



**Texas Association for
Home Care & Hospice**
Leading ★ Advancing ★ Advocating

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My name is Rachel Hammon, Executive Director for the Texas Association from Home Care and Hospice. Thank you for the opportunity to testify today on **Issues #4 and #5** of the **DADS Sunset Report**.

Texas Association for Home Care and Hospice represents over 1,400 licensed home and community supports services agencies (HCSSAs) in our state. Our members provide a variety of services such as personal attendant service (PAS) to individuals with physical disabilities and PAS and Habilitation to individuals with intellectual and developmental disabilities (IDD), skilled home health nursing and therapy, private duty nursing and medically necessary therapy services for medically fragile children.

Issue #4

We appreciate the hard work that Sunset staff has put into developing this report and recommendations. Unfortunately section #4 of the report contains many inaccuracies about the survey and enforcement of HCSSAs in particular. The report reaches conclusions that misrepresent the industry, makes recommendations that would not achieve the desired result, and that could result in unnecessary harm to the home care and hospice industry.

The major concern the Sunset staff presents in Issue #4 is that DADS is not adequately supervising long term care providers, resulting in poor quality care for Medicaid beneficiaries. The report concludes that "right to correct" should be repealed and penalties for non-compliance should be increased.

In my testimony I will point out some of these inaccuracies and how it resulted in misinformed recommendations. But I will also present some alternative recommendations that might better address some of the underlying concerns of the Sunset staff.

We take issue with Issue #4 of the report for the following reasons:

1. *Homogenization of data* – Throughout the chapter, Sunset compares and sometimes *combines* the data of violations and penalties amongst long term care provider types. This is very confusing and misrepresentative because different long term care providers are governed by different rules and regulations.

For example: p. 44 states, "one enforcement action may cover multiple violations [therefore DADS] could not account for the number of violations tied to 225 enforcement actions". For HCSSAs that statement is not true because each enforcement action is tied to a single violation. These types of errors are present throughout the report.

In order to make sound conclusions, it first requires having accurate data.

2. *Accuracy* – The Sunset report, in many places includes data and statements that indicate the author/s do not understand how HCSSAs are regulated for health and safety by DADS and how penalties are imposed. Nor how these regulations compare to other long term care providers.

For example: on p. 46 the report discusses how home health agencies commit a significant number of “serious” violations. The analysis in this section is misleading and inaccurate because Sunset doesn’t understand the way that HCSSA rules are written and applied by DADS. It appears the Sunset author/s are referring to “Severity Level B” violations when they use the word “serious”; this is very misleading as Severity Level B violations include a wide variety of citations; not all related to health and safety.

For HCSSAs, not all Severity Level B violations/citations actually result in “threats to health and safety, serious harm, or potentially death” as cited in the report. Many of Severity Level B violations are administrative failures that did not result in any actual harm. Our rules at Title 40, Part 1, Chapter 97, Subchapter F, Rule 97.602 governing **Administrative Penalties need to be restructured so that the violations and citations are reflective of the true severity of the error to reflect the intent of our current statute as written at Health & Safety code Chapter 142.017.**

One example of a “serious” (Level B) violation for HCSSAs is maintaining proof of continuing education of an administrator and alternate administrator. If the agency misplaced the document or forgot to keep a copy, or received the education in the wrong time period this is considered a severity level B and therefore “serious” violation by DADS.

In summary, we cannot conclude that the “serious” violations referenced by the report actually resulted in harm to patients and clients. The rules should be revised in order to report this information accurately and to assess more appropriate enforcement action.

3. *Conclusions about “right to correct”* – Our association completely disagrees with the analysis of “right to correct” in the report. For example, p. 47 states “The right to correct substantially hinders [DADS’] ability to implement its own enforcement guidelines [and] weakens the integrity of the regulatory process.” This is misleading because **Severity Level B violations can and do result in “no right to correct” for HCSSAs.**

Here is how “right to correct” actually works:

First, the only violations that HCSSAs are allowed to correct are for Severity Level A violations that have **no imminent threat to harm a beneficiary** and are classified as minor. For a Severity level B violation, DADS can choose to assess an administrative penalty, regardless of whether or not the agency corrected the violation. DADS can also take enforcement action against a HCSSA including revoking their license.

Second, maintaining the ability to correct a mistake is important to maintaining an adequate provider network and ensuring quality services for beneficiaries. But it requires DADS to actually follow-up to see

if the issues are corrected. Our members tell us that they very rarely do. The State should A) dedicate adequate funding for survey and enforcement; and B) the enforcement arm of DADS should do follow-through.

Third, restructuring the Severity Level violations and penalties would result in more effective prioritization of enforcement. See detailed recommendations below.

4. *Conclusions about penalties* – Recommendations related to inadequacy of penalties for licensed HCSSAs represents the author/s lack of understanding of HCSSA regulations.

First, there is no cap or limit on the total financial amount of penalties that can be assessed to a HCSSA. While nursing homes may have a total cap per inspection, the \$1,000 cited in the report for HCSSAs is per violation. For example, an agency could have triggered five Severity Level A violations assessed at \$100 per violation, two Severity Level A violations assessed at \$200, and one Severity Level B violation assessed at \$1,000 for a total of \$1,900 in total penalties.

Second, given the inherent flaws in the current regulatory structure we cannot accurately determine what percentages of violations are actually related to issues that threaten the health and safety of beneficiaries. We also know that DADS staff assess penalties and assign severity levels at their discretion.

Third, the Sunset staff has presented no evidence to support their assertion that increasing penalties will result in overall improved health and safety in the program. Any increase should be based on accurate data and peer-reviewed evidence that higher penalties lead to greater compliance. This has not been presented here.

Lastly, a large percentage of home care services delivered through the Medicaid program are not part of a medical model therefore it is erroneous to compare these violations to medical professional penalties, as was done in the report.

TAHC&H Recommendations

If the Sunset Commission is interested in improving DADS survey and enforcement of licensed HCSSAs, this is what we put forward as alternate recommendations:

1. We would appreciate the opportunity to participate in a stakeholder process to restructure violations, penalties, and enforcement action to more accurately reflect the nature of the violation and therefore result in more consistent and accurate enforcement.

Title 40, Part 1, Chapter 97, Subchapter F, Rule 97.602 governing Administrative Penalties needs to be restructured so that the violations and citations are reflective of the true severity of the error. This will provide the data necessary to better determine if and how health and safety violations are affecting quality of care in the Medicaid program.

We recommend that this section of our rules should be broken-out into three categories: A, B, C. A (administrative, minor violations); B (those things that could substantially limit the agency's ability to provide care); C (imminent threat of harm to health and safety or care that resulted in harm or death). Overlaps between the existing categories should be sorted out and eliminated in order to give a better picture of the actual status of the industry.

2. The provisions surrounding "right to correct" are sufficient for HCSSAs insofar as DADS commits to follow-through with enforcement actions. Our licensure rules already dictate the types of violations that qualify for "right to correct" and those that do not. DADS already has significant discretion on what qualifies for right to correct.

Instead, the State should dedicate monies from penalties back to the survey and certification activities of licensed HCSSAs, so that DADS has the resources they need to actually enforce existing regulations.

Through these two recommendations, State regulators will be able to collect more accurate data about the true nature of violations and know where to spend their precious resources. Rather than eliminating important regulatory tools like "right to correct" and hiking-up penalties, the State would be better off directing monetary penalties toward enforcement and follow-up by DADS. IF – after restructuring the regulations and improving enforcement – a more thorough analysis reveals failures in health and safety for home care and hospice recipients, we would be more than happy to work with lawmakers on solutions that are based on solid evidence and best practices.

Issue 5

We agree that it is a problem that DADS contracts are "isolated" from HHSC. As DADS programs move into managed care, there is no risk-evaluation and no ability for HHSC to properly set up managed care contracts if they have little understanding of what the beneficiaries have been receiving from a programmatic standpoint, and what providers have been expected to provide. This is why, in our experience, moving programs from DADS to the more service and needs-based delivery model of managed care has been so problematic.

Another way to improve contracting at DADS that would also be a preparation for moving waiver programs to managed care is the following:

Currently providers of Home and Community Based Services (HCBS) may have different contract requirements, based on the waiver that they are operating under and whether they operate under a HCSSA license. Some providers of HCBS do not have a license and are held accountable to health and safety standards purely through their contract with DADS that is based solely on the program / waiver they are delivering.

TAHC&H Recommendations

The State should:

1. Identify and define the same services across programs.
2. Standardize names and definitions for these services.
3. Standardize minimum provider qualifications for each given service: for HCBS this should be licensure thus eliminating contracting standards that are duplicative of licensure.

This would simplify contracting requirements for HCBS and potentially create some cost-savings to the state. It will also support the transition of waiver programs to managed care. Once all HCBS is delivered through managed care, the state will need to rely exclusively on licensure to enforce basic health and safety regulations, while the health plans will assume the role of contract monitoring and performance.

P. 57 discusses "Inconsistent use of centralized sanction review committee". We contend that there are many problems with the Sanction and Review Committee (SARC):

- It is unclear what the minimum experience or qualifications are required to be on SARC. How do they choose the members? Do they have experience with long term services and supports?
- In our experience, SARC simply reviews what has already been decided by DADS. What process exists to make sure they are making an appropriate decision? Provider are not allowed provide additional information or context and DADS doesn't provide additional information.
- Our view is that SARC is a compilation of people who do not appear to understand the program or contract and make their decision based on a recommendation from DADS.

TAHC&H Recommendations

1. There should be better qualified individuals conducting the review; and
2. A process by which the provider has the opportunity to refute the case. SARC could become a meaningful first level of appeal, like the Informal dispute Resolution (IDR) or Informal Review Of Deficiencies (IROD). The advantage of making SARC a first-level appeal process is that the state would free the State Office of Administrative Hearings (SOAH) to hear more meaningful cases, while SOAH might attempt to reach amenable decisions in order not to be taken any further.
3. SARC should be housed within HHSC or an agency independent from DADS and LTSS.

Sec. 142.017. ADMINISTRATIVE PENALTY. (a) The department may assess an administrative penalty against a person who violates:

(1) this chapter or a rule adopted under this chapter; or

(2) Section 102.001, Occupations Code, if the violation relates to the provision of home health, hospice, or personal assistance services.

(b) The penalty shall be not less than \$100 or more than \$1,000 for each violation. Each day of a violation that occurs before the day on which the person receives written notice of the violation from the department does not constitute a separate violation and shall be considered to be one violation. Each day of a continuing violation that occurs after the day on which the person receives written notice of the violation from the department constitutes a separate violation.

(c) The department by rule shall specify each violation for which an administrative penalty may be assessed. In determining which violations warrant penalties, the department shall consider:

(1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation and the hazard of the violation to the health or safety of clients; and

(2) whether the affected home and community support services agency had identified the violation as a part of its internal quality assurance process and had made appropriate progress on correction.

(d) The department by rule shall establish a schedule of appropriate and graduated penalties for each violation based on:

(1) the seriousness of the violation, including the nature, circumstances, extent, and gravity of the violation and the hazard or safety of clients;

(2) the history of previous violations by the person or a controlling person with respect to that person;

(3) whether the affected home and community support services agency had identified the violation as a part of its internal quality assurance process and had made appropriate progress on correction;

(4) the amount necessary to deter future violations;

(5) efforts made to correct the violation; and

(6) any other matters that justice may require.

(e) Except as provided by Subsection (j), the department by rule shall provide the home and community support services agency with a reasonable period of time following the first day of a violation to correct the violation before assessing an administrative penalty if a plan of correction has been implemented.

(f) An administrative penalty may not be assessed for minor violations unless those violations are of a continuing nature or are not corrected.

(g) The department shall establish a system to ensure standard and consistent application of penalties regardless of the home and community support services agency location.

(h) All proceedings for the assessment of an administrative penalty under this chapter are subject to Chapter 2001, Government Code.

(i) The department may not assess an administrative penalty against a state agency.

(j) The department may assess an administrative penalty without providing a reasonable period of time to the agency to correct the violation if the violation:

(1) results in serious harm or death;

(2) constitutes a serious threat to health or safety;

(3) substantially limits the agency's capacity to provide care;

(4) is a violation in which a person:

(A) makes a false statement, that the person knows or should know is false, of a material fact:

(i) on an application for issuance or renewal of a license or in an attachment to the application; or

(ii) with respect to a matter under investigation by the department;

(B) refuses to allow a representative of the department to inspect a book, record, or file required to be maintained by an agency;

(C) wilfully interferes with the work of a representative of the department or the enforcement of this chapter;

(D) wilfully 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;

(E) 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; or

(F) fails to submit:

(i) a plan of correction not later than the 10th day after the date the person receives a statement of licensing violations; or

(ii) an acceptable plan of correction not later than the 30th day after the date the person receives notification from the department that the previously submitted plan of correction is not acceptable;

(5) is a violation of Section 142.0145; or

(6) involves the rights of the elderly under Chapter 102, Human Resources Code.

Added by Acts 1997, 75th Leg., ch. 1191, Sec. 7, eff. Sept. 1, 1997. Amended by Acts 1999, 76th Leg., ch. 276, Sec. 10, eff. Sept. 1, 1999; Acts 2001, 77th Leg., ch. 1420, Sec. 14.778, eff. Sept. 1, 2001.

Amended by:

Acts 2007, 80th Leg., R.S., Ch. 809 (S.B. 1318), Sec. 9, eff. September 1, 2007.

Sec. 142.0145. VIOLATION OF LAW RELATING TO ADVANCE DIRECTIVES. (a) The department shall assess an administrative penalty against a home and community support services agency that violates Section 166.004.

(b) A penalty assessed under this section shall be \$500.

(c) The penalty shall be assessed in accordance with department rules. The rules must provide for notice and an opportunity for a hearing.

Added by Acts 1999, 76th Leg., ch. 450, Sec. 2.02, eff. Sept. 1, 1999.