

By: Menendez

H.B. No. 33

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 concerning a statement of violations prepared by  
12 the department in accordance with this section. The process must  
13 provide for adjudication by an appropriate disinterested person of  
14 disputes relating to a statement of violations [~~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~~] day after the  
23 date of receipt of a request from the assisted living facility for  
24 informal dispute resolution; [~~and~~]

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

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

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

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

14                   (D) information that is publicly available; or

15                   (E) information that is confidential by law;

16           (4) the Health and Human Services Commission to give  
17 full consideration to all factual arguments raised during the  
18 informal dispute resolution process that:

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

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

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

27           (6) that ex parte communications concerning the

1 substance of any argument relating to a survey, inspection,  
2 investigation, visit, or statement of violations under  
3 consideration not occur between the informal dispute resolution  
4 staff and the assisted living facility or the department; and

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

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

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

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

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

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

26 [(c)] The Health and Human Services Commission may not  
27 delegate its responsibility to administer the informal dispute

1 resolution process established by this section to another state  
2 agency.

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

7 (d) A statement of violations prepared by the department  
8 following a survey, inspection, investigation, or visit is  
9 confidential pending the outcome of the informal dispute resolution  
10 process. Information concerning the outcome of a survey,  
11 inspection, investigation, or visit may be posted on any website  
12 maintained by the department while the dispute is pending if the  
13 posting clearly notes each finding that is in dispute.

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

16 SUBCHAPTER E. ARBITRATION

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

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

21 (2) suspension, revocation, or denial of a license  
22 under Section 247.041;

23 (3) assessment of a civil penalty under Section  
24 247.045; or

25 (4) assessment of an administrative penalty under  
26 Section 247.0451.

27 Sec. 247.082. ELECTION OF ARBITRATION. (a) Except as

1 provided by Subsection (d), an affected facility may elect binding  
2 arbitration of any dispute to which this subchapter applies.  
3 Arbitration under this subchapter is an alternative to a contested  
4 case hearing or to a judicial proceeding relating to the assessment  
5 of a civil penalty.

6 (b) An affected facility may elect arbitration under this  
7 subchapter by filing the election with the court in which the  
8 lawsuit is pending and sending notice of the election to the  
9 department and the office of the attorney general. The election  
10 must be filed not later than the 10th day after the date on which the  
11 answer is due or the date on which the answer is filed, whichever is  
12 earlier. If a civil penalty is requested after the initial filing of  
13 a Section 242.094 action through the filing of an amended or  
14 supplemental pleading, an affected facility must elect arbitration  
15 not later than the 10th day after the date on which the amended or  
16 supplemental pleading is served on the affected facility or the  
17 facility's counsel.

18 (c) The department may elect arbitration under this  
19 subchapter by filing the election with the court in which the  
20 lawsuit is pending and by notifying the facility of the election not  
21 later than the date on which the facility may elect arbitration  
22 under Subsection (b).

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

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

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

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

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

9           Sec. 247.083. ARBITRATION PROCEDURES. (a) The arbitration  
10 shall be conducted by an arbitrator.

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

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

21           (d) The State Office of Administrative Hearings may  
22 designate a nationally recognized association that performs  
23 arbitration services to conduct arbitrations under this subchapter  
24 and may, after consultation with the department, contract with that  
25 association for the arbitrations.

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

1       Sec. 247.084. ARBITRATOR QUALIFICATIONS. Each arbitrator  
2 must be on an approved list of a nationally recognized association  
3 that performs arbitration services or be otherwise qualified as  
4 provided in the rules adopted under Section 247.083(b).

5       Sec. 247.085. ARBITRATOR SELECTION. The arbitrator shall  
6 be appointed in accordance with the rules adopted under Section  
7 247.083(b).

8       Sec. 247.086. ARBITRATOR DUTIES. The arbitrator shall:

9           (1) protect the interests of the department and the  
10 facility;

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

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

15       Sec. 247.087. SCHEDULING OF ARBITRATION. (a) The  
16 arbitrator conducting the arbitration shall schedule arbitration  
17 to be held not later than the 90th day after the date the arbitrator  
18 is selected and shall notify the department and the facility of the  
19 scheduled date.

20           (b) The arbitrator may grant a continuance of the  
21 arbitration at the request of the department or facility. The  
22 arbitrator may not unreasonably deny a request for a continuance.

23       Sec. 247.088. EXCHANGE AND FILING OF INFORMATION. Not  
24 later than the seventh day before the first day of arbitration, the  
25 department and the facility shall exchange and file with the  
26 arbitrator:

27           (1) all documentary evidence not previously exchanged

1 and filed that is relevant to the dispute; and

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

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

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

12 Sec. 247.090. TESTIMONY; RECORD. (a) The arbitrator may  
13 require witnesses to testify under oath and shall require testimony  
14 under oath if requested by the department or the facility.

15 (b) The department shall make an electronic recording of the  
16 proceeding.

17 (c) An official stenographic record of the proceeding is not  
18 required, but the department or the facility may make a  
19 stenographic record. The party that makes the stenographic record  
20 shall pay the expense of having the record made.

21 Sec. 247.091. EVIDENCE. (a) The department or the facility  
22 may offer evidence and shall produce additional evidence as the  
23 arbitrator considers necessary to understand and resolve the  
24 dispute.

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



1       Sec. 247.092. CLOSING STATEMENTS; BRIEFS. The department  
2 and the facility may present closing statements, but the record  
3 does not remain open for written briefs unless required by the  
4 arbitrator.

5       Sec. 247.093. EX PARTE CONTACTS PROHIBITED. (a) Except as  
6 provided by Subsection (b), the department and the facility may not  
7 communicate with an arbitrator other than at an oral hearing unless  
8 the parties and the arbitrator agree otherwise.

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

15       Sec. 247.094. ORDER. (a) The arbitrator may enter any  
16 order that may be entered by the department, board, commissioner,  
17 or court under this chapter in relation to a dispute described by  
18 Section 247.081.

19       (b) The arbitrator shall enter the order not later than the  
20 60th day after the last day of the arbitration.

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

24       (d) The order must:

25               (1) be in writing;

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

27               (3) include a statement of the arbitrator's decision

1 on the contested issues and the department's and facility's  
2 stipulations on uncontested issues.

3 (e) The arbitrator shall file a copy of the order with the  
4 department and shall notify the department and the facility in  
5 writing of the decision.

6 Sec. 247.095. EFFECT OF ORDER. An order of an arbitrator  
7 under this subchapter is final and binding on all parties. Except  
8 as provided by Section 247.097, there is no right to appeal.

9 Sec. 247.096. CLERICAL ERROR. For the purpose of  
10 correcting a clerical error, an arbitrator retains jurisdiction of  
11 the award until the 20th day after the date of the award.

12 Sec. 247.097. COURT VACATING ORDER. (a) On a finding  
13 described by Subsection (b), a court shall:

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

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

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

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

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

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

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

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

5             (1) the date of the award; or

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

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

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

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

22       (c) A judgment filed under Subsection (b) is enforceable in  
23 the same manner as any other judgment of the court. The court may  
24 award costs for an application made under Subsection (b) and for any  
25 proceedings held after the application is made.

26       (d) Subsection (b) does not affect the right of a party, in  
27 accordance with Section 247.097 and within the time limit

1 prescribed by Section 247.097(d)(2), if applicable, to make a  
2 motion to the court or initiate a proceeding in court as provided by  
3 law to vacate the arbitrator's order or to vacate a judgment of the  
4 court entered in accordance with the arbitrator's order.

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

8 (a) The commission by rule shall establish an informal  
9 dispute resolution process in accordance with this section. The  
10 process must provide for adjudication by an appropriate  
11 disinterested person of disputes relating to a proposed enforcement  
12 action or related proceeding of the Texas Department of Human  
13 Services under Section 32.021(d), Human Resources Code, or Chapter  
14 242, 247, or 252, Health and Safety Code. The informal dispute  
15 resolution process must require:

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

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

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

25 (B) the 90th calendar day after receipt of a  
26 request from an assisted living facility for informal dispute  
27 resolution~~[, and~~

1           ~~[(3) any individual representing an institution or~~  
2 ~~facility in an informal dispute resolution process to register with~~  
3 ~~the commission and disclose the following.~~

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

7                   ~~[(B) ownership, including the identity of the~~  
8 ~~controlling person or persons, of the institution or facility the~~  
9 ~~individual is representing before the commission; and~~

10                   ~~[(C) the identity of other entities the~~  
11 ~~individual represents or has represented before the commission~~  
12 ~~during the previous 24 months].~~

13           (d) The commission shall use a negotiated rulemaking  
14 process and engage a qualified impartial third party as provided by  
15 Section 2009.053, with the goal of adopting rules that are fair and  
16 impartial to all parties not later than January 1, 2015. This  
17 subsection expires September 1, 2015.

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

26           SECTION 5. This Act takes effect September 1, 2013.