



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

September 26, 1997

Dr. William R. Archer, III
Interim Commissioner
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

Letter Opinion No. 97-088

Re: Whether a licensed nursing facility providing rehabilitation services under Medicaid must also be licensed as a hospital under chapter 241 of the Health and Safety Code (RQ-617)

Dear Dr. Archer:

The Texas Department of Health licenses and regulates general and special hospitals pursuant to the Texas Hospital Licensing Law.¹ Your predecessor inquired about the department's responsibilities under subchapter F of chapter 241 of the Health and Safety Code. Subchapter F, adopted by the Seventy-third Legislature as Senate Bill 212, requires facilities that provide comprehensive medical rehabilitation to be licensed as hospitals.² "Comprehensive medical rehabilitation" is defined as

the provision of rehabilitation services that are designed to improve or minimize a person's physical or cognitive disabilities, maximize a person's functional ability, or restore a person's lost functional capacity through close coordination of services, communication, interaction, and integration among several professions that share the responsibility to achieve team treatment goals for the person.³

Subchapter F further provides that

[a]n interdisciplinary team for comprehensive medical rehabilitation shall be directed by a licensed physician. . . . [and] . . . shall have available to it . . . members of the following professions as necessary to meet the treatment needs of the patient: (1) physical therapy; (2) occupational therapy; (3) speech-language pathology; (4) therapeutic recreation; (5) social services and case management; (6) dietetics; (7) psychology; (8) respiratory

¹Health & Safety Code ch. 241.

²Act of May 25, 1993, 73d Leg., R.S., ch. 707, 1993 Tex. Gen. Laws 2776, 2776.

³Health & Safety Code § 241.121.

therapy; (9) rehabilitative nursing; (10) certified orthotics; and (11) certified prosthetics.⁴

The Senate Interim Committee on Health and Human Services (the “committee”), appointed by the lieutenant governor in 1991 to study potential abuses in private psychiatric and substance abuse facilities, also reviewed rehabilitation facilities.⁵ After a *New York Times* article alleged widespread abuses in the head injury rehabilitation industry, the lieutenant governor asked the committee to review medical rehabilitation facilities in the state.⁶ The committee heard allegations about medical rehabilitation facilities involving patient abuse and neglect, overly aggressive marketing, delays in evaluating patients and initiating therapy, inappropriate lengths of stay, and fraudulent billing.⁷ Senate Bill 212, adopted in response to these problems, requires facilities that provide “comprehensive medical rehabilitation” to be licensed as hospitals.⁸ The Texas Board of Health “by rule shall adopt standards for the provision of rehabilitation services by a hospital to ensure the health and safety of a patient receiving the services.”⁹ The rules adopted by the board “may not conflict with a federal rule, regulation, or standard.”¹⁰

You ask whether a licensed nursing facility that provides comprehensive medical rehabilitation must also be licensed as a hospital under the Texas Hospital Licensing Law. Section 241.122 requires providers of inpatient comprehensive medical rehabilitation to be licensed as hospitals:

Unless a person has a license issued under this chapter, 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*. [Emphasis added].

A nursing home that provides “inpatient comprehensive medical rehabilitation” within chapter 241 of the Health and Safety Code must be licensed as a hospital.

⁴*Id.* § 241.123.

⁵SENATE INTERIM COMM. ON HEALTH & HUMAN SERVICES, PRIVATE PSYCHIATRIC, SUBSTANCE ABUSE AND MEDICAL REHABILITATION SERVICES IN TEXAS ii, iv (Nov. 1992).

⁶*Id.*; see Peter Kerr, *Centers for Head Injury Accused of Earning Millions for Neglect*, N.Y. TIMES, Mar. 16, 1992, at A1.

⁷SENATE INTERIM COMM. ON HEALTH & HUMAN SERVICES, 1, 12.

⁸Health & Safety Code § 241.122.

⁹*Id.* § 241.123(a).

¹⁰*Id.* § 241.123(g).

However, this is not the end of our inquiry, because you are particularly concerned about the application of subchapter F to nursing homes that provide rehabilitation services under the Medicaid program. A “skilled nursing facility” under the Medicaid program is an institution which, among other things:

(1) is primarily engaged in providing to residents—

(A) skilled nursing care and related services for residents who require medical or nursing care, or

(B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons, and is not primarily for the care and treatment of mental diseases.¹¹

A “nursing facility” under Medicaid is an institution which, among other things:

(1) is primarily engaged in providing to residents—

(A) skilled nursing care and related services for residents who require medical or nursing care,

(B) rehabilitation services for the rehabilitation of injured, disabled, or sick persons, or

(C) on a regular basis, health-related care and services to individuals who because of their mental or physical condition require care and services (above the level of room and board) which can be made available to them only through institutional facilities, and is not primarily for the care and treatment of mental diseases.¹²

The requirements for Medicaid certification of long-term care nursing facilities are set out in rules promulgated by the Health Care Financing Administration of the federal Department of Health and Human Services.¹³ A long-term care nursing facility must make a comprehensive assessment of each resident’s needs, including rehabilitation potential, and must develop a comprehensive care plan for each resident to meet the needs identified in the comprehensive assessment.¹⁴ If the resident’s comprehensive plan of care requires specialized rehabilitation

¹¹42 U.S.C. § 1395i-3(a).

¹²*Id.* § 1396r(a).

¹³42 C.F.R. pt. 483.

¹⁴*Id.* § 483.20(b), (d).

services, the facility must provide them, either by providing the rehabilitation services itself or by obtaining them from an outside provider.¹⁵ “Specialized rehabilitation services,” which include, but are not limited to “physical therapy, speech-language pathology, occupational therapy, and mental health rehabilitative services for mental illness and mental retardation,” must be provided under the written order of a physician by qualified personnel.¹⁶

The Texas Department of Human Services has promulgated regulations for the licensure and Medicaid certification of long-term care nursing facilities that conform to the federal requirements.¹⁷ Long-term care nursing facilities must be licensed by the Texas Department of Human Services as nursing facilities.¹⁸

The legislative history of Senate Bill 212 does not indicate that the legislature intended to change the licensing requirements for nursing facilities that provide specialized rehabilitation services to residents in compliance with the requirements for Medicaid certification. Section 241.122 describes “inpatient comprehensive medical rehabilitation” as medical services that “are more intensive than nursing facility care and minor treatment.” The legislative history of Senate Bill 212 shows that the legislature distinguished “inpatient comprehensive medical rehabilitation” from the kind of rehabilitation typically provided by nursing facilities as a condition of Medicaid certification.

Section 241.122 in Senate Bill 212 as introduced by Senators Zaffirini, Moncrief, and Harris of Tarrant County, read as follows:

Unless a person has a license issued under this chapter, a person may not provide inpatient comprehensive medical rehabilitation services to a patient who requires medical services that are provided under the supervision of a physician and that are more intensive than general nursing care and minor treatment.¹⁹

At a hearing on Senate Bill 212 held by the Senate Health and Human Services Committee on March 16, 1993, a witness who represented nursing homes and intermediate care facilities for the

¹⁵*Id.* § 483.45.

¹⁶*Id.*

¹⁷*See* 40 T.A.C. §§ 19.1(a) (citing laws that govern requirements for long-term care nursing facility licensure and Medicaid certification), .801(2) (requiring comprehensive assessment of each resident), .802 (requiring comprehensive care plan), .1301 (requiring provision of specialized rehabilitation services to residents, tracking requirements stated in 42 C.F.R. § 483.45).

¹⁸*Id.* § 19.2301; *see* Health & Safety Code ch. 242 (licensure provisions for nursing homes); Act of August 9, 1991, 72d Leg., 1st C.S., ch. 15, § 1.11, 1991 Tex. Gen. Laws 281, 298.

¹⁹S.B. 212, 73d Leg., R.S. (1993).

mentally retarded expressed his association's concern that Senate Bill 212 might apply to those facilities,²⁰ and suggested an amendment that would exclude such facilities.²¹ This testimony did not in fact establish that nursing homes and intermediate facilities for the mentally retarded provided comprehensive medical rehabilitation services. When the witness was asked whether those facilities provided comprehensive medical rehabilitation services, he stated that a comprehensive assessment was done of the patient upon admission, and if that assessment included any form of rehabilitation, the nursing home was required to provide it. Thus, there appears to have been some confusion of the terms "comprehensive medical rehabilitation services" and "comprehensive assessment" in this exchange.

On March 19, 1993, the Committee on Health and Human Services reported Senate Bill 212 unfavorably with a favorable committee substitute.²² The committee substitute referred to medical services "that are more intensive than nursing facility care and minor treatment," the same phrase that appears in the enacted bill.²³ The following exchange on the Senate floor explains the significance of this phrase:

Senator Moncrief, bill co-sponsor: Senator, to . . . establish legislative intent Is the intent of Senate Bill 212 to authorize . . . a nursing home to provide comprehensive rehab services?

Senator Zaffirini, bill 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.²⁴

²⁰Hearings on S.B. 212 Before the Senate Comm. on Health & Human Services, 73d Leg., R.S. *passim* (Mar. 16, 1993) (testimony of Thomas Suehs, Executive Director of Texas Health Care Association) (transcript available from Senate Staff Services Office).

²¹*Id.* (exchange between Thomas Suehs, Executive Director of Texas Health Care Association, and Carolyn Hall, from Legislative Council) (transcript available from Senate Staff Services Office).

²²H.J. of Tex., 73d Leg. 548 (1993).

²³C.S.S.B. 212, 73d Leg., R.S. (1994). A brief submitted to us by the Texas Health Care Association includes a copy of a letter from the Department of Health to the Texas Health Care Association. It states that certain staff representatives of the Department of Health agreed that "changing Senate Bill 212, Section 241.122, line 20 to remove the word 'general' and 'facility' between nursing and care, would be satisfactory and nursing facility care would be defined to include title 42, social security act 1396D, and for intermediate care facilities for mentally retarded and 1396R nursing home care." Letter from Maurice B. Shaw, Acting Associate Commissioner for Special Health Services, to Thomas M. Suehs and Ed Jackson (Mar. 19, 1993). Section 1396d(a) of title 42, United States Code, defines "medical assistance" for the Medicaid program to include skilled nursing facilities.

²⁴Debate on S.B. 212 on the Floor of the Senate, 73d Leg., R.S. (Mar. 25, 1993) (transcript available from Senate Staff Services).

In our opinion, the legislature intended that nursing facilities providing rehabilitation pursuant to the Medicaid program could continue to do so without being licensed as “comprehensive medical rehabilitation” hospitals under subchapter F of chapter 241, Health and Safety Code. Subchapter F requires such hospitals to provide each patient a “written continuing care plan that addresses the patient’s needs for care after discharge, including recommendations for treatment and care and information about the availability of resources for treatment or care.”²⁵ This requirement recognizes that patients who have received comprehensive medical rehabilitation services in a hospital may still need care and treatment of a less intensive nature after leaving the hospital.²⁶

We conclude that subchapter F of chapter 241, Health and Safety Code, does not apply to a licensed nursing home that provides rehabilitation services under the laws and regulations governing the Medicaid program if the services are not “more intensive than nursing facility care and minor treatment.”²⁷ Of course, subchapter F does not authorize a licensed nursing home to provide any services in addition to those it could legally provide under its nursing home license before the addition of subchapter F to chapter 241. If a licensed nursing facility provides a level of care that requires licensing as a comprehensive medical rehabilitation hospital pursuant to subchapter F of chapter 241 of the Health and Safety Code, it is subject to the jurisdiction of the Department of Health under chapter 241.²⁸

²⁵Health & Safety Code § 241.123(e).

²⁶We note that the comprehensive rehabilitation fund created by section 111.060 of the Human Resources Code may be used according to rules promulgated by the Texas Rehabilitation Commission to provide inpatient hospitalization at a comprehensive rehabilitation facility, outpatient services, and *post-acute services* to persons with traumatic brain injury. 40 T.A.C. §§ 113.1, .4-.5.

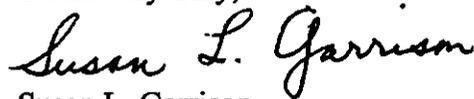
²⁷Health & Safety Code § 241.122.

²⁸*See id.* ch. 241, subch. C (enforcement of licensing requirements).

S U M M A R Y

Subchapter F of chapter 241 of the Health and Safety Code, does not apply to a licensed nursing home that provides rehabilitation services under the laws and regulations governing the Medicaid program that are not more intensive than nursing facility care and minor treatment. The Department of Health is not required to license such nursing facilities as comprehensive medical rehabilitation hospitals pursuant to subchapter F. However, if a nursing home exceeds its authority to provide "nursing facility care and minor treatment" pursuant to a nursing facility license and if it is providing the level of care described in subchapter F of chapter 241 of the Health and Safety Code, it is required to hold a hospital license.

Yours very truly,



Susan L. Garrison
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Opinion Committee