

1-1 By: Menendez (Senate Sponsor - Uresti) H.B. No. 33
 1-2 (In the Senate - Received from the House April 22, 2013;
 1-3 April 24, 2013, read first time and referred to Committee on Health
 1-4 and Human Services; May 13, 2013, reported favorably by the
 1-5 following vote: Yeas 8, Nays 0; May 13, 2013, sent to printer.)

1-6 COMMITTEE VOTE

	Yea	Nay	Absent	PNV
1-7 Nelson	X			
1-8 Deuell	X			
1-9 Huffman	X			
1-10 Nichols	X			
1-11 Schwertner	X			
1-12 Taylor			X	
1-13 Uresti	X			
1-14 West	X			
1-15 Zaffirini	X			

1-17 A BILL TO BE ENTITLED
 1-18 AN ACT

1-19 relating to alternative methods of dispute resolution in certain
 1-20 disputes between the Department of Aging and Disability Services
 1-21 and an assisted living facility licensed by the department.

1-22 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

1-23 SECTION 1. Section 247.051, Health and Safety Code, is
 1-24 amended to read as follows:

1-25 Sec. 247.051. INFORMAL DISPUTE RESOLUTION. (a) The Health
 1-26 and Human Services Commission by rule shall establish an informal
 1-27 dispute resolution process to address disputes between a facility
 1-28 and the department concerning a statement of violations prepared by
 1-29 the department in accordance with this section. The process must
 1-30 provide for adjudication by an appropriate disinterested person of
 1-31 disputes relating to a statement of violations [a proposed
 1-32 enforcement action or related proceeding under this chapter]. The
 1-33 informal dispute resolution process must require:

1-34 (1) the assisted living facility to request informal
 1-35 dispute resolution not later than the 10th day after the date of
 1-36 notification by the department of the violation of a standard or
 1-37 standards;

1-38 (2) the Health and Human Services Commission to
 1-39 complete the process not later than the 90th [30th] day after the
 1-40 date of receipt of a request from the assisted living facility for
 1-41 informal dispute resolution; [and]

1-42 (3) that, not later than the 10th business day after
 1-43 the date an assisted living facility requests an informal dispute
 1-44 resolution, the department forward to the assisted living facility
 1-45 a copy of all information that is referred to in the disputed
 1-46 statement of violations or on which a citation is based in
 1-47 connection with the survey, inspection, investigation, or other
 1-48 visit, excluding:

1-49 (A) the name of any complainant, witness, or
 1-50 informant;

1-51 (B) any information that would reasonably lead to
 1-52 the identification of a complainant, witness, or informant;

1-53 (C) information obtained from or contained in the
 1-54 records of the facility;

1-55 (D) information that is publicly available; or

1-56 (E) information that is confidential by law;

1-57 (4) the Health and Human Services Commission to give
 1-58 full consideration to all factual arguments raised during the
 1-59 informal dispute resolution process that:

1-60 (A) are supported by references to specific
 1-61 information that the facility or department relies on to dispute or

2-1 support findings in the statement of violations; and
2-2 (B) are provided by the proponent of the argument
2-3 to the Health and Human Services Commission and the opposing party;
2-4 (5) that informal dispute resolution staff give full
2-5 consideration to the information provided by the assisted living
2-6 facility and the department;
2-7 (6) that ex parte communications concerning the
2-8 substance of any argument relating to a survey, inspection,
2-9 investigation, visit, or statement of violations under
2-10 consideration not occur between the informal dispute resolution
2-11 staff and the assisted living facility or the department; and
2-12 (7) that the assisted living facility and the
2-13 department be given a reasonable opportunity to submit arguments
2-14 and information supporting the position of the assisted living
2-15 facility or the department and to respond to arguments and
2-16 information presented against them.
2-17 (b) [any individual representing an assisted living
2-18 facility in an informal dispute resolution process to register with
2-19 the Health and Human Services Commission and disclose the
2-20 following:
2-21 [(A) the individual's employment history during
2-22 the preceding five years, including employment in regulatory
2-23 agencies of this state and other states;
2-24 [(B) ownership, including the identity of the
2-25 controlling person or persons, of the assisted living facility the
2-26 individual is representing before the Health and Human Services
2-27 Commission; and
2-28 [(C) the identity of other entities the
2-29 individual represents or has represented before the Health and
2-30 Human Services Commission during the preceding 24 months.
2-31 [(b) The Health and Human Services Commission shall adopt
2-32 rules to adjudicate claims in contested cases.
2-33 [(c)] The Health and Human Services Commission may not
2-34 delegate its responsibility to administer the informal dispute
2-35 resolution process established by this section to another state
2-36 agency.
2-37 (c) An assisted living facility requesting an informal
2-38 dispute resolution under this section must reimburse the department
2-39 for any costs associated with the department's preparation,
2-40 copying, and delivery of information requested by the facility.
2-41 (d) A statement of violations prepared by the department
2-42 following a survey, inspection, investigation, or visit is
2-43 confidential pending the outcome of the informal dispute resolution
2-44 process. Information concerning the outcome of a survey,
2-45 inspection, investigation, or visit may be posted on any website
2-46 maintained by the department while the dispute is pending if the
2-47 posting clearly notes each finding that is in dispute.
2-48 SECTION 2. Chapter 247, Health and Safety Code, is amended
2-49 by adding Subchapter E to read as follows:
2-50 SUBCHAPTER E. ARBITRATION
2-51 Sec. 247.081. SCOPE OF SUBCHAPTER. This subchapter applies
2-52 to any dispute between a facility licensed under this chapter and
2-53 the department relating to:
2-54 (1) renewal of a license under Section 247.023;
2-55 (2) suspension, revocation, or denial of a license
2-56 under Section 247.041;
2-57 (3) assessment of a civil penalty under Section
2-58 247.045; or
2-59 (4) assessment of an administrative penalty under
2-60 Section 247.0451.
2-61 Sec. 247.082. ELECTION OF ARBITRATION. (a) Except as
2-62 provided by Subsection (d), an affected facility may elect binding
2-63 arbitration of any dispute to which this subchapter applies.
2-64 Arbitration under this subchapter is an alternative to a contested
2-65 case hearing or to a judicial proceeding relating to the assessment
2-66 of a civil penalty.
2-67 (b) An affected facility may elect arbitration under this
2-68 subchapter by filing the election with the court in which the
2-69 lawsuit is pending and sending notice of the election to the

3-1 department and the office of the attorney general. The election
 3-2 must be filed not later than the 10th day after the date on which the
 3-3 answer is due or the date on which the answer is filed, whichever is
 3-4 earlier. If a civil penalty is requested after the initial filing of
 3-5 a Section 242.094 action through the filing of an amended or
 3-6 supplemental pleading, an affected facility must elect arbitration
 3-7 not later than the 10th day after the date on which the amended or
 3-8 supplemental pleading is served on the affected facility or the
 3-9 facility's counsel.

3-10 (c) The department may elect arbitration under this
 3-11 subchapter by filing the election with the court in which the
 3-12 lawsuit is pending and by notifying the facility of the election not
 3-13 later than the date on which the facility may elect arbitration
 3-14 under Subsection (b).

3-15 (d) Arbitration may not be used to resolve a dispute related
 3-16 to an affected facility that has had an arbitration award levied
 3-17 against it in the previous five years.

3-18 (e) If arbitration is not permitted under this subchapter or
 3-19 the election of arbitration is not timely filed:

3-20 (1) the court shall dismiss the arbitration election
 3-21 and retain jurisdiction of the lawsuit; and

3-22 (2) the State Office of Administrative Hearings shall
 3-23 dismiss the arbitration and does not have jurisdiction over the
 3-24 lawsuit.

3-25 (f) An election to engage in arbitration under this
 3-26 subchapter is irrevocable and binding on the facility and the
 3-27 department.

3-28 Sec. 247.083. ARBITRATION PROCEDURES. (a) The arbitration
 3-29 shall be conducted by an arbitrator.

3-30 (b) The arbitration and the appointment of the arbitrator
 3-31 shall be conducted in accordance with rules adopted by the chief
 3-32 administrative law judge of the State Office of Administrative
 3-33 Hearings. Before adopting rules under this subsection, the chief
 3-34 administrative law judge shall consult with the department and
 3-35 shall consider appropriate rules developed by any nationally
 3-36 recognized association that performs arbitration services.

3-37 (c) The party that elects arbitration shall pay the cost of
 3-38 the arbitration. The total fees and expenses paid for an arbitrator
 3-39 for a day may not exceed \$1,000.

3-40 (d) The State Office of Administrative Hearings may
 3-41 designate a nationally recognized association that performs
 3-42 arbitration services to conduct arbitrations under this subchapter
 3-43 and may, after consultation with the department, contract with that
 3-44 association for the arbitrations.

3-45 (e) On request by the department, the attorney general may
 3-46 represent the department in the arbitration.

3-47 Sec. 247.084. ARBITRATOR QUALIFICATIONS. Each arbitrator
 3-48 must be on an approved list of a nationally recognized association
 3-49 that performs arbitration services or be otherwise qualified as
 3-50 provided in the rules adopted under Section 247.083(b).

3-51 Sec. 247.085. ARBITRATOR SELECTION. The arbitrator shall
 3-52 be appointed in accordance with the rules adopted under Section
 3-53 247.083(b).

3-54 Sec. 247.086. ARBITRATOR DUTIES. The arbitrator shall:

3-55 (1) protect the interests of the department and the
 3-56 facility;

3-57 (2) ensure that all relevant evidence has been
 3-58 disclosed to the arbitrator, department, and facility; and

3-59 (3) render an order consistent with this chapter and
 3-60 the rules adopted under this chapter.

3-61 Sec. 247.087. SCHEDULING OF ARBITRATION. (a) The
 3-62 arbitrator conducting the arbitration shall schedule arbitration
 3-63 to be held not later than the 90th day after the date the arbitrator
 3-64 is selected and shall notify the department and the facility of the
 3-65 scheduled date.

3-66 (b) The arbitrator may grant a continuance of the
 3-67 arbitration at the request of the department or facility. The
 3-68 arbitrator may not unreasonably deny a request for a continuance.

3-69 Sec. 247.088. EXCHANGE AND FILING OF INFORMATION. Not

4-1 later than the seventh day before the first day of arbitration, the
 4-2 department and the facility shall exchange and file with the
 4-3 arbitrator:

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

4-6 (2) information relating to a proposed resolution of
 4-7 the dispute.

4-8 Sec. 247.089. ATTENDANCE. (a) The arbitrator may proceed
 4-9 in the absence of any party or representative of a party who, after
 4-10 notice of the proceeding, fails to be present or to obtain a
 4-11 postponement.

4-12 (b) An arbitrator may not make an order solely on the
 4-13 default of a party and shall require the party who is present to
 4-14 submit evidence, as required by the arbitrator, before making an
 4-15 award.

4-16 Sec. 247.090. TESTIMONY; RECORD. (a) The arbitrator may
 4-17 require witnesses to testify under oath and shall require testimony
 4-18 under oath if requested by the department or the facility.

4-19 (b) The department shall make an electronic recording of the
 4-20 proceeding.

4-21 (c) An official stenographic record of the proceeding is not
 4-22 required, but the department or the facility may make a
 4-23 stenographic record. The party that makes the stenographic record
 4-24 shall pay the expense of having the record made.

4-25 Sec. 247.091. EVIDENCE. (a) The department or the facility
 4-26 may offer evidence and shall produce additional evidence as the
 4-27 arbitrator considers necessary to understand and resolve the
 4-28 dispute.

4-29 (b) The arbitrator is the judge of the relevance and
 4-30 materiality of the evidence offered. Strict conformity to rules
 4-31 applicable to judicial proceedings is not required.

4-32 Sec. 247.092. CLOSING STATEMENTS; BRIEFS. The department
 4-33 and the facility may present closing statements, but the record
 4-34 does not remain open for written briefs unless required by the
 4-35 arbitrator.

4-36 Sec. 247.093. EX PARTE CONTACTS PROHIBITED. (a) Except as
 4-37 provided by Subsection (b), the department and the facility may not
 4-38 communicate with an arbitrator other than at an oral hearing unless
 4-39 the parties and the arbitrator agree otherwise.

4-40 (b) Any oral or written communication, other than a
 4-41 communication authorized under Subsection (a), from the parties to
 4-42 an arbitrator shall be directed to the association that is
 4-43 conducting the arbitration or, if there is no association
 4-44 conducting the arbitration, to the State Office of Administrative
 4-45 Hearings for transmittal to the arbitrator.

4-46 Sec. 247.094. ORDER. (a) The arbitrator may enter any
 4-47 order that may be entered by the department, board, commissioner,
 4-48 or court under this chapter in relation to a dispute described by
 4-49 Section 247.081.

4-50 (b) The arbitrator shall enter the order not later than the
 4-51 60th day after the last day of the arbitration.

4-52 (c) The arbitrator shall base the order on the facts
 4-53 established at arbitration, including stipulations of the parties,
 4-54 and on the law as properly applied to those facts.

4-55 (d) The order must:

4-56 (1) be in writing;

4-57 (2) be signed and dated by the arbitrator; and

4-58 (3) include a statement of the arbitrator's decision
 4-59 on the contested issues and the department's and facility's
 4-60 stipulations on uncontested issues.

4-61 (e) The arbitrator shall file a copy of the order with the
 4-62 department and shall notify the department and the facility in
 4-63 writing of the decision.

4-64 Sec. 247.095. EFFECT OF ORDER. An order of an arbitrator
 4-65 under this subchapter is final and binding on all parties. Except
 4-66 as provided by Section 247.097, there is no right to appeal.

4-67 Sec. 247.096. CLERICAL ERROR. For the purpose of
 4-68 correcting a clerical error, an arbitrator retains jurisdiction of
 4-69 the award until the 20th day after the date of the award.

5-1 Sec. 247.097. COURT VACATING ORDER. (a) On a finding
 5-2 described by Subsection (b), a court shall:

5-3 (1) on application of a facility, vacate an
 5-4 arbitrator's order with respect to an arbitration conducted at the
 5-5 election of the department; or

5-6 (2) on application of the department, vacate an
 5-7 arbitrator's order with respect to an arbitration conducted at the
 5-8 election of a facility.

5-9 (b) A court shall vacate an arbitrator's order under
 5-10 Subsection (a) only on a finding that:

5-11 (1) the order was procured by corruption, fraud, or
 5-12 misrepresentation;

5-13 (2) the decision of the arbitrator was arbitrary or
 5-14 capricious and against the weight of the evidence; or

5-15 (3) the order exceeded the jurisdiction of the
 5-16 arbitrator under Section 247.094(a).

5-17 (c) If the order is vacated, the dispute shall be remanded
 5-18 to the department for another arbitration proceeding.

5-19 (d) A suit to vacate an arbitrator's order must be filed not
 5-20 later than the 30th day after:

5-21 (1) the date of the award; or

5-22 (2) the date the facility or department knew or should
 5-23 have known of a basis for suit under this section, but in no event
 5-24 later than the first anniversary of the date of the order.

5-25 (e) Venue for a suit to vacate an arbitrator's order is in
 5-26 the county in which the arbitration was conducted.

5-27 Sec. 247.098. ENFORCEMENT OF CERTAIN ARBITRATION ORDERS FOR
 5-28 CIVIL PENALTIES. (a) This section applies only to a suit for the
 5-29 assessment of a civil penalty under Section 247.045 in which
 5-30 binding arbitration has been elected under this subchapter as an
 5-31 alternative to the judicial proceeding.

5-32 (b) On application of a party to the suit, the district
 5-33 court in which the underlying suit has been filed shall enter a
 5-34 judgment in accordance with the arbitrator's order unless, within
 5-35 the time limit prescribed by Section 247.097(d)(2), a motion is
 5-36 made to the court to vacate the arbitrator's order in accordance
 5-37 with Section 247.097.

5-38 (c) A judgment filed under Subsection (b) is enforceable in
 5-39 the same manner as any other judgment of the court. The court may
 5-40 award costs for an application made under Subsection (b) and for any
 5-41 proceedings held after the application is made.

5-42 (d) Subsection (b) does not affect the right of a party, in
 5-43 accordance with Section 247.097 and within the time limit
 5-44 prescribed by Section 247.097(d)(2), if applicable, to make a
 5-45 motion to the court or initiate a proceeding in court as provided by
 5-46 law to vacate the arbitrator's order or to vacate a judgment of the
 5-47 court entered in accordance with the arbitrator's order.

5-48 SECTION 3. Section 531.058, Government Code, is amended by
 5-49 amending Subsection (a) and adding Subsection (d) to read as
 5-50 follows:

5-51 (a) The commission by rule shall establish an informal
 5-52 dispute resolution process in accordance with this section. The
 5-53 process must provide for adjudication by an appropriate
 5-54 disinterested person of disputes relating to a proposed enforcement
 5-55 action or related proceeding of the Texas Department of Human
 5-56 Services under Section 32.021(d), Human Resources Code, or Chapter
 5-57 242, 247, or 252, Health and Safety Code. The informal dispute
 5-58 resolution process must require:

5-59 (1) an [the] institution or facility to request
 5-60 informal dispute resolution not later than the 10th calendar day
 5-61 after notification by the department of the violation of a standard
 5-62 or standards; and

5-63 (2) the commission to complete the process not later
 5-64 than:

5-65 (A) the 30th calendar day after receipt of a
 5-66 request from an [the] institution or facility, other than an
 5-67 assisted living facility, for informal dispute resolution; or

5-68 (B) the 90th calendar day after receipt of a
 5-69 request from an assisted living facility for informal dispute

6-1 resolution~~[, and~~
6-2 ~~[(3) any individual representing an institution or~~
6-3 ~~facility in an informal dispute resolution process to register with~~
6-4 ~~the commission and disclose the following:~~

6-5 ~~[(A) the individual's employment history during~~
6-6 ~~the preceding five years, including employment in regulatory~~
6-7 ~~agencies of this state and other states,~~

6-8 ~~[(B) ownership, including the identity of the~~
6-9 ~~controlling person or persons, of the institution or facility the~~
6-10 ~~individual is representing before the commission; and~~

6-11 ~~[(C) the identity of other entities the~~
6-12 ~~individual represents or has represented before the commission~~
6-13 ~~during the previous 24 months].~~

6-14 (d) The commission shall use a negotiated rulemaking
6-15 process and engage a qualified impartial third party as provided by
6-16 Section 2009.053, with the goal of adopting rules that are fair and
6-17 impartial to all parties not later than January 1, 2015. This
6-18 subsection expires September 1, 2015.

6-19 SECTION 4. Section 247.051, Health and Safety Code, as
6-20 amended by this Act, and Section 247.081, Health and Safety Code, as
6-21 added by this Act, apply only to disputes described by those
6-22 sections, as amended or added, that occur on or after the effective
6-23 date of this Act. A dispute that occurs before the effective date
6-24 of this Act is governed by the law applicable to the dispute
6-25 immediately before the effective date of this Act, and that law is
6-26 continued in effect for that purpose.

6-27 SECTION 5. This Act takes effect September 1, 2013.

6-28 * * * * *