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Department of Aging
and Disability Services

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OPINION COMMITTEE COMMISSIONER
Adelaide Horn

April 8, 2009

The Honorable Gregg Abbott
Office of the Attorney General
Post Office Box 12548
Austin, Texas 78711-2548

FILE # ML-46046-09
I.D. # 046046

RQ-0794-GA

Re: Whether the Texas Department of Aging and Disability Services may authorize assistant living facilities to provide nursing services to residents who are terminally ill or are experiencing a short-term, acute illness.

Dear General Abbott:

The Department of Aging and Disability Services (DADS)¹ is the licensing authority over entities providing services to the public within the scope of the Assisted Living Facility Act.² An assisted living facility (ALF) provides food and shelter and personal care services to its residents, in a homelike setting, with an emphasis on personal dignity, autonomy, independence and privacy.³ ALFs include large apartment-like settings and single family structures with communal dining and social areas.

The types of "personal care services" that can be provided at ALFs are:

- A) assistance with meals, dressing, movement, bathing, or other personal needs or maintenance;
- B) the administration of medication by a person licensed to administer medication or the assistance with or supervision of medication; or
- C) general supervision or oversight of the physical and mental well-being of a person who needs assistance to maintain a private and independent resident in an assisted living facility or who needs assistance to manage the person's personal life, regardless of whether a guardian has been appointed for the person.⁴

DADS is responsible for licensing ALFs by adopting and enforcing rules that establish acceptable levels of care and that require an ALF, among other things, to ensure resident independence and self-determination, access to care, continuity of care, and quality of life.⁵ In September 1999, the Texas Legislature amended the ALF Act by adding Texas Health and

¹ All references to DADS includes reference to the Texas Department of Human Services which ceased to exist as of September 1, 2004. See Act of June 4, 2003, 78th Leg. R.S., HB 2292.

² Tex. Health & Safety Code Ann., ch. 247 (§§ 247.001 - .069) (Vernon 2001 & Supp. 2007).

³ *Supra*, § 247.002(1) and 247.0011(c)

⁴ *Supra*, § 247.002(5).

⁵ See, *supra*, §§ 247.0011(b) and (c).

Safety Code, §247.0011, which requires DADS to protect residents of ALFs by adopting rules relating to quality of care and quality of life, as well as the assessment of the condition and service need of each resident.⁶ Section 247.0011(c) provides that assisted living services should enhance a person's ability to age in place in a residential setting while receiving increasing or decreasing levels of services as the person's needs change.⁷

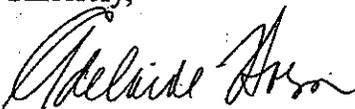
The Office of the Attorney General Opinion JC-0072, issued in July 1999, considered whether the provision of "occasional nursing services" by ALF staff, as authorized by former 40 TAC §92.2(b), fell within the scope of personal care services, as defined in the statute.⁸ In that opinion, the Attorney General concluded that a rule adopted by DADS that authorized an assisted living facility (then known as a personal-care facility) "to furnish nursing services beyond assisting with personal needs or maintenance, administering medications, or generally supervising residents' physical and mental well-being," was *ultra vires*.⁹ Section 92.2(b) was amended on August 1, 2000. As the ALF rules exist today, there is no reference to "occasional nursing services."

Currently, 40 TAC §92.41(e)(1)(B), provides that a facility must not admit or retain "an individual who requires the services of facility employees who are licensed nurses on a daily or regular basis. *Individuals with a terminal condition or who are experiencing a short-term, acute episode are excluded from this requirement.*"¹⁰ This provision has been interpreted by DADS to allow an ALF to use its own employees to provide nursing services, but only to a person who has a terminal condition or is experiencing an acute illness of a short duration.

The Legislature's charge regarding an ALF resident's ability to age at the ALF, surrounded by the necessary services and supports, became effective after JC-0072 was issued. Given that the Legislature has made clear its intent that ALF services be flexible to serve the changing needs of an ALF resident as he ages at the ALF, the question is whether DADS may allow ALFs to provide nursing services (using facility staff) to a resident who is terminally ill or is experiencing a short-term, acute illness, as allowed by 40 TAC §92.41(e)(1)(B)?

Attached are copies of the statute, the section of the ALF rules in question and the Attorney General Opinion referenced above. Please contact Ms. Flora Fearon, Rules and Policy Attorney, at 438-3095, or by email at flora.fearon@dads.state.tx.us with any questions concerning this request.

Sincerely,



Adelaide Horn
Commissioner

⁶ See, *Supra*, § 247.0011(b).

⁷ See, *Supra*, § 247.0011(c).

⁸ *Op. Tex. Att'y Gen. No. JC-0072 (1999)*

⁹ *Id.* at 7.

¹⁰ Emphasis added to text.