SUBJECT: Revising regulation of assisted living facilities

COMMITTEE: Human Services — committee substitute recommended

VOTE: 7 ayes — Naishtat, Chavez, J. Davis, Ehrhardt, Noriega, Raymond, Villarreal

1 present, not voting — Wohlgemuth

1 absent — Telford

SENATE VOTE: On final passage, May 3 — voice vote

WITNESSES: None

BACKGROUND: "Assisted living" describes residential care settings that offer varying levels of assistance in activities of daily living. It implies two common elements: the residential setting is neither a single-family dwelling nor a nursing home, and the central goal is to maximize a person's independence. Services provided also vary but tend to fall within three categories:

- personal care, such as bathing, toileting, eating, and medication reminders;
- support services, such as transportation, recreational planning, and grocery shopping; and
- specialized care, such as home health care or services focused on a particular condition, such as Alzheimer's disease.

Most assisted living facilities are small, often converted residences or other buildings that accommodate only a few residents. However, many large facilities offer individual living units, sometimes grouped according to the level of care required by the residents. Although most of the larger facilities were built for that purpose, some are converted apartments, hotels, and other types of buildings. About 90 percent of assisted living residents pay costs from their personal funds (private pay). Other sources of funding include Medicaid, Supplemental Security Income, and state or local subsidies, primarily to licensed personal-care homes through various health and human services programs.

In 1999, the 76th Legislature enacted SB 93 by Moncrief (Health and Safety Code, chapter 247) to regulate assisted living facilities. It requires a facility to obtain a license from the Texas Department of Human Services (DHS) and authorizes DHS to charge licensing fees and to conduct inspections. Under current law, if DHS finds an assisted living facility or a nursing home in violation of the standards in a way that creates an immediate threat to residents' health and safety, it must suspend the facility's license or order immediate closure of part or all of the facility. For violations that do not pose an immediate threat to residents' health and safety, DHS may suspend the facility's license.

The state maintains a nursing and convalescent home trust fund to provide emergency assistance funds to alleviate an immediate threat to the health and safety of nursing-home residents. DHS may disburse money from the fund only under a court order and a finding that an emergency exists. This usually occurs when the state needs to take over a nursing home's operations through a trusteeship. The 76th Legislature enacted HB 2909 by Naishtat, raising the cap on this fund from $500,000 to $10 million.

DIGEST:

CSSB 527 would establish a process by which violations of assisted living facility standards that did not pose an immediate threat to residents would be adjudicated without suspending the facility's license. DHS could suspend or revoke a license after providing notice and opportunity for a hearing if the facility violated a rule in a substantial or repeated manner or placed residents' health and safety in immediate danger. The bill would allow a court, though not DHS, to enjoin a facility's operation. A court could not order arbitration.

CSSB 527 would establish violations for which administrative penalties could be considered, the amount of those penalties, notification requirements, hearings and reviews, and payment and amelioration of penalties. It also would establish an emergency fund for assisted living facilities.

The bill would define "immediate threat of harm" as a situation considered to threaten or put the health or safety of a resident in immediate jeopardy. Such a threat also would include a situation in which an assisted living facility's noncompliance with a licensure requirement puts a resident in jeopardy.

The bill would take effect September 1, 2001. DHS would have to adopt rules to implement it by January 1, 2002.

Inspector training. CSSB 527 would require DHS inspectors to pass an examination before inspecting facilities. DHS would have to develop the examination in consultation with assisted living facilities and consumers.

Violation. If DHS found a violation of standards, it could suspend the facility's license. In cases of emergency suspension of a license, DHS and the State Office of Administrative Hearings would have to expedite any hearings or decisions. The bill would repeal the current requirement that DHS hold an exit conference to advise an assisted living facility of the findings of an inspection.

Administrative penalties. DHS could impose an administrative penalty against an assisted living facility for violating any regulation, knowingly submitting a false statement on an application or in an investigation, refusing to allow an investigator to inspect records or facilities, wilfully interfering with the work of a DHS inspector, or failing to pay a penalty within 30 days of final determination.

An administrative penalty would be capped at $1,000 except in cases of a repeat offense. The Texas Board of Human Services would have to establish gradations of penalties based on the seriousness of the violation. In assessing the violation, DHS would have to consider the following factors:

- the gradations of penalties available and the seriousness of the violation;
- previous violations, efforts to correct the current violation, and deterrence of future violations; and
- the size of the facility and of the business entity that owned it.

DHS could not assess a monetary penalty under this bill for the same violation for which an assisted living facility was penalized under the state's Medicaid program.

DHS could not collect an administrative penalty assessed because of a violation of regulations if the assisted living facility corrected the violation within 45 days, unless the violation resulted in serious harm or death. The

right to correct also would not apply in cases in which the violation was a second offense, nor to an inappropriate placement, which carries its own right to correct. An assisted living facility that corrected a violation would have to maintain that correction for at least one year, or else a penalty of three times the original penalty would apply. DHS would not have to provide a second opportunity for correction.

Report. Following a determination that a violation had occurred, DHS would have to issue a preliminary report that could recommend an administrative penalty. Within 10 days of this determination, DHS would have to give written notice to the assisted living facility charged with the violation. Notice would have to include a summary of the charges, a penalty recommendation, right to a hearing, and possible right to correct. If the assisted living facility would have a right to correct, the report also would have to include notice that the facility would have to file a plan of correction within 10 days and the date the plan of correction would have be implemented.

Within 20 days of receiving a notice, the assisted living facility could send DHS its written consent to the report or could make a written request for a hearing. If the facility filed a plan of correction and implemented it, DHS would have to inspect the correction and notify the assisted living facility that it was satisfied or that the correction was unsatisfactory, in which case a penalty would have to be assessed. The facility then would have 20 days to consent or request a hearing. Failure to respond to any notice by DHS would result in the original penalty being assessed.

Hearings. Hearings would be conducted by administrative law judges, who would make findings of fact and conclusions of law and would issue decisions including a recommendation of a penalty amount. Reports by DHS investigators could be used as evidence. On the basis of such a decision, DHS could find that a violation had occurred and could assess a penalty. If DHS found that a violation had not occurred, all records of the alleged violation would have to be expunged, except records that DHS had obtained during the investigation and the administrative law judge’s findings of fact. Hearings would be subject to the Administrative Procedures Act.

Penalty. If DHS determined that a violation had occurred, it would have to give notice of the findings, the amount of administrative penalty, the rate of

interest payable, whether the penalty could be ameliorated in lieu of payment, and right to review. The assisted living facility then would have 30 days to pay the penalty or file a petition. DHS could allow installment payments or amelioration in lieu of payment. If the fine was not paid on time, the penalty would be subject to interest, and DHS could refer the matter to the attorney general. In cases where the penalty was reduced or not upheld by a hearing, DHS would have to remit the penalty, execute a release of bond, and pay interest on the funds.

Amelioration of violation. In lieu of payment, DHS could allow an assisted living facility to use some or all of a penalty to correct the violation, as long as the violation did not place a resident in immediate harm. Amelioration also could not be offered to a facility with more than three violations in two years or with two of the same violations in a two-year period. Within 10 days of a determination, DHS would have to inform a facility if amelioration would be required. The facility then would have 45 days to file an amelioration plan. At a minimum, the plan would have to include:

- proposed changes that would improve the quality of the facility;
- identification, through measurable outcomes, of how the changes would improve quality of life in the facility;
- goals and time lines for the changes; and
- specific actions to implement the plan.

Optional elements of the plan would include changes designed to improve staff recruitment and retention, dental services, or other quality-of-life improvements. DHS would have 45 days following receipt of the plan to approve or deny it. If the plan was approved, any hearing proceedings would have to cease.

Dispute resolution. The Health and Human Services Commission (HHSC) would have to establish an informal dispute-resolution process for DHS enforcement actions. To use this process, an assisted living facility would have to request it within 10 days of notification of a violation. HHSC then would have 30 days to complete the process. Any person representing an assisted living facility in a dispute resolution would have to register with HHSC and disclose the person's employment history for five years, any ownership of the facility represented, and other entities represented before

HHSC in the past two years. HHSC would have to adopt rules to implement this process and could not delegate the responsibility.

Inappropriate placement. If DHS determined that a resident had been placed inappropriately in an assisted living facility, the facility would have to move the resident within 10 days, unless, during that time, a physician determined that the placement was appropriate or the resident or a family member speaking on the resident's behalf asked for the resident to stay. The facility also could request, in writing, that the resident stay or could apply for a waiver from the state for all requirements for evacuation if the facility did not meet state standards.

DHS could allow the resident to remain if it received these written statements and would have to develop standard forms to facilitate obtaining them. If it did not receive a statement, DHS could not assess an administrative penalty, but the resident would have to move within 30 days, regardless of any other law, including rights of resident or property laws, or any contract terms.

Emergency fund. CSSB 527 would establish an assisted living facility emergency trust fund with the comptroller, which would provide emergency funds to assisted living facilities, rather than to all nursing homes, through DHS without a legislative appropriation. The funds could be used only to alleviate an immediate threat to residents' health and safety, including food, medication, sanitation services, minor repairs, and personal-care products or services. A court could order DHS to disburse emergency funds if it found that an assisted living facility had insufficient operating funds, if an emergency existed that threatened residents' health and safety, or in other situations where funding was in the residents' best interests.

The fund would be capped at $500,000, and any excess at the end of each fiscal year would have to be transferred to general revenue to be used by DHS to enforce regulations for assisted living facilities. If the fund fell below the cap, DHS would have to charge assisted living facilities a fee in addition to the licensing fee to fund the emergency account. DHS could charge the fee more than once a year if necessary to replenish the fund, as long as it notified the governor and the Legislative Budget Board. The fee would be determined by the number of beds per assisted living facility.

SUPPORTERS SAY:

CSSB 527 would enable the state to enforce regulations for assisted living facilities without shutting them down. Under current law, DHS has few options for penalizing assisted living facilities that violate the regulations. Closing them for minor infractions hurts residents rather than improving the quality of care, which is the primary intent of regulation. If residents' health and safety are in jeopardy, the facility should be suspended or closed, but in less serious cases, the state should be able to impose penalties that improve a facility's quality of life.

Allowing amelioration of penalties or correction of violations is appropriate because these measures give an assisted living facility an incentive and means to improve care. If the state imposes monetary penalties for violations, it takes scarce funds away from care of the residents. It is better for those funds to be used to improve care, rather than punishing the residents.

The separate trust fund for assisted living facilities proposed by CSSB 527 is also the subject of SB 691 by Moncrief, which the House passed to third reading on May 18. Assisted living facilities should not have to subsidize the nursing-home industry. Separate statutes govern these two types of facilities, but assisted living facilities still must contribute to the nursing-home trust fund. This was not a big problem when the nursing-home fund was capped at $500,000. However, in 1999, after the state had to take over 13 nursing homes, the Legislature raised the cap to $10 million, placing a huge burden on assisted living facilities. This industry has different concerns, structures, and funding from those of the nursing-home industry. Most assisted living facilities are small private businesses funded with private money. They do not receive state money or reimbursement rates. In contrast, nursing homes are larger businesses that do receive state and federal assistance.

OPPONENTS SAY:

The more the state regulates businesses, the higher their costs. The increased regulation proposed by CSSB 527 would drive up the costs of assisted living facility services. These facilities largely are supported by private paying residents, not by government programs. If their costs become too high and facilities have to close, both consumers and businesses will lose out.

Establishing a separate trust fund for assisted living facilities could drive up the fees charged to nursing homes. If assisted living facilities no longer pay

into the nursing-home trust fund, multiple fees or higher fees would have to be charged to nursing homes to make up the difference.

OTHER OPPONENTS SAY:

CSSB 527 would continue the trend toward inappropriately requiring owners of more than one small facility to be licensed and to conform to regulations geared toward larger facilities. Many small assisted living facilities in Texas are being treated like large facilities but may not have the resources to comply with the thousands of regulations that DHS has established for nursing homes. The hearings and dispute-resolution processes that this bill would add often are too expensive for small businesses to participate in, and the fines often are too high. The state should not regulate small assisted living facilities in the same manner as for larger ones.

The bill should limit more narrowly the use of DHS records as evidence in civil actions to prevent overblown reactions to alleged problems. DHS forms on which surveying and inspection information is kept rarely indicate any mitigating circumstances about an alleged problem or any explanation of the problem by the operator, nor do they reflect all of the qualities of the services the facility provides.

NOTES:

The bill's fiscal note estimates that it would cost the state about $1 million to implement in fiscal 2002-03 and roughly $430,000 per year thereafter, mainly because of additional staffing requirements for hearings and the informal dispute-resolution process.

The committee substitute would change the Senate engrossed version of SB 527 by increasing the maximum administrative penalty from $500 to $1,000, allowing facilities to obtain waivers to move inappropriately placed residents, directing DHS to develop forms for inappropriate placement requests, allowing DHS to charge a second annual fee to fund the proposed emergency account, and authorizing, rather than requiring, DHS to suspend a license.