

## **BILL ANALYSIS**

C.S.H.B. 33  
By: Menéndez  
Human Services  
Committee Report (Substituted)

### **BACKGROUND AND PURPOSE**

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. C.S.H.B. 33 seeks to expand such options for an assisted living facility by providing certain protections for a facility involved in the department's informal dispute resolution process and establishing certain arbitration procedures.

### **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 and 3 and to the chief administrative law judge of the State Office of Administrative Hearings in SECTION 2 of the 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.H.B. 33 amends the Health and Safety Code to specify that the purpose of the informal dispute resolution process required to be established by the Health and Human Services Commission (HHSC) is 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 and to require such process to provide for adjudication of disputes relating to such a statement, rather than disputes relating to a proposed enforcement action or related proceeding under the Assisted Living Facility Licensing Act. The bill changes the deadline for HHSC to complete the informal dispute resolution process from not later than the 30th day after the date of receipt of a request from the facility for informal dispute resolution to not later than the 90th day after receipt of such a request. The bill requires the process to require DADS, not later than the 10th business day after a facility requests an informal dispute resolution, to forward to the facility a copy of all information 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, with certain specified exclusions.

C.S.H.B. 33 requires the informal dispute resolution process to require HHSC to give full consideration to all factual arguments raised during the informal dispute resolution process that 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 that are provided by the proponent of the argument to HHSC and the opposing party and requires the process to require informal dispute resolution staff to give full consideration to the information provided by the facility and DADS. The bill requires the process to prohibit substantive ex parte communications concerning an argument relating to a survey, inspection, investigation, visit, or statement of violations under consideration between the informal dispute resolution staff and the facility or DADS and to require that the facility and DADS be given a reasonable opportunity to submit arguments and information supporting each party's position and to respond to arguments and information presented against them. The bill removes a provision requiring the process to require an individual representing the facility to register with HHSC and to disclose the individual's employment history during the preceding five years, the facility's ownership, and the identity of other entities the individual represents or represented before HHSC during the preceding 24 months. The bill removes a provision requiring HHSC to adopt rules to adjudicate claims in contested cases.

C.S.H.B. 33 requires an assisted living facility requesting an informal dispute resolution to reimburse DADS any costs associated with the department's preparation, copying, and delivery of information requested by the facility. The bill establishes 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 and authorizes the posting of information concerning the outcome of a survey, inspection, investigation, or visit on any website maintained by DADS while the dispute is pending if the posting clearly notes each finding that is in dispute.

C.S.H.B. 33 establishes arbitration procedures to address disputes between an assisted living facility and DADS relating to a license renewal, suspension, revocation, or denial or the assessment of a civil or administrative penalty under the Assisted Living Facility Licensing Act. The bill authorizes an affected facility or DADS to elect arbitration of any applicable dispute other than a dispute related to an affected facility that has had an arbitration award levied against it in the previous five years, specifies that arbitration is an alternative to either a contested case hearing or a judicial proceeding relating to the assessment of a civil penalty, and establishes filing and notification requirements and deadlines for an arbitration election. The bill requires the arbitration election and the arbitration to be dismissed by the court in which a lawsuit is pending and the State Office of Administrative Hearings (SOAH), respectively, if arbitration is not permitted or the election is not timely filed, in which case the bill vests continued jurisdiction of the lawsuit in the court. The bill makes an election to engage in arbitration irrevocable and binding on the facility and DADS.

C.S.H.B. 33 requires arbitration to be conducted by an arbitrator who is approved by a nationally recognized association that performs arbitration services or is otherwise qualified as provided in rules adopted by the chief administrative law judge of SOAH. The bill requires the arbitration and the appointment of the arbitrator to be conducted in accordance with rules adopted by the chief administrative law judge and requires the chief administrative law judge, before adopting such rules, to consult with DADS and to consider appropriate rules developed by any nationally recognized association that performs arbitration services. The bill requires the party that elects arbitration to pay the cost of arbitration and caps the total fees and expenses paid for an arbitrator at \$1,000 per day. The bill authorizes SOAH to designate a nationally recognized association that performs arbitration services to conduct arbitrations under the Assisted Living Facility Licensing Act and, after consultation from DADS, to contract with that association for the arbitrations. The bill authorizes the attorney general to represent DADS in the arbitration upon request from DADS.

C.S.H.B. 33 establishes the duties of an arbitrator, deadlines for scheduling an arbitration, an arbitrator's authority to grant continuance of an arbitration, and requirements for DADS and the facility to exchange and file certain specified information with the arbitrator. The bill authorizes the arbitrator to proceed in the absence of any party or representative of a party who, after receiving notice of the proceeding, fails either to be present or to obtain a postponement. The bill

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 before making an award. The bill sets out provisions relating to witness testimony, recordings of a proceeding, and the authority of each party to offer evidence and to present closing statements and written briefs during the arbitration process. The bill prohibits each party from communicating with the arbitrator other than at an oral hearing unless both parties and the arbitrator agree otherwise and requires any other oral or written communication from the parties to the arbitrator to be directed to the association conducting the arbitration or, if there is no association conducting the arbitration, to SOAH for transmittal to the arbitrator.

C.S.H.B. 33 authorizes the arbitrator to enter any order that may be entered by DADS, the executive commissioner of HHSC, the commissioner of DADS, or the court in relation to a dispute for which an election for arbitration may be filed and 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. The bill establishes deadline, form, and filing requirements for such an order and specifies that, for purposes of correcting a clerical error, an arbitrator retains jurisdiction of the award until the 20th day after the date of the award. The bill establishes that an order of an arbitrator is final and binding on all parties, with no right to appeal unless the order is vacated by a court. The bill requires a court, on application of a facility or DADS, to vacate an arbitrator's order on finding that the order was procured by corruption, fraud, or misrepresentation; that the decision of the arbitrator was arbitrary, capricious, or against the weight of the evidence; or that the order exceeded the arbitrator's jurisdiction. The bill requires a dispute to be remanded to DADS for another arbitration proceeding if the order is vacated and establishes filing deadlines and venue for a suit to vacate an arbitrator's order.

C.S.H.B. 33 requires the district court in which a suit for assessment of a civil penalty under the Assisted Living Facility Licensing Act in which a binding arbitration has been elected as an alternative to the judicial proceeding has been filed, on application of a party to the suit, to enter a judgment in accordance with the arbitrator's order unless a motion to vacate the arbitrator's order is made within the required time limit. The bill makes such a judgment enforceable in the same manner as any other judgment of the court and authorizes the court to award costs for application for judgment and for any proceedings held after the application is made. The bill specifies that such a judgment does not affect the right of a party to make a motion to the court or initiate a proceeding in a court to vacate the arbitrator's order or to vacate a judgment of the court entered in accordance with the arbitrator's order.

C.S.H.B. 33 amends the Government Code to require the informal dispute resolution process established by HHSC for certain long-term care facilities to require HHSC to complete the process not later than the 90th day after receipt of a request from an assisted living facility for an informal dispute resolution. The bill removes provisions requiring the process to require an individual representing an institution or facility to register with HHSC and disclose the individual's employment history during the preceding five years, ownership of the institution or facility, and the identity of other entities the individual represents or has represented before HHSC during the previous 24 months. The bill, in a temporary provision set to expire September 1, 2015, requires the executive commissioner of HHSC to use a negotiated rulemaking process and to engage a qualified impartial third party, with the goal of adopting rules that are fair and impartial to all parties not later than January 1, 2015.

### **EFFECTIVE DATE**

September 1, 2013.

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

While C.S.H.B. 33 may differ from the original in minor or nonsubstantive ways, the following comparison is organized and highlighted in a manner that indicates the substantial differences

between the introduced and committee substitute versions of the bill.

#### INTRODUCED

SECTION 1. Section 247.051, Health and Safety Code, is amended to read as follows:  
Sec. 247.051. INFORMAL DISPUTE RESOLUTION. (a) The Health and Human Services Commission by rule shall establish an informal dispute resolution process to address disputes between a facility and the department as a result of the survey review conducted by the department in accordance with this section. The process must provide for adjudication by an appropriate disinterested person of disputes relating to the results of a survey [a proposed enforcement action or related proceeding under this chapter]. The informal dispute resolution process must require:

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

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

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

(4) that, not later than the 10th business day after the date an assisted living facility requests information regarding the survey, the department forward to the assisted living facility a copy of all information that is referred to in the disputed statement of deficiency or on which a citation is based in connection with the survey, 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

#### HOUSE COMMITTEE SUBSTITUTE

SECTION 1. Section 247.051, Health and Safety Code, is amended to read as follows:  
Sec. 247.051. INFORMAL DISPUTE RESOLUTION. (a) The Health and Human Services Commission by rule shall establish an informal dispute resolution process to address disputes between a facility and the department concerning a statement of violations prepared by the department in accordance with this section. The process must provide for adjudication by an appropriate disinterested person of disputes relating to a statement of violations [a proposed enforcement action or related proceeding under this chapter]. The informal dispute resolution process must require:

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

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

(3) that, not later than the 10th business day after the date an assisted living facility requests an informal dispute resolution, the department 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;  
(5) the Health and Human Services Commission 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 department relies on to dispute or support findings in the statement of **deficiency**; and

(B) are provided by the proponent of the argument to the Health and Human Services Commission and the opposing party;

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

(7) that ex parte communications concerning the substance of any argument relating to a survey under consideration not occur between the informal dispute resolution staff and the assisted living facility or the department; and

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

(b)

~~[and disclose the following:~~

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

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

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

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

~~[(e) The Health and Human Services Commission may not delegate its~~

(E) information that is confidential by law;  
(4) the Health and Human Services Commission 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 department relies on to dispute or support findings in the statement of **violations**; and

(B) are provided by the proponent of the argument to the Health and Human Services Commission and the opposing party;

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

(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 the department; and

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

(b) [any individual representing an assisted living facility in an informal dispute resolution process to register with the Health and Human Services Commission and disclose the following:

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

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

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

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

~~[(e) The Health and Human Services Commission may not delegate its~~

responsibility to administer the informal dispute resolution process established by this section to another state agency.

(c) An assisted living facility requesting an informal dispute resolution under this section must reimburse the department any costs associated with the preparation, copying, and delivery of survey information requested by the facility.

(d) A statement of deficiency prepared by the department following a survey is confidential pending the outcome of the informal dispute resolution process.

Information concerning the outcome of a survey may be posted on any website maintained by the department while the dispute is pending if the posting clearly notes each finding that is in dispute.

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

SUBCHAPTER E. ARBITRATION

Sec. 247.081. SCOPE OF SUBCHAPTER.

This subchapter applies to any dispute between a facility licensed under this chapter and the department relating to:

- (1) renewal of a license under Section 247.023;
- (2) suspension or revocation of a license under Section 247.041;
- (3) assessment of a civil penalty under Section 247.045; or
- (4) assessment of an administrative penalty under Section 247.0451.

Sec. 247.082. ELECTION OF

ARBITRATION. (a) Except as provided by Subsection (d), an affected facility may elect binding arbitration of any dispute to which this subchapter applies. 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) An affected facility may 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 the department and the office of the attorney general. The election must be

responsibility to administer the informal dispute resolution process established by this section to another state agency.

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

(d) A statement of violations prepared by the department following a survey, inspection, investigation, or visit is confidential pending the outcome of the informal dispute resolution process.

Information concerning the outcome of a survey, inspection, investigation, or visit may be posted on any website maintained by the department while the dispute is pending if the posting clearly notes each finding that is in dispute.

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(b) An affected facility may 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 the department and the office of the attorney general. The election must 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. If a civil penalty is requested after the initial filing of a Section 242.094 lawsuit through the filing of an amended or supplemental pleading, an affected facility must 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) The department may 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 may elect arbitration under Subsection (b).

(d) Arbitration may not be used to resolve a dispute related to an affected facility that has had an award levied against it in the previous five years.

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

(1) the court shall dismiss the arbitration election and retain jurisdiction of the lawsuit; and

(2) the State Office of Administrative Hearings shall dismiss the arbitration and does not have jurisdiction over the lawsuit.

(f) An election to engage in arbitration under this subchapter is irrevocable and binding on the facility and the department.

Sec. 247.083. ARBITRATION PROCEDURES.

Sec. 247.084. ARBITRATOR QUALIFICATIONS.

Sec. 247.085. ARBITRATOR SELECTION.

Sec. 247.086. ARBITRATOR DUTIES.

Sec. 247.087. SCHEDULING OF ARBITRATION.

Sec. 247.088. EXCHANGE AND FILING OF INFORMATION.

Sec. 247.089. ATTENDANCE.

Sec. 247.090. TESTIMONY; RECORD.

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. 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, an affected facility must 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) The department may 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 may elect arbitration under Subsection (b).

(d) Arbitration may not be 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) If arbitration is not permitted under this subchapter or the election of arbitration is not timely filed:

(1) the court shall dismiss the arbitration election and retain jurisdiction of the lawsuit; and

(2) the State Office of Administrative Hearings shall dismiss the arbitration and does not have jurisdiction over the lawsuit.

(f) An election to engage in arbitration under this subchapter is irrevocable and binding on the facility and the department.

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Sec. 247.088. EXCHANGE AND FILING OF INFORMATION.

Sec. 247.089. ATTENDANCE.

Sec. 247.090. TESTIMONY; RECORD.

Sec. 247.091. EVIDENCE.

Sec. 247.092. CLOSING STATEMENTS;  
BRIEFS.

Sec. 247.093. EX PARTE CONTACTS  
PROHIBITED.

Sec. 247.094. ORDER.

Sec. 247.095. EFFECT OF ORDER.

Sec. 247.096. CLERICAL ERROR.

Sec. 247.097. COURT VACATING  
ORDER.

Sec. 247.098. ENFORCEMENT OF  
CERTAIN ARBITRATION ORDERS FOR  
CIVIL PENALTIES.

Sec. 247.091. EVIDENCE.

Sec. 247.092. CLOSING STATEMENTS;  
BRIEFS.

Sec. 247.093. EX PARTE CONTACTS  
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Sec. 247.097. COURT VACATING  
ORDER.

Sec. 247.098. ENFORCEMENT OF  
CERTAIN ARBITRATION ORDERS FOR  
CIVIL PENALTIES.

**No equivalent provision.**

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

(a) The commission by rule shall establish an informal dispute resolution process in accordance with this section. The process must provide for adjudication by an appropriate disinterested person of disputes relating to a proposed enforcement action or related proceeding of the Texas Department of Human Services under Section 32.021(d), Human Resources Code, or Chapter 242, 247, or 252, Health and Safety Code. The informal dispute resolution process must require:

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

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

(A) the 30th calendar day after receipt of a request from an [the] 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]; and  
~~[(3) any individual representing an institution or facility in an informal dispute resolution process to register with the commission and disclose the following:  
[(A) the individual's employment history during the preceding five years, including employment in regulatory agencies of this state and other states;  
[(B) ownership, including the identity of the controlling person or persons, of the institution or facility the individual is representing before the commission; and  
[(C) the identity of other entities the individual represents or has represented before the commission during the previous 24 months].~~  
(d) The commission shall use a negotiated rulemaking process and engage a qualified impartial third party as provided by Section 2009.053, with the goal of adopting rules that are fair and impartial to all parties not later than January 1, 2015. This subsection expires September 1, 2015.

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

SECTION 4. This Act takes effect September 1, 2013.

SECTION 4. Substantially the same as introduced version.

SECTION 5. Same as introduced version.