

Assembly Bill No. 2194

Passed the Assembly August 31, 2016

Chief Clerk of the Assembly

Passed the Senate August 25, 2016

Secretary of the Senate

This bill was received by the Governor this _____ day
of _____, 2016, at _____ o'clock ____M.

Private Secretary of the Governor

CHAPTER _____

An act to amend Sections 4600.5, 4602, 4604, 4607, 4610, and 4621 of, to amend and repeal Section 4620 of, and to add Section 4603.1 to, the Business and Professions Code, and to amend Section 51034 of the Government Code, relating to massage.

LEGISLATIVE COUNSEL’S DIGEST

AB 2194, Salas. California Massage Therapy Council: business of massage.

The Massage Therapy Act, until January 1, 2017, provides for certification of massage practitioners and massage therapists by the California Massage Therapy Council. Existing law states the intent of the Legislature regarding that act. Existing law also provides for the council to be governed by an interim board of directors until September 15, 2015, and for the appointment of a new board of directors having 4-year terms. Existing law prohibits a certificate from being denied and a holder of a certificate from being disciplined except according to specified procedures and authorizes a court to find that other procedures are fair and reasonable when the full circumstances of the denial or discipline are considered. Existing law authorizes an applicant or certificate holder to challenge a denial or discipline decision in a court of competent jurisdiction if challenged within one year after the effective date of the denial or discipline. Existing law authorizes the council to discipline an owner or operator of a massage business or establishment who is certified for the conduct of all individuals providing massage for compensation on the business premises. That act requires the council to immediately suspend, on an interim basis, the certificate of a certificate holder if the council receives notice that a certificate holder has been arrested and charges have been filed alleging a violation of certain provisions of law and requires the council to notify an establishment or employer of the suspension by email within 10 business days. That act authorizes the council, if it determines that a certificate holder has committed an act punishable as a sexually related crime, to immediately suspend the certificate of that certificate holder, and provides that the certificate holder has the right to request a hearing to challenge

the suspension. By June 1, 2016, existing law requires the council to provide a report to the appropriate policy committees of the Legislature that includes specified information.

This bill would revise the intent of the Legislature, as specified. The bill would require local governments to impose and enforce only reasonable and necessary fees and regulations on massage businesses and massage establishments, in keeping with the requirements of existing law and being mindful of the need to protect legitimate business owners and massage professionals, particularly sole providers. The bill would extend the operation of these provisions to January 1, 2021, and make nonsubstantive changes to delete obsolete provisions related to the interim board. The bill would also authorize the council to discipline an owner or operator of a massage business or establishment under those circumstances if the owner or operator is an applicant for certification.

This bill would provide that a procedure meets the requirements for fair procedure if certain procedures are followed. The bill would authorize a final decision to deny or impose discipline to be based solely on a written statement or declaration made under penalty of perjury, as specified. By expanding the crime of perjury this bill would impose a state-mandated local program.

This bill would authorize an applicant or certificate holder to challenge a denial or discipline decision in a court of competent jurisdiction within 90 days after the effective date of the decision. The bill would provide that a certificate issued under that act is not a fundamental vested right and would require judicial review of a denial or disciplinary decision by the council to be conducted using the substantial evidence standard of review. The bill would additionally authorize the council to notify an establishment or employer of the suspension of a certificate by first-class mail, and would authorize a certificate holder whose certificate is suspended to request an oral hearing or consideration of a written statement to challenge the suspension. The bill would instead require that report to be submitted by January 1, 2017.

Existing law authorizes the legislative body of a city or a county for unincorporated areas to enact an ordinance providing for the licensing for regulation of the business of massage when carried on within the city or county. Existing law authorizes that ordinance to condition the issuance of a license to engage in the business of

massage upon proof that a massage business meets specified reasonable standards set by the ordinance. Existing law prohibits a city, county, or city and county from requiring a massage establishment to have specified internal physical structures, including windows, and requiring a person certified under the Massage Therapy Act to undergo a background check beyond what is required by the Massage Therapy Act.

This bill would prohibit a city, county, or city and county from requiring a massage establishment to have a shower or bath and would also specify that a background check includes a criminal background check or requiring submission of fingerprints for a federal or state criminal background check.

The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

The people of the State of California do enact as follows:

SECTION 1. Section 4600.5 of the Business and Professions Code is amended to read:

4600.5. (a) It is the intent of the Legislature that this act enable consumers and local governments to more easily identify certified massage professionals, provide for consistent statewide certification and oversight of massage professionals, ensure that schools approved by the council that are teaching massage provide a high level of training, assist local governments and law enforcement in meeting their duty to maintain the highest standards of conduct in massage establishments by vetting and disciplining certificate holders, provide for a self-funded nonprofit oversight body to certify massage professionals, and ensure full compliance with, and execution of, the requirements of this act.

(b) It is the intent of the Legislature that broad control over land use in regulating massage establishments be vested in local governments so that they may manage those establishments in the best interests of the individual community, and that the requirements and practice of the profession of massage therapy remain a matter of statewide concern, regulation, and oversight.

Local governments should give strong consideration to establishing a registration program that grants local governments the ability to either suspend or revoke a registration of massage business for specific violations.

(c) It is the intent of the Legislature that local governments, law enforcement, nonprofit stakeholders, the massage industry, and massage professionals work together going forward to improve communication and share information to further increase the value of statewide certification, to collaborate in the implementation of this act, and to develop a model ordinance reflecting best practices in massage regulation for cities and counties to adopt that will respect local control, patient privacy, and the dignity of the profession of massage therapy.

SEC. 2. Section 4602 of the Business and Professions Code is amended to read:

4602. (a) The California Massage Therapy Council, as defined in subdivision (d) of Section 4601, is hereby established and shall carry out the responsibilities and duties set forth in this chapter.

(b) The council may take any reasonable actions necessary to carry out the responsibilities and duties set forth in this chapter, including, but not limited to, hiring staff, entering into contracts, and developing policies, procedures, rules, and bylaws to implement this chapter.

(c) The council may require background checks for all employees, contractors, volunteers, and board members as a condition of their employment, formation of a contractual relationship, or participation in council activities.

(d) The council shall issue a certificate to an individual applicant who satisfies the requirements of this chapter for that certificate.

(e) The council is authorized to determine whether the information provided to the council in relation to the certification of an applicant is true and correct and meets the requirements of this chapter. If the council has any reason to question whether the information provided is true or correct, or meets the requirements of this chapter, the council is authorized to make any investigation it deems necessary to establish that the information received is accurate and satisfies any criteria established by this chapter. The applicant has the burden to prove that he or she is entitled to certification.

(f) The council shall be governed by a board of directors comprised of 13 members who shall be chosen in the following manner:

(1) One member shall be a representative of the League of California Cities, unless that entity chooses not to exercise this right to appoint.

(2) One member shall be a representative of the California Police Chiefs Association, unless that entity chooses not to exercise this right to appoint.

(3) One member shall be a representative of the California State Association of Counties, unless that entity chooses not to exercise this right to appoint.

(4) One member shall be a representative of an “anti-human trafficking” organization to be determined by the council. This organization shall appoint one member, unless the organization chooses not to exercise this right to appoint.

(5) One member shall be appointed by the Office of the Chancellor of the California Community Colleges, unless that office chooses not to exercise this right to appoint.

(6) One member shall be a member of the public appointed by the Director of the Department of Consumer Affairs, unless the director chooses not to exercise this right to appoint.

(7) One member shall be appointed by the California Association of Private Postsecondary Schools, unless that entity chooses not to exercise this right to appoint.

(8) One member shall be appointed by the American Massage Therapy Association, California Chapter, who shall be a California-certified massage therapist or massage practitioner who is a California resident and who has been practicing massage for at least three years, unless that entity chooses not to exercise this right to appoint.

(9) One member shall be a public health official representing a city, county, city and county, or state health department, to be determined by the council. The city, county, city and county, or state health department chosen, shall appoint one member unless that entity chooses not to exercise this right to appoint.

(10) (A) One member shall be a certified massage therapist or a certified massage practitioner who is a California resident who has practiced massage for at least three years prior to the appointment, selected by a professional society, association, or

other entity which membership is comprised of massage therapist professionals, and that chooses to participate in the council. To qualify, a professional society, association, or other entity shall have a dues-paying membership in California of at least 1,000 individuals, have been established since 2000, and shall have bylaws that require its members to comply with a code of ethics.

(B) If there is more than one professional society, association, or other entity that meets the requirements of subparagraph (A), the appointment shall rotate based on a four-year term between each of the qualifying entities. The qualifying entity shall maintain its appointment authority during the entirety of the four-year term during which it holds the appointment authority. The order in which a qualifying professional society, association, or other entity has the authority to appoint shall be determined by alphabetical order based on the full legal name of the entity as of January 1, 2014.

(11) The members appointed to the board in accordance with paragraphs (1) to (10), inclusive, shall appoint three additional members, at a duly held board meeting in accordance with the board's bylaws. One of those appointees shall be an attorney licensed by the State Bar of California, who has been practicing law for at least three years and who at the time of appointment represents a city in the state. One of those appointees shall represent a massage business entity that has been operating in the state for at least three years. The council shall establish in its bylaws a process for appointing an additional member, provided that the member has knowledge of the massage industry or can bring needed expertise to the operation of the council for purposes of complying with Section 4603.

(g) Board member terms shall be for four years.

(h) The board of directors shall establish fees reasonably related to the cost of providing services and carrying out its ongoing responsibilities and duties. Initial and renewal fees for certificates shall be in an amount sufficient to support the functions of the council in the administration of this chapter, but in no event shall exceed three hundred dollars (\$300). The renewal fee shall be reassessed biennially by the board.

(i) The meetings of the council shall be subject to the rules of the Bagley-Keene Open Meeting Act (Article 9 (commencing with Section 11120) of Chapter 1 of Part 1 of Division 3 of Title 2 of

the Government Code). The board may adopt additional policies and procedures that provide greater transparency to certificate holders and the public than required by the Bagley-Keene Open Meeting Act.

(j) Prior to holding a meeting to vote upon a proposal to increase the certification fees, the board shall provide at least 90 days' notice of the meeting, including posting a notice on the council's Internet Web site unless at least two-thirds of the board members concur that there is an active threat to public safety and that voting at a meeting without prior notice is necessary. However, the board shall not waive the requirements of subdivision (i).

(k) If the board approves an increase in the certification fees, the council shall update all relevant areas of its Internet Web site and notify all certificate holders and affected applicants by email within 14 days of the board's action.

SEC. 3. Section 4603.1 is added to the Business and Professions Code, to read:

4603.1. Local governments shall impose and enforce only reasonable and necessary fees and regulations on massage businesses and massage establishments, in keeping with the requirements of existing law and being mindful of the need to protect legitimate business owners and massage professionals, particularly sole providers.

SEC. 4. Section 4604 of the Business and Professions Code is amended to read:

4604. (a) In order to obtain certification as a massage therapist, an applicant shall submit a written application and provide the council with satisfactory evidence that he or she meets all of the following requirements:

(1) The applicant is 18 years of age or older.

(2) The applicant has successfully completed the curricula in massage and related subjects totaling a minimum of 500 hours, or the credit unit equivalent, that incorporates appropriate school assessment of student knowledge and skills.

(A) Of the 500 hours, a minimum of 100 hours of instruction shall address anatomy and physiology, contraindications, health and hygiene, and business and ethics.

(B) All of the 500 hours shall be from approved schools.

(3) The applicant has passed a massage and bodywork competency assessment examination that meets generally

recognized psychometric principles and standards and that is approved by the council. The successful completion of this examination may have been accomplished before the date the council is authorized by this chapter to begin issuing certificates.

(4) The applicant has successfully passed a background investigation pursuant to Section 4606, and has not violated any of the provisions of this chapter.

(5) All fees required by the council have been paid.

(6) The council may issue a certificate to an applicant who meets the qualifications of this chapter if he or she holds a current and valid registration, certification, or license from any other state whose licensure requirements meet or exceed those defined within this chapter. If an applicant has received education at a school that is not approved by the council, the council shall have the discretion to give credit for comparable academic work completed by an applicant in a program outside of California.

(b) A certificate issued pursuant to this chapter and any identification card issued by the council shall be surrendered to the council by any certificate holder whose certificate is suspended or revoked.

SEC. 5. Section 4607 of the Business and Professions Code is amended to read:

4607. The council may discipline an owner or operator of a massage business or establishment who is certified pursuant to this chapter or is an applicant for certification pursuant to this chapter for the conduct of all individuals providing massage for compensation on the business premises.

SEC. 6. Section 4610 of the Business and Professions Code is amended to read:

4610. (a) An applicant for a certificate shall not be denied a certificate, and a certificate holder shall not be disciplined pursuant to this chapter except according to procedures that satisfy the requirements of this section. Denial or discipline that is not in accord with this section shall be void and without effect.

(b) The council may discipline a certificate holder by any, or a combination, of the following methods:

(1) Placing the certificate holder on probation, which may include limitations or conditions on practice.

(2) Suspending the certificate and the rights conferred by this chapter on a certificate holder for a period not to exceed one year.

(3) Suspending or staying the disciplinary order, or portions of it, with or without conditions.

(4) Revoking the certificate.

(5) Taking other action as the council deems proper, as authorized by this chapter or policies, procedures, rules, or bylaws adopted by the board.

(c) The council may issue an initial certificate on probation, with specific terms and conditions, to any applicant.

(d) Any denial or discipline shall be decided upon and imposed in good faith and in a fair and reasonable manner. Any procedure that conforms to the requirements of subdivision (e) is fair and reasonable.

(e) A procedure is fair and reasonable and meets requirements for fair procedure if the procedures specified in subdivision (f) or (g) are followed or if all of the following apply:

(1) Denial or discipline shall be based on a preponderance of the evidence. In determining the basis for the denial or discipline and making a final decision that denial or discipline shall be imposed, the council may consider all written documents or statements as evidence, but shall weigh the reliability of those documents or statements. A final decision to deny or impose discipline may be based solely on a written statement or declaration made under penalty of perjury and the individual providing the written statement or declaration made under penalty of perjury shall not be required to appear at an oral hearing or provide additional documents or information beyond the written statement or declaration made under penalty of perjury that was already provided.

(2) The provisions of the procedure are publicly available on the council's Internet Web site.

(3) The council provides 15 calendar days prior notice of the denial or discipline and the reasons for the denial or discipline.

(4) The council provides an opportunity for the applicant or certificate holder, to be heard, orally or in writing, not less than five days before the effective date of the denial or discipline, by a person or body authorized to decide whether the proposed denial or discipline should go into effect.

(f) (1) Notwithstanding any other law, if the council receives notice that a certificate holder has been arrested and charges have been filed by the appropriate prosecuting agency against the

certificate holder alleging a violation of subdivision (b) of Section 647 of the Penal Code or any other offense described in paragraph (11) of subdivision (a) of Section 4609, the council shall immediately suspend, on an interim basis, the certificate of that certificate holder, and take all of the following additional actions:

(A) Notify the certificate holder at the address last filed with the council that the certificate has been suspended and the reason for the suspension within 10 business days.

(B) Provide notification of the suspension by email to the clerk or other designated contact of the city, county, or city and county in which the certificate holder lives or works, pursuant to the council's records, within 10 business days.

(C) Provide notification of the suspension by email or first-class mail to any establishment or employer, whether public or private, that the council has in its records as employing the certificate holder, within 10 business days.

(2) Upon notice to the council that the charges described in paragraph (1) have resulted in a conviction, the council shall permanently revoke the suspended certificate. The council shall provide notice to the certificate holder, at the address last filed with the council by a method providing delivery confirmation, within 10 business days that it has evidence of a valid record of conviction and that the certificate will be revoked unless the certificate holder provides evidence within 15 days from the date of the council's mailing of the notice that the conviction is either invalid or that the information is otherwise erroneous.

(3) Upon notice that the charges described in paragraph (1) have resulted in an acquittal or have been otherwise dismissed prior to conviction, the certificate shall be immediately reinstated and the certificate holder and any establishment or employer that received notice pursuant to this section shall be notified of the reinstatement within 10 business days.

(g) (1) Notwithstanding any other law, if the council determines that a certificate holder has committed an act punishable as a sexually related crime or a felony that is substantially related to the qualifications, functions, or duties of a certificate holder, the council may immediately suspend the certificate of that certificate holder. A determination to immediately suspend a certificate pursuant to this subdivision shall be based upon a preponderance of the evidence and the council shall also consider any available

credible mitigating evidence before making a decision. Written statements by any person shall not be considered by the council when determining whether to immediately suspend a certificate unless made under penalty of perjury. If the council suspends a certificate in accordance with this subdivision, the council shall take all of the following additional actions:

(A) Notify the certificate holder within 10 business days, at the address last filed with the council, by a method providing delivery confirmation, that the certificate has been suspended, the reason for the suspension, and that the certificate holder has the right to request a hearing pursuant to paragraph (2).

(B) Notify by email or any other means consistent with the notice requirements of this chapter, any business or employer, whether public or private, that the council has in its records as employing or contracting with the certificate holder for massage services, and the California city, county, or city and county that has jurisdiction over that establishment or employer, that the certificate has been suspended within 10 business days.

(2) A certificate holder whose certificate is suspended pursuant to this subdivision shall have the right to request, in writing, an oral hearing or consideration of a written statement to challenge the factual basis for the suspension. If the holder of the suspended certificate requests an oral hearing or consideration of a written statement on the suspension, the oral hearing or consideration of a written statement shall be held within 30 calendar days after receipt of the request. A holder whose certificate is suspended based on paragraph (1) shall be subject to revocation or other discipline in accordance with subdivision (a).

(3) If the council determines, after a hearing conducted pursuant to this subdivision, to lift the suspension, the certificate shall be immediately reinstated and the certificate holder, any establishment or employer, and the city, county, or city and county that has jurisdiction over that establishment or employer, that received notice pursuant to this section shall be notified of the reinstatement within 10 business days.

(h) Any notice required under this section may be given by any method reasonably calculated to provide actual notice. Any notice given by mail shall be given by first-class or certified mail sent to the last address of the applicant or certificate holder shown on the council's records.

(i) An applicant or certificate holder may challenge a denial or discipline decision issued pursuant to this section in a court of competent jurisdiction. Any action challenging a denial or discipline, including any claim alleging defective notice, shall be commenced within 90 days after the effective date of the denial or discipline. Certification issued pursuant to this chapter is not a fundamental vested right and judicial review of denial and disciplinary decisions made by the council shall be conducted using the substantial evidence standard of review. If the action is successful, the court may order any relief, including reinstatement, that it finds equitable under the circumstances.

(j) This section governs only the procedures for denial or discipline decision and not the substantive grounds for the denial or discipline. Denial or discipline based upon substantive grounds that violates contractual or other rights of the applicant or certificate holder, or is otherwise unlawful, is not made valid by compliance with this section.

SEC. 7. Section 4620 of the Business and Professions Code is amended to read:

4620. (a) On or before January 1, 2017, for the time period beginning on January 1, 2015, the council shall provide a report to the appropriate policy committees of the Legislature that includes all of the following:

(1) A feasibility study of licensure for the massage profession, including a proposed scope of practice, legitimate techniques of massage, and related statutory recommendations.

(2) The council's compensation guidelines and current salary levels.

(3) The status of the council's progress towards revising the school approval process.

(4) Performance metrics, including, but not limited to:

(A) The annual number of denied certificate applications, and a brief description of the grounds for each decision.

(B) The annual number of suspended, revoked, or otherwise disciplined certificates, and a brief description of the grounds for each decision.

(C) The number of certificates taken off suspension, and a brief description of the grounds for each decision.

(D) The number of schools inspected and unapproved and a brief description of the grounds for each decision to unapprove.

(E) The total number of complaints about certificate holders received annually, including a subtotal of complaints received from local law enforcement and the action taken by the council as a result of those complaints.

(b) The council shall testify in person if requested by the appropriate policy committees of the Legislature.

(c) This section shall be repealed on January 1, 2021.

SEC. 8. Section 4621 of the Business and Professions Code is amended to read:

4621. (a) This chapter shall remain in effect only until January 1, 2021, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2021, deletes or extends that date.

(b) Notwithstanding any other law, the powers and duties of the council shall be subject to review by the appropriate policy committees of the Legislature.

SEC. 9. Section 51034 of the Government Code is amended to read:

51034. (a) The Legislature in enacting this chapter recognizes the existing power of a city or county to regulate a lawful massage business pursuant to Section 37101, or pursuant to Section 16000 or 16100 of the Business and Professions Code, or under Section 7 of Article XI of the California Constitution.

(b) Nothing contained in this chapter shall be a limitation on that existing power or on the existing authority of a city to license for revenue purposes. A city, county, or city and county shall not enact or enforce an ordinance that conflicts with the provisions of this section or Chapter 10.5 (commencing with Section 4600) of Division 2 of the Business and Professions Code.

(c) Nothing contained in this chapter shall authorize a city, county, or city and county to do any of the following:

(1) Prohibit a person of one sex from engaging in the massage of a person of the other sex.

(2) Define a massage establishment as an adult entertainment business, or otherwise regulate a massage establishment as adult entertainment.

(3) Require a massage establishment to have windows or walls that do not extend from the floor to ceiling, or have other internal physical structures, including windows, that interfere with a client's reasonable expectation of privacy.

(4) Require a massage establishment to have a shower or bath.

(5) Impose client draping requirements that extend beyond the covering of genitalia and female breasts, or otherwise mandate that the client wear special clothing.

(6) Prohibit a massage establishment from locking its external doors if the massage establishment is a business entity owned by one individual with one or no employees or independent contractors.

(7) Require a massage establishment to post any notice in an area that may be viewed by clients that contains explicit language describing sexual acts, mentions genitalia, or specific contraception devices.

(8) Impose a requirement that a person certified pursuant to Chapter 10.5 (commencing with Section 4600) of Division 2 of the Business and Professions Code take any test, medical examination, or background check, including a criminal background check or requiring submission of fingerprints for a federal or state criminal background check, or comply with education requirements beyond what is required by Chapter 10.5 (commencing with Section 4600) of Division 2 of the Business and Professions Code.

(9) Impose a requirement that an individual holding a certificate issued in accordance with Chapter 10.5 (commencing with Section 4600) of Division 2 of the Business and Professions Code, obtain any other license, permit, certificate, or other authorization to provide massage for compensation. However, this paragraph shall not be construed to prohibit a city, county, or city and county from requiring by ordinance that a massage business or establishment obtain a license, permit, certificate, or other authorization in order to operate lawfully within the jurisdiction.

(10) Impose a dress code requirement on a person certified pursuant to Chapter 10.5 (commencing with Section 4600) of Division 2 of the Business and Professions Code in excess of those already imposed pursuant to paragraph (10) of subdivision (a) of Section 4609 of the Business and Professions Code.

(11) Prohibit a person certified pursuant to Chapter 10.5 (commencing with Section 4600) of Division 2 of the Business and Professions Code from performing massage for compensation on the gluteal muscles, prohibit specific massage techniques recognized by the California Massage Therapy Council as

legitimate, or impose any other specific restriction on professional practice beyond those set forth in subparagraph (E) of paragraph (1) of subdivision (a) of Section 4609 of the Business and Professions Code, except as authorized by Section 460 of the Business and Professions Code.

SEC. 10. No reimbursement is required by this act pursuant to Section 6 of Article XIII B of the California Constitution because the only costs that may be incurred by a local agency or school district will be incurred because this act creates a new crime or infraction, eliminates a crime or infraction, or changes the penalty for a crime or infraction, within the meaning of Section 17556 of the Government Code, or changes the definition of a crime within the meaning of Section 6 of Article XIII B of the California Constitution.

Approved _____, 2016

Governor