

BILL ANALYSIS

Senate Research Center
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S.B. 643
By: Nelson, et al.
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Texas has been working to improve conditions in its state developmental centers (centers) since 2005, when reports of widespread abuse and neglect in centers surfaced. This legislation is intended to improve centers and addresses several federal governmental concerns.

As proposed, S.B. 643 includes a number of procedural reforms to strengthen the oversight of centers and enable the Department of Aging and Disability Services (DADS) to better care for center residents.

[**Note:** While the statutory reference in this bill is to the Texas Department of Mental Health and Mental Retardation (TX MHMR), the following amendments affect DADS, as the successor agency to TX MHMR.]

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the executive commissioner of the Health and Human Services Commission in SECTION 9 (Sections 555.021, 555.022, and 555.023, Health and Safety Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 261.404, Family Code, by adding Subsection (b-1) as follows:

(b-1) Requires the caseworker or supervisor to immediately notify the Health and Human Services Commission's (HHSC) office of inspector general (OIG) and promptly provide OIG with a copy of DFPS's investigation report, if an investigation under this section reveals evidence of abuse, neglect, or exploitation of a resident or client of a state developmental center as defined by Section 531.002 (Definitions), Health and Safety Code, or the intermediate care facility for the mentally retarded (ICF-MR) component of the Rio Grande State Center, and a caseworker of the Department of Family and Protective Services (DFPS) or a supervisor of a caseworker believes that the abuse, neglect, or exploitation is a criminal offense.

SECTION 2. Amends Subchapter F, Chapter 411, Government Code, by adding Section 411.1144, as follows:

Sec. 411.1144. ACCESS TO CRIMINAL HISTORY RECORD INFORMATION: AGENCIES WITH EMPLOYEES OR VOLUNTEERS AT STATE DEVELOPMENTAL CENTERS. (a) Entitles the Department of State Health Services (DSHS) and the Department of Aging and Disability Services (DADS) to obtain from the Texas Department of Public Safety (DPS) criminal history record information maintained by DPS that relates to a person:

- (1) who is an applicant for employment with the agency, an employee of the agency, a volunteer with the agency, or an applicant for a volunteer position with the agency; and
- (2) who would be placed in direct contact with a resident or client of a state developmental center or the ICF-MR component of the Rio Grande State Center.

(b) Prohibits criminal history record information obtained by an agency under Subsection (a) from being released or disclosed to any person except on court order, with the consent of the person who is the subject of the criminal history record information, for purposes of an administrative hearing held by the agency concerning the person who is the subject of the criminal history record information, or as provided by Subsection (c).

(c) Provides that an agency is not prohibited from releasing criminal history record information obtained under Subsection (a) or (d) to the person who is the subject of the criminal history record information.

(d) Entitles DSHS and DADS, subject to Section 411.087 (Access to Criminal History Record Information Maintained by Federal Bureau of Investigation or Local Criminal Justice Agency), to obtain through the Federal Bureau of Investigation (FBI) criminal history record information maintained or indexed by the FBI that pertains to a person described by Subsection (a) and obtain from any other criminal justice agency in this state criminal history record information maintained by that criminal justice agency that relates to a person described by Subsection (a).

SECTION 3. Amends Subchapter C, Chapter 531, Government Code, by adding Section 531.1022, as follows:

Sec. 531.1022. ASSISTING CERTAIN INVESTIGATIONS BY LAW ENFORCEMENT. (a) Requires OIG to employ commissioned peace officers for the sole purpose of assisting a state or local law enforcement agency in the investigation of an alleged criminal offense involving a resident or client of a state developmental center as defined by Section 531.002 (Definitions), Health and Safety Code, or the ICF-MR component of the Rio Grande State Center.

(b) Requires OIG to prepare a final report for each investigation conducted under this section. Requires OIG to ensure that the report does not contain identifying information of an individual mentioned in the report. Requires that the final report include a summary of the activities performed by OIG in conducting the investigation, a statement regarding whether the investigation resulted in a finding that an alleged criminal offense was committed, and a description of the alleged criminal offense that was committed.

(c) Requires OIG to deliver the final report to certain persons, legislative committees, and entities.

(d) Provides that a final report regarding an investigation is subject to required disclosure under Chapter 552 (Public Information). Provides that all information and materials compiled by OIG in connection with an investigation are confidential, and not subject to disclosure under Chapter 552, and not subject to disclosure, discovery, subpoena, or other means of legal compulsion for their release to anyone other than OIG or its employees or agents involved in the investigation conducted by OIG, except that this information is authorized to be disclosed to the office of the attorney general, the state auditor's office, and law enforcement agencies.

(e) Requires OIG to prepare an annual status report of its activities under this section. Prohibits the annual report from containing identifying information of an individual mentioned in the report. Requires that the annual status report include certain information that is aggregated and disaggregated by individual state developmental center or the ICF-MR component of the Rio Grande State Center.

(f) Requires OIG to submit the annual status report to certain persons, legislative committees, and entities.

(g) Provides that an annual status report submitted under this section is public information under Chapter 552.

SECTION 4. Amends Section 531.002(17), Health and Safety Code, by redefining "state developmental center."

SECTION 5. Amends Chapter 531, Health and Safety Code, by adding Section 531.0021, as follows:

Sec. 531.0021. REFERENCE TO STATE SCHOOL OR SUPERINTENDENT. (a) defines "state school."

(b) Defines "superintendent."

SECTION 6. Amends Section 532.001(b), Health and Safety Code, to provide that the Texas Department of Mental Health and Mental Retardation (TX MHMR) also includes community services operated by TX MHMR and certain facilities, including the Abilene State Developmental Center, rather than Abilene State School. Makes conforming changes.

SECTION 7. Amends Section 551.022, Health and Safety Code, by adding Subsection (e), to provide that this section does not apply to a state developmental center or the director of a state developmental center.

SECTION 8. Amends Subchapter B, Chapter 551, Health and Safety Code, by adding Section 551.0225, as follows:

Sec. 551.0225. POWERS AND DUTIES OF STATE DEVELOPMENTAL CENTER DIRECTOR. (a) Provides that the director of a state developmental center is the administrative head of the center.

(b) Provides that the director of a state developmental center has the custody of and responsibility to care for the buildings, grounds, furniture, and other property relating to the center.

(c) Requires the director of a state developmental center to perform certain duties.

(d) Authorizes the director of a state developmental center, in accordance with TX MHMR rules and operating procedures, to establish policy to govern the state developmental center that the director considers will best promote the residents' interest and welfare; hire subordinate officers, teachers, and other employees and set their salaries, in the absence of other law; and dismiss a subordinate officer, teacher, or employee.

SECTION 9. Amends Subtitle B, Title 7, Health and Safety Code, by adding Chapter 555, as follows:

CHAPTER 555. STATE DEVELOPMENTAL CENTERS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 555.001. DEFINITIONS. Defines "alleged offender resident," "client," "commission," "complaint," "department," "developmental center employee," "direct care employee," "executive commissioner," "independent ombudsman," "office," "resident," and "state developmental center."

Sec. 555.002. STATE DEVELOPMENTAL CENTER FOR ALLEGED OFFENDER RESIDENTS. (a) Requires DADS to establish a separate state developmental center for the care of alleged offender residents apart from other clients and residents. Requires DADS to designate an existing state developmental center for this purpose.

(b) Requires DADS, in establishing a state developmental center designated for alleged offender residents, to transfer an alleged offender resident already residing in a state developmental center to the designated state developmental center; place alleged offender residents in separate homes at the designated state developmental center based on whether the alleged offender resident is an adult or a person younger than 18 years of age or a male or female; place all alleged offender residents committed to or transferred to a state developmental center in the designated state developmental center; divert future admissions of residents who are not alleged offenders from the designated state developmental center; and provide training regarding the service delivery system for alleged offender residents to direct care employees of the designated state developmental center.

(c) Provides that an alleged offender resident who is transferred to the designated state developmental center, notwithstanding Section 594.014 (Right to Administrative Hearing), is not entitled to an administrative hearing regarding a transfer of the resident.

(d) Requires DADS to ensure that the designated state developmental center complies with the requirements for ICF-MR certification under the Medicaid program as appropriate.

[Reserves Sections 555.003-555.020 for expansion.]

SUBCHAPTER B. POWERS AND DUTIES

Sec. 555.021. **REQUIRED CRIMINAL HISTORY CHECKS FOR EMPLOYEES AND VOLUNTEERS.** (a) Requires DADS and DSHS to perform a state and federal criminal history background check on a person who is an applicant for employment with the agency, an employee of the agency, a volunteer with the agency, or an applicant for a volunteer position with the agency and who would be placed in direct contact with a resident or client.

(b) Requires the executive commissioner of HHSC to adopt rules requiring a person described by Subsection (a) to submit fingerprints in a form and of a quality acceptable to DPS and the FBI for use in conducting a criminal history background check.

(c) Requires each agency to obtain electronic updates from DPS of arrests and convictions of a person for whom the agency performs a background check under Subsection (a) and who remains an employee or volunteer of the agency and continues to have direct contact with a resident or client.

Sec. 555.022. **DRUG TESTING; POLICY.** (a) Requires the executive commissioner of HHSC by rule to adopt a policy regarding random testing and reasonable suspicion testing for the illegal use of drugs by an employee of a state developmental center.

(b) Requires the director of a state developmental center to enforce the policy adopted under Subsection (a) by performing necessary drug testing of employees of the state developmental center for the use of a controlled substance as defined by Section 481.002 (Definitions).

(c) Authorizes testing under this section to be performed on a random basis or on reasonable suspicion of the use of a controlled substance.

(d) Provides that for purposes of this section, a report made under Section 555.023 is considered reasonable suspicion of the use of a controlled substance.

Sec. 555.023 **REPORTS OF ILLEGAL DRUG USE; POLICY.** Requires the executive commissioner of HHSC by rule to adopt a policy requiring an employee of a state developmental center who knows or reasonably suspects that another employee of the state developmental center is illegally using or under the influence of a controlled

substance, as defined by Section 481.002, to report that knowledge or reasonable suspicion to the director of the state developmental center.

Sec. 555.024. DEVELOPMENTAL CENTER EMPLOYEE TRAINING. (a) Requires that before a developmental center employee begins to perform the employee's duties without direct supervision, DADS provide the employee with competency training and a course of instruction about the general duties of a developmental center employee. Requires DADS to ensure the basic developmental center employee competency course focuses on the uniqueness of the individuals the developmental center employee serves, techniques for improving quality of life for and promoting the health and safety of individuals with mental retardation, and the conduct expected of developmental center employees.

(b) Requires DADS to ensure the training required by Subsection (a) provides instruction and information regarding certain topics.

(c) Requires DADS, in addition to the training required by Subsection (a) and before a direct care employee begins to perform the direct care employee's duties without direct supervision, to provide a direct care employee with training and instructional information regarding certain topics.

Sec. 555.025. VIDEO SURVEILLANCE. (a) Defines "private space."

(b) Authorizes DADS to install and operate video surveillance equipment in a state developmental center or the ICF-MR component of the Rio Grande State Center for the purpose of detecting and preventing the exploitation or abuse of residents and clients.

(c) Prohibits DADS from installing or operating video surveillance equipment in a private space or in a location in which video surveillance equipment can capture images within a private space.

(d) Requires DADS to ensure the use of video surveillance equipment under this section complies with federal requirements for ICF-MR certification.

Sec. 555.026. MORTALITY REVIEW. (a) Requires the executive commissioner of HHSC to establish an independent mortality review system to review the death of a person who, at the time of the person's death, was a resident or client.

(b) Requires that a review under this section be conducted in addition to any review conducted by the state developmental center or the Rio Grande State Center.

(c) Requires the executive commissioner of HHSC to contract with a patient safety organization certified in accordance with 42 C.F.R. Part 3, as effective on January 20, 2009, to conduct independent mortality reviews required by this section. Requires that the contract require the patient safety organization to conduct an independent mortality review using a team consisting of a physician, a registered nurse, and a clinician with certain prescribed expertise, and any other appropriate person as provided by the executive commissioner of HHSC.

(d) Requires a patient safety organization that performs an independent mortality review to submit to DADS, the office of independent ombudsman, and HHSC's OIG a report of the findings of the mortality review.

(e) Authorizes DADS to use information from a mortality review report only to advance statewide practices regarding the treatment and care of individuals with mental retardation or other disabilities.

(f) Authorizes DADS to release a summary or a statistical compilation of data drawn from reports submitted under this section only if the summary or statistical

compilation does not contain information that would permit the identification of an individual.

[Reserves Sections 555.027-555.050 for expansion.]

SUBCHAPTER C. OFFICE OF INDEPENDENT OMBUDSMAN FOR STATE DEVELOPMENTAL CENTERS

Sec. 555.051. ESTABLISHMENT; PURPOSE. Provides that the office of independent ombudsman is administratively attached to DADS for the purpose of investigating, evaluating, and securing the rights of the residents and clients of state developmental centers.

Sec. 555.052. INDEPENDENCE. Provides that the independent ombudsman in the performance of the ombudsman's duties and powers under this subchapter acts independently of DADS.

Sec. 555.053. APPOINTMENT OF INDEPENDENT OMBUDSMAN. Requires the governor to appoint the independent ombudsman.

Sec. 555.054. ASSISTANT OMBUDSMEN. Requires the independent ombudsman to hire assistant ombudsmen to perform, under the direction of the independent ombudsman, the same duties and exercise the same powers as the independent ombudsman and to station an assistant ombudsman at each state developmental center.

Sec. 555.055. CONFLICT OF INTEREST. Prohibits a person from serving as an independent ombudsman or as an assistant ombudsman if the person or the person's spouse is employed by or participates in the management of a business entity or other organization receiving funds from DADS; owns or controls, directly or indirectly, any interest in a business entity or other organization receiving funds from DADS; or is required to register as a lobbyist under Chapter 305 (Registration of Lobbyists), Government Code, because of the person's activities or compensation on behalf of a profession related to the operation of DADS.

Sec. 555.056. REPORT. (a) Requires the independent ombudsman to submit a report on a biannual basis to the governor, the lieutenant governor, and the speaker of the house of representatives that is both aggregated and disaggregated by individual state developmental center and describes the work of the independent ombudsman; the results of any review or investigation undertaken by the independent ombudsman, including reviews or investigation of services contracted by DADS; and any recommendations that the independent ombudsman has in relation to the duties of the independent ombudsman.

(b) Requires the independent ombudsman to ensure that information submitted in a report under Subsection (a) does not permit the identification of an individual.

(c) Requires the independent ombudsman to immediately report to the governor, lieutenant governor, and speaker of the house of representatives any particularly serious or flagrant case of abuse or injury of a resident client about which the independent ombudsman is made aware; problem concerning the administration of a state developmental center program or operation; or interference by a state developmental center, DADS, or HHSC with an investigation conducted by the independent ombudsman.

Sec. 555.057. COMMUNICATION AND CONFIDENTIALITY. (a) Requires DADS to allow any resident or client, authorized representative of a resident or client, family member of a resident or client, or other interested party to communicate with the independent ombudsman or an assistant ombudsman. Provides that the communication is authorized to be in person, by mail, or by any other means and is confidential and privileged.

(b) Provides that the records of the independent ombudsman are confidential, except that the independent ombudsman is required to share with DFPS a communication that may involve the abuse, neglect, or exploitation of a resident or client; share with the regulatory services division of DADS a communication that may involve a violation of an ICF-MR standard or condition of participation; and disclose the ombudsman's nonprivileged records if required by a court order on a showing of good cause.

(c) Authorizes the independent ombudsman to make reports relating to an investigation public after the investigation is complete but only if the name and any other personally identifiable information of a resident or client, authorized representative of a resident or client, family member of a resident or client, state developmental center, and employee of a state developmental center are redacted from the report and remain confidential.

(d) Provides that the name, address, or other personally identifiable information of a person who files a complaint with the office of independent ombudsman, information generated by the office of independent ombudsman in the course of an investigation, and confidential records obtained by the office of independent ombudsman are confidential and not subject to disclosure under Chapter 552, Government Code, except as provided by this section.

Sec. 555.058. PROMOTION OF AWARENESS OF OFFICE. Requires the independent ombudsman to promote awareness among the public, residents, clients, and employees of state developmental centers of how the office of independent ombudsman is authorized to be contacted, the purpose of the office of independent ombudsman, and the services the office of independent ombudsman provides.

Sec. 555.059. DUTIES AND POWERS. (a) Requires the independent ombudsman to:

(1) evaluate the delivery of services to residents and clients to ensure that the rights of residents and clients are fully observed;

(2) refer a complaint alleging the abuse, neglect, or exploitation of a resident or client to DFPS for investigation;

(3) refer a complaint alleging a possible violation of an ICF-MR standard or condition of participation to the regulatory services division of DADS;

(4) refer a complaint alleging a criminal offense, other than an allegation of abuse, neglect, or exploitation of a resident or client, to the HHSC's OIG;

(5) conduct investigations of complaints, other than complaints alleging criminal offenses or the abuse, neglect, or exploitation of a resident or client, if the office of independent ombudsman determines that a resident or client or the resident's or client's family may be in need of assistance from the office of independent ombudsman, or a complaint raises the possibility of a systemic issue in the state developmental center's provision of services;

(6) conduct an annual audit of each state developmental center's policies, practices, and procedures to ensure that each resident and client is encouraged to exercise the resident's or client's rights, including the right to file a complaint and the right to due process;

(7) prepare and deliver an annual report regarding the findings of each audit to certain persons, entities, and legislative committees;

(8) require a state developmental center to provide access to all records, data, and other information under the control of the center that the

independent ombudsman determines is necessary to investigate a complaint or to conduct an audit under this section;

(9) review all final reports produced by DFPS and the regulatory services division of DADS regarding a complaint referred by the independent ombudsman;

(10) provide assistance to a resident, client, authorized representative of a resident or client, or family member of a resident or client who the independent ombudsman determines is in need of assistance, including advocating with an agency, provider, or other person in the best interests of the resident or client; and

(11) make appropriate referrals under any of the duties and powers listed in this subsection.

(b) Authorizes the independent ombudsman to apprise a person who is interested in a resident's or client's welfare of the rights of the resident or client.

(c) Authorizes the independent ombudsman in any matter that does not involve an alleged criminal offense or the abuse, neglect, or exploitation of a resident or client, to contact or consult with an administrator, employee, resident, client, family member of a resident or client, expert, or other individual in the course of the investigation or to secure information to assess whether a resident's or client's rights have been violated.

(d) Prohibits the independent ombudsman, notwithstanding any other provision of this chapter, from investigating an alleged criminal offense or the alleged abuse, neglect, or exploitation of a resident or client. Requires the independent ombudsman to refer an allegation of abuse, neglect, or exploitation of a resident or client to DFPS.

Sec. 555.060. RETALIATION PROHIBITED. Prohibits DADS or a state developmental center from retaliating against a DADS employee or employee of a state developmental center who in good faith makes a complaint to the office of independent ombudsman or cooperates with the office of independent ombudsman in the investigation.

Sec. 555.061. TOLL-FREE NUMBER. (a) Requires the office of independent ombudsman to establish a permanent, toll-free number for the purpose of receiving any information concerning the violation of a right of a resident or client.

(b) Requires the office of independent ombudsman to ensure that the toll-free number is prominently displayed in the main administration area of a state developmental center and that in each room in which a resident lives or a client receives services, and that a resident, a client, the authorized representative of a resident, and an employee of a state developmental center have confidential access to a telephone for the purpose of calling the toll-free number.

SECTION 10. Amends Section 591.003, Health and Safety Code, by adding Subdivision (19-a), to define "state developmental center."

SECTION 11. Amends Section 593.042, Health and Safety Code, by adding Subsection (c) to require an that application for commitment of a person to a residential care facility that is a state developmental center include a statement demonstrating that the proposed resident meets the requirements for commitment to a state developmental center under Section 593.052(a-1) (relating to committing a person to a residential care facility).

SECTION 12. Amends Section 593.052, Health and Safety Code, by amending Subsections (a) and (b) and adding Subsections (a-1) and (b-1), as follows:

(a) Creates Subsection (a)(4)(A) from existing text. Creates Subsection (a)(4)(B) to require that a proposed resident is prohibited from being committed to a residential care facility unless the residential care facility is not a state developmental center.

(a-1) Prohibits a proposed resident from being committed to a residential care facility that is a state developmental center unless the proposed resident is a person with severe or profound mental retardation or mild or moderate mental retardation who meets certain criteria; evidence is presented showing that the proposed resident meets certain criteria; the proposed resident cannot be adequately and appropriately habilitated in an available, less restrictive setting; and the residential care facility is a state developmental center that provides habilitative services, care, training, and treatment appropriate to the proposed resident's needs.

(b) Requires the court, if it is determined that the requirements of Subsection (a) have been met and that long-term placement in a residential care facility, other than a state developmental center, is appropriate, to commit the proposed resident for care, treatment, and training to a community center or DADS, rather than department, when space is available in a residential care facility, other than a state developmental center.

(b-1) Requires the court, if it is determined that the requirements of Subsection (a-1) have been met and that long-term placement in a residential care facility that is a state developmental center is appropriate, to commit the proposed resident for care, treatment, and training to DADS when space is available in a state developmental center.

SECTION 13. Amends Section 48.252, Human Resources Code, by adding Subsection (d), as follows:

(d) Requires a caseworker or supervisor, if an investigation under this section reveals evidence of abuse, neglect, or exploitation of a resident or client of a state developmental center as defined by Section 531.002, Health and Safety Code, or the ICF-MR component of the Rio Grande State Center, and a caseworker of DFPS or supervisor of a caseworker believes that the abuse, neglect, or exploitation is a criminal offense, to immediately notify HHSC's office of inspector general and promptly provide HHSC's office of inspector general with a copy of the DFPS investigation report.

SECTION 14. (a) Requires HHSC's office of inspector general, not later than December 1, 2009, to begin employing peace officers as required by Section 531.1022, Government Code, as added by this Act.

(b) Requires DADS, not later than September 1, 2014, to designate a state developmental center for alleged offender residents as required by Section 555.002, Health and Safety Code, as added by this Act.

(c) Requires DADS, not later than January 1, 2010, to develop the training required by Section 555.024, Health and Safety Code, as added by this Act.

(d) Requires DADS, not later than September 1, 2010, to ensure that all developmental center employees and direct care employees receive the training required by Section 555.024, Health and Safety Code, as added by this Act, regardless of when the employee was hired.

(e) Requires the executive commissioner of HHSC, not later than December 1, 2009, to adopt rules as required by Section 555.022, Health and Safety Code, as added by this Act.

(f) Requires the executive commissioner of HHSC, not later than December 1, 2009, to contract for mortality review services as required by Section 555.026, Health and Safety Code, as added by this Act.

(g) Requires the governor, not later than December 1, 2009, to appoint the independent ombudsman as required by Section 555.053, Health and Safety Code, as added by this Act.

SECTION 15. (a) Makes application of Section 411.1144, Government Code, as added by this Act, and Section 555.021, Health and Safety Code, as added by this Act, prospective.

(b) Requires the executive commissioner of HHSC, not later than September 1, 2009, to adopt rules as required by Section 555.021, Health and Safety Code, as added by this Act.

SECTION 16. (a) Makes application of Section 551.022(e), Health and Safety Code, and Section 551.0225, Health and Safety Code, as added by this Act, prospective.

(b) Makes application of this Act prospective.

SECTION 17. Makes application of Sections 593.042 and 593.052, Health and Safety Code, as amended by this Act, prospective.

(b) Makes application of this Act prospective.

SECTION 18. Effective date: upon passage or September 1, 2009.