

SESSION OF 2016

SUPPLEMENTAL NOTE ON SENATE BILL NO. 363

As Recommended by Senate Committee on
Public Health and Welfare

Brief*

SB 363 would create the Acupuncture and Oriental Medicine Practice Act (Act) and provide for the licensure of individuals under the Act by the Kansas State Board of Healing Arts (Board). The bill would: define key terms; outline the therapies included and excluded in oriental medicine; establish requirements for the licensure of acupuncturists, the licensure application process, reciprocal licensure, licensure fees, and for the discipline of the licensees, including non-disciplinary resolutions; exempt certain individuals from licensure; provide for the grandfathering of individuals currently practicing acupuncture and oriental medicine who meet specific requirements; establish an Acupuncture Advisory Council (Council) and set out the Council's duties, membership requirements, meeting days, and compensation; define the duties and authority of the Board; address patient confidentiality requirements; and amend existing law to clarify the practice of healing arts would not include acupuncturists.

The Act would take effect on publication in the statute book, but the effective date of certain provisions in the bill would be delayed, as outlined in the bill details that follow.

Definitions (New Section 2)

The following would be among the terms defined in the Act:

*Supplemental notes are prepared by the Legislative Research Department and do not express legislative intent. The supplemental note and fiscal note for this bill may be accessed on the Internet at <http://www.kslegislature.org>

- “Acupuncture” would mean a distinct system of health care, based on traditional and modern oriental medical concepts, to examine, evaluate, diagnose, manage or treat disease, illness, injury, pain or other physical or mental conditions in order to promote the restoration and maintenance of health and wellness;
- “Auricular detox treatment” would be defined as a very limited procedure involving the insertion of acupuncture needles into specific points in the outer ear and used in the treatment of drug or alcohol abuse, or both;
- “Oriental medicine” would mean Chinese medicine, traditional Chinese medicine, Asian medicine, East Asian Medicine, and other names used to describe this medical model and the methods taught; and
- “National Certification Commission for Acupuncture and Oriental Medicine” (NCCAOM) is a national organization that would validate entry-level competency in the practice of acupuncture and oriental medicine through the administration of professional certification examinations.

Oriental Medicine Therapies (New Section 2)

Oriental medicine therapies would include:

- Acupuncture treatments and related techniques involving the insertion and removal of needles at specific points of the body with or without the following: palpation of specific points, manipulation of the needles, and application of heat sources or electrical current. These therapies include “dry needling,” “trigger point therapy,” intramuscular therapy,” “auricular detox treatment,” and similar terms;

- Mechanical, thermal, pressure, suction, friction, electrical, magnetic, light, sound, vibration, manual treatment, and electromagnetic treatment;
- The use, application or recommendation of therapeutic exercises, breathing techniques, meditation, and dietary and nutritional counseling based on oriental medicine principles; and
- The use and recommendation of herbal products and nutritional supplements, according to the acupuncturist's level of training and certification as a diplomate in oriental medicine or herbology by NCCAOM.

Oriental medicine therapies would not include the dispensing or administering of any controlled substances or any prescription-only drugs, medicine and surgery including the use of lasers for surgical purposes as practiced by physicians and surgeons, osteopathic medicine and surgery or osteopathic manipulative treatment, or the practice of chiropractic.

License Required for Practice of Acupuncture (New Section 3)

Beginning July 1, 2017, the practice of acupuncture would be prohibited unless the individual possesses a current and valid acupuncture license issued under the Act, is licensed to practice medicine and surgery, is a licensed chiropractor, or is a licensed naturopathic doctor. Only a person licensed as an acupuncturist under the Act would be entitled to use the following terms, as appropriate: "licensed acupuncturist," "oriental medicine practitioner," "practitioner of oriental medicine," abbreviations of these terms or words similar to such titles or the designated letters "L.Ac." When using the term "Dr." or "Doctor" in conjunction with a licensee's practice, the licensee would be required to identify that he or she is a doctor of oriental medicine. Licensure

under the Act would be required in order for an individual to hold oneself out as specializing in or practicing any form of oriental medicine in the state.

Use of Needles

Needles used in acupuncture would be required to be pre-packaged, single-use, and sterile needles and used only on an individual patient in a single treatment session.

Individuals Exempt from Acupuncture Licensure (New Section 4)

Effective July 1, 2017, the bill would exempt nine categories of individuals from acupuncture licensure, including:

- A person licensed to practice medicine and surgery, a licensed chiropractor or a licensed naturopathic doctor when acting or practicing within each licensed professional's scope of practice and not representing oneself as being licensed under the Act or indicating licensure under the Act through the use of a name, title, or designation;
- A herbalist or herbal retailer if not holding oneself out as a licensed acupuncturist;
- Health care providers in the U.S. armed forces, federal facilities, and other military service when acting in the line of duty in the state;
- Any student, trainee or visiting teacher of acupuncture, oriental medicine or herbology while participating in a course of study or training under the supervision of a licensed acupuncturist in a Council approved program, including continuing education programs and any other programs

recognized by the NCCAOM as a route to certification in these areas of study;

- Persons rendering assistance in an emergency or disaster relief;
- Self-care by a patient or gratuitous care by a family member not holding oneself out to the public as a licensed acupuncturist;
- Persons who massage, if they do not practice acupuncture and oriental medicine or hold themselves out as licensed practitioners in these areas;
- Any team acupuncturist, oriental medicine or herbology practitioner traveling with and treating individuals associated with an out-of-state or national team that is temporarily in the state for training or competition; and
- Auricular detox technicians performing only auricular detox treatments under the supervision of a licensed acupuncturist.

Licensure Requirements (New Section 5)

Applications for Licensure

Applicants for licensure as acupuncturists would be required to meet the following requirements to the satisfaction of the Board:

- Be at least 21 years of age at the time of application;
- Graduated from a school or apprenticeship program recognized by the NCCAOM, or its

equivalent, and approved by the Board, and meets one of the following:

- Active status of a NCCAOM certified diplomate of acupuncture or oriental medicine; or
- Equivalent status as recognized by the Council and approved by the Board;
- Demonstrates the ability to communicate in the English language as determined by rules and regulations adopted by the Board if English is the applicant's second language;
- Has good moral character; and
- Paid all required non-refundable licensure fees, prescribed in new section 8 of the bill.

Applications for Reciprocal License

The bill would allow reciprocal licensure for individuals in the active practice of acupuncture or oriental medicine in another state, territory, District of Columbia, or other country upon certification from the other jurisdiction that the applicant is licensed, certified or registered; has never had any disciplinary action taken against his or her license, certification or registration; and the applicant is entitled to endorsement by the other jurisdiction. Additionally, the applicant would be required to present proof satisfactory to the Board that the applicant meets the statutory requirements for reciprocal licensure established in the bill. Applicants for license by endorsement would be required to have qualifications that meet the Kansas requirements.

Grandfathered License

The bill would provide that applicants who do not meet the licensure requirements established under the bill, but who have practiced acupuncture or oriental medicine in Kansas

during three of the last five years prior to the effective date of the Act may be issued a license if the following requirements are met: proof of a minimum of 1,350 hours of study (excluding online study) in acupuncture obtained by July 1, 2017; a practice with a minimum of 1,500 patient visits for three of the five years preceding the application, which would require documentation as outlined in the bill; a showing that any complaints against the applicant have been absolved or resolved to the satisfaction of the Board; submission of the application by January 1, 2018; proof of the ability to communicate in the English language, if it is the second language for the applicant, as determined by rules and regulations adopted by the Board; and payment of the required non-refundable fees.

Notwithstanding the requirements for licensure for new applicants and grandfathered applicants, the bill would allow the Board to issue a license to a person who successfully passes the NCCAOM board examinations and submits an application for licensure under the Act by January 1, 2018. The bill also would provide a procedure for the reinstatement of a revoked license.

Inactive License (New Section 6)

Effective on and after July 1, 2017, the bill would create the designation of inactive license, which may be issued by the Board upon written application and payment of the requisite fee. The bill would allow the Board to issue an inactive license only to persons who meet all acupuncturist licensure requirements and who do not engage in the active practice of acupuncture and oriental medicine in the state. The holder of an inactive license would not be entitled to engage in active practice. Provisions in the bill related to the expiration, renewal, and reinstatement of a license would apply to inactive license holders. The bill would allow inactive licensees to apply to engage in active practice by presenting a request accompanied by the established fee.

Annual License Renewal Process (New Section 7)

The licensure renewal process established by the bill would be effective on July 1, 2017. Licenses would be issued annually and would be canceled on March 31 of each year unless renewed. Licenses issued or reinstated from January 1 through March 31 would be canceled on March 31 of the following year. License renewal would be requested on a form provided by the Board and accompanied by the established renewal fee to be paid by the renewal date of the license.

The bill would establish requirements for notification by the Board with regard to the renewal date, the cancellation of a license for failure to apply and pay the required fee, and the process and fees required for the reinstatement of a canceled license. Specific requirements would apply to licenses canceled for at least one year but less than five years.

The bill would authorize the Board to require any licensee to submit to a continuing education audit and to provide evidence of satisfactory completion of continuing education requirements. Prior to license renewal, active licensees would be required to submit to the Board evidence of maintenance of professional liability insurance. The Board would be authorized to require any licensee to provide evidence of malpractice insurance.

Fees (New Section 8)

The Board would be required to charge and collect in advance fees for acupuncturists through March 31, 2018, as established under the bill. After March 31, 2018, the Board would charge and collect advance fees established through rules and regulations, not to exceed the fees initially established by the bill.

If an examination is not administered by the Board, the bill would authorize the Board to required fees for the

examination to be paid by the individual taking the exam directly to the examination service.

Deposit of Fees, Charges, and Penalties (New Section 9)

Moneys received by the Board for fees, charges, and penalties would be deposited in the State Treasury, with 20.0 percent of the amount credited to the State General Fund and the balance credited to the Healing Arts Fee Fund.

Acupuncture Advisory Council (New Section 10)

A Council would be established to assist the Board in carrying out the provisions of the Act. The Council would consist of five members appointed as follows:

- The Board, with recommendations from the Kansas Association of Oriental Medicine, would appoint two members who are actively licensed acupuncturists under the Act and one member who is an actively licensed acupuncturist and holds a current NCCAOM certification in herbology or oriental medicine;
- The President of the Board or a designee; and
- One member, appointed by the Governor from the public who is not engaged, directly or indirectly, in the provision of health services.

The bill would require, insofar as possible, that the members appointed to the Council be from different geographic areas. The bill addresses the filling of vacancies, length of terms, quorum, licensure requirements for Council members, and the selection of a chairperson. The Council would be required to meet at least once each year and at such other times as may be necessary on the call of the chairperson or on the request of a majority of the Council's

members. The first meeting would be called by the president of the Board or a designee.

Board members would receive compensation, as provided in KSA 75-3223(e), from the Healing Arts Fee Fund.

Duties of the Council (New Section 11)

The Council would be tasked with advising the Board regarding examination, licensing and other fees; rules and regulations to be adopted to carry out provisions of the Act; the annual continuing education requirements to maintain an active license; changes and new requirements taking place in the areas of acupuncture and oriental medicine; and such other duties and responsibilities as the Board may assign.

Duties of the Board (New Section 12)

The Board, with the advice and assistance of the Council, would license and regulate applicants and keep a roster of the licensees; adopt rules and regulations necessary to administer the provisions of the Act and prescribe forms issued in the Act's administration; establish standards for approval of an educational course of study and clinical experience; establish continuing education criteria; establish standards of professional conduct, a procedure for the discipline of licensees, and keep a record of all such proceedings; and establish standards for clean needle technique.

Grounds for Disciplinary Action (New Section 13)

Provisions dealing with grounds for disciplinary action and administrative review would take effect on July 1, 2017. The bill would establish 13 grounds for which a licensee's license may be revoked, suspended or limited, or the licensee publicly or privately censured, or an application for a license or for reinstatement denied. The grounds for disciplinary

action outlined in the bill include, in part: unprofessional conduct; obtaining a license by means of fraud, misrepresentations, or concealment of material facts; professional incompetency; felony conviction; violation of any provisions of the Act; violation of a lawful order or rule and regulation of the Board; failure to report to the Board information regarding adverse action taken against the licensee; and the inability to practice due to impairment by reason of physical or mental illness, or condition, or use of alcohol, drugs, or controlled substances. Information relating to impairment would be confidential and not subject to discovery by or release to any person or entity outside a Board proceeding. The bill would require the provision regarding confidentiality expire on July 1, 2022, and would require the Kansas Legislature to review the provision prior to its expiration date.

Administrative proceedings would be conducted in accordance with the Kansas Administrative Procedure Act (KAPA) and reviewable under the Kansas Judicial Review Act.

Board Jurisdiction in Disciplinary Actions (New Section 14)

The bill would grant the Board jurisdiction in proceedings for disciplinary action against any licensee practicing under the Act, and such action would be required to comply with KAPA. Before or after formal charges have been filed, the bill would authorize the Board and licensee to enter into a stipulation that would be binding on both parties. An enforcement order based on a stipulation would allow for the ordering of any disciplinary action. Additionally, the Board would be authorized to temporarily suspend or temporarily limit the license of any licensee in accordance with the Emergency Adjudicative Proceedings Act under KAPA if the Board determines grounds exist for disciplinary action and the licensee's continuation of practice would constitute imminent danger to public health and safety. Judicial review and civil

enforcement of any agency actions under the Act would be in accordance with the Kansas Judicial Review Act.

Non-Disciplinary Resolution (New Section 15)

As a non-disciplinary resolution, the Board or a committee of the Board would be authorized to enter into a written agreement with a licensee for a professional development plan, make written recommendations to a licensee or issue a written letter of concern to a licensee if the Board, a committee of the Board or a peer review committee determines conditions outlined in the bill exist to warrant such action. A meeting of the Board or a committee of the Board for the purpose of discussing or adopting a non-disciplinary resolution would not be subject to KAPA and the Kansas Open Meetings Act. A non-disciplinary resolution would not be a disciplinary action or other order or adjudication. A non-disciplinary resolution would be confidential and not admissible in any civil, criminal, or administrative action, but would be admissible in any disciplinary proceeding by the Board.

Board Access to Information in Investigations (New Section 16)

The Board or its authorized agents or employees would at all reasonable times be granted, for the purpose of examination, access to and the right to copy any document, report, record or other physical evidence of any person being investigated or any such evidence maintained by and in the possession of any clinic, acupuncture and oriental medicine practitioner's office, or other public or private agency if the information relates to the competence, unprofessional conduct or the mental or physical ability of a licensee to safely practice acupuncture and oriental medicine.

The Board would be authorized to issue subpoenas to compel attendance and testimony of witnesses or the

production of document or other physical evidence if such evidence relates to these stated concerns. The bill would provide a licensee the right to petition the Board for the revocation, limitation or modification of a subpoena and provide the basis under which such action on the subpoena may be taken by the Board. The district court would have jurisdiction to issue an order requiring the appearance and production of evidence to the Board or the Board's duly authorized agent or to revoke, limit or modify the subpoena under certain conditions.

Assessment of a Civil Fine (New Section 17)

The Board, in addition to any other penalty prescribed by the Act, would be authorized to assess a civil fine against a licensee for violation of the Act, after proper notice and an opportunity for the licensee to be heard. The civil fine would not exceed \$2,000 for the first violation, \$5,000 for the second violation, and \$10,000 for the third and for each subsequent violation. All civil fines collected would be deposited in the State Treasury to the credit of the State General Fund.

Confidentiality of Complaint Information (New Section 18)

Any complaint or report, record or other information relating to a complaint in the possession of the Board would be deemed confidential and disclosure by the Board in a manner which identifies or enables identification of the person who is the subject or source of the information would be prohibited, except the disclosure would be permitted as specifically outlined in the bill. Redislosure by an agency authorized to receive the information disclosed by the Board would be prohibited unless otherwise authorized by law. These provisions regarding confidentiality would expire on July 1, 2022, and the Kansas Legislature would be required to review the provisions before their expiration.

***Protection from Civil Damages for Good Faith Reporting
(New Section 19)***

No persons reporting in good faith to the Board concerning alleged incidents of malpractice or the qualifications, fitness or character of or disciplinary action taken against a person licensed, registered or certified by the Board would be subject to a civil action for damages as a result of reporting the information. Likewise, any state, regional or local association composed of persons licensed to practice acupuncture and oriental medicine and individual members of any associated committees, which in good faith investigates or communicates the same type of information regarding a licensee, would be immune from liability in a civil action based on the information disclosed in good faith.

Professional Liability Insurance Coverage (New Section 20)

Effective July 1, 2017, professional liability insurance coverage would be required for each licensee as a condition of practice in the state. The Board would be required to fix the minimum level of coverage by rules and regulations.

Patient Confidentiality (New Section 21)

Effective July 1, 2017, confidential relations and communications between a licensed acupuncturist and a patient would be on the same basis as that provided by law between a physician and a patient.

Injunctions (New Section 22)

On and after July 1, 2017, the Board would be authorized to seek an injunction against any person violating the provisions of the Act, without regard to whether proceedings have been or may be instituted before the Board or criminal proceedings have been or will be instituted.

Penalty for Violation of the Act (New Section 23)

On and after July 1, 2017, any violations of the Act would constitute a class B misdemeanor.

Severability Clause (New Section 24)

A finding by a court of competent jurisdiction that any section of the Act is invalid would not affect, impair, or invalidate the remainder of the Act.

Exclusion from the Practice of Healing Arts (Section 25)

The bill would add acupuncturists licensed and practicing in accordance with the Act, amendments to the Act, rules and regulations adopted, and their interpretations by the Kansas Supreme Court to the list of persons not included in the practice of healing arts.

Background

At the Senate Committee on Public Health and Welfare hearing, two representatives and an attorney for the Kansas Association of Oriental Medicine, a private citizen, a physician, and a representative of the Kansas Association of Osteopathic Medicine testified in favor of the bill. The proponents generally stated the bill would clarify and establish the lawful independent practice for licensed acupuncturists and give Kansans access to a safe and effective health care option with fully-trained acupuncturists. The proponents stated 45 states currently license acupuncturists. Additionally, the proponents presented amendments to address concerns expressed by varying stakeholders. Written testimony in favor of the bill was provided by three physicians and an acupuncturist.

Opponent testimony was provided by representatives of the Kansas Chiropractic Association (KCA) and the Kansas

Physical Therapy Association (KPTA). The KPTA representative generally stated disagreement with the definition of what acupuncture includes, that physical therapists are not exempted from the bill, and that physical therapists' scope of practice would be limited as it relates to dry needling. The KCA representative stated support for the base principle of the bill, expressed concern with regard to some of the bill language, and proposed amendments that, if made, would lead the KCA to support the bill. Written testimony in opposition to the bill was provided by a representative of the Kansas Physical Therapy Association, a doctor of physical therapy, a nurse practitioner, and a private individual.

Neutral testimony was provided by a representative of the Kansas Medical Society (KMS) who stated having no issue with the practice of acupuncture, but proposed amendments to more clearly define the practice of acupuncture. Written neutral testimony was provided by a representative of the Board and the Secretary of Health and Environment.

According to the fiscal note prepared by the Division of the Budget, the Board estimates enactment of the bill, as introduced, would result in the licensure of 42 new acupuncturists under the Act and result in the collection of revenues from license fees of \$12,600, 10.0 percent of which (\$1,260) would be remitted to the State General Fund. The Board indicates the addition of a new group of practitioners to license would result in increased complaints, investigations, and caseload activity and would require an increase in 2.00 FTE positions and operating expenditures, for a total expenditure of \$144,235. Any fiscal effect associated with the bill is not reflected in *The FY 2017 Governor's Budget Report*.