

SUBJECT: Regulating electronic monitoring in nursing homes

COMMITTEE: Human Services — committee substitute recommended

VOTE: 5 ayes — Naishtat, Chavez, Ehrhardt, Raymond, Wohlgemuth
0 nays
4 absent — J. Davis, Noriega, Telford, Villarreal

SENATE VOTE: On final passage, April 10 — 29-0

WITNESSES: For — Beth Ferris, Texas Advocates for Nursing Home Residents;
Registered but did not testify: Aaryce Hayes, Advocacy, Inc.; Abby Sandlin,
Texas Watch; Marie Wisdom, Advocates for Nursing Home Reform

Against — None

DIGEST: CSSB 177 would regulate electronic monitoring in nursing homes. An institution would have to allow a resident or his or her guardian or legal representative to monitor the resident's room by video, audio, or other electronic format. A nursing home could not refuse to admit a resident or remove a resident from the institution because of a request to conduct electronic monitoring, if it were authorized electronic monitoring, but could require that a monitoring device be installed in a safe manner and that the monitoring be conducted in plain view.

The nursing home would have to accommodate taping, such as by providing a power source for the camera; post notice of possible taping at the entrance of the home; and require residents who were being taped to post a conspicuous notice outside their doors. All costs associated with taping, other than electricity, would be the resident's responsibility.

If the resident had the mental capacity to request electronic monitoring and had not been declared judicially to lack the required capacity, the resident could request monitoring. If the resident had been declared judicially to lack the required capacity, only the resident's guardian could request monitoring.

If the resident did not have the required capacity but had not been declared judicially to lack the capacity, only the resident's legal representative could request monitoring. The Department of Human Services (DHS) would have to prescribe guidelines for institutions, residents' family members and advocates, and others to determine when a resident lacked the required capacity and who could be considered the resident's legal representative.

DHS would have to prescribe a form to allow a resident, guardian, or legal representative to request electronic monitoring. The form would have to require the person requesting monitoring to release the nursing home from civil liability for violating the resident's privacy; choose between the camera always being unobstructed or being obstructed at times to protect the resident's dignity; and obtain consent of roommates.

In giving consent, a roommate also would have to release the institution from civil liability and could make consent conditional on the video camera's being pointed away from the roommate or on limiting or prohibiting the use of an audio monitoring device. In cases where a resident was being taped and another resident who had not consented to monitoring was moved into the room, the monitoring would have to cease until the new roommate's consent was obtained.

At the time of admission to a nursing home, a resident would have to sign a form stating that a person who places an electronic monitoring device in a resident's room or who uses or discloses a tape or other recording made by the device may be civilly liable for unlawful violation of privacy rights; that a person who covertly places a monitoring device in a resident's room or who consents to covert placement waives any privacy right the person may have had; and that if the nursing home refuses to allow electronic monitoring or fails to accommodate a monitoring device, the resident's legal representative should contact DHS. The form also would have to set forth guidelines on taping and the legal requirements for reports of abuse and neglect as they pertain to taping.

DHS and the institution could not be held civilly liable in connection with the covert placement of an electronic monitoring device in a patient's room. The placement would be considered covert if the placement and use of the device

were not open and obvious and if the institution and DHS were not informed about the device by the resident or by a person who placed or used it.

Current law requires a person who suspects neglect or abuse of a nursing-home resident to make an oral report immediately to DHS or to a local or state law enforcement agency and to make a written report within five days. A person who fails to do so commits a Class A misdemeanor, punishable by up to one year in jail and/or a maximum fine of \$4,000. Under CSSB 177, a person who conducted electronic monitoring in a nursing home would be considered to have viewed or listened to a tape or recording within 14 days of when it was made. If a resident gave the tape or recording to another person and asked the person to review it to determine whether abuse or neglect had occurred, the person who received the tape or recording would be considered to have reviewed it within seven days. Failure to report any abuse or neglect on the tape within the required time frames would result in penalties.

A tape or recording created through either covert or authorized monitoring could be admitted into evidence in a civil or criminal case or administrative proceeding, subject to the applicable rules of evidence, if the tape or recording showed the time and date when the recorded events occurred and if the contents had not been edited or artificially enhanced.

A person who intentionally hampered, obstructed, tampered with, or destroyed an electronic monitoring device installed in a resident's room according to the bill's provisions would commit a Class B misdemeanor, punishable by up to 180 days in jail and/or a maximum fine of \$2,000. It would be a defense to prosecution that the person took the action with the consent of the resident, guardian, or legal representative.

DHS' statement of the rights of nursing-home residents would have to include the right to place an monitoring device in the resident's room. The bill would authorize DHS to enforce taping regulations and would direct the Long-Term Care Legislative Oversight Committee to study the impact of the regulations on the nursing-home industry. DHS would have to devise a procedure under which current residents were encouraged to sign the admission form with the newly required provisions.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2001.

SUPPORTERS
SAY:

CSSB 177 would ensure that electronic monitoring in nursing homes is conducted in an appropriate manner. Many nursing-home residents already are being videotaped, and this bill would impose reasonable regulations on how that is done. The current lack of guidelines can result in other residents' privacy being compromised, or the resident may not have the flexibility to obstruct the camera at key times. The state needs a comprehensive and cohesive set of regulations to ensure that electronic monitoring is conducted in a manner that is respectful of all nursing-home residents.

CSSB 177 would protect the rights of other nursing-home residents. It would allow monitoring to be conducted in a room with more than one resident only if all roommates agreed. The roommates could limit or restrict how taping could occur in the room. This would protect roommates' privacy and ensure that all residents of a room were comfortable with taping.

Taping is an effective way to prevent abuse or neglect. Nursing-home residents are among the most vulnerable elderly people. In many cases, they are too frail or incapacitated to defend themselves against abuse or neglect. Because their family members cannot supervise their care all the time, abuse or neglect may go unreported. The presence of a camera would deter abuse or neglect by nursing-home employees.

Taping allows families to obtain the evidence they need if abuse or neglect has occurred. Elderly people in nursing homes may not make good witnesses in cases of abuse or neglect because of failing eyesight, confusion, dementia, or other conditions that are prevalent within this population. Video or audio tapes are compelling documentation of what occurred.

Taping also protects good caregivers from being falsely accused. If a resident or relative suspects abuse or neglect, the entire staff could come under suspicion. Taping would protect innocent caregivers by proving that they did not harm the resident.

This bill would protect residents even if they did not have the resources to conduct electronic monitoring. Nursing homes would be required to place a notice outside of the home to alert that taping may be occurring. This would extend the deterrent to all residents of the home.

OPPONENTS
SAY:

CSSB 177 would impose state regulation on a practice that nursing homes already are regulating in ways that are appropriate for each setting. Nursing-home residents have diverse medical conditions that require many different levels of care. Nursing homes have evaluated taping in the context of what is appropriate for their residents. The state should not require a one-size-fits-all approach in this matter.

The bill's consent provisions could create significant friction among residents. If a roommate refused to sign the consent form, the other roommate would be left in the unfair position of not being permitted to tape possible neglect or abuse.

CSSB 177 would encourage frivolous lawsuits. Complications in medical treatment could arise that, to the untrained eye, could seem to be the health professional's fault. It could take a health professional many months with a lawyer to clear up such a matter. Also, nursing homes sometimes will agree to settle cases in which they are not at fault simply because it would cost more to defend themselves in an action. Given the high and rising cost of insurance premiums for nursing homes, the state should be cautious about opening the door for new ways for nursing homes to be sued.

Taping is not effective in preventing abuse or neglect of residents. The equipment required to tape a resident's care costs hundreds of dollars, and tapes must be changed regularly. Residents without families or concerned friends are unlikely to be able to afford the equipment or to get up and change the tapes regularly. Residents with family or concerned friends already have the best prevention against abuse or neglect: extra sets of eyes on the lookout for signs of mistreatment. The state should encourage nursing homes to make their facilities more accessible to families, friends, or volunteers, rather than to spend time and resources developing the forms and signs needed for taping to occur.

NOTES: The committee substitute changed the Senate engrossed version by adding the notice requirements and the provisions prohibiting nursing homes from discriminating against residents who wanted to install electronic monitoring devices.