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Comments to Sunset Advisory Commission
Senator Jane Nelson, Chair
Regarding the Texas Department of Aging
and Disability Services (DADS)

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Thank you for the opportunity to submit comments regarding the Sunset Advisory Commission Staff Report on the Texas Department of Aging and Disability Services (DADS). My name is Richard Hernandez, representing ResCare, Inc., the largest community-based service provider of services to persons with Intellectual and Developmental Disabilities in the state of Texas. ResCare currently contracts with DADS to offer services in the ICF/IID, HCS, CLASS and TxHmL programs, serving over 3500 people in all regions of Texas. ResCare is a member of the Providers Alliance for Community Services of Texas (PACSTX), a trade association which has submitted comments on behalf of its membership, which ResCare supports. While we support many of the recommendations of the Sunset staff, we would like consideration for the additional input of the provider community in strengthening the effectiveness and efficiency of DADS, our State Authority.

I would like to focus on two specific issues today, for the members of this Commission. **Issue 3: DADS Lacks Effective Means for Ensuring Its Clients Receive Adequate Care in Day Habilitation Facilities.** Recommendation 3.1 would require DADS to develop in rule, requirements for contract provisions regarding basic safety and service requirements that its community-based IDD waiver and ICF providers should include in their contracts with day habilitation facilities. A few of the specifically cited requirements, which are basic common sense items, include mandating background checks, fire drills, Abuse, Neglect, Exploitation (ANE) hotline postings and client service plan adherence. Recommendation 3.3 would require DADS to compile basic information and data on day habilitation facilities providing services to persons in DADS programs, including data on violations and deficiencies found during inspections. While this data could possibly be useful in identifying the relative quality of care from among available day habilitation facilities, Sunset staff emphasize that DADS would still hold contracting program providers accountable for violations and deficiencies by the day habilitation facilities.

In addition to fundamentally requiring ICF/IID and waiver program providers to become the state regulatory entity, these recommendations do not delineate how providers will, or by what standards, enforce compliance with additional contractual requirements. The ensuing review and monitoring will be costly, the methods and interpretations of compliance will be subjective and inconsistent, and the only recourse for non-compliance with requirements will be contract cancellation. However, even contract cancellation conflicts with DADS requirements that the choice of individuals served in each program be honored. If a day habilitation facility does not fully comply with contractual requirements (which will vary among contracts held), losing a contract for a provider which may have only one or two of its clients in attendance, has very little impact on the day habilitation facility. Moreover, an individual

in services may just transfer to a different provider which still holds a contract with the day habilitation facility of their choosing.

As directed in recommendation 3.3, data which may be compiled by DADS that outlines the number and level of violations and deficiencies by a day habilitation facility, may prove useful to a provider in considering whether to contract with a specific day habilitation facility, may not in fact have much, if any, impact on client choice. It may matter little to an individual if a day habilitation facility conducts fire drills, as required, as long as their friends and acquaintances are attending the day program of their choice. Further, the location, proximity to one's home, and the significant lack of options for day habilitation services, also are a very large factor in the determination of choice.

While ResCare and PACSTX agree completely that DADS lacks an effective means for oversight of day habilitation facilities, we completely disagree with the recommended solution. DADS should consider creating a Day Habilitation license category or certification requirement, promulgate rules and regulations for participation, monitor each facility for compliance, and contract directly with each facility for billing and payment. Only this type of model would ensure that compliance and enforcement can be assured on a uniform basis, and that individuals served will not be at risk.

My final comment pertains to **Issue 4: Few Long-Term Care Providers Face Enforcement Action for Violations**. While ResCare is deeply committed to quality services and committed to the health and safety of all of its participants and staff, we are not without our share of regulatory issues. Maintaining quality services is a challenging venture when operating in the economic climate created by not only the lack of cost of living rate increases, but even more so by successive rate reductions. The maintenance of a quality workforce is an issue that challenges every private provider on a scale exponentially multiplied beyond that of State Supported Living Centers, whose rates are approximately four times that of community care providers. Applying greater penalties to providers does not remedy the inability to recruit and retain higher quality workforce, and will not result in a reduction in survey issues for providers who are working diligently to comply with regulations. Those providers who blatantly neglect corrective action should be dealt with directly and specifically. "Broad brush" approaches to solving "bad apple" problems will only create greater problems for the whole. By eliminating the right to correct, and significantly increasing administrative penalties (particularly for 6-bed group homes), DADS would only increase the likelihood of driving providers out of business, and reducing access to services. A well-funded, healthy provider network provides DADS with a more effective base to determine which providers are truly the "bad apples," opening the door to dealing directly and swiftly with those. It is interesting, and somewhat contradictory, that the Sunset Report would target the lack of enforcement on the part of DADS as it pertains to issue 4, but in issue 3, it would recommend that QA enforcement should be deferred to private providers through contract-specific requirements, with no accountability or penalties for day habilitation facilities that may experience critical incidents. There is no such recommendation for stricter state oversight in issue 3 that compares to its recommendations in issue 4.

Related to issue 4, but not addressed in the Sunset report is the DADS' process of issuance of electronic "Provider/Information Letters" which very frequently address new interpretations of rules, or often promulgate new requirements. These, as well as revisions to the Program-specific Billing Guidelines that are not in rule, often create new mandates (many of which are costly, but not reimbursed) and that do not have to be subjected to statutory code revision requirements. Stakeholders have no input into the promulgation of these mandates which can also be subjectively applied by DADS surveyors. In this regard, matters of program policy should be required to be amended into Texas Administrative Code, so they can be properly vetted. Any requirements that add cost should be accompanied by an appropriate

rate “add-on” as determined by HHSC, and also subjected to public scrutiny. As the current process dictates today, DADS can create rules, regulations and unfunded mandates while side-stepping the administrative rule process. As an alternative, if necessary, DADS may consider employing the process used in other states, whereby an “emergency rule” is promulgated in the Texas Administrative Code, which can be enforced for only a limited period of time (usually 90 – 180 days), while allowing for the statutory TAC process to be followed.

Finally, as it relates to issue 4, ResCare and PACSTX agrees with and supports **Recommendation 4.4: Direct DADS to refer appeals of enforcement actions to the State Office of Administrative Hearings (SOAH) within 60 days of receiving a request for a hearing, directing the Office to set a timely hearing date.** However, we believe that this recommendation should have the caveat that all rulings by SOAH are final, and that the agency would not have any option to accept or reject the ruling of SOAH. We believe that this change would have multiple benefits to the state and providers by reducing administrative costs, reducing workloads for staff while yielding more impartial hearings with more equitable resolution to disputes.

While my testimony has focused primarily on two priority issues, it does not, by any means, indicate that there are not additional issues with which we would like to have a continued dialogue. It is just a judicious attempt to comport with anticipated time-constraints for today’s hearing. I wish to express my utmost gratitude to Sunset Advisory Commission Members and their staffs, and Sunset staff for encouraging input from ResCare, PACSTX and the Private Providers Association of Texas (PPAT), as well as other stakeholders. We look forward to a continued dialogue throughout the process with the desired outcome of a stronger, more effective State I/DD Authority (DADS), resulting in higher quality services for the people receiving the needed supports.

Thank you for the opportunity to address this panel, and please address any questions to me at the contact information noted above.

Respectfully submitted,
Richard Hernandez