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Via electronic submission to:
HHSRulesCoordinationOffice@hhsc.state.tx.us

COMMENT LETTER

HHSC Rules Coordination Office

Re: Draft 26 TAC, Part 1, Chapter 320, Subchapter A, Rights of Individuals Receiving Mental Health Services, Project No. 18R047

To whom it may concern:

On behalf of our more than 450 member hospitals and health systems, including rural, urban, children's, teaching and specialty hospitals, the Texas Hospital Association is pleased to submit comments on the Texas Health and Human Services Commission's draft 26 TAC, Part 1, Chapter 320, Subchapter A, Rights of Individuals Receiving Mental Health Services. THA appreciates HHSC's commitment to an open and transparent rulemaking process. THA member hospitals continue to evaluate the impact of the draft rules and THA will provide additional information to HHSC as it becomes available.

Applying the Subchapter to Chapter 241 Hospitals

With regard to the draft rules, THA urges HHSC to reconsider its approach to draft section 320.2, entitled "Application." We note with particular concern that the new chapter 320 will apply to the following entities:

> (3) a hospital licensed under Texas Health and Safety Code, Chapter 241 that provides mental health services;

Additionally, the definition of "entity," which is used throughout the Subchapter in the application of the requirements, contains the same language ("(C) a hospital licensed under Texas Health and Safety Code, Chapter 241 that provides mental health services;").

Administrative rules should provide clear, pertinent guidance to affected individuals and entities. Existing chapter 404, Subchapter E of Title 25, which the new Subchapter A replaces, provides that clarity by stating in its applicability section that it applies to, among other entities, "psychiatric hospitals." Psychiatric hospital is, in turn, defined as:

> (A) An establishment licensed by the Texas Department of Health under the Texas Health and Safety Code, Chapter 577, offering inpatient services, including treatment, facilities, and beds for use beyond 24 hours, for the primary purpose of providing psychiatric assessment and diagnostic services and psychiatric inpatient care and treatment for mental illness. Such services must be more intensive than room, board,

> personal services, and general medical and nursing care. Although substance abuse services may be offered, a majority of beds (51%) must be dedicated to the treatment of mental illness in adults and/or children. Services other than those of an inpatient nature are not licensed or regulated by the Texas Department of Health and are considered only to the extent that they affect the stated resources for the inpatient components; or
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> (B) That identifiable part of a hospital in which diagnosis, treatment, and care for persons with mental illness is provided and that is licensed by the Texas Department of Health under the Texas Health and Safety Code, Chapter 241.

Thus, existing Subchapter E is clear in its application to private psychiatric facilities licensed under chapter 577, and to licensed psychiatric units located in a hospital licensed under Texas Health and Safety Code Chapter 241, *i.e.*, a general or special hospital (referred to herein as a "Chapter 241 hospital"). However, because of the ambiguous phrase "that provides mental health services," the new language may be argued to apply the protections of the subchapter to a patient receiving care in a Chapter 241 hospital, regardless of where in the hospital that care is rendered and even regardless of whether the hospital has a licensed psychiatric unit. When read in the context of the broad definition of mental health services ("[a]ny services concerned with the diagnosis, treatment, and care of individuals with a mental illness. . ."), this presents a myriad of compliance issues for Chapter 241 hospitals.

First, the language does not limit the application of the rules to any particular part of the hospital, and therefore creates a great deal of uncertainty as to the population of patients to which the subchapter would apply. For example, is a Chapter 241 hospital "provid[ing] mental health services" to:

- A patient being held in the emergency department under an emergency detention awaiting transfer to an appropriate facility but who is not receiving any therapeutic intervention while awaiting the transfer?
- A patient awaiting surgery who receives a psychoactive medication to manage pre-operative anxiety or any patient in any area of the hospital who receives medication because they are anxious or agitated? (And for that matter, is agitation a physical symptom or a mental condition?)
- A medical or surgical patient who is consulted on by a psychiatrist to determine medical decision-making capacity?
- A patient with altered mental status who is being evaluated for an underlying psychiatric condition?
- A patient in a medical or surgical unit who has a pre-existing psychiatric condition that is being managed concurrently with medical issues during the hospitalization?
- A patient undergoing detox who is also receiving psycho-supportive care for an underlying addiction?

And if so, how long to the protections apply? Examples of how this ambiguous application language could lead to enforcement traps for Chapter 241 hospitals are almost endless, whereas applying the provisions consistent with the application of the existing subchapter provides a bright line to both providers and patients as to where, how, and to whom the subchapter applies.

Furthermore, if it is the intent of HHSC to apply the patient rights protections to patients of a Chapter 241 hospital outside of a licensed psychiatric unit, in some instances it would be both unnecessary and operationally impossible

to implement. In addition, certain rights and other provisions specified in the subchapter would be nearly impossible to implement in an acute care setting, including:

- Section 320.1(4), indicating that the purpose of the subchapter is "to ensure that entity staff members are aware of the rights of individuals receiving mental health services."

  THA Comment: In a Chapter 241 hospital, the vast majority of patients are not receiving mental health services, even under HHSC's expanded view of the concept of "providing mental health services." It is unreasonable to expect that all staff would be aware of the rights of individual's receiving mental health services, and it serves no purpose for such employees to be aware of regulatory requirements that have nothing to do with their patient care responsibilities.

- Section 320.4(10) – The right to meet with the professional staff members responsible for the individual's care and to be informed of their names, professional disciplines, job titles, and responsibilities. In addition, the individual has the right to an explanation of the justification involving any proposed change in the appointment of staff members responsible for the individual's care.

  THA Comment: In a Chapter 241 hospital, caregivers come and go constantly, e.g., at shift change, or when practitioners rotate off of a service, and it would be impossible to explain the reason or reasons why there might be a change to the staff member responsible for the individual's care every time that occurs.

- Section 320.4(12) - The right to an in-house review, by an equally licensed practitioner, of the individual recovery or treatment plan or specific procedure upon reasonable request, as provided for in the written procedures of the entity.

  THA Comment: Mental health professionals practicing in an acute care setting are few in number. A Chapter 241 hospital will likely find it very difficult to find another practitioner to review a treatment plan or procedure as required by this subsection. Also, are these requirements limited to only the mental health treatment plan or mental health procedures, or would they include medical treatment and procedures?

- Section 320.4(13) - The right to an explanation of the reason for any transfer of the individual to any program within or outside of the entity.

  THA Comment: Is this requirement limited to only transfers related to mental health treatment, or would it also include transfers related to medical treatment?

- Section 320.4(14) - The right to information pertaining to the cost of services rendered (itemized when possible), the sources of the program's reimbursement, and any limitations placed upon the duration of services.

  THA Comment: Are these requirements limited to only information related to mental health treatment, or would they include medical treatment? Further, the requirements are not consistent with what would apply to medical services.

- Section 320.4(20) - The right to give or deny informed consent for the use and disposition of photographs, audio, or video recordings used in the treatment of the individual, with the exception of security video recordings.

  THA Comment: Chapter 241 hospitals routinely use photographs for medical documentation purposes, e.g., photographing a wound to document wound progression or healing. Will photographing for medical documentation purposes now require an additional process for a patient receiving mental health services?

- Section 320.5(3) - The right to suitable clothing which is neat, clean, and well-fitting.

  THA Comment: While Chapter 241 hospitals attempt to accommodate the comfort of their patients whenever possible, will an ill-fitting hospital gown (which few would characterize as "well-fitting") be the basis of an enforcement violation?

- Section 320.5(9) - The right to written information about any prescription medication ordered by the medical staff member, including the name, dosage, risks, side effects, benefits, administration schedule, and name of the physician who prescribed the medication.

  THA Comment: Do these requirements apply to all medications? Chapter 241 hospitals strive to provide as much information as possible about courses of treatment, but providing all of this information in written form for all medications received during a hospitalization, some of which may be provided on an urgent or emergent basis, would be extremely burdensome—if not impossible.

- Section 320.5(13) - The right to keep and use personal possessions, including the right to wear one's own clothing and religious or other symbolic items.

  THA Comments: For infection control and other reasons, including treatment-related purposes, hospital inpatients generally wear hospital gowns. Will the requirement that a patient be allowed to wear their own clothes be the basis of an enforcement violation?

- Section 320.5(21) The right of an individual under the age of 18 receiving inpatient services to receive inpatient services in an area separated from adults receiving services.

  THA Comments: It is not uncommon for mature minors to receive treatment in an area where adults are also receiving services, for example in a labor and delivery/postpartum unit. This requirement will be, in some instances, impossible to implement in a Chapter 241 hospital.

- Section 320.7(5), relating to providing a patient rights handbook.

  THA Comment: Again, knowing who would need to receive a handbook will be difficult in some circumstances, and the absurdity of providing a handbook in cases when the instance of "providing mental health services" is fleeting, such as a one-time medication administration, is self-evident.

- Section 320.7(7), relating to posting of patient rights in "common areas".

  THA Comment: Again, with the possibility that the rules could apply anywhere in a Chapter 241 hospital, it would be challenging, if not impossible to post patient rights information in the hospital's common areas.

- Section 320.8, relating to orally communicating rights to a patient or a legally authorized representative.

  THA Comment: Again, with the possibility that the rules could apply anywhere in a Chapter 241 hospital, and the uncertainty of which patients the rule applies to, it would be challenging if not impossible to orally communicate these rights to every patient.

- Section 320.9, relating to the requirement of having a rights protection officer.

  THA Comment: This requirement imposes an unnecessary regulatory burden on many facilities that are already having trouble stretching their limited resources to fulfill their patient care missions, or even keeping their doors open. In addition, given the uncertainty as to the areas of a Chapter 241 hospital to which the rule applies, the requirement in subsection 320.9(2) that the entity post the "name, telephone number, email, and mailing address of the rights protection officer prominently . . . in every area frequented by individuals receiving services" is operationally impossible. Additional concerns related to the specific requirements in the draft rule are set forth below.

Comments on the Draft Rules as Applied to Any Entity or Licensed Facility

In addition to the comments above, THA offers the following comments related to the draft rules as applied to private psychiatric facilities or to a Chapter 241 hospital, with or without a licensed psychiatric unit.

Rights Protection Officer

Section 320.9 would require the appointment of a rights protection officer by any entity. The definition of entity includes, among other things, "a hospital licensed under Texas Health and Safety Code, Chapter 241 that provides mental health services" and "a psychiatric hospital licensed under Texas Health and Safety Code, Chapters 571-577." Thus, it appears under the draft rules that private entities will be required to designate a rights protection officer (RPO). This requirement does not exist under current rules and THA finds no basis in statute for such a requirement. THA questions the necessity of requiring a private facility to employ an RPO. Private facilities, unlike public facilities that are currently required to have an RPO, are subject to the jurisdiction and enforcement authority of HHSC for violations of patient rights. This provides sufficient protections for individuals receiving services in private facilities. While most, if not all, facilities have persons designated as patient advocates, requiring a private facility to designate an RPO as a regulatory requirement is an unnecessary and incremental regulatory burden.

Additionally, the specific requirements of draft rule 320.9 are problematic in that they impose burdens that are unreasonable and operationally difficult if not impossible to implement. Subsection 320.9(2), for example, requires the following:

> (2) The name, telephone number, email, and mailing address of the rights protection officer must be prominently posted **in every area frequented by individuals receiving services** . . . .

As applied to licensed psychiatric facilities, the emphasized language would require a facility subject to the requirements to post this information in literally every area of a facility since services are provided throughout the facility, which is an absurd regulatory burden.

Definition of Inpatient Services

The definition of inpatient services included in the subchapter is potentially problematic in that it may require a facility to consider an observation patient as an inpatient if the length of stay exceeds 24 hours. We request that the definition of "inpatient services" be revised to reflect an intended length of stay of greater than 24 hours. This revision is consistent with federal law and will provide clarity on the applicability of the specific requirements of rule 320.5, which is applicable only to patients receiving inpatient services.

Right of Access to Medical Records

Section 320.4(22) provides that an individual has the "right to information contained in the individual's own record, including the right to an independent review, in accordance with federal and state law, of any denial of access to such information. This right does not extend to the PHI of another individual." This requirement seems intended to allow access to be restricted in accordance with existing law, e.g., Health and Safety Code sec. 611.0045(c); however, the rule could be clearer in that regard. For example the rule references an independent review, which is not contemplated by section 611.0045. THA request that the language be clarified to read:

> The right to information contained in the individual's own record, except as allowed by any federal and state law relating to the restriction or denial of access to such information. This right does not extend to the PHI of another individual.

Legally Authorized Representative

Although all hospitals are committed to appropriately involving a legally authorized representative in the planning and decision-making processes, we are concerned about the draft rule 320.10(4), which reads:

> (4) actively participate in the development and review of the individual's recovery or treatment plan and in the development of the individual's discharge plan;

The language "actively participate in the development" suggests a level of involvement in medical decision-making that may not be appropriate in many circumstances, or even legally or ethically allowed. We request that the language be revised to read:

(4) to be informed of the individual's recovery or treatment plan and discharge plan;

We appreciate your consideration of these comments. Should you have any questions or need additional information, please do not hesitate to contact me at 512/465-1000 or swohleb@tha.org.

Respectfully submitted,

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