

# INTOLERABLE CARE

**A snapshot of the Texas nursing home quality crisis**



**A REPORT BY AARP TEXAS**

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## A snapshot of the Texas nursing home quality crisis

### INTRODUCTION

**T**exas nursing home quality is shamefully poor and, according to several studies, worse than what exists in most other states.<sup>1</sup> An inadequate state regulatory structure with insufficient powers for sanctioning violators of licensing requirements is allowing nursing home operators to escape accountability when they hurt residents or jeopardize their health. As a result of this intolerable care, many residents of Texas nursing homes face unnecessary health and safety risks.

To protect older persons and others in nursing homes, and to preserve Texas' reputation as a hospitable and safe place for vulnerable citizens, it is crucial that state policymakers adopt the common-sense reforms outlined in this report. Doing so will improve the well-being of the 93,000+ residents of Texas' 1,200+ nursing homes.

This report summarizes an AARP Texas examination of recent-years' records of the state Department of Aging and Disability Services (DADS), which licenses long-term care providers.\* The review finds a troubling lack of attention to the quality of care crisis affecting Texas nursing homes. The records help to illustrate that state officials are aware of numerous, long-standing, and severe problems in nursing homes but are often failing to hold nursing home operators accountable. This inaction is largely because DADS lacks necessary enforcement powers to keep nursing home residents safe.

Following its 2014 report<sup>2</sup> about shortcomings in nursing home oversight in Texas, the bipartisan Texas Sunset Advisory Commission in 2015 recommended that the Texas Legislature strengthen nursing home regulation.<sup>3</sup> AARP Texas has consistently endorsed those recommendations, and the Commission's proposals still need legislative approval. The Texas Senate Committee on Health and Human Services in November 2016 renewed the call for legislative action on nursing home safety.<sup>4</sup> This AARP report notes some findings of those legislative reports and presents additional recommendations to improve Texas nursing home quality and safety to put an end to this intolerable care.

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\* AARP Texas reviewed nursing home state licensing violations and sanctions for state fiscal years 2014 and 2015. Under a public records request, the data was provided by the Texas Department of Aging and Disability Services, ASPEN Central Office System, October 2016.

## BACKGROUND

The State of Texas has a responsibility to ensure the health and safety of vulnerable Texans, including those who are elderly or disabled and receive long term services and supports. The responsibility extends to residents of nursing facilities, which are licensed by the Texas Department of Aging and Disability Services (DADS). Additionally, certification by the federal Centers for Medicare and Medicaid Services (CMS) is required for the facility operators to receive payment under the Medicaid or Medicare programs. DADS conducts certification surveys for nursing facilities on behalf of CMS.

Under the Texas Health and Safety Code, a variety of regulatory tools are available to DADS. They include: administrative penalties, injunctive relief and civil penalties, trusteeships, emergency suspensions and closing orders, suspension of admissions, denial of payment for new admissions, revocation of licensure, and financial penalties.

## KEY FINDINGS

### I. Texas nursing homes commit serious licensing violations.

In state fiscal year 2015, investigators spotted **454 violations of the highest severity level** (those involving “immediate jeopardy” of nursing home residents) and **312 at the second-highest severity level** (those involving “actual harm” of residents). In FY 2014, there were 470 violations at the highest level and 337 at the second-highest level.

### II. The state does not consistently take enforcement action against violative nursing homes.

**2015:** In a 12-month period starting in September 2014, Texas authorities cited nursing homes for **17,466 state violations**, many of them among the highest severity levels, including ones that involve “immediate jeopardy” to residents’ health and safety. In that period (fiscal year 2015) **the state took only 40 enforcement actions.**

**2014 and 2013:** In fiscal year 2014, state authorities identified 18,879 licensing violations and took only 39 enforcement actions, according to the AARP Texas review of records. Similar to AARP’s findings, the Sunset Advisory Commission found that in fiscal year 2013, DADS took enforcement action in response to **less than 1 percent, or 11, of the almost 19,000 state nursing home violations** confirmed by its staff.<sup>5</sup> And that same year, according to the Sunset Advisory Commission, DADS assessed only 5 administrative penalties, collecting just \$400,000 from nursing home violations.<sup>6</sup>

### III. Texas fails to assess meaningful sanctions against serious and repeat offenders.

Many nursing homes have serious and repeat violations but are not sanctioned by the state. In fiscal years 2014 and 2015, 328 of the state’s 1,200+ nursing facilities accounted for 94 percent of all serious violations. Of those 328 facilities, the state collected fines from only 22 of them.

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**Excerpt from the *AARP Bulletin* article, “Nursing Homes Need Better Monitoring,” by Thomas Korosec. December 2016.**

To strengthen nursing home quality in Texas, AARP is asking the Legislature to hold nursing home operators accountable when they provide poor care,” said Amanda Fredriksen, AARP Texas associate state director for advocacy.

A variety of sources and studies have highlighted the overall poor performance of Texas nursing homes. For instance:

A May 2015 survey by the Henry J. Kaiser Family Foundation found that 51 percent of Texas nursing homes received ratings of one or two stars in the federal Centers for Medicare & Medicaid Services’ five-star quality rating system. That put Texas last in the nation.

*ProPublica*, an investigative journalism organization, found that over the past three years Texas ranked third among the states in the average number of “serious deficiencies” found at its nursing homes.

The Texas Department of Aging and Disability Services (DADS) provides a consumer rating of the state’s nursing homes. On a scale of 1 to 100, the average score recently was 58.

“That’s a solid F,” Fredriksen said. “There’s a robust amount of data that suggests there are real problems when it comes to providing quality care in Texas nursing homes.”

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Several facilities have committed serious violations but have not been appropriately sanctioned. For example, the following facilities were found to have had multiple violations of increasing severity over multiple years and have not been fined:

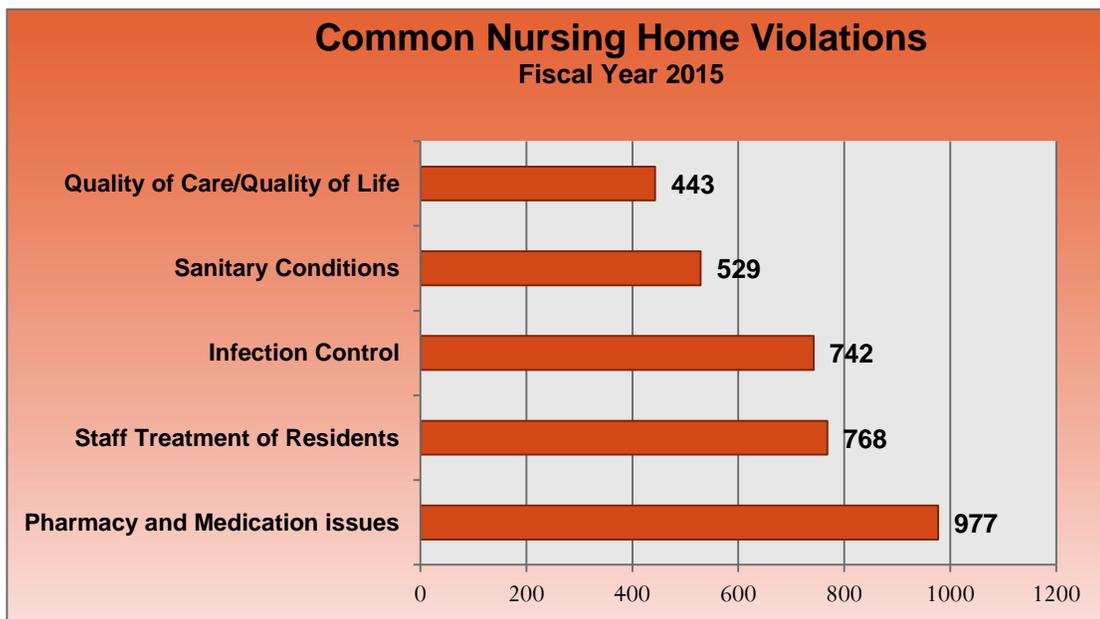
- **Hearne Health Care Center (Hearne, Texas)** was cited for 63 violations in fiscal year 2015. Three violations involved “actual harm” and 12 involved the more serious violation known as “immediate jeopardy” of a resident or residents. “Staff treatment of residents” was identified 18 times over the course of five visits to the facility by state surveyors. The state has not collected any fines for these health and safety violations. In fiscal year 2014, Hearne Health Care Center was marked with 26 state licensing violations and paid no fines to the state. Violations that year included “infection control” and “reportable incidents of abuse and neglect.”

- **Windsor Nursing and Rehabilitation Center (Corpus Christi, Texas)** was cited with 19 violations from four visits by state surveyors. Nine of the violations were at the highest-severity levels, and included matters related to staff treatment of residents, nursing services and administration. The state has not collected any fines for the 19 violations. In 2014, the facility was cited for 21 state licensing violations, some of which involved matters that led to the violations in 2015.

- **Retama Manor Nursing Center (Laredo, Texas)** had 26 violations from four visits by surveyors in fiscal year 2015. Five violations were labeled “actual harm,” a Level 3 (Actual Harm that is Not Immediate

Jeopardy) violation. The remaining violations were of lesser-severity levels. The facility was not fined for any of the violations, even though many of the 2015 violations are similar to the 22 violations the facility was cited for in the prior year.

- **Windsor Houston Nursing and Rehabilitation Center (Houston, Texas)** was cited for 57 violations from eight visits to the facility by state surveyors in fiscal year 2015. Three violations involved “actual harm” of a resident or residents and 10 involved the most severe level of “immediate jeopardy” for residents and included matters related to nutrition, quality of care, and pharmacy procedures. Other violations at the facility involved residents who were given drugs unnecessarily, medication errors, and staff treatment of residents. The facility was not assessed a fine by the state. In fiscal year 2014, the facility faced 38 Level 2 violations. The problems festered, leading to more severe violations in 2015.
- **Regency Manor Healthcare Center (Temple, Texas)** had 36 violations from eight visits by state surveyors in fiscal year 2015. The facility was fined by the state only for its October 2014 visit at which surveyors identified five Level 4 (Immediate Jeopardy To Resident’s Health and Safety) violations that included “staff treatment of residents,” “quality of care,” and “significant medication errors.” Violations on other visits included pressure sores, urinary tract infections and (in)appropriate treatment of feeding tubes. In 2014, the facility also had 36 violations and was not fined at all by the state. The violations that year included issues related to infection control, pest control, medication errors, and staff treatment of residents – all similar to violations cited in 2015.



## Severity Levels of Texas Nursing Home Violations and number of incidents in FY 2015



### SUNSET ADVISORY COMMISSION FINDINGS

The Legislature should address numerous issues that were raised by the Sunset Advisory Commission report on DADS, many of which were included in Senate Bill 204 during the 84<sup>th</sup> Legislature in 2015.<sup>7</sup>

**SERIOUS AND REPEAT VIOLATIONS:** The Commission determined that DADS issues few sanctions for violations, including many serious and repeated violations, leaving nursing home residents in harm's way. The Commission determined that, according to DADS, 92 nursing homes had repeated violations at the highest levels of severity – immediate jeopardy and actual harm – within fiscal years 2012 and 2013. These violations include problems such as sexual abuse, resident-on-resident aggression, inadequate treatment of sores and infections, and medication errors.

**LICENSE REVOCATION:** Statutes authorize DADS to revoke provider licenses for serious violations that may result in immediate harm to the health and safety of Texans. But the Commission found that since 2011, the agency had revoked only a handful of licenses.<sup>8</sup>

**RIGHT TO CORRECT:** State law provides nursing homes the right to correct any violation without being assessed an administrative penalty as long as the department determines the violation does not: result in serious harm to or death of a resident; constitute a serious threat to the health or safety of a resident; or substantially limit the institution's capacity to provide care. Texas nursing facilities have the right to correct all violations except those at level 4 or involving "Immediate Jeopardy."

The right to correct prevents DADS from assessing penalties against 80 percent of violations, according to the Commission. This right allows providers to repeatedly commit the same violations by later coming into compliance, but it “weakens the integrity of the regulatory process,” according to the Commission’s report.

**OTHER FACTORS:** An agency’s administrative penalty authority should reflect the potential severity of the violation and serve as a deterrent to such violations of law. The Sunset Advisory Commission found that low penalty caps, negotiated reductions, and appeal delays are hindering DADS ability to be a strong enforcer of nursing home regulations.<sup>9</sup>

## AARP TEXAS RECOMMENDATIONS

**Repeal *Right to Correct*.** State law provides nursing homes the right to correct any violation as long as the department determines the violation does not: result in serious harm to or death of a resident; constitute a serious threat to the health or safety of a resident; or substantially limit the institution’s capacity to provide care.<sup>10</sup> In practice, Texas nursing facilities frequently avoid paying penalties for most types of violations because of the “right to correct” law. Right to correct exempts from financial penalty all types of violations except those at Level 4, “Immediate Jeopardy.”

Just because a violation is not labeled Level 4 does not mean it is not serious or that there has been no harm to a resident. In 2015, state surveyors identified more than 14,500 violations at Level 2 or “Potential for more than minimal harm.” Common Level 2 violations include pressure sores, medication errors, infection control, quality of life, and staff treatment of residents. All violations most people would consider serious. When fines are not assessed for these violations, nursing home operators have little incentive to correct the violations.

**End the deferral to the federal government.** Texas law prohibits the state from assessing a penalty for a violation if the facility is cited and fined for the violation under federal guidelines.<sup>11</sup> Other states, such as Alaska, Arizona, Arkansas, California, Florida, and Ohio, maintain control over the sanctions associated with their state’s licensing of nursing homes.

**Establish escalating sanctions for serious or repeated violations.** As recommended by the Sunset Advisory Commission, “DADS should apply a full range of sanctions to long-term care providers for serious or repeated violations that jeopardize public health, life, and safety.” Under this recommendation, DADS would be able to apply escalating sanctions based on multiple factors already in law, such as the nature and circumstances of violations, in addition to repeated violations.

### 42<sup>ND</sup> IS NOTHING TO BRAG ABOUT

Texas ranks 42<sup>nd</sup> in the nation for inappropriate use of antipsychotics, according to CMS.<sup>13</sup> Roughly 1 in 5 nursing home residents are being unnecessarily given powerful medications, which can result in serious harm.

## CONCLUSION

The state has a duty to ensure that our most vulnerable citizens, including the elderly and individuals with disabilities, are treated in a manner that protects their health and safety and preserves their quality of life. Nursing homes are regulated by the state and federal governments for these purposes. While many Texas nursing homes may provide competent care, the overall quality of care in many facilities is lacking, according to state data based on inspections.

In November 2016, the Texas Senate Health and Human Services reported that the quality of Texas nursing facilities is poor. In reviewing 2015 data, it found that among the five states with the most senior citizens, Texas had the highest number of low-rated nursing facilities, and over 50 percent of the state's nursing facilities received one or two stars out of a five-star federal rating system.<sup>12</sup>

State officials are hamstrung by two state laws, the *Right to Correct* law and the law requiring the state to defer to the federal government when assessing financial penalties. For sanctions to effectively protect Texas seniors in nursing homes, they need to be significant enough to serve as a deterrent to future violations.

Without reform to the *Right to Correct* law, the adoption of escalating sanctions, and an end to the state's deferral to the federal government, Texas nursing home regulators will struggle to adequately keep nursing home residents safe.

## ENDNOTES

<sup>1</sup> "Nursing Home Inspect: Find Nursing Home Problems in Your State." ProPublica. Data updated August 2016. <http://projects.propublica.org/nursing-homes/>

<sup>2</sup> Texas Sunset Advisory Commission. 2014. <https://www.sunset.texas.gov/reviews-and-reports/agencies/departments-aging-and-disability-services-dads>

<sup>3</sup> Texas Sunset Advisory Commission. Staff Report with Final Results. Department of Aging and Disability Services. July 2015. Page 43, Issue 4. <https://www.sunset.texas.gov/public/uploads/files/reports/DADS%20Staff%20Report%20with%20Final%20Results.pdf>

<sup>4</sup> Texas Senate Committee on Health and Services. Interim Report To the 85<sup>th</sup> Legislature. <http://www.senate.state.tx.us/75r/senate/commit/c610/c610.InterimReport2016.pdf>

<sup>5</sup> Texas Sunset Advisory Commission. <https://www.sunset.texas.gov/public/uploads/files/reports/DADS%20Staff%20Report%20with%20Final%20Results.pdf>

<sup>6</sup> Texas Sunset Advisory Commission. 2015. <https://www.sunset.texas.gov/public/uploads/files/reports/DADS%20Staff%20Report%20with%20Final%20Results.pdf>

<sup>7</sup> Texas Sunset Advisory Commission. 2015.

<https://www.sunset.texas.gov/public/uploads/files/reports/DADS%20Staff%20Report%20with%20Final%20Results.pdf>

<sup>8</sup> Texas Sunset Advisory Commission. 2015.

<https://www.sunset.texas.gov/public/uploads/files/reports/DADS%20Staff%20Report%20with%20Final%20Results.pdf>

<sup>9</sup> Texas Sunset Advisory Commission. 2015.

<https://www.sunset.texas.gov/public/uploads/files/reports/DADS%20Staff%20Report%20with%20Final%20Results.pdf>

<sup>10</sup> Texas Health and Safety Code. Section 242.0665. Right To Correct.

<http://www.statutes.legis.state.tx.us/Docs/HS/htm/HS.242.htm>

<sup>11</sup> Texas Health and Safety Code. Section 242.070. Application of Other Law.

<http://www.statutes.legis.state.tx.us/Docs/HS/htm/HS.242.htm>

<sup>12</sup> Federal Centers for Medicare and Medicaid Services. <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/CertificationandCompliance/NHs.html>

<sup>13</sup> Texas Health and Human Services. “Appropriate Use of Antipsychotic Medications.” November, 2016. Based on data from the end of the second quarter 2016 (June 2016). <https://hhs.texas.gov/doing-business-hhs/provider-portals/long-term-care-providers/nursing-facilities-nf/quality-monitoring-program-qmp/appropriate-use-antipsychotic-medications>