TEXAS MEDICAL ASSOCIATION

Physicians Caring for Texans

January 22, 2024

Texas Health and Human Services Commission
Attn: Christi Carro, Program Specialist
Mail Code E-370
701 W. 51st Street
Austin, Texas 78751

Sent via email to hhscltcrrules@hhs.texas.gov

Re: Comments on Proposed Rule 22R054

Dear Ms. Carro:

The Texas Medical Association ("TMA") thanks the Texas Health and Human Services Commission ("HHSC") for the opportunity to provide comments to on the proposed amendments to Title 26, Part 1, Chapter 353 of the Texas Administrative Code ("TAC"), concerning Licensing Standards for Assisted Living Facilities ("ALFs"). TMA is a private, voluntary, non-profit association of more than 57,000 physician and medical student members. It was founded in 1853 to serve the people of Texas in matters of medical care, prevention and cure of disease, and improvement of public health. Today, its vision is to "Improve the health of all Texans."

TMA appreciates HHSC's efforts to reorganize, clarify, and update the rules relating to ALF licensing standards and respectfully submits the following comments and recommendations for HHSC's consideration.

Comments and Recommendations

1. Proposed §553.3, *Definitions*.

Proposed §553.3, in part, amends the definitions for "attendant," "health maintenance activity," "personal care services," and "practitioner" and adds a definition for "skilled nursing." For the reasons stated below, TMA recommends these definitions be amended.

Attendant. For the definition of "attendant" in proposed §553.3(13), TMA recommends the phrase "personal care" be replaced with the term "personal care services," as the latter phrase is a defined term and a reference to "personal care" alone may create confusion. Additionally, the second

sentence in proposed §553.3(13) suggests an attendant is not precluded from performing any task assigned by the ALF, without regard to licensing and registration law or related scope of practice limitations. To fix this misperception, TMA recommends the second sentence be replaced with a statement that notes the definition does not limit the job responsibilities of an attendant and acknowledges the attendant may be responsible for other tasks in the ALF (but does not broadly claim the attendant is not precluded from performing such tasks).

Particularly, TMA recommends the following edits to the definition of "attendant" in proposed §553.3(13):

> (13) [~~(11)~~] Attendant—A facility employee who provides personal [~~direct~~] care services to residents. This definition does not limit the job responsibilities of an attendant, which may also include providing services in the facility other than personal care services to residents. ~~Attendants are not precluded from performing other tasks as assigned to assist with services in the facility.~~ [~~This employee may serve other functions, including cook, janitor, porter, maid, laundry worker, security personnel, bookkeeper, activity director, and manager.~~]

(For purposes of this comment letter, blue underlined language indicates new language, and language with a red strikethrough indicates deleted language.)

Health maintenance activity. For the definition of "health maintenance activity" in proposed §553.3(36), TMA recommends that the phrase beginning with "Consistent with the definition in the Texas Board of Nursing rules for RN Delegation" be moved to paragraph (A), as paragraphs (B) and (C) are not consistent with the cited definition. Particularly, the definition of "health maintenance activities" in the Texas Board of Nursing ("BON") rules states that the tasks *may* be exempt from delegation based on a nurse's assessment, whereas proposed §553.3(36)(B) refers to a task that *is* exempt from such delegation. Additionally, the definition in the BON rules includes, rather than excludes, the activities listed in proposed §553.3(36)(C). For these reasons, TMA requests the following edits to proposed §553.3(36):

> (36) [~~(33)~~] Health maintenance activity (HMA)--~~Consistent with the definition in the Texas Board of Nursing rules for RN Delegation at 22 TAC §225.4 (relating to Definitions), a~~ A task that:
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> > (A) consistent with the definition in the Texas Board of Nursing rules for RN Delegation at 22 TAC 225.4 (relating to Definitions), requires a higher level of skill to perform than activities of daily living; [~~may be exempt from delegation based on an RN's assessment in accordance with §553.263(c) of this chapter (relating to Health Maintenance Activities); and~~]
> >
> > (B) is exempt from delegation based on an RN's assessment in accordance with Texas Board of Nursing rules at 22 TAC Chapter 225; and [~~requires a higher level of skill to perform than personal care services and, in the context of an ALF, excludes the following tasks:~~]

(C) in the context of an assisted living facility, excludes:

(i) intermittent catheterization; and

(ii) subcutaneous, nasal, or insulin pump administration of insulin or other injectable medications prescribed in the treatment of diabetes mellitus.

Personal care services. For the definition of "personal care services" in proposed §553.3(62), TMA recommends the definition be more closely aligned with the related statutory definition in Texas Health and Safety Code §247.002(5) by amending the section as follows: "Assistance with activities of daily living, as defined in this section, ~~and~~ or general supervision or oversight of the physical and mental well-being of residents in the facility."

Practitioner. For the definition of "practitioner" in proposed §553.3(66), HHSC has proposed replacing "physician assistant" with "physician's assistant." TMA recommends the term "physician assistant" be retained, as this phrase is a term of art and a specific category of professional licensing by the Texas Medical Board.[1] Physician's assistant, on the other hand, could be interpreted to mean an unlicensed person who helps a physician.

Skilled nursing. TMA has concerns that the language in the definition of "skilled nursing" in proposed §553.3(78) differs from the scope of professional nursing set forth in the Nurse Practice Act[2] and BON rules.[3] Neither refer to "clinical reasoning" or "critical decision making," though similar language is found in the BON's definitions of "nursing clinical judgement."[4] However, using terminology that does not match the nursing statute and rules could create the misimpression in the regulated community that the scope of nursing practice is different for assisted living facilities.

As such, TMA recommends that the definition instead incorporate the statutory and regulatory framework[5], as follows:

Skilled nursing—~~Tasks that may only be~~ Services provided by a registered nurse or by a licensed vocational nurse, as authorized by Texas Occupations Code Chapter 301 and Texas Administrative Code, Title 22, Part 11~~ and require clinical reasoning, nursing judgment, or critical decision making~~.

[1] *See* Tex. Occ. Code Ch. 204, *Physician Assistants*.
[2] Tex. Occ. Code, Subtitle E, Chapter 301.
[3] 22 Tex. Admin. Code Pt. 11.
[4] *See*, *e.g.*, 22 Tex. Admin. Code §214.2 ("Nursing Clinical Judgment--the observed outcome of critical thinking and decision-making that uses nursing knowledge to observe and access presenting situations, identify a prioritized client concern, and generate the best possible evidence-based solutions in order to deliver safe client care.").
[5] This would also be similar to HHSC's definition of "skilled nursing" in 1 Tex. Admin. Code §363.203.

2. Proposed §553.9, *General Characteristics of a Resident*.

TMA recommends that subsection (b)(1) of proposed §553.9, *General Characteristics of a Resident*, be clarified, as there may be confusion as to whether the "must not be considered" language prohibits an ALF from concluding that a resident exhibiting symptoms of cognitive or emotional distress is at risk of imminent harm to self or others. Particularly, TMA recommends that proposed §553.9 be amended as follows:

> (b) [~~This section describes some general characteristics of a resident in a facility.~~] A resident may:
>
> > (1) exhibit symptoms of cognitive [~~mental~~] or emotional distress [~~disturbance~~], provided the resident is ~~but must~~ [~~is~~] not ~~be~~ considered to be at risk of imminent harm to self or others;

3. Proposed §553.253, *Employee Qualifications and Training*.

Certain staff training requirements are stated in proposed §553.253(d). TMA recommends the phrase "personal care" be replaced with the term "personal care services," as the latter phrase is a defined term and a reference to "personal care" alone may create confusion regarding the circumstances in which the staff training is required.

4. Proposed §553.259, *Admission Policies and Procedures*.

Under the current rules in §553.259(a)(5), a resident's health examination must be performed by a physician. Proposed §553.259(b)(1) would allow it to be performed by a "healthcare practitioner."[6] TMA has concerns that the limited scope of several of the healthcare professionals included within the definition of "practitioner" would prevent a complete evaluation of the resident.

For instance, the practice of dentistry is limited to the mouth, teeth, gums, or jaws.[7] The practice of nursing does not include acts of medical diagnosis.[8] A physician assistant's services require physician supervision and delegation, and diagnosis is limited to a "working diagnosis."[9]. Podiatry is limited to treatment of the foot.[10]

As such, TMA recommends retention of the current requirement that a physician perform the examination.

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[6] Under the ALF rules, a "practitioner" is defined as a physician, dentist, podiatrist, physician assistant, or advanced practice registered nurse. 26 Tex. Admin. Code §553.3(66).
[7] Tex. Occ. Code §251.003.
[8] Tex. Occ. Code § 301.002.
[9] Tex. Occ. Code §204.202
[10] Tex. Occ. Code §202.001

5. Proposed §553.261, *Inappropriate Placement in a Type A or Type B Facility*.

Proposed §553.261, *Inappropriate Placement in a Type A or Type B Facility*, relocates content from proposed amended §553.259(e). Under the current process, if an ALF or HHSC surveyor determines a resident is inappropriately placed but the resident wishes to remain in the ALF, the ALF must submit such request to HHSC no later than the 10th working day after the ALF determines a resident is inappropriately placed or the 10th working day after the ALF receives the Statement of Licensing Violations and Plan of Correction (Form 3724) and the Report of Contact (Form 3614-A).[11] The process set forth in proposed §553.261(b) and (c), however, only requires an ALF to submit a request to HHSC within 10 working days after the date the ALF receives Form 3724 and Form 3614-A. This suggests that an ALF does not need to submit request paperwork where the ALF has determined a resident is inappropriately placed but has not received the two forms (perhaps because HHSC is unaware of the inappropriate placement). To fix this, proposed §553.261 could be amended as follows:

> (b) If both the resident and the facility want the resident to remain despite an HHSC surveyor or the facility determining that the resident is inappropriately placed, the facility is not required to discharge the resident if, within 10 working days after the date the facility determines the resident is inappropriately placed or receives ~~receiving~~ the Statement of Licensing Violations and Plan of Correction, Form 3724, and the Report of Contact, Form 3614-A, from HHSC, the facility submits to the HHSC regional office:
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> …
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> (c) If~~, during a site visit,~~ an HHSC surveyor or a facility determines that a resident is inappropriately placed at the facility, and both the resident and the facility want the resident to remain, the facility must request an evacuation waiver, as described in paragraph (1) of this subsection, to the HHSC regional office within 10 working days after the date the facility determines the resident is inappropriately placed or receives the Statement of Licensing Violations and Plan of Correction, Form 3724, and the Report of Contact, Form 3614-A.
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> …

6. Proposed §553.275, *Dietary Services*.

For dietary services provided in an ALF, the current rules in §553.261(e)(4) contemplates that a therapeutic diet is ordered by a physician. Under proposed §553.275(c)(3), however, it could ordered by a "practitioner."

As previously discussed, the definition of "practitioner" in the ALF rules includes health professionals who are limited in the areas of the body that they treat and the services they may

[11] *See* 22 Tex. Admin. Code §553.259(e)(1)(B), (2)(B); HHSC, *Long-Term Care Regulatory Provider Letter*, PL 2022-22, at 2, 5 (Aug. 5, 2022).

provide. Additionally, though advanced practice registered nurses and physician assistants may prescribe drugs and devices pursuant to supervised and delegated practice under Chapter 157 of the Texas Occupations code, food is not a drug or device.[12]

As such, TMA recommends that the current language requiring a physician be retained, which would also be consistent with the regulatory framework for other Texas facilities.[13]

7. Proposed §553.281, *Health Maintenance Activities*.

Proposed §553.281(a) seems to serve two purposes: 1. to determine if a would-be health maintenance service ("HMA") actually *is* a HMA, particularly, does it meet the HMA requirement in proposed §553.3(36)(B) that the task be exempt from delegation based on a nurse's assessment; and 2. to authorize an ALF to allow an attendant to perform an activity determined to be an HMA.

To clarify that an exemption from delegation is contingent on a nurse's determination that all conditions under 22 TAC §225.8(a)(2) exist, TMA recommends that proposed §553.281(a)(2) be amended as follows:

> (2) an RN acting on behalf of the facility has:
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> (A) conducted and documented an assessment of the resident's health status and all other relevant factors in accordance with Texas Administrative Code, Title 22 §225.6 (relating to RN Assessment of the Client); and
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> (B) determined and documented that all of the conditions listed in 22 TAC §225.8(a)(2) (relating to Health Maintenance Activities Not Requiring Delegation) exist.

8. Proposed §553.283, *RN Delegation of Care Tasks*.

Proposed §553.283 sets forth the conditions under which a nurse may delegate a task that, per the analysis under proposed §553.281, requires delegation and thus does not qualify as an HMA. To clarify why an activity may not qualify as a HMA under proposed §553.281, and to avoid the suggestion that only a nurse may decide if an activity deemed delegable by the nurse is a permissible ALF activity, TMA recommends proposed §553.283 be amended as follows:

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[12] The practice of nursing also specifically excludes "the prescription of therapeutic or corrective measures." Tex. Occ. Code §301.002.

[13] *See* 25 Tex. Admin. Code §133.41 ("Therapeutic diets shall be prescribed by the physician(s) responsible for the care of the patients."); 26 Tex. Admin. Code §510.41 ("Therapeutic diets shall be prescribed by the physician(s) responsible for the care of the patients."); 26 Tex. Admin. Code §511.53 ("A physician responsible for the care of the patients shall prescribe therapeutic diets."); 26 Tex. Admin. Code §554.101 ("Therapeutic diet--A diet ordered by a physician as part of treatment for a disease or clinical condition, in order to eliminate, decrease, or increase certain substances in the diet or to provide food which has been altered to make it easier for the resident to eat."); 26 Tex. Admin. Code §554.1116 ("If a resident requires a therapeutic diet, the attending physician must prescribe the therapeutic diet, unless the physician delegates this task to a qualified dietitian, to the extent allowed by Texas law.").

If ~~the RN determines under §553.281 of this subchapter (relating to Health Maintenance Activities) that~~ an activity does not qualify as a health maintenance activity because an RN has determined under §553.281 of the subchapter (relating to Health Maintenance Activities) that not all of the conditions listed in 22 TAC §225.8(a)(2) (relating to Health Maintenance Activities Not Requiring Delegation) exist, an attendant may perform that activity for the resident if:

(1) the RN has determined in accordance with Texas Administrative Code (TAC), Title 22, Chapter 225 (relating to RN Delegation to Personnel and Tasks Not Requiring Delegation in Independent Living Environments for Clients with Stable and Predictable Conditions) that~~: (A)~~ the activity can be delegated to an attendant;~~ and~~

~~(B)~~ (2) the activity is consistent with the ~~allowable in an~~ assisted living facility services listed in ~~accordance with~~ §553.7 of this chapter (relating to Assisted Living Facility Services); and

~~(2)~~ (3) the RN has properly delegated the task to an attendant in accordance with 22 TAC Chapter 225.

9. Proposed §553.285, *Resident Records and Retention*.

To clarify that an ALF may retain resident records longer than five years after the services end, as longer retention of health information may be required or legally prudent,[14] TMA recommends amending proposed §553.285(a)(2) to read: "(2) Resident records must be retained for a minimum of five years after services end." Additionally, to avoid any implication that an ALF must destroy resident records at the end of the five-year retention period, TMA recommends amending §553.285(e)(1) and (2) as follows:

(1) When resident records are destroyed~~ after the retention period~~, the facility must shred or incinerate the records in a manner that protects confidentiality.

(2) At the time of destruction, which may not be before the retention period ends, the facility must document in a log the following for each record destroyed:

…

For the release of resident records in proposed §553.285(d)(1) and (3), HHSC may wish to consider adding an exception for the release of health information where it has been determined that access to such information would be harmful to the physical, mental, or emotional health of the resident. Similar preventing harm exceptions can be found in state and federal law.[15]

[14] For instance, if an ALF provides services that qualify as Medicare benefits, the ALF may wish to retain the related health information for the 6-year statute of limitations applicable to violations of the Medicare program. *See* 42 C.F.R. §1003.1570.

[15] Tex. Occ. Code §159.006(a) (for physicians); 45 C.F.R. §164.524(a)(3) (for covered entities under the Health Insurance Portability and Accountability Act (HIPAA)); 45 C.F.R. §171.201 (for health care providers, relating to information blocking).

Regarding the written authorization in proposed §553.285(d)(2) to release a resident's records, TMA recommends amending the language as follows, as the resident may be incapacitated: "… only be released with the ~~resident's~~ written consent of the resident or, if applicable, the resident's legally authorized representative, except … ."

10. Proposed §553.287, *Rights*.

Proposed §553.287(a)(30) states, in part, that a resident has the right to "designate [~~a guardian~~] an agent" to make health care decisions on the resident's behalf should the resident become incapacitated. However, a person may only make such designation under a medical power of attorney,[16] which is a type of advance directive.[17] This is not clear from the proposed language. As such, TMA recommends proposed §553.287(a)(30) be amended as follows:

> (30) A resident has the right to execute an advance directive, under Texas Health and Safety Code, Chapter 166, including the right to delegate to ~~or designate~~ an agent under a medical power of attorney the authority ~~in advance of need~~ to make decisions regarding the resident's health care should the resident become incapacitated.

11. Proposed §553.295, *Emergency Preparedness and Response*.

Proposed §553.295(h)(1)(B) requires ALFs to have arrangements and procedures for providing power in the areas used by residents when sheltering during a disaster or emergency. For the health and safety of the residents, TMA recommends that the minimum standards of operation during a disaster for an ALF include arrangements and procedures to provide power sufficient to operate all life-sustaining equipment and services required by the residents. For this reason, TMA recommends that proposed §553.295(h)(1)(B) be amended as follows:

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[16] *See* Tex. Health & Safety Code, Ch. 166, Subch. D, *Medical Power of Attorney*. *See also* Office of Tex. Governor | Health Care Directives: Texas Law, at https://gov.texas.gov/organization/disabilities/health_care_directive (last visited Jan. 19, 2024):

> Texas Law
> - Allows an individual, including a minor, through a Medical Power of Attorney, to designate an agent to make health care decisions on that individual's behalf if the individual's doctor certifies that the individual is incompetent to make such decisions.
> …
> - If an individual becomes incompetent before a Medical Power of Attorney has been completed, a guardianship procedure may be appropriate. …
> - Provides that if an individual is incompetent or unable to communicate his or her own medical decisions and no guardian or representative with Medical Power of Attorney has been appointed, then medical decisions may be made by the attending physician with the cooperation of one of the following people: the patient's spouse, an available adult child of the patient, one of the patient's parents, or the patient's nearest living relative.

Id. The latter list is based on statutory priority, not resident's preference. *See* Tex. Health & Safety Code §166.039(b) (for an adult qualified patient); §313.004(a) (for an adult patient of a home and community support services agency or in a hospital, amongst other settings).

[17] Tex. Health & Safety Code §166.002(1)(C).

> (B) facility arrangements and procedures for providing, in areas used by residents during a disaster or emergency, power, including power to operate all life-sustaining equipment and services required by the residents, and ambient temperatures that are safe under the circumstances, but which may not be less than 68 degrees Fahrenheit or more than 82 degrees Fahrenheit; and

Additionally, for the temporary placement of an ALF resident in another facility in an emergency, the current rules in §553.275(m)(5)(a) require that to protect the health of the resident through continuity of care, the receiving facility has the "necessary physician orders for care." Proposed §553.295(m)(5)(a) would replace "physician orders" with "practitioner's orders."

As previously discussed, the definition of "practitioner" in the ALF rules includes health professionals who are limited in the areas of the body that they treat and the services they may provide. TMA has concerns that the limited scope of several of those healthcare professionals would prevent the complete evaluation of the resident necessary to effectuate a safe placement in another facility. Comparable statutory framework for other facility transfers and discharges of patients also contemplates the process being guided by a physician's order.[18]

As such, TMA recommends that the current language requiring a physician be retained.

Conclusion

TMA thanks HHSC for the opportunity to comment on the proposed amendments to Title 26, Part 1, Chapter 353 of the TAC, concerning Licensing Standards for ALFs. If you have any questions, please do not hesitate to contact Kelly Walla, Vice President and General Counsel, at kelly.walla@texmed.org, or Kelly Flanagan, Associate General Counsel, at kelly.flanagan@texmed.org.

Sincerely,

Rick W. Snyder, II, MD
President, Texas Medical Association

cc: Kelly Walla, JD, LLM Kelly Flanagan, JD

[18] *See* Tex. Health & Safety Code §317.003 ("As soon as possible before a patient's discharge or transfer to another facility but not later than the time the patient's attending physician issues a discharge order, a hospital shall notify the designated caregiver of the patient's discharge or transfer."); *see also* Health & Safety Code §241.027 ("The rules must require that if a patient at a hospital has an emergency medical condition which has not been stabilized, the hospital may not transfer the patient unless… a licensed physician has signed a certification, which includes a summary of the risks and benefits, that, based on the information available at the time of transfer, the medical benefits reasonably expected from the provision of appropriate medical treatment at another medical facility outweigh the increased risks to the patient and, in the case of labor, to the unborn child from effecting the transfer.")