LONG-TERM CARE LEGISLATIVE OVERSIGHT COMMITTEE
INTERIM REPORT 2000

A REPORT TO THE
77TH TEXAS LEGISLATURE

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CHAIRMAN

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Committee On
LONG-TERM CARE LEGISLATIVE OVERSIGHT

November 30, 2000

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The Honorable James E. "Pete" Laney
Speaker, Texas House of Representatives
Texas State Capitol, Rm. 2W.13
Austin, Texas 78701

The Honorable Rick Perry
Lt. Governor of Texas
Texas State Capitol, Rm. 2E
Austin, Texas 78701

Dear Speaker Laney and Governor Perry:

The Long-Term Care Legislative Oversight Committee of the Seventy-Sixth Legislature hereby submits its interim report including recommendations for consideration by the Seventy-Seventh Legislature.

Respectfully submitted,

Elliott Naishtat, Chairman

Jim McReynolds

Judith Zaffirini

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INTRODUCTION

During the 75th Legislative Session, Senate Bill 190, by Senator Judith Zaffirini and Representative Elliott Naishtat, was passed into law. Subchapter O. "Legislative Oversight," created the Long-Term Care Legislative Oversight Committee. As stipulated by Sec. 242.652, the committee is composed of two members of the Senate and one public member appointed by the lieutenant governor; and two members of the House of Representatives and one public member appointed by the speaker of the House of Representatives. The lieutenant governor and the speaker, on an alternating basis, are responsible for appointing the presiding officer of the committee.

For the interim preceding the 77th Legislative Session, the speaker appointed Representative Elliott Naishtat as the presiding officer, Representative Jim McReynolds and public member Patricia Karrh. The lieutenant governor appointed Senator Judith Zaffirini, Senator Jane Nelson and public member Elaine Nail.

During the interim, the House and Senate Committees on Human Services were charged to study and make recommendations on issues such as the long-term care business climate, the continuum of care and support options available to Texans in need of long-term care, and the effectiveness of state regulatory efforts to ensure quality services. In light of the long-term care issues being studied by the House and Senate Committees on Human Services, Representative Naishtat directed the Long-Term Care Legislative Oversight Committee to focus on a specific aspect of SB 190, 75th Session. The committee was directed to:

> Evaluate the Department of Human Services' implementation of Section 242.071, Health and Safety Code, entitled "Amelioration of Violation," and make recommendations to the department and the Legislature regarding implementation of the provision.

The committee has completed its hearings and investigations and has issued its report. The committee wishes to express appreciation to the speakers and citizens who provided testimony at its hearings, the dedicated members of the amelioration workgroup, the leadership and staff of the Department of Human Services, the Texas Legislative Council, and the staff of the Texas House of Representatives and Senate for their time and efforts on behalf of the committee.

LONG-TERM CARE LEGISLATIVE OVERSIGHT COMMITTEE

INTERIM STUDY CHARGE

CHARGE Evaluate the Department of Human Services' implementation of Section 242.071, Health and Safety Code, entitled "Amelioration of Violation," and make recommendations to the department and the Legislature regarding implementation of the provision.

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Background

Senate Bill 190, 75th Session, added, *inter alia*, a small section to Chapter 242 of the Health and Safety Code, entitled "Amelioration of Violation." The amelioration provision gives the commissioner of the Department of Human Services (DHS) an option to allow nursing homes that have been assessed an administrative penalty to ameliorate their fines by redirecting these fines to improve direct care services to residents (see box).

> **Sec. 242.071. Amelioration of Violation**. In lieu of ordering payment of the administrative penalty under Section 242.069, the commissioner may require the person to use, under the supervision of the department, any portion of the penalty to ameliorate the violation or to improve services, other than administrative services, in the institution affected by the violation.
>
> *Source: Vernon's Texas Statutes and Codes Annotated*,

Under Chapter 242, the option of amelioration in nursing homes is only available for administrative penalties. Administrative penalties are assessed by DHS and are the first set of tools that DHS has to enforce state laws regarding nursing home care. DHS has the authority to recommend administrative penalties when a facility licensed under Chapter 242 fails to meet specified rules and requirements and the violation falls within the description of DHS rules in the Texas Administrative Code.[1] For example, if a home fails to adequately protect a resident from verbal, sexual, physical, and mental abuse, or refuses to allow a DHS representative to inspect any part of the premises, an administrative penalty can be recommended.[2]

Additionally, in certain administrative penalty cases, the facility may avoid the imposition of the penalty through the "right-to-correct" provision in Chapter 242. Under this provision, in situations of a less serious nature, DHS has the option to give a home the "right-to-correct," thus allowing the home 45 days to correct the deficiency.[3] If correction occurs within 45 days, the penalty is erased.[4] An example of a "right-to-correct" violation could be the failure of a facility to maintain food at a safe and appropriate temperature, thus placing residents at risk for food borne illnesses, though no actual illness occurred.[5] In Fiscal Year 1999, about one-third of the nearly 800 recommended administrative penalties by DHS were designated as "right-to-correct."[6]

At DHS' discretion, cases can also be referred to the Office of the Attorney General (OAG) for pursuit of civil monetary penalties.[7] Cases that involve death or extreme instances of resident harm from abuse or neglect are often referred to the OAG. Under Chapter 242, the option of amelioration does not apply to civil monetary penalties. Further, the types of cases that are referred to the OAG are typically not appropriate for amelioration.

Since DHS completed implementation of SB 190 in 1998, the House and Senate Committees on Human Services have repeatedly heard testimony from the nursing home industry regarding the lack of use of the

Other State Enforcement Tools

An enforcement tool at the state's disposal is the ability to suspend resident admissions to a nursing home. The Commissioner of DHS has the authority to suspend admissions; in FY 99, he issued orders to do so for five facilities. As required by law, in order for DHS to suspend admissions, the facility must have committed acts for which a civil penalty could be imposed.

DHS may also revoke nursing home operating licenses or deny requests for renewal of those licenses. Typically in conjunction with the placement of a trustee, DHS may also enforce an emergency license suspension which last for ten days.

Finally, as an action of last choice, DHS, or the court appointed trustee, may close a home. Three facilities were closed by trustees in FY 99 due to the owner's insolvency.

Source: *Department of Human Services. Senate Bill 190 Annual Report. October 1999.*

amelioration provision. Research showed that since 1998, when rules were promulgated to implement SB 190, no nursing home had been approved to ameliorate any penalties.[8] Research also indicated that there are no clear policy guidelines for DHS to follow regarding the appropriate use of this section of the Health and Safety Code. The language contained in Sec. 242.071 is the only guidance on how the provision should be utilized.

The committee determined that DHS had established only one criterion for evaluating requests to ameliorate penalties. At the time the committee began its study, DHS would only approve the use of this provision if the nursing home submitted a proposal that would cause a dramatic program change in the home related to quality of care.[9]

Using this criterion, acceptable program changes would include implementation of the "Eden Alternative."[10] The "Eden Alternative" represents a dramatic shift in management philosophy from the traditional medical model used by the majority of nursing facilities, and has been proven to increase the well-being of nursing home residents. DHS did not establish policies regarding the type of penalties allowed to be ameliorated or what specific proposals for amelioration should address. Again, as of press time, no facility had been approved to ameliorate its administrative penalties.

The committee held an initial public hearing on March 30, 2000 to hear from DHS about issues surrounding expanding the use of the amelioration provision. The committee also took public testimony on the issue. Industry representatives stated that the amelioration provision was an important component of the deliberations surrounding SB 190, and called for its expanded use. Concerned that the provision could be used as a way to circumvent regulation, various nursing home resident advocacy groups expressed apprehension about expanding the use of the provision.

The Eden Alternative

The Eden Alternative is based on the belief that human beings are ill-suited to life in an institution. The Eden Alternative allows a home to transform a conventional facility into a "human habitat" by:

> "Creating an environment that imbues life with variety and spontaneity; building a human habitat that is alive with plants, companion animals, and children; providing residents with easy access to companionship by promoting close and continuing contact between the elements at the human habitat and the residents; and de-emphasizing the programmed activities approach to life."

Source: Sandy Ransom.. Eden Alternative: Building

At that time, the committee felt the responsible use of the provision would allow DHS to give a nursing home the option to invest its administrative penalties in clear and measurable quality outcomes in resident care. The use of this clause, with proper guidelines, would give DHS the ability to redirect a nursing home's money that would have been used to pay administrative fines and legal fees, to instead be spent on improving resident care. Towards that end, the committee explored the policy questions regarding amelioration.

Testimony and discussions at the initial hearing revealed the complexity of the issues that would have to be addressed if DHS were to responsibly increase the use of the amelioration provision. Several questions that the committee would have to answer were identified during the hearing (see box). Due to the technical complexity of the identified questions and the controversial nature of some of the related issues, the committee decided to establish a workgroup to address the charge to the committee.

After the hearing, the committee extended an invitation to individuals present who expressed interest in joining the workgroup. The workgroup was made up of representatives from the nursing home industry, AARP, nursing home resident advocates, representatives of the Texas Senior Advocacy Coalition, relevant agency staff, including the State Ombudsman and staff from DHS' Long-Term Care Regulatory Division, and staff of members of the committee. The two public members of the Long-Term Care Legislative Oversight Committee also participated at the workgroup level (see appendices for workgroup membership).

Identified Questions

What penalties should be eligible for amelioration?

What should the amelioration plan proposed by the facility address?

How should DHS take the history of the facility and/or operator into consideration?

What limits should DHS place on the use of the amelioration provision?

Where in the continuum of due process should amelioration occur?

How should DHS monitor compliance with an approved amelioration plan?

What consequences should there be for not complying with an amelioration plan?

How should amelioration affect a home's history?

What statutory changes are required to make

The workgroup met twice, with over 20 members in attendance. Committee staff had several additional individual meetings with workgroup members, including sessions with long-term care regulatory staff at DHS, to walk through the amelioration process and address questions and concerns of other workgroup members.

The result of the workgroup's efforts was a draft policy guidance regarding the expanded use of the amelioration provision to be submitted to the Department of Human Services. The Long-Term Care Legislative Oversight Committee held a second public hearing on September 21, 2000 to review the workgroup's draft guidance and take additional public testimony on the issue.

The remainder of this report contains the amelioration policy guidance to DHS that the committee adopted at the September hearing, as well as related recommendations adopted by the committee.

Amelioration Policy Guidance to the Department of Human Services

The policy guidance addresses these issues:

When should amelioration of a violation be approved?
- What scope and severity of penalties should be eligible for amelioration?
- What should the amelioration plan proposed by the facility address?
- How should DHS take the history of the facility and/or operator into consideration?
- What limits should DHS place on the use of the amelioration provision?

Where in the continuum of due process should amelioration occur?
How should DHS monitor compliance with an approved amelioration plan?
What should the consequences be for not complying with an amelioration plan?
How will amelioration affect a home's history?
Other guidance to the Department of Human Services
- Best Practice / Quality of Life Improvement Grants

When should amelioration of a violation be approved?

Four central questions need to be answered to determine when amelioration of a violation should be approved.

1) **What scope and severity of penalties should be eligible for amelioration?**
2) **What should the amelioration plan proposed by the facility address?**
3) **How should DHS take the history of the facility and/or operator into consideration?**
4) **What limits should DHS place on the use of the amelioration provision?**

What scope and severity of penalties should be eligible for amelioration?

The Amelioration Workgroup used the Department of Human Services' administrative penalties scope and severity table to determine under which category of penalties a nursing home would be eligible to submit an amelioration plan to DHS (see chart on next page). After research and deliberation, the workgroup determined that, with one possible exception:

> **DHS should consider limiting amelioration as <u>an option</u> only for administrative penalties resulting from violations in the "G: Negative Outcome: Isolated ($500-2,000)" scope and severity category.**

Rationale

DHS has indicated that all "Minimal Impact" deficiencies (D, E and F) are currently eligible for "right-to-correct" and, therefore, should not be part of the discussion surrounding amelioration.[11] However, it should be noted that industry representatives stated that "right-to-correct" is not granted for first time occurrences of D, E and F deficiencies and provided examples to the committee. DHS should take the information provided by the industry representatives into consideration when developing any new rules around the use of the amelioration provision. If appropriate, DHS should consider amelioration for penalties in these lower categories as the one exception to the rule that only penalties in the G category be eligible.

Deficiencies in any of the "Immediate Threat" (J, K, and L) categories are situations of a serious nature, including death or injury or potential harm and immediate jeopardy to residents. Violations in these categories should not be eligible for amelioration. Examples of "Immediate Threat" violations include severely substandard dietary conditions, serious medication errors, and critical levels of understaffing that could lead to serious harm or death as well as preventable death and serious injury.[12]

Administrative Penalties
Scope and Severity Table

	Isolated	Pattern	Widespread
Immediate threat	J $3,000-6,000	K $4,000-8,000	L $5,000-10,000
Negative Outcome	G $500-2,000	H $1,000-3,000	I $2,000-5,000
Minimal Impact	D $100-600	E $200-800	F $400-1,000
Substantial compliance	A	B	C

Source: Department of Human Services, Long-Term Care Policy Division.

Further, many deficiencies in any of the "Immediate Threat" categories are often referred to the Office of the Attorney General for pursuit of civil monetary penalties, and are also not part of the discussion surrounding amelioration. Similarly, any "G: Negative Outcome: Isolated" deficiency that is referred to the OAG would not be eligible for amelioration.

Other deficiencies that would not be eligible for amelioration include those in the "H" and "I": Negative Outcome - Pattern and Widespread" categories that involve harm to residents, such as serious injury, negligent or incorrect medication, and preventable severe bed sores.

Deficiencies in the "G: Negative Outcome: Isolated" category could involve harm to residents, but are not viewed as placing the resident in immediate jeopardy.[13] Further, being deemed "isolated," these deficiencies have typically been determined to be unforeseeable and not occurring because of systemic negligence on the part of the facility.[14] Therefore, these deficiencies should be eligible for amelioration.

However, a wide variety of deficiencies are assigned to the "G: Negative Outcome: Isolated" category.[15] If a "G: Negative Outcome: Isolated" tag is assigned to a deficiency that was preventable and resulted from

negligence and/or a systemic failure on the part of the home, then DHS should take those circumstances into consideration when reviewing the amelioration proposal.

Maintaining Discretion

The preceding guidance is specific in recommending that DHS consider only one category of deficiency for amelioration. However, within that one category, DHS should maintain ultimate discretion in approving amelioration proposals. The committee's research revealed that the severity and circumstances surrounding deficiencies in the G category can vary greatly. It is possible that any given G deficiency would not be appropriate for amelioration. Therefore, this guidance should in no way be construed as a directive that all G deficiencies be approved for amelioration.

Scenario of an Appropriate Candidate for Amelioration

Industry representatives described deficiency scenarios that the committee felt would be reasonable candidates for amelioration.[16] Under these scenarios, the deficiency was not the result of any systemic negligence on the part of the operator, was unforeseeable, and could not have been prevented by the operator.

For example, a nurse aide uses bad judgment by failing to ask for assistance with transferring a resident to a wheelchair. Attempting to move the resident on his own resulted in minor injury to the resident and a "G: Negative Outcome: Isolated" deficiency was assessed by DHS. The department's investigation showed that the incident happened at the end of a long day, and while the aide had been instructed to seek assistance, he thought he could complete the transfer himself. DHS determined the nurse aide had been properly trained, had no history of problems and had passed all required background checks. Since the nursing home had instructed the aide that transfers were to be performed by two aides, the home took appropriate disciplinary action when that direction was not followed. The home had a good operating history and there was no reason to believe the incident was the result of any systemic problem.

In a sample of administrative penalties imposed in FY 1999, 48.5% of the penalties were in the "G: Negative Outcome: Isolated" category. Therefore, while this proposal limits amelioration to just one category of violations, a substantial number of violations would still be eligible for consideration. Each of the other 11 scope and severity categories represent no more than 10% of the deficiencies. In FY 1999, the average penalty amount for the "G" category was $12,606.

Source: Department of Human Services. Report to the Long-term Care Legislative Oversight Committee.

Under the preceding scenario, there is no question that regulatory action should be taken and that a deficiency should be cited. However, due to the fact that the deficiency was not the result of any systemic negligence on the part of the operator, a strong amelioration proposal should be considered.

What should the amelioration plan proposed by the facility address and what categories of resident care and facility operations could be targeted for improvement under the plan?

To facilitate the development, submission and evaluation of amelioration proposals, DHS should develop a standardized form for nursing homes to use. Standardized forms would aid in the training of the staff that will evaluate the proposals and help make the state's expectations clear to the homes that are developing plans. Standardized forms would also facilitate consistency in the approval of proposals. In developing the standardized forms, DHS should consider the following criteria:

- The plan should target the improvement of services and/or quality of care of nursing home residents and should be based on measurable outcomes;

- Appropriate areas of improvement should be above and beyond the current statutory requirements for providing care in nursing homes; and

- The plan should answer the question: How is the management and/or operation of the facility going to be different as a result of instituting this plan?

- Plans should consist of the following:
  - clear goals;
  - clear and measurable objectives, with specific time lines;
  - appropriate activities to meet each objective; and
  - measurable outcomes to prove the achievement of the goals;

- Allowable spending should include, but not be limited to:
  - improving staffing levels, staff recruitment, and retention;
  - dental services; and
  - implementation of best practices in areas of infection control, resident behavior, decrease in use of psychotropic drugs, increase of quality of life indicators, bowel and bladder control, decrease in use of restraints, dietary improvements and other resident/quality of life areas;

- An amelioration plan that seeks solely to address the specific original violation in question is not sufficient for approval. However, a plan that would institute significant facility-wide management and/or operational changes to substantively address the situation that occurred in the original violation should be considered for approval;

- Non-allowable spending for amelioration plans should include any of the following:
  - capital improvements not determined to be directly related to quality of life;
  - kitchen materials such as pots and pans; and
  - administrative equipment, functions or costs;

- There should be an optional section on the standardized forms for residents, resident councils, family councils, advocates and/or ombudsmen to indicate their support for an amelioration proposal and provide additional comments on the proposal. Nursing homes should make every effort to

involve such groups and DHS should take these groups' participation into consideration when reviewing proposals.

How should DHS take the history of the facility and/or operator into consideration?

In evaluating a submitted plan, DHS should take into consideration the operating history of the facility and/operator in question. Taking history into consideration does not mean that facilities and/or operators with below average operating histories will necessarily be denied the opportunity to ameliorate. Rather, the operating history will be one factor to consider in determining whether the state feels the facility is likely to pursue in good faith, and successfully complete, the submitted plan of amelioration.

What limits should DHS place on the use of the amelioration provision?

DHS should consider the following limits on the use of the amelioration provision.

- A home should not be allowed to ameliorate a violation more than three times in a two-year period, and only once in a two-year period for a similar or related deficiency;

- Regarding the concern that a number of the ameliorated G penalties would not add up to enough money for a home to make significant quality improvements, DHS should consider allowing multiple G violations identified during one survey to be combined in an amelioration proposal, in order to increase the dollar amount ameliorated; and

- It would be appropriate for DHS to consider allowing the combination of violations to count as one "amelioration," for the purpose of applying the biennial limits on use of the amelioration provision. If DHS adopts such a policy, the combination of multiple penalties should not be automatic, but rather at the discretion of the department. Depending on the circumstance surrounding each penalty, the ability to combine penalties should be an option, not a right.

Where in the continuum of due process should amelioration occur?

DHS should consider the following guidance when determining where in the continuum of due process amelioration should occur.

- Within ten days from the time DHS notifies the home of the total amount of the penalty (once DHS has confirmed that the deficiency has been corrected and the Informal Dispute Resolution process is complete), the home could elect to pursue amelioration and must notify DHS of its desire to do so;
- After giving DHS notice of intent to submit an amelioration plan, the home should have 45 days to submit a plan;
- Upon receipt of the home's proposal, DHS should have 45 days to approve the plan. If the plan is approved, then any appeal of the violation in question is dismissed;
- A nursing home should have an opportunity to request an extension to complete its amelioration plan. A home asking for an extension should be able to demonstrate progress on the proposal and justification for the extension;
- If a home does not submit a proposal by the deadline and has not secured an extension, the opportunity to ameliorate should be lost;
- It is appropriate to allow DHS to extend its own deadline for approval of a plan if necessary. It is in DHS' best interest to rule on the proposal in a timely manner. There are already reporting requirements in place regarding DHS' resolution of deficiencies and the agency can be held accountable for timeliness;
- Once the plan is approved, the remaining time lines for implementation of the amelioration plan will be unique to each plan and should be clearly stated and agreed upon by both parties;
- There should be no appeal of DHS's decision to approve an amelioration plan. If the submitted plan is not approved, the home may still pursue its appeal of the violation in question;
- There may be a desire by either party to place a stay on any appeal filed at the State Office for Administrative Hearings (SOAH) while the amelioration proposal is being developed, submitted, and reviewed. If so, there is already due process in place at SOAH for filing a motion to request a stay on an appeal.[17] Either party can oppose the motion if it feels a stay is not in its best interest. Since there is a discretionary process in place through SOAH, the imposition of a stay should not be automatic.
- If the home does not elect to pursue amelioration before the first ten-day deadline, there should be no other opportunities to select amelioration throughout the continuum of due process, with one exception. If, through the appeals process that follows the initial Informal Dispute Resolution

process, an H or I deficiency is reclassified to a G deficiency, the home should have the chance to elect to ameliorate at the time of the reclassification; and

- If a home is allowed to address a violation through the "right-to-correct" option, amelioration should not be an option, as the home would simply correct the violation. If the home is given the "right-to-correct" option but DHS determines that it failed to comply with the plan of correction, amelioration should still not be an option.

How should DHS monitor compliance with an approved amelioration plan?

The monitoring process will vary depending on the complexity of the plan and the amount of the penalty being ameliorated. DHS should consider the following guidelines for the monitoring of amelioration plans.

- Progress and/or continued compliance with any amelioration plan could be monitored during any regular visit to the nursing home by a DHS surveyor. Situations wherein progress could be monitored include annual surveys, complaint investigations and full investigations;
- Further monitoring of an amelioration plan should be an allowable reason for DHS to enter a home at its discretion. Based on resources available, the complexity of the amelioration plan and the history of the operator, DHS may vary the number of follow-up visits. Included in the appendices is an estimate, developed by DHS, of the fiscal and staff impacts of increasing the use of the amelioration of violation provision;
- If any aspect of the plan requires specific purchases of equipment or services and/or completion of a project, then the home could be required to submit invoices and receipts to DHS. DHS could confirm the expenditures during a subsequent visit to the home;
- DHS may require a home to submit progress reports on the implementation of the plan;
- Upon full implementation of an amelioration plan, the nursing home should be required to notify DHS, submit a final report on the implementation and outcomes of the plan, and schedule a follow-up inspection of outcomes outlined in the amelioration plan; and
- In complex cases, and at DHS' discretion, an outside auditor may be approved by DHS to monitor the home's progress and report to DHS.

What should the consequences be for not complying with an amelioration plan?

If a home, during routine monitoring by DHS of the amelioration plan, fails to implement the amelioration plan as agreed to, DHS should consider imposing the following penalties immediately.

- For the disregard of implementation or substantial non-compliance with the amelioration plan, a penalty two times greater than the original amount of the administrative penalty should be assessed. Initial payment should be due to DHS no later than 45 days from the date of discovery by DHS surveyors;
- DHS should have the discretion to determine "substantial non-compliance." If a facility successfully implements the spirit of the amelioration plan, but fails to complete minor activities within the time

line of the plan, non-compliance should not be automatic;

- If a failure to comply with any part of the amelioration plan is determined, and the failure does not constitute a willful disregard, DHS should have the option to give the home the opportunity to correct the breach of agreement without having to pay the penalty. If the home does not sufficiently correct the breach, the appropriate penalty should be assessed; and
- DHS may refer cases of non-compliance to the OAG for collection of the penalty.

How will amelioration affect a home's history?

If a nursing home is eligible and chooses the option to ameliorate administrative penalties, DHS should consider the following consequences with regard to a nursing home's history for licensing renewal purposes:

- A successfully ameliorated violation should be included in a home's history. Amelioration is a form of payment, not an appeal, and should not remove the violation from a home's history;
- However, if the home successfully complies with the amelioration plan, DHS should add a comment to the nursing home's history that the home was fined for certain violations, was approved to ameliorate those fines, and successfully implemented the amelioration plan.

Other Guidance to the Department of Human Services

- The committee believes that additional reporting requirements should be instituted to specifically track the use of the amelioration provision. Reporting could be included in the regular SB 190 reports and could track the number of amelioration proposals submitted, approved and successfully completed. The reports could also highlight the quality improvements that were made through use of the amelioration provision.
- As use of the amelioration provision increases, it would be prudent for DHS and the relevant committees to return in September 2001 to reevaluate the guidance developed by the workgroup and the use of the provision overall.
- Throughout the workgroup process,

Best Practice/Quality of Life Improvement Grants: The concept of "Best Practice/Quality of Life Improvement Grants" should be considered by DHS. In order to further facilitate the state's involvement in initiatives that improve the quality of life for residents of nursing homes, a portion of administrative penalties collected could be deposited in a fund to provide grants to facilities, which would be used to improve the care of residents. Facilities could submit grant proposals to DHS for projects similar to those identified above as appropriate uses of ameliorated funds. Compliance with the grant proposal could be monitored the same way as outlined above for monitoring amelioration plans.

there was concern about the conflict between requiring a "systemic change" and limiting amelioration to the G level of violations. The fines typically associated with G level violations may not amount to adequate resources for "systemic change." In light of this conflict, it would be prudent for DHS to reconsider the standard of requiring substantial "systemic change," as long as only those violations that involve truly isolated cases are allowed to be ameliorated. Nevertheless, proposals should always address important resident care issues.

Recommended statutory changes

Committee staff has researched statutory changes that would be necessary as a result of changes in the amelioration process considered by the committee. A statutory change would be required if the amelioration process includes a mandate that facilities waive their right of appeal if their amelioration plan is approved. The Texas Legislative Council believes the language would be constitutional, as it would be a statutorily authorized form of settling the administrative penalty and would not deny access to the courts or due process.[18]

§ 242.071. Amelioration of Violation (proposed new language is underlined)

In lieu of ordering payment of the administrative penalty under Section 242.069, the commissioner may require the person to use, under the supervision of the department, any portion of the penalty to ameliorate the violation or to improve services, other than administrative services, in the institution affected by the violation. <u>If a request for amelioration is granted, the person must agree to waive the person's right to any appeal under Health and Safety Code chapter 242 related to the administrative penalty that is the subject of the amelioration request .</u>

Committee Recommendations

At the final September 21, 2000 hearing of the Long-Term Care Legislative Oversight Committee, four motions were approved by committee members. All four motions were approved by unanimous consent.

1. The committee adopts and submits the proposed guidance to the Department of Human Services relating to the use of the amelioration of violation provision.

Immediately preceding this section, this report presents the guidance that the committee adopted.

2. The committee recommends that the Legislature amend Chapter 242 of the Health and Safety Code to stipulate that if a request for amelioration is granted, the nursing home must agree to waive its right to any appeal related to the administrative penalty that is the subject of the amelioration request.

Immediately preceding this section, the final aspect of the guidance details this statutory change.

3. The committee directs the Department of Human Services to adopt new reporting requirements to track the number of amelioration proposals submitted, approved and successfully completed.

The Department of Human Services already submits regular reports to the governor and the Legislature on the discharge of its responsibilities under SB 190. DHS could add these new reporting requirements regarding amelioration to its regular SB 190 reports.[19]

4. The committee recommends that the Legislature amend Chapter 242 of the Health and Safety Code to establish a "Best Practices/Quality of Life Improvement Grant Program" to be funded through administrative penalties collected by the state from nursing facilities.

In order to facilitate the state's involvement in initiatives that improve the quality of life for residents of nursing homes, a portion of administrative penalties collected could be deposited in a fund to provide grants to facilities, which would be used to improve the care of residents. Facilities could submit grant proposals to DHS for projects similar to those identified above as appropriate uses of ameliorated funds. Compliance with the terms of the grant could be monitored in the same way as monitoring of amelioration plans.

ENDNOTES

1. Texas Department of Human Services. Senate Bill 190 Annual Report. October 1999.
2. Ibid.
3. Ibid.
4. Ibid.
5. Texas Department of Human Services, Personal Communication, September 25, 2000.
6. Texas Department of Human Services. Senate Bill 190 Annual Report. October 1999.
7. *Vernon's Texas Statutes and Codes Annotated*, Health and Safety Code, Sec. 242.065.
8. Texas Department of Human Services, Personal Communication, March 2000.
9. Ibid.
10. Ibid.
11. Texas Department of Human Services, Personal Communication, April 2000.
12. Texas Department of Human Services, Personal Communication, May 2000.
13. Ibid.
14. Ibid.
15. Ibid.
16. Peter Longo, Texas Health Care Association. Testimony to the Long-Term Care Legislative Oversight Committee. March 30, 2000.
17. Texas Department of Human Services, Personal Communication, August 2000.
18. Texas Legislative Council, Personal Communication, September 2000.
19. Texas Department of Human Services, Personal Communication, September 2000.

Appendices

Appendix A: Feedback on Questions from July 6, 2000 Workgroup Meeting, Committee Staff, August 2000.

Feedback on Questions from July 6, 2000 Workgroup Meeting

At the July 6, 2000 workgroup meeting several questions were raised. Committee staff has tried to answer those questions and, when appropriate, offer a position on the issue raised. Staff felt that every issue raised by the workgroup deserved to be addressed.

1) Deficiencies in the D, E and F categories are eligible for the "right-to-correct," which allows a home to correct the deficiency within 45 days and have it dropped from its record. If a home has a repeat violation in one year, the violation is not eligible for "right-to-correct" on the second and subsequent occurrences. However, industry representatives stated that the "right-to-correct" is not granted for first time occurrences of D, E and F deficiencies. The question was whether "lower" deficiencies that are not granted a "right-to-correct" should be eligible for amelioration. In response to the committee's follow-up research, DHS maintained that the scenario described by the industry representatives should never happen and was unable to verify any occurrences. Workgroup member Darrell Zurovec is working to provide examples to the committee. DHS will take whatever information is provided into consideration when developing any new rules around the use of the amelioration provision.

2) Workgroup members raised the concern that while it has been understood that DHS would retain discretion in approving amelioration plans, it would be prudent to be explicit about the Long-Term Care Legislative Oversight Committee's intention that discretion be maintained. Committee staff has since had additional meetings with DHS to clarify the committee's intention and will address this issue more extensively in the final written guidance that the committee will submit to DHS.

3) Industry representatives asked what would happen in a scenario where, through the appeals process that follows the initial Informal Dispute Resolution process, an H or I deficiency was reclassified as a G. Would the home get the chance to elect amelioration at the time it was re-classified, even though it was after the initial "window" for electing to submit an amelioration proposal?

It is reasonable to allow the submission of an amelioration plan at that time. Since the violation was not originally a G, the home did not have the chance to elect amelioration initially. Committee staff attempted to obtain data on how often such a scenario occurs. DHS staff could see few scenarios where that would occur and could not recall any to date. DHS staff agreed that in the rare case where a higher violation is reclassified, it should be permissible to allow the home to submit an amelioration plan. That being said, staff wants to clarify that if any deficiency begins as a G, and the home does not pursue amelioration within the initial ten-day deadline, there should be no future opportunity for amelioration.

4) DHS and resident advocates expressed concern that the time necessary to evaluate submitted plans and

monitor approved plans would create a considerable workload issue for DHS. In light of Chairman Naishtat's shared concern about this issue, committee staff requested that DHS project the fiscal and staffing implications of an expanded use of the provision. DHS based its estimate on the process originally proposed by the committee and assumed that the average plan would take 12 months to be completed and that DHS would conduct 13 follow-up visits to monitor implementation.

All cost estimates based on the following assumptions

Plan review and background verification time	40 hours
Plan review and Background verification cost	$17.95/hour
Follow-up visits	13
Surveyor	$25.37/hour
Follow-up visit time	average of 24 hours per visit
Travel costs	20%

Estimate of surveyor hours per approved amelioration case	312
Surveyor cost	$7,915.44
Travel	$1,583.09
TOTAL COST / PER AMELIORATION CASE (minus costs of initial review of proposals)	**$9,498.53**

DHS would also presumably have to incur the costs of reviewing all plans that were submitted, whether they were ultimately approved or not. Last year, DHS had 245 penalties in the G category. The following is an estimate of the review costs alone:

Number of Penalties		245
Hours per amelioration plan review		40
Average cost per hour of review		$17.95
Total hours of review per year	9,800	
Total cost of reviews per year		**$175,910**

It is worth noting that it is unlikely that every nursing home with a G penalty will elect to pursue

amelioration. Discussions with industry representatives have confirmed that there will be many instances where a home will choose not to pursue amelioration. For example, the dollar amount of the penalty may be too small to make amelioration beneficial or the home may want to contest the validity of the penalty altogether. Therefore, DHS may not have to review plans for all G violations.

Finally, DHS assumed a proposed amelioration plan approval rate of 12.5 percent to calculate the yearly costs. If there were 254 total proposals and 12.5 percent were approved, DHS would be monitoring approximately 31 amelioration plans a year. Total costs would be as follows:

Total for approx. 31 cases / year @ $9,498.53	$294,454.43
Estimated cost to review all proposals	$175,910.00
Potential DHS total yearly costs	**$470,364.43**

Committee staff notes that there are ways to reduce the administrative costs projected by DHS. While adequate monitoring of the plans is important, reducing the number of follow-up visits per case could reduce costs. The number of visits could vary depending on the complexity of the amelioration plan.

5) The issue of creating standardized forms for the submission of amelioration proposals was discussed at the meeting. Committee staff followed up on this issue with the DHS staff that would have to develop and use such forms. DHS staff reiterated that the benefits of such forms would be well worth the work to develop them. The forms would make it easier for the homes to submit proposals and for DHS to evaluate the proposals. Standardized forms would also aid in the training of the staff that will evaluate the proposals. Finally, the forms would help make the state's expectations clear to the homes that are developing plans and would facilitate consistency in the approval of proposals.

6) At the last meeting, there was also discussion around the conflict between requiring a "systemic change" and limiting amelioration to the G level of violations. The conflict is that the fines typically associated with G level violations may not amount to adequate resources for "systemic change." Committee staff recognizes this conflict and believes that it would be prudent to reconsider the standard of requiring substantial "systemic change," as long as only those violations that involve truly "isolated" cases are allowed to be ameliorated. Nevertheless, proposals should always address important resident care issues. Committee staff has begun discussing this issue with DHS staff.

7) There was considerable discussion around the deadlines that both the homes and DHS would have for submitting and approving amelioration proposals. Forty-five days, instead of the proposed thirty days, was an option. The need for flexibility with both of the deadlines was also discussed.

First, committee staff believes that extending both deadlines to 45 days makes sense. There is a precedent for 45-day time frames in the DHS regulatory structure. Also, 45 days would allow for more time for the home to develop a substantive proposal. Second, committee staff, after discussions with DHS, feels that there should be the opportunity for homes to ask for more time to complete their proposal. Homes asking for an extension must be required to demonstrate progress on the proposal and justification for the extension. Nearly all similar processes at DHS have some mechanism for requesting an extension. To clarify, if a home does not submit a proposal by the deadline and has not secured an extension, the opportunity to ameliorate would be lost.

Committee staff believes it is appropriate to allow DHS to extend its own deadline if necessary. It is in DHS' best interest to rule on the proposal in a timely manner. There are already reporting requirements in place regarding DHS' resolution of deficiencies, and the Legislature can and does hold DHS accountable for timeliness. To that end, committee staff believes that additional reporting requirements should be instituted to specifically track the use of the amelioration provision. Staff has discussed this with DHS and such reporting could be included in regular SB 190 reports.

8) There was also discussion around whether a "stay" should be placed on appeals already filed with the State Office for Administrative Hearings (SOAH) while a home develops a proposal and DHS evaluates the proposal. It was pointed out in the workgroup that placing a "stay" would avoid the legal costs of discovery and other appeal preparations. Because one of the goals of expanding the use of amelioration is to avoid the legal costs to the industry and the state, the workgroup decided that the issue of placing a "stay' on the appeal should be revisited.

Through further research, committee staff learned that there is already due process in place at SOAH for requesting a "stay" on an appeal. Once an appeal is filed, either party in the case can file a motion for a "stay." Often, the motions for "stays" are filed jointly by both parties and their approval is routine. However, either party can oppose the motion if it feels a "stay" is not in its best interest. Since there is already a discretionary process in place through SOAH, staff believes that the imposition of a "stay" should not be automatic. Staff continues to be concerned about the delay a "stay" would cause. If a "stay" is placed on an appeal, SOAH will not look for a date to schedule the hearing until the "stay" is lifted. Meanwhile, earlier potential hearing dates would be filled, further delaying resolution of the case.

9) There was continuing discussion around what role residents, resident councils, family councils, advocates and ombudsman might play in the development, approval and/or monitoring of the amelioration plans. Concern was raised regarding whether a resident council's contribution to, or approval of, an amelioration plan could result in the council's liability for any adverse outcomes.

Through further research and discussion, committee staff believes that when an active family or resident council exists, nursing homes should be routinely seeking input from these groups about improvements that

should be made. There should also be an optional section on the standardized forms for a council to indicate its support for an amelioration proposal and provide additional comments on the proposal. Due to the varying structures and levels of involvement of these councils, committee staff believes that a prescriptive role for these councils, with any official approval authority, would not be prudent. However, nursing homes should make every effort to involve such groups and DHS should take councils' participation into consideration when reviewing proposals. Further, a process without official approval authority would address concerns that were raised about liability.

10) There was concern that a number of the ameliorated G penalties would not constitute enough money for the home to do anything significant to improve quality. In light of that concern, the workgroup discussed the possibility of allowing multiple G violations identified during one survey to be combined in an amelioration proposal in order to increase the dollar amount ameliorated. Related to this discussion, the workgroup also suggested that a home not be allowed to ameliorate a violation more than three times in a two-year period, and only once in a two-year period for a similar or related deficiency. The questions are: 1) Is it a good idea to allow the violations to be combined at all, and 2) If we allow three G violations from a single survey to be combined, should that count as all three that are allowed for the year, or should it just count as one "amelioration?"

Committee staff's initial reaction is that as long as all three violations are the type that staff and the workgroup have expressed comfort with ameliorating (meaning truly "isolated," not preventable, and not caused by negligence of the home), they could be combined. Further, committee staff believes it would be appropriate to allow the combination of violations to count as one "amelioration," if DHS is only allowing amelioration for truly "isolated" violations that were not preventable and not the result of negligence by the home. If DHS is to adopt such a policy, Committee staff believes the combination of multiple penalties should not be automatic, but rather at the discretion of the department. Depending on the circumstance surrounding each penalty in question, the ability to combine penalties should be an option, not a right.

11) Rep. McReynolds's office suggested that the committee research the budgetary issues surrounding the deposit of paid administrative penalties and the related appropriations implications of any changes the workgroup recommends. Collected administrative penalties are deposited into general revenue and are not earmarked for any purpose. Further, the Legislative Budget Board does not take into account any projected revenue from administrative penalties when budgeting for the coming biennium. Total collected administrative penalties totaled just over $760,000 for FY 99. Increased use of amelioration could potentially reduce the total penalties collected, but the reduction would be negligible and the ultimate effect on the state's budget process would be unnoticeable or nonexistent.

12) Committee staff has researched the statutory changes, if any, that would be necessary to carry out any of the changes to the amelioration process considered by the committee. If language is added to the amelioration process mandating that facilities waive their right to appeal if their amelioration plan is approved and carried out, it would be best if there was a statutory change. Committee staff asked the Texas Legislative Council if it believed that such a statutory provision would be unconstitutional, and asked for an opinion. The Texas Legislative Council indicated that the language would most likely be

constitutional, as it would simply be a statutorily authorized form of settling the administrative penalty and would not deny access to the courts or due process.

Appendix B: Memorandum: Administrative Penalties with No Right to Correct, Darrell Zurovec, Associate General Counsel, Mariner Post-Acute Network, September 2000.

MEMORANDUM

To: Mike Lucas

From: Darrell Zurovec, Associate General Counsel

Re: Administrative Penalties with No Right to Correct

Date: November 30, 2000

As we discussed, I have been reviewing my records to identify administrative penalties that TDHS imposed, without giving a facility a right to correct, based on a deficiency that had a scope and severity less than the actual harm level. I have identified twenty-six (26) such penalties that range from $800 to $64,000. In the aggregate, these penalties total approximately $400,000. There were additional examples in which TDHS imposed penalties at low scope and severity levels without providing a right to correct. However, those deficiencies alleged violations of residents' rights or related to the proper reporting of allegations of abuse and neglect. These types of deficiencies do not warrant a right to correct, regardless of the deficiencies' scope and severity level.

While I was not able to review each penalty individually, I thought it would be helpful to provide you with a higher level of detail on a few examples. Accordingly, I enclose Exhibit 1, which provides a summary of six penalties at five facilities in which TDHS did not give a right to correct. I also enclose as Exhibit 2 the statutory provisions that create the right to correct, and the exceptions to the right to correct

I hope that this information is helpful to you. If you would like a list of all 26 penalties referenced above, or if you have any questions, please let me know.

DDZ/mt

Enclosures

EXHIBIT 1

1) **Brazosview Health Care Center**

Date of survey: June 17, 1999

Deficiency: F156 Notice of Rights & Services

Severity: D –potential for more than minimal harm that is not immediate jeopardy

Penalty: $100/day – Estimated total penalty = $2,700.

Allegations: A company unaffiliated with the facility provided psychological services to two residents without obtaining appropriate consent from the residents or their legal representatives.

2) **Stoneybrook Healthcare Center**

Date of survey: May 11, 1999

Deficiency: F 426 Pharmacy Services

Scope & Severity: D –potential for more than minimal harm that is not immediate jeopardy

Penalty: $300/day – Total penalty of $14,700.

Allegations: One resident did not receive a single dose of an anti-spasticity medication approximately one month prior to the investigation. The facility's system for obtaining refills of prescriptions was inadequate.

3) **Mariner Health of Cypresswood**

Date of survey: June 17, 1999

Deficiency: F316 Quality of Care

F371 Dietary Services

Scope & Severity: F316 - E –potential for more than minimal harm that is not immediate jeopardy

F371 – F –potential for more than minimal harm that is not immediate jeopardy

Penalty: F316: $500/day – Total penalty = $15,500.

F371: $300/day – Total penalty = $9,300.

Allegations: F316 – Facility did not follow its own policy and procedure with respect to attempting to restore bladder function to four incontinent residents.

F371 – Areas of the kitchen were not maintained in a sanitary condition and the temperatures of the freezer and refrigerator were not maintained appropriately.

4) **Southfield**

Date of survey: July 27, 1999
Deficiency: F257 Environment
Scope & Severity: D –potential for more than minimal harm that is not immediate jeopardy
Penalty: $200/day – Total penalty = $800.
Allegations: The facility failed to maintain temperatures in the range of 71-81° Fahrenheit. Surveyors observed a thermostat with a reading of 68°. The survey occurred in July in Houston, Texas.

5) **The Village Healthcare Center**

Date of survey: May 28, 1999
Deficiency: F281 Resident Assessment
Scope & Severity: D –potential for more than minimal harm that is not immediate jeopardy
Penalty: $200/day – Total penalty = $8,600.
Allegations: A nurse made an error in transcribing a physician's order resulting in a resident receiving antibiotics three times per day rather than every six hours. The facility discovered and corrected the error approximately one month before the surveyors conducted their investigation.

EXHIBIT 2

Section 242.0665(a) of the Texas Health & Safety Code creates the right to correct and provides as follows:

(a) The department may not collect an administrative penalty against an institution under this subchapter if, not later than the 45th day after the date the institution receives notice under Section 242.067(c), the institution corrects the violation..

Section 242.0665(b) creates exceptions to the right to correct and provides as follows:

(b) Subsection (a) does not apply:

(1) to a violation that the department determines:
(A) results in serious harm to or death of a resident;
(B) constitutes a serious threat to the health or safety of a resident; or
(C) substantially limits the institution's capacity to provide care;
(2) to a violation described by Sections 242.066 (a)(2)-(6)[1];
(3) to a violation of a rule adopted under Section 242.1225[2] or of Section 242.133 or 242.1335[3]; or
(4) to a violation of a right of a resident adopted under Subchapter L.

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[1] Sections 242.066(a)(2)-(6) provide:

(a) The department may assess an administrative penalty against a person who: . . .

(2) makes a false statement, that the person knows or should know is false, of a material fact:
(A) on an application for issuance or renewal of a license or in an attachment to the application; or
(B) with respect to a matter under investigation by the department;
(3) refuses to allow a representative of the department to inspect:
(A) a book, record, or file required to be maintained by an institution; or
(B) any portion of the premises of an institution;
(4) willfully interferes with the work of a representative of the department or the enforcement of this chapter;
(5) willfully interferes with a representative of the department preserving evidence of a violation of this chapter or a rule, standard, or order adopted or license issued under this chapter; or
(6) fails to pay a penalty assessed by the department under this chapter not later than the 10th day after the date the assessment of the penalty becomes final.

[2] Section 242.1225 relates to reporting allegations of abuse and neglect to the state.

[3] Section 242.133 and Section 242.1335 relate to retaliation against individuals who report allegations of abuse or neglect.

AppendixC: Summary of Relevant Input from the July 6, 2000 Meeting of the Amelioration Workgroup, Committee Staff, July 2000.

Summary of Relevant Input from July 6, 2000 Meeting of the Amelioration Workgroup

Thank you again for your participation Thursday. Below is a list of issues discussed at that meeting. In some cases, additional information is needed and the Committee staff will do that research. In many of the cases, key issues were identified, but further input needs to be offered on those issues as we move forward. Please take the time over the next week to review the issues listed below and reply to this email with any opinions or comments you may have regarding any one of the issues. Further, if you would like to meet with Committee staff individually, please do not hesitate to contact me at 463-0786 to schedule an appointment. Again, thank you, and look forward to receiving your input.

Issue: What level of violations should be eligible for Amelioration consideration?

Tim Graves commented that while designating level "G" violations is a good start, some consideration may need to be given to exploring whether there are other levels that should be considered. He suggested we may want to look at the "H" and "I" categories.

Further, the issue of eligibility for the levels of violations below "G", which theoretically are eligible for "right-to-correct," was discussed. Industry representatives stated that there are "D, E, and F" violations that are not allowed to be "right-to-corrected." It was noted that if a home has a repeat violation in one year, the violation is not eligible for "right-to-correct" on the second and subsequent occurrences. However, the industry maintained that "right-to-correct" is not granted for first time occurrences of "D, E, and F" violations. There was no opposition to further researching the circumstances surrounding "D, E, and F" violations that are not granted the "right-to-correct" and considering those instances for eligibility for amelioration. Staff will research the issue and report back to the workgroup members.

Candice Carter stated that while it has been understood that DHS would retain ultimate discretion in approving amelioration plans, it would be prudent to be explicit about the Long-Term Care L.O.C.'s intention that discretion be maintained. Committee staff agrees and will ensure that the intention in put in writing in any guidance submitted to DHS.

Tim Graves raised a question about the draft proposal's recommendation that there be no further opportunity to pursue amelioration after the initial 10 day window a home would have to elect to pursue amelioration. He asked what would happen in a scenario where, through the appeals process, a "H or I" violation was reclassified as a "G"? Would the home get another chance to elect amelioration? There was

no definite opposition expressed to letting the home elect amelioration under that scenario, but the workgroup wanted further exploration of the issue before a decision was made. Staff will further research the issue and follow-up with the workgroup.

Issue: What "workload issues" will DHS face in expanding the use of the amelioration provision?

Jim Lehrman expressed concern that the time necessary to evaluate submitted plans and monitor approved plans would become a considerable workload issue for the Long-Term Care Regulatory department. He noted that nearly half of the violations fall into the "G" category. DHS has not attempted to project the fiscal and staffing implications of an expanded use of the provision, but agreed to work with Committee staff to develop some estimates.

Jim Lehrman also reminded the workgroup that the more time his department must spend on evaluation and monitoring amelioration plans, the more resources are taken away from their other primary responsibilities. He also assured those concerned that work related to amelioration would be of secondary importance to ensuring resident safety in times of crisis. Committee staff notes that his comments are assuming present resources in his division, which is a pragmatic assumption. However, Committee staff intends to work with the department to develop fiscal and staffing estimates in order to possibly advocate for staff increases to handle this new responsibility.

It was also pointed out by Sen. Nelson's staff that it would be unlikely that homes would request amelioration for every one of the G violations. Industry representatives concurred that there would be many instances where a home would choose not to pursue amelioration.

Advocates stated that they were already concerned about Long-Term Care Regulatory's lack of adequate resources and therefore were especially concerned about the resource demands related to amelioration.

Issue: What should the amelioration plan proposed by the facility address?

The possibility of developing standardized forms for the submission of amelioration proposals was discussed. It was noted that such an approach could ease the workload demands related to reviewing the proposals, facilitate DHS' desire to achieve consistency in the evaluation of the proposals, and allow for better log-term tracking of the use of the amelioration provision. While it would require more work in the beginning to develop the form, there was no vocal opposition to the concept. Committee staff will further discuss the possibility of developing such forms with DHS.

There was also discussion around the conflict between requiring a "systemic change" and limiting amelioration to the "G" level of violations. It was suggested that the workgroup and DHS may need to rethink the standard of requiring "systemic change" if more violations are to be ameliorated.

Issue: Where in the continuum of due process should amelioration occur?

There was discussion regarding whether 30 days would be adequate for homes to develop amelioration proposals and for DHS to evaluate those proposals. The workgroup noted the conflict between wanting the process to proceed fairly quickly and wanting to see substantive, well thought out proposals.

Tim Graves stated that he hoped during the 30 days that DHS is evaluating the proposals there would be the opportunity for communication between DHS and the home if DHS felt minor revisions would make difference in their evaluation of the proposal. Jim Lehrman responded that allowing for that level of communication could increase the workload, but as long as it was limited to when only minor revisions should be made, DHS could support such a policy. However, Jim Lehrman made it clear that DHS would not want to end up "writing the plan for them" when exceptionally poor proposals are submitted. Committee staff agrees that only when minor adjustments would change the likelihood of DHS approval there should be an opportunity for DHS and the home to discuss the need for revision.

For various reasons the workgroup discussed the possible need for some flexibility regarding the 30 day deadlines for both the homes and DHS. The desire to facilitate meaningful involvement of resident and/or family councils was one argument for flexibility with the deadlines. DHS also pointed out that in times of crisis and heavy workload, the 30 day deadline for approval may be unrealistic. The workgroup also discussed the possibility of expanding the deadlines to 45 days since there was a precedent for such a time line under the "right-to-correct" process. There is a need for further discussion of this issue in the workgroup. Staff will conduct further research and contact workgroup members to discuss the issue.

The workgroup agreed that we need to consider what the consequences would be if the deadlines "passed" for the homes and DHS respectively. Committee staff suggested that if a home did not submit a proposal by the deadline, then the opportunity to ameliorate would be lost. Committee staff also suggested the possibility of allowing a home to request an extension for developing the proposal. There is also a need for further discussion of this issue in the workgroup. Staff will conduct further research and contact workgroup members to discuss the issue.

Issue: Should a "stay" be placed on already filed appeals while a home develops a proposal and DHS evaluates the proposal?

Prior to the July 6, 2000 meeting, industry representatives suggested that a "stay" be placed on any appeal while a home develops a proposal and DHS evaluates the proposal. Under their suggestion, if the proposal was approved, the appeal would be dropped. If the proposal was denied, then the stay would be lifted and the appeal could continue. While logical, Committee staff initially rejected this idea because the "stay" would further extend the already lengthy appeal process. Additionally, a home would never get its appeal hearing date before its amelioration proposal was approved or denied. However, it was pointed out at the workgroup that placing a "stay" would avoid the legal costs of discovery and other appeal preparations. Because one of the goals of the effort to expand the use of amelioration is to avoid the legal costs to the industry and the state, the workgroup decided that the issue of placing a "stay' on the appeal should be revisited. It was also noted that the workgroup should research whether the "stay" presented any conflicts

with federal time lines for due process. Committee staff will follow-up with DHS on this issue and facilitate further discussion with the workgroup members.

Issue: What role might residents, resident councils, family councils, advocates and ombudsman play in the development, approval, and/or monitoring of the amelioration plans?

Concern was raised regarding whether a resident or family council's contribution to, or approval of an amelioration proposal could be construed as some sort of official sanctioning of the home's activities, and thus carry with it some liability concerns. Committee staff will attempt to get a legal answer to this question.

Workgroup members wanted clarification about whether the resident groups in question would be involved in the development or the approval of proposals. This issue will need to be further explored.

Tim Graves noted that the involvement of such groups was originally suggested by his association and that he would be happy to assist Committee staff in developing more specifics on how these entities' involvement could be facilitated. He suggested that perhaps the standardized forms that have been contemplated could include some section for noting a resident or family council's approval of the proposal. Beth Farris noted that it would be important for the section of the form to also include a designation of what kind of resident council reviewed the proposal because the governance structure of such councils can vary.

Jon Willis noted that fewer than 40% of homes have functioning family councils and so any avenue for council input and/or approval may need to be optional.

Candice Carter commented that strictly adhering to the 30 day deadline for homes to develop and submit a proposal could be in conflict with meaningful family and/or resident involvement. Therefore, she stated that we may want to discuss allowing for some flexibility regarding the 30 day deadline.

Issue: What are some of the financial issues surrounding the amount of money generated by level G violations?

There was discussion surrounding the implications on future nursing home budget cycles if "ameliorated funds" were used to fund improvements that should be ongoing, such as increased benefits for direct care workers. For example, if $50,000 was ameliorated and spent on health benefits for nurse aides, what would happen to those benefits in the next fiscal year after the ameliorated funds were spent and after an amelioration plan no longer legally required the home to spend funds in that manner? It was pointed out that we are not talking about giving the homes $50,000 that they did not already have under their revenue streams, but only allowing them to keep it. Therefore, the home should theoretically have the funds available in subsequent fiscal years. There was a desire for some assurances that such benefits would not be dropped after the amelioration plan "expired," and the idea of requiring some amelioration plans to be sustained beyond the initial funding cycle was discussed. Tim Graves expressed that while a valid question

had been raised, dropping of such benefits would not be likely. However, he stated that he would be happy to work through the workgroup to address the concerns that were expressed.

There was a good deal of discussion surrounding whether the dollar amounts generated by level "G" violations would be substantial enough to fund meaningful amelioration plans. There was concern that a number of the ameliorated "G" violations would not constitute enough money for the home to do anything significant to improve quality. In light of that concern, the workgroup discussed the possibility of allowing multiple "G" violations identified during one survey to be combined in an amelioration proposal in order to increase the dollar amount ameliorated. A clear opinion on the part of the workgroup was not identified on this issue and thus further discussion is necessary.

The workgroup also began to discuss the possibility of homes proposing amelioration plans that would "cost" more than the penalty amount being violated. Under this scenario, the ameliorated funds would just represent a portion of the costs. DHS shared that an amelioration proposal they are currently reviewing involves costs beyond the amount to be ameliorated. The workgroup expressed interest in further investigating this issue.

Issue: How can we facilitate consistency on the part of DHS in the use of the provision?

Jim Lehrman stated that the use of standardized forms and bringing the ultimate decision making into the state office would both help to maximize consistency.

Miscellaneous Comments

It was noted that the titles of the scope and severity categories cited frequently in the draft proposal have changed. Staff will correct those titles throughout.

Jim Lehrman stated that should DHS go forward with expanding the use of the amelioration provision, it would be prudent for his department and this workgroup to come back a year from now and re-evaluate the guidance developed by the workgroup and the use of the provision overall. Staff concurs and such a recommendation will be part of the final report.

In relation to the discussions of what to require of an amelioration plan, Pat Karrh reminded the group that we do not want to make the whole process so difficult and rigid that homes which could implement a meaningful plan would rather just decide to write a check, thus defeating our goal under amelioration.

Rep. McReynolds' office suggested that the Committee research the budgetary issues surrounding where paid administrative penalties are now deposited and the related appropriations implications of any changes the workgroup recommends. Committee staff will research this issue and identify any implications on the state appropriations process.

Industry representatives mentioned a DHS requirement under the Community-Based Alternatives program that providers obtain at least three bids for any services or equipment for which they are requesting reimbursement. It was noted that if DHS adopted a similar requirement for services or equipment contained in an amelioration plan, it could represent a barrier to carrying out the process in a timely manner. Staff will follow-up with DHS on this issue.

Appendix D: Agenda, July 6, 2000 Amelioration Workgroup, Committee Staff, July 2000.

LONG-TERM CARE COMMITTEE

LEGISLATIVE OVERSIGHT

AMELIORATION WORKGROUP

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Texas State Capitol
Thursday, July 6, 2000
1W.14
2:00 p.m.

Agenda

I. Overview of Workgroup Process and Goals

II. Presentation/Explanation of Staff Draft Proposal

III. Discussion of Draft Proposal

1. When should amelioration of a violation be approved?

2. Where in the continuum of due process should amelioration occur?

IV. Next Steps/Meetings/Hearings

Appendix E: Summary of Relevant Input from the April 20, 2000 Meeting of the Amelioration Workgroup, Committee Staff, April 2000.

Summary of Relevant Input from April 20, 2000 Meeting of the Amelioration Workgroup

The following summary will use the questions posed to the workgroup as an outline.

1. Monetary "floors" or "ceilings" on amounts allowed to be ameliorated?

The statement was made that having "floors" might be counter intuitive because homes with larger penalties would be rewarded, while those with smaller infractions that corrected them more quickly would be punished by not having the option to ameliorate. Nobody raised any disagreement with this logic. While there was some desire for "ceilings," staff was left with the impression that the "ceilings" would more appropriately linked to the violation and/or level of severity, not a dollar figure. At this point, staff feels there was nearly consensus that there should not be financial "floors" or "ceilings," but rather "ceilings" based on the type and severity of violation.

2. Monetary "floors" or "ceilings" on the percentage of a violation that could be ameliorated?

While no agreement was reached, the issue of only allowing a ceratin percentage of the violation to be ameliorated was raised . One member proposed a system whereby homes with "worse" histories would be allowed to ameliorate progressively lower percentages of the eligible penalty. It was discussed, but not clear, whether "history" in this case referred to overall operating history or history of the use of amelioration. The following example was offered: 1st use of amelioration in a two year period - 100% could be ameliorated; 2nd use - 75%; 3rd use - 30%, with no more than three 'ameliorations" allowed in a two year period. Conversely, it was also expressed that perhaps the worse homes need the amelioration provision even more.

3. Penalties for what type of violations should be eligible for amelioration?

There was a general consensus among the advocates at the meeting that penalties for "serious violations for abuse and neglect" should not be eligible for amelioration. There was much discussion around the

recommendation that the criteria for amelioration eligibility be different from the criteria for the right-to-correct option. The logic behind the recommendation was that if you used the same criteria as for the right-to-correct option, amelioration would only be open to those who fail to correct a "right-to-correct" violation. This logic, along with a concern that we don't create a second "right-to-correct" opportunity, seemed to give the recommendation some support across the workgroup.

However, once the group discussed the categories of violations that are not "right-to-correct" eligible, and therefore would be left for amelioration eligibility under the recommendation, there was some real concern. The categories of violations that are not "right-to-correct" eligible are violations that result in serious harm or death of a resident; constitute a serious threat to the health and safety of a resident; substantially limit the facility's capacity to provide care; or any of the violations relating to the criteria for denying a license or a violation of resident's rights. One industry representative confirmed that he felt amelioration should be an option for violations involving harm or a threat to a resident if the provision was to be useful at all since most other violations are already under "right-to-correct." There was concern about such violations being eligible. It was also pointed out that the some of the most severe cases are referred to the Attorney General's office and are therefore not in the realm of "administrative penalties."

It was eventually decided that it would be beneficial to work through the new scope and severity chart and related rules developed by DHS (attached) and decide, category by category, what should be eligible for amelioration (disregard the now outdated chart in section 19.2112 of the rules included in the packet distributed at the meeting). Staff recommends taking the new chart and rules into consideration as you develop your input. There was also discussion of the benefit of looking at the data for which violations of what scope and severity are most commonly occurring.

It was also suggested that whether the violation was "willful" be taken into consideration. However, it was pointed out that whether it was willful was already considered in deciding if the violation should be cited. Some industry representatives questioned whether that is actually considered.

4. Where in the continuum of due process should amelioration occur?

Early on, members of the workgroup expressed that, because amelioration was an option for dealing with a penalty that is finally ordered, amelioration should not be an option until after all due process is exhausted. Other members of the workgroup, including Committee staff, expressed concern about the amount of time current due process requires. Committee staff made it clear that the Chairman was not interested in increasing the use of the provision if it did not occur until after all due process is carried out. In response to those concerns the workgroup discussed requiring a home to decide if they want to ameliorate the fine within 20 days after they receive the notice of the violation (which occurs 10 working days after the exit conference). It is within those 20 days that the home currently notifies DHS of it's desire to consent or appeal, DHS assesses whether the violation has been corrected and thus the total amount of the fine is determined.

The idea that a home would waive it's right to appeal if it elected to ameliorate was discussed and one industry representative agreed that the idea was reasonable. There was also a discussion of whether amelioration should be an option when a home is given the "right-to-correct" option, but it is determined

that they failed to "correct." While some members favored allowing amelioration in that scenario, concern over allowing amelioration after a failure to correct was also expressed.

Finally, there was a broader discussion of whether amelioration should actually be a settlement option, as was being discussed during much of the meeting, or whether it should be kept completely separate from the settlement process. No definitive opinions were offered in response, but concern was expressed about the option of amelioration "flavoring" the settlement. Industry representatives stated that having amelioration as a tool in the settlement process would speed up the entire process, as it would be easier to sit down and broker a deal as soon as possible.

5. What role should history play?

As stated previously, there was discussion of using a home's history of electing to ameliorate when determining subsequent eligibility for amelioration and/or the percentage that could be ameliorated.
Staff also inquired whether home's general operating history should be taken into consideration when approving an amelioration proposal. There was not much discussion, with some members indicating that only "good" homes should be given the option, and others stating that perhaps homes with "bad" histories would need the option the most.

Finally, whether an ameliorated fine should remain on a home's record was discussed. Several members expressed that the ameliorated fine should be on their record. No member seemed to contest that recommendation, but there was a generally accepted suggestion that the home's record reflect that the fine had been successfully ameliorated.

Appendix F: Workgroup Membership List and April 20, 2000 Workgroup Agenda, Committee Staff, April 2000.

Workgroup on Amelioration

Membership

Mike Lucas	Office of Rep. Elliott Naishtat
Jon Weizenbaum and Chris Hudson	Office of Senator Judith Zaffirini
Heather Flemming	Office of Rep. Jim McReynolds
Amy Lindley	Office of Senator Jane Nelson
Elaine Nail	Public Member of LOC
Patricia Karrh	Public Member of LOC
Chris Britton	Office of Lt. Gov. Perry
Erin Florence	Office of Speaker Laney
Anne Heiligenstein	Office of the Governor
Tim Graves and Peter Longo	Texas Healthcare Association
Darrell Zurovec	Mariner Post-Acute, Inc.
David Latimer	Texas Association of Homes and Services for the Aging
Candice Carter	AARP
Beth Farris	Texas Advocates for Nursing Home Residents
Marie Wisdom	Advocates for Nursing Home Reform
Bruce Bower	Texas Senior Advocacy Coalition
Jim Lehrman and Marc Gold	Department of Human Services
John Willis	Texas Department on Aging
Mike Burris	Arboretum Group
Lillian Phillips	Heartland
Marlon Johnston	Tonn and Associates

First Meeting: April 20, 2000 / 1:00 p.m. - Sam Houston Building, Room 210

I. Overview of Workgroup Process and Goals

II. Overview of Issue Areas to be Covered

III. Discussion of First Issue Areas

A. When amelioration should be an option?

1. Monetary floors or ceilings?
2. Based on type of violation or circumstances involved?
3. Consideration of history?
4. Where in the continuum of due process should amelioration occur?
5. Department discretion versus prescriptive rules?
6. Per home/owner limits on use of option?
7. Establish a decision-making Committee?

B. When amelioration should not be an option?

IV. Next Workgroup Meeting

AppendixG: Agenda, March 30, 2000 Long-Term Care Legislative Oversight Committee Hearing, Committee Staff, March 2000.

LONG-TERM CARE LEGISLATIVE OVERSIGHT COMMITTEE

TEXAS HOUSE OF REPRESENTATIVES
P.O. BOX 2910 ! AUSTIN, TEXAS 78768-2910
CAPITOL EXTENSION E2.152 ! (512) 463-0786 ! FAX (512) 463-8981

Texas State Capitol
Thursday, March 30, 2000
E2.028
9:00 a.m.

Agenda

I. Call to order / Roll call

II. Introduction and opening remarks

III. Organization, procedures and schedule

IV. Invited briefing and discussion regarding selected issues related to SB 190, 75th Session

Panel

Jim Lehrman-Associate Commissioner for Long-Term Care Regulatory, Department of Human Services (DHS)

A. Introduction and overview of SB 190 status reports provided to the Committee.
B. Briefing and discussion of use of the "Amelioration of Violation" provision of SB 190.
C. Briefing and discussion of DHS's efforts to address consistency in the regulatory system.

V. Public testimony regarding the use of the "Amelioration of Violation" provision of SB 190 and DHS's efforts to address consistency in the regulatory system

VI. Other Business/Closing Remarks

VII. Adjourn

Note: In order to assist the public in preparing testimony for this hearing, Long-Term Care Legislative Oversight Committee staff conducted a stakeholder meeting prior to the hearing to inform concerned parties of the selected issues related to SB 190, 75th Session, which the Committee will study.

AppendixH: Amelioration of Violation Briefing Document, Committee Staff, March 2000.

Amelioration of Violation

Background

SB 190, 75th session, created a small section in Ch. 242 of the Health and Safety Code titled "Amelioration of Violation". It gives the Commissioner of the Department of Human Services (DHS) an option to allow nursing homes who have been assessed an administrative penalty to ameliorate their fines by improving services. It reads as follows:

Sec. 242.071. Amelioration of Violation. In lieu of ordering payment of the administrative penalty under Section 242.069, the commissioner may require the person to use, under the supervision of the department, any portion of the penalty to ameliorate the violation or to improve services, other than administrative services, in the institution affected by the violation.

Concerns have been raised by the nursing home industry about the lack of use of the amelioration provision in SB 190. There are no clear policy guidelines for DHS to follow regarding the appropriate use of this section of the Health and Safety Code. Currently, DHS will only approve the use of this provision if the nursing facility submits a proposal which would cause a dramatic program change for care. Such acceptable program changes would include the implementation of the "Eden Alternative" or the "Wellspring Model." These are both dramatic shifts in management philosophy from the traditional medical model currently being used by the vast majority of nursing facilities, and have been proven to increase the well-being of nursing home residents. To date, no facility has been approved to ameliorate their administrative fines by implementing a plan for improving services.

With more defined policy guidelines this provision could be expanded in its use to allow for the Department of Human Services to "mandate quality" in nursing facilities who are out-of compliance with State Medicaid regulations. This tool would allow DHS to give out-of compliance nursing facilities the option to invest their monetary penalties towards clear and measurable quality outcomes in resident care. The use of this clause, with proper guidelines, could give DHS the ability to redirect money that is being used for administrative fines and legal fees to instead be spent on improving resident care. Towards that end, some necessary policy questions need to be addressed.

Starting the Process Towards Positive Change

To responsibly increase the use of this provision, some policy questions need to be addressed to assure appropriate use of the amelioration clause.

When is it appropriate to use the amelioration provision?

Guidelines should address when the use of the amelioration provision is appropriate, when it may not be appropriate, and when it should never be an option. If the situation is one that is appropriate, should there be a "floor limit" on how much the fines have to be, before this provision is an option? Should facilities be eligible for this option if their fines exceed a certain limit?

What protections/ consequences need to be in place if the nursing facility in violation does not fulfill the requirements of the amelioration plan?

Should more fines be assessed on a home that has additional penalties assessed against it while operating under an amelioration plan?

Where in the current continuum of due process should amelioration become an option?

Currently, a home has 45 days to "correct" certain deficiencies and if they fail to do so, administrative fines are then assessed. Nursing facilities can then appeal the administrative penalties until a final decision is made on the amount of the fines and when the penalties have to be paid. During this process the administrative penalty is sometimes decreased in the negotiations. DHS then enters into a final agreement for payment. When and where should the amelioration provision become an option? What can be done so that the amelioration provision is not another form of the "right to correct" option that nursing facilities have to correct their deficiencies?

How will amelioration of a violation affect a nursing facility's history, and how will a nursing facility's history affect the approval of amelioration plans?

Under SB 190, DHS is required to take into account a nursing facility's history of care for licensing purposes. How would a facility who fulfills their agreement in the amelioration plan be looked upon during their licensing renewal? Would it be viewed as if the violation never occurred or would their history reflect they were in violation and were still required to pay administrative penalties (instead of paying monetary penalties to the state, they would have invested that money into quality care initiatives)? Also, as DHS is deciding to approve an amelioration proposal, should the nursing facility's history affect the proposal? Should the history of an owner or corporation affect the decision to approve a proposal?

How will DHS monitor compliance with approved amelioration plans?

Guidelines for the monitoring of a nursing facility's amelioration plan would need to be established. Could DHS monitor the plan when they are in the nursing facilities for other reasons, such as complaint investigations, annual surveys, or incident investigations? Is there a need to establish a separate monitoring program specifically for the amelioration plans?

What categories of resident care and facility operations could be targeted for improvement under the amelioration plans?

Could funds be used for only certain targeted areas? For example, should ameliorated funds be targeted at improving direct staff retention rates or paying for capital improvements on old buildings to come into compliance with safety codes? Should amelioration of violation proposals be open to anything the nursing facility feels needs improvement? Should there be any guidelines, in rule or statute, addressing the targeting or ameliorated fines or should it be left completely to the department's discretion?

Are there "legal protections" that need to be established to ensure that state approved amelioration plans are not used to defend poor care or management that result in state or civil actions?

In states where the regulatory agency acts in a more consultative role with the nursing home industry, there have been accounts of nursing home defense attorneys using the state's consultation as a defense for their client's violations. The state may need to consider statutory language or rules to clarify that entering into an amelioration plan does not relieve the home's liability should a violation occur during implementation of that plan. If the state approves an amelioration plan and it is implemented, is the state liable for any adverse outcomes? Policies would need to be developed to assure that the use of this provision will not be used "against" the state in civil actions.

Conclusion

There are several policy questions to consider if the amelioration of violation provision is to be used more extensively, and responsibly. The use of this provision provides an opportunity to address concerns over the use, and consequences of using, administrative penalties on nursing facilities, while exploring new ways to ensure residents receive quality care.