

## **BILL ANALYSIS**

C.S.S.B. 223  
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Human Services  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

Interested parties contend that legislation is needed to combat fraud, waste, and abuse and to ensure that Medicaid providers comply with certain program requirements and licensing rules. C.S.S.B. 223 seeks to address matters relating to certain facilities and care providers, including providers under the state Medicaid program, and makes provision for certain penalties.

### **RULEMAKING AUTHORITY**

It is the committee's opinion that rulemaking authority is expressly granted to the executive commissioner of the Health and Human Services Commission in SECTIONS 1.03, 1.06, 1.08, 1.09, 3.14, and 5.02 of this bill.

### **ANALYSIS**

Section 531.0055, Government Code, as amended by Chapter 198 (H.B. 2292), Acts of the 78th Legislature, Regular Session, 2003, expressly grants to the executive commissioner of the Health and Human Services Commission all rulemaking authority for the operation of and provision of services by the health and human services agencies. Similarly, Sections 1.16-1.29, Chapter 198 (H.B. 2292), Acts of the 78th Legislature, Regular Session, 2003, provide for the transfer of a power, duty, function, program, or activity from a health and human services agency abolished by that act to the corresponding legacy agency. To the extent practical, this bill analysis is written to reflect any transfer of rulemaking authority and to update references as necessary to an agency's authority with respect to a particular health and human services program.

C.S.S.B. 223 amends the Health and Safety Code to require a home and community support services license applicant or license holder to provide the Department of Aging and Disability Services (DADS) representative conducting a survey of the premises of the license applicant or license holder with a reasonable and safe workspace at the premises. The bill authorizes the executive commissioner of the Health and Human Services Commission (HHSC) to adopt rules to implement such a requirement. The bill requires DADS to provide certain specified information, after a survey of a home and community support services agency by DADS, to the home and community support services agency administrator, rather than to the chief executive officer of the agency. The bill specifies, in a provision including information relating to the DADS representative conducting the survey in the information that DADS is required to provide to the home and community support services agency administrator, that DADS is required to include information on the identity, including the name, of each DADS representative conducting or reviewing the results of the survey, rather than requiring the inclusion of the signature of each such representative conducting, reviewing, or approving the results. The bill prohibits DADS from renewing an initial home and community support services agency license unless DADS has conducted an initial on-site survey of the agency.

C.S.S.B. 223 requires DADS at least semiannually to provide joint training for home and community support services agencies and surveyors on subjects that address at least one of the 10 most common violations of federal or state law by such agencies. The bill authorizes DADS

to charge a home and community support services agency a fee, not to exceed \$50 per person, for the training.

C.S.S.B. 223 requires a home and community support services license holder, if certain application information as specified by executive commissioner rule changes after the applicant submits an application to DADS for a license or after DADS issues the license, to report the change to DADS and pay a fee not to exceed \$50 not later than the time specified by executive commissioner rule. The bill requires the executive commissioner by rule to specify the information provided in an application that a license holder is required to report to DADS if the information changes, prescribe the time for reporting such a change, establish which changes required to be reported will require DADS evaluation and approval, and set the amount of a late fee to be assessed against a license holder who fails to report a change in the application information within the time prescribed.

C.S.S.B. 223 authorizes the executive commissioner to adopt rules governing the duties and responsibilities of home and community support services agency administrators, including rules regarding an administrator's management of daily operations of the home and community support services agency, an administrator's responsibility for supervising the provision of quality care to agency clients, an administrator's implementation of agency policy and procedures, and an administrator's responsibility to be available to the agency at all times in person or by telephone.

C.S.S.B. 223 requires the executive commissioner of HHSC, as soon as practicable after the bill's effective date but not later than July 1, 2012, to adopt the rules necessary to implement the changes in law made by the bill regarding home and community support services.

C.S.S.B. 223 defines "department," "executive commissioner," and "home and community support services agency administrator" or "administrator" for purposes of provisions of law relating to home and community support services.

C.S.S.B. 223 authorizes DADS to consider and evaluate the compliance history of an applicant for a convalescent or nursing home license and other specified persons for any period during which the applicant or other person operated an institution in Texas or in another state or jurisdiction and makes conforming changes. The bill, in a provision of law requiring the exclusion of licensing eligibility for a person who has substantially failed to comply with provisions of law relating to convalescent and nursing homes or rules adopted under those provisions to extend for a period of least two years, authorizes that period to extend throughout the person's lifetime or existence, rather than prohibiting the period from exceeding a period of 10 years.

C.S.S.B. 223, in certain provisions of law relating to criminal history checks of employees and applicants for employment in certain facilities serving the elderly, persons with disabilities, or persons with terminal illnesses, including provisions relating to criminal history record information obtained by certain entities, verification of employability and discharge of certain employees listed in the nurse aide registry or employee misconduct registry, criminal history records of employees, notification requirements concerning criminal history record information, certain convictions barring employment, privileged records, and civil liability, includes a financial management services agency serving as a fiscal and employer agent for an individual employer participating in the consumer-directed service option and an individual employer participating in the consumer-directed service option and responsible for hiring service providers to deliver program services among the entities to which those provisions of law apply and makes related conforming changes. The bill includes an applicant for employment by or an employee of an individual employer among the persons for whom a facility, a regulatory agency, a financial management services agency on behalf of an individual employer, or a private agency on behalf of a facility is entitled to obtain from the Department of Public Safety (DPS) criminal history record information maintained by DPS. The bill requires a financial management

services agency to forward criminal history record information received from DPS to the individual employer requesting the information. The bill requires an individual employer to immediately discharge any employee whose criminal history check reveals conviction of a crime that bars employment or that the individual employer determines is a contraindication to employment. The bill prohibits a person from being employed by an individual employer before the fifth anniversary of the date the person is convicted of certain specified offenses. The bill defines "financial management services agency" and "individual employer" and makes a nonsubstantive change to the definition of "nurse aide registry."

C.S.S.B. 223 amends the Government Code to redefine "participating agency" to include HHSC's office of inspector general. The bill includes the office of inspector general among the entities entitled to obtain from DPS the criminal history record information maintained by DPS that relates to a provider under Medicaid or a person applying to enroll as a Medicaid provider. The bill establishes that the criminal history record information an agency or the office of inspector general is authorized to obtain from DPS includes criminal history record information relating to a person with a direct or indirect ownership or control interest, as defined by federal law, in a provider of five percent or more and a person whose information is required to be disclosed in accordance with federal law relating to the integrity of the Medicare and state health care programs.

C.S.S.B. 223 requires the office of inspector general to impose without prior notice a hold on payment of claims for reimbursement on receipt of reliable evidence that the circumstances giving rise to the hold on payment involve fraud or wilful misrepresentation under the state Medicaid program in accordance with federal law. The bill requires the office of inspector general to notify the provider of the hold on payment in accordance with federal law relating to the suspension of certain Medicaid payments in case of fraud, rather than requiring such notification not later than the fifth working day after the date the payment hold is imposed.

C.S.S.B. 223 makes provisions of law relating to the duty of participating agencies to exchange certain information regarding allegations of Medicaid fraud or abuse applicable to criminal history record information held by a participating agency that relates to a health care professional and makes conforming changes. The bill authorizes a participating agency to enter into a memorandum of understanding or agreement with another participating agency for the purpose of exchanging criminal history record information relating to a health care professional that both participating agencies are authorized to access. The bill provides that confidential criminal history record information in the possession of a participating agency that is provided to another participating agency remains confidential while in the possession of the participating agency that receives the information.

C.S.S.B. 223 amends the Human Resources Code to authorize HHSC's office of inspector general, in addition to HHSC, to obtain from any law enforcement or criminal justice agency the criminal history record information that relates to a Medicaid provider or a person applying to enroll as a Medicaid provider. The bill establishes that the criminal history record information HHSC and the office of inspector general are authorized to obtain related to a Medicaid provider or a person applying to enroll as a provider includes criminal history record information relating to a person with a direct or indirect ownership or control interest, as defined by federal law, in a provider of five percent or more and a person whose information is required to be disclosed in accordance with federal law relating to the integrity of the Medicare and state health care programs.

C.S.S.B. 223, in a provision of law requiring the executive commissioner by rule to establish criteria for revoking a Medicaid provider's enrollment or denying a person's application to enroll as a Medicaid provider, requires the executive commissioner by rule to also establish such criteria for HHSC's office of inspector general and requires the executive commissioner by rule to establish such criteria for the suspension of a provider's billing privileges under Medicaid. The bill includes in the conditions on which such action by HHSC or the office is based any

exclusion or debarment of the provider from participation in a state or federally funded health care program, the provider's failure to bill for Medicaid or refer clients for Medicaid within a 12-month period, or any of the provider screening or enrollment provisions contained in federal law.

C.S.S.B. 223 requires the executive commissioner, as a condition of eligibility to participate as a Medicaid provider, by rule to require a provider or a person applying to enroll as a provider to disclose all persons with a direct or indirect ownership or control interest in a provider of five percent or more, any managing employees of the provider, and an agent or subcontractor of the provider if the provider or other specified person has a direct or indirect ownership interest of at least five percent in the agent or subcontractor or if the provider engages in a business transaction with the agent or subcontractor that meets the criteria specified by a provision of federal law relating to the disclosure of certain information by providers. The bill requires the executive commissioner, as a condition of eligibility to participate as a Medicaid provider, by rule to require disclosure by persons applying for enrollment as providers and provide for screening of applicants for enrollment in conformity and compliance with the requirements of federal law. The bill requires the executive commissioner, in adopting the required rules, to adopt rules as authorized by and in conformity with federal law for the imposition of a temporary moratorium on enrollment of new providers, or to impose numerical caps or other limits on the enrollment of providers, that HHSC or the office of inspector general, in consultation with HHSC, determines to have a significant potential for fraud, waste, or abuse.

C.S.S.B. 223 includes a person who fails to maintain documentation to support a claim for payment in accordance with the requirements specified by DADS rule or Medicaid program policy or engages in any other conduct that an HHSC rule has defined as a violation of the Medicaid program among the persons considered to have committed a violation of provisions relating to Medicaid. The bill makes such a person liable to HHSC for either the amount paid in response to the claim for payment or the payment of an administrative penalty in an amount not to exceed \$500 for each violation, as determined by HHSC.

C.S.S.B. 223 authorizes DADS to assess an administrative penalty against a person who violates the Adult Day Care Act, a rule, standard, or order adopted under that act, or a term of a license issued under that act; makes a false statement of material fact that the person knows is false or should know is false on certain applications or with respect to a matter under investigation by DADS; refuses to allow a representative of DADS to inspect a book, record, or file required to be maintained by an adult day-care facility or any portion of the premises of an adult day-care facility; wilfully interferes with a representative of DADS under certain circumstances; fails to pay a penalty within a certain time frame; or fails to notify DADS of a change of ownership before the effective date of the change of ownership. The bill prohibits the penalty from exceeding \$500 for each violation and provides that each day of a continuing violation constitutes a separate violation. The bill requires DADS to establish gradations of penalties in accordance with the relative seriousness of the violation. The bill requires DADS, in determining the amount of a penalty, to consider any matter that justice may require, including the gradations of penalties established by DADS; the seriousness of the violation, including the nature, circumstances, extent, and gravity of the prohibited act and the hazard or potential hazard created by the act to the health or safety of the public; the history of previous violations; the deterrence of future violations; and the efforts to correct the violation. The bill specifies that a penalty assessed for failing to pay a penalty within a certain time frame is in addition to the penalty previously assessed and not timely paid.

C.S.S.B. 223 prohibits DADS from collecting an administrative penalty from an adult day-care facility if, not later than the 45th day after the date the facility receives a notice of the violation, the facility corrects the violation and sets out violations for which such a prohibition does not apply. The bill requires an adult day-care facility that corrects a violation to maintain the correction. The bill authorizes DADS to assess and collect an administrative penalty for a subsequent violation if the facility fails to maintain the correction until at least the first anniversary after the date the correction was made. The bill establishes that such an

administrative penalty is equal to three times the amount of the original penalty assessed but not collected. The bill establishes that DADS is not required to provide the facility with an opportunity to correct the subsequent violation.

C.S.S.B. 223 requires DADS to issue a preliminary report stating the facts on which DADS concludes that a violation of the Adult Day Care Act, a rule, standard, or order adopted under that act, or a term of a license issued under that act has occurred if DADS has examined the possible violation and facts surrounding the possible violation and concluded that a violation has occurred. The bill authorizes the report to recommend a penalty and the amount of the penalty. The bill requires DADS to give written notice of the report to the person charged with the violation not later than the 10th day after the date on which the report is issued and sets out the elements required to be included in the notice. The bill authorizes the person charged, not later than the 20th day after the date on which the person received the notice, to give to DADS written notice that the person agrees with the department's report and consents to the recommended penalty or to make a written request for a hearing. The bill requires the adult day-care facility, if the violation is subject to correction, to submit a plan of correction to DADS for approval not later than the 10th day after the date on which the notice is received. The bill requires DADS, if the violation is subject to correction and the person reports to DADS that the violation has been corrected, to inspect the correction or take any other step necessary to confirm the correction and notify the person that the correction is satisfactory and a penalty will not be assessed or the correction is not satisfactory and a penalty is recommended. The bill authorizes a person charged with a violation, not later than the 20th day after the date on which the person receives a notice assessing a penalty, to give to DADS written notice that the person agrees with DADS' report and consents to the recommended penalty or to make a written request for a hearing. The bill requires the commissioner of DADS or the commissioner's designee to assess the penalty recommended by DADS if the person charged with the violation consents to the recommended penalty or does not timely respond to a notice. The bill requires DADS to give written notice of the decision to the person charged with the violation if the commissioner of DADS or the commissioner's designee assesses the recommended penalty and requires the person to pay the penalty.

C.S.S.B. 223 requires an administrative law judge to order a hearing and give notice of the hearing if a person assessed a penalty requests a hearing and requires the hearing to be held before an administrative law judge. The bill requires the judge to make findings of fact and conclusions of law regarding the occurrence of a violation. The bill requires the commissioner of DADS or the commissioner's designee, based on the findings of fact and conclusions of law and the recommendation of the administrative law judge, by order to find a violation has occurred and assess an administrative penalty or find a violation has not occurred. The bill establishes that such proceedings are subject to the Administrative Procedure Act.

C.S.S.B. 223 requires the commissioner of DADS or the commissioner's designee to give notice of the findings to the person charged with a violation. The bill requires the commissioner or the commissioner's designee, if either finds that a violation has occurred, to give to the person charged written notice of the findings, the amount of the administrative penalty, the rate of interest payable with respect to the penalty and the date on which interest begins to accrue, and the person's right to judicial review of the order. The bill requires the person assessed the penalty, not later than the 30th day after the date on which the order is final, to pay the full amount of the penalty or file a petition for judicial review contesting the occurrence of the violation, the amount of the penalty, or both. The bill authorizes DADS to permit the person to pay a penalty in installments. The bill establishes that, if the person does not pay the penalty within the 30-day period or in installments, if applicable, the penalty is subject to interest and DADS is authorized to refer the matter to the attorney general for collection of the penalty and interest. The bill establishes the rate at which and the period for which the interest accrues. The bill requires the commissioner of DADS or the commissioner's designee, if the amount of the penalty is reduced or the assessment of a penalty is not upheld on judicial review, to remit to the person charged the appropriate amount of any penalty payment plus accrued interest or execute a

release of the supersedeas bond if one has been posted. The bill establishes the rate at which and the period for which accrued interest on the amount remitted by the commissioner of DADS or the commissioner's designee is required to be paid.

C.S.S.B. 223 requires the semiannual training provided by DADS for surveyors and providers of certain long-term care facilities to cover subjects that address the 10 most common violations by long-term care facilities of federal or state law, rather than at least one of the 10 most common violations. The bill authorizes DADS to charge providers a fee not to exceed \$50 per person for the training. The bill requires the executive commissioner to adopt rules necessary to implement the requirements for such training as soon as practicable after the bill's effective date but not later than July 1, 2012.

C.S.S.B. 223 requires a state agency that is affected by a provision of the bill to request a federal waiver or authorization if the agency determines that a waiver or authorization is necessary for the implementation of the provision, and it authorizes the agency to delay implementation until the federal waiver or authorization is obtained. The bill makes conforming and nonsubstantive changes.

### **EFFECTIVE DATE**

September 1, 2011.

### **COMPARISON OF ORIGINAL AND SUBSTITUTE**

C.S.S.B. 223 differs from the original by defining "home and community support services agency administrator" or "administrator" as the person who is responsible for implementing and supervising the administrative policies and operations of the home and community support services agency and for administratively supervising the provision of all services to agency clients on a day-to-day basis, whereas the original defines that term as an individual who engages in the practice of home and community support services agency administration, without regard to whether the individual has an ownership interest in the agency or whether the individual's administrative functions and duties are shared with any other individual.

C.S.S.B. 223 differs from the original, in a bill provision establishing certain requirements of a home and community support services license applicant or license holder relating to a survey of the premises of the license applicant or license holder, by specifying that the license applicant or license holder is required to provide the Department of Aging and Disability Services (DADS) representative conducting a survey, rather than the person conducting the survey, as in the original, with a reasonable and safe workspace at the premises and by omitting a specification included in the original that such a workspace allow the person to conduct the survey in private.

C.S.S.B. 223 differs from the original, in a bill provision requiring DADS to provide certain training for home and community support services agencies on subjects that address the 10 most common violations of federal or state law by home and community support service agencies, by requiring DADS to provide joint training at least semiannually on such subjects, whereas the original requires DADS to provide semiannual training on such subjects. The substitute differs from the original by including surveyors in the persons required to be provided the training, whereas the original authorizes other persons regulated by DADS to participate in the training. The substitute differs from the original by specifying that DADS is authorized to charge the specified fee for such training to a home and community support services agency, whereas the original contains no such specification.

C.S.S.B. 223 differs from the original by requiring a home and community support services license holder changing certain application information after an application for a license has been submitted or after DADS issues the license to pay a fee not to exceed \$50 within the specified time, whereas the original requires such a license holder to pay a fee a \$50 within the

specified time.

C.S.S.B. 223 differs from the original by including in the rules governing the duties and responsibilities of home and community support services agency administrators authorized to be adopted by the executive commissioner, rules regarding an administrator's responsibility to be available to the agency at all times in person or by telephone, whereas the original includes in such rules the average hours per week an administrator must spend on administrative duties.

C.S.S.B. 223 differs from the original by requiring the executive commissioner to adopt the rules necessary to implement the changes in law made by the bill regarding home and community support services as soon as practicable after the bill's effective date but not later than July 1, 2012, rather than not later than December 1, 2011 as in the original.

C.S.S.B. 223 differs from the original, in a bill provision requiring the executive commissioner by rule to require a provider or a person applying to enroll as a provider to disclose certain persons as a condition of eligibility to participate in the Medicaid program, by specifying that a provider or person must disclose an agent or subcontractor of the provider if the provider or other specified persons have a direct or indirect ownership interest of at least five percent in the agent or subcontractor or if the provider engages in a business transaction with the agent or subcontractor that meets the criteria specified by a provision of federal law relating to the disclosure of certain information by providers, whereas the original contains no such specification.

C.S.S.B. 223 differs from the original by including a person who fails to maintain documentation to support a claim for payment in accordance with the requirements specified by DADS rule or Medicaid program policy among the persons considered to have committed a violation of provisions relating to Medicaid, whereas the original includes a person who fails to maintain adequate document to support such a claim among those persons.

C.S.S.B. 223 contains a provision not included in the original requiring the semiannual training by DADS for surveyors and providers of certain long-term facilities to cover subjects that address the 10 most common violations by long-term care facilities of federal or state law, rather than at least one of the 10 most common violations, and authorizing DADS to charge providers a fee not to exceed \$50 per person for the training. The substitute contains a provision not included in the original requiring the executive commissioner to adopt rules necessary to implement the requirements for such training as soon as practicable after the bill's effective date but not later than July 1, 2012.

C.S.S.B. 223 differs from the original in nonsubstantive ways.