

SUBJECT: Enforcement and regulation of nursing homes and other facilities

COMMITTEE: Human Services — favorable, with amendment

VOTE: 5 ayes — Christian, McCall, Miller, Reyna, Wohlgemuth
0 nays
4 absent — Uresti, Naishtat, Olivo, Villarreal

SENATE VOTE: On final passage, April 25 — 31-0, on Local and Uncontested Calendar

WITNESSES: For — Caton Fenz, Harris County Commissioners Court; Roberta Lloyd, Mike Stafford of Harris County
Against — Gavin Gadberry, Texas Health Care Association

BACKGROUND: The Health and Safety Code regulates nursing homes and intermediate care facilities for the mentally retarded (ICF-MRs) and assigns penalties for violations of the regulations. Nursing homes and ICF-MRs are regulated by the Texas Department of Human Services (DHS), which has the authority to petition a court for a temporary restraining order to preclude further violations that could threaten the health and safety of residents.

Under current law, the regulating agency performs investigations of violations and the Office of the Attorney General (OAG) prosecutes them. Any fee or penalty collected is deposited in general revenue and appropriated to the agency that administers and enforces the regulations. Only if a civil penalty is collected can the state assess attorneys' fees. The venue for all actions is Travis County.

DHS must accept private accreditation issued by the Joint Commission on Accreditation of Healthcare Organizations (JCAHO) in lieu of an inspection by DHS for the purposes of a nursing home's license renewal only if JCAHO standards meet the department's minimum standards and involve an annual inspection and the nursing home submits relevant applications, fees, and documentation to DHS.

DIGEST: SB 1204, as amended, would permit the OAG to delegate certain responsibilities to a county attorney, amend the OAG's authority to prosecute violations of nursing home or ICF-MR regulations, authorize DHS to petition the court for a temporary restraining order, and would permit a private accreditation to be used for inspection or certification requirements.

The bill would permit the OAG to delegate prosecuting authority to a county attorney in a county with a population of 3.4 million or more, currently only Harris County. A county that accepted the delegated authority would have all the rights and obligations of the attorney general. It could retain any attorneys' fees or expenses collected, but any penalty would be divided equally between the county attorney and DHS. The venue for action could either be Travis County or the county with the delegated prosecuting authority.

The bill would permit the OAG to collect attorney's fees and reasonable expenses if the court granted an injunction or temporary restraining order. Reasonable expenses would include investigative costs, witness fees, deposition expenses, court costs, and other expenses incurred by the department.

It would permit the department to petition a court for a temporary restraining order to restrain a nursing home or ICF-MR from denying access for investigation purposes.

SB 1204, as amended, would permit DHS to accept private accreditation issued by JCAHO to satisfy the requirements for Medicaid and Medicare certification, as long as federal regulations permitted it and the department obtained any needed waiver or authorization from the federal regulators. DHS would be required to apply for any needed permission by October 1, 2003, and report progress in implementing this to the governor and Legislature by December 1, 2003.

The bill would take effect September 1, 2003.

SUPPORTERS SAY: SB 1204 would improve prosecution of nursing home violations at no additional cost to the state. By the time a case is referred to the OAG, DHS has determined that it cannot negotiate with the home to rectify the situation.

These are the worst cases of violations and the state should move quickly to protect residents by obtaining a temporary restraining order or trusteeship. Counties can move more quickly on cases, better protecting their residents. It would not cost the state anything as the cost of prosecution would be borne by the county, yet the county also would share any penalty awarded with DHS.

The bill would give the OAG options for prosecuting these cases. The bill is permissive, and the decision to delegate the authority would belong to the OAG. If it did not make sense for a case to be prosecuted by the county attorney, the OAG would not refer it.

There is precedent for county involvement in cases over which the OAG has initial authority. Counties have worked with the OAG to prosecute cases in other areas of the law. The Harris County Attorney Office works with the OAG to prosecute cases involving environmental enforcement and consumer fraud. Also, under Health and Safety Code sec. 247.045, DHS may refer cases relating to assisted living facilities to the local district attorney, county attorney, or city attorney if the OAG fails to take action within 30 days of receipt of a referral from DHS.

Venue for these cases should be where the violation occurred, when adequate county resources exist, for expeditious resolution. While the Travis County venue is convenient for violations in Central Texas and necessary for violations in rural areas of the state, Harris County is capable of handling its own cases, and it would be faster and less expensive for them to be tried there.

**OPPONENTS
SAY:**

The provisions relating to delegation of authority in SB 1204 are not needed because the OAG does a fine job in dispatching the cases referred to it. There are relatively few cases sent by DHS to the OAG, and those that are referred are prosecuted quickly and competently. In fiscal 2002, there were 41 DHS nursing home or ICF-MR cases referred to the OAG, only five of which were from Harris County. The OAG has the resources it needs to prosecute the five cases this bill would free for prosecution by the county, and the prosecution is being conducted in a timely manner.

A recent DHS report supported the assertion that the current system of prosecution works well. The fiscal 2002 DHS Long-Term Care Regulatory

Annual Report supports that enforcement of regulations remains strong and the quality and outcomes of prosecuted cases are good.

The state would lose money under the proposed delegated authority in SB 1204. Under current law, DHS retains the entire penalty, but would split it with the county if this bill became law. While this would be advantageous to the county's budget, DHS needs the money to fund enforcement and regulation activities.

Because the cases that actually get referred are the most serious and the parties involved are not disposed to settle, DHS needs the full weight of the state's prosecuting authority. A threat of prosecution by the OAG carries a greater weight than that of a county attorney. DHS should be assured that cases it referred would be prosecuted by the most forceful entity.

The state needs to move quickly on these cases and should not be slowed by evaluating the appropriateness of delegating a case. Under current law, OAG lawyers can walk down the street and file for a temporary restraining order or trusteeship. Adding another element of decision before action is taken would place residents at risk.

Limiting the bill to Harris County would prevent the OAG from referring the majority of cases. Of the 41 cases referred last year, five were from Harris County, while 15 were from Arlington and 10 from Austin. If the OAG truly was overworked, it would make more sense to permit the Tarrant County or Travis County attorneys' offices to prosecute these cases.

**OTHER
OPPONENTS
SAY:**

Elements of SB 1204 are needed and should be considered separately from the issue of county delegation of authority. The OAG should have the power to obtain a temporary restraining order against people who prevent investigations, and JCAHO accreditation should be used for Medicaid and Medicare certification, if allowed by federal regulators. County delegation should be stripped from the bill, and these beneficial provisions should remain.

NOTES: The committee amendment would permit DHS to accept private accreditation issued by JCAHO to satisfy the requirements for Medicaid and Medicare certification.