



MAY 27 2014

## Texas Association of Residential Care Communities

Post Office Box 9005 • Austin TX 78766-9005 • 512-338-1223 • e-mail: [sidrich@austin.rr.com](mailto:sidrich@austin.rr.com)

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May 23, 2014

Amy Trost  
Sunset Commission  
Post Office Box 13066  
Austin, Texas 78711

Re: Sunset Staff Report-DADS

Amy:

I am submitting information about certain aspects of the administration at DADS, in response to the staff report. Please mail this information to all Commission members.

Sincerely,

A handwritten signature in black ink, appearing to read "Sid Rich". The signature is written in a cursive style with a large, sweeping initial "S" and a long horizontal stroke extending to the right.

Sid Rich



May 8, 2014

To: The Sunset Commission

From: Sid Rich, Texas Association of Residential Care Communities

Re: Issues with the Texas Department of Aging and Disability Services

Texas Register - April 18, 2014

Chapter 46 Contracting

to Provide Assisted Living and Residential Care Services

Under Public Comment, the reader was directed to address questions to a certain employee at DADS Contract Oversight and Support section. Call her employee A.

**On Wednesday, May 7, 2014** I called employee A. with my questions. She asked me why I was calling her. I explained that she was the individual listed in the Register as the contact person. She seemed surprised and said she would find out who I should talk with. Later in the day employee B. left word for me to call.

**On Thursday, May 8, 2014** I returned the call to employee B. and she said she didn't know anything about the rules. I told her that I had now talked to two people, both of whom denied knowledge of the rules in question. I asked her who I should speak with and she referred me back to employee A. I told her that employee A. was the one who referred me to her, employee B. I then called employee A. back and she attempted to answer my questions, while frequently referring to a chapter that I was not talking about at all. Both employees were very nice on the telephone, I'll give them that. Needless to say, this seems like an agency that doesn't exactly have its act together. This is important because the Department issues a great many proposed rules.

**Recommendations:**

- 1) the Department should clearly identify the *correct* contact person, and
- 2) the contact person should be advised that they have been designated and be prepared to answer questions

**Observations:**

1) Over a number of years it seems to me that the Department does not seem to *crossstrain* its employees. If an employee has been assigned a particular project and that employee is unavailable, then no one else can answer questions. With no backup, it seems to me that this situation does not benefit the Department—aside from the consumer.

2) Many times it is difficult to find the right person or section to answer a question or help with a problem. What it seems like is that there is a lack of general knowledge on the part of Department employees if the question or issue is not directly related to their specific job. One might conclude that the "right hand doesn't know what

the left hand is doing.” Because of my years of experience and knowledge of the Department, I am able to eventually find the information I am looking for or answers to my questions. Imagine what it must be like for the average Joe or Jane?

**Recommendations:**

- 3) Insure that more than one person has knowledge of an issue, and
- 4) Implement a general orientation program, with documentation, that equips all employees with general knowledge of Department responsibilities and functions and who to contact.



# Texas Association of Residential Care Communities

Post Office Box 9005 • Austin TX 78766-9005 • 512-338-1223 • e-mail: sidrich@austin.rr.com

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June 30, 2014

Kevin Levine  
Director  
Sunset Commission  
Post Office Box 13066  
Austin, Texas 78711

Re: Recommendations/Resource Material

Kevin:

We are enclosing two sets of material: 1) Final observations and recommendations on DADS and Sunset Staff recommendations, and 2) Letter to Senator Nelson from Silsbee Oaks Health Care along with sworn statements from employees, statements from families, and from State Representative James White concerning the dysfunctional and retaliatory culture in DADS Regional Offices. We believe that the reader will be astonished by some of the information.

Sincerely,

A handwritten signature in black ink, appearing to read "Sid Rich", is written over a long, horizontal, slightly wavy line that extends across the width of the signature area.

Sid Rich  
Executive Director

Copies to Commission  
Members and interested parties

TEXAS ASSOCIATION OF RESIDENTAL CARE  
COMMUNITIES

Post Office Box 9005  
Austin, Texas 78766-9005  
sidrich@austin.rr.com  
512-338-1223

**To:** Sunset Advisory Commission  
and Interested Parties

**From:** Sid Rich, Executive Director

**Subject:** DADS and the Sunset Advisory Commission Staff Report  
Issue 4, FINAL RECOMMENDATIONS

**1. Source:** TARC

**Issue:** A venue for providers to appeal a case when a situation has reached an impasse.

**Comment:** The Department of Aging and Disability Services is responsible for licensing, investigation, and surveying nursing home facilities. Owners, licensed providers, and practitioners have no remedy or recourse against the aberrant conduct of Regional Offices and employees. These offices enjoy an autonomous status, do pretty much what they wish, and are supported by the state office even when they are proved to be wrong.

The sole source of reporting complaints about DADS employee misconduct, for example, is a general telephone number at DADS central office. It is a message center that has been used without any response or remedy. The Office of Inspector General (OIG) at the HHSC does not handle such cases. Attempts at reason with persons at high levels within the agency fail, or are met with threats of investigation or penalties.

Issues with DADS have become an egregious pattern of *punishment* over *compliance* within these Regions. In simple terms, regardless of competence, diligence, and professionalism of facility staff and regardless of the facts at issue, the facility is *always wrong* and DADS is *always right*. This prevailing culture has eradicated even a modicum of defense or remedy for providers, closed the doors on the ability to report misconduct, and excessively increased the cost of doing business in Texas for facility owners.

A case in point, and there are others, concerns a facility built in Dallas County under National Fire Protection Association 101, Chapter 13, 1988 Edition. Under this code, a sprinkler system was not required at this facility. The Department approved the construction and licensed the building. DADS approved the facility's license renewal for 31 consecutive years. On the 32<sup>nd</sup> year the DADS Regional Office in Arlington wrote them a deficiency for lack of a sprinkler system. It was appealed but overturned. The owners, in a effort to substantiate their claim, commissioned an independent and expensive study of their building type. It was rejected. The owners were finally forced to sprinkle this *existing* building at a cost of \$571,658.30. DADS forced this—not because they should—but because they could. The facility owners complied because they had this, and other facilities in Dallas county, and were afraid if they didn't comply, the Arlington office would repeatedly retaliate against them.

In an email from the DADS Chief Architect, to their company attorney, he stated, "I have no argument that the building can be licensed as a large Type B without sprinklers because it meets the construction type in Chapter 13 of the 1988 edition of the LSC without sprinklers ...". The state office clearly knew that the Regional Office was wrong in their insistence that the facility be sprinkled but did not overrule them.

Something must restrain the "heavy hand" of government. There has to be some way for providers to receive a fair and impartial hearing in cases like this.

**Recommendation:** Create a *Joint Legislative Oversight Committee for Nursing Homes*. There is already legislative precedent for such a committee. One such committee was created in SB 190, 1997, by senator Judith Zaffirini, co-authored by Senator Jane Nelson. It is time to do this again. The language should be inserted into the Sunset legislation for DADS.

## **2. Source:** TARC

**Issue:** Regional Consistency and Accountability

**Comment:** It is obvious that statutes and regulations for nursing homes and assisted living facilities are the same in all DADS Regions. But interpretation and enforcement is not the same. As we stated under issue 1, these offices enjoy an autonomous status, do pretty much what they wish, and are supported by the state office even when they are proved to be wrong. While we have complained about this over many years, with many administrations and commissioners, nothing changes. We believe the reason is that the state office fears that if they overturn a regional decision, and they are wrong, they will take the heat for it. It seems that they would rather over

regulate and punish and let the inspectors take the heat. However, when the Region is clearly wrong, as in issue 1 above, then they have an obligation to intervene. When they don't, it emboldens the Region and this is what is happening now.

When a survey team finishes inspecting a nursing home facility, for example, the team leader is required to meet with the administrator and discuss the findings of the survey. This is a valuable exercise for the facility and the DADS' survey team, which is required to leave an "informal list" of deficiencies, if there are any. DADS would then send the facility a "formal" list of deficiencies which the home would be required to correct. Prior to the passage of SB 344 by Carona, it was not uncommon for a survey team to ADD deficiencies to the final "formal" list—deficiencies that the home was totally unaware of. This was inappropriate policy and the Legislature agreed. Instead of ignoring the practice, the state office should have called all the Regional Directors to Austin, discussed the policy, and discontinued it. It should not have required legislation.

One of the Regions had architects who retired. The new crew decided that they didn't like the configuration of attics in assisted living facilities. They demanded changes that cost thousands of dollars. Once the Department approves a building then the only issues should be repairs and maintenance. We complained to the state office about the attic issue but we were pretty much ignored. This is another situation where Regional Directors should have been called to Austin for a "teachable moment," but that did not happen.

We believe that consistency and uniformity can be achieved within the Regions IF the central office has the desire and will to do so. It's called LEADERSHIP!

**Recommendation:** Charge the Commissioner of DADS, in the statute, with the task of achieving uniformity within regions and require quarterly progress reports to the appropriate legislative authorities.

### **3. Source:** TARC

**Issue:** Leadership in Regulatory Services

**Comment:** Years ago the Assistant Commissioner over nursing homes, assisted living, home health, etc was a medical doctor. That person had standing with providers, Texas Medical Association, medical directors and the Feds. This would make even more sense because the really important issues deal with patient care—in nursing homes, assisted living, home health and the rest.

**Recommendation A:** Make the Assistant Commissioner for Regulatory Services a medical doctor. **Recommendation B:** Underneath the Assistant Commissioner are four departments: Survey Operations, Enforcement, Policy and Rules, and Licensing. The director of Survey Operations and Enforcement should be a person who has been licensed as a nursing home administrator and has had experience running a nursing home. The Department should also make a conscience effort to employ down-line staffers, in all four departments, who have experience with assisted living, home health, adult day care, and with the developmentally disabled.

**4. Source:** TARC

**Issue:** Clinical Competence

**Comment:** In a recent survey of one of our member facilities, a social worker on the DADS team had an expired license. DADS would never tolerate an employee of a nursing facility practicing with an expired license.

**Recommendation:** Mandate in the statute that all DADS survey team members maintain current clinical state licensure (many are inactive), and produce certificates of timely completion of continuing education courses appropriate to their specialty—and that they show proof to the administrator prior to the beginning of the survey.

**5. Source:** TARC

**Issue:** Joint Commission for Accreditation

**Comment:** The “Joint Commission” has long been the “gold standard” for measuring excellence in health care administration. Hospitals use them almost exclusively. An independent, not-for-profit organization, The Joint Commission accredits and certifies more than 20,500 health care organizations and programs in the United States. Joint Commission accreditation and certification is recognized nationwide as a symbol of quality that reflects an organization’s commitment to meeting certain performance standards. Why shouldn’t Texas nursing homes be afforded the option of using the Joint Commission in lieu of state certification? Joint Commission for Accreditation of Healthcare Organizations (JCAHO) methods are proven to be a reliable and an effective option to state licensure accreditation. The Texas Health and Safety Code says:

*(a) The department shall accept an annual accreditation review from the Joint Commission on Accreditation of Health Organizations for a nursing home instead of an inspection for renewal of a license under Section 242.033 and in satisfaction of the requirements for certification by the department for participation in the medical assistance program under*

*Chapter 32, Human Resources Code, and the federal Medicare program, but only if:* Conditions are then listed. One of which is: (A) determined whether a waiver or authorization from a federal agency is necessary under federal law, including for federal funding purposes, before the department accepts an annual accreditation review from the Joint Commission:

**Recommendation:** Find out from the federal government if they will allow Texas to offer JACHO accreditation in lieu of state inspections and then publish the appropriate rule to implement it.

## **6. Source:** TARC

**Issue:** Survey Disclosure by DADS

**Comment:** : Inspectors can sight anything in a survey. The facility is always assumed to be guilty and it's up to them to prove otherwise. The facility can submit statements from facility staff disputing events that took place in a survey. According to the Texas Administrative Code 393.1(i), "HHSC will not conduct an IDR (informal dispute resolution) based on alleged surveyor misconduct, alleged state survey agency failure to comply with survey protocol, complaints about existing federal or state standards, or attempts to clear previously corrected deficiencies/violations." There is no effective procedure for providers to challenge the inspector, the evidence, or the proof they may use.

**Recommendation:** Enact legislation mandating disclosure of the procedures, process, and persons responsible for creating the statements of deficiencies.

## **7. Source:** TARC

**Issue:** Internal Training

**Comment:** We contacted the staffer at DADS who is the expert in Assisted Living and has been for sometime. We asked a hypothetical question. An owner has a licensed assisted living facility and now decides they want to participate in a government component and dedicate some of their beds to that. We then asked how they would contact a managed care organization since the Department was no longer doing CBA (Community Based Alternatives) contracting. She seemed a bit vague about CBA contracting. We also asked how reimbursement would be handled. She didn't know the answer. We called her back later to check on the issues and she said she was still trying to find out. We then called the Health and Human Service Commission and asked the same questions. A staff person called us back and answered our questions immediately. If you want answers to related issues, DADS staff cannot usually provide the answer. It seems like staff

training is very specific and if you depart from that narrow window of knowledge, the staffer is incapable of responding. This is not new. We have noticed this for years!

**Recommendation:** DADS should provide more extensive training to program staff.

#### **8. Source:** TARC

**Issue:** Information Documents from DADS/Cross-Training Employees

**Comment:** We are enclosing an email from DADS, Exhibit A, which is information sent to persons who are interested in opening an assisted living facility. **Reference 1:** When you call the number listed you DO NOT get the architectural unit. You get an employee who transfers your call. The instructions should say that. **Reference 2:** If you have a question about licensure you are invited to call the Manager of Licensure. The problem is, according to the answering machine, there is no one else to talk with if he is not available. There should be other employees in Licensure that can answer questions. **Reference 3:** The person who answers the telephone at this number says she cannot answer any questions about CBA or reimbursement. **Reference 4.** When you call to inquire about Star + Plus reimbursement the recording says— *this is a wrong number.*

**Recommendation:** Verify the accuracy of information before it is circulated. Cross train employees. Over a number of years, it is clear that the Department does not seem to utilize program units where others have knowledge of an issue or a program. They seem to have one specialist on a subject. If that person is on sick leave or vacation or traveling on business you are forced to wait until that person returns. The absence of backup does not benefit the Department or the consumer.

#### **9. Source:** TARC

**Issue:** Internal Training/ Cross-Training/ and Communication

**Comment:** We received the April 18, 2014 issue of the Texas Register. We had questions about Chapter 46: *Contracting to Provide Assisted Living and Residential Care Services*. Under “Public Comment,” the reader was directed to address questions to a certain employee at DADS Contract Oversight and Support Section—call her employee A. We called employee A and asked her some questions. She seemed surprised and asked why we were calling. We explained that she was the individual listed in the Register as the contact person. She said she would find out who we should talk with— call her employee B. We called employee B and she said she didn’t know anything about the contracting rules. When we asked Employee B

who we should talk with now, she referred us back to employee A. We then explained that A had referred us to B. We called A back and she attempted to answer our questions, while frequently referring to a chapter that had nothing to do with what we were concerned about. Needless to say, DADS doesn't exactly have its act together. Is this a serious state agency or the "keystone" cops? We had to laugh, but it's really not funny. DADS proposes lots of rules.

**Recommendation:** Before DADS lists a contact person in the Texas Register, they should make sure it's the right person and that they are informed that they will be listed, before the publication comes out.

**10. Source:** Sunset Staff Report, Issue 4

**Issue:** DADS issues few sanctions for violations

**Comment:** **Page 44, paragraph 4.** The repost says ... "in fiscal year 2013, DADS took enforcement action in response to less than one percent, or 225, of the almost 38,000 state violations confirmed by its staff, ..." Inspectors can sight anything in a survey. The facility is always assumed to be guilty and it's up to them to prove otherwise. There is no effective procedure for providers to challenge the inspector, the evidence, or the proof they may use. It seems to us that the Sunset staff mentality is driven by numbers. Violations "confirmed" does not necessarily mean that the violations are "valid." **Page 45, paragraph 1.** Staff makes a point to emphasize, "Compared to the approximately \$5.4 billion in revenues taken in by the Texas nursing home industry alone, \$400,000 in state penalties is insignificant." Staff seems upset that the penalties were not more. Is there a quota system that we should be using? Perhaps it might be instructive to mention that Texas ranks 49<sup>th</sup> in the nation in nursing home reimbursement—and that homes have not even received their cost since 1997. Insufficient reimbursement is a penalty that was overlooked while advocating that more money be extracted from facilities. **Page 45, paragraph 4.** Staff calls attention to, "...repeated violations at the highest levels of severity ..." We still maintain that violations "confirmed" does not necessarily mean violations "valid." The report mentions 92 facilities. While we don't view any violation as unimportant, 92—if valid, is only 7.6 % of the 1,208 certified facilities as of January 2014.

**Recommendation:** Sunset staff is of the same mentality as DADS staff. They are predisposed to "punishment," rather than "compliance." We have pointed out many inequities in the survey and regulatory process—and these are real issues. Unless the Commission really wants an inefficient and onerous agency bent on punishment, **REJECT staff recommendation 4.1**

**Require DADS to develop, in rule, progressive sanctions for serious or repeated violations.**

**11. Source:** Sunset Staff Report, Issue 4

**Issue:** Licensure Revocation

**Comment: Page 46, paragraph 6.** Staff states, “ ... in the last three fiscal years, DADS has revoked just three nursing home licenses, with no revocations in fiscal year 2013.” Once again, is this a numbers game? Is it a mentality where staff has simply concluded that, “It seems like out of 1,195 licensed homes, there should have been more license revocations?” Why isn’t it just as valid to celebrate the fact that so few licenses have been revoked? Why can’t we conclude that Texas nursing homes are doing a good job? **Page 47, paragraph 2.** Staff notes, “In contrast, in fiscal year 2013, the agency (DADS) revoked the licenses of 43 home health agencies.” Once again it seems that the staff mentality is immersed in numbers, comparing actions in one program against another. Comparing revocations of home health agencies against nursing homes is a classic example of “apples to oranges.” Most all the rules that Sunset staff objects to have been “hammered out” over the years by DADS, providers, and advocates. They should not be rejected on a periodic whim of people who have no real experience in long-term care.

**Recommendation:** Sunset staff is of the same mentality as DADS staff. They are predisposed to “punishment,” rather than “compliance.” Unless the Commission really wants an agency bent on punishment, **REJECT staff recommendation to change the rules for licensure revocation.**

**12. Source:** Sunset Staff Report, Issue 4

**Issue:** Statutorily granting providers the right to correct most violations ...

**Comment: Page 47, paragraph 4.** “Statute grants all licensed providers the right to correct most violations within 45 to 60 days and prohibits DADS from using penalties to encourage compliance as long as the provider corrects the violation. This issue, as much as any other, exemplifies the fact that staff is more concerned about *punishment* than about *compliance*.”

**Recommendation:** Sunset staff is of the same mentality as DADS staff. They are predisposed to “punishment,” rather than “compliance.” Most all the rules that Sunset Staff objects to have been “hammered out” over the years by DADS, providers, and advocates. They should not be rejected on a periodic whim of people who have no real experience in long-term care.

Unless the Commission really wants an agency bent on punishment, **REJECT staff recommendation 4.2 Repeal “right to correct” provisions**

**for long-term care providers from statute, and require DADS to define, in rule, criteria for their appropriate use.**

**13. Source:** Sunset Staff Report, Issue 4

**Issue:** DADS Penalties/Penalty Caps

**Comment:** Page 48, paragraph 3 – 4. Staff expresses concern about the level of penalty caps. Graciously, they seem to think that \$10,000 per violation, per day, is sufficient for nursing homes, but they do not agree with the caps on other programs. Only bureaucrats—who have never had to worry about paying a mortgage, making a payroll, or caring for our aged population would take issue with penalties from \$500 to \$5,000 per violation, per day.

**Recommendation:** Sunset staff is of the same mentality as DADS staff. They are predisposed to “punishment,” rather than “compliance.” These fines and caps that Sunset Staff objects to have been “hammered out” over the years by DADS, providers, and advocates. They should not be rejected on a periodic whim of people who have no real experience in long-term care. Unless the Commission really wants an agency bent on punishment, **REJECT staff recommendation 4.3 Authorize higher administrative penalties for home health and assisted living facilities and repeal limits on penalties per inspection for intermediate care facilities.**

**14. Source;** Sunset Staff Report, Issue 4

**Issue:** Negotiated Reductions

**Comment:** Page 49, paragraph 2. Staff complains that only an average of 42 percent of provider penalties were collected. If you want to sell your house, and you want \$200,000 out of it, you list it for more and negotiate. We have already established that surveyors and inspectors can sight anything in a survey and there is no effective procedure for providers to challenge the inspector, the evidence, or the proof they may use. An inspector, in the same way an owner sells a house, cites the facility with as many monetary penalties as possible. That way, the state always gets more than what is justified in the negotiated reductions. The reader is also reminded that none of our providers have gotten even their cost since 1997. The financial penalties, when levied by bureaucrats with nothing to lose—and applied per violation, per day— can reach enormous levels. Once again, is the state’s primary goal *compliance* or *punishment*?

**Recommendation:** These rules that Sunset Staff objects to have been “hammered out” over the years by DADS, providers, and advocates. **Reject any change in the rules for negotiated reductions.**

**15. Source:** Sunset Staff

**Issue:** Delayed Appeals

**Comment:** Page 49, paragraph 4. Staff seems to be “miffed” that providers are given the courtesy of being consulted about hearing dates. After all, these facilities are charged with taking care of needy people 24-7. They have to maintain shift coverage while freeing up certain individuals for the hearings, not to mention the schedules of their lawyers. This practice of consultation and agreement is reasonable.

**Recommendation:** **Reject any attempt to deny providers the opportunity to negotiate hearing dates.**