

BILL ANALYSIS

Senate Research Center
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S.B. 57
By: Zaffirini
Health & Human Services
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

S.B. 57 will improve the standard of care for persons with brain injury in Texas and prevent abuse and neglect of vulnerable persons with special needs. This bill will bring licensing standards in line with current industry practices since post acute brain injury providers are not residential or custodial caregivers, but rather complex organizations providing medically necessary therapies and services.

The current assisted living licensure process has low standards, which allows some license holders to operate unsafely without adequate staff levels, without appropriate professional staff, and without adequate training. Current licensing requirements do not reflect the evolution of the rehabilitation industry.

The state can realize a better return on the funds it allocates for comprehensive rehabilitation services (CRS) and vocational rehabilitation (VR) if it requires all providers to operate at a higher standard of care consistent with national practices in the rehabilitation field.

Currently, post-acute providers operate as assisted living facilities, a designation intended only to provide room and board with minimal therapeutic services. Post-acute providers are unable to preauthorize some patients for care because insurance carriers argue that services are custodial or residential in nature due to the assisted living licensure. This defers the insurer's responsibility to the state for providing adequate services. Post-acute providers offer a more complex continuum of specialized services than are offered at assisted living facilities. A facility must obtain a Department of Aging and Disability Services (DADS) assisted living (Type A or B) license in order to operate in Texas. The statute governing program and contracting requirements is found in Title 40 of the Texas Administrative Code.

S.B. 57 establishes a new post-acute licensing and regulatory system for post-acute acquired brain injury rehabilitation facilities administered through the Department of State Health Services (DSHS). The purpose of establishing a licensing and regulation program specific to the post-acute brain injury rehabilitation industry is to raise the standard of care for persons with brain injuries. It will bring licensing standards in line with current industry practices and decrease or eliminate the barrier some insurance carriers raise because such facilities are now licensed as assisted living facilities.

As proposed, S.B. 57 amends current law relating to the licensing and regulation of post-acute care acquired brain injury rehabilitation facilities and provides penalties.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the executive commissioner of the Health and Human Services Commission in SECTION 1 (Section 248A.056, Health and Safety Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Subtitle B, Title 4, Health and Safety Code, by adding Chapter 248A, as follows:

CHAPTER 248A. POST-ACUTE CARE ACQUIRED BRAIN INJURY
REHABILITATION FACILITIES

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 248A.001. SHORT TITLE. Authorizes this chapter to be cited as the Post-Acute Care Acquired Brain Injury Rehabilitation Facility Licensing Act.

Sec. 248A.002. DEFINITIONS. Defines "brain injury," "commissioner," "department," "executive commissioner," "facility," "nursing care," "patient," and "services."

Sec. 248A.003. EXEMPTIONS. (a) Provides that this chapter does not apply to:

(1) a home and community support services agency licensed under Chapter 142 (Home and Community Support Services);

(2) a person licensed under Chapter 241 (Hospitals);

(3) an institution licensed under Chapter 242 (Convalescent and Nursing Homes and Related Institutions);

(4) an ambulatory surgical center licensed under Chapter 243 (Ambulatory Surgical Center);

(5) a birthing center licensed under Chapter 244 (Birthing Centers);

(6) a facility licensed under Chapter 245 (Abortion Facilities) or Chapter 247 (Assisted Living Facilities);

(7) a child-care institution, foster group home, foster family home, or child-placing agency, for children in foster care or other residential care who are under the conservatorship of the Department of Family and Protective Services (DFPS); or

(8) a person providing medical or nursing care or services under a license or permit issued under other state law.

(b) Provides that this chapter does not require an entity listed in Subsection (a) to obtain an additional license under this chapter to provide services authorized under another license issued by this state.

[Reserves Sections 248A.004-248A.050 for expansion.]

SUBCHAPTER B. LICENSING, FEES, AND INSPECTIONS

Sec. 248A.051. LICENSE REQUIRED; QUALIFICATIONS. (a) Prohibits a person from establishing or operating a post-acute care acquired brain injury rehabilitation facility unless the person holds a license issued under this chapter.

(b) Requires the executive commissioner of the Health and Human Service Commission (executive commissioner) in order to protect the public health and safety, to establish qualifications for holding a license under this chapter. Requires that the qualifications require the facility to hold an accreditation for post-acute providers from the Commission on Accreditation of Rehabilitation Facilities or another nationally recognized accreditation organization approved by the executive commissioner.

Sec. 248A.052. APPLICATION. (a) Requires an applicant for a license to submit an application to the Department of State Health Services (DSHS) on a form prescribed by DSHS and in accordance with executive commissioner rules.

(b) Requires that each application be accompanied by a nonrefundable license fee in the amount set by the executive commissioner under Section 248A.054(a).

(c) Authorizes DSHS to require that an application be approved by the local health authority or other local official for compliance with municipal ordinances on building construction, fire prevention, and sanitation.

Sec. 248A.053. ISSUANCE AND RENEWAL OF LICENSE. (a) Requires DSHS to issue a license to an applicant if on inspection and investigation it finds that the applicant meets the requirements of this chapter and the rules adopted by the executive commissioner.

(b) Requires that a license be renewed at the times and in accordance with the rules established by the executive commissioner.

Sec. 248A.054. FEES. (a) Requires the executive commissioner to establish a license application fee in the amount reasonable and necessary to cover the cost of administering this chapter.

(b) Authorizes the executive commissioner to establish other reasonable and necessary fees in amounts that are adequate, with the license application and license renewal fees, to collect sufficient revenue to meet the expenses necessary to administer this chapter. Authorizes the fees to include construction plan review and inspection fees.

(c) Provides that all fees collected under this chapter are nonrefundable.

(d) Requires all fees received by DSHS to be deposited to the credit of the general revenue fund and to be appropriated only to DSHS to administer this chapter.

Sec. 248A.055. NONTRANSFERABILITY; POSTING. (a) Provides that a license issued under this chapter is not transferable or assignable.

(b) Requires a facility to post in plain sight the license issued under this chapter.

Sec. 248A.056. DUTIES OF EXECUTIVE COMMISSIONER. (a) Requires the executive commissioner to adopt rules necessary to implement this chapter. Requires that the rules establish minimum standards for facilities to protect the health and safety of facility patients and to protect the public, including standards relating to:

(1) the issuance, renewal, denial, suspension, and revocation of the license required by this chapter;

(2) the qualifications, duties, and supervision of professional and nonprofessional personnel and volunteers, including a requirement that a manager of a facility be certified brain injury specialist;

(3) staff-to-patient ratios, which must require one staff person for every six patients during the day and a minimum of one staff person for every eight patients overnight;

(4) post-acute care acquired brain injury transitional residential services provided by a license holder, including a requirement that at least 20 hours each week of therapy by licensed professionals be made available for each inpatient or day treatment patient and must include the disciplines required under Subsection (b);

(5) the organizational structure, lines of authority, delegation of responsibility, and operation of a facility;

(6) records of services kept by the license holder, including the disposal or destruction of those records;

(7) safety, fire prevention, and sanitation provisions;

(8) transfer of patients in a medically appropriate manner from or to a facility;

(9) construction plan approval and inspection;

(10) training for employees who do not hold a license as a health care practitioner and who will be delivering care to patients, including a requirement for at least 16 hours of orientation training, 24 hours of observation training, and evidence of demonstrated competency or proficiency from the training;

(11) annual continuing education of at least 12 hours for employees;

(12) treatment of minors; and

(13) any other aspects of a facility as necessary to protect the health and safety of facility patients and to protect the public.

(b) Requires a facility to provide regular representation of services in the medical and therapeutic disciplines of psychiatry, neurology, nursing, physical therapy, occupational therapy, speech and language pathology, neuropsychology, psychology and counseling, case management, and dietetics.

(c) Authorizes a facility to also provide services in the disciplines of, applied behavioral analysis, education and special education, recreational therapy, vocational rehabilitation counseling, counseling by licensed practicing counselors, clinical psychology, rehabilitation psychology engineering, behavior analysis, internal medicine, social work, neurosurgery, psychotherapy, otolaryngology, and education specialists.

(d) Authorizes a facility to provide the services of audiology, exercise physiology and fitness, ophthalmology, neurooptometry, and endocrinology and if provided, requires that the services be under a physician's order and supervision.

(e) Provides that Subsection (a) does not authorize the executive commissioner to establish the qualifications of licensed health care providers or permit the executive commissioner to authorize persons to provide health care services who are not authorized to provide those services under other state law.

Sec. 248A.057. CONSTRUCTION STANDARDS. (a) Requires that the facility's construction conform to the minimum standards established by the executive commissioner if there are no local regulations in effect or enforced in the area in which a facility is located.

(b) Provides that construction of a facility is subject to construction plan approval by DSHS.

Sec. 248A.058. INSPECTIONS; INVESTIGATIONS. (a) Authorizes DSHS to inspect a facility and its records at reasonable times as necessary to ensure compliance with this chapter.

(b) Requires DSHS to investigate each complaint received regarding a facility.

Sec. 248A.059. CONTINUUM OF TREATMENT. Requires a facility to make available to persons who have suffered an acquired brain injury a continuum of treatment that includes inpatient residential rehabilitation; day treatment rehabilitation; and outpatient rehabilitation or home and community rehabilitation.

[Reserves Sections 248A.060-248A.100 for expansion.]

SUBCHAPTER C. GENERAL ENFORCEMENT

Sec. 248A.101. LICENSE DENIAL, SUSPENSION, PROBATION, OR REVOCATION. (a) Authorizes DSHS to deny, revoke, or suspend a license issued under this chapter for a violation of this chapter or the rules adopted under this chapter.

(b) Provides that, except as provided by Section 248A.102, the procedures by which DSHS denies, revokes, or suspends, a license and by which those actions are appealed are governed by DSHS's rules for a contested case hearing and by Chapter 2001 (Administrative Procedure), Government Code.

(c) Authorizes DSHS to schedule the facility for probation rather than suspending or revoking the facility's license if DSHS finds that a facility is in repeated noncompliance with this chapter or rules adopted under this chapter but that the noncompliance does not endanger the public health and safety. Requires DSHS to provide notice to the facility of the probation and of the items of noncompliance not later than the 10th day before the date the probation period begins. Requires DSHS to designate a period of not less than 30 days during the probation period which the facility will remain under probation. Requires the facility to correct the items that were in noncompliance and report the corrections to DSHS for approval.

(d) Authorizes DSHS to suspend or revoke the license of a facility that does not correct items that were in noncompliance or that does not comply with this chapter or the rules adopted under this chapter within the applicable probation period.

Sec. 248A.102. EMERGENCY SUSPENSION. (a) Authorizes DSHS to issue an emergency order to suspend any license issued under this chapter if DSHS has reasonable cause to believe that the conduct of a license holder creates an immediate danger to the public health and safety.

(b) Provides that an emergency suspension is effective immediately without a hearing on notice to the license holder.

(c) Requires DSHS on written request of the license holder, to conduct a hearing not earlier than the 10th day or later than the 30th day after the date the hearing request is received to determine if the emergency suspension is to be continued, modified, or rescinded.

(d) Provides that the hearing and any appeal are governed by DSHS rules for a contested case hearing and by Chapter 2001, Government Code.

Sec. 248A.103. INJUNCTION. (a) Authorizes DSHS to request that the attorney general petition a district court to restrain a license holder or other person from continuing to violate this chapter or any rule adopted by the executive commissioner under this chapter. Provides that venue for a suit for injunctive relief is in Travis County.

(b) Requires the district court on an application for injunctive relief and a finding that a license holder or other person has violated this chapter or executive commissioner rules, to grant the injunctive relief that the facts warrant.

Sec. 248A.104. CIVIL PENALTY. (a) Provides that a license holder or person who violates this chapter or a rule adopted by the executive commissioner under this chapter is liable for a civil penalty, to be imposed by a district court, of not more than \$1,000 for each day of violation.

(b) Authorizes the attorney general to sue to collect the penalty and to recover reasonable expenses, including attorney's fees, incurred in recovering the penalty.

(c) Requires that all penalties collected under this section be deposited to the credit of the general revenue fund.

Sec. 248A.105. CRIMINAL PENALTY. (a) Provides that a person who knowingly establishes or operates a facility without a license issued under this chapter commits an offense.

(b) Provides that an offense under this section is a Class B misdemeanor.

(c) Provides that each day of a continuing violation constitutes a separate offense.

[Reserves Sections 248A.106-248A.150 for expansion.]

SUBCHAPTER D. ADMINISTRATIVE PENALTY

Sec. 248A.151. IMPOSITION OF PENALTY. Authorizes the commissioner of DSHS (commissioner) to impose an administrative penalty on a person licensed under this chapter who violates this chapter or a rule or order adopted under this chapter.

Sec. 248A.152. AMOUNT OF PENALTY. (a) Prohibits the amount of the penalty from exceeding \$1,000 for each violation, and each day a violation continues or occurs is a separate violation for purposes of imposing a penalty. Prohibits the total amount of the penalty assessed for a violation continuing or occurring on a separate day under this subsection from exceeding \$5,000.

(b) Requires that the amount be based on the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation; the threat to health or safety caused by the violation; the history of previous violations; the amount necessary to deter a future violation; whether the violator demonstrated good faith, including when applicable whether the violator made good faith efforts to correct the violation; and any other matter that justice may require.

Sec. 248A.153. REPORT AND NOTICE OF VIOLATION AND PENALTY. (a) Requires DSHS to give written notice of the report by certified mail to the person if DSHS initially determines that a violation occurred.

(b) Requires that the notice include a brief summary of the alleged violation; state the amount of the recommended penalty; and inform the person of the person's right to a hearing on the occurrence of the violation, the amount of the penalty, or both.

Sec. 248A.154. PENALTY TO BE PAID OR HEARING REQUESTED. (a) Authorizes the person in writing, not later than the 20th day after the date the person receives the notice sent under Section 248A.153, to accept the determination and recommended penalty of DSHS or to make a request for a hearing on the occurrence of the violation, the amount of the penalty, or both.

(b) Requires the commissioner by order to approve the determination and impose the recommend penalty if the person accepts the determination and recommended penalty or if the person fails to respond to the notice.

Sec. 248A.155. HEARING. (a) Requires the commissioner to refer the matter to the State Office of Administrative Hearings (SOAH) if the person requests the hearing. Requires SOAH to promptly set a hearing date and give written notice of the time and place of the hearing to the person. Requires an administrative law judge of SOAH to conduct the hearing.

(b) Requires the administrative law judge to make findings of fact and conclusions of law and promptly issue to the commissioner a proposal for a decision about the occurrence of the violation and the amount of proposed penalty.

Sec. 248A.156. DECISION BY COMMISSIONER. (a) Authorizes the commissioner by order, based on the findings of fact, conclusions of law, and proposal for a decision, to find that a violation occurred and impose a penalty or to find that a violation did not occur.

(b) Requires that the notice of the commissioner's order under Subsection (a) that is sent to the person in accordance with Chapter 2001, Government Code, include a statement of the right of the person to judicial review of the order.

Sec. 248A.157. OPTIONS FOLLOWING DECISION: PAY OR APPEAL. Requires a person, not later than the 30th day after the date the order of the commissioner under Section 248A.156 that imposes an administrative penalty becomes final to pay the penalty or file a petition for judicial review of the commissioner's order contesting the occurrence of the violation, the amount of the penalty, or both.

Sec. 248A.158. STAY OF ENFORCEMENT OF PENALTY. (a) Authorizes a person who files a petition for judicial review, within the period prescribed by Section 248A.157, to:

(1) stay enforcement of the penalty by paying the penalty to the court for placement in an escrow account; or giving the court a supersedeas bond approved by the court that is for the amount of the penalty and is effective until all judicial review of the commissioner's order is final; or

(2) request the court to stay enforcement of the penalty by filing with the court a sworn affidavit of the person stating that the person is financially unable to pay the penalty and is financially unable to give the supersedeas bond; and sending a copy of the affidavit to the commissioner by certified mail.

(b) Authorizes the commissioner, if the commissioner receives a copy of the affidavit under Subsection (a) (2), to file with the court, not later than the fifth day after the date the copy is received, a contest to the affidavit. Requires the court to hold a hearing on the facts alleged in the affidavit as soon as practicable and to stay the enforcement of the penalty on finding that the alleged facts are true. Provides that the person who files an affidavit has the burden of proving that the person is financially unable to pay the penalty and to give a supersedeas bond.

Sec. 248A.159. COLLECTION OF PENALTY. (a) Authorizes that the penalty be collected if the person does not pay the penalty and the enforcement of the penalty is not stayed.

(b) Authorizes the attorney general to sue to collect the penalty and to recover reasonable expenses, including attorney's fees, incurred in recovering the penalty.

(c) Requires that a penalty collected under this subchapter be deposited in the state treasury in the general revenue fund.

Sec. 248A.160. DECISION BY COURT. (a) Authorizes the court to uphold or reduce the amount of the penalty and to order the person to pay the full or reduced amount of the penalty if the court sustains the finding that a violation occurred.

(b) Requires the court to order that a penalty is not owed if the court does not sustain the finding that a violation occurred.

Sec. 248A.161. REMITTANCE OF PENALTY AND INTEREST. (a) Requires the court, when the court's judgment becomes final, to order that the appropriate amount plus accrued interest be remitted to the person not later than the 30th day after the date that the judgment of the court becomes final if the person paid the penalty and if the amount of the penalty is reduced or the penalty is not upheld by the court.

(b) Provides that the interest accrues at the rate charged on loans to depository institutions by the New York Federal Reserve Bank.

(c) Requires that the interest be paid for the period beginning on the date the penalty is paid and ending on the date the penalty is remitted.

Sec. 248A.162. RELEASE OF BOND. (a) Requires the court to order when the court's judgment becomes final, the release of the bond if the person gave a supersedeas bond and the penalty is not upheld by the court.

(b) Requires the court to order the release of the bond after the person pays the reduced amount if the person gave a supersedeas bond and the amount of the penalty is reduced.

Sec. 248A.163. ADMINISTRATIVE PROCEDURE. Provides that a proceeding to impose the penalty is considered to be a contested case under Chapter 2001, Government Code.

SECTION 2. (a) Requires the executive commissioner, not later than September 1, 2012, to adopt the rules and standards required by Chapter 248A, Health and Safety Code, as added by this Act.

(b) Provides that notwithstanding Section 248A.051, Health and Safety Code, as added by this Act, a post-acute care acquired brain injury rehabilitation facility is not required to hold a license under Chapter 248A until September 1, 2012.

SECTION 3. (a) Effective date, except as provided by Subsection (b) of this Section: September 1, 2011.

(b) Effective date, Subchapters C and D, Chapter 248A, Health and Safety Code, as added by this Act: September 1, 2012.