

- SUBJECT:** Regulating assisted living facilities
- COMMITTEE:** Public Health — favorable, with amendments
- VOTE:** 9 ayes — Gray, Coleman, Capelo, Delisi, Glaze, Hilderbran, Maxey, McClendon, Uresti
- 0 nays
- SENATE VOTE:** On final passage, March 18 — 30-0 (Harris, present, not voting)
- WITNESSES:** For — Teresa Aguirre, Texas Association of Homes and Services for the Aging; Diana Deaton, Texas Assisted Living Association; Lauralee Harris, Mental Health Association of Tarrant County; Aaryce Hayes, Advocacy, Inc.; “Mat” C.W. Mathews, Texas Organization of Residential Care Homes; Mauro Reyna, AARP
- Against — Bill Ford; Dr. W.N. Laine, Jr; Pat Nelson, Kay Pace, Unlimited Care of Texas, Inc.; Sid Rich, Texas Association of Residential Care Communities; Johnny I. St. Clair
- On — Marc Gold, Texas Department of Human Services; Cindy Knox, R.D., L.D., Texas Dietetic Association
- BACKGROUND:** The Texas Department of Human Services (DHS) has been regulating personal care facilities since about 1990. These are defined as establishments that furnish food, shelter, and personal care services to four or more persons who are unrelated to the proprietor. Personal care services are defined as:
- ! assistance with meals, dressing, movement, bathing or, other personal needs,
 - ! the administration of medication, or
 - ! the general supervision or oversight of the physical and mental well-being of a person.
- Personal care homes meeting this definition must be licensed. Facilities may apply for a provisional license, which allows them six months to come into compliance with health and safety code and other requirements. Provisional

licenses are not available to homes that come to the agency's attention due to a complaint.

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

"Legally unlicensed homes" refers to personal care homes that provide similar services in establishments for three or fewer persons or that 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 is estimated to run as high as 4,000.

There is no commonly accepted definition for "assisted living facilities." They are not specifically regulated by the federal government and are regulated by Texas if they meet the statutory definition of a personal care home. "Assisted living" has been used to describe residential care settings that offer varying levels of assistance in activities of daily living. It implies two common elements: 1) the residential setting is neither a single-family dwelling nor a nursing home, and 2) the central goal of the residential situation is to maximize an individual's independence.

Services provided also vary, but tend to fall within three categories:

- ! personal care, such as bathing, toileting, eating, and medication reminders;
- ! support services, such as transportation, recreational planning, and grocery shopping; and
- ! specialized care, such as home health care or services focused on a particular condition, such as Alzheimer's Disease.

One frequent component of assisted living facilities is the attempt to allow an individual "to age in place," i. e., to receive an increasing amount of assistance as needed as the individual ages and becomes less capable of self-care.

Most assisted living facilities are small, often converted residences or other buildings that accommodate only a few residents. However, there are many large facilities that offer individual living units, sometimes grouped according to the level of assisted care required by the residents. Although most of the

larger facilities were built for that purpose, some of them are converted apartments, hotels, and other types of buildings.

About 90 percent of the assisted living residents pay costs through their own personal funds (private pay). Other sources of funding include Medicaid, Supplemental Security Income and state or local subsidies, primarily to licensed personal care homes through various health and human services programs.

“Home health agencies” are licensed and regulated by the Texas Department of Health (TDH) and are defined as entities that provide “home health, hospice or personal assistance services for pay or other consideration in the client’s residence, an independent living environment, or another appropriate location.” Since Medicare is the primary payer for acute-care home health services in Texas, many home health agencies also meet Medicare certification requirements.

DIGEST:

SB 93 would amend the laws regulating personal care facilities, which would be referred to instead as “assisted living facilities.” Assisted living facilities would be defined as establishments that furnish, in one or more facilities, food, shelter, and personal care services to four or more people who are unrelated to the proprietor. The bill would state that the legislative intent of the bill is to ensure that assisted living facilities deliver the highest possible quality of care.

The DHS board also would have to establish a license for assisted living facilities that provide only medication supervision. Facilities that are not required to be licensed could not use the term “assisted living facility” in reference to their operations, unless they obtained a license. Facilities that would be exempt from regulation include boarding facilities and personal care facilities that only provide services to clients of the Texas Department of Mental Health and Mental Retardation.

The bill would enact new requirements on unlicensed facilities that provide sleeping accommodations and, through contract, home health services to two or more residents, at least 80 percent of whom are at least 65 years of age or disabled.

These facilities would have to execute contracts with each resident, which would have to state specific provisions including:

- ! the licensure status of the establishment;
- ! the name and mailing address of at least one person authorized to act on behalf of the owner or management and of any health care provider providing services under contract with the establishment;
- ! fee schedules, billing and payment procedures, and provisions guaranteeing written notice of fee changes; and
- ! a description of the complaint resolution process.

SB 93 also would newly authorize the department to include in its regulation consideration of the “controlling persons” of the facility, which would be defined as a person who has the ability, directly or indirectly, to influence or direct the expenditure of money, management, or policies of the assisted living facility. The department also would be authorized to require from license applicants or holders information relating to the license holders’ or controlling persons’ compliance with regulatory requirements in other states.

A report or document prepared by DHS relating to the regulation of an assisted living facility would not be admissible as evidence in a civil action to prove the facility violated a state standard, except:

- ! if the state or political subdivision of the state was a party to the action; or
- ! if the documents were offered to establish warning or notice to an assisted living facility of a department determination; or
- ! as allowed by rule under the Texas Rules of Evidence.

The provision also would not prohibit or limit the testimony of a department employee as to observations, factual findings, conclusions or determinations that the facility violated a standard. It would not prohibit or limit the use of department reports in depositions or discovery in connection with a civil action if use of the reports appears reasonably calculated to lead to the discovery of admissible evidence.

The bill also would:

- ! require people serving as managers of facilities with more than 17 beds to have an associate’s degree in a health-related field, or a bachelor’s degree, or at least one year of experience working in management, and, if hired after the

effective date of this act, to complete at least one educational course on the management of assisted living facilities;

! require managers of assisted living facilities that treat residents with Alzheimer's disease to be above the age of 21 and have an associate degree in nursing or health care management, a bachelor's degree in psychology, gerontology or nursing, or at least one year of experience working with people with dementia;

! change licensing fee amounts from those stated in statute to amounts set by the board, not to exceed \$750 on a per-bed fee schedule and a base fee schedule;

! institute a review process for plans to construct or modify an assisted living facility;

! prohibit the issuance of provisional licenses after December 31, 1999;

! require a training program to provide specialized training to state assisted living facility inspectors;

! require DHS to notify the Department of Protective and Regulatory Services and the Health and Human Services Commission of an incident of abuse, neglect, or exploitation in an assisted living facility;

! require DHS to conduct periodic, regional training programs to local governments and appropriate state agencies on assisted living facility characteristics and applicable laws;

! specifically prohibit DHS from requiring the removal and relocation of a resident if the resident's presence did not endanger other residents and the resident could receive adequate care;

! authorize health care professionals to provide services within their scope of practice to residents of assisted living facilities and require them to maintain medical records of those services in accordance with their licensing and other regulatory standards;

! give residents the right to contract with a home health agency or with an independent health professional;

! prohibit assisted living facility license holders from retaliating against a person for filing a complaint or grievance or providing information about personal care services provided by the license holder;

! require DHS by January 1, 2000, to identify unlicensed assisted living facilities in Texas and take enforcement actions and report to the governor and the Legislature the results of their efforts;

! require DHS and the Texas Department of Licensing and Regulation to form a joint work group with consumer, developer and provider representatives to study and make recommendations by September 1, 2000,

concerning the application of the Texas Accessibility Standards and other architectural requirements for assisted living facilities; and

! require DHS to implement rules relating to a new reimbursement method for personal care services funded through the Community-based Alternatives program that is based on the type of service provided in addition to the number of clients occupying a room.

Facilities would have to provide their license number or state-issued facility identification number in all their promotional materials, and would have to provide each prospective resident with a consumer disclosure statement, including statements, if necessary, to indicate that licensure as an assisted living facility does not indicate state endorsement of the facility's rehabilitation services to brain injured clients. DHS would have to adopt a consumer disclosure statement standard form by September 1, 1999.

Except as otherwise provided by this act, this act would take effect September 1, 1999. This bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house.

**SUPPORTERS
SAY:**

SB 93 would update state regulations to meet a rapidly growing new care industry in Texas. It would support consumer safety and satisfaction by promoting policies supporting elderly Texans who want to "age in place" in more home-like facilities. It would enact protections against fraudulent contracting, abuse and neglect, and illegally unlicensed facilities.

The Texas population is aging rapidly. It is said that a "baby boomer" turns 50 every eight seconds, and the state also is an attractive residential and vacation location for retirees. Between 1990 and 2025 the state's population of persons over the age of 65 is expected to increase 155 percent.

Assisted living is the fastest growing segment of the health care industry. Its 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.

Assisted living facilities also are a primary residential alternative to institutions for persons with mental illness and mental retardation.

Because the industry is relatively new, there has been an alarming increase in the number of “underground” personal care facilities that are unlicensed and unregulated. Some of these facilities practice “census gaming” by moving residents from one home to another when a state official visits, to avoid coming under state licensing and regulation. The Senate Committee on Home Health and Assisted Living Facilities found enough cases of poor and inadequate treatment, even death, to seek changes in current law.

Inadequate conditions in assisted living facilities happen in both licensed and unlicensed facilities. This bill would improve existing oversight over the licensed facilities, and direct DHS to do more about identifying and bringing into compliance the unlicensed facilities.

SB 93 would improve regulatory oversight, while taking into account the concerns of the industry. It would not drive up the cost of business for assisted living centers, because many of provisions would rework current law. Implementing standards that are too high, such as requiring licensing for all facilities, or raising licensing requirements similar to those required for nursing homes, would make assisted living facilities unavailable and unaffordable to consumers.

The new requirements for assisted living facility administrators take into consideration the value of experience in lieu of a degree, so that anyone who is currently an administrator would qualify.

New provisions requiring certain facilities that hire home health agencies to be available to their residents, that is, legally unlicensed facilities that use a home health model, still would not be required to be licensed as assisted living facilities. Instead, they would be required to include specific provisions in their contracts with residents, such as the type and costs of care available.

Small operators, who manage more than one facility that together provide care to four or more people, are required by *current* law to be licensed. This bill does not lower that number to three people, as originally proposed, because that would have made too great of a change for small businesses, as well as increase state licensing and enforcement costs.

The bill specifically would support and allow aging in place by prohibiting the department from requiring a resident to be moved from a facility that is

providing the resident adequate services. Board rules could set standards for determining whether adequate services are being provided.

The authority to issue provisional licenses would be removed because they were originally instituted to allow personal care facilities to let the department know they were operating and trying to come up to state Health and Safety Code standards. In reality, few facilities took advantage of this provision to come forward. This provision was abused by unlicensed facilities that obtained provisional licenses before the department was notified of problems in their facilities so that they would not be penalized when the department found out they were unlicensed.

By directing DHS to respond to new operator building plans in 30 days, this measure would speed up DHS response and make provisional licenses unnecessary for new operators.

The provisions regarding the use of department records and testimony as evidence in civil actions are necessary. This change would allow the introduction of relevant evidence that validly demonstrates a facility's "track record" in providing care. It also would protect against the misuse of department reports. These provisions are very similar to provisions adopted by the 75th Legislature covering the use of evidence against nursing homes.

These measures would not increase the cost of health care, nor the possibility of state expenditures on health care. Currently, the only source of state funding to assisted living facilities is through the DHS Community-based Alternatives program, a very minor source of assisted living facility revenues. Most residents pay the facilities using their own funds, and this is not expected to change. If state expenditures in community care increase, they will increase because state clients demand that type of care over institutional care, not because facilities are regulated.

**OPPONENTS
SAY:**

This bill inappropriately would focus on licensed facilities, instead of the unlicensed ones. Licensed facilities are the ones that tend to be law-abiding, and they don't need any more regulation or oversight. Instead of 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 assisted living facility services, this would be harmful. They are largely supported by private paying residents, not government programs. If their costs become too high and facilities have to close, both consumers and business will lose out.

OTHER
OPPONENTS
SAY:

This bill does not go far enough in protecting residents of assisted living facilities. All facilities that hold themselves out to be providing personal care or home health services should be licensed. The licensing requirements could be varied to reflect the differing levels of services provided. Such tailored requirements would not increase the cost of business on any one facility.

This bill, by essentially converting present laws on personal care facilities into statutes dealing with assisted living facilities, still does not sufficiently address the range of regulatory concerns surrounding “aging in place.”

The need for state oversight and regulation increases with the vulnerability of the residents. Residents who enter an assisted living facility while relatively healthy may need more protection *in that same facility* in later years as their physical and mental health decline. This law does not specify what constitutes adequate care and when, or if, residents should be moved onto a facility providing a higher level of care.

DHS also needs to speed up its inspection process and approval of new facilities, otherwise provisional licenses could still be authorized. Some facilities must wait four to six months for their licenses while the final paperwork and inspections are being processed by the department, causing distress for consumers who already have sold their homes and for providers who have invested in resources but are unable to begin operations.

This bill would go too far in its licensure requirements because it would require owners of more than one small facility to be licensed and conform to regulations geared toward larger facilities. There are many small operators out there who are able to provide care to one or two people in a couple of converted residences because of the economies of scale that are available in running more than one home. But the profits are not great enough to meet the licensure requirements. Thus, many small operators would have to close their homes. Licensure should be based on the size of the facility, not on the number of facilities operated.

The use of department records as evidence in civil actions should be more limited than what is provided in this bill to prevent overblown reactions to alleged problems. Department forms on which surveying and inspection information is kept rarely indicate any mitigating circumstances about an alleged problem or the provider's explanation of the problem, nor do they reflect all of the good or exceptional qualities of the services provided by the provider.

Increased regulation could lead to a call for state funding for assisted living facilities in the future.

NOTES:

The committee amendments would:

- ! add the use of a state-issued facility identification number as an alternative to the use of a license number in facility advertisements;
- ! add licensed vocational nurses to the list of health care professionals authorized to provide treatment in assisted living facilities;
- ! substitute the term "apply to the admissibility as evidence" with "bar the admission into evidence" when referring to exceptions to the prohibitions against the use of department records in civil actions;
- ! authorize health care professionals to operate within their scope of practice but not requiring assisted living facilities to provide the same level of care as a nursing home, and authorize a resident to contract with a home health agency or health professional for services; and
- ! prohibit the issuance of provisional licenses after December 31, 1999.

This bill is one of four bills on today's calendar that were filed by Sen. Moncrief based on the findings of the Senate Interim Committee:

- ! SB 94, relating to the regulation of home health agencies;
- ! 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 TDH to DHS.

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SB 200 by Moncrief, which would authorize DHS to assess administrative penalties on assisted living facilities, passed the Senate on April 15 and is pending in the House Human Services Committee.