

BILL ANALYSIS

Senate Research Center

S.B. 2407
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

The United States Department of Justice (DOJ) notified the governor that it would begin a Civil Rights of Institutionalized Persons Act (CRIPA) investigation of all state schools in August 2008, after having already investigated the Lubbock and Denton State Schools. DOJ released its report in December 2008, and concluded that conditions and practices in Texas' state schools violate the constitutional and federal statutory rights of residents. Specifically, the facilities fail to provide consumers with adequate health care or protect residents from harm; provide adequate behavioral services, freedom from unnecessary or inappropriate restraint, and habilitation; and provide services to qualified person with disabilities in the most integrated setting appropriate to their needs.

DOJ affirms that the State of Texas has not taken adequate steps and is violating federal requirements regarding serving persons in the most integrated setting to meet their needs, including inadequate admission processes, ineffective community options processes, and poor execution of discharge processes. As a consequence, persons who desire to live in the community, and who reasonably can be accommodated there, are denied the opportunity to live and work in more integrated settings in violation of the state's obligations under Title II of the Americans with Disabilities Act (ADA).

According to DOJ, Texas has failed to make adequate progress toward serving persons in the most integrated setting. Between September 2007 and 2008, only four percent of persons, or 164 persons, moved from state schools to community settings; in 2006, Texas state schools or centers had twice the national average of children admitted; and since 2004, more than 800 employees across all 13 state schools have been suspended or fired for abusing facility residents. There is an inherent conflict of interest with how case management is currently provided. The local Mental Retardation Authorities (MRAs) should reassume the case management function because they have the expertise, infrastructure, and relationships with local communities and providers. This bill will also allow the state to provide services in a more cost-effective way, as it costs half as much to serve persons with intellectual disabilities in a community setting than in a state school.

As proposed, S.B. 2407 requires a person with mental retardation residing in an institution or the person's legally authorized representative to participate in the community living options information process; requires the executive commissioner of the Health and Human Services Commission (HHSC) to develop protocols to divert adults and children with mental retardation from commitment to a state school and to include rules regarding certain responsibilities of the authority, including case management services for individuals receiving services under a Home and Community-based Services (HSC) waiver program; requires the Department of Aging and Disability Services (DADS), in developing its biennial long-range plan to include certain strategies and to establish a positive behavior support training and technical assistance project to provide certain functions; and requires HHSC and DADS to jointly conduct a study regarding the feasibility of providing medical assistance for long-term services and supports through the Medicaid managed care program to persons with mental retardation who are eligible for that assistance.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the executive commissioner of the Health and Human Services Commission (executive commissioner) in SECTION 7 (Section 531.02446,

Government Code), SECTION 15 (Section 161.077, Human Resources Code), and SECTION 18 of this bill.

Rulemaking authority previously granted to the executive commissioner is modified in SECTION 10 (Section 533.0355, Health and Safety Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 55.33(a), Family Code, as follows:

(a) Requires the juvenile court (court), if the court or jury determines under Section 55.32 (Hearing on Issue of Fitness to Proceed) that a child is unfit to proceed with the court proceedings for delinquent conduct, to:

(1) if the unfitness to proceed is a result of mental illness or mental retardation, provided that the child meets the commitment criteria under Subtitle C (Texas Mental Health Code) or D (Persons With Mental Retardation Act), Title 7 (Mental Health and Mental Retardation), Health and Safety Code, order the child placed with the Department of State Health Services (DSHS) or Department of Aging and Disability Services (DADS), rather than the Texas Department of Mental Health and Mental Retardation (MHMR), for a period of not more than 90 days, which order is prohibited from specifying a shorter period, for placement in a facility designated by the appropriate department;

(2) if the unfitness to proceed is a result of mental illness and the court determines that the child may be adequately treated in an alternative setting, order the child to receive treatment for mental illness on an outpatient basis for a period of not more than 90 days, which order may not specify a shorter period; or

(3) if the unfitness to proceed is a result of mental retardation and the court determines that the child may benefit from treatment or habilitation services in an alternative setting, order the child to receive the treatment or services on an outpatient basis for a period of not more than 90 days.

SECTION 2. Amends Section 55.52(a), Family Code, to require the court, if the court or jury finds that a child is not responsible for the child's conduct under Section 55.51 (Lack of Responsibility for Conduct Determination; Examination), to order the child, if the child's lack of responsibility is a result of mental retardation and the court determines that the child may benefit from treatment or habilitation services in an alternative setting, to receive the treatment or services on an outpatient basis for a period of not more than 90 days. Makes conforming changes.

SECTION 3. Amends Article 46B.010, Code of Criminal Procedure, to require the court to dismiss the charge on its own motion or on the motion of any interested party, rather than on the motion of the attorney general representing the state, if a court orders the commitment of or participation in an outpatient treatment program by a defendant who is charged with a misdemeanor punishable by confinement and the defendant is not tried before the date of expiration of the maximum period of restoration under this chapter as described by Article 46B.0095 (Maximum Period of Facility Commitment or Outpatient Treatment Program Participation Determination by Maximum Term for Offense).

SECTION 4. Amends Section 531.02442(a), Government Code, by amending Subdivision (1) and adding Subdivision (4), to redefine "institution" and define "department."

SECTION 5. Amends Section 531.02442, Government Code, by amending Subsection (b) and adding Subsection (f), as follows:

(b) Requires a person with mental retardation residing in an institution or the person's legally authorized representative to participate in the community living options information process. Makes a conforming change.

(f) Requires DADS each year to update materials used during the community living options information process, and provide training regarding the community living options information process to staff members involved with the process at each institution and each local mental retardation authority (authority).

SECTION 6. Amends Section 531.02443, Government Code, by amending Subsection (d) and adding Subsections (g) and (h), as follows:

(d) Requires that the contract (relating to implementation of the community living options information process) with the authority perform certain actions, including that it require the authority to coordinate tours and visits to community living options for an adult resident or an adult resident's legally authorized representative and ensure that an authority employee working with an adult resident, the adult resident's family members, the adult resident's legally authorized representative, or any person designated by the adult resident or the adult resident's legally authorized representative is an active voting member of the adult resident's interdisciplinary team. Makes a nonsubstantive change.

(g) Requires an authority that performs duties required by the community living options information process under Section 531.02442 or this section to annually submit a report to DADS regarding the outcomes of the community living options information process as performed by the authority. Requires that the report required by this section include certain information.

(h) Requires DADS to annually submit a report to the legislature regarding the community living options information process, including aggregate information regarding outcomes based on the reports submitted to DADS by authorities and as determined by DADS during surveys under Chapter 252 (Intermediate Care Facilities for the Mentally Retarded), Health and Safety Code. Requires that the report include certain information.

SECTION 7. Amends Subchapter B, Chapter 531, Government Code, by adding Section 531.02446, as follows:

Sec. 531.02446. DIVERSION PROTOCOLS TO PREVENT COMMITMENT TO CERTAIN INSTITUTIONS. (a) Requires the executive commissioner of the Health and Human Services Commission (executive commissioner) by rule to develop protocols to divert adults and children with mental retardation from commitment to a state school.

(b) Requires the executive commissioner to ensure that the diversion protocols are designed to eliminate the commitment to state schools of individuals younger than 22 years of age and direct adults and children with mental retardation towards the least restrictive living environment appropriate for the person.

(c) Requires DADS to develop the diversion protocols with the advice and assistance of the Promoting Independence Advisory Committee and representatives of family members or legally authorized representatives of adult residents of state schools, persons with mental retardation, state schools, and local mental retardation authorities.

(d) Requires the executive commissioner, as part of the diversion protocols, to contract with a nonprofit entity for the provision of temporary, emergency living arrangements for the children at immediate risk of commitment to a state school.

(e) Requires an entity awarded a contract under this section to provide temporary, emergency living arrangements at homes, with no more than six children placed in the home.

SECTION 8. Amends Section 252.002(2), Health and Safety Code, to redefine "department."

SECTION 9. Amends Section 252.040, Health and Safety Code, by adding Subsection (j), to require DADS to determine during a survey whether a facility has properly implemented the

community living options information process required by Section 531.02442, Government Code.

SECTION 10. Amends Section 533.0355(b), Health and Safety Code, to require the executive commissioner, in adopting rules under this section, to include rules regarding certain responsibilities of the authority, including case management services for individuals receiving services under a Home and Community-based Services (HCS) waiver program. Makes nonsubstantive changes.

SECTION 11. Amends Sections 593.013(a)-(c), (e), and (f), Health and Safety Code, as follows:

(a) Prohibits a person from being admitted or committed to a residential care facility unless an interdisciplinary team from an authority serving the county in which the application was filed recommends that placement.

(b) Requires the interdisciplinary team to perform certain actions, including that it determine and recommend the community-based supports and services needed to support the individual successfully in the individual's home. Makes nonsubstantive changes.

(c) Requires the interdisciplinary team to provide an opportunity to participate in team meetings to the person, the person's attorney, the person's legally authorized representative, the person's parent if the person is a minor, the person's guardian, and any person designated by the person who is the subject of the meetings or designated by the person's legally authorized representative, rather than to give the person, the person's parent if the person is a minor, and the person's guardian an opportunity to participate in the meetings.

(e) Requires the interdisciplinary team to prepare a written report, rather than a written report of its findings and recommendations that is, signed by each team member and containing the team's findings and recommendations. Requires that the report include certain information.

(f) Creates this subsection from existing text. Requires the interdisciplinary team to promptly send a copy of the report and recommendations to the person, the person's parent if the person is a minor, the person's guardian, the person's attorney, and the person's legally authorized representative and, if the court ordered the team's report and recommendations under Section 593.041, to the court as provided by that section. Deletes existing text requiring the team, if the court has ordered the interdisciplinary team report and recommendations under Section 593.041, to promptly send a copy of the report and recommendations to the court, the person with mental retardation or the person's legal representative, the person's parent if the person is a minor, and the person's guardian. Makes nonsubstantive changes.

SECTION 12. Amends Section 593.041, Health and Safety Code, by amending Subsection (d) and adding Subsection (d-1), as follows:

(d) Prohibits a person from being committed to DADS for placement in a residential care facility under this subchapter unless an interdisciplinary team from an authority serving the county in which the application was filed has completed a report recommending the placement, rather than unless a report by an interdisciplinary team recommending placement has been completed, during the six months preceding the date of the court hearing on the application. Requires the court to order the report and recommendations on receiving the application if the report and recommendations have not been completed or revised during that six-month period and filed at the time the application is made.

(d-1) Requires that the report and recommendations be filed before the date of the court hearing on the application unless the court determines that an emergency admission, emergency services, or respite care is necessary.

SECTION 13. Amends Section 593.052, Health and Safety Code, by amending Subsections (a) and (b) and adding Subsections (a-1), (b-1), and (d), as follows:

(a) Prohibits a proposed resident from being committed to a residential care facility unless for certain reasons, including clear and convincing evidence is presented showing that because of retardation, the proposed resident represents a substantial risk of physical impairment or injury to the proposed resident or others, rather than to himself or others.

(a-1) Requires the court, in finding that a proposed resident meets the commitment criteria prescribed by Subsection (a), to specify which criterion listed in Subsection (a)(2)(A) (relating to risk to the proposed resident or others) or (B) (relating to inability to care for basic personal physical needs) forms the basis for the decision.

(b) Requires the court, in determining whether long-term placement in a residential care facility is appropriate, to consider the least restrictive alternative identified by the interdisciplinary team under Section 593.013.

(b-1) Requires that an order for long-term placement in a residential care facility state that the commitment for care, treatment, and training is authorized for a maximum of a 12-month period. Requires the facility administrator, notwithstanding Chapter 594 (Transfer and Discharge), to discharge the resident at the end of the 12-month period unless a new order committing the person to a residential care facility has been issued under this chapter. Requires the facility administrator, not later than the 30th day before the date a resident is scheduled to be discharged under this section, to notify a representative for the authority that serves the area in which the facility is located or in which the resident will reside after discharge of the resident's scheduled discharge. Requires that the notice include the date the resident is scheduled to be discharged and to include a request that the authority prepare a transition plan for placing the resident in the community served by the authority. Requires an authority that receives a request under this section to prepare a transition plan for the resident and assist the facility in implementing the plan.

(d) Requires that the evidence, to be clear and convincing under Subsection (a)(2)(A), include evidence of a recent overt act that tends to confirm the likelihood of substantial risk of physical impairment or injury to the proposed resident or others.

SECTION 14. Amends Subchapter B, Chapter 161, Human Resources Code, by adding Section 161.033, as follows:

Sec. 161.033. STATE SCHOOL REQUIREMENTS FOR LONG-RANGE PLAN. Requires DADS, in developing the long-range plan required by Section 533.032, Health and Safety Code, to:

(1) include strategies for downsizing state schools and transitioning more state school residents to community-based care;

(2) describe initiatives for achieving cost efficiencies relating to the strategies required by Subdivision (1); and

(3) estimate the fiscal impact of each strategy and initiative, including the impact on DADS funding and the number of full-time equivalent DADS employees and the cost implications to other health and human services agencies.

SECTION 15. Amends Subchapter D, Chapter 161, Human Resources Code, by adding Section 161.077, as follows:

Sec. 161.077. POSITIVE BEHAVIOR SUPPORT TRAINING AND TECHNICAL ASSISTANCE PROJECT. (a) Defines "challenging behavior," "child with intense behavioral support needs," "in-home behavior mentor," "positive behavior support plan," and "positive behavior support specialist."

(b) Requires DADS to establish a positive behavior support training and technical assistance project to perform certain tasks.

(c) Requires the executive commissioner to adopt rules implementing the project. Sets forth the required content of the rules.

SECTION 16. (a) Requires the Health and Human Services Commission (HHSC) and DADS to jointly conduct a study regarding the feasibility of providing medical assistance for long-term services and supports through the Medicaid managed care program under Chapter 533, Government Code, to persons with mental retardation who are eligible for that assistance.

(b) Requires HHSC and DADS, not later than December 1, 2010, to submit a report regarding the results of the study to the standing committees of the senate and house of representatives having primary jurisdiction over the Medicaid program. Sets forth the required content of the report.

SECTION 17. (a) Requires DADS, not later than September 1, 2011, to file an application for a new commitment order for each person who was committed to a residential care facility in a proceeding that began before September 1, 2009, is currently residing in a residential care facility, and has resided in a residential care facility for at least one year.

(b) Requires DADS, in filing the applications as required by Subsection (a) of this section, to prioritize the applications based on the length of time a person has resided in a residential care facility.

SECTION 18. (a) Requires the executive commissioner, not later than January 1, 2010, to develop and implement the diversion protocols required under Section 531.02446, Government Code, as added by this Act.

(b) Requires the executive commissioner, not later than January 1, 2010, to adopt rules relating to the provision of case management services for individuals receiving services under an HCS waiver and to ensure that this function is transferred to authorities as quickly as possible without disrupting the provision of services.

SECTION 19. Requires the executive commissioner, as soon as practicable after the effective date of this Act, to apply for and actively pursue a waiver or an amendment to this state's waiver under Section 1915(c) of the federal Social Security Act (42 U.S.C. Section 1936n(c)) or other authorization from the federal Centers for Medicare and Medicaid Services or any other federal agency authorizing the provision of HCS at group homes in which five or six individuals with mental retardation reside and receive those services.

SECTION 20. (a) Makes application of Chapter 593, Health and Safety Code, as amended by this Act, prospective.

(b) Provides that the change in law made by this Act in amending Article 46B.010, Code of Criminal Procedure, applies to a defendant against whom proceedings are initiated under Chapter 46B of that code before, on, or after the effective date of this Act.

(c) Provides that Section 55.33, Family Code, as amended by this Act, applies to a child whose fitness to proceed is the subject of a hearing under Section 55.32, Family Code, before, on, or after the effective date of this Act, regardless of when the conduct that is the subject of a petition alleging delinquent conduct occurred.

(d) Provides that Section 55.52, Family Code, as amended by this Act, applies to a child who is found not to be responsible for the child's conduct under Section 55.51, Family Code, before, on, or after the effective date of this Act, regardless of when the conduct that is subject of a petition alleging delinquent conduct occurred.

SECTION 21. Effective date: September 1, 2009.