

**HOUSE COMMITTEE ON HUMAN SERVICES**  
**HB 3386 - 76<sup>TH</sup> LEGISLATURE**  
**APRIL 6, 1999**

Members, before we move into the omnibus Welfare Reform Legislation, I would like to lay out House Bill 3386 and recognize its author, Chairman Harvey Hilderbran. And welcome, Harvey, to the committee.

Good afternoon, members. Good afternoon, Mr. Chairman. Thanks for hearing the Health Bill 3386, in which I believe you are a joint author, and if you are not, you will be one tomorrow. I believe that is one of the ones I gave you last week to sign up on.

House Bill 3386 is an important piece of legislation and it came to my attention during the interim that the current registry system, which is maintained by DHS of nurses aides in Texas nursing facilities, hasn't worked as well as we liked it to. The registry is utilized in performing background checks on nurses aides that have applied for jobs in nursing facilities. However, there has been instances in which the nurse aide who has a history of abusing residents has been overlooked during the background check, because of such factors as illegible handwriting, incorrect gender identification, or change or actually transposed numbers on driver's license information. Health Bill 3386 requires that during the background check of a nurses aide certain factors be required in order to accurately access the identity and history of the person seeking employment in a nursing facility. These criteria include the complete name, race and sex of the employee and identifying numbers such as social security number, driver's license or state identification number, birth date and mailing address, all of which are to be submitted on typewritten form. This is in an effort to avoid some of the mishaps which have been encountered during the background check process.

Members, I am preparing a committee substitute that will be presented to the committee, hopefully by next week. The two things that the committee substitute does is: 1) it eliminates the need for the physical note. The reason it has a physical note to my understanding is that because we have asked in this bill for it to cover more than DHS jurisdiction, including the Texas Dept. of Health, which has oversight over home health agencies and other personal care homes and other entities that are all regulated by DHS because we added that and broadened the bill quite a bit from what current law is, that is the reason given for the physical note. So, in order to pass the bill and eliminate physical note, we are going to propose a committee substitute that will narrow it just to DHS jurisdiction and oversight. Another important thing that is actually an inadvertent error and oversight in the original draft, I don't know if that was listed by counsel oversight or what, but we had intended for the bill to specifically require a typed form, typewritten requirement there, I mentioned it in my opening statement, I did not find it in my perusal of the bill this morning as I was getting ready for this afternoon and if in fact this is confirmed, we will include that in the committee substitute because one of the examples that my witness will talk about is that handwritten form that included some errors but also included, for

instance, the name “Gordon” to be recorded as “Cordon”, causing a specific incident where people suffered.

Additionally, the current registry tracks only nurses aides, there is no method in tracking other employees who have access to fragile residents, which can be just as great of a threat and we think we need to expand that. This bill would also require TDHS to keep a separate registry of non nurse aide employees who have been fired from the Texas nursing facilities for abuse or neglect of a resident. I expect that there are very few people who fall in this category and therefore, and would not be cumbersome for the agency to keep track of.

Mr. Chairman, members, essentially there are two parts to the bill. In the first section we tighten the requirement for the information to include the identification numbers. This has to be at least one of the bills written currently but could be more. Now if we wanted to specifically say that we want both numbers on line 17, no. 2, we would say any two known identifying numbers. The way it is written it could end up increasing numbers which is fine with me. I think the more we have, the better, safeguard. But we didn’t specifically say any two, we just want to make sure we get those numbers typed so we can identify, have that identification ability.

Also, in the second half of the bill, the second part, requires DHS to keep track of any employee terminated for abuse or neglect, i.e., non-nurse aides and non-certified aides. So that is an expansion. We think it is important because, and we don’t think it is cumbersome because we believe that since this are cases where there has actually been someone fired for the cause or in fact, in some cases, prosecuted, that is the population we are keeping up with, which is going to be a small population and we think the duty on the facility to report that to DHS is something we ought to require and we think that expanding it beyond the nurses aides and the non-certified nurses aides is appropriate and frankly, we have loop holes in the current law. It is failing to work, I have got a witness that is going to speak specifically to some cases and also has been my technical resource in drafting this bill and I would encourage you to ask any question of him that you don’t have for me or even that you have for me, too. I think I have covered physical notes, and if in the case that in the sunset??? process we pass a long term care agency, then we would want to amend the bill on the floor somewhere else in the process to change that language and in that case, we could go back to including all the broader authority instead of the narrow DHS authority without increasing the physical note or that would be my argument. With that, any questions, members?

Members, are there any questions?

Thank you, Harvey. We have several witness affirmations. Should I call David Marks?

Yes, that is my -----

Welcome.

Hi. How are you doing, Mr. Chairman?

Good.

My name is David Marks and I will begin by saying good afternoon members of the committee and Mr. Chairman. I am here today in support of Health Bill 3386.

Are you representing any group?

I am not. I am here in my own capacity representing no one. I am a lawyer by profession with almost the entirety of my legal career having been spent in the area of nursing home law. More specifically, over the past twenty years I have been involved almost totally in the prosecution of nursing home abuse and neglect cases, both in a criminal context, as well as the civil context. For over ten years, I was a district attorney and served as a special prosecutor for the Attorney General's Office where my primary responsibilities included enforcement of the nursing home laws and criminal prosecution of abuse and neglect violators and for the past ten years, my civil practice has been focused solely on nursing home abuse and neglect cases where in particular I have handled several cases involving rape and violent crimes committed against nursing home residents by employees who had either a history of patient abuse at the time they committed these crimes or had a criminal record, had been to the penitentiary and had criminal convictions which would have barred them under the law from even being employed in a nursing home. I am here today to share with you the real life experience of a woman by the name of Dorothy Cooper, whom I was honored to represent in a recent case.

Dorothy Cooper was admitted to a nursing home in Midland by the name of Terrace West Nursing Home at the age of 62. She was a stroke victim and was relatively young to be in a nursing home, but was helpless, confined to a wheel chair, the left side of her body was totally paralyzed and she was essentially helpless and dependent upon the staff for most of her basic activities of living. Fourteen months after being admitted into this nursing home, a male nurse aide by the name of Johnny Gordon was assigned to provide care to Dorothy and over the next three months, Johnny Gordon repeatedly violated Dorothy, repeatedly raped her, threatened her life if she dared reveal what was taking place. Gordon's predatory activities were discovered after this three months, at which time he confessed, pled guilty and went to the penitentiary for the crime of rape. Part of the real tragedy of this story is that Johnny Gordon should have never had the opportunity to have touched Dorothy Cooper. He should never have been employed, he was barred from employment by virtue of the fact that he had been to the penitentiary for burglary, forgery and theft. He should have never been an employee of Terrace West Nursing Home. Furthermore, one year, just one year before he was hired at Terrace West, he had repeatedly abused a helpless, 70 pound, wheel chair bound resident in a facility less than 20 miles away, owned by this same company. That incident was investigated by the Texas Department of Human Services and he was found to have committed the abuse that was alleged. They validated the findings.

What I am here today to do is to express concern about the Johnny Gordon's who are out there, who, under our present system, can still slip through the cracks and gain employment in nursing homes. The problems that we have are threefold: 1) Although criminal history checks are required for individuals who work in nursing homes and social security numbers are required, that is part of the information that is required on the criminal history check form that is submitted by the facility to the state. That information is not being utilized by the state. In this case, in the

case of Johnny Gordon, Terrace West Nursing Home submitted the criminal history check as they were required to do. They made a mistake though. There was a legibility issue and his name was submitted, instead of Johnny "Gordon", it was Johnny "Cordon", spelled with a "C". Arguably, it could have been read as a "C" or a "G". It was submitted in handwriting. The state received it, they punched it in as a "C", "Cordon". They didn't punch in, however, his social security number or any of the identifying information. Because of that, the criminal history check that was designed to keep people like Mr. Gordon out, was defeated. And the state, in their investigation, they admitted that we blew it. We made a typographical error. But no one asked the question, why don't you submit the social security number. You are getting that information anyway. Why wouldn't you want that, that is the most important information that law enforcement, one of the most vital indicators and pieces of data that law enforcement agencies utilize in running criminal history backgrounds and yet, we have a practice that is occurring where these numbers are not being utilized. Now I mentioned to you that he had worked at a previous facility 20 miles away, owned by the same facility, where he had repeatedly abused and was fired from that facility. You know what? They submitted the criminal history check, too. But they made a mistake on their criminal history check. Instead of entering Johnny Gordon as a male, they entered his gender as a female and guess what? That defeats a criminal history check. No social security number was used, simply Johnny Gordon, female, was submitted and yet another opportunity was missed to reveal this man's criminal history. The third problem is that after the Texas Department of Human Services validated, they validated the fact that he had abused a helpless wheel chair bound resident, this was nine months before, or a little more than nine months before he came into contact with Dorothy Cooper, there was no place, no registry that would house or keep this information and that is one of the very important parts of this bill. You have to understand that a large percentage, a very large percentage of individuals who are hired as nurse aides in nursing homes, are not certified when they are hired. Presently, we have a certified nurse aide registry and the certified nurse aide registry maintains any history of abuse or neglect. If there has been a validated finding of abuse or neglect, the certified nurse aide registry maintains that history and nursing homes today are required to check with the certified nurse aide registry before offering employment to verify that they do not have, the individual seeking employment, does not have a history of abuse or neglect. There is no non-certified registry. In other words, there is no place for a nursing home operator to call where he could obtain a finding or a determination as to whether or not this individual had previously abused somebody while working as a non-certified nurse aide, and that was the case of Johnny Gordon. When he was hired at the first facility, he was not certified. So when he committed the repeated acts of abuse and neglect, there was no registry to enter that information on. There was no place for the second nursing home to call, no centralized registry for them to call, even though a high percentage of the employees who enter nursing homes today enter as non-certified nurse aides. Essentially, Johnny Gordon could get out of the penitentiary, he could go to a facility and seek employment, somebody could submit him as a female, somebody could submit him as "Cordon" instead of "Gordon", and he could re-enter the employment ranks today. There would be no place, even though he is a care giver, and even though he is going to be functioning as an aide, there is no place for a nursing home to call, no registry to contact to determine if an individual is not certified, but is going, or about to go through the class, is in fact, somebody who ought to be in a nursing home by virtue of their history in caring for patients.

The bill before you would close those holes, the last hole being as Rep. Hilderbran mentioned, the fact that we believe that these criminal history checks should be submitted in typewritten form and not in handwritten form, so there is no question as to interpretation of writing. Those are the three solutions which are contained within the body of the bill in which I would urge you to accept.

Are you considering coming back and working for the Attorney General?

No. Not at this time.

Members, are there questions for Mr. Marks?

Thank you very much for coming in.

You are welcome. Thank you.

The chair calls Mary Ann Holz with AARP who is a registered Nurse. Do you wish to testify?

No.

Thank you very much.