

STATE OF OKLAHOMA

1st Session of the 50th Legislature (2005)

HOUSE BILL 1688

By: Smaligo

AS INTRODUCED

An Act relating to public health and safety; amending 63 O.S. 2001, Sections 1-1912, as amended by Section 6, Chapter 230, O.S.L. 2002, 1-1914 and 1-1914.1, as amended by Section 7, Chapter 230, O.S.L. 2002 (63 O.S. Supp. 2004, Sections 1-1912 and 1-1914.1), which relate to the Nursing Home Care Act; providing for dispute resolution process; stating legislative intent; providing for dispute resolution; defining terms; providing for certain challenges to deficiencies; providing for contents of certain requests; providing for assignment of certain requests; providing for process of informal dispute resolution hearing; authorizing hearing by telephone conference or record review; providing for impartial decision makers; providing for order of arguments and time of arguments; establishing evidentiary standards; providing for attendance of hearings; prohibiting representation by attorney; providing for written determination; specifying contents and distribution; establishing certain limits on informal dispute resolution hearing; amending 63 O.S. 2001, Section 1-1951, as amended by Section 16, Chapter 230, O.S.L. 2002 (63 O.S. Supp. 2004, Section 1-1951), which relates to certified nurse aides; providing for feeding assistants; providing for codification; and providing an effective date.

BE IT ENACTED BY THE PEOPLE OF THE STATE OF OKLAHOMA:

SECTION 1. AMENDATORY 63 O.S. 2001, Section 1-1912, as amended by Section 6, Chapter 230, O.S.L. 2002 (63 O.S. Supp. 2004, Section 1-1912), is amended to read as follows:

Section 1-1912. A. The State Department of Health shall promptly serve a notice of violation upon a licensee whenever upon inspection or investigation, the Department determines that:

1. The facility is in violation of the Nursing Home Care Act, any rule promulgated thereunder, or applicable federal certification criteria; or

2. The financial condition of the facility poses an immediate risk to the proper operation of the facility or to the health, safety or welfare of the residents of the facility.

B. Each notice of violation shall be prepared in writing and shall specify the nature of the violation, and the statutory provision, rule or standard alleged to have been violated. The notice of violation shall inform the licensee of its obligation to file a plan of correction within ten (10) working days of receipt of the notice of violation.

C. The Department shall notify the licensee of its intent to take any remedial action, impose administrative penalties, place a monitor or temporary manager in the facility, issue a conditional license, or suspend or revoke a license. The Department shall also inform the licensee of the right to a hearing and a right to an informal dispute resolution hearing.

D. Whenever the Department finds that an emergency exists requiring immediate action to protect the health, safety or welfare of any resident of a facility licensed pursuant to the provisions of this act, the Department may, without notice of hearing, issue an order stating the existence of such an emergency and requiring that action be taken as deemed necessary by the Department to meet the emergency. The order shall be effective immediately. Any person to whom such an order is directed shall comply with such order immediately but, upon application to the Department, shall be afforded a hearing within ten (10) business days of receipt of the application. On the basis of such hearing, the Department may continue the order in effect, revoke it, or modify it. Any person aggrieved by such order continued after the hearing provided in this subsection may appeal to the district court in Oklahoma County

within thirty (30) days. Such appeal when docketed shall have priority over all cases pending on the docket, except criminal cases. For purposes of this subsection, the State Board of Health shall define by rule the term "emergency" to include, but not be limited to, a life-endangering situation.

SECTION 2. AMENDATORY 63 O.S. 2001, Section 1-1914, is amended to read as follows:

Section 1-1914. A. A facility shall have ten (10) working days after receipt of notice of violation in which to prepare and submit a plan of correction. The plan of correction shall include a fixed time period, not to exceed sixty (60) days within which the violations are to be corrected. The Department may extend this period where correction involves substantial structural improvement. If the Department rejects a plan of correction, it shall send notice of the rejection and the reason for the rejection to the facility. The facility shall have ten (10) working days after receipt of the notice of rejection in which to submit a modified plan. If the modified plan is not timely submitted, or if the modified plan is rejected, the Department shall impose a plan of correction which the facility shall follow.

B. If the violation has been corrected prior to submission and approval of a plan of correction, the facility may submit a report of correction in place of a plan of correction.

C. Upon a licensee's written request, the Department shall determine whether to grant a licensee's request for an extended correction time. Such request shall be served on the Department prior to expiration of the correction time originally approved. The burden of proof shall be on the licensee to show good cause for not being able to comply with the original correction time approved.

D. If a facility desires to contest any Department action under this section, it shall send a written request for an informal dispute resolution or a hearing to the Department within ten (10)

working days of receipt of notice of the contested action and the Department shall commence the informal dispute resolution or hearing.

SECTION 3. AMENDATORY 63 O.S. 2001, Section 1-1914.1, as amended by Section 7, Chapter 230, O.S.L. 2002 (63 O.S. Supp. 2004, Section 1914.1), is amended to read as follows:

Section 1914.1 A. For violations of the Nursing Home Care Act, the rules promulgated thereto, or Medicare/Medicaid certification regulations:

1. The State Department of Health shall seek remedial action against a licensee, owner or operator of a facility and may, after notice and opportunity for hearing, impose the remedy most likely to:

- a. gain and ensure continued compliance with the Nursing Home Care Act, the rules promulgated thereto, or federal certification standards or both rules and standards, or
- b. provide for the financial operation of the facility that ensures the health, safety and welfare of the residents;

2. In the alternative or in addition to any remedial action, the State Commissioner of Health may direct the Oklahoma Health Care Authority to withhold vendor payments due to a facility under its programs until such time as the corrections are made;

3. The Department may deny, refuse to renew, suspend or revoke a license, ban future admissions to a facility, assess administrative penalties, or issue a conditional license; ~~and~~

4. a. Pursuant to an investigation or inspection that reveals a willful violation of rules pertaining to minimum direct-care staffing requirements, the Commissioner shall notify the Oklahoma Health Care Authority and the Authority shall withhold as a

penalty a minimum of twenty percent (20%) of the vendor payments due the facility under its programs for each day such violation continues.

- b. The Commissioner shall impose an equivalent penalty amount under licensure standards for a facility that does not receive vendor payments under its program that is in willful violation of rules pertaining to minimum direct-care staffing requirements; and

5. Engage in informal dispute resolution.

B. Whenever the Department takes remedial action against a facility because the financial condition of the facility has endangered or is at risk of endangering the proper operation of the facility or the health, safety or welfare of the residents of the facility, the Department shall also review the conditions of all other facilities in this state owned or operated by a person with a controlling interest as defined Section 1-851.1 of this title, and may take remedial action against the facilities as necessary or appropriate.

C. Remedial action as provided in subsection A or B of this section shall be based on current and past noncompliance or incomplete or partial compliance; repeated violations; or failure to substantially comply with the Nursing Home Care Act and rules promulgated thereto. In determining the most appropriate remedy, the Department shall consider at least the following:

1. The nature, circumstances and gravity of the violations;
2. The repetitive nature of the violations at the facility or others operated by the same or related entities;
3. The previous degree of difficulty in obtaining compliance with the rules at the facility or others operated by the same or related entities; and

4. A clear demonstration of good faith in attempting to achieve and maintain continuing compliance with the provisions of the Nursing Home Care Act.

SECTION 4. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1914.3 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. The Legislature finds it is necessary to provide an alternative process to formal judicial or administrative appeals of deficiencies for long-term care facilities as a means for faster, more efficient, and less expensive resolution of disputes.

B. Informal dispute resolution hearings shall be conducted by the State Department of Health or its successor agency.

C. The State Department of Health shall assign all informal dispute resolution hearings to the unit or section charged with performing survey or inspection activity for hospitals and hospital-based skilled nursing facilities.

SECTION 5. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1914.4 of Title 63, unless there is created a duplication in numbering, reads as follows:

For purposes of this act:

1. "Deficiency" means a violation or alleged violation by a long-term care facility of applicable state or federal laws, rules, or regulations governing the operation or licensure of a long-term care facility;

2. "Deficiency identification number" means an alphanumeric designation of a deficiency by the Office of Long-Term Care that denotes the applicable state or federal rule, regulation, or law allegedly violated and that is used on the statement of deficiencies;

3. "Impartial decision maker" means an individual employed by a state agency to conduct an informal dispute resolution hearing for the agency;

4. "Informal dispute resolution" means a nonjudicial process or forum before an impartial decision maker that provides a facility cited for deficiency with the opportunity to dispute a citation for deficiency;

5. "Long-term care facility" has the same meaning as under Section 1-851.1 of Title 63 of the Oklahoma Statutes;

6. "Party" means a facility requesting an informal dispute resolution hearing, the Office, or both;

7. "State survey agency" means the Office, the federally designated state entity that performs Medicaid and Medicare surveys and inspections of Oklahoma long-term care facilities; and

8. "Statement of deficiencies" means a statement prepared by the Office citing the applicable state or federal laws, rules, or regulations violated by a long-term care facility and the facts supporting the citation.

SECTION 6. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1914.5 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. A long-term care facility that wishes to challenge a deficiency through the informal dispute resolution process shall make a written request to the State Department of Health within ten (10) calendar days of the receipt of the statement of deficiencies from the Office of Long-Term Care.

B. The written request for an informal dispute resolution shall include:

1. A list of all deficiencies that the facility wishes to challenge; and

2. A statement indicating whether the long-term care facility wants the hearing to be conducted by telephone conference call, by record review of the impartial decision maker, or by a meeting in which the facility and the Office appear before the impartial decision maker.

C. A request for an informal dispute resolution shall not:

1. Stay any action for enforcement or imposition of remedies;

or

2. Affect or preclude the right of a long-term care facility to judicial or administrative appeal.

SECTION 7. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1914.6 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. Upon receipt of a request for an informal dispute resolution hearing from a long-term care facility, the State Department of Health shall assign the matter to an impartial decision maker.

B. The impartial decision maker shall:

1. Schedule a time and date for a hearing; and

2. Inform the parties of the time and date of the hearing.

C. If the request for an informal dispute resolution hearing includes a request by the facility for a hearing at which the facility may appear before the impartial decision maker, the impartial decision maker shall:

1. Arrange for facilities appropriate for conducting the hearing; and

2. Inform the parties of the location of the facility.

D. 1. Each party shall submit to the impartial decision maker all documentary evidence that the party believes has a bearing on or relevance to the deficiencies in dispute by the date specified by the impartial decision maker.

2. Documentary evidence that is not submitted by the date specified by the impartial decision maker may be:

a. refused and not considered by the impartial decision maker, or

b. accepted by the impartial decision maker.

(1) If the evidence is accepted, the impartial decision maker shall provide the opposing party

the opportunity to submit additional documentary evidence.

- (2) However, the additional evidence shall be limited to information that addresses or rebuts the documentary evidence submitted after the date specified by the impartial decision maker.

E. 1. If the request for an informal dispute resolution hearing does not include a request by the long-term care facility for a hearing at which the long-term care facility may appear before the impartial decision maker, or upon agreement of the long-term care facility and the Office of Long-Term Care, the impartial decision maker may conduct the hearing by telephone conference call or by a review of documentary evidence submitted by the parties.

2. a. If the informal dispute resolution hearing is conducted by record review, the impartial hearing officer may request, and the parties shall provide, a written statement setting forth the parties positions for accepting, rejecting, or modifying each deficiency in dispute.
- b. The written statement shall specify the documentary evidence that supports the position of each party for each deficiency in dispute.
- c. The long-term care facility shall provide its written statement to the impartial decision maker and the Office.
- d. The Office shall then provide its written statement in rebuttal to the impartial decision maker and the facility.

SECTION 8. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1914.7 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. The impartial decision maker in the informal dispute resolution process may be an individual or a committee of individuals employed by the State Department of Health.

B. 1. An impartial decision maker shall be a nurse, a physician, a pharmacist, or any combination of nurses, physicians, or pharmacists, employed by the Department.

2. Each person acting as an impartial decision maker shall be licensed by the State of Oklahoma and be in good standing with their respective licensing agencies or boards.

C. All impartial decision makers shall undergo and complete surveyor training arranged by the Office of Long-Term Care.

SECTION 9. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1914.8 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. 1. In all informal dispute resolution cases except record review, the long-term care facility shall present the initial arguments.

2. The Office of Long-Term Care shall then present its arguments.

B. 1. The informal dispute resolution hearing shall be limited to no more than two (2) hours in length, with each party being permitted one (1) hour to present its arguments.

2. However, the impartial hearing officer may grant each party additional equal time for good cause as determined by the impartial decision maker.

C. 1. Rules of evidence or procedure shall not apply to the informal dispute resolution hearing except as provided in this section.

2. The impartial decision maker may:

- a. accept any information that the impartial decision maker deems material to the issue being presented, and

- b. reject any information that the impartial decision maker deems immaterial to the issue being presented.

D. 1. The informal dispute resolution hearing may not be recorded.

2. However, the impartial decision maker may make written or recorded notes of the arguments.

E. Only employees of the long-term care facility, attending physicians of residents of the long-term care facility at the time of the deficiency, pharmacists providing medications to residents of the long-term care facility at the time of the deficiency, and consultant pharmacists or nurse consultants utilized by the long-term care facility, or the medical director of the long-term care facility may appear or participate at the hearing for, or on the behalf of, the long-term care facility.

F. Only employees of the Office of Long-Term Care may appear or participate at the hearing for, or on behalf of, the Office.

G. No party may be represented by an attorney.

SECTION 10. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1914.9 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. 1. Upon the conclusion of all arguments by the parties at the informal dispute resolution hearing, the impartial decision maker shall issue a written statement of findings that shall be entitled "Determinations".

2. The determinations shall include:

- a. a recitation of the deficiency identification numbers,
- b. a statement of whether a disputed deficiency should remain, be removed, or be modified on the statement of deficiencies, and
- c. the facts and persuasive arguments that support the finding of the impartial decision maker for each deficiency identification number.

B. 1. The determination of the impartial decision maker shall be provided to all parties.

2. a. The Office of Long-Term Care shall review the determination and shall issue a written document entitled "State Survey Agency Determination".

b. The state survey agency determination shall state:

(1) whether, for each disputed deficiency mentioned in the impartial decision maker's determination, the finding of the impartial decision maker is accepted, rejected, or accepted as modified by the state survey agency,

(2) for each deficiency finding by the impartial decision maker that the Office does not accept the finding of the impartial decision maker, a statement explaining the reasons that the finding was not accepted along with the facts, circumstances, or reasons for not accepting the finding, and

(3) for each disputed deficiency finding of the impartial decision maker that the Office accepts the finding with modification, a recitation of the modification and the reason or reasons for the modification.

C. A state survey agency determination is not subject to appeal, reargument, or reconsideration.

D. The Office shall deliver a copy of the state survey agency determination to the facility and to the impartial decision maker.

E. 1. In accordance with the state survey agency determination, the Office shall issue an amended state of deficiencies if the state survey agency determination results in modification to any deficiencies cited in the original statement of deficiencies.

2. If the Office determines that amendments to the statement of deficiencies should result in changes to the scope or severity assigned to any deficiency, the amended statement of deficiencies shall reflect the changes to the scope or severity of any cited deficiency.

F. The amended statement of deficiencies shall be provided to the facility.

SECTION 11. NEW LAW A new section of law to be codified in the Oklahoma Statutes as Section 1-1914.10 of Title 63, unless there is created a duplication in numbering, reads as follows:

A. 1. The informal dispute resolution hearing is limited to deficiencies cited on a statement of deficiencies.

2. No other issues may be addressed at an informal dispute resolution hearing, including, but not limited to:

- a. scope and severity assessments of deficiencies unless the scope and severity assessments allege substandard quality of care or immediate jeopardy,
- b. any remedies imposed,
- c. any alleged failure of the survey team to comply with a requirement of the survey process,
- d. any alleged inconsistency of the survey team in citing deficiencies among facilities, and
- e. any alleged inadequacy or inaccuracy of the informal dispute resolution process.

3. a. If the impartial decision maker finds that matters not subject to informal dispute resolution are presented, the impartial decision maker shall strike all documentary evidence related to or presented for the purpose of disputing the matter not subject to informal dispute resolution.

- b. The impartial decision maker may not include in the determination any matter not subject to informal dispute resolution.

SECTION 12. AMENDATORY 63 O.S. 2001, Section 1-1951, as amended by Section 16, Chapter 230, O.S.L. 2002 (63 O.S. Supp. 2004, Section 1-1951), is amended to read as follows:

Section 1-1951. A. The State Department of Health shall have the power and duty to:

1. Issue certificates of training and competency for nurse aides;
2. Approve training and competency programs including, but not limited to, education-based programs and employer-based programs;
3. Determine curricula and standards for training and competency programs;
4. Establish and maintain a registry for certified nurse aides ~~and for,~~ nurse aide trainees, and feeding assistants;
5. Establish categories and standards for nurse aide certification and registration; and
6. Exercise all incidental powers as necessary and proper to implement and enforce the provisions of this section.

B. The State Board of Health shall promulgate rules to implement the provisions of this section and shall have power to assess fees.

1. Each person certified as a nurse aide pursuant to the provisions of this section shall be required to pay certification and recertification fees in amounts to be determined by the State Board of Health, not to exceed Fifteen Dollars (\$15.00).

2. In addition to the certification and recertification fees, the State Board of Health may impose fees for training or education programs conducted or approved by the Board.

3. All revenues collected as a result of fees authorized in this section and imposed by the Board shall be deposited into the Public Health Special Fund.

C. Only a person who has qualified as a certified nurse aide and who holds a valid current nurse aide certificate for use in this state shall have the right and privilege of using the title Certified Nurse Aide and to use the abbreviation CNA after the name of such person. Any person who violates the provisions of this section shall be subject to a civil monetary penalty to be assessed by the Department.

D. 1. The State Department of Health shall establish and maintain a certified nurse aide ~~and,~~ nurse aide trainee and feeding assistant registry that:

- a. is sufficiently accessible to promptly meet the needs of the public and employers, and
- b. provides a process for notification and investigation of alleged abuse, exploitation or neglect of residents of a facility or home, clients of an agency or center, or of misappropriation of resident or client property.

2. The registry shall contain information as to whether a nurse aide has:

- a. successfully completed a certified nurse aide training and competency examination,
- b. met all the requirements for certification, or
- c. received a waiver from the Board.

3. a. The registry shall include, but not be limited to, the following information on each certified nurse aide or nurse aide trainee:

- (1) the ~~individual's~~ full name of the individual,
- (2) information necessary to identify each individual,

- (3) the date the individual became eligible for placement in the registry,
- (4) information on any finding of the Department of abuse, neglect or exploitation by the certified nurse aide or nurse aide trainee, including:
 - (a) documentation of the Department's investigation, including the nature of the allegation and the evidence that led the Department to confirm the allegation,
 - (b) the date of the hearing, if requested by the certified nurse aide or nurse aide trainee, and
 - (c) a statement by the individual disputing the finding if the individual chooses to make one.

4. The Department shall include the information specified in division (4) of subparagraph a of paragraph 3 of this subsection in the registry within ten (10) working days of the substantiating finding and it shall remain in the registry, unless:

- a. it has been determined by an administrative law judge, a district court or an appeal court that the finding was in error, or
- b. the Board is notified of the death of the certified nurse aide or nurse aide trainee.

5. Upon receipt of an allegation of abuse, exploitation or neglect of a resident or client, or an allegation of misappropriation of resident or client property by a certified nurse aide or nurse aide trainee, the Department shall place a pending notation in the registry until a final determination has been made. If the investigation, or administrative hearing held to determine whether the certified nurse aide or nurse aide trainee is in violation of the law or rules promulgated pursuant thereto, reveals

that the abuse, exploitation or neglect, or misappropriation of resident or client property was unsubstantiated, the pending notation shall be removed within twenty-four (24) hours of receipt of notice by the Department.

6. The Department shall, after notice to the individuals involved and a reasonable opportunity for a hearing, make a finding as to the accuracy of the allegations.

7. If the Department after notice and opportunity for hearing determines with clear and convincing evidence that abuse, neglect or exploitation, or misappropriation of resident or client property has occurred and the alleged perpetrator is the person who committed the prohibited act, notice of the findings shall be sent to the nurse aide and to the district attorney for the county where the abuse, neglect or exploitation, or misappropriation of resident or client property occurred and to the Medicaid Fraud Control Unit of the Attorney General's Office. Notice of ineligibility to work as a nurse aide in a long-term care facility, a residential care facility, assisted living facility, day care facility, or any entity that requires certification of nurse aides, and notice of any further appeal rights shall also be sent to the nurse aide.

8. The Department shall require that each facility check the nurse aide registry before hiring a person to work as a nurse aide. If the registry indicates that an individual has been found, as a result of a hearing, to be personally responsible for abuse, neglect or exploitation, that individual shall not be hired by the facility.

9. If the state finds that any other individual employed by the facility has neglected, abused, misappropriated property or exploited in a facility, the Department shall notify the appropriate licensing authority and the district attorney for the county where the abuse, neglect or exploitation, or misappropriation of resident or client property occurred.

10. Upon a written request by a certified nurse aide or nurse aide trainee, the Board shall provide within twenty (20) working days all information on the record of the certified nurse aide or nurse aide trainee when a finding of abuse, exploited or neglect is confirmed and placed in the registry.

11. Upon request and except for the names of residents and clients, the Department shall disclose all of the information relating to the confirmed determination of abuse, exploitation and neglect by the certified nurse aide or nurse aide trainee to the person requesting such information, and may disclose additional information the Department determines necessary.

12. A person who has acted in good faith to comply with state reporting requirements and this section of law shall be immune from liability for reporting allegations of abuse, neglect or exploitation.

E. Each nurse aide trainee shall wear a badge which clearly identifies the person as a nurse aide trainee. Such badge shall be furnished by the facility employing the trainee. The badge shall be nontransferable and shall include the first and last name of the trainee.

F. 1. For purposes of this section, "feeding assistant" means an individual who is paid to feed residents by a facility or who is used under an arrangement with another agency or organization and meets the following requirements:

a. completion of a minimum eight-hour training course approved by the state that contains the following topics:

- (1) feeding techniques,
- (2) assistance with feeding and hydration,
- (3) communication and interpersonal skills,
- (4) appropriate responses to resident behavior,

- (5) safety and emergency procedures, including the Heimlich maneuver,
- (6) infection control,
- (7) resident rights, and
- (8) recognizing resident behavioral changes that should be reported to the supervisory nurse.

b. Each facility that employs or contracts employment of a feeding assistant shall maintain a record of all individuals, used by the facility as feeding assistants, who have successfully completed the training course approved by the state for paid feeding assistants.

SECTION 13. This act shall become effective November 1, 2005.

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