

## **BILL ANALYSIS**

Senate Research Center  
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H.B. 33  
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Health & Human Services  
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Engrossed

### **AUTHOR'S / SPONSOR'S STATEMENT OF INTENT**

Interested parties note that an assisted living facility currently does not have many options to remedy a finding resulting from a review of the facility by the Department of Aging and Disability Services (DADS). H.B. 33 seeks to expand such options for an assisted living facility by providing certain protections for a facility involved in DADS's informal dispute resolution process and establishing certain arbitration procedures.

H.B. 33 amends current law relating to alternative methods of dispute resolution in certain disputes between the Department of Aging and Disability Services and an assisted living facility licensed by the department.

[**Note:** While the statutory reference in this bill is to the Texas Department of Human Services (TDHS), the following amendments affect the Department of Aging and Disability Services, as the successor agency to TDHS.]

### **RULEMAKING AUTHORITY**

Rulemaking authority previously granted to the Health and Human Services Commission (HHSC) is modified in SECTION 1 (Section 247.051, Health and Safety Code) of this bill.

Rulemaking authority previously granted to HHSC is rescinded in SECTION 1 (Section 247.051, Health and Safety Code) of this bill.

Rulemaking authority is expressly granted to the chief administrative law judge of the State Office of Administrative Hearings in SECTION 2 (Section 247.083, Health and Safety Code) of this bill.

Rulemaking authority previously granted to HHSC is modified in SECTION 3 (Section 531.058, Government Code) of this bill.

Rulemaking authority is expressly granted to HHSC in SECTION 3 (Section 531.058, Government Code) of this bill.

### **SECTION BY SECTION ANALYSIS**

SECTION 1. Amends Section 247.051, Health and Safety code, as follows:

Sec. 247.051. INFORMAL DISPUTE RESOLUTION. (a) Requires the Health and Human Services Commission (HHSC) by rule to establish an informal dispute resolution process to address disputes between an assisted living facility and the Department of Aging and Disability Services (DADS) concerning a statement of violations prepared by DADS in accordance with this section. Requires that the process provide for adjudication by an appropriate disinterested person of disputes relating to a statement of violations, rather than relating to a proposed enforcement action or related proceeding under this chapter (Assisted Living Facilities). Requires that the informal dispute resolution process require:

- (1) Makes no change to this subdivision;

(2) HHSC to complete the process not later than the 90th day, rather than not later than the 30th day, after the date of receipt of a request from the assisted living facility for informal dispute resolution;

(3) that, not later than the 10th business day after the date an assisted living facility requests an informal dispute resolution, DADS forward to the assisted living facility a copy of all information that is referred to in the disputed statement of violations or on which a citation is based in connection with the survey, inspection, investigation, or other visit, excluding:

(A) the name of any complainant, witness, or informant;

(B) any information that would reasonably lead to the identification of a complainant, witness, or informant;

(C) information obtained from or contained in the records of the facility;

(D) information that is publicly available; or

(E) information that is confidential by law;

(4) HHSC to give full consideration to all factual arguments raised during the informal dispute resolution process that:

(A) are supported by references to specific information that the facility or DADS relies on to dispute or support findings in the statement of violations; and

(B) are provided by the proponent of the argument to HHSC and the opposing party;

(5) that informal dispute resolution staff give full consideration to the information provided by the assisted living facility and DADS;

(6) that ex parte communications concerning the substance of any argument relating to a survey, inspection, investigation, visit, or statement of violations under consideration not occur between the informal dispute resolution staff and the assisted living facility or DADS; and

(7) that the assisted living facility and DADS be given a reasonable opportunity to submit arguments and information supporting the position of the assisted living facility or DADS and to respond to arguments and information presented against them.

Deletes existing text requiring that the informal dispute resolution process require any individual representing an assisted living facility in an informal dispute resolution process to register with HHSC and disclose the individual's employment history during the preceding five years, including employment in regulatory agencies of this state and other states; ownership, including the identity of the controlling person or persons, of the assisted living facility the individual is representing before HHSC; and the identity of other entities the individual represents or has represented before during the preceding 24 months.

Deletes existing Subsection (b) requiring HHSC to adopt rules to adjudicate claims in contested cases.

(b) Redesignates existing Subsection (c) as Subsection (b) and makes no further change to this subsection.

(c) Requires an assisted living facility requesting an informal dispute resolution under this section to reimburse DADS for any costs associated with DADS's preparation, copying, and delivery of information requested by the facility.

(d) Provides that a statement of violations prepared by DADS following a survey, inspection, investigation, or visit is confidential pending the outcome of the informal dispute resolution process. Authorizes information concerning the outcome of a survey, inspection, investigation, or visit to be posted on any website maintained by DADS while the dispute is pending if the posting clearly notes each finding that is in dispute.

SECTION 2. Amends Chapter 247, Health and Safety Code, by adding Subchapter E, as follows:

#### SUBCHAPTER E. ARBITRATION

Sec. 247.081. SCOPE OF SUBCHAPTER. Provides that this subchapter applies to any dispute between a facility licensed under this chapter and DADS relating to:

- (1) renewal of a license under Section 247.023 (Issuance and Renewal of License);
- (2) suspension, revocation, or denial of a license under Section 247.041 (Denial, Suspension, or Revocation of License);
- (3) assessment of a civil penalty under Section 247.045 (Civil Penalties); or
- (4) assessment of an administrative penalty under Section 247.0451 (Administrative Penalty).

Sec. 247.082. ELECTION OF ARBITRATION. (a) Authorizes an affected facility, except as provided by Subsection (d), to elect binding arbitration of any dispute to which this subchapter applies. Provides that arbitration under this subchapter is an alternative to a contested case hearing or to a judicial proceeding relating to the assessment of a civil penalty.

(b) Authorizes an affected facility to elect arbitration under this subchapter by filing the election with the court in which the lawsuit is pending and sending notice of the election to DADS and the office of the attorney general. Requires that the election be filed not later than the 10th day after the date on which the answer is due or the date on which the answer is filed, whichever is earlier. Requires an affected facility, if a civil penalty is requested after the initial filing of a Section 242.094 action through the filing of an amended or supplemental pleading, to elect arbitration not later than the 10th day after the date on which the amended or supplemental pleading is served on the affected facility or the facility's counsel.

(c) Authorizes DADS to elect arbitration under this subchapter by filing the election with the court in which the lawsuit is pending and by notifying the facility of the election not later than the date on which the facility is authorized to elect arbitration under Subsection (b).

(d) Prohibits arbitration from being used to resolve a dispute related to an affected facility that has had an arbitration award levied against it in the previous five years.

(e) Provides that if arbitration is not permitted under this subchapter or the election of arbitration is not timely filed:

(1) the court is required to dismiss the arbitration election and retain jurisdiction of the lawsuit; and

(2) the State Office of Administrative Hearings (SOAH) is required to dismiss the arbitration and does not have jurisdiction over the lawsuit.

(f) Provides that an election to engage in arbitration under this subchapter is irrevocable and binding on the facility and DADS.

Sec. 247.083. **ARBITRATION PROCEDURES.** (a) Requires that the arbitration be conducted by an arbitrator.

(b) Requires that the arbitration and the appointment of the arbitrator be conducted in accordance with rules adopted by the chief administrative law judge of SOAH. Requires the chief administrative law judge, before adopting rules under this subsection, to consult with DADS and to consider appropriate rules developed by any nationally recognized association that performs arbitration services.

(c) Requires the party that elects arbitration to pay the cost of the arbitration. Prohibits the total fees and expenses paid for an arbitrator for a day from exceeding \$1,000.

(d) Authorizes SOAH to designate a nationally recognized association that performs arbitration services to conduct arbitrations under this subchapter and to, after consultation with DADS, contract with that association for the arbitrations.

(e) Authorizes the attorney general, on request by DADS, to represent DADS in the arbitration.

Sec. 247.084. **ARBITRATOR QUALIFICATIONS.** Requires each arbitrator to be on an approved list of a nationally recognized association that performs arbitration services or be otherwise qualified as provided in the rules adopted under Section 247.083(b).

Sec. 247.085. **ARBITRATOR SELECTION.** Requires the arbitrator to be appointed in accordance with the rules adopted under Section 247.083(b).

Sec. 247.086. **ARBITRATOR DUTIES.** Requires the arbitrator to protect the interests of DADS and the facility, ensure that all relevant evidence has been disclosed to the arbitrator, DADS, and facility, and render an order consistent with this chapter and the rules adopted under this chapter.

Sec. 247.087. **SCHEDULING OF ARBITRATION.** (a) Requires the arbitrator conducting the arbitration to schedule arbitration to be held not later than the 90th day after the date the arbitrator is selected and to notify DADS and the facility of the scheduled date.

(b) Authorizes the arbitrator to grant a continuance of the arbitration at the request of DADS or facility. Prohibits the arbitrator from unreasonably denying a request for a continuance.

Sec. 247.088. **EXCHANGE AND FILING OF INFORMATION.** Requires DADS and the facility, not later than the seventh day before the first day of arbitration, to exchange and file with the arbitrator all documentary evidence not previously exchanged and filed that is relevant to the dispute, and information relating to a proposed resolution of the dispute.

Sec. 247.089. ATTENDANCE. (a) Authorizes the arbitrator to proceed in the absence of any party or representative of a party who, after notice of the proceeding, fails to be present or to obtain a postponement.

(b) Prohibits an arbitrator from making an order solely on the default of a party and requires the arbitrator to require the party who is present to submit evidence, as required by the arbitrator, before making an award.

Sec. 247.090. TESTIMONY; RECORD. (a) Authorizes the arbitrator to require witnesses to testify under oath and to require testimony under oath if requested by DADS or the facility.

(b) Requires DADS to make an electronic recording of the proceeding.

(c) Provides that an official stenographic record of the proceeding is not required, but authorizes DADS or the facility to make a stenographic record. Requires the party that makes the stenographic record to pay the expense of having the record made.

Sec. 247.091. EVIDENCE. (a) Authorizes DADS or the facility to offer evidence and requires DADS or the facility to produce additional evidence as the arbitrator considers necessary to understand and resolve the dispute.

(b) Provides that the arbitrator is the judge of the relevance and materiality of the evidence offered. Provides that strict conformity to rules applicable to judicial proceedings is not required.

Sec. 247.092. CLOSING STATEMENTS; BRIEFS. Authorizes DADS and the facility to present closing statements, but provides that the record does not remain open for written briefs unless required by the arbitrator.

Sec. 247.093. EX PARTE CONTACTS PROHIBITED. (a) Prohibits DADS and the facility, except as provided by Subsection (b), from communicating with an arbitrator other than at an oral hearing unless the parties and the arbitrator agree otherwise.

(b) Requires that any oral or written communication, other than a communication authorized under Subsection (a), from the parties to an arbitrator be directed to the association that is conducting the arbitration or, if there is no association conducting the arbitration, to SOAH for transmittal to the arbitrator.

Sec. 247.094. ORDER. (a) Authorizes the arbitrator to enter any order that may be entered by DADS, executive commissioner of HHSC, commissioner of DADS, or court under this chapter in relation to a dispute described by Section 247.081.

(b) Requires the arbitrator to enter the order not later than the 60th day after the last day of the arbitration.

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

(d) Requires that the order be in writing, be signed and dated by the arbitrator, and include a statement of the arbitrator's decision on the contested issues and DADS's and the facility's stipulations on uncontested issues.

(e) Requires the arbitrator to file a copy of the order with DADS and to notify DADS and the facility in writing of the decision.

Sec. 247.095. EFFECT OF ORDER. Provides that an order of an arbitrator under this subchapter is final and binding on all parties. Provides that except as provided by Section 247.097, there is no right to appeal.

Sec. 247.096. CLERICAL ERROR. Provides that an arbitrator, for the purpose of correcting a clerical error, retains jurisdiction of the award until the 20th day after the date of the award.

Sec. 247.097. COURT VACATING ORDER. (a) Requires a court, on a finding described by Subsection (b), to:

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

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

(b) Requires a court to vacate an arbitrator's order under Subsection (a) only on a finding that:

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

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

(3) the order exceeded the jurisdiction of the arbitrator under Section 247.094(a).

(c) Requires that the dispute, if the order is vacated, be remanded to DADS for another arbitration proceeding.

(d) Requires that a suit to vacate an arbitrator's order be filed not later than the 30th day after the date of the award, or the date the facility or DADS knew or should have known of a basis for suit under this section, but in no event later than the first anniversary of the date of the order.

(e) Provides that venue for a suit to vacate an arbitrator's order is in the county in which the arbitration was conducted.

Sec. 247.098. ENFORCEMENT OF CERTAIN ARBITRATION ORDERS FOR CIVIL PENALTIES. (a) Provides that this section applies only to a suit for the assessment of a civil penalty under Section 247.045 in which binding arbitration has been elected under this subchapter as an alternative to the judicial proceeding.

(b) Requires the district court in which the underlying suit has been filed, on application of a party to the suit, to enter a judgment in accordance with the arbitrator's order unless, within the time limit prescribed by Section 247.097(d)(2), a motion is made to the court to vacate the arbitrator's order in accordance with Section 247.097.

(c) Provides that a judgment filed under Subsection (b) is enforceable in the same manner as any other judgment of the court. Authorizes the court to award costs for an application made under Subsection (b) and for any proceedings held after the application is made.

(d) Provides that Subsection (b) does not affect the right of a party, in accordance with Section 247.097 and within the time limit prescribed by Section 247.097(d)(2), if applicable, to make a motion to the court or initiate a proceeding in court as provided by law to vacate the arbitrator's order or to vacate a judgment of the court entered in accordance with the arbitrator's order.

SECTION 3. Amends Section 531.058, Government Code, by amending Subsection (a) and adding Subsection (d), as follows:

(a) Requires that the informal dispute resolution process required to be established by HHSC by rule require:

(1) an institution or facility to request informal dispute resolution not later than the 10th calendar day after notification by the Texas Department of Human Services of the violation of a standard or standards; and

(2) HHSC to complete the process not later than:

(A) the 30th calendar day after receipt of a request from an institution or facility, other than an assisted living facility, for informal dispute resolution; or

(B) the 90th calendar day after receipt of a request from an assisted living facility for informal dispute resolution.

Deletes existing text requiring that the informal dispute resolution process require any individual representing an institution or facility in an informal dispute resolution process to register with HHSC and disclose the individual's employment history during the preceding five years, including employment in regulatory agencies of this state and other states; ownership, including the identity of the controlling person or persons, of the institution or facility the individual is representing before HHSC; and the identity of other entities the individual represents or has represented before HHSC during the previous 24 months. Makes nonsubstantive changes.

(d) Requires HHSC to use a negotiated rulemaking process and engage a qualified impartial third party as provided by Section 2009.053 (Impartial Third Parties), with the goal of adopting rules that are fair and impartial to all parties not later than January 1, 2015. Provides that this subsection expires September 1, 2015.

SECTION 4. Provides that Section 247.051, Health and Safety Code, as amended by this Act, and Section 247.081, Health and Safety Code, as added by this Act, apply only to disputes described by those sections, as amended or added, that occur on or after the effective date of this Act. Provides that a dispute that occurs before the effective date of this Act is governed by the law applicable to the dispute immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 5. Provides that this Act takes effect September 1, 2013.