

SUBJECT: Nursing facilities and the Department of Human Services

COMMITTEE: Human Services — committee substitute recommended

VOTE: 8 ayes — Hilderbran, Naishtat, Davila, Denny, J. Jones, Krusee, Maxey,  
Wohlgemuth

0 nays

1 absent — Park

WITNESSES: For — Sara Speights, Texas Health Care Association; Delta Sue Best, self  
and nursing home owners; Cheryl L. Killian, Arlington; Keith Rayl,  
Temple; Chet Brooks, Chartwell Health Care Inc.; Lindsay Pow Thorpe,  
Chartwell Healthcare Group of Companies; David Latimer, Texas  
Association of Homes and Services for the Aging

Against — None

On — David Latimer, Texas Association of Homes and Services for the  
Aging

DIGEST: CSHB 2644 would make several changes regarding nursing facilities that  
participate in the Medicaid program and the Department of Human  
Services. These changes include:

**Certification of nursing facilities.** Except for rules necessary to  
implement rights granted to elderly individuals, the Department of Human  
Services (DHS) would be required to:

- adopt rules for the certification of facilities for participation in the state  
Medicaid program that are the same as those standards imposed by federal  
law;
- provide that the above provision would not prevent DHS from using any  
civil, administrative, or criminal remedy authorized by federal or state law

with respect to a facility that is in violation of a certification or licensing requirement;

- instruct DHS not to require certified nursing facilities complying with each standard of participation in the Medicaid program to meet additional state standards, if the subject matter of those standards were the same.

**Inadmissibility of violations in civil actions.** A finding by DHS that an institution had violated a standard for participation in the state Medicaid program, or assessment of a monetary penalty would not be admissible as evidence in a civil action that the institution had committed a violation. This provision would not affect enforcement actions or related proceedings in which the state or agency or political subdivision of the state was a party.

**DHS rules for contested cases.** DHS would be authorized to adopt rules to deal with claims arising from contested cases between DHS and nursing facilities involving the contract between the parties for the delivery of medical assistance by nursing homes. The rules would have to include:

- an informal dispute resolution process that provides for adjudication by an appropriate disinterested person in a regional office of the department and an informal appeal to the department's central office;
- an administrative appeals process under the Administrative Procedures Act; and
- binding arbitration.

**Binding arbitration for certain disputes.** CSHB 2644 sets out arbitration procedures for disputes between DHS and nursing homes in disputes between the parties in five categories: license renewal, license suspension, license revocation, assessment of civil, monetary and certain other penalties.

An affected institution could elect binding arbitration of any dispute listed above by filing the election with DHS not later than the 10th day after a notice of hearing relating to any dispute described above is received by the institution.

DHS could elect arbitration by notifying the institution of the election not later than the 10th day after a notice of hearing relating to any dispute described above is received by the institution.

When either the institution or DHS elected to engage in arbitration, it would be irrevocable and binding on the parties. The arbitration would be conducted by a panel of three arbitrators. The actual arbitration and the section of the panel would be required to be conducted in accordance with rules adopted by the administrative law judge of the State Office of Administrative Hearings.

Before adopting rules, the chief administrative law judge would be required to consult with DHS and would be required to consider appropriate rules developed by any nationally recognized association that performs arbitration services.

The cost of the arbitration would be split by both the institution and DHS if the institution elects to arbitrate. If DHS chose to arbitrate, it would be required to pay the entire cost of the arbitration.

The State Office of Administrative Hearings could designate a nationally recognized association that performs arbitration services to conduct arbitrations may after consultation with DHS, contract with that association for the arbitrations.

Each arbitrator would be required to be on an approved list of a nationally recognized association that performs arbitration services or be otherwise qualified as provided in rules adopted.

The duties of the arbitration panel would be outlined in order to protect the interests of DHS and the institution, ensure that all relevant evidence has been disclosed to the panel, department or institution and render an order consistent with this legislation.

Arbitration would be required to be held not later than the 90th day after the date a panel was selected and would be required to give notice of the scheduled arbitration to both parties.

At least seven days prior to the scheduled arbitration, the DHS and institution would be required to exchange and file with the arbitration panel all evidentiary documents not previously exchanged and other information related to the proposed resolution of the dispute.

The legislation makes provisions for the submission of evidence at the arbitration hearing, closing statements and briefs, prohibits either party from communicating with the arbitrator independently, unless the parties agree otherwise.

The bill includes provisions for attendance requirements at scheduled arbitrations, procedures for making an order when one party fails to appear, provisions relating to testimony, testimony under oath, requirements that testimony be taped. An official stenographic transcript would not be required.

The arbitration panel would have to enter an order not later than 60 days after the last day of arbitration. The order would have to be in writing, signed and dated by each arbitrator, include a statement of the arbitrators' decision. The order would be required to be filed with DHS and send a copy two both parties.

An order of an arbitration panel would be final and binding on all parties with no right to appeal, except that a court could vacate an order within 30 days after the date of the award or at certain other times, upon a finding that corruption, fraud or misrepresentation was used to procure the order, the decision of the panel was arbitrary or capricious and not supported by the weight of the evidence.

An arbitration panel could enter into any order that could be entered by the department, board, commission or court under the provisions of this bill.

The bill would take effect on September 1, 1995.

SUPPORTERS  
SAY:

CSHB 2644 would assist DHS in its own attempt to streamline and simplify its regulatory functions with regard to nursing homes that participate in the Medicaid program, by requiring that DHS promulgate regulations for nursing home certification analogous with federal law. Most

states have chosen to adopt the federal standards. By adopting the federal standards, Texas would cut down on the enormous amount of state regulations promulgated by DHS that make the laws in this area a maze of confusion for the regulators and those regulated under these provisions.

Sometimes nursing homes and DHS have genuine professional differences relating to DHS nursing facility regulations. The binding arbitration provision in CSHB 2644 would provide is an important tool in deciding those differences without the need for civil litigation.

OPPONENTS  
SAY:

The provision providing for binding arbitration could be a problem, especially in civil penalty cases. A penalty is not so much a "dispute" as a legitimate enforcement tool. It should be determined in an enforcement setting not arbitration, where awards tend to be lower. For some nursing homes, arbitration could be seen as the cost of doing business.

Three arbitrators are unnecessary and would provide duplicative functions in the arbitration of these disputes. This duplication would cost the state additional money.

NOTES:

The author may file amendments to reduce the number of arbitrators involved in an arbitration from three to one, cap the costs of each arbitration at \$500 or strike the arbitration provision altogether.

DHS has assumed that approximately 162 institutions will choose arbitration as an alternative to contested case hearing or judicial proceeding relating to the assessment of civil penalties for fiscal 1996, 165 institutions in fiscal 1997, 172 institutions in fiscal 1998, 179 institutions in fiscal 1999 and 188 institutions in fiscal 2000. The estimated costs of this bill would be \$439,457 in 1996 and \$443,366 in 1997.

The committee substitute clarified that DHS may adopt more stringent standards for Medicaid nursing facilities in the area of patient rights and permitted informal hearings to be held at the agency's regional as well as central offices. The substitute also added a new procedure for resolution of disputes and binding arbitration.