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Attorney General Paxton:

Pursuant to Texas Government Code Section 402.042, I respectfully request an Attorney General Opinion with respect to the following questions:

- (1) Does the Texas Health and Human Services Commission (HHSC) have the authority to regulate and license providers of Individualized Skills and Socialization (ISS) services under Chapter 103, Human Resources Code, or any other state statutory authority?
- (2) If HHSC does have the authority to license and regulate ISS service providers, does that authority include the ability to assess administrative penalties against ISS service providers in an amount that is higher than the amounts that may be imposed against DAHS providers as provided by Sections 103.012(b) and 103.013(c), Human Resources Code?

Relevant Statutes and Rules

HHSC regulates multiple types of long-term care providers serving adults needing health, social, and related services. These providers are generally classified as Facility-Based Programs, Medicaid Waiver Programs, or Community-Based Programs. Examples include assisted living facilities, nursing facilities, DAHS, ISS, Deaf Blind with Multiple Disabilities (DBMD), Texas Home Living (TxHmL), and Home and Community-based Services (HCS). Effective January 1, 2023, HHSC adopted rules to “establish licensing procedures, standards, and requirements for an ISS provider licensed as a DAHS facility in accordance with Texas Human Resources Code Chapter 103” (see *Subchapter H, Chapter 559, Title 26, Texas Administrative Code*).

As a threshold matter, it does not appear that there has been any legislative direction from the Texas Legislature for HHSC to require direct regulation and licensure of ISS services. There is no definition or other mention of ISS services in Chapter 103 of the Texas Human Resources Code or in Subchapters A-G, Chapter 559, Title 26 of the Texas Administrative Code, which existed nearly three decades before the adoption of Subchapter H in 2023. Indeed, the term “individualized skills and socialization” appears in only one state statute: Section 32.0755, Human Resources Code, in relation to prevocational services and Medicaid reimbursement rates. It is also worth noting that ISS providers in Texas are not required to register as a DAHS facility; the HHSC website includes directories organized into “Traditional DAHS facilities,” “DAHS with ISS facilities,” and “DAHS-ISS only facilities” (see Texas DAHS Directories at <https://www.hhs.texas.gov/providers/long-term-care-providers/day-activity-health-services-dahs>). It is unclear what statutory authority exists for HHSC to regulate ISS-only providers under

the auspices of regulating DAHS services and facilities.

Further complicating the issue is that Section 559.201(a) of the HHSC rules states that the “purpose” of Subchapter H, Chapter 559, is to establish regulations for ISS providers that are “licensed as” a DAHS facility. This would seem to limit the scope of that subchapter’s applicability to only a subset of ISS providers. Section 559.201(b), however, states that Subchapter H more broadly applies to “an individualized skills and socialization provider and the provision of on-site and off-site individualized skills and socialization services.” In short, these subsections seem to conflict with each other regarding the appropriate application of Subchapter H.

The issue gets even more confusing when reviewing the definitions within Subchapter H of Chapter 559, relating to ISS provider requirements. Sections 559.203(10) and 559.203(11) provide the following definitions:

(10) Individualized skills and socialization--A DBMD, TxHmL, or HCS program service described in §260.503 of this title (relating to Description of Individualized Skills and Socialization), §262.905 of this title (relating to Description of On-Site and Off-Site Individualized Skills and Socialization), or §263.2005 of this title (relating to Description of On-Site and Off-Site Individualized Skills and Socialization). The two types of individualized skills and socialization are on-site individualized skills and socialization and off-site individualized skills and socialization.

(11) Individualized skills and socialization provider--A provider licensed as a DAHS provider by HHSC to provide individualized skills and socialization services. A provider of individualized skills and socialization services is considered an individualized skills and socialization provider once licensed.

Section 559.203(10) defines “ISS” as a “DBMD, TxHmL, or HCS program service.” Notably, this definition of ISS does not provide that ISS is a DAHS program service. Section 559.203(11), meanwhile, defines “ISS provider” as a provider “licensed as a DAHS provider to provide ISS services.” As in Section 559.201(a) cited above, this would seem to limit the scope of Subchapter H to, at best, only a subset of ISS providers.

It should be mentioned that HHSC and the Texas Department of Aging and Disability (DADS) – whose functions have since been moved to HHSC – have long grappled with how best to regulate day habilitation services, which have now effectively been replaced by ISS services. In 2015, the Texas Sunset Commission specifically recommended that the Texas Legislature change state statute to require DADS to adopt rules to develop additional safety requirements for day habilitation services. The Texas Legislature notably did not adopt the DADS Sunset bill (SB 204) that year and has not since directed HHSC to adopt such rules.

HHSC Appropriations

It is also noteworthy that in addition to the lack of specific statutory authority for HHSC, there has been no such authority granted in any state budget and no appropriation for implementation

of an ISS licensure program. In fact, in 2021 the Texas Legislature adopted a General Appropriations Act that included Rider 21 (“Transition of Day Habilitation Services”) in Article II of the budget relating to health care expenditures. That rider directed HHSC to develop a plan to replace day habilitation services with a more integrated and comprehensive system of services. Pursuant to Rider 21, HHSC issued a January 2021 report to replace day habilitation services with ISS services. On page 17 of its own report, HHSC noted that “HHSC has no direct oversight of day habilitation providers because comprehensive waiver program providers that directly contract with HHSC either subcontract for this service or provide it directly.” On page 18, they further noted that “HHSC would require statutory authority to explicitly authorize HHSC to enter these facilities to assess ISS providers’ compliance with HCBS regulations.” As previously noted, the Texas Legislature has provided no such statutory authority.

For a copy of the HHSC January 2021 report, see:

<https://www.hhs.texas.gov/sites/default/files/documents/laws-regulations/reports-presentations/2021/rider-21-transition-day-habilitation-services-jan-2021.pdf>

Administrative Penalties

If, despite the questions raised above, it is determined that HHSC has authority to regulate and license some or all ISS services and providers, there is also a question of whether there is a limit on the amount of an administrative penalty that HHSC can assess against an ISS provider. Section 103.012(b), Human Resources Code, provides that an administrative penalty assessed under the chapter may not exceed \$500 for each violation. It is my understanding, however, that HHSC is currently circulating a draft of rules that would add new administrative penalties related to the provision of ISS services, and that these proposed penalties would be higher than penalties currently applied to DAHS facilities. Section 559.105(d), Title 26, Texas Administrative Code, currently includes a schedule of administrative penalties applicable to DAHS facilities, none of which exceed \$500. Adopting penalties that are in excess of existing statutory limits under Chapter 103, Human Resources Code, seems impermissible given that Subchapter H, Chapter 559, purports to regulate ISS services and providers under the auspices of regulating DAHS facilities licensed under Chapter 103.

Summary

There are multiple types of providers in Texas for adults in need of health, social, and related services, including DAHS providers, ISS providers, and providers that combine DAHS and ISS services. While regulation of DAHS services and facilities by HHSC is statutorily authorized under Chapter 103, Human Resources Code, there does not seem to be similar authority to regulate ISS providers or services, or possibly even to separately regulate any ISS services provided by a licensed DAHS facility. Additionally, there is no apparent authority for HHSC to ignore existing statutory limits on the amount of any administrative penalties that may be assessed against a regulated provider.

Thank you for your attention to this matter and for your service to Texas.

Regards,

