

**SUBJECT:** Administrative penalties for personal care homes

**COMMITTEE:** Human Services — committee substitute recommended

**VOTE:** 9 ayes — Naishtat, Maxey, Chavez, Christian, J. Davis, Noriega, Telford, Truitt, Wohlgemuth

0 nays

**SENATE VOTE:** On final passage, April 15 — voice vote

**WITNESSES:** For — Wilhelmina Gladden, American Association of Retired Persons; Lauralee Harris, Mental Health Association of Tarrant County; Aaryce Hayes, Advocacy, Inc.

Against — Sid Rich, Texas Association of Residential Care Communities

On — Marc Gold and Jim Lehrman, Texas Department of Human Services; Tim Graves, Texas Health Care Association; John Willis, Texas Department on Aging

**BACKGROUND:** The Texas Department of Human Services (DHS) has regulated personal care facilities since about 1990. These establishments furnish food, shelter, and personal care services to four or more persons who are unrelated to the proprietor. Personal care services are defined as:

- ! help with meals, dressing, movement, bathing, or other personal needs;
- ! administration of medication; or
- ! general supervision or oversight of the physical and mental well-being of a person.

Personal care homes meeting this definition must be licensed. “Legally unlicensed” personal care homes provide similar services in establishments for three or fewer persons or provide similar services to four or more people through a home health model, in which a licensed home health agency is contracted to provide services. The number of legally unlicensed facilities in Texas is estimated at as many as 4,000.

In fiscal 1997, DHS identified 774 *illegally* unlicensed personal care homes and estimated that there could be as many as 2,000 such facilities.

DIGEST:

CSSB 200 would authorize DHS to assess administrative penalties against a personal care facility or to require a personal care facility to use some or all of the penalty amounts to ameliorate the violation or to improve services. It also would require DHS to give personal care facilities 45 days to correct a violation and to give alleged violators a right to a hearing.

**Administrative penalties.** DHS could assess a penalty against a person who:

- ! violated a law, rule, standard, or order relating to personal care homes;
- ! made a false statement on a license application or on a matter under investigation by DHS;
- ! refused to allow a DHS representative to inspect facility records or premises;
- ! wilfully interfered with enforcement or with preservation of evidence; or
- ! failed to pay a penalty by the 30th day after the penalty assessment was final.

DHS could assess penalties up to \$5,000 for each violation, except for violations of resident rights, which could not exceed \$1,000 per violation. The DHS board could establish gradations of penalties in accordance with the seriousness of the violation.

**Right to correct.** DHS could not collect an administrative penalty from a facility if the facility corrected the violation within 45 days of receiving notice of the violation. A right to correct would not apply to:

- ! violations that resulted in serious resident harm, threat to safety, or death;
- ! cases that would limit substantially the facility's capacity to provide care;
- ! violations of resident rights; or
- ! violations caused by false statements, refusals to allow DHS inspections, wilful interference with DHS enforcement, and failure to pay other penalties.

**Reports and notices.** DHS could issue a preliminary report to facilities stating the facts on which a violation had occurred and could state the amount

of the penalty. DHS would have to give written notice to the person charged with the violation not later than the 10th day after the date on which the report was issued. The notice would have to include a summary of charges, amount of recommended penalty, a statement of whether the violation was subject to correction, and a statement that the person had a right to a hearing.

By the 20th day after which the notice was sent, the person could give written consent to the report, make a written request for a hearing, or submit a plan of correction. The bill would specify DHS procedures regarding corrections.

If DHS assessed a penalty, the agency would have to give written notice to the person charged.

**Hearings.** Hearings would have to be held before an administrative law judge, who would issue to the commissioner a written decision and a recommendation regarding the amount of the proposed penalty, if a penalty was warranted. The commissioner then could find the violation to have occurred or not to have occurred, based on the findings and conclusions of the administrative law judge.

**Penalty payment.** A person charged with a penalty would have to pay the full amount or file a petition for a judicial review within 30 days. DHS could permit penalties to be paid in installments or to be used in part or in whole to ameliorate the violation.

Penalties not paid would be subject to interest, and DHS could refer the matter to the Attorney General's Office for collection.

The bill would take effect September 1, 1999.

**SUPPORTERS  
SAY:**

CSSB 200 would give DHS the tools it needs to enforce state laws and standards on personal care facilities, thereby ensuring the safety of the many elderly and disabled adults who rely on these facilities for care. Personal care homes, both licensed and unlicensed, have been found to have wide-ranging problems in meeting the health and safety needs of their residents.

Personal care homes, also called assisted living facilities, are the fastest growing segment of the health care industry. Their growth matches the aging of the population and the preference of consumers to live in non-institutional

residences that can assist them in minor daily living activities, should the need arise. The freedom to come and go as they choose, use their own physicians, and furnish their own rooms makes such facilities attractive to many senior citizens.

Personal care homes also are a primary residential alternative to institutions for persons with mental illness and mental retardation.

Currently, the only two options DHS has to handle violations are to close down the facility or to allow it to continue to operate and refer the case to the attorney general. Consumers complain that it is hard to get DHS to take action because the agency has so few tools with which to respond, and that even for life-threatening situations, it can take months to close a facility. However, closure is too extreme for most violations and would force residents to move and find a new home.

Administrative penalties are used commonly and widely in state regulation of professionals and facilities in Texas and in other states. This bill would not increase the industry's costs. Only facilities that violated state rules or laws would risk incurring higher expenses due to fines and needed corrections. Also, CSSB 200 would give DHS flexibility to require a correction rather than imposing a penalty, a routine practice in nursing home regulation.

A \$5,000 penalty is an appropriate maximum fine for personal care homes because it is big enough to get the attention of the operator but low enough to account for a typical personal care home's revenues and potential to harm residents, who are less needy and vulnerable than nursing home residents.

The administrative penalties proposed in this bill are significantly lower and less stringent than those imposed on nursing homes, as they should be. For example, nursing homes can be subject to a \$10,000 fine and fines for each day of continuing violations. Also, nursing homes that fail to maintain corrections made in their facility for a year can receive a triple penalty for a subsequent violation.

Because of a philosophy promoted by most personal care homes called "aging in place," personal care home residents may be fully competent when they first move into a facility but become more vulnerable and needy as they age in the home. Also, the move to a personal care facility is a major life change

for most elderly people, who often resist or delay moving out of an unsatisfactory home once they have settled in. Administrative penalties, in tandem with appropriate laws and rules, would ensure that this increasingly vulnerable population has adequate state oversight.

As the industry grows and as residents age in their personal care homes, the potential for harm and the need to have appropriate state oversight also will grow to safeguard residents' health and safety and to ensure that they receive the care and services they need.

Other bills considered this session would address problems associated with unlicensed facilities. One, SB 93 by Moncrief, would require DHS to identify those facilities and develop a compliance plan. Many facilities are legally unlicensed because the state has exempted small facilities from licensure. Until such facilities are placed under the authority of DHS, the agency can do little to enforce their quality of care.

OPPONENTS  
SAY:

Personal care homes should not be subject to administrative penalties because, unlike nursing homes, most of their residents are not vulnerable, incapacitated, incompetent, or totally dependent upon caregiving. Personal care homes are a clean industry with few problems. Residents always can leave a personal care home that does not meet their standards, and the state should not interfere with someone's choice of residence.

Also, there is no evidence that financial penalties or the threat thereof makes facilities operate better. If anything, the threat of closure is a more powerful enforcer than the threat of a fine. If the state wants to refine its enforcement tools, it should focus on judging outcomes of care, not on whether facilities meet certain rigid requirements.

Chances are highly unlikely that DHS would allow facilities to correct their problems in lieu of a fine.

This bill inappropriately would focus on licensed facilities instead of on the unlicensed ones. Licensed facilities tend to be law-abiding, and they do not need any more regulation or oversight. Rather than giving DHS more authority to regulate, the agency should be directed to do more to identify unlicensed facilities and to prosecute them or force them to comply with state rules.

The more the state regulates businesses, the higher their costs. For personal care homes, this would be harmful. They are largely supported by private paying residents, not by government programs. If their costs become too high and facilities have to close, both consumers and business will lose.

OTHER  
OPPONENTS  
SAY:

DHS should be authorized to impose a penalty for each day a violation continues. This type of penalty is necessary to make sure problems are corrected promptly. An operator has no incentive to fix a problem if the operator knows that the fine will be \$5,000 regardless of when it is fixed.

The maximum administrative penalty amount should be raised to \$10,000 to give DHS a wide range with which to address severe violations. This is especially necessary because DHS does not have the authority to impose a penalty for each day of a continuing violation.

Personal care facilities that correct their violations should have to maintain the correction for at least a full year or incur a penalty for a subsequent violation equal to three times the amount of the original penalty. This measure is necessary to make sure that personal care homes do not take advantage of the correction alternative to operate in continual violation of state regulations once DHS inspectors have left the facility.

NOTES:

Major changes made by the House committee substitute to the Senate version of the bill include:

- ! removing a provision that personal care facilities that corrected their violations would have to maintain the correction for at least a full year or incur a penalty for a subsequent violation equal to three times the amount of the original penalty assessed but not collected; and
- ! removing provisions that would have authorized DHS to assess monetary penalties under the agency's authority under personal care home laws and Medicaid program laws.

Four related bills by Moncrief have passed both houses and been sent to the governor:

- ! SB 93, which would regulate personal care facilities as assisted living facilities;
- ! SB 94, relating to the regulation of home health agencies;

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- ! SB 95, relating to studies on the delivery of long-term care and community services; and
- ! SB 96, relating to the transfer of licensing and regulation of home health agencies from the Texas Department of Health to DHS.