

SUBJECT: Regulating home health agencies

COMMITTEE: Public Health — favorable, with amendments

VOTE: 9 ayes — Gray, Coleman, Capelo, Delisi, Glaze, Hilderbran, Maxey, McClendon, Uresti

0 nays

SENATE VOTE: On final passage, March 18 — voice vote (Harris present, not voting)

WITNESSES: For — Teresa Aguirre, Texas Association of Homes and Services for the Aging; Aaryce Hayes, Advocacy, Inc.; Mauro Reyna, American Association of Retired Persons

Against — None

BACKGROUND: Home health agencies are licensed and regulated by the Texas Department of Health (TDH) and are defined as entities that provide “home health, hospice or personal assistance services for pay or other consideration in the client’s residence, an independent living environment or another appropriate location.”

Home health agencies provide both short-term acute-care services and long-term care services. Since Medicare has been the primary payer for acute-care home health services in Texas, most home health agencies also meet Medicare certification requirements. However, the provision of long-term care services, primarily funded through the Medicaid program, is a growing portion of the home health industry.

Medicaid is the state/federal health benefit program for the low-income elderly and disabled. Medicare is the federal health benefit program for the elderly and disabled.

Medicaid and state-funded long-term care home and community-based health services are offered through several state agencies, including TDH, the Texas Department of Human Services (DHS), the Texas Department of Mental

Health and Mental Retardation, and the Texas Rehabilitation Commission (TRC).

The Senate Interim Committee on Home Health and Assisted Living found problems associated with the fragmentation of state regulation of home health agencies and the services they provided through various programs. TDH regulates home health agencies against two standards: Medicare requirements and state Health and Safety Code requirements. Home health agencies also must conform to the requirements of the multiple state agencies and programs that contract with them for services.

DIGEST:

Controlling person. SB 94 would amend home health agency regulations to do the following in regard to controlling entities in home health agency operations:

- ! require applicants for licensure to identify any controlling person and to supply documents relating to that person's compliance with licensing standards;
- ! authorize TDH to require applicants, license holders, or controlling persons to provide information relating to compliance with regulatory requirements in other states;
- ! authorize the issuance of licenses only to qualified applicants whose controlling persons also had complied with all applicable licensing laws; and
- ! authorize the department to base penalties on the history of previous violations by the controlling person as well as by the license holder.

The bill would define a controlling person as a person, acting alone or with others, who had the ability to influence or direct the management, expenditures, or policies of a home health agency.

Complaints and inspections. SB 94 would amend home health agency regulations to:

- ! require TDH to provide specialized training relating to the conduct of appropriate surveys and acceptable delegation of nursing tasks;
- ! prohibit a license holder from retaliating against a person who filed a complaint or grievance or provided the department with information on services provided by the license holder; and

- ! require home health agencies to report incidences of abuse, neglect, and exploitation to TDH and the Department of Protective and Regulatory Services (DPRS), and require DPRS to notify TDH and relevant contracting state agencies of incidences of abuse, neglect, and exploitation by a home health agency employee.

The bill also would amend provisions relating to the public release of information obtained through investigations by authorizing such release if the information:

- ! complied with federal requirements and did not reveal the identity of an individual and the service provider had a reasonable opportunity to review and comment on the information before its release; or
- ! was found in complaint documents that had been categorized by the department and from which individual identifications had been removed.

SB 94 also would:

- ! limit the admissibility as evidence in civil actions of information prepared by the department relating to the regulation of a home health agency;
- ! authorize the department to deny, suspend, or revoke the licenses of, and assess administrative penalties against, persons who intentionally or knowingly agreed to accept remuneration for soliciting patients; and
- ! require home health agencies to comply with TDH rules regarding the disposition of special or medical waste and to instruct clients in the proper handling of hypodermic needles, scalpel blades, and other sharps.

Information prepared by the department would not be admissible in a civil action except:

- ! in enforcement actions in which the state or political subdivision was a party;
- ! when offered to warn the home health agency of a relevant determination; or
- ! as allowed under any rule of the Texas Rules of Evidence.

Department employees would not be barred from testifying about their observations, findings, and conclusions, and department records could be

used in depositions and discovery if they would lead reasonably to the discovery of admissible evidence.

The bill would take effect September 1, 1999.

**SUPPORTERS
SAY:**

SB 94 would improve protection for consumers of home health services. These patients can be more vulnerable than most patients to fraudulent or negligent practices by providers, because they receive care in their residences and not in a hospital, doctor's office, or nursing facility in which there are other health-care professionals to provide additional oversight.

Home health care is a fundamental component of Texas' long-term care infrastructure. Most Texans who use home health services are chronically ill.

The Senate interim committee found patterns of fraud and poor care in the home health agencies, which serve a large number of elderly and disabled individuals. The committee also found problems associated with the fragmentation of regulation of and services provided by home health agencies.

As Texas' population continues to grow and age and as cutbacks in in-patient care increase due to managed care, reliance on home health care will continue to grow. Without adequate regulation, problems with fraudulent practices and sloppy, if not abusive or negligent, care also will continue to grow. Also, the state's interest in delivering appropriate high-quality and cost-effective care increases with the increasing role that Medicaid plays as a primary payer.

The bill would enact provisions concerning the handling of complaints and reporting of abuse, neglect, or other problems to close some of the gaps and address some of the problems that spring from the involvement of so many agencies and providers. For example, many home health agencies simply curtail the employment of workers who may have been involved in abuse and neglect without reporting the incidents to the state for investigation. This renders vulnerable other patients, agencies, and providers who later hire this person unaware of the previous problems.

Also, a better classification system by TDH would make it possible for the public to assess the performance of a home health agency. Currently, many

complaints against home health providers never make it to the central TDH office in Austin and are lost to consumers completely.

Requiring information about the controlling entity and the entity's history of compliance in state licensing would give the state a better handle on regulating and penalizing, if necessary, home health agencies whose poor performance is due to business-related decisions by the owner that affect the quality of health care. SB 94 would give TDH the statutory authority it needs to use information on controlling entities in considering administrative actions. These provisions would conform to similar provisions enacted for nursing home licensing last session and to provisions proposed for assisted living facilities this session.

Physicians are the “gatekeepers” to home health care. Both Medicare and Medicaid require a prescription for home health services. SB 94 would protect consumers and state agencies from schemes by providers to increase their income through illegal remuneration. Referrals to agencies in which physicians have a financial interest represent a direct conflict of interest. Also, the Texas Administrative Code requires home health agencies to have written policies regarding the illegal solicitation of patients, but it does not specify what happens when agencies violate the law.

The bill's provisions regarding the use of department records and testimony as evidence in civil actions are necessary to allow the introduction of relevant evidence that validly demonstrates a facility's track record in providing care. These provisions, however, would protect against the misuse of department reports. They are very similar to provisions adopted by the 75th Legislature covering the use of evidence against nursing homes.

Requiring specially trained inspectors would help both providers and consumers, who complain that TDH's model for regulation relies too heavily on a “medical model” that focuses on the treatment of acute care needs — a very different treatment approach from the services needed and outcomes expected for conditions that require long-term care.

**OPPONENTS
SAY:**

Most of the provisions in SB 94 are unnecessary because the state agencies already have the power to do many of these things, such as implement special training programs, fix their complaint systems, and require information about controlling entities. The federal Occupational Safety and Health

Administration already requires home health agencies to implement specified procedures regarding client instruction and the handling of medical waste and sharps.

OTHER
OPPONENTS
SAY:

The use of department records as evidence in civil actions should be more limited than provided under SB 94 to prevent overblown reactions to alleged problems. Department forms on which surveying and inspection information are kept rarely indicate any mitigating circumstances about an alleged problem or the provider's explanation of the problem, nor do they reflect all of the good or exceptional qualities of the services provided.

NOTES:

The House committee amendments would add provisions that would:

- ! direct the disposal or handling of special or medical wastes;
- ! add occupational therapists to the list of licensed health-care professionals who do not have to be licensed also under home health agency regulations; and
- ! clarify the admissibility into evidence of certain department records in civil actions.

SB 94 is one of four bills on today's calendar filed by Sen. Moncrief on the basis of the findings of the Senate interim committee. Others include:

- ! SB 93, relating to the regulation of assisted care facilities;
- ! SB 95, relating to studies on the delivery of long-term care and community services; and
- ! SB 96, relating to the transfer of licensing and regulation of home health agencies from TDH to DHS.