



Bob Bullock
Lieutenant Governor of Texas

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MJS

The Capitol
Austin, Texas 78711-2068
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December 13, 1991

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Opinion Committee

The Honorable Dan Morales
Attorney General
State of Texas
Price Daniel Sr. State Office Building
Austin, Texas 78711

Dear General Morales:

As you know, the Senate Interim Committee on Health and Human Services has been studying patient abuse in private psychiatric facilities. The Committee's hearings have demonstrated the need to take action now to put an end to these abuses. Because two agencies with primary responsibility in this area have adopted statutory interpretations we believe are contrary to state law, pursuant to Section 402.042, Government Code, we ask your official opinion regarding the issues below.

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Inspection of psychiatric facilities by the appropriate state regulatory agencies to ensure compliance with state law and standards is necessary to meet the agencies' obligation to protect patients in Texas' private treatment facilities. The Legislature long ago gave the Texas Department of Mental Health and Mental Retardation (TDMHMR) and the Texas Department of Health (TDH) broad authority to perform such inspections--with or without a complaint--and we believe both agencies have those powers under the current Health and Safety Code, to which all citations below refer.

Since passage of the Texas Mental Health Code (now Subtitle E, Title 7) in 1957, TDMHMR has had responsibility under Section 571.002 of the Code to "assure [each person suffering from severe mental illness] access to humane care and treatment..." and authority under Section 571.006 to adopt rules for proper and efficient treatment, make investigations based on complaints, regularly review commitment procedures of and require reports from mental health facilities. The agency also has responsibility under Chapter 577 for licensing certain private mental health facilities. This responsibility includes extensive powers contained in Section 577.013 to conduct "investigations" to assure compliance with the licensing statute and with TDMHMR's rules and standards, including specific authority to enter the premises of a private mental hospital to obtain compliance.

Since 1959, with passage of the Texas Hospital Licensing Law (now Chapter 241), TDH has had responsibility for licensing general and special medical/surgical hospitals. Under Section 241.026, the Texas Board of Health is required to "adopt and enforce rules and minimum standards" for the licensure of hospitals under TDH's jurisdiction, provided those standards do not exceed the minimum Medicare certification standards. Under authority of Section 241.051, the Board of Health, acting through TDH, "...may enter and inspect a hospital...to assure compliance with or prevent a violation..." of the licensing chapter or the rules and standards adopted under that chapter.

ACCOMPANIED BY ENCLOSURES -

TDMHMR contends that, following adoption of Subchapter B, Chapter 222 (Sections 222.024 and 222.022, in particular), it may only enter and inspect facilities to enforce state law or standards based on a complaint after a hospital obtains an initial license under Chapter 577, if the hospital is Medicare certified or accredited by an appropriate national organization. TDH contends that adoption of Subchapter B deprived it of the authority to conduct any inspection of a hospital the agency licenses, with or without a complaint, after the hospital obtains an initial license under Chapter 241, if the hospital is Medicare certified or accredited by an appropriate national organization.

Both agencies argue that the words "additional licensing inspections," in Section 222.024 refer to all inspections. We believe the Legislature intentionally used the word "licensing" to modify the word "inspection," to identify and limit the application of that section to only those inspections required as a condition precedent to granting an initial or renewal license and to distinguish licensing inspections from inspections made to enforce state law and standards.

Further, we believe the agencies' interpretations of Section 222.024 allow a statute with a laudable but narrow purpose (to prevent duplicative procedures and rules) to swallow up the broad public purposes which have always been the heart of the Mental Health Code and Hospital Licensing Law: "to provide to each person with severe mental illness access to humane care and treatment" and "to protect and promote the public health...by providing for the...enforcement of certain standards in the...operation of hospitals." Sections 571.002 and 241.002.

Because the Committee strongly disagrees with both agencies' interpretations of the provisions of the Health and Safety Code cited above, we ask the questions below. With respect to questions one through four, please address whether the answer is "yes" regardless of whether the hospital is certified for Medicare participation or accredited by an appropriate national accrediting organization.

1. During the period after a hospital governed by Chapter 241 obtains its initial license, is TDH authorized to conduct a random, unannounced inspection or program evaluation of the hospital to ensure compliance with state laws or TDH standards?
2. During the period after a hospital governed by Chapter 577 obtains its initial license, is TDMHMR authorized to conduct a random, unannounced inspection or program evaluation of the hospital to ensure compliance with state laws or TDMHMR standards?
3. During the period after a hospital governed by Chapter 241 obtains its initial license, is TDH authorized to conduct an inspection or program evaluation of the hospital based on a complaint of a violation of state law or TDH standards?
4. During the period after a hospital governed by Chapter 577 obtains its initial license, is TDMHMR authorized to conduct an inspection or program evaluation of the hospital based on a complaint of a violation of state law or TDMHMR standards?
5. (a) Does Chapter 571 authorize TDMHMR to adopt standards with which private psychiatric facilities located within hospitals subject to Chapter 241 would be required to comply?

The Honorable Dan Morales
December 13, 1991
Page 3

(b) If the answer to (a) is "yes," does Chapter 571 authorize TDMHMR to enter and inspect such a facility in response to a complaint to determine whether a violation of state law or TDMHMR standards occurred or regularly to review the facility's commitment procedures?

(c) If the answer to (b) is "yes," is either TDH or TDMHMR authorized to impose sanctions or take other enforcement action against such a facility if a violation of state law or TDMHMR standards is found? If either or both agencies have such authority, what sanctions may the agency or agencies impose and what other enforcement actions may that agency take?

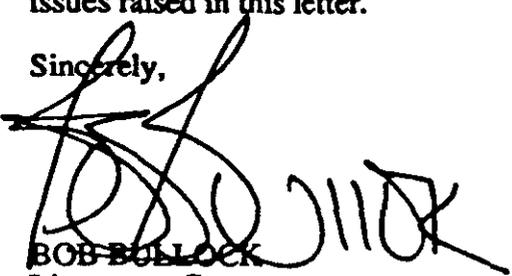
6. Is TDH authorized to adopt and enforce standards regarding patient care, treatment and rights governing those portions of general hospitals licensed under Chapter 241 which provide treatment to persons with mental illness? If the answer is "yes," would such standards be considered to exceed the minimum Medicare standards in violation of Section 241.026(b) if Medicare statutes or rules adopted under those statutes are silent regarding the matters governed by such TDH standards?

We have enclosed a memorandum supporting our position that both agencies have broad power to inspect facilities within each agency's jurisdiction with or without a complaint to ensure compliance with state laws and the agencies' rules and standards.

Due to the serious conditions we have become aware of during the course of the Committee's hearings and your own investigation, we would appreciate an expedited response to the questions above.

Please feel free to contact Ms. Leslie Lemon of the committee staff at 463-0360 or Mr. Steve Bresnen of the Lieutenant Governor's staff if you have any questions or need clarification of the issues raised in this letter.

Sincerely,



BOB BULLOCK
Lieutenant Governor



MIKE MONCRIEF
Chairman, Senate Interim Committee on
Health and Human Services

BB/MM:sb

cc: Dennis R. Jones, Commissioner
Texas Department of Mental Health and Mental Retardation

Robert A. MacLean, M.D., Acting Commissioner
Texas Department of Health

bcc: The Honorable Judith Zaffirini
The Honorable Chris Harris
Ms. Leslie Lemon
Ms. Carolyn Hall
Mr. Jerry Benedict
Mr. Jeff Thorn
Business and Capitol Offices