

RD-617



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September 9, 1993

The Honorable Dan Morales  
Attorney General of Texas  
P.O. Box 12548  
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SEP 13 1993

MBJ

Opinion Committee

FILE # MZ-22260-93

Attn: Opinion Committee

I.D.# 22260

Dear General Morales:

The Texas Department of Health licenses and regulates general and special hospitals pursuant to the Texas Hospital Licensing Law, Health & Safety Code, Chapter 241. An issue has arisen relating to the application of the language found in Chapter 707, 73rd Legislature, Regular Session, 1993 (SB 212). The issue is whether a licensed nursing facility which provides comprehensive medical rehabilitation must also be licensed as a hospital under the Texas Hospital Licensing Law. It is the position of the department that licensed nursing facilities providing comprehensive medical rehabilitation are not also required to be a licensed hospital.

Arguments For This Position

SB 212 added Subchapter F to Chapter 241 of the Health and Safety Code. The subchapter relates to comprehensive medical rehabilitation. New §241.122 states that "(U)nless a person has a license issued under this chapter (the Texas Hospital Licensing Law), a person other than an individual may not provide inpatient comprehensive medical rehabilitation to a patient who requires medical services that are provided under the supervision of a physician and that are more intensive than nursing facility care and minor treatment."

The first argument is that §241.004 of the Texas Hospital Licensing Law states that "(T)his chapter does not apply to a facility: (1) licensed under Chapter 242 . . . ." Chapter 242 of the Health and Safety Code relates to the licensing of nursing facilities. By this language, nothing in the Texas Hospital Licensing Law applies to a licensed nursing facility. This exemption would include exemption from Subchapter F as added by SB 212.

In addition, the license requirement does not apply if the patient does not require medical services that are provided under the supervision of a physician and that are more intense than nursing facility care. Chapter 242 relating to the licensing of nursing facilities does not define

nursing facility care; however, the rules of the department adopted under that chapter define a "nursing facility" as "an establishment that provides food, shelter and nursing care to four or more persons who are unrelated to the owner of the establishment, and that provides minor treatment under the direction and supervision of a physician licensed by the Texas State Board of Medical Examiners, or other services that meet some need beyond the basic provision of food, shelter, and laundry. A nursing facility may be a building, which may consist of one or more floors or one or more units or may be a distinct part of a hospital." See 25 T.A.C., §145.2(b) as adopted at 18 Texas Register 2673 (April 23, 1993). "Nursing care" is defined as "services provided by nursing personnel as prescribed by a physician which services include, but are not limited to, promotion and maintenance of health; prevention of illness and disability; management of health care during acute and chronic phases of illness; guidance and counseling of individuals and families, and referral to physicians, other health care providers, and community resources when appropriate." "Nursing personnel" are defined as "all persons responsible for giving nursing care to residents. Such personnel includes registered nurses, licensed vocational nurses, therapists, medication aides, nurse aides, and orderlies." See 25 T.A.C., Section 145.3 as adopted at 18 Texas Register 2674, 2675 (April 23, 1993). The rules of the department relating to nursing facilities also include 25 T.A.C., Section 145.41 relating to standards for nursing facilities. Subsection (j) states "Provision of specialized rehabilitative services. The board adopts by reference 40 T.A.C., §19.1101 and §19.1102 (relating to provision of specialized rehabilitative services), as amended October 1, 1992." See 18 Texas Register 2678, 2684. While the rules in Title 40 do not use the term "comprehensive medical rehabilitation," those rules do not limit the type of rehabilitation services to be provided by a nursing facility.

Under the nursing facility licenses issued by the department, rehabilitative services of which comprehensive medical rehabilitation are a part (see §241.121 as added by SB 212), are considered to be nursing facility care; therefore, no hospital license is required in order to provide that care under §241.122 as added by SB 212.

In addition, federal law recognizes the provision of rehabilitation services as a part of nursing facility care. The definition of "skilled nursing facility" in 42 USCA §1395i-3(a) and "nursing facility" in 42 USCA §1396r(a) includes "rehabilitation services for the rehabilitation of injured, disabled, or sick persons." Subsection (b)(4)(A) of each section requires a nursing facility to provide "nursing and related services and specialized rehabilitative services to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident."

#### **Arguments Against the Department's Position**

Section 311.023 of the Code Construction Act provides that a court, in construing a statute, whether or not the statute is ambiguous on its face, may consider the object sought to be attained, the circumstances under which the statute was enacted, legislative history, and the consequences of a particular construction. (Additional factors are common law or former statutory provisions, administrative construction of the statute, and title, preamble and emergency provision.) The Attorney General should apply the same criteria in considering this issue.

1. Object sought to be attained. The object sought to be attained by SB 212 was the extension of certain standards and protections to patients receiving medical rehabilitation services. This was to be done by requiring hospital licensure for persons providing comprehensive medical rehabilitation services on an inpatient basis and then authorizing the department to develop standards for those licensed facilities. The object was not to regulate only certain providers, but to regulate through licensure any provider of comprehensive medical rehabilitation services when provided on an inpatient basis.

2. Circumstances under which the statute was enacted. The Senate Interim Committee on Health and Human Services was asked to address the need for legislation affecting rehabilitation facilities by Lieutenant Governor Bullock. Abuses cited in then-recent newspaper articles concerned rehabilitation services provided in nursing facilities as well as other types of facilities.

3. Legislative history. On March 25, 1993, when SB 212 was being considered by the Senate, the following statements were made:

**Senator Moncrief:** To establish legislative intent, if you would answer the following question. Is it the intent of Senate Bill 212 to authorize a nursing home to provide comprehensive rehab services?

**Senator Zaffirini (the bill's sponsor):** Basically, a nursing home can provide the services it is already licensed to provide. But if the nursing home wanted to provide the comprehensive rehabilitation services, then and only then it would require a second license.

These statements followed discussion on the same issue at the March 16, 1993, Senate Committee hearing on SB 212. A transcript of the committee discussion with Tom Suehs (Executive Director of the Texas Health Care Association representing nursing facilities) and Carolyn Hall (the attorney with the Texas Legislative Council who handled much of the drafting on SB 212) indicates that there was some confusion on this issue.

4. Consequences of a particular construction. If SB 212 is interpreted to exempt nursing homes that provide comprehensive medical rehabilitation services, then patients receiving those services in a nursing home will not be entitled to the standards and protections established by SB 212. Patients receiving those same services in a hospital will. SB 212 would exempt the very facilities which prompted the call for the legislation in the first place. As a result, providers of comprehensive medical rehabilitation services would likely shift those services from the hospital setting to the nursing home setting and avoid the rehabilitation services standards and all other requirements imposed on hospitals to ensure quality patient care.

If you have any questions regarding this opinion request, please contact Sharon Alexander, an attorney for the department at (512)458-7236. Thank you for your attention to this matter.

Sincerely,



David R. Smith, M.D.  
Commissioner of Health

Enclosure