Jennifer S. Riggs
Board Certified in Administrative Law
Texas Board of Legal Specialization
jriggs@r-alaw.com

RIGGS & RAY
A PROFESSIONAL CORPORATION
ATTORNEYS AND COUNSELORS

506 WEST 14TH STREET, SUITE A
AUSTIN, TEXAS 78701
512 457-9806 TELEPHONE
512 457-9066 FACSIMILE

Jason Ray
Board Certified in Administrative Law
Texas Board of Legal Specialization
jray@r-alaw.com

November 13, 2020

Executive Commissioner Cecile Young
Health and Human Services Commission
4900 North Lamar
Austin, Texas 78751

Re: Petition for Rulemaking regarding TEX. HEALTH & SAFETY CODE Ch. 254

Commissioner Young,

Our firm represents the Texas Association of Freestanding Emergency Centers (TAFEC), which is Texas' freestanding emergency facility trade group. The association works with state leaders and agencies to ensure the fair regulation and growth of this industry, as well as raising public awareness of the industry and promoting an overall understanding of the unique benefits of freestanding emergency centers. TAFEC exists, in part, to raise statewide awareness of freestanding emergency centers as a high-quality, accessible medical care option. To that end, TAFEC files this petition for rulemaking and requests that HHSC and DSHS promulgate rules clarifying that, so long as freestanding emergency centers clearly delineate between emergency medical care and non-emergency medical care, both in the services they offer and provide and in their disclosures for such services, freestanding emergency centers may provide non-emergency medical care within the scope of practice of their health care providers.

I. AUTHORITY

This petition is submitted pursuant to section 2001.021 of the Administrative Procedure Act. TEX. GOV'T CODE §2001.001 et. seq. Under section 2001.021, any interested person may, by petition, request the adoption of a rule by a state agency. Section 2001.021 provides that

(c) Not later than the 60th day after the date of submission of a petition under this section, a state agency shall:
(1) deny the petition in writing, stating its reasons for the denial; or
(2) initiate a rulemaking proceeding under this subchapter.

TEX. GOV'T CODE §2001.021 (Vernon 2000). Likewise, pursuant to Title 1 Administration, Part 15 Texas Health and Human Services Commission, Chapter 351 Coordinated Planning and Delivery of Health and Human Services, Subchapter A General Provisions,

Rule §351.2 Petition for the Adoption of a Rule, TAFEC requests that the Executive Commissioner accept this petition and refer the petition to the appropriate program to initiate the rulemaking process under Government Code, Chapter §2001, Subchapter B, within 60 days from the date of submission of the petition by TAFEC.

Freestanding Emergency Centers exist pursuant to Texas Health and Safety Code Chapter 254. Subchapters C and D of Chapter 254 provide HHSC Executive Commissioner with the express authority to propose and adopt rules necessary to implement Chapter 254. Subchapter E of Chapter 254 provides DSHS with the authority to enforce the HHSC rules. DSHS/HHSC rules regulating freestanding emergency centers are found at 25 TAC Ch. 131, et seq.

II. THE PETITIONER

Texas Government Code section 2001.021 provides that an interested person must be:

(1) a resident of this state;
(2) a business entity located in this state;
(3) a governmental subdivision located in this state; or
(4) *a public or private organization located in this state that is not a state agency*.

TEX. GOV'T CODE ANN. §2001.021(d)(emphasis added).

The Petitioner is TAFEC. TAFEC's address is 3305 Steck Ave., Ste. 200, Austin, TX 78757. TAFEC's telephone number is 512-759-8111. TAFEC is a member-based association representing freestanding emergency centers in Texas. TAFEC and its members support consistently straightforward, pro-patient advocacy that promotes the fair and wisely regulated growth of Texas' freestanding emergency center industry to help ensure Texans' timely access to high quality medical care. TAFEC is a trade association that represents over 120 freestanding emergency center locations in Texas. TAFEC is an "interested person" within the meaning of section 2001.021.

III. BASIS FOR THE PETITION

This petition requests both the creation of and amendments to HHSC rules at 25 TAC Ch. 131.

Texas Health and Safety Code chapter 254 does not restrict freestanding emergency centers to providing *only* emergency care and ancillary services. Current HHSC rules do not reference freestanding emergency centers' ability to provide non-emergent or outpatient services. Because freestanding emergency centers are licensed to provide emergency health care 24 hours a day, seven days a week, they are uniquely qualified, and perhaps overqualified, to provide non-emergency outpatient services.

By letter dated July 28, 2020, TAFEC sought clarification and a waiver, if necessary, of the HHSC position that freestanding emergency centers may only provide emergency

medical care. The context for TAFEC's letter was the fact that there are over 185 freestanding emergency centers with 1500 beds available to relieve the burden on hospitals caused by the COVID-19 pandemic. In addition, the wide distribution and small size of freestanding emergency centers would help limit potential contagion.

By letter dated October 22, 2020, HHSC responded that HHSC does not have the authority to "suspend or amend" a statute. HHSC responded that a freestanding emergency center is not prohibited from keeping a patient admitted longer than 23 hours, provided an incident report is submitted to HHSC. The HHSC response, however, rejected TAFEC's request for clarification or a waiver that freestanding emergency centers may provide non-emergency medical care to help alleviate the COVID-19 crisis. Implicit in the HHSC response was the premise that freestanding emergency centers simply cannot provide non-emergency medical care, pandemic crisis or no pandemic crisis. There is no basis, however, for the HHSC position and rules that prohibit freestanding emergency centers from providing non-emergency care.

The Texas Legislature has not seen fit to prohibit freestanding emergency centers from providing non-emergency medical services. Despite this lack of statutory authority for any limitation, HHSC takes the position that they may offer and provide only emergency medical care. The purpose of this petition is to request that HHSC clarify that, so long as freestanding emergency centers clearly delineate between emergency medical care and non-emergency medical care, both in the services they offer and provide and in their disclosures for such services, they may provide non-emergency medical care within the scope of practice of their health care providers.

IV. THE PROPOSED AMENDMENTS TO CHAPTER 131

TAFEC proposes amending 25 TAC §131.1 by adding a new subsection (d) to read as follows, noting the new language with underscoring:

> (d) Nothing in this chapter prohibits freestanding emergency medical care facilities from making available non-emergency care within the scope of practice of its health care providers so long as no emergency exists for the patient and the facility clearly delineates between emergency medical care and non-emergency medical care, and provided the facility discloses whether the freestanding emergency medical care facility is an out of network provider.

25 TAC §131.1(d) (as proposed). This proposed rule plainly allows otherwise licensed medical providers to provide non-emergency care that is within the scope of their practice.

TAFEC proposes amending 25 TAC §131.21(c)(3) to delete the language noted with strike-throughs as follows:

> (c) Scope of facility license.
> . . . .

> (3) A facility shall not have more than one health facility license for the same physical address. The premises of a facility license shall be separated from any other ~~occupancy or~~ licensed health facility by a minimum of a one-hour fire rated wall.

25 TAC §131.21(c)(3) (as proposed). The reason TAFEC requests this deletion is that there is no basis in chapter 254 for such a restriction on the property of freestanding emergency medical care facilities. As a result, it exceeds HHSC and DSHS authority.

TAFEC proposes amending 25 TAC §131.21(c)(4) by deleting the language noted with strikethroughs and adding the language noted with underscoring as follows:

> (c) Scope of facility license.
> . . . .
>
> (4) A facility license authorizes ~~only~~ emergency care services and those procedures that are related to providing emergency care <u>only as described in this chapter; provided, however that a facility is not prohibited from providing non-emergency medical care when no emergency exists within the meaning of 25 TAC §131.2(12) or any emergency that existed has been alleviated such that transfer for advanced care at a hospital is not required, and the non-emergency medical care is within the scope of practice of the health care provider providing the services.</u>

25 TAC §131.21(c)(4) (as proposed).

V. EXPLANATION OF RULE CHANGES

A. Chapter 254 Texas Health & Safety Code

Chapter 254 of the Texas Health & Safety Code governs the licensing and regulation of Freestanding Emergency Medical Care Facilities (FEMCFs). TEX. HEALTH & SAFETY CODE §§254.001 – 254.206. Subchapter D, sections 254.151-254.157, provide for the regulation of FEMCFs. Chapter 254 defines "emergency care," sets forth the criteria for providing emergency care at such facilities, and directs the HHSC to pass rules to govern licensing, the minimum standards for the facilities, and minimum standards of emergency care.

HHSC and DSHS take the position that the Code prohibits FEMCFs from providing any services *other* than emergency services. *See* 25 TAC §131.2(c)(4); *see also* 25 TAC §131.21(c)(3). Nothing in the Code, however, prohibits FEMCFs from providing non-emergency services so long as the FEMCFs do not violate the minimum standards established for emergency services. For that reason, HHSC and DSHS lack the authority to prohibit FEMCFs or their resident physicians from providing non-emergency medical services. HHSC and DSHS, however, can and should require that FEMCFs clearly delineate the difference between emergency and non-emergency medical services.

TAFEC proposes the attached rules to clarify the limits on the DSHS' regulations, to assure that FEMCFs clearly delineate for the public and patients the nature of emergency and non-emergency services, and to assure that FEMCFs are available to the public as medical resources, particularly in urgent situations that do not constitute emergencies.

B. Emergency Care Defined

Section 254.001 of the Code defines "emergency care" as follows:

> (2) "Emergency care" has the meaning assigned by Sections 843.002 and 1301.155, Insurance Code.

TEX. HEALTH & SAFETY CODE §254.001(2).

Section 843.002 of the Insurance Code defines "emergency care" as follows:

> (7) "Emergency care" means health care services provided in a hospital emergency facility, freestanding emergency medical care facility, or comparable emergency facility to evaluate and stabilize medical conditions of a recent onset and severity, including severe pain, that would lead a prudent layperson possessing an average knowledge of medicine and health to believe that the individual's condition, sickness, or injury is of such a nature that failure to get immediate medical care could:
>
> (A) place the individual's health in serious jeopardy;
> (B) result in serious impairment to bodily functions;
> (C) result in serious dysfunction of a bodily organ or part;
> (D) result in serious disfigurement; or
> (E) for a pregnant woman, result in serious jeopardy to the health of the fetus.

TEX. INS. CODE §843.002(7). Section 1301.155 of the Insurance Code defines "emergency care" in virtually identical terms. *See* TEX. INS. CODE §1301.155(a).

Under these sections, when a FEMCF is providing emergency care, it is limited to certain, specific situations. When such a situation exists,

> (a) The facility shall provide to each facility patient, without regard to the individual's ability to pay, an appropriate medical screening, examination, and stabilization within the facility's capability, including ancillary services routinely available to the facility, *to determine whether an emergency medical condition exists and any necessary stabilizing treatment*.

TEX. HEALTH & SAFETY CODE §254.153(a) (emphasis added).

In addition, before providing services, the facility must have a referral agreement with a hospital licensed in the state for the transfer of patients requiring advanced medical care. *See* TEX. HEALTH & SAFETY CODE §254.153(b). The Code directs that the State promulgate rules to govern transfer protocols for patients who require advanced medical care at a hospital. TEX. HEALTH & SAFETY CODE §254.151(a)(12), (b). The State has done so.

Finally, the Code itself imposes notice, disclosure, and advertising limits on FEMCFs with regard to the provision of emergency care. The emergency notices must

> (1) state[]:
>
> (A) the facility is a freestanding emergency medical care facility;
>
> (B) the facility charges rates comparable to a hospital emergency room and may charge a facility fee;
>
> (C) a facility of a physician providing medical care at the facility may be an out-of-network provider for the patients' health benefit plan provider network; and
>
> (D) a physician providing medical care at the facility may bill separately from the facility for the medical care provided to a patient; and
>
> (2) either:
>
> (A) lists the health benefit plans in which the facility is an in-network provider in the health benefit plan's provider network; or
>
> (B) states the facility is an out-of-network provider for all health benefit plans.

TEX. HEALTH & SAFETY CODE §254.155(a). FEMCFs must include substantially similar statements, with a list of fees, in disclosure statements provided to patients on the FEMCF website. TEX. HEALTH & SAFETY CODE §254.156. FEMCFs may not advertise that they take or accept insurance unless they are a provider in a network for a health benefit plan. TEX. HEALTH & SAFETY CODE §254.157.

The reason for these requirements is to let the public know that FEMCFs can have costs for emergency care that are similar to the costs charged by hospital emergency rooms. In addition, the notice and disclosure requirements and the restriction on advertising is for the stability of the health benefit plans because

> (b) If an insured cannot reasonably reach a preferred provider, an insurer shall provide reimbursement for the following emergency care services at the usual and customary rate or at an agreed rate and at the preferred level of benefits until the insured can reasonably be expected to transfer to a preferred provider.

TEX. INS. CODE §1301.155(b). The notice and disclosure requirements were designed to prevent patients who are covered by a health benefit plan from favoring a FEMCF over a hospital that may be in a negotiated provider network.

C. Non-emergency Medical Care is Not Prohibited

HHSC and DSHS have misinterpreted the limits on providing emergency care as a prohibition on providing non-emergency care. Nothing in the language of any of these emergency care standards addresses *non-emergency* care in any way, much less prohibits FEMCFs from actually providing non-emergency care. All FEMCFs have, pursuant to applicable regulations, licensed physicians on-site 24 hours a day, seven days a week. Those licensed physicians are always able to provide non-emergency care as long as the care is in the scope of the license of the physician and does not require any other facility license. For example, physician offices or clinics (as well as urgent care facilities) do not require any licensure except that of the professional staff. Thus, the non-emergency care contemplated by this petition for rulemaking would not expand into what hospitals do, in terms of inpatient services, or ASCs, in terms of outpatient surgery.

The policy reasons for licensing emergency care facilities do not apply to non-emergency care. Nothing in Chapter 254 or the Insurance Code prevents FEMCFs from providing scheduled non-emergency medical services if no emergency exists. If an emergency does not exist, either because a patient seeks non-emergency type care, or because the FEMCF has determined that an emergency does not exist, or because any emergency has been alleviated, nothing prevents the FEMCF from offering and providing non-emergency care. Non-emergency care is not referenced in section 1301.155 of the Insurance Code. Likewise, the requirement in section 254.153 regarding the FEMCF's duty to determine whether an emergency medical condition exists and to provide any necessary stabilizing treatment, all without regard to the patient's ability to pay, would not apply. Those sections, by their plain language apply only to emergency medical care.

For these reasons, HHSC and DSHS lack the authority to prohibit FEMCFs from providing non-emergency care. HHSC and DSHS clearly have the authority, however, to delineate between emergency and non-emergency care and situations under section 254.151(a)(13), which provides as follows:

> (13) any other aspect of the operation of a facility that the executive commissioner considers necessary to protect the facility's patients and the public.

TEX. HEALTH & SAFETY CODE §254.151(a)(13). HHSC and DSHS also have the authority to apply the exemptions from Chapter 254's licensing requirements. *See* TEX. HEALTH & SAFETY CODE §254.052; 25 TAC §131.23.

D. Issues with DSHS FEMCF Rules

The DSHS defines a FEMCF as follows:

> (14) Freestanding Emergency Medical Care Facility – A facility that is structurally separate from a hospital and which receives an individual and provides emergency care as defined in paragraph (12).

25 TAC §131.2(14). The DSHS defines "emergency care" in 25 TAC §131.2(12) in virtually identical language as that used in sections 843.002(7) and 1301.155(a) of the Insurance Code. TEX. INS. CODE §843.002(7), §1301.155(a). Like the statutes upon which they are based, neither of these definitions prohibits FEMCFs from providing non-emergency medical care.

A problem exists, however, in how the DSHS defines the scope of a facility license:

> (c) Scope of facility license.
> . . . .
>
> (3) A facility shall not have more than one health facility license for the same physical address. *The premises of a facility license shall be separated from any other occupancy or licensed health facility by a minimum of a one-hour fire rated wall.*
>
> (4) A facility license authorizes *only emergency care services and those procedures that are related to providing emergency care*.

25 TAC §131.21(c)(3) and (4). HHSC and DSHS historically take the position that non-emergency services cannot be provided at a facility licensed as a FEMCF.

TAFEC maintains that such a limit exceeds HHSC and DSHS authority. If a patient seeks services of a non-emergency nature and/or if, after following all applicable protocols for determining whether a patient requires emergency care, a FEMCF determines that no emergency exists within the meaning of 25 TAC §131.2(12) (or sections 843.002(7) and 1301.155(a) of the Insurance Code) or that any emergency that existed has been alleviated such that transfer for advanced care at a hospital is not required, a FEMCF may offer the patient any non-emergency medical care that is within the scope of practice of the FEMCF's health care providers. It is *not* the proper role of HHSC or DSHS to provide that non-emergency patients be directed only to a "Designated provider" within the meaning of 25 TAC §131.2(10) when the FEMCF either is itself a network provider or the patient elects, after full disclosure, to select the FEMCF as an out of network provider. To avoid confusion and to clearly delineate between emergency and non-emergency care, however, TAFEC proposes the above rules.

VI. CONCLUSION

These rule amendments are necessary to align the HHSC rules with their statutory authority. The Texas Legislature has not prohibited freestanding emergency centers from providing non-emergency medical services. HHSC should clarify this fact. The proposed rules and amendments effectively state that, so long as freestanding emergency centers clearly delineate between emergency medical care and non-emergency medical care, subject to proper and applicable disclosures for such services, freestanding emergency centers may provide non-emergency medical care within the scope of practice of their health care providers.

In addition, there are strong public policy reasons behind formally allowing FEMCFs to deliver non–emergency services. In 2019, the Texas Legislature stated a clear intent for State agencies, boards, commissions and departments to promulgate rules that lower barriers to market participation, result in lower prices, or increase competition for products or services provided by or to license holders in this state. *See* TEX. OCC. CODE ch. 57. The proposed rules would accomplish all three of these stated Legislative goals. FEMCFs are a particularly capital intensive health care option that operate 24 hours a day, seven days a week. That results in a tremendous capacity to provide additional health care to the surrounding patient population. Prohibiting the delivery of non-emergency care limits access to such outpatient health care, and drives up the cost for patients that need emergency care because it requires the full cost of FEMCF equipment, buildings and personnel to be amortized across many fewer patients and services than would be required if non-emergency care services were allowed to share those costs. Thus, the proposed rules are consistent with Legislative intent, support a strong and competitive business environment, and permit a more efficient use of ready and available health care resources.

Similarly, earlier this year the Centers for Medicare and Medicaid Services ("CMS") issued a memorandum in which CMS "identified [FEMCFs] as a critical resource to assist in expanding capacity" for patients requiring a higher level of care." QSO-20-27-Hospital, issued April 21, 2020 (emphasis added); available at https://www.cms.gov/files/document/qso-20-27-hospital.pdf. That CMS memo recognized the need to take "critical steps to ensure America's health care facilities are prepared to respond to the COVID-19 Public Health Emergency," and created a process for FEMCFs to receive a waiver that allowed FEMCFs to "to participate in Medicare and Medicaid to help address the urgent need to increase hospital capacity to provide care to patients." Although CMS' waiver process was directed at FEMCFs, the waivers did not limit FEMCFs to providing only emergency care to Medicare and Medicaid patients. In fact, several times CMS referenced its intent that FEMCFs provide such outpatient services to Medicare and Medicaid patients. These proposed rules would give full effect to CMS' request that FEMCFs participate in Medicare and Medicaid to the extent they are able.

We look forward to receiving the HHSC's and DSHS's timely response, within 60 days, as provided in section 2001.021(c) of the APA.

Respectfully submitted this November 13, 2020.

Sincerely,

/s/ Jennifer Riggs

Jennifer Riggs

Jason Ray

Cc: Karen Ray, HHSC Chief Counsel
Victoria Ford, HHSC Chief Policy and Regulatory Officer
Dr. Hellerstedt, DSHS Commissioner
Barbara Klein, DSHS General Counsel
David Koustron, Deputy Executive Commissioner, Regulatory Services Division
Kristi Jordan, Associate Commissioner, Health Care Regulation
Rachel Turner, Health Facility Compliance Manager