

By: Menendez

H.B. No. 2041

A BILL TO BE ENTITLED

AN ACT

1  
2 relating to alternative methods of dispute resolution in certain  
3 disputes between the Department of Aging and Disability Services  
4 and an assisted living facility licensed by the department.

5 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

6 SECTION 1. Section 247.051, Health and Safety Code, is  
7 amended to read as follows:

8 Sec. 247.051. INFORMAL DISPUTE RESOLUTION. (a) The Health  
9 and Human Services Commission by rule shall establish an informal  
10 dispute resolution process to address disputes between a facility  
11 and the department as a result of the survey review conducted by the  
12 department in accordance with this section. The process must  
13 provide for adjudication by an appropriate disinterested person of  
14 disputes relating to the results of a survey [~~a proposed~~  
15 ~~enforcement action or related proceeding under this chapter~~]. The  
16 informal dispute resolution process must require:

17 (1) the assisted living facility to request informal  
18 dispute resolution not later than the 10th day after the date of  
19 notification by the department of the violation of a standard or  
20 standards;

21 (2) the Health and Human Services Commission to  
22 complete the process not later than the 90th [~~30th~~]  
23 date of receipt of a request from the assisted living facility for  
24 informal dispute resolution; [~~and~~]

1           (3) any individual representing an assisted living  
2 facility or the department in an informal dispute resolution  
3 process to register with the Health and Human Services Commission;

4           (4) the department to prove a violation of a standard;

5           (5) that, not later than the fifth business day after  
6 the date an assisted living facility requests an informal dispute  
7 resolution, the department forward to the assisted living facility  
8 and to the Health and Human Services Commission a copy of all  
9 information prepared or gathered by the department in connection  
10 with the survey, excluding the name of any person who may have filed  
11 a complaint in connection with the survey;

12           (6) that all legal and factual arguments raised during  
13 the informal dispute resolution process be fully considered and  
14 impartially decided;

15           (7) that a presumption of truth not be given to a  
16 statement contained in the department's statement of deficiencies;

17           (8) that ex parte communications concerning the  
18 substance of any argument relating to a survey under consideration  
19 not occur between the informal dispute resolution staff and another  
20 person;

21           (9) that the assisted living facility and the  
22 department be given a reasonable opportunity to submit arguments  
23 and evidence and to respond to arguments and evidence presented  
24 against them; and

25           (10) that an architect or engineer with experience  
26 with life safety code issues affecting assisted living facilities  
27 decide disputes relating to life safety code issues.

1        (b) Unless arbitration is elected in accordance with  
2 Subchapter E, the ~~[and disclose the following:~~

3                ~~[(A) the individual's employment history during~~  
4 ~~the preceding five years, including employment in regulatory~~  
5 ~~agencies of this state and other states,~~

6                ~~[(B) ownership, including the identity of the~~  
7 ~~controlling person or persons, of the assisted living facility the~~  
8 ~~individual is representing before the Health and Human Services~~  
9 ~~Commission; and~~

10               ~~[(C) the identity of other entities the~~  
11 ~~individual represents or has represented before the Health and~~  
12 ~~Human Services Commission during the preceding 24 months.~~

13               ~~[(b) The Health and Human Services Commission shall adopt~~  
14 ~~rules to adjudicate claims in contested cases.~~

15               ~~[(c) The]~~ Health and Human Services Commission may not  
16 delegate its responsibility to administer the informal dispute  
17 resolution process established by this section to another state  
18 agency.

19               (c) A statement of deficiency prepared by the department  
20 following a survey is confidential pending the outcome of the  
21 informal dispute resolution process. Information concerning the  
22 outcome of a survey may not be posted by the department on any  
23 website pending the outcome of the informal dispute resolution  
24 process.

25               SECTION 2. Chapter 247, Health and Safety Code, is amended  
26 by adding Subchapter E to read as follows:

27                                SUBCHAPTER E. ARBITRATION

1       Sec. 247.081. SCOPE OF SUBCHAPTER. This subchapter applies  
2 to any dispute between a facility licensed under this chapter and  
3 the department relating to:

4           (1) renewal of a license under Section 247.023;

5           (2) suspension or revocation of a license under  
6 Section 247.041;

7           (3) assessment of a civil penalty under Section  
8 247.045;

9           (4) assessment of an administrative penalty under  
10 Section 247.0451; or

11           (5) an informal dispute resolution under Section  
12 247.051.

13       Sec. 247.082. ARBITRATION PROCEDURES. (a) The arbitration  
14 shall be conducted by an arbitrator.

15       (b) The arbitration and the appointment of the arbitrator  
16 shall be conducted in accordance with rules adopted by the chief  
17 administrative law judge of the State Office of Administrative  
18 Hearings. Before adopting rules under this subsection, the chief  
19 administrative law judge shall consult with the department and  
20 shall consider appropriate rules developed by any nationally  
21 recognized association that performs arbitration services.

22       (c) The party that elects arbitration shall pay the cost of  
23 the arbitration. The total fees and expenses paid for an arbitrator  
24 for a day may not exceed \$1,000.

25       (d) The State Office of Administrative Hearings may  
26 designate a nationally recognized association that performs  
27 arbitration services to conduct arbitrations under this subchapter

1 and may, after consultation with the department, contract with that  
2 association for the arbitrations.

3 (e) On request by the department, the attorney general may  
4 represent the department in the arbitration.

5 Sec. 247.083. ARBITRATOR QUALIFICATIONS. Each arbitrator  
6 must be on an approved list of a nationally recognized association  
7 that performs arbitration services or be otherwise qualified as  
8 provided in the rules adopted under Section 247.082(b).

9 Sec. 247.084. ARBITRATOR SELECTION. The arbitrator shall  
10 be appointed in accordance with the rules adopted under Section  
11 247.082(b).

12 Sec. 247.085. ARBITRATOR DUTIES. The arbitrator shall:

13 (1) protect the interests of the department and the  
14 facility;

15 (2) ensure that all relevant evidence has been  
16 disclosed to the arbitrator, department, and facility; and

17 (3) render an order consistent with this chapter and  
18 the rules adopted under this chapter.

19 Sec. 247.086. SCHEDULING OF ARBITRATION. (a) The  
20 arbitrator conducting the arbitration shall schedule arbitration  
21 to be held not later than the 90th day after the date the arbitrator  
22 is selected and shall notify the department and the facility of the  
23 scheduled date.

24 (b) The arbitrator may grant a continuance of the  
25 arbitration at the request of the department or facility. The  
26 arbitrator may not unreasonably deny a request for a continuance.

27 Sec. 247.087. EXCHANGE AND FILING OF INFORMATION. Not

1 later than the seventh day before the first day of arbitration, the  
2 department and the facility shall exchange and file with the  
3 arbitrator:

4 (1) all documentary evidence not previously exchanged  
5 and filed that is relevant to the dispute; and

6 (2) information relating to a proposed resolution of  
7 the dispute.

8 Sec. 247.088. ATTENDANCE. (a) The arbitrator may proceed  
9 in the absence of any party or representative of a party who, after  
10 notice of the proceeding, fails to be present or to obtain a  
11 postponement.

12 (b) An arbitrator may not make an order solely on the  
13 default of a party and shall require the party who is present to  
14 submit evidence, as required by the arbitrator, before making an  
15 award.

16 Sec. 247.089. TESTIMONY; RECORD. (a) The arbitrator may  
17 require witnesses to testify under oath and shall require testimony  
18 under oath if requested by the department or the facility.

19 (b) The department shall make an electronic recording of the  
20 proceeding.

21 (c) An official stenographic record of the proceeding is not  
22 required, but the department or the facility may make a  
23 stenographic record. The party that makes the stenographic record  
24 shall pay the expense of having the record made.

25 Sec. 247.090. EVIDENCE. (a) The department or the facility  
26 may offer evidence and shall produce additional evidence as the  
27 arbitrator considers necessary to understand and resolve the

1 dispute.

2 (b) The arbitrator is the judge of the relevance and  
3 materiality of the evidence offered. Strict conformity to rules  
4 applicable to judicial proceedings is not required.

5 Sec. 247.091. CLOSING STATEMENTS; BRIEFS. The department  
6 and the facility may present closing statements, but the record  
7 does not remain open for written briefs unless required by the  
8 arbitrator.

9 Sec. 247.092. EX PARTE CONTACTS PROHIBITED. (a) Except as  
10 provided by Subsection (b), the department and the facility may not  
11 communicate with an arbitrator other than at an oral hearing unless  
12 the parties and the arbitrator agree otherwise.

13 (b) Any oral or written communication, other than a  
14 communication authorized under Subsection (a), from the parties to  
15 an arbitrator shall be directed to the association that is  
16 conducting the arbitration or, if there is no association  
17 conducting the arbitration, to the State Office of Administrative  
18 Hearings for transmittal to the arbitrator.

19 Sec. 247.093. ORDER. (a) The arbitrator may enter any  
20 order that may be entered by the department, board, commissioner,  
21 or court under this chapter in relation to a dispute described by  
22 Section 247.081.

23 (b) The arbitrator shall enter the order not later than the  
24 60th day after the last day of the arbitration.

25 (c) The arbitrator shall base the order on the facts  
26 established at arbitration, including stipulations of the parties,  
27 and on the law as properly applied to those facts.

1        (d) The order must:

2            (1) be in writing;

3            (2) be signed and dated by the arbitrator; and

4            (3) include a statement of the arbitrator's decision  
5 on the contested issues and the department's and facility's  
6 stipulations on uncontested issues.

7        (e) The arbitrator shall file a copy of the order with the  
8 department and shall notify the department and the facility in  
9 writing of the decision.

10        Sec. 247.094. EFFECT OF ORDER. An order of an arbitrator  
11 under this subchapter is final and binding on all parties. Except  
12 as provided by Section 247.096, there is no right to appeal.

13        Sec. 247.095. CLERICAL ERROR. For the purpose of  
14 correcting a clerical error, an arbitrator retains jurisdiction of  
15 the award until the 20th day after the date of the award.

16        Sec. 247.096. COURT VACATING ORDER. (a) On a finding  
17 described by Subsection (b), a court shall:

18            (1) on application of a facility, vacate an  
19 arbitrator's order with respect to an arbitration conducted at the  
20 election of the department; or

21            (2) on application of the department, vacate an  
22 arbitrator's order with respect to an arbitration conducted at the  
23 election of a facility.

24        (b) A court shall vacate an arbitrator's order under  
25 Subsection (a) only on a finding that:

26            (1) the order was procured by corruption, fraud, or  
27 misrepresentation;



1           (2) the decision of the arbitrator was arbitrary or  
2 capricious and against the weight of the evidence; or

3           (3) the order exceeded the jurisdiction of the  
4 arbitrator under Section 247.093(a).

5           (c) If the order is vacated, the dispute shall be remanded  
6 to the department for another arbitration proceeding.

7           (d) A suit to vacate an arbitrator's order must be filed not  
8 later than the 30th day after:

9                   (1) the date of the award; or

10                   (2) the date the facility or department knew or should  
11 have known of a basis for suit under this section, but in no event  
12 later than the first anniversary of the date of the order.

13           (e) Venue for a suit to vacate an arbitrator's order is in  
14 the county in which the arbitration was conducted.

15           Sec. 247.097. ENFORCEMENT OF CERTAIN ARBITRATION ORDERS FOR  
16 CIVIL PENALTIES. (a) This section applies only to a suit for the  
17 assessment of a civil penalty under Section 247.045 in which  
18 binding arbitration has been elected under this subchapter as an  
19 alternative to the judicial proceeding.

20           (b) On application of a party to the suit, the district  
21 court in which the underlying suit has been filed shall enter a  
22 judgment in accordance with the arbitrator's order unless, within  
23 the time limit prescribed by Section 247.096(d)(2), a motion is  
24 made to the court to vacate the arbitrator's order in accordance  
25 with Section 247.096.

26           (c) A judgment filed under Subsection (b) is enforceable in  
27 the same manner as any other judgment of the court. The court may

1 award costs for an application made under Subsection (b) and for any  
2 proceedings held after the application is made.

3 (d) Subsection (b) does not affect the right of a party, in  
4 accordance with Section 247.096 and within the time limit  
5 prescribed by Section 247.096(d)(2), if applicable, to make a  
6 motion to the court or initiate a proceeding in court as provided by  
7 law to vacate the arbitrator's order or to vacate a judgment of the  
8 court entered in accordance with the arbitrator's order.

9 SECTION 3. The changes in law made by this Act apply only to  
10 a dispute described by Section 247.051, Health and Safety Code, as  
11 amended by this Act, or Section 247.081, Health and Safety Code, as  
12 added by this Act, that occurs on or after the effective date of  
13 this Act. A dispute that occurs before the effective date of this  
14 Act is governed by the law in effect immediately before the  
15 effective date of this Act, and that law is continued in effect for  
16 that purpose.

17 SECTION 4. This Act takes effect September 1, 2011.