

By: Menendez

H.B. No. 33

A BILL TO BE ENTITLED

1 AN ACT
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) that, not later than the 10th business day after
5 the date an assisted living facility requests information regarding
6 the survey, the department forward to the assisted living facility
7 a copy of all information that is referred to in the disputed
8 statement of deficiency or on which a citation is based in
9 connection with the survey, excluding:

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

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

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

16 (D) information that is publicly available; or

17 (E) information that is confidential by law;

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

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

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

26 (6) that informal dispute resolution staff give full
27 consideration to the information provided by the assisted living

1 facility and the department;

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

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

11 (b) [~~and disclose the following:~~

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

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

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

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

24 [~~(e)]~~ The Health and Human Services Commission may not
25 delegate its responsibility to administer the informal dispute
26 resolution process established by this section to another state
27 agency.

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

5 (d) A statement of deficiency prepared by the department
6 following a survey is confidential pending the outcome of the
7 informal dispute resolution process. Information concerning the
8 outcome of a survey may be posted on any website maintained by the
9 department while the dispute is pending if the posting clearly
10 notes each finding that is in dispute.

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

13 SUBCHAPTER E. ARBITRATION

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

- 17 (1) renewal of a license under Section 247.023;
18 (2) suspension or revocation of a license under
19 Section 247.041;
20 (3) assessment of a civil penalty under Section
21 247.045; or
22 (4) assessment of an administrative penalty under
23 Section 247.0451.

24 Sec. 247.082. ELECTION OF ARBITRATION. (a) Except as
25 provided by Subsection (d), an affected facility may elect binding
26 arbitration of any dispute to which this subchapter applies.
27 Arbitration under this subchapter is an alternative to a contested

1 case hearing or to a judicial proceeding relating to the assessment
2 of a civil penalty.

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

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

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

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

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

27 (2) the State Office of Administrative Hearings shall

1 dismiss the arbitration and does not have jurisdiction over the
2 lawsuit.

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

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

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

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

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

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

25 Sec. 247.084. ARBITRATOR QUALIFICATIONS. Each arbitrator
26 must be on an approved list of a nationally recognized association
27 that performs arbitration services or be otherwise qualified as

1 provided in the rules adopted under Section 247.083(b).

2 Sec. 247.085. ARBITRATOR SELECTION. The arbitrator shall
3 be appointed in accordance with the rules adopted under Section
4 247.083(b).

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

6 (1) protect the interests of the department and the
7 facility;

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

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

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

17 (b) The arbitrator may grant a continuance of the
18 arbitration at the request of the department or facility. The
19 arbitrator may not unreasonably deny a request for a continuance.

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

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

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

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

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

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

12 (b) The department shall make an electronic recording of the
13 proceeding.

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

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

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

25 Sec. 247.092. CLOSING STATEMENTS; BRIEFS. The department
26 and the facility may present closing statements, but the record
27 does not remain open for written briefs unless required by the

1 arbitrator.

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

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

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

16 (b) The arbitrator shall enter the order not later than the
17 60th day after the last day of the arbitration.

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

21 (d) The order must:

22 (1) be in writing;

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

24 (3) include a statement of the arbitrator's decision
25 on the contested issues and the department's and facility's
26 stipulations on uncontested issues.

27 (e) The arbitrator shall file a copy of the order with the

1 department and shall notify the department and the facility in
2 writing of the decision.

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

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

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

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

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

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

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

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

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

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

27 (d) A suit to vacate an arbitrator's order must be filed not

1 later than the 30th day after:

2 (1) the date of the award; or

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

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

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

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

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

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

1 court entered in accordance with the arbitrator's order.

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

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