



June 6, 2014

Mr. Ken Levine
Director
Sunset Advisory Commission
PO Box 13066
Austin, TX 78711

RE: Sunset Staff Report on the Department of Aging and Disability Services

On behalf of the Texas Health Care Association (THCA) and its membership, I am pleased to submit the enclosed comments and recommendations for consideration to the members of the Sunset Commission. Founded in 1950, THCA is the State's largest long term care association, whose membership is comprised of over 450 for profit and non-profit entities, including nursing facilities, specialized rehabilitation facilities and assisted living facilities.

THCA appreciates the effort and attention provided by the Sunset Commission process and its leadership to ensure consistent and predictable performance from state agencies in effort to eliminate duplication and inefficiencies in state government performance. As the state's single long term care agency, the Department of Aging and Disability Services (DADS) is responsible for providing regulatory oversight and monitoring for over 11,000 providers across Texas. Because the agency has multiple responsibilities, it is critical DADS functions in a manner that is both consistent and predictable in monitoring compliance of both state and federal licensure/certification requirements.

Issue #4: Few Long Term Care Providers Face Enforcement Action for Violations

Under Issue #4, the Sunset Commission Staff Report recommends DADS develop, "progressive sanctions for serious or repeated violations" and to "repeal 'right to correct' provisions for long term provider from statute, and require DADS to define, in rule, criteria for their appropriate use".

THCA Position

Respecting the apparent underlying intent of these two recommendations, to improve the delivery of care for residents served by long term providers, THCA opposes these recommendations. Our basis for opposition is:

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"The mission of the Texas Health Care Association is to unite, represent, and support professionals who strive to improve the delivery, quality, and integrity of long term healthcare services."

- 1) The existence of current enforcement provisions in Texas; and,
- 2) Concerns contrary to the apparent goal of the recommendations, improved quality of care through a heightened regulatory process, that the added focus on sanctions will stifle innovation and a willingness to aspire beyond the minimum standards.

In addition, there is concern that the expansion of the severity of sanctions and the repeal of “right to correct” provisions will result in the unintended consequence of additional recruitment and retention difficulties. These types of challenges will affect all providers, and require the redirection of current limited resources away from the priority of care delivery that is both hands-on and patient centered.

THCA Recommendations/Solutions

1. *THCA maintains the position that no additional regulations or “progressive sanctions” are necessary to reduce the potential for repeat violations.*

Allegations or reports of substandard care must be taken seriously and fully investigated when they are reported or determined as having occurred. It is important however, to recognize that across Texas, in each of our communities, are tens of thousands of caring and compassionate staff that have, for years, provided a high quality of care to our most vulnerable elderly. Ensuring a safe environment that promotes and encourages residents’ quality of life should be a top priority for all long term care providers, as well as the state agencies responsible for oversight. Providers that are either unwilling or unable to dedicate the resources and attention necessary to correct deficient practice should be addressed in accordance with the rules and regulations set forth at both the state and federal levels.

As noted in the Joint Committee on Aging Interim Report (January 2013), “DADS does, however, have complete control over licensing of nursing homes operating in the state. Current licensing laws and rules are in place that would allow DADS to revoke a nursing home license”. A policy of progressive sanctions implies that each individual incident is related and as a result is indicative of widespread poor quality. The flexibility of the survey process to assess each violation (for scope and severity) as an isolated incident or the demonstration of patterned poor performance recognizes the independent nature of a serious event that may not reflect the overall quality of care provided on a daily basis. Tex. Health & Safety Code § 242.061(a)(1) authorizes DADS to impose significant sanctions when a provider has “violated this chapter or a rule, standard, or order adopted or license issued under this chapter in either a repeated or substantial manner”. As a result, the current system allows enforcement decisions based upon the significance and circumstances of legitimate findings and/or provider compliance pattern concerns, without being structurally mandated to impose penalties on well-intentioned, compliant providers.

The Commission’s Staff Report does not mention the significant remedies that are imposed by the Centers for Medicaid & Medicare Services (CMS). As recognized in the report, almost all nursing facilities in the State participate in Medicaid and/or Medicare programs. DADS recommend remedies following enforcement actions. One reason that DADS enforcement activities may appear

to be low is CMS sanctions have often already been imposed. If DADS recommends a federal sanction, generally, the agency cannot also impose a duplicate State sanction for the same conduct (Tex. Health & Safety Code § 242.070).

Approximately 92% of nursing facilities in Texas are Medicaid and Medicare (dually) certified. The Sunset Commission staff report did not include the aggregate (state and federal) penalty amounts imposed. According to DADS Regulatory Services Data Management and Analysis, the total Civil Money Penalty (CMP) amount imposed for FY13 was \$6.02 million

The many remedies that may be imposed at either the state or federal levels include, but are not limited to, the following:

- Denial of Payment for New Admissions (DPNA)
- Mandatory Directed In-service Training
- Ban on Admissions
- Administrative Penalties
- Professional License Referrals to licensure boards
- Attorney General Office Referrals
- Per Instance Civil Money Penalties (CMPs)
- Per Day Civil Money Penalties

There are numerous enforcement sanctions already available to DADS. No further enforcement remedies are necessary.

2. *THCA supports the maintenance of existing “Right to Correct” language and proposes consideration for studying “best practices” of other healthcare industries regulatory processes to determine if alternate approaches to regulatory oversight are applicable in long term care.*

Providers are not out to short cut the delivery of care and circumvent the rules and expectations in place as a means to an end. The finding in the report that “DADS issues few sanctions for violations...leaving people receiving care in nursing homes and from other licensed providers in harm’s way”, discounts the level of effort being made by nursing homes to improve quality, resulting in fewer violations, as well as implies the surveyor process is not addressing poor quality.

Tex. Health & Safety Code § 242.0665 (Right to Correct) affords the facility the ability to correct and maintain the correction of a violation, while directing available resources towards the corrective actions necessary to maintain compliance. The current statute, not only allows the provider the opportunity make correcting the violation a priority, but give the state the ability to assess administrative penalties, “equal to three times the amount of the penalty assessed” without a the opportunity to correct if the violation reoccurs within one year. Repealing the “right to correct” would negate the stated goal of Section 242, “to ensure that institutions in this state deliver the highest possible quality of care” and instead place greater emphasis on punitive penalty assessment.

According to the DADS Regulatory Services (FY 2013) Annual Report released in March 2014, the number of new applicants testing to become Licensed Nursing Facility Administrators in Texas has declined to its lowest level since 2010. In addition, there is ongoing concern regarding the recruitment and retention of certified nurse aides and licensed nurses (RN and LVN) across the state. Supporting a more punitive environment may further exacerbate these human resource issues, and merely compound the problems intended to correct.

In reviewing the Sunset Commission staff report, it is not evident that research was conducted into the regulatory oversight process of other healthcare sectors. Review of alternate methods and approaches to identify “best practices” in enforcement methods that have both a measurable and sustainable effect on the delivery of care would serve as a value add in the Commissions pursuit of final recommendations.

Over the past decade, the Texas nursing facility profession has improved the level of quality of care provided, while managing the care delivery of patients whose acuity of illness has continued to increase. Many of the opportunities for improvement and the resulting changes in performance have resulted in partnerships and collaboration between long term care providers, state agencies and consumer advocates, working together to identify best practices, promote quality improvement principles and engage those long term care providers not meeting minimum standards to reinforce expectations. These important collaborative efforts must be reinforced and supported, and not impeded by a regulatory environment that discourages collaboration and candor. To assume a low percentage of civil money penalties or “low number” serious violations as lack of oversight or deterrence discounts the significant level of effort and energy, at all levels, to improve care for frail and elderly Texans.

Supporting the delivery of skilled nursing care should be a priority. THCA intends to continue its efforts with state policy and regulatory leaders to ensure Texas seniors receive the quality skilled nursing facility care they deserve. THCA appreciates the opportunity to provide this response and stands ready to assist the Commission to further advance and support the quality of life and care provided in Texas.

Sincerely,

A handwritten signature in black ink, appearing to read 'Kevin Warren', followed by a horizontal line.

Kevin Warren
President/CEO