

BILL ANALYSIS

C.S.H.B. 4110
By: Guillen
Human Services
Committee Report (Substituted)

BACKGROUND AND PURPOSE

Long-term care providers are charged with the well-being of some of Texas' most vulnerable citizens, including senior citizens and those with intellectual or developmental disabilities. Penalties for violations of relevant Texas law while caring for these individuals should be carefully considered and adjusted to fit individual circumstances. At the same time, Texas law on the subject should be clear and avoid imposing needless burdens. C.S.H.B. 4110 seeks to address unclear, ambiguous, and repetitive language in Texas law relating to administrative penalties and procedures with respect to certain long-term care providers and to provide for the establishment of a task force by the Health and Human Services Commission (HHSC) that is charged with making recommendations to the legislature on related improvements to HHSC rules and policies applicable to services provided under certain Medicaid waiver programs.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that this bill does not expressly grant any additional rulemaking authority to a state officer, department, agency, or institution.

ANALYSIS

C.S.H.B. 4110 amends the Human Resources Code to prohibit the Health and Human Services Commission (HHSC) from assessing an administrative penalty against a provider participating in the home and community-based services (HCS) Medicaid waiver program or the Texas home living (TxHmL) Medicaid waiver program for minor violations of any law or rule relating to the programs unless those violations are of a continuing nature or are not corrected by the provider.

C.S.H.B. 4110 repeals a requirement for the executive commissioner of HHSC to consider certain factors in determining the types of violations that warrant imposition of an administrative penalty and in establishing the schedule of progressive administrative penalties and penalty amounts with respect to HCS and TxHmL Medicaid waiver program providers. Instead, the bill revises the provision providing for the executive commissioner's duty to specify by rule the violations that warrant the imposition of an administrative penalty and to develop a penalty schedule by incorporating in substantially the same manner certain of those repealed provisions as applicable to each of those tasks as follows:

- requires both the specification of violations and the schedule of penalties to be based on:
 - the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation and the hazard created by the violation to the health and safety of an individual; and

- whether the provider had identified the violation as part of the provider's internal quality assurance process and made appropriate progress on correcting the identified violation; and
- additionally requires the schedule of penalties to be based on:
 - the provider's history of previous violations;
 - the amount necessary to deter future violations;
 - other than for a violation identified as part of the provider's internal quality assurance process, the provider's effort to correct the violation; and
 - any other matters that justice may require.

The bill removes the requirement that the executive commissioner consult with appropriate stakeholders before adopting such rules and, with respect to the schedule of penalties, replaces the requirement that the schedule consists of progressive administrative penalties in accordance with the relative type, frequency, and seriousness of a violation with the requirement that the schedule consist of appropriate and graduated penalties for each violation.

C.S.H.B. 4110, with respect to the rules regarding administrative penalties applicable to HCS and TxHmL Medicaid waiver program providers, establishes an exception from the requirement for the rules to provide that a provider commits a separate violation each day the provider continues to violate the law or rule by further requiring the rules to provide that each day of a violation occurring before the day on which the provider receives written notice of the violation from HHSC does not constitute a separate violation and is considered to be one violation. The bill removes the requirement that the rules ensure standard and consistent interpretation of service delivery rules and consistent application of administrative penalties throughout Texas. The bill replaces the requirement that the executive commissioner develop, on adoption of the rules, interpretive guidelines for regulatory staff and providers regarding the imposition of administrative penalties with the requirement that the executive commissioner maintain such interpretive guidelines.

C.S.H.B. 4110 revises notice requirements with respect to administrative penalties applicable to HCS and TxHmL Medicaid waiver program providers in the following manner:

- changes the date after which HHSC must by rule provide a reasonable period of time to a provider who has implemented a plan of correction to correct a violation before HHSC may assess an administrative penalty from the date HHSC sends notice of the violation to the provider to the first day of the violation;
- removes the prohibition against such a reasonable period of time being less than 45 days;
- conditions HHSC's authority to address an administrative penalty without providing a reasonable period of time to correct the violation on HHSC providing written notice of the violation to the provider;
- removes the following circumstances under which HHSC may assess an administrative penalty without providing a provider a reasonable period of time to correct the violation:
 - the violation represents a pattern of violation that results in actual harm;
 - the violation is widespread in scope and either results in actual harm or constitutes a potential for actual harm;
 - the violation constitutes an immediate threat to the health or safety of a recipient;
 - or
 - the violation substantially limits the provider's ability to provide care; and
- instead includes among the circumstances under which HHSC may assess an administrative penalty without providing the provider a reasonable period of time to correct the violation if the violation results in serious harm or death or the violation constitutes a serious threat to health or safety and was not corrected by the provider or the provider has not made demonstrable progress toward correcting the violation before receiving the notice of the violation from HHSC.

The bill repeals provisions defining "actual harm," "immediate threat to the health or safety of a recipient," "pattern of violation," "recipient," and "widespread in scope" for purposes of those provisions.

C.S.H.B. 4110 establishes, for purposes of administrative penalties applicable to HCS and TxHmL Medicaid waiver program providers, that the date of correction is the date identified by the provider and submitted to HHSC with evidence of the correction and establishes that penalties do not accrue for a violation until a provider receives written notice of the violation and of all elements of the violation that must be corrected by the provider to achieve compliance.

C.S.H.B. 4110 requires HHSC to provide an amount of time determined sufficient by HHSC for the service planning team to modify the service plan before imposing an administrative penalty if HHSC identifies a violation resulting from a deficiency of services authorized in a service plan, including potential hazards to the health and safety of an individual. This requirement applies notwithstanding requirements for a provider to notify the service planning team of a significant change in condition. The bill authorizes HHSC to waive or reduce any applicable penalty if it determines that strict enforcement of the rule or law would impose a hardship or otherwise not be in the best interest of persons supported by the provider. The bill's provisions regarding administrative penalties applicable to HCS and TxHmL Medicaid waiver program providers apply only to a violation that occurs on or after the bill's effective date.

C.S.H.B. 4110 repeals a provision establishing the expiration of provisions providing for an amelioration process in lieu of HHSC demanding payment for administrative penalty applicable to a HCS or TxHmL Medicaid waiver program provider. The bill replaces a prohibition against HHSC offering amelioration to a provider for a violation that resulted in hazard to the health or safety of a recipient, including serious harm or death, or that substantially limits the provider's ability to provide care with a prohibition against HHSC offering amelioration to a provider for a violation that resulted in serious harm to or death of a recipient.

C.S.H.B. 4110 requires HHSC to establish the home and community-based services waiver program regulation task force to review all rules and policies adopted by HHSC that are applicable to services provided under the HCS and TxHmL Medicaid waiver programs and to provide to the executive commissioner recommendations on clarifying the rules and policies, reducing administrative burdens, and repealing or reversing any duplicative or conflicting rules or policies that are not required by state or federal law. The bill requires the executive commissioner to appoint the task force's members not later than December 1, 2023, with representatives of the HCS and TxHmL Medicaid waiver program providers and representatives of appropriate health and human services agency functions, including regulatory, waiver, and billing functions. The bill requires HHSC to prepare and submit a report to the legislature not later than December 1, 2024, that includes the task force's recommendations and any administrative changes made by HHSC as a result of those recommendations. The bill's task force provisions expire September 1, 2025.

C.S.H.B. 4110 repeals the following provisions of the Human Resources Code:

- Sections 161.089(d) and (h); and
- Section 161.0891(h).

EFFECTIVE DATE

On passage, or, if the bill does not receive the necessary vote, September 1, 2023.

COMPARISON OF INTRODUCED AND SUBSTITUTE

While C.S.H.B. 4110 may differ from the introduced in minor or nonsubstantive ways, the following summarizes the substantial differences between the introduced and committee substitute versions of the bill.

The substitute omits provisions from the introduced that did the following with respect to administrative penalties applicable to an HCS or TxHmL Medicaid waiver program provider:

- prohibited HHSC, after assessing an administrative penalty against a provider for a violation of a law or rule, from recouping past payments from the provider for a violation of the same law or rule;
- excepted HHSC from the prohibition against imposing a payment hold against, recouping past payments from, or otherwise withholding contract payments from the provider for the same violation of a law or rule that was the subject of an administrative penalty if the provider has committed fraud, waste, or abuse; and
- authorizing HHSC to impose a referral hold in lieu of an administrative penalty against a provider.

Both the introduced and the substitute change the date after which HHSC must by rule provide a reasonable period of time to a provider who has implemented a plan of correction to correct a violation before HHSC may assess an administrative penalty from the date HHSC sends notice of the violation to the provider under current law, but the bill versions differ in their approaches. The introduced changed this date to the date HHSC sends written notice to the provider of the violation, whereas the substitute changes the date to the first day of the violation. The substitute removed a prohibition against this period being less than 45 days, which was not removed by the introduced.

While both the introduced and the substitute revise the circumstances under which HHSC may assess an administrative penalty without providing a reasonable period of time to correct the violation, the bill versions differ with respect to one circumstance. The introduced included among such circumstances the violation resulting in actual harm or death, whereas the substitute includes among such circumstances the violation resulting in serious harm or death.

While both the introduced and the substitute require HHSC to provide an applicable service planning team sufficient time to modify a service plan before imposing an administrative penalty with respect to a violation HHSC identifies resulting from a deficiency of services authorized in the service plan, the substitute specifies the time considered sufficient is a determination made by HHSC, and the introduced did not include that specification.

The substitute includes provisions absent from the introduced that do the following:

- repeal a provision requiring the executive commissioner to consider certain factors in determining the types of violations that warrant imposition of an administrative penalty and in establishing the schedule of progressive administrative penalties and penalty amounts with respect to HCS and TxHmL Medicaid waiver program providers; and
- establish that the bill's provisions regarding administrative penalties of certain providers apply only to a violation that occurs on or after the bill's effective date.

Both the introduced and the substitute provide for the creation of a task force, but the bill versions differ in the follow manner:

- whereas the introduced named the task force as the home and community-based services waiver regulations taskforce, the substitute names the task force as the home and community-based services waiver program regulation task force;
- whereas the introduced required the task force to review all rules, regulations, and policies applicable to home and community-based services, the substitute instead directs the task force to review all rules and policies adopted by HHSC that are applicable to services provided under the HCS and TxHmL Medicaid waiver programs; and
- the introduced set the task force provisions to expire January 1, 2026, and the substitute sets those provisions to expire on September 1, 2025.