

RECEIVED

MAR 23 2011

OPINION COMMITTEE



FILE # ML-46702-11
I.D. # 46702

FRED BROWN
STATE REPRESENTATIVE
DISTRICT 14

STATE CAPITOL
P.O. BOX 2910
AUSTIN, TEXAS 78768-2910
512/463-0698
FAX: 512/463-5109
CAPITOL OFFICE ROOM
1N.09

DISTRICT
1920 WEST VILLA MARIA ROAD
SUITE 303
BRYAN, TEXAS 77807
979/822-9797
FAX: 979/822-7979

March 21, 2011

RQ-0956-GA

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

The Honorable Greg Abbott
Attn. Nancy S. Fuller
Chair, Opinion Committee
Office of the Attorney General of Texas
P.O. Box 12548
Austin, Texas 78711-2548

RE: Request for Opinion

Dear Ms. Fuller:

On behalf of the Joint Select Committee on Oversight and HHSC Eligibility System, this is to request that the Attorney General of Texas issue an opinion pursuant to article IV, section 22, of the Texas Constitution and pursuant to section 402.042 of the Texas Government Code.

SUMMARY OF REQUEST

At issue is the validity of a recently added "residency" requirement to Chapter 402 of the Texas Occupations Code. Chapter 402 governs the licensing of individuals in the fitting and dispensing of hearing instruments. The new subsection (i) to section 402.209 provides that the Committee that regulates the fitting and dispensing of hearing instruments may not issue a license to an applicant who is a licensed audiologist in another state. The Committee, however, must issue a license to an individual from another state that is licensed "to fit and dispense" provided that person meets the statutory requirements under section 402.209. In addition, Texas-licensed audiologists are exempt from the requirements of Chapter 402, including the requirement that they take an examination in order to obtain a parallel license to fit and dispense. Your opinion is requested regarding the constitutional validity of the prohibition on non-resident audiologists under the Commerce Clause of the United States Constitution and under the equal protection provisions of the United States and Texas Constitutions.

Committees:

Chair, Joint Committee on Oversight and HHSC Eligibility System • Higher Education • Land and Resource Management

REGULATORY FRAMEWORK

Fitting and dispensing hearing instruments in Texas

In Texas, the licensees of two different state agencies are expressly authorized by law to fit and dispense hearing instruments: audiologists licensed under Chapter 401 of the Texas Occupations Code, *see* TEX. OCCUPATIONS CODE §401.403(a)(1)(D); 402.451(a)(6), and fitters and dispensers of hearing instruments licensed under Chapter 402 of the Texas Occupations Code. *See* TEX. OCCUPATIONS CODE §402.201. The required qualifications for the two respective licensees are different in many respects. For example, the educational requirements for a licensed audiologist include a masters degree, *see* TEX. OCCUPATIONS CODE §401.304(a)(1), whereas the educational requirements for a fitter and dispenser require only a high school diploma or the equivalent. *See* TEX. OCCUPATIONS CODE §402.203(a)(2)(A). Because of the higher level of education and training qualifications required of audiologists to be licensed in Texas, they are exempt from the provisions of Chapter 402. *See* TEX. OCCUPATIONS CODE §402.003(a)(3). As indicated, this includes the exemption from the examination requirements in order to obtain a fitters and dispensers license. *See* TEX. OCCUPATIONS CODE §402.202(b). In addition, Texas-licensed audiologists are expressly authorized to provide affidavits in support of temporary training permits for fitters and dispensers, *see* TEX. OCCUPATIONS CODE §402.252, to supervise temporary training permit holders, *see* TEX. OCCUPATIONS CODE §402.255(a), and to own businesses that sell hearing instruments. *See* TEX. OCCUPATIONS CODE §402.406(a).

Reciprocity for those licensed to fit and dispense in other states

The standard for licensure as a fitter and dispenser under Chapter 402 for an individual from another state used to be that the Committee “shall waive the examination requirement and issue a license under this chapter to a license holder from another state or territory whose licensing requirements are equal to or greater than the licensing requirements of this chapter.” TEX. OCC. CODE ANN. § 402.209(a) (repealed). The 2009 amendments require that those from out of state now must take an examination prescribed by the Committee in order to be licensed in Texas and must meet certain other criteria listed in section 402.209. This in itself is not at issue here, since Texas applicants must also meet those same criteria.

The section of the new law about which your opinion is requested is subsection (i) of section 402.209:

(i) The committee may not issue a license under this section to an applicant *who is a licensed audiologist in another state*. The committee shall refer the applicant to the State Board of Examiners for Speech-Language Pathology and Audiology.

TEX. OCC. CODE ANN. § 402.209(i)(emphasis added).

In other words, regardless of whether the out of state applicant meets all of the stated requirements in section 402.209, he or she may not even apply. That appears to deny such applicants equal protection, when compared with Texas applicants and when compared to other out of state, non-audiologist, applicants. Just as Texas audiologists are "licensed" to fit and dispense, so, too, may an out of state audiologist be licensed to fit and dispense.

The prohibition in subsection (i) also operates to exclude out of state audiologists *in favor of* Texas audiologists. Texas audiologists are provided rights under Chapter 402 that are denied to those from out of state. The purpose for this disparate treatment appears to be economic. For example, section 402.003(a)(3) provides that Chapter 402 does not apply to a person with a masters or doctoral degree in audiology from an accredited college or university *if that person does not sell hearing instruments*. TEX. OCC. CODE ANN. § 402.003(a)(3). Your opinion is requested as to whether this prohibition violates the Commerce Clause of the United States Constitution.

Finally, section 402.209 contains a residency requirement:

(c) The committee shall require an applicant for a license under this section to provide as part of the application:

(1) written verification that the applicant is licensed in good standing as a fitter and dispenser of hearing instruments in another state and has held the license for at least three years preceding the date of application;

(2) written verification that:

(A) the requirements to obtain a license to fit and dispense hearing instruments in the state in which the applicant is licensed include passing an examination approved by the committee by rule; or

(B) the applicant holds a certification from a professional organization approved by the committee by rule;

(3) *affirmation that the applicant is a resident of this state*[.]

TEX. OCC. CODE ANN. §402.209(c)(3). This provision does not appear to be supported by any legitimate state interest. *See generally Cooper v. McBeath*, 11 F.3d 547 (5th Cir 1994)

For these reasons, The Joint Select Committee on Oversight and HHSC Eligibility System requests that you issue an opinion on whether sections 402.209(i) and 402.209(c)(3) are invalid under the Commerce Clause of the United States Constitution and under the equal protection provisions of the United States and Texas Constitutions. Your attention to this request is greatly appreciated. By copy of this letter, we are letting the two agencies at issue know about this request. In addition, there are a number of trade

associations that would likely be interested in submitting comments to your office in connection with this request. Please let my office know if you need additional information by contacting my office at 512-463-0698.

Sincerely,

A handwritten signature in black ink that reads "Fred Brown". The signature is written in a cursive style with a large, looping initial "F".

The Honorable Fred Brown
Chair, Joint Select Committee on Oversight and HHSC Eligibility System

cc: The Texas Committee in the Fitting and Dispensing of Hearing Instruments
The Texas Board of Examiners for Speech-Language Pathology and Audiology