b) The equipment shall be of sufficient quality to meet the maximum use requirements of the current students, as demanded by the activity patterns of the program.

(c) Equipment not in working order shall be removed from the instructional area, marked as out-of-order, or properly identified as awaiting repair.

(d) The amount of classroom and laboratory space shall meet the use requirements of the maximum number of current students in class with appropriate seating facilities or work stations, as necessitated by the activity patterns of the program.

(e) Enrollment shall not exceed the design characteristics of the student workstations.

(f) The facilities shall meet any state and local ordinances or requirements governing building and safety for the designated use.

(g) If adequate facilities and equipment are available, the following maximum ratios are recommended for the supervised course of instruction, and may be varied at the discretion of the massage therapy educational program to conform to specific conditions:

(1) laboratory--12 tables to 1 instructor and 3 students to 1 table; and

(2) classroom--36 students to 1 instructor.

§140.348. Massage School Transcripts and Records.

(a) Massage schools shall make available for inspection by the department, all records relating to the massage therapy educational program and necessary data required for approval and to show compliance with the Act and this chapter. A copy of the accreditation authorization and the letter of eligibility from the United States Department of Education shall be available for review, if applicable.

(b) Each massage therapy educational program shall maintain student transcripts of academic records permanently. Original or certified copies of transcripts (official transcripts) shall be available to students and any person authorized by the student at a reasonable charge if the student has fulfilled the financial obligation to the school. Transcripts must be made available to students who have satisfied the terms of the enrollment agreement within 30 calendar days of the date the terms are satisfied. The transcript of a student shall include the following:

- (1) name and license number of massage therapy educational program;
- (2) the name of the student;
- (3) student's social security number;
- (4) student's date of birth;
- (5) inclusive dates of attendance;
- (6) list of subjects and number of course hours taken by the student at the massage therapy educational program;
- (7) dates of courses;
- (8) address of student;
- (9) signature of authorized representative of the massage therapy educational program; and
- (10) pass/fail score.

(c) Each massage therapy educational program shall retain the following student records for at least three years:

- (1) enrollment agreements and contracts;

(2) written record and evaluation of previous education and training on a form provided by the department;

(3) official transcript(s) from all previous post-secondary schools attended by the student; and

(4) a master student registration list of any person who signs an enrollment agreement, makes a down payment to attend the class, or attends a class. The list must contain:

(A) the date of the entry;

(B) the name of student;

(C) the address of the student including city, state, and zip code;

(D) the telephone number of the student with area code;

(E) the social security number of the student;

(F) the date of birth of the student; and

(G) the name and dates of supervised education course work.

(d) Financial records must be retained as required by federal retention requirements, if applicable.

#### §140.349. Student Grievances.

(a) Each massage therapy educational program shall establish a written grievance procedure that is disclosed to all students at the time of enrollment. The procedure shall attempt to resolve disputes between students, including drops and graduates, and the school or instructor. Adequate records shall be maintained of grievances and resolutions.

(b) Each massage therapy educational program shall make every effort to resolve grievances and complaints.

(c) A massage school may not discipline or retaliate against a student for filing a complaint with the department.

#### §140.350. Massage School Fire Safety.

(a) Each massage school shall maintain each instructional location in accordance with applicable state and local fire code(s) and regulations.

(b) The conviction of an owner or operator of a massage school for a violation of a state or local fire code(s) provision shall constitute grounds for disciplinary action under this chapter.

§140.351. Massage School Sanitation.

(a) Each instructional location shall be maintained in accordance with applicable state and local sanitary or health code(s) and regulations.

(b) An instructional location and all fixed equipment shall be thoroughly cleaned on a routine basis and shall be rendered free from harmful organisms by the application of an accepted bactericidal agent.

(c) Each massage therapy education program must keep the instructional location clean, sanitary, and in good repair at all times.

(d) Toilet facilities shall be kept clean and sanitary without offensive odor and in working order at all times. Restrooms shall not be used as storage rooms.

(e) Each location shall provide hand washing facilities, including hot and cold running water, located near or adjacent to the toilet room or rooms. Hot air blowers or suitable holders for sanitary towels and dispensers for soap shall be provided, and be adequately supplied at all times.

(f) All trash containers must be emptied daily and kept clean by washing or using plastic liners.

(g) Disposable sheets, towels, or protectors which cannot be disinfected will be disposed of in a waste receptacle immediately after use.

(h) Furniture, equipment, and other fixtures shall be of a washable material and kept clean and in good repair. Electrical equipment shall be kept sanitary and safe at all times.

(i) Clean sheets shall be used on each client.

(j) Soiled sheets are to be discarded. After a sheet has been used once, it shall be deposited in a partially closed receptacle, container, or basket, and shall not be used again until properly laundered and disinfected.

(k) Used towels shall be laundered in chlorinated hot water either by regular commercial laundering or by a non-commercial laundering process.

(l) Oil must be kept in closed containers.

(m) Each instructional site must have adequate ventilation.

§140.360. Massage Establishment Application Procedures and Licensure.

(a) Unless otherwise exempt under the Act a place of business that advertises or offers massage therapy or other massage services must be licensed by the department as provided by this section.

(b) A sexually oriented business may not obtain a license from the department or operate as a massage establishment.

(c) An applicant must file an application and license fee with the department. The application shall contain:

(1) the name and address of the massage establishment;

(2) if a corporation:

(A) the name and address of any person who directly or indirectly owns or controls the outstanding shares of stock in the massage establishment;

(B) the name, address and birth dates of the directors; and

(C) a statement that its franchise taxes are current, that the corporation is exempt from payment of the franchise tax, or that it is an out-of-state corporation that is not subject to the franchise tax;

(3) the name, address and birth dates of the sole proprietor or partners;

(4) if any other type of organization, the name, address and birth dates of the owners;

(5) the name, address and birth dates of those persons in a managerial position;

(6) a current list of all establishment employees and/or contractors which includes:

(A) full name;

(B) address;

(C) job title;

(D) license number and expiration date (if licensed as a massage therapist);

(E) birth date;

(F) social security number; and

(G) start date of employment/contract.

(7) the number of the valid sales tax permit issued to the massage establishment, if a sales tax permit is required for the establishment;

(8) a detailed floor plan of the proposed massage establishment that includes entrance and exits, length and width of establishment (in feet), total square feet, and location of restrooms;

(9) the inspection report of the local fire marshal, if required by local authorities or a letter from the county attorney or city official stating that fire inspections are not required in that jurisdiction;

(10) evidence of separation from the establishment of rooms used wholly or in part for residential or sleeping purposes by a solid wall or by a wall with a solid door which shall remain locked during business hours; and

(11) a statement of all misdemeanor and felony offenses for which the owners or operators have been convicted, entered a plea of nolo contendere or guilty, or received deferred adjudication.

(12) pass the juris prudence exam. Licensed massage therapists operating as solo practitioners are exempt from this requirement.

§140.361. General Requirements for Massage Establishments.

(a) A massage establishment shall employ or contract with only licensed massage therapists to perform massage therapy or other massage services. Documentation of the employment or contract relationship and verification that the licensed massage therapist is a United States citizen or a legal permanent resident with a valid work permit shall be maintained by the massage establishment and made available during an inspection or investigation. Required documentation shall include:

(1) A copy of the current massage therapist license for each person providing massage therapy or other massage services;

(2) if an employee, a completed I-9 form for each employee providing massage therapy or other massage services; and

(3) if an employee, a completed W-4 form for each employee providing massage therapy or other massage services; or

(4) if under an independent contractor or contract labor agreement, a copy of the contract signed by both the owner or operator and the licensed massage therapist, and

(5) if under an independent contractor or contract labor agreement, a completed W-9 form signed by the licensed massage therapist.

(b) No massage establishment shall be operated until the department has approved and licensed the establishment.

(c) A massage establishment must maintain separation from rooms used wholly or in part for residential or sleeping purposes by a solid wall or by a wall with a solid door which shall remain locked during business hours.

(d) A massage establishment must display the license along with a current year validation card in a prominent location in the establishment where it is available for inspection by the public.

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

(f) A massage establishment is subject to inspection to verify compliance with the Act and this title by authorized personnel of the department at any reasonable time.

(g) All massage establishments shall notify the department in writing of any legal action (civil or criminal) which may concern the operation of the massage establishment and be filed against the massage establishment, its owner, operators, officers, directors, or any employee within 10 working days after the massage establishment, its owner, operators, officers, directors, or any employee has commenced the legal action or been

served with legal process. The massage establishment shall submit a file-marked copy of the petition or complaint that has been filed with the court with the written notice.

(h) A massage establishment may not:

(1) employ or contract with an individual who is not a United States citizen or a legal permanent resident with a valid work permit;

(2) employ a minor unless the minor's parent or legal guardian authorizes in writing the minor's employment by the establishment;

(3) allow a nude or partially nude employee to provide massage therapy or other massage services to a customer;

(4) allow any individual, including a client, student, license holder, or employee, to engage in sexual contact in the massage establishment; or

(5) allow any individual, including a student, license holder, or employee, to practice massage therapy in the nude or in clothing designed to arouse or gratify the sexual desire of any individual;

(6) allow an unlicensed student to provide massage therapy or other massage services to the public beyond the department-approved internship.

(i) A massage establishment shall:

(1) properly maintain and secure for each client the initial consultation documents, all session notes, and related billing records;

(2) maintain a current list of all establishment employees and/or contractors at all times which includes:

(A) full name;

(B) address;

(C) job title;

(D) license number and expiration date (if licensed as a massage therapist); and

(E) start date of employment/contract.

(3) make available to the department on request, including during an announced or unannounced site inspection, the information kept as provided by

paragraph (1) of this subsection and the current and all previous lists for the previous two years as provided by paragraph (2) of this subsection.

(j) For purposes of this section:

(1) "Nude" means a person who is:

(A) entirely unclothed; or

(B) clothed in a manner that leaves uncovered or visible through less than fully opaque clothing any portion of the breasts below the top of the areola of the breasts or any portion of the genitals or buttocks.

(2) "Sexual contact" includes:

(A) any touching of any part of the genitalia or anus;

(B) any touching of the breasts of a female without the written consent of the female;

(C) any offer or agreement to engage in any activity described in subparagraph (A) or (B) of this paragraph;

(D) kissing;

(E) deviate sexual intercourse, sexual contact, sexual intercourse, indecent exposure, sexual assault, prostitution, and promotions of prostitution as described in Penal Code, Chapters 21, 22, and 43, or any offer or agreement to engage in such activities;

(F) any behavior, gesture, or expression that may reasonably be interpreted as inappropriately seductive or sexual; or

(G) inappropriate sexual comments about or to a client, including sexual comments about a person's body.

§140.362. Sanitation Requirements for Massage Establishments.

(a) Each massage establishment shall be maintained in accordance with applicable state and local sanitary or health code(s) and regulations.

(b) A massage establishment and all fixed equipment shall be thoroughly cleaned on a routine basis and shall be rendered free from harmful organisms by the application of an accepted bactericidal agent.

(c) Each massage establishment must maintain its facilities clean, sanitary, and in good repair at all times.

(d) Toilet facilities shall be kept clean and sanitary without offensive odor and in working order at all times. Restrooms shall not be used as storage rooms.

(e) Each massage establishment shall provide hand washing facilities, including hot and cold running water, located near or adjacent to the toilet room or rooms. Hot air blowers or suitable holders for sanitary towels and dispensers for soap shall be provided, and be adequately supplied at all times.

(f) All trash containers must be emptied daily and kept clean by washing or using plastic liners.

(g) Disposable sheets, towels or protectors which cannot be disinfected will be disposed of in a waste receptacle immediately after use.

(h) Furniture, equipment, or other fixtures shall be of a washable material and kept clean and in good repair. Electrical equipment shall be kept sanitary and safe at all times.

(i) Clean sheets shall be used on each client.

(j) Soiled sheets are to be discarded. After a sheet has been used once, it shall be deposited in a partially closed receptacle, container, or basket, and shall not be used again until properly laundered and disinfected.

(k) Used towels shall be laundered in chlorinated hot water either by regular commercial laundering or by a non-commercial laundering process.

(l) Oil must be kept in closed containers.

(m) Each massage establishment must have adequate ventilation.

#### §140.363. Massage Establishment Renewal.

(a) When issued, a massage establishment license is valid for a two-year period beginning on the date of issuance of the initial license and must be renewed prior to the expiration date.

(b) The renewal date of a license shall be the last day of the month in which the license was originally issued.

(c) At least 30 days prior to the expiration date of the massage establishment's license, the department shall send notice to the massage establishment, including a renewal form, of the expiration date of the license and the amount of the renewal fee due.

(d) The license renewal form shall contain information concerning changes in address or ownership or operators and information regarding conviction, pleas of nolo contendere, or guilty, or receipt of deferred adjudication for crimes or offenses by owners or operators.

(e) A massage establishment has renewed the license when the licensee has mailed the renewal form; a current inspection report of the local fire marshal, if required by local authorities, or a letter from the county attorney or city official stating that fire inspections are not required in that jurisdiction; and the required renewal fee to the department prior to the expiration date of the license. The postmark date shall be considered the date of mailing.

(f) The department shall issue a renewal license to a massage establishment that has met all requirements for renewal.

#### §140.364. Massage Establishment Exemptions.

(a) In accordance with the Act, a place of business is not required to hold a massage establishment license under the Act if:

(1) the place of business is owned by the federal government, the state, or a political subdivision of the state;

(2) at the place of business, a licensed massage therapist practices as a solo practitioner and:

(A) does not use a business name or assumed name; or

(B) uses a business name or an assumed name and provides the massage therapist's full legal name or license number in each advertisement and each time the business name or assumed name appears in writing;

(3) at the place of business, an acupuncturist, athletic trainer, chiropractor, cosmetologist, midwife, nurse, occupational therapist, perfusionist, physical therapist, physician, physician assistant, podiatrist, respiratory care practitioner, or surgical assistant licensed or certified in this state employs or contracts with a licensed massage therapist to provide massage therapy as part of the person's practice; or

(4) at the place of business, a person offers to perform or performs massage therapy:

(A) for not more than 72 hours in any six-month period; and

(B) as part of a public or charity event, the primary purpose of which is not to provide massage therapy.

(b) Unless the person is exempt from the licensing requirement, a person may not represent that the person is a massage establishment unless the person holds an appropriate license under this chapter.

#### §140.365. Massage Establishment Change of Ownership or Change of Location.

(a) No massage establishment license shall be transferred, bartered, or sold to another person or owner. The new owner of a massage establishment must apply for a license as a new applicant. A massage establishment may not operate under a new owner until a massage establishment license is issued by the department to the new owner. A license issued under this section is not transferable.

(b) The department may consider the addition or deletion of any person defined as an owner in §140.300(17) of this title (relating to Definitions) as a change in ownership. The massage establishment must notify the department of the change in ownership a minimum of 60 days before the change in ownership to request that the department, in lieu of a full application, accept a partial application.

(c) The department may require submission of a full application for approval for a change in ownership if:

(1) the department has a reasonable basis to believe the change in ownership of the establishment may significantly affect the establishment's continued ability to meet the criteria for approval; or

(2) the establishment fails to file notice of the change of ownership at least 60 days prior to the ownership transfer.

(d) The department may require a partial application for approval for a change in ownership if the department reasonably believes the change in ownership will not significantly affect the establishment's continued ability to meet the criteria for approval.

(e) No massage establishment license shall be transferred to another location. If the location of an establishment changes, a new application for licensure must be submitted and approved before the establishment may provide massage therapy or other massage therapy services.

#### §140.370. Filing Complaints.

(a) Any person may complain to the department alleging that a massage therapist, massage school, massage therapy instructor, massage establishment, or another person or business has violated the Act or this chapter.

(b) A person wishing to file a complaint against a massage therapist, massage school, massage therapy instructor, massage establishment, or another person or business

shall notify the department. The initial notification of a complaint may be in writing, by telephone, or by personal visit to the office of the massage therapy licensing program.

(c) Official complaints must be in writing either through correspondence or on department forms. Upon receipt of a complaint, the department shall send to the complainant an acknowledgment letter and the department's complaint form, which the complainant may complete and return.

(d) The department shall not investigate anonymous complaints.

#### §140.371. Investigation of Complaints.

(a) The department shall make an initial investigation.

(b) If the department determines that the information in the complaint does not allege a violation of the Act or rules or does not fall within the department's jurisdiction, the department shall advise the complainant and, if possible, refer the complainant to the appropriate governmental agency for handling such a complaint.

(c) The department shall, at least as frequently as quarterly, notify the parties to the complaint of the status of the complaint until its final disposition, except in cases where such notice would jeopardize an undercover investigation.

(d) If an investigation is conducted, the investigator shall attempt to contact the complainant to discuss the complaint.

(e) If the department determines that there are insufficient grounds to support the complaint, the department shall dismiss the complaint and give written notice of the dismissal to the licensee or person against whom the complaint has been filed and the complainant.

(f) The department shall determine whether the complaint fits within the category of a serious complaint affecting the health or safety of clients or other persons.

(g) If the department determines that there are sufficient grounds to support the complaint, the department may propose to deny, suspend, revoke, or refuse to renew a license, reprimand a licensee or impose an administrative penalty.

#### §140.372. Grounds for Denial of License or Disciplinary Action.

(a) The department may refuse to issue a license to a person, suspend or revoke the license of a person, or place a person licensed under the Act on probation if the person:

- (1) obtains a license by fraud, misrepresentation, or concealment of material facts;
- (2) sells, barter, or offers to sell or barter a license;
- (3) violates a rule adopted by the executive commissioner;
- (4) engages in unprofessional conduct as defined by executive commissioner rule that endangers or is likely to endanger the health, welfare, or safety of the public;
- (5) violates an order or ordinance adopted by a political subdivision under Local Government Code, Chapter 243; or
- (6) violates this chapter.

(b) The department shall revoke the license of a person if:

- (1) the person is convicted of, enters a plea of nolo contendere or guilty to, or receives deferred adjudication for an offense involving prostitution or another sexual offense; or
- (2) the department determines the person has practiced or administered massage therapy at or for a sexually oriented business.

(c) The department shall revoke the license of a person licensed as a massage school or massage establishment if the department determines that:

- (1) the school or establishment is a sexually oriented business; or
- (2) an offense involving prostitution or another sexual offense that resulted in a conviction for the offense, a plea of nolo contendere or guilty to the offense, or a grant of deferred adjudication for the offense occurred on the premises of the school or establishment.

(d) If the department finds a person has violated the Act or rules adopted under the Act or any other law or rule relating to the practice of massage therapy in Texas, the following sanctions and penalties apply:

- (1) denial of the person's application for licensure;
- (2) issuance of a written warning;
- (3) limitation or restriction of the licensee's practice for a specified time;
- (4) suspension of the license;

- (5) revocation of the license;
- (6) required participation by the licensee in one or more education programs;
- (7) issue a formal reprimand;
- (8) probation of any penalty imposed;
- (9) acceptance of the voluntary surrender of a license; or
- (10) assessment of an administrative penalty not to exceed \$1000 per day for each violation.

§140.373. Formal Hearings.

(a) A formal hearing and all related proceedings shall be conducted in accordance with the provisions of the Administrative Procedure Act (APA), Government Code, Chapter 2001, applicable state and federal statutes, the Rules of Practice and Procedures of the State Office of Administrative Hearings (SOAH), and this chapter.

(b) An administrative law judge (ALJ) appointed by the SOAH shall preside over and conduct the hearing. A formal hearing shall be held in Travis County, Texas, unless otherwise determined by the ALJ or upon agreement of the parties.

(c) After the hearing, the ALJ shall prepare a proposal for decision and provide copies of same to all parties to the hearing.

(d) The final order or decision will be rendered by the commissioner or commissioner's designee.

§140.374. Suspension of License for Failure to Pay Child Support.

(a) On receipt of a final court order or attorney general's order suspending a license due to failure to pay child support, or for failure to comply with a child custody order, the department shall immediately determine if a license has been issued to the obligator named on the order, and, if a license has been issued:

- (1) record the suspension of the license in the department's records;
- (2) report the suspension as appropriate; and
- (3) demand surrender of the suspended license.

(b) The department shall implement the terms of the final court or attorney general's order suspending a license without additional review or hearing. The department will provide notice as appropriate to the licensee or to others concerned with the license.

(c) The department may not modify, remand, reverse, vacate, or stay a court or attorney general's order suspending a license issued under the Family Code, Chapter 232, and may not review, vacate, or reconsider the terms of an order.

(d) A licensee who is the subject of a final court or attorney general's order suspending his or her license is not entitled to a refund for any fee paid to the department.

(e) If a suspension overlaps a license renewal period, an individual with a license suspended under this section shall comply with the normal renewal procedures in the Act and this chapter; however, the license will not be renewed until subsection (g) of this section is met.

(f) An individual who continues to use the title(s) massage therapist, massage therapy instructor, massage school, or massage establishment or to engage in any activity for which a license is required after the issuance of a court or attorney general's order suspending the license is liable for the same civil and criminal penalties provided for engaging in the prohibited activity without a license or while a license is suspended as any other license holder of the department.

(g) On receipt of a court or attorney general's order vacating or staying an order suspending a license, the department shall promptly issue the affected license to the individual if the individual is otherwise qualified for a license.

#### §140.375. Informal Disposition.

(a) Informal disposition of any complaint or contested case involving a licensee or an applicant for licensure may be made through an informal conference held to determine whether an agreed settlement order may be secured.

(b) An informal conference shall be voluntary.

(c) A conference shall be informal and shall not follow the procedures established in this chapter for contested cases and formal hearings.

(d) The licensee, the licensee's attorney, and department staff may question witnesses, make relevant statements, present statements of persons not in attendance, and present such other evidence as may be appropriate.

(e) The complainant shall not be considered a party in the informal conference but shall be given an opportunity to be heard if the complainant attends. Any written statement submitted by the complainant shall be reviewed at the conference.

(f) At the conclusion of the informal conference, department representatives may make recommendations for informal disposition of the complaint or contested case or for any disciplinary action authorized by the Act. The department may also:

- (1) conclude that the department lacks jurisdiction;
- (2) conclude that a violation of the Act or this chapter has not been established;
- (3) order that the investigation be closed; or
- (4) refer the matter for further investigation.

§140.376. Licensing of Persons with Criminal Background.

(a) Notwithstanding actions set out in §140.372(b) and (c) of this title (relating to Grounds for Denial of License or Disciplinary Action), the department may suspend or revoke a license, disqualify a person from receiving a license or deny to a person the opportunity to be examined for a license because of the person's conviction of a felony or misdemeanor if the crime directly relates to the duties and responsibilities of a massage therapist, massage therapy instructor, massage school, or massage establishment.

(b) In considering whether a criminal conviction directly relates to the occupation of a massage therapist, the department shall consider:

- (1) the nature and seriousness of the crime;
  - (2) the relationship of the crime to the purposes for requiring a license.
- The following felonies and misdemeanors relate to the license of a massage therapist, massage therapy instructor, massage school or massage establishment because these criminal offenses indicate an unwillingness or an inability to be able to perform as a massage therapist:

(A) the misdemeanor of knowingly or intentionally acting as a massage therapist without a license issued under the Act;

(B) a misdemeanor and/or felony offense involving moral turpitude;

(C) a misdemeanor and/or felony offense under various titles of the Texas Penal Code:

(i) Title 5 concerning offenses against the person;

(ii) Title 7 concerning offenses against property;

(iii) Title 9 concerning offenses against public order and decency;

(iv) Title 10 concerning offenses against public health, safety, and morals; and

(v) Title 4 concerning offenses of attempting or conspiring to commit any offenses in this subsection;

(vi) the misdemeanors and felonies listed in clauses (i) - (v) of this subparagraph are not inclusive in that the department may consider other particular crimes in special cases in order to promote the intent of the Act and this chapter;

(3) the extent to which a license might offer an opportunity to engage in further criminal activity of the same type as that in which the person previously had been involved; and

(4) the relationship of the crime to the ability, capacity, or fitness required to perform the duties and discharge the responsibilities of a massage therapist. In determining the present fitness of a person, the department shall consider the evidence described in the Occupations Code, Chapter 53, relating to Consequences of Criminal Conviction.