

Senate Bill 1055
79th Legislature, Regular Session, 2005

A Report to the Governor, Lieutenant Governor
and Speaker of the House of Representatives

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Purpose of the Report

Pursuant to Senate Bill 1055, 79th Legislature, Regular Session, 2005, the Texas Health and Human Services Commission (HHSC) was required to convene a workgroup to study state laws relating to the delivery of personal care services. HHSC delegated the convening of this group to the Department of Aging and Disability Services (DADS) as the agency that licenses home health agencies and assisted living facilities.

The purpose of the study was to perform a comprehensive review of the changing environment in the personal care services delivery system to determine if changes in state licensing and regulation were warranted, and if so, what changes should be considered. The workgroup was charged with considering:

- State licensing laws
- The nature, extent, and differences of consumer needs and preferences
- The qualifications of persons authorized to provide personal care services
- The settings in which personal care services are provided, including the life safety codes applicable to those settings

The study focused on state laws relating to the delivery of personal care services to four or more persons who are unrelated to the proprietor in settings that are not licensed as assisted living facilities, but are instead settings where one or more residents receive personal care services through one or more home and community support services agencies. The complete text of SB 1055 Section 3 can be found in Appendix A.

The primary question before the workgroup was whether to recommend a change in the definition of assisted living facilities, in particular, related to the provision of personal care services by a home health agency.

Workgroup Membership

As required by SB 1055, the workgroup was composed of providers, consumer advocates, building inspectors, fire marshals, and other appropriate individuals, including DADS staff. The individuals involved included:

Providers:

Rose Dunaway, Texas Association for Home Care
Sharon Liggett, Texas Organization of Residential Care Homes
Keith Rayl, Temple Meridian Retirement Community
Sid Rich, Texas Association of Residential Care Communities
Kathy Schoenberg, Texas Organization of Residential Care Homes

Theresa Shook, Texas Assisted Living Association
Heather Vasek, Texas Association for Home Care
Jeanoyce Wilson, Texas Assisted Living Association

Consumer Advocates:

Dennis Borel, Coalition of Texans with Disabilities
Michelle Crain, Texas Association of Centers for Independent Living
Beth Ferris, Texas Association for Nursing Home Residents
Colleen Horton, Texas Center for Disability Studies
Chris Kyker, Texas Silver-Haired Legislature
Amber McCarthy, National MS Society/Disability Policy Consortium
Joe M. Sanchez, AARP - Texas
Kristina Shugart, Capitol Area Agency on Aging
Cathy Wasserman, The Senior Source

Building Inspectors:

Rebeka Eaddy, DADS, Architectural Program
Diane Jarvis, DADS, Regulatory Services Policy
Fred Worley, DADS, Architectural Program

Fire Marshal:

Richard Bishop, State Fire Marshal's Office

Others:

Dotty Acosta, DADS, Regulatory Services Policy
Susan Davis, DADS, Regulatory Services Enforcement
Sandy Gregory, DADS, Provider Services Policy
Jacquie Shillis, DADS, Government Relations
Debra Owens, DADS, Access & Intake AAA
Mary Valente, DADS, Regulatory Services Policy
John Willis, DADS, Long Term Care Ombudsman
Ric Zimmerman, DADS, Regulatory Services Policy

Workgroup Schedule

The workgroup convened on February 2, 2006; March 8, 2006; and June 15, 2006 to discuss the matters before it.

Workgroup Considerations

State Licensing

Texas Health and Safety Code Section 247.002 defines an assisted living facility as “an establishment that furnishes, in one or more facilities, food and shelter to four or more persons who are unrelated to the proprietor of the establishment and provides personal care services.”

Personal care services are defined by Texas Health and Safety Code Section 247.002(5) as:

- Assistance with meals, dressing, movement, bathing, or other personal needs or maintenance;
- The administration of medication by a person licensed to administer medication or the assistance with or supervision of medication; or
- General supervision or oversight of the physical and mental well-being of a person who needs assistance to maintain a private and independent residence in an assisted living facility or who needs assistance to manage the person's personal life, regardless of whether a guardian has been appointed for the person.

Texas Health and Safety Code Section 247.004 exempts certain settings from the assisted living facility licensure requirements, notably boarding homes and facilities operated by certain religious entities. The complete text of Section 247.004 can be found in Appendix B.

Based upon the statutory language as well as the opinion expressed by the Office of the Attorney General (OAG) in Letter Opinion 90-085 (issued in 1990), DADS, the Department of Human Services, and the Texas Department of Health before it, have interpreted Chapter 247 such that, if the proprietor of an establishment makes arrangements for someone to provide home health services to the residents, the location meets the definition of an assisted living facility and is required to be licensed under Chapter 247. For example, DADS (and legacy Department of Human Services before it) have encountered situations in which a landlord has referred his or her tenants to a specific home health agency, or the landlord has made arrangements for an individual caregiver to live on the premises. Often the tenants were charged an additional fee for the caregiver's services; sometimes the tenants paid the caregiver directly and sometimes the tenants paid only the landlord with a portion of the payment being “passed on” to the caregiver.

A facility with four or more residents can operate legally without a license if it provides community meals, light housework, meal preparation, transportation, grocery shopping, money management, or laundry services but does not provide personal care services. If residents want to receive personal care services in such a setting, they would have to contract with a licensed home and community support services agency (HCSSA) provider. If the residents in such a setting make their own arrangements with a HCSSA, without any influence or involvement on the part of the proprietor, the establishment does not meet the current definition of an assisted living facility.

In August 2005, DADS submitted a related request to the OAG for clarification of Texas Health and Safety Code Chapter 247. The scenario presented to the OAG in this request was a location that characterized itself as a retirement community and required the residents of that community to obtain personal care services only from a home health agency owned by the retirement community. DADS sought clarification about whether this type of arrangement met the definition of assisted living facility as defined by Chapter 247. The OAG released Opinion No. GA-0403 on February 23, 2006. (The full text of the opinion is included in Appendix C.) The OAG determined that an establishment that furnishes food and shelter to four or more persons unrelated to the proprietor and requires those persons to obtain personal care services through the proprietor's licensed home health agency is an assisted living facility that must be licensed under Chapter 247.

The Changing Environment and Consumer Needs

The environments in which personal care services are delivered have changed and are expected to continue to change. Considerations include the following:

- There is a movement toward more integrated settings; persons who previously might have resided in a nursing facility are now residing in an assisted living facility, and those who previously might have resided in assisted living facilities are now receiving personal care services in a private residence.
- The National Family Caregiver Initiative, which is part of the Older Americans Act, has had a tremendous impact on people aging in place due to assistance given to family caregivers and/or volunteers. There is more aging in place; but at the same time, people are growing older healthier, which equals a longer span in retirement years.
- Due to the fact that services are more readily available outside of a nursing home setting than they have been previously, there is a more fragile population in the personal care environment requiring higher-level assistance, safety, and security.
- Consumers want more choices for services.
- The 79th Legislature appropriated additional funding to offer long-term services and supports in the community to more individuals through the Medicaid waiver programs. If this trend continues, it might lead to more eligible consumers receiving personal care services outside of institutional settings.

- In terms of demographics, the population is aging. A corresponding increase in the numbers of people receiving personal care services can be expected.
- Telehealth and telemedicine have been very helpful for those staying home.
- Safe, affordable, and accessible housing, both supportive and independent, is a current need and is anticipated to continue to be a future need for many consumers.

Current Qualifications for Persons Authorized to Provide Personal Care Services

The regulatory requirements related to the provision of personal assistance services can be found in the HCSSA rules under 40 Texas Administrative Code (TAC) Section 97.404 (c):

Personal assistance services as defined in §97.2 of this chapter (relating to Definitions) may be performed by an unlicensed person who is at least 18 years of age and has demonstrated competency, when competency cannot be determined through education and experience, to perform the tasks assigned by the supervisor. An unlicensed person who is under 18 years of age, is a high school graduate or is enrolled in a vocational educational program, and has demonstrated competency to perform the tasks assigned by the supervisor, may perform personal assistance services.

HCSSAs that are Medicare certified must also meet federal requirements related to staff qualifications. The complete text of 42 Code of Federal Regulations Section 484.36 which lays out the training requirements for home health aides is included in Appendix D.

The regulatory requirements relating to staff qualifications in assisted living facilities can be found in 40 TAC 92.41(a)(2): Full-time facility attendants must be at least 18 years old or a high-school graduate.

The requirements for staff training in assisted living facilities are outlined in 40 TAC 92.41(a)(4). (The complete text is included in Appendix E.) The facility must document that staff members are competent to provide personal care before assuming responsibilities and that they have received the required training. Training requirements include:

- Four hours of orientation before employees may assume any job responsibilities, covering, at a minimum, reporting of abuse and neglect, confidentiality of resident information, universal precautions, conditions about which staff should notify the facility manager, residents' rights, and emergency and evacuation procedures.

- Sixteen hours of on-the-job supervision and training for attendants within the first 16 hours of employment following orientation.
- Six documented hours of education annually for direct care staff.
- Annual in-service training, appropriate to job responsibilities for licensed nurses, certified nurse aides, or certified medication aides, if these are employed by the facility.

Regarding staff qualifications, the workgroup determined that:

- Requiring more staff training for persons who provide personal care services is desirable, but the low pay levels for this type of staff has already resulted in a shortage of applicants.
- Significantly increasing staff qualifications may lead to an increase in costs.
- What is most important is for the person providing the services to demonstrate a skill set and receive training on confidentiality, safety, and other basic “life skills.”

Settings in Which Personal Care Services are Provided

Some possible settings where personal care services are being provided to four or more persons unrelated to the proprietor include:

- Apartment complexes
- Duplexes/fourplexes
- Residential rental properties (including single family residences in which four or more persons reside)
- Dormitories
- Fraternity/sorority houses
- Trailer parks
- RV parks
- Campgrounds
- Homeless shelters
- Battered women’s shelters
- Hotels/motels/bed & breakfasts
- Boarding houses
- Monasteries/convents
- Co-ops
- Communes
- Condominiums
- Residential facilities for the elderly as defined by Human Resources Code Chapter 105 (The complete text of HRC Chapter 105 can be found in Appendix F.)

- Single family residences in which the property owner has taken in persons unrelated to them (for example, Katrina evacuees or friends having financial difficulties) and are letting those people live in the home with their own families
- Motor home caravans (i.e., modern day “gypsies”)
- On-site housing provided by farms to farm workers
- On-site housing provided by ranches to ranch workers
- On-site housing provided by church camps/summer camps/etc. provided to camp counselors/grounds keepers/other staff

These settings may be subject to different building and fire code standards than licensed facilities, which must meet the standards in the Life Safety Code. Locations that are not licensed are subject to whatever building code the local government has adopted for that area. Although there are locally enforced standards (depending on the type and use of the structure), unlicensed settings, which may house multiple persons with physical or cognitive limitations, may not come to anyone’s attention until a fire occurs. See Appendix G for a review of Fire Reports from the State Fire Marshall.

Some of the settings listed above are more relevant to this study than others, for example, locations where multiple persons with physical limitations reside, such as apartment complexes in which a large percentage of the tenants have physical limitations. There is no way to tell how many of these establishments exist or where they are located.

Texas law already addresses some settings in relation to the provision of personal care services. Under Chapter 105 of the Human Resources Code, a facility with two or more residents over the age of 65, 80 percent of whom are not related to proprietor or another resident, is not required to be licensed as long as the facility is not limiting resident’s choice of a provider of personal care services. With certain exceptions, the residents of these facilities must be informed that the facility is not licensed and be provided a statement identifying the life safety and fire codes met by the building as well as a statement indicating whether those codes are comparable to the codes with which an assisted living facility licensed under Chapter 247, Health and Safety Code, must comply. (The rules requiring assisted living facilities to comply with the Life Safety Code and the National Fire Protection Association codes are included in Appendix H. Depending on the type and size of the assisted living facility, the facility may have to comply with one chapter versus another, but they are all subject to Life Safety Code requirements.)

Some of the settings in the list above are likely to be locations in which four or more persons who are not related to the proprietor reside, and at least one resident receives personal care services from a home health agency. If the proprietor is not providing or arranging personal care services, these settings do not meet the definition of assisted living facility and are not required to be

licensed as assisted living facilities. If the proprietor is providing or making arrangements for the provision of personal care services, the establishment must be licensed as an assisted living facility.

The only time the state becomes involved in determining whether a license is required is when a complaint is filed alleging that an establishment is operating illegally without a license. When such a complaint is filed, the Department of Aging and Disability Services conducts an investigation to determine whether the establishment should be licensed. The workgroup recognized that the Department does address each complaint, but felt the Department would benefit from increased funding to assist it in conducting these investigations.

Summary of Workgroup Considerations

During the course of discussions, the workgroup specifically addressed the following issues as required by the bill:

- State licensing laws
- The nature, extent, and differences of consumer needs and preferences
- The qualifications of persons authorized to provide personal care services
- The settings in which personal care services are provided, including the life safety codes applicable to those settings.

Workgroup Conclusions

Workgroup members recognized that, regardless of the 2/23/06 OAG opinion, they had been tasked with determining whether changes to the state licensing requirements were warranted. As such, the parameters of the scope of work permitted the workgroup to make a recommendation to amend the state licensing statutes to exempt from assisted living facility licensing requirements the type of setting addressed in the OAG opinion: a location that characterized itself as a retirement community and required the residents of that community to obtain personal care services only from a home health agency owned by the retirement community. However, the workgroup unanimously agreed that this type of arrangement should not be exempt from assisted living facility licensure.

After much discussion and deliberation, the workgroup also concluded that assisted living licensing requirements should not be extended beyond the settings to which they currently apply.

Workgroup Recommendations

After a full discussion of the task assigned and careful deliberations as to the ramifications of its recommendations, the workgroup recommends that:

- The current licensing requirements for assisted living facilities in Health and Safety Code Chapter 247 remain in place.

- Adequate funding be appropriated to DADS to allow the department to investigate unlicensed facilities that may be operating in violation of the licensure requirements.

Appendix A

Text of SB 1055 (Section 3), 79th Legislature, Regular Session, 2005

SECTION 3. (a) The Health and Human Services Commission shall convene a workgroup composed of providers, consumer advocates, building inspectors, fire marshals, and other individuals as appropriate to study state laws relating to the delivery of personal care services to four or more persons who are unrelated to the proprietor in settings that are not licensed as assisted living facilities, but are instead settings where one or more residents receive personal care services through one or more home and community support services agencies. The purpose of the study is to perform a comprehensive review of the changing environment in the personal care services delivery system to determine if changes in state licensing and regulation are warranted, and if so, what changes should be considered. The workgroup shall consider, among other things:

- (1) state licensing laws;
- (2) the nature, extent, and differences of consumer needs and preferences;
- (3) the qualifications of persons authorized to provide personal care services; and
- (4) the settings in which personal care services are provided, including the life safety codes applicable to those settings.

(b) Not later than December 1, 2006, the workgroup, with the assistance of the Health and Human Services Commission, shall prepare and deliver a report and make recommendations on the issues studied to the governor, the lieutenant governor, and the speaker of the house of representatives.

(c) This section expires February 1, 2007.

Appendix B

Health and Safety Code § 247.004 EXEMPTIONS (to assisted living licensing requirements)

This chapter does not apply to:

(1) a boarding facility that has rooms for rent and that may offer community meals, light housework, meal preparation, transportation, grocery shopping, money management, or laundry services but that does not provide personal care services;

(2) an establishment conducted by or for the adherents of the Church of Christ, Scientist, for the purpose of providing facilities for the care or treatment of the sick who depend exclusively on prayer or spiritual means for healing without the use of any drug or material remedy if the establishment complies with local safety, sanitary, and quarantine ordinances and regulations;

(3) a facility conducted by or for the adherents of a qualified religious society classified as a tax-exempt organization under an Internal Revenue Service group exemption ruling for the purpose of providing personal care services without charge solely for the society's professed members or ministers in retirement, if the facility complies with local safety, sanitation, and quarantine ordinances and regulations; or

(4) a facility that provides personal care services only to persons enrolled in a program that is funded in whole or in part by the Texas Department of Mental Health and Mental Retardation and that is monitored by the Texas Department of Mental Health and Mental Retardation or its designated local authority in accordance with standards set by the Texas Department of Mental Health and Mental Retardation.

For subsection (3) a "Qualified religious society" means a church, synagogue, or other organization or association that is organized primarily for religious purposes and that:

(A) has been in existence in this state for at least 35 years; and

(B) does not distribute any of its income to its members, officers, or governing body other than as reasonable compensation for services or reimbursement of expenses.

Note that references to the legacy Texas Department of Mental Health and Mental Retardation in these rules apply to DADS.

Appendix C
Office of the Attorney General
Letter Opinion 90-085

<p>Mr. James R. Hine Commissioner Texas Department of Aging and Disability Services Post Office Box 149030 Austin, Texas 78714-9030</p>	<p>Opinion No. GA-0403</p> <p>Re: Whether an establishment that furnishes food and shelter to four or more persons who are unrelated to the proprietor and that requires those persons to obtain personal care services through the proprietor's licensed home health agency is an assisted living facility that must be licensed under section 247.021(a) of the Health and Safety Code (RQ-0381-GA)</p>
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Dear Mr. Hine:

You inquire whether an establishment that furnishes food and shelter to four or more persons who are unrelated to the proprietor and that requires those persons to obtain personal care services through the proprietor's licensed home health agency is an assisted living facility that must be licensed under section 247.021(a) of the Health and Safety Code.¹ See Tex. Health & Safety Code Ann. § 247.021(a) (Vernon 2001).

I. Law and Background Facts

Section 247.021(a) states that no person may "establish or operate an assisted living facility without a license" issued under chapter 247. *Id.* The term "assisted living facility" is defined elsewhere in chapter 247 as an establishment that:

- (A) furnishes, in one or more facilities, food and shelter to four or more persons who are unrelated to the proprietor of the establishment; and
- (B) provides personal care services.

Id. § 247.002(1) (Vernon Supp. 2005); see also 40 Tex. Admin. Code § 92.4 (2005) (Tex. Dep't of Aging & Disability Servs., Types of Assisted Living Facilities); cf. Tex. Tax Code Ann. § 11.18(k)(1) (Vernon Supp. 2005) (defining "assisted living services" to mean "responsible adult supervision of or assistance with routine living functions of an individual in instances where the individual's condition necessitates that supervision or assistance"). Chapter 247 also defines the phrase "personal care services" to mean

- (A) assistance with meals, dressing, movement, bathing, or other personal needs or maintenance;
- (B) the administration of medication by a person licensed to administer medication or the assistance with or supervision of medication; or
- (C) general supervision or oversight of the physical and mental well-being of a

person who needs assistance to maintain a private and independent residence in an assisted living facility or who needs assistance to manage the person's personal life, regardless of whether a guardian has been appointed for the person.

Tex. Health & Safety Code Ann. § 247.002(5) (Vernon Supp. 2005); see *also* 40 Tex. Admin. Code § 92.3(28) (2005) (Tex. Dep't of Aging & Disability Servs., Definitions).

Your agency, the Department of Aging and Disability Services (the "Department"), enforces chapter 247, the Assisted Living Facility Licensing Act (the "Act"). See Request Letter, *supra* note 1, at 1; see *also* Tex. Health & Safety Code Ann. § 247.001 (Vernon 2001) (titling the Act). You tell us that in 2004 the Department "received a complaint concerning an establishment that is characterized by its owners as a retirement community, where more than four persons unrelated to the owner reside." Request Letter, *supra* note 2, at 2; *cf.* Tex. Tax Code Ann. § 11.18 (Vernon Supp. 2005) (defining "retirement community" to mean "a collection of various types of housing that are under common ownership and designed for habitation by individuals over the age of 62"). You continue:

The owner of this establishment also operates a licensed nursing facility [see Tex. Health & Safety Code Ann. § 242.301(1) (Vernon 2001) (defining "nursing facility")] at a nearby location, and is a licensed home and community support services agency . . . under Chapter 142, Health and Safety Code. The [Department] investigation revealed that, as part of the initial residential contract, residents of the retirement community must agree to the exclusive use of the owner's licensed home health agency [see *id.* § 142.001(12), (13) (Vernon Supp. 2005) (defining "home and community support services agency" and "home health services," respectively)] to provide any personal care or home health care services that may be needed by the resident. If a resident wants to obtain personal care or other home health services from any other provider, the resident would be in violation of the residential contract and would be required to move At least one other health care provider that attempted to enter the retirement community premises in order to provide home health services at the request of a resident was prevented by the owner or the owner's agent from providing those services to the resident.

Request Letter, *supra* note 1, at 2. You aver that your agency and its predecessor agency, the Texas Department of Human Services, have construed the statutory definition of "assisted living facility"

to include a residential establishment if there are four or more people unrelated to the proprietor living at the location and the proprietor exercises control over who may provide personal care services at that location. While the manner of control may vary from situation to situation, if the proprietor arranges for personal care services directly or indirectly, or requires the resident to use only a provider selected by the proprietor, the proprietor is deemed to be providing the personal care services and the establishment is deemed to be an assisted living facility. In this case, the owner controls the residents' access to personal care services by requiring that any such services be provided exclusively through the owner's home health agency.

Id. at 3. With this scenario in mind, you ask whether the owner of a residential facility housing at least four people unrelated to the proprietor that requires those residents to obtain personal care services through a particular licensed home health agency must be licensed to operate as an assisted living facility under section 247.021(a), Health and Safety Code. See *id.*

II. Analysis: First Question

You indicate that your agency's interpretation of the statute to require an establishment such as the one you describe to be licensed as an assisted living facility stems in part from a 1990 letter opinion from this office. See *id.* at 2. Letter Opinion 90-85 considers whether a "retirement center" that also provides or arranges for the provision of home health services must be licensed as an institution under chapter 242 of the Health and Safety Code. See Tex. Att'y Gen. LO-90-85, at 1. For purposes of chapter 242, an "institution" includes

(A) an establishment that:

(i) furnishes, in one or more facilities, food and shelter to four or more persons who are unrelated to the proprietor of the establishment; and

(ii) provides minor treatment under the direction and supervision of a [licensed] physician . . . , or other services that meet some need beyond the basic provision of food, shelter, and laundry.

Tex. Health & Safety Code Ann. § 242.002(10)(A) (Vernon 2001), *as amended by* Act of May 28, 1997, 75th Leg., R.S., ch. 1159, § 1.02, sec. 242.002(10), 1997 Tex. Gen. Laws 4363, 4364. Like personal care service providers, the home health services providers at issue in the letter opinion must be licensed under Health and Safety Code chapter 142. See Tex. Health & Safety Code Ann. § 142.002(a) (Vernon Supp. 2005); *see also* Tex. Att'y Gen. LO-90-85, at 1. Assuming that a "retirement center" is a residential facility that "furnishes . . . food and shelter to four or more persons who are unrelated to the proprietor," Tex. Health & Safety Code Ann. § 242.002(10)(A)(i) (Vernon 2001), *as amended by* Act of May 28, 1997, 75th Leg., R.S., ch. 1159, § 1.02, sec. 242.002(10), 1997 Tex. Gen. Laws 4363, 4364, the letter opinion notes that determining whether a retirement center is an institution that must be licensed depends upon whether providing health care "through the 'cooperation' of a licensed home health agency" is providing minor treatment or other services beyond food, shelter, and laundry for purposes of the definition of "institution." Tex. Att'y Gen. LO-90-85, at 4-5. While not expressly deciding one way or the other, the opinion states that "[w]e do not think the legislature . . . contemplated that a residential facility could escape licensure and regulation [as an institution] merely by contracting or otherwise arranging for provision of additional services, where direct provision 'in cooperation with' a home health agency of such services would have brought the facility clearly within the ambit of chapter 242." *Id.* at 6. Letter Opinion 90-85 suggests that institutions, or, by analogy, assisted living facilities, may not attempt to avoid statutory licensure requirements on mere technicalities, although it does not directly respond to the issue you raise regarding an establishment that requires residents to contract with a particular personal care services provider specified by the proprietor.

The Department has authority to interpret chapter 247. The Department is required to protect assisted living facility residents by "adopting rules relating to quality of care and quality of life," Tex. Health & Safety Code Ann. § 247.0011(b)(1) (Vernon 2001); by regulating assisted living facilities' operation, see *id.* § 247.0011(b)(4); and to enforce chapter 247's licensing requirements, see, e.g., *id.* §§ 247.041(a), .042(a) (Vernon Supp. 2005) (authorizing the Department to deny, suspend, or revoke a license and to suspend or close a facility in an emergency); *id.* §§ 247.043(a), .044(a) (Vernon 2001) (authorizing the Department to investigate allegations of abuse, exploitation, or neglect of a resident and to petition a district court for injunctive relief against an entity violating the licensing requirements); *id.* § 247.0451(a) (Vernon Supp. 2005) (authorizing the Department to assess an administrative penalty). Given its authority, the Department's construction of the statutory definition of "assisted living facility" to encompass establishments that "provide[] personal care services," Tex. Health & Safety Code Ann. § 247.002(5) (Vernon Supp. 2005) (defining "assisted living facility"), by requiring residents to purchase such services from a provider specified by the proprietor is entitled to "serious consideration" from a court if the construction does not contradict the statute's plain language and is reasonable. *Tarrant Appraisal Dist. v. Moore*, 845 S.W.2d 820, 823 (Tex. 1993); see also Tex. Gov't Code Ann. § 311.023(6) (Vernon 2005) (stating that a court construing a statute may consider "among other matters the . . . administrative construction of the statute").

The Department's interpretation is consistent with the statute's plain language. Section 247.002(1) defines "assisted living facility" to mean an establishment that "provides personal care services." Tex. Health & Safety Code Ann. § 247.002(1)(B) (Vernon Supp. 2005). The term "provides" is not defined by statute or by rule, see *id.* § 247.002; 40 Tex. Admin. Code § 92.3 (2005) (Tex. Dep't of Aging & Disability Servs., Definitions), and must therefore "be read in context and construed according to . . . common usage." Tex. Gov't Code Ann. § 311.011(a) (Vernon 1998). A 1985 Texas Supreme Court decision construing the term "provides" in the context of a statute permitting termination of parental rights if the parent failed to "provid[e] adequate support" determines that the statute did not authorize termination if a parent arranged for the child's adequate support, even if the parent did not personally support the child. See *Holick v. Smith*, 685 S.W.2d 18, 21 (Tex. 1985) (quoting Tex. Fam. Code Ann. § 15.02(1)(C) (current version at Tex. Fam. Code Ann. § 161.001(1)(C) (Vernon Supp. 2005)). A 1950 opinion of this office also discusses the term "provides." See Tex. Att'y Gen. Op. No. V-1106 (1950) at 4. The opinion states, "The usual and ordinary meaning of the verb 'provide' is 'to supply or furnish.'" *Id.* (quoting 34 Words & Phrases 666 (1940)); cf. The New Oxford American Dictionary 1372 (2001) (defining "provide" to mean "make available for use; supply").

In light of our previous construction of an analogous statute in Letter Opinion 90-85 and the common meaning of the term "provides," we conclude that the Department reasonably may construe section 247.002(1)'s definition of "assisted living facility" to include an establishment that does not itself provide personal care services but that furnishes such services by requiring its residents to contract with a personal care provider specified by the establishment proprietor. See Tex. Health & Safety Code Ann. § 247.002(1)(B) (Vernon Supp. 2005). Accordingly, an establishment that furnishes "food and shelter to four or more persons who are unrelated to the proprietor" and that furnishes personal care services by requiring its residents to contract with a particular provider is an assisted living facility under section 247.002(1) and may not operate without a license issued under section 247.021(a). See *id.* § 247.002(1), § 247.021(a) (Vernon 2001).

III. Analysis: Second Question

You ask second whether a licensed assisted living facility may require its residents to contract directly with personal care services providers by providing in the residents' contracts that they will exclusively use the provider with which the proprietor has a contractual arrangement. See Tex. Health & Safety Code Ann. § 247.067(c) (Vernon 2001); Request Letter, *supra* note 1, at 5. Using a ruling from the Centers for Medicare and Medicaid Services regarding federal requirements that you claim are "somewhat analogous," you reason that "the resident's right of choice is exercised at the time that the resident chooses a particular nursing facility that contracts with a particular" personal care services provider. *Id.* at 4.² In other words, by choosing to reside in a particular assisted living facility that requires residents to use personal care services provided only by the proprietor's health services agency, the residents are in effect exercising their right to choose under section 247.067 of the Health and Safety Code. We do not believe the Centers for Medicare and Medicaid Services' interpretation of federal law is dispositive in interpreting section 247.067.

Section 247.067 provides health care professionals with a right to provide certain services to a resident of an assisted living facility and provides residents with a right to contract for health care services. Tex. Health & Safety Code Ann. § 247.067 (Vernon 2001). Section 247.067(b) allows a health care professional to "provide services within the professional's scope of practice to" an assisted living facility resident at the facility. *Id.* § 247.067(b). For purposes of section 247.067(b), a "health care professional" is "an individual licensed, certified, or otherwise authorized to administer health care, for profit or otherwise, in the ordinary course of business or professional practice." *Id.* § 247.067(a). Subsection (c) endows "[a] resident of an assisted living facility" with a "right to contract with a home and community support services agency licensed under Chapter 142 or with an independent health professional for health care services." *Id.* § 247.067(c). Under chapter 142, a "home and community support services agency" includes "a person who provides . . . personal assistance services³ for pay or other consideration in a client's residence, an independent living environment, or another appropriate agency." *Id.* § 142.001(12) (Vernon Supp. 2005) (footnote added).

Preliminarily, we construe the phrase "for health care services" in section 247.067(c) to modify both "independent health professional" and "a home and community support services agency." Section 247.067 thus pertains only to a resident's right to contract for health care services, whether provided by an independent health professional or a home and community support services agency. Section 247.067(c) does not affect a resident's authority to contract for personal care services that are not health care services.

To the extent that a personal care services provider is a health care professional, section 247.067(b) plainly authorizes the health care professional to provide services at the facility to an assisted living facility resident. See *id.* § 247.067(b) (Vernon 2001). Some of the tasks that are within section 247.002(5)'s definition of "personal care services" may be performed by a health care professional. See *id.* § 247.002(5) (Vernon Supp. 2005). In our opinion, section 247.067(b) prohibits the proprietor of an assisted living facility from barring a health care professional from entering the facility to treat a resident who has contracted with that professional to provide health care services, regardless of the terms of the resident's contract with the assisted living facility.

While section 247.067(c) may be read as you suggest--to permit an assisted living facility to require residents to make their choice of personal care services provider by contracting with the facility--we believe such a reading is inconsistent with other provisions of the Act. See Tex. Health & Safety Code Ann. § 247.001 (Vernon 2001 & Supp. 2005); see also *Martin v. Dep't of Public Safety*, 964 S.W.2d 772, 774 (Tex. App.--Austin 1998, no writ) (noting that a court does not "construe a statutory provision in isolation," but construes "it in the context of the statute as a whole"). Several of the Act's provisions indicate that the legislature intended to promote "resident independence and self-determination." Tex. Health & Safety Code Ann. § 247.011(a)(1) (Vernon 2001); see also *id.* § 247.0011(b) (requiring the Department to "protect" assisted living facility residents by "promoting policies that maximize" residents' "dignity, autonomy, privacy, and independence"); *id.* § 247.064(b)(7) (requiring assisted living facilities to recognize, by posting a residents' bill of rights, that each resident "has the right to . . . unrestricted communication, including personal visitation with any person of the resident's choice, at any reasonable hour"). We have also examined the legislative history of section 247.067(c), which was adopted in 1999, and find it consistent with our construction. See Act of May 11, 1999, 76th Leg., R.S., ch. 233, § 1, sec. 247.067(c), 1999 Tex. Gen. Laws 1064, 1076-77. In introducing the amendment that proposed to add subsection (c) before the House Committee on Public Health, Representative Harvey Hilderbran averred that, though much of the bill was intended to regulate the level of care that an assisted living facility could provide, subsection (c) was intended to make clear that the bill was not intended to regulate a resident's right to bring in a home and community support services agency. See *Assisted Living Facility Licensing Act: Hearings on S.B. 93 Before the House Comm. on Public Health*, 76th Leg., R.S. (Apr. 14, 1999) (statement of Representative Hilderbran) (tape available from House Video/Audio Services).

We consequently conclude that an assisted living facility proprietor may not restrict a resident's right to contract with a personal care services provider for health care services by requiring the resident to use only the provider that the assisted living facility has specified. Tex. Health & Safety Code Ann. § 247.067(c) (Vernon 2001); see *Ex parte Kubas*, 83 S.W.3d 366, 369 (Tex. App.--Corpus Christi 2002, pet. ref'd) (quoting *Tex. Water Rights Comm'n v. Write*, 464 S.W.2d 642, 648 (Tex. 1971) (quoting *Mellinger v. City of Houston*, 3 S.W. 249, 253 (Tex. 1887))) (defining the term "right" as "'a claim . . . secured by law'"). An assisted living facility proprietor who restricts a resident's right to contract with a personal care services provider for health care services or who bars health care professionals with whom residents have contracted violates chapter 247's requirements. The Department may suspend or revoke an assisted living facility license for a violation of chapter 247. See Tex. Health & Safety Code Ann. § 247.041(a) (Vernon Supp. 2005). The Department also may determine that additional enforcement actions may be taken. See, e.g., *id.* §§ 247.042 ("Emergency Suspension or Closing Order"), .043(b) ("Investigation of Abuse, Exploitation, or Neglect"), § 247.045 (Vernon 2001) ("Civil Penalties"). See generally 40 Tex. Admin. Code ch. 92, subch. H (2005) (Tex. Dep't of Aging & Disability Servs., Enforcement).

IV. Analysis: Third Question

You ask third whether a licensed assisted living facility may enforce its contract with the resident regarding the choice of personal care service provider by terminating the residential contract. See Request Letter, *supra* note 1, at 5. To the extent the contract pertains to the provision of non-health care services, the facility may enforce it. To the extent the contract purports to cover the provision of services by health care professionals or of

health care services by a home and community support services agency, the facility may not enforce it.

S U M M A R Y

An establishment, including one characterized as a retirement community, that furnishes food and shelter to four or more persons who are unrelated to the proprietor and that requires those persons to obtain personal care services through the proprietor's licensed home health agency is an assisted living facility that must be licensed under section 247.021(a) of the Health and Safety Code. An assisted living facility may not require its residents to use a particular personal care services provider to the extent the services are provided by a health care professional, as defined by section 247.067(a) of the Health and Safety Code. Nor may an assisted living facility restrict its residents' rights to contract for health care services with personal care services providers, although a facility may restrict residents' authority to contract with personal care services providers for services other than health care. To the extent an assisted living facility's contract with its residents requires the residents to obtain non-health care personal care services from a specified provider, the facility may enforce the contract.

Very truly yours,

[signature on file]

GREG ABBOTT
Attorney General of Texas

BARRY MCBEE
First Assistant Attorney General
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NANCY S. FULLER
Chair, Opinion Committee
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Assistant Attorney General, Opinion Committee

Footnotes

1. See Letter from Mr. James R. Hine, Commissioner, Texas Department of Aging and Disability Services, to Nancy Fuller, Chair, Opinion Committee, Office of the Attorney General (Aug. 19, 2005) (on file with the Opinion Committee, *also available at* <http://www.oag.state.tx.us>) [hereinafter Request Letter].
2. See Letter from James L. Reed, Associate Regional Administrator, Division of Medicaid, United States Department of Health & Human Services, to Ms. DeAnn Friedholm, State Medicaid Director, Texas Health and Human Services Commission (Aug. 5, 1994) (on file with the Opinion Committee).

3. Section 142.001(22) defines "personal assistance service" to mean "routine ongoing care or services required by an individual in a residence or independent living environment that enable the individual to engage in the activities of daily living or to perform the physical functions required for independent living, including respite services." Tex. Health & Safety Code Ann. § 142.001(22) (Vernon Supp. 2005). The term expressly encompasses personal care, which is defined to include:

- (A) bathing;
- (B) dressing;
- (C) grooming;
- (D) feeding;
- (E) exercising;
- (F) toileting;
- (G) positioning;
- (H) assisting with self-administered medications;
- (I) routine hair and skin care; and
- (J) transfer or ambulation.

Id. § 142.001(22), (22-a).

Appendix D

TITLE 42--PUBLIC HEALTH

CHAPTER IV--CENTERS FOR MEDICARE & MEDICAID SERVICES, DEPARTMENT OF HEALTH AND HUMAN SERVICES

PART 484 HOME HEALTH SERVICES

Subpart C Furnishing of Services

Sec. 484.36 Condition of participation: Home health aide services.

Home health aides are selected on the basis of such factors as a sympathetic attitude toward the care of the sick, ability to read, write, and carry out directions, and maturity and ability to deal effectively with the demands of the job. They are closely supervised to ensure their competence in providing care. For home health services furnished (either directly or through arrangements with other organizations) after August 14, 1990, the HHA must use individuals who meet the personnel qualifications specified in Sec. 484.4 for "home health aide".

(a) Standard: Home health aide training—

(1) Content and duration of training. The aide training program must address each of the following subject areas through classroom and supervised practical training totalling at least 75 hours, with at least 16 hours devoted to supervised practical training. The individual being trained must complete at least 16 hours of classroom training before beginning the supervised practical training.

- (i) Communications skills.
- (ii) Observation, reporting and documentation of patient status and the care or service furnished.
- (i) Reading and recording temperature, pulse, and respiration.
- (ii) Basic infection control procedures.
- (iii) Basic elements of body functioning and changes in body function that must be reported to an aide's supervisor.
- (iv) Maintenance of a clean, safe, and healthy environment.
- (v) Recognizing emergencies and knowledge of emergency procedures.
- (vi) The physical, emotional, and developmental needs of and ways to work with the populations served by the HHA, including the need for respect for the patient, his or her privacy and his or her property.
- (vii) Appropriate and safe techniques in personal hygiene and grooming that include--

- (A) Bed bath.
- (B) Sponge, tub, or shower bath.
- (C) Shampoo, sink, tub, or bed.
- (D) Nail and skin care.
- (E) Oral hygiene.
- (F) Toileting and elimination.
- (viii) Safe transfer techniques and ambulation.
- (ix) Normal range of motion and positioning.
- (x) Adequate nutrition and fluid intake.
- (xi) Any other task that the HHA may choose to have the home health aide perform.

“Supervised practical training” means training in a laboratory or other setting in which the trainee demonstrates knowledge while performing tasks on an individual under the direct supervision of a registered nurse or licensed practical nurse.

(2) Conduct of training—

(i) Organizations. A home health aide training program may be offered by any organization except an HHA that, within the previous 2 years has been found--

- (A) Out of compliance with requirements of this paragraph (a) or paragraph (b) of this section.
 - (B) To permit an individual that does not meet the definition of “home health aide” as specified in Sec. 484.4 to furnish home health aide services (with the exception of licensed health professionals and volunteers);
 - (C) Has been subject to an extended (or partial extended) survey as a result of having been found to have furnished substandard care (or for other reasons at the discretion of the CMS or the State);
 - (D) Has been assessed a civil monetary penalty of not less than \$5,000 as an intermediate sanction;
 - (E) Has been found to have compliance deficiencies that endanger the health and safety of the HHA's patients and has had a temporary management appointed to oversee the management of the HHA;
 - (F) Has had all or part of its Medicare payments suspended;
- or
- (G) Under any Federal or State law within the 2-year period beginning on October 1, 1988--
 - (1) Has had its participation in the Medicare program terminated;
 - (2) Has been assessed a penalty of not less than \$5,000 for deficiencies in Federal or State standards for HHAs;

- (3) Was subject to a suspension of Medicare payments to which it otherwise would have been entitled;
- (4) Had operated under a temporary management that was appointed to oversee the operation of the HHA and to ensure the health and safety of the HHA's patients; or
- (5) Was closed or had its residents transferred by the State.

(ii) Qualifications for instructors. The training of home health aides and the supervision of home health aides during the supervised practical portion of the training must be performed by or under the general supervision of a registered nurse who possesses a minimum of 2 years of nursing experience, at least 1 year of which must be in the provision of home health care. Other individuals may be used to provide instruction under the supervision of a qualified registered nurse.

(3) Documentation of training. The HHA must maintain sufficient documentation to demonstrate that the requirements of this standard are met.

(b) Standard: Competency evaluation and in-service training—

(1) Applicability. An individual may furnish home health aide services on behalf of an HHA only after that individual has successfully completed a competency evaluation program as described in this paragraph. The HHA is responsible for ensuring that the individuals who furnish home health aide services on its behalf meet the competency evaluation requirements of this section.

(2) Content and frequency of evaluations and amount of in-service training.

- (i) The competency evaluation must address each of the subjects listed in paragraph (a)(1) (ii) through (xiii) of this section.
- (ii) The HHA must complete a performance review of each home health aide no less frequently than every 12 months
- (iii) The home health aide must receive at least 12 hours of in-service training during each 12-month period. The in-service training may be furnished while the aide is furnishing care to the patient.

(3) Conduct of evaluation and training—

- (i) Organizations. A home health aide competency evaluation program may be offered by any organization except as specified in

paragraph (a)(2)(i) of this section. The in-service training may be offered by any organization.

(ii) Evaluators and instructors. The competency evaluation must be performed by a registered nurse. The in-service training generally must be supervised by a registered nurse who possesses a minimum of 2 years of nursing experience at least 1 year of which must be in the provision of home health care.

(iii) Subject areas. The subject areas listed at paragraphs (a)(1)(iii), (ix), (x), and (xi) of this section must be evaluated after observation of the aide's performance of the tasks with a patient. The other subject areas in paragraph (a)(1) of this section may be evaluated through written examination, oral examination, or after observation of a home health aide with a patient.

(4) Competency determination. (i) A home health aide is not considered competent in any task for which he or she is evaluated as "unsatisfactory". The aide must not perform that task without direct supervision by a licensed nurse until after he or she receives training in the task for which he or she was evaluated as "unsatisfactory" and passes a subsequent evaluation with "satisfactory".

(ii) A home health aide is not considered to have successfully passed a competency evaluation if the aide has an "unsatisfactory" rating in more than one of the required areas.

(5) Documentation of competency evaluation. The HHA must maintain documentation which demonstrates that the requirements of this standard are met.

(6) Effective date. The HHA must implement a competency evaluation program that meets the requirements of this paragraph before February 14, 1990. The HHA must provide the preparation necessary for the individual to successfully complete the competency evaluation program. After August 14, 1990, the HHA may use only those aides that have been found to be competent in accordance with Sec. 484.36(b).

(c) Standard: Assignment and duties of the home health aide—

(1) Assignment. The home health aide is assigned to a specific patient by the registered nurse. Written patient care instructions for the home health aide must be prepared by the registered nurse or other appropriate professional who is responsible for the supervision of the home health aide under paragraph (d) of this section.

(2) Duties. The home health aide provides services that are ordered by the physician in the plan of care and that the aide is permitted to perform under State law. The duties of a home health aide include the provision of hands-on personal care, performance of simple procedures as an extension of therapy or nursing services, assistance in ambulation or

exercises, and assistance in administering medications that are ordinarily self-administered. Any home health aide services offered by an HHA must be provided by a qualified home health aide.

(d) Standard: Supervision—

(1) If the patient receives skilled nursing care, the registered nurse must perform the supervisory visit required by paragraph (d)(2) of this section. If the patient is not receiving skilled nursing care, but is receiving another skilled service (that is, physical therapy, occupational therapy, or speech-language pathology services), supervision may be provided by the appropriate therapist.

(2) The registered nurse (or another professional described in paragraph (d)(1) of this section) must make an on-site visit to the patient's home no less frequently than every 2 weeks.

(3) If home health aide services are provided to a patient who is not receiving skilled nursing care, physical or occupational therapy or speech-language pathology services, the registered nurse must make a supervisory visit to the patient's home no less frequently than every 60 days. In these cases, to ensure that the aide is properly caring for the patient, each supervisory visit must occur while the home health aide is providing patient care.

(4) If home health aide services are provided by an individual who is not employed directly by the HHA (or hospice), the services of the home health aide must be provided under arrangements, as defined in section 1861(w)(1) of the Act. If the HHA (or hospice) chooses to provide home health aide services under arrangements with another organization, the HHA's (or hospice's) responsibilities include, but are not limited to--

- (i) Ensuring the overall quality of the care provided by the aide;
- (ii) Supervision of the aide's services as described in paragraphs (d)(1) and (d)(2) of this section; and
- (iii) Ensuring that home health aides providing services under arrangements have met the training requirements of paragraphs (a) and (b) of this section.

(e) Personal care attendant: Evaluation requirements—

(1) Applicability. This paragraph applies to individuals who are employed by HHAs exclusively to furnish personal care attendant services under a Medicaid personal care benefit.

(2) Rule. An individual may furnish personal care services, as defined in Sec. 440.170 of this chapter, on behalf of an HHA after the individual has been found competent by the State to furnish those services for which a competency evaluation is required by paragraph (b) of this section and which the individual is required to perform. The individual need not be determined competent in those services listed in paragraph (a) of this section that the individual is not required to furnish.

[54 FR 33367, August 14, 1989, as amended at 56 FR 32974, July 18, 1991;
56 FR 51334, Oct. 11, 1991; 59 FR 65498, Dec. 20, 1994; 60 FR 39123,
Aug. 1, 1995; 66 FR 32778, June 18, 2001]

Appendix E

Requirements for Staff Training in Assisted Living Facilities 40 TAC 92.41(a)(4)

The facility must document that staff members are competent to provide personal care before assuming responsibilities and have received the following training.

(A) All staff members must complete four hours of orientation before assuming any job responsibilities. Training must cover, at a minimum, the following topics:

- (i) reporting of abuse and neglect;
- (ii) confidentiality of resident information;
- (iii) universal precautions;
- (iv) conditions about which they should notify the facility manager;
- (v) residents' rights; and
- (vi) emergency and evacuation procedures.

(B) Attendants must complete 16 hours of on-the-job supervision and training within the first 16 hours of employment following orientation.

Training must include:

- (i) in Type A and B facilities, providing assistance with the activities of daily living; in Type E facilities, medications and recognizing, reporting, and recording side effects;
- (ii) resident's health conditions and how they may affect provision of tasks;
- (iii) safety measures to prevent accidents and injuries;
- (iv) emergency first aid procedures, such as the Heimlich maneuver and actions to take when a resident falls, suffers a laceration, or experiences a sudden change in physical and/or mental status;
- (v) managing disruptive behavior;
- (vi) behavior management, for example, prevention of aggressive behavior and de-escalation techniques, practices to decrease the frequency of the use of restraint, and alternatives to restraints; and
- (vii) fall prevention.

(C) Direct care staff must complete six documented hours of education annually, based on each employee's hire date. Staff must complete one hour of annual training in fall prevention and one hour of training in behavior management, for example, prevention of aggressive behavior and de-escalation techniques, practices to decrease the frequency of the use of restraint, and alternatives to restraints. Training for these subjects must be competency-based. Subject matter must address the unique needs of the facility. Suggested topics include:

- (i) promoting resident dignity, independence, individuality, privacy, and choice;
- (ii) resident rights and principles of self-determination;
- (iii) communication techniques for working with residents with hearing, visual, or cognitive impairment;

- (iv) communicating with families and other persons interested in the resident;
 - (v) common physical, psychological, social, and emotional conditions and how these conditions affect residents' care;
 - (vi) essential facts about common physical and mental disorders, for example, arthritis, cancer, dementia, depression, heart and lung diseases, sensory problems, or stroke;
 - (vii) cardiopulmonary resuscitation;
 - (viii) common medications and side effects, including psychotropic medications, when appropriate;
 - (ix) understanding mental illness;
 - (x) conflict resolution and de-escalation techniques; and
 - (xi) information regarding community resources.
- (D) Facilities that employ licensed nurses, certified nurse aides, or certified medication aides must provide annual in-service training, appropriate to their job responsibilities, from one or more of the following areas:
- (i) communication techniques and skills useful when providing geriatric care (skills for communicating with the hearing impaired, visually impaired and cognitively impaired; therapeutic touch; recognizing communication that indicates psychological abuse);
 - (ii) assessment and nursing interventions related to the common physical and psychological changes of aging for each body system;
 - (iii) geriatric pharmacology, including treatment for pain management, food and drug interactions, and sleep disorders;
 - (iv) common emergencies of geriatric residents and how to prevent them, for example falls, choking on food or medicines, injuries from restraint use; recognizing sudden changes in physical condition, such as stroke, heart attack, acute abdomen, acute glaucoma; and obtaining emergency treatment;
 - (v) common mental disorders with related nursing implications; and
 - (vi) ethical and legal issues regarding advance directives, abuse and neglect, guardianship, and confidentiality.

Appendix F

Human Resources Code § 105 RESIDENTIAL FACILITIES FOR THE ELDERLY

§ 105.001. DEFINITIONS. In this chapter:

(1) "Establishment" means a facility providing sleeping accommodations to two or more qualifying adult residents, at least 80 percent of whom are 65 years of age or older or are disabled, and offering, for a fee, one or more supportive services through contract with an agency licensed under Chapter 142, Health and Safety Code, or with another entity.

(2) "Qualifying adult resident" means an adult resident of a facility who is not related within the second degree by consanguinity or affinity to:

(A) a person who has an ownership interest in the facility; or

(B) at least one other resident of the facility.

(3) "Supportive services" means medical services, health-related services, or personal care services as defined by Section 247.002, Health and Safety Code.

Added by Acts 1999, 76th Leg., ch. 233, § 5, eff. Sept. 1, 1999.

§ 105.002. EXEMPT FACILITIES. The following facilities are exempt from the application of this chapter:

(1) housing in which all supportive services are arranged directly by the residents themselves and are provided by outside entities;

(2) nursing facilities licensed under Chapter 242, Health and Safety Code; and

(3) continuing care facilities regulated by the Texas Department of Insurance under Chapter 246, Health and Safety Code.

Added by Acts 1999, 76th Leg., ch. 233, § 5, eff. Sept. 1, 1999.

§ 105.003. DISCLOSURE REQUIRED IN CONTRACT. An establishment that is not required to be licensed as an assisted living facility under Chapter 247, Health and Safety Code, shall execute a contract with each of its residents that contains, in addition to other required information, the following elements:

(1) the name, street address, and mailing address of the establishment;

(2) the name and mailing address of at least one person authorized to act on behalf of the owner or owners or management agent of the establishment;

- (3) a statement describing the licensure status of the establishment;
- (4) the name, mailing address, and telephone number of any provider, including any individual or entity, regardless of whether licensed, providing supportive services under a contract with the establishment;
- (5) the term of the contract;
- (6) a description of the services to be provided that are included in the base monthly rate to be paid by the resident;
- (7) a description of any additional services available for an additional fee from a provider through a contract with the establishment;
- (8) a provision requiring the establishment to provide written notice of any change in fee schedules that outline the cost of additional services not later than the 31st day before the effective date of the change;
- (9) a description of the process by which the contract may be modified, amended, or terminated;
- (10) a description of the complaint resolution process available to residents;
- (11) the name, street address, mailing address, and telephone number of the resident's designated representative, if any;
- (12) a description of the billing and payment procedures and requirements;
- (13) a statement ensuring the ability and right of residents to receive services from providers with whom the establishment does not have a contract; and
- (14) a statement identifying the life safety and fire codes met by the building and a statement indicating whether those codes are comparable to the codes with which an assisted living facility licensed under Chapter 247, Health and Safety Code, must comply.

Added by Acts 1999, 76th Leg., ch. 233, § 5, eff. Sept. 1, 1999.

Appendix G

Fire Reports from the State Fire Marshall

The State Fire Marshal's Office (SFMO) reviewed fire reports going back to 1982, to identify fires that killed three or more persons over the age of 50 in any kind of setting. Three or more fatalities were selected as a search criterion to eliminate fires in homes that killed a married couple, and to potentially focus on locations where older residents, not related to the owners, may have lived. This review did not address fires involving disabled persons under age 50. It is not mandatory that these fatality reports be filed with SFMO, so there may be incidents that have not been documented.

The search uncovered four fires in buildings which housed elderly residents not related to the owner. These fires occurred during hours residents would normally be asleep and/or the residents were incapable of self-evacuation. There were NO multiple fatality fires observed in any type of facility equipped with an automatic fire sprinkler system.

2/10/1982, 6:49 PM, San Antonio. A fire in a multifamily dwelling killed four persons aged 64, 63, 61, and 58. Cause of fire was undetermined. A contributing cause of death of the four was listed as "irrational acts" implying that the four did not attempt to escape the fire. All four died of burns and smoke inhalation and were found in the area the fire originated. There were no smoke alarms or fire sprinklers installed.

10/10/1982, 6:15 PM, Pampa. A fire in a nursing home killed three aged 89, 87, and 76 and injured six aged 93, 89, 79, 79, 73 and 21 (employee). Those residents killed and injured were classified as "unable to act" to escape and sustained smoke inhalation. The staff member was injured by smoke inhalation while attempting to rescue residents. The cause of the fire was "portable electrical equipment." The facility was equipped with smoke alarms which operated, but was not equipped with fire sprinklers. This was the only multi-fatality fire in a nursing home identified by this review.

5/10/1986, 11:30 PM, Houston. A fire in a one- or two-family dwelling killed three persons aged 74, 62, and 57. The cause of the fire was undetermined. All three died of burns and smoke inhalation. There were no smoke alarms or fire sprinklers installed.

4/11/1993, 12:22 AM, Texas City. A fire in a building classified as a boarding/rooming house or residential hotel killed three persons aged 78, 78, and 94 and injured two aged 78 and 89. The fire origin was an intentionally set fire in a bedroom. One of the three killed was believed to have started the fire, and the two other fatalities were sleeping in adjacent rooms. The two injured were burned and exposed to smoke as they escaped the fire. The building was

equipped with smoke alarms which operated, but was not equipped with fire sprinklers.

In addition, six fires involving multiple fatalities of older Texans not meeting the parameters above were reported to SFMO:

6/11/90, 11:55 PM, Abilene. A residential fire killed one 60-year-old and two persons aged 64. All those killed were members of one family. There were no smoke alarms or fire sprinklers installed.

2/23/95, 6:46 AM, Dallas. An apartment fire caused by discarded smoking materials killed a 65-year-old married couple and another adult aged 50. The building was equipped with smoke alarms which operated, but was not equipped with fire sprinklers.

1/28/96, 3:00 AM, Dallas. A residential fire ignited by a lamp too close to combustibles killed three persons aged 83, 71, and 50 and injured two aged 46 and 14. All were members of one family. The building was equipped with smoke alarms which operated, but was not equipped with fire sprinklers.

11/10/96, 6:15 AM, Newton County. A residential fire killed the owner aged 83, a relative aged 68, and a non-relative aged 63. The fire began when heating equipment ignited a rug. There were no smoke alarms or fire sprinklers installed.

5/9/98, 7:45 AM, Lubbock. A fire originating near a gas water heater in a residence killed the disabled owner aged 88 and a couple aged 52 and 55. There were no smoke alarms or fire sprinklers installed.

1/14/2000, 3:15 AM, Garland. A fire ignited by a natural gas explosion in a single family dwelling killed a couple aged 80 and another aged 83. The building was equipped with smoke alarms (unknown if they operated), but was not equipped with fire sprinklers.

Appendix H

Requirements for Assisted Living Facilities to Comply with the Life Safety Code and the National Fire Protection Association Codes

TAC 40 §92.61 Introduction and Application

(a) Classification of facilities.

(1) A small facility is a building(s) consisting of one or more floors providing sleeping accommodations for 16 or fewer residents exclusive of "live-in" houseparents, family or staff.

(2) A large facility is a building(s) consisting of one or more floors providing sleeping accommodations for 17 or more residents exclusive of "live-in" staff.

(b) Applicability of requirements for construction and life safety.

(1) All buildings or structures, new or existing, used as a licensed assisted living facility must be in accordance with these standards. Any exceptions are specifically mentioned.

(2) For existing buildings and structures which are converted to assisted living occupancy, no residents will be admitted until all standards are met and approval for occupancy is granted by the licensing section of the Texas Department of Human Services (DHS).

(3) A licensed nursing facility or licensed hospital, meeting Chapter 12 or Chapter 13 of National Fire Protection Association 101 (NFPA 101), may be considered as an assisted living occupancy without additional fire safety features as may be specified in this subchapter.

(4) Buildings and structures must conform to the 1988 edition of NFPA 101, as published by the National Fire Protection Association, Inc., Batterymarch Park, Quincy, Massachusetts 02269, as follows. DHS has the option, for new construction only, of accepting compliance with later editions of the code, in their entirety, when required by local building authorities.

(A) All Type A facilities and small Type B facilities must conform to Chapter 21.

(B) Type B large facilities must conform to Chapter 12. The requirements of limited care, as defined by the NFPA 101, may be used.

(C) Other chapters, sections, subsections, or paragraphs of the NFPA 101 such as Chapters 1 through 7 and Chapter 31, must apply as referenced or intended for their relation to Chapters 21, 12 and 18.

(D) Buildings which contain living units with independent cooking and bathroom facilities shall conform with NFPA 101, Chapters 21 and 18, New Apartment Buildings, Option #2, "Buildings provided with a complete automatic fire detection and notification system," as a minimum.

(5) New construction is subject to local codes. The description of the occupancy may vary with local codes. In the absence of local codes or their enforcement for new construction, the department will require conformance to the fundamentals of the following codes:

(A) the Uniform Building Code, 1988 edition by the International Conference of Building Officials, 5360 South Workman Mill Road, Whittier, California 90601, 'R'

Occupancy, Divisions 1 and 3 for Type A facilities, and 'I' Occupancy for Large Type B facilities;

(B) the Uniform Plumbing Code, 1988 edition, as published by the International Association of Plumbing and Mechanical Officials, 5032 Alhambra Avenue, Los Angeles, California 90032;

(C) the National Electrical Code as specified under NFPA 101;

(D) illumination systems must be designed and installed in accordance with the Lighting Handbook of the Illuminatory Engineering Society (IES) of North America, except as may be modified in this subchapter.

(6) An existing building either occupied as an assisted living facility at the time of initial inspection by DHS or converted to occupancy as an assisted living facility must meet all local requirements pertaining to that building for that occupancy. DHS will require the facility sponsor or licensee to submit evidence that local requirements are satisfied. When local laws, codes or ordinances are more stringent than these standards for assisted living, the more stringent requirements will govern.

(7) Buildings must be structurally sound with regard to actual or expected dead, live, and wind loads according to applicable building codes.

(8) The facility must meet the provisions and requirements concerning accessibility for individuals with disabilities in the following laws: the Americans with Disabilities Act of 1990 (Public Law 101-336; Title 42, United States Code, Chapter 126); Title 28, Code of Federal Regulations, Part 35; Texas Civil Statutes, Article 9102; and Title 16, Texas Administrative Code, Chapter 68. Plans for new construction, substantial renovations, modifications, and alterations must be submitted to the Texas Department of Licensing and Regulation (Attn: Elimination of Architectural Barriers Program) for accessibility approval under Article 9102.

Source Note: The provisions of this §92.61 adopted to be effective August 31, 1993, 18 TexReg 2697; transferred effective September 1, 1993, as published in the Texas Register September 3, 1993, 18 TexReg 5885; amended to be effective August 1, 1998, 23 TexReg 7036; amended to be effective August 1, 2000, 25 TexReg 6361; amended to be effective September 1, 2003, 28 TexReg 3830

TAC 40 §92.71 Introduction and Application: Type E Facilities

(a) Classification of facilities. A Type E facility provides sleeping accommodations for 16 or fewer residents exclusive of "live-in" houseparents, family, or staff. Two-story buildings must meet all life safety code requirements in regard to protecting vertical openings, as specified in the 1988 edition of the National Fire Protection Association (NFPA) 101, Section 21-2.3.1.

(b) Applicability of requirements for construction and life safety.

(1) All buildings or structures, new or existing, must be in accordance with these standards. Any exceptions are specifically mentioned.

(2) For existing buildings and structures which are converted to assisted living occupancy, no residents will be admitted until all standards are met and approval for occupancy is granted by the licensing section of the Texas Department of Human Services (DHS).

(3) Buildings and structures must conform to the 1988 edition of the National Fire Protection Association (NFPA) 101, as published by the National Fire Protection Association, Inc., Batterymarch Park, Quincy, Massachusetts 02269. DHS has the option, for new construction only, of accepting compliance with later editions of the code, in their entirety, when required by local building authorities.

(A) All Type E facilities must conform to NFPA 101, Chapter 21.

(B) Other chapters, sections, subsections, or paragraphs of the NFPA 101, such as Chapters 1 through 7 and Chapter 31, must apply as referenced or intended for their relation to Chapter 21.

(4) New construction is subject to local codes. The description of the occupancy may vary with local codes. In the absence of local codes or their enforcement for new construction, the department will require conformance to the fundamentals of the following codes:

(A) the Uniform Building Code, 1988 edition by the International Conference of Building Officials, 5360 South Workman Mill Road, Whittier, California 90601, 'R' Occupancy, Divisions 1 and 3, congregate residences;

(B) the Uniform Plumbing Code, 1988 edition, as published by the International Association of Plumbing and Mechanical Officials, 5032 Alhambra Avenue, Los Angeles, California 90032;

(C) the National Electrical Code as specified under NFPA 101; and

(D) the Lighting Handbook of the Illuminatory Engineering Society (IES) of North America for illumination systems' design and installation, except as may be modified in this subchapter.

(5) An existing building either occupied as an assisted living facility at the time of initial inspection by DHS or converted to occupancy as an assisted living facility must meet all local requirements pertaining to that building for that occupancy. DHS will require the facility sponsor or licensee to submit evidence that local requirements are satisfied. When local laws, codes, or ordinances are more stringent than these standards for assisted living, the more stringent requirements will govern.

(6) Buildings must be structurally sound with regard to actual or expected dead, live, and wind loads according to applicable building codes.

(7) The facility must meet the provisions and requirements concerning accessibility for individuals with disabilities in the following laws and regulations: the Americans with Disabilities Act of 1990 (Title 42, United States Code, Chapter 126); Title 28, Code of Federal Regulations, Part 35; Texas Civil Statutes, Article 9102; and Title 16, Texas Administrative Code, Chapter 68. Plans for new construction, substantial renovations, modifications, and alterations must be submitted to the Texas Department of Licensing and Regulation (Attn: Elimination of Architectural Barriers Program) for accessibility

approval under Article 9102.

Source Note: The provisions of this §92.71 adopted to be effective May 1, 2001, 26 TexReg 2047; amended to be effective March 1, 2002, 27 TexReg 1347

Also note that references to legacy Department of Human Services (DHS) in these rules apply to DADS. .