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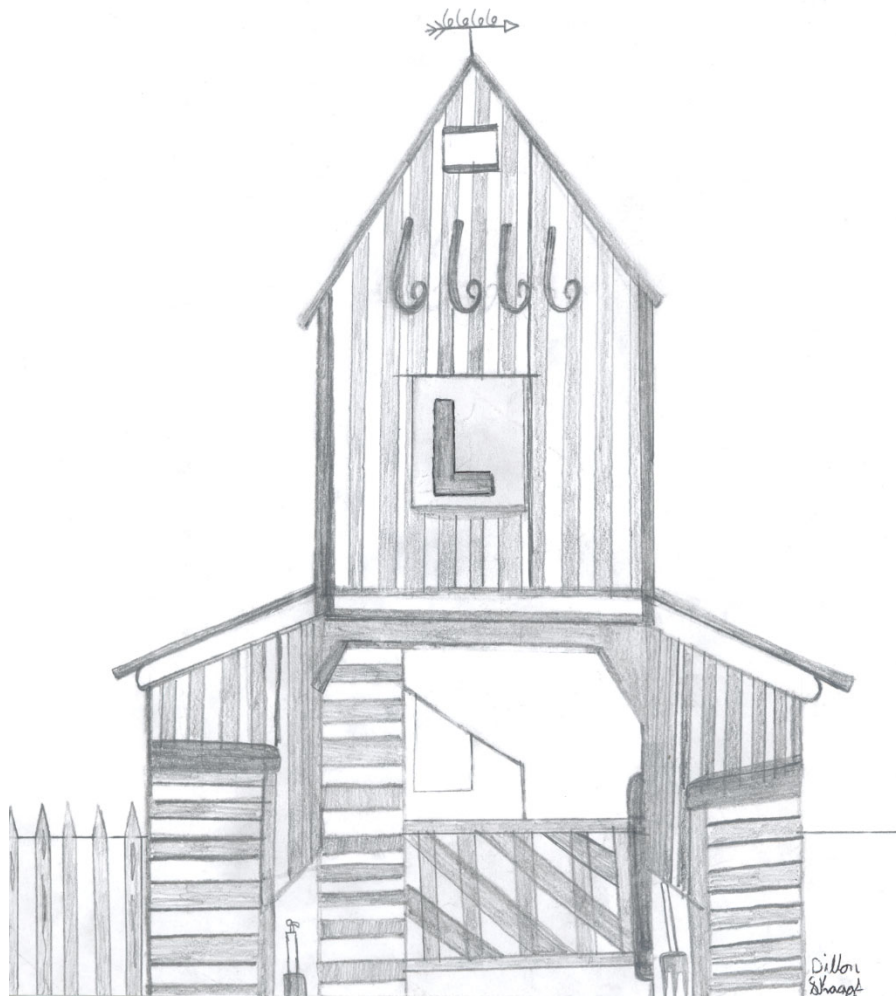
# TEXAS REGISTER

*Volume 44 Number 37*

*September 13, 2019*

*Pages 4911 - 5192*

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School children's artwork is used to decorate the front cover and blank filler pages of the *Texas Register*. Teachers throughout the state submit the drawings for students in grades K-12. The drawings dress up the otherwise gray pages of the *Texas Register* and introduce students to this obscure but important facet of state government.

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# TEXAS REGISTER

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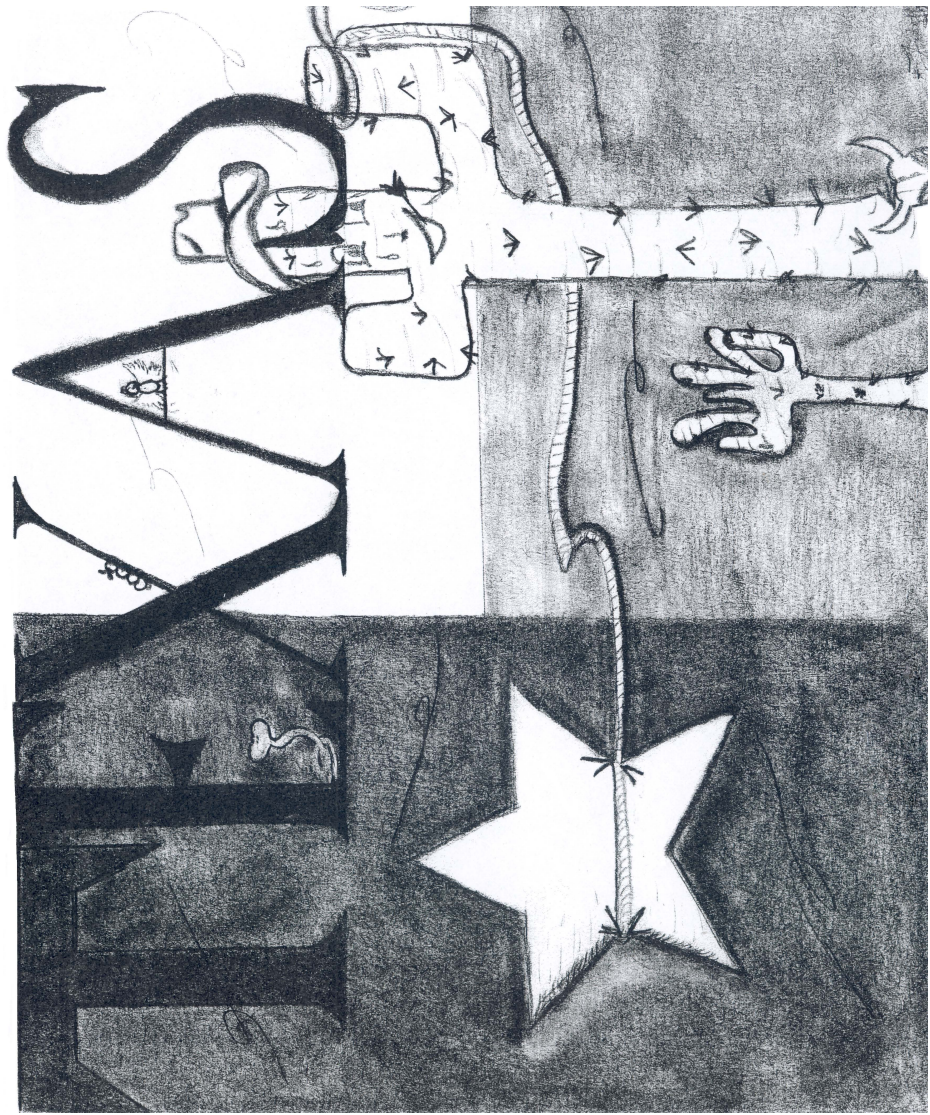
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# THE GOVERNOR

As required by Government Code, §2002.011(4), the *Texas Register* publishes executive orders issued by the Governor of Texas. Appointments and proclamations are also published. Appointments are published in chronological order. Additional information on documents submitted for publication by the Governor's Office can be obtained by calling (512) 463-1828.

## Appointments

### Appointments for July 19, 2019

Appointed to the Juvenile Justice Advisory Board, for a term to expire June 30, 2025, Timothy J. McCoy of Corpus Christi, Texas (pursuant to Executive Order RP-09).

### Appointments for July 24, 2019

Appointed to the Texas County and District Retirement System Board of Trustees, for a term to expire December 31, 2021, Christopher T. Hill of McKinney, Texas (replacing William B. Metzger of Sunnyvale who resigned).

### Appointments for July 25, 2019

Appointed to the Jobs and Education for Texans Grant Program Advisory Board, for a term to expire June 19, 2021, William P. Conley of Wimberley, Texas (Commissioner Conley is being reappointed).

Appointed to the Texas Health Services Authority Board of Directors, for a term to expire June 15, 2021, Paula E. Anthony-McMann, Ph.D. of Tyler, Texas (Dr. Anthony-McMann is being reappointed).

Appointed to the Texas Health Services Authority Board of Directors, for a term to expire June 15, 2021, Victoria Ai Linh Bryant, Pharm.D. of Houston, Texas (Dr. Bryant is being reappointed).

Appointed to the Texas Health Services Authority Board of Directors, for a term to expire June 15, 2021, Shannon S. Calhoun of Goliad, Texas (Ms. Calhoun is being reappointed).

Appointed to the Texas Health Services Authority Board of Directors, for a term to expire June 15, 2021, Lourdes M. Cuellar of Houston, Texas (Ms. Cuellar is being reappointed).

Appointed to the Texas Health Services Authority Board of Directors, for a term to expire June 15, 2021, Salil V. Deshpande, M.D. of Houston, Texas (Dr. Deshpande is being reappointed).

Appointed to the Texas Health Services Authority Board of Directors, for a term to expire June 15, 2021, Emily F. Hartmann of El Paso, Texas (Ms. Hartmann is being reappointed).

Appointed to the Texas Health Services Authority Board of Directors, for a term to expire June 15, 2021, Kenneth S. James of Volente, Texas (Mr. James is being reappointed).

Appointed to the Texas Health Services Authority Board of Directors, for a term to expire June 15, 2021, Jerome P. Lisk, M.D. of Tyler, Texas (Dr. Lisk is being reappointed).

Appointed to the Texas Health Services Authority Board of Directors, for a term to expire June 15, 2021, Leticia C. Rodriguez of Monahans, Texas (Ms. Rodriguez is being reappointed).

Appointed to the Texas Health Services Authority Board of Directors, for a term to expire June 15, 2021, Jonathan J. Sandstrom Hill of Lake-way, Texas (Mr. Hill is being reappointed).

Appointed to the Texas Health Services Authority Board of Directors, for a term to expire June 15, 2021, Siobhan Shahan of Lubbock, Texas (Ms. Shahan is being reappointed).

Appointed to the Texas Health Services Authority Board of Directors, for a term to expire June 15, 2021, Carlos J. Vital, M.D. of Friendswood, Texas (Dr. Vital is being reappointed).

Appointed to the Texas Health Services Authority Board of Directors as an Ex-Officio Member, for a term to expire June 15, 2021, Calvin J. Green of Elgin, Texas (Mr. Green is being reappointed).

Appointed to the Texas Health Services Authority Board of Directors as an Ex-Officio Member, for a term to expire June 15, 2021, Jeffrey W. Hoogheem of Killteen, Texas (Mr. Hoogheem is being reappointed).

### Appointments for July 29, 2019

Appointed to the Texas Workforce Commission, for a term to expire February 1, 2025, Robert B. Daniel of Georgetown, Texas (replacing Robert D. Thomas of Austin whose term expired).

### Appointments for July 30, 2019

Appointed to the Appraisal Management Companies Advisory Committee, for a term to expire January 31, 2021, John H. Eichelberger, III of Houston, Texas (replacing Lawrence J. McNamara of Dallas whose term expired).

Appointed to the Appraisal Management Companies Advisory Committee, for a term to expire January 31, 2021, Lisa J. Rodriguez of Schertz, Texas (replacing Sara Jones Oates of Austin whose term expired).

### Appointments for July 31, 2019

Appointed to the Crime Victims' Institute Advisory Council, for a term to expire January 31, 2020, Michael S. Kennington of Pittsburg, Texas (replacing Rodman F. Goode of Cedar whose term expired).

Appointed to the Crime Victims' Institute Advisory Council, for a term to expire January 31, 2020, Jeffrey L. Oldham of Austin, Texas (replacing Mary Anne Wiley of Austin whose term expired).

Appointed to the Crime Victims' Institute Advisory Council, for a term to expire January 31, 2020, Eugene P. Pack of Houston, Texas (replacing Henry S. Porretto of Galveston whose term expired).

Appointed to the Crime Victims' Institute Advisory Council, for a term to expire January 31, 2020, Jeffery D. Robertson of Wimberley, Texas (replacing Deborah K. Unruh of Austin whose term expired).

Appointed to the Crime Victims' Institute Advisory Council, for a term to expire January 31, 2020, Andrea Sparks of Austin, Texas (replacing Victoria H. Camp of Austin whose term expired).

Appointed to the Crime Victims' Institute Advisory Council, for a term to expire January 31, 2020, Hector L. Villarreal of Alice, Texas (replacing Dorothy J. Carmichael of College Station whose term expired).

Appointed to the Crime Victims' Institute Advisory Council, for a term to expire January 31, 2021, Abigail C. Brookshire of Midlothian, Texas (replacing Stephanie Anne Schulte of El Paso whose term expired).

Appointed to the Crime Victims' Institute Advisory Council, for a term to expire January 31, 2021, Elizabeth L. Hamilton of Round Rock, Texas (replacing Janie Lee Shafer of San Antonio whose term expired).

Appointed to the Crime Victims' Institute Advisory Council, for a term to expire January 31, 2021, Joan Huffman of Houston, Texas (replacing Robert Duncan of Lubbock whose term expired).

Appointed to the Crime Victims' Institute Advisory Council, for a term to expire January 31, 2021, Randall S. MacNaughton, II of San Antonio, Texas (replacing Mark H. Wilson of Brandon whose term expired).

Appointed to the Crime Victims' Institute Advisory Council, for a term to expire January 31, 2021, James White of Hillister, Texas (replacing Stefani D. Carter of Dallas whose term expired).

Appointed to the Crime Victims' Institute Advisory Council, for a term to expire January 31, 2021, Erleigh N. Wiley of Forney, Texas (replacing Geoffery D. Puryear of Cedar Park whose term expired).

Appointed to the Commission on State Emergency Communications, for a term to expire September 1, 2019, Clinton Sawyer of Amherst, Texas (replacing Terry J. Henley of Meadows Place who resigned).

#### **Appointments for August 1, 2019**

Appointed to the Rehabilitation Council of Texas, for a term to expire October 29, 2021, Lonny Matthew Berend of Abilene, Texas (Mr. Berend is being reappointed).

Appointed to the Rehabilitation Council of Texas, for a term to expire October 29, 2021, Lisa M. Taylor Cowart of Beaumont, Texas (replacing Troyon R. Myree of Houston whose term expired).

Appointed to the Rehabilitation Council of Texas, for a term to expire October 29, 2021, JoAnne J. Fluke of Lumberton, Texas (Ms. Fluke is being reappointed).

Appointed to the Rehabilitation Council of Texas, for a term to expire October 29, 2021, Paul R. Hunt of Austin, Texas (Mr. Hunt is being reappointed).

Appointed to the Rehabilitation Council of Texas, for a term to expire October 29, 2021, Joseph D. Powell of Grapevine, Texas (replacing Casey D. Hertel of Abilene whose term expired).

Appointed to the Rehabilitation Council of Texas, for a term to expire October 29, 2021, Colton J. Read of New Braunfels, Texas (replacing James M. Brocato of Beaumont whose term expired).

Appointed to the Rehabilitation Council of Texas, for a term to expire October 29, 2021, Crystal W. Stark of College Station, Texas (Ms. Stark is being reappointed).

Appointed to the Rehabilitation Council of Texas, for a term to expire at the pleasure of the Governor, Cheryl A. Fuller of Austin, Texas (Ms. Fuller is being reappointed).

#### **Appointments for August 2, 2019**

Appointed to the Rio Grande Compact Commission, for a term to expire June 9, 2025, Patrick R. Gordon of El Paso, Texas (Mr. Gordon is being reappointed).

#### **Appointments for August 6, 2019**

Appointed to the Parks and Wildlife Commission as Presiding Officer, for a term to expire at the pleasure of the Governor, Stanley Morian of Houston, Texas (replacing Ralph H. Duggins, III of Forth Worth as presiding officer).

Appointed to the Parks and Wildlife Commission, for a term to expire February 1, 2021, Anna Benavides Galo of Laredo, Texas (replacing Kelcy L. Warren of Dallas who resigned).

Appointed to the Parks and Wildlife Commission, for a term to expire February 1, 2025, James E. Abell of Tyler, Texas (replacing Anna Benavides Galo of Laredo whose term expired).

Appointed to the Parks and Wildlife Commission, for a term to expire February 1, 2025, Jeffery D. Hildebrand of Houston, Texas (replacing James H. Lee of Houston whose term expired).

Appointed to the Parks and Wildlife Commission, for a term to expire February 1, 2025, Robert L. Patton, Jr. of Fort Worth, Texas (replacing Ralph H. Duggins, III of Forth Worth whose term expired).

#### **Appointments for August 7, 2019**

Appointed to the State Securities Board as Presiding Officer, for a term to expire at the pleasure of the Governor, E. Wallace Kinney of Comfort, Texas (replacing Beth Ann Blackwood of Dallas as presiding officer).

Appointed to the State Securities Board, for a term to expire January 20, 2025, Mary Tyroch Bragg of Belton, Texas (replacing Beth Ann Blackwood of Dallas whose term expired).

#### **Appointments for August 8, 2019**

Appointed to the Credit Union Commission as Presiding Officer, for a term to expire at the pleasure of the Governor, Yusuf E. Farran of El Paso, Texas (replacing Allyson Morrow of San Benito as presiding officer).

Appointed to the Credit Union Commission, for a term to expire February 15, 2023, Karyn C. Brownlee of Coppell, Texas (replacing Ricky E. Ybarra of Austin who resigned).

Appointed to the Credit Union Commission, for a term to expire February 15, 2025, Elizabeth L. Bayless of Austin, Texas (Ms. Bayless is being reappointed).

Appointed to the Credit Union Commission, for a term to expire February 15, 2025, Terrolyn Rankin-Swan of Monahans, Texas (replacing Barbara Stewart of Daingerfield whose term expired).

Appointed to the Credit Union Commission, for a term to expire February 15, 2025, David F. Schurtz of Hudson Oaks, Texas (replacing Allyson Morrow of San Benito whose term expired).

#### **Appointments for August 9, 2019**

Appointed to the Nueces River Authority Board of Directors, for a term to expire February 1, 2025, Jane D. Bell of Corpus Christi, Texas (replacing Rebecca Bradford of Corpus Christi whose term expired).

Appointed to the Nueces River Authority Board of Directors, for a term to expire February 1, 2025, Dane C. Bruun of Corpus Christi, Texas (Mr. Bruun is being reappointed).

Appointed to the Nueces River Authority Board of Directors, for a term to expire February 1, 2025, Dan S. Leyendecker of Corpus Christi, Texas (Mr. Leyendecker is being reappointed).

Appointed to the Nueces River Authority Board of Directors, for a term to expire February 1, 2025, Jason B. Peeler of Floresville, Texas (replacing Jesse B. Burton, III of San Antonio whose term expired).

Appointed to the Nueces River Authority Board of Directors, for a term to expire February 1, 2025, David E. Purser of Karnes City, Texas (Mr. Purser is being reappointed).



Appointed to the Nueces River Authority Board of Directors, for a term to expire February 1, 2025, Armandina G. Ramirez of Karnes City, Texas (Ms. Ramirez is being reappointed).

Appointed to the Nueces River Authority Board of Directors, for a term to expire February 1, 2025, Anita L. Shackelford of Leakey, Texas (replacing Joe C. McMillian of Dilley whose term expired).

**Appointments for August 12, 2019**

Appointed to the Texas Transportation Commission, for a term to expire February 1, 2025, Robert C. Vaughn of Dallas, Texas (replacing Jeff Austin, III of Tyler whose term expired).

Appointed to the Texas Behavioral Health Executive Council, effective September 1, 2019, for a term to expire February 1, 2025, Gloria Z. Canseco of San Antonio, Texas (pursuant to HB 1501, 86th Legislature, Regular Session)

**Appointments for August 13, 2019**

Appointed to the Texas Lottery Commission, for a term to expire February 1, 2023, Erik C. Saenz of Houston, Texas (replacing Douglas E. Lowe of Palestine whose term expired).

Appointed to the Texas Funeral Service Commission, for a term to expire February 1, 2025, Kevin A. Combest of Lubbock, Texas (replacing Gary E. Shaffer of San Angelo whose term expired).

Appointed to the Texas Funeral Service Commission, for a term to expire February 1, 2025, Melanie H. Grammar of Whitewright, Texas (replacing Jean L. Olinger, Ph.D. of Blanco whose term expired).

Appointed to the Texas Funeral Service Commission, for a term to expire February 1, 2025, Jonathan F. Scepanski of McAllen, Texas (Mr. Scepanski is being reappointed).

**Appointments for August 14, 2019**

Appointed to the Sabine River Compact Administration, for a term to expire July 12, 2025, Michael H. Lewis of Newton, Texas (Mr. Lewis is being reappointed).

**Appointments for August 15, 2019**

Appointed to the Education Commission of the States, for a term to expire at the pleasure of the Governor, Senator Peter Flores of Pleasanton, Texas (replacing Senator Royce West of Dallas).

Appointed to the Education Commission of the States, for a term to expire at the pleasure of the Governor, Representative Dan Huberty of Humble, Texas (replacing Representative Ronald E. Simmons of Carrollton).

Appointed to the Governing Board of the Texas Indigent Defense Commission, for a term to expire February 1, 2020, Valerie Covey of Georgetown, Texas (replacing Christopher T. Hill of McKinney who resigned).

**Appointments for August 16, 2019**

Appointed to the Texas Judicial Council, for a term to expire June 30, 2025, Sonia V. Clayton of Spring, Texas (Ms. Clayton is being reappointed).

**Appointments for August 19, 2019**

Appointed as the Secretary of State, for a term to expire January 16, 2023, Ruth Ruggero Hughs of Austin, Texas (replacing Gregory D. Whitley of Austin who resigned).

**Appointments for August 20, 2019**

Appointed to the Texas Workforce Commission as Presiding Officer, for a term to expire at the pleasure of the Governor, Robert B. Daniel

of Georgetown, Texas (replacing Ruth Ruggero Hughs as presiding officer).

Appointed to the Texas Workforce Commission, for a term to expire February 1, 2021, Aaron S. Demerson of Austin, Texas (replacing Ruth Ruggero Hughs of Austin who resigned).

**Appointments for August 26, 2019**

Appointed as the Border Commerce Coordinator, for a term to expire at the pleasure of the Governor, Ruth Ruggero Hughs of Austin, Texas (replacing Gregory D. Whitley of Austin)

Appointed to the Health and Human Services Transition Legislative Oversight Committee, for a term to expire at the pleasure of the Governor, Wayne K. Carson, Ph.D. of Arlington, Texas (replacing John D. Colyandro of Austin who resigned).

Appointed to the Health and Human Services Transition Legislative Oversight Committee, for a term to expire at the pleasure of the Governor, Bonnie C. Hellums of Houston, Texas (replacing Heather Griffith Peterson of Austin who resigned).

**Appointments for August 27, 2019**

Appointed to the Judicial Compensation Commission, for a term to expire February 1, 2025, Carlos Z. Amaral of San Antonio, Texas (replacing Robert E. Lindsey, III of Goldthwaite whose term expired).

Appointed to the Judicial Compensation Commission, for a term to expire February 1, 2025, Rebeca Aizpuru Huddle of Bellaire, Texas (Justice Huddle is being reappointed).

Appointed to the Judicial Compensation Commission, for a term to expire February 1, 2025, Curtis H. Nelson of San Antonio, Texas (replacing Linda B. Russell of League City whose term expired).

Greg Abbott, Governor

TRD-201903030



Executive Order GA-07

WHEREAS, on August 3, 2019, a gunman killed twenty-two people in El Paso and injured dozens more in a despicable act of domestic terrorism; and

WHEREAS, the mother of the El Paso gunman had previously expressed concern to police about her son and the weapon with which he would later commit his cowardly attack; and

WHEREAS, on August 31, 2019, another gunman heinously killed seven people in Odessa and injured dozens more; and

WHEREAS, the Odessa gunman had called both the police and the Federal Bureau of Investigation prior to his shooting spree, had previously failed a background check, and was recently reported to law enforcement for confronting a neighbor while brandishing a semiautomatic rifle; and

WHEREAS, these tragic events come in the wake of other mass shootings in Texas, including one in which a gunman in Santa Fe opened fire in his high school with a shotgun and a revolver, another in which a gunman murdered worshippers at their church in Sutherland Springs, and another in which a gunman fatally ambushed police officers in Dallas; and

WHEREAS, mental instability, racial hatred, extremist ideology, a desire to sow domestic terror, and other factors have contributed to these horrific mass shootings in varying degrees; and

WHEREAS, legislative action has been and will be taken to safeguard against these dangers; and

WHEREAS, in addition to further legislative action, executive action can be taken immediately to help prevent more mass shootings and keep Texans safe; and

WHEREAS, revised and readily available standards for gathering and processing information about potential criminal or terrorist acts can lead to swifter action by law enforcement to prevent such acts, including mass shootings;

NOW, THEREFORE, I, GREG ABBOTT, Governor of the State of Texas, by virtue of the power and authority vested in me by the Constitution and Statutes of the State of Texas, do hereby order the following:

Order No. 1: Within thirty days of this order, the Texas Department of Public Safety shall develop standardized intake questions that can be used by all Texas law-enforcement agencies to better identify whether a person calling the agency has information that should be reported to the Texas Suspicious Activity Reporting Network.

Order No. 2: Within thirty days of this order, the Department of Public Safety shall develop clear guidance, based on the appropriate legal standard, for when and how Texas law-enforcement agencies should submit Suspicious Activity Reports.

Order No. 3: Within sixty days of this order, the Texas Commission on Law Enforcement shall make training available to educate all law-enforcement officers regarding the standards that will be developed pursuant to Order No. 1 and Order No. 2.

Order No. 4: The Department of Public Safety shall create and conduct an initiative to raise public awareness and understanding of how Suspicious Activity Reports are used by law-enforcement agencies to identify potential mass shooters or terroristic threats, so that the general public and friends, family members, coworkers, neighbors, and classmates will be more likely to report information about potential gunmen.

Order No. 5: The Department of Public Safety shall work with the Texas Education Agency and the Texas Higher Education Coordinating Board on ways to better inform schools, students, staff, and families about the importance of Suspicious Activity Reports and how to initiate that process.

Order No. 6: The Department of Public Safety shall work with local law enforcement, mental-health professionals, school districts, and others to create multidisciplinary threat assessment teams for each of its regions, and when appropriate shall coordinate with federal partners.

Order No. 7: The Department of Public Safety, as well as the Office of the Governor, shall use all available resources to increase staff at all fusion centers in Texas for the purpose of better collecting and responding to Suspicious Activity Reports, and better monitoring and analyzing social media and other online forums, for potential threats.

Order No. 8: Beginning January 1, 2020, all future grant awards from the Office of the Governor to counties shall require a commitment that the county will report at least 90 percent of convictions within seven business days to the Criminal Justice Information System at the Department of Public Safety. By January 1, 2021, such reporting must take place within five business days.

This executive order supersedes all previous orders on this matter that are in conflict or inconsistent with its terms, and this order shall remain in effect and in full force until modified, amended, rescinded, or superseded by me or by a succeeding governor.

Given under my hand this the 5th day of September, 2019.

Greg Abbott, Governor

TRD-201903105



Proclamation 41-3689

**TO ALL TO WHOM THESE PRESENTS SHALL COME:**

I, GREG ABBOTT, Governor of the State of Texas, do hereby certify that exceptional drought conditions pose a threat of imminent disaster in Duval, Hall, Jim Hogg, Randall, Swisher, Webb, and Zapata counties.

WHEREAS, significantly low rainfall and prolonged dry conditions continue to increase the threat of wildfire across these portions of the state; and

WHEREAS, these drought conditions pose an imminent threat to public health, property, and the economy;

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby declare a state of disaster in the previously listed counties based on the existence of such threat.

Pursuant to Section 418.017 of the code, I authorize the use of all available resources of state government and of political subdivisions that are reasonably necessary to cope with this disaster.

Pursuant to Section 418.016 of the code, any regulatory statute prescribing the procedures for conduct of state business or any order or rule of a state agency that would in any way prevent, hinder, or delay necessary action in coping with this disaster shall be suspended upon written approval of the Office of the Governor. However, to the extent that the enforcement of any state statute or administrative rule regarding contracting or procurement would impede any state agency's emergency response that is necessary to protect life or property threatened by this declared disaster, I hereby authorize the suspension of such statutes and rules for the duration of this declared disaster.

In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my office in the City of Austin, Texas, this the 23rd day of August, 2019.

Greg Abbott, Governor

TRD-201903088



Proclamation 41-3690

**TO ALL TO WHOM THESE PRESENTS SHALL COME:**

WHEREAS, I, GREG ABBOTT, Governor of the State of Texas, issued a disaster proclamation on August 23, 2017, certifying that Hurricane Harvey posed a threat of imminent disaster for Aransas, Austin, Bee, Brazoria, Calhoun, Chambers, Colorado, DeWitt, Fayette, Fort Bend, Galveston, Goliad, Gonzales, Harris, Jackson, Jefferson, Jim Wells, Karnes, Kleberg, Lavaca, Liberty, Live Oak, Matagorda, Nueces, Refugio, San Patricio, Victoria, Waller, Wharton and Wilson counties; and

WHEREAS, the disaster proclamation of August 23, 2017, was subsequently amended on August 26, August 27, August 28 and September 14 to add the following counties to the disaster proclamation: Angelina, Atascosa, Bastrop, Bexar, Brazos, Burleson, Caldwell, Cameron, Comal, Grimes, Guadalupe, Hardin, Jasper, Kerr, Lee, Leon, Madison, Milam, Montgomery, Newton, Orange, Polk, Sabine, San Augustine, San Jacinto, Trinity, Tyler, Walker, Washington and Willacy; and

WHEREAS, on September 20, 2017, and in each subsequent month effective through today, I issued proclamations renewing the disaster declaration for all counties listed above; and

WHEREAS, due to the catastrophic damage caused by Hurricane Harvey, a state of disaster continues to exist in those same counties;

NOW, THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby renew the disaster proclamation for the 60 counties listed above.

Pursuant to Section 418.017 of the code, I authorize the use of all available resources of state government and of political subdivisions that are reasonably necessary to cope with this disaster.

Pursuant to Section 418.016 of the code, any regulatory statute prescribing the procedures for conduct of state business or any order or rule of a state agency that would in any way prevent, hinder or delay necessary action in coping with this disaster shall be suspended upon written approval of the Office of the Governor. However, to the extent that the enforcement of any state statute or administrative rule regarding contracting or procurement would impede any state agency's emergency response that is necessary to protect life or property threatened by this declared disaster, I hereby authorize the suspension of such statutes and rules for the duration of this declared disaster.

In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my office in the City of Austin, Texas, this the 30th day of August, 2019.

Greg Abbott, Governor

TRD-201903089



Proclamation 41-3691

**TO ALL TO WHOM THESE PRESENTS SHALL COME:**

I, GREG ABBOTT, Governor of the State of Texas, certified on August 23, 2019, that exceptional drought conditions posed a threat of immi-

nent disaster in Duval, Hall, Jim Hogg, Randall, Swisher, Webb, and Zapata counties. I hereby certify those conditions continue and also now threaten Briscoe, Brooks, Castro, Nueces, Jim Wells, San Patricio, Wilbarger, and Wichita counties.

WHEREAS, significantly low rainfall and prolonged dry conditions continue to increase the threat of wildfire across these portions of the state; and

WHEREAS, these drought conditions pose an imminent threat to public health, property, and the economy;

THEREFORE, in accordance with the authority vested in me by Section 418.014 of the Texas Government Code, I do hereby declare a state of disaster in all of the counties listed above based on the existence of such threat.

Pursuant to Section 418.017 of the code, I authorize the use of all available resources of state government and of political subdivisions that are reasonably necessary to cope with this disaster.

Pursuant to Section 418.016 of the code, any regulatory statute prescribing the procedures for conduct of state business or any order or rule of a state agency that would in any way prevent, hinder, or delay necessary action in coping with this disaster shall be suspended upon written approval of the Office of the Governor. However, to the extent that the enforcement of any state statute or administrative rule regarding contracting or procurement would impede any state agency's emergency response that is necessary to protect life or property threatened by this declared disaster, I hereby authorize the suspension of such statutes and rules for the duration of this declared disaster.

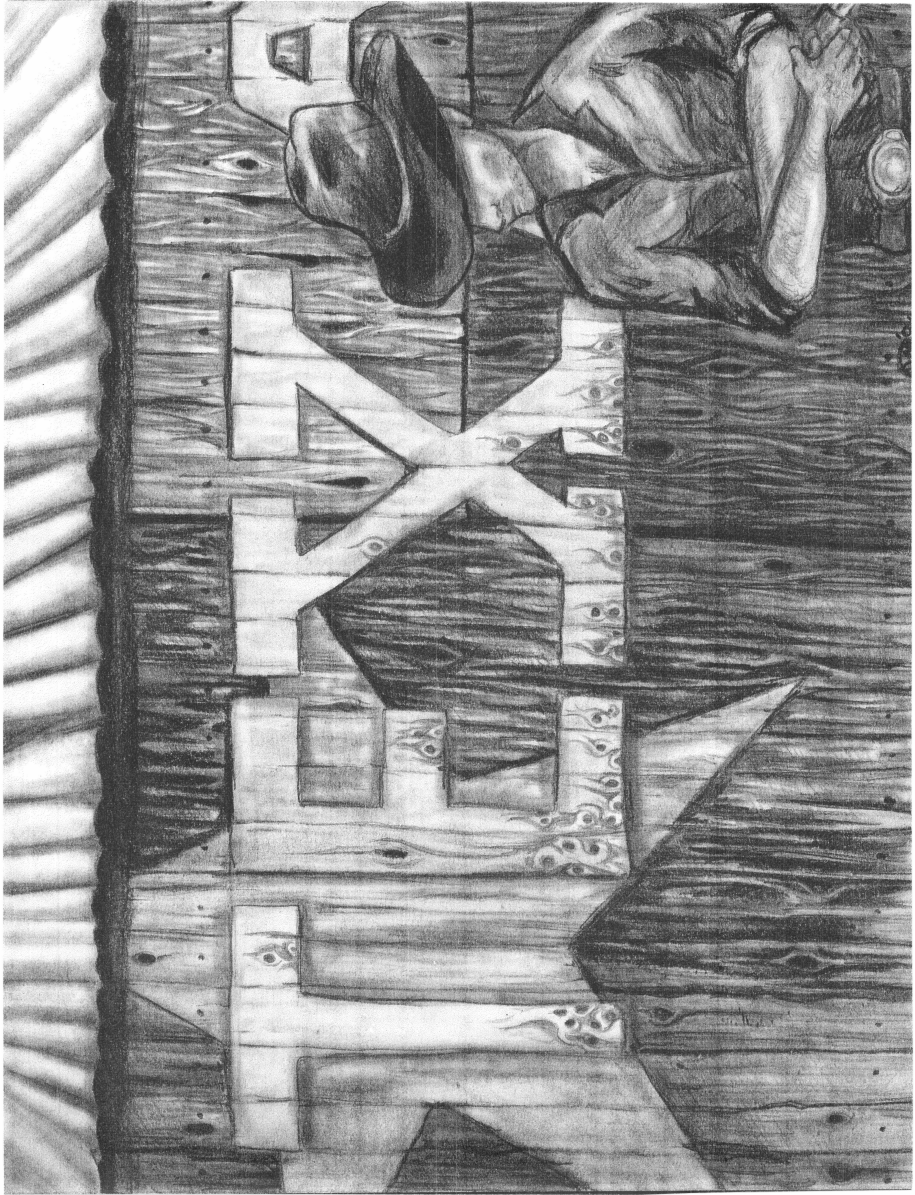
In accordance with the statutory requirements, copies of this proclamation shall be filed with the applicable authorities.

IN TESTIMONY WHEREOF, I have hereunto signed my name and have officially caused the Seal of State to be affixed at my office in the City of Austin, Texas, this the 30th day of August, 2019.

Greg Abbott, Governor

TRD-201903087





# PROPOSED RULES

Proposed rules include new rules, amendments to existing rules, and repeals of existing rules. A state agency shall give at least 30 days' notice of its intention to adopt a rule before it adopts the rule. A state agency shall give all interested persons a reasonable opportunity to submit data, views, or arguments, orally or in writing (Government Code, Chapter 2001).

**Symbols in proposed rule text.** Proposed new language is indicated by underlined text. ~~[Square brackets and strikethrough]~~ indicate existing rule text that is proposed for deletion. “(No change)” indicates that existing rule text at this level will not be amended.

## TITLE 16. ECONOMIC REGULATION

### PART 2. PUBLIC UTILITY COMMISSION OF TEXAS

#### CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS

##### SUBCHAPTER S. WHOLESALE MARKETS

###### 16 TAC §25.502

The Public Utility Commission of Texas (commission) proposes amendments to §25.502, relating to pricing safeguards in markets operated by the Electric Reliability Council of Texas. The proposed amendments will remove provisions relating to commission approval of ERCOT protocol amendments related to non-competitive constraints that are no longer needed, and make stylistic updates.

###### Public Benefits

Ms. Mueller has also determined that for each year of the first five years the proposed section is in effect, the anticipated public benefits expected as a result of the adoption of the proposed rule will be elimination of regulatory approvals that are no longer needed and removal of obsolete provisions. There will be no probable economic cost to persons required to comply with the rule under Texas Government Code §2001.024(a)(5).

###### Fiscal Impact on Small and Micro-Businesses and Rural Communities

There is no adverse economic effect anticipated for small businesses, micro-businesses, or rural communities as a result of implementing the proposed rule. Accordingly, no economic impact statement or regulatory flexibility analysis is required under Texas Government Code §2006.002(c).

###### Takings Impact Analysis

The commission has determined that the proposed rule will not be a taking of private property as defined in chapter 2007 of the Texas Government Code.

###### Fiscal Impact on State and Local Government

Paula Mueller, Rules Director, has determined that for the first five-year period the proposed amendments are in effect, there will be no fiscal implications for the state or for units of local government under Texas Government Code §2001.024(a)(4) as a result of enforcing or administering the sections.

###### Local Employment Impact Statement

For each year of the first five years the proposed section is in effect there should be no effect on a local economy; therefore, no local employment impact statement is required under Texas Government Code §2001.022.

###### Costs to Regulated Persons

Texas Government Code §2001.0045(b) does not apply to this rulemaking because the Public Utility Commission is expressly excluded under subsection §2001.0045(c)(7).

###### Growth Impact Statement

The agency provides the following governmental growth impact statement for the proposed rule, as required by Texas Government Code §2001.0221. The agency has determined that for each year of the first five years that the proposed rule is in effect, the following statements will apply:

- (1) the proposed rule will not create a government program and will not eliminate a government program;
- (2) implementation of the proposed rule will not require the creation of new employee positions and will not require the elimination of existing employee positions;
- (3) implementation of the proposed rule will not require an increase and will not require a decrease in future legislative appropriations to the agency;
- (4) the proposed rule will not require an increase and will not require a decrease in fees paid to the agency;
- (5) the proposed rule will not create a new regulation;
- (6) the proposed rule will limit an existing regulation by eliminating a requirement for commission approval of ERCOT protocol revisions related to non-competitive constraints;
- (7) the proposed rule will not change the number of individuals subject to the rule's applicability; and
- (8) the proposed rule will not affect this state's economy.

###### Public Hearing

The commission staff will conduct a public hearing on this rulemaking, if requested in accordance with Texas Government Code §2001.029, at the commission's offices located in the William B. Travis Building, 1701 North Congress Avenue, Austin, Texas 78701 on October 22, 2019 at 9:00 a.m. The request for a public hearing must be received within 15 days after publication.

###### Public Comments

Comments on the proposed amendments may be filed with the commission's filing clerk at 1701 North Congress Avenue, Austin, Texas or mailed to P.O. Box 13326, Austin, Texas 78711-3326, within 15 days after publication. Sixteen copies

of comments to the proposed amendment are required to be filed by 16 TAC §22.71(c). Comments should be organized in a manner consistent with the organization of the proposed rule. The commission invites specific comments regarding the costs associated with, and benefits that will be gained by, implementation of the proposed rule. The commission will consider the costs and benefits in deciding whether to adopt the rule. All comments should refer to project number 49788.

#### Statutory Authority

This amendment is proposed under §14.002 of the Public Utility Regulatory Act, Tex. Util. Code Ann. (West 2016 and Supp. 2017) (PURA), which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, PURA §39.151 which grants the commission the authority to adopt rules relating to the reliability of the regional electric network and accounting for the production and delivery of electricity among generators and all other market participants.

Cross reference to statutes: Public Utility Regulatory Act §§14.002 and 39.151.

§25.502. *Pricing Safeguards in Markets Operated by the Electric Reliability Council of Texas.*

(a) - (c) (No change.)

(d) Control of resources. Each resource entity must [shalt] inform ERCOT as to each resource that it controls, and provide proof that is sufficient for ERCOT to verify control. In addition, the resource entity must [shalt] notify ERCOT of any change in control of a resource that it controls no later than 14 calendar days prior to the date that the change in control takes effect, or as soon as possible in a situation where the resource entity cannot meet the 14 calendar day notice requirement. For purposes of this section, "control" means ultimate decision-making authority over how a resource is dispatched and priced, either by virtue of ownership or agreement, and a substantial financial stake in the resource's profitable operation. If a resource is jointly controlled, the resource entities must [shalt] inform ERCOT of any right to use an identified portion of the capacity of the resource. Resources under common control will [shalt] be considered affiliated.

(e) RMR resources. Except for the occurrence of a forced outage, a generation entity must [shalt] submit to ERCOT in writing a notice of suspension of operation no later than 150 calendar days prior to the suspension date. If a generation resource is to be mothballed on a seasonal basis in accordance with ERCOT protocols, the generation entity must [shalt] submit in writing a notice of suspension of operation no later than 90 calendar days prior to the suspension date. ERCOT must [shalt] issue a final determination of the need for RMR service within 60 calendar days of ERCOT's receipt of the notice. If ERCOT determines that the generation resource is not needed for RMR service, the generation entity may suspend operation of the generation resource before the suspension date, subject to ERCOT approval. Unless ERCOT has determined that a generation entity's generation resource is not required for ERCOT reliability, determined that the resource is needed for reliability but is not a cost-effective solution to the reliability concern, or entered into an MRA service agreement as an alternative to an RMR service agreement, the generation entity must [shalt] not terminate its registration of the generation resource with ERCOT unless it has transferred the generation resource to a generation entity that has a current resource-entity agreement with ERCOT and the transferee registers that generation resource with ERCOT at the time of the transfer.

(1) Complaint with the commission. If, by the suspension date, ERCOT has not notified the generation entity that the continued operation of the generation resource is not required for reliability or

is not a cost-effective solution to the reliability need, and has not entered into an RMR service agreement with the generation entity for the generation resource or an MRA service agreement as an alternative to an RMR service agreement, then the generation entity may file a complaint with the commission against ERCOT, under §22.251 of this title (relating to Review of Electric Reliability Council of Texas (ERCOT) Conduct).

(A) The generation entity will [shalt] have the burden of proof.

(B) As required by §22.251(d) of this title, absent a showing of good cause to the commission to justify a later deadline, the generation entity's deadline to file the complaint is 35 calendar days after the suspension date.

(C) The dispute underlying the complaint is not subject to ERCOT's alternative dispute resolution procedures.

(D) In its complaint, the generation entity may request interim relief under §22.125 of this title (relating to Interim Relief), an expedited procedural schedule, and identify any special circumstances pertaining to the generation resource at issue.

(E) As required by §22.251(f) of this title, ERCOT must [shalt] file a response to the generation entity's complaint and must [shalt] include as part of the response all existing, non-privileged documents that support ERCOT's position on the issues identified by the generation entity as required by §22.251(d)(1)(C) of this title.

(F) The scope of the complaint may include the need for the RMR service; the reasonable compensation and other terms for the RMR service; the length of the RMR service, including any appropriate RMR exit options; and any other issue pertaining to the RMR service.

(G) Any compensation ordered by the commission will [shalt] be effective the first calendar day after the suspension date. If there is a pre-existing RMR service agreement concerning the generation resource, the compensation ordered by the commission will [shalt] not become effective until the termination of the pre-existing agreement, unless the commission finds that the pre-existing RMR service agreement is not in the public interest.

(H) If the generation entity does not file a complaint with the commission, the generation entity will [shalt] be deemed to have accepted ERCOT's most-recent offer as of the suspension date.

(2) Out-of-merit-order dispatch. The generation entity must [shalt] maintain the generation resource so that it is available for out-of-merit-order dispatch instruction by ERCOT until:

(A) ERCOT determines that the generation resource is not required for ERCOT reliability;

(B) any RMR service agreement takes effect;

(C) the commission determines that the generation resource is not required for ERCOT reliability; or

(D) a commission order requiring the generation entity to provide RMR service takes effect.

(3) (No change.)

(4) (No change.)

(5) Approval of RMR and MRA service agreements. All recommendations by ERCOT staff to enter into an RMR or MRA service agreement will [shalt] be subject to approval by the ERCOT governing board. If ERCOT identifies a reliability need for RMR or MRA service but recommends against entering into an RMR or MRA service agreement, ERCOT staff's recommendation will [shalt] be subject

to approval by the ERCOT governing board. In its request for governing board approval, ERCOT staff must [shall] present information that justifies its recommendation.

(6) Refund of payments for capital expenditures. A resource entity that owns or controls a resource providing RMR or MRA service must [shall] refund payments for capital expenditures made by ERCOT in connection with the RMR or MRA service agreement if the resource participates in the energy or ancillary service markets at any time following the termination of the agreement. ERCOT may require less than the entire original amount of capital expenditures to be refunded to reflect the depreciation of capital over time.

(7) Implementation. ERCOT, through its stakeholder process, must [shall] establish protocols and procedures to implement this subsection.

(f) Noncompetitive constraints. ERCOT, through its stakeholder process, must [shall] develop [and submit for commission oversight and review] protocols to mitigate the price effects of congestion on noncompetitive constraints.

(1) The protocols must [shall] specify a method by which noncompetitive constraints may be distinguished from competitive constraints.

(2) Competitive constraints and noncompetitive constraints must [shall] be designated annually prior to the corresponding auction of annual congestion revenue rights. A constraint may be redesignated on an interim basis.

(3) The protocols must [shall] be designed to ensure that a noncompetitive constraint will not be treated as a competitive constraint.

~~[(4) The protocols shall not take effect until after the commission has exercised its oversight and review authority over these protocols as part of the implementation of the requirements of §25.501 of this title, (relating to Wholesale Market Design for the Electric Reliability Council of Texas) so that these protocols shall take effect as part of the wholesale market design required by that section. Any subsequent amendment to these protocols shall also be submitted to the commission for oversight and review, and shall not take effect unless ordered by the commission.]~~

~~[(5) ERCOT, through its stakeholder process, may adopt protocols that categorize all constraints as noncompetitive constraints. Protocols adopted pursuant to this paragraph shall terminate no later than the 45th day after ERCOT begins to use nodal energy prices for resources pursuant to §25.501(f) of this title. Protocols adopted pursuant to this paragraph need not be submitted to the commission for oversight and review prior to taking effect. ]~~

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 29, 2019.

TRD-201903005

Theresa Walker

Assistant Rules Coordinator

Public Utility Commission of Texas

Earliest possible date of adoption: October 13, 2019

For further information, please call: (512) 936-7252



## PART 4. TEXAS DEPARTMENT OF LICENSING AND REGULATION

### CHAPTER 65. BOILERS

The Texas Department of Licensing and Regulation (Department) proposes amendments to existing rules at 16 Texas Administrative Code (TAC), Chapter 65, Subchapter A, §65.2, Subchapter C, §65.12, and Subchapter I, §65.64, regarding the Boilers Program. These proposed changes are referred to herein as "proposed rules."

#### EXPLANATION OF AND JUSTIFICATION FOR THE RULES

The rules under 16 TAC Chapter 65 implement Texas Health and Safety Code, Chapter 755, Boilers.

The proposed rules implement §6.002 of House Bill (HB) 2847, Article 6, 86th Legislature, Regular Session (2019), which amends Health and Safety Code §755.029(c), removing the requirement to post boiler certificates of operation under glass. The proposed rules also add four new definitions and specify conditions under which boiler operators may obtain extensions of the interval between internal boiler inspections. The proposed rules are necessary to implement the statutory change and to provide clarity and certainty to boiler operators to plan the frequency of internal inspections. Health and Safety Code §755.026 provides for the availability of extensions and the proposed rules supply additional specific conditions under which the Department may approve the extensions.

A task group was convened to examine and deliberate the criteria under which the Department may approve extension requests. The task group met on May 22, 2018, and created amendments to the extensions rule and related definitions. The Board of Boiler Rules (Board) discussed the rule and voted to propose it at its July 13 meeting, and it was published for public comment on October 5, 2018. Following the public comment period and the receipt of written and oral comments, the Board at its December 5, 2018, meeting deliberated and recommended that the rule be returned to the task group for further review and revision. The proposed rules are a product of that review and reconsideration by the task group, staff, and stakeholders.

The proposed rules were presented to the Board at its August 19, 2019, meeting. The Board discussed the proposed rules and voted to recommend that the proposed rules without changes be published in the *Texas Register* for public comment.

#### SECTION-BY-SECTION SUMMARY

The proposed amendments to §65.2 add definitions for "continuous water treatment," "operation," "out of service," and "standby" and relate to the amendments proposed to §65.64. The section is also renumbered accordingly.

The proposed amendment to §65.12 removes the obligation to post a boiler's certificate of operation under glass, to implement the HB 2847 statutory change.

The proposed amendments to §65.64 clarify the requirements for extension of the interval between internal inspections, and simplify the language used in the section.

#### FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tony Couvillon, Policy Research and Budget Analyst, has determined that for each year of the first five years the proposed rules are in effect, there are no estimated additional costs or reductions in costs to the state or local governments as a result

of enforcing or administering the proposed rules. Mr. Couvillon has also determined that for each year of the first five years the proposed rules are in effect, there is no estimated increase or loss in revenue to the state or to local governments as a result of enforcing or administering the proposed rules.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

Mr. Couvillon has determined that the proposed rules will not affect any local economy, so the agency is not required to prepare a local employment impact statement under Government Code §2001.022.

#### PUBLIC BENEFITS

Mr. Couvillon also has determined that for each year of the first five-year period the proposed rules are in effect, the public benefit will be increased safety of boiler operation in Texas. The proposed amendments provide clarification of the conditions under which operating extensions will and will not be approved. An extension request for a boiler that does not meet the stated conditions will result in the need for a comprehensive internal inspection of the boiler before it may resume operating.

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there may be a reduction in costs (savings) to persons who are required to comply with the proposed rules. Boiler operators will benefit from increased certainty as to the conditions under which they may obtain extensions and therefore some operators may succeed in increasing the interval between required, costly inspections by planning to satisfy these criteria. Further, the removal of the requirement to post boiler certificates of operation under glass eliminates a minor cost for operators going forward.

#### PROBABLE ECONOMIC COSTS TO PERSONS REQUIRED TO COMPLY WITH PROPOSAL

Mr. Couvillon has determined that for each year of the first five-year period the proposed rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules.

#### FISCAL IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES, AND RURAL COMMUNITIES

There will be no adverse effect on small businesses, micro-businesses, or rural communities as a result of the proposed rules. Because the agency has determined that the proposed rule will have no adverse economic effect on small businesses, micro-businesses, or rural communities, preparation of an Economic Impact Statement and a Regulatory Flexibility Analysis, as detailed under Texas Government Code §2006.002, is not required.

#### ONE-FOR-ONE REQUIREMENT FOR RULES WITH A FISCAL IMPACT

The proposed rules do not have a fiscal note that imposes a cost on regulated persons, including another state agency, a special district, or a local government. Therefore, the agency is not required to take any further action under Government Code §2001.0045.

#### GOVERNMENT GROWTH IMPACT STATEMENT

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rules. For each year of the first five years the proposed rules will be in effect, the agency has determined the following:

1. The proposed rules do not create or eliminate a government program.
2. Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.
3. Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.
4. The proposed rules do not require an increase or decrease in fees paid to the agency.
5. The proposed rules do not create a new regulation.
6. The proposed rules expand an existing regulation and limit another existing regulation. The removal of the requirement to post boiler certificates under glass limits §65.12, and the addition of conditions and criteria for extensions in §65.64 expands the rule, but does not expand its scope or applicability.
7. The proposed rules do not increase or decrease the number of individuals subject to the rule's applicability.
8. The proposed rules do not positively or adversely affect this state's economy.

#### TAKINGS IMPACT ASSESSMENT

The Department has determined that no private real property interests are affected by the proposed rules and the proposed rules do not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, the proposed rules do not constitute a taking or require a takings impact assessment under Government Code §2007.043.

#### PUBLIC COMMENTS

Comments on the proposed rules may be submitted to Dalma Sotero, Legal Assistant, Texas Department of Licensing and Regulation, P.O. Box 12157, Austin, Texas 78711, or facsimile (512) 475-3032, or electronically: [erule.comments@tdlr.texas.gov](mailto:erule.comments@tdlr.texas.gov). The deadline for comments is 30 days after publication in the *Texas Register*.

### SUBCHAPTER A. GENERAL PROVISIONS

#### 16 TAC §65.2

##### STATUTORY AUTHORITY

The proposed rules are proposed under Texas Occupations Code Chapter 51 and Texas Health and Safety Code Chapter 755, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code Chapter 51 and Texas Health and Safety Code Chapter 755. No other statutes, articles, or codes are affected by the proposed rules.

##### §65.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (19) (No change.)

(20) Continuous water treatment--A verifiable program that controls and limits corrosion and deposits in a boiler.



(21) [~~(20)~~] Department--Texas Department of Licensing and Regulation.

(22) [~~(21)~~] Deputy Inspector--An inspector appointed by the executive director.

(23) [~~(22)~~] Disconnected Boiler--A boiler in which all fuel, water, steam and electricity are removed from any connection on the boiler. These connections shall provide an isolated gap and the source shall be safely isolated to prevent potential leaks or electrical hazards.

(24) [~~(23)~~] Electric Boiler--A boiler in which the source of heat is electricity, such as an electrode type boiler and an immersion resistance element type boiler.

(25) [~~(24)~~] Electrode Type Boiler--An electric boiler in which heat is generated by the passage of electric current using water as the conductor.

(26) [~~(25)~~] Executive Director--The executive director of the department.

(27) [~~(26)~~] External Inspection--An inspection of the exterior of a boiler and its appurtenances that is made, if possible, while the boiler is in operation.

(28) [~~(27)~~] Heat Recovery Steam Generator (HRSG)--A boiler which produces steam where its principle source of thermal energy is a hot gas stream having high ramp rates, such as the exhaust of a gas turbine.

(29) [~~(28)~~] Heating Boiler--A steam heating boiler, hot water heating boiler, hot water supply boiler, or potable water heater that is directly fired with oil, gas, solar energy, electricity, coal, or other solid or liquid fuel.

(30) [~~(29)~~] High-Temperature Water Boiler--A water boiler designed for operation at pressures exceeding 160 pounds per square inch gage (1100 kilopascals) or temperatures exceeding 250 degrees Fahrenheit (121 degrees Celsius).

(31) [~~(30)~~] Hot Water Heating Boiler--A boiler designed for operation at a pressure not exceeding 160 pounds per square inch gage (1100 kilopascals) or temperatures not exceeding 250 degrees Fahrenheit (121 degrees Celsius) at or near the boiler outlet.

(32) [~~(31)~~] Hot Water Supply Boiler--A boiler designed for operation at pressures not exceeding 160 pounds per square inch gage (1100 kilopascals) or temperatures not exceeding 250 degrees Fahrenheit (121 degrees Celsius) at or near the boiler outlet if the boiler's heat input exceeds 200,000 British thermal units per hour (58.6 kilowatts); water temperature exceeds 210 degrees Fahrenheit (99 degrees Celsius); or nominal water-containing capacity exceeds 120 gallons (454 Liters).

(33) [~~(32)~~] Immersion Resistance Element Type Boiler--An electric boiler in which heat is generated by the passage of an electric current through a resistance heating element immersed in water.

(34) [~~(33)~~] Inspection Agency--An authorized inspection agency providing inspection services.

(35) [~~(34)~~] Inspector--The chief inspector, a deputy inspector, or an authorized inspector.

(36) [~~(35)~~] Install--To place, position or fit into position and then to connect, change or modify in such a manner as to bring the boiler into service.

(37) [~~(36)~~] Installation--The act of installing a boiler or associated equipment.

(38) [~~(37)~~] Internal inspection--A complete and thorough inspection of the interior waterside and fireside areas of a boiler as construction allows.

(39) [~~(38)~~] Maximum Allowable Working Pressure (MAWP)--The greatest pressure at which a boiler is designed to operate.

(40) [~~(39)~~] Metric (SI)--An international system of measurement.

(41) [~~(40)~~] Metrication--The process of converting between US customary units and metric (SI) units.

(42) [~~(41)~~] Modular Boiler--A steam or hot water heating assembly consisting of a group of individual boilers called modules, intended to be installed as a unit, with a single inlet and single outlet. Modules may be under one jacket or may be individually jacketed.

(43) [~~(42)~~] Multiple Pressure Steam Generator--A boiler consisting of several sections of heat exchange surface designed for different pressure levels.

(44) [~~(43)~~] National Board--The National Board of Boiler and Pressure Vessel Inspectors.

(45) [~~(44)~~] National Board Inspection Code--The manual for boiler and pressure vessel inspectors published by the National Board.

(46) [~~(45)~~] Nominal--The accepted ASME standard used to designate a size or capacity of an item.

(47) [~~(46)~~] Non-Code Boiler--A complete boiler not constructed to the appropriate ASME Code.

(48) [~~(47)~~] Nonstandard Boiler--A boiler that does not qualify as a standard boiler.

(49) [~~(48)~~] Nuclear Boiler--A nuclear power plant system, including its pressure vessels, piping systems, pumps, valves, and storage tanks that produces and controls an output of thermal energy from nuclear fuel and the associated systems essential to the function of the power system.

(50) Operation--A boiler is in operation when the energy source is being applied to the boiler.

(51) Out of Service--A boiler is out of service when it is not in operation and it is not designated as in standby.

(52) [~~(49)~~] Owner or Operator--Any person, firm, or corporation owning or operating boilers within the State of Texas.

(53) [~~(50)~~] Person--An individual, corporation, partnership, association or other legal entity.

(54) [~~(51)~~] Pool Heater--A hot water supply boiler or a potable water heater designed to provide hot water to a pool.

(55) [~~(52)~~] Portable Boiler--A boiler primarily intended for use at a temporary location.

(56) [~~(53)~~] Potable Water Heater--A boiler designed for operation at pressures not exceeding 160 pounds per square inch gage (1100 kilopascals) and water temperatures not exceeding 210 degrees Fahrenheit (99 degrees Celsius) if the boiler's heat input exceeds 200,000 British thermal units per hour (58.6 kilowatts) or nominal water-containing capacity exceeds 120 gallons (454 liters).

(57) [~~(54)~~] Power Boiler--A high-temperature water boiler or a boiler in which steam is generated at a pressure exceeding 15 pounds per square inch gage (103 kilopascals) for a purpose external to the boiler.

(58) [(55)] Preliminary order--A written order issued by the chief inspector or any commissioned boiler inspector to require repairs or alterations to render a boiler safe for use or to require that operation of the boiler be discontinued. The Boiler Inspection report which requires repairs to be made or the boiler operation to be ceased which is signed by the chief inspector or a commissioned boiler inspector is a Preliminary Order.

(59) [(56)] Process Steam Generator--An evaporator, heat exchanger, or vessel in which steam is generated by the use of heat resulting from the operation of a processing system that contains a number of pressure vessels, such as used in the manufacture of chemical and petroleum products.

(60) [(57)] Reinstalled Boiler--A boiler removed from its original setting and reinstalled at the same location or at a new location without change of ownership.

(61) [(58)] Repair--The work necessary to restore pressure-retaining items to a safe and satisfactory operating condition.

(62) [(59)] Rules--The rules promulgated and enforced by the commission in accordance with Texas Health and Safety Code, §755.032 and Texas Occupations Code, Chapter 51.

(63) [(60)] Safety Appliance--A safety device such as a safety valve or a pressure relief valve for a boiler provided to diminish the danger of accidents.

(64) [(61)] Secondhand Boiler--A boiler in which the location and ownership have changed.

(65) [(62)] Serious Accident--An explosion resulting in any degree of distortion to the wall of the boiler or related equipment or damage to the building where the boiler is located. Or, emergency medical services are dispatched to the location of a boiler accident in which one or more persons require on-site medical services, transport to a medical facility or the accident results in a fatality.

(66) [(63)] Special Inspection--An inspection by the chief inspector or deputy inspector other than those in Texas Health and Safety Code, §§755.025 - 755.027.

(67) [(64)] Stacked Boiler--A design in which one boiler is placed on a rack above another boiler, as designed by the boiler manufacturer with a rack nameplate, and as approved by the department.

(68) [(65)] Standard Boiler--A boiler that bears the stamp of a nationally recognized engineering professional society, or the stamp of any jurisdiction that has adopted a standard of construction equivalent to the standard required by the executive director.

(69) Standby--A boiler is in standby when the owner or operator has designated it as in standby and it is in operation at low fire or it is designated as in standby and can be placed into operation within a maximum of 48 hours' notice.

(70) [(66)] Steam Heating Boiler--A boiler designed for operation at pressures not exceeding 15 pounds per square inch gage (103 kilopascals).

(71) [(67)] System Pressure--The pressure of the boiler system, which is governed by the highest safety valve or pressure relief valve set pressure as allowed by ASME Code and this chapter.

(72) [(68)] Texas Commission--Authorization to inspect boilers and enforce Texas Health and Safety Code, Chapter 755, and 16 Texas Administrative Code, Chapter 65, on behalf of the department.

(A) ASME Only Commission--Only authorizes an inspector to conduct ASME new construction activities.

(B) In-Service Only Commission--Only authorizes an inspector to conduct boiler in-service activities.

(C) ASME and In-Service Commission--Authorizes an inspector to conduct both activities in subparagraphs (A) and (B).

(73) [(69)] Unfired Steam Boiler--An unfired pressure vessel in which steam is generated. The term does not include: vessels known as evaporators or heat exchangers; or vessels in which steam is generated by using the heat that results from the operation of a processing system that contains a number of pressure vessels, as used in the manufacture of chemical and petroleum products.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Brad Bowman

General Counsel

Texas Department of Licensing and Regulation

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For further information, please call: (512) 463-3306



## SUBCHAPTER C. BOILER REGISTRATION AND CERTIFICATE OF OPERATION-- REQUIREMENTS

### 16 TAC §65.12

The proposed rules are proposed under Texas Occupations Code Chapter 51 and Texas Health and Safety Code Chapter 755, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code Chapter 51 and Texas Health and Safety Code Chapter 755. No other statutes, articles, or codes are affected by the proposed rules.

#### §65.12. Boiler Registration and Certificate of Operation Required.

Except as provided by this chapter, each boiler operated in this state must:

- (1) be registered with the department; and
- (2) have qualified for a current certificate of operation with the current certificate of operation posted [under glass] in a conspicuous place on or near the boiler for which it is issued.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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## SUBCHAPTER I. INSPECTION OF BOILERS

### 16 TAC §65.64

The proposed rules are proposed under Texas Occupations Code Chapter 51 and Texas Health and Safety Code Chapter 755, which authorize the Texas Commission of Licensing and Regulation, the Department's governing body, to adopt rules as necessary to implement these chapters and any other law establishing a program regulated by the Department.

The statutory provisions affected by the proposed rules are those set forth in Texas Occupations Code Chapter 51 and Texas Health and Safety Code Chapter 755. No other statutes, articles, or codes are affected by the proposed rules.

#### §65.64. *Extension of Interval between Internal Inspections.*

(a) To extend the interval between internal inspections [~~For the interval between internal inspection to be extended~~] as provided for in Texas Health and Safety Code, §755.026, the following procedure must be followed.

(1) ~~Before the expiration date of the current certificate of operation, the owner or operator shall submit in a manner prescribed by the department a request for extension for each boiler, including the following: [Not less than thirty (30) days and not more than sixty (60) days prior to the expiration date of the current certificate of operation, the owner or operator shall submit in a manner prescribed by the department a request for each boiler, stating the desired length of extension, which will be no more than one (1) year from the expiration date of the current certificate of operation, the date of the last internal inspection, and a statement certifying that records are available showing compliance with Texas Health and Safety Code, §755.026, and pay the required fees.]~~

(A) ~~the desired length of extension for a time period no more than one (1) year following the expiration date of the current certificate of operation; and~~

(B) ~~the date of the last internal inspection.~~

(2) ~~Records shall be available demonstrating compliance with Texas Health and Safety Code, §755.026 and this section for review by the Authorized Inspector and the department upon request.~~

(3) [~~2~~] The department shall notify the owner or operator and the inspection agency having jurisdiction of the maximum extension period that may be approved.

(4) [~~3~~] ~~Before [Prior to] the expiration of the current certificate of operation, the inspection agency shall review all relevant records and[;] make an external inspection. The inspection agency shall submit the inspection report in accordance with Texas Health and Safety Code, §755.027. [;] and submit the external inspection report to the department.]~~

(5) [(4)] Upon completion of the requirements in paragraphs (1) - (4) [(3)] and payment of all required fees, a new certificate of operation may be issued for the extended period of operation.

(6) [(5)] Violations noted during the external inspection may be cause for denial of the extension request.

(7) [(6)] If the department denies an extension request, the boiler shall be internally inspected ~~before [prior to] the expiration of the certificate of operation[; unless authorized in writing to continue operation until an internal inspection can be conducted].~~

(8) ~~Boilers for which the certificate of operation has expired must pass internal and external inspections before a new certificate of operation may be issued.~~

(b) ~~The interval between internal inspections may be extended if, at all times since the last internal inspection, continuous water treatment has been maintained and any of the following apply:~~

(1) ~~the boiler was in operation;~~

(2) ~~the boiler was in standby;~~

(A) ~~Continuous water treatment is not required during the time that a boiler is designated as in standby and can be placed into operation within a maximum of 48 hours' notice.~~

(B) ~~Continuous water treatment is required during the time that a boiler is designated as in standby and is in operation at low fire.~~

(3) ~~the boiler was out of service for repairs for periods not exceeding 10 consecutive days, or~~

(4) ~~the boiler was out of service for repairs for any periods exceeding 10 consecutive days and the owner or operator had:~~

(A) ~~notified the department and the authorized inspection agency in a manner prescribed by the department and in accordance with subsection (c) that the period of time out of service was expected to exceed 10 consecutive days; and~~

(B) ~~requested from the department and obtained written confirmation from the department that eligibility for extension of the interval between internal inspections would be maintained despite the period of time that the boiler was out of service.~~

(c) ~~The notification required in subsection (b)(4)(A):~~

(1) ~~shall be made by the owner or the owner's agent.~~

(2) ~~shall be made on the earlier of:~~

(A) ~~the date on which the owner or operator becomes aware that the period of time out of service will exceed 10 consecutive days; or~~

(B) ~~the date on which the boiler has been out of service for 10 consecutive days.~~

(d) ~~A request for extension of the interval between internal inspections may be denied for failure to comply with any applicable provision of the Texas Health and Safety Code, Chapter 755, or this chapter.~~

(e) [(b)] An additional extension for up to one hundred twenty (120) days may be allowed as provided for in Texas Health and Safety Code, §755.026, when it is established an emergency exists.

(1) ~~Before [Prior to] the expiration date of the current certificate of operation, the owner or operator shall submit to the department, in the manner prescribed by the department, a request stating an emergency exists with an explanation of the emergency and the date of the last internal inspection. The request shall be submitted along with the inspection agency's external inspection report, confirming compliance with Texas Health and Safety Code, §755.026.~~

(2) The department shall notify the owner or operator and the inspection agency having jurisdiction of the maximum extension period that may be approved.

(3) Upon completion of the requirements in paragraphs (1) and (2) and payment of all required fees, a new certificate of operation may be issued for the extended period of operation.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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## TITLE 22. EXAMINING BOARDS

### PART 9. TEXAS MEDICAL BOARD

#### CHAPTER 161. GENERAL PROVISIONS

The Texas Medical Board (Board) proposes amendments to §§161.1 - 161.6. The Board proposes repeal of §§161.8, 161.9, 161.11 - 161.13.

The Board conducted a rule review and determined the rule is still necessary. The Board further determined that the amendments and deletions were necessary to accurately reflect the operations of the board and eliminate obsolete committees and their related functions.

The amendment to §161.1, relating to Introduction, adds language to recognize and include all advisory board and committees under TMB authority. The proposed amendment also deletes unnecessary repetitive statutory language.

The amendment to §161.2, relating to Purpose and Functions, adds language to recognize and include all advisory board and committees under TMB authority, and the role of the board in determining qualifications and eligibility criteria for certain licenses and permits.

The amendment to §161.3, relating to Organization and Structure, deletes unnecessary repetitive statutory language. The proposed amendment simplifies rules relating to standards of eligibility, conduct, and potential grounds for removal of board members.

The amendment to §161.4, relating to Officers of the Board, removes an incorrect word.

The amendment to §161.5, relating to Meetings, deletes reference to certain committees that are disbanded, obsolete or unnecessary.

The amendment to §161.6, relating to Committees of the Board, deletes unnecessary repetitive statutory language.

The repeal of §161.8, relating to Chief of Staff, deletes unnecessary repetitive statutory language.

The repeal of §161.9, relating to Medical Director, deletes unnecessary repetitive statutory language.

The repeal of §161.11, relating to Rule Changes, deletes unnecessary repetitive statutory language.

The repeal of §161.12, relating to Compliance with Non-Discrimination Laws, deletes unnecessary repetitive statutory language.

The repeal of §161.13, relating to General Considerations, deletes unnecessary repetitive statutory language.

The public benefit anticipated as a result of these amendments is to simplify and clarify the functions and operations of the board that are not otherwise clearly set out in statute. This increases public ability to understand the functions and duties of the board.

Scott Freshour, General Counsel for the Texas Medical Board, has determined that for each year of the first five years the sections as proposed are in effect the public benefit anticipated as a result of enforcing this proposal will be to simplify and clarify the functions and operations of the board that are not otherwise clearly set out in statute. This increases public ability to understand the functions and duties of the board.

Mr. Freshour has determined that for the first five-year period these rule amendments are in effect, there will be no effect to individuals required to comply with these rules as proposed. There will be no effect on small businesses, micro businesses, or rural communities.

Pursuant to Texas Government Code §2006.002, the agency provides the following economic impact statement for the proposed rule amendments and has determined that for each year of the first five years the proposed amendments will be in effect there will be no effect on small businesses, micro businesses, or rural communities. The agency has considered alternative methods of achieving the purpose of the proposed rule amendments and found none.

Pursuant to Texas Government Code §2001.024(a)(4), Mr. Freshour certifies that the agency has determined that for each year of the first five years these rule amendments, as proposed, are in effect:

(1) there is no additional estimated cost to the state or to local governments expected as a result of enforcing or administering the rules;

(2) there are no estimated reductions in costs to the state or to local governments as a result of enforcing or administering the rules;

(3) there is no estimated loss or increase in revenue to the state or to local governments as a result of enforcing or administering the rules;

(4) there are no foreseeable implications relating to cost or revenues of the state or local governments with regard to enforcing or administering the rules;

Pursuant to Government Code §2001.0221, the agency provides the following Government Growth Impact Statement for the proposed rules. For each year of the first five years the proposed amendments will be in effect, Mr. Freshour has determined the following:

(1) The proposed rules do not create or eliminate a government program.

(2) Implementation of the proposed rules does not require the creation of new employee positions or the elimination of existing employee positions.

(3) Implementation of the proposed rules does not require an increase or decrease in future legislative appropriations to the agency.

(4) The proposed rules do not require an increase or decrease in fees paid to the agency.

- (5) The proposed rules do not create a new regulation.
- (6) The proposed rules expand, limit, or repeal an existing regulation as described above.
- (7) The proposed rules do not increase or decrease the number of individuals subject to the rules' applicability.
- (8) The proposed rules do not positively or adversely affect this state's economy.

Comments on the proposal may be submitted to Rita Chapin, P.O. Box 2018, Austin, Texas 78768-2018, or e-mail comments to: rules.development@tmb.state.tx.us. A public hearing will be held at a later date.

## 22 TAC §§161.1 - 161.6

The amendments are proposed under the authority of the Texas Occupations Code Annotated, 153.001, which provides authority for the Board to adopt rules necessary to administer and enforce the Medical Practice Act.

No other statutes, articles or codes are affected by this proposal.

### §161.1. Introduction.

(a) The Texas Medical Board, referred to as the "board" or the "Medical Board", is an agency of the executive branch of state government statutorily empowered to regulate the practice of medicine in Texas. [Any reference in these rules to the former Texas State Board of Medical Examiners means the Texas Medical Board. The Medical Board also] The Board also provides oversight and support for several advisory boards and advisory committees. [the Texas Physician Assistant Board, referred to as the "Physician Assistant Board," the Texas State Board of Acupuncture Examiners, referred to as the "Acupuncture Board."]

(b) The board may adopt rules as necessary to govern its own proceedings, perform its duties, regulate the practice of medicine in Texas, and enforce applicable law. }

(c) The board may act under its statute and rules through the Executive Director, Executive Committee, or another committee of the board.}

### §161.2. Purpose and Functions.

(a) The purpose of the board is to protect the public's safety and welfare through the regulation of the practice of medicine. [The board fulfills its purpose primarily through the licensure and discipline of physicians and other allied health care providers as mandated by law.]

(b) The board's functions include but are not limited to the following:

- (1) Establish standards for the practice of medicine by physicians.
- (2) Regulate the practice of medicine through the licensure and discipline of physicians.
- (3) Provide oversight of the several advisory boards and advisory committees. [Texas Physician Assistant Board and the Texas State Board of Acupuncture Examiners as specified by law.]
- (4) Interpret the Medical Practice Act and applicable sections of the Acts, [Physician Assistant Licensing Act, the Acupuncture Act, the Surgical Assistant Act] and [the Board] Rules [to physicians, physician assistants, acupuncturists, surgical assistants], of the several advisory boards and advisory committees subject to Medical Board oversight. [and the public to ensure informed professionals, allied health professionals, and consumers.]

(5) Receive complaints and investigate possible violations of the Medical Practice Act and the Board Rules.

(6) Discipline violators through appropriate legal action to enforce the Medical Practice Act and the Board Rules.

~~[(7) Provide a mechanism for public comment with regard to the Board Rules and the Medical Practice Act and the Surgical Assistant Act.]~~

~~[(8)]~~ Review and modify the Board Rules when necessary and appropriate.

~~[(9)]~~ Examine and license qualified applicants to practice medicine, [acupuncture, and] surgical assisting, perfusion and medical physics in Texas in a manner that ensures that applicable standards are maintained.

~~[(10)]~~ Provide recommendations to the legislature concerning appropriate changes to the Medical Practice Act and Surgical Assistant Act to ensure that the acts are current and applicable to changing needs and practices.

~~[(11) Provide informal public information on licensees.]~~

~~[(12) Maintain data concerning the practice of medicine.]~~

### §161.3. Organization and Structure.

(a) The board shall consist of ~~19~~ members appointed by the Governor with the advice and consent of the Senate.}

(b) The board shall consist of the following composition: nine physicians with a degree of doctor of medicine (M.D.) and licensed to practice medicine in Texas for at least three years; three physicians with a degree of doctor of osteopathic medicine (D.O.) and licensed to practice medicine in Texas for three years; and seven members who represent the public.}

(c) The terms of board members shall be six years in length and shall be staggered so that the terms of not more than one-third of the members shall expire in a single calendar year. Upon completion of a term, a member shall continue to serve until a successor has been appointed. A member may be reappointed to successive terms as permitted by law at the discretion of the Governor.}

(d) Each board member shall meet and maintain the qualifications for board membership and execute their duties as set by law.

(e) A board member should strive to achieve and project the highest standards of professional conduct. Such standards include:

- (1) A board member should not accept or solicit any benefit that might influence the board member in the discharge of official duties or that the board member knows or should know is being offered with the intent to influence official conduct.
- (2) A board member should not accept employment or engage in any business or professional activity that would involve the disclosure of confidential information acquired by reason of the official position as a board member.
- (3) A board member should not accept employment that could impair independence of judgment in the performance of the board member's official duties.
- (4) A board member should not make personal investments that could reasonably be expected to create a conflict between the board member's private interest and the public interest.
- (5) A board member should not intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised the board member's official powers or performed the board member's official duties in favor of another.

(6) A board member should be fair and impartial in the conduct of the business of the board. A board member should project such fairness and impartiality in any meeting or hearing.

(7) A board member should be diligent in preparing for meetings and hearings.

(8) A board member should avoid conflicts of interests. If a conflict of interest should unintentionally occur, the board member should recuse himself or herself from participating in any matter before the board that could be affected by the conflict.

(9) A board member should avoid the use of the board member's official position to imply professional superiority or competence.

(10) A board member should avoid the use of the board member's official position as an endorsement in any health care related matter.

(11) Board member appearances.

(A) A board member should not appear as an expert witness in any case in which a licensee of the board is a party and in which the expert testimony relates to standard of care or professional malpractice. A board member may provide expert testimony if the board member has been called primarily as a fact witness. A board member should disclose any potential employment as an expert witness to and seek prior approval of the board's executive committee. When providing expert testimony in any matter, a board member should state that any opinion of the board member is not on behalf of or approved by the board and should not claim special expertise because of board membership.

(B) A board member shall not appear in any administrative proceeding involving the exercise of the board's licensing or disciplinary authority before the board or the State Office of Administrative Hearings in which proceeding a licensee of the board is a party. A board member may furnish a written statement for a licensee to use in such administrative proceedings only if:

(i) the board member sought and received in writing the prior approval of the board's executive committee;

(ii) the written statement of the board member used by a licensee presents only facts that the board member has personally witnessed and does not offer or provide any statement as to character of the licensee or characterization of the events witnessed; and

(iii) the written statement plainly states that the recitation of the witnessed facts is not an indication of in any manner that the board concurs with, agrees to, or supports those facts or the board member in his or her action.

(12) A board member should refrain from making any statement that implies that the board member is speaking for the board if the board has not voted on an issue or unless the board has given the board member such authority.

(c) ~~[(f)]~~ Report of Potential Grounds for Removal. In addition to Section 152.006 of the Act, the following are grounds ~~[If the executive director of the board has knowledge that a potential ground for removal exists, the executive director shall notify the president of the board of that ground. The president of the board shall then notify the governor's office and the attorney general that a potential ground for removal exists. If the potential ground for removal involves the president of the board, the executive director shall notify the next highest ranking officer of the board, who shall then notify the governor and the attorney general that a potential ground for removal exists. Grounds] for potential removal that must be reported are as follows:~~

(1) For purposes of Section 152.006(a)(5), a ~~[A board member is absent from more than half of the regularly scheduled board meetings that the member is eligible to attend during a calendar year without an excuse approved by a majority vote of the board. A]~~ board member shall be considered to have been absent from a regularly scheduled board meeting if the member fails to attend at least a portion of either a full board session or a portion of a regularly scheduled committee meeting to which a member is assigned during such board meeting. Any dispute or controversy as to whether or not an absence has occurred shall be submitted to the full board for resolution by a majority vote after giving the purported absentee the opportunity to present information concerning the alleged absences and after allowing discussion by other members of the board.

(2) A board member who is subject of a non-disciplinary or disciplinary action, including but not limited to any remedial plan, board order, or administrative penalty, regardless of the nature of the violation(s) that led to the remedial plan, board order, or administrative penalty.

~~[(g) The validity of an action of the board is not affected by the fact that the action is taken when a ground for potential removal of a board member exists.]~~

~~[(h)]~~ Each member of the board shall receive per diem as provided by law for each day that the member engages in the business of the board and will be reimbursed for travel expenses incurred in accordance with the state of Texas and board's travel policies.

#### §161.4. Officers of the Board.

(a) The Governor shall designate a member of the board to serve as the president of the board.

(b) The board shall elect officers from among its members to serve as the vice president and the secretary-treasurer for a term not to extend longer than two years. The election of officers shall be held at least every other year at a regular meeting of the board.

(c) All elections and any other issues requiring a vote of the board shall be decided by a simple majority of the members present and voting.

(d) If more than two candidates are nominated for an office, and no candidate receives a majority on the first ballot, a second ballot will be conducted between the two candidates receiving the highest number of votes.

(e) Duties of the officers.

(1) The duties of the president shall include the following:

(A) approve the agenda for each board meeting;

(B) preside at all meetings of the board;

(C) represent the board in legislative matters and in meetings with related groups;

(D) appoint the members to serve on the standing, ad hoc, and advisory committees of the board;

(E) appoint the chair of each board committee;

(F) perform or designate a member or members of the board to coordinate the annual performance review of the executive director; and[-]

(G) perform such other duties as pertain to the office of the president. [and]

(2) The duties of the vice president shall include the following:

(A) function as president in the absence or incapacity of the president;

(B) serve as president if the office of president becomes vacant until another member is named by the Governor; and

(C) perform such other duties that are from time to time assigned by the board.

(3) The duties of the secretary-treasurer shall include the following:

(A) function as president in the absence or incapacity of both the president and vice president;

(B) serve as president if both the offices of president and vice president becomes vacant until another member is elected by the board or named by the Governor; and

(C) perform such other duties as set out by law or such other duties that are from time to time assigned by the board.

(f) In the event of the absence or incapacity of the president, vice president, and secretary-treasurer, the board may elect another person to act as presiding officer of a board meeting or may elect an interim acting president for the duration of the absence or incapacity of the officers.

(g) After the death, resignation, or permanent incapacity of any elected officer, the board shall hold an election to fill the vacant officer position. If any elected officer is elected to another position at these elections, that officer's vacant position shall be filled by election to be held following the creation of the new vacancy.

#### §161.5. Meetings.

~~(a) [The board shall meet at least four times a year. It shall consider such matters as may be necessary.]~~

~~(a) [(b)] Special meetings shall be called by the president or by resolution of the board or upon written request signed by five members of the board.~~

~~[(e) An agenda for each board meeting and committee meeting shall be posted in accordance with law and copies shall be sent to the board members.]~~

~~(b) [(d)] Board and committee meetings shall be conducted pursuant to the provisions of Robert's Rules of Order Newly Revised unless the board by rule adopts a different procedure.~~

~~[(e) A quorum for transaction of business by the board shall be one more than half the board's membership at the time of the meeting.]~~

~~(c) [(f)] The board may act only by majority vote of its members present and voting, with each member entitled to one vote. No proxy vote shall be allowed.~~

~~[(g) Meetings of the board and of the committees are open to the public unless such meetings are conducted in executive session pursuant to state law.]~~

~~(d) [(h)] In order that board and committee meetings may be conducted safely, efficiently, and with decorum, attendees may not engage in disruptive activity that interferes with board proceedings.~~

~~(e) [(i)] Members of the public shall remain within those areas of the board offices and board meeting room designated as open to the public.~~

~~(f) [(j)] Members of the public shall not address or question board members during meetings unless recognized by the board's presiding officer pursuant to a published agenda item.~~

~~(g) [(k)] Journalists have the same right of access to board meetings conducted in open session as other members of the public and are subject to the same requirements.~~

~~(h) [(l)] The board's presiding officer may exclude from a meeting any person who, after being duly warned, persists in disruptive activity that interferes with board proceedings.~~

~~(i) [(m)] Any person may record all or any part of the proceedings of a public board meeting in attendance by means of a tape recorder, video camera, or any other means of sonic or visual reproduction.~~

(1) The executive director shall direct any individual wishing to record or videotape as to equipment location, placement, and the manner in which the recording is conducted.

(2) The decision will be made so as not to disrupt the normal order and business of the board.

~~[(n) Executive Session.]~~

~~[(1) The board may meet in executive session pursuant to law.]~~

~~[(2) An executive session of the board shall not be held unless a quorum of the board has first been convened in open meeting. If during such open meeting, a motion is passed by the board to hold an executive session, the presiding officer shall publicly announce that an executive session will be held.]~~

~~[(3) The presiding officer of the board shall announce the date and time at the beginning and end of the executive session.]~~

~~[(4) A certified agenda of the executive session shall be prepared.]~~

~~[(e) Committee minutes shall be approved by the full board with a quorum of the committee members present to vote on approval of the minutes.]~~

#### §161.6. Committees of the Board.

(a) Each board committee shall be composed of board members appointed by the president of the board and shall include at least one physician member who holds the degree of doctor of osteopathic medicine and one public member.

(b) The following are standing and permanent committees of the board. The responsibilities and authority of these committees shall include the following duties and powers, and other responsibilities and charges that the board may from time to time delegate to these committees.

(1) Disciplinary Process Review Committee:

(A) oversee the disciplinary process and give guidance to the board and board staff regarding means to improve the disciplinary process and more effectively enforce the Medical Practice Act and board rules;

(B) monitor the effectiveness, appropriateness and timeliness of the disciplinary process and enforcement of the Medical Practice Act and board rules;

(C) make recommendations regarding resolution and disposition of specific cases and approve, adopt, modify, or reject recommendations from board staff or board representatives regarding actions to be taken on pending cases;

(D) approve dismissals of complaints and closure of investigations; and

(E) make recommendations to the board staff and the board regarding policies, priorities, budget, and any other matters related to the disciplinary process and enforcement of the Medical Practice Act and board rules.

(2) Executive Committee:

(A) ensure records are maintained of all committee actions;

(B) delegate tasks to other committees;

(C) take action on matters of urgency that may arise between board meetings;

(D) assist in the presentation of information concerning the board and the regulation of the practice of medicine to the Legislature and other state officials;

(E) review staff reports regarding finances and the budget;

(F) formulate and make recommendations to the board concerning future board goals and objectives and the establishment of priorities and methods for their accomplishment;

(G) study and make recommendations to the board regarding the roles and responsibilities of the board offices and committees;

(H) study and make recommendations to the board regarding ways to improve the efficiency and effectiveness of the administration of the board;

(I) study and make recommendations to the board regarding board rules or any area of a board function that, in the judgment of the committee, needs consideration; and

(J) make recommendations to the board regarding matters brought to the attention of the executive committee.

(3) Finance Committee:

(A) review staff reports regarding finances and the budget;

(B) assist in the presentation of budget needs to the Legislature and other state officials;

(C) recommend proper fees for the agency to charge; and

(D) consider and make recommendations to the board regarding any aspect of board finances.

~~[(4) Legislative Committee:]~~

~~[(A) review and make recommendations to the board regarding proposed legislative changes concerning the Medical Practice Act and the regulation of medicine;]~~

~~[(B) establish communication with members of the Legislature, trade associations, consumer groups, and related groups;]~~

~~[(C) assist in the organization, preparation, and delivery of information and testimony to members and committees of the Legislature; and]~~

~~[(D) make recommendations to the board regarding matters brought to the attention of the legislative committee.]~~

(4) ~~[(5)]~~ Licensure Committee:

(A) review applications for licensure and permits, make determinations of eligibility and report to the board its recommendations as provided by the Medical Practice Act and board rules;

(B) review board rules regarding licensure and make recommendations to the board regarding changes or implementation of such rules;

(C) evaluate each examination accepted by the board and develop each examination administered by the board;

(D) investigate and report to the board any problems in the administration of examinations and recommend and implement ways of correcting identified problems;

(E) make recommendations to the board regarding post-graduate training permits and issues concerning physicians in training;

(F) maintain communication with Texas medical schools;

(G) develop rules with regard to international medical schools in the areas of curriculum, faculty, facilities, academic resources, and performance of graduates;

(H) study and make recommendations regarding documentation and verification of records from all applicants for licensure or permits;

(I) review applications for acudetox specialist certification, ~~surgical assistants, perfusionists and medical physicists~~, make determinations of eligibility, and report to the board its recommendations as provided by Texas Occupations Code [~~Annotated, 205.303~~] and board rules;

~~[(J) review applications for acupuncture licensure recommended by the Texas State Board of Acupuncture Examiners and for applicants that hold licenses in other states that have licensure requirements that are substantially equivalent to those of this state, make determinations of eligibility, and report to the board its recommendations;]~~

(J) ~~[(K)]~~ review applications and make initial determinations and recommendations to the board regarding approval, denial, revocation, decertification, or continued approval and certification of non-profit health organizations pursuant to the Medical Practice Act;

~~[(K) [(L)]~~ develop and review board rules regarding all persons and entities subject to the Board's jurisdiction, and make recommendations to the board regarding changes or implementation of such rules; and

~~[(L) [(M)]~~ review applications for surgical assistant licensure, make determinations, of eligibility, and report to the board its recommendations; and

~~[(M) [(N)]~~ make recommendations to the board regarding matters brought to the attention of the licensure committee.

~~[(6) Public Information/Physician Profile Committee:]~~

~~[(A) develop information for distribution to the public;]~~

~~[(B) review and make recommendations to the board in regard to press releases, newsletters, web-sites and other publications;]~~

~~[(C) study and make recommendations to the board regarding all aspects of public information and public relations;]~~

~~[(D) receive information from the public concerning the regulation of medicine pursuant to a published agenda item and board rules;]~~

~~[(E) study and make recommendation to the board regarding all aspects of physician profiles; and]~~



[(F) make recommendations to the board regarding matters brought to the attention of the public information/physician profile committee;]

[(7) Standing Orders Committee;]

[(A) review and make recommendations to the board regarding board rules pertaining to standing orders;]

[(B) study and make recommendations to the board regarding issues concerning or referred by the Texas State Board of Acupuncture Examiners or other acupuncture issues;]

[(C) study and make recommendations to the board regarding issues concerning or referred by the Texas Physician Assistant Board;]

[(D) study and make recommendations to the board concerning ethical issues related to the practice of medicine; and]

[(E) make recommendations to the board regarding matters brought to the attention of the standing orders committee;]

[(8) Telemedicine Committee;]

[(A) review, study, and make recommendations to the board concerning the practice of telemedicine, including but not limited to licensure, regulation, and/or discipline of telemedicine license holders or applicants;]

[(B) review, study, and make recommendations to the board concerning interstate and intrastate telemedicine issues;]

[(C) review, study, and make recommendations to the board concerning board rules regarding or affecting the practice of telemedicine; and]

[(D) review, study, and make recommendations to the board concerning any other issue brought to the attention of the committee;]

(c) With statutory or board authorization, the president may appoint, disband, or reconvene standing, ad hoc, or advisory committees as deemed necessary. Such committees shall have and exercise such authority as may be granted by the board.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Scott Freshour

General Counsel

Texas Medical Board

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For further information, please call: (512) 305-7016



## 22 TAC §§161.8, 161.9, 161.11 - 161.13

The repeals are proposed under the authority of the Texas Occupations Code Annotated, 153.001, which provides authority for the Board to adopt rules necessary to administer and enforce the Medical Practice Act.

No other statutes, articles or codes are affected by this proposal.

§161.8. *Chief of Staff.*

§161.9. *Medical Director.*

§161.11. *Rule Changes.*

§161.12. *Compliance with Non-Discrimination Laws.*

§161.13. *General Considerations.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Scott Freshour

General Counsel

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For further information, please call: (512) 305-7016



## TITLE 25. HEALTH SERVICES

### PART 1. DEPARTMENT OF STATE HEALTH SERVICES

#### CHAPTER 131. FREESTANDING EMERGENCY MEDICAL CARE FACILITIES

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes amendments to §131.2, concerning Definitions; and §131.46, concerning Emergency Services.

#### BACKGROUND AND PURPOSE

The proposal is necessary to comply with House Bill (H.B.) 3152, 85th Legislature, Regular Session, 2017, which amends the Texas Health and Safety Code, Chapter 323. H.B. 3152 requires HHSC to define facilities as sexual assault forensic exam (SAFE)-ready facilities and requires certain health-care facilities to provide sexual assault survivors the option to transfer to a facility that is SAFE-ready. The proposed amendment to §131.46 will also implement H.B. 4531, 86th Legislature, Regular Session, 2019, concerning the rights and treatment of and services provided to certain adult sexual assault survivors.

#### SECTION-BY-SECTION SUMMARY

The proposed amendment to §131.2 adds definitions of the terms SAFE-ready facility, sexual assault forensic examiner, and sexual assault survivor, and re-numbers the definitions accordingly. This amendment is necessary to comply with H.B. 3152.

The proposed amendment to §131.46(h) updates language for emergency services available to sexual assault survivors and adds a reference to Texas Health and Safety Code, Chapter 323, which outlines the care facilities must provide to sexual assault survivors. This amendment is necessary to comply with H.B. 3152 and H.B. 4531.

#### FISCAL NOTE

Trey Wood, HHSC Chief Financial Officer, has determined that for each year of the first five years that the rules will be in effect, enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of state or local governments.

#### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not affect the number of HHSC employee positions;
- (3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;
- (4) the proposed rules will not affect fees paid to HHSC;
- (5) the proposed rules will not create a new rule;
- (6) the proposed rules will expand existing rules;
- (7) the proposed rules will not change the number of individuals subject to the rules; and
- (8) the proposed rules will not affect the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined that there may be an adverse economic effect on small businesses or micro-businesses, or rural communities as the rule is proposed.

The proposed rules require 217 FEMCs licensed statewide to develop, implement, and enforce policies and procedures that ensure a sexual assault survivor receives the care specified under Health and Safety Code, Chapter 323. HHSC lacks sufficient data to estimate the number of those facilities designated as a small business, micro-business, or rural communities impacted by the proposed rules.

HHSC determined that alternative methods to achieve the purpose of the proposed rules for small businesses, micro-businesses, or rural communities would not be consistent with ensuring the health and safety of survivors of sexual assault.

#### LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

#### COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas and do not impose a cost on regulated persons.

#### PUBLIC BENEFIT AND COSTS

David Kostroun, HHSC Deputy Executive Commissioner of Regulatory Services, has determined that for each year of the first five years the sections are in effect, the public benefit will be higher quality of care provided to sexual assault survivors and greater clarity of information regarding facilities that are best equipped to serve sexual assault survivors.

Trey Wood has determined that for the first five years that the rule is in effect, persons who are required to comply may incur economic costs. The proposed rules require FEMCs to develop, implement, and enforce policies and procedures that ensure a sexual assault survivor receives the care specified under Health and Safety Code, Chapter 323. HHSC assumes those facilities may incur costs for required documentation, staff training, and a possible increase in the number of patients transferred to facilities which are SAFE-ready. HHSC lacks sufficient information to estimate those costs. For these reasons, the costs to persons required to comply cannot be determined at this time.

#### REGULATORY ANALYSIS

HHSC has determined that this proposal is not a "major environmental rule" as defined by Government Code §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

#### TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

#### PUBLIC COMMENT

Written comments on the proposal may be submitted to the Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or e-mailed to 19R009comments@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or e-mailed before midnight on the following business day to be accepted. When e-mailing comments, please indicate "Comments on Proposed Rule 19R009" in the subject line.

### SUBCHAPTER A. GENERAL PROVISIONS

#### 25 TAC §131.2

##### STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and the Texas Health and Safety Code, Chapter 323.

##### CROSS REFERENCE TO STATUTE

The rule amendments implement Texas Health and Safety Code, Chapters 254 and 323, and Texas Government Code, Chapter 531.

##### §131.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) - (31) (No change.)

(32) SAFE-ready facility--A facility designated by the Health and Human Services Commission as a sexual assault forensic exam ready facility.

(33) Sexual assault forensic examiner--A certified sexual assault nurse examiner or a physician with specialized training on conducting a forensic medical examination.

(34) Sexual assault survivor--An individual who is a victim of a sexual assault, regardless of whether a report is made or a conviction is obtained in the incident.

(35) [(32)] Stabilize--To provide necessary medical treatment of an emergency medical condition to ensure, within reasonable medical probability, that the condition is not likely to deteriorate materially from or during the transfer of the individual from a facility.

(36) [(33)] Transfer--The movement (including the discharge) of an individual outside a facility at the direction of and after personal examination and evaluation by the facility physician. Transfer does not include the movement outside a facility of an individual who has been declared dead or who leaves the facility without the permission of the facility physician.

(37) [(34)] Transfer agreement--A referral, transmission or admission agreement with a hospital licensed in this state.

(38) [(35)] Universal precautions--Procedures for disinfection and sterilization of reusable medical devices and the appropriate use of infection control, including hand washing, the use of protective barriers, and the use and disposal of needles and other sharp instruments as those procedures are defined by the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services. This term includes standard precautions as defined by CDC which are designed to reduce the risk of transmission of blood borne and other pathogens in healthcare facilities.

(39) [(36)] Violation--Failure to comply with the Act, a rule or standard, special license provision, or an order issued by the commissioner of state health services or the commissioner's designee, adopted or enforced under the Act.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Karen Ray

Chief Counsel

Department of State Health Services

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For further information, please call: (512) 834-4591



## SUBCHAPTER C. OPERATIONAL REQUIREMENTS

### 25 TAC §131.46

#### STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and the Texas Health and Safety Code, Chapter 323.

#### CROSS REFERENCE TO STATUTE

The rule amendments implement Texas Health and Safety Code, Chapters 254 and 323, and Texas Government Code, Chapter 531.

§131.46. *Emergency Services.*

(a) - (g) (No change.)

(h) Emergency services for sexual assault survivors [survivors of sexual assault]. The facility shall develop, implement, and enforce policies and procedures to ensure after a sexual assault survivor presents to the facility following a sexual assault, the facility shall provide the care specified under Health and Safety Code, Chapter 323. [If a facility does not provide diagnosis or treatment services to victims of sexual assault, the facility shall refer a victim seeking a forensic medical examination to a hospital or other health care facility that provides services to those victims.]

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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### 25 TAC §131.45

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes an amendment to §131.45, concerning Facility Staffing and Training.

#### BACKGROUND AND PURPOSE

The purpose of the proposal is to update the requirements for establishing a nursing peer review committee. The proposal is necessary to comply with House Bill (H.B.) 3296, 85th Legislature, Regular Session, 2017, which amended the Texas Occupations Code, Chapter 303, related to nursing peer review committees.

#### SECTION-BY-SECTION SUMMARY

The proposed amendment to §131.45 adds new subsection (d) to require the establishment of a nursing peer review committee to conduct nursing peer review, as required by Texas Occupations Code, Chapter 303. This amendment is necessary to comply with H.B. 3296.

#### FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rule will be in effect, enforcing or administering the rule does not have foreseeable implications relating to costs or revenues of state or local governments.

#### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rule will be in effect:

- (1) the proposed rule will not create or eliminate a government program;
- (2) implementation of the proposed rule will not affect the number of HHSC employee positions;
- (3) implementation of the proposed rule will result in no assumed change in future legislative appropriations;
- (4) the proposed rule will not affect fees paid to HHSC;
- (5) the proposed rule will not create a new rule;
- (6) the proposed rule will expand existing rules;

(7) the proposed rule will increase the number of individuals subject to the rule; and

(8) the proposed rule will not affect the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined that there may be an adverse economic effect on small businesses, micro-businesses, or rural communities as the rule is proposed.

The proposed rules require 217 Freestanding Emergency Medical Care Facilities (FEMCs) licensed statewide to establish a nursing peer review committee as required by Texas Occupations Code, Chapter 303. HHSC lacks sufficient data to estimate the number of those facilities designated as small or micro-businesses, or rural community impacted by the proposed rules.

HHSC has also determined that alternative methods to achieve the purpose of the proposed rules for small businesses, micro-businesses, or rural communities would not be consistent with the health, safety, and environmental and economic welfare of the state in providing adequate oversight to nursing staff or compliance with the Texas Occupations Code.

#### LOCAL EMPLOYMENT IMPACT

The proposed rule will not affect a local economy.

#### COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to this rule because the rule is necessary to protect the health, safety, and welfare of the residents of Texas.

#### PUBLIC BENEFIT AND COSTS

David Kostroun, HHSC Deputy Executive Commissioner of Regulatory Services, has determined that for each year of the first five years the rule is in effect, the public benefit will be increased conformity with existing statutes. Another anticipated public benefit is that an increase in nursing peer review committees will positively impact the work of nurses and the medical care their patients receive.

Trey Wood has determined that for the first five years that the rule is in effect, persons who are required to comply may incur economic costs. The proposed rules require FEMCs to establish a nursing peer review committee as required by Texas Occupations Code, Chapter 303. HHSC assumes that some facilities may incur costs establishing a new committee, due to the reduction in minimum nursing staff requirements from 10 to 8, and costs will vary by facility. HHSC lacks sufficient information to estimate those costs. For these reasons, the costs to persons required to comply cannot be determined.

#### TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

#### PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or e-mailed to [19R023Comments@hhsc.state.tx.us](mailto:19R023Comments@hhsc.state.tx.us).

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed before midnight on the last day of the comment period. If the last day to submit comments falls on a holiday, comments must be postmarked, shipped, or e-mailed before midnight on the following business day to be accepted. When e-mailing comments, please indicate "Comments on Proposed Rule 19R023" in the subject line.

#### STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and the Texas Occupations Code, Chapter 303.

The amendment implements Texas Government Code §531.0055 and Texas Occupations Code, Chapter 303.

#### §131.45. Facility Staffing and Training.

(a) A facility shall have personnel qualified to operate emergency equipment and to provide emergency care to patients on site and available at all treatment times.

(b) Nursing services.

(1) There shall be an organized nursing service under the direction of a qualified registered nurse (RN). The facility shall be staffed to ensure that the nursing needs of all patients are met.

(2) There shall be a written plan of administrative authority for all nursing services with responsibilities and duties of each category of nursing personnel delineated and a written job description for each category. The scope of nursing services shall be limited to nursing care rendered to patients as authorized by the Nursing Practice Act, Occupations Code Chapter 301.

(A) The responsible individual for nursing services shall be a qualified RN whose responsibility and authority shall be clearly defined and shall include supervision of both personnel performance and patient care.

(B) There shall be a written delineation of functions, qualifications, and patient care responsibilities for all categories of nursing personnel.

(C) Nursing services shall be provided in accordance with current recognized standards or recommended practices.

(3) There shall be an adequate number of RNs on duty to meet minimum staff requirements to include supervisory and staff RNs to ensure the immediate availability of an RN for emergency care or for any patient when needed.

(4) There shall be other nursing personnel in sufficient numbers to provide nursing care not requiring the service of an RN. An RN shall assign the nursing care of each patient to other nursing personnel in accordance with the patient's needs and the preparation and qualifications of the nursing staff available.

(5) An RN qualified, at a minimum, with current certification in advanced cardiac life support and Pediatric Advanced Life Support shall be on duty and on the premises at all times whenever patients are present in the facility.

(6) All direct care staff members shall maintain current certification and competency in Basic Cardiac Life Support.

(c) In addition to meeting the requirements for nursing staff under subsection (b) of this section, facilities shall comply with the following minimum staffing requirements.

(1) Facilities that provide only topical anesthesia, local anesthesia, or minimal sedation are required to have a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility.

(2) Facilities that provide moderate sedation/analgesia are required to have the following additional staff:

(A) a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility; and

(B) an individual trained and currently certified in advanced cardiac life support and pediatric advanced life support shall be available until all patients have been discharged.

(3) Facilities that provide deep sedation/analgesia and/or regional anesthesia shall have the following additional staff:

(A) a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility; and

(B) an individual who is trained and currently certified in advanced cardiac life support and pediatric advanced life support shall be on duty on the premises and sufficiently free of other duties to enable the individual to respond rapidly to emergency situations until all patients have been discharged.

(d) Nursing peer review committees. The facility shall establish a nursing peer review committee to conduct nursing peer review, as required by Texas Occupations Code, Chapter 303.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Karen Ray

Chief Counsel

Department of State Health Services

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## CHAPTER 133. HOSPITAL LICENSING

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes amendments to §133.2, concerning Definitions; and §133.41, concerning Hospital Functions and Services.

### BACKGROUND AND PURPOSE

The proposal is necessary to comply with House Bill (H.B.) 3152, 85th Legislature, Regular Session, 2017, which amends the Texas Health and Safety Code, Chapter 323. H.B. 3152 requires HHSC to define facilities as sexual assault forensic exam-ready (SAFE-ready) facilities and requires certain health-care facilities to provide sexual assault survivors the option to transfer to a facility that is SAFE-ready. The proposed amendment to §133.41 will also implement H.B. 4531, 86th Legislature, Regular Session, 2019, concerning the rights and

treatment of and services provided to certain adult sexual assault survivors.

### SECTION-BY-SECTION SUMMARY

The proposed amendment to §133.2 adds definitions of the terms SAFE-ready facility, sexual assault forensic examiner, and sexual assault survivor and removes references to a community-wide plan, which is no longer being used. This amendment also re-numbers the definitions accordingly. This amendment is necessary to comply with H.B. 3152.

The proposed amendment to §133.41(e)(6) updates language for emergency services available to sexual assault survivors and adds a reference to Texas Health and Safety Code, Chapter 323, which outlines the care facilities must provide to sexual assault survivors. This amendment also removes unnecessary duplicate information regarding these services to improve clarity and consistency. This amendment is necessary to comply with H.B. 3152 and H.B. 4531.

### FISCAL NOTE

Trey Wood, HHSC Chief Financial Officer, has determined that for each year of the first five years that the rules will be in effect, enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of state or local governments.

### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect:

(1) the proposed rules will not create or eliminate a government program;

(2) implementation of the proposed rules will not affect the number of HHSC employee positions;

(3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;

(4) the proposed rules will not affect fees paid to HHSC;

(5) the proposed rules will not create a new rule;

(6) the proposed rules will expand existing rules;

(7) the proposed rules will not change the number of individuals subject to the rules; and

(8) the proposed rules will not affect the state's economy.

### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined that there may be an adverse economic effect on small businesses or micro-businesses, or rural communities as the rules are proposed.

The proposed rules require 643 hospitals licensed statewide to develop, implement, and enforce policies and procedures that ensure sexual assault survivors receive the care specified under Health and Safety Code, Chapter 323. There are 115 hospitals currently designated as SAFE-ready. HHSC lacks sufficient data to estimate the number of those facilities designated as a small business, micro-business, or rural communities impacted by the proposed rules.

HHSC determined that alternative methods to achieve the purpose of the proposed rules for small businesses, micro-businesses, or rural communities would not be consistent with ensuring the health and safety of survivors of sexual assault.

## LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

## COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas and do not impose a cost on regulated persons.

## PUBLIC BENEFIT AND COSTS

David Kostroun, HHSC Deputy Executive Commissioner of Regulatory Services, has determined that for each year of the first five years the sections are in effect, the public benefit will be higher quality of care provided to sexual assault survivors and greater clarity of information regarding facilities that are best equipped to serve sexual assault survivors.

Trey Wood has determined that for the first five years that the rules are in effect, persons who are required to comply may incur economic costs. The proposed rules require hospitals to develop, implement, and enforce policies and procedures that ensure a sexual assault survivor receives the care specified under Health and Safety Code, Chapter 323. HHSC assumes those facilities may incur costs for required documentation, staff training, and a possible increase in the number of patients transferred to facilities which are SAFE-ready. HHSC lacks sufficient information to estimate those costs. For these reasons, the costs to persons required to comply cannot be determined at this time.

## REGULATORY ANALYSIS

HHSC has determined that this proposal is not a "major environmental rule" as defined by Government Code §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

## TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

## PUBLIC COMMENT

Written comments on the proposal may be submitted to the Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or emailed to 19R009comments@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If the last day to submit comments falls on a holiday, comments must be post-marked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 19R009" in the subject line.

## SUBCHAPTER A. GENERAL PROVISIONS

### 25 TAC §133.2

#### STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and the Texas Health and Safety Code, Chapter 323.

The rule amendments implement Texas Health and Safety Code, Chapters 241 and 323, and Texas Government Code, Chapter 531.

#### §133.2. Definitions.

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Act--The Texas Hospital Licensing Law, Health and Safety Code (HSC), Chapter 241.

(2) - (9) (No change.)

~~(10) Community-wide plan--An agreement entered into between one or more health care facilities, entities administering a sexual assault program, district attorney's offices, or law enforcement agencies that designates one or more health care facilities in the community as a primary health care facility to furnish emergency medical services and evidence collection to sexual assault survivors on a community or area-wide basis.~~

(10) [(11)] Competent--Possessing the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant benefits and harms of and reasonable alternatives to a proposed treatment decision.

(11) [(12)] Comprehensive medical rehabilitation--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 responsibility to achieve team treatment goals for the person.

(12) [(13)] Comprehensive medical rehabilitation hospital--A general hospital that specializes in providing comprehensive medical rehabilitation services, including surgery and related ancillary services.

(13) [(14)] Comprehensive medical rehabilitation unit--An identifiable part of a hospital which provides comprehensive medical rehabilitation services to patients admitted to the unit.

(14) [(15)] Cooperative agreement--An agreement among two or more hospitals for the allocation or sharing of health care equipment, facilities, personnel, or services.

(15) [(16)] Dentist--A person licensed to practice dentistry by the Texas State Board of Dental Examiners. This includes a doctor of dental surgery or a doctor of dental medicine.

(16) [(17)] Department--The Department of State Health Services, 1100 West 49th Street, Austin, Texas 78756-3199.

(17) [(18)] Dietitian--A person who is currently licensed by the Texas State Board of Examiners of Dietitians as a licensed dietitian or provisional licensed dietitian, or who is a registered dietitian with the American Dietetic Association.

(18) [(19)] Director--The hospital licensing director, Department of State Health Services.

(19) [(20)] Do Not Resuscitate (DNR) order--An order issued in a hospital under Health and Safety Code, Chapter 166, Subchapter E (relating to Health Care Facility Do-Not-Resuscitate Orders), instructing a health care professional not to attempt cardiopulmonary resuscitation on a patient whose circulatory or respiratory function ceases.

(20) [(21)] Emergency medical condition--A medical condition manifesting itself by acute symptoms of sufficient severity (including severe pain, psychiatric disturbances or symptoms of substance abuse) such that the absence of immediate medical attention could reasonably be expected to result in one or all of the following:

(A) placing the health of the individual (or with respect to a pregnant woman, the health of the woman or her unborn child) in serious jeopardy;

(B) serious impairment to bodily functions;

(C) serious dysfunction of any bodily organ or part; or

(D) with respect to a pregnant woman who is having contractions:

(i) that there is inadequate time to effect a safe transfer to another hospital before delivery; or

(ii) that transfer may pose a threat to the health or safety of the woman or the unborn child.

(21) [(22)] Freestanding emergency medical care facility--A facility that is structurally separate and distinct from a hospital and receives individuals for the provision of emergency care. The facility is owned and operated by the hospital, and is exempt from the licensing requirements of Texas Health and Safety Code, Chapter 254, under §254.052(7) or (8).

(22) [(23)] General hospital--An establishment that:

(A) offers services, facilities, and beds for use for more than 24 hours for two or more unrelated individuals requiring diagnosis, treatment, or care for illness, injury, deformity, abnormality, or pregnancy; and

(B) regularly maintains, at a minimum, clinical laboratory services, diagnostic X-ray services, treatment facilities including surgery or obstetrical care or both, and other definitive medical or surgical treatment of similar extent.

(23) [(24)] Governing body--The governing authority of a hospital which is responsible for a hospital's organization, management, control, and operation, including appointment of the medical staff; includes the owner or partners for hospitals owned or operated by an individual or partners.

(24) [(25)] Governmental unit--A political subdivision of the state, including a hospital district, county, or municipality, and any department, division, board, or other agency of a political subdivision.

(25) [(26)] Hospital--A general hospital or a special hospital.

(26) [(27)] Hospital administration--Administrative body of a hospital headed by an individual who has the authority to represent the hospital and who is responsible for the operation of the hospital according to the policies and procedures of the hospital's governing body.

(27) [(28)] Incompetent--Lacking the ability, based on reasonable medical judgment, to understand and appreciate the nature and consequences of a treatment decision, including the significant bene-

fits and harms of and reasonable alternatives to a proposed treatment decision.

(28) [(29)] Inpatient--An individual admitted for an intended length of stay of 24 hours or greater.

(29) [(30)] Inpatient services--Services provided to an individual admitted to a hospital for an intended length of stay of 24 hours or greater.

(30) [(31)] Intellectual Disability--Significantly sub-average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period.

(31) [(32)] Licensed vocational nurse (LVN)--A person who is currently licensed under the Nursing Practice Act by the Texas Board of Nursing for the State of Texas as a licensed vocational nurse or who holds a valid vocational nursing license with multi-state licensure privilege from another compact state.

(32) [(33)] Licensee--The person or governmental unit named in the application for issuance of a hospital license.

(33) [(34)] Medical staff--A physician or group of physicians and a podiatrist or group of podiatrists who by action of the governing body of a hospital are privileged to work in and use the facilities of a hospital for or in connection with the observation, care, diagnosis, or treatment of an individual who is, or may be, suffering from a mental or physical disease or disorder or a physical deformity or injury.

(34) [(35)] Mental health services--All services concerned with research, prevention, and detection of mental disorders and disabilities and all services necessary to treat, care for, supervise, and rehabilitate persons who have a mental disorder or disability, including persons whose mental disorders or disabilities result from alcoholism or drug addiction.

(35) [(36)] Niche hospital--A hospital that:

(A) classifies at least two-thirds of the hospital's Medicare patients or, if data is available, all patients:

(i) in not more than two major diagnosis-related groups; or

(ii) in surgical diagnosis-related groups.

(B) specializes in one or more of the following areas:

(i) cardiac;

(ii) orthopedics;

(iii) surgery; or

(iv) women's health; and

(C) is not:

(i) a public hospital;

(ii) a hospital for which the majority of inpatient claims are for major diagnosis-related groups relating to rehabilitation, psychiatry, alcohol and drug treatment, or children or newborns; or

(iii) a hospital with fewer than 10 claims per bed per year.

(36) [(37)] Nurse--A registered, vocational, or advanced practice registered nurse licensed by the Texas Board of Nursing or entitled to practice in this state under Occupations Code, Chapters 301, 304, or 305.

(37) [(38)] Outpatient--An individual who presents for diagnostic or treatment services for an intended length of stay of less than

24 hours; provided, however, that an individual who requires continued observation may be considered as an outpatient for a period of time not to exceed a total of 48 hours.

(38) [(39)] Outpatient services--Services provided to patients whose medical needs can be met in less than 24 hours and are provided within the hospital; provided, however, that services that require continued observation may be considered as outpatient services for a period of time not to exceed a total of 48 hours.

(39) [(40)] Owner--One of the following persons or governmental unit which will hold or does hold a license issued under the statute in the person's name or the person's assumed name:

- (A) a corporation;
- (B) a governmental unit;
- (C) a limited liability company;
- (D) an individual;
- (E) a partnership if a partnership name is stated in a written partnership agreement or an assumed name certificate;

(F) all partners in a partnership if a partnership name is not stated in a written partnership agreement or an assumed name certificate; or

(G) all co-owners under any other business arrangement.

(40) [(41)] Patient--An individual who presents for diagnosis or treatment.

(41) [(42)] Pediatric and adolescent hospital--A general hospital that specializes in providing services to children and adolescents, including surgery and related ancillary services.

(42) [(43)] Person--An individual, firm, partnership, corporation, association, or joint stock company, and includes a receiver, trustee, assignee, or other similar representative of those entities.

(43) [(44)] Physician--A physician licensed by the Texas Medical Board.

(44) [(45)] Physician assistant--A person licensed as a physician assistant by the Texas Physician Assistant Board.

(45) [(46)] Podiatrist--A podiatrist licensed by the Texas State Board of Podiatric Medical Examiners.

(46) [(47)] Practitioner--A health care professional licensed in the State of Texas, other than a physician, podiatrist, or dentist. A practitioner shall practice in a manner consistent with their underlying practice act.

(47) [(48)] Premises--A premises may be any of the following:

- (A) a single building where inpatients receive hospital services; or
- (B) multiple buildings where inpatients receive hospital services provided that the following criteria are met:
  - (i) all buildings in which inpatients receive hospital services are subject to the control and direction of the same governing body;
  - (ii) all buildings in which inpatients receive hospital services are within a 30-mile radius of the primary hospital location;

(iii) there is integration of the organized medical staff of each of the hospital locations to be included under the single license;

(iv) there is a single chief executive officer for all of the hospital locations included under the license who reports directly to the governing body and through whom all administrative authority flows and who exercises control and surveillance over all administrative activities of the hospital;

(v) there is a single chief medical officer for all of the hospital locations under the license who reports directly to the governing body and who is responsible for all medical staff activities of the hospital;

(vi) each hospital location to be included under the license that is geographically separate from the other hospital locations contains at least one nursing unit for inpatients which is staffed and maintains an active inpatient census, unless providing only diagnostic or laboratory services, or a combination of diagnostic or laboratory services, in the building for hospital inpatients; and

(vii) each hospital that is to be included in the license complies with the emergency services standards:

(I) for a general hospital, if the hospital provides surgery or obstetrical care or both; or

(II) for a special hospital, if the hospital does not provide surgery or obstetrical care.

(48) [(49)] Presurvey conference--A conference held with department staff and the applicant or the applicant's representative to review licensure rules and survey documents and provide consultation prior to the on-site licensure inspection.

(49) [(50)] Psychiatric disorder--A clinically significant behavioral or psychological syndrome or pattern that occurs in an individual and that is typically associated with either a painful syndrome (distress) or impairment in one or more important areas of behavioral, psychological, or biological function and is more than a disturbance in the relationship between the individual and society.

(50) [(51)] Quality improvement--A method of evaluating and improving processes of patient care which emphasizes a multidisciplinary approach to problem solving, and focuses not on individuals, but systems of patient care which might be the cause of variations.

(51) [(52)] Registered nurse (RN)--A person who is currently licensed by the Texas Board of Nursing for the State of Texas as a registered nurse or who holds a valid registered nursing license with multi-state licensure privilege from another compact state.

(52) SAFE-ready facility--A facility designated by the Health and Human Services Commission as a sexual assault forensic exam-ready facility.

(53) Sexual assault forensic examiner--A certified sexual assault nurse examiner or a physician with specialized training on conducting a forensic medical examination.

(54) Sexual assault survivor--An individual who is a victim of a sexual assault, regardless of whether a report is made or a conviction is obtained in the incident.

(55) [(53)] Special hospital--An establishment that:

(A) offers services, facilities, and beds for use for more than 24 hours for two or more unrelated individuals who are regularly admitted, treated, and discharged and who require services more intensive than room, board, personal services, and general nursing care;



(B) has clinical laboratory facilities, diagnostic X-ray facilities, treatment facilities, or other definitive medical treatment;

(C) has a medical staff in regular attendance; and

(D) maintains records of the clinical work performed for each patient.

(56) [(54)] Stabilize--With respect to an emergency medical condition, to provide such medical treatment of the condition necessary to assure, within reasonable medical probability, that no material deterioration of the condition is likely to result from or occur during the transfer of the individual from a facility, or that the woman has delivered the child and the placenta.

(57) [(55)] Surgical technologist--A person who practices surgical technology as defined in Health and Safety Code, Chapter 259.

(58) [(56)] Transfer--The movement (including the discharge) of an individual outside a hospital's facilities at the direction of any person employed by (or affiliated or associated, directly or indirectly, with) the hospital, but does not include such a movement of an individual who has been declared dead, or leaves the facility without the permission of any such person.

(59) [(57)] Universal precautions--Procedures for disinfection and sterilization of reusable medical devices and the appropriate use of infection control, including hand washing, the use of protective barriers, and the use and disposal of needles and other sharp instruments as those procedures are defined by the Centers for Disease Control and Prevention (CDC) of the Department of Health and Human Services. This term includes standard precautions as defined by CDC which are designed to reduce the risk of transmission of blood borne and other pathogens in hospitals.

(60) [(58)] Violation--Failure to comply with the licensing statute, a rule or standard, special license provision, or an order issued by the executive commissioner of health and human services (executive commissioner) or the executive commissioner's designee, adopted or enforced under the licensing statute. Each day a violation continues or occurs is a separate violation for purposes of imposing a penalty.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2019.

TRD-201902906

Karen Ray

Chief Counsel

Department of State Health Services

Earliest possible date of adoption: October 13, 2019

For further information, please call: (512) 834-4591



## SUBCHAPTER C. OPERATIONAL REQUIREMENTS

### 25 TAC §133.41

#### STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and the Texas Health and Safety Code, Chapter 323.

The rule amendments implement Texas Health and Safety Code, Chapters 241 and 323, and Texas Government Code, Chapter 531.

#### §133.41. Hospital Functions and Services.

(a) - (d) (No change.)

(e) Emergency services. All licensed hospital locations, including multiple-location sites, shall have an emergency suite that complies with §133.161(a)(1)(A) of this title (relating to Requirements for Buildings in Which Existing Licensed Hospitals are Located) or §133.163(f) of this title, and the following.

(1) - (5) (No change.)

(6) Emergency services for sexual assault survivors [survivors of sexual assault]. This section does not affect the duty of a health care facility to comply with the requirements of the federal Emergency Medical Treatment and Active Labor Act of 1986 (42 U.S.C. §1395dd) that are applicable to the facility. The hospital shall develop, implement, and enforce policies and procedures to ensure that after a sexual assault survivor presents to the hospital following a sexual assault, the hospital shall provide the care specified under the Health and Safety Code, Chapter 323.

[(A) The hospital shall develop, implement and enforce policies and procedures to ensure that, except as otherwise provided by subparagraph (C) of this paragraph, after a sexual assault survivor presents to the hospital following a sexual assault, the hospital shall provide the care specified under subparagraph (D) of this paragraph.]

[(B) A facility that is not a health care facility designated in a community-wide plan as the primary health care facility in the community for treating sexual assault survivors shall inform the survivor that:]

[(i) the facility is not the designated facility and provide to the survivor the name and location of the designated facility; and]

[(ii) the survivor is entitled, at the survivor's option:]

[(i) to receive the care described by subparagraph (D) of this paragraph at that facility, subject to subparagraph (D)(i) of this paragraph; or]

[(ii) to be stabilized and to be transferred to and receive the care described by subparagraph (D) of this paragraph at a health care facility designated in a community-wide plan as the primary health care facility in the community for treating sexual assault survivors.]

[(C) If a sexual assault survivor chooses to be transferred under subparagraph (B)(ii)(I) of this paragraph, after obtaining the survivor's written, signed consent to the transfer, the facility shall stabilize and transfer the survivor to a health care facility in the community designated in a community-wide plan as the health care facility for treating sexual assault survivors, where the survivor will receive the care specified under subparagraph (D) of this paragraph.]

[(D) A hospital providing care to a sexual assault survivor shall provide the survivor with the following:]

[(i) subject to subparagraph (G) of this paragraph, a forensic medical examination in accordance with Government Code, Chapter 420, Subchapter B, when the examination has been requested by a law enforcement agency under Code of Criminal Procedure, Article 56.06, or is conducted under Code of Criminal Procedure, Article 56.065. If a sexual assault survivor is age 18 or older and has not reported the assault to a law enforcement agency, a hospital shall provide this forensic medical examination, when the sexual assault survivor has

arrived at the facility not later than 96 hours after the time the assault occurred and has consented to the examination;]

*[(ii)]* a private area, if available, to wait or speak with the appropriate medical, legal, or sexual assault crisis center staff or volunteer until a physician, nurse, or physician assistant is able to treat the survivor;]

*[(iii)]* access to a sexual assault program advocate, if available, as provided by Code of Criminal Procedure, Article 56.045;]

*[(iv)]* the information form required by Health and Safety Code, §323.005;]

*[(v)]* a private treatment room, if available;]

*[(vi)]* if indicated by the history of contact, access to appropriate prophylaxis for exposure to sexually transmitted infections; and]

*[(vii)]* the name and telephone number of the nearest sexual assault crisis center.]

*[(E)]* The hospital must obtain documented consent before providing the forensic medical examination and treatment.]

*[(F)]* Upon request, the hospital shall submit to the department its plan for the provision of service to sexual assault survivors. The plan must describe how the hospital will ensure that the services required under subparagraph (D) of this paragraph will be provided.]

*[(i)]* The hospital shall submit the plan by the 60th day after the department makes the request.]

*[(ii)]* The department will approve or reject the plan not later than the 120th day following the submission of the plan.]

*[(iii)]* If the department is not able to approve the plan, the department will return the plan to the hospital and will identify the specific provisions of statutes or rules with which the hospital's plan failed to comply.]

*[(iv)]* The hospital shall correct and resubmit the plan to the department for approval not later than the 90th day after the plan is returned to the hospital.]

*[(G)]* A person may not perform a forensic examination on a sexual assault survivor unless the person has the basic training described by Health and Safety Code, §323.0045, or the equivalent education and training.]

*[(H)]* Basic Sexual Assault Forensic Evidence Collection Training.]

*[(i)]* A person who performs a forensic examination on a sexual assault survivor must have at least basic forensic evidence collection training or the equivalent education.]

*[(ii)]* A person who completes a continuing medical or nursing education course in forensic evidence collection that is approved or recognized by the appropriate licensing board is considered to have basic sexual assault forensic evidence training for purposes of this chapter.]

*[(iii)]* Each health care facility that has an emergency department and that is not a health care facility designated in a community-wide plan as the primary health care facility in the community for treating sexual assault survivors shall develop a plan to train personnel on sexual assault forensic evidence collection.]

*[(I)]* Sexual Assault Survivors Who Are Minors. This chapter does not affect participating entities of children's advocacy centers under Family Code, Chapter 264, Subchapter E, or the working

protocols set forth by their multidisciplinary teams to ensure access to specialized medical assessments for sexual assault survivors who are minors. To the extent of a conflict with Family Code, Chapter 264, Subchapter E, that subchapter controls.]

(f) - (y) (No change.)

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 26, 2019.

TRD-201902907

Karen Ray

Chief Counsel

Department of State Health Services

Earliest possible date of adoption: October 13, 2019

For further information, please call: (512) 834-4591



## CHAPTER 135. AMBULATORY SURGICAL CENTERS

### SUBCHAPTER A. OPERATING REQUIREMENTS FOR AMBULATORY SURGICAL CENTERS

#### 25 TAC §135.15

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC) proposes an amendment to §135.15, concerning Facility Staffing and Training.

#### BACKGROUND AND PURPOSE

The purpose of the proposal is to update the requirements for establishing a nursing peer review committee. The proposal is necessary to comply with House Bill (H.B.) 3296, 85th Legislature, Regular Session, 2017, which amended the Texas Occupations Code, Chapter 303, related to nursing peer review committees.

#### SECTION-BY-SECTION SUMMARY

The proposed amendment to §135.15 adds new subsection (c) to require the establishment of a nursing peer review committee to conduct nursing peer review, as required by Texas Occupations Code, Chapter 303. This amendment is necessary to comply with H.B. 3296.

#### FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rule will be in effect, enforcing or administering the rule does not have foreseeable implications relating to costs or revenues of state or local governments.

#### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rule will be in effect:

- (1) the proposed rule will not create or eliminate a government program;
- (2) implementation of the proposed rule will not affect the number of HHSC employee positions;
- (3) implementation of the proposed rule will result in no assumed change in future legislative appropriations;

- (4) the proposed rule will not affect fees paid to HHSC;
- (5) the proposed rule will not create a new rule;
- (6) the proposed rule will expand existing rules;
- (7) the proposed rule will increase the number of individuals subject to the rule; and
- (8) the proposed rule will not affect the state's economy.

**SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS**

Trey Wood has also determined that there may be an adverse economic effect on small businesses, micro-businesses, or rural communities.

The proposed rules require 523 Ambulatory Service Centers (ASCs) licensed statewide to establish a nursing peer review committee as required by Texas Occupations Code, Chapter 303. HHSC lacks sufficient data to estimate the number of those facilities designated as a small business, micro-business, or rural community impacted by the proposed rules.

HHSC has also determined that alternative methods to achieve the purpose of the proposed rules for small businesses, micro-businesses, or rural communities would not be consistent with the health, safety, and environmental and economic welfare of the state in providing adequate oversight to nursing staff or compliance with the Texas Occupations Code.

**LOCAL EMPLOYMENT IMPACT**

The proposed rule will not affect a local economy.

**COSTS TO REGULATED PERSONS**

Texas Government Code §2001.0045 does not apply to this rule because the rule is necessary to protect the health, safety, and welfare of the residents of Texas.

**PUBLIC BENEFIT AND COSTS**

David Kostroun, HHSC Deputy Executive Commissioner of Regulatory Services, has determined that for each year of the first five years the rule is in effect, the public benefit will be increased conformity with existing statutes. Another anticipated public benefit is that an increase in nursing peer review committees will positively impact the work of nurses and the medical care their patients receive.

Trey Wood has determined that for the first five years that the rule is in effect, persons who are required to comply may incur economic costs. The proposed rules require ASCs to establish a nursing peer review committee as required by Texas Occupations Code, Chapter 303. HHSC assumes that some facilities may incur costs establishing a new committee and costs will vary by facility. HHSC lacks sufficient information to estimate those costs. For these reasons, the costs to persons required to comply cannot be determined.

**TAKINGS IMPACT ASSESSMENT**

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

**PUBLIC COMMENT**

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102,

Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or emailed to 19R023Comments@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If the last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 19R023" in the subject line.

**STATUTORY AUTHORITY**

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and the Texas Occupations Code, Chapter 303.

The amendment implements Texas Government Code §531.0055 and Texas Occupations Code, Chapter 303

*§135.15. Facility Staffing and Training.*

(a) Nursing services.

(1) There shall be an organized nursing service under the direction of a qualified registered nurse (RN). The ambulatory surgical center (ASC) shall be staffed to assure that the nursing needs of all patients are met.

(2) There shall be a written plan of administrative authority for all nursing services with responsibilities and duties of each category of nursing personnel delineated and a written job description for each category. The scope of nursing service shall include, but is not limited to, nursing care rendered to patients preoperatively, intraoperatively, and postoperatively.

(A) The responsible individual for nursing services shall be a qualified registered nurse (RN) whose responsibility and authority for nursing service shall be clearly defined and includes supervision of both personnel performance and patient care.

(B) There shall be a written delineation of functions, qualifications, and patient care responsibilities for all categories of nursing personnel.

(C) Surgical technicians and licensed vocational nurses may be permitted to serve in the scrub nurse role under the direct supervision of an RN; they shall not be permitted to function as circulating nurses in the operating rooms. Licensed vocational nurses and surgical technicians may assist in circulatory duties under the direct supervision of a qualified RN.

(D) Nursing services shall be provided in accordance with current recognized standards or recommended practices.

(E) The facility shall adopt, implement and enforce policies and procedures to comply with Health and Safety Code, Chapter 259 (relating to Surgical Technologists at Health Care Facilities).

(3) There shall be an adequate number of RNs on duty to meet the following minimum staff requirements: director of the department (or designee), and supervisory and staff personnel for each service area to assure the immediate availability of an RN for emergency care or for any patient when needed.

(A) An RN shall assign the nursing care of each patient to other nursing personnel in accordance with the patient's needs and the preparation and qualifications of the nursing staff available.

(B) There shall be other nursing personnel in sufficient numbers to provide nursing care not requiring the service of an RN.

(4) An RN qualified, at a minimum, with current certification in basic cardiac life support shall be on duty and on the premises at all times whenever patients are present in the facility.

(b) Additional staffing requirements. In addition to meeting the requirements for nursing staff under subsection (a) of this section, facilities shall comply with the following minimum staffing requirements.

(1) Facilities that provide only topical anesthesia, local anesthesia and/or minimal sedation are required to have a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility.

(2) Facilities that provide moderate sedation/analgesia are required to have the following additional staff:

(A) a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility; and

(B) an individual trained and currently certified in advanced cardiac life support and, if surgery is performed on pediatric patients, pediatric advanced life support shall be available until all patients have been discharged from the postanesthesia care unit.

(3) Facilities that provide deep sedation/analgesia, general anesthesia, and/or regional anesthesia shall have the following additional staff:

(A) a second individual on duty on the premises who is trained and currently certified in basic cardiac life support until all patients have been discharged from the facility; and

(B) an individual who is trained and currently certified in advanced cardiac life support and, if surgery is performed on pediatric patients, pediatric advanced life support shall be on duty on the premises and sufficiently free of other duties to enable the individual to respond rapidly to emergency situations until all patients have been discharged from the postanesthesia care unit.

(c) Nursing peer review committees. The facility shall establish a nursing peer review committee to conduct nursing peer review, as required by Texas Occupations Code, Chapter 303.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 28, 2019.

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Karen Ray

Chief Counsel

Department of State Health Services

Earliest possible date of adoption: October 13, 2019

For further information, please call: (512) 834-4591



## CHAPTER 200. REPORTING OF HEALTH CARE-ASSOCIATED INFECTIONS AND PREVENTABLE ADVERSE EVENTS

### SUBCHAPTER A. CONTROL OF COMMUNICABLE DISEASES

#### 25 TAC §§200.1 - 200.6

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), proposes amendments to §200.1, concerning Definitions; §200.2, concerning General Reporting Guidelines for Health Care-Associated Infection and Preventable Adverse Event Data; §200.3, concerning How to Report; §200.4, concerning Which Events to Report; §200.5, concerning Data to Report; and §200.6, concerning When to Initiate Reporting.

#### BACKGROUND AND PURPOSE

The proposal is necessary to comply with Senate Bill (S.B.) 384, 86th Legislature, Regular Session, 2019, which amended Texas Health and Safety Code, Chapter 98, Reporting of Health Care-Associated Infections and Preventable Adverse Events. The new law alters the list of health care-associated infections (HAIs) that health care facilities must report to DSHS by removing the language outlining the specific medical procedures required for HAI reporting by facility type, and replacing it with a requirement for all health care facilities to report the list of HAIs that the Centers for Medicare and Medicaid Services (CMS) require facilities participating in the Medicare program to report. These changes have the effect of aligning state reporting requirements with federal CMS reporting requirements. Health care facilities will now have one set of HAI data elements to report, instead of having to report one set of data elements mandated by Texas and another mandated by CMS. This alignment will significantly ease reporting requirements.

#### SECTION-BY-SECTION SUMMARY

Section 200.1 deletes the definitions of "APGAR Score," "central line," "medical gas," "perinatal," "pediatric and adolescent hospital," "special care setting," "unsafe condition," "urinary catheter," and "urinary tract infection (UTI)." The amendment revises the name of the definition of "inpatient treatment" to "inpatient," and deletes the reference "of greater than 24 hours." The amendment adds a statement "as defined by the NHSN," an acronym for the Centers for Disease Control and Prevention's National Healthcare Safety Network or its successor. The amendment uses the acronym HAI for health care-associated infection and uses "HAI data" for health-care associated infection data.

The amendment to §200.2 deletes the preventable adverse event (PAE) data information since the PAE data are not reported to NHSN and adds the titles of the referenced sections.

The amendment to §200.3(b) adds the titles of the referenced sections. The amendment to §200.3(c) corrects a rule reference for §200.1 that is renumbered due to the deletion of certain definitions. The reference to a hospital and ambulatory surgical center was removed in subsection (c)(2) as those references are listed in subsection (c). The amendment to §200.3(e) deletes the specific reporting requirement for patients identified with a surgical site infection associated with a procedure, since it was removed in §200.4.

The amendment to §200.4 removes specific procedures required for HAI reporting by facility type and replaces it with the requirements for all health care facilities to report the list of HAIs that CMS requires facilities participating in the Medicare program to report. The amendment adds a website for a current list of reportable HAIs and PAEs.

The amendment to §200.5 includes a DSHS website for HAI-Texas.org and PAETexas.org for facilities to utilize for data reporting requirements.

The amendment to §200.6 removes specific procedures required for HAI reporting by facility type and replaces it with the requirements for all health care facilities to report the list of HAIs that CMS requires facilities participating in the Medicare program to report.

#### FISCAL NOTE

Donna Sheppard, Chief Financial Officer, has determined that in the first five years that the rules will be in effect, enforcing or administering the rules do not have foreseeable implications relating to costs or revenues of state or local governments.

#### GOVERNMENT GROWTH IMPACT STATEMENT

DSHS has determined that during the first five years that the rules will be in effect: (1) the proposed rules will not create or eliminate a government program; (2) implementation of the proposed rules will not affect the number of DSHS employee positions; (3) implementation of the proposed rules will result in no assumed change in future legislative appropriations; (4) the proposed rules will not affect fees paid to DSHS; (5) the proposed rules will not create a new rule; (6) the proposed rules will limit existing rules; (7) the proposed rules will not change the number of individuals subject to the rules; and (8) the proposed rules will not affect the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Donna Sheppard, has also determined that there will be no adverse economic effect on small businesses, micro-businesses, or rural communities. The rules do not impose any additional costs on small businesses, micro-businesses, or rural communities that are required to comply with the rules.

#### LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

#### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas; do not impose a cost on regulated persons; are amended to reduce the burden or responsibilities imposed on regulated persons by the rules; and are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

#### PUBLIC BENEFIT AND COSTS

Imelda Garcia, Associate Commissioner, Laboratory and Infectious Disease Services Division, has determined that for each year of the first five years the rules are in effect, the public benefit will be more accurate and complete reporting of HAI data in Texas, resulting in better data analysis, better education regarding HAIs, and enhanced prevention of HAI in Texas. The passage of S.B. 384 aligns state reporting requirements for HAIs with federal CMS reporting requirements for HAIs. This will facil-

itate ease of reporting for entities required to report, simplify both the list of conditions which are required to be reported to DSHS and the list of facilities required to report, and will allow Texas to more accurately evaluate prevention efforts by comparing standardized HAI data with other states. Donna Sheppard, has also determined that for the first five years the rules are in effect, there are no anticipated economic costs to persons who are required to comply with the proposed rules because S.B. 384 removes language outlining the specific procedures required for HAI reporting by facility type, and replaces it with the requirements for all health care facilities to report the list of HAIs that CMS requires facilities participating in the Medicare program to report, thus aligning state and federal reporting requirements. Facilities required to report the data in the proposed rule changes are already reporting this data to CMS and the proposed rules will not result in any additional reporting burden on reporting entities.

#### REGULATORY ANALYSIS

DSHS has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

#### TAKINGS IMPACT ASSESSMENT

DSHS has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code, §2007.043.

#### PUBLIC COMMENT

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or emailed to [HHRulesCoordinationOffice@hhsc.state.tx.us](mailto:HHRulesCoordinationOffice@hhsc.state.tx.us).

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When emailing comments, please indicate "Comments on Proposed Rule 19R053" in the subject line.

#### STATUTORY AUTHORITY

The amendments are authorized by Texas Health and Safety Code, Chapter 98, which authorizes the Executive Commissioner of HHSC to adopt rules as necessary; and Texas Government Code, §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services system, including by DSHS. Under Texas Health and Safety Code, Chapter 1001, the DSHS Commissioner is authorized to assist the Executive Commissioner in the development of rules relating to the matters with DSHS jurisdiction.

The amendments implement Texas Government Code, §531.0055 and Texas Health and Safety Code, §98.103.

§200.1. *Definitions.*

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

- (1) AHRQ--Agency for Healthcare Research and Quality.
- (2) Ambulatory surgical center--A facility licensed under Texas Health and Safety Code, Chapter 243.
- ~~(3) APGAR Score--A test designed to quickly evaluate a newborn's physical condition and to determine any immediate need for extra medical or emergency care.~~
- ~~(4) Central line--An intravascular catheter that terminates at or close to the heart or in one of the great vessels which is used for infusion, withdrawal of blood or hemodynamic monitoring.~~
- (3) ~~(5)~~ CMS--Centers for Medicare and Medicaid Services under the United States Department of Health and Human Services.
- (4) ~~(6)~~ Comments--Notes or explanations submitted by the health care facilities concerning the department's compilation and summary of the facilities' data that is made available to the public as described in the Texas Health and Safety Code, §98.106.
- (5) ~~(7)~~ Data--Facility and patient level information reported to the department for the purposes of monitoring health care-associated infections and preventable adverse events.
- (6) ~~(8)~~ Data summary--Facility level information prepared by the department for each health care facility required to report in this state to facilitate comparisons of risk-adjusted infection rates and preventable adverse events.
- (7) ~~(9)~~ Department--Department of State Health Services.
- (8) ~~(10)~~ Device days--The number of patients in a special care setting who have one or more central lines for each day of the month, determined at the same time each day of the reporting quarter.
- (9) ~~(11)~~ Facility contact--Person identified by the health care facility responsible for coordinating communications related to data submission, verification and approval of data summary.
- (10) ~~(12)~~ Facility Identification Number--The unique, distinguishable, uniform number used to identify each health care facility.
- (11) ~~(13)~~ Fall--A sudden, unintended, uncontrolled downward displacement of a patient's body to the ground or other object.
- (12) ~~(14)~~ General hospital--A hospital licensed under Texas Health and Safety Code, Chapter 241, or a hospital that provides surgical or obstetrical services and that is maintained or operated by the state.
- (13) ~~(15)~~ Great vessels--Primary blood vessels to include aorta, pulmonary artery, superior vena cava, inferior vena cava, brachiocephalic veins, internal jugular veins, subclavian veins, external iliac veins, common femoral veins, and in neonates, the umbilical artery or umbilical vein.
- (14) ~~(16)~~ HAI--Health care-associated infection. ~~(HAI)--~~ Localized or symptomatic condition resulting from an adverse reaction to an infectious agent or its toxins to which a patient is exposed in the course of the delivery of health care to the patient.

~~(15)~~ ~~(17)~~ HAI [Health care-associated infection] data--Patient level information identifying the patient, procedures and events required by this chapter, infections resulting from those procedures or events, and causative pathogens when laboratory confirmed.

~~(16)~~ ~~(18)~~ Health care facility or facility--A general hospital or ambulatory surgical center.

~~(17)~~ ~~(19)~~ ICD-CM--The International Classification of Diseases, Clinical Modification that is used to code and classify morbidity data from the inpatient and outpatient records of hospitals, ambulatory surgical centers, and physician offices.

~~(18)~~ ~~(20)~~ Incident--A patient safety event that reached the patient, whether or not the patient was harmed.

~~(19)~~ ~~(21)~~ Inpatient[~~Treatment~~]-An admission to an acute care hospital [of greater than 24 hours] for medical treatment as defined by the NHSN.

~~(22)~~ Medical Gas--A gas used in the medical treatment of a patient such as oxygen, nitrogen or nitrous oxide.]

~~(20)~~ ~~(23)~~ Mild Harm--Bodily or psychological injury results in the minimal symptoms or loss of function, or injury limited to the additional treatment, monitoring and/or increased length of stay.

~~(21)~~ ~~(24)~~ Moderate Harm--Bodily or psychological injury adversely affecting functional ability or quality of life, but not at the levels of severe harm.

~~(22)~~ ~~(25)~~ Near Miss--A patient safety event that did not reach the patient.

~~(23)~~ ~~(26)~~ NHSN--Centers for Disease Control and Prevention's National Healthcare Safety Network or its successor.

~~(24)~~ ~~(27)~~ NHSN-reported PAE--A preventable adverse event as defined by NQF or CMS which is reported through NHSN [or its successor].

~~(25)~~ ~~(28)~~ NQF--National Quality Forum.

~~(26)~~ ~~(29)~~ No Harm--A patient safety incident that reached the patient, but no harm was evident.

~~(27)~~ ~~(30)~~ PSO--Patient safety organization.

~~(31)~~ Perinatal--The period from the 20th week of gestation through 4 weeks postpartum.]

~~(32)~~ Pediatric and adolescent hospital--A general hospital that specializes in providing services to children and adolescents, as defined in Texas Health and Safety Code, §241.003-]

~~(28)~~ ~~(33)~~ Pressure Ulcer--Localized injury to the skin and/or underlying tissue that usually occurs over a bony prominence as a result of pressure, or pressure in combination with shear and/or friction.

~~(29)~~ ~~(34)~~ PAE--Preventable adverse event. Examples of PAEs are given in Texas Health and Safety Code, §98.1045.

~~(30)~~ ~~(35)~~ Reporting quarters--First quarter: January 1 through March 31; Second quarter: April 1 through June 30; Third quarter: July 1 through September 30; Fourth quarter: October 1 through December 31.

~~(31)~~ ~~(36)~~ Risk adjustment--A statistical method to account for a patient's severity of illness and the likelihood of development of a health care-associated infection (e.g., duration of procedure in minutes, wound class, and American Society of Anesthesiology (ASA) score).

(32) [(37)] SRE--Serious Reportable Event. Also known as a "never event."

(33) [(38)] Severe Harm--Bodily or psychological injury that interferes significantly with the functional ability or quality of life.

[(39) Special care setting--A unit or service of a general, pediatric or adolescent hospital that provides treatment to inpatients who require extraordinary care on a concentrated and continuous basis. The term includes an adult intensive care unit, a burn intensive care unit and a critical care unit.]

(34) [(40)] TxHSN--Texas Health Care Safety Network.

(35) [(41)] TxHSN-reported PAE--A preventable adverse event as defined in §200.7 of this title (relating to Schedule for HAI and PAE Reporting) reported through the TxHSN portal or its successor.

[(42) Unsafe Condition--Any circumstance that increases the probability of a patient safety event.]

[(43) Urinary catheter--As defined by the Centers for Disease Control and Prevention's National Healthcare Safety Network at [www.cdc.gov/nhsn](http://www.cdc.gov/nhsn) or its successor.]

[(44) Urinary tract infection (UTI)--As defined by the Centers for Disease Control and Prevention's National Healthcare Safety Network at [www.cdc.gov/nhsn](http://www.cdc.gov/nhsn) or its successor.]

(36) [(45)] Validation--The process of comparing data received by the department to original patient and facility records to ascertain the accuracy of reported data compared to the case definition.

(37) [(46)] Verification--Review of data submitted electronically to assure completeness and internal consistency.

#### §200.2. *General Reporting Guidelines for Health Care-Associated Infection and Preventable Adverse Event Data.*

(a) All general hospitals and ambulatory surgical centers in operation during any part of a reporting quarter described in §200.1 of this title (relating to Definitions) shall submit HAI [health care-associated infection (HAI)] data, including whether the HAI contributed to a patient's death, and the death of a patient[, and designated preventable adverse event (PAE) data] as specified in §§200.3 - 200.7 of this title (relating to How to Report; Which Events to Report; Data to Report; When to Initiate Reporting; and Schedule for HAI and PAE Reporting) to NHSN. [the Centers for Disease Control and Prevention's National Healthcare Safety Network (NHSN) or its successor. TxHSN-reported] PAE information as specified in §200.6 of this title [(relating to When to Initiate Reporting)] shall be reported via the TxHSN portal or its successor.

(b) Facilities that fail to comply with reporting requirements are subject to the enforcement provisions of Texas Health and Safety Code, Chapter 98, Subchapter D.

(c) HAI or PAE data submission does not constitute the report of a disease as defined and required in Chapter 97 of this title (relating to Communicable Diseases).

(d) HAI, including whether the HAI contributed to a patient's death, or PAE data submission does not constitute annual events or incident reporting as defined in §133.49 of this title (relating to Reporting Requirements), or §135.26 of this title (relating to Reporting Requirements).

(e) The facility shall ensure that the department has accurate email and phone information for a facility contact. The facility shall ensure that communications from the department are continuously monitored even if the position is vacant for any reason (vacation, illness, etc.).

#### §200.3. *How to Report.*

(a) Facilities shall submit HAI and NHSN-reported PAEs, including whether the HAI or NHSN-reported PAE contributed to a patient's death to NHSN [or its successor]. Health care facilities shall report TxHSN-reported PAEs through the TxHSN portal or its successor.

(b) Facilities shall comply with the process prescribed by this chapter and NHSN [or its successor] to allow the department access to HAI data, including whether the HAI contributed to a patient's death, and/or designated PAE data as specified in §§200.3 - 200.7 of this title (relating to How to Report; Which Events to Report; Data to Report; When to Initiate Reporting; and Schedule for HAI and PAE Reporting).

(c) Facilities shall use their facility identification number to identify their facility in the electronic data and correspondence with the department. Each facility meeting the definition of ambulatory surgical center or general hospital as defined in §200.1(2) and (12) [(44)] of this title (relating to Definitions) shall have its own facility identification number.

(1) CMS certified health care facilities shall use the CMS-assigned provider number.

(2) If a facility has multiple campuses [or a hospital and ambulatory surgical center are] associated by ownership, each site shall each use a unique CMS provider number. In the event that a facility is not CMS certified or a facility operates multiple facilities under one CMS number, the facility shall use the identification number assigned by NHSN [or its successor].

(3) The relationship between CMS-assigned and NHSN-assigned facility identifiers and the name and license number of the facility is public information.

(d) The department shall notify the facility contact by email 90 calendar days in advance of any change in requirements for reporting HAI data, including whether the HAI contributed to a patient's death, and designated PAE data.

(e) [Facilities shall report HAI and NHSN-reported PAE data on patients identified with a surgical site infection associated with a procedure listed in §200.4 of this title (relating to Which Events to Report).] Facilities shall report [TxHSN-reported] PAE data as defined in §200.4 and §200.6 of this title.

(1) For HAI reporting, if the facility treating the patient performed the procedure, the facility shall report the infection to NHSN [or its successor] according to the surveillance methods described by NHSN [or its successor] and this chapter. For NHSN-reported PAE reporting, if the event occurred in the facility treating the patient, the facility shall report the event to NHSN [or its successor] according to the surveillance methods described by NHSN [or its successor] and this chapter.

(2) For PAE reporting, TxHSN-reported PAEs identified at the same facility that the PAE occurred, shall be reported through the TxHSN portal or its successor as described in this chapter.

(3) For HAI and NHSN-reported PAE reporting, if the facility treating the patient did not perform the procedure, the treating facility shall notify the facility that performed the procedure, document the notification, and maintain this documentation for audit purposes. The facility that performed the procedure shall verify the data related to the infection. The performing facility shall report the HAI or NHSN-reported PAE to NHSN [or its successor] according to the surveillance methods described by NHSN [or its successor] and this chapter.

(4) For TxHNSN-reported PAEs, if the facility that identified the PAE is not the facility responsible for the event, the facility that identified the PAE shall notify the facility where the event occurred, document the notification, and maintain this documentation for audit purposes. The facility in which the event occurred shall report the PAE to TxHNSN or its successor according to the methods described by the department and this chapter.

§200.4. *Which Events to Report.*

(a) ICD-CM codes as designated by the federal NHSN [Centers for Disease Control and Prevention's National Healthcare Safety Network (NHSN) or its successor] shall constitute the definition of events listed in this rule. Facilities shall adapt to changes in ICD-CM specifications as directed by NHSN and the department.

(b) A health care facility shall report HAI data to the department for any HAI occurring in the facility that CMS requires to be reported through NHSN. The HAI data must include the causative pathogen if the infection is laboratory-confirmed. A current list of reportable HAIs can be found at [HAITexas.org](http://HAITexas.org).

(c) A health care facility shall report each HAI to the department under this section regardless of the facility's participation in Medicare.

~~[(b) All general hospitals shall report the number of device days and laboratory-confirmed central line-associated primary bloodstream infections in special care settings including the causative pathogen.]~~

~~[(c) All general hospitals, including pediatric and adolescents hospitals shall report the number of urinary catheter device days and laboratory-confirmed catheter-associated urinary tract infections in special care settings.]~~

~~[(d) General hospitals, other than pediatric and adolescent hospitals, and ambulatory surgical centers shall report the HAI data related to the following surgical procedures: The surgical procedure is defined by the NHSN operative procedure and the associated ICD-CM codes linked to that operative procedure in NHSN.]~~

~~[(1) Colon surgeries (Colon surgery).]~~

~~[(2) Hip arthroplasties (Hip prosthesis).]~~

~~[(3) Knee arthroplasties (Knee prosthesis).]~~

~~[(4) Abdominal hysterectomies (Abdominal hysterectomy).]~~

~~[(5) Vaginal hysterectomies (Vaginal hysterectomy).]~~

~~[(6) Coronary artery bypass grafts (Coronary artery bypass graft with both chest and donor site incisions and Coronary artery bypass graft with chest incision only).]~~

~~[(7) Vascular procedures (Abdominal aortic aneurysm repair, Carotid endarterectomy, and Peripheral vascular bypass surgery).]~~

~~[(e) Pediatric and adolescent hospitals shall report the HAI data relating to the following surgical procedures. The surgical procedure is defined by the NHSN operative procedure and the associated ICD-CM codes linked to that operative procedure in NHSN.]~~

~~[(1) Spinal surgery with instrumentation (Spinal fusion, Laminectomy, and Refusion of spine).]~~

~~[(2) Cardiac procedures, excluding thoracic cardiac procedures (Cardiac surgery and Heart transplant).]~~

~~[(3) Ventriculoperitoneal shunt procedures (Ventricular shunt operations); including revision and removal of shunt.]~~

~~[(d) [(f)] Facilities shall report whether the HAI or the NHSN-reported PAE contributed to a patient's death either directly or by exacerbating an existing disease condition which then led to death.~~

~~[(e) [(g)] A health care facility [General hospitals and ambulatory surgical centers] shall report any of the following preventable adverse events involving the facility's patient. A current list of reportable PAEs can be found at [PAETexas.org](http://PAETexas.org).~~

~~(1) A health care-associated adverse condition or event for which the Medicare program will not provide additional payment to the facility under a policy adopted by the federal Centers for Medicare and Medicaid Services.~~

~~(2) An event included in the list of adverse events identified by the National Quality Forum.~~

~~(3) The executive commissioner may exclude an adverse event from the reporting requirement if the executive commissioner, in consultation with the advisory panel, determines that the adverse event is not an appropriate indicator of a preventable adverse event.~~

~~[(f) [(h)] Facilities shall also report denominator data as indicated in TxHNSN protocols for TxHNSN-reported PAEs. For the HAI events identified in this section for calculation of risk adjusted infection rates as required in Texas Health and Safety Code, §98.106(b), NHSN protocols shall be used for the determination of denominator data for HAI and NHSN-reported PAEs. The following facility information shall be entered by the facility for each reporting period.~~

~~(1) Number of beds.~~

~~(2) Number of surgeries or invasive procedures performed during the reporting period.~~

~~(3) Number of patient days.~~

~~[(g) [(i)] If a facility has no HAI and/or PAE during the reporting period, facilities shall report this information through NHSN for HAI and NHSN-reported PAEs. Facilities shall report the absence of TxHNSN-reported PAEs through the TxHNSN portal or its successor.~~

§200.5. *Data to Report.*

Data required to be submitted in §200.4 of this title (relating to Which Events to Report) shall be reported using the training, enrollment, case definitions and protocols required by the department in coordination with NHSN [or its successor]. Specific modules and variables will be identified for facilities prior to the enrollment deadline through training, departmental website ([HAITexas.org](http://HAITexas.org) and [PAETexas.org](http://PAETexas.org)), and notification of the facility contact. Content or data element changes will be communicated in the same manner 90 calendar days in advance of the change.

§200.6. *When to Initiate Reporting.*

(a) All health care facilities who meet the criteria in §200.4 of this title (relating to Which Events to Report) shall enroll in NHSN within 90 calendar days of the designation of NHSN as the secure electronic interface to report HAI or NHSN-reported PAE data. In addition, all health care facilities shall notify the department to obtain TxHNSN user accounts and report TxHNSN-reported PAEs through TxHNSN or its successor. Facilities will be required to do this within 90 calendar days of when TxHNSN-reported PAEs are required to be reported or for newly reporting facilities, within 90 days of becoming eligible to report TxHNSN-reported PAEs.

(b) Facilities shall submit HAI and designated PAE data beginning with the entire reporting quarter of the effective date in subsection (a) of this section.

~~[(1) All facilities—HAI data relating to central line-associated primary bloodstream infections in special care units.]~~



{(2) Ambulatory surgical centers and general hospitals, except pediatric and adolescent hospitals--HAI data relating to knee arthroplasties as defined in §200.4(d)(3) of this title.}

{(3) Pediatric and adolescent hospitals--HAI data relating to ventriculoperitoneal shunts as defined in §200.4(e)(3) of this title.}

{(e) In addition to the data listed in subsection (b) of this section, facilities shall submit the following data beginning January 1, 2012.}

{(1) Ambulatory surgical centers and general hospitals, except pediatric and adolescent hospitals--HAI data relating to hip arthroplasties as defined in §200.4(d)(2) of this title and coronary artery bypass grafts as defined in §200.4(d)(6) of this title.}

{(2) Pediatric and adolescent hospitals--HAI data relating to cardiac procedures and as defined in §200.4(e)(2) of this title.}

{(d) In addition to the data listed in subsections (b) and (e) of this section, facilities shall submit the following data beginning January 1, 2013.}

{(1) Ambulatory surgical centers and general hospitals, except pediatric and adolescent hospitals--HAI data relating to abdominal and vaginal hysterectomies as defined in §200.4(d)(4) and (5) of this title, colon surgeries as defined in §200.4(d)(1) of this title, and vascular procedures as defined in §200.4(d)(7) of this title.}

{(2) Pediatric and adolescent hospitals--HAI data relating to spinal surgeries with instrumentation as defined in §200.4(e)(1) of this title.}

{(e) In addition to the data listed in subsections (b), (e), and (d) of this section, all facilities shall submit the following data beginning July 1, 2013. All general hospitals, including pediatric and adolescents hospitals, shall report the number of urinary catheter device days and laboratory-confirmed catheter-associated urinary tract infections as defined by NHSN, from special care settings.}

{(f) Beginning March 1, 2014, in addition to the data listed in subsections (b) - (e) of this section, all facilities, including pediatric and adolescents hospitals, shall report whether an HAI contributed to the death of a patient for those procedures outlined in §200.4 of this title and defined by NHSN.}

(c) [(g)] Facilities that are required to report after this initial enrollment period (e.g., newly licensed, change in provider status, etc.) shall enroll within 90 calendar days of the date the facilities [they] become eligible to report in accordance with §200.2 of this title (relating to General Reporting Guidelines for Health Care-Associated Infection and Preventable Adverse Event Data) and §200.3 of this title (relating to How to Report) and shall submit data beginning with the entire reporting quarter after becoming eligible.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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General Counsel

Department of State Health Services

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For further information, please call: (512) 776-7676



## CHAPTER 265. GENERAL SANITATION SUBCHAPTER K. ARTIFICIAL SWIMMING LAGOONS

### 25 TAC §§265.151 - 265.174

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), proposes new Subchapter K, §§265.151 - 265.174, concerning Artificial Swimming Lagoons.

#### BACKGROUND AND PURPOSE

The purpose of the new sections is to comply with House Bill (H.B.) 1468, 85th Legislature, Regular Session, 2017, which amended Texas Health and Safety Code, §1.005, relating to Definitions, and §341.064, relating to Swimming Pools, Artificial Swimming Lagoons, and Bathhouses. H.B. 1468 created a new category of a water recreational facility, as an artificial swimming lagoon. The new rules provide construction requirements, sanitation procedures, and operational requirements for artificial swimming lagoons in accordance with good public engineering practices, to protect the health and safety of users, and to reduce to a practical minimum the possibility of drowning or of injury to bathers.

Existing facilities are not subject to the new requirements regarding engineering and construction. However, other requirements, such as water quality and user safety, apply to all facilities upon the effective date of the rules.

#### SECTION-BY-SECTION SUMMARY

Proposed new §265.151, General Provisions, describes the scope and purpose of the new rules, how the rules will apply to new and pre-existing artificial swimming lagoons, and the role of local regulatory authorities in adopting equivalent or more stringent standards.

Proposed new §265.152, Definitions, defines terms used in the new rules.

Proposed new §265.153, Plans, Permits, and Instructions, contains provisions for the use of licensed engineers to plan and design artificial swimming lagoons, the opportunity for DSHS to review the plans, and the owner to provide operational instructions.

Proposed new §265.154, General Construction and Design, contains design provisions for construction of artificial swimming lagoons, including material use, interior color, user loads, floor surface footing and slopes, and underwater use seats and water lounges.

Proposed new §265.155, Decks, Entrances and Exits, Diving Facilities, Slides, and Other Aquatic Play Features, contains design and construction requirements for entrances and exits, other structures to include decks, steps, and handrails, and play features to include floating platforms, diving facilities, slides and other aquatic play features in an artificial swimming lagoon.

Proposed new §265.156, General Requirements for Circulation Systems, describes the equipment used for circulation systems in artificial swimming lagoons, including gauges, flow meters, and circulation equipment.

Proposed new §265.157, Filters, contains requirements for installing filters that meet national standards.

Proposed new §265.158, General Requirements for Pumps and Motors, contains provisions for the use of pumps and motors that meet national standards.

Proposed new §265.159, Suction Outlets, Gravity Flow Systems, and Return Inlets, contains requirements to design these systems in accordance with the Federal Virginia Graeme Baker Act and applicable national standards.

Proposed new §265.160, Surface Skimming and Perimeter Overflow (Gutter) Systems, contains requirements to design these systems to protect against entrapment and to meet water circulation needs of an artificial swimming lagoon.

Proposed new §265.161, Electrical Requirements, requires electrical equipment and installation to meet applicable national standards and codes.

Proposed new §265.162, Water Supply, requires an artificial swimming lagoon constructed on or after the effective date of this subchapter to use potable water from a public water supply or from a private water supply meeting certain requirements, and to use backflow prevention devices and water supply methods meeting national standards.

Proposed new §265.163, Drinking Water, Food, Beverages, and Containers, contains requirements for supplying users with a source of drinking water and allows the consumption of food and beverages in the artificial swimming lagoon if the lagoon is privately owned and operated.

Proposed new §265.164, Wastewater Disposal, requires the disposal of wastewater in accordance with Texas Commission on Environmental Quality or local regulatory authority standards.

Proposed new §265.165, Disinfectant Equipment, requires the use of a disinfectant for which the residual can be easily measured, the use of monitoring controllers, the proper storage and labeling of disinfectants, and personnel to be properly trained and provided appropriate protective equipment and clothing.

Proposed new §265.166, Water Quality, requires the use of chemicals that are registered with the Environmental Protection Agency or are listed by the NSF International. This new rule defines the types and frequency of water quality testing requirements, and the recordkeeping and retention requirements for water quality.

Proposed new §265.167, Request for Alternate Method of Disinfectant, provides a method to submit to DSHS an application to use an alternate method of disinfectant.

Proposed new §265.168, Enclosures, describes the type of enclosures and the entry gates, doors, and windows required for an artificial swimming lagoon.

Proposed new §265.169, Safety Features, contains provisions for safety equipment, the use of watercraft, safety signs, safety equipment, lighting, and emergency telephones.

Proposed new §265.170, Lifeguard Requirements, contains provisions for the minimum number of lifeguards, safety and personal equipment, training and certification of lifeguards, and on-site records of a lifeguard's certification.

Proposed new §265.171, Operation and Management, contains provisions for the certification of the lagoon operator, off-season water clarity and safety, and proper use of chemicals.

Proposed new §265.172, Dressing and Sanitary Facilities, defines the number, locations, and type of user sanitary facilities required at artificial swimming lagoons.

Proposed new §265.173, Compliance, Inspections, and Investigations, defines DSHS' or a local regulatory authority's right to inspect at reasonable times.

Proposed new §265.174, Enforcement, describes the enforcement provisions for DSHS or a local regulatory authority and provisions for either voluntary or court-ordered closures and re-openings.

#### FISCAL NOTE

Donna Sheppard, Chief Financial Officer, has determined that for the first five years that the sections will be in effect, there will be no fiscal implications to state or local governments as a result of enforcing and administering the sections as proposed.

#### GOVERNMENT GROWTH IMPACT STATEMENT

DSHS has determined that during the first five years that the rules will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not affect the number of DSHS employee positions;
- (3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;
- (4) the proposed rules will not affect fees paid to DSHS;
- (5) the proposed rules will create new rules;
- (6) the proposed rules will not expand, limit, or repeal existing rules; and
- (7) the proposed rules will not change the number of individuals subject to the rules.

DSHS has insufficient information to determine the proposed rules' effect on the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Donna Sheppard, Chief Financial Officer, has also determined that the adverse impact on small businesses, micro-businesses or rural communities required to comply with the sections as proposed is unknown. The rules may impose additional costs, but it is unknown the extent of changes required for them to comply.

#### LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

#### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas and are necessary to implement legislation that does not specifically state that §2001.0045 applies to the rules.

#### PUBLIC BENEFIT AND COSTS

Stephen Pahl, Associate Commissioner, Consumer Protection Division, has determined that for each year of the first five years that the rules will be in effect, the public will benefit from adoption of the sections. The public benefit anticipated from enforcing

or administering the sections is to better ensure the health and safety of residents of Texas.

Donna Sheppard, Chief Financial Officer, has also determined that for the first five years the rules are in effect persons with pre-existing facilities may incur economic costs, but we are unable to determine the costs as it is unknown the extent of changes required for them to comply. It has also been determined that for future artificial swimming lagoons there is no anticipated economic costs to persons required to comply with the proposed rules because future facilities will have standard construction and operation requirements and safety standards that are consistent for each artificial swimming lagoon.

#### REGULATORY ANALYSIS

DSHS has determined that this proposal is not a "major environmental rule" as defined by Texas Government Code §2001.0225. "Major environmental rule" is defined to mean a rule the specific intent of which is to protect the environment or reduce risk to human health from environmental exposure and that may adversely affect, in a material way, the economy, a sector of the economy, productivity, competition, jobs, the environment or the public health and safety of a state or a sector of the state. This proposal is not specifically intended to protect the environment or reduce risks to human health from environmental exposure.

#### TAKINGS IMPACT ASSESSMENT

DSHS has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Texas Government Code §2007.043.

#### PUBLIC HEARING

A public hearing to receive comments on the proposal will be scheduled after publication in the *Texas Register* and will be held at the DSHS Exchange Building, 8407 Wall Street, Austin, Texas 78754. The meeting date and time will be posted on the DSHS Artificial Swimming Lagoon website at: <https://dshs.texas.gov/swimminglagoons/>. Please contact Katie Moore by phone at (512) 231-5719 or by email at [katie.moore@dshs.texas.gov](mailto:katie.moore@dshs.texas.gov) if you have questions.

#### PUBLIC COMMENT

Written comments on the proposal may be submitted to Katie Moore, Consumer Protection Division, Texas Department of State Health Services, Mail Code 1987, P.O. Box 149347, Austin, Texas 78714-9347; hand delivered to Katie Moore, Consumer Protection Division, Texas Department of State Health Services, 8407 Wall Street, Austin, Texas 78754; or sent by email to [PHSCPS@dshs.texas.gov](mailto:PHSCPS@dshs.texas.gov). When emailing comments, please indicate "Comments on Chapter 265 Artificial Lagoon Rules" in the subject line.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) emailed before midnight on the last day of the comment period. If the last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted.

#### STATUTORY AUTHORITY

The new rules are authorized by Texas Health and Safety Code, §341.002, which authorizes the Executive Commissioner of the Health and Human Services Commission to adopt rules and establish standards and procedures for the management and control of sanitation and for health protection measures; and by Texas Government Code, §531.0055 and Texas Health and Safety Code, §1001.075, which authorize the Executive Commissioner of the HHSC to adopt rules and policies necessary for the operation and provision of health and human services by DSHS and for the administration of Texas Health and Safety Code, Chapter 1001.

The new rules implement Texas Health and Safety Code, Chapters 341 and 1001; and Texas Government Code, Chapter 531.

#### §265.151. General Provisions.

(a) Scope and purpose. This subchapter addresses minimum standards for the design and construction of artificial swimming lagoons. The rules in this subchapter establish minimum operating standards for artificial swimming lagoons to ensure proper filtration, chemical balance, and maintenance of the water for the safety of users, and to reduce to a practical minimum the possibility of drowning or injury to users. This subchapter implements Texas Health and Safety Code, §341.064(g) authorized by Texas Health and Safety Code, §341.002, and the rules are considered to be good public health engineering practices.

(b) Application of the rules. This subchapter applies to all artificial swimming lagoons, regardless of the date of construction, unless otherwise specified.

(c) Date of construction. The date of construction of the artificial swimming lagoon is the date that a building permit for construction is issued or, if no building permit is required, the date that excavation or electrical service begins, whichever is earlier, in which case the artificial swimming lagoon owner or operator must produce adequate written documentation of that fact.

(d) Local regulatory authority. When a local regulatory authority has jurisdiction for the regulation of the artificial swimming lagoon, it may adopt standards equivalent to or more stringent than this subchapter, with the exception of a department-approved alternate method of disinfectant, that are in accordance with good public health engineering and safety practices.

#### §265.152. Definitions.

The following words and terms, when used in this subchapter, have the following meanings, unless the context clearly indicates otherwise.

(1) AED--Automated External Defibrillator. A device that automatically diagnoses the life-threatening cardiac arrhythmias of ventricular fibrillation and pulseless ventricular tachycardia, and is able to treat those conditions by application of electricity which stops the arrhythmia, allowing the heart to re-establish an effective rhythm.

(2) Alternative communication system--Devices that alert multiple on-site staff when activated, such as pager systems, radios, or walkie-talkie communication systems. Used to notify either on-site emergency medical services (EMS), on-site medical staff, or on-site certified staff such as lifeguards, or a commercial emergency monitoring service.

(3) Alternative method of disinfectant--A method of disinfection required to be approved by the department.

(4) ANSI--American National Standards Institute.

(5) APSP--Association of Pool and Spa Professionals.

(6) ARC--American Red Cross.

(7) Artificial swimming lagoon--lagoon. An artificial body of water used for recreational purposes with more than 20,000 square feet of surface area, an artificial liner, and a method of disinfectant. The term does not include a body of water open to the public that continuously recirculates water from a spring or a pool. The term "lagoon" used in this subchapter means "artificial swimming lagoon."

(8) Artificial swimming lagoon enclosure--A fence, wall, or combination of fences, walls, gates, or doors that completely surround the lagoon.

(9) Artificial swimming lagoon yard--An area that has an enclosure that contains the lagoon.

(10) ASME--American Society of Mechanical Engineers.

(11) ASPSA--American Swimming Pool and Spa Association.

(12) Australian standard AS 4663-2013--A method to measure the slip resistance of pedestrian surfaces.

(13) Backflow prevention device--A device designed to prevent a physical connection between a potable water system and a non-potable source such as the lagoon, or a physical connection between the lagoon and a sanitary sewer or wastewater disposal system.

(14) Bonded--Permanent joining of metallic parts to form an electrically conductive path that ensures electrical continuity and the capacity to conduct safely any current likely to be imposed in order to minimize the risk of electrocution.

(15) Broken stripe--A horizontal stripe that is at least 1-inch wide with uniform breaks in the stripe, with the breaks totaling not more than 75% of the length of the stripe and stripe breaks.

(16) BVM--Bag-Valve Mask. A handheld device used to provide positive pressure ventilation to persons who are not breathing adequately. Also known by its proprietary name, Ambu bag.

(17) Chemical feeder--A mechanical or electronic device for applying chemicals into the lagoon.

(18) Circulation equipment--Mechanical components that are part of a circulation system on the lagoon. Circulation equipment includes pumps, hair and lint strainers, filters, valves, gauges, meters, heaters, surface skimmers, inlet/outlet fittings, underdrain and dewatering systems, and chemical feeding devices.

(19) Circulation system--An arrangement of mechanical equipment, components, and circulation equipment connected by piping to the lagoon in a closed circuit.

(20) Cross-connection control device--A device that is designed to prevent a physical connection between a potable water system and a non-potable source such as the lagoon, or a physical connection between the lagoon and a sanitary sewer or wastewater disposal system. (See paragraph (13) of this section "Backflow prevention device.")

(21) DCOF--Dynamic coefficient of friction. A measurement of frictional resistance of a surface one pushes against when already in motion.

(22) DCOF AcuTest--A test used to evaluate the slip resistance or DCOF of a tile surface under known conditions using a standardized sensor prepared according to a specific protocol.

(23) Deck--An area immediately adjacent to or attached to the lagoon that is specifically constructed or installed for sitting, standing, or walking and may include the coping. The term does not include a sandy beach area adjacent to a zero-entry access area.

(24) Deep area--A water level in the lagoon that is over five feet in depth.

(25) Department--The Texas Department of State Health Services.

(26) Depth--Vertical distance measured at three feet from the lagoon wall or barrier from the bottom of the lagoon to the design water level.

(27) Design water level--

(A) For a skimmer system, the midpoint of the operating range of the skimmers.

(B) For a gutter or overflow system, the top of the overflow rim of the gutter or overflow system.

(28) Disinfectant--Energy, chemicals, or a combination of both used to kill undesirable or pathogenic (disease causing) organisms and having a measurable residual or level adequate to make the desired kill.

(29) Diving board--A recreational mechanism for entering the lagoon, consisting of a semi-rigid board that derives its elasticity through the use of a fulcrum mounted below the board.

(30) DPD--A chemical testing reagent (N, N-Diethyl-P-Phenylenediamine). It is used to measure the levels of free chlorine or bromine in water by yielding a series of colors ranging from light pink to dark red.

(31) Facility--The lagoon, restrooms, dressing rooms, equipment rooms, decks or walkways, beach entries, enclosure and other appurtenances directly serving the lagoon.

(32) Filter--A device that removes undissolved particles from water by recirculating the water through a porous substance (filter media or element).

(33) Filter media--A finely graded material (for example, sand, diatomaceous earth, polyester fabric, or anthracite) that removes filterable particles from the water.

(34) FINA--Fédération de Internationale de Natation. The organization that administers international competition in aquatic sports.

(35) Licensed engineer--A person licensed to engage in the practice of engineering in the State of Texas in accordance with the Texas Engineering Practice Act, Texas Occupations Code, Chapter 1001, and related rules.

(36) Licensed master electrician--An individual, licensed as a master electrician, who on behalf of an electrical contractor, electrical sign contractor, or employing governmental entity, performs electrical work in accordance with the Texas Electrical Safety and Licensing Act, Texas Occupations Code, Chapter 1305, and related rules.

(37) Lifeguard--An expert swimmer who supervises the safety and rescue of swimmers, surfers, and other water sports participants and who has successfully completed and holds a current ARC certificate or the equivalent certification from and an aquatic safety organization, which includes training in cardiopulmonary resuscitation for adults, infants, and children, use of an AED, use of a BVM, and first aid.

(38) Local regulatory authority--A county, municipality, or other political subdivision of the state.

(39) Motorboat--Any vessel propelled or designed to be propelled by machinery, whether or not the machinery is permanently

or temporarily affixed or is the principal source of propulsion. (See paragraph (64) of this section "Vessel.")

(40) Non-swimming area--A section of a lagoon used by vessels or motorboats, or for other aquatic activities such as surfing and wakeboarding.

(41) NSF--NSF International.

(42) NSF 50 or NSF/ANSI Standard 50--Standard establishing minimum requirements for materials, design, construction, and performance of equipment commonly included in the water circulation systems of residential and public swimming pools, spas, or hot tubs.

(43) NSF 60 or NSF/ANSI Standard 60--Standard covering drinking water treatment chemicals and establishing criteria for promoting sanitation and protection of public health in relation to drinking water.

(44) ORP--Oxidation Reduction Potential. The potential level of oxidation-reduction produced by strong oxidizing (sanitizing) agents in a water solution. Oxidation level is measured in millivolts by an ORP meter.

(45) Overflow system--Overflows, surface skimmers, and surface water collection systems of various design and manufacture for removal of surface water from the lagoon.

(46) pH--A value expressing the relative acidic or basic tendencies of a substance such as water on a scale from 0 to 14 with 7.0 being neutral, values less than 7.0 being acidic, and values greater than 7.0 being basic.

(47) Pump--A mechanical device that causes hydraulic flow and pressure for filtration, heating, and circulation of the water in the lagoon.

(48) Regulatory authority--A federal or state agency or a local regulatory authority.

(49) Rescue tube--A piece of lifesaving equipment that is an essential part of the equipment that must be carried by lifeguards and that is used to make water rescue easier by helping help support the victim's and rescuer's weight.

(50) Return inlet or inlet--Aperture or fitting through which the water under positive pressure returns into the lagoon.

(51) Ring buoy--A ring-shaped floating buoy capable of supporting a user.

(52) Rope and float line--A continuous line that is not less than 1/4-inch in diameter and that is supported by buoys and attached to sides of the lagoon to separate swimming areas from non-swimming areas of the lagoon.

(53) Secchi disk--An eight-inch diameter disk with alternating black and white quadrants that is lowered in the water column and is used to measure water turbidity and clarity.

(54) Self-closing and self-latching device--A mechanism on a gate that enables a gate to automatically fully close and latch without human or electrical power.

(55) Service animal--A canine that is specially trained or equipped to help a person with a disability and that is used by a person with a disability in accordance with the Texas Human Resources Code, Chapter 121. An animal of any other species, whether wild or domestic, trained or untrained, is not considered a service animal.

(56) Slide--A recreational feature with a flow of water and an inclined flume or channel by which a rider is conveyed downward into the lagoon.

(57) Slip resistant--A surface that has been treated or constructed to significantly reduce the chance of slipping.

(58) Steps, recessed steps, ladders, and recessed treads--A lagoon entry and exit that may be used separately or in conjunction with one another.

(59) Suction outlet--A fitting, fitting assembly, cover or grate, and related components that provide a localized low-pressure area for the transfer of water from the lagoon.

(60) Swimming area--A section of a lagoon used for swimming, wading, or other activities involving contact with or immersion in water.

(61) TCEQ--Texas Commission on Environmental Quality.

(62) UL--An independent testing laboratory (formerly Underwriters Laboratories).

(63) User load--The number of persons in the swimming areas of the lagoon at any given moment or during any stated period of time.

(64) Vessel--Any watercraft, including surfboards, paddleboards, and wakeboards, other than a seaplane on water, used or capable of being used for transportation on water. (See paragraph (39) of this section "Motorboat.")

(65) VGBA--The Virginia Graeme Baker Pool and Spa Safety Act. A federal law that requires all public pools and spas to be fitted with suction outlets that meet the ASME/ANSI A112.19.8 standard.

(66) Wastewater disposal system--A plumbing system used to dispose of backwash or other water from the lagoon or from dressing rooms and other facilities associated with the lagoon.

(67) Water lounge or shelf--A horizontal area of the lagoon that adjoins the lagoon wall at a depth of 2 inches to 10 inches and is used for seating and play.

#### §265.153. Plans, Permits, and Instructions.

(a) Licensed Engineer required. The lagoon constructed on or after the effective date of this subchapter shall be planned and designed by a licensed engineer.

(b) Plans and permits. The department may review plans for the lagoon to ensure compliance with the rules in this subchapter. The lagoon shall comply with any regulatory authority permit requirements. Regardless of whether a regulatory authority requires plans or permits, the lagoon shall be designed, constructed, and operated in compliance with this subchapter.

(c) Operational instructions. Upon completion of construction, the owner shall obtain complete written operational instructions for the lagoon that include procedures for filtration, backwash, cleaning, operation of all chemical feed devices, and general maintenance. In addition, the builder shall label all valves and exposed piping, including normal operating pressures and pressure differential that indicate the need for cleaning.

#### §265.154. General Construction and Design.

(a) Non-toxic and sound materials. Lagoons and all appurtenances shall be constructed of materials that:

- (1) are nontoxic to humans and the environment;
- (2) are impervious and enduring;
- (3) will withstand design stresses; and

(4) will provide a watertight structure with a smooth, easily cleanable surface without cracks or joints that are not watertight and easily cleanable.

(b) NSF 50. For lagoons constructed on or after the effective date of this subchapter, pumps, filters, skimmers, chemical feeders, and other equipment that falls within NSF/ANSI Standard 50 shall meet the standard as confirmed by a testing laboratory. Conformity with the NSF 50 shall be evidenced by the listing or labeling of such equipment by such a laboratory or by separate documentation.

(c) Prohibition of earth material.

(1) Earth shall not be permitted as an interior finish in the lagoon. Clean sand or similar material if used in a beach environment:

(A) shall only be used over an impervious surface;

(B) shall be designed to perform in such an environment; and

(C) shall be controlled so as not to adversely affect the proper circulation, filtration, treatment system, maintenance, safety, sanitation, and operation of the lagoon.

(2) If sand or similar material is used in the lagoon, positive upflow circulation through the sand or other systems shall be provided as necessary to ensure that sanitary conditions are maintained at all times.

(d) Interior color. The color of the interior of the lagoon shall be white or a light enough color so that objects and users in the water shall be easily seen. The finish shall be at least 6.5 on the Munsell color value scale. An eight-inch black disk or a Secchi disk at the deepest point of the floor in a swimming area of the lagoon shall be clearly and immediately seen by an observer.

(e) Materials to withstand freezing temperatures. The lagoon liner or shell and appurtenances, piping, filter system, pump and motor, and other components shall be designed and constructed to facilitate protection from damage due to freezing.

(f) Surface water. The lagoon shall be designed such that surface water does not enter the lagoon.

(g) Interior surface footing. The surfaces within the lagoon intended to provide footing for users shall be slip-resistant to help reduce the chance for a fall. The roughness or irregularity of such surfaces shall not cause injury to feet during normal use.

(h) General shape. This subchapter is not intended to regulate the perimeter shape of the lagoon. It is the responsibility of the licensed engineer to take into account the effect a given shape of the lagoon will have on the health and safety of the users.

(i) Entanglement or entrapment avoidance. There shall be no protrusions, extensions, means of entanglement, or other obstructions in the lagoon that are likely to cause entrapment or injury of the user.

(j) Maximum users in swimming areas. Maximum user loading in a swimming area shall comply with the following:

(1) In an area of water depth 4 feet or less, the user load shall not exceed one user per 15 square feet of water surface.

(2) In an area of water depth greater than 4 feet, the user load shall not exceed one user per 25 square feet of water surface.

(3) The owner or operator shall be responsible for restricting usage so that the maximum capacity is not exceeded.

(k) Maximum users in non-swimming areas. The owner or operator shall determine the maximum user loading in a non-swimming

area by considering the type of use in the non-swimming area and the presence of motorboats and vessels and shall post signs indicating the maximum number of users.

(l) Floor slopes. For the lagoon constructed on or after the effective date of this subchapter, floor slope in a swimming area shall comply with the following:

(1) For depths up to five feet, the slope shall be uniform and not exceed 1:10.

(2) For depths over five feet, the slope shall be uniform and not exceed 1:3.

(3) The slope may vary in limited areas where access for persons with disabilities has been provided.

(m) Underwater seat benches. An underwater seat bench shall:

(1) be constructed with slip-resistant materials;

(2) have a maximum seating width of 18 inches projecting from the wall at a depth not to exceed 20 inches below the design water level;

(3) be located fully outside of the required minimum diving water envelope if the lagoon is used for diving;

(4) be visually set apart and provided with a solid or broken stripe at least 1-inch wide on the top surface along the front leading edge of the bench; and

(A) the stripe shall be plainly visible to persons on the ground above the bench; and

(B) the stripe shall be a contrasting color to the background on which it is applied, and the color shall be permanent; and

(5) not be used as a required entry or exit access unless used in conjunction with steps.

(n) Water lounges. A water lounge shall:

(1) be a minimum of 20 inches wide and provide a minimum of 10 square feet of horizontal surface adjoining on the edge of the lagoon over a distance of not less than 3 feet;

(2) be horizontal and at a depth of 2 inches to 10 inches below the water surface;

(3) be visually set apart with a horizontal solid or broken stripe at least 1-inch wide on the top surface along the leading edge of horizontal surfaces of all edges not adjoining the lagoon wall; and

(A) the stripe shall be plainly visible to persons on the deck; and

(B) the stripe shall be contrasting color to the background on which it is applied, and the color shall be permanent; and

(4) be located fully outside of the required minimum diving water envelope if the lagoon is intended for use with diving equipment;

(5) have a slip-resistant surface; and

(6) be located in water depth of 4 feet or less.

(o) Construction tolerances. For lagoons constructed on or after the effective date of this subchapter, construction tolerances in a deep area may vary plus or minus three inches. All other dimensions may vary plus or minus two inches. Construction tolerances for entry or exit step treads and risers may vary plus or minus 1/2-inch.

§265.155. Decks, Entrances and Exits, Diving Facilities, Slides, and Other Aquatic Play Features.

(a) Access. Entrances and exits, including hand and grab rails, walkways, and docks, shall comply with applicable requirements for access to recreation facilities and the elements for persons with disabilities under federal, state, and local fair housing and disability access laws.

(b) Decks for lagoons. The following is required where decks are provided for lagoons:

(1) Each deck shall be at least five feet wide.

(2) A deck shall be provided at each entry or exit into the swimming areas.

(3) An unobstructed deck area at least four feet wide shall be provided for access around:

(A) diving equipment;

(B) special feature stairways, such as for a waterslide;

(C) lifeguard stands;

(D) diving boards;

(E) similar deck equipment; and

(F) structural columns.

(4) In a swimming area where perimeter deck is non-contiguous and the clearance is not at least four feet, locations for life-guards to safely access the edge of the lagoon are required.

(5) A deck shall slope away from the lagoon so that water drains into deck drains or to perimeter areas.

(6) A deck drain shall not drain to the lagoon, lagoon gutter, or recirculation systems.

(7) Loose plant material or bedding shall not be permitted within a perimeter deck.

(8) Carpet, wood, and artificial turf are prohibited as perimeter deck materials.

(9) Concrete that is used as a deck material shall be installed in accordance with the American Concrete Institute ACI Standard 302.1R-15, "Guide for Concrete Floor and Slab Construction" and in accordance with local building codes.

(10) All decks shall have slip resistant, textured finishes that have a minimum dynamic coefficient of friction at least equal to the requirements of ANSI A137.1-2012 for that installation as measured by the DCOF AcuTest or by the Australian Standard AS 4663-2013.

(11) Continuous watertight expansion joint material shall be provided between perimeter decks and lagoon coping.

(12) Open joints or gaps larger than 3/16-inch or vertical elevations exceeding 1/4-inch in the deck shall be corrected using appropriate fillers.

(c) Acceptable means of entry or exit. Acceptable means of entry or exit include stairs, recessed steps, ladders, ramps, swimouts, lifts, and beach (zero-depth) entry or exit.

(d) Number of entry or exit. A minimum of two entry or exit points are required in each swimming area. A single set of entry or exit steps or a single beach entry extending a minimum of 75% around the perimeter of the swimming area meets the minimum entry or exit requirements.

(e) Beach entry slope. Beach entry slopes shall not exceed 1:10.

(f) Slip resistant surfaces. Steps, ladders, and recessed treads shall have slip resistant surfaces.

(g) Steps. For a lagoon constructed on or after the effective date of this subchapter, steps shall comply with the following:

(1) Steps shall conform with the most recent edition of the Centers for Disease Control and Prevention Model Aquatic Health Code (MAHC) in MAHC Sections 4.5.4.5, MAHC Table 4.5.4.5, MAHC Figure 4.5.4.5.1, Figure 4.5.4.5.2, and Figure 4.5.4.5.2.

(2) The bottom riser height may be allowed to taper to zero.

(3) Steps shall not be used underwater to transition between different depths.

(4) Underwater steps shall be provided with a horizontal solid or broken stripe at least one-inch wide on the top surface along the front leading edge of each step. This stripe shall be plainly visible to persons standing above the steps. The stripe shall be a contrasting color to the background on which it is applied, and the color shall be permanent in nature and shall be a slip resistant surface.

(h) Handrails. A lagoon shall comply with applicable federal, state, and local requirements for access by persons with disabilities.

(1) Handrails, if removable, shall be installed in such a way that they cannot be removed without the use of tools.

(2) Handrails shall be provided for each set of stairs provided in a lagoon constructed on or after the effective date of this subchapter and shall be constructed of corrosion-resistant materials, bonded in accordance with the National Electrical Code, and anchored securely.

(3) The upper railing surface of handrails shall extend above the deck or at the interface of the water and beach.

(4) Dimensions of handrails not for use by persons with disabilities shall conform to requirements in the most current edition of the Centers for Disease Control and Prevention Model Aquatic Health Code (MAHC) in MAHC Table 4.5.5.7 and MAHC Figure 4.5.5.7.1.

(i) Floating platforms.

(1) A floating swim platform or floating dive platform shall:

(A) be constructed of a non-slip and splinter-resistant material that can be easily cleaned;

(B) have at least one ladder with handles and steps that extend at least 30 inches below water level;

(C) be anchored or secured to keep it in its designated area if a floating platform; and

(D) minimize the risk of entrapment by being constructed with:

(i) all braces and struts designed to prevent entrapment of users; and either

(ii) a visible minimum 12-inch air space under maximum load; or

(iii) a smooth solid bottom that extends at least 2 feet below the water.

(2) A floating platform with a perimeter greater than 75 feet shall have a minimum of two ladders with handles and steps that extend at least 30 inches below the water level.

(3) A floating dive platform less than 20 inches above the water level shall have a minimum of 9 feet of water depth for 16 feet horizontal distance beyond the diving platform.

(4) A floating dive platform greater than 20 inches above the water level shall be designed and constructed according to minimum dimensions specified by the FINA Facilities Rules, 2017-2021.

(j) Slides and other aquatic play features.

(1) A slide or other aquatic play feature, such as a climbing wall, floating amusement island, or zip line, shall be installed according to manufacturer's instructions.

(2) An aquatic play feature that meets the definition of "Amusement Ride" in Texas Occupations Code, Chapter 2151 (the Amusement Ride Safety Inspection and Insurance Act) shall comply with that chapter.

(3) A feature that meets the definition of a "slide" in the Consumer Product Safety Commission's Standard for Swimming Pool Slides as published in Title 16 Code of Federal Regulations, Part 1207, shall comply with those standards.

(k) Diving platforms or boards. A diving platform or diving board shall be designed and constructed according to standards specified by the FINA Rules, 2017-2021.

§265.156. General Requirements for Circulation Systems.

(a) Licensed Engineer. The circulation system of a lagoon constructed on or after the effective date of this subchapter shall be designed by a licensed engineer.

(b) Circulation. The circulation system shall provide complete and uniform circulation of the water necessary to maintain the water quality requirements in this subchapter.

(c) Access for inspection or repair. Circulation system components shall be accessible for inspection, servicing, repair, or replacement and shall be installed in accordance with manufacturer's specifications.

(d) Non-toxic materials. The circulation system piping and fittings shall be non-toxic, and shall be of materials able to withstand operating pressures and conditions. Polyvinyl chloride pipe shall bear the NSF seal for potable water and be schedule 40 or stronger.

(e) Operation and maintenance instructions. Circulation system operation and maintenance instructions shall be provided to the operator of the lagoon. A copy of the instructions shall be kept in the building housing the circulation system.

(f) Gauges and meters. For a lagoon constructed on or after the effective date of this subchapter, the circulation system shall be equipped with:

(1) a filter inlet pressure gauge on each filter;

(2) a filter outlet gauge on each filter; and

(3) a flow meter installed according to manufacturer's instructions and located to show the rate of flow through each filter in gallons per minute and that is represented by the manufacturer to be accurate within 10% of the true flow rate.

(g) Labeling of exposed piping. Exposed piping shall be labeled to identify the piping function and direction of flow. The name of the liquid or gas and arrows indicating direction of flow shall be permanently indicated on the pipe.

§265.157. Filters.

(a) NSF/ANSI standards. Filters shall be listed and labeled to NSF/ANSI Standard 50 or NSF/ANSI Standard 60, unless the lagoon

was constructed before the effective date of this subchapter and it uses filters that are not replaced.

(b) Filters cleanable. For lagoons constructed on or after the effective date of this subchapter, filters shall be designed so that after cleaning according to manufacturer's instructions, the system provides the required water clarity.

(c) Observable waste discharge. For a lagoon constructed on or after the effective date of this subchapter, filters shall have a readily observable free fall or sight glass installed on the waste discharge line in order that the filter washing progress may be observed. Sight glasses shall be readily removable for cleaning.

(d) Filters accessible. Filters shall be installed so that filtration surfaces are accessible for inspection and service in accordance with manufacturer's instructions.

(e) Operation and maintenance instructions. Filters and separation tanks shall have operation and maintenance instructions permanently installed on the filter or separation tank. Maintenance instructions shall be unobstructed and clearly visible.

§265.158. General Requirements for Pumps and Motors.

(a) Safe pump operation. The installation of a pump and component parts shall provide safe operation in accordance with manufacturer's instructions.

(b) UL and NEMA requirements. A pump shall comply with UL or National Electrical Manufacturers Association requirements.

(c) Backflow prevention. A priming device for a pump receiving piped water from a public water supply providing potable water shall be isolated from the potable supply by means of a cross-connection control device (backflow prevention device) approved by the TCEQ or local regulatory authority.

(d) Backflow prevention assembly testing. A backflow prevention assembly shall be tested upon installation and certified to be operating within specifications by a licensed backflow prevention assembly tester. A backflow prevention assembly shall be tested and certified to be operating within specifications at least annually by a licensed backflow prevention assembly tester. Documentation of testing and certification shall be kept for at least three years and shall be provided during an inspection.

(e) Pumps and motors. A pump or motor provided for circulation of water shall meet the filter design range of flow required for filtering and cleaning the filters against the total dynamic head developed by the complete system and to meet required water clarity.

(f) Cleanable strainer or screen. For a lagoon constructed on or after the effective date of this subchapter, a pump, except a pump with a vacuum filter, shall have a cleanable strainer or screen upstream of the circulation pump to remove waste that shall be readily accessible and cleaned as per manufacturer's instructions.

(g) Motors. A motor shall:

(1) have an open, drip-proof enclosure as defined by the National Electrical Manufacturers Association Standard MG1-2016, or subsequent standard, and be constructed electrically and mechanically to perform satisfactorily and safely under the conditions of load and environment normally encountered in lagoon installations;

(2) be capable of operating the pump under full load with a voltage variation of plus or minus 10% from the nameplate rating;

(3) have thermal or current overload protection, either built in or in the line starter, to provide locked rotor and running protection; and



(4) comply with UL requirements.

(h) Emergency shutoff switch. An emergency shutoff switch shall be provided for service personnel to disconnect all power to circulation and jet system pumps. An emergency shut-off switch shall be readily accessible to operators and located within sight of the lagoon and not more than 50 feet from the lagoon.

§265.159. Suction Outlets, Gravity Flow Systems, and Return Inlets.

(a) Skimmer. For the purpose of this section, a skimmer is not considered to be a suction outlet.

(b) Licensed Engineer. A suction outlet system, gravity flow system, or return system constructed on or after the effective date of this subchapter shall be planned and designed by a licensed engineer.

(c) Submerged suction outlets. Fully submerged suction outlets (main drains) are not required.

(d) Entrapment protection. A suction outlet system shall be designed to protect against suction entrapment, evisceration, and hair entanglement/entrapment hazards in accordance with ANSI/APSP-16, American National Standard for Suction Entrapment Avoidance in Swimming Pools, Wading Pools, Spas, Hot Tubs and Catch Basins.

(e) Suction outlets. Suction outlets shall comply with the following:

(1) Covers, grates, and fittings shall be compliant with the VGBA.

(2) At least two hydraulically balanced VGBA-compliant suction outlets shall be provided per pump suction line.

(3) Suction outlets installed in water 4 feet deep or less shall be unblockable such that its perforated (open) area cannot be shadowed by the area of the 18-inch x 23-inch Body Blocking Element as described in ANSI/APSP-16, American National Standard for Suction Entrapment Avoidance in Swimming Pools, Wading Pools, Spas, Hot Tubs and Catch Basins.

(4) The distance between hydraulically balanced VGBA-compliant suction outlets, as measured from center to center of the suction outlet cover or grate shall be no less than three feet and no more than five feet.

(5) The flow rating of each suction outlet cover or grate shall be at least equal to the system's maximum flow rate.

(6) No means of isolating hydraulically balanced suction outlets is permitted that could allow one suction outlet to serve as the sole source of water to a pump.

(7) A single pipe to a pump suction inlet that serves two or more suction outlets may have a valve to shut off the flow to the pump.

(f) Water velocity in pipes. Water velocity in pipes in a pump-suction hydraulic system shall not exceed 6 six feet per second (fps) when 100% of the pump flow comes from the suction outlet system and any suction fitting in the suction outlet system is blocked. When one suction fitting in the suction outlet system is blocked the flow rate through fitting, cover, or grate shall not exceed the approved flow rate for that fitting and cover or grate.

(g) Closure when cover broken, missing, or loose. If the cover or grate on a suction outlet including a vacuum outlet that is missing, broken, or loose, the swimming area of the lagoon shall be closed immediately and remain closed until a proper repair is made or replacement is installed.

(h) Return inlets. A return inlet shall be designed so as not to constitute a hazard to the user.

(i) Automatic cleaners. An automatic bottom or side cleaner that could provide a means of entanglement or entrapment shall not be operated in a swimming area of the lagoon when the swimming area is occupied by users.

§265.160. Surface Skimming and Perimeter Overflow (Gutter) Systems.

(a) Licensed engineer. A surface skimming system or perimeter overflow (gutter) system constructed on or after the effective date of this subchapter shall be planned and designed by a licensed engineer.

(b) Surface skimming design. A surface skimming system or perimeter overflow system shall be planned and designed as required in §265.159 of this subchapter (relating to Suction Outlets, Gravity Flow Systems, and Return Inlets) and shall be capable of providing 100% of the design system flow, unless the department has approved an alternate method of disinfectant.

(c) Safe design of surface skimming and perimeter overflow systems. A surface skimmer or perimeter overflow system shall be designed and installed to prevent body and limb entrapment.

(d) Effective skimming action maintained. Surface skimmers shall be located to maintain effective skimming action throughout the lagoon.

(e) Hydraulic capacity of perimeter overflow system. The hydraulic capacity of a perimeter overflow (gutter) surface skimming system shall be capable of handling 100% of the circulation flow, unless the department has approved an alternate method of disinfectant.

§265.161. Electrical Requirements.

(a) Licensed designer. An electrical system installed on or after the effective date of this subchapter shall be planned and designed by a licensed engineer or licensed master electrician.

(b) Compliance with National Electrical Code (NEC). All electrical equipment and lines shall comply with applicable provisions in the current NEC in effect on the date of installation.

(c) Testing laboratory approval. Electrical equipment shall be approved by a nationally recognized electrical testing laboratory, such as UL, at the time of installation as evidenced by the listing or labeling on the equipment.

(d) Grounding and bonding. Equipment, as required, shall be bonded and grounded in accordance with the NEC in effect at the time of installation. Pumps shall be both internally and externally grounded and bonded in accordance with the NEC.

(e) Manufacturer's instructions. Electrical equipment and related electrical components shall comply with manufacturer's installation instructions.

(f) Line clearances. Electrical line clearances shall comply with the National Electrical Safety Code or NEC in effect at the time of construction.

(g) Inspections required. For a lagoon constructed on or after the effective date of this subchapter, a licensed electrician shall conduct at least two inspections, one during construction and one after construction, to ensure that all electrical facilities are constructed in compliance with this section.

(h) Emergency shutoff switch. An emergency shutoff switch shall be provided for service personnel to disconnect all power to circulation and jet system pumps. An emergency shutoff switch shall be readily accessible to operators, located within sight of the lagoon and not more than 50 feet from the lagoon.

§265.162. Water Supply.

(a) Water Supply. For a lagoon constructed on or after the effective date of this subchapter, the initial fill water and make-up water shall come from a public water system as defined by 30 TAC §290.38 (relating to Definitions) or from a well that complies with the requirements of subsection (c) of this section.

(b) Water distribution system. All portions of the water distribution system shall be protected against backflow and back siphonage using a high hazard preventer such as a reduced-pressure-principle backflow preventer meeting the requirements of the American Society of Sanitary Engineering Standard 1013 2013, as amended, and approved for use in potable water systems possibly subjected to back siphonage or high back pressure or an air gap designed to ASME Standard A112.1.2.

(c) Private water supply. If the water supply providing water to the lagoon does not meet the definition of a public water system, that water supply shall comply with the following requirements.

(1) Water pressure. The system shall:

(A) be designed to maintain a minimum pressure of 35 pounds per square inch (psi) at all points within the distribution network at flow rates of at least 1.5 gallons per minute per connection;

(B) be designed to maintain a minimum pressure of 20 psi under combined fire and drinking water flow conditions when the system is intended to provide firefighting capability; and

(C) maintain a minimum distribution pressure not be less than 20 psi at any time.

(2) Bacteriological properties. Coliform testing of the well water shall be performed each month the lagoon is open for use. Records of bacteriological tests of the well water shall be kept onsite for three years and made available during inspection.

(3) Chemical properties.

(A) Water samples for chemical analysis obtained from the entry point to the distribution system shall be submitted to a laboratory certified by TCEQ once every three years.

(B) The chemical analysis shall be for secondary constituent levels as set out by 30 TAC §290.118 (relating to Secondary Constituent Levels).

(C) Records of all chemical testing shall be kept on site for three years and made available during inspection.

(d) Hose bibs. Hose bibs shall be protected with a vacuum breaker.

#### §265.163. Drinking Water, Food, Beverages, and Containers.

(a) Drinking water. Drinking water shall be available to users at all areas of the lagoon.

(b) Location of water lines. Location of water lines in relation to wastewater lines shall be in compliance with 30 TAC §290.44 (relating to Water Distribution).

(c) Food and beverages. Food and beverages may be consumed in the lagoon only if it is privately owned and operated. Consumption of food and beverages in a lagoon that is not privately owned and operated is prohibited.

(d) Non-breakable containers. Food and beverages shall be served only in non-breakable containers. Glass containers shall not be allowed on a deck, in the lagoon, or anywhere within the enclosure.

(e) Trash containers. Covered trash containers shall be provided where food and beverages are allowed or served.

#### §265.164. Wastewater Disposal.

(a) Discharge or disposal. Filter backwash water and drainage water that is not reused in a lagoon shall be discharged or disposed of in accordance with the requirements of TCEQ or local regulatory authority.

(b) No direct connection. No direct mechanical (hard) connection shall be made between the lagoon, the lagoon drain, the chemical treatment equipment, or the system of piping and the sanitary sewer system, septic system, or other wastewater disposal system.

(c) Backwash water. Backwash water and lagoon draining water shall be discharged through an air gap formed by positioning the discharge pipe opening at least two pipe diameters above the overflow level of any barriers that could cause flooding and submergence of the discharge opening or by other means in accordance with TCEQ requirements. Splash screening barriers are permitted as long as the barriers do not destroy air gap effectiveness.

(d) On-site sewage facility wastewater disposal lines. On-site sewage facility wastewater disposal lines shall be located in compliance with 30 TAC §285.31 (relating to Selection Criteria for Treatment and Disposal Systems) or local regulatory requirements.

(e) Other wastewater or drainage water disposal facilities or lines. The location of other wastewater disposal facilities or lines shall meet applicable standards of 30 TAC, Chapter 307, Texas Surface Water Quality Standards, Chapter 308, Criteria and Standards for the National Pollutant Discharge Elimination System, Chapter 311, Watershed Protection, and Chapter 315, Pretreatment Regulations for Existing and New Sources of Pollution, or local regulatory authority.

#### §265.165. Disinfectant Equipment.

(a) Design requirement. Disinfectant equipment and systems constructed on or after the effective date of this subchapter shall be planned and designed by a licensed engineer.

(b) Disinfectant agent. Lagoon water shall be continuously disinfected by a disinfectant agent with a residual that can be easily measured by simple and accurate field tests, unless the department has approved an alternate method of disinfectant.

(c) Training and protection. Personnel responsible for the operation of the disinfectant agent and other potentially hazardous chemicals shall be properly trained and provided with appropriate protective equipment and clothing, including rubber gloves and goggles, safety information, and safety data sheets. Safety data sheets covering all chemicals for which personnel are responsible shall be kept on site and readily available.

(d) Monitoring controllers. Automated, manual, or remotely managed controllers shall be installed for monitoring and turning on or off chemical feeders used for pH and disinfectants.

(e) Instructions. Operation manuals or other instructions that give clear directions for cleaning and calibrating automated controller probes and sensors shall be kept in close proximity to the automated controller.

(f) Storage.

(1) Disinfectant agents and other chemicals and feed equipment shall be stored so that users do not have access.

(2) Dry chemicals shall be stored off the floor in a dry, above-ground-level room and protected against flooding or wetting from floors, walls, and ceiling.

(3) Chlorine compounds shall not be stored in the same storage room or storage area as petroleum products.

(g) Labeling. All chemical bulk and day tanks shall be clearly labeled to indicate the tank's contents.

(h) Chlorine gas prohibited. Use of compressed chlorine gas is prohibited.

§265.166. Water Quality.

(a) Environmental Protection Agency (EPA) registration. A sanitizer, disinfectant, or other chemical used to treat the water shall be EPA-registered under the Federal Insecticide, Fungicide, and Rodenticide Act if it is a pesticide as defined by the EPA.

(b) NSF/ANSI listing. A non-pesticide chemical used to treat the water shall be listed and labeled to NSF/ANSI Standard 50 or NSF/ANSI Standard 60.

(c) Manufacturer's instructions. Chemicals shall be used according to the manufacturer's instructions.

(d) Required water quality. Unless the department has approved an alternate form of disinfectant, water quality shall meet the following criteria at all times the lagoon is open.  
Figure: 25 TAC §265.166(d)

(e) Water clarity. Water clarity shall be sufficient such that an eight-inch black disk or Secchi Disk on the floor at the deepest part of the swimming areas of the lagoon can be clearly and immediately seen by an observer on the water surface above the disk or by someone standing on the shore closest to the disk.

(f) Swimming area testing frequency.

(1) When a swimming area of a lagoon is open, tests for sanitizer levels (free available chlorine or bromine) and pH shall be made in each swimming area at least three times a day. One of the tests for sanitizer levels and pH shall be made before opening.

(2) Test samples in a swimming area shall be taken where the water is a minimum of three feet in depth.

(3) Alkalinity and calcium hardness testing frequency. Unless the department has approved an alternate method of disinfectant when a lagoon is open, tests for alkalinity shall be performed weekly and tests for calcium hardness shall be performed monthly in all swimming areas of the lagoon.

(g) Non-swimming area testing and frequency.

(1) Unless the department has approved an alternate method of disinfectant when a non-swimming area of a lagoon is open, tests for sanitizer levels (free available chlorine, bromine) and pH shall be performed at least three times a day. One of the tests for sanitizer levels and pH shall be performed before opening.

(2) Test samples in a non-swimming area of the lagoon shall be taken at a minimum of two locations located on opposite sides of the lagoon.

(3) Alkalinity testing frequency. Unless the department has approved an alternate method of disinfectant when a lagoon is open, tests for alkalinity shall be performed weekly and tests for calcium hardness shall be performed monthly.

(h) ORP reading frequency. Readings shall be recorded at the same time sanitizer and pH tests are performed where in-line ORP meters are used.

(i) Reliable testing methods. A reliable means of testing for pH, free available chlorine, combined chlorine, cyanuric acid (if used), bromine, alkalinity, calcium hardness, shall be maintained for the lagoon. The test method shall be capable of measuring chemical ranges as detailed in subsection (d) of this section.

(j) DPD chemical test. Free available chlorine levels shall be determined by the use of the DPD method or its equivalent.

(k) Storage of test kits and reagents. Test kits and reagents shall be stored according to the manufacturer's instructions and protected from extreme heat and cold and from exposure to water, chemicals, petroleum products or any other element or environment that could adversely affect the efficacy of water quality test results.

(l) Testing reagents. Testing reagents shall be changed at frequencies recommended by the manufacturer to ensure accuracy of the tests.

(m) Chemical balance. Water shall be chemically balanced in a lagoon. Testing methods to determine the chemical balance of the water in the lagoon, such as the Langelier Saturation Index, shall be conducted once a week at a minimum.

(n) Operation record retention. Operational records, including results of required chemical testing under this section, shall be kept for three years and be made available during an inspection.

(o) Off-season chemical levels. When a lagoon is not in use for at least 30 days (such as off-season), clarity shall be maintained, and algae growth shall be prevented, however, other water quality parameters as required in this section need not be maintained.

§265.167. Request for Alternate Method of Disinfectant.

(a) Application. Pursuant to Texas Health and Safety Code, §341.064(b), an owner or operator may apply to use an alternate method of disinfectant.

(b) Submission. A completed application for use of an alternate method of disinfectant must be submitted to the department, Consumer Safety Section, no later than 180 days before the opening of the lagoon. The application shall include:

(1) the type and level of primary disinfectant;

(2) the type and level, where applicable, of any supplemental method of water treatment;

(3) the method for and equipment used for storing, delivering, and measuring primary disinfectant levels and supplemental water treatment levels;

(4) data supporting the effectiveness of the primary disinfectant and supplemental method of water treatment in maintaining required water quality;

(5) descriptions of any specialized equipment, application methods, or other water treatment methods that may differ from the requirements in §265.166 of this subchapter (relating to Water Quality);

(6) a proposed testing schedule for determining levels of biological and chemical levels as specified by the department to ensure the health and safety of the public;

(7) a detailed drawing or map of the lagoon that indicates swimming areas and non-swimming areas; and

(8) any additional information the department requires to make its decision.

(c) Decision. The department shall approve or reject a request to use an alternate method of disinfectant no later than 90 days after the completed application is submitted.

(d) Additional information. If the department requires additional information to make its decision, the application is not considered completed for purposes of subsections (b) and (c) of this section until the department receives the additional information as requested.

§265.168. Enclosures.

(a) Enclosure required. The lagoon shall be enclosed by a fence, wall, or barrier that meets the requirements in this section.

(b) Minimum height. The enclosure, including doors and gates, shall have a minimum perpendicular height of at least six feet as measured from the ground surface on the outside of the fence.

(c) Openings. The enclosure shall have no openings in, through it, or under it, which would allow a four-inch diameter sphere to pass.

(d) An enclosure constructed with horizontal and vertical members with the distance between the tops of the horizontal members less than 48 inches, shall have openings that may not allow a sphere 1-3/4 inches in diameter to pass through the enclosure.

(e) The enclosure shall be designed and constructed so that it cannot be readily climbed. Structures, light poles, trees, or any other object that could make the enclosure easy to climb shall be a minimum of three horizontal feet from the exterior of the fence.

(f) Entry gates, doors and windows.

(1) Entry doors, gates, and windows in the enclosure shall be directly and continuously supervised by staff during hours of operation or locked to prevent unauthorized entry.

(2) All entry gates and doors shall open outward away from the lagoon and shall:

(A) have hand-activated opening hardware; and

(B) have hardware enabling the doors and gates to be locked by a padlock or built-in lock.

(g) Latching devices. Entry doors and gates shall be equipped with self-closing and self-latching devices that keep the gate or door securely closed and within its range of operation. A gate latch shall be installed on entry gates and doors so that it is at least 60 inches above the ground, except that it may be installed lower if:

(1) the latch is installed on the lagoon side of the gate only;  
and

(2) the gate or enclosure has no openings greater than 1/2-inch in any direction within 18 inches from the latch, including the space between the gate and the gate post to which the gate latches; or

(3) a gate latch may be located 42 inches or higher above the ground if the gate cannot be opened except by key, card, or combination from either side of the gate.

(h) Building. A building that serves as part of the enclosure shall have doors or gates that access the yard of the lagoon constructed on or after the effective date of this subchapter only if:

(1) any doors or gates between the building and the lagoon yard are for entry into a storage room, restroom, shower room, dressing room, or mechanical room adjacent to the lagoon; and

(2) the room does not have any door or gate openings to the outside of the enclosure.

§265.169. Safety Features.

(a) Safety equipment. Safety equipment shall have its function plainly marked and shall be kept in ready condition at all times a lagoon is open for use.

(b) Boundaries. Boundaries shall be designated as follows.

(1) Boundaries for swimming or wading areas of the lagoon shall be marked by a buoy line with floats.

(2) The buoy line's floats or buoys shall be at regular intervals, no further than 25 feet apart and where lines are joined.

(3) Clearly visible depth marker buoys shall be provided on the boundary float line indicating the following depths below the depth marker buoy:

(A) the maximum depth;

(B) at the point where the depth exceeds three feet, six inches; and

(C) at the five-foot depth if the depth of the swimming area exceeds five feet.

(c) Vessel and motorboat safety.

(1) Ignitable fuel. Motorboats using any ignitable propellant or fuel such as gasoline, kerosene, propane, or alcohol are prohibited in the swimming areas, but may be permitted in other areas for specific events, subject to any safety plan approved by a local regulatory authority.

(2) Personal flotation devices.

(A) Each vessel or motorboat passenger under 13 years of age shall be required to wear a United State Coast Guard (USCG)-approved personal flotation device while the vessel or motorboat is underway. A life belt, floaties, or a ring buoy does not satisfy this requirement.

(B) An adult operator of a vessel or motorboat may not permit a person under 13 years of age to be on board the vessel or motorboat while the vessel or motorboat is under way if the person is not wearing a USCG-approved personal flotation device.

(C) No person shall be prohibited from the use of a USCG-approved personal flotation device.

(d) Safety signs. Lagoon safety signs shall comply with the following:

(1) Signs shall be securely mounted.

(2) Signs shall be easily readable from all areas of the lagoon and have a minimum letter, symbol, and number height of three inches.

(3) All letters, numbers, and symbols on the signs shall be in contrasting color to the background and easily read.

(4) Required signs in the swimming area:

(A) days and hours of operation;

(B) "Non-Service Animals Prohibited;"

(C) "Glass Containers Prohibited;"

(D) "Entering the Lagoon if Ill with Diarrhea is Prohibited;"

(E) "Changing Diapers Within 6 Feet of the Lagoon is Prohibited;"

(F) "In Case of Emergency Dial 911;"

(G) "No Swimmers Allowed Outside the Swimming Area;"

(H) "No Diving" and the international symbol for no diving where water depths are less than nine feet; and

(I) maximum user load.

(5) Required signs in the non-swimming area:

(A) days and hours of operation;  
(B) "Non-Service Animals Prohibited;"  
(C) "Glass Containers Prohibited;"  
(D) "Entering the Lagoon if Ill with Diarrhea is Prohibited;"

(E) "Changing Diapers Within 6 Feet of the Lagoon is Prohibited;"

(F) "In Case of Emergency Dial 911;"

(G) "Motorboats and Vessels Are Prohibited in Swimming Area" at lagoons where vessels or motorboats are allowed;

(H) "No Diving" and the international symbol for no diving where water depths are less than nine feet; and

(I) maximum user load.

(6) If lifeguards are not provided or are not required to be present, the following signs are required:

(A) "Warning - No Lifeguard on Duty;" and

(B) "No Diving" and the international symbol for no diving.

(7) The required notifications may be mounted on individual signs or combined on one sign.

(e) Night swimming prohibited. Night swimming, from one-half hour before sunset to one-half hour after sunrise, shall be prohibited unless lighting is provided as required in subsection (f) of this section.

(f) Lighting Requirements. If the lagoon is open for night swimming or during periods of low illumination, the lagoon surface lighting shall:

(1) Maintain lagoon surface lighting levels at a minimum of 15 horizontal foot candles (161 lux).

(2) Illuminate all parts of the lagoon open for use, including the swimming areas, depth markers, signs, entrances, restrooms, safety equipment, deck areas, walkways, and any area occupied or in use.

(3) Underwater lighting shall not be less than eight-initial rated lumens per linear foot of the lagoon perimeter where underwater lighting is provided. Underwater lighting is not required for lagoon.

(g) Ring buoy, throw rope, and reaching pole. A lagoon shall have at least one ring buoy with throwing rope and a reaching pole at each swimming area and at each area that provides access to motorboats or vessels.

(1) The reaching pole shall be in the immediate vicinity of the water and accessible to users.

(2) The reaching pole shall be light, strong, non-telescoping, and at least 12 feet long. The pole shall be constructed of fiberglass or other material that does not conduct electricity and shall have a body hook or shepherd's crook with blunted ends attached.

(3) The throwing rope shall be 1/4-inch to 3/8-inch diameter, with a length at least two-thirds of the width of the swimming area. An USCG-approved ring buoy with an outside diameter of at least 20 inches shall be attached to the throwing rope.

(h) Safety equipment. Safety equipment, including ring buoys and rope, floating lines with buoys, emergency communication equipment, backboards with tie-downs and head supports, first aid kits, and

required signs, shall be maintained in good condition and in good working order.

(i) Emergency telephone. The lagoon shall have a minimum of two emergency telephones, commercial emergency contact devices, or alternative communication systems that are capable of immediately summoning emergency services and that are readily accessible, within 200 feet of the water, and are functioning at all times the lagoon is open. Clear operating instructions for the emergency telephone shall be provided.

(1) A fixed location telephone, commercial emergency contact device, or alternative communication system shall be visible, have no obstruction to access, and have some method of identification that enables the telephone or other device or system to be easily identified by users.

(2) A telephone or emergency contact device may not be answered by an on-site office. The alternative communication system may not be answered by an on-site office unless the alternative communication system complies with paragraph (5) of this subsection.

(3) A telephone shall be capable of making outside calls to 911 dispatch or emergency medical services.

(4) A commercial emergency contact device, when activated, shall directly connect to a 24-hour monitoring service, or directly to 911 dispatch or to emergency medical services.

(5) An alternative communication system that contacts an on-site office may be used if the lagoon is in a remote area with limited or delayed emergency medical services response times, and it has employees on-site that are trained and certified or licensed to perform emergency medical intervention when the lagoon is open.

(6) At least one emergency telephone, commercial emergency contact device, or alternative communication system device shall be located within 200 feet of a swimming area.

#### §265.170. Lifeguard Requirements.

(a) Waterfront supervision. A waterfront manager or director who holds a current lifeguard certificate or its equivalent shall be required to manage and direct all water-related activities in the non-swimming and swimming areas.

(b) Lifeguards required. A lagoon shall provide lifeguards if:

(1) alcohol is sold, served, or allowed to be brought in;

(2) motorboats are used or allowed;

(3) the lagoon is open to the general public;

(4) unsupervised children under the age of 14 years are allowed; or

(5) users enter the water from any height above the deck or wall, including from diving boards, drop slides, starting platforms, or climbing walls.

(c) Minimum number. A minimum of two lifeguards shall be provided for each swimming area. In the non-swimming area of the lagoon, the owner or operator shall have a lifeguard safety plan in place that defines the number of lifeguards for non-swimming swimming areas when open.

(1) The number of lifeguards shall be sufficient to provide adequate supervision and close observation of all users at all times.

(2) The number of lifeguards shall be sufficient to allow for alternation of tasks such that no lifeguard conducts surveillance activities for more than 60 continuous minutes.

(d) Surveillance. Each lifeguard shall be given an assigned surveillance area commensurate with ability and training.

(e) Other assigned duties shall not distract. Lifeguards conducting surveillance of users shall not be assigned duties that would distract the lifeguard's attention from proper observation of the users, or that would prevent immediate assistance to persons in the water.

(f) In-service training. Lifeguards shall be provided with alertness and response drills and other training, including:

(1) a pre-season training program to refresh skills;

(2) a continual "in-service" training program totaling a minimum 60 minutes each week for each lifeguard; and

(3) performance audits as recommended by the ARC, Young Men's Christian Association, or equivalent aquatic safety organization.

(g) Records kept onsite. A lagoon shall keep records of each lifeguard's certification, including expiration dates and in-service training, for at least three years.

(h) Emergency action plan. An Emergency Action Plan shall be developed for the lifeguards and shall contain at a minimum:

(1) a list of emergency telephone numbers;

(2) the location of the first-aid kit and other rescue equipment such as the AED, BVM, and the backboard;

(3) a response plan for inclement weather such as thunderstorms, lightning, or high winds, including evacuation areas; and

(4) a plan following Centers for Disease Control and Prevention standards for responding to formed-stool contamination, diarrheal-stool contamination, vomit contamination, and contamination involving blood.

(i) Safety equipment. Lifeguards shall have access to safety equipment, including:

(1) An Occupational Safety and Health Administration (OSHA)-compliant 24-unit first aid kit housed in a durable weather-resistant container and kept filled and ready for use. The kit shall include disease transmission barriers and cleaning kits meeting OSHA standards.

(2) A number of backboards equipped with a head immobilizer and sufficient straps to immobilize a person to the backboard, in locations sufficient to affect a two-minute response time to an incident.

(3) At least one portable AED and one BVM kept in a secure location that can be easily and quickly accessed by lifeguards or other trained personnel.

(4) Platforms or stands are required where water surface area is greater than 2,000 square feet or where the depth of the water is greater than 5 feet and shall include a protective umbrella or sunshade high enough to give lifeguards a complete and unobstructed view of the area of responsibility for the lifeguards.

(j) Personal equipment. Each lifeguard shall be provided:

(1) uniform attire that readily identifies the lifeguard as a staff member and a lifeguard;

(2) a rescue tube;

(3) personal protective devices, including a resuscitation mask with one-way valve and non-latex, non-powdered, one-use disposable gloves worn as a hip pack or attached to the rescue tube; and

(4) a whistle or other signaling device for communicating to users, other lifeguards, or staff.

§265.171. Operation and Management.

(a) Required certification. The lagoon shall be maintained under the supervision and direction of a properly trained and certified operator who is responsible for the sanitation, safety, proper maintenance of the lagoon, and for maintaining all physical and mechanical equipment and records. Training and certification can be obtained by completion of one of following courses or their equivalent:

(1) the National Recreation and Parks Association, "Aquatic Facility Operator;"

(2) the National Swimming Pool Foundation, "Certified Pool Operator;"

(3) the Association of Pool and Spa Professionals "Professional Pool & Spa Operator;" or

(4) the American Swimming Pool and Spa Association, "Licensed Aquatic Facility Technician."

(b) Water clarity. The lagoon shall be opened for use only when the bottom at the deepest point of the swimming areas of the lagoon are clearly visible. Visual occlusion by sediment or other matter shall be checked before opening and periodically, as necessary, while the lagoon is in use. Clarity shall be observed between one and five minutes after users have exited. Sediment shall be removed as needed before allowing re-entry by users into the lagoon.

(c) Closure signs. When the lagoon is closed for the season or for any other reason other than during normal operating periods, a "Lagoon Closed" sign in letters at least one-inch in height shall be posted on the exterior of each entrance.

(d) Off-season water clarity. When the lagoon is not in use for at least 30 days (such as off-season), clarity shall be maintained, and algae growth shall be prevented, however, other water quality parameters required by §265.166 of this subchapter (relating to Water Quality) need not be maintained.

(e) Off-season safety. When a lagoon is not in use after seasonal operation, while under construction or renovation, or for any other reason, the lagoon shall not be allowed to give off objectionable odors, become a breeding site for pests, or create any other nuisance condition or hazard.

(f) Domestic animals prohibited. Domestic animals and other pets shall not be allowed within the enclosure, except that service animals shall be allowed within the lagoon enclosure, but not in the lagoon.

(g) Flotation devices. No person shall be prohibited from the use of a USCG-approved personal flotation device.

(h) Protection from chemical exposure. Personnel in charge of maintaining the lagoon shall be properly trained in accordance with §265.165 of this subchapter (relating to Disinfectant Equipment).

(i) Use of chemicals. Use of chemicals shall be according to the chemical manufacturer's directions. No chemical shall be used in a way that violates the manufacturer's instructions for the chemical feed system or the NSF/ANSI 50 or NSF/ANSI 60 certification of the chemical feed system.

(j) Use of registered products. Only chemicals registered and labeled for use in pools, spas, drinking water, and other recreational water aquatic facilities shall be used.

§265.172. Dressing and Sanitary Facilities.

(a) Fixture design. Fixtures at dressing and sanitary facilities shall be designed so that the fixtures are readily cleanable.

(b) Fixture installation. Fixtures at dressing and sanitary facilities shall be installed in accordance with local plumbing codes and shall be properly protected by backflow connection prevention devices.

(c) Cleaning. Dressing and sanitary facilities shall be cleaned as necessary to maintain sanitary conditions at all times.

(d) Ventilation. Adequate ventilation shall be provided in dressing and sanitary facilities to prevent objectionable odors.

(e) Dressing and sanitary facilities at lagoons open to the general public.

(1) Separate men's and women's dressing and sanitary facilities shall be provided. The rooms shall be well lit, drained, ventilated, and of good construction, using impervious materials. The facilities shall be developed and planned so that good sanitation will be maintained throughout the building at all times. An appropriate number of dressing rooms that can accommodate a family are allowed.

(2) Partitions between portions of the dressing room area, screen partitions, shower, toilet, and dressing room booths shall be of durable material not subject to damage by water and shall be designed so that a waterway is provided between partitions and floor to permit thorough cleaning of the walls and floor areas with hoses and brooms.

(3) Floors shall have slip-resistant surfaces and shall be sufficiently smooth to ensure ease in cleaning. Floor drains shall be provided, and floors shall be sloped a minimum of 1/4-inch per foot toward the drains to ensure positive drainage.

(4) An adequate number of hose bibs and a hose of adequate length shall be provided for washing down all areas of the dressing facility interior. Adequate cross-connection control devices, approved by TCEQ or the local regulatory authority, shall be provided. When not in use, hoses shall be stored in such a manner to prevent a trip hazard.

(f) Lavatories, showers, and toilets at lagoons open to the general public constructed on or after the effective date of this subchapter shall comply with the following.

(1) Lavatory, shower, and toilet facilities shall be located to encourage use of the sanitary facilities by users of the lagoon as follows:

(A) at points of main entry into the enclosure;

(B) within 200 feet of entry or exit into the swimming area; and

(C) no more than 500 feet from entry or exit into the non-swimming area.

(2) The required fixture schedule for lagoons open to the general public is contained in the following table:

Figure: 25 TAC §265.172(f)(2)

(3) Cleansing showers and lavatories shall be provided with hot and cold running water.

(4) The number of total fixtures required at the lagoon can be distributed between required sanitary facilities within the enclosure of the lagoon.

(g) Lavatories, showers, and toilets at lagoons serving apartments, Home Owners Associations (HOAs), condominiums, hotels or motels, or other mixed-use, privately owned developments.

(1) Lavatories, showers, and toilets at lagoons serving apartments, Home Owners Associations (HOAs), condominiums, hotels or motels, or other mixed-use, privately owned developments

shall be located to encourage use of the sanitary facilities by users of the lagoon as follows:

(A) within 200 feet of entry or exit into the swimming areas of the lagoon; and

(B) no more than 500 feet from entry or exit into the non-swimming areas of the lagoon.

(2) The required fixture schedule for lagoons at apartments, HOAs, condominiums, hotels or motels, or other mixed use privately owned developments are contained in the following table:

Figure: 25 TAC §265.172(g)(2)

(3) Lavatories, showers, and toilets in apartments, HOAs, condominiums, hotels or motels, or other mixed use privately owned developments sharing use or ownership of the lagoon may count their public-use sanitary facilities toward the required number of fixtures if in compliance with paragraph (2) of this subsection.

(4) When sanitary facilities are located within an apartment, HOA, condominium, hotel or motel, or other mixed-use privately owned development sharing use or ownership of the lagoon, a sign shall be posted at each entry or exit in letters at least three inches in height stating the location of the nearest available restroom facility.

(h) Additional requirements for all sanitary facilities:

(1) Soap dispensers with liquid or powdered soap shall be provided at each lavatory. The dispenser shall metal or plastic, with no glass permitted.

(2) When provided, mirrors shall be shatter resistant.

(3) Toilet paper holders and toilet paper shall be provided at each toilet.

(4) Covered waste receptacles shall be provided in toilet or dressing room areas.

(5) Single-use hand drying towels or hand drying devices shall be provided near the lavatory.

§265.173. Compliance, Inspections, and Investigations.

(a) A department or local regulatory authority shall have the right to enter at all reasonable times any area or environment, including the lagoon facility, building, storage, equipment room, bathhouse, or office to inspect and investigate for compliance with this subchapter to review records, to question any person, or to locate, identify, and assess the condition of the lagoon.

(b) Advance notice or permission for entry is not required.

(c) A department or local regulatory authority shall not be impeded or refused entry during his official duties by reason of any company policy.

(d) It is a violation of this subchapter for a person to interfere, deny, or delay an inspection or investigation conducted by a department or a local regulatory authority.

§265.174. Enforcement.

(a) If a person has caused, suffered, allowed, or permitted a violation of Texas Health and Safety Code, §341.064, or this subchapter, the department or local regulatory authority may, in accordance with Texas Health and Safety Code, §341.092, assess civil penalties, seek injunctive relief in district court, or both.

(b) A person who has caused, suffered, allowed, or permitted a violation of Texas Health and Safety Code, §341.064, or this subchapter may also be subject to a criminal penalty under Texas Health and Safety Code, §341.091.

(c) The department or local regulatory authority may take any appropriate legal remedy, including immediately closing the lagoon through voluntary compliance or an injunction.

(d) If the lagoon closes, either voluntarily or by court order, public access to the lagoon shall be restricted and a notice posted notifying the public that the lagoon is closed until further notice.

(e) In case of voluntary closure and upon presentation of evidence that the deficiencies that caused the closure have been corrected, operation may be resumed if explicitly authorized by the department or local regulatory authority in writing. Such evidence may be in the form of a reinspection by the regulatory authority, or by other evidence acceptable to the regulatory authority.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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For further information, please call: (512) 231-5719



## **TITLE 31. NATURAL RESOURCES AND CONSERVATION**

### **PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT**

#### **CHAPTER 51. EXECUTIVE**

##### **SUBCHAPTER D. EDUCATION**

###### **31 TAC §51.81**

The Texas Parks and Wildlife Department (the department) proposes an amendment to §51.81, concerning Mandatory Boater Education. The proposed amendment would eliminate provisions regarding classroom elements of boater education, provide for exceptions to mandatory boater education requirements, and effect nonsubstantive housekeeping changes.

The Texas Water Safety Act (Parks and Wildlife Code, Chapter 31) requires persons born after September 1, 1993 to complete an approved boater education course before legally being able to operate a vessel of more than 15 horsepower, a wind-blown vessel of more than 14 feet in length, or a personal watercraft alone in public water. Almost all boater education is now provided via online and distance education modalities, making classroom components obsolete. Therefore, the proposed amendment would eliminate the requirement that a student attend at least six hours of training and be evaluated by an instructor. The proposed amendment also would eliminate the home study program, which the department has determined is not utilized enough to justify continuance and reword a provision governing the waiting period between examinations to make it clear that the provision applies to the equivalency examination and not a course examination.

Additionally, the proposed amendment would require a background check to be conducted for persons seeking to become

certified boating education instructors, which the department deems prudent in order to ensure that persons delivering boater education instruction under the aegis of the department are of sufficient character. The proposed amendment would also eliminate subsection (g), which is unnecessary because the provision applies only to persons who are exempt from mandatory boater education requirements by age.

Finally, the proposed amendment would exempt certain members of the armed services and Merchant Marine from boater education requirements, as well as persons who possess a Canadian Pleasure Craft Operator's Card. The department recognizes that there are personnel of the military branches and the Merchant Marine who by virtue of their training and or military occupation specialty have already met or exceeded any requirement of state law in terms of boating safety and that requiring such personnel to obtain boater education certification would be redundant and ineffective. Similarly, there is a Canadian equivalent to the boater education standards developed for the United States. The department sees no need to require persons who have obtained a Canadian Pleasure Craft Operator's Card to also obtain boater education certification in Texas.

Tim Spice, Boating Safety Education Manager, has determined that for each of the first five years that the rule as proposed is in effect, there will be no fiscal implications to state or local governments as a result of enforcing or administering the rule

Mr. Spice also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be the continued availability of convenient boater education certification and the continued public safety benefits associated with reduced accident rates, insurance costs, and enforcement costs that are proven to result from boater education courses.

There will be no adverse economic effect on persons required to comply with the rule as proposed.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect affect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose record-keeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services. The department has determined that there will be no direct economic impacts on small businesses, microbusinesses, or rural communities. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.



The department has determined that Government Code, §2001.0225 (Regulatory Analysis of Major Environmental Rules), does not apply to the proposed rule.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

In compliance with the requirements of Government Code, §2001.0221, the department has prepared the following Government Growth Impact Statement (GGIS). The rule as proposed, if adopted, will neither create nor eliminate a government program; not result in an increase or decrease in the number of full-time equivalent employee needs; not result in a need for additional General Revenue funding; not affect the amount of any fee; will not create a new regulation; will limit an existing regulation (by eliminating classroom components of boater education) but will not expand or repeal an existing regulation; neither increase nor decrease the number of individuals subject to regulation; and not positively or adversely affect the state's economy.

Comments on the proposed rule may be submitted to Tim Spice, Texas Parks and Wildlife Department 4200 Smith School Road, Austin, Texas, 78744; (512) 389-8141 (e-mail: tim.spice@tpwd.texas.gov).

The amendment is proposed under the authority of Parks and Wildlife Code, §31.108, which requires the commission to adopt rules to administer a boating education program.

The proposed amendment affects Parks and Wildlife Code, Chapter 31.

§51.81. *Mandatory Boater Education.*

(a) - (b) (No change.)

(c) The course is successfully completed when the student[;]

~~{(1) attends at least six hours of training;}~~

~~{(2) is evaluated by the instructor as acceptable in attitude, knowledge and skill; and}~~

~~{(3) scores a minimum of 70% on a course exam prescribed by the department.~~

(d) In lieu of a course, a person may complete an equivalency exam process consisting of a multiple-choice exam proctored by an agent appointed by the department or accessed through a department-sponsored web site.

(1) Equivalency ~~[Home study and equivalency]~~ exam passage shall be set at a minimum 80 percent passing score.

(2) A person who fails the equivalency exam must wait at least 24 hours to [may] retake it [one time at least 24 hours after the time of first completion].

(e) (No change.)

(f) The department shall:

(1) train and certify boater education instructors upon completion of an application, background check, game warden interview and proof of student and instructor course completion;

(2) - (3) (No change.)

~~{(g) In addition to those exemptions established in Parks and Wildlife Code, §31.110, and authorized in §31.108(b), persons who have successfully completed a "voluntary boater education course" pre-~~

~~viously administered or approved by the department are exempt from the requirements established in this subchapter.}~~

(g) ~~{(h)}~~ A person 18 years of age or older may obtain a one-time deferral from the boater-education requirements of Parks and Wildlife Code, §31.109, after paying the fee established in §53.50 of this title (relating to Training and Certification Fees) to the department.

(1) A deferral under this subsection does not authorize any person to supervise the operation of a vessel by any other person.

(2) A boater education deferral is valid for 15 consecutive days beginning on the date of purchase and ending at midnight of the 15th day following purchase.

(h) The following are exempt from the boater education requirements of Parks and Wildlife Code, §31.109:

(1) a member of the Armed Forces of the United States on active or reserve duty who is qualified as an officer of the deck under-way, boat coxswain, boat officer, watercraft operator, or marine deck officer;

(2) a member of the United States Merchant Marine; and

(3) a person who possesses a valid Canadian Pleasure Craft Operator's Card issued in the person's name.

(i) A person engaged in showing, testing, or demonstrating boats under Parks and Wildlife Code, §31.041(d), is exempt from the boater education course requirement while showing, testing, or demonstrating a boat.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Robert D. Sweeney, Jr.

General Counsel

Texas Parks and Wildlife Department

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For further information, please call: (512) 389-4329



## CHAPTER 53. FINANCE

### SUBCHAPTER A. FEES

#### DIVISION 3. TRAINING AND CERTIFICATION FEES

##### 31 TAC §53.50

The Texas Parks and Wildlife Department (the department) proposes an amendment to §53.50, concerning Training and Certification Fees. The proposed amendment would eliminate the current provision requiring a service fee schedule to be established by the executive director, a provision exempting an online provider of boater education from collecting and forwarding a \$10 fee to the department, and a provision establishing that the fees required by the section do not affect enhanced content offered by a boating education provider.

The Texas Water Safety Act (Parks and Wildlife Code, Chapter 31), requires persons born after September 1, 1993, to complete an approved boater education course before legally being able to operate a vessel of more than 15 horsepower, a windblown

vessel of more than 14 feet in length, or a personal watercraft alone in public water.

Parks and Wildlife Code, §31.108 allows the department to appoint agents to administer a boater education course or course equivalency examination. Section 31.108 requires agents to collect and forward to the department a \$10 course or examination fee and allows agents to collect and retain a service fee. The department has determined that the statutory provisions of Parks and Wildlife Code, §31.108(b) do not apply to the provision in current rule exempting agents from the requirement to collect and forward to the department a \$10 course or examination fee. The department has also determined that because there are a number of easy, and in some cases free, options for persons to obtain boater education, it is unnecessary to cap the amount of a service fee that a provider may charge a customer for a boater education course; therefore, the proposed amendment would eliminate the service fee cap and the provision requiring the executive director to establish a fee schedule for that purpose. The proposed rule would have the effect of defaulting to the requirements imposed by statute.

Mr. Tim Spice, Boating Safety Education Manager, has determined that for each of the first five years that the rule as proposed is in effect, there will be fiscal implications to the department as a result of enforcing or administering the rule. The department estimates that there will be a revenue increase of approximately \$225,000 in Fiscal Year 2020, increasing by approximately 10 percent per year thereafter, as a result of internet providers collecting and forwarding to the department a fee of \$10 per boater education participant.

There will be no fiscal implications for other units of state or local government.

Mr. Spice also has determined that for each of the first five years the rule as proposed is in effect, the public benefit anticipated as a result of enforcing or administering the rule as proposed will be the continued availability of convenient boater education certification and the continued public safety benefits associated with reduced accident rates, insurance costs, and enforcement costs that are proven to result from boater education courses.

There will be no adverse economic effect on persons required to comply with the rule as proposed.

Under the provisions of Government Code, Chapter 2006, a state agency must prepare an economic impact statement and a regulatory flexibility analysis for a rule that may have an adverse economic effect on small businesses and micro-businesses. As required by Government Code, §2006.002(g), the Office of the Attorney General has prepared guidelines to assist state agencies in determining a proposed rule's potential adverse economic impact on small businesses. Those guidelines state that an agency need only consider a proposed rule's "direct adverse economic impacts" to small businesses and micro-businesses to determine if any further analysis is required. For that purpose, the department considers "direct economic impact" to mean a requirement that would directly impose recordkeeping or reporting requirements; impose taxes or fees; result in lost sales or profits; adversely affect market competition; or require the purchase or modification of equipment or services. The department has determined that there will be no direct economic impacts on small businesses, microbusinesses, or rural communities. Accordingly, the department has not prepared a regulatory flexibility analysis under Government Code, Chapter 2006.

The department has not drafted a local employment impact statement under the Administrative Procedures Act, §2001.022, as the agency has determined that the rule as proposed will not impact local economies.

The department has determined that there will not be a taking of private real property, as defined by Government Code, Chapter 2007, as a result of the proposed rule.

In compliance with the requirements of Government Code, §2001.0221, the department has prepared the following Government Growth Impact Statement (GGIS). The rule as proposed, if adopted, will neither create nor eliminate a government program; not result in an increase or decrease in the number of full-time equivalent employee needs; not result in a need for additional General Revenue funding; not affect the amount of any fee; will not create a new regulation; will expand an existing regulation (by eliminating the exemption for the requirement to collect and forward a fee to the department for online boater education) but will not limit or repeal an existing regulation; neither increase nor decrease the number of individuals subject to regulation; and not positively or adversely affect the state's economy.

Comments on the proposed rule may be submitted to Tim Spice, Texas Parks and Wildlife Department 4200 Smith School Road, Austin, Texas, 78744; (512) 389-8141 (e-mail: tim.spice@tpwd.texas.gov).

The amendment is proposed under the authority of Parks and Wildlife Code, §31.108, which requires the commission to adopt rules to administer a boating education program.

The proposed amendment affects Parks and Wildlife Code, Chapter 31.

*§53.50. Training and Certification Fees.*

(a) - (b) (No change.)

(c) Boater education fees.

(1) (No change.)

(2) ~~An~~Except as provided in paragraph (4) of this subsection, an agent shall collect a \$10 per person examination or course fee and forward that fee to the department within 30 days after the examination or course is administered.

(3) In addition to the examination or course fee described in paragraph (2) of this subsection, an agent may charge and keep a service fee ~~in an amount established in a fee schedule approved by the director, which shall not exceed \$25~~.

~~[(4) An agent providing an Internet-based boater education course and examination is exempt from the requirement to collect and forward to the department the \$10 examination or course fee.]~~

~~[(5) The fees established in this subsection apply only to course content necessary to satisfy the minimum requirements for boater education certification in Texas. Nothing in this subsection shall be construed to prohibit an agent from providing and charging a fee for enhanced content.]~~

(4) ~~[(6)]~~ The fee for obtaining a boater education deferral is \$10.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 30, 2019.



## TITLE 37. PUBLIC SAFETY AND CORRECTIONS

### PART 13. TEXAS COMMISSION ON FIRE PROTECTION

#### CHAPTER 403. CRIMINAL CONVICTIONS AND ELIGIBILITY FOR CERTIFICATION

##### 37 TAC §§403.3, 403.11, 403.15

The Texas Commission on Fire Protection (commission) proposes amendments to Chapter 403, Criminal Convictions and Eligibility for Certification, concerning §403.3, Scope, §403.11, Procedures for Suspension, Revocation or Denial of a Certificate to Persons with Criminal Backgrounds, and §403.15, Report of Convictions by an Individual or a Department.

##### BACKGROUND AND PURPOSE

The purpose of the amendments is to remove language regarding an individual's conduct prior to court action. Senate Bill 1217 passed during the 86th legislative session forbids an agency from considering an arrest that did not result in an individual's conviction. The amendment to §403.15(e) corrects the number of the commission form.

##### FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tim Rutland, Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there will be no significant fiscal impact to state government or local governments. Because there is no effect on local economies for the first five years that the proposed amendments are in effect, no local employment impact statement is required by Texas Government Code §2001.022.

##### PUBLIC BENEFIT

Mr. Rutland has also determined that for each year of the first five years the amendments are in effect the public benefit from the passage of the proposal will be to ensure compliance with Senate Bill 1217.

##### ECONOMIC IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES AND RURAL COMMUNITIES

There will be no effect on persons required to comply with the amendments as proposed. There will be no impact on micro or small businesses or rural communities. As a result, the commission asserts that the preparation of an economic impact statement and a regulatory flexibility analysis, as provided by Government Code §2006.002, is not required.

##### GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined that during the first five years the amendments are in effect:

(1) the rules will not create or eliminate a government program;

(2) the rules will not create or eliminate any existing employee positions;

(3) the rules will not require an increase or decrease in future legislative appropriation;

(4) the rules may increase in fees paid to the agency, to the extent that there may be more applicants who are eligible for licensure by the commission, if arrests can no longer be considered as a basis for ineligibility.

(5) the rules will not create a new regulation;

(6) the rules will limit an existing regulation because the commission can no longer consider arrests when assessing the eligibility of applicants and certificate holders;

(7) the rules will not increase the number of individuals subject to the rule; and

(8) the rules are not anticipated to have an adverse impact on the state's economy.

##### TAKINGS IMPACT ASSESSMENT

The commission had determined that no private real property interests are affected by this proposal and this proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043

##### REQUIREMENT FOR RULE INCREASING COSTS TO REGULATED PERSONS

Texas Government Code Section 2001.0045 does not apply to the proposed rule because §2001.0045(c)(6) exempts the agency because agency rules are necessary to protect the health, safety and welfare of the residents of this state because this rule may increase the number of fire protection personnel serving communities.

##### ENVIRONMENTAL RULE ANALYSIS

The commission has determined that this proposal is not brought with the specific intent to protect the environment or reduce risks to human health from environmental exposure. It is not a "major environmental rule," as defined by Government Code §2001.0225. As a result, the commission asserts that the preparation of an environmental impact analysis, as provided by Government Code §2001.0225, is not required.

##### PUBLIC COMMENT

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register*, to Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to [deborah.cowan@tcfp.texas.gov](mailto:deborah.cowan@tcfp.texas.gov). Comments will be reviewed and discussed at a future commission meeting.

##### STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; and §419.032 which allows the commission to appoint fire protection personnel and §419.036, which authorizes the commission to take disciplinary actions against certificate holders.

The proposal implements Texas Government Code, Chapter 419, §419.008, §419.032, and §419.036.

§403.3. *Scope.*

(a) The policy and procedures established in this chapter apply to a person who holds or applies for any certificate issued under the commission's regulatory authority contained in Government Code, Chapter 419.

(b) When a person is [~~charged with, or~~] convicted of a crime of a sexual nature, the conviction of which would require the individual to be registered as a sex offender under Chapter 62 of the Code of Criminal Procedure; or

(c) When a person is convicted of a crime [~~engages in conduct~~] that is an offense under Title 7 of the Texas Penal Code, or a similar offense under the laws of the United States of America, another state, or other jurisdiction, the person's conduct directly relates to the competency and reliability of the person to assume and discharge the responsibilities of fire protection personnel. Such conduct includes, but is not limited to, intentional or knowing conduct, without a legal privilege, that causes or is intended to cause a fire or explosion with the intent to injure or kill any person or animal or to destroy or damage any property. The commission may [~~consider the person's conduct even though a final conviction has not occurred and may~~]:

- (1) deny [~~to~~] a person the opportunity to be examined for a certificate;
- (2) deny the application for a certificate;
- (3) grant the application for a new certificate with the condition that a probated suspension be placed on the newly granted certificate;
- (4) refuse to renew a certificate;
- (5) suspend, revoke or probate the suspension or revocation of an existing certificate; or
- (6) limit the terms or practice of a certificate holder to areas prescribed by the commission.

(d) When a person's criminal conviction of a felony or misdemeanor directly relates to the duties and responsibilities of the holder of a certificate issued by the commission, the commission may:

- (1) deny [~~to~~] a person the opportunity to be examined for a certificate;
- (2) deny the application for a certificate;
- (3) grant the application for a new certificate with the condition that a probated suspension be placed on the newly granted certificate;
- (4) refuse to renew a certificate;
- (5) suspend, revoke or probate the suspension or revocation of an existing certificate; or
- (6) limit the terms or practice of a certificate holder to areas prescribed by the commission.

§403.11. *Procedures for Suspension, Revocation, or Denial of a Certificate to Persons with Criminal Backgrounds.*

(a) If the commission [~~Standards Division (the division)~~] proposes to suspend, revoke, limit, or deny a certificate based on the criteria in this chapter, the division shall notify the individual per Government Code, Chapter 2001. The notice of intended action shall specify the facts or conduct alleged to warrant the intended action.

(b) If the proposed action is to limit, suspend, revoke, or refuse to renew a current certificate, or deny an application for a new certificate, a written notice of intended action shall comply with the preliminary notice requirements of Government Code §2001.054(c). The individual may request, in writing, an informal conference with the commission staff in order to show compliance with all requirements of law for the retention of the certificate, pursuant to Government Code §2001.054(c). A written request for an informal staff conference must be submitted to the division director no later than 15 days after the date of the notice of intended action. If the informal staff conference does not result in an agreed consent order, a formal hearing shall be conducted in accordance with the Administrative Procedure Act, Government Code, Chapter 2001.

(c) If the individual does not request an informal staff conference or a formal hearing in writing within the time specified in this section, the individual is deemed to have waived the opportunity for a hearing, and the proposed action will be taken.

(d) If the commission limits, suspends, revokes, or denies a certificate under this chapter, a written notice shall be provided to the person that includes [~~the executive director shall give the person written notice~~]:

- (1) [~~of~~] the reasons for the decision;
- (2) that the person may appeal the decision [~~of the executive director~~] to the commission in accordance with §401.63 of this title (relating to Final Decision and Orders [~~Appeals to the Commission~~]) within 30 days from the date the decision [~~of the executive director~~] is final and appealable;
- (3) that the person, after exhausting administrative appeals, may file an action in a district court of Travis County, Texas, for judicial review of the evidence presented to the commission and its decision; and that such petition must be filed with the court no later than 30 days after the commission action is final and appealable.

§403.15. *Report of Convictions by an Individual or a Department.*

(a) A certificate holder must report to the commission, any conviction, other than a minor traffic offense (Class C misdemeanor) under the laws of this state, another state, the United States, or foreign country, within 14 days of the conviction date.

(b) A fire department or local government entity shall report to the commission, any conviction of a certificate holder other than a minor traffic offense (class C misdemeanor) under the laws of this state, another state, the United States, or foreign country, that it has knowledge of, within 14 days of the conviction date.

(c) A certificate holder is subject to suspension, revocation or denial of any or all certifications for violation of the requirements of subsection (a) of this section. Each day may be considered a separate offense.

(d) A fire department or government entity regulated by the commission violating subsection (b) of this section may be subject to administrative penalties of up to \$500. Each day may be considered a separate offense.

(e) Notification may be made by mail, e-mail, or in person to the Texas Commission on Fire Protection (TCFP) Austin office. TCFP Form #014 [~~#0014~~] shall be used.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 27, 2019.

TRD-201902912  
Tim Rutland  
Executive Director  
Texas Commission on Fire Protection  
Earliest possible date of adoption: October 13, 2019  
For further information, please call: (512) 936-3812



## CHAPTER 421. STANDARDS FOR CERTIFICATION

### 37 TAC §421.11

The Texas Commission on Fire Protection (commission) proposes amendments to Chapter 421, Standards for Certification, concerning §421.11, Requirement To Be Certified Within One Year.

#### BACKGROUND AND PURPOSE

The purpose of the amendments is to add language addressing the process for military spouses to be appointed to fire protection duties and to ensure compliance with SB 1200 as passed by the 86th Legislature. Also, in subsections (a) and (b) of this rule, the word "commission" is no longer capitalized in order to be consistent with the use of the term in other commission rules.

#### FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tim Rutland, Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there will be no significant fiscal impact to state government or local governments. Because there is no effect on local economies for the first five years that the proposed amendments are in effect, no local employment impact statement is required by Texas Government Code §2001.022.

#### PUBLIC BENEFIT

Mr. Rutland has also determined that for each year of the first five years the amendments are in effect the public benefit from the passage of the proposal will be the allowance of military spouses to be temporarily appointed to fire protection duties without being required to hold commission certification, provided certain requirements are met; approved by commission staff and to ensure compliance with SB 1200 as passed by the 86th Legislature.

#### ECONOMIC IMPACT ON SMALL BUSINESSES, MICRO-BUSINESS AND RURAL COMMUNITIES

There will be no effect on persons required to comply with the amendments as proposed. There will be no impact on micro or small businesses or rural communities. As a result, the commission asserts that the preparation of an economic impact statement and a regulatory flexibility analysis, as provided by Government Code §2006.002, is not required.

#### GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined that during the first five years the amendments are in effect:

- (1) the rule will not create or eliminate a government program;
- (2) the rule will not create or eliminate any existing employee positions;
- (3) the rule will not require an increase or decrease in future legislative appropriation;

(4) the rule may result in a slight decrease in fees paid to the agency because military spouses are not required to pay fees for certification;

(5) the rule will not create a new regulation;

(6) the rule will expand a regulation by including military spouses as a new category of licensee;

(7) the rule may slightly increase the number of individuals subject to the rule because it expands the opportunity for previously non-qualified individuals to serve; and

(8) the rule is not anticipated to have an adverse impact on the state's economy.

#### TAKINGS IMPACT ASSESSMENT

The commission has determined that no private real property interests are affected by this proposal and this proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043

#### REQUIREMENT FOR RULE INCREASING COSTS TO REGULATED PERSONS

Texas Government Code Section 2001.0045 does not apply to the proposed rule because it does not impose a cost on regulated persons, another state agency, a special district, or a local government.

#### ENVIRONMENTAL RULE ANALYSIS

The commission has determined that this proposal is not brought with the specific intent to protect the environment or reduce risks to human health from environmental exposure. It is not a "major environmental rule," as defined by Government Code §2001.0225. As a result, the commission asserts that the preparation of an environmental impact analysis, as provided by Government Code §2001.0225, is not required.

#### PUBLIC COMMENT

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register*, to Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to [deborah.cowan@tcfp.texas.gov](mailto:deborah.cowan@tcfp.texas.gov). Comments will be reviewed and discussed at a future commission meeting.

#### STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; and §419.032 which allows the commission to appoint fire protection personnel.

The proposal implements Texas Government Code, Chapter 419, §419.008 and §419.032.

§421.11. *Requirement To Be Certified Within One Year.*

(a) Except for subsection (c) and (d) of this section, fire [Fire] protection personnel or part-time fire protection employees of a fire department who are appointed duties identified as fire protection personnel duties must be certified by the commission [Commission] in the discipline(s) to which they are assigned within one year of their appointment to the duties or within two years of successfully passing the

applicable commission [~~Commission~~] examination, whichever is less. The commission [~~Commission~~] shall not approve an initial certification for a regulated discipline until it has reviewed and approved a person's fingerprint-based criminal history record. An individual who accepts appointment(s) in violation of this section shall be removed from the appointment(s) and will be subject to administrative penalties. A department or local government that appoints an individual in violation of this section will also be subject to administrative penalties.

(b) An individual who has been removed from appointment to duties identified as fire protection personnel duties for violation of this section must petition the commission [~~Commission~~] in writing for permission to be reappointed to the duties from which they were removed. The petition will be considered only if the individual has obtained all appropriate certification(s) applicable to the duties to which the individual seeks reappointment.

(c) A military spouse may be appointed to fire protection personnel duties with a regulated fire department without being required to obtain the applicable certification, provided the military spouse submits the following to the commission prior to appointment and has received confirmation of approval from the commission:

- (1) notification to the commission of intent to perform regulated fire protection duties;
- (2) documentation of equivalent certification from another jurisdiction;
- (3) a fingerprint-based criminal history record using the commission approved system;
- (4) proof of residency in Texas; and
- (5) a copy of the individual's military identification card.

(d) A military spouse appointed to fire protection duties under this section may engage in those duties only for the period in which the military service member to whom the spouse is married is stationed at a military installation in Texas, but not to exceed three years from the date the military spouse receives approval from the commission to engage in those duties.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Tim Rutland

Executive Director

Texas Commission on Fire Protection

Earliest possible date of adoption: October 13, 2019

For further information, please call: (512) 936-3812



## CHAPTER 433. DRIVER/OPERATOR SUBCHAPTER B. MINIMUM STANDARDS FOR DRIVER/OPERATOR-AERIAL APPARATUS

### 37 TAC §433.207

The Texas Commission on Fire Protection (commission) proposes amendments to Chapter 433, Drive/Operator, Subchapter B, Minimum Standards For Driver/Operator-Aerial Appara-

tus, concerning §433.207, International Fire Service Accreditation Congress (IFSAC) Seal.

### BACKGROUND AND PURPOSE

The purpose of the amendments is to remove the "grandfathering" provision from rule language for Driver/Operator-Aerial that ended on May 31, 2019.

### FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tim Rutland, Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there will be no significant fiscal impact to state government or local governments. Because there is no effect on local economies for the first five years that the proposed amendments are in effect, no local employment impact statement is required by Texas Government Code §2001.022.

### PUBLIC BENEFIT

Mr. Rutland has also determined that for each year of the first five years the amendments are in effect the public benefit from the passage of the proposal will be accurate and clear and concise rules regarding obtaining Driver/Operator - Aerial IFSAC seals.

### ECONOMIC IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES AND RURAL COMMUNITIES

There will be no effect on persons required to comply with the amendments as proposed. There will be no impact on micro or small businesses or rural communities. As a result, the commission asserts that the preparation of an economic impact statement and a regulatory flexibility analysis, as provided by Government Code §2006.002, is not required.

### GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined that during the first five years the amendments are in effect:

- (1) the rule will not create or eliminate a government program;
- (2) the rule will not create or eliminate any existing employee positions;
- (3) the rule will not require an increase or decrease in future legislative appropriation;
- (4) the rule will not result in a decrease in fees paid to the agency;
- (5) the rule will not create a new regulation;
- (6) the rule will not expand a regulation;
- (7) the rule will not increase the number of individuals subject to the rule; and
- (8) the rule is not anticipated to have an adverse impact on the state's economy.

### TAKINGS IMPACT ASSESSMENT

The commission has determined that no private real property interests are affected by this proposal and this proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043

### REQUIREMENT FOR RULE INCREASING COSTS TO REGULATED PERSONS

Texas Government Code Section 2001.0045 does not apply to the proposed rule because it does not impose a cost on regulated persons, another state agency, a special district, or a local government.

#### ENVIRONMENTAL RULE ANALYSIS

The commission has determined that this proposal is not brought with the specific intent to protect the environment or reduce risks to human health from environmental exposure. It is not a "major environmental rule," as defined by Government Code §2001.0225. As a result, the commission asserts that the preparation of an environmental impact analysis, as provided by Government Code §2001.0225, is not required.

#### PUBLIC COMMENT

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register*, to Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to [deborah.cowan@tcfp.texas.gov](mailto:deborah.cowan@tcfp.texas.gov). Comments will be reviewed and discussed at a future commission meeting.

#### STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; and §419.032 which allows the commission to appoint fire protection personnel.

The proposal implements Texas Government Code, Chapter 419, §419.008 and §419.032.

§433.207. *International Fire Service Accreditation Congress (IF-SAC) Seal.*

~~[(a) Individuals holding a current commission Driver/Operator-Aerial certification received prior to May 31, 2018 and documenting an NFPA 1001 Fire Fighter I IFSAC seal may be granted an International Fire Service Accreditation Congress (IFSAC) seal as a Driver/Operator-Aerial by making application to the commission for the IFSAC seal and paying applicable fees. This subsection will expire on May 31, 2019.]~~

[(b)] Individuals completing a commission approved Driver/Operator-Aerial program; documenting an NFPA 1001 Fire Fighter I IFSAC seal and passing the applicable state examination, may be granted an IFSAC seal for Driver/Operator-Aerial by making application to the commission for the IFSAC seal and paying applicable fees. Individuals must submit the application and fee for the seal prior to the expiration of the examination in order to qualify for the IFSAC seal.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Tim Rutland

Executive Director

Texas Commission on Fire Protection

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For further information, please call: (512) 936-3812



## CHAPTER 437. FEES

### 37 TAC §437.3

The Texas Commission on Fire Protection (commission) proposes amendments to Chapter 437, Fees, concerning §437.3, Certification Application Processing Fees.

#### BACKGROUND AND PURPOSE

The purpose of the amendments is to amend the initial certification fee for obtaining certification by the commission.

#### FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tim Rutland, Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there will be a minor fiscal impact to state government or local governments, by reducing the amount of state funds collected by the commission for certification applications. Because there is no effect on local economies for the first five years that the proposed amendments are in effect, no local employment impact statement is required by Texas Government Code §2001.022.

#### PUBLIC BENEFIT

Mr. Rutland has also determined that for each year of the first five years the amendments are in effect the public benefit from the passage of the proposal will be lower fees for individuals and entities when obtaining initial certification with the agency.

#### ECONOMIC IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES AND RURAL COMMUNITIES

There will be no negative effect on persons required to comply with the amendments as proposed. There will be no negative impact on micro or small businesses or rural communities. As a result, the commission asserts that the preparation of an economic impact statement and a regulatory flexibility analysis, as provided by Government Code §2006.002, is not required.

#### GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined that during the first five years the amendments are in effect:

- (1) the rule will not create or eliminate a government program;
- (2) the rule will not create or eliminate any existing employee positions;
- (3) the rule will not require an increase or decrease in future legislative appropriation;
- (4) the rule will result in a decrease in fees paid to the agency by reducing the fees collected for certification applications;
- (5) the rule will not create a new regulation;
- (6) the rule will not expand a regulation;
- (7) the rule will not increase the number of individuals subject to the rule; and
- (8) the rule is not anticipated to have an adverse impact on the state's economy.

#### TAKINGS IMPACT ASSESSMENT

The commission has determined that no private real property interests are affected by this proposal and this proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, this proposal does

not constitute a taking or require a takings impact assessment under Government Code §2007.043

#### REQUIREMENT FOR RULE INCREASING COSTS TO REGULATED PERSONS

Texas Government Code Section 2001.0045 does not apply to the proposed rule because it does not impose a cost on regulated persons, another state agency, a special district, or a local government.

#### ENVIRONMENTAL RULE ANALYSIS

The commission has determined that this proposal is not brought with the specific intent to protect the environment or reduce risks to human health from environmental exposure. It is not a "major environmental rule," as defined by Government Code §2001.0225. As a result, the commission asserts that the preparation of an environmental impact analysis, as provided by Government Code §2001.0225, is not required.

#### PUBLIC COMMENT

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register*, to Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to [deborah.cowan@tcfp.texas.gov](mailto:deborah.cowan@tcfp.texas.gov). Comments will be reviewed and discussed at a future commission meeting.

#### STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; and §419.026 which allows the commission to set and collect a fee for each certificate the commission issues.

The proposal implements Texas Government Code, Chapter 419, §419.008 and §419.026.

#### §437.3. Certification Application Processing Fees.

(a) A non-refundable application processing fee of ~~55~~ ~~85~~ is required for each certificate issued by the commission. If a certificate is issued within the time provided in §401.125 of this title (relating to Processing Periods), the fee will be applied to the certification. If the certificate is denied, the applicant must pay a new certification application processing fee to file a new application.

(b) The regulated employing entity shall be responsible for all certification application processing fees required as a condition of appointment.

(c) Nothing in this section shall prohibit an individual from paying a certification application processing fee for any certificate which he or she is qualified to hold, providing the certificate is not required as a condition of appointment (see subsection (b) of this section concerning certification fees).

(d) A facility that provides training for any discipline for which the commission has established a curriculum must be certified by the commission. The training facility will be charged a separate certification application processing fee for each discipline or level of discipline for which application is made.

(e) The certification application processing fee is waived for a military service member or military veteran whose military service, training, or education substantially meets the requirements for commission certification, and is applying for the first time for a certification required by commission rules for appointment to duties.

(f) The certification application processing fee is waived for a military service member, military veteran, or military spouse who holds a current license or certification issued by another jurisdiction that has requirements substantially equivalent to the requirements for commission certification[;] and is applying for the first time for a certification required by commission rules for appointment to duties.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 27, 2019.

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Tim Rutland

Executive Director

Texas Commission on Fire Protection

Earliest possible date of adoption: October 13, 2019

For further information, please call: (512) 936-3812

## CHAPTER 445. ADMINISTRATIVE INSPECTIONS AND PENALTIES

### 37 TAC §§445.1, 445.7, 445.9, 445.11

The Texas Commission on Fire Protection (commission) proposes amendments to Chapter 445, Administrative Inspections and Penalties, concerning §445.1 Entity Inspections, §445.7, Procedures, §445.9, Procedure for Violations, and new §445.11 Training Facilities.

#### BACKGROUND AND PURPOSE

The purpose of the amendments is to provide additional information regarding rule violations and administrative penalties which may be issued by the commission. The new section is specific to Training Facilities certified by the commission. The proposal seeks to more closely comply with a previous Sunset Commission recommendation for the 2008-2009 Review Cycle, 81st legislative session.

#### SECTION-BY-SECTION SUMMARY

In subsections (a) to (c) of the proposed amendments to §445.1, the word "commission" is no longer capitalized to conform with the use of the term in other commission rules.

The proposed amendments to §445.7 better implement the commission's statutory enforcement authority. Subsection (c) adds penalties for uncorrected minor violations. Subsection (c)(2) sets the penalty amounts and states that each rule violation is considered a separate violation for purposes of imposing a penalty and that each day a violation occurs is considered a separate violation. The amendments to subsection (d) establish penalty amounts for uncorrected major violations and state that each rule violation is considered a separate violation for purposes of imposing a penalty and that each day a violation occurs is considered a separate violation. Subsection (e) states that repeat violations may result in higher penalties.

Subsection (c) is re-lettered to subsection (f) so the subsections appear in alphabetical order. A minor grammatical change is the proposed amendment in subsection (f).

Minor grammatical changes are proposed for §445.9 in subsections (a) and (b). Subsection (d) also makes more effective the statutory enforcement authority of the commission. Sub-



section (d)(1) adds "violation history" as a factor to determine a penalty. The proposed amendments to subsection (d) add the following factors to consider in determining a penalty: (1) nature, circumstances, extent and gravity of a prohibited act; (2) economic damage to property or the public's interests or confidence caused by the violation; (3) any economic benefit gains through the violation; (4) actions deemed necessary to deter future violations; and (5) any demonstrated good faith/efforts to correct the violation.

Section 445.11 is a proposed new rule to regulate training facilities through disciplinary actions for violations of the commission's rules, standards, and curriculum. The proposed rule also authorizes the commission to take disciplinary action against students, instructors, and field examiners at the facilities.

#### FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tim Rutland, Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there may be an increase in general revenue to the state, to the extent that the enforcement actions could result in paid administrative penalties. Because there is no effect on local economies for the first five years that the proposed amendments are in effect, no local employment impact statement is required by Texas Government Code §2001.022.

#### PUBLIC BENEFIT

Mr. Rutland has also determined that for each year of the first five years the amendments are in effect the public benefit from the passage of the proposal will be more information regarding rule violations, administrative penalty types and amounts which may be assessed pursuant to violations of commission rules. The rule will more effectively implement the commission's statutory enforcement authority.

Because there is no effect on local economies for the first five years that the proposed amendments are in effect, no local employment impact statement is required by Texas Government Code §2001.022

#### ECONOMIC IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES AND RURAL COMMUNITIES

There will be no effect on persons required to comply with the amendments as proposed. There will be no impact on micro or small businesses or rural communities. As a result, the commission asserts that the preparation of an economic impact statement and a regulatory flexibility analysis, as provided by Government Code §2006.002, is not required.

#### GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined that during the first five years the amendments are in effect:

- (1) the rules will not create or eliminate a government program;
- (2) the rules will not create or eliminate any existing employee positions;
- (3) the rules will not require an increase or decrease in future legislative appropriation;
- (4) the rules will not result in an increase or decrease in fees paid to the agency;
- (5) the rules will create a new regulation to the extent that the rules implement existing statutes related to training facilities;
- (6) the rules will expand a regulation to include training facilities;

(7) the rules will increase the number of individuals subject to the rule because training facility students, instructors, and field examiners may be subject to disciplinary action; and

(8) the rules are not anticipated to have an adverse impact on the state's economy.

#### TAKINGS IMPACT ASSESSMENT

The commission has determined that no private real property interests are affected by this proposal and this proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043.

#### REQUIREMENT FOR RULE INCREASING COSTS TO REGULATED PERSONS

Texas Government Code Section 2001.0045 does not apply to the proposed rule because §2001.0045(c)(6) exempts the agency because agency rules are necessary to protect the health, safety and welfare of the residents of this state.

#### ENVIRONMENTAL RULE ANALYSIS

The commission has determined that this proposal is not brought with the specific intent to protect the environment or reduce risks to human health from environmental exposure. It is not a "major environmental rule," as defined by Government Code §2001.0225. As a result, the commission asserts that the preparation of an environmental impact analysis, as provided by Government Code §2001.0225, is not required.

#### PUBLIC COMMENT

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register*, to Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to [deborah.cowan@tcfp.texas.gov](mailto:deborah.cowan@tcfp.texas.gov). Comments will be reviewed and discussed at a future commission meeting.

#### STATUTORY AUTHORITY

The amendments are proposed under Texas Government Code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; §419.027, which authorizes the commission to inspect facilities conducting training; §419.028, which authorizes the commission to regulate training programs and instructors; §419.029, which authorizes the commission to establish minimum curriculum requirements; §419.036, which authorizes the commission to take disciplinary action; and §419.047, which allows the commission to enforce minimum standards adopted by the commission.

The proposal implements Texas Government Code, Chapter 419, §419.008, §419.027, §419.028, §419.029, §419.036; and §419.047.

#### §445.1. Entity Inspections.

(a) The commission [Commission] shall conduct at least biennial inspections of the entities that fall under the regulatory authority of the commission [Commission,] and may perform risk-based [risk based] inspections of entities the commission [Commission] determines to be at risk.

(b) The purpose of these inspections shall be to promote safety and proficiency in the fire service by ensuring compliance with state law and commission [Commission] rules pertaining to minimum standards for fire protection personnel education, protective clothing, self-contained breathing apparatus, personal alert safety systems, standard operating procedures, or any other aspect of the fire service regulated by the commission [Commission].

(c) This shall include inspections of volunteer fire fighters and fire departments that participate in the voluntary regulation program pursuant to §419.071 of the Texas Government Code in one or more of the component areas.

§445.7. *Procedures.*

(a) The inspector shall, if possible, notify the current or acting, on duty and available, department head of the inspector's presence at the department and his intention to conduct a departmental inspection.

(b) During the course of the inspection, any noncompliance with state law or commission rule shall be noted. Violations shall be determined to be either minor or major violations based upon the following guidelines.

(c) Penalty amounts for uncorrected minor violations.

(1) Minor violations shall be defined as those violations which the inspector determines do not pose a serious threat to personnel safety due to lack of personnel protection equipment or training, are not widespread, or are not repeat violations of the same nature for which the entity was cited within the previous five years. See minor violations and penalties in the applicable table.

(2) \$250 - \$500 per day. Each rule violation is considered a separate violation for purposes of imposing a penalty. Each day a violation continues to occur is considered a separate violation for purposes of imposing a penalty.  
Figure: 37 TAC §445.7(c)

(d) Penalty amounts for uncorrected major violations.

(1) [(2)] Major violations shall be defined as those violations which in the inspector's opinion constitute an immediate threat to personnel safety, flagrant or repeated violations in the same or similar areas, fraud, or obvious attempts to circumvent state law or commission rule. A major violation may be as follows but not limited to a deficiency or safety issue involving protective clothing, a self-contained breathing apparatus, personal alert safety systems, breathing air, or other matter that in the inspector's judgment presents an immediate and significant risk of injury. See major violations and penalties in the applicable table.

(2) \$500 - \$1,000 per day. Each rule violation is considered a separate violation for purposes of imposing a penalty. Each day a violation continues to occur is considered a separate violation for purposes of imposing a penalty.  
Figure: 37 TAC §445.7(d)

(e) Repeat violations of rules may result in higher penalty sanctions.

(f) (e)] In order to determine compliance with commission requirements pertaining to a particular item[,] the inspector may examine as many items of protective clothing and equipment deemed necessary by the inspector.

§445.9. *Procedure for Violations.*

(a) Findings of only minor violations. If during [the course of] a departmental inspection the inspector determines the department has committed only minor violations, the following procedure applies.

(1) The inspector shall issue an inspector's [inspectors] report which will identify the findings from the compliance inspection. The inspector's report is a written summary of an inspector's findings that is given to an inspected entity after an inspection. In cases of minor violations, the inspector's report may identify deficiencies and prescribe corrective action within specific timeframes.

(2) The department then has 30 calendar days from the date the inspector's report is received to provide the commission with a written schedule of actions that will be taken to correct the violations. The schedule of actions will allow necessary amounts of time for such things as obtaining items through city requisitions and bid processes, when necessary. Lack of funds is not an acceptable reason for delay.

(3) If the department fails to timely provide an acceptable written schedule of actions for obtaining compliance, the inspector or compliance officer may issue a notice of alleged violation. The notice of alleged violation is a written document that briefly summarizes the alleged violation(s)[;] and requires the person to correct the violation(s). The notice may also prescribe a specific time period to rectify the matter and achieve compliance[,] and assess an administrative penalty. If an administrative penalty is assessed, the notice shall state the amount of the penalty. The notice shall also inform the person of the person's right to an informal staff conference and that if the person fails to timely correct the alleged violation or fails to request a preliminary staff conference before the 61st day after receipt of the notice, the commission may issue a default order. In addition, the notice of alleged violation may:

- (A) allow extra time to come into compliance;
- (B) assess administrative penalties which may be prorated;
- (C) suspend or revoke licenses or certificates; and
- (D) require proof of compliance.

(b) Findings of major violations. If during [the course of] a departmental inspection the inspector determines the department has committed a major violation, the following procedure applies.

(1) The inspector or compliance officer shall issue a notice of alleged violation. The notice shall identify the violations and require the department or provider to correct the violation. In addition, the notice of alleged violation may:

- (A) specify a time period to achieve compliance;
- (B) assess administrative penalties;
- (C) suspend or revoke licenses or certificates; and
- (D) require proof of compliance.

(2) In addition to any of the above, the commission may also temporarily suspend a person's or regulated entity's certificate on a determination by a panel of the commission that continued activity by the person or entity would present an immediate threat to the public, regulated personnel, or fire service trainees; and seek an injunction in a district court in Travis County along with civil penalties, court costs, and attorney's fees. See Tex. Gov't Code §419.906(a), (d).

(c) If a fire department or training provider fails to correct the alleged violation in a timely manner or fails to request a preliminary staff conference (information settlement conference) before the 61st day after the date it receives a notice of alleged violation, the commission through its executive director may issue a default order.

(d) When determining administrative penalties for a notice of alleged violation or default order the following factors shall be considered:

- (1) compliance and violation history;
- (2) the seriousness of the violation; including but not limited to the nature, circumstances, extent and gravity of the prohibited act;
- (3) the safety threat to the public or fire protection personnel;
- (4) the economic damage to property or the public's interests or confidence caused by the violation;
- (5) any economic benefit gained through the violation;
- (6) actions deemed necessary to deter future violations;
- (7) any demonstrated good faith of the alleged violator, including efforts taken by the person or entity to correct the violation;
- (8) [(4)] any mitigating factors; and
- (9) [(5)] any other factors the commission considers appropriate.

(e) If the fire department or training provider timely requests a preliminary staff conference (informal settlement conference), the procedures in Chapter 401, Subchapter E apply, and if the preliminary staff conference does not result in approval of a consent order the matter shall be referred for a contested case hearing.

§445.11. Training Facilities.

Administrative actions and penalties regarding training facilities. Administrative actions and penalties for uncorrected rule violations pertaining to the minimum competency requirements for commission certifications and to approved training courses may be as follows:

- (1) Minor and major violation penalties may be imposed.
- (2) Training facility certifications and student, instructor and field examiner certifications may be revoked, suspended, denied or probated if the commission determines the rules, standards and curriculum violations create an imminent danger to life and safety of the public or fire protection personnel.
- (3) Training facility certifications and student, instructor and field examiner certifications may be revoked, suspended, denied or probated if the commission determines the rules, standards and curriculum violations resulted in failure to meet the minimum instruction and testing requirements for course completion.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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 Tim Rutland  
 Executive Director  
 Texas Commission on Fire Protection  
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 For further information, please call: (512) 936-3812



**CHAPTER 453. HAZARDOUS MATERIALS  
 SUBCHAPTER B. MINIMUM STANDARDS  
 FOR HAZARDOUS MATERIALS INCIDENT  
 COMMANDER  
 37 TAC §453.207**

The Texas Commission on Fire Protection (commission) proposes amendments to Chapter 453, Hazardous Materials, Subchapter B, Minimum Standards For Hazardous Materials Incident Commander, concerning §453.207, International Fire Service Accreditation Congress (IFSAC) Seal.

**BACKGROUND AND PURPOSE**

The purpose of the amendments is to remove the "grandfathering" provision from rule language for Hazardous Materials - Incident Commander that ended on May 31, 2019.

**FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT**

Tim Rutland, Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there will be no significant fiscal impact to state government or local governments. Because there is no effect on local economies for the first five years that the proposed amendments are in effect, no local employment impact statement is required by Texas Government Code §2001.022.

**PUBLIC BENEFIT**

Mr. Rutland has also determined that for each year of the first five years the amendments are in effect the public benefit from the passage of the proposal will be accurate and clear and concise rules regarding obtaining Hazardous Materials-Incident Commander IFSAC seals.

**ECONOMIC IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES AND RURAL COMMUNITIES**

There will be no effect on persons required to comply with the amendments as proposed. There will be no impact on micro or small businesses or rural communities. As a result, the commission asserts that the preparation of an economic impact statement and a regulatory flexibility analysis, as provided by Government Code §2006.002, is not required.

**GOVERNMENT GROWTH IMPACT STATEMENT**

The agency has determined that during the first five years the amendments are in effect:

- (1) the rule will not create or eliminate a government program;
- (2) the rule will not create or eliminate any existing employee positions;
- (3) the rule will not require an increase or decrease in future legislative appropriation;
- (4) the rule will not result in a decrease in fees paid to the agency;
- (5) the rule will not create a new regulation;
- (6) the rule will not expand a regulation;
- (7) the rule will not increase the number of individuals subject to the rule; and
- (8) the rule is not anticipated to have an adverse impact on the state's economy.

**TAKINGS IMPACT ASSESSMENT**

The commission has determined that no private real property interests are affected by this proposal and this proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043

## REQUIREMENT FOR RULE INCREASING COSTS TO REGULATED PERSONS

Texas Government Code §2001.0045 does not apply to the proposed rule because it does not impose a cost on regulated persons, another state agency, a special district, or a local government.

## ENVIRONMENTAL RULE ANALYSIS

The commission has determined that this proposal is not brought with the specific intent to protect the environment or reduce risks to human health from environmental exposure. It is not a "major environmental rule," as defined by Government Code §2001.0225. As a result, the commission asserts that the preparation of an environmental impact analysis, as provided by Government Code §2001.0225, is not required.

## PUBLIC COMMENT

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register*, to Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or emailed to [deborah.cowan@tcfp.texas.gov](mailto:deborah.cowan@tcfp.texas.gov). Comments will be reviewed and discussed at a future commission meeting.

## STATUTORY AUTHORITY

The amendments are proposed under Texas Government code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; and §419.032 which allows the commission to appoint fire protection personnel.

The proposal implements Texas Government code, Chapter 419, §419.008 and §419.032.

§453.207 *International Fire Service Accreditation Congress (IFSAC) Seal.*

[(a) Individuals holding a current commission Hazardous Materials Incident Commander certification received prior to May 31, 2018 may be granted an International Fire Service Accreditation Congress (IFSAC) seal as a Hazardous Materials Incident Commander by making application to the commission for the IFSAC seal and paying applicable fees. Individuals must also document the required prerequisite IFSAC seals listed in subsection (b) of this section. This subsection (a) will expire on May 31, 2019.]

[(b)] Individuals completing a commission approved Hazardous Materials Incident Commander program and documenting the following IFSAC seals:

- (1) Hazardous Materials Awareness Level Personnel; and
- (2) Hazardous Materials Operations Level Responders, including the Mission-Specific Competencies for Personal Protective Equipment and Product Control under the current edition; or
- (3) NFPA 472 Hazardous Materials Operations prior to the 2008 edition; and
- (4) upon passing the applicable state examination, may be granted an IFSAC seal for Hazardous Materials Incident Commander by making application to the commission for the IFSAC seal and paying applicable fees. Individuals must submit the application and fee for the seal prior to the expiration of the examination in order to qualify for the IFSAC seal.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Tim Rutland

Executive Director

Texas Commission on Fire Protection

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For further information, please call: (512) 936-3812



## CHAPTER 457. MINIMUM STANDARDS FOR INCIDENT SAFETY OFFICER CERTIFICATION

### 37 TAC §457.7

The Texas Commission on Fire Protection (commission) proposes amendments to Chapter 457, Minimum Standards For Incident Safety Officer Certification, concerning §457.7, International Fire Service Accreditation Congress (IFSAC) Seal.

### BACKGROUND AND PURPOSE

The purpose of the amendments is to remove the "grandfathering" provision from rule language for Incident Safety Officer that ended on May 31, 2019.

### FISCAL IMPACT ON STATE AND LOCAL GOVERNMENT

Tim Rutland, Executive Director, has determined that for each year of the first five-year period the proposed amendments are in effect, there will be no significant fiscal impact to state government or local governments. Because there is no effect on local economies for the first five years that the proposed amendments are in effect, no local employment impact statement is required by Texas Government Code §2001.022.

### PUBLIC BENEFIT

Mr. Rutland has also determined that for each year of the first five years the amendments are in effect the public benefit from the passage of the proposal will be accurate and clear and concise rules regarding obtaining Incident Safety Officer IFSAC seals.

### ECONOMIC IMPACT ON SMALL BUSINESSES, MICRO-BUSINESSES AND RURAL COMMUNITIES

There will be no effect on persons required to comply with the amendments as proposed. There will be no impact on micro or small businesses or rural communities. As a result, the commission asserts that the preparation of an economic impact statement and a regulatory flexibility analysis, as provided by Government Code §2006.002, is not required.

### GOVERNMENT GROWTH IMPACT STATEMENT

The agency has determined that during the first five years the amendments are in effect:

- (1) the rule will not create or eliminate a government program;
- (2) the rule will not create or eliminate any existing employee positions;
- (3) the rule will not require an increase or decrease in future legislative appropriation;
- (4) the rule will not result in a decrease in fees paid to the agency;

- (5) the rule will not create a new regulation;
- (6) the rule will not expand a regulation;
- (7) the rule will not increase the number of individuals subject to the rule; and
- (8) the rule is not anticipated to have an adverse impact on the state's economy.

**TAKINGS IMPACT ASSESSMENT**

The commission has determined that no private real property interests are affected by this proposal and this proposal does not restrict, limit, or impose a burden on an owner's rights to his or her private real property that would otherwise exist in the absence of government action. As a result, this proposal does not constitute a taking or require a takings impact assessment under Government Code §2007.043

**REQUIREMENT FOR RULE INCREASING COSTS TO REGULATED PERSONS**

Texas Government Code Section 2001.0045 does not apply to the proposed rule because it does not impose a cost on regulated persons, another state agency, a special district, or a local government.

**ENVIRONMENTAL RULE ANALYSIS**

The commission has determined that this proposal is not brought with the specific intent to protect the environment or reduce risks to human health from environmental exposure. It is not a "major environmental rule," as defined by Government Code §2001.0225. As a result, the commission asserts that the preparation of an environmental impact analysis, as provided by Government Code §2001.0225, is not required.

**PUBLIC COMMENT**

Comments regarding the proposed amendments may be submitted, in writing, within 30 days following the publication of this notice in the *Texas Register*, to Tim Rutland, Executive Director, Texas Commission on Fire Protection, P.O. Box 2286, Austin, Texas 78768 or e-mailed to [deborah.cowan@tcfp.texas.gov](mailto:deborah.cowan@tcfp.texas.gov). Comments will be reviewed and discussed at a future commission meeting.

**STATUTORY AUTHORITY**

The amendments are proposed under Texas Government code, Chapter 419, §419.008, which provides the commission the authority to propose rules for the administration of its powers and duties; and §419.032 which allows the commission to appoint fire protection personnel.

The proposal implements Texas Government code, Chapter 419, §419.008 and §419.032.

*§457.7 International Fire Service Accreditation Congress (IFSAC) Seal.*

[(a) Individuals holding a current commission Incident Safety Officer certification received prior to May 31, 2018 and documenting Fire Fighter II, Instructor I and Fire Officer I seals may be granted an International Fire Service Accreditation Congress (IFSAC) seal as an Incident Safety Officer by making application to the commission for the IFSAC seal and paying applicable fees. This subsection will expire on May 31, 2019.]

[(b)] Individuals completing a commission approved Incident Safety Officer program, documenting Fire Fighter II, Instructor I and Fire Officer I seals, and passing the applicable state examination, may

be granted an IFSAC seal for Incident Safety Officer by making application to the commission for the IFSAC seal and paying applicable fees. Individuals must submit the application and fee for the seal prior to the expiration of the examination in order to qualify for the IFSAC seal.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Executive Director

Texas Commission on Fire Protection

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**TITLE 40. SOCIAL SERVICES AND ASSISTANCE**

**PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES**

**CHAPTER 19. NURSING FACILITY REQUIREMENTS FOR LICENSURE AND MEDICAID CERTIFICATION**

As required by Texas Government Code §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Texas Health and Human Services Commission (HHSC) in accordance with Texas Government Code §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation and provision of services by the health and human services system, including rules in Title 40, Part 1.

The Executive Commissioner of HHSC proposes in Title 40, Part 1, Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification, amendments to §§19.1, 19.101, 19.401 - 19.411, 19.413, 19.414, 19.416, 19.417, 19.421, 19.501 - 19.504, 19.601, 19.602, 19.606, 19.702, 19.703, 19.706, 19.801 - 19.803, 19.901, 19.1001, 19.1010, 19.1101, 19.1104, 19.1107 - 19.1111, 19.1113, 19.1201 - 19.1203, 19.1205, 19.1401, 19.1501, 19.1601, 19.1901, 19.1902, 19.1908 - 19.1912, 19.1915, 19.1917, 19.1929, and 19.2704.

HHSC proposes new §§19.701, 19.904, 19.1102, 19.1116, and 19.1931 in Chapter 19.

HHSC proposes the repeal of §§19.418, 19.701, 19.705, 19.1102, 19.1103, 19.1903, and 19.1904 in Chapter 19.

**BACKGROUND AND PURPOSE**

The purpose of the amendments, new sections, and repeals in 40 TAC, Chapter 19, is to make HHSC rules consistent with federal regulations for nursing facilities participating in Medicare and

Medicaid and to protect the health and safety of nursing facility residents.

The Code of Federal Regulations, Title 42, Subpart B, §§483.1, 483.5, 483.10, 483.12, 483.15, 483.20, 483.21, 483.24, 483.25, 483.30, 483.35, 483.40, 483.45, 483.50, 483.55, 483.60, 483.65, 483.70, 483.75, 483.80, 483.85, 483.90 and 483.95, was amended effective November 28, 2016, to revise the requirements that nursing facilities must meet to participate in the Medicare and Medicaid programs.

The proposed rules focus on person-centered care and culture change, quality of life improvement, care and services, health outcomes, individual choice, resident safety, professional standards, and quality assurance and performance improvement. The rule changes are necessary to enhance health and safety protections for nursing facility residents, streamline regulatory requirements for nursing facility providers, and improve consistency of regulatory survey activity.

HHSC replaces references to both the "Texas Department of Human Services" or "DHS" and the "Department of Aging and Disability Services" or "DADS" with references to the "Texas Health and Human Services Commission" or "HHSC" throughout the proposal. The terms "responsible party," "legal representative," and other similar terms are replaced with the term "resident representative," throughout the proposal. The word "Texas" is added to the beginning of Texas codes. HHSC also makes editorial changes throughout the proposal to remove gender-specific language, adopt person-first respectful language, make plural nouns singular such as "resident" instead of "residents," and improve clarity and readability of the rules.

#### SECTION-BY-SECTION SUMMARY

The proposed amendment to §19.1 clarifies the requirements for nursing facilities for licensure and certification in the Medicare and Medicaid programs.

The proposed amendment to §19.101 adds new definitions for "adverse event," "certified facility," "chemical restraints," "person-centered care," "RAI - Resident Assessment Instrument," "resident representative," "restraint," and "survey agency." Proposed amended §19.101 also revises the definitions of "administrator," "advanced practice registered nurse," "attending physician," "comprehensive care plan," "dentist," "DHS," "distinct part," "drug," "involuntary seclusion," "licensed health professional," "long-term care-regulatory," "MDS - Minimum Data Set," "misappropriation of funds," "nurse aide," "nurse practitioner," "nursing facility or nursing home," "OBRA - Omnibus Budget Reconciliation Act of 1987," "physical restraint," "physician," "podiatrist," "substandard quality of care violation," "supervision (direct)," and "supervision (general)" with editorial changes to provide more clarity to the use of terms. Proposed amended §19.101 deletes the definitions for "affiliate," "agent," "APA - The Administrative Procedure Act, Texas Government Code, Chapter 2001," "controlled substance," "dangerous drugs," "department," "direct care by licensed nurses," "exposure (infections)," "free choice," "interdisciplinary care plan," "licensed nursing home (facility) administrator," "medical-social care plan," "medically related condition," "NHIC - National Heritage Insurance Corporation," "nonnursing personnel," "nurse aide trainee," "nursing assessment," "nursing facility/home administrator," "optometrist," "psychoactive drugs," "reimbursement methodology," "restraints (chemical)," "restraints (physical)," "state survey agency," "supervising physician," "supervision (intermittent)," "therapy week," "UAR - HHSC's Utilization and

Assessment Review Section," and "uniform data set" because Chapter 19 no longer uses these terms. Chapter 19 uses the term "agent" in several different senses and the contexts in which the term appears provide its meaning. This term "free choice" is only used in the title of §19.406 and the section effectively defines the term. This section has been renumbered to account for the additions and deletions of definitions that were updated.

The proposed amendment to §19.401(b) adopts by reference the Centers for Medicare and Medicaid Services (CMS) rule regarding resident rights found in 42 Code of Federal Regulations, Section 483.10 adopted to be effective November 28, 2016. As a requirement for obtaining a license under the Texas Health and Safety Code, Chapter 242, a nursing facility must comply with the rules related to resident rights in 42 CFR, Section 483.10. Also, §19.401(c)(3) is amended to require that a resident be free from neglect, as well as abuse and exploitation. This change makes this reference consistent with other similar references in Chapter 19.

The proposed amendment to §19.402 makes editorial changes to remove gender specific language, use person-first language, use the same terminology to refer to the resident's representative, and replace term used for mental competency to add clarity and consistency to the rule. Also, the amendment of §19.402(g) clarifies that any legal surrogate designated in accordance with state law may exercise a resident's rights to the extent provided by state law even if the resident has not been found to lack capacity by a state court.

The proposed amendment to §19.403 makes editorial changes to use the same term to refer to a resident representative to add clarity and consistency to the rule. Also, the proposed amendment to §19.403(l)(2)(A) removes an unnecessary citation to §19.701(4)(B), related to Quality of Life, and §19.403(m)(1) removes an unnecessary citation to §19.402, relating to Exercise of Rights. Finally, the proposed amendments to §19.403(f)(2) and (i) make this rule consistent with requirements in 42 Code of Federal Regulations, Section 483.10.

The proposed amendment to §19.404 updates the language related to the management of financial affairs and replaces the term "responsible party" with "resident representative" to provide clarity and consistency in the rule.

The proposed amendment to §19.405 makes minor editorial and organizational changes for clarity and consistency, such as replacing "DADS" and "the Department of Aging and Disability Services" with HHSC, and replacing terms, such as "legally authorized representative" or "responsible party" with "resident representative" and "attorney general's" with "Office of the Attorney General." Specifically, the proposed amendment to subsection (f) clarifies how the facility must convey funds and a final accounting of funds to a resident who is discharged or evicted, or to the individual or probate jurisdiction administering the resident's estate of a resident who has died. The proposed amendment to subsection (j) adds clarifying language related to the requirements for requesting items or services that may be charged to a resident's personal funds. Edits are also made to update references.

The proposed amendment to §19.406 makes editorial changes such as replacing "adjudged incompetent" with "found to lack capacity" and deletes an unnecessary reference to §19.1502(b)(3), relating to Choice of Pharmacy Provider.

The proposed amendment to §19.407 replaces obsolete citations to §19.1910(e), relating to Clinical Records, and §19.403, relating to Notice of Rights and Services. Also, the proposed amendment makes editorial and organizational changes related to a resident's right to refuse release of personal and clinical records; governmental searches of resident records; and the protection of information that contains personal identification information.

The proposed amendment to §19.408 replaces "family member" and "guardian of the resident" with "resident representative" and editorial changes are made for clarity and consistency.

The proposed amendment to §19.409 makes editorial and organizational changes for clarity and consistency. Specifically, §19.409(b) is added to clarify the requirement to make survey results available for examination in a place readily accessible to residents. This requirement was previously in §19.409(a)(1).

The proposed amendment to §19.410 makes minor editorial and organizational changes for clarity and consistency, such as replacing "DHS" with "HHSC," and "responsible party" with "resident representative." Also, the proposed amendment to §19.410(b)(2) removes an unnecessary citation to §19.2316(f), relating to Collection of Applied Income.

The proposed amendment to §19.411 makes editorial changes by replacing "he" with "the resident" and "plan of care" with "care plan" to remove gender specific language and to ensure use of consistent terminology.

The proposed amendment to §19.413 adds a resident representative to the list of individuals that a resident has the right to have immediate access to. Also, the proposed amendment makes minor editorial changes such as replacing "responsible party" and "legally authorized representative" with "resident representative." In addition, the proposed amendment to §19.413(e) updates a citation to subsections (c)(1)(C) and (d)(1)(A), (B) or (C) of this section.

The proposed amendment to §19.414 deletes an outdated provision prohibiting a facility from requiring a resident's private telephone to be connected to a central switchboard.

The proposed amendment to §19.416 updates a citation to the Estates Code and deletes a cross reference to §19.1921.

The proposed amendment to §19.417 replaces "his" with "the resident" to remove gender specific language.

The proposed repeal of §19.418 deletes a rule relating to a resident self-administering drugs. This requirement is now addressed in proposed §19.401(b) of this title which incorporates by reference 42 CFR, Section 483.10.

The proposed amendment to §19.421 replaces "individual" with "resident" for clarity and consistent use of terms.

The proposed amendment of §19.501 adds new subsections (a), (b)(3), (e), and (f). New subsection (a) requires the facility to establish and implement an admissions policy. New subsection (b)(3) adds that the facility must not require a resident or potential resident to waive potential facility liability for losses of personal property. New subsection (e) adds that the facility must provide a resident or potential resident notice of special characteristics or service limitations of the facility. New subsection (f) requires the facility that is a composite distinct part to disclose its physical configuration and specify the policies that apply to room changes between its different locations. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.502(b)(5) more fully explains the circumstance of nonpayment that could lead to the discharge of a resident from a nursing facility. The proposed amendment to §19.502(c) adds requirements related to the information and documentation that must be communicated between the discharging and receiving health care institutions or providers when a resident is transferred or discharged. The proposed amendment to §19.502(d) deals with facility initiated discharges or transfers and outlines the facility responsibilities for notifying the resident, resident representative, and the State Ombudsman of a discharge or transfer before it occurs. The proposed amendment to §19.502(f)(4)(A) increases the time a resident has to appeal a discharge or transfer from 10 days to 90 days, which makes the rule consistent with the HHSC hearing rules. The proposed amendment to §19.504(f)(4)(B) and (C) adds requirements related to filing an appeal when a resident has been notified of transfer or discharge from a facility. Proposed new §19.502(g) requires the facility to update a notice of transfer or discharge as soon as practicable if any information in the notice changes before the transfer or discharge. The proposed amendment to §19.502(h) requires the facility to document that a resident is sufficiently prepared and oriented to ensure a safe transfer or discharge from the facility. It also requires that the facility provide the orientation in a form and manner that the resident can understand. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.503 changes the rule title to "Notice of Bed Hold Policy and Return to Medicaid-certified Facilities," makes changes to subsections (a) and (c), and adds a new subsection (d). The change to subsection (a) adds that the notice given to a resident before the resident transfers to the hospital or goes on therapeutic leave must include the reserved bed payment policy in the state plan. The change to subsection (c) requires a facility to allow a resident whose hospitalization or therapeutic leave exceeds the bed-hold period to return to the resident's previous room if it is available. The change to subsection (c) also requires the facility to provide the notice required under §19.502 to a resident expected to return to the facility when the facility determines the resident cannot return to the facility. The new subsection (d) requires the facility that is a composite distinct part to permit a resident returning to the facility to return to an available bed in the particular location of the composite distinct part in which the resident previously resided. If a bed is not available in that location, the facility must give the resident the option to return to that location when a bed becomes available. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.504(a) adds the requirement that a facility must provide equal access to quality care regardless of diagnosis, severity of condition, or payment source. Additional edits were made to update references and the subsections were reordered to account for the addition of a subsection.

The proposed amendment to Subchapter G changes the title of the subchapter to "Freedom from Abuse, Neglect, and Exploitation."

The proposed amendment to §19.601 changes the rule title to "Freedom from Abuse, Neglect and Exploitation" to better identify the subject of the section. The proposed amendment to §19.601(a) - (c) updates the requirements related to residents' rights to be free from abuse, neglect, and exploitation; the facility's employment practices; the facility's responsibilities for reporting and investigating allegations of abuse, neglect and ex-

ploitation; and the facility's responsibility for prohibiting and preventing mistreatment, abuse, neglect, exploitation, and misappropriation of residents' property. The proposed amendment to §19.601(d) adds facility requirements related to the use of restraints. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.602 changes the rule title to "Incidents of Abuse, Neglect, and Exploitation Reportable to the Texas Health and Human Services Commission and Law Enforcement Agencies by Facilities." It adds a new subsection (a) and makes changes to subsection (d). New subsection (a) adds the requirements related to the facility's investigatory and reporting duties in response to allegations of abuse, neglect, exploitation, or mistreatment. The changes to subsection (d) add that the facility must submit a written investigative report to HHSC no later than the fifth working day after the initial report. The subsections are reordered to account for the addition of a subsection. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.606 updates and corrects a statutory reference by replacing Texas Health and Safety Code §242.134 with the Texas Health and Safety Code §260A.016. The proposed changes make minor editorial and organizational changes for clarity and consistency, such as updating Texas Department of Human Services (DHS) to HHSC.

The repeal of §19.701 is proposed because the content of the existing section has been moved to other sections. The requirements in §19.701(1)-(4) are covered by §19.401(b) which states that HHSC is adopting by reference the CMS rule regarding resident rights found in 42 Code of Federal Regulations, Section 483.10. Also, §19.701(5) is added to the new proposed §19.701(d).

Proposed new §19.701 requires the facility to provide the care and services necessary for the resident to attain or maintain the highest practicable physical, mental, and psychosocial well-being consistent with the resident's plan of care. Subsection (c) incorporates the existing requirement of §19.701(c) that care for a child in a facility must meet the child's unique medical and developmental needs. Subsection (d) incorporates the existing requirement of §19.701(5) that pediatric residents should be matched with roommates of similar age and developmental levels.

The proposed amendment to §19.702(a) requires the facility to provide a program of activities for residents designed to encourage independence and interaction in the community. The proposed amendment to §19.702(b) clarifies the certification and training requirements for an activity director hired by the facility. These changes are consistent with the recent revision of the Code of Federal Regulations. Edits were also made to update references.

The proposed amendment to §19.703(b) updates the statutory authority for licensing a social worker in Texas from Human Resources Code, Chapter 50 to Texas Occupations Code, Chapter 55 and adds "gerontology" as a human service field of study under the qualifications of an individual employed by a facility as a social worker. This change is consistent with the recent revision of the Code of Federal Regulations.

The proposed repeal of §19.705 deletes a rule relating to the environment the facility must provide a resident. The contents of this rule have been added to proposed new §19.401(b) which incorporates by reference 42 CFR, Section 483.10.

The proposed amendment to §19.706(c) adds clarifying language that explains the resident has the right to have a family member or other resident representative meet in the facility with the family or resident representative of other residents and organize a family council. The proposed amendment to §19.706(d)(2) requires that if a family council exists, a facility demonstrate responses to the grievances and recommendations of the family council. The proposed amendment to §19.706(d)(3) requires the facility to make residents and family members aware of upcoming meetings in a timely manner. The proposed amendment to §19.706(d)(4) gives the resident or family group the right to approve the staff person designated to assist the resident or family group. The proposed amendment to §19.706(e)(7) adds the requirement that the facility allow a resident to participate in a family council. The proposed amendment to §19.706(g)(3) states the facility must not limit the rights of a resident, resident's family member, or a family council member to meet with another resident representative. These changes are consistent with the recent revision of the Code of Federal Regulations. A few paragraphs were renumbered to account for the additional paragraphs.

The proposed amendment to §19.801(2) requires the facility to complete a comprehensive assessment of a resident's needs, strengths, goals, life history, and preferences. The proposed amendment to §19.801(5) adds requirements related to coordinating assessments with the Preadmission Screening and Resident Review (PASRR) process in 42 CFR, Part 483, Subpart C. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment of §19.802 changes the rule title to "Comprehensive Person-Centered Care Planning" to demonstrate the focus on comprehensive person-centered care planning. The proposed amendment to §19.802(a) requires a facility to develop and implement a baseline care plan for each resident within 48 hours after the facility admits the resident. The proposed amendment to §19.802(b) adds requirements related to the comprehensive care plan and the inclusion of PASRR services in the plan. The proposed amendment to §19.802(b) also requires the comprehensive care plan to include the resident's goals, the resident's preferences, the resident's potential for future discharge, and discharge plans, as appropriate. The facility must develop this part of the comprehensive care plan in consultation with the resident and the resident's representative. The proposed amendment to §19.802(c) adds two mandatory members to the interdisciplinary team that prepares the comprehensive care plan: a nurse aide with responsibility for the resident and the qualified dietitian or director of food and nutrition services. The proposed amendment to §19.802(d) requires the facility to include an explanation in the resident's clinical record if the facility determines that the resident and the resident representative cannot practicably participate in the development of the resident's comprehensive care plan. The proposed amendment to §19.802(h) requires the services provided or arranged by the facility be culturally-competent and trauma-informed. These changes are consistent with the recent revision of the Code of Federal Regulations. Subsections were reordered to account for the addition of subsections.

The proposed amendment to §19.803 requires the facility to develop and implement a discharge planning process and states what must be included in the discharge summary. These changes are consistent with the recent revision of the Code of Federal Regulations. Subsections and paragraphs were reordered to account for the addition of a subsection.



The proposed amendment to §19.901 requires the nursing facility ensure a resident receives treatment and care in accordance with professional standards of practice, the comprehensive person-centered care plan, and the resident's choices, and defines what must be included in the care plan. The proposed amendment deletes several subsections in §19.901 because the content of the rule has been added to other sections. These include: §19.901(1), which relates to the activities of daily living, and has been moved to §19.701; §19.901(6), which relates to mental and psychosocial functioning, and has been moved to §19.904; §19.901(9), which relates to nutrition, and has been moved to §19.901(6); §19.901(10), which relates to hydration, and has been moved to §19.901(6); §19.901(11), which relates to special needs, and has been moved to §19.901(2), §19.901(7), §19.901(8), and §19.901(9); §19.901(12), which relates to unnecessary drugs and §19.701(13), which relates to medication errors, and has been moved to §19.1501. These changes are consistent with the recent revision of the Code of Federal Regulations. The section is reordered to account for the addition and deletion of subsections.

Proposed new §19.904 requires the facility to provide the necessary behavioral health care and services so each resident can attain or maintain the highest practicable physical, mental, and psychosocial well-being in accordance with the comprehensive assessment and care plan. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1001(a) updates the requirement that the facility have sufficient staff, with appropriate competencies and skill sets considering the number, acuity, and diagnoses of the facility's resident population as determined by the facility assessment. The proposed amendment to §19.1001(a)(1) requires a facility to ensure that its licensed nurses have the competencies and skill sets necessary to care for the facility's residents, as identified through resident assessments and care plans. The proposed amendment to §19.1001(a)(3) adds requirements related to the proficiency of nurse aides. The proposed amendment to §19.1001(a)(4) adds requirements for facility hiring and the use of nurse aides. The proposed amendments to §19.1001(5)(D) and §19.1001(6)(B) add statutory authorities for advocacy systems for individuals with mental illness and individuals with intellectual or developmental disabilities. These changes are consistent with the recent revision of the Code of Federal Regulations. Edits are also made to reorder subsections and paragraphs to account for the addition and deletion of subsections and paragraphs.

The proposed amendment to §19.1010(c)(3) corrects a cross-reference from §19.602(e)(2) to §19.602(g)(2), relating to Incidents of Abuse, Neglect and Exploitation Reportable to the Texas Health and Human Service Commission and Law Enforcement Agencies, and changes the name of DADS to HHSC.

The proposed amendment to Subchapter L changes the title of the subchapter to "Food and Nutrition Services."

The proposed amendment to §19.1101 changes the rule title to "Food and Nutrition Services" and requires the facility to take into account the dietary preferences of each resident. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed repeal of §19.1102 is replaced with new §19.1102. The new section incorporates provisions of the existing section and adds new education, training, and certification requirements for a dietitian and a director of food and nutrition services.

The new section permits a dietitian hired or contracted before November 28, 2016, to meet the stricter requirements by November 28, 2021, if they are either registered by the Commission on Dietetic Registration or are licensed in Texas with at least one year of supervisory experience in dietetic services of a health care facility. The proposed new rule language requires facilities, when making food and nutrition staffing determinations, to take into account resident assessments, individual plans of care, and the characteristics of the resident population, as determined by the facility assessment. It also adds a paragraph (5) that requires sufficient staff to carry out the functions of the facility's food and nutrition services. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed repeal of §19.1103 deletes the rule because the content of the rule has been added to proposed amended §19.1102 as paragraph (5).

The proposed amendment to §19.1104(c) removes the requirement that a qualified dietitian must be a part of the interdisciplinary team because the content of rule has been added to proposed §19.802.

The proposed amendment to §19.1107(a) changes the rule title to "Menus, Nutritional Adequacy, and Meal Service" and requires facilities to provide residents with a menu that meets established national guidelines for nutrition; takes into account religious, ethnic, and cultural needs of facility residents, and is updated periodically. The proposed amendment to §19.1107(g)(4) also requires the facility to provide assistance to a resident who uses special eating utensils to ensure that the resident is able to use the special equipment for consuming meals and snacks. The proposed addition of §19.1107(i) adds that this section does not limit a resident's right to make personal dietary choices. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1108 changes the rule title to "Food and Drink." It also adds requirements related to the provision of adequate food and drink in the facility. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1109 corrects the cross-reference by replacing §19.1911(12)(B)(vi) of this chapter with §19.1911(b)(16)(E) related to Contents of the Clinical Record.

The proposed amendment to §19.1110 amends subsections (a) and (b) and replaces subsections (c) and (d) with a new subsection (c). As amended subsection (a) requires the facility to serve meals at regular times comparable to normal mealtimes in the community or in accordance with a resident's needs, preferences, requests, or care plan. The proposed amendment to §19.1110(b) allows the facility to have up to 16 hours between a substantial evening meal and breakfast the following day if a resident group agrees to this meal span. The new subsection (c) adds the requirement that alternative meals and snacks must be provided to a resident who wants to eat at non-traditional times or outside of scheduled meal service times, consistent with the resident's plan of care. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1111(a)(1) - (3) specifically permits the facility to procure food from local producers and to use produce grown in facility gardens, subject to compliance with applicable state and local laws and safe growing and food handling practices. It also states that this section does not preclude

a resident from consuming foods not procured by the facility. The proposed amendment to §19.1111 adds subsection (d). This new subsection requires the facility to have a written policy regarding use and storage of foods brought to a resident by family and other visitors to ensure safe and sanitary storage, handling, and consumption. The proposed amendment to §19.1111(g) clarifies the requirement that the facility and all food service personnel must meet the standards imposed by local, state, and federal codes regarding food and food handling. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1113(a) eliminates redundant language related to the required training for paid feeding assistants. The proposed amendment to §19.1113(c)(1) adds new requirements related to resident selection criteria for the use of paid feeding assistants. These changes are consistent with the recent revision of the Code of Federal Regulations.

Proposed new §19.1116 states that therapeutic diets must be prescribed by the attending physician unless the physician delegates this duty to a registered or licensed dietitian. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1201 adds that a physician, physician assistant or advanced practice registered nurse must provide orders for a resident's immediate care and needs upon admission to the facility. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1202 requires that the physician sign and date all orders with the exception of influenza and pneumococcal vaccines, which may be administered per a physician's standing order. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1203(3), §19.1205(a), and §19.1205(c) change references to a nurse practitioner or clinical nurse specialist to references to an advanced practice registered nurse. This is the terminology currently used by the Texas Board of Nursing for this classification of nurses. A few references were updated in §19.1203.

The proposed amendment to §19.1205(d) permits a physician to delegate the task of writing dietary orders to a qualified dietitian. The proposed amendment to §19.1205(e) permits a physician to delegate the task of writing therapy orders to a qualified therapist. The proposed amendment to §19.1205(f) changes a reference to a physician extender to a reference to a physician assistant or advanced practice registered nurse. This is the terminology currently used by the Texas Medical Board and the Texas Board of Nursing. These changes are consistent with the recent revision of the Code of Federal Regulations. Additionally, a few paragraphs were renumbered to account for the deletion of a paragraph.

The proposed amendment to §19.1401(b)(3) requires the facility to make a referral for dental services within three days for a resident with lost or damaged dentures. If the referral does not occur within three days, the proposed amendment requires the facility to provide documentation of what it did to ensure the resident could still eat and drink adequately while awaiting dental services and the extenuating circumstances that led to the delay. The proposed amendment to §19.1401(c) adds that the facility must have a policy identifying those circumstances when the loss or damage of dentures is the facility's responsibility and may not charge a resident for the replacement of lost or dam-

aged dentures determined, in accordance with facility policy, to be the facility's responsibility. These changes are consistent with the recent revision of the Code of Federal Regulations. A few subsections were reordered to account for the addition of subsections.

The proposed amendment of §19.1501 adds subparagraphs (4)(B) and (4)(D), amends subparagraph (4)(C), and adds paragraphs (5), (6), and (7). New subparagraph (4)(B) defines psychotropic drugs. The revisions to subparagraph (4)(C) describe the circumstances under which a pharmacist must report drug irregularities to the attending physician, medical director, and the director of nurses and also requires the attending physician to document any identified irregularity in the resident's clinical record. New subparagraph (4)(D) requires a facility to develop and maintain written policies and procedures for the monthly drug regimen review. New paragraph (5) adds requirements related to unnecessary drugs. New paragraph (6) adds requirements related to the use of psychotropic drugs in the facility. New paragraph (7) adds requirements related to the medication error rate. Existing paragraphs (5) and (6) are renumbered as (8) and (9). These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1601(a) - (c) requires a facility to establish an infection prevention and control program and designate an infection preventionist. The proposed amendment to §19.1601(d) requires a facility to report to the health officer having jurisdiction the name of any resident with a reportable disease and to implement infection control procedures directed by the local health authority. The proposed amendment to §19.1601(e) adds more specific requirements for pneumococcal and influenza vaccinations for residents. The proposed amendment also deletes §19.1601(g) related to the Quality and Assurance Committee in the facility. The content of §19.1601(g) has been moved to proposed §19.1917. These changes are consistent with the recent revision of the Code of Federal Regulations. Subsections were reordered to account for the addition and deletion of subsections.

The proposed amendment to §19.1901 adds and corrects citations for federal statutory provisions that pertain to nursing facilities licensed by HHSC. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1902(b) requires the governing board of the facility to appoint the facility administrator. It also requires the facility administrator to report to, as well as be accountable to, the governing body for the overall management of a facility. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed repeal of §19.1903 deletes a rule relating to the required training of nurse aides. The content of this rule has been added to new proposed §19.1001(a)(3) and (4). These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed repeal of §19.1904 deletes a rule relating to the proficiency of nurse aides. The content of this rule has been added to new proposed §19.1001(3). These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1908(b)(1) clarifies that a physician, physician assistant, or advanced practice registered nurse may order laboratory services for a resident. The proposed amendment to §19.1908(b)(2) requires the facility to

promptly notify the ordering physician, physician assistant, or advanced practice registered nurse of laboratory results that fall outside of clinical reference ranges. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1909(b)(1) clarifies that a physician, physician assistant, or advanced practice registered nurse may order radiology or other diagnostic services for a resident. The proposed amendment to §19.1909(b)(2) requires the facility to promptly notify the ordering physician, physician assistant, or advanced practice registered nurse of radiology or other diagnostic results that fall outside of clinical reference ranges. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1910(d) adds the circumstances under which release of the nursing facility's clinical records is required or permitted. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1911(a) corrects the reference regarding a resident's clinical record by replacing 1 TAC §371.214 (relating to Resource Utilization Review) with Texas Administrative Code, Title 1, Part 15, Chapter 371, Subchapter C (relating to Utilization Review). The proposed amendment to §19.1911(17) adds that laboratory, radiology, and other diagnostic services reports must be included in the clinical records of a resident in the facility. It also repeals a requirement that letters of guardianship be maintained in the clinical record. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1912 adds §19.1912(b)(1). This new paragraph requires the facility to have written policies and procedures to ensure that the administrator's duties and responsibilities involve providing the appropriate notices as required in §19.2310 (relating to Nursing Facility Ceases to Participate) in the event the facility closes or changes ownership or administrative authority. Also, the proposed amendment to §19.1912 makes minor editorial and organizational changes for clarity and consistency, such as updating DHS to HHSC and replacing terms such as "legally authorized representative," "representative payee," or "responsible party" with "resident representative." These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1915(a)(1) adds that another practitioner other than the resident's attending physician can order a transfer from the facility to a hospital in an emergency situation. The proposed amendment to §19.1915(a)(2) clarifies the requirement that when the facility transfers a resident, providers will exchange medical and other information needed for care and treatment of the resident in order to determine if the resident can receive appropriate services, receive services in a less restrictive setting than a facility, or reintegrate into the community. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1917(a) specifies which facility staff must be members of the Quality Assessment and Assurance Committee. The proposed amendment to §19.1917(b) clarifies the functions and responsibilities of the committee. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.1929 adds language regarding the development, implementation, and maintenance of effective training programs, consistent with expected roles, for all new

and existing staff, contractors, and volunteers to make this rule consistent with federal rules governing Medicaid-certified facilities. Beginning November 28, 2019, a facility must determine the amount and types of training necessary for its staff based on the facility assessment as specified in §19.1931. The proposed amendment to §19.1929(1)(C) - (E) requires the training each employee receives as part of orientation and annually to include activities that constitute abuse, neglect, and exploitation (ANE); procedures for reporting ANE; dementia management; and resident abuse prevention. The proposed amendment to §19.1929(7) requires, beginning November 28, 2019, that the facility's mandatory training for staff must include the topics of effective communications for direct care staff, rights of the resident, the facility's infection prevention and control program, and behavioral health. The changes to §19.1929 are consistent with the recent revision of the Code of Federal Regulations.

Proposed new §19.1931 requires the facility to conduct, document and annually review a facility-wide assessment to determine what resources are necessary to care for its residents competently during day-to-day operations and emergencies. The facility assessment addresses the facility's resident population and their needs, resources and risks. These changes are consistent with the recent revision of the Code of Federal Regulations.

The proposed amendment to §19.2704 adds paragraph (i)(12). This new paragraph requires the facility to promptly report a significant change in the mental or physical condition of a resident, with mental illness or an intellectual or developmental disability, by submitting a MDS Significant Change in Status Assessment Form in the LTC Online Portal. This change is consistent with the recent revision of the Code of Federal Regulations.

#### FISCAL NOTE

Trey Wood, Chief Financial Officer, has determined that for each year of the first five years that the rules will be in effect, enforcing or administering the rules does not have foreseeable implications relating to costs or revenues of state or local governments.

#### GOVERNMENT GROWTH IMPACT STATEMENT

HHSC has determined that during the first five years that the rules will be in effect:

- (1) the proposed rules will not create or eliminate a government program;
- (2) implementation of the proposed rules will not affect the number of HHSC employee positions;
- (3) implementation of the proposed rules will result in no assumed change in future legislative appropriations;
- (4) the proposed rules will not affect fees paid to HHSC;
- (5) the proposed rules will create new rules;
- (6) the proposed rules will expand existing rules;
- (7) the proposed rules will not change the number of individuals subject to the rules; and
- (8) the proposed rules will not affect the state's economy.

#### SMALL BUSINESS, MICRO-BUSINESS, AND RURAL COMMUNITY IMPACT ANALYSIS

Trey Wood has also determined that there will be an adverse economic effect on small businesses or micro-businesses, or rural communities.

The facilities certified to participate in Medicare and Medicaid will not incur additional costs to comply with the proposed changes that implement changes in the federal regulations. These facilities have already incurred the cost of complying with the federal regulations. The seven facilities that are licensed-only facilities, and do not receive Medicare and Medicaid funds, will incur costs to comply with the changes made as a result of changes in the federal regulations.

HHSC estimates that the number of small businesses or micro-businesses subject to the proposed rules is seven licensed-only nursing facilities. The projected economic impact for a small business or micro-business is \$36,463.00.

HHSC determined that alternative methods to achieve the purpose of the proposed rules for small businesses or micro-businesses would not be consistent with ensuring the health and safety of residents in nursing facilities.

#### LOCAL EMPLOYMENT IMPACT

The proposed rules will not affect a local economy.

#### COSTS TO REGULATED PERSONS

Texas Government Code, §2001.0045 does not apply to these rules because the rules are necessary to protect the health, safety, and welfare of the residents of Texas and to receive a source of federal funds or comply with federal law.

#### PUBLIC BENEFIT AND COSTS

David Kostroun, Deputy Executive Commissioner for Regulatory Services, has determined that for each year of the first five years the rules are in effect, the public benefit will be enhanced health and safety protections for nursing facility residents, streamlined regulatory requirements for nursing facility providers, and improved consistency of regulatory survey activity.

Trey Wood has determined that for the first five years the rules are in effect, persons who are required to comply with the proposed rules may incur economic costs. For Medicare and Medicaid certified nursing facilities, there will be no costs to comply with the rules, because these facilities will incur the cost of complying with the federal regulations. The rules will result in a cost for licensed-only facilities that are not certified to participate in Medicare and Medicaid because these facilities will be required to comply with the changes made as a result of changes in the federal regulations.

#### TAKINGS IMPACT ASSESSMENT

HHSC has determined that the proposal does not restrict or limit an owner's right to his or her property that would otherwise exist in the absence of government action and, therefore, does not constitute a taking under Government Code §2007.043.

#### PUBLIC COMMENT

Questions about the content of this proposal may be directed to Sharon Wallace at (210) 619-8292 in HHSC Long-term Care Regulatory Services.

Written comments on the proposal may be submitted to Rules Coordination Office, P.O. Box 13247, Mail Code 4102, Austin, Texas 78711-3247, or street address 4900 North Lamar Boulevard, Austin, Texas 78751; or emailed to HHSCRulesCoordinationOffice@hhsc.state.tx.us.

To be considered, comments must be submitted no later than 31 days after the date of this issue of the *Texas Register*. Comments must be: (1) postmarked or shipped before the last day of

the comment period; (2) hand-delivered before 5:00 p.m. on the last working day of the comment period; or (3) e-mailed before midnight on the last day of the comment period. If last day to submit comments falls on a holiday, comments must be postmarked, shipped, or emailed before midnight on the following business day to be accepted. When e-mailing comments, please indicate "Comments on Proposed Rule 40R010" in the subject line.

## SUBCHAPTER A. BASIS AND SCOPE

### 40 TAC §19.1

#### STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The amendments affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

#### §19.1. *Basis and Scope.*

(a) *Basis in legislation.* The Nursing Facility Requirements for Licensure and Medicaid Certification implement the [specify] requirements of federal and state laws and regulations governing licensed nursing facilities and nursing facilities participating in the Medicaid program [the Title XIX Nursing Facilities vendor program] administered by HHSC [the Texas Department of Human Services (DHS)] in cooperation with other federal and state agencies. If there is a conflict between material in these requirements and the laws or regulations governing the Medicaid program, the Medicaid laws and regulations [latter] are controlling. It is the intent of the Texas Legislature that rules adopted under Chapter 242 [§242] of the Texas Health and Safety Code may be more stringent than [that] the standards imposed by federal law for certification for participation in the state Medicaid program. The rules and standards may not be less stringent than the Medicaid certification standards imposed under the Omnibus Budget Reconciliation Act of 1987.

(b) *Scope.* The Nursing Facility Requirements for Licensure and Medicaid Certification contain the requirements that an institution must meet in order to be licensed as a nursing facility and also to qualify to participate in the Medicaid program. The requirements serve as a basis for survey activities for licensure and certification.

(1) Certain requirements are specific to Medicaid-certified facilities and are so designated. The Medicaid-specific requirements apply to all residents, including[-; but not limited to] private pay, Medicaid applicants and recipients, U.S. Department of Veteran's Affairs [VA] patients, and Medicare recipients, who are admitted to and reside in a Medicaid-certified facility or a Medicaid-certified distinct part of a facility.

(2) Additional requirements [Requirements] for facilities or distinct parts of facilities that are certified for Medicare-only participation are in [Chapter] 42[.] CFR §§483.5-483.95 [Code of Federal Regulations, §§483.5-483.75].

(3) These requirements do not apply to skilled nursing facilities [(SNFs)] licensed under the Texas Health and Safety Code, Chapter 241, participating only in the Medicare program.

{(4) Additional documents that a facility may need for reference include; but are not limited to:-}

- ~~[(A) Medication Aide Rules (DHS);]~~
- ~~[(B) Nurse Aide Training Rules (DHS);]~~
- ~~[(C) Nurse Aide Training Manual (DHS);]~~
- ~~[(D) Occupational Safety and Health Administration (OSHA) rules and guidelines;]~~
- ~~[(E) rules and regulations for the Control of Communicable Diseases (TDH);]~~
- ~~[(F) Medical Waste Regulation in Texas (Publication RG-1, Texas Natural Resource Conservation Commission);]~~
- ~~[(G) Nurse Practice Act and Licensed Vocational Nurse Act;]~~
- ~~[(H) Food Establishment Rules (TDH);]~~
- ~~[(I) Centers for Disease Control;]~~
  - ~~[(i) Handwashing Guidelines;]~~
  - ~~[(ii) Prevention of Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Health-Care and Public Safety Workers;]~~
  - ~~[(iii) Guidelines for Isolation Precautions in Hospitals and Infection Control in Hospital Personnel;]~~
  - ~~[(iv) Recommendations for Preventing Transmission of Human Immunodeficiency Virus and Hepatitis B Virus to Patients During Exposure-Prone Invasive Procedures; and]~~
  - ~~[(v) Prevention and Control of Tuberculosis in Facilities Providing Long Term Care to the Elderly;]~~
- ~~[(J) §§96.1-96.9 of this title (relating to Certification of Long Term Care Facilities);]~~
- ~~[(K) Methicillin-Resistant Staphylococcus Aureus: A Protocol for Infection Control (TDH); and]~~
- ~~[(L) HIV/AIDS Model Workplace Guidelines (TDH).]~~

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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 Karen Ray  
 Chief Counsel  
 Department of Aging and Disability Services  
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 For further information, please call: (210) 619-8292



## SUBCHAPTER B. DEFINITIONS

### 40 TAC §19.101

#### STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The amendments affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

#### §19.101. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise.

(1) ~~Abuse--~~Negligent or willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical or emotional harm or pain to a resident; or sexual abuse, including involuntary or nonconsensual sexual conduct that would constitute an offense under Texas Penal Code §21.08 (indecent exposure) or Texas Penal Code Chapter 22 (assaultive offenses), sexual harassment, sexual coercion, or sexual assault.

(2) ~~Act--~~Chapter 242 of the Texas Health and Safety Code.

(3) ~~Activities assessment--~~See Comprehensive Assessment and Comprehensive Care Plan.

(4) ~~Activity director--~~The qualified individual appointed by the facility to direct the activities program as described in §19.702 of this chapter (relating to Activities).

(5) ~~Addition--~~The addition of floor space to an institution.

(6) ~~Administrator--~~A person currently licensed in accordance with 26 TAC Chapter 555 (relating to Nursing Facility Administrators) [~~Licensed nursing facility administrator~~].

(7) ~~Admission MDS assessment--~~An MDS assessment that determines a recipient's initial determination of eligibility for medical necessity for admission into the Texas Medicaid Nursing Facility Program.

(8) ~~Advanced practice registered nurse--~~A person licensed [by the Texas Board of Nursing] as a registered nurse and approved to practice as an advanced practice registered nurse by the Texas Board of Nursing.

(9) ~~Adverse event--~~An untoward, undesirable, and usually unanticipated event that causes death or serious injury, or the risk of death or serious injury.

~~[(9) Affiliate--~~With respect to a:]

~~[(A) partnership, each partner thereof;]~~

~~[(B) corporation, each officer, director, principal stockholder, and subsidiary; and each person with a disclosable interest;]~~

~~[(C) natural person, which includes each:]~~

~~[(i) person's spouse;]~~

~~[(ii) partnership and each partner thereof of which said person or any affiliate of said person is a partner; and]~~

~~[(iii) corporation in which said person is an officer, director, principal stockholder, or person with a disclosable interest.]~~

~~[(10) Agent--~~An adult to whom authority to make health care decisions is delegated under a durable power of attorney for health care.]

~~[(10) [(11)] Alzheimer's disease and related disorders--~~Alzheimer's disease and any other irreversible dementia described by the Centers for Disease Control and Prevention or the most current edition of the Diagnostic and Statistical Manual of Mental Disorders.

~~[(11) [(12)] Applicant--~~A person or governmental unit, as those terms are defined in the Texas Health and Safety Code, Chapter 242, applying for a license under that chapter.

~~[(13) APA--The Administrative Procedure Act, Texas Government Code, Chapter 2001.]~~

~~(12) [(14)]~~ Attending physician--A physician, currently licensed by the Texas Medical Board, who is designated by the resident or resident representative [~~responsible party~~] as having primary responsibility for the treatment and care of the resident.

~~(13) [(15)]~~ Authorized electronic monitoring--The placement of an electronic monitoring device in a resident's room and using the device to make tapes or recordings after making a request to the facility to allow electronic monitoring.

~~(14) [(16)]~~ Barrier precautions--Precautions including the use of gloves, masks, gowns, resuscitation equipment, eye protectors, aprons, face shields, and protective clothing for purposes of infection control.

~~(15) [(17)]~~ Care and treatment--Services required to maximize resident independence, personal choice, participation, health, self-care, psychosocial functioning and reasonable safety, all consistent with the preferences of the resident.

~~(16) [(18)]~~ Certification--The determination by HHSC that a nursing facility meets all the requirements of the Medicaid or Medicare programs.

~~(17) Certified facility--A facility that meets the requirements of the Medicare program, the Medicaid program, or both.~~

~~(18) [(19)]~~ Certified Ombudsman--Has the meaning given in 26 TAC §88.2 (relating to Definitions).

~~(19) CFR--Code of Federal Regulations.~~

~~(20) Change of ownership--~~ An event that results in a change to the federal taxpayer identification number of the license holder of a facility. The substitution of a personal representative for a deceased license holder is not a change of ownership.

~~(21) Chemical restraints--Any drug administered for the purpose of discipline or convenience, and not required to treat the resident's medical symptoms.~~

~~[(21) CFR--Code of Federal Regulations.]~~

~~(22) CMS--Centers for Medicare & Medicaid Services.~~

~~(23) Complaint--Any allegation received by HHSC other than an incident reported by the facility. Such allegations include, but are not limited to, abuse, neglect, exploitation, or violation of state or federal standards.~~

~~(24) Completion date--The date an RN assessment coordinator signs an MDS assessment as complete.~~

~~(25) Comprehensive assessment--An interdisciplinary description of a resident's needs and capabilities including daily life functions and significant impairments of functional capacity, as described in §19.801(2) of this chapter (relating to Resident Assessment).~~

~~(26) Comprehensive care plan--A plan of care prepared by an interdisciplinary team that includes measurable short-term and long-term objectives and timetables to meet the resident's needs developed for each resident after admission. The plan addresses at least the following needs: medical, nursing, rehabilitative, psychosocial, dietary, activity, and resident's rights. The plan includes strategies developed by the team, as described in §19.802(c)(2) [§19.802(b)(2)] of this chapter (relating to Comprehensive Person-Centered Care Planning [Plans]), consistent with the physician's prescribed plan of care, to assist the resident in eliminating, managing, or alleviating~~

health or psychosocial problems identified through assessment. Planning includes:

(A) goal setting;

(B) establishing priorities for management of care;

(C) making decisions about specific measures to be used to resolve the resident's problems; and

(D) assisting in the development of appropriate coping mechanisms.

~~[(27) Controlled substance--A drug, substance, or immediate precursor as defined in the Texas Controlled Substance Act, Texas Health and Safety Code, Chapter 481, or the Federal Controlled Substance Act of 1970, Public Law 91-513.]~~

~~(27) [(28)]~~ Controlling person--A person with the ability, acting alone or in concert with others, to directly or indirectly, influence, direct, or cause the direction of the management, expenditure of money, or policies of a nursing facility or other person. A controlling person does not include a person, such as an employee, lender, secured creditor, or landlord, who does not exercise any influence or control, whether formal or actual, over the operation of a facility. A controlling person includes:

(A) a management company, landlord, or other business entity that operates or contracts with others for the operation of a nursing facility;

(B) any person who is a controlling person of a management company or other business entity that operates a nursing facility or that contracts with another person for the operation of a nursing facility;

(C) an officer or director of a publicly traded corporation that is, or that controls, a facility, management company, or other business entity described in subparagraph (A) of this paragraph but does not include a shareholder or lender of the publicly traded corporation; and

(D) any other individual who, because of a personal, familial, or other relationship with the owner, manager, landlord, tenant, or provider of a nursing facility, is in a position of actual control or authority with respect to the nursing facility, without regard to whether the individual is formally named as an owner, manager, director, officer, provider, consultant, contractor, or employee of the facility.

~~(28) [(29)]~~ Covert electronic monitoring--The placement and use of an electronic monitoring device that is not open and obvious, and the facility and HHSC have not been informed about the device by the resident, by a person who placed the device in the room, or by a person who uses the device.

~~(29) [(30)]~~ DADS--The term referred to the Department of Aging and Disability Services; it now refers to HHSC.

~~[(31) Dangerous drugs--Any drug as defined in the Texas Health and Safety Code, Chapter 483.]~~

~~(30) [(32)]~~ Dentist--A practitioner licensed to practice dentistry by the Texas State Board of Dental Examiners.

~~[(33) Department--The Health and Human Services Commission.]~~

~~(31) [(34)]~~ DHS-- This term referred to the Texas Department of Human Services; it now refers to HHSC [unless the context concerns an administrative hearing. Administrative hearings were formerly the responsibility of DHS; they now are the responsibility of the HHSC].

(32) [(35)] Dietitian--A qualified dietitian is one who is qualified based upon either:

(A) registration by the Commission on Dietetic Registration of the Academy of Nutrition and Dietetics; or

(B) licensure, or provisional licensure, as a dietitian under Texas Occupations Code, Chapter 701 and one year of supervisory experience in dietetic service of a health care facility.

[(36) Direct care by licensed nurses--Direct care consonant with the physician's planned regimen of total resident care includes:]

[(A) assessment of the resident's health care status;]

[(B) planning for the resident's care;]

[(C) assignment of duties to achieve the resident's care;]

[(D) nursing intervention; and]

[(E) evaluation and change of approaches as necessary.]

(33) [(37)] Direct ownership interest--Ownership of equity in the capital, stock, or profits of, or a membership interest in, an applicant or license holder.

(34) [(38)] Disclosable interest--Five percent or more direct or indirect ownership interest in an applicant or license holder.

(35) [(39)] Distinct part--That portion of a facility certified to participate in the Medicaid Nursing Facility program or as a SNF in the Medicare program.

(36) [(40)] Drug (also referred to as medication)--Any of the following:

(A) any substance recognized as a drug in the official United States Pharmacopoeia, official Homeopathic Pharmacopoeia of the United States, or official National Formulary, or any supplement to any of them;

(B) any substance intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease in humans [man];

(C) any substance (other than food) intended to affect the structure or any function of the body of a human [man]; and

(D) any substance intended for use as a component of any substance specified in subparagraphs (A) - (C) of this paragraph. It does not include devices or their components, parts, or accessories.

(37) [(41)] Electronic monitoring device--Video surveillance cameras and audio devices installed in a resident's room, designed to acquire communications or other sounds that occur in the room. An electronic, mechanical, or other device used specifically for the nonconsensual interception of wire or electronic communication is excluded from this definition.

(38) [(42)] Emergency--A sudden change in a resident's condition requiring immediate medical intervention.

(39) [(43)] Executive Commissioner--The executive commissioner of the Health and Human Services Commission.

(40) [(44)] Exploitation--The illegal or improper act or process of a caregiver, family member, or other individual who has an ongoing relationship with a resident using the resources of the resident for monetary or personal benefit, profit, or gain without the informed consent of the resident.

[(45) Exposure (infections)--The direct contact of blood or other potentially infectious materials of one person with the skin or mucous membranes of another person. Other potentially infectious materials include the following human body fluids: semen, vaginal secre-

tions, cerebrospinal fluid, peritoneal fluid, amniotic fluid, saliva in dental procedures, and body fluid that is visibly contaminated with blood and all body fluids when it is difficult or impossible to differentiate between body fluids.]

(41) [(46)] Facility--Unless otherwise indicated, a facility is an institution that provides organized and structured nursing care and service and is subject to licensure under Texas Health and Safety Code, Chapter 242.

(A) For Medicaid, a facility is a nursing facility which meets the requirements of §1919(a) - (d) of the Social Security Act. A facility may not include any institution that is for the care and treatment of mental diseases except for services furnished to individuals age 65 and over and who are eligible as defined in 26 TAC Chapter 303 [Chapter 47 of this title] (relating to Preadmission Screening and Resident Review (PASRR)).

(B) For Medicare and Medicaid purposes (including eligibility, coverage, certification, and payment), the "facility" is always the entity which participates in the program, whether that entity is comprised of all of, or a distinct part of, a larger institution.

(C) "Facility" is also referred to as a nursing home or nursing facility. Depending on context, these terms are used to represent the management, administrator, or other persons or groups involved in the provision of care of the resident; or to represent the physical building, which may consist of one or more floors or one or more units, or which may be a distinct part of a licensed hospital.

(42) [(47)] Family council--A group of family members, friends, or legal guardians of residents, who organize and meet privately or openly.

(43) [(48)] Family representative--An individual appointed by the resident to represent the resident and other family members, by formal or informal arrangement.

(44) [(49)] Fiduciary agent--An individual who holds in trust another's monies.

[(50) Free choice--Unrestricted right to choose a qualified provider of services.]

(45) [(51)] Goals--Long-term: general statements of desired outcomes. Short-term: measurable time-limited, expected results that provide the means to evaluate the resident's progress toward achieving long-term goals.

(46) [(52)] Governmental unit--A state or a political subdivision of the state, including a county or municipality.

(47) [(53)] Health care provider--An individual, including a physician, or facility licensed, certified, or otherwise authorized to administer health care, in the ordinary course of business or professional practice.

(48) [(54)] Hearing--A contested case hearing held in accordance with the Administrative Procedure Act, Texas Government Code, Chapter 2001, and the formal hearing procedures in 1 TAC Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act) and Chapter 91 of this title (relating to Hearings Under the Administrative Procedure Act).

(49) [(55)] HHSC--The Texas Health and Human Services Commission.

(50) [(56)] HIV--Human Immunodeficiency Virus.

(51) [(57)] Incident--An abnormal event, including accidents or injury to staff or residents, which is documented in facility

reports. An occurrence in which a resident may have been subject to abuse, neglect, or exploitation must also be reported to HHSC.

~~(52) [(58)] Indirect ownership interest--Any ownership or membership interest in a person that has a direct ownership interest in an applicant or license holder.~~

~~(53) [(59)] Infection control--A program designed to prevent the transmission of disease and infection in order to provide a safe and sanitary environment.~~

~~(54) [(60)] Inspection--Any on-site visit to or survey of an institution by HHSC for the purpose of licensing, monitoring, complaint investigation, architectural review, or similar purpose.~~

~~[(61) Interdisciplinary care plan--See the definition of "comprehensive care plan."]~~

~~(55) [(62)] Involuntary seclusion--Separation of a resident from others or from the resident's room or confinement to the resident's room, against the resident's will or the will of a person who is legally authorized to act on behalf of the resident. Monitored separation from other residents is not involuntary seclusion if the separation is a therapeutic intervention that uses the least restrictive approach for the minimum amount of time, not exceed to 24 hours, until professional staff can develop a care plan [plan of care] to meet the resident's needs.~~

~~(56) [(63)] IV--Intravenous.~~

~~(57) [(64)] Legend drug or prescription drug--Any drug that requires a written or telephonic order of a practitioner before it may be dispensed by a pharmacist, or that may be delivered to a particular resident by a practitioner in the course of the practitioner's practice.~~

~~(58) [(65)] License holder--A person that holds a license to operate a facility.~~

~~(59) [(66)] Licensed health professional--A physician; physician assistant; advanced practice registered nurse; physical, speech, or occupational therapist; pharmacist; physical or occupational therapy assistant; registered professional nurse; licensed vocational nurse; licensed dietitian; ~~or~~ licensed social worker; or certified respiratory care practitioner.~~

~~[(67) Licensed nursing home (facility) administrator--A person currently licensed by HHSC in accordance with Chapter 18 of this title (relating to Nursing Facility Administrators).]~~

~~(60) [(68)] Licensed vocational nurse (LVN)--A nurse who is currently licensed by the Texas Board of Nursing as a licensed vocational nurse.~~

~~(61) [(69)] Life Safety Code--NFPA 101.~~

~~(62) [(70)] Life safety features--Fire safety components required by NFPA 101, including building construction, fire alarm systems, smoke detection systems, interior finishes, sizes and thicknesses of doors, exits, emergency electrical systems, and sprinkler systems.~~

~~(63) [(71)] Life support--Use of any technique, therapy, or device to assist in sustaining life. (See §19.419 of this chapter (relating to Advance Directives)).~~

~~(64) [(72)] Local authorities--Persons, including, but not limited to, local health authority, fire marshal, and building inspector, who may be authorized by state law, county order, or municipal ordinance to perform certain inspections or certifications.~~

~~(65) [(73)] Local health authority--The physician appointed by the governing body of a municipality or the commissioner's court of the county to administer state and local laws relating to public~~

health in the municipality's or county's jurisdiction as defined in Texas Health and Safety Code, §121.021.

~~(66) [(74)] Long-term care-regulatory--HHSC Regulatory Services Division, which is responsible for surveying nursing facilities to determine compliance with regulations for licensure and certification for Medicaid [Title XIX] participation.~~

~~(67) [(75)] Major injury--An injury that qualifies as a major injury under NFPA 99.~~

~~(68) Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, or delivery of resident services. Management services do not include contracts solely for maintenance, laundry, or food service.~~

~~(69) [(76)] Manager--A person, other than a licensed nursing home administrator, having a contractual relationship to provide management services to a facility.~~

~~[(77) Management services--Services provided under contract between the owner of a facility and a person to provide for the operation of a facility, including administration, staffing, maintenance, or delivery of resident services. Management services do not include contracts solely for maintenance, laundry, or food service.]~~

~~(70) [(78)] Managing local ombudsman--Has the meaning given in 26 TAC §88.2 (relating to Definitions).~~

~~(71) [(79)] MDS--Minimum data set. See RAI [Resident Assessment Instrument (RAI)].~~

~~(72) [(80)] MDS nurse reviewer--A registered nurse employed by HHSC to monitor the accuracy of the MDS assessment submitted by a Medicaid-certified nursing facility.~~

~~(73) [(81)] Medicaid applicant--A person who requests the determination of eligibility to become a Medicaid recipient.~~

~~(74) [(82)] Medicaid nursing facility vendor payment system--Electronic billing and payment system for reimbursement to nursing facilities for services provided to eligible Medicaid recipients.~~

~~(75) [(83)] Medicaid recipient--A person who meets the eligibility requirements of the Title XIX Medicaid program, is eligible for nursing facility services, and resides in a Medicaid-participating facility.~~

~~(76) [(84)] Medical director--A physician licensed by the Texas Medical Board, who is engaged by the nursing home to assist in and advise regarding the provision of nursing and health care.~~

~~(77) [(85)] Medical power of attorney--The legal document that designates an agent to make treatment decisions if the individual designator becomes incapable.~~

~~[(86) Medical-social care plan--See Interdisciplinary Care Plan.]~~

~~[(87) Medically related condition--An organic, debilitating disease or health disorder that requires services provided in a nursing facility, under the supervision of licensed nurses.]~~

~~(78) [(88)] Medication aide--A person who holds a current permit issued under the Medication Aide Training Program as described in Chapter 95 of this title (relating to Medication Aides--Program Requirements) and acts under the authority of a person who holds a current license under state law which authorizes the licensee to administer medication.~~

~~(79) [(89)] Misappropriation ~~[of funds]~~--The taking, secretion, misapplication, deprivation, transfer, or attempted transfer to any~~



person not entitled to receive any property, real or personal, or anything of value belonging to or under the legal control of a resident without the effective consent of the resident or other appropriate legal authority, or the taking of any action contrary to any duty imposed by federal or state law prescribing conduct relating to the custody or disposition of property of a resident.

(80) [(90)] MN--Medical necessity. A determination, made by physicians and registered nurses who are employed by or contract with the state Medicaid claims administrator, that a recipient requires the services of a licensed nurse in an institutional setting to carry out a physician's planned regimen for total care. A recipient's need for custodial care in a 24-hour institutional setting does not constitute medical necessity.

(81) [(91)] Neglect--The failure to provide goods or services, including medical services that are necessary to avoid physical or emotional harm, pain, or mental illness.

(82) [(92)] NFPA--National Fire Protection Association.

(83) [(93)] NFPA 99--NFPA 99, Health Care Facilities Code, 2012 Edition.

(84) [(94)] NFPA 101--NFPA 101, Life Safety Code, 2012 Edition.

[(95)] NHIC--This term referred to the National Heritage Insurance Corporation. It now refers to the state Medicaid claims administrator.]

(96) Nonnursing personnel--Persons not assigned to give direct personal care to residents; including administrators, secretaries, activities directors, bookkeepers, cooks, janitors, maids, laundry workers, and yard maintenance workers.]

(85) [(97)] Nurse aide--An individual who provides nursing or nursing-related services to residents in a facility under the supervision of a licensed nurse. This term may include an individual who provides these services through an agency or under a contract with the facility. This definition does not include an individual who is a licensed health professional, a registered dietitian, or someone who volunteers such services without pay. A nurse aide is not authorized to provide nursing or nursing-related services for which a license or registration is required under state law. Nurse aides do not include those individuals who furnish services to residents only as paid feeding assistants.

[(98)] Nurse aide trainee--An individual who is attending a program teaching nurse aide skills.]

(86) [(99)] Nurse practitioner--An advanced practice registered nurse licensed by the Texas Board of Nursing in the role of Nurse Practitioner.

(87) [(100)] Nurses' station--A nurses' station is an area designated as the focal point on all shifts for the administration and supervision of resident-care activities for a designated number of resident bedrooms.

[(101)] Nursing assessment--See definition of "comprehensive assessment" and "comprehensive care plan."]

(88) [(102)] Nursing care--Services provided by nursing personnel which include, but are not limited to, observation; promotion and maintenance of health; prevention of illness and disability; management of health care during acute and chronic phases of illness; guidance and counseling of individuals and families; and referral to physicians, other health care providers, and community resources when appropriate.

(89) [(103)] Nursing facility or nursing home [facility/home]--See definition of "facility." [An institution that provides organized and structured nursing care and service, and is subject to licensure under Texas Health and Safety Code, Chapter 242. The nursing facility may also be certified to participate in the Medicaid Title XIX program. Depending on context, these terms are used to represent the management, administrator, or other persons or groups involved in the provision of care to the residents; or to represent the physical building, which may consist of one or more floors or one or more units, or which may be a distinct part of a licensed hospital.]

[(104)] Nursing facility/home administrator--See the definition of "licensed nursing home (facility) administrator."]

(90) [(105)] Nursing personnel--Persons assigned to give direct personal and nursing services to residents, including registered nurses, licensed vocational nurses, nurse aides, and medication aides. Unlicensed personnel function under the authority of licensed personnel.

(91) [(106)] Objectives--See definition of "goals."

(92) [(107)] OBRA--Omnibus Budget Reconciliation Act of 1987, which includes provisions relating to nursing home reform[; as amended].

(93) [(108)] Ombudsman intern--Has the meaning given in 26 TAC §88.2 (relating to Definitions).

(94) [(109)] Ombudsman Program--Has the meaning given in 26 TAC §88.2 (relating to Definitions).

[(110)] Optometrist--An individual with the profession of examining the eyes for defects of refraction and prescribing lenses for correction who is licensed by the Texas Optometry Board.]

(95) [(111)] Paid feeding assistant--An individual who meets the requirements of §19.1113 of this chapter (relating to Paid Feeding Assistants) and who is paid to feed residents by a facility or who is used under an arrangement with another agency or organization.

(96) [(112)] PASARR or PASRR--Preadmission Screening and Resident Review.

(97) [(113)] Palliative Plan of Care--Appropriate medical and nursing care for residents with advanced and progressive diseases for whom the focus of care is controlling pain and symptoms while maintaining optimum quality of life.

(98) [(114)] Patient care-related electrical appliance--An electrical appliance that is intended to be used for diagnostic, therapeutic, or monitoring purposes in a patient care area, as defined in Standard 99 of the National Fire Protection Association.

(99) [(115)] Person--An individual, firm, partnership, corporation, association, joint stock company, limited partnership, limited liability company, or any other legal entity, including a legal successor of those entities.

(100) Person-centered care--To focus on the resident as the locus of control, and to support the resident in making choices and having control over the resident's daily life.

(101) [(116)] Pharmacist--An individual, licensed by the Texas State Board of Pharmacy to practice pharmacy, who prepares and dispenses medications prescribed by a practitioner.

(102) [(117)] Physical restraint--Any manual method, or physical or mechanical device, material or equipment attached, or adjacent to the resident's body, that the individual cannot remove easily which restricts freedom of movement or normal access to one's body. The term includes a restraint hold. [See Restraints (physical).]

(103) [(418)] Physician--A doctor of medicine or osteopathy currently licensed by the Texas Medical Board to practice medicine.

(104) [(419)] Physician assistant (PA)--An individual who is licensed as a physician assistant under Texas Occupations Code, Chapter 204.

(105) [(420)] Podiatrist--A practitioner whose profession encompasses the care and treatment of feet who is licensed to practice podiatry by the Texas State Board of Podiatric Medical Examiners.

(106) [(421)] Poison--Any substance that federal or state regulations require the manufacturer to label as a poison and is to be used externally by the consumer from the original manufacturer's container. Drugs to be taken internally that contain the manufacturer's poison label, but are dispensed by a pharmacist only by or on the prescription order of a practitioner, are not considered a poison, unless regulations specifically require poison labeling by the pharmacist.

(107) [(422)] Practitioner--A physician, podiatrist, dentist, or an advanced practice registered nurse or physician assistant to whom a physician has delegated authority to sign a prescription order, when relating to pharmacy services.

(108) [(423)] Private and unimpeded access--Access to enter a facility, or communicate with a resident outside of the hearing or view of others, without interference or obstruction from facility employees, volunteers, or contractors.

(109) [(424)] PRN (pro re nata)--As needed.

(110) [(425)] Provider--The individual or legal business entity that is contractually responsible for providing Medicaid services under an agreement with HHSC.

~~[(126) Psychoactive drugs--Drugs prescribed to control mood, mental status, or behavior.]~~

(111) [(427)] Qualified mental health professional - community services--Has the meaning given in 25 TAC §412.303 (relating to Definitions).

(112) [(428)] Qualified surveyor--An employee of HHSC who has completed state and federal training on the survey process and passed a federal standardized exam.

(113) [(429)] Quality assessment and assurance committee--A group of health care professionals in a facility who develop and implement appropriate action to identify and rectify substandard care and deficient facility practice.

(114) [(430)] Quality-of-care monitor--A registered nurse, pharmacist, or dietitian employed by HHSC who is trained and experienced in long-term care facility regulation, standards of practice in long-term care, and evaluation of resident care, and functions independently of HHSC Regulatory Services Division.

(115) [(431)] Quality measure report--A report that provides information derived from an MDS that provides a numeric value to quality indicators. This data is available to the public as part of the Nursing Home Quality Initiative (NHQI), and is intended to provide objective measures for consumers to make informed decisions about the quality of care in a nursing facility.

(116) RAI--Resident Assessment Instrument. An assessment tool used to conduct comprehensive, accurate, standardized, and reproducible assessments of each resident's functional capacity as specified by the Secretary of the U. S. Department of Health and Human Services. At a minimum, this instrument must consist of the MDS core elements as specified by CMS; utilization guidelines; and Care Area Assessment process.

(117) [(432)] Recipient--Any individual residing in a Medicaid certified facility or a Medicaid certified distinct part of a facility whose daily vendor rate is paid by Medicaid.

(118) [(433)] Rehabilitative services--Rehabilitative therapies and devices provided to help a person regain, maintain, or prevent deterioration of a skill or function that has been acquired but then lost or impaired due to illness, injury, or disabling condition. The term includes physical and occupational therapy, speech-language pathology, and psychiatric rehabilitation services.

~~[(134) Reimbursement methodology--The method by which HHSC determines nursing facility per diem rates.]~~

(119) [(435)] Representative payee--A person designated by the Social Security Administration to receive and disburse benefits, act in the best interest of the beneficiary, and ensure that benefits will be used according to the beneficiary's needs.

(120) [(436)] Resident--Any individual residing in a nursing facility.

(121) [(437)] Resident group--A group or council of residents who meet regularly to:

(A) discuss and offer suggestions about the facility policies and procedures affecting residents' care, treatment, and quality of life;

(B) plan resident activities;

(C) participate in educational activities; or

(D) for any other purpose.

(122) Resident representative--

(A) Any of the following:

(i) an individual chosen by the resident to act on behalf of the resident in order to support the resident in decision-making; access medical, social, or other personal information of the resident; manage financial matters; or receive notifications;

(ii) a person authorized by state or federal law (including agents under power of attorney, representative payees, and other fiduciaries) to act on behalf of the resident in order to support the resident in decision-making; access medical, social, or other personal information of the resident; manage financial matters; or receive notifications;

(iii) legal representative, as used in Section 712 of the Older Americans Act; or

(iv) the court-appointed guardian of a resident.

(B) This definition is not intended to expand the scope of authority of any resident representative beyond that authority specifically authorized by the resident, state or federal law, or a court of competent jurisdiction.

(123) [(438)] Responsible party--An individual authorized by the resident to act for him as an official delegate or agent. Responsible party is usually a family member or relative, but may be a legal guardian or other individual. Authorization may be in writing or may be given orally.

(124) Restraint--A chemical or physical restraint.

(125) [(439)] Restraint hold--

(A) A manual method, except for physical guidance or prompting of brief duration, used to restrict:

(i) free movement or normal functioning of all or a portion of a resident's body; or

(ii) normal access by a resident to a portion of the resident's body.

(B) Physical guidance or prompting of brief duration becomes a restraint if the resident resists the guidance or prompting.

~~[(140) Restraints (chemical)--Psychoactive drugs administered for the purposes of discipline, or convenience, and not required to treat the resident's medical symptoms.]~~

~~[(141) Restraints (physical)--Any manual method, or physical or mechanical device, material or equipment attached, or adjacent to the resident's body, that the individual cannot remove easily which restricts freedom of movement or normal access to one's body. The term includes a restraint hold.]~~

(126) [(142)] RN--Registered nurse. An individual currently licensed by the Texas Board of Nursing as a registered nurse.

(127) [(143)] RN assessment coordinator--A registered nurse who signs and certifies a comprehensive assessment of a resident's needs, using the RAI, including the MDS, as specified by HHSC.

(128) [(144)] RUG--Resource Utilization Group. A categorization method, consisting of 34 categories based on the MDS, that is used to determine a recipient's service and care requirements and to determine the daily rate HHSC pays a nursing facility for services provided to the recipient.

(129) [(145)] Secretary--Secretary of the U.S. Department of Health and Human Services.

(130) [(146)] Services required on a regular basis--Services which are provided at fixed or recurring intervals and are needed so frequently that it would be impractical to provide the services in a home or family setting. Services required on a regular basis include continuous or periodic nursing observation, assessment, and intervention in all areas of resident care.

(131) [(147)] SNF--A skilled nursing facility or distinct part of a facility that participates in the Medicare program. SNF requirements apply when a certified facility is billing Medicare for a resident's per diem rate.

(132) [(148)] Social Security Administration--Federal agency for administration of social security benefits. Local social security administration offices take applications for Medicare, assist beneficiaries file claims, and provide information about the Medicare program.

(133) [(149)] Social worker--A qualified social worker is an individual who is licensed, or provisionally licensed, by the Texas State Board of Social Work Examiners as prescribed by the Texas Occupations Code, Chapter 505, and who has at least:

(A) a bachelor's degree in social work; or

(B) similar professional qualifications, which include a minimum educational requirement of a bachelor's degree and one year experience met by supervised employment providing social services in a health care setting.

(134) [(150)] Standards--The minimum conditions, requirements, and criteria established in this chapter with which an institution must comply to be licensed under this chapter.

(135) [(151)] State Medicaid claims administrator--The entity under contract with HHSC to process Medicaid claims in Texas.

(136) [(152)] State Ombudsman--Has the meaning given in 26 TAC §88.2 (relating to Definitions).

(137) [(153)] State plan--A formal plan for the medical assistance program, submitted to CMS, in which the State of Texas agrees to administer the program in accordance with the provisions of the State Plan, the requirements of Titles XVIII and XIX, and all applicable federal regulations and other official issuances of the U.S. Department of Health and Human Services.

~~[(154) State survey agency-- HHSC is the agency, which through contractual agreement with CMS is responsible for Title XIX (Medicaid) survey and certification of nursing facilities.]~~

(138) [(155)] Stay agreement--An agreement between a license holder and the executive commissioner that sets forth all requirements necessary to lift a stay and rescind a license revocation proposed under §19.2107 of this chapter (relating to Revocation of a License by the HHSC Executive Commissioner).

(139) [(156)] Substandard quality of care violation--A violation [One or more violations] of §19.401(a), §19.401(b), §19.402(b), (c), or (m); §19.406(d)-(h); §19.417(a), (b), or (d); §19.425(b)(1); §19.504(a); §19.601; §19.602; §19.701; §19.703; §19.706(a), (c), (d)(1)-(d)(5), or (e)(7); §19.801; 19.901; §19.904(2) or (4); §19.1501(5), (6), or (7); or §19.1601(e)(2) of this chapter that constitutes: [§19.601 of this chapter (relating to Resident Behavior and Facility Practices); §19.701 of this chapter (relating to Quality of Life); or §19.901 of this chapter (relating to Quality of Care) that constitute:]

(A) an immediate threat to resident health or safety;

(B) a pattern of or actual harm that is not an immediate threat; or

(C) a widespread potential for more than minimal harm, but less than an immediate threat, with no actual harm.

~~[(157) Supervising physician--A physician who assumes responsibility and legal liability for services rendered by a physician assistant (PA) and has been approved by the Texas Medical Board to supervise services rendered by specific PAs. A supervising physician may also be a physician who provides general supervision of an advanced practice registered nurse providing services in a nursing facility.]~~

(140) [(158)] Supervision--General supervision, unless otherwise identified.

(141) [(159)] Supervision (direct)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within the qualified person's [his] sphere of competence. If the person being supervised does not meet assistant-level qualifications specified in this chapter and in federal regulations, the supervisor must be on the premises and directly supervising.

(142) [(160)] Supervision (general)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within the qualified person's [his] sphere of competence. The person being supervised must have access to the qualified person providing the supervision.

~~[(161) Supervision (intermittent)--Authoritative procedural guidance by a qualified person for the accomplishment of a function or activity within his sphere of competence, with initial direction and periodic inspection of the actual act of accomplishing the function or activity. The person being supervised must have access to the qualified person providing the supervision.]~~

(143) Survey agency--HHSC is the agency that, through contractual agreement with CMS, is responsible for Title XIX (Medicaid) survey and certification of nursing facilities.

(144) [(162) Texas Register--A publication of the Texas Register Publications Section of the Office of the Secretary of State that contains emergency, proposed, withdrawn, and adopted rules issued by Texas state agencies. The Texas Register was established by the Administrative Procedure and Texas Register Act of 1975.

(145) [(163)] Therapeutic diet--A diet ordered by a physician as part of treatment for a disease or clinical condition, in order to eliminate, decrease, or increase certain substances in the diet or to provide food which has been altered to make it easier for the resident to eat.

~~[(164) Therapy week--A seven-day period beginning the first day rehabilitation therapy or restorative nursing care is given. All subsequent therapy weeks for a particular individual will begin on that day of the week.]~~

(146) [(165)] Threatened violation--A situation that, unless immediate steps are taken to correct, may cause injury or harm to a resident's health and safety.

(147) [(166)] Title II--Federal Old-Age, Survivors, and Disability Insurance Benefits of the Social Security Act.

(148) [(167)] Title XVI--Supplemental Security Income (SSI) of the Social Security Act.

(149) [(168)] Title XVIII--Medicare provisions of the Social Security Act.

(150) [(169)] Title XIX--Medicaid provisions of the Social Security Act.

(151) [(170)] Total health status--Includes functional status, medical care, nursing care, nutritional status, rehabilitation and restorative potential, activities potential, cognitive status, oral health status, psychosocial status, and sensory and physical impairments.

~~[(171) UAR--HHSC's Utilization and Assessment Review Section.]~~

~~[(172) Uniform data set--See RAI (Resident Assessment Instrument).]~~

(152) [(173)] Universal precautions--The use of barrier precautions and other precautions to prevent the spread of blood-borne diseases.

(153) [(174)] Unreasonable confinement--Involuntary seclusion.

(154) [(175)] Vaccine preventable diseases--The diseases included in the most current recommendations of the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention.

(155) [(176)] Vendor payment--Payment made by HHSC on a daily-rate basis for services delivered to recipients in Medicaid-certified nursing facilities. Vendor payment is based on the nursing facility's approved-to-pay claim processed by the state Medicaid claims administrator. The Nursing Facility Billing Statement, subject to adjustments and corrections, is prepared from information submitted by the nursing facility, which is currently on file in the computer system as of the billing date. Vendor payment is made at periodic intervals, but not less than once per month for services rendered during the previous billing cycle.

~~[(177) Willfully interfere--To act or not act to intentionally prevent, interfere with, or impede or to attempt to intentionally prevent, interfere with, or impede.]~~

(156) [(178)] Widespread--When the problem causing a violation is pervasive in a facility or represents systemic failure that affected or has the potential to affect a large portion or all of a facility's residents.

~~[(157) Willfully interfere--To act or not act to intentionally prevent, interfere with, or impede or to attempt to intentionally prevent, interfere with, or impede.]~~

(158) [(179)] Working day--Any 24-hour period, Monday through Friday, excluding state and federal holidays.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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For further information, please call: (210) 619-8292



## SUBCHAPTER E. RESIDENT RIGHTS

**40 TAC §§19.401 - 19.411, 19.413, 19.414, 19.416, 19.417, 19.421**

### STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The amendments affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

#### *§19.401. Introduction.*

(a) The resident has a right to a dignified existence, self-determination, and communication with and access to persons and services inside and outside the facility. A facility must protect and promote the rights of each resident.

(b) HHSC adopts by reference as a requirement for obtaining a license under Texas Health and Safety Code Chapter 242 the Centers for Medicare and Medicaid Services rule regarding resident rights, 42 CFR §483.10, adopted to be effective November 28, 2016. The adopted rule was published in the October 4, 2016, issue of the Federal Register (81 Fed. Reg. 68688, 68849).

(c) [(b)] HHSC [The Texas Department of Human Services (DHS)] has developed the following statement of the rights of a resident.

Figure: 40 TAC §19.401(c)

[Figure: 40 TAC §19.401(b)]

(d) [(e)] The facility must give a copy of the Statement of Resident Rights to each resident, next of kin or guardian, and facility staff

member. The facility must maintain a copy of the statement, signed by the resident or the resident's next of kin or guardian, in the facility records.

(c) ~~[(d)]~~ The Statement of Resident Rights must be posted in accordance with §19.1921 of this chapter ~~[title]~~ (relating to General Requirements for a Nursing Facility).

§19.402. *Exercise of Rights.*

(a) The resident has the right to exercise the resident's ~~[his]~~ rights as a resident at the facility and as a citizen or resident of the United States.

(b) The resident has the right to be free of interference, coercion, discrimination, or reprisal from the facility in exercising the resident's ~~[his]~~ rights.

(c) In the case of a resident found to lack capacity ~~[adjudged incompetent]~~ under the laws of the State of Texas by a court of competent jurisdiction, the rights of the resident are exercised by the resident representative ~~[person]~~ appointed under Texas law to act on the resident's behalf.

(d) The facility must comply with all applicable provisions of the Texas Human Resources Code, Title 6, Chapter 102. An individual may not be denied appropriate care on the basis of the individual's ~~[his]~~ race, religion, color, national origin, sex, age, disability ~~[handicap]~~, marital status, or source of payment.

(e) The facility must allow the resident the right to observe the resident's ~~[his]~~ religious beliefs. The facility must respect the religious beliefs of the resident in accordance with 42 United States Code §1396f.

(f) Competent adults may issue directives or durable powers of attorney for health care, subject to the requirements of §19.419 of this subchapter ~~[title]~~ (relating to Advance Directives ~~[and Durable Powers of Attorney for Health Care]~~).

(g) In the case of a resident who has not been found to lack capacity ~~[not adjudicated incompetent]~~ by a state court, any legal surrogate designated in accordance with state law may exercise the resident's rights to the extent provided by state law.

§19.403. *Notice of Rights and Services.*

(a) The facility must inform the resident, ~~[the resident's next of kin or guardian,]~~ both orally and in writing, in a language that the resident understands, of the resident's rights and all rules and regulations governing resident conduct and responsibilities during the stay in the facility. This notification must be made prior to or upon admission and during the resident's stay if changed.

(b) The facility must also inform the resident, upon admission and during the stay, in a language the resident understands, of the following:

- (1) facility admission policies;
- (2) a description of the protection of personal funds as described in §19.404 of this subchapter (relating to Protection of Resident Funds);
- (3) the Texas Human Resources Code, Title 6, Chapter 102; or a written list of the rights and responsibilities contained in the Texas Human Resources Code, Title 6, Chapter 102;

(4) a written description of the services available through the Ombudsman Program. This information must be made available to each facility by the ombudsman program. Facilities are responsible for reproducing this information and making it available to residents, their families, and resident ~~[legal]~~ representatives;

(5) a written statement to the resident, the resident's next of kin, or guardian describing the facility's policy for:

- (A) the drug testing of employees who have direct contact with residents; and
- (B) the criminal history checks of employees and applicants for employment; and

(6) HHSC rules and the facility's policies related to the use of restraint and involuntary seclusion. This information must also be given to the resident's legally authorized representative, if the resident has one.

(c) Upon admission of a resident, a facility must:

(1) provide written information to the resident's family representative, in a language the representative understands, of the right to form a family council; or

(2) inform the resident's family representative, in writing, if a family council exists, of the council's meeting time, date, location and contact person.

(d) Receipt of information in subsections ~~(b) - (d)~~ ~~[(a) - (e)]~~ of this section, and any amendments to it, must be acknowledged in writing by all parties receiving the information.

(e) The facility must post a copy of the documents specified in subsections ~~(a) and (b)~~ ~~[subsections (a) - (b)]~~ of this section in a conspicuous location.

(f) The resident or the resident's legal representative has the following rights:

(1) upon an oral or written request to the facility, to access all records pertaining to the resident, including clinical records, within 24 hours (excluding weekends and holidays); and

(2) ~~[after receipt of the resident's records for inspection,]~~ to purchase photocopies of all or any portion of the records~~;~~ ~~at a cost not to exceed the community standard,]~~ upon request and two workdays advance notice to the facility.

(g) The resident has the right to be fully informed in language the resident understands of the resident's total health status, including the resident's medical condition.

(h) The resident has the right to refuse treatment, to formulate an advance directive (as specified in §19.419 of this subchapter (relating to Advance Directives), and to refuse to participate in experimental research.

(1) If the resident refuses treatment, the resident must be informed of the possible consequences.

(2) If the resident chooses to participate in experimental research, the resident must be fully notified of the research and possible effects of the research. The research may be carried on only with the full written consent of the resident's physician, and the resident.

(3) Experimental research must comply with Federal Drug Administration regulations on human research as found in 45 CFR, Part 46 ~~[Code of Federal Regulations, Part 4b, Subpart A]~~.

(i) The facility must inform a resident before, or at the time of admission, and periodically during the resident's stay (if there are any changes), of services available in the facility and of charges for those services, including any charges for services not covered under Medicare or by the facility's per diem rate. ~~[Notice must be in writing, at least 30 days before the effective date of any changes in rates for services not covered by the current charge, or in Medicaid-certified facilities, by Medicaid.]~~

(j) The facility must provide a written description of a resident's legal rights, which includes:

(1) a description of the manner of protecting personal funds, described in §19.404 of this subchapter;

(2) a posting of names, addresses, and telephone numbers of all pertinent state client advocacy groups such as HHSC, the Ombudsman Program, the protection and advocacy network, and, in Medicaid-certified facilities, the Medicaid fraud control unit; and

(3) a statement that the resident may file a complaint with HHSC concerning resident abuse, neglect, and misappropriation of resident property in the facility.

(k) The facility must inform a resident of the name, specialty, and way of contacting the physician responsible for the resident's care.

(l) Notification of changes.

(1) A facility must immediately inform the resident; consult with the resident's physician; and [if known,] notify, consistent with the representative's authority, the resident representative [resident's legal representative or an interested family member] when there is:

(A) an accident involving the resident that results in injury and has the potential for requiring physician intervention;

(B) a significant change in the resident's physical, mental, or psychosocial status (that is, a deterioration in health, mental, or psychosocial status in either life-threatening conditions or clinical complications);

(C) a need to alter treatment significantly (that is, a need to discontinue an existing form of treatment due to adverse consequences, or to commence a new form of treatment); or

(D) a decision to transfer or discharge the resident from the facility.

(2) The facility also must promptly notify the resident and [if known,] the resident [resident's legal] representative, if any, [or interested family member] when there is:

(A) a change in room or roommate assignment with the reason for the change provided in writing [as described in §19.701(4)(B) of this chapter (relating to Quality of Life)]; or

(B) a change in resident rights under federal or state law or regulations as described in subsection (b) [(a)] of this section.

(3) The facility must record and periodically update the address and phone number of the resident representative [resident's family or legal representative, or a responsible party].

(m) Additional requirements for Medicaid-certified facilities. Medicaid-certified facilities must:

(1) provide the resident with the state-developed notice of rights under §1919(e)(6) of the Social Security Act [(see also §19.402 of this subchapter (relating to Exercise of Rights))];

(2) inform a resident who is entitled to Medicaid benefits, in writing, at the time of admission to the nursing facility or, when the resident becomes eligible for Medicaid of:

(A) the items and services that are included in nursing facility services provided under the State Plan and for which the resident may not be charged;

(B) those other items and services that the facility offers and for which the resident may be charged, and the amount of charges for those services;

(3) inform each resident when changes are made to the items and services specified in paragraphs (2)(A) and (2)(B) of this subsection;

(4) provide a written description of the requirements and procedures for establishing eligibility for Medicaid, including the right to request an assessment under §1924(c) of the Social Security Act, which:

(A) is used to determine the extent of a couple's nonexempt resources at the time of institutionalization; and

(B) attributes to the community spouse an equitable share of resources that cannot be considered available for payment toward the cost of the institutionalized spouse's medical care in the process of spending down to Medicaid eligibility levels; and

(5) prominently display in the facility written information, and provide to residents and potential residents oral and written information about how to apply for and use Medicare and Medicaid benefits, and how to receive refunds [funds] for previous payments covered by such benefits.

#### §19.404. Protection of Resident Funds

(a) Management of financial affairs. The resident has the right to manage the resident's [his] financial affairs and the facility may not require a resident [residents] to deposit their personal funds with the facility. A [The] resident may designate another person to manage the resident's [his] financial affairs.

(b) Management of personal funds.

(1) Licensed-only facilities. Upon written authorization of a resident, the facility may hold, safeguard, manage, and account for the personal funds of the resident deposited with the facility. The facility will act as a fiduciary agent if the facility holds, safeguards, and accounts for the resident's personal funds.

(2) Medicaid-certified facilities. Upon written authorization of a resident, the facility must hold, safeguard, manage, and account for the personal funds of the resident deposited with the facility, as described in §19.405 of this subchapter [title] (relating to Additional Requirements for Trust Funds in Medicaid-certified [Medicaid-Certified] Facilities). The facility will act as a fiduciary agent if the facility holds, safeguards, and accounts for the resident's personal funds.

(c) Statement of resident rights and responsibilities. The facility must provide each resident and resident representative [responsible party] with a written statement at the time of admission that meets the following requirements:

(1) the statement describes the resident's rights to select how personal funds will be handled. The following alternatives must be included:

(A) the resident has the right to manage the resident's [his] financial affairs;

(B) the facility may not require a resident [residents] to deposit the resident's [their] personal funds with the facility;

(C) the facility has an obligation, upon written authorization of a resident, to hold, safeguard, manage, and account for the personal funds of the resident deposited with the facility;

(D) the resident has a right to apply to the Social Security Administration to have a representative payee designated for federal or state benefits to which the resident [he] may be entitled; and

(E) except when subparagraph (D) of this paragraph applies, the resident has a right to designate in writing another person to manage the resident's personal funds;

(2) the statement notes, when applicable, that any charge for the facility handling a Medicaid recipient's personal funds is included in the facility's basic rate; and

(3) the statement advises the resident that the facility must have written permission from the resident or resident representative [; responsible party, or legal representative] to handle the resident's [his] personal funds.

*§19.405. Additional Requirements for Trust Funds in Medicaid-certified Facilities.*

(a) Deposit of funds. The facility must keep funds received from a resident for holding, safeguarding, and accounting, separate from the facility's funds.

(1) This separate account must be identified " (Name of Facility), Resident's Trust Fund Account," or by a similar title that shows a fiduciary relationship exists between a resident and the facility.

(2) A facility may commingle the trust funds of Medicaid residents and private-pay residents.

(3) If the funds are commingled, the facility must provide, upon request, the following records to HHSC [~~the Department of Aging and Disability Services~~], the Texas Office of the Attorney General [~~attorney general's~~] Medicaid Fraud Control Unit, and the U.S. Department of Health and Human Services:

(A) copies of release forms signed and dated by each private-pay resident or resident representative [~~responsible party~~] whose funds are commingled; and

(B) legible copies of the trust fund records of private-pay residents whose funds are commingled.

(4) The facility must maintain the forms and records described in paragraph (3) of this subsection in the same manner as the financial records of Medicaid residents as specified in this section.

(5) A facility must ensure that a release form described in paragraph (3)(A) of this subsection:

(A) includes permission for the facility to maintain trust fund records of private-pay residents in the same manner as those of Medicaid residents;

(B) is obtained from a private-pay resident upon admission or at the time of request for trust fund services; and

(C) includes a provision allowing inspection of the private-pay resident's trust fund records by the agencies described in paragraph (3) of this subsection.

(b) Funds in excess of \$50. The facility must deposit any residents' personal funds in excess of \$50 in an interest-bearing account (or accounts) that is separate from any of the facility's operating accounts, and that credits all interest earned on the residents' funds to that account. In pooled accounts, there must be a separate accounting for each resident's share.

(c) Funds less than \$50. The facility may maintain a resident's personal funds that do not exceed \$50 in a noninterest-bearing account, interest-bearing account, or petty cash fund.

(d) Accounting and records.

(1) The facility must:

(A) establish and maintain current, written, individual records of all financial transactions involving a resident's personal funds that the facility is holding, safeguarding, and accounting;

(B) keep these records in accordance with:

(i) the American Institute of Certified Public Accountants' Generally Accepted Accounting Principles; and

(ii) the requirements of law for a fiduciary relationship; and

(C) include at least the following in these records:

(i) resident's name;

(ii) identification of the resident's representative payee and resident representative, [resident's legally authorized representative, representative payee, or responsible party, if any,] and payor source;

(iii) valid letter of guardianship, if any;

(iv) valid power of attorney, if any;

(v) resident's admission and discharge dates;

(vi) resident's trust fund ledger containing the following:

(I) description of each transaction;

(II) the date and amount of each deposit and withdrawal;

(III) the name of the person who accepted any withdrawn funds;

(IV) the balance after each transaction; and

(V) amount of interest earned, posted at least quarterly;

(vii) receipts for purchases and payments, including cash-register tapes or sales statements from a seller;

(viii) written requests for personal funds from the trust fund account; and

(ix) written requests for specific brands, items, or services.

(2) The facility must maintain the following as general trust fund records:

(A) valid trust fund trial balance;

(B) petty cash logs;

(C) bank statements for trust fund and operating accounts;

(D) trust fund checkbook and register;

(E) trust fund account monthly reconciliations;

(F) trust fund bank account agreement form;

(G) applied income ledgers;

(H) applied income payment plans from HHSC [~~DADS~~];

(I) proof of surety bond;

(J) written agreements (e.g., bed hold, private room); and

(K) facility census, admission, discharge, and leave records.

(3) A resident must approve a withdrawal from the resident's personal funds by signing a document that shows the resident's approval and the date of the approval.

(4) Except as provided in subparagraph (B) of this paragraph, a facility must obtain a receipt for the purchase of an item or service.

(A) The receipt must contain:

- (i) the resident's name;
- (ii) the date the receipt was written or created;
- (iii) the amount of funds spent;
- (iv) the specific item or service purchased;
- (v) the name of the business from which the purchase was made; and
- (vi) the signature of the resident.

(B) A receipt is not required if:

- (i) a purchase is made with funds withdrawn in accordance with paragraph (3) of this subsection;
- (ii) a purchase is made by the resident, a resident representative, ~~legally authorized representative, a responsible party,~~ or an individual, ~~[(~~ other than facility personnel, ~~)]~~ authorized in writing by the resident; or
- (iii) the item purchased costs one dollar or less.

(5) If a facility cannot obtain the signature of a resident as required by paragraph (3) or (4)(A)(vi) of this subsection, the facility must obtain the signature of a witness. The witness may not be the person responsible for accounting for the resident's trust funds, that person's supervisor, or the person who accepts the withdrawn funds or who sells the item being purchased. The facility and HHSC [DADS] staff must be able to identify the witness's name, address, and relationship to the resident or facility.

(e) Notice of certain balances. The facility must notify each resident that receives Medicaid benefits:

(1) if the amount in the resident's account reaches \$200 less than SSI resource limit for one person, specified in §1611(a)(3)(B) of the Social Security Act; and

(2) that, if the amount in the account, in addition to the value of the resident's other nonexempt resources, reaches the SSI resource limit for one person, the resident may lose eligibility for Medicaid or SSI.

(f) Conveyance upon death.

(1) Upon the death of a resident with a personal fund deposited with the facility [~~If a resident with personal funds managed by a facility dies~~], the facility must convey, within 30 days after the date of the death [resident's death], the resident's funds and a final accounting of those funds to the individual or probate jurisdiction administering the resident's estate, or make a bona fide effort to locate the resident representative [responsible party] or heir to the estate [~~(see also §19.416 of this title (relating to Personal Property))~~].

(2) If a facility is not able to convey funds in accordance with paragraph (1) of this subsection, the facility must, within 30 days after the resident's death;

(A) hold the funds by depositing them in a separate account or maintaining them in an existing account, designating on the account records that the resident is deceased; or

(B) submit funds to HHSC [DADS] in accordance with paragraph (4) of this subsection.

(3) If the facility holds funds in accordance with paragraph (2)(A) of this subsection:

(A) the facility must provide HHSC [DADS] with a notarized affidavit that contains:

- (i) the resident's name;
- (ii) the amount of funds being held;
- (iii) a description of the facility's efforts to locate a resident representative [responsible party] or heir;
- (iv) a statement acknowledging that the funds are not the property of the facility, but the property of the deceased resident's estate; and
- (v) a statement that the facility will hold the funds until they are conveyed to a resident representative [responsible party] or heir or submitted to HHSC [DADS] in accordance with paragraph (4) of this subsection;

(B) the facility must submit the funds to HHSC [DADS] in accordance with paragraph (4) of this subsection within 180 days after the resident's death; and

(C) funds held by a facility in accordance with this paragraph may be monitored or reviewed by HHSC [DADS] or the [Health and Human Services Commission,] Office of Inspector General.

(4) A facility must submit unclaimed funds to HHSC [DADS], Accounts Receivable[, Mail Code E-411, P.O. Box 149030, Austin Texas 78714-9030].

(A) The funds must be identified as money that will escheat to the state.

(B) If the facility held the funds in accordance with paragraph (3) of this subsection, the facility must include the notarized affidavit described in paragraph (3)(A) of this subsection.

(g) Assurance of financial security. The facility must purchase a surety bond, or otherwise provide assurance satisfactory to the Secretary of Health and Human Services to ensure the security of all personal funds of residents deposited with the facility.

(1) The amount of a surety bond must equal the average monthly balance of all the facility's resident trust fund accounts for the 12-month period preceding the bond issuance or renewal date.

(2) Resident trust fund accounts are specific only to the single facility purchasing a resident trust fund surety bond.

(3) If a facility employee is responsible for the loss of funds in a resident's trust fund account, the resident, the resident's family, and the resident [resident's legal] representative are not obligated to make any payments to the facility that would have been made out of the trust fund had the loss not occurred.

(h) Items and services that may not be charged to a resident's personal funds.

(1) The facility may not impose a charge against the personal funds of a resident for any item or service for which payment is made under Medicaid or Medicare.

(2) Items or services included in Medicare or Medicaid payment that may not be billed to the resident's personal funds by the facility include:

(A) nursing services as required in §19.1001 of this chapter [title] (relating to Nursing Services);



(B) dietary services as required in §19.1101 of this chapter [title] (relating to Food and Nutrition Services [~~Dietary Services~~]);

(C) an activities program as required in §19.702 of this chapter [title] (relating to Activities);

(D) room and bed maintenance services;

(E) routine personal hygiene items and services as required to meet the needs of the resident, including[; ~~but not limited to~~]:

(i) hair hygiene supplies, including shampoo, comb, and brush;

(ii) bath soaps, disinfecting soaps, or specialized cleansing agents when indicated to treat special skin problems or to fight infection;

(iii) razor and shaving cream;

(iv) toothbrush, toothpaste, and dental floss;

(v) denture adhesive and denture cleanser;

(vi) moisturizing lotion;

(vii) tissues, cotton balls, and cotton swabs;

(viii) deodorant;

(ix) incontinent care and supplies, to include[; ~~but not limited to~~], cloth or disposable incontinent briefs;

(x) sanitary napkins and related supplies;

(xi) towels and washcloths;

(xii) hospital gowns;

(xiii) over-the-counter drugs;

(xiv) hair and nail hygiene services; and

(xv) personal laundry; and

(F) medically-related social services as required in §19.703 of this chapter [title] (relating to Social Services General Requirements).

(3) A facility must base necessity for and type of incontinent brief described in paragraph (2)(E)(ix) of this subsection on an assessment of the resident's medical and psychosocial condition and resulting determination.

(i) Items and services that may be charged to a resident's personal funds. The facility may charge a resident for requested services that are more expensive than or in excess of covered services in accordance with §19.2601 of this chapter [title] (relating to Vendor Payment (Items and Services Included)). The following list contains general categories and examples of items and services that the facility may charge to a resident's personal funds if they are requested by a resident, if the facility informs the resident that there will be a charge, and if payment is not made by Medicare or Medicaid:

(1) telephone;

(2) television or radio for personal use;

(3) personal comfort items, including smoking materials, notions and novelties, and confections;

(4) cosmetics and grooming items and services in excess of those for which payment is made under Medicare or Medicaid;

(5) personal clothing;

(6) personal reading material;

(7) gifts purchased on behalf of a resident;

(8) flowers and plants;

(9) social events and entertainment offered outside the scope of the activities program, provided under §19.702 of this chapter [title];

(10) noncovered special care services, such as privately hired nurses and aides;

(11) private room, except when therapeutically required, such as isolation for infection control;

(12) specially-prepared or alternative food requested instead of the food generally prepared by the facility, as required in §19.1101 of this chapter [title]; and

(13) incontinent briefs if the resident representative [resident's legally authorized representative or responsible party] submits a written request to the facility and the attending physician and director of nurses (DON) determine and document in the clinical record that there is no medical or psychosocial need for supplies.

(j) Request for items or services that may be charged to a resident's personal funds. [~~The facility must:~~]

(1) The facility can only charge a resident for an item or service not included under §19.2601 of this chapter if the resident or the resident representative specifically requests the item or service. [~~not charge a resident, nor his representative, for any item or service not requested by the resident;~~]

(2) The facility must not require a resident or resident representative [~~not require a resident, or his representative;~~] to request any item or service as a condition of admission or continued stay.[; ~~and~~]

(3) The facility must inform, orally and in writing, the resident or resident representative, when the resident or resident representative [~~inform the resident or his representative, when he~~] requests an item or service for which a charge will be made, that there will be a charge for the item or service and the amount of the charge.

(k) Access to financial record. The individual financial record must be available on request to the resident, resident representative, and [~~responsible party;~~] representative payee [~~or legal representative~~].

(l) Quarterly statement.

(1) The individual financial record must be available, through quarterly statements and on request, to the resident, representative payee, and resident representative. [~~legally authorized representative, representative payee, or responsible party.~~]

(2) The statement must reflect any resident's funds that the facility has deposited in an account as well as any resident's funds held by the facility in a petty cash account.

(3) The statement must include at least the following:

(A) balance at the beginning of the statement period;

(B) total deposits and withdrawals;

(C) interest earned, if any;

(D) bank name and location of any account in which the resident's personal funds have been deposited; and

(E) ending balance.

(m) Banking charges.

(1) Charges for checks, deposit slips, and services for pooled checking accounts are the responsibility of the facility and

may not be charged to the resident or resident representative. [; legally authorized representative, or responsible party.]

(2) Bank service charges and charges for checks and deposit slips may be deducted from the individual checking accounts if it is the resident's written, individual choice to have this type of account.

(3) Bank fees on individual accounts established solely for the convenience of the facility are the responsibility of the facility and may not be charged to the resident or resident representative. [; legally authorized representative, or responsible party.]

(4) The facility may not charge the resident or resident representative [; legally authorized representative, or responsible party] for the administrative handling of either type of account.

(5) If the facility places any part of the resident's funds in savings accounts, certificates of deposit, or any other plan whereby interest or other benefits are accrued, the facility must distribute the interest or benefit to participating residents on an equitable basis. If pooled accounts are used, interest must be prorated on the basis of actual earnings or end-of-quarter balances.

(n) Access to funds.

(1) Disbursements from the trust fund.

(A) A request for funds from the trust fund or trust fund petty cash box may be made, either orally or in writing, by the resident, or resident representative [the resident's legally authorized representative, representative payee, or responsible party] to cover a resident's expenses.

(B) The facility must respond to a request received during normal business hours at the time of the request.

(C) The facility must respond to a request received during hours other than normal business hours immediately at the beginning of the next normal business hours.

(2) Discontinuing trust fund participation.

(A) If a resident or resident representative [; legally authorized representative, or responsible party] requests that the facility discontinue managing the resident's personal funds the facility must return to the resident or resident representative [; legally authorized representative, or responsible party] all of the resident's personal funds held by the facility, including any interest accrued.

(B) If the request is made during normal business hours, the facility must immediately return the funds.

(C) If the request is made during hours other than normal business hours, the facility must return the funds immediately during the next normal business hours.

(3) Transfer or discharge. If a resident is transferred or discharged from a facility, the facility must, within five working days after the transfer or discharge, return to the resident or resident representative [; legally authorized representative, or responsible party] all of the resident's personal funds held by the facility, including any interest accrued.

(4) For purposes of this subsection, normal business hours are 8:00 a.m. to 5:00 p.m., Monday through Friday, excluding national holidays.

(o) Handling of monthly benefits. If the Social Security Administration has determined that a Title II and Title XVI Supplemental Security Income (SSI) benefit to which the resident is entitled should be paid through a representative payee, the provisions in 20 CFR [Code of Federal Regulations (CFR),] §§404.2001- 404.2065, for Old Age,

Survivors, and Disability Insurance benefits and 20 CFR [;] §§416.601 - 416.665, for SSI benefits apply.

(p) Change of ownership. If the ownership of a facility changes, the former owner must transfer the bank balances or trust funds to the new owner with a list of the residents and their balances. The former owner must get a receipt from the new owner for the transfer of these funds. The former owner must keep this receipt for monitoring or audit purposes.

(q) Alternate forms of documentation. Without HHSC's [DADS] prior written approval, a facility may not submit alternate forms of documentation, including affidavits, to verify a resident's personal fund expenditures or as proof of compliance with any requirements specified in these requirements for the resident's personal funds.

(r) Limitation on certain charges. A nursing facility may not impose charges for certain Medicaid-eligible individuals, for nursing facility services that exceed the per diem amount established by HHSC [DADS] for such services. "Certain Medicaid-eligible individuals" means an individual who is entitled to medical assistance for nursing facility services, but for whom such benefits are not being paid because, in determining the individual's income to be applied monthly to the payment for the costs of nursing facility services, the amount of such income exceeds the payment amounts established by HHSC [DADS].

(s) Trust fund monitoring and audits.

(1) HHSC [DADS] may periodically monitor all trust fund accounts to assure compliance with this section. HHSC [DADS] notifies a facility of monitoring plans and gives a report of the findings to the facility.

(2) HHSC [DADS] may, as a result of monitoring, refer a facility to the Office of Inspector General (OIG) for an audit.

(3) The facility must provide all records and other documents required by subsection (d) of this section to HHSC [DADS] upon request.

(4) HHSC [DADS] provides the facility with a report of the findings, which may include corrective actions that the facility must take and internal control recommendations that the facility may follow.

(5) The facility may request an informal review in accordance with subsection (t) of this section or a formal hearing in accordance with subsection (u) of this section to dispute the report of findings.

(6) If the facility does not request an informal review or a formal hearing and the report of findings requires corrective actions, the facility must complete corrective actions within 60 days after receiving the report of findings.

(7) If the facility does not complete corrective actions required by HHSC [DADS] within 60 days after receiving the report of findings, HHSC [DADS] may impose a vendor hold on payments due to the facility under the provider agreement until the facility completes corrective actions.

(8) If HHSC [DADS] imposes a vendor hold in accordance with paragraph (7) of this subsection, the facility may request a formal hearing in accordance with subsection (u)(5) of this section. If the failure to correct is upheld, HHSC [DADS] continues the vendor hold until the facility completes the corrective actions.

(t) Informal review.

(1) A facility that disputes the report of findings described in subsection (s)(4) of this section may request an informal review un-

der this section. The purpose of an informal review is to provide for the informal and efficient resolution of the matters in dispute and is conducted according to the following procedures.[:]

(A) HHSC [DADS] must receive a written request for an informal review by United States [(U.S.)] mail, hand delivery, special mail delivery, or fax no later than 15 days after the date on the written notification of the report of findings described in subsection (s)(4) of this section. If the 15th day is a Saturday, Sunday, national holiday, or state holiday, then the first day following the 15th day is the final day the written request will be accepted. A request for an informal review that is not received by the stated deadline is not granted.

(B) A facility must submit a written request for an informal review to the HHSC Trust Fund Monitoring Unit.[:]

~~[(i) by U.S. mail to DADS Trust Fund Monitoring Unit, Attn: Manager, P.O. Box 149030, Mail Code W-340, Austin, Texas 78714-9030;]~~

~~[(ii) hand delivery or special mail delivery to 701 West 51st Street, Austin, Texas 78751-2321; or]~~

~~[(iii) by fax to (512) 438-3639.]~~

(C) A facility must, with its request for an informal review:

(i) submit a concise statement of the specific findings it disputes;

(ii) specify the procedures or rules that were not followed;

(iii) identify the affected cases;

(iv) describe the reason the findings are being disputed; and

(v) include supporting information and documentation that directly demonstrates that each disputed finding is not correct.

(D) HHSC [DADS] does not grant a request for an informal review that does not meet the requirements of this subsection.

(2) Informal review process. Upon receipt of a request for an informal review, the Trust Fund Monitoring Unit Manager coordinates the review of the information submitted.

(A) Additional information may be requested by HHSC [DADS], and must be received in writing ~~[by U.S. mail, hand delivery, special mail, or fax in accordance with paragraph (1)(B)(i)-(iii) of this subsection]~~ no later than 15 days after the date the facility receives the written request for additional information. If the 15th day is a Saturday, Sunday, national holiday, or state holiday, then the first day following the 15th day is the final day the additional information will be accepted.

(B) HHSC [DADS] sends its written decision to the facility by certified mail, return receipt requested.

(i) If the original findings are upheld, HHSC [DADS] continues the schedule of deficiencies and requirement for corrective action.

(ii) If the original findings are reversed, HHSC [DADS] issues a corrected schedule of deficiencies with the written decision.

(iii) If the original findings are revised, HHSC [DADS] issues a revised schedule of deficiencies including any revised corrective action.

(iv) If the original findings are upheld or revised, the facility may request a formal hearing in accordance with subsection (u) of this section.

(v) If the original findings are upheld or revised and the facility does not request a formal hearing, the facility has 60 days from the date of receipt of the written decision to complete the corrective actions. If the facility does not complete the corrective actions by that date, HHSC [DADS] may impose a vendor hold. If HHSC [DADS] imposes a vendor hold, the facility may request a formal hearing in accordance with subsection (u)(5) of this section. If the failure to correct is upheld, HHSC [DADS] continues the vendor hold until the facility completes the corrective action.

(u) Formal hearing.

(1) The facility must submit a written request for a formal hearing under this section to the [:] HHSC Appeals Division[:] Mail Code W-613, P.O. Box 149030, Austin, Texas 78714-9030.

(2) The written request for a formal hearing must be received within 15 days after:

(A) the date on the written notification of the report of findings described in subsection (s)(4) of this section; or

(B) the facility receives the written decision sent as described in subsection (t)(2)(B) of this section.

(3) A formal hearing is conducted in accordance with Texas Administrative Code, Title 1, Chapter 357, Subchapter I (relating to Hearings Under the Administrative Procedure Act).

(4) No later than 60 days after a final determination is issued as a result of a formal hearing requested by a facility under subsection (s)(8) or (t)(2)(B)(iv) of this section, the facility must complete any corrective action required by HHSC [DADS] or be subject to a vendor hold on payments due to the facility under the provider agreement until the facility completes corrective action. If HHSC [DADS] imposes a vendor hold, the facility may request a formal hearing in accordance with paragraph (5) of this subsection. If the failure to correct is upheld, HHSC [DADS] continues the vendor hold until the facility completes the corrective action.

(5) If HHSC [DADS] imposes a vendor hold under subsections (s)(7), (t)(2)(B)(v), or (u)(4) of this section, the facility may request a formal hearing within 15 days after receiving notice of the correction failure and the vendor hold. The formal hearing is limited to the issue of whether the facility completed the corrective action.

*§19.406. Free Choice.*

(a) Resident rights. The resident has the right to:

(1) choose and retain a personal attending physician, subject to that physician's compliance with the facility's standard operating procedures for physician practices in the facility;

(2) be fully informed in advance about care and treatment and of any changes in that care or treatment that may affect the resident's well-being; and

(3) unless found to lack capacity [~~adjudged incompetent or otherwise found to be incapacitated~~] under the laws of the State of Texas, participate in planning care and treatment or changes in care and treatment. See §19.419 of this title (relating to Advance Directives) [~~and Durable Powers of Attorney~~].

(b) Licensed-only facilities. The resident must be allowed complete freedom of choice to obtain pharmacy services from any pharmacy that is qualified to perform the services. A facility must not require residents to purchase pharmaceutical supplies or services from

the facility itself or from any particular vendor. The resident has the right to be informed of prices before purchasing any pharmaceutical item or service from the facility, except in an emergency.

(c) Additional requirements regarding freedom of choice for Medicaid recipients. The recipient must be allowed complete freedom of choice to obtain any Medicaid services from any institution, agency, pharmacy, person, or organization that is qualified to perform the services, unless the provider causes the facility to be out of compliance with the requirements specified in this chapter.

(1) A facility must not require recipients to purchase supplies or services, including pharmaceutical supplies or services, from the facility itself or from any particular vendor. The recipient has the right to be informed of prices before purchasing any item or services from the facility, except in an emergency [(see §19.1502(b)(3) of this title (relating to Choice of Pharmacy Provider))].

(2) The facility must furnish Medicaid recipients with complete information about available Medicaid services, how to obtain these services, their rights to freely choose service providers as specified in this subsection and the right to request a hearing before HHSC [the Texas Department of Human Services (DHS)] if the right to freely choose providers has been abridged without due process.

§19.407. *Privacy and Confidentiality.*

The resident has the right to personal privacy and confidentiality of the resident's [his] personal and clinical records. [(See also §19.1910(e) of this title (relating to Clinical Records) and §19.403(e) of this title (relating to Notice of Rights and Services)-)]

(1) Personal privacy includes accommodations, medical treatment, written and telephone communications, personal care, visits, and meetings of family and resident groups, but this does not require the facility to provide a private room for each resident.

(2) Except as provided in paragraph (3)(B) of this section, the resident may approve or refuse the release of personal and clinical records to any individual outside of the facility.

(3) The resident's right to refuse release of personal and clinical records does not apply [when]:

(A) when the resident is transferred to another health care institution;

(B) when the record release is required by law or permitted under §19.1910(d) of this chapter (relating to Clinical Records); or

(C) during surveys.

(4) The facility must ensure the resident's right to privacy in the following areas:

(A) accommodations as described in §19.1701 of this chapter [title] (relating to Physical Environment [General Requirements]);

(B) medical treatment, including[-: The facility must provide privacy to each resident] during examinations, treatment, case discussions, and consultations[-: Staff must treat these matters confidentially];

(C) personal care;

(D) access and visitation as described in §19.413 of this subchapter [title] (relating to Access and Visitation Rights); and

(E) meetings with family and resident groups.

(5) [(E)] Governmental [governmental] searches are permitted only if there exists probable cause to believe an illegal substance

or activity is being concealed. Administrative searches by the appropriate entity, such as the fire inspector, are allowed only for limited purposes, but such searches would not ordinarily extend to the resident's personal belongings. HHSC [The Texas Department of Human Services (DHS)] and the nursing facility must provide for and allow residents their individual freedoms. State statutes authorize inspections of the nursing facility but do not authorize inspection of those areas in which an individual has a reasonable expectation of privacy. Any direct participation by HHSC [DHS] personnel in an inspection of "the contents of residents' personal drawers and possessions," is in violation of federal and state law; and

[(F) the resident has the right to privacy for meetings with family and resident groups.]

(6) [(5)] All information that contains personal identification or descriptions which would uniquely identify an individual resident [or a provider of health care] is considered to be personal and private and will be kept confidential. [Personal identifying information (except for PCN numbers) will be deleted from all records, reports, and/or minutes from formal studies which are forwarded to DHS, or anyone else. These records, reports, and/or minutes, which have been de-identified, will still be treated as confidential. All such material mailed to DHS or anyone else must be in a sealed envelope marked "Confidential."]

§19.408. *Grievances.*

(a) A resident has the right to:

(1) voice grievances without discrimination or reprisal including[-: These] grievances regarding [include those with respect to] treatment that [which] has been furnished as well as treatment that [which] has not been furnished;

(2) prompt efforts by the facility to resolve grievances the resident may have, including those with respect to the behavior of other residents; and

(3) notify state agencies of complaints against a facility. Complaints will be acknowledged by the staff of the agency that receives the complaint. All complaints will be investigated, whether oral or written.

(b) A nursing facility may not retaliate or discriminate against a resident, a resident representative, [family member or guardian of the resident,] or a volunteer because the resident, the resident representative, [resident's family member or guardian,] a volunteer, or any other person:

(1) makes a complaint or files a grievance concerning the facility;

(2) reports a violation of law, including a violation of laws or regulations regarding nursing facilities; or

(3) initiates or cooperates in an investigation or proceeding of a governmental entity relating to care, services, or conditions at the nursing facility.

(c) A facility may not discharge or otherwise retaliate against:

(1) an employee, resident, or other person because the employee, resident, or other person files a complaint, presents a grievance, or otherwise provides in good faith information relating to the misuse of a restraint or involuntary seclusion at the facility; or

(2) a resident because someone on behalf of the resident files a complaint, presents a grievance, or otherwise provides in good faith information relating to the misuse of a restraint or involuntary seclusion at the facility.

§19.409. *Examination of Survey Results.*

(a) The resident has the right to:

(1) examine the results of the most recent survey of the facility conducted by federal or state surveyors and any plan of correction in effect with respect to the facility[. ~~The facility must make the results available for examination in a place readily accessible to residents, and must post a notice of their availability;~~ and

(2) receive information from agencies acting as client advocates, and be afforded the opportunity to contact these agencies.

(b) The facility must make the survey results available for examination in a place readily accessible to residents and must post a notice of their availability.

§19.410. *Refunds in Medicaid-certified Facilities.*

(a) The nursing facility must refund private funds paid to the facility for periods covered by Medicaid, including retroactive periods of Medicaid coverage, when:

(1) the Medicaid vendor payment has been accepted by the nursing facility; or

(2) the nursing facility has been notified by HHSC [~~the Texas Department of Human Services (DHS)~~] about an individual's eligibility for Medicaid.

(b) The nursing facility must make the refund within 30 days of:

(1) notification of eligibility for nursing home coverage;

(2) notification of correction of applied income [~~(see also §19.2316(f) of this title (relating to Collection of Applied Income) which specifies procedures concerning applied income refunds at the time of discharge);~~ or

(3) receipt of any vendor payment from HHSC [~~DHS~~] for any covered period.

(c) When the facility becomes aware of the need for a refund as indicated in subsection (a) of this section, facility staff must write to the resident or resident representative, [~~his responsible party;~~] notifying the resident [~~him~~] about the [~~his~~] right to a refund and the amount due.

§19.411. *Work.*

The resident has the right to:

(1) refuse to perform services for the facility; and

(2) perform services for the facility, if the resident [~~he~~] chooses, when:

(A) the facility has documented the resident's need or desire for work in the care plan [~~of care~~];

(B) the care plan specifies the nature of the services performed and whether the services are voluntary or paid;

(C) compensation for paid services is at or above prevailing rates; and

(D) the resident agrees to the work arrangement described in the care plan [~~of care~~].

§19.413. *Access and Visitation Rights.*

(a) A resident has the right to have access to, and the facility must provide immediate access to a resident to, the following:

(1) in Medicaid-certified facilities, any [~~a~~] representative of the Secretary of Health and Human Services;

(2) any [~~a~~] representative of the State of Texas;

(3) the resident's individual physician;

(4) the State Ombudsman;

(5) a certified ombudsman;

(6) any [~~a~~] representative of the protection and advocacy system for individuals with intellectual or developmental disabilities established under the Developmental Disabilities Assistance and Bill of Rights Act, 42 USC Chapter 144, Subchapter I, Part C;

(7) any [~~a~~] representative of the protection and advocacy system for individuals with mental illness established under the Protection and Advocacy for Mentally Ill Individuals Act, 42 USC Chapter 114, Subchapter I;

(8) subject to the resident's right to deny or withdraw consent at any time, immediate family or other relatives of the resident; [~~and~~]

(9) subject to reasonable restrictions and the resident's right to deny or withdraw consent at any time, others who are visiting with the consent of the resident; [~~and~~];

(10) the resident representative.

(b) A facility must provide reasonable access to a resident by any entity or individual that provides health, social, legal, or other services to the resident, subject to the resident's right to deny or withdraw consent at any time.

(c) In accordance with the Older Americans Act, §712(b)(1)(A) and 45 CFR §1324.11(e)(2), a facility must allow:

(1) the State Ombudsman, a certified ombudsman, and an ombudsman intern to have:

(A) immediate, private, and unimpeded access to enter the facility at any time during the facility's regular business hours or regular visiting hours;

(B) immediate, private, and unimpeded access to a resident; and

(C) immediate and unimpeded access to the name and contact information of a resident representative [~~responsible party~~] if the State Ombudsman, a certified ombudsman, or an ombudsman intern determines the information is needed to perform a function of the Ombudsman Program; and

(2) the State Ombudsman and a certified ombudsman to have immediate, private, and unimpeded access to enter the facility at a time other than regular business hours or visiting hours, if the State Ombudsman or a certified ombudsman determines access may be required by the circumstances to be investigated.

(d) A facility, in accordance with the Older American Act, §712(b)(1)(B) and 45 CFR §1324.11(e)(2), must allow the State Ombudsman and a certified ombudsman immediate access to:

(1) all files, records, and other information concerning a resident, including an incident report involving the resident, if:

(A) the State Ombudsman or certified ombudsman has the consent of the resident or resident [~~legally authorized~~] representative;

(B) the resident is unable to communicate consent to access and has no resident [~~legally authorized~~] representative; or

(C) such access is necessary to investigate a complaint and the following occurs:

(i) the resident [resident's legally authorized] representative refuses to give consent to access to the records, files and other information;

(ii) the State Ombudsman or certified ombudsman has reasonable cause to believe that the resident [legally authorized] representative is not acting in the best interest of the resident; and

(iii) if it is a certified ombudsman seeking access to the records, files, or other information, the certified ombudsman obtains the approval of the State Ombudsman to access the records, files, or other information without the resident [legally authorized] representative's consent; and

(2) the administrative records, policies, and documents of the facility to which the residents or general public have access.

(e) The rules adopted under the Health Insurance Portability and Accountability Act of 1996, 45 CFR Part 164, Subparts A and E, do not preclude a facility from releasing protected health information or other identifying information regarding a resident to the State Ombudsman or a certified ombudsman if the requirements of subsections (c)(1)(C) and (d)(1)(A), (B), or (C) of this section are met. The State Ombudsman and a certified ombudsman are each a "health oversight agency" as that phrase is defined in 45 CFR §164.501.

§19.414. *Telephone.*

(a) The resident has the right to have reasonable access to the use of a telephone, [~~(f) other than a pay phone(f)~~], where calls can be made without being overheard, and which can also be used for making calls to summon help in case of emergency.

(b) The facility must permit residents to contract for private telephones at their own expense. [~~The facility must not require private telephone to be connected to a central switchboard.~~]

§19.416. *Personal Property.*

The resident has the right to retain and use personal possessions, including some furnishings, and appropriate clothing as space permits, unless to do so would infringe upon the rights or health and safety of other residents. Reasons for any limitations are documented in the resident's clinical record. [~~See §19.1921(i) of this title (relating to General Requirements for a Nursing Facility).~~]

(1) If the resident dies, personal property must be transferred to the estate or the person designated by the resident.

(2) If it is donated or sold to the facility by the resident or estate, the transaction must be documented.

(3) If the resident dies and there is no resident representative or family [~~responsible party, family, or legal guardian~~] and no arrangements have been made for the disposition of property, the facility must dispose of property according to the Texas Property Code, Title 6, Chapter 71 (concerning Escheat of Property) and according to the Texas Estates Code, Chapter 551 (concerning Payment of Certain Estates to State) [~~Probate Code, Chapter 40 (concerning Payment of Estates into State Treasury)~~].

§19.417. *Married Couples.*

A [~~The~~] resident must be ensured privacy for visits with the resident's [~~his~~] spouse. The resident has the right to share a room with the resident's [~~his~~] spouse when married residents live in the same facility and both spouses consent to the arrangement.

§19.421. *Refusal of Certain Transfers in Medicaid-certified Facilities.*

(a) A resident [~~An individual~~] has the right to refuse a transfer to another room within the facility, if the purpose of the transfer is to relocate:

(1) a resident of a skilled nursing facility (SNF) from the distinct part of the facility that is an SNF to a part of the facility that is not an SNF; or

(2) a resident of a nursing facility from the distinct part of the facility that is a nursing facility to a distinct part of the facility that is an SNF.

(b) A resident's exercise of the right to refuse transfer under this section does not affect the resident's [~~individual's~~] eligibility or entitlement to Medicaid benefits.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Karen Ray

Chief Counsel

Department of Aging and Disability Services

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**40 TAC §19.418**

**STATUTORY AUTHORITY**

The repeal is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The repeal affects Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

§19.418. *Self-administration of Drugs.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Karen Ray

Chief Counsel

Department of Aging and Disability Services

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**SUBCHAPTER F. ADMISSION,  
TRANSFER, AND DISCHARGE RIGHTS  
IN MEDICAID-CERTIFIED FACILITIES**

**40 TAC §§19.501 - 19.504**

**STATUTORY AUTHORITY**

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of

HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The amendments affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

*§19.501. Admissions Policy for Medicaid-certified Facilities.*

(a) The facility must establish and implement an admissions policy.

(b) ~~[(a)]~~ The facility must not request or require:

(1) a resident [residents] or a potential resident [potential residents] to waive the resident's or potential resident's [their] rights, including the resident's or potential resident's rights to Medicare or Medicaid; [and]

(2) oral or written assurance that a resident [residents] or a potential resident is [potential residents are] not eligible for, or will not apply for, Medicare or Medicaid benefits; and[-]

(3) a resident or a potential resident to waive potential facility liability for losses of personal property.

(c) ~~[(b)]~~ The facility must not request or require a third-party guarantee of payment to the facility as a condition of admission or expedited admission, or continued stay in the facility. However, the facility may require an individual who has legal access to a resident's income or resources available to pay for facility care to sign a contract, without incurring personal financial liability, to provide facility payment from the resident's income or resources.

(d) ~~[(e)]~~ In the case of a person eligible for Medicaid, a nursing facility must not charge, solicit, accept, or receive, in addition to any amount otherwise required to be paid under the State Plan, any gift, money, donation, or other consideration as a precondition of admission, expedited admission, or continued stay in the facility. However, a nursing facility may:

(1) charge a resident who is eligible for Medicaid for items and services the resident has requested and received, and that are not specified in the State Plan as included in the term "nursing facility services" so long as the facility gives proper notice of the availability and cost of these services to a resident [residents] and does not condition the resident's admission or continued stay on the request for and receipt of these additional services; and

(2) solicit, accept, or receive a charitable, religious, or philanthropic contribution from an organization or from a person unrelated to a Medicaid-eligible resident or potential resident, but only to the extent that the contribution is not a condition of admission, expedited admission, or continued stay in the facility for a Medicaid-eligible resident.

(e) A nursing facility must disclose and provide a resident or potential resident before time of admission, notice of special characteristics or service limitations of the facility.

(f) A nursing facility that is a composite distinct part, as defined by 42 CFR §483.5, must disclose in its admission agreement its physical configuration, including the various locations that comprise the composite distinct part, and must specify the policies that apply to room changes between its different locations.

*§19.502. Transfer and Discharge in Medicaid-certified Facilities.*

(a) Examples. [Definition.] Transfer and discharge includes movement of a resident to a bed outside the certified facility, whether

that bed is in the same physical plant or not. Transfer and discharge does not refer to movement within the same certified facility.

(b) Transfer and discharge requirements. The facility must permit each resident to remain in the facility and must not transfer or discharge the resident from the facility unless:

(1) the transfer or discharge is necessary for the resident's welfare, and the resident's needs cannot be met in the facility;

(2) the transfer or discharge is appropriate because the resident's health has improved sufficiently so the resident no longer needs the services provided by the facility;

(3) the safety of individuals in the facility is endangered due to the clinical or behavioral status of the resident;

(4) the health of other individuals in the facility would otherwise be endangered;

(5) the resident has failed, after reasonable and appropriate notice, to pay for (or to have paid under Medicare or Medicaid) a stay at the facility. Nonpayment applies if the resident does not submit the necessary paperwork for third party payment or after the third party, including Medicare or Medicaid, denies the claim and the resident refuses to pay for the resident's stay. For a resident who becomes eligible for Medicaid after admission to a facility, the facility may charge a resident only allowable charges under Medicaid;

(6) the resident or resident representative; responsible party; or family or legal representative] requests a voluntary transfer or discharge; or

(7) the facility ceases to operate as a nursing facility and no longer provides resident care.

(c) Documentation. When the facility transfers or discharges a resident under any of the circumstances specified in subsection (b)(1) - (7) ~~[(b)(1) - (5)]~~ of this section, the facility must ensure that the transfer or discharge is documented in the resident's clinical record and appropriate information is communicated to the receiving health care institution or provider. [must be documented. The documentation must be made by:]

(1) Documentation must include:

(A) the basis for the transfer per subsection (b)(1) - (7) of this section; and

(B) in the case of subsection (b)(1) of this section, the specific resident's needs that cannot be met, facility attempts to meet the resident needs, and the service available at the receiving facility to meet the needs.

(2) The documentation required by paragraph (1) of this subsection, must be made by:

(A) the resident's physician when transfer or discharge is necessary under subsection (b)(1) or (b)(2) of this section; or

(B) a physician when transfer or discharge is necessary under subsection (b)(3) or (b)(4) of this section.

(3) Information provided to the receiving health care institution or provider must include the following:

(A) contact information of the practitioner responsible for the care of the resident;

(B) resident representative information, including contact information;

(C) advance directive information;

(D) all special instructions or precautions for ongoing care, as appropriate;

(E) comprehensive care plan goals; and

(F) all other necessary information, including a copy of the resident's discharge summary, consistent with §19.803 of this chapter (relating to Discharge Summary (Discharge Plan of Care)), as applicable, to ensure a safe and effective transition of care.

~~[(1) the resident's physician when transfer or discharge is necessary under subsection (b)(1) or (2) of this section; and]~~

~~[(2) a physician when transfer or discharge is necessary under subsection (b)(4) of this section.]~~

(d) Notice before transfer or discharge. Before a facility transfers or discharges a resident, the facility must:

(1) notify the resident and the resident representative~~]; if known, a responsible party or family or legal representative of the resident]~~ about the transfer or discharge and the reasons for the move in writing and in a language and manner the resident understands;

(2) if the discharge or transfer is initiated by the facility, send a copy of the notice to a representative of the Ombudsman Program at the time a discharge notice is presented to the resident and resident representative, in accordance with the timeframes described in subsection (e) of this section, except that the notice may be provided as soon as practicable, such as in a list of residents sent on a monthly basis, when a resident is temporarily transferred on an emergency basis to an acute care facility;

(3) ~~[(2)]~~ record the reasons for the transfer or discharge in the resident's clinical record;

(4) ~~[(3)]~~ include in the notice the items described in subsection (f) of this section; and

(5) ~~[(4)]~~ comply with §19.2310 of this chapter (relating to Nursing Facility Ceases to Participate) when the facility voluntarily withdraws from Medicaid or Medicare or is terminated from Medicaid or Medicare participation by HHSC or the secretary.

(e) Timing of the notice.

(1) Except when specified in paragraph (3) of this subsection or in §19.2310 of this chapter, the notice of transfer or discharge required under subsection (d) of this section must be made by the facility at least 30 days before the resident is transferred or discharged.

(2) The requirements described in paragraph (1) of this subsection and subsection ~~(h) [(g)]~~ of this section do not have to be met if the resident or resident representative~~]; responsible party, or family or legal representative]~~ requests the transfer or discharge.

(3) Notice must [may] be made as soon as practicable before transfer or discharge when:

(A) the safety of individuals in the facility would be endangered, as specified in subsection (b)(3) of this section;

(B) the health of individuals in the facility would be endangered, as specified in subsection (b)(4) of this section;

(C) the resident's health improves sufficiently to allow a more immediate transfer or discharge, as specified in subsection (b)(2) of this section;

(D) the transfer and discharge is necessary for the resident's welfare because the resident's needs cannot be met in the facility, as specified in subsection (b)(1) of this section, and the resident's urgent medical needs require an immediate transfer or discharge; or

(E) a resident has not resided in the facility for 30 days.

(4) When an immediate involuntary transfer or discharge as specified in subsection (b)(3) or (4) of this section, is contemplated, unless the discharge is to a hospital, the facility must:

(A) immediately call the staff of the state office Consumer Rights and Services section of HHSC to report its intention to discharge; and

(B) submit to HHSC the required physician documentation regarding the discharge.

(f) Contents of the notice. For nursing facilities, the written notice specified in subsection (d) of this section must include the following:

(1) the reason for transfer or discharge;

(2) the effective date of transfer or discharge;

(3) the location to which the resident is transferred or discharged;

(4) a statement of the resident's appeal rights, including [that]:

(A) the resident has the right to appeal the action as outlined in HHSC's Fair and Fraud Hearings~~]; Fraud, and Civil Rights]~~ Handbook by requesting a hearing through the Medicaid eligibility worker at the local HHSC office within 90 [40] days after the date of the notice;

(B) if the resident requests the hearing before the discharge date, the resident has the right to remain in the facility until the hearing officer makes a final determination unless failure to transfer or discharge would endanger the health or safety of the resident or individuals in the facility. The facility must document the danger failure to discharge would present; and

(C) information on how to obtain an appeal form and assistance in completing the form and submitting the appeal hearing request;

(5) the name, address, email address, and telephone number of the managing local ombudsman and the toll-free number of the Ombudsman Program;

(6) in the case of a resident with mental illness, the address, email address, and phone number of the state mental health authority; and

(7) in the case of a resident with an intellectual or developmental disability, the authority for individuals with intellectual and developmental disabilities, and the phone number, address, and email address of the agency responsible for the protection and advocacy of individuals with intellectual and developmental disabilities.

(g) Changes to the notice. If the information in the notice changes before effecting the transfer or discharge, the facility must update the recipients of the notice as soon as practicable once the updated information becomes available.

(h) [(g)] Orientation for transfer or discharge. A facility must provide and document sufficient preparation and orientation to residents to ensure safe and orderly transfer or discharge from the facility. This orientation must be provided in a form and manner that the resident can understand.

(i) [(h)] Notice of relocation to another room. Except in an emergency, the facility must notify the resident and the resident representative [either the responsible party or the family or legal representative] at least five days before relocation of the resident to another room



within the facility. The facility must prepare a written notice which contains:

- (1) the reasons for the relocation;
- (2) the effective date of the relocation; and
- (3) the room to which the facility is relocating the resident.

(j) ~~(i)~~ Fair hearings.

(1) Individuals who receive a discharge notice from a facility have 90 days to appeal. If the recipient appeals before the discharge date, the facility must allow the resident to remain in the facility, except in the circumstances described in subsections (b)(5) and (e)(3) of this section, until the hearing officer makes a final determination. Vendor payments and eligibility will continue until the hearing officer makes a final determination. If the recipient has left the facility, Medicaid eligibility will remain in effect until the hearing officer makes a final determination.

(2) When the hearing officer determines that the discharge was inappropriate, the facility, upon written notification by the hearing officer, must readmit the resident immediately, or to the next available bed. If the discharge has not yet taken place, and the hearing officer finds that the discharge will be inappropriate, the facility, upon written notification by the hearing officer, must allow the resident to remain in the facility. The hearing officer will also report the findings to HHSC ~~[Long-Term Care]~~ Regulatory Services Division for investigation of possible noncompliance.

(3) When the hearing officer determines that the discharge is appropriate, the resident is notified in writing of this decision. Any payments made on behalf of the recipient past the date of discharge or decision, whichever is later, must be recouped.

(k) ~~(j)~~ Discharge of married residents. If two residents in a facility are married and the facility proposes to discharge one spouse to another facility, the facility must give the other spouse notice of the spouse's ~~[his]~~ right to be discharged to the same facility. If the spouse notifies a facility, in writing, that the spouse ~~[he]~~ wishes to be discharged to another facility, the facility must discharge both spouses on the same day, pending availability of accommodations.

*§19.503. Notice of Bed-Hold Policy and Return To [Readmission in] Medicaid-certified Facilities.*

(a) Notice before transfer. Before a nursing facility transfers a resident to a hospital or a resident goes ~~[allows a resident to go]~~ on therapeutic leave, the nursing facility must provide written information to the resident ~~[and a family member]~~ or resident ~~[legal]~~ representative that specifies:

(1) the duration of the bed-hold policy under the Medicaid State Plan, ~~[(see §19.2603 of this title (relating to Therapeutic Home Visits Away from the Facility)) if any, during which the resident is permitted to return and resume residence in the facility; [and]~~

(2) the reserved bed payment policy, in the State plan;

(3) ~~[(2)]~~ the facility's policies regarding bed-hold periods, which must be consistent with subsection (c) of this section, permitting a resident to return; and[-]

(4) the information specified in §19.502 of this subchapter (relating to Transfer and Discharge in Medicaid-certified Facilities).

(b) Bed-hold notice upon transfer. At the time of transfer of a resident to a hospital or for therapeutic leave, a nursing facility must provide to the resident and resident ~~[a family member or legal]~~ representative, written notice which specifies the duration of the bed-hold policy described in subsection (a) of this section.

(c) Permitting resident to return to facility. A nursing facility must establish and follow a written policy on permitting residents to return to the facility after they are hospitalized or placed on therapeutic leave. ~~[under which a resident whose hospitalization or therapeutic leave]~~

(1) The policy must provide that a resident whose hospitalization or therapeutic leave exceeds the bed-hold period under the State Plan returns to the facility and to the resident's previous room if available or returns to the facility[-, is readmitted to the facility] immediately upon the first availability of a bed in a semi-private room if the resident:

(A) ~~[(1)]~~ requires the services provided by the facility; and

(B) ~~[(2)]~~ is eligible for Medicare skilled nursing facility services or Medicaid nursing facility services.

(2) If the facility that determines that a resident who was transferred with an expectation of returning to the facility cannot return to the facility, the facility must comply with the requirements of §19.502 of this subchapter.

(d) Readmission to a composite distinct part. When the facility to which a resident returns is a composite distinct part, as defined by 42 CFR §483.5, the resident must be permitted to return to an available bed in the particular location of the composite distinct part in which the resident resided previously. If the bed is not available in that location at the time of readmission, the resident must be given the option to return to that location upon the first availability of a bed.

(e) ~~[(d)]~~ Bed-hold charges. The facility may enter into a written agreement with the resident ~~[recipient]~~ or resident representative ~~[responsible party]~~ to reserve a bed.

(1) The facility may charge the recipient an amount not to exceed the HHSC ~~[DHS]~~ daily vendor rate according to the recipient's classification at the time the resident ~~[individual]~~ leaves the facility.

(2) The facility must document all bed-hold charges in the recipient's financial record at the time the bed-hold reservation services were provided.

(3) The facility may not charge a bed-hold fee if HHSC ~~[the Texas Department of Human Services (DHS)]~~ is paying for the same period of time, as in a three-day therapeutic home visit.

*§19.504. Equal Access to Quality Care in Medicaid-certified Facilities.*

(a) A facility must provide equal access to quality care regardless of diagnosis, severity of condition, or payment source.

(b) ~~[(a)]~~ A facility must establish, ~~[and]~~ maintain, and implement identical policies and practices regarding transfer, discharge, and the provision of services under the Medicaid State Plan for all individuals regardless of source of payment.

(c) ~~[(b)]~~ The facility may charge any amount for services furnished to non-Medicaid residents consistent with the notice requirement in §19.403(i) ~~[(h)]~~ and (j) ~~[(i)]~~ of this chapter ~~[title]~~ (relating to Notice of Rights and Services).

(d) ~~[(e)]~~ HHSC ~~[The Texas Department of Human Services]~~ is not required to offer additional services on behalf of a recipient other than services provided in the State Plan.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.



## SUBCHAPTER G. FREEDOM FROM ABUSE, NEGLECT, AND EXPLOITATION

### 40 TAC §§19.601, 19.602, 19.606

#### STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The amendments affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

*§19.601. Freedom from Abuse, Neglect, and Exploitation. [Resident Behavior and Facility Practice.]*

(a) General. The resident has the right to be free from abuse, neglect, misappropriation of resident property, and exploitation as defined in §19.101 of this chapter (relating to Definitions). This includes freedom from any physical or chemical restraint not required to treat the resident's medical symptoms.

(b) Abuse. The resident has the right to be free from verbal, sexual, physical and mental abuse, corporal punishment, and involuntary seclusion.

(c) Policies and procedures. The facility must develop and implement written policies and procedures that prohibit and prevent mistreatment, abuse, neglect, and exploitation of a resident, and misappropriation of a resident's property.

(1) The facility must:

(A) not use verbal, mental, sexual, or physical abuse, corporal punishment, or involuntary seclusion;

(B) not employ or otherwise engage an individual who has:

(i) been found guilty of abuse, neglect, exploitation, misappropriation of property, or mistreatment of a resident by a court of law;

(ii) had a finding entered into the state nurse aide registry concerning abuse, neglect, exploitation or mistreatment of a resident, or misappropriation of a resident's property;

(iii) been convicted of any crime contained in §250.006, Texas Health and Safety Code; or

(iv) a disciplinary action in effect against the individual's professional license by a state licensure body as a result of a finding of abuse, neglect, exploitation, mistreatment of a resident or misappropriation of a resident's property.

(C) report any knowledge it has of actions by a court of law against an employee, which would indicate unfitness for service as a nurse aide or other staff to the state nurse aide registry or licensing authority.

(2) The written policies and procedures must:

(A) establish protocols to investigate any such allegations; and

(B) include training as required by §19.1929 of this chapter (relating to Staff Development).

(d) [(a)] Restraints. The facility must ensure that the resident is free from physical or chemical restraints imposed for purposes of discipline or convenience and that are not required to treat the resident's medical symptoms. If the use of restraints is indicated, the facility must use the least restrictive alternative for the least amount of time and document ongoing re-evaluation of the need for restraints. [The resident has the right to be free from any physical or chemical restraints imposed for purposes of discipline or convenience, and not required to treat the resident's medical symptoms.]

(1) If physical restraints are used because they are required to treat the resident's medical condition, the restraints must be released and the resident repositioned as needed to prevent deterioration in the resident's condition. Residents must be monitored hourly and, at a minimum, restraints must be released every two hours for a minimum of ten minutes, and the resident repositioned.

(2) A facility must not administer to a resident a restraint that:

(A) obstructs the resident's airway, including a procedure that places anything in, on, or over the resident's mouth or nose;

(B) impairs the resident's breathing by putting pressure on the resident's torso;

(C) interferes with the resident's ability to communicate; or

(D) places the resident in a prone or supine hold.

(3) A behavioral emergency is a situation in which severely aggressive, destructive, violent, or self-injurious behavior exhibited by a resident:

(A) poses a substantial risk of imminent probable death of, or substantial bodily harm to, the resident or others;

(B) has not abated in response to attempted preventive de-escalatory or redirection techniques;

(C) could not reasonably have been anticipated; and

(D) is not addressed in the resident's comprehensive care plan.

(4) If restraint is used in a behavioral emergency, the facility must use only an acceptable restraint hold. An acceptable restraint hold is a hold in which the resident's limbs are held close to the body to limit or prevent movement and that does not violate the provisions of paragraph (2) of this subsection.

(5) A staff person may use a restraint hold only for the shortest period of time necessary to ensure the protection of the resident or others in a behavioral emergency.

(6) A facility may adopt policies that allow less use of restraint than allowed by the rules of this chapter.

(7) Use of restraints and their release must be documented in the clinical record.

~~[(b) Abuse. The resident has the right to be free from verbal, sexual, physical and mental abuse, corporal punishment, and involuntary seclusion.]~~

~~[(c) Staff treatment of residents. The facility must develop and implement written policies and procedures that prohibit mistreatment, neglect, and abuse of residents, and misappropriation of residents' property.]~~

~~[(1) The facility must:]~~

~~[(A) not use verbal, mental, sexual, or physical abuse, corporal punishment, or involuntary seclusion; and]~~

~~[(B) not employ individuals who have:]~~

~~[(i) been found guilty of abusing, neglecting, or mistreating residents by a court of law; or]~~

~~[(ii) had a finding entered into the state nurse aide registry concerning abuse, neglect, mistreatment of residents, or misappropriation of their property; or]~~

~~[(iii) been convicted of any crime contained in §250.006, Health and Safety Code; and]~~

~~[(C) report any knowledge it has of actions by a court of law against an employee, which would indicate unfitness for service as a nurse aide or other staff to the state nurse aide registry or licensing authority.]~~

~~[(2) The facility must ensure that all alleged violations involving mistreatment, neglect, or abuse, including injuries of unknown source, and misappropriation of resident property, are reported immediately to the administrator of the facility and to other officials in accordance with Texas law through established procedures (see §19.602 of this title (relating to Incidents of Abuse and Neglect Reportable to the Texas Department of Human Services and Law Enforcement Agencies by Facilities)).]~~

~~[(3) The facility must have evidence that all alleged violations are thoroughly investigated and must prevent further potential abuse while the investigation is in progress.]~~

~~[(4) The results of all investigations must be reported to the administrator or his designated representative and to other officials in accordance with Texas law (including to the state survey and certification agency) within five workdays of the incident, and if the alleged violation is verified, appropriate corrective action must be taken.]~~

~~§19.602. Incidents of Abuse, ~~and~~ Neglect, and Exploitation Reportable to the Texas Health and Human Services Commission [Department of Aging and Disability Services (DADS)] and Law Enforcement Agencies by Facilities.~~

~~(a) In response to allegations of abuse, neglect, exploitation, or mistreatment, the facility must:~~

~~(1) ensure that all alleged violations involving abuse, neglect, exploitation or mistreatment, including injuries of unknown source and misappropriation of resident property are reported:~~

~~(A) immediately to the administrator of the facility and to HHSC, but no later than two hours after the allegation is made, if the events that cause the allegation involve abuse, or result in serious bodily injury; or~~

~~(B) no later than 24 hours after the allegation is made to the administrator of the facility and to HHSC, if the events that cause the allegation do not involve abuse and do not result in serious bodily injury;~~

~~(2) conduct an investigation of the reported acts and have evidence that all alleged violations are thoroughly investigated;~~

~~(3) prevent further potential abuse, neglect, exploitation, or mistreatment while the investigation is in progress; and~~

~~(4) report the results of all investigations to the administrator or the administrator's designee and to HHSC within five working days of the incident and, if the alleged violation is verified, take appropriate corrective action.~~

~~(b) [(a)] A facility owner or employee who has cause to believe that the physical or mental health or welfare of a resident has been or may be adversely affected by abuse, neglect, or exploitation caused by another person must report the abuse, neglect, or exploitation.~~

~~(c) [(b)] Reports described in subsections (a)(1) and (b) [subsection (a)] of this section must be made to HHSC. [DADS at 1-800-458-9858 and]~~

~~(d) Written investigation [written] reports described in subsection (a)(4) of this section must be sent to: HHSC no later than the fifth working day after the initial report [DADS Consumer Rights and Services, P. O. Box 14930, Austin, Texas 78714-9030].~~

~~[(1) The person reporting must make the telephone report immediately on learning of the alleged abuse, neglect, exploitation, conduct, or conditions. The person must send a written report to DADS Consumer Rights and Services within five days after the telephone report.]~~

~~[(2) The facility must conduct an investigation of the reported act(s). The facility must send a written report of the investigation to DADS no later than the fifth working day after the oral report.]~~

~~(c) [(e)] As a condition of employment, an employee of a facility must sign a statement that states:~~

~~(1) the employee may be criminally liable for failure to report abuses; and~~

~~(2) [under the Texas Health and Safety Code, Title 4, §260A.14,] the employee has a cause of action against a facility, its owners or employees [owner(s) or employee(s)] if the employee [he] is suspended, terminated, disciplined, [or] discriminated against, or retaliated against, under the Texas Health and Safety Code, Title 4, §260A.014, as a result of:~~

~~(A) reporting to the employee's supervisor, the administrator, HHSC [DADS], or a law enforcement agency a violation of law, including a violation of laws or regulations regarding nursing facilities; or~~

~~(B) [for] initiating or cooperating in any investigation or proceeding of a governmental entity relating to care, services, or conditions at the nursing facility.~~

~~(f) [(d)] The statements described in subsection (e) [(e)] of this section must be available for inspection by HHSC [DADS].~~

~~(g) [(e)] A local or state law enforcement agency must be notified of reports described in subsection (b) [(a)] of this section that allege that:~~

~~(1) a resident's health or safety is in imminent danger;~~

~~(2) a resident has recently died because of conduct alleged in the report of abuse or neglect or other complaint;~~

~~(3) a resident has been hospitalized or treated in an emergency room because of conduct alleged in the report of abuse or neglect or other complaint;~~

(4) a resident has been a victim of any act or attempted act described in the Texas Penal Code, §§21.02, 21.11, 22.011, or 22.021; or

(5) a resident has suffered bodily injury, as that term is defined in the Texas Penal Code, §1.07, because of conduct alleged in the report of abuse or neglect or other complaint.

§19.606. *Reporting of Resident Death Information.*

(a) All licensed facilities must report ~~submit~~ to HHSC the ~~death~~ [the Texas Department of Human Services (DHS) a report of deaths] of any resident [persons residing] in the facility and any resident who is transferred [those persons transferred] from the facility to a hospital and who dies [expire] within 24 hours after transfer.

(b) The facility must submit to HHSC ~~[DHS]~~ a standard HHSC ~~[DHS]~~ form within ten working days ~~[workdays]~~ after the last day of the month in which a resident death occurs. The form must include:

- (1) name of deceased;
- (2) social security number of the deceased;
- (3) date of death; and
- (4) name and address of the institution.

(c) These reports are confidential under the Texas Health and Safety Code, §260A.016 ~~[§242.134]~~; however, a licensed facility ~~[facilities]~~ must make available historical statistics provided to the facility ~~[them]~~ by HHSC ~~[DHS]~~ and must provide the statistics, if requested, to an applicant ~~[the applicants]~~ for admission or the applicant's ~~[their]~~ representative.

(d) HHSC ~~[DHS]~~ produces statistical information of official causes of death to determine patterns and trends of incidents of death among the elderly and in specific facilities and makes this information available to the public upon request.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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## SUBCHAPTER H. QUALITY OF LIFE

### 40 TAC §19.701, §19.705

#### STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The repeals affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

§19.701. *Quality of Life.*

§19.705. *Environment.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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### 40 TAC §§19.701 - 19.703, 19.706

#### STATUTORY AUTHORITY

The new section and amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The new section and amendments affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

§19.701. *Quality of Life.*

(a) Each resident must receive, and the facility must provide, the necessary care and services to attain or maintain the highest practicable, physical, mental, and psychosocial well-being consistent with the resident's comprehensive assessment and care plan.

(1) Based on the comprehensive assessment of a resident and consistent with the resident's needs and choices, the facility must provide the necessary care and services to ensure that a resident's abilities in activities of daily living do not diminish unless circumstances of the resident's clinical condition demonstrate that such diminution was unavoidable.

(2) This includes the facility ensuring that:

(A) a resident is given the appropriate treatment and services to maintain or improve the ability to carry out the activities of daily living, including those specified in subsection (b) of this section;

(B) a resident who is unable to carry out activities of daily living receives the necessary services to maintain good nutrition, grooming, and personal and oral hygiene; and

(C) personnel provide basic life support, including CPR, to a resident requiring such emergency care prior to the arrival of emergency medical personnel and subject to related physician orders and the resident's advance directives.

(b) The facility must provide care and services in accordance with subsection (a) of this section for the following activities of daily living:

(1) hygiene - bathing, dressing, grooming, and oral care;

(2) mobility - transfer and ambulation, including walking;

(3) elimination - toileting;

(4) dining - eating including meals and snacks; and

(5) communication - speech, language, and other functional communication systems.

(c) If a child is admitted to a facility, care must be provided to meet the child's unique medical and developmental needs.

(d) Pediatric residents should be matched with roommates of similar age and developmental levels.

*§19.702. Activities.*

(a) The facility must provide, based on the comprehensive assessment and care plan and the preferences of each resident, [for] an ongoing program to support a resident in the resident's choice of activities, both facility-sponsored group and individual activities and independent activities, designed to meet the interests of and support[; in accordance with the comprehensive assessment, the interest and] the physical, mental, and psychosocial well-being of each resident, encouraging both independence and interaction in the community.

(b) The activities program must be directed by a qualified professional who[;]

[+] is a qualified therapeutic recreation specialist or an activities professional who [is]:

[(A) licensed or registered, if applicable, by the state in which practicing; and]

(1) [(B) is eligible for certification as a therapeutic recreation specialist[; therapeutic recreation assistant,] or as an activities professional by a recognized accrediting body, such as the National Council for Therapeutic Recreation Certification, on or after October 1, 1990; [or]

(2) has two years of experience in a social or recreational program within the last five years, one of which was full-time in a therapeutic [patient] activities program [in a health care setting]; [or]

(3) is a qualified occupational therapist or occupational therapy assistant; or

(4) has completed an activity director training course approved by a recognized credentialing body [any state. The Texas Department of Human Services (DHS) does not review or approve any courses. DHS accepts training courses approved by a recognized credentialing body], such as the National Certification Council for Activity Professionals, National Council for Therapeutic Recreation Certification, [the National Therapeutic Recreation Society,] or the Consortium for Therapeutic Recreation/Activities Certification, Inc.

(c) An activity director [Activity directors] must complete eight hours of approved continuing education or equivalent continuing education units each year. Approval bodies include organizations or associations recognized as such by certified therapeutic recreation specialists or certified activity professionals or registered occupational therapists.

(d) The facility must ensure that activities assessment and care planning are completed and reviewed or updated as provided in §19.801 and §19.802 of this chapter [title] (relating to Resident Assessment and Comprehensive Person-Centered Care Planning [Plans]). If indicated by the RAI or [Resident Assessment Instrument (RAI) and/or] the resident's need, an in-depth activities assessment is required.

(e) Toys and recreational equipment for a pediatric resident [residents] must be appropriate for the size, age, and developmental level of the resident [residents].

*§19.703. Social Services General Requirements.*

(a) The facility must provide medically-related social services to attain the highest practicable physical, mental, or psychosocial well-being of each resident. [See also §19.901 of this title (relating to Quality of Care) for information concerning psychosocial functioning.]

(1) A facility with more than 120 beds must employ a qualified social worker on a full-time basis.

(2) A facility of 120 beds or less must employ or contract with a qualified social worker (or in lieu thereof, a social worker who is licensed by the Texas State Board of Social Worker [Work] Examiners, and who meets the requirements of subsection (b)(2) of this section) to provide social services a sufficient amount of time to meet the needs of the residents.

(b) A qualified social worker is an individual who is licensed, including a temporary or provisional license, by the Texas State Board of Social Worker [Work] Examiners as prescribed by Texas Occupations Code, Chapter 505 [Chapter 50 of the Human Resources Code], and who has at least:

(1) a bachelor's degree in social work, or a bachelor's degree in a human services field, including[; but not limited to,] sociology, gerontology, special education, rehabilitation counseling, and psychology; and

(2) one year of supervised social work experience in a health care setting working directly with individuals.

*§19.706. Resident Group and Family Council.*

(a) A resident has the right to organize and participate in resident groups in a facility.

(b) A facility must assist a resident [residents] who requires [require] assistance to attend resident group meetings.

(c) A resident [resident's family] has the right to have a family member or other resident representative meet in the facility with the family or resident representative [families] of other residents in the facility and organize a family council. A family council may:

(1) make recommendations to the facility proposing policy and operational decisions affecting resident care and quality of life; and

(2) promote educational programs and projects intended to promote the health and happiness of residents.

(d) If a resident group or family council exists, a facility must:

(1) listen to and consider the views of a resident group or family council and act promptly upon the grievances and recommendations of residents and families concerning issues of [proposed policy and operational decisions affecting] resident care and life in the facility;

(2) be able to demonstrate responses to the grievances and recommendations of the resident group or family council and the rationale for such responses;

(3) [(2)] provide a resident group or family council with private space and take reasonable steps with the approval of the group, to make residents and family members aware of upcoming meetings in a timely manner;

(4) [(3)] provide a designated staff person who is approved by the resident or family group and the facility and who is responsible for providing assistance and responding to written requests that result from resident group and family council meetings; and

(5) [(4)] allow staff or visitors to attend meetings only at the resident group's or family council's invitation.

(e) If a family council exists, a facility must:

(1) upon written request, allow the family council to meet in a common meeting room of the facility at least once a month during hours mutually agreed upon by the family council and the facility;

(2) provide the family council with adequate space on a prominent bulletin board to post notices and other information;

(3) designate a staff person to act as the family council's liaison to the facility;

(4) respond in writing to written requests by the family council within five working days;

(5) include information about the existence of the family council in a mailing that occurs at least semiannually; ~~and~~

(6) permit a representative of the family council to discuss concerns with an individual conducting an inspection or survey of the facility; and [-]

(7) allow a resident to participate in a family council.

(f) Unless the resident objects, a family council member may authorize, in writing, another member to visit and observe a resident represented by the authorizing member.

(g) A facility must not limit the rights of a resident, a resident's family member, or a family council member to meet with an outside person, including:

(1) an employee of the facility during the employee's non-working hours if the employee agrees; ~~or~~

(2) a member of a nonprofit or government organization;

(3) another resident representative.

(h) A facility must not:

(1) terminate an existing family council;

(2) prevent or interfere with the family council from receiving outside correspondence addressed to the family council or open family council mail; or

(3) willfully interfere with the formation, maintenance, or operation of a family council, including interfering by:

(A) denying a family council the opportunity to accept help from an outside person;

(B) discriminating or retaliating against a family council participant; or

(C) willfully scheduling events in conflict with previously scheduled family council meetings, if the facility has other scheduling options.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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## SUBCHAPTER I. RESIDENT ASSESSMENT

### 40 TAC §§19.801 - 19.803

#### STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The amendments affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

#### §19.801. Resident Assessment.

A facility must conduct, initially and periodically, a comprehensive, accurate, standardized, reproducible assessment of a resident's functional capacity. The facility must electronically transmit to CMS resident-entry-and-death-in-facility tracking records required by the RAI; and OBRA assessments, including admission, annual, quarterly, significant change, significant correction, and discharge assessments.

(1) Admission orders. At the time a resident is admitted, the facility must have physician orders for the resident's immediate care.

(2) Comprehensive assessments.

(A) A facility must make a comprehensive assessment of a resident's needs, strengths, goals, life history, and preferences, using the current RAI process, including the MDS, Care Area Assessment process, and the Utilization Guidelines specified by HHSC [~~DADS~~] and approved by CMS. The current RAI process is found in the MDS 3.0 manual posted by CMS on <http://www.cms.gov>.

(B) A facility must conduct an additional assessment and document the summary information if the MDS indicates an additional assessment on a care area is required.

(C) A facility must conduct a comprehensive assessment of a resident as follows:

(i) within 14 calendar days after admission, excluding readmissions in which there is no significant change in the resident's physical or mental condition. For purposes of this section, "readmission" means a return to the facility following a temporary absence for hospitalization or for therapeutic leave;[-]

(ii) within 14 calendar days after the facility determines, or should have determined, that there has been a significant change in the resident's physical or mental condition. For purposes of this section, a "significant change" means a major decline or improvement in the resident's status that will not normally resolve itself without further intervention by staff or by implementing standard disease-related clinical interventions, that has an impact on more than one area of the resident's health status, and requires interdisciplinary review or revision of the care plan, or both; and[-]

(iii) not less often than once every 12 months.

(3) Quarterly review assessment. A facility must assess a resident using the quarterly review instrument specified by HHSC [~~DADS~~] and approved by CMS not less frequently than once every three months.

(4) Use. A facility must maintain all resident assessments completed within the previous 15 months in the resident's active record and use the results of the assessments to develop, review, and revise the

resident's comprehensive care plan [of care] as specified in §19.802 of this subchapter (relating to Comprehensive Person-Centered Care Planning [Plans]).

(5) PASRR. A Medicaid-certified facility must:

(A) coordinate assessments with the PASRR [PASSR] process in 42 CFR, Part 483, Subpart C to the maximum extent practicable to avoid duplicative testing and effort, including:

(i) incorporating the recommendations from the PASRR level II determination and the PASRR evaluation report into a resident's assessment, care planning, and transitions of care; and

(ii) referring a level II resident and a resident suspected of having mental illness, an intellectual disability, or a developmental disability for level II resident review upon a significant change in status assessment; and

(B) promptly report a significant change in the mental or physical condition of a resident by submitting a MDS Significant Change in Status Assessment Form in the LTC Online Portal, in accordance with §19.2704(i)(12) of this chapter (Nursing Facility Responsibilities Related to PASRR).

(6) Automated data processing requirement.

(A) A facility must complete an MDS for a resident. The facility must enter MDS data into the facility's assessment software within 7 days after completing the MDS and electronically transmit the MDS data to CMS within 14 days after completing the MDS.

(B) A facility must complete the Long Term Care Medicaid Information form on an OBRA assessment that is submitted to the state Medicaid claims system for a Medicaid recipient or Medicaid applicant according to HHSC [DADS] instructions located on the Texas Medicaid Healthcare Partnership Long Term Care Portal at <http://www.tmhp.com>.

(C) Data format. The facility must transmit MDS data to CMS in the format specified by CMS and HHSC [DADS].

(D) Information concerning a resident is confidential and a facility must not release information concerning a resident except as allowed by this chapter, including §19.407 of this chapter (relating to Privacy and Confidentiality) and §19.1910(d) of this chapter (relating to Clinical Records).

(7) Accuracy of assessments. The assessment must accurately reflect the resident's status.

(8) Coordination. A registered nurse must conduct or coordinate each assessment with the appropriate participation of health professionals.

(9) Certification.

(A) A registered nurse must sign and certify that the assessment is completed.

(B) Each individual who completes a portion of the assessment must sign and certify the accuracy of that portion of the assessment.

(10) Penalty for falsification under Medicare and Medicaid.

(A) An individual who willfully and knowingly:

(i) certifies a material and false statement in a resident assessment is subject to a civil money penalty of not more than \$1,000 for each assessment; or

(ii) causes another individual to certify a material and false statement in a resident assessment is subject to a civil money penalty of not more than \$5,000 for each assessment.

(B) Clinical disagreement does not constitute a material and false statement.

(11) Use of independent assessors in Medicaid-certified facilities and dually certified facilities. If HHSC [DADS] determines, under a certification survey or otherwise, that there has been a knowing and willful certification of false statements under paragraph (10) of this section, HHSC [DADS] may require (for a period specified by HHSC [DADS]) individuals who are independent of the facility and who are approved by HHSC [DADS] to conduct and certify the resident assessments under this section.

(12) Pediatric resident assessment.

(A) A facility must ensure that a pediatric assessment:

(i) is performed by a licensed health professional experienced in the care and assessment of children;

(ii) includes parents or guardians in the assessment process; and

(iii) includes a discussion with a parent or guardian about the potential for community transition.

(B) The clinical record of a child must include a record of immunizations, blood screening for lead, and developmental assessment. The local school district's developmental assessment may be used if available. [See §19.1934 of this chapter (relating to Educational Requirements for Persons Under Age 22).]

(C) A licensed health professional must assess a child's functional status in relation to pediatric developmental levels, rather than adult developmental levels.

(D) A facility must ensure pediatric residents receive services in accordance with the guidelines established by the Department of State Health Services' Texas Health Steps (THSteps). For Medicaid-eligible pediatric residents between the ages of six months and six years, blood screening for lead must be done in accordance with THSteps guidelines.

§19.802. Comprehensive Person-Centered Care Planning [Plans].

(a) Baseline care plans.

(1) The facility must develop and implement a baseline care plan for each resident that includes the instructions needed to provide effective and person-centered care of the resident that meet professional standards of quality care. The baseline care plan must:

(A) be developed within 48 hours of a resident's admission;

(B) include the minimum healthcare information necessary to properly care for a resident, including:

(i) initial goals based on admission orders;

(ii) physician orders;

(iii) dietary orders;

(iv) therapy services;

(v) social services; and

(vi) PASRR recommendation, if applicable.

(2) The facility may develop a comprehensive care plan in place of the baseline care plan if the comprehensive care plan:

(A) is developed within 48 hours of the resident's admission; and

(B) meets the requirements set forth in subsections (b) - (g) of this section, except subsection (c)(1) of this section.

(3) The facility must provide the resident and the resident representative a summary of the baseline care plan that includes:

(A) the initial goals of the resident;

(B) a summary of the resident's medications and dietary instructions;

(C) any services and treatments to be administered by the facility and personnel acting on behalf of the facility; and

(D) any updated information based on the details of the comprehensive care plan, as necessary.

(b) [(a)] A facility must develop a comprehensive person-centered care plan for each resident, consistent with the resident's rights, that includes measurable short-term and long-term objectives and timeframes [timetables] to meet a resident's medical, nursing, mental, and psychosocial needs that are identified in the comprehensive assessment. If a child is admitted to the facility, the comprehensive care plan must be based on the child's individual needs. The comprehensive care plan must describe the following:

(1) the services that are to be furnished to attain or maintain the resident's highest practicable physical, mental, and psychosocial well-being as required under §19.701 of this chapter (relating to Quality of Life) and §19.901 of this chapter [title] (relating to Quality of Care); [and]

(2) any services that would otherwise be required under §19.701 of this chapter and §19.901 of this chapter [title] but are not provided due to the resident's exercise of rights, including the right to refuse treatment under §19.403(i) [§19.402(g)] of this chapter [title] (relating to Notice [Exercise] of Rights and Services);[-]

(3) any nursing facility specialized services or nursing facility PASRR support activities the nursing facility will provide as a result of PASRR recommendations, in accordance with Subchapter BB of this chapter (relating to Nursing Facility Responsibilities Related To Preadmission Screening And Resident Review (PASRR)); and

(4) in consultation with the resident and resident representative:

(A) the resident's goals for admission and desired outcomes;

(B) the resident's preference and potential for future discharge, whether the resident's desire to return to the community was assessed, and any referrals to local contact agencies or other appropriate entities; and

(C) discharge plans in the comprehensive care plan as appropriate, in accordance with §19.803 of this subchapter (relating to Discharge Summary (Discharge Plan of Care)).

(c) [(b)] The comprehensive care plan must be:

(1) developed within seven days after completion of the comprehensive assessment;

(2) prepared by an interdisciplinary team that includes:

(A) the attending physician;[-]

(B) a registered nurse with responsibility for the resident;[-] and

(C) a nurse aide with responsibility for the resident;

(D) the qualified dietitian or director of food and nutrition services;

(E) other appropriate staff in disciplines as determined by the resident's needs or as requested by the resident;[-] and [-]

(F) to the extent practicable, [with] the participation of the resident and the resident[-; the resident's family or legal] representative;

(3) periodically reviewed and revised by a team of qualified persons after each assessment, including both the comprehensive and quarterly review assessments; and

(4) for a resident under 22 years of age, annually reviewed at a comprehensive care plan meeting between the facility and the resident's LAR as defined in §19.805(a)(5) of this subchapter [title] (relating to Permanency Planning for a Resident Under 22 Years of Age), which includes a review of:

(A) the LAR's contact information as required by §19.805(b)(4)(F) [§19.805(b)(5)(F)] of this subchapter [title];

(B) the resident's comprehensive assessment;

(C) the resident's educational status; and

(D) the resident's permanency plan.

(d) Regarding subsection (c)(2)(F) of this section, an explanation must be included in a resident's clinical record if the participation of the resident and the resident representative is determined not practicable for the development of the resident's comprehensive care plan.

(e) [(e)] A comprehensive care plan must include:

(1) for a resident under 18 years of age, the activities, supports, and services that, when provided or facilitated by the facility, will enable the resident to live with a family; or

(2) for a resident 18-22 years of age, the activities, supports, and services that, when provided or facilitated by the facility, will result in the resident having a consistent and nurturing environment in the least restrictive setting, as defined by the resident and LAR as defined in §19.805(a)(5) of this subchapter [title].

(f) [(d)] A comprehensive care plan may include a palliative plan of care. This plan may be developed only at the request of the resident, surrogate decision maker or legal representative for residents with terminal conditions, end stage diseases or other conditions for which curative medical interventions are not appropriate. The plan of care must have goals that focus on maintaining a safe, comfortable and supportive environment in providing care to a resident at the end of life.

(g) [(e)] For a resident under 22 years of age, the facility must provide written notice to the LAR, as defined in §19.805(a)(5) of this subchapter [title], of a meeting to conduct an annual review of the resident's comprehensive care plan no later than 21 days before the meeting date and request a response from the LAR.

(h) [(f)] The services provided or arranged by the facility must:

(1) meet professional standards of quality; [and]

(2) be provided by qualified persons in accordance with each resident's written care plan; and [of care.]

(3) effective November 28, 2019, be culturally-competent and trauma-informed.

(i) [(g)] The comprehensive care plan must be made available to all direct care staff.



§19.803. *Discharge Summary (Discharge Plan of Care).*

(a) Discharge planning. The facility must develop and implement an effective discharge planning process.

(1) The facility's discharge planning process must:

(A) ensure that the discharge needs of each resident are identified and result in the development of a discharge plan for each resident;

(B) include regular re-evaluation of a resident to identify changes that require modification of the discharge plan and update the discharge plan to reflect these changes;

(C) involve the interdisciplinary team in the ongoing process of developing the discharge plan;

(D) consider caregiver or support person availability and the resident's or caregiver's or support person's capacity and capability to perform required care, as part of the identification of discharge needs;

(E) involve the resident and resident representative in the development of the discharge plan and inform the resident and resident representative of the final plan;

(F) address the resident's goals of care and treatment preferences; and

(G) document that a resident has been asked about their interest in receiving information regarding returning to the community.

(i) If the resident indicates an interest in returning to the community, the facility must document any referrals to local contact agencies or other appropriate entities made for this purpose.

(ii) Facilities must update a resident's comprehensive care plan and discharge plan as appropriate, in response to information received from referrals to local contact agencies or other appropriate entities.

(iii) If discharge to the community is determined to not be feasible, the facility must document who made the determination and why.

(2) The evaluation of the resident's discharge needs and discharge plan must be completed on a timely basis and documented in the resident's clinical record.

(3) The results of the evaluation of the resident's discharge needs and discharge plan must be discussed with the resident or the resident representative.

(b) [(a)] When a facility anticipates [Before or at the time of] a resident's discharge, the facility must develop [give the resident] a discharge summary that includes:

(1) a recapitulation of the overall course of the resident's stay that includes diagnoses, course of illness, treatment, or therapy and pertinent lab, radiology, and consultation results, a final summary of the resident's status;

(2) reconciliation or all pre-discharge medications with the resident's post-discharge medications both prescribed and over-the-counter;

(3) [(2)] a statement notifying a resident granted permanent medical necessity (PMN) under the Medicaid program that:

(A) PMN status continues after discharge, unless the resident is discharged to home;

(B) PMN status expires 30 consecutive days after the resident is discharged to home; and

(C) a new medical necessity determination is required if the resident applies to be admitted to a nursing facility under the Medicaid program more than 30 consecutive days after the resident moves home from a nursing facility; and

(4) [(3)] a post-discharge care plan [of care], developed with the participation of the resident and a resident representative that: [; and a family representative, responsible party or legal guardian, that will, after discharge,]

(A) will assist the resident to adjust to the [his] new living environment; and

(B) indicates where the resident plans to reside and arrangements that have been made for follow-up care and any post discharge medical and non-medical services.

(c) [(b)] The facility discharge summary must be available for release to authorized persons, facilities or agencies with the consent of the resident or resident representative [as required by subsection (a) of this section when a resident is being discharged home; to another nursing facility; a Medicare skilled nursing facility; or another residential facility, such as a board and care home, an intermediate care facility for individuals with an intellectual disability or related conditions; or an assisted living facility].

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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## SUBCHAPTER J. QUALITY OF CARE

### 40 TAC §19.901, §19.904

#### STATUTORY AUTHORITY

The new section and amendment are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The new section and amendment affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

#### §19.901. *Quality of Care.*

Based on the comprehensive assessment of a resident, the facility must ensure that a resident receives treatment and care in accordance with professional standards of practice, the comprehensive person-centered care plan, and the resident's choices, including the following: [Each resident must receive and the facility must provide the necessary care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being; as defined by and in accordance with the comprehensive assessment and plan of care. If children are ad-

mitted to the facility, care and services must be provided to meet their unique medical and developmental needs.]

~~[(1) Activities of daily living. Based on the comprehensive assessment of the resident, the facility must ensure that:]~~

~~[(A) a resident's abilities in activities of daily living do not diminish unless the circumstances of the individual's clinical condition demonstrate that diminution is unavoidable. This includes the resident's abilities to:]~~

~~[(i) bathe, dress, and groom;]~~

~~[(ii) transfer and ambulate;]~~

~~[(iii) toilet;]~~

~~[(iv) eat; and]~~

~~[(v) use speech, language, or other functional communication systems;]~~

~~[(B) the resident is given the appropriate treatment and services to maintain or improve his abilities specified in paragraph (1) of this section;]~~

~~[(C) a resident who is unable to carry out activities of daily living receives the necessary services to maintain good nutrition, grooming, and personal and oral hygiene.]~~

~~(1) [(2) Vision and hearing. To ensure that a resident receives [residents receive] proper treatment and assistive devices to maintain vision and hearing abilities, the facility must, if necessary, assist the resident:~~

~~(A) in making appointments; and~~

~~(B) by arranging for transportation to and from the office of a practitioner specializing in the treatment of vision or hearing impairment or the office of a professional specializing in the provision of vision or hearing assistive devices.~~

~~(2) [(3) Skin Integrity.~~

~~(A) Pressure ulcers [sores]. Based on the comprehensive assessment of the resident, the facility must ensure that:~~

~~(i) [(A)] a resident receives care, consistent with professional standards of practice, to prevent [who enters the facility without] pressure ulcers and [sores] does not develop pressure ulcers [sores] unless the resident's [his] clinical condition demonstrates that they are unavoidable; and~~

~~(ii) [(B)] a resident with [having] pressure ulcers [sores] receives necessary treatment and services, consistent with professional standards of practice, to promote healing, prevent infection, and prevent new ulcers [sores] from developing.~~

~~(B) Foot Care. To ensure that a resident receives proper treatment and care to maintain mobility and good foot health, the facility must:~~

~~(i) provide foot care and treatment, in accordance with professional standards of practice, including to prevent complications from the resident's medical condition; and~~

~~(ii) if necessary, assist the resident in making appointments with a qualified person, and arranging for transportation to and from such appointments.~~

~~(3) [(4) Incontinence [Urinary incontinence].~~

~~(A) The facility must ensure that a resident who is continent of bladder and bowel on admission receives services and assis-~~

~~tance to maintain continence unless the resident's clinical condition is or becomes such that continence is not possible to maintain.~~

~~(B) For a resident with urinary incontinence, based [Based] on the comprehensive assessment of the resident, the facility must ensure that:~~

~~(i) [(A)] a resident who enters the facility without an indwelling catheter is not catheterized unless the resident's [his] clinical condition demonstrates that catheterization is necessary; [and]~~

~~(ii) a resident who enters the facility with an indwelling catheter or subsequently receives one is assessed for removal of the catheter as soon as possible unless the resident's clinical condition demonstrates that catheterization is necessary; and~~

~~(iii) a resident who is incontinent of bladder receives appropriate treatment and services to prevent urinary tract infections and to restore continence to the extent possible.~~

~~[(B) a resident who is incontinent of bladder receives appropriate treatment and services to prevent urinary tract infections and to restore as much normal bladder function as possible.]~~

~~(C) For a resident with fecal incontinence, based on the resident's comprehensive assessment, the facility must ensure that a resident who is incontinent of bowel receives appropriate treatment and services to restore as much normal bowel function as possible.~~

~~(4) Colostomy, urostomy, or ileostomy care. The facility must ensure that a resident who requires colostomy, urostomy, or ileostomy services, receives such care consistent with professional standards of practice, the comprehensive person-centered care plan, and the resident's goals and preferences.~~

~~(5) Mobility. The facility must ensure that: [Range of motion. Based on the comprehensive assessment of the resident, the facility must ensure that:]~~

~~(A) a resident who enters the facility without a limited range of motion does not experience reduction in range of motion unless the resident's clinical condition demonstrates that a reduction in range of motion is unavoidable; [and]~~

~~(B) a resident with a limited range of motion receives appropriate treatment and services to increase range of motion and [and/or] to prevent further decrease in range of motion; and [-]~~

~~(C) a resident with limited mobility receives appropriate services, equipment, and assistance to maintain or improve mobility with the maximum practicable independence unless a reduction in mobility is unavoidable.~~

~~(6) Assisted nutrition and hydration. (Includes naso-gastric and gastrostomy tubes, both percutaneous endoscopic gastrostomy and percutaneous endoscopic jejunostomy, and enteral fluids). Based on a resident's comprehensive assessment, the facility must ensure that a resident:~~

~~(A) maintains acceptable parameters of nutritional status, such as usual body weight or desirable body weight range and electrolyte balance, unless the resident's clinical condition demonstrates that this is not possible or the resident preferences indicate otherwise;~~

~~(B) is offered sufficient fluid intake to maintain proper hydration and health;~~

~~(C) is offered a therapeutic diet when there is a nutritional problem and the health care provider orders a therapeutic diet;~~

~~(D) who has been able to eat enough alone or with assistance is not fed by enteral methods unless the resident's clinical con-~~

dition demonstrates that enteral feeding was clinically indicated and consented to by the resident; and

(E) who is fed by enteral means receives the appropriate treatment and services to restore, if possible, oral eating skills and to prevent complications of enteral feeding including aspiration pneumonia, diarrhea, vomiting, dehydration, metabolic abnormalities, and nasal-pharyngeal ulcers.

(7) Parenteral fluids. Parenteral fluids must be administered consistent with professional standards of practice and in accordance with physician orders, the comprehensive person-centered care plan, and the resident's goals and preferences.

(8) Respiratory care, including tracheostomy care and tracheal suctioning. The facility must ensure that a resident who needs respiratory care, including tracheostomy care and tracheal suctioning, is provided such care, consistent with professional standards of practice, the comprehensive person-centered care plan, the resident's goals and preferences, and §19.802 of this chapter, (relating to Comprehensive Person-Centered Care Planning).

(9) Prostheses. The facility must ensure that a resident who has a prosthesis is provided care and assistance, consistent with professional standards of practice, the comprehensive person-centered care plan, and the resident's goals and preferences, to wear and be able to use the prosthetic device.

(10) Pain management. The facility must ensure that pain management is provided to a resident who requires such services, consistent with professional standards of practice, the comprehensive person-centered care plan, and the resident's goals and preferences.

(11) Dialysis. The facility must ensure that a resident who requires dialysis receives such services, consistent with professional standards of practice, the comprehensive person-centered care plan, and the resident's goals and preferences.

(12) Trauma-informed care. Effective November 28, 2019, the facility must ensure that a resident who is a trauma survivor receives culturally-competent, trauma-informed care in accordance with professional standards of practice and accounting for resident's experiences and preferences in order to eliminate or mitigate triggers that may cause re-traumatization of the resident.

(13) Bed rails. The facility must attempt to use appropriate alternatives before installing a side or bed rail. If a bed or side rail is used, the facility must ensure correct installation, use, and maintenance of bed rails, including the following elements:

(A) assess the resident for risk of entrapment from bed rails before installation;

(B) review the risks and benefits of bed rails with the resident or resident representative and obtain informed consent before installation;

(C) ensure the bed's dimensions are appropriate for the resident's size and weight; and

(D) follow the manufactures' recommendations and specifications for installing and maintaining bed rails.

{{(6) Mental and psychosocial functioning. Based on the comprehensive assessment of the resident, the facility must ensure that:}}

{{(A) a resident who displays mental or psychosocial adjustment difficulty receives appropriate treatment and services to correct the assessed problem; and}}

{{(B) a resident whose assessment does not reveal a mental or psychosocial adjustment difficulty does not display a pattern of decreased social interaction and/or increased withdrawn, angry, or depressive behaviors, unless his clinical condition demonstrates that such a pattern is unavoidable.}}

{{(7) Naso-gastric tube. Based on the comprehensive assessment of the resident, the facility must ensure that:}}

{{(A) a resident who has been able to eat enough alone or with assistance is not fed by naso-gastric tube unless his clinical condition demonstrates that use of a naso-gastric tube is unavoidable; and}}

{{(B) a resident who is fed by a naso-gastric or gastrostomy tube receives the appropriate treatment and services to prevent aspiration pneumonia, diarrhea, vomiting, dehydration, metabolic abnormalities, and nasal-pharyngeal ulcers, and to restore, if possible, normal eating skills.}}

[(14) [(8)] Accidents. The facility must ensure that:

(A) the resident environment remains as free of accident hazards as possible; and

(B) each resident receives adequate supervision and assistive devices to prevent accidents.

{{(9) Nutrition. Based on the comprehensive assessment of the resident, the facility must ensure that a resident:}}

{{(A) maintains acceptable parameters of nutritional status, such as body weight and protein levels, unless his clinical condition demonstrates that this is not possible; and}}

{{(B) receives a therapeutic diet when there is a nutritional problem.}}

{{(10) Hydration. The facility must ensure that the resident is provided with sufficient fluid intake to maintain proper hydration and health.}}

{{(11) Special needs. The facility must ensure that residents receive proper treatment and care for the following special services:}}

{{(A) injections;}}

{{(B) parenteral or enteral fluids;}}

{{(C) colostomy, ureterostomy, or ileostomy care;}}

{{(D) tracheostomy care;}}

{{(E) tracheal suctioning;}}

{{(F) respiratory care;}}

{{(G) foot care; and}}

{{(H) prostheses.}}

{{(12) Unnecessary drugs.}}

{{(A) General. Each resident's drug regimen must be free from unnecessary drugs. An unnecessary drug is any drug when used:}}

{{(i) in excessive dose (including duplicate drug therapy); or}}

{{(ii) for excessive duration; or}}

{{(iii) without adequate monitoring; or}}

{{(iv) without adequate indications for its use; or}}

~~[(v)]~~ in the presence of adverse consequences which indicate the dose should be reduced or discontinued; or]

~~[(vi)]~~ any combination of the circumstances in clauses (i)-(v) of this subparagraph.]

~~[(B)]~~ Antipsychotic drugs. Based on the comprehensive assessment of the resident, the facility must ensure that:]

~~[(i)]~~ residents who have not used antipsychotic drugs are not given these drugs unless antipsychotic drug therapy is necessary to treat a specific condition as diagnosed and documented in the clinical record; and]

~~[(ii)]~~ residents who use antipsychotic drugs receive gradual dose reductions, and behavioral interventions, unless clinically contraindicated, in an effort to discontinue use of these drugs.]

~~[(13)]~~ Medication errors. The facility must ensure that:]

~~[(A)]~~ it is free of medication error rates of 5.0% or greater; and]

~~[(B)]~~ residents are free of significant medication errors.]]

~~[(15)]~~ [(14)] Pediatric care.

(A) Licensed nursing care of children. A facility caring for children must have 24 hour a day on-site licensed nursing staff in numbers sufficient to provide safe care. For any facility with five or more children under 26 pounds, at least one nurse must be assigned solely to the care of those children.

(B) Fewer than five pediatric residents. Facilities with fewer than five pediatric residents must assure that the children's rooms are in close proximity to the nurses' station.

(C) Respiratory care of children.

(i) To facilitate the care of ventilator-dependent children or children with tracheostomies, a facility must group those children in rooms contiguous or in close proximity to each other. An exception to this rule is children who are able to be schooled off-site.

(ii) Facilities must assure that alarms on ventilators, apnea monitors, and any other such equipment uniquely identify the child or the child's room.

(iii) A facility caring for children with tracheostomies requiring daily care (including ventilator-dependent children with tracheostomies) must have 24 hour a day on-site respiratory therapy staff in numbers sufficient to provide a safe ratio of respiratory therapist per these residents. For the purposes of this rule, respiratory therapy staff is defined as a registered respiratory therapist (RRT), a certified respiratory therapy technician (CRT), or a licensed nurse whose primary function is respiratory care.

(I) If the facility cares for nine or more children with tracheostomies requiring daily care (including ventilator-dependent children with tracheostomies), the facility must maintain a ratio of no less than one respiratory therapy staff per nine tracheostomy residents 24 hours a day.

(II) If the facility cares for six or more ventilator dependent children, the facility must:

(-a-) designate a respiratory therapy supervisor, either on staff or contracted who must be credentialed by the National Board for Respiratory Care (either CRT or RRT).

(-b-) provide and document that all respiratory therapy staff is trained in the care of children who are ventilator dependent. This training must be reviewed annually.

(-c-) assure that appropriate care, maintenance, and disinfection of all ventilator equipment and accessories occurs.

#### §19.904. Behavioral Health Services.

Each resident must receive and the facility must provide the necessary behavioral health care and services to attain or maintain the highest practicable physical, mental, and psychosocial well-being, in accordance with the comprehensive assessment and care plan.

(1) The facility must have sufficient staff who provide direct services to a resident with the appropriate competencies and skills sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident. This is determined by resident assessments and individual plans of care and considering the number, acuity and diagnoses of the facility's resident population in accordance with §19.1931 of this chapter (relating to Facility Assessment). These competencies and skills sets include knowledge of and appropriate training and supervision for:

(A) caring for a resident with mental and psychosocial disorders, as well as a resident with a history of trauma or post-traumatic stress disorder, that have been identified in the facility assessment conducted pursuant to §19.1931 of this chapter; and

(B) implementing non-pharmacological interventions.

(2) Based on the comprehensive assessment of a resident, the facility must ensure that:

(A) a resident who displays or is diagnosed with mental disorder or psychosocial adjustment difficulty, or who has a history of trauma or posttraumatic stress disorder, receives appropriate treatment and services to correct the assessed problem or to attain the highest practicable mental and psychosocial well-being;

(B) a resident whose assessment did not reveal or who does not have a diagnosis of a mental or psychosocial adjustment difficulty or a documented history of trauma or post-traumatic stress disorder does not display a pattern of decreased social interaction or increased withdrawn, angry, or depressive behaviors, unless the resident's clinical condition demonstrates that development of such a pattern was unavoidable; and

(C) a resident who displays or is diagnosed with dementia, receives the appropriate treatment and services to attain or maintain the resident's highest practicable physical, mental, and psychosocial well-being.

(3) If rehabilitative services such as physical therapy, speech-language pathology, occupational therapy, and rehabilitative services for mental disorders and intellectual disability, are required in the resident's comprehensive care plan, the facility must:

(A) provide the required services, including specialized rehabilitation services as required in §19.802 of this chapter (relating to Comprehensive Person-Centered Care Planning).

(B) obtain the required services from an outside resource in accordance with §19.1906 of this chapter (relating to Use of Outside Resources), from a Medicare or Medicaid provider of specialized rehabilitative services.

(4) The facility must provide medically-related social services to attain or maintain the highest practicable physical, mental and psychosocial well-being of each resident.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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For further information, please call: (210) 619-8292



## SUBCHAPTER K. NURSING SERVICES

### 40 TAC §19.1001, §19.1010

#### STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The amendments affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

#### §19.1001. Nursing Services.

(a) The facility must have sufficient staff with the appropriate competencies and skill sets to provide nursing and related services to assure resident safety and attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident. This is ~~as~~ determined by resident assessments and individual plans of care and considering the number, acuity and diagnoses of the facility's resident population in accordance with the facility assessment required at §19.1931 of this chapter (relating to Facility Assessment). Staff who have been instructed and who have demonstrated competence in the care of children must provide nursing ~~[Nursing]~~ services to children ~~[must be provided by staff who have been instructed and have demonstrated competence in the care of children]~~. Care and services are to be provided as specified in §19.901 of this chapter (relating to Quality of Care).

#### (1) Sufficient staff.

(A) The facility must provide services by sufficient numbers of each of the following types of personnel on a 24-hour basis to provide nursing care to all residents in accordance with resident care plans:

(i) licensed nurses, except when waived under paragraph (5) [(3)] of this subsection; and

(ii) other nursing personnel, including nurse aides.

(B) The facility must designate a licensed nurse to serve as a charge nurse on each shift, except when waived under paragraph (5) [(3)] of this subsection.

(C) The facility must ensure that licensed nurses have the specific competencies and skill sets necessary to care for a resident's needs, as identified through resident assessments, and described in the care plan.

(D) The facility must provide care that includes assessing, evaluating, planning, and implementing resident care plans and responding to a resident's needs.

#### (2) Registered nurse.

(A) The facility must use the services of a registered nurse for at least eight consecutive hours a day, seven days a week, except when waived under paragraph (5) [(3)] or (6) [(4)] of this subsection.

(B) The facility must designate a registered nurse to serve as the director of nursing on a full-time basis, 40 hours per week, except when waived under paragraph (6) [(4)] of this subsection.

(C) The director of nursing may serve as a charge nurse only when the facility has an average daily occupancy of 60 or fewer residents.

(3) Proficiency of nurse aides. The facility must ensure that nurse aides are able to demonstrate competency in skills and techniques necessary to care for a resident's needs, as identified through resident assessments, and described in the resident's care plan.

(4) Requirements for facility hiring and use of nurse aides.

(A) General rule. A facility must not use any individual working in the facility as a nurse aide for more than four months, on a full-time basis, unless:

(i) the individual is competent to provide nursing and nursing related services; and

(ii) the individual:

(I) has completed a training and competency evaluation program, or a competency evaluation program approved by the state as meeting the requirements of 42 CFR §§483.151-483.154; or

(II) has been deemed or determined competent as provided in 42 CFR §483.150(a) and (b).

(B) Nonpermanent employees. A facility must not use on a temporary, per diem, leased, or any basis other than a permanent employee any individual who does not meet the requirements in subparagraph (A)(i) and (ii) of this paragraph.

(C) Competency. A facility must not use any individual who has worked less than four months as a nurse aide in that facility unless the individual:

(i) is a full-time employee in a state-approved training and competency evaluation program;

(ii) has demonstrated competence through satisfactory participation in a state-approved nurse aide training and competency evaluation program, or competency evaluation program; or

(iii) has been deemed or determined competent as provided in 42 CFR §483.150(a) and (b).

(D) Registry Verification. Before allowing an individual to serve as a nurse aide, a facility must receive registry verification that the individual has met competency evaluation requirements and is not designated in the registry as having a finding concerning abuse, neglect or mistreatment of a resident, or misappropriation of a resident's property, unless:

(i) the individual is a full-time employee in a training and competency evaluation program approved by the state; or

(ii) the individual can prove that the individual has recently successfully completed a training and competency evaluation program, or competency evaluation program approved by the state and has not yet been included in the registry. A facility must follow up to ensure that such an individual actually becomes registered.

(E) Multi-state registry verification. Before allowing an individual to serve as a nurse aide, a facility must seek information from every state registry, established under §1819(e)(2)(A) or §1919(e)(2)(A) of the Social Security Act, that the facility believes will include information about the individual.

(F) Required retraining. If, since an individual's most recent completion of a training and competency evaluation program, there has been a continuous period of 24 consecutive months during none of which the individual provided nursing or nursing-related services for monetary compensation, the individual must complete a new training and competency evaluation program or a new competency evaluation program.

(G) Regular in-service education. The facility must complete a performance review of every nurse aide at least once every 12 months, and must provide regular in-service education based on the outcome of these reviews. The in-service training must:

(i) be sufficient to ensure the continuing competence of a nurse aide, but must be no less than 12 hours per year;

(ii) address areas of weakness as determined in nurse aides' performance reviews and facility assessment at §19.1931 of this chapter, and may address the special needs of a resident as determined by the facility staff;

(iii) for a nurse aide providing services to an individual with cognitive impairments, address the care of the cognitively impaired; and

(iv) include dementia management training and resident abuse prevention training.

(H) The facility must comply with the nurse aide training and registry rules found in Chapter 94 of this title (relating to Nurse Aides).

(5) [(3)] Waiver of requirement to provide licensed nurses on a 24-hour basis.

(A) To the extent that a facility is unable to meet the requirements of paragraphs (1)(B) and (2)(A) of this subsection, the state may waive these requirements with respect to the facility, if:

(i) the facility demonstrates to the satisfaction of HHSC that the facility has been unable, despite diligent efforts (including offering wages at the community prevailing rate for nursing facilities), to recruit appropriate personnel;

(ii) HHSC determines that a waiver of the requirement will not endanger the health or safety of individuals staying in the facility;

(iii) the state finds that, for any periods in which licensed nursing services are not available, a registered nurse or a physician is obligated to respond immediately to telephone calls from the facility; and

(iv) the waived facility has a full-time registered or licensed vocational nurse on the day shift seven days a week. For purposes of this requirement, the starting time for the day shift must be between 6 a.m. and 9 a.m. The facility must specify in writing the schedule that it follows.

(B) A waiver granted under the conditions listed in this paragraph is subject to annual state review.

(C) In granting or renewing a waiver, a facility may be required by the state to use other qualified, licensed personnel.

(D) The state agency granting a waiver of these requirements provides notice of the waiver to the State Ombudsman and the protection and advocacy systems [system] in the state for individuals with mental illness established under the Protection and Advocacy for Mentally Ill Individuals Act (42 USC Chapter 114, Subchapter I) and [or] individuals with intellectual or developmental disabilities established under the Developmental Disabilities Assistance and Bill of Rights Act (42 USC Chapter 144, Subchapter I, Part C).

(E) The nursing facility that is granted a waiver by the state notifies residents of the facility and the resident representatives [(or, when appropriate, the guardians or legal representatives of the residents) and members of their immediate families] of the waiver.

(6) [(4)] Waiver of the requirement to provide services of a registered nurse for more than 40 hours a week in a Medicare skilled nursing facility (SNF).

(A) The secretary of the U.S. Department of Health and Human Services (secretary) may waive the requirement that a Medicare SNF provide the services of a registered nurse for more than 40 hours a week, including a director of nursing specified in paragraph (2) of this subsection, if the secretary finds that:

(i) the facility is located in a rural area and the supply of Medicare SNF services in the area is not sufficient to meet the needs of individuals residing in the area;

(ii) the facility has one full-time registered nurse who is regularly on duty at the facility 40 hours a week; and

(iii) the facility either has:

(I) only residents whose physicians have indicated (through physician's orders or admission notes) that they do not require the services of a registered nurse or a physician for a 48-hour period; or

(II) made arrangements for a registered nurse or a physician to spend time at the facility, as determined necessary by the physician, to provide necessary skilled nursing services on days when the regular full-time registered nurse is not on duty.

(B) The secretary provides notice of the waiver to the State Ombudsman and the protection and advocacy systems [system] in the state for individuals with mental illness established under the Protection and Advocacy for Mentally Ill Individuals Act (42 USC Chapter 114, Subchapter I) and [or] individuals with intellectual or developmental disabilities established under the Developmental Disabilities Assistance and Bill of Rights Act (42 USC Chapter 144, Subchapter I, Part C).

(C) The SNF that is granted a waiver [by the state] notifies residents of the facility and the resident representatives [(or, when appropriate, the guardians or legal representatives of the residents) and members of their immediate families] of the waiver.

(D) A waiver of the registered nurse requirement under subparagraph (A) of this paragraph is subject to annual renewal by the secretary.

(7) [(5)] Request for waiver concerning staffing levels. The facility must request a waiver through the local HHSC Regulatory Services Division, in writing, at any time the administrator determines that staffing will fall, or has fallen, below that required in paragraphs (1) and (2) of this subsection for a period of 30 days or more out of any 45 days.

(A) The following information must be included in the request [request/notification]:

(i) beginning date when facility was or is [was/is] unable to meet staffing requirements;

(ii) type waiver requested (24-hour licensed nurse or seven-day-per-week R. N.);

(iii) projected number of hours per month staffing reduced for 24-hour licensed nurse waiver or seven-day-per-week R.N. waiver; and

(iv) staffing adjustments made due to inability to meet staffing requirements.

(B) Waivers for licensed-only or certified facilities will be granted by HHSC Regulatory Services Division staff. Waivers for a Medicare SNF receive final approval from the CMS [Centers for Medicare and Medicaid Services].

(C) If a facility, after requesting a waiver, is later able to meet the staffing requirements of paragraphs (1) and (2) of this subsection, HHSC [Long Term] Regulatory Services Division staff must be notified, in writing, of the effective date that staffing meets requirements.

(D) Verification that the facility appropriately made a request and notification will be done at the time of survey.

(E) Amounts paid to Medicaid-certified facilities in the per diem payment to meet the staffing requirements of paragraphs (1) and (2) of this subsection may be adjusted if staffing requirements are not met.

(8) [(6)] Duration of waiver. Approved waivers are valid throughout the facility licensure or certification period, unless approval is withdrawn. During the relicensure or recertification survey, the determination is made for approval or denial for the next facility licensure or certification period if a waiver continues to be necessary. The facility requests a redetermination for a waiver from HHSC [Long-Term Care] Regulatory Services Division staff at the time the survey is scheduled. At other times if a request is made, HHSC staff may schedule a visit for waiver determination.

(9) [(7)] Requirements for waiver approval. To be approved for a waiver, the nursing facility must meet all of the requirements stated in this subchapter and the requirements specified throughout this chapter. In some instances, the survey agency may require additional conditions or arrangements such as:

(A) an additional licensed vocational nurse on day-shift duty when the registered nurse is absent;

(B) modification of nursing services operations; and

(C) modification of the physical environment relating to nursing services.

(10) [(8)] Denial or withdrawal of a waiver. Denial or withdrawal of a waiver may be made at any time if any of the following conditions exist:

(A) requirements for a waiver are not met on a continuing basis;

(B) the quality of resident care is not acceptable; or

(C) justified complaints are found in areas affecting resident care.

(11) [(9)] Requirement that SNFs be in a rural area. A SNF (Medicare) must be in a rural area for waiver consideration, as specified in paragraph (6) [(4)] of this subsection. A rural area is any area outside the boundaries of a standard metropolitan statistical area. Rural areas are defined and designated by the federal Office of Management

and Budget; are determined by population, economic, and social requirements; and are subject to revisions.

(b) Nurse staffing information.

(1) Data requirements. The facility must post the following information:

(A) on a daily basis:

(i) the facility name;

(ii) the current date;

(iii) the resident census; and

(iv) the specific shifts for the day; and

(B) at the beginning of each shift, the total number of hours and actual time of day to be worked by the following licensed and unlicensed nursing staff, including relief personnel directly responsible for resident care:

(i) RNs;

(ii) LVNs; and

(iii) CNAs.

(2) Posting requirements. The nursing facility must post the data described in paragraph (1) of this subsection:

(A) in a clear and readable format; and

(B) in a prominent place readily accessible to residents and visitors.

(3) Public access to posted nurse staffing data. The facility must, upon oral or written request, make copies of nurse staffing data available to the public for review at a cost not to exceed the community standard rate.

(4) Facility data retention requirements. The facility must maintain the posted daily nurse staffing data for the period of time specified by written facility policy or for at least two years following the last day in the schedule, whichever is longer.

#### §19.1010. Nursing Practices.

(a) A licensed [Licensed] nurse [nurses] must practice within the constraints of applicable state laws and regulations governing their practice, including the Nurse Practice Act, and must follow the guidelines contained in the facility's written policies and procedures.

(b) A nurse [Nurses] must enter, or approve and sign, nurses' notes in the following instances:

(1) at least monthly; and

(2) at the time of any physical complaints, accidents, incidents, and change in condition or diagnosis, and progress. All of these situations must be promptly recorded as exceptions and included in the clinical record.

(c) If permitted by written policies of the nursing facility, an RN or a physician's assistant may determine and pronounce a resident dead unless a resident is being supported by artificial means that preclude a determination that the resident's spontaneous respiratory and circulatory functions have ceased. The facility's nursing staff and the medical staff or consultant must have jointly developed and approved the policies. The policies must include the following requirements:

(1) The apparent death of a resident must be reported immediately to the attending physician, relatives, and any guardian or legal representatives.

(2) The body of a deceased resident must not be removed from the facility without a physician's or registered nurse's authorization. Telephone authorization is acceptable, if not in conflict with local regulations. Authorization by a justice of the peace, acting as a coroner, is sufficient when the attending or consulting physician or registered nurse is not available.

(3) A death that involves trauma, or unusual or suspicious circumstances, must be reported immediately, in accordance with local regulations, and to HHSC [DADS], in accordance with §19.602(g)(2) [§19.602(e)(2)] of this chapter (relating to Incidents of Abuse, [and] Neglect, and Exploitation Reportable to the Texas Health and Human Services Commission [Department of Aging and Disability (DADS)] and Law Enforcement Agencies by Facilities). Deaths must also be reported to HHSC [DADS] monthly, in accordance with §19.606 of this chapter (relating to Reporting of Resident Death Information).

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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For further information, please call: (210) 619-8292



## SUBCHAPTER L. FOOD AND NUTRITION SERVICES

**40 TAC §§19.1101, 19.1102, 19.1104, 19.1107 - 19.1111, 19.1113, 19.1116**

### STATUTORY AUTHORITY

The new sections and amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The new sections and amendments affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

*§19.1101. Food and Nutrition Services [Dietary Service].*

The facility must provide each resident with a nourishing, palatable, well-balanced diet that meets each resident's daily nutritional and special dietary needs, taking into consideration the preferences of each resident.

*§19.1102. Staffing.*

The facility must employ sufficient staff with the appropriate competencies and skill sets to carry out the functions of the food and nutrition services, taking into consideration resident assessments, individual plans of care, and the number, acuity, and diagnoses of the facility's resident population in accordance with the facility assessment required at §19.1931 of this chapter (relating to Facility Assessment). This includes:

(1) a qualified dietitian, either full-time, part-time, or on a consultant basis. A qualified dietitian:

(A) holds a bachelors' or higher degree granted by a regionally accredited college or university in the United States, or an equivalent foreign degree, with completion of the academic requirements of a program in nutrition or dietetics accredited by an appropriate national accreditation organization recognized for this purpose;

(B) has completed at least 900 hours of supervised dietetics practice under the supervision of a registered dietitian or nutrition professional; and

(C) is licensed as a dietitian by the state of Texas;

(2) a dietitian hired or contracted with before November 28, 2016, that does not meet the requirements in paragraph (1)(A) - (C) of this section must:

(A) be either:

(i) registered by the Commission on Dietetic Registration or;

(ii) licensed, or provisionally licensed, by the Texas Department of Licensing and Regulation with at least one year of supervisory experience in dietetic service of a health care facility; and

(B) meet the requirements in paragraph (1)(A) - (C) of this section by November 28, 2021;

(3) if a qualified dietitian is not employed full-time, the facility must designate a person to serve as the director of food and nutrition services who receives frequent scheduled consultations from a qualified dietitian and who:

(A) is a certified dietary manager;

(B) is a certified food service manager;

(C) has similar national certification for food service management and safety from a national certifying body; or

(D) has an associate's or higher degree in food service management or in hospitality, if the course study includes food service or restaurant management, from an accredited institution of higher learning;

(4) a director of food and nutrition services who is not a qualified dietitian and does not meet the requirements in paragraph (3)(A) - (D) of this section, and who was designated before November 28, 2016, must:

(A) be at least:

(i) an associate-in-arts graduate in nutrition and food service management;

(ii) a graduate of a dietetic technician or dietetic assistant training program approved by the Academy of Nutrition and Dietetics or the Association of Nutrition & Foodservice Professionals;

(iii) a person who has completed a state-agency-approved 90-hour course in food service supervision; or

(iv) a person who has training and experience in food service supervision and management in a military service equivalent in content to the programs in paragraph (3) of this section or clauses (i) - (iii) of this subparagraph and has had the person's training credentials evaluated and approved by the nutrition program specialist of the HHSC Regulatory Services Division; and

(B) meet one of the requirements in paragraph (3)(A) - (D) of this subsection by November 28, 2021.



(5) Support staff. The facility must provide sufficient support personnel to carry out the functions of the food and nutrition service.

§19.1104. *Dietary Consultant Requirements.*

(a) The facility must ensure a qualified dietitian is available as frequently and for such time as is necessary to assure each resident a diet that meets the daily nutritional and special dietary needs of each resident, based upon the acuity and clinical needs of the resident. The facility must ensure that monthly dietary consultant hours are provided, at a minimum, as follows:

- (1) facility population: 60 residents or under - eight hours;
- (2) facility population: each additional 30 residents or fraction thereof - additional four hours.

(b) To meet the consultant-hour requirement, time is accrued and counted exactly as rendered.

~~[(e) The qualified dietitian must be a part of the interdisciplinary team conducting assessment and care planning where indicated by the individual resident's needs.]~~

(c) ~~[(d)]~~ The facility must outline consultant services in a signed contract. This requirement does not apply to a facility that employs ~~[facilities which employ]~~ a qualified dietitian on the facility's [their] staff.

§19.1107. *Menus, ~~and~~ Nutritional Adequacy, and Meal Service.*

(a) Menus must:

(1) meet the nutritional needs of residents in accordance with established national guidelines [the recommended dietary allowances of the Food and Nutrition Board of the National Research Council, National Academy of Sciences];

(2) be prepared at least one week in advance;

(3) be written for each type of diet ordered in the facility, in accordance with the facility's diet manual;

(4) be written or completely evaluated for nutritional adequacy by the facility's qualified dietitian ~~[or consultant dietitian];~~

(5) vary from week to week, taking the general age-group of residents into consideration; ~~[and]~~

(6) be followed unless ~~[- Any]~~ substitutions are ~~[must be]~~ documented as required in subsection (d) of this section; ~~[-]~~

(7) reflect, based on a facility's reasonable effort, the religious, cultural, and ethnic needs of the resident population, as well as input received from residents and resident groups; and

(8) be updated periodically.

(b) A qualified dietitian may accept diet orders and changes from the physician.

(c) The facility must ensure that a current diet manual, approved by the qualified dietitian [facility dietitian or the consultant dietitian], is readily available to dietary service personnel and the supervisor of nursing service. To be current, the diet manual must be no more than five years old.

(d) The facility must retain records of menus served, including substitutions, and food purchased for 30 days. A list of residents receiving special diets and a record of their diets must be kept in the dietary area for at least 30 days.

(e) The facility must post the current week's menu:

(1) in the dietary department, including therapeutic diet menus, so employees responsible for purchasing, preparing, and serving foods can use it; and

(2) in a convenient location so the residents may see it.

(f) The dietary department must keep a seven-day supply of staple foods and a two-day supply of perishable foods at all times. The facility is allowed the flexibility to use food on hand to make substitutions at any interval as long as comparable nutritional value is maintained. Any substitution of menu items must be recorded on the day of use. ~~[See also §19.1719(e)(1) of this title (relating to Other Rooms and Areas) for information concerning storage areas.]~~

(g) Accommodation of a resident's ~~[resident]~~ needs. The facility must provide:

(1) table service for all who can and will eat at the table, including a resident who uses a wheelchair [residents];

(2) firm supports, such as over-bed tables, for serving trays to a resident who is bedfast [residents];

(3) sturdy tray stands of proper height to a resident [residents] able to be out of bed for the resident's [their] meals;

(4) special eating equipment and utensils for a resident [residents] who needs [need] them and appropriate assistance to ensure that the resident can use the assistive devices when consuming meals and snacks; and

(5) prompt assistance for a resident [residents] who needs [need] help eating.

(h) An identification system, such as tray cards, must be available to ensure that all diets are served in accordance with physician's orders.

(i) Nothing in this section limits a resident's right to make personal dietary choices.

§19.1108. *Food and Drink.*

Each resident must receive and the facility must provide:

(1) food prepared in accordance with established professional food preparation practices and by methods that conserve nutritive value, flavor, and appearance;

(2) adequate amounts of food and drink that is palatable, attractive, and at a safe and appetizing [the proper] temperature;

(3) food prepared in a form designed to meet individual needs;

(4) appealing options [substitutes] of similar nutritive value to a resident ~~[residents]~~ who chooses not to eat food that is initially served or who requests a different meal choice; [refuse food served; and]

(5) food that is prepared and served on schedule; ~~[-]~~

(6) food that accommodates resident allergies, intolerances, and preferences; and

(7) drinks, including water and other liquids, consistent with a resident's needs and preferences, and sufficient to maintain resident hydration.

§19.1109. *Food Intake.*

Food intake of a resident [residents] must be monitored and recorded as follows.

(1) Deviations from normal food and fluid intake must be recorded in the clinical records in accordance with

§19.1911(b)(16)(E)[- See also §19.1911(12)(B)(vi)] of this chapter [title] (relating to Contents of the Clinical Record) [for information concerning dietary intake and clinical records].

(2) In-between meals and bedtime snacks, and supplementary feedings, either as a part of the overall care plan or as ordered by a physician, including caloric-restricted diets, must be documented using the point, percentage, or other system consistently facility-wide. [See also §19.1911(12)(B)(vi) of this title (relating to Contents of the Clinical Record) for information concerning dietary intake and clinical records.]

§19.1110. Frequency of Meals.

(a) Each resident must receive [receives] and the facility must provide [provides] at least three meals daily, at regular times comparable to normal mealtimes in the community or in accordance with a resident's needs, preferences, requests, and care plan.

(b) There must be not more than 14 hours between a substantial evening meal and breakfast the following day, except when a nourishing snack is served at bedtime, up to 16 hours may elapse between a substantial evening meal and breakfast the following day if a resident group agrees to this meal span [as provided in subsection (d) of this section].

(c) Suitable, nourishing alternative meals and snacks must be provided to a resident who wants to eat at non-traditional times or outside of scheduled meal service times, consistent with the resident's plans of care.

[(e) The facility must offer snacks at bedtime daily. Routine snacks that are not ordered by the physician and are not part of the plan of care do not need to be documented as accepted or rejected.]

[(d) When a nourishing snack is provided at bedtime, up to 16 hours may elapse between a substantial evening meal and breakfast the following day, if a resident group agrees to this meal span and a nourishing snack is served.]

§19.1111. Food Safety Requirements [Sanitary Conditions].

(a) The facility must[:]

[(+) procure food from sources approved or considered satisfactory by federal, state, and local authorities. [:]

(1) The facility may include food items obtained directly from local producers, subject to applicable State and local laws or regulations.

(2) This section does not prohibit or prevent a facility from using produce grown in facility gardens, subject to compliance with applicable safe growing and food handling practices.

(3) This section does not preclude a resident from consuming foods not procured by the facility.

(b) [(2)] The facility must store, prepare, and serve food under sanitary conditions, as required by the Texas Department of State Health Services food service sanitation requirements. [: and]

(c) [(3)] The facility must dispose of garbage and refuse properly. [See also §19.318(j)-(l) of this title (relating to Other Rooms and Areas) for information concerning dietary physical plant.]

(d) The facility must have a written policy regarding use and storage of foods brought to a resident by family and other visitors to ensure safe and sanitary storage, handling, and consumption.

(e) [(b)] Dietary service personnel must be in good health and practice hygienic food-handling techniques. Persons with symptoms of communicable diseases or open, infected wounds may not work.

(f) [(e)] Dietary service personnel must wear clean, washable garments, wear hair coverings or clean caps, and have clean hands and fingernails.

(g) [(d)] The facility and all food service personnel must meet the standards imposed by local, state, and federal codes regarding food and food handling. [Routine health examinations must meet all local, state, and federal codes for food service personnel.]

§19.1113. Paid Feeding Assistants.

(a) State-approved training course. The facility may use a paid feeding assistant, if the paid feeding assistant has successfully completed a state-approved training course that meets the requirements of §19.1115 of this subchapter [chapter] (relating to Requirements for Training of Paid Feeding Assistants) before feeding a resident. [residents. The facility must not use any individual working in the facility as a paid feeding assistant unless that individual has successfully completed the state-approved training course for paid feeding assistants.]

(b) Supervision. A paid feeding assistant must work under the supervision of an RN or an LVN [a registered nurse or a licensed vocational nurse]. In an emergency, a paid feeding assistant must call a supervisory nurse for help. A paid feeding assistant can only feed a resident [residents] in the dining room.

(c) Resident selection criteria.

(1) The facility must ensure that a paid feeding assistant provides dining assistance only for a resident [only feed residents] who has [have] no complicated feeding problems, which include difficulty swallowing, recurrent lung aspirations, and tube or parenteral/IV feedings.

(2) The facility must base resident selection on the interdisciplinary team's [charge nurse's] assessment and the resident's latest assessment and care plan [of care]. A resident's comprehensive care plan must reflect the resident's appropriateness for a paid feeding assistant.

§19.1116. Therapeutic Diets.

If a resident requires a therapeutic diet, the attending physician must prescribe the therapeutic diet, unless the physician delegates this task to a qualified dietitian, to the extent allowed by Texas law.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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SUBCHAPTER L. DIETARY SERVICES

40 TAC §19.1102, §19.1103

STATUTORY AUTHORITY

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and

Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The repeals affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

§19.1102. *Staffing.*

§19.1103. *Sufficient Staffing.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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## SUBCHAPTER M. PHYSICIAN SERVICES

### 40 TAC §§19.1201 - 19.1203, 19.1205

#### STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The amendments affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

§19.1201. *Physician Services.*

A physician must personally approve in writing a recommendation that an individual be admitted to a facility. Each resident must remain under the care of a physician. A physician, physician assistant, or advanced practice registered nurse must provide orders for the resident's immediate care and needs. The facility must ensure that:

(1) the medical care and other health care of each resident is supervised by an attending physician. Any consultations must be ordered by the attending physician;

(2) another physician supervises the medical care and other health care of a resident [residents] when the resident's [their] attending physician is unavailable; and

(3) if a child is [children are] admitted to the facility:

(A) appropriate pediatric consultative services are utilized, in accordance with the comprehensive assessment and care plan [of care]; and

(B) a pediatrician or other physician with training or expertise in the clinical care of children with complex medical needs participates in all aspects of the medical care.

§19.1202. *Physician Visits.*

The physician must:

(1) review, revise, if necessary, [and/or revise] and sign orders relating to the resident's total program of care, including medications and treatments, according to the visit schedule required by §19.1203(2) of this subchapter [title] (relating to Frequency of Physician Visits);

(2) write, sign, and date progress notes at each visit;

(3) sign and date all orders, with the exception of influenza and pneumococcal vaccines, which may be administered per physician's standing order after an assessment for contraindications;

(4) write, sign, and date a physician's discharge summary within 20 working days [workdays] of being notified by the facility of the discharge, except as specified in §19.1912(e) of this chapter [title] (relating to Additional Clinical Record Service Requirements), if the resident has been temporarily discharged for 30 days or less, and readmitted to the same facility; and

(5) provide documentation in the clinical record as specified in §19.1911 and §19.1912 of this chapter [title] (relating to Contents of the Clinical Record and Additional Clinical Record Service Requirements).

§19.1203. *Frequency of Physician Visits.*

Physician visits must conform to the following schedule:

(1) Licensed-only facility. Each resident must have a medical examination at least annually by the resident's [his] physician and as necessary to meet the needs of the resident. Physician orders must be reviewed and revised as necessary at least once every 60 days, unless the resident's physician specifies, in writing in the resident's clinical record, a different schedule for each review and revision.

(2) Medicaid-certified facilities and Medicare skilled nursing facilities.

(A) The resident must be seen by a physician at least once every 30 days for the first 90 days after admission, and at least once every 60 days thereafter.

(B) A physician visit is considered timely if it occurs not later than ten days after the date the visit was required.

(C) Except as provided in paragraph (3) of this section and §19.1205(c) of this subchapter [title] (relating to Physician Delegation of Tasks), all required visits must be made by the physician personally.

(3) Medicare skilled nursing facilities. At the option of the physician, required visits in Medicare skilled nursing facilities after the initial visit may alternate between personal visits by the physician and visits by a physician assistant or an advanced practice registered nurse[; nurse practitioner, or clinical nurse specialist] in accordance with §19.1205 of this subchapter [title (relating to Physician Delegation of Tasks)].

§19.1205. *Physician Delegation of Tasks.*

(a) In a Medicare skilled nursing facility (SNF), except as specified in subsection (b) of this section, a physician may delegate tasks to a physician assistant, or an advanced practice registered nurse [nurse practitioner, or clinical nurse specialist] who:

{(1) meets the applicable definition in 42 Code of Federal Regulations §491.2 (see §19.101 of this title (relating to Definitions)) or in the case of a clinical nurse specialist, is licensed as such by the state;}

(1) {(2)} is acting within the scope of practice as defined by state law; and

(2) {(3)} is under the supervision of the physician.

(b) In a Medicare SNF, a physician may not delegate a task when the regulations specify that the physician must perform it personally, or when the delegation is prohibited under state law or by the facility's own policies.

(c) In a Medicaid nursing facility, any required physician task may also be satisfied when performed by an advanced practice registered nurse [a nurse practitioner, clinical nurse specialist,] or physician assistant who is not an employee of the facility but who is working in collaboration with a physician. Services must be provided in the context of applicable state laws, rules, and regulations governing the practice of an advanced practice registered nurse [nurse practitioners, clinical nurse specialists,] and physician assistants.

(d) A physician may delegate the task of writing dietary orders to a qualified dietitian who:

- (1) is acting within the scope of practice; and
- (2) is under the supervision of the physician.

(e) A physician may delegate the task of writing therapy orders to a qualified therapist who:

- (1) is acting within the scope of practice; and
- (2) is under the supervision of the physician.

(f) [(d)] The physician assistant or advanced practice registered nurse [extender] providing care to a pediatric resident must have training and expertise in the care of children with complex medical needs.

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## SUBCHAPTER O. DENTAL SERVICES

### 40 TAC §19.1401

#### STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The amendment affects Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

§19.1401. *Dental Services.*

(a) The facility must assist a resident [residents] in obtaining routine and 24-hour emergency dental care.

(1) At the time of admission, the facility must obtain the name of the resident's preferred dentist and record the name in the clinical record.

(2) At least annually, the facility must ask each resident and resident representative [~~and/or responsible party~~] if the resident desires [~~they desire~~] a dental examination at the resident's expense.

(3) The facility must make all reasonable efforts to arrange for a dental examination for each resident who desires one.

(4) The facility is not liable for the cost of the resident's dental care.

(5) Licensed-only facilities must maintain a list of local dentists for a resident [residents] who requires a dentist [require one].

(b) Medicaid-certified facilities also must provide or obtain from an outside resource, in accordance with §19.1906 of this chapter [title] (relating to Use of Outside Resources), the following dental services to meet the needs of each resident:

(1) Emergency [emergency] dental services, which are limited to procedures necessary to control bleeding, relieve pain, and eliminate acute infection; operative procedures which are required to prevent the imminent loss of teeth; treatment of injuries to the teeth or supporting structures.

(A) Covered emergency dental procedures include[; ~~but are not limited to~~]:

(i) alleviation of extreme pain in oral cavity associated with serious infection or swelling;

(ii) repair of damage from loss of tooth due to trauma (acute care only, no restoration);

(iii) open or closed reduction of fracture of the maxilla or mandible;

(iv) repair of laceration in or around oral cavity;

(v) excision of neoplasms, including benign, malignant and premalignant lesions, tumors and cysts;

(vi) incision and drainage of cellulitis;

(vii) root canal therapy, for which payment [Payment] is subject to dental necessity review and pre- and post-operative x-rays are required; and

(viii) extractions: single tooth, permanent; single tooth, primary; supernumerary teeth; soft tissue impaction; partial bony impaction; complete bony impaction; surgical extraction of erupted tooth or residual root tip.

(B) Routine restorative procedures are not considered emergency procedures. Dental services not covered include[; ~~but are not limited to~~]:

(i) cleaning;

(ii) filling teeth with amalgam composite, glass ionomer, or any other restorative material;

(iii) cast or preformed crowns (capping);

(iv) restoration of carious or noncarious permanent or primary teeth, including those requiring root canal therapy;

(v) replacement or repositioning of teeth;

(vi) services to the alveolar ridges or periodontium of the maxilla and the mandible, except for procedures covered under subparagraph (A) of this paragraph; and

(vii) complete or partial dentures.

(2) Assistance [assistancē] to the resident, if necessary:

(A) in making appointments; and

(B) by arranging for transportation to and from the dentist's office.

(3) Prompt [prompt] referral, within three days, of a resident [residents] with lost or damaged dentures for dental services. If a referral does not occur within three days, the facility must provide documentation of what they did to ensure the resident could still eat and drink adequately while awaiting dental services and the extenuating circumstances that led to the delay [to a dentist].

(4) Coordination [eoordination] of dental services for pediatric residents age 12 months to 21 years, in accordance with Texas Health Steps (THSteps) [Early and Periodic Screening, Diagnosis, and Treatment (EPSDT)] guidelines.

(c) The facility must have a written policy identifying those circumstances when the loss or damage of dentures is the facility's responsibility and may not charge a resident for the loss or damage of dentures determined in accordance with facility policy to be the facility's responsibility.

(d) [(e)] Medicaid-certified facilities are not required to provide routine dental services.

(e) [(d)] Payment for services provided on the teeth, gums, alveolar ridges, and supporting structures are not a benefit of the Texas Medicaid Program; however, recipients with applied income may use incurred medical expenses to pay for routine dental services and appliances.

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## SUBCHAPTER P. PHARMACY SERVICES

### 40 TAC §19.1501

#### STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The amendment affects Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

§19.1501. *Pharmacy Services.*

A licensed-only facility must assist the resident in obtaining routine drugs and biologicals and make emergency drugs readily available, or

obtain them under an agreement described in §19.1906 of this chapter [title] (relating to Use of Outside Resources). A Medicaid-certified facility must provide routine and emergency drugs and biologicals to its residents, or obtain them under an agreement described in §19.1906 of this chapter [title (relating to Use of Outside Resources)]. See also §19.901(12) and (13) of this title (relating to Quality of Care) for information concerning drug therapy and medication errors].

(1) Methods and procedures. The facility may permit unlicensed personnel to administer drugs, but only under the general supervision of a licensed nurse. The unlicensed individual must be a nursing student, a medication aide student, or a medication aide with a current permit issued by HHSC [the Texas Department of Human Services].

(2) Accuracy in service delivery. A facility must provide pharmaceutical services (including procedures that assure the accurate acquiring, receiving, dispensing, and administering of all drugs and biologicals) to meet the needs of each resident.

(3) Service consultation. The facility must employ or obtain the services of a pharmacist, currently licensed by the Texas State Board of Pharmacy and in good standing, who:

(A) provides consultation on all aspects of the provision of pharmacy services in the facility;

(B) establishes a system of records of receipt and disposition of all controlled drugs in sufficient detail to enable an accurate reconciliation;

(C) determines that drug records are in order and that an account of all controlled drugs is maintained and periodically reconciled; and

(D) adheres to requirements in §19.1503 of this subchapter [title] (relating to Additional Supervision and Consultation Requirements).

(4) Drug regimen review.

(A) The drug regimen of each resident must be reviewed at least once a month by a licensed pharmacist. The consultant pharmacist's drug regimen review must be maintained in the resident's clinical record. This review must include a review of the resident's medical chart.

(B) A psychotropic drug is any drug that affects brain activities associated with mental processes and behavior. Psychotropic drugs include psychoactive medications as defined in §19.1207 of this chapter (relating to Prescription of Psychoactive Medication). These drugs include drugs in the following categories:

(i) anti-psychotic;

(ii) anti-depressant;

(iii) anti-anxiety; and

(iv) hypnotic.

(C) [(B)] The pharmacist must report any irregularities to the attending physician and the director of nursing, and these reports must be acted upon.

(i) Irregularities include any drug that meets the criteria set forth in paragraph (5) of this subsection.

(ii) Any irregularities noted by the pharmacist during this review must be documented on a separate, written report that is sent to the attending physician and the facility's medical director and director of nursing and lists the resident's name, the relevant drug, and the irregularity the pharmacist identified.

(iii) The attending physician must document in the resident's clinical record that the identified irregularity has been reviewed and what, if any, action has been taken to address it. If there is to be no change in the medication, the attending physician must document the physician's rationale in the resident's clinical record.

(D) The facility must develop and maintain written policies and procedures for the monthly drug regimen review that include time frames for the different steps in the process and steps the pharmacist must take when the pharmacist identifies an irregularity that requires urgent action to protect the resident.

(5) Unnecessary Drugs. Each resident's drug regimen must be free from unnecessary drugs. An unnecessary drug is any drug when used:

(A) in excessive dose (including duplicate drug therapy);

(B) for excessive duration;

(C) without adequate monitoring;

(D) without adequate indications for its use;

(E) in the presence of adverse consequences which indicate the dose should be reduced or discontinued; or

(F) in any combination of the reasons stated in subparagraphs (A) - (E) of the paragraph.

(6) Psychotropic drugs. Based on a comprehensive assessment of a resident, the facility must ensure that:

(A) a resident who has not used psychotropic drugs is not given these drugs unless the medication is necessary to treat a specific condition as diagnosed and documented in the resident's clinical record;

(B) a resident who uses psychotropic drugs receives gradual dose reductions and behavioral interventions, unless clinically contraindicated, in an effort to discontinue use of these drugs;

(C) a resident does not receive psychotropic drugs pursuant to a PRN order unless that medication is necessary to treat a diagnosed specific condition that is documented in the resident's clinical record; and

(D) PRN orders for psychotropic drugs are limited to 14 days. Except as provided in subparagraph (E) of this paragraph, if the attending physician or prescribing practitioner believes that it is appropriate for the PRN order to be extended beyond 14 days, the physician must document the rationale in the resident's clinical record and indicate the duration for the PRN order.

(E) PRN orders for anti-psychotic drugs are limited to 14 days and cannot be renewed unless the attending physician or prescribing practitioner evaluates the resident for the appropriateness of the medication.

(7) Medication errors. The facility must ensure that:

(A) the medication error rates are not 5 percent or greater; and

(B) the residents are free of any significant medication errors.

(8) [(5)] Labeling of drugs and biologicals. Drugs and biologicals used in the facility must be labeled in accordance with currently accepted professional principals and in compliance with the state laws and regulations [Texas State Board of Pharmacy Laws and Regu-

lations, §291], including the appropriate accessory and cautionary instructions and the expiration date when applicable.

(9) [(6)] Storage of drugs and biologicals.

(A) In accordance with state and federal laws, the facility must store all drugs and biologicals in locked compartments under proper temperature controls and permit only authorized personnel to have access to the keys.

(B) The facility must provide separately locked, permanently affixed compartments for storage of controlled drugs, listed in Schedule II of the Comprehensive Drug Abuse Prevention and Control Act of 1976, and of other drugs subject to abuse, except when the facility uses single-unit-package drug distribution systems in which the quantity stored is minimal and a missing dose can be readily detected [(see §19.1509 of this title (relating to Controlled Substances))].

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## SUBCHAPTER Q. INFECTION CONTROL

### 40 TAC §19.1601

#### STATUTORY AUTHORITY

The amendment is authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The amendment affects Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

§19.1601. *Infection Control.*

(a) General. [Infection Control Program.] The facility must establish and maintain an infection prevention and control program designed to provide a safe, sanitary, and comfortable environment and to help prevent the development and transmission of communicable diseases [disease] and infections. [infection, including influenza, pneumococcal pneumonia, and tuberculosis. Under the program, the facility must:]

[(1) investigate, control, and prevent infections in the facility;]

[(2) decide what procedures, such as isolation, should be applied to an individual resident; and]

[(3) maintain a record of incidents and corrective actions related to infections.]

(b) Infection prevention and control program (IPCP). The facility must establish an IPCP and conduct an annual review, effective

November 28, 2019, of the IPCP and update the program, as necessary. The Quality Assessment and Assurance Committee, as described in §19.1917 of this chapter (relating to Quality Assessment and Assurance) monitors the IPCP. The IPCP must include:

(1) a system for preventing, identifying, reporting, investigating, and controlling infections and communicable diseases for all residents, staff, volunteers, visitors, and other individuals providing services under a contractual arrangement based upon the facility assessment conducted according to §19.1931 of this chapter (relating to Facility Assessment), and following accepted national standards;

(2) written standards, policies, and procedures for the program, which must include:

(A) a system of surveillance designed to identify possible communicable diseases or infections before they can spread to other persons in the facility;

(B) when and to whom possible incidents of communicable diseases or infections should be reported;

(C) standard and transmission-based precautions to be followed to prevent spread of infections;

(D) when and how isolation should be used for a resident; including:

(i) the type and duration of the isolation, depending upon the infectious agent or organism involved; and

(ii) a requirement that the isolation should be the least restrictive possible for the resident under the circumstances;

(E) the circumstances under which the facility must prohibit employees with a communicable disease or infected skin lesions from direct contact with a resident or a resident's food, if direct contact will transmit the disease; and

(F) the hand hygiene procedures to be followed by staff involved in direct resident contact;

(3) an antibiotic stewardship program that includes antibiotic use protocols and a system to monitor antibiotic use;

(4) a system for recording incidents identified under the facility's IPCP and the corrective actions taken by the facility; and

(5) acceptable accommodations for a resident with a communicable disease according to current practices and policies for infection control.

(c) Infection preventionist. Effective November 28, 2019, the facility must designate one or more individuals as the infection preventionist (IP) who is responsible for the facility's IPCP. The individual designated as the IP, or at least one of the individuals if there is more than one IP, must be a member of the facility's Quality Assessment and Assurance Committee and report to the committee on the IPCP on a regular basis. The IP must:

(1) have primary professional training in nursing, medical technology, microbiology, epidemiology, or other related field;

(2) be qualified by education, training, experience or certification;

(3) work at least part-time at the facility; and

(4) have completed specialized training in infection prevention and control.

~~[(b) Preventing spread of infection.]~~

~~[(1) If the facility determines in accordance with its infection control program, that a resident needs isolation to prevent the spread of infection, the facility must isolate the resident. Residents with communicable disease must be provided acceptable accommodations according to current practices and policies for infection control. See §19.1(b)(4)(I) of this title (relating to Basis and Scope) for information concerning the Centers for Disease Control and Prevention (CDC) guidelines.]~~

~~[(2) The facility must prohibit employees with a communicable disease or infected skin lesions from direct contact with residents or their food, if direct contact will transmit the disease.]~~

~~[(3) The facility must require staff to wash their hands after each direct resident contact for which handwashing is indicated by accepted professional practice.]~~

~~[(4) The name of any resident with a reportable disease as specified in Title 25, Chapter 97, Subchapter A (relating to Control of Communicable Diseases) must be reported immediately to the city health officer, county health officer, or health unit director having jurisdiction, and appropriate infection control procedures must be implemented as directed by the local health authority.]~~

~~(d) [(e)] Communicable Diseases.~~

~~(1) Policies. The facility must have and implement written policies for the control of communicable diseases in employees and residents and must maintain evidence of compliance with local and state health codes and ordinances regarding employee and resident health status.~~

~~(2) Reporting. The name of any resident with a reportable disease as specified in Title 25, Chapter 97, Subchapter A (relating to Control of Communicable Diseases), must be reported immediately to the city health officer, county health officer, or health unit director having jurisdiction, and appropriate infection control procedures must be implemented as directed by the local health authority.~~

~~(3) [(d)] Tuberculosis.~~

~~(A) [(1)] The facility must conduct and document an annual review that assesses the facility's current risk classification according to the current CDC Guidelines for Preventing the Transmission of Mycobacterium Tuberculosis in Health Care Settings.~~

~~(B) [(2)] The facility must screen all employees before providing services in the facility, according to CDC guidelines. The facility must require all persons providing services under an outside resource contract to provide evidence of a current tuberculosis screening prior to providing services in the facility. The facility must document or keep a copy of the evidence provided.~~

~~(C) [(3)] If the facility determines or suspects that an employee or person providing services under an outside resource contract has been exposed to or has a positive screening for a communicable disease, the facility must respond according to the current CDC guidelines and keep documentation of the action taken.~~

~~(D) [(4)] If the facility determines that an employee or a person providing services under an outside resource contract has been exposed to a communicable disease, the facility must conduct and document a reassessment of the risk classification. The facility must conduct and document subsequent screening based upon the reassessed risk classification.~~

~~(E) [(5)] The facility must screen all residents at admission in accordance with the attending physician's recommendations and current CDC guidelines. If the facility determines or suspects that a resident has been exposed to a communicable disease or has a posi-~~

tive screening, the facility must respond according to the current CDC guidelines and attending physician's recommendations, and keep documentation of the response.

(e) Vaccinations.

(1) A [Effective September 1, 2012, a] facility must develop and implement a written policy to protect a resident from vaccine preventable diseases in accordance with Texas Health and Safety Code, Chapter 224.

(A) The policy must:

(i) require an employee, contractor, or other individual with privileges providing direct care to a resident to receive vaccines for the vaccine preventable diseases specified by the facility based on the level of risk the employee, contractor, or other individual presents to residents by the employee's, contractor's, or other individual's routine and direct exposure to residents;

(ii) specify the vaccines an employee, contractor, or other individual with privileges to provide direct resident care is required to receive in accordance with clause (i) of this subparagraph;

(iii) include procedures for the facility to verify that an employee, contractor, or other individual with privileges to provide direct resident care has complied with the policy;

(iv) include procedures for the facility to exempt an employee, contractor, or other individual with privileges to provide direct resident care from the required vaccines for the medical conditions identified as contraindications or precautions by the CDC;

(v) for an employee, contractor, or other individual with privileges to provide direct resident care who is exempt from the required vaccines, include procedures the employee, contractor, or other individual must follow to protect residents from exposure to vaccine preventable diseases, such as the use of protective equipment, such as gloves and masks, based on the level of risk the employee, contractor, or other individual presents to residents by the employee's, contractor's, or other individual's routine and direct exposure to residents;

(vi) prohibit discrimination or retaliatory action against an employee, contractor, or other individual with privileges to provide direct resident care who is exempt from the required vaccines for the medical conditions identified as contraindications or precautions by the CDC, except that required use of protective medical equipment, such as gloves and masks, may not be considered retaliatory action;

(vii) require the facility to maintain a written or electronic record of each employee's, contractor's, or other individual's compliance with or exemption from the policy; and

(viii) include disciplinary actions the facility may take against an employee, contractor, or other individual with privileges to provide direct resident care who fails to comply with the policy.

(B) The policy may:

(i) include procedures for an employee, contractor, or other individual with privileges to provide direct resident care to be exempt from the required vaccines based on reasons of conscience, including [a] religious beliefs; and

(ii) prohibit an employee, contractor, or other individual with privileges to provide direct resident care who is exempt from the required vaccines from having contact with residents during a public health disaster, as defined in Texas Health and Safety Code, §81.003 (relating to Definitions).

(2) A facility must offer vaccinations to a resident [residents] in accordance with an immunization schedule adopted by the Advisory Committee on Immunization Practices of the CDC.

(A) Pneumococcal vaccinations for residents. The facility must offer pneumococcal vaccination to a resident 65 years of age or older who has not received the vaccination and to a resident younger than 65 years of age, who has not received the vaccination but is a candidate for it because of chronic illness. A pneumococcal vaccination must be offered to a current resident of a facility and to a new resident at the time of admission. A vaccination must be completed unless a physician has indicated that the vaccination is medically contraindicated or the resident refuses the vaccination. The facility must develop and implement policies and procedures to ensure that:

(i) before offering the pneumococcal immunization, each resident or resident representative receives education regarding the benefits and potential side effects of the pneumococcal vaccination;

(ii) each resident is offered a pneumococcal immunization, unless the immunization is medically contraindicated or the resident has already been immunized;

(iii) the resident or the resident representative has the opportunity to refuse immunization; and

(iv) the resident's clinical record includes documentation that indicates:

(I) that the resident or the resident representative was provided education regarding the benefits and potential side effects of pneumococcal immunization;

(II) that the resident either received the pneumococcal immunization or did not receive the pneumococcal immunization due to medical contraindication or refusal; and

(III) the date of the receipt or refusal of the pneumococcal vaccination.

~~{(i) The facility must develop and implement policies and procedures to ensure that the resident or resident's legal representative receives education regarding the benefits and potential side effects of the pneumococcal vaccination. When a pneumococcal vaccination is offered, the facility must show in the resident medical record that this was provided.}~~

(v) [(ii)] Based on an assessment and practitioner recommendation, a second pneumococcal vaccination may be given five years after the first pneumococcal vaccination, unless medically contraindicated or the resident or the resident [resident's legal] representative refuses the second vaccination.

(B) Influenza vaccinations for residents and employees. The facility must offer an influenza vaccination [vaccinations] to a resident [residents] and an employee [employees] in contact with residents, unless the vaccination is medically contraindicated by a physician or the employee or resident has refused the vaccination.

(i) Influenza vaccinations for all residents and employees in contact with a resident [residents] must be completed by November 30 of each year. Employees hired or residents admitted after this date and during the influenza season (through March of each year) must receive influenza vaccinations, unless medically contraindicated by a physician or the employee, the resident, or the resident [resident's legal] representative refuses the vaccination.

(ii) The facility must develop and implement policies and procedures that ensure that: [the resident or resident's legal representative receives education regarding the benefits and potential side effects of the influenza vaccination. When an influenza vaccina-



tion is offered, the facility must show in the resident medical record that this education was provided.]

(I) before offering the influenza immunization, each resident or resident representative receives education regarding the benefits and potential side effects of the influenza vaccination; and

(II) the resident's clinical record includes documentation that indicates:

(-a-) that the resident or the resident representative was provided education regarding the benefits and potential side effects of influenza immunization;

(-b-) that the resident either received the influenza immunization or did not receive the influenza immunization due to medical contraindications or refusal; and

(-c-) the date of the receipt or refusal of the annual influenza vaccination.

(C) Hepatitis B vaccinations for employees. The facility must develop a method to identify employees at risk of directly contacting blood or potentially infectious materials. The facility must offer an employee identified as being at risk of directly contacting blood or potentially infectious materials a hepatitis B vaccine within 10 days of employment. If the employee initially declines the hepatitis B vaccination but at a later date, while still at risk of directly contacting blood or potentially infectious materials, decides to accept the vaccination, the facility must make the vaccination available within 10 days after the employee decides to accept that vaccination.

~~{(D) Documentation of receipt, refusal, or contraindication of vaccination.}~~

~~{(i) Except as provided in clause (ii) of this subparagraph, the medical record for each resident must show the date of the receipt or refusal of the annual influenza vaccination and the pneumococcal vaccination.}~~

~~{(ii) If a resident does not receive or refuse a vaccination, the resident's medical record must show the resident did not receive the annual influenza vaccination or the pneumococcal vaccination due to a medical contraindication.}~~

(f) Linens. Personnel must handle, store, process, and transport linens so as to prevent the spread of infection and in accordance with §19.325 of this chapter (relating to Linen).

(g) The Quality Assessment and Assurance Committee as described in §19.1917 of this chapter (relating to Quality Assessment and Assurance) will monitor the Infection Prevention and Control Program [infection control program].

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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## SUBCHAPTER T. ADMINISTRATION

**40 TAC §§19.1901, 19.1902, 19.1908 - 19.1912, 19.1915, 19.1917, 19.1929, 19.1931**

## STATUTORY AUTHORITY

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The amendments affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

### §19.1901. Administration.

A nursing facility must be administered in a manner that enables it to use its resources effectively and efficiently to attain or maintain the highest practicable physical, mental, and psychosocial well-being of each resident.

(1) Licensure. A nursing facility (NF) must be licensed by HHSC [the Texas Department of Human Services (DHS)] as described in §19.201 of this chapter [it]e (relating to Criteria for Licensure).

(2) Compliance with federal, state, and local laws and professional standards. The facility must operate and provide services in compliance with all applicable federal, state, and local laws, regulations, and codes, and with accepted professional standards and principles that apply to professionals providing services in such a facility.

(3) Medicaid-certified facilities' relationship to other Health and Human Services regulations.

(A) In addition to compliance with the regulations set forth in this chapter [these Nursing Facility Requirements for Licensure and Certification], as Medicaid providers, facilities are obliged to meet the applicable provisions of other federal regulations, including [but not limited to] those pertaining to:

(i) nondiscrimination on the basis of race, color, or national origin (45 CFR [Code of Federal Regulations], Part 80);<sup>2</sup><sub>3</sub>

(ii) nondiscrimination on the basis of disability [handicap] (45 CFR [Code of Federal Regulations], Part 84);<sup>2</sup><sub>3</sub>

(iii) nondiscrimination on the basis of age (45 CFR [Code of Federal Regulations], Part 91);<sup>2</sup><sub>3</sub>

(iv) nondiscrimination on the basis of race, color, national origin, sex, age, or disability (45 CFR, Part 92);

(v) protection of human subjects of research (45 CFR [Code of Federal Regulations], Part 46);<sup>2</sup><sub>3</sub> and

(vi) protection from fraud and abuse (42 CFR [Code of Federal Regulations], Part 455); and

(vii) protection of individually identifiable health information (45 CFR, Parts 160 and 164).

(B) Although the [these] regulations listed in subparagraph (A) of this paragraph are not in themselves considered requirements under 42 CFR, Part [Code of Federal Regulations] 483, their violation may result in the termination or suspension of payment with federal funds, or the refusal to grant or continue payment with federal funds.

### §19.1902. Governing Body.

(a) The facility must have a governing body, or designated persons functioning as a governing body that is legally responsible for establishing and implementing policies regarding the management and operation of the facility. The governing body must have periodically

updated written policies and procedures that are formally adopted and dated, specifying and governing all services. The policies and procedures must be available to all of the facility's governing body's members, staff, residents, family or resident [legal] representatives [of residents], and the public. The governing body must:

(1) designate a person to exercise the administrator's authority when the facility does not have an administrator. The facility must secure a licensed nursing home administrator within 30 days; and

(2) ensure that a person designated as being in authority notifies HHSC [the Texas Department of Human Services] immediately when the facility does not have an administrator.

(b) The governing board appoints and the [The] facility must operate under the supervision of a nursing facility administrator who is:

(1) licensed by the Texas Board of Nursing Facility Administrators;

(2) responsible for management of the facility; [and]

(3) required to work at least 40 hours per week on administrative duties; and [-]

(4) accountable to and who reports to the governing body for the overall management of the facility.

~~[(c) The administrator must be accountable to the governing body for overall management of the nursing facility.]~~

#### §19.1908. Laboratory Services.

(a) The facility must provide or obtain clinical laboratory services to meet the needs of its residents. The facility is responsible for the quality and timeliness of the services.

(1) If the facility provides its own laboratory services, the services must meet the applicable requirements [conditions] for [coverage of the services furnished by] laboratories specified in 42 CFR [Code of Federal Regulations], Part 493.

(2) If the facility provides blood bank and transfusion services, it must meet the applicable requirements for laboratories specified in 42 CFR [Code of Federal Regulations], Part 493.

(3) If the laboratory chooses to refer specimens for testing to another laboratory, the referral laboratory must be certified [approved or licensed to test specimens] in the appropriate specialties or [and/or] subspecialties of services in accordance with 42 CFR [Code of Federal Regulations], Part 493.

(4) If the facility does not provide laboratory services on site, it must have an agreement to obtain these services only from a laboratory that meets the applicable requirements of 42 CFR [Code of Federal Regulations], Part 493, or from a physician's office.

(b) The facility must:

(1) provide or obtain laboratory services only when ordered by a physician, physician assistant, or advanced practice registered nurse in accordance with state law, including scope of practice laws [the attending physician];

(2) promptly notify the ordering [attending] physician, physician assistant, or advanced practice registered nurse of the results that fall outside of clinical reference ranges in accordance with written facility policies and procedures for notification of a practitioner or per the ordering physician's orders [findings];

(3) assist the resident in making transportation arrangements to and from the source of service, if the resident needs assistance; and

(4) file in the resident's clinical record laboratory reports that are dated and contain the name and address of the testing [issuing] laboratory.

#### §19.1909. Radiology and Other Diagnostic Services.

(a) The nursing facility must provide or obtain radiology and other diagnostic services to meet the needs of its residents. The facility is responsible for the quality and timeliness of the services.

(1) If the facility provides its own diagnostic services, the services must meet the applicable conditions of participation for hospitals contained in 42 CFR, [Code of Federal Regulations] §482.26.

(2) If the facility does not provide its own diagnostic services, it must have an agreement to obtain these services from a provider or supplier that is approved to provide these services under Medicare.

(b) The facility must:

(1) provide or obtain radiology and other diagnostic services only when ordered by a physician, physician assistant, or advanced practice registered nurse in accordance with state law, including scope of practice laws [the attending physician];

(2) promptly notify the ordering [attending] physician, physician assistant, or advanced practice registered nurse of the results that fall outside of clinical reference ranges in accordance with written facility policies and procedures for notification of a practitioner or per the ordering physician's orders [findings];

(3) assist the resident in making transportation arrangements to and from the source of service, if the resident needs assistance; and

(4) file in the resident's clinical record signed and dated reports of x-ray and other diagnostic services.

#### §19.1910. Clinical Records.

(a) The facility must maintain clinical records on each resident, in accordance with accepted professional health information management standards and practices, that are:

(1) complete;

(2) accurately documented;

(3) readily accessible;

(4) systematically organized; and

(5) protected from unauthorized release.

(b) Clinical records must be retained [for]:

(1) for five years after medical services end; or

(2) for a minor, for three years after a resident reaches legal age under Texas law.

(c) The facility must safeguard clinical record information against loss, destruction, or unauthorized use.[-]

(d) The facility must keep confidential all information contained in the resident's records, regardless of the form or storage method of the records, except when release is:

(1) required by law or this chapter; [-]

~~[(1) transfer to another health care institution;]~~

~~[(2) law or this chapter;]~~

~~[(3) third party payment contract; or]~~

(2) ~~[(4)] to the resident or resident representative where permitted by applicable law; [-]~~

(3) ~~for treatment, payment, or health care operations, as permitted by and in compliance with applicable law; or~~

(4) ~~for public health activities, reporting of abuse, neglect or domestic violence, health oversight activities, judicial and administrative proceedings, law enforcement purposes, organ donation purposes, research purposes, or to coroners, medical examiners, funeral directors, and to avert a serious threat to health or safety as permitted by and in compliance with applicable law.~~

*§19.1911. Contents of the Clinical Record.*

(a) A resident's clinical record must meet all documentation requirements in the HHSC [~~Texas Health and Human Services Commission~~] rule at Texas Administrative Code, Title 1, Part 15, Chapter 371, Subchapter C (relating to Utilization Review) [† TAC §371.214 (relating to Resource Utilization Group Classification System)].

(b) The clinical record of each resident must contain:

(1) a face sheet that contains the attending physician's current mailing address and telephone numbers;

(2) sufficient information to identify and care for the resident, to include at a minimum:

(A) full name of resident;

(B) full home or mailing [~~home/mailing~~] address, or both;

(C) social security number;

(D) health insurance claim numbers, if applicable;

(E) date of birth; and

(F) clinical record number, if applicable;

(3) a record of the resident's assessments, including 15 months of MDS records;

(4) the comprehensive care plan [~~; interdisciplinary plan of care~~] and services provided [~~(see also §19.802 of this chapter (relating to Comprehensive Care Plans))~~];

(5) a permanency plan, for residents younger than 22 years of age;

(6) the results of any Preadmission Screening and Resident Review;

(7) signed and dated clinical documentation from all health care practitioners involved in the resident's care, with each page identifying the name of the resident for whom the clinical care is intended;

(8) any directives or medical powers of attorney as described in §19.419 of this chapter (relating to Advance Directives);

(9) discharge information and a discharge summary in accordance with §19.803 of this chapter (relating to Discharge Summary (Discharge Plan of Care)) [~~and a physician discharge summary, to include, at least, dates of admission and discharge, admitting and discharge diagnoses, condition on discharge, and prognosis, if applicable~~];

(10) at admission or within 14 days after admission, documentation of an initial medical evaluation, including history, physical examination, diagnoses and an estimate of discharge potential and rehabilitation potential, and documentation of a previous annual medical examination;

(11) authentication of a hospital diagnosis, which may be in the form of a signed hospital discharge summary, a signed report from the resident's hospital or attending physician, or a transfer form signed by the physician;

(12) the physician's signed and dated orders, including medication, treatment, diet, restorative and special medical procedures, and routine care to maintain or improve the resident's functional abilities (required for the safety and well-being of the resident), which must not be changed either on a handwritten or computerized physician's order sheet after the orders have been signed by the physician unless space allows for additional orders below the physician's signature, including space for the physician to sign and date again;

(13) arrangements for the emergency care of the resident in accordance with §19.1204 of this chapter (relating to Availability of Physician for Emergency Care);

(14) observations made by nursing personnel according to the time frames specified in §19.1010 of this chapter (relating to Nursing Practices);

(15) items as specified on the MDS assessment;

(16) current information, including:

(A) PRN medications and results;

(B) treatments and any notable results;

(C) physical complaints, changes in clinical signs and behavior, mental and behavioral status, and all incidents or accidents;

(D) flow sheets, which may include bathing, restraint observation or release documentation, elimination, fluid intake, vital signs, ambulation status, positioning, continence status and care, and weight;

(E) a record of dietary intake, including deviations from normal diet, rejection of substitutions, and physician's ordered snacks or supplemental feedings;

(F) a record of the date and hour a drug or treatment is administered; and

(G) documentation of a special procedure performed for the safety and well-being of the resident; and

(17) laboratory, radiology and other diagnostic services reports, as required by §19.1908 of this subchapter (relating to Laboratory Services) and §19.1909 of this subchapter (relating to Radiology and Other Diagnostic Services).

~~[(17) a copy of the most recent court order and letters of guardianship appointing a guardian of the resident or the resident's estate received by the facility.]~~

*§19.1912. Additional Clinical Record Service Requirements.*

(a) Index of admissions and discharges. The facility must maintain a permanent, master index of all residents admitted to and discharged from the facility. This index must contain at least the following information concerning each resident:

(1) name of resident (first, middle, and last);

(2) date of birth;

(3) date of admission;

(4) date of discharge; and

(5) social security, Medicare, or Medicaid number.

(b) Facility closure. In the event of closure of a facility, change of ownership or change of administrative authority: [-]

(1) the facility must have in place written policies and procedures to ensure that the administrator's duties and responsibilities involve providing the appropriate notices, as required by §19.2310 of this chapter (relating to Nursing Facility Ceases to Participate); and

(2) the new management must maintain documented proof of the medical information required for the continuity of care of all residents. This documentation may be in the form of copies of the resident's clinical record or the original clinical record. In a change of ownership, the two parties will agree and designate in writing who will be responsible for the retention and protection of the inactive and closed clinical records.

(c) Method of recording and correcting [reording/correecting] information. All resident care information must be recorded in ink or permanent print except for the medication, treatment, or [medication/treatment] diet section of the resident's care plan. Correction of errors will be in accordance with accepted health information management standards.

(1) Erasures are not allowed on any part of the clinical record, with the exception of the medication, treatment, or diet [medication/treatment/diet] section of the resident's [resident] care plan.

(2) Correction of errors will be in accordance with accepted health information management standards.

(d) Required record retention. Periodic thinning of active clinical records is permitted; however, the following items must remain in the active clinical record:

- (1) current history and physical;
- (2) current physician's orders and progress notes;
- (3) current RAI [resident assessment instrument (RAI)] and subsequent quarterly reviews; in Medicaid-certified facilities, all RAIs and Quarterly Reviews for the prior 15-month period;
- (4) current care plan;
- (5) most recent hospital discharge summary or transfer form;
- (6) current nursing and therapy notes;
- (7) current medication and treatment records;
- (8) current lab and x-ray reports;
- (9) the admission record; and
- (10) the current permanency plan.

(e) Readmissions.

(1) If a resident is discharged for 30 days or less and readmitted to the same facility, upon readmission, to update the clinical record, staff must:

- (A) obtain current, signed physician's orders;
- (B) record a descriptive nurse note, giving a complete assessment of the resident's condition;
- (C) include any changes in diagnoses[, etc.];
- (D) obtain signed copies of the hospital or transferring facility history and physical and discharge summary and a[- A] transfer summary containing this information is acceptable;

(E) complete a new RAI and update the comprehensive care plan if evaluation of the resident indicates a significant change,

which appears to be permanent and if[- H] no such change has occurred, then update only the resident comprehensive care plan; and

(F) comply with §19.805 of this chapter [title] (regarding Permanency Planning for a Resident Under 22 Years of Age [Pediatric Residents]).

(2) A new clinical record must be initiated if the resident is a new admission or has been discharged for over 30 days.

(f) Signatures.

(1) The use of faxing [electronic data transmission of facsimiles (faxing)] is acceptable for sending and receiving health care documents, including the transmission of physicians' orders. Long term care facilities may utilize electronic transmission if they adhere to the following requirements:

(A) The facility must implement safeguards to assure that faxed documents are directed to the correct location to protect confidential health information.

(B) All faxed documents must be signed by the author before transmission.

(2) Stamped signatures are acceptable for all health care documents requiring a physician's signature, if the person using the stamp sends a letter of intent which specifies that he will be the only one using the stamp, and then signs the letter with the same signature as the stamp.

(3) The facility must maintain all letters of intent on file and make them available to representatives of HHSC [the Texas Department of Human Services (DHS)] upon request.

(4) Use of a master signature legend in lieu of the legend on each form for nursing staff signatures of medication, treatment, or flow sheet entries is acceptable under the following circumstances.

(A) Each nursing employee documenting on medication, treatment, or flow sheets signs employee's [his] full name, title, and initials on the legend.

(B) The original master legend is kept in the clinical records office or director of nurses' office.

(C) A current copy of the legend is filed at each nurses' station.

(D) When a nursing employee leaves employment with the facility, the employee's [his] name is deleted from the list by lining through it and writing the current date by the name.

(E) The facility updates the master legend as needed for newly hired and terminated employees.

(F) The master signature legend must be retained permanently as a reference to entries made in clinical records.

(g) Destruction of Records. When resident records are destroyed after the retention period is complete, the facility must shred or incinerate the records in a manner which protects confidentiality. At the time of destruction, the facility must document the following for each record destroyed:

- (1) resident name;
- (2) clinical or medical record number, if used;
- (3) social security number, Medicare number, Medicaid number [Medicare/Medicaid number], or the date of birth; and
- (4) date and signature of person carrying out disposal.

(h) Confidentiality. The facility must develop and implement written policies and procedures to safeguard the confidentiality of clinical [medical] record information from unauthorized access.

(1) Except as provided in paragraph (2) of this subsection, the facility must not allow access to a resident's clinical record unless a physician's order exists for supplies, equipment, or services provided by the entity seeking access to the record.

(2) The facility must allow access and [and/or] release confidential medical information under court order or by written authorization of the resident or the resident representative, as in [his or her legal representative (see) §19.407 of this chapter [title] (relating to Privacy and Confidentiality)]).

*§19.1915. Transfer Agreement.*

(a) The facility must have in effect a written transfer agreement with one or more hospitals that reasonably assures that:

(1) Residents will be transferred from the facility to the hospital and ensured of timely admission to the hospital when transfer is medically appropriate as determined by the attending physician or, in an emergency situation, another practitioner in accordance with written facility policy.

(2) Providers will exchange medical [Medical] and other information, including information required under §19.502(b)(4) of this chapter (relating to Transfer and Discharge in Medicaid-certified Facilities), needed for care and treatment of residents, and when the transferring facility deems it appropriate, for determining whether such residents can receive appropriate services, receive services [be adequately cared for] in a less restrictive [expensive] setting than either the facility or the hospital, or reintegrate into the community [will be exchanged between the institutions].

(3) For Medicaid-certified facilities, the hospitals must be approved for participation under the Medicare and Medicaid programs.

(b) In addition, to ensure continuity of care, the transfer agreement must [should]:

(1) provide for prompt diagnostic and other medical services;

(2) ensure accountability for a resident's personal effects at the time of transfer;

(3) specify the steps needed to transfer a resident in a prompt, safe and efficient manner; and

(4) provide for supplying, at the time of transfer, a summary of administrative, social, medical, and nursing information to the facility to which the resident is transferred.

(c) If the board or [and/or] governing body for a long-term care facility and a hospital are the same, the controlling entity must have written procedures outlining how transfers will occur.

(d) The facility is considered to have a transfer agreement in effect if HHSC [DHS] determines that the facility attempted in good faith to enter into an agreement with a hospital sufficiently close to the facility to make transfer feasible but could not, and it is in the public interest not to enforce this requirement. The facility must document in writing its good faith effort to enter into an agreement.

*§19.1917. Quality Assessment and Assurance.*

(a) The facility must maintain a Quality Assessment and Assurance Committee consisting of:

(1) the director of nursing services;

(2) the medical director or designee;

[(2) a physician designated by the facility; and]

(3) at least three other members of the facility's staff, at least one of whom must be the administrator, a board member or other individual in a leadership role; and

(4) effective November 28, 2019, the infection preventionist.

(b) The Quality Assessment and Assurance Committee reports to the facility's governing body regarding its activities. The committee must:

(1) meet [meets] at least quarterly to identify issues with respect to which quality assessment and assurance activities are necessary; [and]

(2) develop [develops] and implement [implements] appropriate plans of action to correct identified quality deficiencies; and [-]

(3) regularly review and analyze data, including data resulting from drug regimen reviews, and act on available data to make improvements.

(c) The State of Texas or the Secretary of Health and Human Services may not require disclosure of the records of the Quality Assessment and Assurance Committee except insofar as such disclosure is related to the compliance of the committee with the requirements of subsection (b) of this section.

(d) Good faith attempts by the committee to identify and correct quality deficiencies may not be used as a basis for sanctions.

(e) The Quality Assessment and Assurance Committee must adopt and ensure implementation of a written policy to identify, assess, and develop strategies to control risk of injury to residents and nurses associated with the lifting, transferring, repositioning, or moving of a resident. The policy must establish a process that includes:

(1) analysis of the risk of injury to both residents and nurses posed by the resident handling needs of the resident populations served by the nursing facility and the physical environment in which resident handling and moving occurs;

(2) annual in-service education of nurses in the identification, assessment, and control of risk of injury to residents and nurses during resident handling;

(3) evaluation of alternative ways to reduce risks associated with resident handling, including evaluation of equipment and the environment;

(4) restriction, to the extent feasible with existing equipment and aids, of manual resident handling or moving of all or most of a resident's weight to emergency, life-threatening, or otherwise exceptional circumstances;

(5) collaboration with and an annual report to the nurse staffing committee;

(6) specific procedures for nurses to refuse to perform or be involved in resident handling or moving that the nurse believes in good faith will expose a resident or a nurse to an unacceptable risk of injury;

(7) submission of an annual report by the nursing staff to the Quality Assessment and Assurance Committee on activities related to the identification, assessment, and development of strategies to control risk of injury to residents and nurses associated with the lifting, transferring, repositioning, or moving of a resident; and

(8) in developing architectural plans for constructing or remodeling a nursing facility or a unit of a nursing facility in which resident handling and moving occurs, consideration of the feasibility of incorporating resident handling equipment or the physical space and construction design needed to incorporate that equipment at a later date.

§19.1929. Staff Development.

Each facility must develop, implement and maintain effective training programs of orientation, training, and continuing in-service education to develop the skills of its staff, including all new and existing staff, individuals providing services under a contractual arrangement, and volunteers, consistent with their expected roles. Effective November 28, 2019, a facility must determine the amount and types of training necessary based on a facility assessment as specified at §19.1931 of this subchapter (relating to Facility Assessment) and as described in §19.1001 [§19.1903] of this chapter [title] (relating to Nursing Services) [Required Training of Nurse Aides].

(1) As part of orientation and annually, each employee must receive instruction regarding:

(A) Human Immunodeficiency Virus (HIV), as outlined in the educational information provided by the Texas Department of State Health Services Model Workplace Guidelines. At a minimum the HIV curriculum must include:

- (i) modes of transmission;
- (ii) methods of prevention;
- (iii) behaviors related to substance abuse;
- (iv) occupational precautions;
- (v) current laws and regulations concerning the

rights of an acquired immune deficiency syndrome/HIV-infected individual; and

(vi) behaviors associated with HIV transmission which are in violation of Texas law; ~~and~~

(B) restraint reduction and the prevention of falls through competency-based training. Facilities also may choose to train on behavior management, including prevention of aggressive behavior and de-escalation techniques;[-]

(C) activities that constitute abuse, neglect, exploitation, or misappropriation of resident property as set forth at §19.601 of this chapter (relating to Freedom from Abuse, Neglect and Exploitation);

(D) procedures for reporting incidents of abuse, neglect, exploitation, or misappropriation of resident property; and

(E) dementia management and resident abuse prevention.

(2) Each registered nurse, licensed vocational nurse, and nurse aide (nurse assistant) who provides nursing services must receive at least one hour of training each year in caring for people who have dementia.

(3) Nursing staff, licensed nurses, and nurse aides must receive annual in-service training which includes components, appropriate to their job responsibilities, from one or more of the following categories:

(A) communication techniques and skills useful when providing geriatric care, such as skills for communicating with the hearing impaired, visually impaired and cognitively impaired; therapeutic touch; and recognizing communication that indicates psychological abuse;

(B) assessment and nursing interventions related to the common physical and psychological changes of aging for each body system;

(C) geriatric pharmacology, including treatment for pain management and sleep disorders;

(D) common emergencies of geriatric residents and how to prevent them, for example, falls, choking on food or medicines, injuries from restraint use; recognizing sudden changes in physical condition, such as stroke, heart attack, acute abdomen, and acute glaucoma; and obtaining emergency treatment;

(E) common mental disorders with related nursing implications; and

(F) ethical and legal issues regarding advance directives, abuse and neglect, guardianship, and confidentiality.

(4) Facilities with pediatric residents must comply with the following:

(A) Facility staff must be trained in the use of pediatric equipment and supplies, including emergency equipment and supplies.

(B) Facility staff must [should] receive annual continuing education dealing with pediatric issues, including child growth and development and pediatric assessment.

(5) Minimum continuing in-service education requirements are listed in subparagraphs (A)-(B) of this paragraph. Attendance at relevant outside training may be used to satisfy the in-service education requirement. The facility must keep in-service records for each employee listed. The minimum requirements are:

(A) licensed personnel--two hours per quarter; and

(B) nurse aides--12 hours annually. For the purpose of this paragraph, a medication aide is considered a nurse aide and must receive the same continuing in-service education. This in-service education does not qualify as continuing education units required for renewal of a medication aide permit.

(6) A rural hospital participating in the Medicaid Swing Bed Program as specified in §19.2326 of this chapter [title] (relating to Medicaid Swing Bed Program for Rural Hospitals) is not required to meet the requirements of this section, if the swing beds are used for no more than one 30-day length of stay per year, per resident.

(7) Effective November 28, 2019, the facility must also include as part of its mandatory training the following topics:

(A) effective communications for direct care staff;

(B) rights of the resident and the responsibilities of a facility to properly care for its residents as set forth in Subchapter E of this chapter (relating to Resident Rights);

(C) standards, policies, and procedures for the facility's infection prevention and control program, as set forth in §19.1601 of this chapter (relating to Infection Control); and

(D) behavioral health training, as set forth in §19.904 of this chapter (relating to Behavioral Health Services).

§19.1931. Facility Assessment.

The facility must conduct and document a facility-wide assessment to determine what resources are necessary to care for its residents competently during both day-to-day operations and emergencies. The facility must review and update that assessment, as necessary, and at least annually. The facility must also review and update this assessment whenever there is, or the facility plans for, any change that would require a

substantial modification to any part of this assessment. The facility must address or include:

(1) the facility's resident population, including:

(A) both the number of residents and the facility's resident capacity;

(B) the care required by the resident population considering the types of diseases, conditions, physical and cognitive disabilities, overall acuity, and other pertinent facts that are present within that population;

(C) the staff competencies that are necessary to provide the level and types of care needed for the resident population;

(D) the physical environment, equipment, services, and other physical plant considerations that are necessary to care for this population; and

(E) any ethnic, cultural, or religious factors that may potentially affect the care provided by the facility, including activities and food and nutrition services;

(2) the facility's resources, including:

(A) all buildings and other physical structures and vehicles;

(B) equipment (medical and non-medical);

(C) services provided, such as physical therapy, pharmacy, and specific rehabilitation therapies;

(D) all personnel, including managers, employees, contractors, and volunteers, as well as their education, training and any competencies related to resident care;

(E) contracts, memorandums of understanding, or other agreements with their parties to provide services or equipment to the facility during both normal operations and emergencies; and

(F) health information technology resources, such as systems for electronically managing patient records and electronically sharing information with other organizations; and

(3) a facility-based and community-based risk assessment, utilizing an all-hazards approach.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 28, 2019.

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Karen Ray

Chief Counsel

Department of Aging and Disability Services

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For further information, please call: (210) 619-8292



**40 TAC §19.1903, §19.1904**

**STATUTORY AUTHORITY**

The repeals are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes

licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The repeals affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

§19.1903. *Required Training of Nurse Aides.*

§19.1904. *Proficiency of Nurse Aides.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Karen Ray

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**SUBCHAPTER BB. NURSING FACILITY  
RESPONSIBILITIES RELATED TO  
PREADMISSION SCREENING AND RESIDENT  
REVIEW (PASRR)  
DIVISION 2. NURSING FACILITY  
RESPONSIBILITIES**

**40 TAC §19.2704**

**STATUTORY AUTHORITY**

The amendments are authorized by Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation and provision of services by the health and human services agencies, and Texas Health and Safety Code, §242.033, which authorizes licensing of nursing facilities, and Texas Health and Safety Code §326.004 which requires the HHSC executive commissioner to adopt rules to administer and implement the chapter.

The amendments affect Texas Government Code, §531.0055 and Texas Health and Safety Code, §242.037 and chapter 326.

§19.2704. *Nursing Facility Responsibilities Related to PASRR.*

(a) If an individual seeks admission to a nursing facility, the nursing facility:

(1) must coordinate with the referring entity to ensure the referring entity conducts a PL1; and

(2) may provide assistance in completing the PL1, if the referring entity is a family member, LAR, other personal representative selected by the individual, or a representative from an emergency placement source and requests assistance in completing the PL1.

(b) A nursing facility must not admit an individual who has not had a PL1 conducted before the individual is admitted to the facility.

(c) If an individual's PL1 indicates the individual is not suspected of having MI, ID, or DD, a nursing facility must enter the PL1 from the referring entity into the LTC Online Portal. The nursing facility may admit the individual into the facility through the routine admission process.

(d) For an individual whose PL1 indicates the individual is suspected of having MI, ID, or DD, a nursing facility:

(1) must enter the PL1 into the LTC Online Portal if the individual's admission category is:

- (A) expedited admission; or
- (B) exempted hospital discharge; and

(2) must not enter the PL1 into the LTC Online Portal if the individual's admission category is pre-admission.

(e) Except as provided by subsection (f) of this section, a nursing facility must not admit an individual whose PL1 indicates a suspicion of MI, ID, or DD without a complete PE and PASRR determination.

(f) A nursing facility may admit an individual whose PL1 indicates a suspicion of MI, ID, or DD without a complete PE and PASRR determination only if the individual:

- (1) is admitted as an expedited admission;
- (2) is admitted as an exempted hospital discharge; or
- (3) has not had an interruption in continuous nursing facility residence other than for acute care lasting fewer than 30 days and is returning to the same nursing facility.

(g) A nursing facility must check the LTC Online Portal daily for messages related to admissions and directives related to the PASRR process.

(h) Within seven calendar days after the LIDDA or LMHA has entered a PE or resident review into the LTC Online Portal for an individual or resident who has MI, ID, or DD, a nursing facility must:

(1) review the recommended list of nursing facility specialized services, LIDDA specialized services, and LMHA specialized services; and

(2) certify in the LTC Online Portal whether the individual's or resident's needs can be met in the nursing facility.

(i) After an individual or resident who is determined to have MI, ID, or DD from a PE or resident review has been admitted to a nursing facility, the facility must:

(1) contact the LIDDA or LMHA within two calendar days after the individual's admission or, for a resident, within two calendar days after the LTC Online Portal generated an automated notification to the LIDDA or LMHA, to schedule an IDT meeting to discuss nursing facility specialized services, LIDDA specialized services, and LMHA specialized services;

(2) convene the IDT meeting within 14 calendar days after admission or, for a resident review, within 14 calendar days after the LTC Online Portal generated an automated notification to the LIDDA or LMHA;

(3) participate in the IDT meeting to:

(A) identify which of the nursing facility specialized services, LIDDA specialized services, and LMHA specialized services recommended for the resident that the resident, or LAR on the resident's behalf, wants to receive; and

(B) determine whether the resident is best served in a facility or community setting.

(4) provide staff from the LIDDA and LMHA access to the resident and the resident's clinical facility records upon request from the LIDDA or LMHA;

(5) enter into the LTC Online Portal within 3 business days after the IDT meeting for a resident:

(A) the date of the IDT meeting;

(B) the name of the persons who participated in the IDT meeting;

(C) the nursing facility specialized services, LIDDA specialized services, and LMHA specialized services that were agreed to in the IDT meeting; and

(D) the determination of whether the resident is best served in a facility or community setting;

(6) include in the comprehensive care plan:

(A) the nursing facility specialized services agreed to by the resident or LAR; and

(B) the nursing facility PASRR support activities;

(7) submit a complete and accurate request for nursing facility specialized services in the LTC Online Portal within 20 business days after the date of the IDT meeting;

(8) start providing a therapy service within three [3] business days after receiving approval from HHSC in the LTC Online Portal;

(9) order DME or CMWC in accordance with §19.2754(e) of this subchapter (relating to Requesting Authorization to Provide Durable Medical Equipment and Customized Manual Wheelchairs);

(10) provide on-going therapy services as approved by HHSC; ~~and~~

(11) for a designated resident, annually document in the LTC Online Portal all nursing facility specialized services, LIDDA specialized services, and LMHA specialized services being provided to the designated resident; and [-]

(12) promptly report a significant change in the mental or physical condition of a resident by submitting a MDS Significant Change in Status Assessment Form in the LTC Online Portal.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Karen Ray  
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Department of Aging and Disability Services

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For further information, please call: (210) 619-8292



## TITLE 43. TRANSPORTATION

### PART 1. TEXAS DEPARTMENT OF TRANSPORTATION

#### CHAPTER 1. MANAGEMENT

##### SUBCHAPTER F. ADVISORY COMMITTEES

The Texas Department of Transportation (department) proposes amendments to §1.82, Statutory Advisory Committee Opera-



tions and Procedures, §1.85, Department Advisory Committees, §1.86, Corridor Advisory Committees, and §1.87, Corridor Segment Advisory Committees, the repeal of §1.88, Interim Report, and a new §1.88, Duration of Advisory Committees.

#### EXPLANATION OF PROPOSED AMENDMENTS

Several rules currently provide, in accordance with Government Code, §2110.008, that each of the Texas Transportation Commission's (commission) or department's advisory committees created by statute or by the commission or department is abolished on December 31, 2019. The amendments are the result of the commission's review of the need to continue the existence of those advisory committees. The amendments remove the existing sunset provisions and combine the substance of those provisions into one section for clarity and ease of understanding. The commission recognizes that the continuation of a few existing advisory committees is necessary for improved communication between the department and the public and the amendments extend the duration of specified advisory committees for that purpose.

Amendments to §1.82, Statutory Advisory Committee Operations and Procedures, remove subsection (i) of that section, relating to the duration of advisory committees created by statute. The substance of that subsection is being combined with the sunset provisions of other advisory committees in new §1.88, Duration of Advisory Committees.

Amendments to §1.85, Department Advisory Committees, remove subsection (c) of that section, relating to the duration of advisory committees created by the commission or the department, and redesignate existing subsection (d) as subsection (c). The substance of current subsection (c) is being combined with the sunset provisions of other advisory committees in new §1.88, Duration of Advisory Committees.

Amendments to §1.86, Corridor Advisory Committees, remove subsection (e) of that section, relating to the duration of corridor advisory committees. The substance of current subsection (e) is being combined with the sunset provisions of other advisory committees in new §1.88, Duration of Advisory Committees.

Amendments to §1.87, Corridor Segment Advisory Committees, provide clarity relating to the composition of a corridor segment advisory committee. Subsection (b) provides the method for the commission to select the members of an advisory committee. The addition of the word "may" in the subsection clarifies that an entity listed in the subsection is not required to participate on an advisory committee. The amendments also remove subsection (e) of the section, relating to the duration of corridor segment advisory committees. The substance of that subsection is being combined with the sunset provisions of other advisory committees in new §1.88, Duration of Advisory Committees.

Section 1.88, Interim Report, is being repealed because its provisions have been executed. That section is being replaced by new §1.88, Duration of Advisory Committees. The new section combines into one section the sunset provisions for advisory committees formerly in other sections in Chapter 1, Subchapter F. The new section continues the current condition that all advisory committees are abolished on December 31, 2019, except for those listed in subsection (b) or described by subsection (b), (c), or (d). New subsection (c) relates to corridor segment advisory committees and restates the substance of former §1.87(e). New subsection (d) continues the existence of the I-69 Corridor Advisory Committee until December 31, 2020. New subsection (e) relates to the Ports-to-Plains Advisory Com-

mittee and segment committees for geographic segments along the Ports-to-Plains Corridor established in accordance with H.B. No. 1079, 86th Legislature, Regular Session, 2019 and abolishes the segment committees on October 31, 2020, and the Ports-to-Plains Advisory Committee on August 31, 2021.

#### FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined, as required by Government Code, §2001.024(a)(4), that for each of the first five years in which the proposed rules are in effect, there will be no fiscal implications for other state agencies or local governments as a result of enforcing or administering the amendments and an indeterminate, negligible fiscal implication for the department because it is anticipated that the amendments can be accommodated within the agency's existing resources.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

Marc Williams, Deputy Executive Director, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed rules and therefore, a local employment impact statement is not required under Government Code, §2001.022.

#### PUBLIC BENEFIT

Mr. Williams has also determined, as required by Government Code, §2001.024(a)(5), that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the rules will be improved accuracy of the rules and improved communication between the department and the public.

#### COSTS ON REGULATED PERSONS

Mr. Williams has also determined, as required by Government Code, §2001.024(a)(5), that for each year of that period there are no anticipated economic costs for persons, including a state agency, special district, or local government, required to comply with the proposed rules and therefore, Government Code, §2001.0045, does not apply to this rulemaking.

#### ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities, as defined by Government Code, §2006.001, and therefore, an economic impact statement and regulatory flexibility analysis are not required under Government Code, §2006.002.

#### GOVERNMENT GROWTH IMPACT STATEMENT

Mr. Williams has considered the requirements of Government Code, §2001.0221 and has determined that for the first five years in which the proposed rules are in effect there is no impact on the growth of state government in comparison to the existing levels.

#### TAKINGS IMPACT ASSESSMENT

Mr. Williams has determined that a written takings impact assessment is not required under Government Code, §2007.043.

#### SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §§1.82, 1.85, 1.86, and 1.87, the repeal of §1.88, and new §1.88 may be submitted to Rule Comments, General Counsel Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "Advisory Committees." The deadline for receipt of

comments is 5:00 p.m. on October 14, 2019. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

### 43 TAC §§1.82, 1.85 - 1.88

#### STATUTORY AUTHORITY

The amendments and new rule are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.117, which provides the commission with the authority to establish, as it considers necessary, advisory committees on any of the matters under its jurisdiction, and Government Code, §2110.008, which provides that a state agency by rule may designate the date on which an advisory committee will automatically be abolished.

#### CROSS REFERENCE TO STATUTE

Government Code, Chapter 2110, and Transportation Code, §§55.006 and 201.117.

#### §1.82. *Statutory Advisory Committee Operations and Procedures.*

(a) **Applicability.** This section applies to statutory advisory committees and governs the operation of statutory advisory committees unless it is superseded by a specific provision in §1.84 of this subchapter (relating to Statutory Advisory Committees).

(b) **Election of officers and terms of members.**

(1) Unless otherwise specified with regard to a particular committee, each committee shall elect a chair and vice-chair by majority vote of the members of the committee. The chair and vice-chair shall each be elected for a term of not less than one year and not more than two years. Once elected, the chair and vice-chair may stand for reelection, without limit on the number of consecutive terms.

(2) Members shall serve on an advisory committee until new members are appointed.

(c) **Meetings.**

(1) **Meeting requirements.** The division designated for an advisory committee under subsection (f) of this section shall submit to the Office of the Secretary of State notice of a meeting of the advisory committee at least 10 days before the date of the meeting. The notice must provide the date, time, place, and subject of the meeting. A meeting of an advisory committee must be open to the public. An advisory committee will follow the agenda set for each meeting under paragraph (2) of this subsection. Filing of notice of meetings with the Office of the Secretary of State shall be coordinated through the department's General Counsel Division.

(2) **Scheduling of meetings.** Meeting dates, times, places, and agendas will be set by the division designated under subsection (f) of this section. Any committee member may suggest the need for a meeting or an agenda item, provided that the committee may only discuss items that are within the committee's and the department's jurisdiction. The division designated under subsection (f) of this section will provide notice of the time, date, place, and purpose of meetings to the members, by mail, email, telephone or any combination of the three, at least 10 calendar days in advance of each meeting. All meetings must take place in Texas and must be held in a location that is readily accessible to the general public.

(3) **Quorum.** A majority of the membership of an advisory committee, including the chairman, constitutes a quorum. The committee may act only by majority vote of the members present at the meeting.

(4) **Removal.** A committee member may be removed at any time without cause by the person or entity that appointed the member or by that person's or entity's successor.

(5) **Parliamentary procedure.** Parliamentary procedures for all committee meetings shall be in accordance with the latest edition of Robert's Rules of Order, except that the chair may vote on any action as any other member of the committee, and except to the extent that Robert's Rules of Order are inconsistent with any statute or this subchapter.

(6) **Record.** Minutes of all committee meetings shall be prepared and filed with the commission. The complete proceedings of all committee meetings must also be recorded by electronic means.

(7) **Public information.** All minutes, transcripts, and other records of the advisory committees are records of the commission and as such may be subject to disclosure under the provisions of Government Code, Chapter 552.

(d) **Reimbursement.** The department may, if authorized by law and the executive director, reimburse a member of a committee for reasonable and necessary travel expenses. Current rules and laws governing reimbursement of expenses for state employees shall govern reimbursement of expenses for advisory committee members.

(e) **Conflict of interest.** Advisory committee members are subject to the same laws and policies governing ethical standards of conduct as those for commission members and employees of the department.

(f) **Administrative support.** For each advisory committee, the executive director will designate a division of the department that will be responsible for providing any necessary administrative support essential to the functions of the committee.

(g) **Advisory committee recommendations.** In developing department policies, the commission will consider the recommendations submitted by advisory committees.

(h) **Manner of reporting.**

(1) The division designated under subsection (f) of this section shall, in writing, report to the commission an official action of a statutory advisory committee, including any advice and recommendations, prior to commission action on the issue. The chair of the advisory committee or the chair's designee will also be invited by the department to appear before the commission prior to commission action on a posted agenda item to present the committee's advice and recommendations.

(2) In the event a written report cannot be furnished to the commission prior to commission action, the report may be given orally, provided that a written report is furnished within 10 days of commission action.

~~[(i) **Duration.** Except as otherwise specified in this subchapter, each statutory advisory committee is abolished December 31, 2019, unless the commission amends its rules to provide for a different date.]~~

#### §1.85. *Department Advisory Committees.*

(a) **Creation.**

(1) **Project advisory committees.**

(A) **Purpose.** The executive director may authorize a district engineer to create, by written order, an ad hoc project advisory committee composed of the following members as may be deemed ap-

propriate by the district engineer: department staff; affected property owners and business establishments; technical experts; professional consultants representing the department; and representatives of local governmental entities, the general public, chambers of commerce, and the environmental community. A project advisory committee shall serve the purpose of facilitating, evaluating, and achieving support and consensus from the affected community and governmental entities in the initial stages of a transportation project. Advice and recommendations of a committee provide the department with an enhanced understanding of public, business, and private concerns about a project from the development phase through the implementation phase, thus facilitating the department's communications and traffic management objectives, resulting in a greater cooperation between the department and all affected parties during project development and construction.

(B) Duties. A project advisory committee shall:

(i) maintain community and local government communication; and

(ii) respond in a timely fashion to affected parties' concerns about project development and construction.

(C) Manner of reporting. A project advisory committee shall report its advice and recommendations to the district engineer.

(D) Duration. A project advisory committee may be abolished at any stage of project development, but in no event may a committee continue beyond completion of the project.

(2) Rulemaking advisory committees.

(A) Purpose. The commission, by order, may create ad hoc rulemaking advisory committees pursuant to Government Code, Chapter 2001, §2001.031, for the purpose of receiving advice from experts, interested persons, or the general public with respect to contemplated rulemaking.

(B) Duties. A rulemaking advisory committee shall provide advice and recommendations with respect to a specific contemplated rulemaking.

(C) Manner of reporting. A rulemaking advisory committee shall report its advice and recommendations to the division responsible for the development of the rules.

(D) Duration. A rulemaking committee shall be abolished upon final adoption of rules by the commission.

(3) Bicycle Advisory Committee.

(A) Purpose. The purpose of the Bicycle Advisory Committee is to advise the commission on bicycle issues and matters related to the Safe Routes to School Program. By involving representatives of the public, including bicyclists and other interested parties, the department helps ensure effective communication with the bicycle community, and that the bicyclist's perspective will be considered in the development of departmental policies affecting bicycle use, including the design, construction and maintenance of highways. The committee will also provide recommendations to the department on the Safe Routes to School Program.

(B) Duties. The committee shall:

(i) in accordance with Transportation Code, §201.9025, advise and make recommendations to the commission on the development of bicycle tourism trails;

(ii) provide recommendations on the selection of projects under Chapter 25, Subchapter I of this title (relating to Safe Routes to School Program); and

(iii) review and make recommendations on items of mutual concern between the department and the bicycling community.

(C) Manner of reporting. The committee shall report its advice and recommendations to the commission, except for matters relating to the Safe Routes to School Program. Under the Safe Routes to School Program the committee shall reports its recommendations to the director of the division responsible for administering the program.

(4) Freight Advisory Committee.

(A) Purpose. The purpose of the Freight Advisory Committee is to serve as a forum for discussion regarding transportation decisions affecting freight mobility and promote the sharing of information between the private and public sectors on freight issues. The committee's advice and recommendations will provide the department with a broad perspective regarding freight transportation matters and assist in identifying potential freight transportation facilities that are critical to the state's economic growth and global competitiveness.

(B) Duties. The committee shall:

(i) provide advice regarding freight-related priorities, issues, projects and funding needs;

(ii) make recommendations regarding the creation of statewide freight transportation policies and performance measures;

(iii) make recommendations regarding the development of a comprehensive and multimodal statewide freight transportation plan; and

(iv) communicate and coordinate regional priorities with other organizations as requested by the department.

(C) Manner of reporting. The committee shall report its advice and recommendations to the executive director or a department employee designated by the executive director and shall make reports to the commission as requested.

(b) Operating procedures.

(1) Membership. Except as otherwise specified in this section, an advisory committee shall be composed of not more than 24 members to be appointed by the division or official to whom the committee is to report. When applicable to the purpose and duties of the committee, the membership shall provide a balanced representation between:

(A) industries or occupations regulated or directly affected by the department; and

(B) consumers of services provided either by the department or by industries or occupations regulated by the department.

(2) Meetings.

(A) An advisory committee shall meet once a calendar year and at such other times as requested by the division to which it reports.

(B) A majority of the membership of an advisory committee constitutes a quorum. A committee may take formal action only by majority vote of its membership.

(3) Officers. Each committee shall elect a chair and vice-chair by majority vote of the members of the committee.

~~(e) Duration. Except as otherwise specified in this section, a committee created under this section is abolished December 31, 2019, unless the commission amends its rules to provide for a different date.]~~

~~(c) [(d)] Reimbursement. The department may, if authorized by law and the executive director, reimburse a member of a committee~~

for reasonable and necessary travel expenses. Current rules and laws governing reimbursement of expenses for state employees shall govern reimbursement of expenses for advisory committee members.

*§1.86. Corridor Advisory Committees.*

(a) Purpose. The commission by order may create an advisory committee for any other corridor. The purpose of an advisory committee is to facilitate and achieve support and consensus from affected communities, governmental entities, and other interested parties in the planning of transportation improvements in the corridor for which it is created and in the establishment of development plans for that corridor. An advisory committee's advice and recommendations will provide the department with an enhanced understanding of public, business, and private concerns about the corridor for which it is created, facilitating the department's communications and project development objectives and resulting in greater cooperation between the department and all affected parties during project planning and development.

(b) Membership. An advisory committee may be composed of members of the following groups as deemed appropriate by the commission: affected property owners and owners of business establishments; technical experts; representatives of local governmental entities; members of the general public; economic development officials; chambers of commerce officials; members of the environmental community; department staff; and professional consultants representing the department.

(c) Duties. An advisory committee shall report to the executive director its advice and recommendations on transportation improvements to be made in the corridor for which it is created, including facilities to be included in a development plan for that corridor and upgrades and other improvements to be made to existing facilities located in that corridor, and on other corridor level planning and development matters as requested by the department. The corridor advisory committee may also provide information to, coordinate with, or request information relating to the planning and development of a segment of the corridor from a corridor segment advisory committee established under §1.87 of this subchapter (relating to Corridor Segment Advisory Committees). In developing advice and recommendations, an advisory committee will evaluate economic, political, societal, and demographic population trends affecting transportation, and will consider existing facilities, upgrades to existing facilities, new or planned facilities, multimodal solutions, and available financing options.

(d) Additional requirements. An advisory committee is subject to the requirements for operating procedures and reimbursement of expenses applicable to a department advisory committee under §1.85 of this subchapter (relating to Department Advisory Committees).

~~{(e) Duration. An advisory committee created under this section is abolished December 31, 2019, unless the commission amends its rules to provide for a different date.}~~

*§1.87. Corridor Segment Advisory Committees.*

(a) Purpose. The commission by order may create a corridor segment advisory committee to assist the department in the transportation planning process for any highway corridor. The purpose of an advisory committee is to facilitate and achieve support and consensus from affected communities, governmental entities, and other interested parties in the planning of transportation improvements in the segment of a corridor for which it is created and in the establishment of development plans for that segment. An advisory committee's advice and recommendations will provide the department with an enhanced understanding of public, business, and private concerns about the segment for which it is created, facilitating the department's communications and project development objectives and resulting in greater coop-

eration between the department and all affected parties during project planning and development.

(b) Membership. A corridor segment advisory committee may consist [consists] of the following members:

(1) one member appointed by the county judge of each county in which the proposed segment may be located, representing the general public within the county;

(2) one member appointed by each metropolitan planning organization within whose boundaries all or part of the proposed segment may be located, representing the general public within the metropolitan planning organization;

(3) additional members representing the general public within cities designated by the commission, in which all or part of a proposed segment may be located, each of whom will be appointed by the mayor of a designated city; and

(4) additional members, each of whom:

(A) will represent, and be appointed by the governing body of, a port, chamber of commerce, economic development council or corporation, or other organization that has an interest in transportation, within whose service area all or part of a proposed segment may be located and that is designated by the commission to appoint a member of the committee; or

(B) is an individual who resides or has a business in the area in which the segment may be located, has an interest in transportation, and is appointed to the committee by the commission.

(c) Duties. An advisory committee shall report to the executive director its advice and recommendations on transportation improvements to be made in the segment of a corridor for which it is created, including facilities to be included in a development plan for that segment and upgrades and other improvements to be made to existing facilities located in that segment, and other segment level planning, development, and financing matters as requested by the department. A corridor segment advisory committee may provide information to, coordinate with, or request information from a corridor advisory committee created under §1.86 of this subchapter (relating to Corridor Advisory Committees). In developing advice and recommendations, a corridor segment advisory committee will evaluate economic, political, societal, and demographic population trends affecting transportation, and will consider existing facilities, upgrades to existing facilities, new or planned facilities, multimodal solutions, and available financing options.

(d) Additional requirements. A corridor segment advisory committee is subject to the requirements for operating procedures applicable to a department advisory committee under §1.85 of this subchapter (relating to Department Advisory Committees).

~~{(e) Duration. A corridor segment advisory committee may be abolished at any time by the commission, but in no event may a committee continue beyond completion of the segment for which the committee is created. Except as otherwise specified in this paragraph, a committee created under this section is abolished December 31, 2019, unless the commission amends its rules to provide for a different date.}~~

*§1.88. Duration of Advisory Committees.*

(a) Except as provided by this section, each statutory advisory committee or department advisory committee is abolished on December 31, 2019.

(b) The following advisory committees are abolished on December 31, 2021:

(1) a statutory or department advisory committee created after December 31, 2019;

(2) the Aviation Advisory Committee;

(3) the Public Transportation Advisory Committee;

(4) the Port Authority Advisory Committee;

(5) the Border Trade Advisory Committee;

(6) the Bicycle Advisory Committee;

(7) the Freight Advisory Committee; and

(8) the Commission for High-Speed Rail in the Dallas/Fort Worth Region.

(c) A corridor segment advisory committee created under §1.87 of this subchapter (relating to Corridor Segment Advisory Committees) after December 31, 2019, is abolished on the date provided in the minute order creating the committee or if a date is not provided in the order, on the earlier of:

(1) the date of the completion of the segment for which the committee was created; or

(2) December 31, 2021.

(d) The I-69 Corridor Advisory Committee is abolished on December 31, 2020.

(e) Each segment committee established by the department in accordance with H.B. No. 1079, 86th Legislature, Regular Session, 2019, is abolished on October 31, 2020. The Ports-to-Plains Advisory Committee established in accordance with that Act is abolished on August 31, 2021.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 29, 2019.

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Becky Blewett

Deputy General Counsel

Texas Department of Transportation

Earliest possible date of adoption: October 13, 2019

For further information, please call: (512) 463-8630



### 43 TAC §1.88

#### STATUTORY AUTHORITY

The repeal is proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.117, which provides the commission with the authority to establish, as it considers necessary, advisory committees on any of the matters under its jurisdiction, and Government Code, §2110.008, which provides that a state agency by rule may designate the date on which an advisory committee will automatically be abolished.

#### CROSS REFERENCE TO STATUTE

Government Code, Chapter 2110, and Transportation Code, §§55.006 and 201.117.

§1.88. *Interim Report.*

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 29, 2019.

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Becky Blewett

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For further information, please call: (512) 463-8630



### 43 TAC §1.90

The Texas Department of Transportation (department) proposes new §1.90, Advisory Committees for the Ports-to-Plains Corridor.

#### EXPLANATION OF PROPOSED AMENDMENTS

H.B. No. 1079, Acts of the 86th Legislature, Regular Session, 2019, (HB 1079) requires the Texas Department of Transportation (department) to establish a Ports-to-Plains Advisory Committee to assist the department in conducting a comprehensive study of the Ports-to-Plains Corridor in accordance with that Act. HB 1079 establishes the composition, purpose, and tasks of the advisory committee and provides requirements for its meetings and the manner in which the advisory committee will report to the department.

Further, HB 1079 requires the department to designate geographic segments along the Ports-to-Plains Corridor and to work with the Ports-to-Plains Advisory Committee to establish segment committees for each of those segments. HB 1079 establishes the purpose and tasks of the segment committees and provides guidelines for a segment committee's composition and meetings and the manner in which each segment committee will report to the advisory committee and the department.

Government Code, Chapter 2110, provides requirements generally applicable to state advisory committees, whether the committees are created by statute or by a state agency. Section 2110.005 requires a state agency to adopt rules that state the purpose and tasks of an advisory committee and that describe the manner in which the committee will report to the agency. Section 2110.008 authorizes a state agency to determine the period during which an advisory committee operates.

New §1.90, Advisory Committees for the Ports-to-Plains Corridor, provides the information required by Government Code, Chapter 2110, for the Ports-to-Plains Advisory Committee and segment committees for geographic segments along the Ports-to-Plains Corridor. The section sets out the purpose, tasks, and reporting requirements for the Ports-to-Plains Advisory Committee and segment committees, and provides the sunset dates for the committees.

#### FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined, as required by Government Code, §2001.024(a)(4), that for each of the first five years in which the amendments as proposed are in effect, there will be no fiscal implications for state or local governments as a result of enforcing or administering the amendments.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

Peter Smith, P.E., Director of the Transportation Planning and Programming Division, has certified that there will be no significant impact on local economies or overall employment as a result of enforcing or administering the proposed rules and, therefore, a local employment impact statement is not required under Government Code, §2001.022.

#### PUBLIC BENEFIT

Mr. Smith has also determined, as required by Government Code, §2001.024(a)(5), that for each year of the first five years in which the sections are in effect, the public benefit anticipated as a result of enforcing or administering the amendments will be compliance with statutory requirements relating to advisory committees established as required by HB 1079.

#### COSTS ON REGULATED PERSONS

Mr. Smith has also determined, as required by Government Code, §2001.024(a)(5), that for each year of that period there are no anticipated economic costs for persons, including a state agency, special district, or local government, required to comply with the proposed rules and, therefore, Government Code, §2001.0045, does not apply to this rulemaking.

#### ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities, as defined by Government Code, §2006.001, and, therefore, an economic impact statement and regulatory flexibility analysis are not required under Government Code, §2006.002.

#### GOVERNMENT GROWTH IMPACT STATEMENT

Mr. Smith has considered the requirements of Government Code, §2001.0221 and has determined that for the first five years in which the proposed rules are in effect there is no impact on the growth of state government.

#### TAKINGS IMPACT ASSESSMENT

Mr. Smith has determined that a written takings impact assessment is not required under Government Code, §2007.043.

#### SUBMITTAL OF COMMENTS

Written comments on new §1.90 may be submitted to Rule Comments, General Counsel Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@txdot.gov with the subject line "Ports-to-Plains Advisory Committees." The deadline for receipt of comments is 5:00 p.m. on October 14, 2019. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

#### STATUTORY AUTHORITY

The new rule is proposed under Transportation Code, §201.101, which provides the Texas Transportation Commission (commission) with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §201.117, which provides the commission with the authority to establish, as it considers necessary, advisory committees on any of the matters under its jurisdiction, Government Code, §2110.005, which requires a state agency by rule to state the purpose and tasks of an advisory committee and to describe

the manner in which the committee will report to the agency, and Government Code, §2110.008, which provides that a state agency by rule may designate the date on which an advisory committee will automatically be abolished.

#### CROSS REFERENCE TO STATUTE

Government Code, Chapter 2110, Transportation Code, §201.117, and H.B. No. 1079, Acts of the 86th Legislature, Regular Session, 2019.

#### §1.90. Advisory Committees for Ports-to-Plains Corridor.

(a) Purpose. This section provides the information required by Government Code, Chapter 2110, for the Ports-to-Plains Advisory Committee (advisory committee) and segment committees for geographic segments along the Ports-to-Plains Corridor, established in accordance with H.B. No. 1079, 86th Legislature, Regular Session, 2019.

#### (b) The Ports-to-Plains Advisory Committee.

(1) Purpose and duties. The purpose of the Ports-to-Plains Advisory Committee is to assist the department in conducting the study of the Ports-to-Plains Corridor required by H.B. No. 1079. The advisory committee has the duties and responsibilities set forth in that Act.

(2) Manner of reporting. The advisory committee shall review and compile the reports submitted by each segment committee and submit the compiled reports to the department with a summary and recommendations based on those reports, in accordance with H.B. No. 1079.

(c) Segment Committees. The department will determine geographic segments along the Ports-to-Plains Corridor. The department, in conjunction with the advisory committee, will take applications for service on a segment committee and will establish a segment committee for each geographic segment.

(1) Purpose and duties. The purpose of a segment committee is to assist the department and the advisory committee in accordance with H.B. No. 1079. A segment committee has the duties and responsibilities set forth in that Act.

(2) Manner of reporting. Each segment committee shall prepare and file a report with the Ports-to-Plains Advisory Committee in accordance with H.B. No. 1079.

(d) Exemption from corridor advisory committee rules. Section 1.86 of this subchapter (relating to Corridor Advisory Committees) does not apply to the Ports-to-Plains Advisory Committee.

(e) Exemption from corridor segment advisory committee rules. Section 1.87 of this subchapter (relating to Corridor Segment Advisory Committees) does not apply to a segment committee established under H.B. No. 1079.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

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Becky Blewett

Deputy General Counsel

Texas Department of Transportation

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For further information, please call: (512) 463-8630



## CHAPTER 15. FINANCING AND CONSTRUCTION OF TRANSPORTATION PROJECTS

### SUBCHAPTER E. FEDERAL, STATE, AND LOCAL PARTICIPATION

#### 43 TAC §15.51, §15.55

The Texas Department of Transportation (department) proposes amendments to §15.51 and §15.55, concerning Federal, State, and Local Participation.

#### EXPLANATION OF PROPOSED AMENDMENTS

The 75th Texas Legislature (1997) created the Economically Disadvantaged Counties Program (program) and gave the Texas Transportation Commission (commission) the authority to adjust minimum local match requirements for eligible local governments. Section 222.053, Transportation Code, previously defined an economically disadvantaged county as a county that has, in comparison to other counties in the state, below average per capita taxable property value, below average per capita income, and above average unemployment. The department identified the counties that met those criteria using data obtained from the Texas Comptroller of Public Accounts on an annual basis. Those counties were eligible for the program during the subsequent fiscal year.

Senate Bill 2168, 86th Legislature, Regular Session, amended §222.053, Transportation Code, to expand the criteria used in determining a county's eligibility to be classified as economically disadvantaged. Senate Bill 2168 was signed June 10, 2019, and effective immediately. Now, a county is considered to be an economically disadvantaged county even if it does not currently meet the standard criteria, as long as it met the standard criteria within any one of the past six years and has been included in no less than five federally declared disasters within the same time period. If a county meets these requirements, the adjustment to the local match shall be equivalent to the highest adjustment rate set in the last year the county was eligible for the program.

Amendments to §15.51, Definitions, modify the definition of the term "economically disadvantaged county" by directly referencing the relevant statutory provisions.

Amendments to §15.55, Construction Cost Participation, update the language related to local match adjustments to align the rule with the statutory provisions as amended. Certain subsections have been renumbered accordingly.

#### FISCAL NOTE

Brian Ragland, Chief Financial Officer, has determined, in accordance with Government Code, §2001.024(a)(4), that for each of the first five years in which the proposed rules are in effect, there will be no fiscal implications for state agencies and an indeterminate, positive impact on a county that will be newly classified as an economically disadvantaged county under these rules, as a result of enforcing or administering the rules.

#### LOCAL EMPLOYMENT IMPACT STATEMENT

Peter Smith, P.E., Director of the Transportation Planning and Programming Division, has determined, in accordance with Government Code, §2001.022, that there will be no negative impact on local economies or overall employment as a result of enforcing or administering the proposed rules and that there may be an indeterminate, positive effect of the rule on employment in each

geographic area affected by the rule for each year of the first five years that the rule will be in effect.

#### PUBLIC BENEFIT

Peter Smith, P.E., Director of the Transportation Planning and Programming Division, has determined, as required by Government Code, §2001.024(a)(5), that for each year of the first five years in which the proposed rules are in effect, the public benefit anticipated as a result of enforcing or administering the rules will be the potential relief from local participation costs for counties eligible under the expanded definition of "economically disadvantaged county."

#### COSTS ON REGULATED PERSONS

Peter Smith, P.E., Director of the Transportation Planning and Programming Division, has also determined, as required by Government Code, §2001.024(a)(5), that for each year of that period there are no anticipated economic costs for persons, including a state agency, special district, or local government, required to comply with the proposed rules and, therefore, Government Code, §2001.0045, does not apply to this rulemaking.

#### ECONOMIC IMPACT STATEMENT AND REGULATORY FLEXIBILITY ANALYSIS

There will be no adverse economic effect on small businesses, micro-businesses, or rural communities, as defined by Government Code, §2006.001, and, therefore, an economic impact statement and regulatory flexibility analysis are not required under Government Code, §2006.002.

#### GOVERNMENT GROWTH IMPACT STATEMENT

Peter Smith, P.E., Director of the Transportation Planning and Programming Division, has considered the requirements of Government Code, §2001.0221 and has determined that for the first five years in which the proposed rules are in effect, there is no impact on the growth of state government.

#### TAKINGS IMPACT ASSESSMENT

Mr. Smith has determined that a written takings impact assessment is not required under Government Code, §2007.043.

#### SUBMITTAL OF COMMENTS

Written comments on the proposed amendments to §15.51 and §15.55 may be submitted to Rule Comments, General Counsel Division, Texas Department of Transportation, 125 East 11th Street, Austin, Texas 78701-2483 or to RuleComments@tx-dot.gov with the subject line "Economically Disadvantaged Counties Program." The deadline for receipt of comments is 5:00 p.m. on October 14, 2019. In accordance with Transportation Code, §201.811(a)(5), a person who submits comments must disclose, in writing with the comments, whether the person does business with the department, may benefit monetarily from the proposed amendments, or is an employee of the department.

#### STATUTORY AUTHORITY

The amendments are proposed under Transportation Code, §201.101, which provides the commission with the authority to establish rules for the conduct of the work of the department, and more specifically, Transportation Code, §222.053, which authorizes the commission to adjust the minimum local matching funds requirement for highway projects in economically disadvantaged counties.

#### CROSS REFERENCE TO STATUTES IMPLEMENTED BY THIS RULEMAKING

Transportation Code, §222.053.

§15.51. *Definitions.*

The following words and terms, when used in this subchapter, shall have the following meanings, unless the context clearly indicates otherwise.

- (1) Commission--The Texas Transportation Commission.
- (2) Construction cost--All direct and indirect costs identified by the department's cost accounting system to a highway improvement or other transportation project, other than for right of way acquisition, preliminary engineering, and construction engineering.
- (3) Construction engineering cost/expenses--Engineering or project administration costs and expenses incurred, including indirect costs and expenses identified by the department's cost accounting system, on a highway improvement or other transportation project after contract award.
- (4) Department--The Texas Department of Transportation.
- (5) District office--One of the 25 geographical areas, managed by a district engineer, in which the department conducts its primary work activities.
- (6) Economically disadvantaged county--A county described by Transportation Code, §222.053(a) or (a-1), as determined from data provided by the Texas Comptroller of Public Accounts and the Federal Emergency Management Agency as appropriate. [As determined from data provided to the department by the Texas Comptroller of Public Accounts at the beginning of each fiscal year, a county that has, in comparison to other counties in the state:]
  - [(A) below average per capita taxable property value;]
  - [(B) below average per capita income; and]
  - [(C) above average unemployment.]
- (7) Eligible utilities--Costs of utility adjustments, required by a highway improvement or other transportation project, that are eligible, in accordance with federal and state law, for reimbursement by the department.
- (8) Executive director--The executive director of the department, or a designee.
- (9) Federal funds--Financial assistance provided by the federal government for highway improvement and other transportation projects.
- (10) Highway improvement project--A project which provides for the design, construction, improvement, or enhancement of a public road, including bridges, culverts, or other appurtenances related to public roads, either on or off the state highway system.
- (11) Local government--Any county, city, other political subdivision of this state, or special district that has the authority to finance a highway improvement or other transportation project.
- (12) Local participation--Financial assistance provided by a local government to participate in costs associated with highway improvement or other transportation projects.
- (13) Matching funds/participation ratio--Those portions of funds required or chargeable for the contribution toward a highway improvement or other transportation project's cost by a local government.
- (14) National Highway System (NHS)--A part of the National Intermodal Transportation System consisting of the National System of Interstate and Defense Highways and those principal arterial roads which are essential for interstate and regional commerce and

travel, national defense, intermodal transfer facilities, and international commerce and border crossings as designated by the United States Congress by criteria set forth in federal law.

(15) Off-State Highway System Bridge Program--A federally mandated program by which federal funds are made available to replace or rehabilitate bridges under the jurisdiction of a local government and not on the state highway system.

(16) Preliminary engineering cost/expenses--Costs and expenses incurred, including indirect costs and any other expenses identified by the department's cost accounting system, on a highway improvement project before construction contract award.

(17) Reconstruction--The primary activities involving the rebuilding of a segment of highway along the existing route as well as those associated with the acquisition of rights of way where necessary to upgrade to current standards.

(18) Rehabilitation--The primary activities to restore, or re-establish in good condition, a segment of highway (not including the construction of additional travel lanes, other than high occupancy vehicle lanes or auxiliary lanes).

(19) Reservoir agency--A public or private agency that has the authority to construct, maintain, or operate a reservoir facility.

(20) Right of way acquisition--That process identified with the procurement of real property, access rights, mineral rights, and easements permitted in accordance with state law for the construction of approved highway improvement or other transportation projects.

~~[(20) Right of way costs--All direct and indirect costs identified by the department's cost accounting system for the acquisition of land or an interest in land necessary for the development of a highway improvement or other transportation project (including access rights to abutting properties, eligible utility relocation/adjustment costs, and other direct expenses when specified in the agreement).]~~

(21) Right of way costs--All direct and indirect costs identified by the department's cost accounting system for the acquisition of land or an interest in land necessary for the development of a highway improvement or other transportation project (including access rights to abutting properties, eligible utility relocation/adjustment costs, and other direct expenses when specified in the agreement).

~~[(21) Right of way acquisition--That process identified with the procurement of real property, access rights, mineral rights, and easements permitted in accordance with state law for the construction of approved highway improvement or other transportation projects.]~~

(22) State funds--Money received by the department, other than federal funds, funds in excess of minimum requirements, or local participation, to be expended for highway improvement and other transportation projects.

(23) State highway system--The system of highways in the state included in a comprehensive plan prepared by the department's executive director under the direction and with the approval of the commission in accordance with Transportation Code, §201.103.

(24) State highway system routes--Those state numbered routes designated as a part of the state highway system.

(25) Transportation project--A transportation improvement project or transportation-related program that is not a highway improvement project and that is fully or partially funded with state or federal funds.

(26) Utility relocation/adjustment costs--Costs of work related to the adjustment, relocation, and removal of utility facilities ac-



completed in accordance with §21.21 of this title (relating to State Participation in Relocation, Adjustment, and/or Removal) and Chapter 21, Subchapter C of this title (relating to Utility Accommodation).

*§15.55. Construction Cost Participation.*

(a) Required cost participation. The commission may require, request, or accept from a local government matching or other funds, rights-of-way, utility adjustments, additional participation, planning, documents, or any other local incentives.

(1) Participation ratios. Except as provided in subsections (b) and (d) of this section, the agreement between the local government and the department must include participation ratios as described in subsection (c) of this section.

(2) In-kind contributions. The department will accept in-kind contributions for local government matching or other funds only under agreements that do not include highway construction.

(b) Economically disadvantaged counties. In evaluating a proposal for a highway improvement project with a local government that consists of all or a portion of an economically disadvantaged county, the executive director shall, for those projects in which the commission is authorized by law to provide state cost participation, adjust the minimum local matching funds requirement after receipt of a request for adjustment under paragraph (4) [(3)] of this subsection.

(1) Commission certification. The commission will certify a county as an economically disadvantaged county on an annual basis as soon as possible after the comptroller reports on the economic indicators listed in Transportation Code, §222.053(a) [under §15.51(6) of this subchapter (relating to Definitions)].

(2) Local match adjustment for a county described by Transportation Code, §222.053(a). In determining the adjustment to the local matching funds requirement, and a local government's effort and ability to meet the requirement, the commission will consider a local government's:

- (A) population level;
- (B) bonded indebtedness;
- (C) tax base;
- (D) tax rate;
- (E) extent of in-kind resources available; and
- (F) economic development sales tax.

(3) Local match adjustment for a county described by Transportation Code, §222.053(a-1). The adjustment will be equivalent to the highest adjustment rate set in the last year the county was considered to meet the criteria set out in Transportation Code, §222.053(a).

(4) [(3)] Request for adjustment. The city council, county commissioners court, district board, or similar governing body of a local government that represents all or a portion of an economically disadvantaged county, shall submit a request for adjustment to the local district office of the department. The request will include, at a minimum:

- (A) the proposed project scope;
- (B) the estimated total project cost;
- (C) a breakdown of the anticipated total cost by category (e.g., right-of-way, utility adjustment, plan preparation, construction);
- (D) the proposed participation rate;

(E) the nature of any in-kind resources to be provided by the local government;

(F) the rationale for adjusting the minimum local matching funds requirement; and

(G) any other information considered necessary to support a request.

(5) [(4)] Timing of determination. The executive director will determine whether to make an adjustment at the time the local government submits a proposal for a highway improvement or other transportation project.

(6) [(5)] Definition. For purposes of this subsection, "executive director" means the executive director or his or her designee, not below the level of district engineer or division or office director.

(c) Participation ratios. The department will establish federal, state, and local cost participation ratios for highway improvement or other transportation projects, subject to the availability of funds to the department. In-kind participation will be valued as described in §15.52(7)(E) of this subchapter (relating to Agreements).

(d) Off-state highway system bridge program.

(1) Definitions. The following words and terms, when used in this subsection, shall have the following meanings, unless the context clearly indicates otherwise.

(A) Bridge--For an equivalent-match project, a bridge or other mainlane cross-drainage structure, including low water crossings (with or without conduit).

(B) Deficient bridge--A bridge having a structural load capacity or other safety condition that is inadequate.

(C) District engineer--The chief executive officer in each designated district office of the department.

(D) Equivalent-match project--A project in which the local government will improve the structural load capacity or other safety condition of off-state system bridges utilizing 100% local funds.

(E) Participation-waived project--An off-state system bridge project in which the state agrees to pay for local participation for eligible preliminary engineering, construction, and construction engineering costs as shown in subsection (c) of this section. This project must be authorized for development only, or for development and construction, on the department's approved Unified Transportation Program, satisfy minimum standards established by the department for off-state system bridges, and meet the additional requirements of this subsection.

(F) Safety work--Work performed as part of an equivalent-match project that improves the safety of the project. This work may include, but is not limited to, providing improved structural load capacity, improved hydraulic capacity, increased roadway width, adequate bridge rail, and adequate approach guardrail.

(2) Waiver. The district engineer may waive the requirement for a local government to provide the original 10% estimate of direct costs for preliminary engineering, construction engineering, and construction funds on the participation-waived project(s) if the local governmental body commits by written resolution or ordinance, as described in paragraph (4) of this subsection, to spend an equivalent amount of funds for structural improvement or other safety work on another bridge or bridges on the equivalent-match project(s) within its jurisdiction or the jurisdiction of a geographically adjacent or overlapping governmental unit. An equivalent amount includes, but is not limited to, expenditures for direct or indirect costs for structural

improvement or other safety work on bridge(s) in the equivalent-match project(s). Work on one or more equivalent-match projects may be credited to one or more participation-waived projects.

(3) Eligibility. A local government is eligible for a waiver if:

(A) the construction contract for the participation-waived project has not been awarded;

(B) work on the equivalent-match project has not begun prior to approval of the waiver (approval of the waiver does not guarantee that the participation-waived project agreement will be executed);

(C) the local government is in compliance with load posting and closure regulations as defined in the National Bridge Inspection Standards under 23 C.F.R. §650.303;

(D) the bridge on the proposed equivalent-match project(s) is a deficient bridge, or a bridge that is weight restricted for school buses; and

(E) the equivalent-match project increases the structural load capacity of the existing bridge, replaces the bridge with a new bridge, or otherwise increases safety, with a minimum upgrade to safely carry expected school bus loading.

(4) Request for waiver. To request a waiver, a local government must provide a written request to the district engineer that includes the location(s), description of structural improvement or other safety work proposed, estimated cost for the equivalent-match project(s), and a copy of the local governmental body's resolution or ordinance. The resolution or ordinance must acknowledge assumption of all responsibilities for engineering and construction and complying with all applicable state and federal environmental regulations and permitting requirements for the bridge(s) on the equivalent-match project(s).

(5) Considerations. In approving a request for waiver, the district engineer will consider:

(A) the type of work proposed for the equivalent-match project(s);

(B) regional transportation needs; and

(C) past performance under this subsection.

(6) Approval. The district engineer will submit a letter to the local government indicating the district engineer's approval or disapproval of the waiver. If disapproved, the letter will state the reasons for disapproval. If the waiver is approved, the letter will state that the local government, for the equivalent-match project(s), will assume:

(A) all costs of the work;

(B) responsibility for complying with all applicable state and federal environmental regulations and permitting requirements; and

(C) responsibility for the engineering and construction necessary for completion of the work.

(7) Agreement and conditions.

(A) If the district engineer approves the waiver, the local government and the department will enter into an agreement for the participation-waived project as specified in §15.52 of this subchapter. One or more participation-waived project agreements can utilize one or more common or independent equivalent-match projects if the total equivalent-match project amount equals or exceeds the total remaining local participation amount being waived at the time the agreement

is executed, and the common agreements are adequately cross-referenced. Previously executed agreements may be amended to incorporate these participation waiver provisions, or to utilize an additional equivalent-match project(s) for any outstanding amount not previously waived, provided the construction contract for the participation-waived project has not been awarded and the equivalent-match work has not begun.

(B) Local governments will be allowed a maximum of three years after the contract award of the participation-waived project(s) to complete structural or other safety improvements on the equivalent-match project(s). If more than one participation-waived project utilizes a common equivalent-match project, the time period allowed for completion of the equivalent-match project(s) will begin when the first of the participation-waived projects is awarded. The district engineer may specify a period less than three years for completion of equivalent-match projects if project specific conditions warrant. If specified, the shorter allowable work period must be explicitly stated in the agreement(s). No later than 30 days after completion, documentation of completion of the equivalent-match project(s) requirement will be provided by letter to the district engineer. If the local government fails to adequately complete the equivalent-match project(s), it will be excluded from future waivers under this subsection for a minimum of five years. The district engineer may grant an extension to the three-year completion requirement if a contract for the equivalent-match project(s) has been executed within that three years and the contract timeline for completion is reasonable. In the absence of information suggesting that a shorter or longer period is appropriate, two years or less will be presumed to be a reasonable time, for a maximum of five years to complete the equivalent-match project(s) following award of the programmed bridge. The granting of an extension to the three-year time limit must be done in writing in response to a written request to the district engineer from the local government. The extension approval must specify a new required completion date.

(C) With the approval of the district engineer, an equivalent-match project(s) may be substituted by subsequent amendment to the participation-waived project agreement(s). A substitution may be allowed for unforeseen circumstances, including but not limited to, an equivalent-match project that is selected for replacement under some other program of work. Work on the substituted equivalent-match project(s) must be completed within a maximum of three years after the award of the construction contract for the original participation-waived project.

(D) The local government is responsible for all of the direct cost of any participation-waived project cost item or portion of a cost item that is not eligible for federal participation under the Federal Highway Bridge Replacement and Rehabilitation Program under 23 U.S.C. §144 and 23 C.F.R. §650 Subpart D. The local government is also responsible for any costs resulting from changes made at the request of the local government.

(E) The local government will be responsible for 100% of right of way and utilities for the participation-waived project.

(F) A local government located in an economically disadvantaged county that receives an adjustment under subsection (b) of this section may participate in the provisions of this subsection in the amount of its reduced matching funds requirement.

(G) The department will not reimburse funds already received by the department under the terms of existing agreements. Funds already received for a specific project(s) may be credited against the local government's required participation for the subsequent participation-waived project agreement(s) for that same project(s).

(H) Any equivalent-match project(s) cost that is in excess of the local government's required participation for a specific participation-waived project agreement(s) cannot be credited for use on a future participation-waived project(s).

(I) Each equivalent-match project(s) must be specifically identified in the participation-waived project agreement(s) at the time of execution.

(J) The local government must pay its funding share of the estimated participation-waived project cost, as provided in §15.52(7)(A) of this subchapter, for any local participation balance that is remaining at the time the project agreement(s) is executed. This balance would include any remaining required local participation amount in excess of the amount waived as a result of credit for equivalent-match work to be performed as part of the agreement.

(8) Projects with neighboring states. Local cost participation is not required for a bridge connecting Texas with a neighboring state.

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on August 29, 2019.

TRD-201902996

Becky Blewett

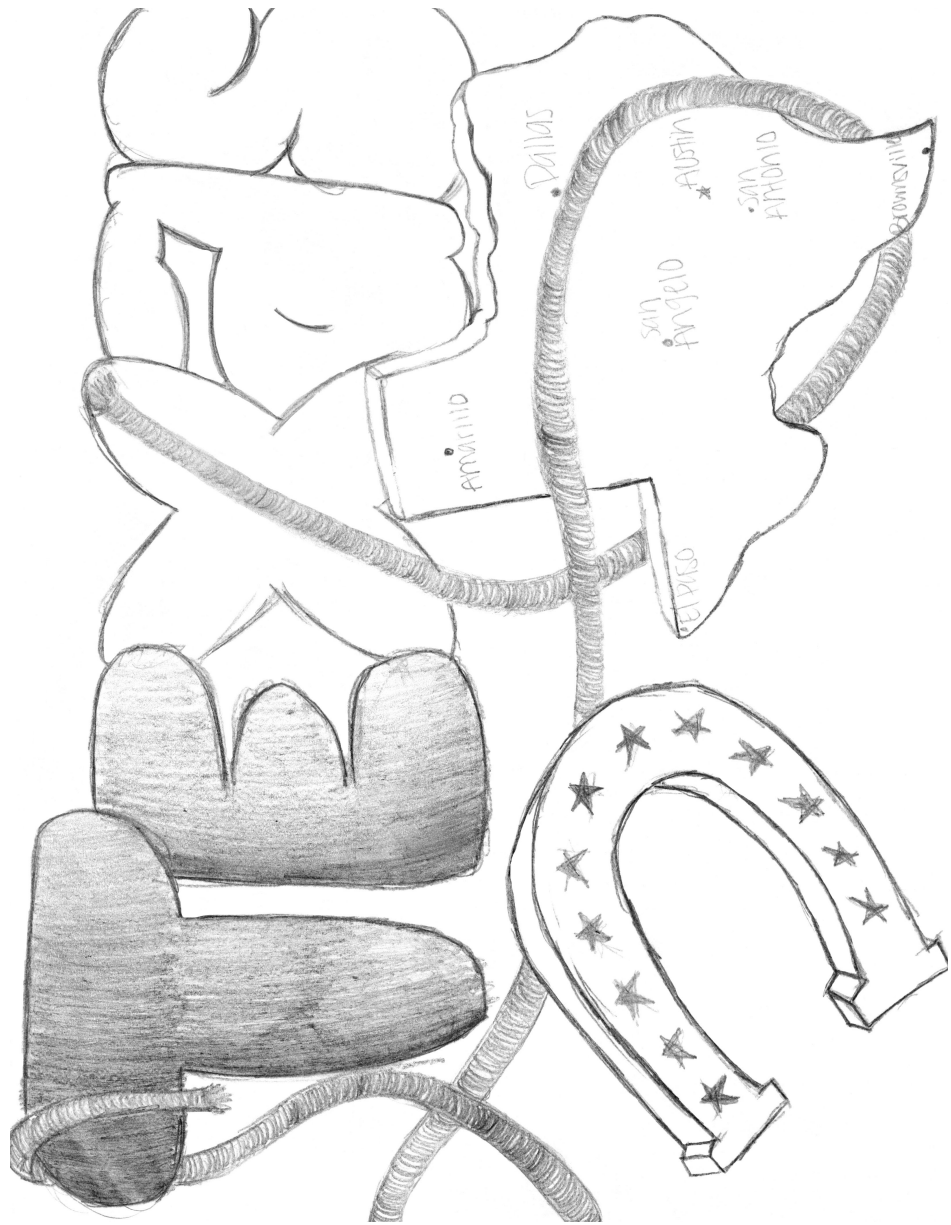
Deputy General Counsel

Texas Department of Transportation

Earliest possible date of adoption: October 13, 2019

For further information, please call: (512) 463-8630





# ADOPTED RULES

Adopted rules include new rules, amendments to existing rules, and repeals of existing rules. A rule adopted by a state agency takes effect 20 days after the date on which it is filed with the Secretary of State unless a later date is required by statute or specified in the rule (Government Code, §2001.036). If a rule is adopted without change to the text of the proposed rule, then the *Texas Register* does not republish the rule text here. If a rule is adopted with change to the text of the proposed rule, then the final rule text is included here. The final rule text will appear in the Texas Administrative Code on the effective date.

## TITLE 22. EXAMINING BOARDS

### PART 34. TEXAS STATE BOARD OF SOCIAL WORKER EXAMINERS

#### CHAPTER 781. SOCIAL WORKER LICENSURE

The Texas State Board of Social Worker Examiners (board) adopts amendments to §§781.102, 781.310, 781.311, 781.317, 781.401, 781.404, 781.405, 781.413, 781.419, 781.511, 781.512, 781.517, 781.603 - 781.605, 780.610, 781.703, and 781.808, and the repeal of and new §781.505, concerning the licensure and regulation of social workers, without changes to the proposed text as published in the July 19, 2019, issue of the *Texas Register* (44 TexReg 3605). The rules will not be republished.

#### BACKGROUND AND PURPOSE

The rules clarify the change from the Department of State Health Services to the Health and Human Services Commission, reduce the number of experience years for licensees from another jurisdiction to help alleviate a shortage of mental health providers in this state, and corrects the requirements regarding inactive status.

#### COMMENTS

The comment period ended on August 19, 2019. The board received no public comments regarding §§781.102, 781.310, 781.311, 781.317, 781.401, 781.404, 781.405, 781.413, 781.419, 781.505, 781.511, 781.512, 781.517, 781.603 - 781.605, 780.610, 781.703, or 781.808.

#### SUBCHAPTER A. GENERAL PROVISIONS

##### 22 TAC §781.102

#### STATUTORY AUTHORITY

The amendment is adopted under Texas Occupations Code, §505.201, which authorizes the board to adopt rules necessary for the performance of its duties.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 30, 2019.

TRD-201903034

Timothy Brown

Chair

Texas State Board of Social Worker Examiners

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For further information, please call: (512) 776-6972



#### SUBCHAPTER C. THE BOARD

##### 22 TAC §§781.310, 781.311, 781.317

#### STATUTORY AUTHORITY

The amendments are adopted under Texas Occupations Code, §505.201, which authorizes the board to adopt rules necessary for the performance of its duties.

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#### SUBCHAPTER D. LICENSES AND LICENSING PROCESS

##### 22 TAC §§781.401, 781.404, 781.405, 781.413, 781.419

#### STATUTORY AUTHORITY

The amendments are adopted under Texas Occupations Code, §505.201, which authorizes the board to adopt rules necessary for the performance of its duties.

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## SUBCHAPTER E. LICENSE RENEWAL AND CONTINUING EDUCATION

### 22 TAC §781.505

#### STATUTORY AUTHORITY

The repeal is adopted under Texas Occupations Code, §505.201, which authorizes the board to adopt rules necessary for the performance of its duties.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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### 22 TAC §§781.505, 781.511, 781.512, 781.517

#### STATUTORY AUTHORITY

The new rule and amendments are adopted under Texas Occupations Code, §505.201, which authorizes the board to adopt rules necessary for the performance of its duties.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER F. COMPLAINTS AND VIOLATIONS

### 22 TAC §§781.603 - 781.605, 781.610

#### STATUTORY AUTHORITY

The amendments are adopted under Texas Occupations Code, §505.201, which authorizes the board to adopt rules necessary for the performance of its duties.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER G. FORMAL HEARINGS

### 22 TAC §781.703

#### STATUTORY AUTHORITY

The amendment is adopted under Texas Occupations Code, §505.201, which authorizes the board to adopt rules necessary for the performance of its duties.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER H. SANCTION GUIDELINES

### 22 TAC §781.808

#### STATUTORY AUTHORITY

The amendment is adopted under Texas Occupations Code, §505.201, which authorizes the board to adopt rules necessary for the performance of its duties.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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# TITLE 31. NATURAL RESOURCES AND CONSERVATION

## PART 2. TEXAS PARKS AND WILDLIFE DEPARTMENT

### CHAPTER 61. DESIGN AND CONSTRUCTION

The Texas Parks and Wildlife Commission in a duly noticed meeting on August 22, 2019, adopted the repeal of §§61.81, 61.121, 61.131, and 61.133 - 61.139, an amendment to §61.132, and new §§61.133 - 61.136, concerning Guidelines for Administration of Texas Local Parks, Recreation, and Open Space Fund. New §61.134 is adopted with changes to the proposed text as published in the July 19, 2019, issue of the *Texas Register* (44 TexReg 3522). The repeal of §§61.81, 61.121, 61.131, and 61.133 - 61.139, the amendment to §61.132, and new §§61.133, and 61.135 - 61.136 are adopted without changes and will not be republished.

The change to §61.134, regarding Local Park and Recreation Grant Program, redesignates the sub-provisions of subsection (b)(7) to correct an inadvertent structural error that causes the aggregate score values of the constituent provisions to be greater than total point value for the criteria.

The repeals, amendments, and new sections are a result of the department's continual outreach and communication efforts with the regulated community. As part of that ongoing process, the department has assessed the efficacy of the current rules and concluded that the current rules are problematic in several respects and can be improved by streamlining them and focusing more closely on the articulation of the department's administrative priorities and the goals of the regulated community. Accordingly, the new rules emphasize the importance of quality over all other considerations in the preparation and evaluation of project proposals. Additionally, the department seeks to locate all rules governing local park and outreach grants in a single subchapter, as opposed to the current structure, which locates applications procedures in one subchapter, a policy statement in another subchapter, and additional policy and rules governing evaluation of grants in yet another subchapter. The repeals, amendments, and new sections are intended to modernize references and designations, eliminate cumbersome and abstruse regulatory structures and language, make the rules easier to interpret, and in general replace the current rules with rules that are more intuitive, navigable, and helpful.

The repeal of §61.81, concerning Application Procedures, §61.121, concerning Policy, and §61.131, concerning Policy, are necessary to relocate the contents of those sections to a single section within Subchapter E (which is being retitled as Local Parks and Recreation Grant Program), with modifications intended to modernize and streamline those rules.

The amendment of §61.132, concerning Texas Local Park Grants Programs Manual, incorporates the contents of current §61.81, modified to reflect the current title of the federal publication containing the procedural guide governing applications for federal funds through the department's grants program, and §61.121, concerning Policy, modified to remove deadlines and administrative provisions that are no longer applicable. The amendment also renames the section as Grants Manual and

Federal Procedural Guide and specifies that the documents be made available on the department's website.

New §61.133, concerning General Provisions, sets forth provisions of universal applicability to the grant programs contained in the subchapter.

New subsection (a) sets forth the department policy guiding the administration of the local park and outreach grant programs, which is to provide high-quality outdoor and indoor recreational opportunities for Texas, consistent with Parks and Wildlife Code, Chapter 24, and the priorities and policies articulated in the department's Land and Water Resources Conservation and Recreation Plan and the Texas Outdoor Recreation Plan (required for federal funding), as applicable. The department believes that because the financial resources made available by the legislature in any given biennium are almost always insufficient to fund every request for assistance, it is therefore important to ensure that the greatest number of projects with achievable maximal beneficial outcomes be approved.

New subsection (b) stipulates that the department will not accept or evaluate a project proposal that is not submitted to the department via the department's on-line application process. The department has utilized technology to create a single portal for submission of project proposals. Requiring all proposals to be submitted via the electronic portal increases administrative efficiencies for both the department and the regulated community.

New subsection (c) provides that the department will not score an application that is not in substantive compliance with the requirements of the subchapter, as determined by the department. The provision is necessary because the department believes it is important to maximize administrative efficiency by not investing time and effort on project proposals that are incomplete and therefore unable to be evaluated thoroughly.

New subsection (d) provides that applications will be scored only if the applicant is in compliance with the conditions of existing or previous grant agreements. Sometimes it is the case that an application for a grant is received from an entity that has not fulfilled the obligations of a previous grant or has otherwise not complied with applicable administrative provisions. The department reasons that a project proposal from such an entity should not be processed until all deficiencies are resolved or a credible plan of action to achieve compliance is submitted.

New subsection (e) establishes the methodology for scoring applications, specifying that the department will evaluate proposed projects on a qualitative basis, awarding points within the specified range from 0 (no points) to the maximum allowable for each criterion, according to the department's determination of how the applicant's treatment of any given component places along a continuum from poor to excellent. The provision also establishes that the department will not automatically award points for cursory, mechanical attempts to amass as many criteria as possible solely in an effort to increase the numerical score of a project. As previously discussed, the department believes that the quality of projects is more important than the number of projects or simply the number of persons affected by a project. The goal of the local park and outreach grants programs is to create meaningful, lifelong participatory relationships between the public and the mission of the agency, in the process enriching and informing the lives of citizens and communities. The department has noticed that the primary motivation of some applicants is simply to receive funds, as opposed to a bona fide intent to work cooperatively with the department to advance shared goals and pri-

orities. In such instances, the application is merely a pretense, an exercise engaged in to obtain funds, irrespective of the goals of the program. The department seeks to encourage all entities with an authentic and genuine desire for service but will not fund project applications that in the view of the department are not in good faith. To that end, the scoring system will not simply award points for "checking a box" but for earnest attempts to provide quality recreational opportunity.

New subsection (f) stipulates that applications be scored according to the provisions of the subchapter and ranked in relation to the scores of other proposals. Because the nature of the availability of funds is such that not every eligible project can be funded, the department uses a competitive system to determine the ultimate funding of approved projects; therefore, projects are scored and then ranked in comparison to each other, with funding going to the highest scoring projects first, and then in descending order until all available funds are expended.

New subsection (g) requires funded projects to be pursued by the sponsor in accordance with the timelines established by the department for each project, unless the department determines that circumstances beyond the sponsor's control warrant timeline extension, and stipulates that failure to meet timelines or timeline extensions constitutes grounds for the department to initiate cancellation of the affected project. The department has determined that it is necessary to explicitly state in rule that sponsors are expected to abide by the conditions of grant agreements, which establish timelines for the accomplishment of grant-funded activities, and that such agreements are subject to cancellation in the event that a sponsor is clearly unable to discharge its obligations under a grant agreement.

New subsection (h) provides that grant awards are dependent on the availability of grant funds. It is intuitively obvious that the department cannot fund projects if there are insufficient funds to do so, but in any case, the department believes it is necessary to state the fact by rule.

New §61.134, concerning Local Park Grants, replaces current §§61.133, concerning Grants for Outdoor Recreation Programs; 61.134, concerning Grants for Indoor Recreation Programs; 61.138, concerning Outdoor Urban Park Grants Program; and 61.139, concerning Indoor Urban Park Grants Program. The current rules governing these grant programs are complex and confusing, consisting of multi-levelled parameters that distract from the central ideas driving the application and review process. Additionally, the department has determined that the distinctions nominally represented by the rules are misleading, because each rule imposes essentially the same scoring criteria and all four grant programs are really just one grant program with four subcategories of application. The department believes that the scoring criteria should simply address the fundamental components of a project proposal and stress the importance of the qualitative analysis used by the department to evaluate and score project applications, while the department's grants manual can be used to develop a more granular and nuanced understanding of both how to prepare and evaluate a given grant application.

New subsection (a) establishes the purpose for which the section exists, which is to provide a mechanism for determining the suitability of project proposals for funding the acquisition of land and the development of public indoor and outdoor recreation facilities. The new subsection is necessary to clearly define the ambit of the new section.

New subsection (b) sets forth the scoring criteria used by the department to evaluate local park grant project proposals, describing each component criterion and establishing a potential point award range for each. In general, the point range for each category reflects the relative importance of that category within the overall scheme of criteria.

New subsection (b)(1) awards up to 10 points for the category of Community Need, subdivided into an automatic five-point award for a current Recreation and Open Space Comprehensive Plan or other comparable plan on file with the department and a 0-5 point award for the quality of the application's description of how the applicant determined the need for the project. This includes how need influenced the site design, a description of the public input process and the applicant's decisions in response to public comment, and a description of other needs assessments impacting the applicant's decisions. The department has determined that because the recreation needs of Texas communities are broad, nuanced, and diverse, the mission of the department and the program is best served by encouraging communities to engage in long-term parks planning by inventorying existing resources and using public input to evaluate recreation needs. Parks and Wildlife Code, §24.007 and §24.057, condition the award of grants on the existence of present or future needs and a statement from a planning authority that a proposed project is consistent with local needs; therefore, the needs assessment component is intended to specifically identify an applicant's needs, verify the processes used to engage the public in arriving at that determination, and illustrate how the proposed project addresses the need. The point range is intended to allow the department to award points based on the thoroughness of the applicant's efforts.

New subsection (b)(2) awards 0-10 points for the applicant's ability to identify specific, well-defined goals and objectives that both clearly explain the local priorities to be addressed by the proposed project and illustrate how the proposed project, if funded, will support the department's Land and Water Resources Conservation and Recreation Plan, Texas Outdoor Recreation Plan, and Local Park Grant program objectives, as applicable. The department's Land and Water Resources Conservation and Recreation Plan is the master planning document that guides all agency decisions regarding the best and highest use of state resources to provide land and water conservation and related recreational activities. The department believes that grant applications consistent with the department's mission and goals should receive preference. Similarly, the Texas Outdoor Recreation Plan is a state planning document required by federal law as a condition of receiving federal funds that are passed through the department for local park and recreation projects. It is therefore necessary for grant applications to be consistent with the priorities established in that document. Additionally, preference will be given to proposed projects that would provide direct recreational opportunity for citizens, which the department believes is the most efficacious use of grant funds.

New subsection (b)(3) awards 0-5 points for the quality of the applicant's timeline and budget for a proposed project. It is intuitively obvious that a thoughtful, realistic budget that correlates to a timeline for project completion is a good predictor of the likelihood of project success, as well as an indicator that a prospective project will not place excessive demands on administrative personnel. Budgets that reflect realistic understanding and expectations (based on the department's experience with similar projects) are far more likely to succeed and far less likely to require time-consuming amendments. The department under-



stands that expenditures during project development and implementation are likely to diverge from application budgets; however, the more realistic a budget is, the better able the department is to evaluate the true competitiveness of the prospective project and the more likely it is that the project, if funded, will succeed.

New subsection (b)(4) allows 0-10 points for the quality and thoroughness of a proposed project's site design. The department believes that a well-considered site design is crucial for assisting the department in understanding a project and a good indicator of the overall quality and effectiveness of the project. Vague plans that do not enable the department to envision the unity of a project's physical manifestation make it difficult to assess the fullness of the project's impact. Therefore, the new rule rewards applications that provide a thorough accounting of the basic physical layout of the proposed project, identify significant natural or cultural features, and provide evidence of emphasis on recreation. The new provision also awards up to five points for the extent to which the project maximizes the use of funds, determined by dividing the direct acquisition, recreational, and conservation costs by the total construction costs and multiplying the result by five. This formula was derived as a result of consultations with the regulated community in an effort to determine an appropriate method for creating a useful coefficient for determining funds maximization.

New subsection (b)(5) awards 0-5 points for organizational capacity. Organizational capacity is the applicant's ability to responsibly implement, manage, and maintain the project once funding has been acquired. The department believes it is irresponsible to fund projects that are beyond the applicant's ability to bring to fruition and/or operate moving forward. Therefore, the new provision requires applicants to prove or offer reasonable assurance that the necessary resources for project completion and continuing success are in place.

New subsection (b)(6) awards 0-10 points for past performance. The department believes that an applicant with a history of competent performance on previous grants represents a lower risk of failure than an applicant with a history of problematic performance. Therefore, up to ten points could be awarded to an applicant that either is in full compliance with previous grant agreements or can offer reasonable assurances that existing deficiencies with prior grant performance will be remedied. First-time applicants will receive an automatic award of ten points, since there is no history of unresolved compliance issues. Applicants with existing compliance issues would be awarded up to ten points in accordance with their past performance. The department wishes to encourage participation by all legitimate entities and believes that a ten-point award for first-time participants will provide an incentive for potential applicants for grants. Similarly, the department believes that an entity with a history of unresolved compliance issues should be given an incentive to develop and implement appropriate corrective measures.

New subsection (b)(7) awards from 0-5 points for projects that improve the geographic distribution of recreational opportunities within the applicant's service area. Five points will automatically be awarded to a project providing the first public park in a jurisdiction. There are still many communities in Texas without public park or recreation facilities. The department believes that such communities deserve preference in scoring. For proposals that do not meet criteria for a first park, up to five points could be awarded based on the project's ability to fill a critical recreation gap and to provide for safe access to the park. Of these

five points, up to three could be awarded to projects that fill a critical recreation need. There are many communities in Texas with identified gaps in recreational opportunity that should receive points. Up to two points could be awarded for projects that are safely accessible to the public via multiple modes of transportation. The department believes that accessibility is a key component of park and recreational opportunity enjoyment; therefore, projects that show accessibility by multiple means of transportation are more desirable than projects that are difficult for the public to access.

New subsection (b)(8) awards 0-10 points to projects that improve access to parks and outreach facilities for under-served populations (defined by Parks and Wildlife Code, §24.002, as "any group of people that is low income, inner city, or rural as determined by the last census, or minority, physically or mentally challenged, youth at risk, youth, or female"). Parks and Wildlife Code, §24.005 requires the department to make grants of money to "a political subdivision or nonprofit corporation for recreation, conservation, or education programs for underserved populations to encourage and implement increased access to and use of parks, recreational areas, cultural resource sites or areas, and open space areas by underserved populations." Local parks are often the key or gateway to a love of outdoor recreation and the department believes it is important to ensure that all segments of the population are provided with the opportunity to experience first-hand the valuable benefits of outdoor recreation. The point total is determined by multiplying the sum of percentage of population qualifying as low-income and percentage of population qualifying as minority by 5. This formula was derived as a result of consultations with the regulated community in an effort to determine an appropriate method for creating a useful coefficient for determining a project's involvement of under-served populations.

New subsection (b)(9) awards 0-5 points for projects that provide opportunities for physically/mentally challenged citizens that exceed federal and state required accessibility standards. As discussed with respect to underserved populations, the department believes that the benefits of outdoor recreation should be available to all citizens, and that projects eliminating barriers to participation by citizens with physical and mental challenges should receive preference. Therefore, the new provision allows up to five points to be awarded to projects based on the extent to which meaningful accessibility to such citizens is provided.

New subsection (b)(10) awards 0-10 points to projects that protect or conserve sensitive ecosystems and natural and/or cultural resources. The department's mission is to manage and conserve natural and cultural resources; thus, it is axiomatic that proposed projects containing components to protect or restore sensitive ecosystems or incorporate elements that cultivate support for and awareness of natural and/or cultural resources should receive preference. The department also intends for the criterion to encourage local communities to identify and include sensitive ecosystems and/or cultural resources in their application and to incorporate them if possible into the site design of prospective projects.

New subsection (b)(11) awards 0-10 points for sustainable park design. The department believes that sustainability is an important concept, as it improves efficiency, lowers costs, and reduces negative impacts to the environment. Therefore, the provision allows the award of points based on the extent to which a prospective project incorporates sustainable design and operation features.

New subsection (b)(12) awards 0-5 points for the quality of and degree to which a proposed project involves coordination with subject matter experts. The department concludes that successful projects contemplate the need for subject matter experts where necessary and effective, such as permitting processes, consultants, professional services, and associated factors that impact the development and operation of a project. Proposed projects that reflect engagement with this criterion are likely to require less administrative assistance from the department and are therefore desirable.

New subsection (b)(13) awards 0-5 points for the extent to which the proposed project involves the contribution of resources from sources other than the applicant to serve as all or part of the applicant's matching share of funds. The criterion is subdivided into two subcategories, either documented guarantees of support from external entities (up to three points) or evidence of community engagement and mobilization greater than the required match (up to two points). The department does not wish to impede communities from obtaining matching funds in any way possible. Therefore, the provision allows the department to recognize non-traditional or unorthodox methods of raising matching funds in addition to the traditional methods.

New §61.135, concerning Grants for Community Outreach Outdoor Programs (CO-OP), sets forth the scoring criteria for CO-OP grants.

New subsection (a) establishes the purpose for which the section exists, which is to provide a mechanism for determining the suitability of project proposals to award funding to tax-exempt organizations for programming that engages under-served populations in outdoor recreation, conservation, and environmental education activities that support the department's mission. The department believes that because the financial resources made available by the legislature in any given biennium are almost always insufficient to fund every request for assistance, it is therefore important to ensure that the greatest number of projects with achievable maximal beneficial outcomes be approved; therefore, there must be some objective method of comparing and ranking applications for grants in order to determine those projects most deserving of funding.

New subsection (b) sets forth the scoring criteria used by the department to evaluate CO-OP grant project proposals, describing each component criterion and establishing a potential point award range for each. In general, the point range for each category reflects the relative importance of that category within the overall scheme of criteria.

New subsection (b)(1) allows the department to award 0-15 points on the basis of the extent to which a project proposal aligns with the mission priorities of the CO-OP program, subdivided into a range of 0-8 points awarded for the department's assessment of the proposal's quality and efficacy relative to program priorities, and a 0-7 point award for the department's assessment of the quality of the project's involvement of participants in sustained direct connections to the department, including department sites, programs, and personnel. Based on input from the regulated community and staff review, the department has determined that the current scoring criteria are a measure of the quantitative relationships with department personnel, programs and sites for each application. The new criteria place greater weight on the qualitative aspect of these relationships, one dimension of which is sustained contact with department programs, sites, and personnel. As a state agency designated for the conservation and management of outdoor re-

sources, the department considers that it is uniquely positioned to provide optimal benefits to the regulated community and the constituents for whom they advocate.

New subsection (b)(2) allows the award of 0-30 points to projects that improve access to parks and outreach facilities for under-served populations (defined by Parks and Wildlife Code, §24.002, as "any group of people that is low income, inner city, or rural as determined by the last census, or minority, physically or mentally challenged, youth at risk, youth, or female"). Parks and Wildlife Code, §24.005, requires the department to make grants of money to "a political subdivision or nonprofit corporation for recreation, conservation, or education programs for underserved populations to encourage and implement increased access to and use of parks, recreational areas, cultural resource sites or areas, and open space areas by underserved populations." Local parks are often the key or gateway to a love of outdoor recreation and the department believes it is important to ensure that all segments of the population are provided with the opportunity to experience first-hand the valuable benefits of outdoor recreation. The criterion are subdivided into subcategories for award of points. The first is the extent to which the proposed project includes target populations (0-6 points per underserved segment of the population served, up to a maximum of 24 points). The department believes that the majority of the points potential for this criterion should be awarded for the diversity of underserved population served by the proposed project. For projects that have a clearly articulated plan of action that convinces the department that the project will reach the target demographic, there will be a 0-3 point award, and evidence of an effective tracking and reporting function that allows for assessment will also be awarded 0-3 points. The department believes that it is important that a proposed project be realistic and measurable.

New subsection (b)(3) awards 0-30 points based on the extent to which the department, based on the application, is able to gauge the probable impact of the proposed project. The point awards for this criterion are subdivided into five subcategories: a project narrative (0-5 points), the potential for the development of life-long behaviors (0-5 points), the likelihood of professional development (0-5 points), activities that utilize a hands-on, active engagement approach to skill development (0-5 points), and the quality of tangible environmental benefits resulting from the project (0-10 points). The department, based on many years of experience managing grant programs, believes that a project narrative illustrating goals that are feasible, fully developed, specific, measurable, attainable, and relevant is a predictor of likely success. The department also believes that grant programs with the potential to inculcate in participants lifelong behaviors that create environmentally responsible stewards of natural resources are very important, as those behaviors are key in developing future generations of environmentally responsible citizens. Similarly, the department wishes to encourage in participants a desire to make outdoor recreation a career path, which is beneficial to future generations for obvious reasons. The department also considers that direct, hands-on activities provide the most direct method for program participants to become engaged in subject matter, and finally, that the extent to which a project will result in tangible environmental benefits is worthy of preference.

New subsection (b)(4) awards 0-20 points for the quality of the applicant's timeline and budget for a proposed project. It is important that an application contain a thoughtful, realistic budget that correlates to a timeline for project completion. Budgets that reflect realistic understanding and expectations (based on the

department's experience with similar projects) are far more likely to succeed. The more realistic a budget is, the better able the department is to evaluate the true competitiveness of the prospective project and the more likely it is that the project, if funded, will succeed.

New subsection (b)(5) awards 0-5 points for organizational capacity. Organizational capacity is the applicant's ability to responsibly implement, manage, and maintain the project once funding has been acquired. The department believes it is irresponsible to fund projects that are beyond the applicant's ability to bring to fruition and/or operate moving forward. Therefore, the new provision requires applicants to prove or offer reasonable assurance that the necessary resources for project completion and continuing success are in place.

New subsection (b)(6) provides for a deduction of 0-20 points for past performance. The department believes that an applicant with a history of competent performance on previous grants represents a lower risk of failure than an applicant with a history of problematic performance. Similarly, the department believes that an entity with a history of unresolved compliance issues should be provided an incentive for developing and implementing appropriate corrective measures on previous grants.

New §61.136, concerning Small Community Grant Program, sets forth the criteria for small community grants.

New subsection (a) establishes the purpose for which the section exists, which is to provide a mechanism for determining the suitability of project proposals for funding the acquisition of land and the development of public outdoor recreation facilities by small communities.

New subsection (b) sets forth the scoring criteria used by the department to evaluate project proposals.

New subsection (b)(1) awards 0-10 points for the extent to which the project proposal identifies specific, well-defined goals and objectives that both clearly explain the local priorities to be addressed by the proposed project and illustrate how the proposed project, if funded, will support the department's Land and Water Resources Conservation and Recreation Plan, Texas Outdoor Recreation Plan, and Local Park Grant program objectives, as applicable.

New subsection (b)(2) allows the award of 0-10 points for the category of Community Need. The criterion allows for the award of 0-5 points for the quality of the application's description of how the applicant determined the need for the project, the influence of that need on the site design, the public input process and the applicant's decisions in response to public comment, and a description of other needs assessments impacting the applicant's decisions. The department has determined that because the recreation needs of Texas communities are broad, nuanced, and diverse, the mission of the department and the program is best served by encouraging communities to engage in long-term parks planning by inventorying existing resources and using public input to evaluate recreation needs. Parks and Wildlife Code, §24.007 and §24.057, condition the award of grants on the existence of present or future needs and a statement from a planning authority that a proposed project is consistent with local needs; therefore, the needs assessment component is intended to specifically identify an applicant's needs, verify the processes used to engage the public in arriving at that determination, and illustrate how the proposed project addresses the need. The point range is intended to allow the department to award points based on the thoroughness of the applicant's efforts.

New subsection (b)(3) awards 0-5 points for the quality of the applicant's timeline and budget for a proposed project. It is intuitively obvious that a thoughtful, realistic budget that correlates to a timeline for project completion is a good predictor of the likelihood of project success, as well as an indicator that a prospective project will not place excessive demands on administrative personnel. Budgets that reflect realistic understanding and expectations (based on the department's experience with similar projects) are far more likely to succeed and far less likely to require time-consuming amendments. The department understands that expenditures during project development and implementation are likely to diverge from application budgets; however, the more realistic a budget is, the better able the department is to evaluate the true competitiveness of the prospective project and the more likely it is that the project, if funded, will succeed.

New subsection (b)(4) allows 0-10 points for the quality and thoroughness of a proposed project's site design. The department believes that a well-considered site design is crucial for assisting the department in understanding a project and a good indicator of the overall quality and effectiveness of the project. Vague plans that do not enable the department to envision the unity of a project's physical manifestation make it difficult to assess the fullness of the project's impact. Therefore, the new rule rewards applications that provide a thorough accounting of the basic physical layout of the proposed project, identify significant natural or cultural features, and provide evidence of emphasis on recreation. The new provision also awards up to five points for the extent to which the project maximizes the use of funds, determined by dividing the direct acquisition, recreational, and conservation costs by the total construction costs and multiplying the result by five. This formula was derived as a result of consultations with the regulated community in an effort to determine an appropriate method for creating a useful coefficient for determining funds maximization.

New subsection (b)(5) awards 0-5 points for organizational capacity. Organizational capacity is the applicant's ability to responsibly implement, manage, and maintain the project once funding has been acquired. The department believes it is irresponsible to fund projects that are beyond the applicant's ability to bring to fruition and/or operate moving forward. Therefore, the new provision requires applicants to prove or offer reasonable assurance that the necessary resources for project completion and continuing success are in place.

New subsection (b)(6) awards 0-5 points for projects that improve the geographic distribution of recreational opportunities in the applicant's service area. Five points will automatically be awarded to a project providing the first public park. There are still many communities in Texas without public park or recreation facilities. The department believes that such communities deserve preference in scoring. For proposals that do not meet criteria for a first park, up to five points could be awarded based on the project's ability to fill a critical recreation gap and to provide for safe access to the park. Of these five points, up to three points could be awarded to projects that fill a critical recreation need. There are many communities in Texas with existing parks, but with identified gaps in recreational opportunity and access challenges that should receive points. Up to two points could be awarded for projects that are safely accessible to the public via multiple modes of transportation. The department believes that accessibility is a key component of park and recreational opportunity enjoyment; therefore, projects that show accessibil-

ity by multiple means of transportation are more desirable than projects that are more difficult for the public to access.

New subsection (b)(7) awards 0-10 points to projects that improve access to parks and outreach facilities for under-served populations (defined by Parks and Wildlife Code, §24.002, as "any group of people that is low income, inner city, or rural as determined by the last census, or minority, physically or mentally challenged, youth at risk, youth, or female"). Parks and Wildlife Code, §24.005 requires the department to make grants of money to "a political subdivision or nonprofit corporation for recreation, conservation, or education programs for underserved populations to encourage and implement increased access to and use of parks, recreational areas, cultural resource sites or areas, and open space areas by underserved populations." Local parks are often the key or gateway to a love of outdoor recreation and the department believes it is important to ensure that all segments of the population are provided with the opportunity to experience first-hand the valuable benefits of outdoor recreation. The point total will be determined by multiplying the sum of percentage of population qualifying as low-income and percentage of population qualifying as minority by 5. This formula was derived as a result of consultations with the regulated community in an effort to determine an appropriate method for creating a useful coefficient for determining a project's involvement of under-served populations.

New subsection (b)(8) awards 0-5 points for projects that provide opportunities for physically/mentally challenged citizens that exceed federal and state required accessibility standards. As discussed with respect to underserved populations, the department believes that the benefits of outdoor recreation should be available to all citizens, and that projects eliminating barriers to participation by citizens with physical and mental challenges should receive preference. Therefore, the new provision allows up to five points to be awarded to projects based on the extent to which meaningful accessibility to such citizens is provided.

New subsection (b)(9) awards 0-10 points to projects that protect or conserve sensitive ecosystems and natural and/or cultural resources. The department's mission is to manage and conserve natural and cultural resources; thus, it is axiomatic that proposed projects containing components to protect or restore sensitive ecosystems or incorporate elements that cultivate support for and awareness of natural and/or cultural resources should receive preference. The department also intends for the criterion to encourage local communities to identify and include sensitive ecosystems and/or cultural resources in their application and to incorporate them if possible into the site design of prospective projects.

New subsection (b)(10) awards 0-10 points for sustainable park design. The department believes that sustainability is an important concept, as it improves efficiency, lowers costs, and reduces negative impacts to the environment. Therefore, the provision allows the award of points based on the extent to which a prospective project incorporates sustainable design and operation features.

New subsection (b)(11) awards 0-5 points for the quality of and degree to which a proposed project involves coordination with subject matter experts. The department concludes that successful projects contemplate the need for subject matter experts where necessary and effective, such as permitting processes, consultants, professional services, and associated factors that impact the development and operation of a project. Proposed

projects that reflect engagement with this criterion are likely to require less administrative assistance from the department and are therefore desirable.

New subsection (b)(12) awards 0-5 points for the extent to which the proposed project involves the contribution of resources from sources other than the applicant to serve as all or part of the applicant's matching share of funds. The criterion is subdivided into two subcategories, either documented guarantees of support from external entities (up to three points) or evidence of community engagement and mobilization greater than the required match (up to two points). The department does not wish to impede communities from obtaining matching funds in any way possible. Therefore, the provision allows the department to recognize non-traditional or unorthodox methods of raising matching funds in addition to the traditional methods.

New subsection (b)(13) awards 0-10 points for past performance. The department believes that an applicant with a history of competent performance on previous grants represents a lower risk of failure than an applicant with a history of problematic performance. Therefore, up to ten points could be awarded to an applicant that either is in full compliance with previous grant agreements or can offer reasonable assurances that existing deficiencies with prior grant performance will be remedied. Applicants with existing compliance issues could be awarded up to ten points in accordance with their past performance. The department wishes to encourage participation by all legitimate entities and believes that a ten-point award for first-time participants will provide an incentive for potential applicants for grants. Similarly, the department believes that an entity with a history of unresolved compliance issues should be provided an incentive for developing and implementing appropriate corrective measures on previous grants.

The department received no comments opposing adoption of the proposed rules.

The department received three comments supporting adoption of the proposed rules.

## SUBCHAPTER B. PROCEDURAL GUIDE FOR LAND AND WATER CONSERVATION FUND PROGRAM

### 31 TAC §61.81

The repeal is adopted under Parks and Wildlife Code, Chapter 24, which requires the department to adopt regulations for grant assistance.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER D. GUIDELINES FOR ADMINISTRATION OF LOCAL LAND AND WATER CONSERVATION FUND PROJECTS

### 31 TAC §61.121

The repeal is adopted under Parks and Wildlife Code, Chapter 24, which requires the department to adopt regulations for grant assistance.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER E. GUIDELINES FOR ADMINISTRATION OF TEXAS LOCAL PARKS, RECREATION, AND OPEN SPACE FUND PROGRAM

### 31 TAC §§61.131, 61.133 - 61.139

The repeals are adopted under Parks and Wildlife Code, Chapter 24, which requires the department to adopt regulations for grant assistance.

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## SUBCHAPTER E. LOCAL PARKS AND RECREATION GRANT PROGRAM

### 31 TAC §§61.132, 61.133 - 61.136

The amendment and new rules are adopted under Parks and Wildlife Code, Chapter 24, which requires the department to adopt regulations for grant assistance.

§61.134. *Local Park and Recreation Grant Program.*

(a) The purpose of this section is to provide a mechanism for determining the suitability of project proposals for funding the acqui-

sition of land and the development of public indoor and outdoor recreation facilities.

(b) Scoring Criteria.

(1) Community Need (Total Range: 0-10 points).

(A) Applicant has a current Park, Recreation, and Open Space Comprehensive Plan or other comparable plan on file with the department at the time of application. (5 points)

(B) Applicant:

(i) describes the needs-assessment process used for this project;

(ii) explains the influence of community needs on the site design;

(iii) provides a detailed description of the public input process (including the timing of public comment opportunity, methods for obtaining and analyzing public comment, and the results/impacts of public comment); or

(iv) identifies other methods of needs assessment such as staff recommendations or threat of a lost opportunity. (0-5 points)

(2) Goals and Objectives (Total Range: 0-10 points). The project proposal identifies specific, well-defined goals and objectives that both clearly explain the local priorities to be addressed by the proposed project and illustrate how the proposed project, if funded, will support the department's Land and Water Resources Conservation and Recreation Plan, Texas Outdoor Recreation Plan, and Local Park Grant program objectives, as applicable. Proposed projects that provide direct recreational opportunities will receive priority.

(3) Timeline and Cost (Total Range: 0-5 points). The project proposal includes a detailed timeline and budget that identify, on a step-by-step basis, the waypoints along the continuum of the project's progress from start to finish and all expected project costs associated with the proposed project, correlated chronologically to the timeline. The department will evaluate proposed projects with respect to this criterion based on the feasibility of the project in the context of the department's understanding of similar projects and the consistency of the submitted budget with that understanding, particularly with respect to acquisition and/or construction costs.

(4) Site Design (Total Range: 0-10 points). An application must include a site plan/boundary map that is clear, easy-to-read, and contains all information required by and identified in the funding application. Acquisition-only projects must describe plans to protect natural and cultural resources and include plans depicting anticipated future development.

(A) Site design takes into consideration the character and special features (including features of natural, cultural, or historical importance) of the site and clearly identifies street names, total acreage, true north arrow, utilities, easements, special features, boundaries of existing parkland, and boundaries of acquisition tracts. Site maps correlate with the project components described in the application and outlined in the itemized budget. (0-5 points)

(B) Project maximizes the use of funds for acquisition, recreation and conservation opportunities, determined by dividing the direct acquisition, recreational, and conservation costs by the total construction costs and multiplying the result by 5. (0-5 points)

(5) Organizational capacity (Total Range: 0-5 points).

(A) The applicant demonstrates to the department's satisfaction that qualified staff and resources are in place to manage the

grant from inception to completion, or, alternatively, evidence that the applicant is partnered with an entity to provide staff and/or resources necessary to manage the grant from inception to completion.

(B) The applicant demonstrates to the department's satisfaction that resources are in place to properly operate and maintain facilities supported by the grant following completion, or, alternatively, a feasible plan and timeline for obtaining resources to properly operate and maintain the facilities supported by the grant following completion.

(6) Past Performance (Total Range: 0-10 points).

(A) Applicant is a first-time applicant. (10 points); or

(B) Applicant is in full compliance with the conditions of previously-funded and active recreation grants awarded by the department under this subchapter. (10 points); or

(C) Applicant is not in compliance with the conditions of previously-funded and active recreation grants awarded by the department under this subchapter but provides a credible and feasible action plan and timeline for achieving compliance. (0-10 points).

(7) Geographic Distribution (Total Range: 0-5 points). The project will improve the geographic distribution of park and recreation lands and facilities in the project's service area or within the applicant's jurisdiction.

(A) Project provides the first public park in the applicant's jurisdiction or intended service area (5 points); or

(B) Project:

(i) fills a critical parks and recreation gap as identified through research, public input, or other means. (0-3 points).

(ii) is safely accessible to the public via multiple modes of transportation (e.g., walking, biking, public transportation system). (0-2 points).

(8) Under-served Populations (Total Range: 0-10 points). The proposed project increases opportunity and improves access to parks and recreation facilities for under-served populations.

(A) Project improves opportunities for low-income citizens, defined as the percent of households making less than \$35,000 per year, based on economic and demographic data for the service area from the most recent federal census data; and/or

(B) Project improves opportunities for ethnic minority citizens, defined as the percent of a population that does not select "white alone" on the US Census, based on economic and demographic data for the service area from the most recent census data; determined by multiplying the sum of percentage of population qualifying as low-income and percentage of population qualifying as minority by 5.

(9) Accessibility (Total Range: 0-5 points). The proposed project provides park and recreation opportunities for physically/mentally challenged citizens that exceed federal and state required accessibility standards.

(10) Conservation (Total Range: 0-10 points). The proposed project actively protects or restores sensitive ecosystems and incorporates elements that cultivate support for and awareness of natural and/or cultural resources.

(11) Sustainable Park Design (Total Range: 0-10 points). The applicant demonstrates that the proposed project uses or incorporates sustainable design features and practices.

(12) Coordination with Subject Matter Experts. (Total Range: 0-5 points).

(A) The applicant demonstrates meaningful input to the proposed project by subject matter experts in acquisition, planning, design, natural resource protection, and construction.

(B) The proposed project reflects consideration and inclusion of best management practices in all phases of project development.

(13) Outside Partnerships (Total Range: 0-5 points). The extent to which the proposed project involves the contribution of resources from sources other than the applicant to serve as all or part of the applicant's matching share of funds.

(A) Current, signed letters of commitment providing detailed descriptions of the nature and value of contributions, including methodologies employed to determine those values. Points shall be awarded on a percentage basis, determined by dividing the total outside contribution value by the total match and multiplying the result by 3. (0-3 points); and/or

(B) Applicant demonstrates and documents external support greater than the required match, including overmatch and/or community mobilization. (0-2 points)

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## CHAPTER 69. RESOURCE PROTECTION SUBCHAPTER H. ISSUANCE OF MARL, SAND, AND GRAVEL PERMITS

### **31 TAC §§69.101, 69.102, 69.105, 69.108, 69.110, 69.111, 69.114, 69.117 - 69.120**

The Texas Parks and Wildlife Commission in a duly noticed meeting on August 22, 2019, adopted amendments to §§69.101, 69.102, 69.105, 69.108, 69.110, 69.111, 69.114, and 69.117 - 69.120, concerning Issuance of Marl, Sand, and Gravel Permits. Sections 69.105, 69.108, and 69.117 are adopted with changes to the proposed text as published in the July 19, 2019, issue of the *Texas Register* (44 TexReg 3620). The amendments to §§69.101, 69.102, 69.110, 69.111, 69.114, and 69.118 - 69.120 are adopted without change and will not be republished.

The change to §69.105, concerning Application Procedures, would retain provisions in the current rules regarding notification and reporting requirements, specifically, provisions regarding the contents of the sedimentation impact assessment required as part of the application. As proposed, the rules stipulated that an applicant for a permit submit a department-approved sedimentation impact assessment as part of the permit application process and eliminated provisions from §69.108, concerning Criteria, and §69.117, concerning Notification and Reporting for General Permits that enumerated the contents of required public

notices. The department's reasoning was that an insufficient or inadequate sedimentation impact assessment would prevent a permit from being issued; however, public comment persuaded the commission that retaining the current language concerning the content of a sedimentation impact assessment would be prudent. The changes are made in §69.105(b)(4).

The amendments are necessitated by the enactment of House Bill 2805 by the most recent session of the Texas Legislature. Additional nonsubstantive changes have been included to improve grammatical sense and comport the rules with current nomenclature.

House Bill 2805 requires the commission to prescribe one application form for individual and general permits and specifies that the form must require publication of notice of the application in the daily or weekly newspaper with the largest circulation in the county or counties affected by the issuance of the permit for three consecutive days, if daily, and in one newspaper published in the community closest to the proposed area of disturbance. The bill also requires an applicant for a permit to provide proof to the department that the notice was sent by certified mail to alongshore property owners at least one river mile upstream and downstream of the proposed area of disturbance, submit a sedimentation impact assessment approved by the department, and, in the case of application for permit renewal, any amendments to the permit. Additionally, the provisions of H.B. 2805 limit the term of a general permit to one year and require a person holding a permit to deliver a report to the department specifying the volume of sedimentary material removed during the term of the permit, and require the commission to adopt rules regarding delivery and format of the report.

The amendments implement the regulatory changes necessitated by House Bill 2805.

The department received one comment opposing adoption of the proposed rules. The commenter stated that the rule as proposed appeared to remove the current requirement that public notice include various details of prospective projects. The department disagrees with the comment to the extent that the proposed rules would compromise any protections under current rules, and responds that the rules as proposed simply incorporated the provisions in question under the rubric of "department-approved sedimentation impact assessment." However, the department has no issue with retaining the current list of components of sedimentation impact assessments if it helps to clarify the concerns of the regulated community and has made changes accordingly.

The department received one comment supporting adoption of the proposed rules.

The amendments are adopted under authority of Parks and Wildlife Code, Chapter 86, which authorizes the commission to adopt rules to govern consideration of applications; setting and collection of application fees; permit conditions; issuance of permits by rule; pricing of and terms for payment for substrate materials; and any other matter necessary for the administration of the chapter.

*§69.105. Application Procedures.*

(a) The application for a permit (either individual or general) shall set forth the proposed location, quantities, kinds of materials to be removed, equipment to be used, period of time, names of alongshore property owners on both sides of the waterway for one mile both upstream and downstream of the proposed operation, and other information as may be required.

(b) All applications shall include:

(1) a completed sand and gravel permit application on a form provided by the department;

(2) a completed publisher's affidavit for notice approved by the department published in:

(A) the daily or weekly newspaper with the greatest circulation in the county or counties affected by the issuance of the permit for three consecutive days, if daily, and if weekly, in three consecutive weeks; and

(B) one newspaper published for the community closest to the proposed area of disturbance, if any;

(3) proof that notice approved by the department was sent by certified mail to all alongshore property owners within one river mile upstream and downstream of the proposed area of disturbance described in the application;

(4) a sedimentation impact assessment, including an evaluation of sediment budget, erosion rates of the river segment to be affected, and the effect on coastal and receiving waters, approved by the department; and

(5) a project description that includes, at a minimum:

(A) the name, address, and telephone number of the applicant;

(B) a description of the proposed activity or a plan of the proposed project;

(C) if applicable, the size of the pipeline or cable, the width of the proposed trench, and the width of the right-of-way to be disturbed;

(D) a vicinity map showing the location of the proposed activity;

(E) the maximum amount of sedimentary material to be disturbed or removed and a description of its intended final disposal area;

(F) the date that the proposed activity will begin;

(G) a statement disclosing whether or not any species listed as state or federal threatened or endangered species might be affected by, or found in the vicinity of, the proposed project; and

(H) maps, drawings, and/or photographs depicting property of adjacent landowners and other resources including trees, wetlands, aquatic habitats such as channels or shallows; and

(6) any requested amendments to the permit, if the application is for the renewal of a permit.

(c) The public notice shall set forth a time and place for a public comment hearing to receive public comment on the application.

(d) Within 30 days of receipt of an administratively complete application, the department shall:

(1) publish notice of the public comment hearing in the Texas Register at least 20 days prior to the hearing date; and

(2) mail a copy of the notice to any person who has made a written request for forwarding of this information, and shall notify the applicant;

(e) The public notice shall set forth in full any trade or corporate name used by the applicant. The applicant shall be responsible for prompt and full payment for all newspaper notice required.

(f) A completed publisher's affidavit for all required newspaper notice shall be required prior to commencement of a contested case hearing.

(g) The department shall set a 30-day public comment period to begin on the date of publication in the *Texas Register* or the newspaper(s), whichever is later. All relevant public comment shall be presented to the executive director or the commission at the time the permit application is presented for decision.

§69.108. *Criteria.*

(a) The director may consider the following criteria in determining whether to grant or deny a permit:

- (1) the past performance of the applicant with respect to its obedience and strict observance of the terms of past permits;
- (2) whether the applicant shows evidence of financial responsibility;
- (3) the ability of the applicant to operate, including its facilities for operation;
- (4) the existence of sedimentary materials in the area applied for;
- (5) whether the granting of the permit will have a material adverse effect on recreational activity in the general area affected by the permit;
- (6) whether the granting of the permit will have a material adverse effect on commercial fishing or the general seafood industry in the general area affected by the permit;
- (7) the effect, if any, on navigation in the general area affected by the permit.

(b) The director shall consider the following criteria in determining whether to grant or deny a permit:

- (1) whether operation under the proposed permit will damage or injuriously affect oysters, oyster beds, or fish-inhabiting waters thereof or adjacent thereto;
- (2) whether the operation will damage or injuriously affect any island, reef, bar, channel, river, creek, or bayou used for frequent or occasional navigation, or change or otherwise injuriously affect any current that will affect navigation;
- (3) the requirements of industry for such sedimentary materials and the relative value to the State of Texas for commercial use.

§69.117. *Emergency Situations.*

(a) In the event of an emergency that requires immediate action to prevent a threat to human health and safety or the environment, a person who seeks to remove or disturb less than 1,000 cubic yards of sedimentary material shall promptly notify the department that an emergency exists. The department shall respond to this notification within 72 hours with a determination that the action is approved, not approved, or approved with conditions.

(b) Within ten days of completing an approved emergency activity, a permittee shall submit a written report to the department. Such report shall include:

- (1) the name, address, and telephone number of the applicant;
- (2) a description of the emergency activity;
- (3) a small-scale map showing the location of the emergency activity;

(4) the estimated amount of sedimentary material disturbed or removed as a result of the emergency activity; and

(5) the date(s) the emergency activity took place.

(c) Additional requirements. The department may, at its discretion, require a permittee to furnish reports during and after any activity authorized under the provisions of this subchapter.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Texas Parks and Wildlife Department

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For further information, please call: (512) 389-4329



## TITLE 40. SOCIAL SERVICES AND ASSISTANCE

### PART 1. DEPARTMENT OF AGING AND DISABILITY SERVICES

#### CHAPTER 9. INTELLECTUAL DISABILITY SERVICES--MEDICAID STATE OPERATING AGENCY RESPONSIBILITIES

As required by Texas Government Code §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Texas Health and Human Services Commission (HHSC) in accordance with Texas Government Code §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation of and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, the Executive Commissioner of HHSC adopts amendments to §§9.153, 9.177, 9.178, and 9.190; and new §9.175; in Subchapter D, Home and Community-based Services (HCS) Program and Community First Choice (CFC); and amendments to §§9.553, 9.555, 9.579, 9.580, and 9.583; and new §9.585; in Subchapter N, Texas Home Living (TxHmL) Program and Community First Choice (CFC); in Title 40, Part 1, Chapter 9, Intellectual Disability Services--Medicaid State Operating Agency Responsibilities.

The amendments to §9.178 and §9.580, and new §9.175 and §9.585, are adopted with changes to the proposed text as published in the March 1, 2019, issue of the *Texas Register* (44 TexReg 942). The amendments to §§9.153, 9.177, 9.190, 9.553, 9.555, 9.579, and 9.583 are adopted without changes to the proposed text as published in the March 1, 2019, issue of the *Texas Register* (44 TexReg 942), and therefore will not be republished.



## BACKGROUND AND JUSTIFICATION

The HCS Program and the TxHmL Program are Medicaid waiver programs approved by the Centers for Medicare & Medicaid Services under §1915(c) of the Social Security Act. These programs provide community-based services and supports to an eligible individual as an alternative to services provided in an institutional setting.

One of the purposes of the adopted rules is to include in Chapter 9, Subchapters D and N, all of the requirements related to abuse, neglect, and exploitation of an individual in the HCS or TxHmL Program. Currently, Texas Administrative Code, Title 40, (40 TAC) §49.310, Abuse, Neglect, and Exploitation Allegations, applies to the HCS and TxHmL Programs and requires a program provider to take certain actions related to abuse, neglect, and exploitation. Rules in 40 TAC Chapter 49, Contracting for Community Services, are being adopted in this issue of the *Texas Register*, to include the HCS and TxHmL Programs from §49.310. Those rules are adopted in Chapter 9, Subchapters D and N, to use terminology specific to the HCS and TxHmL Programs, add specificity to the current requirements of §49.310, and add new requirements. For example, the adopted rules require a program provider to (1) conduct training related to abuse, neglect, and exploitation of staff members, service providers, and volunteers before assuming job duties and at least annually thereafter; (2) ensure that the persons who are trained are knowledgeable about signs and symptoms of abuse, neglect, and exploitation; and (3) educate an individual and legally authorized representative (LAR) about protecting the individual from abuse, neglect, and exploitation.

Another purpose of the adopted rules is to change current references to "Department of Family and Protective Services (DFPS) investigations" to "HHSC investigations." This change is necessary because effective September 1, 2017, in accordance with Texas Government Code, §531.02011 and §531.02013, the functions performed by the DFPS Adult Protective Services (APS) Provider Investigations (PI) Program were transferred to HHSC. The adopted rules also clarify that HHSC investigates allegations of abuse, neglect, or exploitation of an individual when the alleged perpetrator is a volunteer or controlling person, in addition to if the alleged perpetrator is a service provider or staff member.

Another purpose of the adopted rules is to include current requirements for Local Intellectual and Developmental Disability Authorities (LIDDAs) that address changes to the investigatory process for abuse, neglect, and exploitation as a result of amendments to Texas Human Resources Code, Chapter 48, effective September 1, 2015. The amendments gave the DFPS APS PI Program the authority to investigate an allegation of abuse, neglect, or exploitation of an individual receiving services through the consumer directed services (CDS) option. The adopted rules require a LIDDA to ensure its rights protection officer who receives a copy of an HHSC initial intake report or a final investigative report for individuals receiving services through the CDS option, gives a copy of each report to the individual's service coordinator so that the service coordinator can perform functions related to those reports. The requirements for service coordinators related to abuse, neglect, and exploitation in the CDS option are being adopted in 40 TAC Chapter 41, Consumer Directed

Services Option, in this same issue of the *Texas Register*.

The adopted rules require a service provider of behavioral support who is a behavior analyst to be licensed in accordance with Texas Occupations Code, Chapter 506. This change is based on Senate Bill 589 (85th Legislature, Regular Session, 2017) which added Chapter 506 to the Texas Occupations Code to require a behavior analyst to be licensed by the Texas Department of Licensing and Regulation by September 1, 2018.

The adopted rules related to the TxHmL Program delete rules regarding social work services because social work is not a TxHmL Program service.

The adopted rules also update agency names and replace specific website addresses.

## COMMENTS

The 30-day comment period ended March 31, 2019.

During this period, HHSC received comments regarding the proposed rules from a representative of the Texas Council for Developmental Disabilities and Disability Rights Texas and a representative of the Texas Council of Community Centers. A summary of comments relating to the rules and HHSC's responses follows.

Comment: Regarding proposed §9.175(a)(2) and §9.585(a)(2), a commenter stated that the rules do not specify when the training must occur and recommended that the rules require training before a staff member, service provider, or volunteer assumes job duties and annually thereafter.

Response: HHSC disagrees that the rules do not specify when the training must occur. Proposed §9.175(a)(3) and §9.585(a)(3) requires a program provider to train a staff member, service provider, or volunteer on issues related to abuse, neglect, and exploitation before assuming job duties and at least annually thereafter.

Comment: A commenter stated that while the requirements in proposed §9.175(c) and (d) and §9.585(c) and (d) clarify the obligation to obtain medical or psychological services and delineate internal processes for ensuring the care and safety of the alleged victim, the commenter requests that the rule require these processes to be performed in such a way that they do not compromise the evidence to be collected during the HHSC investigation or other investigation or result in further trauma to the individual. The commenter also recommends that instruction be provided as to how assessments should be carried out without further trauma to the victim or contaminating evidence.

Response: HHSC agrees with the importance of a program provider preserving and protecting evidence and not compromising an investigation or further traumatizing the individual and revised §9.175(c) and (d) and §9.585(c) and (d) to include this requirement. HHSC will provide information to help program providers avoid compromising an investigation or further traumatizing the individual.

Comment: Regarding proposed §9.175(d)(2) and §9.585(d)(2), a commenter recommended that the rules require separating the alleged perpetrator from the alleged victim and other individuals receiving services in all situations.

Response: HHSC disagrees that separating an alleged perpetrator from an alleged victim and other individuals is necessary in all situations to secure the individual's safety and declines to make the requested change. HHSC will consider the comment for future rulemaking.

Comment: Regarding proposed §9.175(d)(4)(A) and (B) and §9.585(d)(4)(A) and (B), a commenter noted that the rules allow up to 24 hours to notify the individual and LAR of the allegation report and related matters and recommended that the notification be required no later than one hour after the program provider reports or is notified of the allegation.

Response: HHSC declines to make the suggested changes at this time. HHSC will consider the comments for future rulemaking. Proposed §9.175(d)(4) and §9.585(d)(4) require a program provider to notify the individual, the LAR, and the service coordinator of the allegation report "as soon as possible." While "as soon as possible" could require notification in a matter of minutes, there may be circumstances in which the provider needs additional time to determine the actions required by proposed §9.175(d)(4)(B) and §9.585(d)(4)(B). HHSC considers 24 hours the outside limit to provide notification "as soon as possible" and expects program providers to provide notification in the shortest timeframe possible.

Comment: Regarding proposed §9.175(e) and §9.585(e), which require a program provider to cooperate with the HHSC investigation, a commenter recommended that the rules be broadened to include other investigations, such as by law enforcement.

Response: Sections 9.175 and 9.585, as proposed, only address HHSC investigations of alleged abuse, neglect, or exploitation. HHSC disagrees with the recommendation to broaden the scope of the rules at adoption to address other investigations. Therefore, HHSC declines to make the recommended change.

Comment: Regarding proposed §9.175(f)(1)(B) and §9.585(f)(1)(B), a commenter recommended that the rules require that disciplinary action be taken by the program provider after receiving a final investigative report from HHSC that includes a confirmed finding. Additionally, the commenter recommended that language be added to require that disciplinary action be taken if a staff member or service provider fails to cooperate with the investigation or if it is determined that the service provider or staff member impeded the investigation or was dishonest in evidence provided in the investigation.

Response: HHSC agrees with the recommendation to require a program provider to take disciplinary action against a service provider, staff member, or volunteer confirmed to have committed abuse, neglect, or exploitation. HHSC makes the recommended change by striking "appropriate" and "when warranted" in §9.175(f)(1)(B) and §9.585(f)(1)(B). However, HHSC disagrees with the recommendation to require disciplinary action if a staff member or service provider fails to cooperate with, or impedes, the HHSC investigation. Section 9.175(e)(3) and §9.585(e)(3) require a program provider to ensure that staff members, service providers, volunteers, and controlling persons comply with §9.175(e)(1) and (2) and §9.585(e)(1) and (2). Therefore, HHSC declines to require a program provider to take disciplinary action for failure of a staff member or service provider to comply with the rules. Non-compliance could range in type and severity, and a program provider is generally in the best position to determine if disciplinary action is appropriate. HHSC will consider the comment for future rulemaking.

Comment: Regarding proposed §9.175(f)(3) and §9.585(f)(3), a commenter questioned the delay of five calendar days for the program provider to notify the individual, the LAR, and the service coordinator of the outcome of the investigation. The com-

menter recommended adding language requiring that the notification be made as quickly as possible.

Response: HHSC disagrees with the recommendation to require notification be made as quickly as possible after the program provider receives the final investigative report and declines to make this change. Proposed §9.175(f)(3) and §9.585(f)(3) require a program provider to notify the individual, the LAR, and the service coordinator of the investigation finding "immediately." However, there may be circumstances in which the program provider needs additional time to take the action required by subsection (f)(1) and (2) of these rules. HHSC considers five calendar days a reasonable outside limit to give the notification. HHSC will consider the comment for future rulemaking.

Comment: Regarding proposed §9.175(f)(5) and §9.585(f)(5), a commenter requests clarifying language be added to address that the individual will receive the final investigative report from the financial management services agency (FMSA), local intellectual developmental disability authority (LIDDA), or other agency responsible, when an individual is receiving services through the CDS option and does not have a program provider.

Response: HHSC disagrees with the recommendation to change §9.175(f)(5) and §9.585(f)(5) to clarify whether an FMSA, LIDDA, or another entity must provide a redacted final investigative report to an individual or LAR in the CDS option. Such a change is unnecessary because state rule at 26 TAC §711.613(4) prohibits an FMSA, a service coordinator, and a case manager from releasing a final investigative report to a CDS employer or individual. Further, proposed §41.702(g) and §41.703(h) require a case manager or service coordinator to hold a service planning team meeting to discuss the content of the final investigative report. Therefore, HHSC declines to make the requested change.

Comment: Regarding proposed §9.177(d)(2)(A) and (B) and §9.579(d)(2)(A) and (B), a commenter requested removing the dates related to training requirements for staff who participate in development of an implementation plan for CFC personal assistance services/habilitation because the dates in these rules have passed.

Response: The requested change is outside the scope of this rule project and, therefore, HHSC declines to make the change. HHSC will consider the comment for future rulemaking.

Comment: Regarding proposed §9.178(k)(3) and §9.580(f)(1), a commenter recommended that program providers' review of all final investigative reports from HHSC be performed on a quarterly basis for it to be meaningful and proactive in preventing the re-occurrence of allegations of abuse, neglect, or exploitation. The commenter also stated that the review should include looking at the source of the complaints as well as the details of the allegation and any policies or practices that might have contributed to the allegation.

Response: HHSC disagrees with the recommendation to require program providers to review all final investigative reports on a quarterly basis and declines to make this change. Requiring program providers to conduct an annual review allows them to review data covering a sufficient period of time to be able to effectively identify trends and implement process improvements. HHSC will consider the comment for future rulemaking.

Comment: Regarding proposed §9.178(q)(4) and §9.580(k)(11), a commenter recommended that a behavior support plan that involves implementation of behavior management techniques

involving intrusive interventions or restriction of the individual's rights be amended to require review on a quarterly basis rather than an annual basis.

Response: The requested change is outside the scope of this rule project and, therefore, HHSC declines to make the change. HHSC will consider the comment for future rulemaking.

Comment: Regarding proposed §9.178(s)(1) and (2), a commenter recommended keeping the current language that specifically prohibits retaliation related to the report of inappropriate use of restraint or the prohibited use of seclusion.

Response: HHSC agrees with the recommendation and made changes in §9.178(s)(1) and (2) and §9.580(m)(1) and (2) to clarify that abuse includes the use of seclusion and the use of a restraint not in compliance with federal and state laws, rules, and regulations.

Comment: Regarding proposed §9.178(t) and §9.580(n), a commenter recommended that the program provider be required to enter critical incident data no later than 30 days following the date of the critical incident rather than the last calendar day of the month that follows the month being reported.

Response: The requested change is outside the scope of this rule project and, therefore, HHSC declines to make the change. HHSC will consider the comment for future rulemaking.

Comment: Regarding proposed §9.190(a)(2) and §9.583(q)(2), a commenter expresses concern that the proposed rules will require more staff to have a copy of HHSC's initial intake or final investigation report, which could more easily expose an accused staffer's identity before the allegation of abuse, neglect, or exploitation is found to be confirmed or unconfirmed.

Response: HHSC declines to change §9.190(a)(2) and §9.583(q)(2) to include specific expectations regarding the confidentiality of information in the initial intake report and final investigative report. Such a change is unnecessary because state law at Human Resources Code, §48.101(a)(3) and §48.005 and state rules at 26 TAC §705.7123 and §711.613 address the confidentiality and disclosure of the reports.

Comment: Regarding proposed §9.190(e)(4) and §9.583(d)(3), a commenter recommended adding the contact information for the Protection and Advocacy System, Disability Rights Texas, to the other entities listed for submission of complaints.

Response: The requested change is outside the scope of this rule project and, therefore, HHSC declines to make the change. HHSC will consider the comment for future rulemaking.

Comment: Regarding proposed §9.190(e)(12)(A) and §9.583(k), a commenter recommended changes be made in the process that occurs when an individual's person-directed plan requires revision. The commenter recommended that language be clarified to more accurately depict the role of the individual and the LAR in the service planning process related to revision of the person-directed plan.

Response: The requested change is outside the scope of this rule project and, therefore, HHSC declines to make the change. HHSC will consider the comment for future rulemaking.

Comment: Regarding proposed §9.190(e)(23), a commenter recommended that language be added that includes a specific timeframe related to delivery of a notice to the individual and LAR when a service coordinator recommends termination of an individual's services.

Response: The requested change is outside the scope of this rule project and, therefore, HHSC declines to make the change. HHSC will consider the comment for future rulemaking.

Changes were made in §9.175(f)(3)(B)(i) and §9.585(f)(3)(B)(i) to correct references to 40 TAC Chapter 711 that transferred to Texas Administrative Code, Title 26.

## SUBCHAPTER D. HOME AND COMMUNITY-BASED SERVICES (HCS) PROGRAM AND COMMUNITY FIRST CHOICE (CFC)

### 40 TAC §§9.153, 9.175, 9.177, 9.178, 9.190

#### STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendments and new section implement Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

*§9.175. Certification Principles: Requirements Related to the Abuse, Neglect, and Exploitation of an Individual.*

(a) A program provider must:

(1) ensure that an individual and LAR are, before or at the time the individual begins receiving an HCS Program service or a CFC service and at least annually thereafter:

(A) informed of how to report allegations of abuse, neglect, or exploitation to DFPS and are provided with the toll-free telephone number, 1-800-647-7418, in writing; and

(B) educated about protecting the individual from abuse, neglect, and exploitation;

(2) ensure that each staff member, service provider, and volunteer are:

(A) trained and knowledgeable of:

(i) acts that constitute abuse, neglect, and exploitation;

(ii) signs and symptoms of abuse, neglect, and exploitation; and

(iii) methods to prevent abuse, neglect, and exploitation;

(B) instructed to report to DFPS immediately, but not later than one hour after having knowledge or suspicion, that an individual has been or is being abused, neglected, or exploited, by:

(i) calling the DFPS Abuse Hotline toll-free telephone number, 1-800-647-7418; or

(ii) using the DFPS Abuse Hotline website; and

(C) provided with the instructions described in subparagraph (B) of this paragraph in writing; and

(3) conduct the activities described in paragraph (2)(A) - (C) of this subsection before a staff member, service provider, or volunteer assumes job duties and at least annually thereafter.

(b) If a program provider, staff member, service provider, volunteer, or controlling person knows or suspects an individual is being or has been abused, neglected, or exploited, the program provider must report or ensure that the person with knowledge or suspicion reports the allegation of abuse, neglect, or exploitation to DFPS immediately, but not later than one hour after having knowledge or suspicion, by:

- (1) calling the DFPS Abuse Hotline toll-free telephone number, 1-800-647-7418; or
- (2) using the DFPS Abuse Hotline website.

(c) If a report required by subsection (b) of this section alleges abuse, neglect, or exploitation by a person who is not a service provider, staff member, volunteer, or controlling person, a program provider must:

- (1) as necessary:
  - (A) obtain immediate medical or psychological services for the individual; and
  - (B) assist in obtaining ongoing medical or psychological services for the individual;
- (2) discuss with the individual or LAR alternative residential settings and additional services that may help ensure the individual's safety;
- (3) when taking the actions described in paragraphs (1) and (2) of this subsection, avoid compromising the investigation or further traumatizing the individual; and
- (4) preserve and protect evidence related to the allegation.

(d) If a report required by subsection (b) of this section alleges abuse, neglect, or exploitation by a service provider, staff member, volunteer, or controlling person; or if a program provider is notified by HHSC of an allegation of abuse, neglect, or exploitation by a service provider, staff member, volunteer, or controlling person, the program provider must:

- (1) as necessary:
  - (A) obtain immediate medical or psychological services for the individual; and
  - (B) assist in obtaining ongoing medical or psychological services for the individual;
- (2) take actions to secure the safety of the individual, including if necessary, ensuring that the alleged perpetrator does not have contact with the individual or any other individual until HHSC completes the investigation;
- (3) when taking the actions described in paragraphs (1) and (2) of this subsection, avoid compromising the investigation or further traumatizing the individual;
- (4) preserve and protect evidence related to the allegation; and
- (5) notify, as soon as possible, but no later than 24 hours after the program provider reports or is notified of the allegation, the individual, the LAR, and the service coordinator of:
  - (A) the allegation report; and
  - (B) the actions the program provider has taken or will take based on the allegation, the condition of the individual, and the

nature and severity of any harm to the individual, including the actions required by paragraph (2) of this subsection.

(e) During an HHSC investigation of an alleged perpetrator who is a service provider, staff member, volunteer, or controlling person, a program provider must:

- (1) cooperate with the investigation as requested by HHSC, including providing documentation and participating in an interview;
- (2) provide HHSC access to:
  - (A) sites owned, operated, or controlled by the program provider;
  - (B) individuals, service providers, staff members, volunteers, and controlling persons; and
  - (C) records pertinent to the investigation of the allegation; and
- (3) ensure that staff members, service providers, volunteers, and controlling persons comply with paragraphs (1) and (2) of this subsection.

(f) After a program provider receives a final investigative report from HHSC for an investigation described in subsection (e) of this section, the program provider must:

- (1) if the allegation of abuse, neglect, or exploitation is confirmed by HHSC:
  - (A) review the report, including any concerns and recommendations by HHSC; and
  - (B) take action within the program provider's authority to prevent the reoccurrence of abuse, neglect or exploitation, including disciplinary action against the service provider, staff member, or volunteer confirmed to have committed abuse, neglect, or exploitation;
- (2) if the allegation of abuse, neglect, or exploitation is unconfirmed, inconclusive, or unfounded:
  - (A) review the report, including any concerns and recommendations by HHSC; and
  - (B) take appropriate action within the program provider's authority, as necessary;
- (3) immediately, but not later than five calendar days after the date the program provider receives the HHSC final investigative report:
  - (A) notify the individual, the LAR, and the service coordinator of:
    - (i) the investigation finding; and
    - (ii) the action taken by the program provider in response to the HHSC investigation as required by paragraphs (1) and (2) of this subsection; and
  - (B) notify the individual or LAR of:
    - (i) the process to appeal the investigation finding as described in 26 TAC Chapter 711, Subchapter J (relating to Appealing the Investigation Finding); and
    - (ii) the process for requesting a copy of the investigative report from the program provider;
- (4) within 14 calendar days after the date the program provider receives the final investigative report, complete and send to HHSC the HHSC Notification to Waiver Survey and Certification

(WSC) Regarding an Investigation of Abuse, Neglect or Exploitation form; and

(5) upon request of the individual or LAR, provide to the individual or LAR a copy of the HHSC final investigative report after removing any information that would reveal the identity of the reporter or of any individual who is not the alleged victim.

§9.178. *Certification Principles: Quality Assurance.*

(a) In the provision of HCS Program services and CFC services to an individual, the program provider must promote the active and maximum cooperation with:

(1) providers of services other than HCS Program services or CFC services; and

(2) advocates or other actively involved persons.

(b) The program provider must ensure personalized service delivery based upon the choices made by each individual or LAR and those choices that are available to persons without an intellectual disability or other disability.

(c) Before providing services to an individual in a residence in which host home/companion care, supervised living, or residential support is provided, and annually thereafter, the program provider must:

(1) conduct an on-site inspection to ensure that, based on the individual's needs, the environment is healthy, comfortable, safe, appropriate, and typical of other residences in the community, suited for the individual's abilities, and is in compliance with applicable federal, state, and local regulations for the community in which the individual lives;

(2) ensure that the service coordinator is provided with a copy of the results of the on-site inspection within five calendar days after completing the inspection;

(3) complete any action identified in the on-site inspection for a residence in which supervised living or residential support will be provided to ensure that the residence meets the needs of the individual; and

(4) ensure completion of any action identified in the on-site inspection for a residence in which host home/companion care will be provided to ensure that the residence meets the needs of the individual.

(d) The program provider must ensure that:

(1) emergency plans are maintained in each residence in which host home/companion care, supervised living or residential support is provided;

(2) the emergency plans address relevant emergencies appropriate for the type of service, geographic location, and the individuals living in the residence;

(3) the individuals and service providers follow the plans during drills and actual emergencies; and

(4) documentation of drills and responses to actual emergencies are maintained in each residence.

(e) A program provider must comply with the requirements in this subsection regarding a four-person residence.

(1) Before providing residential support in a four-person residence, the program provider must:

(A) ensure that the four-person residence meets one of the following:

(i) is certified by:

(I) the local fire safety authority having jurisdiction in the location of the residence as being in compliance with the applicable portions of the National Fire Protection Association 101: Life Safety Code (Life Safety Code) as determined by the local fire safety authority;

(II) the local fire safety authority having jurisdiction in the location of the residence as being in compliance with the applicable portions of the International Fire Code (IFC) as determined by the local fire safety authority; or

(III) the Texas State Fire Marshal's Office as being in compliance with the applicable portions of the Life Safety Code as determined by the Texas State Fire Marshal's Office; or

(ii) as described in paragraph (2) of this subsection, is certified by HHSC as being in compliance with the portions of the Life Safety Code applicable to small residential board and care facilities and most recently adopted by the Texas State Fire Marshal's Office; and

(B) obtain HHSC approval of the residence in accordance with §9.188 of this subchapter (relating to DADS Approval of Residences).

(2) HHSC inspects for certification as described in paragraph (1)(A)(ii) of this subsection only if the program provider submits to the HHSC Architectural Unit:

(A) one of the following:

(i) if the four-person residence is located in a jurisdiction with a local fire safety authority:

(I) a completed HHSC Form 5606 available on the HHSC website documenting that the local fire safety authority having jurisdiction refused to inspect for certification using the code (i.e. the Life Safety Code or IFC) for that jurisdiction; and

(II) written documentation from the Texas State Fire Marshal's Office that it refused to inspect for certification using the Life Safety Code; or

(ii) if the four-person residence is located in a jurisdiction without a local fire safety authority, written documentation from the Texas State Fire Marshal's Office that it refused to inspect for certification using the Life Safety Code; and

(B) a completed HHSC form "Request for Life Safety Inspection-HCS Four-Person Home" available on the HHSC website.

(3) The program provider must:

(A) obtain the certification required by paragraph (1)(A) of this subsection annually; and

(B) ensure that a four-person residence:

(i) contains a copy of the most recent inspection of the residence by the local fire safety authority, Texas State Fire Marshal's Office, or HHSC; and

(ii) is in continuous compliance with all applicable local building codes and ordinances and state and federal laws, rules, and regulations.

(f) The program provider must establish an ongoing consumer/advocate advisory committee composed of individuals, LARs, community representatives, and family members that meets at least quarterly. The committee:

(1) at least annually, reviews the information provided to the committee by the program provider in accordance with subsection (k)(6) of this section; and

(2) based on the information reviewed, makes recommendations to the program provider for improvements to the processes and operations of the program provider.

(g) The program provider must make available all records, reports, and other information related to the delivery of HCS Program services and CFC services as requested by HHSC, other authorized agencies, or CMS and deliver such items, as requested, to a specified location.

(h) The program provider must conduct, at least annually, a satisfaction survey of individuals and LARs and take action regarding any areas of dissatisfaction.

(i) The program provider must comply with §49.309 of this title (relating to Complaint Process).

(j) In all respite facilities and all residences in which a service provider of residential assistance or the program provider hold a property interest, the program provider must post in a conspicuous location:

- (1) the name, address, and telephone number of the program provider;
- (2) the effective date of the contract; and
- (3) the name of the legal entity named on the contract.

(k) At least annually, the program provider must:

(1) evaluate information about the satisfaction of individuals and LARs with the program provider's services and identify program process improvements to increase the satisfaction;

(2) review complaints, as described in §49.309 of this title, and identify program process improvements to reduce the filing of complaints;

(3) review all final investigative reports from HHSC and, based on the review, identify program process improvements that help prevent the occurrence of abuse, neglect, and exploitation and improve the delivery of services;

(4) review the reasons for terminating HCS Program services or CFC services and identify any related need for program process improvements;

(5) evaluate critical incident data described in subsection (t) of this section and compare the program provider's use of restraint to aggregate data provided by HHSC on the HHSC website and identify program process improvements that help prevent the reoccurrence of restraints and improve service delivery;

(6) provide all information the program provider reviewed, evaluated, and created as described in paragraphs (1) - (5) of this subsection to the consumer/advocate advisory committee required by subsection (f) of this section;

(7) implement any program process improvements identified by the program provider in accordance with this subsection; and

(8) review recommendations made by the consumer/advocate advisory committee as described in subsection (f)(2) of this section and implement the recommendations approved by the program provider.

(l) The program provider must ensure that all personal information concerning an individual, such as lists of names, addresses, and records obtained by the program provider is kept confidential, that the

use or disclosure of such information and records is limited to purposes directly connected with the administration of the program provider's HCS Program or provision of CFC services, and is otherwise neither directly nor indirectly used or disclosed unless the consent of the individual to whom the information applies or his or her LAR is obtained beforehand.

(m) The program provider must comply with this subsection regarding charges against an individual's personal funds.

(1) The program provider must, in accordance with this paragraph, collect a monthly amount for room from an individual who lives in a three-person or four-person residence. The cost for room must consist only of:

(A) an amount equal to:

(i) rent of a comparable dwelling in the same geographical area that is unfurnished; or

(ii) the program provider's ownership expenses, limited to the interest portion of a mortgage payment, depreciation expense, property taxes, neighborhood association fees, and property insurance; and

(B) the cost of:

(i) shared appliances, electronics, and housewares;

(ii) shared furniture;

(iii) monitoring for a security system;

(iv) monitoring for a fire alarm system;

(v) property maintenance, including personnel costs, supplies, lawn maintenance, pest control services, carpet cleaning, septic tank services, and painting;

(vi) utilities, limited to electricity, gas, water, garbage collection, and a landline telephone; and

(vii) shared television and Internet service used by the individuals who live in the residence.

(2) Except as provided in subparagraphs (B) and (C) of this paragraph, a program provider must collect a monthly amount for board from an individual who lives in a three-person or four-person residence.

(A) The cost for board must consist only of the cost of food, including food purchased for an individual to consume while away from the residence as a replacement for food and snacks normally prepared in the residence, and of supplies used for cooking and serving, such as utensils and paper products.

(B) A program provider is not required to collect a monthly amount for board from an individual if collecting such an amount may make the individual ineligible for the Supplemental Nutrition Assistance Program operated by HHSC.

(C) A program provider must not collect a monthly amount for board from an individual if the individual chooses to purchase the individual's own food, as documented in the individual's implementation plan.

(3) To determine the maximum room and board charge for each individual, a program provider must:

(A) divide the room cost described in paragraph (1) of this subsection by the number of residents receiving HCS Program services or similar services that the residence has been developed to support plus the number of service providers and other persons who live in the residence;

(B) divide the board cost described in paragraph (2) of this subsection by the number of persons consuming the food; and

(C) add the amounts calculated in accordance with subparagraphs (A) and (B) of this paragraph.

(4) A program provider must not increase the charge for room and board because a resident moves from the residence.

(5) A program provider:

(A) must not charge an individual a room and board amount that exceeds an amount determined in accordance with paragraphs (1) - (3) of this subsection; and

(B) must maintain documentation demonstrating that the room and board charge was determined in accordance with paragraphs (1) - (3) of this subsection.

(6) Before an individual or LAR selects a residence, a program provider must provide the room and board charge, in writing, to the individual or LAR.

(7) Except as provided in paragraph (8) of this subsection, a program provider may not charge or collect payment from any person for room and board provided to an individual receiving host home/companion care.

(8) If a program provider makes a payment to an individual's host home/companion care provider while waiting for the individual's federal or state benefits to be approved, the program provider may seek reimbursement from the individual for such payments.

(9) A program provider who manages personal funds of an individual who receives host home/companion care:

(A) may pay a room and board charge for the individual that is less than the foster/companion care provider's cost of room and board, as determined using the calculations described in paragraphs (1) and (2) of this subsection for a three-person or four-person residence, divided by the number of persons living in the host home/companion care provider's home;

(B) must pay the host home/companion care provider directly from the individual's account; and

(C) must not pay a host home/companion care provider a room and board charge that exceeds the host home/companion care provider's cost of room and board, as determined using the calculations described in paragraphs (1) and (2) of this subsection for a three-person or four-person residence, divided by the number of persons living in the host home/companion care provider's home.

(10) For an item or service other than room and board, the program provider must apply a consistent method in assessing a charge against the individual's personal funds that ensures that the charge for the item or service is reasonable and comparable to the cost of a similar item or service generally available in the community.

(n) The program provider must ensure that the individual or LAR has agreed in writing to all charges assessed by the program provider against the individual's personal funds before the charges are assessed.

(o) The program provider must not assess charges against the individual's personal funds for costs for items or services reimbursed through the HCS Program or through CFC.

(p) At the written request of an individual or LAR, the program provider must manage the individual's personal funds entrusted to the program provider, without charge to the individual or LAR in accordance with this subsection.

(1) The program provider must not commingle the individual's personal funds with the program provider's funds.

(2) The program provider must maintain a separate, detailed record of:

(A) all deposits into the individual's account; and

(B) all expenditures from the individual's account that includes:

(i) the amount of the expenditure;

(ii) the date of the expenditure;

(iii) the person to whom the expenditure was made;

(iv) except as described in clause (vi) of this subparagraph, a written statement issued by the person to whom the expenditure was made that includes the date the statement was created and the cost of the item or service paid for;

(v) if the statement described in clause (iv) of this subparagraph documents an expenditure for more than one individual, the amount allocated to each individual identified on the statement; and

(vi) if the expenditure is made to the individual for personal spending money, an acknowledgement signed by the individual indicating that the funds were received.

(3) The program provider may accrue an expense for necessary items and services for which the individual's personal funds are not available for payment, such as room and board, medical and dental services, legal fees or fines, and essential clothing.

(4) If an expense is accrued as described in paragraph (3) of this subsection, the program provider must enter into a written payment plan with the individual or LAR for reimbursement of the funds.

(q) If the program provider determines that an individual's behavior may require the implementation of behavior management techniques involving intrusive interventions or restriction of the individual's rights, the program provider must comply with this subsection.

(1) The program provider must:

(A) obtain an assessment of the individual's needs and current level and severity of the behavior; and

(B) ensure that a service provider of behavioral support services:

(i) develops, with input from the individual, LAR, program provider, and actively involved persons, a behavior support plan that includes the use of techniques appropriate to the level and severity of the behavior; and

(ii) considers the effects of the techniques on the individual's physical and psychological well-being in developing the plan.

(2) The behavior support plan must:

(A) describe how the behavioral data concerning the behavior is collected and monitored;

(B) allow for the decrease in the use of the techniques based on the behavioral data; and

(C) allow for revision of the plan when desired behavior is not displayed or the techniques are not effective.

(3) Before implementation of the behavior support plan, the program provider must:

(A) obtain written consent from the individual or LAR to implement the plan;

(B) provide written notification to the individual or LAR of the right to discontinue implementation of the plan at any time; and

(C) notify the individual's service coordinator of the plan.

(4) The program provider must, at least annually:

(A) review the effectiveness of the techniques and determine whether the behavior support plan needs to be continued; and

(B) notify the service coordinator if the plan needs to be continued.

(r) A program provider must report the death of an individual:

(1) to HHSC and the LIDDA by the end of the next business day after the program provider becomes aware of the death; and

(2) if the program provider reasonably believes that the LAR does not know of the individual's death, to the LAR as soon as possible, but not later than 24 hours after the program provider becomes aware of the death.

(s) A program provider must not retaliate against:

(1) a staff member, service provider, individual, or other person who files a complaint, presents a grievance, or otherwise provides good faith information relating to the possible abuse, neglect, or exploitation of an individual, including:

(A) the use of seclusion; and

(B) the use of a restraint not in compliance with federal and state laws, rules, and regulations; and

(2) an individual because a person on behalf of the individual files a complaint, presents a grievance, or otherwise provides good faith information relating to the possible abuse, neglect, or exploitation of an individual, including:

(A) the use of seclusion; and

(B) the use of a restraint not in compliance with federal and state laws, rules, and regulations.

(t) A program provider must enter critical incident data in the HHSC data system no later than the last calendar day of the month that follows the month being reported in accordance with the HCS Provider User Guide.

(u) A program provider must ensure that:

(1) the name and phone number of an alternate to the Chief Executive Officer (CEO) of the program provider is entered in the HHSC data system; and

(2) the alternate to the CEO:

(A) performs the duties of the CEO during the CEO's absence; and

(B) if the CEO is named as an alleged perpetrator of abuse, neglect, or exploitation of an individual, acts as the contact person in an HHSC investigation and complies with §9.175(d) - (f) of this subchapter (relating to Certification Principles: Requirements Related to the Abuse, Neglect, and Exploitation of an Individual).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER N. TEXAS HOME LIVING (TXHML) PROGRAM AND COMMUNITY FIRST CHOICE (CFC)

**40 TAC §§9.553, 9.555, 9.579, 9.580, 9.583, 9.585**

### STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program;

Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendments and new section implement Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

§9.580. *Certification Principles: Quality Assurance.*

(a) The program provider must:

(1) assist the individual or LAR in understanding the requirements for participation in the TxHmL Program and include the individual or LAR in planning service provision and any changes to the plan for service provision if changes become necessary;

(2) assist and cooperate with the individual's or LAR's request to transfer to another program provider;

(3) assist the individual to access public accommodations or services available to all citizens;

(4) assist the individual to manage the individual's financial affairs upon documentation of the individual's or LAR's written request for such assistance;

(5) ensure that any restriction affecting the individual is approved by the individual's service planning team before the imposition of the restriction;

(6) inform the individual or LAR about the individual's health, mental condition, and related progress;

(7) inform the individual or LAR of the name and qualifications of any person serving the individual and the option to choose among various available service providers;

(8) provide the individual or LAR access to TxHmL Program and CFC records, including, if applicable, financial records maintained on the individual's behalf, about the individual and the delivery of services by the program provider to the individual;



(9) assist the individual to communicate by phone or by mail during the provision of TxHmL Program services or CFC services unless the service planning team has agreed to limit the individual's access to communicating by phone or by mail;

(10) assist the individual, as specified in the individual's PDP, to attend religious activities as chosen by the individual or LAR;

(11) ensure the individual is free from unnecessary restraints during the provision of TxHmL Program services or CFC services;

(12) regularly inform the individual or LAR about the individual's or program provider's progress or lack of progress made in the implementation of the PDP;

(13) receive and act on complaints about the TxHmL Program services or CFC services provided by the program provider;

(14) ensure that the individual is free from abuse, neglect, or exploitation by program provider staff members, service providers, and volunteers;

(15) provide active, individualized assistance to the individual or LAR in exercising the individual's rights and exercising self-advocacy, including:

- (A) making complaints;
- (B) registering to vote;
- (C) obtaining citizenship information and education;
- (D) obtaining advocacy services; and
- (E) obtaining information regarding legal guardianship;

(16) provide the individual privacy during treatment and care of personal needs;

(17) include the individual's LAR in decisions involving the planning and provision of TxHmL Program services and CFC services;

(18) inform the individual or LAR of the process for reporting a complaint to HHSC or the LIDDA when the program provider's resolution of a complaint is unsatisfactory to the individual or LAR, including the HHSC Complaint and Incident Intake toll-free telephone number, 1-800-458-9858, to initiate complaints and the LIDDA telephone number to initiate complaints;

(19) ensure the individual is free from seclusion;

(20) inform the individual or LAR, orally and in writing, of the requirements described in paragraphs (1) - (19) of this subsection:

(A) when the individual is enrolled in the program provider's program;

(B) if the requirements described in paragraphs (1) - (19) of this subsection are revised;

(C) at the request of the individual or LAR; and

(D) if the legal status of the individual changes;

(21) obtain an acknowledgement stating that the information described in paragraph (20) of this subsection was provided to the individual or LAR and that is signed by:

- (A) the individual or LAR;
- (B) the program provider staff person providing such information; and
- (C) a third-party witness; and

(22) notify the individual's service coordinator of an individual's or LAR's expressed interest in the CDS option and document such notification.

(b) The program provider must make available all records, reports, and other information related to the delivery of TxHmL Program services and CFC services as requested by HHSC, other authorized agencies, or CMS and deliver such items, as requested, to a specified location.

(c) At least annually, the program provider must conduct a satisfaction survey of individuals, their families, and LARs, and take action regarding any areas of dissatisfaction.

(d) The program provider must comply with §49.309 of this title (relating to Complaint Process).

(e) In all respite facilities, the program provider must post in a conspicuous location:

- (1) the name, address, and telephone number of the program provider;
- (2) the effective date of the contract; and
- (3) the name of the legal entity named on the contract.

(f) At least annually, the program provider must review:

(1) all final investigative reports from HHSC and, based on the review, identify program process improvements that help prevent the occurrence of abuse, neglect, and exploitation and improve the delivery of services;

(2) complaints, as described in §49.309 of this title, and identify program process improvements to reduce the filing of complaints;

(3) the reasons for suspensions, terminations, and transfers and identify any related need for program process improvements; and

(4) critical incident data reported in accordance with subsection (n) of this section and identify program process improvements that help prevent the reoccurrence of critical incidents and improve the delivery of services.

(g) A program provider must ensure that all personal information maintained by the program provider or its contractors concerning an individual, such as lists of names, addresses, and records created or obtained by the program provider or its contractor, is kept confidential, that the use or disclosure of such information and records is limited to purposes directly connected with the administration of the TxHmL Program or provision of CFC services, and is otherwise neither directly nor indirectly used or disclosed unless the written permission of the individual to whom the information applies or the individual's LAR is obtained before the use or disclosure.

(h) The program provider must ensure that:

(1) the individual or LAR has agreed in writing to all charges assessed by the program provider against the individual's personal funds before the charges are assessed; and

(2) charges for items or services are reasonable and comparable to the costs of similar items and services generally available in the community.

(i) The program provider must not charge an individual or LAR for costs for items or services reimbursed through the TxHmL Program or through CFC.

(j) At the written request of an individual or LAR, the program provider:

(1) must manage the individual's personal funds entrusted to the program provider;

(2) must not commingle the individual's personal funds with the program provider's funds; and

(3) must maintain a separate, detailed record of all deposits and expenditures for the individual.

(k) When a behavioral support plan includes techniques that involve restriction of individual rights or intrusive techniques, the program provider must ensure that the implementation of such techniques includes:

(1) approval by the individual's service planning team;

(2) written consent of the individual or LAR;

(3) verbal and written notification to the individual or LAR of the right to discontinue participation in the behavioral support plan at any time;

(4) assessment of the individual's needs and current level/severity of the behavior targeted by the plan;

(5) use of techniques appropriate to the level/severity of the behavior targeted by the plan;

(6) a written behavioral support plan developed by a service provider of behavioral support with input from the individual, LAR, the individual's service planning team, and other professional personnel;

(7) collection and monitoring of behavioral data concerning the targeted behavior;

(8) allowance for the decrease in the use of intervention techniques based on behavioral data;

(9) allowance for revision of the behavioral support plan when the desired behavior is not displayed or techniques are not effective;

(10) consideration of the effects of the techniques in relation to the individual's physical and psychological well-being; and

(11) at least annual review by the individual's service planning team to determine the effectiveness of the program and the need to continue the techniques.

(l) A program provider must report the death of an individual:

(1) to HHSC and the LIDDA by the end of the next business day after the program provider becomes aware of the death; and

(2) if the program provider reasonably believes that the LAR does not know of the individual's death, to the LAR as soon as possible, but not later than 24 hours after the program provider becomes aware of the death.

(m) A program provider must not retaliate against:

(1) a staff member, service provider, individual, or other person who files a complaint, presents a grievance, or otherwise provides good faith information relating to the possible abuse, neglect, or exploitation of an individual, including:

(A) the use of seclusion; and

(B) the use of a restraint not in compliance with federal and state laws, rules, and regulations; and

(2) an individual because a person on behalf of the individual files a complaint, presents a grievance, or otherwise provides good

faith information relating to the possible abuse, neglect, or exploitation of an individual, including:

(A) the use of seclusion; and

(B) the use of a restraint not in compliance with federal and state laws, rules, and regulations.

(n) A program provider must enter critical incident data in the HHSC data system no later than the last calendar day of the month that follows the month being reported in accordance with the TxHmL Provider User Guide.

(o) A program provider must ensure that:

(1) the name and phone number of an alternate to the Chief Executive Officer (CEO) of the program provider is entered in the HHSC data system; and

(2) the alternate to the CEO:

(A) performs the duties of the CEO during the CEO's absence; and

(B) if the CEO is named as an alleged perpetrator of abuse, neglect, or exploitation of an individual, acts as the contact person in an HHSC investigation and complies with §9.585(d) - (f) of this subchapter (relating to Certification Principles: Requirements Related to the Abuse, Neglect, and Exploitation of an Individual).

§9.585. *Certification Principles: Requirements Related to the Abuse, Neglect, and Exploitation of an Individual.*

(a) A program provider must:

(1) ensure that an individual and LAR are, before or at the time the individual begins receiving a TxHmL Program service or a CFC service and at least annually thereafter:

(A) informed of how to report allegations of abuse, neglect, or exploitation to DFPS and are provided with the toll-free telephone number, 1-800-647-7418, in writing; and

(B) educated about protecting the individual from abuse, neglect, and exploitation;

(2) ensure that each staff member, service provider, and volunteer are:

(A) trained and knowledgeable of:

(i) acts that constitute abuse, neglect, and exploitation;

(ii) signs and symptoms of abuse, neglect, and exploitation; and

(iii) methods to prevent abuse, neglect, and exploitation;

(B) instructed to report to DFPS immediately, but not later than one hour after having knowledge or suspicion, that an individual has been or is being abused, neglected, or exploited, by:

(i) calling the DFPS Abuse Hotline toll-free telephone number, 1-800-647-7418; or

(ii) using the DFPS Abuse Hotline website; and

(C) provided with the instructions described in subparagraph (B) of this paragraph in writing; and

(3) conduct the activities described in paragraph (2)(A) - (C) of this subsection before a staff member, service provider, or volunteer assumes job duties and at least annually thereafter.

(b) If a program provider, staff member, service provider, volunteer, or controlling person knows or suspects an individual is being or has been abused, neglected, or exploited, the program provider must report or ensure that the person with knowledge or suspicion reports the allegation of abuse, neglect, or exploitation to DFPS immediately, but not later than one hour after having knowledge or suspicion, by:

(1) calling the DFPS Abuse Hotline toll-free telephone number, 1-800-647-7418; or

(2) using the DFPS Abuse Hotline website.

(c) If a report required by subsection (b) of this section alleges abuse, neglect, or exploitation by a person who is not a service provider, staff member, volunteer, or controlling person, a program provider must:

(1) as necessary:

(A) obtain immediate medical or psychological services for the individual; and

(B) assist in obtaining ongoing medical or psychological services for the individual; and

(2) discuss with the individual or LAR alternative residential settings and additional services that may help ensure the individual's safety;

(3) when taking the actions described in paragraphs (1) and (2) of this subsection, avoid compromising the investigation or further traumatizing the individual; and

(4) preserve and protect evidence related to the allegation.

(d) If a report required by subsection (b) of this section alleges abuse, neglect, or exploitation by a service provider, staff member, volunteer, or controlling person; or if a program provider is notified by HHSC of an allegation of abuse, neglect, or exploitation by a service provider, staff member, volunteer, or controlling person, the program provider must:

(1) as necessary:

(A) obtain immediate medical or psychological services for the individual; and

(B) assist in obtaining ongoing medical or psychological services for the individual;

(2) take actions to secure the safety of the individual, including if necessary, ensuring that the alleged perpetrator does not have contact with the individual or any other individual until HHSC completes the investigation;

(3) when taking the actions described in paragraphs (1) and (2) of this subsection, avoid compromising the investigation or further traumatizing the individual;

(4) preserve and protect evidence related to the allegation; and

(5) notify, as soon as possible, but no later than 24 hours after the program provider reports or is notified of an allegation, the individual, the LAR, and the service coordinator of:

(A) the allegation report; and

(B) the actions the program provider has taken or will take based on the allegation, the condition of the individual, and the nature and severity of any harm to the individual, including the actions required by paragraph (2) of this subsection.

(e) During an HHSC investigation of an alleged perpetrator who is a service provider, staff member, volunteer, or controlling person, a program provider must:

(1) cooperate with the investigation as requested by HHSC, including providing documentation and participating in an interview;

(2) provide HHSC access to:

(A) sites owned, operated, or controlled by the program provider;

(B) individuals, service providers, staff members, volunteers, and controlling persons; and

(C) records pertinent to the investigation of the allegation; and

(3) ensure that staff members, service providers, volunteers, and controlling persons comply with paragraphs (1) and (2) of this subsection.

(f) After a program provider receives a final investigative report from HHSC for an investigation described in subsection (e) of this section, the program provider must:

(1) if the allegation of abuse, neglect, or exploitation is confirmed by HHSC:

(A) review the report, including any concerns and recommendations by HHSC; and

(B) take action within the program provider's authority to prevent the reoccurrence of abuse, neglect or exploitation, including disciplinary action against the service provider, staff member, or volunteer confirmed to have committed abuse, neglect, or exploitation;

(2) if the allegation of abuse, neglect, or exploitation is unconfirmed, inconclusive, or unfounded:

(A) review the report, including any concerns and recommendations by HHSC; and

(B) take appropriate action within the program provider's authority, as necessary;

(3) immediately, but not later than five calendar days after the date the program provider receives the HHSC final investigative report:

(A) notify the individual, the LAR, and the service coordinator of:

(i) the investigation finding; and

(ii) the action taken by the program provider in response to the HHSC investigation as required by paragraphs (1) and (2) of this subsection; and

(B) notify the individual or LAR of:

(i) the process to appeal the investigation finding as described in 26 TAC Chapter 711, Subchapter J (relating to Appealing the Investigation Finding); and

(ii) the process for requesting a copy of the investigative report from the program provider;

(4) within 14 calendar days after the date the program provider receives the final investigative report, complete and send to HHSC the HHSC Notification to Waiver Survey and Certification (WSC) Regarding an Investigation of Abuse, Neglect or Exploitation form; and

(5) upon request of the individual or LAR, provide to the individual or LAR a copy of the HHSC final investigative report after removing any information that would reveal the identity of the reporter or of any individual who is not the alleged victim.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 438-4639



## CHAPTER 41. CONSUMER DIRECTED SERVICES OPTION

As required by Texas Government Code §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Texas Health and Human Services Commission (HHSC) in accordance with Texas Government Code §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation of and provision of services by the health and human services system, including rules in Title 40, Part 1.

Therefore, the Executive Commissioner of HHSC adopts amendments to §§41.103, 41.108, 41.238, 41.301, 41.307, 41.309, 41.313, and 41.339 in Title 40, Part 1, Chapter 41, Consumer Directed Services Option. The executive commissioner of HHSC also adopts new §§41.233, 41.701, 41.702, and 41.703 in Title 40, Part 1, Chapter 41. Finally, the executive commissioner of HHSC adopts the repeal of §41.233 and §41.701 in Title 40, Part 1, Chapter 41.

The amendments to §§41.238, 41.307, and 41.309, and new §§41.701, 41.702, and 41.703 are adopted with changes to the proposed text as published in the March 1, 2019, issue of the *Texas Register* (44 TexReg 982). These sections will be republished. The amendments to §§41.103, 41.108, 41.301, 41.313, and 41.339, new §41.233, and the repeal of §41.233 and §41.701 are adopted without changes to the proposed text as published in the March 1, 2019, issue of the *Texas Register* (44 TexReg 982). These sections will not be republished.

### BACKGROUND AND JUSTIFICATION

The adopted rules address alleged abuse, neglect, and exploitation of an individual who is receiving a service through the consumer directed services (CDS) option. In the CDS option, an individual or the individual's legally authorized representative is the employer of a service provider, and a financial management services agency (FMSA) contracts with HHSC to provide financial management services to the employer. An employer may

also have a designated representative (DR) to assist with employer responsibilities.

One of the purposes of the adopted rules is to address changes to the investigatory process for abuse, neglect, and exploitation as a result of amendments to Texas Human Resources Code, Chapter 48, and Texas Family Code, Chapter 261, effective September 1, 2015. The amendments gave the Department of Family and Protective Services (DFPS) Adult Protective Services (APS) Provider Investigation (PI) Program authority to investigate an allegation of abuse, neglect, or exploitation of an individual receiving services through the CDS option when the alleged perpetrator is a service provider of an employer or a staff person or controlling person of an FMSA. Effective September 1, 2017, in accordance with Texas Government Code, §§531.02011 and 531.02013, the functions performed by the DFPS APS PI Program, except for the intake function, were transferred to HHSC and became the HHSC Provider Investigation Program.

The adopted rules describe the requirements for an employer or DR and an FMSA if a report to DFPS alleges abuse, neglect, or exploitation by a service provider or a staff person or a controlling person of the FMSA. For an individual in the Home and Community-based Services Program or the Texas Home Living Program, the adopted rules also describe the requirements for a local intellectual and developmental disability authority rights protection officer and service coordinator. For an individual in the Community Living Assistance and Support Services Program or Deaf Blind with Multiple Disabilities Program, the adopted rules describe the requirements for the program director and case manager.

In addition, the adopted rules move the requirements currently contained in Texas Administrative Code, Title 40 (40 TAC), §49.310, Abuse, Neglect, and Exploitation Allegations, that apply to FMSAs to Chapter 41, using terminology specific to FMSAs and the CDS option and adding specificity. The adopted rules also add new requirements for an FMSA. For example, the adopted rules require an FMSA to: (1) train FMSA staff persons related to abuse, neglect, and exploitation before the staff persons assume their job duties and annually thereafter; (2) ensure that the FMSA staff persons who are trained are knowledgeable about signs and symptoms of abuse, neglect, and exploitation; and (3) during initial orientation to the CDS option and annually thereafter, educate an employer and DR about protecting the individual from abuse, neglect, and exploitation. Rules in 40 TAC Chapter 49, Contracting for Community Services, to exclude an FMSA from §49.310, are adopted elsewhere in this issue of the *Texas Register*.

The adopted rules help protect an individual who is receiving services in the CDS option from abuse, neglect, and exploitation and help secure the health, safety, and welfare of an individual who has been abused, neglected, or exploited. The adopted rules for an FMSA are also consistent with the requirements for handling abuse, neglect, and exploitation being adopted for other HHSC contractors for which the HHSC PI Program has jurisdiction to investigate an allegation of abuse, neglect, or exploitation.

The adopted rules also amend the list of programs under which services are available through the CDS option by correcting program names and deleting references to the Medically Dependent Children Program, which ended as a fee-for-service program with services available through the CDS option on February 1, 2017.

The adopted rules correct agency names to reflect that DADS has been abolished and its functions transferred to HHSC. The adopted rules also correct website addresses.

#### COMMENTS

The 30-day comment period ended March 31, 2019.

During the comment period, HHSC received comments submitted on behalf of the Texas Council for Developmental Disabilities (TCDD), Disability Rights Texas (DRTx), CDS in Texas, and EAK Good Neighbor Home Care Consumer Directed Services, and by two individuals. The comments submitted on behalf of TCDD and DRTx were made with specific reference to rules in 40 TAC Chapter 9, Intellectual Disability Services--Medicaid State Operating Agency Responsibilities, that were also proposed in the *Texas Register* on March 1, 2019. However, the commenter requested that HHSC interpret the specific references to Chapter 9 rules as examples only and apply the comments to all pertinent programs and services for which rules were proposed in the *Texas Register* on March 1, 2019.

On that basis, where a comment addresses a proposed rule in Chapter 9 for which Chapter 41 contains a parallel or largely parallel rule provision, the HHSC Chapter 41 responses to comments treat the comment as if it specifically referred to the parallel provision in Chapter 41. If Chapter 41 does not have a proposed rule provision that parallels a proposed rule provision in Chapter 9 that the commenter addressed, HHSC has not responded to the comment in its Chapter 41 responses to comments.

A summary of the comments relating to the rules and HHSC's responses follows.

**Comment:** Regarding the rule language in proposed §41.103(52)(C), which defines "sexual abuse," a commenter said inquiring about the consensual sexual relationships of an individual seems outside the scope of an FMSA's responsibilities. Another commenter stated an FMSA does not know and should not inquire if an employer has engaged in sexual activity with an employee and recommended adding rule language to make it clear when sexual activity is not permitted and the resulting consequences.

**Response:** HHSC disagrees with the commenters and declines to amend the rule language as suggested. The rule language clearly describes when consensual sexual activity between an individual and a service provider, staff person, or controlling person constitutes "sexual abuse." The definition of "sexual abuse" in §41.103(52) is also consistent with the definition of "sexual abuse" in 26 TAC §711.13, which governs the investigation of allegations against certain service providers.

**Comment:** Several commenters stated that the proposed rules related to abuse, neglect, and exploitation involve additional work for FMSAs and employers and increase the training requirements for employers and their employees.

**Response:** HHSC declines to revise the rules in response to this comment. HHSC acknowledges that §41.233 added to the training requirements for an employer and will require HHSC to revise Form 1732 to help employers and DRs meet the initial and annual training requirements on topics related to abuse, neglect, and exploitation. HHSC will also revise Form 1732 and its instructions to ensure a service provider signs, dates, and is given a copy of Form 1732, after the employer or DR provides the training. HHSC also acknowledges that §41.301(d)(1)(A) added signs and symptoms of abuse, neglect, and exploitation to

the currently required training topics. HHSC developed a computer-based training program that an FMSA can use to meet the training requirements for its staff persons. To help FMSAs meet the additional requirement in §41.301(d)(1)(B), §41.307(a)(4), and §41.309(a)(2)(A), to provide a staff person, employer, or DR with instructions on how to report an allegation of abuse, neglect, or exploitation of an individual, as described in §41.701(c), HHSC plans to provide FMSAs with a written document that provides these instructions.

**Comment:** A commenter indicated that the proposed rules contradict the philosophy of self-direction because of increased state and FMSA involvement in decisions and activities that are employer controlled.

**Response:** HHSC disagrees with the commenter and did not make changes in response to the comment. Sections 41.233, 41.301, 41.307, 41.309, and 41.701 - 41.703 describe the separate responsibilities of an employer or DR and an FMSA related to training, reporting, and actions to take before, during, and after an HHSC investigation.

**Comment:** Regarding §41.238(b)(2) and (3), a commenter stated that the HHSC Form 1747-LVN, Licensed Vocational Nurse Supervision Certification, is no longer used and requested that the references to the form be deleted.

**Response:** HHSC agrees and made changes in §41.238(b)(2) and (3) to reflect that the employer or DR will use HHSC Form 1747, Acknowledgment of Nursing Requirements, if the employer or DR hires a licensed vocational nurse.

**Comment:** Regarding proposed §41.301(d)(2), commenters stated that the rule does not specify when the training must occur and recommended that the rule require training before a staff person assumes job duties and annually thereafter.

**Response:** HHSC disagrees that the rule does not specify when training must occur. Proposed §41.301(d)(2) requires an FMSA to train a staff person on issues related to abuse, neglect, and exploitation before the staff person assumes job duties and annually thereafter.

**Comment:** Two commenters expressed concern that FMSAs had not previously been made aware of the proposed rule changes and that the Texas Council on Consumer Direction was not given an opportunity to provide feedback. One commenter noted that the proposed rules add training and notification requirements that will increase the use of FMSA staff time and printed materials. For example, the commenters noted that the rule language in proposed §41.307(a)(4) and §41.309(a)(2)(A) require an FMSA to provide a printed document to the employer and DR and that §41.309(a)(2)(A) will require an FMSA to conduct an annual face-to-face meeting with an employer and DR, which is not a current requirement. The commenters requested a delay in adopting the rules and the opportunity to meet with HHSC to suggest alternative methods for achieving the important goal of protecting individuals from abuse, neglect, and exploitation.

**Response:** HHSC disagrees with the commenters that FMSAs were not made aware of, or given the opportunity to provide feedback on, the proposed rules. HHSC also declines to delay the adoption of the proposed rules. HHSC posted the proposed rules on the HHSC website on December 13, 2017, and emailed the proposed rules to the Texas Council on Consumer Direction on December 14, 2017, for informal stakeholder review and comment. HHSC also presented the proposed rules

to the Medical Care Advisory Committee on November 8, 2018, and to the HHSC Executive Council on February 21, 2019. In response to the comments, HHSC made changes in §41.307(a)(4) and §41.309(a)(2)(A) so that an FMSA can provide the employer and DR with a printed or electronic document that contains an explanation of how an employer or DR must report allegations of abuse, neglect, and exploitation of the individual to DFPS. Providing a printed or electronic copy to the employer or DR is consistent with the requirement in §41.307(b). HHSC also made changes in §41.309(a)(2)(A) to replace "reviewing with and giving" with "providing" so that an FMSA can meet the requirement in §41.309(a)(2)(A) without conducting an annual face-to-face visit.

**Comment:** A commenter asked how an FMSA would have an investigative role in the abuse, neglect, or exploitation of an individual.

**Response:** The proposed rules do not require an FMSA to investigate an allegation of abuse, neglect, or exploitation of an individual that the FMSA reports to DFPS or that the FMSA receives from HHSC Provider Investigations. An FMSA's responsibilities after a report is made or received are described in §§41.701 - 41.703. HHSC did not make changes in response to this comment.

**Comment:** A commenter explained how FMSAs do not operate in the same manner as other HHSC contractors who are home care agencies. The commenter requested that HHSC consider these differences when drafting rules that apply to FMSAs.

**Response:** HHSC agrees that there are differences between FMSAs and other HHSC contractors. For this reason, HHSC did not require an FMSA to obtain immediate and ongoing medical or psychological services for an individual who is an alleged victim of abuse, neglect, or exploitation when the alleged perpetrator is a staff person or a controlling person of the FMSA. HHSC also did not require an FMSA to provide HHSC with access to individuals during an investigation. HHSC did not make changes in response to this comment.

**Comment:** A commenter asked when there will be a rate increase for FMSAs to meet the additional requirements for an FMSA.

**Response:** A rate increase for FMSAs is outside the scope of this rule project.

**Comment:** Regarding proposed §41.339(b)(7), a commenter stated that FMSAs do not receive the insurance coverage information related to staff persons as described in the rule.

**Response:** For purposes of these rules, "staff person" is defined as an employee, contractor, or volunteer of the FMSA. This section requires the FMSA to maintain records relating to the insurance the FMSA purchases to cover its employees, contractors, and volunteers. HHSC declines to make changes in response to this comment.

**Comment:** A commenter objected to the proposed rules because an FMSA makes and receives very few reports alleging abuse, neglect, and exploitation of an individual compared to the thousands of individuals the FMSA serves and frequently the person accused is a family member, the accusation is false, and the employer or individual refuses to remove the person accused.

**Response:** HHSC asserts that the reporting requirements in §41.701 are important to protecting an individual who is receiving services in the CDS option from abuse, neglect,

and exploitation. Further, HHSC included "if necessary" in §41.702(a)(1)(B) and §41.703(a)(1) so that an employer, DR, or FMSA can decide in each situation if securing an individual's safety requires separating the alleged perpetrator from the alleged victim and, for an FMSA, other individuals until HHSC completes the investigation. HHSC declines to make changes in response to this comment.

**Comment:** Commenters stated that while the requirements in §41.701(a) and §41.702(a) clarify the obligation to obtain medical or psychological services and delineate internal processes for ensuring the care and safety of the alleged victim, the commenters requested that the rule require these processes to be performed in such a way that they do not compromise the evidence to be collected during the HHSC investigation or other investigation or result in further trauma to the individual. The commenters also recommended that instruction be provided as to how such assessments should be carried out without further trauma to the victim or contaminating evidence.

**Response:** HHSC agrees with the importance of a CDS employer or DR preserving and protecting evidence and not compromising an investigation or further traumatizing the individual and revised §41.701(a) and §41.702(a) to include this requirement. HHSC will provide information to help CDS employers and DRs avoid compromising an investigation or further traumatizing the individual.

**Comment:** Regarding the requirement in proposed §41.702(a)(1) for an employer or DR to obtain immediate and ongoing medical or psychological services for the individual, a commenter asked if these services would be paid from the individual's budgeted funds, because if so, it would reduce the budgeted funds available to pay for services received through the CDS option. If not, the commenter asked how those expenses would be managed.

**Response:** For an individual receiving services in the CDS option, any necessary immediate and ongoing medical or psychological services provided to the individual will be paid from the individual's budgeted funds only if the individual receives the services through the HHSC home and community-based services (HCBS) program in which the individual is enrolled. Any necessary immediate and ongoing medical or psychological services are provided either through acute care benefits or through the individual's HHSC HCBS program. HHSC did not make changes in response to this comment.

**Comment:** Regarding proposed §41.702(a)(1)(B) and §41.703(a)(1), commenters recommended that the rules require separating the alleged perpetrator from the alleged victim and other individuals receiving services in all situations.

**Response:** HHSC declines to make changes in response to the comments. HHSC disagrees that separating an alleged perpetrator from an alleged victim and other individuals is necessary in all situations to secure the individual's safety. HHSC will consider the comments for future rulemaking.

**Comment:** Regarding proposed §41.702(a)(1)(D) and (2)(B) and §41.703(c)(1)(A) and (2)(A), which require a CDS employer or DR and FMSA to cooperate with the HHSC investigation, commenters recommended that the rules be broadened to include other investigations, such as by law enforcement.

**Response:** Sections 41.702 and 41.703, as proposed, only address HHSC investigations of abuse, neglect, or exploitation. HHSC disagrees with the recommendation to broaden the scope

of the rules at adoption to address other investigations. Therefore, HHSC declines to make the recommended change.

Comment: Regarding §41.703(f)(2)(C), commenters recommended that the rule require an FMSA to take disciplinary action after receiving a final investigative report from HHSC that includes a confirmed finding. Additionally, commenters recommended that language be added to require an FMSA to take disciplinary action if a staff person fails to cooperate with the investigation or if it is determined that the staff person impeded the investigation or was dishonest in evidence provided in the investigation.

Response: HHSC agrees with the recommendation to require an FMSA to take disciplinary action against a staff person confirmed to have committed abuse, neglect, or exploitation. HHSC makes the recommended change by striking "appropriate" and "when warranted" in §41.703(f)(2)(C). However, HHSC disagrees with the recommendation to require disciplinary action if a staff person fails to cooperate with, or impedes, the HHSC investigation. Section 41.702(a)(2)(C) and 41.703(c)(1)(C) require an FMSA to ensure that staff persons and controlling persons comply with §41.702(a)(2)(A) and (B) and §41.703(c)(1)(A) and (B). Therefore, HHSC declines to require an FMSA to take disciplinary action for failure of a staff person to comply with the rules. Non-compliance could range in type and severity, and an FMSA is generally in the best position to determine if disciplinary action is appropriate. HHSC will consider the comments for future rule-making.

Comment: Commenters recommended language that specifically prohibits retaliation for reporting the inappropriate use of restraint or the prohibited use of seclusion.

Response: HHSC agrees with the recommendation and made changes to §41.703(i)(1) and (2) to clarify that abuse includes the use of seclusion and the use of restraint not in compliance with federal and state laws and rules and that retaliation for reporting these forms of abuse is prohibited.

Comment: Regarding proposed §41.703(j), commenters recommended that an FMSA's review of all final investigative reports from HHSC be performed on a quarterly basis for it to be meaningful and proactive in preventing the re-occurrence of allegations of abuse, neglect, or exploitation. Commenters also stated that the review should include looking at the source of the complaints as well as the details of the allegation and any policies or practices that might have contributed to the allegation.

Response: HHSC disagrees with the recommendation to require FMSAs to review all final investigative reports on a quarterly basis and declines to make this change. Requiring FMSAs to conduct an annual review allows them to review data covering a sufficient period of time to be able to effectively identify trends and implement process improvements. HHSC will consider the comments for future rulemaking.

In §41.702(a)(1)(C) reformatted as (a)(1)(D), §41.702(a)(2)(A), and §41.703(a)(2), changes were made to delete "any" in the requirement to preserve and protect evidence related to the allegation because including "any" is not necessary and is consistent with the change in §41.701(a)(5) made in response to a comment.

## SUBCHAPTER A. INTRODUCTION

### 40 TAC §41.103, §41.108

#### STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 29, 2019.

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Karen Ray

Chief Counsel

Department of Aging and Disability Services

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For further information, please call: (737) 867-8771

## SUBCHAPTER B. RESPONSIBILITIES OF EMPLOYERS AND DESIGNATED REPRESENTATIVES

### 40 TAC §41.233

#### STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

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Karen Ray

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### 40 TAC §41.233, §41.238

#### STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services sys-

tem; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

§41.238. *Service Delivery Requirements.*

(a) The employer or DR must ensure that services provided through the CDS option:

(1) are included on the individual's HHSC authorized service plan and, if required by the program rules, included on any other plan such as the habilitation plan or implementation plan;

(2) are budgeted in the employer budget;

(3) are provided only to the individual;

(4) are not provided if the individual receiving services becomes ineligible for program services; and

(5) meet requirements for payment in accordance with program rules and §41.241 of this subchapter (relating to Payment of Services).

(b) If nursing services are included on the service plan, the employer or DR must:

(1) if the employer or DR hires an RN to deliver the service, obtain a completed HHSC Form 1747, Acknowledgment of Nursing Requirements, from the RN before the RN provides nursing services to the individual;

(2) if the employer or DR hires a licensed vocational nurse (LVN) to deliver the service, obtain a completed HHSC Form 1747 from the LVN before the LVN provides nursing services to the individual;

(3) maintain completed HHSC Forms 1747 in the individual's home and send a copy of the completed forms to the FMSA before delivery of nursing services; and

(4) if program rules require that the individual's program provider's nurse complete the initial and annual nursing assessment:

(A) provide a copy of the program provider's nursing assessment, including the number of nursing hours authorized, to the CDS nurse; and

(B) if the CDS nurse disagrees with the number of authorized nursing hours, ensure that the CDS nurse provides justification to the service planning team for consideration and a possible service plan revision.

(c) If HHSC determines that an employer or DR is not in compliance with this section, HHSC may require the employer to develop and implement a corrective action plan in accordance with §41.221 of this subchapter (relating to Corrective Action Plans).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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SUBCHAPTER C. ENROLLMENT AND  
RESPONSIBILITIES OF FINANCIAL  
MANAGEMENT SERVICES AGENCIES  
(FMSAS)

**40 TAC §§41.301, 41.307, 41.309, 41.313, 41.339**

STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

§41.307. *Initial Orientation of an Employer.*

(a) An FMSA must conduct an initial face-to-face orientation with the employer, and the DR if applicable, in the residence of the individual, in which the FMSA:

(1) explains to the employer and DR the roles, rules, and responsibilities that apply to an employer, service provider, FMSA, and state agencies, including:

(A) the employer budget based on the authorized service plan;

(B) the hiring process, including documents and forms to be completed for new employees; and

(C) managing paper and electronic timesheets, due dates, payday schedules, and disbursing employee payroll checks;

(2) reviews with and gives the employer and DR a printed document that clearly states the FMSA's:

(A) normal hours of operation;

(B) key persons to contact with issues or questions and how to contact these persons; and

(C) the complaint process, including how to file a complaint with the FMSA or about the FMSA;

(3) reviews with the employer and DR, HHSC Form 1735, Employer and Financial Management Services Agency Service Agreement, and the applicable Service Provision Requirements Addendum to the form, emphasizing rule and policy requirements of the individual's program, including:

(A) service definitions;

(B) service provider qualifications;

(C) required documentation to be kept in the individual's home;

(D) training requirements for service providers;

(E) program staff who will be reviewing the employer's records; and

(F) if applicable, nursing requirements as described on HHSC Form 1747;

(4) reviews with and gives to the employer and DR a printed or an electronic document that describes how to report an



allegation of abuse, neglect, or exploitation of the individual to DFPS as described in §41.701(a)(1)(A) or (B) of this chapter (relating to Reporting Allegations of Abuse, Neglect, or Exploitation of an Individual); and

(5) educates the employer and DR about protecting the individual from abuse, neglect, and exploitation.

(b) The FMSA must provide to the employer or DR a printed or an electronic copy of the HHSC Consumer Directed Services (CDS) Option Employer Manual.

(c) The FMSA and employer must complete HHSC Form 1736, Documentation of Employer Orientation, upon conclusion of the orientation.

(d) The FMSA must sign and date a completed HHSC Form 1735 signed and dated by the employer before initiation of the CDS option.

§41.309. *Financial Management Services, CFC Support Management, and Vendor Fiscal/Employer Agent Responsibilities.*

(a) An FMSA must provide FMS to an employer or DR. FMS consists of the following activities:

(1) providing an initial orientation as described in §41.307 of this chapter (relating to Initial Orientation of an Employer);

(2) after the initial orientation, doing the following annually:

(A) providing to the employer and DR a printed or an electronic document that contains an explanation of how to report allegations of abuse, neglect, and exploitation of the individual to DFPS as described in §41.701(a)(1)(A) or (B) of this chapter (relating to Reporting Allegations of Abuse, Neglect, or Exploitation of an Individual); and

(B) educating the employer and DR about protecting the individual from abuse, neglect, and exploitation;

(3) providing ongoing training, assistance, and support for employer-related responsibilities;

(4) assisting an employer to verify qualifications of service providers before services are delivered, including citizenship status;

(5) monitoring continued eligibility of service providers;

(6) approving and monitoring budgets for services delivered through the CDS option;

(7) collecting and processing service provider timesheets or invoices approved by the employer;

(8) processing payroll, including calculating employee withholdings and employer contributions and depositing these funds with applicable federal, state, and local agencies;

(9) complying with applicable government regulations concerning employee withholdings, garnishments, mandated withholdings, and benefits;

(10) preparing and filing required tax forms and reports;

(11) paying allowable expenses incurred by the employer;

(12) providing status reports concerning the individual's budget, expenditures, and compliance with CDS option requirements; and

(13) responding to the employer or DR as soon as possible, but at least within two working days after receipt of information requiring a response from the FMSA, unless indicated otherwise in this chapter.

(b) An FMSA must provide, in accordance with HHSC's instructions, CFC support management to an individual or LAR if:

(1) the individual is receiving CFC PAS/HAB; and

(2) the individual or LAR requests to receive CFC support management.

(c) An FMSA must complete HHSC Form 1739 Service Provider Agreement with an employer's service provider before issuing the initial payment for services to the service provider.

(d) An FMSA must accept a designated fee established by HHSC as payment in full for FMS provided.

(e) An FMSA must maintain originals or copies of records to document compliance with this section.

(f) An FMSA must not provide FMS and case management services to the same individual as prohibited in §41.301 of this chapter (relating to Contracting as an FMSA).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER G. REPORTING ALLEGATIONS

### 40 TAC §41.701

#### STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

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## 40 TAC §§41.701 - 41.703

### STATUTORY AUTHORITY

The new sections are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

*§41.701. Reporting Allegations of Abuse, Neglect, or Exploitation of an Individual.*

(a) If an employer or DR knows or suspects that an individual is being or has been abused, neglected, or exploited, the employer or DR must:

(1) report the knowledge or suspicion to DFPS:

(A) for an individual who is in the HCS Program or TxHmL Program, immediately, but not later than one hour, after having knowledge or suspicion by:

(i) calling the toll-free telephone number, 1-800-647-7418; or

(ii) using the DFPS website; or

(B) for an individual who is in the DBMD Program, CLASS Program, PHC Program, CAS Program, or FC Program, immediately, but not later than 24 hours, after having knowledge or suspicion by:

(i) calling the DFPS Abuse Hotline toll-free telephone number, 1-800-252-5400; or

(ii) using the DFPS Abuse Hotline website;

(2) take actions to secure the safety of the individual;

(3) obtain immediate and ongoing medical or psychological services for the individual as necessary;

(4) when taking the actions described in paragraphs (2) and (3) of this subsection, avoid compromising the investigation or further traumatizing the individual; and

(5) preserve and protect evidence related to the allegation.

(b) An employer or DR must ensure a service provider who knows or suspects that an individual is being or has been abused, neglected, or exploited, complies with the reporting requirement in subsection (a)(1)(A) or (B) of this section.

(c) If an FMSA, a staff person, or a controlling person knows or suspects that an individual is being or has been abused, neglected, or exploited, the FMSA must report or ensure that the person with knowledge or suspicion reports the allegation of abuse, neglect, or exploitation to DFPS:

(1) for an individual who is in the HCS Program or TxHmL Program, immediately, but not later than one hour, after having knowledge or suspicion by:

(A) calling the DFPS Abuse Hotline toll-free telephone number, 1-800-647-7418; or

(B) using the DFPS Abuse Hotline website; or

(2) for an individual who is in the DBMD Program, CLASS Program, PHC Program, CAS Program, or FC Program, immediately, but not later than 24 hours, after having knowledge or suspicion by:

(A) calling the DFPS Abuse Hotline toll-free telephone number, 1-800-252-5400; or

(B) using the DFPS Abuse Hotline website.

*§41.702. Requirements Related to HHSC Investigations When an Alleged Perpetrator is a Service Provider.*

(a) If a report required by §41.701(a) or (b) of this subchapter (relating to Reporting Allegations of Abuse, Neglect, or Exploitation of an Individual) alleges abuse, neglect, or exploitation by a service provider; or if an employer, DR, or FMSA is notified by HHSC of an allegation of abuse, neglect, or exploitation by a service provider:

(1) the employer or DR must:

(A) obtain immediate and ongoing medical or psychological services for the individual as necessary;

(B) take actions to secure the safety of the individual, including if necessary, ensuring that the alleged perpetrator does not have contact with the individual until HHSC completes the investigation; and

(C) when taking the actions described in paragraphs (A) and (B) of this subsection, avoid compromising the investigation or further traumatizing the individual;

(D) preserve and protect evidence related to the allegation, including timesheets and other employee-related documentation;

(E) cooperate with the HHSC investigation as requested by HHSC, including providing documentation and participating in an interview; and

(F) ensure that service providers comply with subparagraphs (C) and (D) of this paragraph; and

(2) the FMSA must:

(A) preserve and protect evidence related to the allegation, including timesheets and other employee-related documentation;

(B) cooperate with the HHSC investigation as requested by HHSC, including providing documentation and participating in an interview; and

(C) ensure that staff persons and controlling persons comply with subparagraphs (A) and (B) of this paragraph.

(b) Within one working day after receiving the initial intake report from HHSC for an allegation of abuse, neglect, or exploitation described in subsection (a) of this section, the FMSA must send a copy of the report by fax or secure email to:

(1) the program director of the entity employing the individual's case manager for an individual enrolled in the CLASS Program or the DBMD Program;

(2) the rights protection officer, as required by §4.113 of this title (relating to Rights Protection Officer at a State MR Facility or

MRA), of the LIDDA employing the individual's service coordinator for an individual enrolled in the HCS Program or the TxHmL Program; or

(3) the individual's HHSC regional office for an individual enrolled in the PHC Program, the CAS Program, or the FC Program.

(c) For an individual enrolled in:

(1) the DBMD Program or CLASS Program, a program director is required to give the initial intake report received from the individual's FMSA to the individual's case manager as described in §42.401 of this title (relating to Protection of Individual) or §45.702 of this title (relating to Protection of Individual, Initial and Annual Explanations, and Offering Access to Other Services); or

(2) the HCS Program or TxHmL Program, a rights protection officer is required to give the initial intake report received from the individual's FMSA to the individual's service coordinator as described in §9.190 of this title (relating to LIDDA Requirements for Providing Service Coordination in the HCS Program) or §9.583 of this title (relating to TxHmL Program Principles for LIDDAs).

(d) A case manager or service coordinator who receives an initial intake report must:

(1) within four working days after receiving the report, convene a service planning team meeting in person or by phone to review the report and discuss the actions the employer has taken or will take to protect the individual during the HHSC investigation, which may include:

(A) if a service backup plan is required by §41.404 of this title (relating to Ensuring Development, Approval, and Review of Service Backup Plans), implementing the service backup plan to have a person other than the alleged perpetrator provide services; and

(B) requesting a voluntary suspension of participation in the CDS option in accordance with §41.405 of this chapter (relating to Suspension of Participation in the CDS Option);

(2) document in writing any actions that have been or will be taken as a result of the allegation; and

(3) if appropriate, recommend termination of the CDS option in accordance with §41.407 of this chapter (relating to Termination of Participation in the CDS Option).

(e) After receiving a final investigative report from HHSC for an allegation of abuse, neglect, or exploitation described in subsection (a) of this section, the FMSA must:

(1) within one working day after receiving the report, send a copy of the report by fax or secure email to:

(A) the program director of the entity employing the individual's case manager for an individual enrolled in the CLASS Program or the DBMD Program;

(B) the rights protection officer, as required by §4.113 of this title, of the LIDDA employing the individual's service coordinator for an individual enrolled in the HCS Program or the TxHmL Program; or

(C) the individual's HHSC regional office for an individual enrolled in the PHC Program, the CAS Program, or the FC Program; and

(2) within five working days after receiving the report:

(A) use the report to complete HHSC Form 1719, Notification of Investigatory Findings; and

(B) send the completed form to the alleged perpetrator.

(f) For an individual enrolled in:

(1) the DBMD Program or CLASS Program, a program director is required to give the final investigative report received from the individual's FMSA to the individual's case manager as described in §42.401 of this title or §45.702 of this title; or

(2) the HCS Program or TxHmL Program, a rights protection officer is required to give the final investigative report received from the individual's FMSA to the individual's service coordinator as described in §9.190 of this title or §9.583 of this title.

(g) If the final investigative report confirms the allegation, contains an inconclusive finding, or includes concerns and recommendations, the case manager or service coordinator:

(1) must:

(A) within four working days after receiving the report, convene a service planning team meeting in person or by phone to discuss the content of the report, including any concerns and recommendations by HHSC; and

(B) document in writing any actions that have been or will be taken by the employer as a result of the findings in the report or the concerns and recommendations by HHSC; and

(2) if appropriate, recommend termination of the CDS option, in accordance with §41.407 of this chapter.

*§41.703. Requirements Related to HHSC Investigations When an Alleged Perpetrator is a Staff Person or a Controlling Person of an FMSA.*

(a) If a report required by §41.701(c) of this subchapter (relating to Reporting Allegations of Abuse, Neglect, or Exploitation of an Individual) alleges abuse, neglect, or exploitation of an individual by a staff person or a controlling person; or if an FMSA is notified by HHSC of an allegation of abuse, neglect, or exploitation by a staff person or a controlling person, the FMSA must:

(1) take actions to secure the safety of the individual, including if necessary, ensuring that the alleged perpetrator does not have contact with the individual or any other individual receiving services from the FMSA until HHSC completes the investigation; and

(2) preserve and protect evidence related to the allegation.

(b) Within one working day after receiving the initial intake report from HHSC for an allegation of abuse, neglect, or exploitation described in subsection (a) of this section, the FMSA must send a copy of the report by fax or secure email to:

(1) the program director of the entity employing the individual's case manager for an individual enrolled in the CLASS Program or the DBMD Program;

(2) the rights protection officer, as required by §4.113 of this title (relating to Rights Protection Officer at a State MR Facility or MRA), of the LIDDA employing the individual's service coordinator for an individual enrolled in the HCS Program or the TxHmL Program; or

(3) the individual's HHSC regional office for an individual enrolled in the PHC Program, the CAS Program, or the FC Program.

(c) During an HHSC investigation of an alleged perpetrator who is a staff person or controlling person:

(1) an FMSA must:

(A) cooperate with the investigation as requested by HHSC, including providing documentation and participating in an interview;

(B) provide HHSC access to:

(i) sites owned, operated, or controlled by the FMSA;

(ii) staff persons and controlling persons; and

(iii) records pertinent to the investigation of the allegation; and

(C) ensure that staff persons and controlling persons comply with subparagraphs (A) and (B) of this paragraph; and

(2) the employer or DR must:

(A) cooperate with the investigation as requested by HHSC, including providing documentation and participating in an interview;

(B) provide HHSC access to:

(i) service providers; and

(ii) records pertinent to the investigation of the allegation; and

(C) ensure that service providers comply with subparagraph (A) of this paragraph.

(d) For an individual enrolled in:

(1) the DBMD Program or CLASS Program, a program director is required to give the initial intake report received from the individual's FMSA to the individual's case manager as described in §42.401 of this title (relating to Protection of Individual) or §45.702 of this title (relating to Protection of Individual, Initial and Annual Explanations, and Offering Access to Other Services); or

(2) the HCS Program or TxHmL Program, a rights protection officer is required to give the initial intake report received from the individual's FMSA to the individual's service coordinator as described in §9.190 of this title (relating to LIDDA Requirements for Providing Service Coordination in the HCS Program) or §9.583 of this title (relating to TxHmL Program Principles for LIDDAs).

(e) A case manager or service coordinator who receives an initial intake report must:

(1) within four working days after receiving the report, convene a service planning team meeting in person or by phone to review the report and discuss the actions the employer has taken or will take, which may include:

(A) transferring to a different FMSA in accordance with §41.403 of this chapter (relating to Transfer Process) to protect the individual during the HHSC investigation; and

(B) requesting a voluntary suspension of participation in the CDS option in accordance with §41.405 of this chapter (relating to Suspension of Participation in the CDS Option);

(2) document in writing any actions that have been or will be taken as a result of the allegation; and

(3) if appropriate, recommend termination of the CDS option in accordance with §41.407 of this chapter (relating to Termination of Participation in the CDS Option).

(f) After an FMSA receives a final investigative report from HHSC for an investigation described in subsection (c) of this section, the FMSA must:

(1) within one working day after receiving the report, send a copy of the report by fax or secure email to:

(A) the program director of the entity employing the individual's case manager for an individual enrolled in the CLASS Program or the DBMD Program;

(B) the rights protection officer, as required by §4.113 of this title, of the LIDDA employing the individual's service coordinator for an individual enrolled in the HCS Program or the TxHmL Program; or

(C) the individual's HHSC regional office for an individual enrolled in the PHC Program, the CAS Program, or the FC Program; and

(2) within five working days after receiving the report:

(A) use the report to complete HHSC Form 1719, Notification of Investigatory Findings;

(B) send the completed form to the alleged perpetrator; and

(C) take action within the FMSA's authority in response to the HHSC investigation, including, disciplinary action against a staff person confirmed to have committed abuse, neglect, or exploitation.

(g) For an individual enrolled in:

(1) the DBMD Program or CLASS Program, a program director is required to give the final investigative report received from the individual's FMSA to the individual's case manager as described in §42.401 of this title or §45.702 of this title; or

(2) the HCS Program or TxHmL Program, a rights protection officer is required to give the final investigative report received from the individual's FMSA to the individual's service coordinator as described in §9.190 of this title or §9.583 of this title.

(h) If a final investigative report confirms the allegation, contains an inconclusive finding, or includes concerns and recommendations, a case manager or service coordinator must:

(1) within four working days after receiving the report, convene a service planning team meeting in person or by phone to discuss the content of the report, including any concerns and recommendations by HHSC; and

(2) document in writing any actions that have been or will be taken by the employer as a result of the findings in the report or the concerns and recommendations by HHSC.

(i) An FMSA must not retaliate against:

(1) a staff person, individual, or other person who files a complaint, presents a grievance, or otherwise provides good faith information relating to the possible abuse, neglect, or exploitation of an individual, including:

(A) the use of seclusion; and

(B) the use of a restraint not in compliance with federal and state laws, rules, and regulations; and

(2) an individual because a person on behalf of the individual files a complaint, presents a grievance, or otherwise provides good faith information relating to the possible abuse, neglect, or exploitation of an individual, including:

(A) the use of seclusion; and

(B) the use of a restraint not in compliance with federal and state laws, rules, and regulations.

(j) At least annually, an FMSA must review all final investigative reports from HHSC for investigations described in subsection (c) of this section and, based on the review, identify program process improvements that help prevent the occurrence of abuse, neglect, and exploitation and improve the delivery of FMS.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 29, 2019.

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For further information, please call: (737) 867-8771



## CHAPTER 42. DEAF BLIND WITH MULTIPLE DISABILITIES (DBMD) PROGRAM AND COMMUNITY FIRST CHOICE (CFC) SERVICES

As required by Texas Government Code §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Texas Health and Human Services Commission (HHSC) in accordance with Texas Government Code §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation of and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, the Executive Commissioner of HHSC adopts amendments to §42.103, §42.201, §42.211, §42.212, §42.216, §42.221, §42.223, §42.301, §42.401, §42.405, §42.406, §42.613, §42.614, §42.617, §42.623, §42.632, and §42.641; new §42.220, §42.403, §42.410, and §42.411; and the repeal of §42.222 and §42.403, in Chapter 42, Deaf Blind with Multiple Disabilities (DBMD) Program and Community First Choice (CFC) Services.

The amendments to §42.103, §42.201, §42.212, §42.223, §42.301, §42.401, and §42.405, and new §42.403, §42.410, and §42.411 are adopted with changes to the proposed text as published in the March 1, 2019, issue of the *Texas Register* (44 TexReg 997). The amendments to §42.211, §42.216, §42.221, §42.406, §42.613, §42.614, §42.617, §42.623, §42.632, and §42.641; new §42.220; and the repeal of §42.222 and §42.403 are adopted without changes to the proposed text as published in the March 1, 2019, issue of the *Texas Register* (44 TexReg 997), and therefore will not be republished.

### BACKGROUND AND JUSTIFICATION

Chapter 42, Deaf Blind with Multiple Disabilities and Community First Choice (CFC) Services, governs the Deaf Blind with Multiple Disabilities (DBMD) Program. The DBMD Program is a Medicaid waiver program approved by the Centers for Medicare

& Medicaid Services (CMS) under §1915(c) of the Social Security Act. It provides community-based services and supports to an eligible individual as an alternative to services provided in an institutional setting through the Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions (ICF/IID) Program. An individual in the DBMD Program receives DBMD program services, including case management, and CFC services from a single DBMD program provider.

One of the purposes of the adopted rules is to address adjustments to the investigatory process for abuse, neglect, and exploitation as a result of amendments to Texas Human Resources Code, Chapter 48, and Texas Family Code, Chapter 261, effective September 1, 2015. The amendments gave the Department of Family and Protective Services (DFPS) Adult Protective Services (APS) Provider Investigation (PI) Program the authority to investigate an allegation of abuse, neglect or exploitation of an individual in the DBMD Program when the alleged perpetrator is a service provider, staff person, volunteer, or controlling person of a DBMD program provider. Effective September 1, 2017, in accordance with Texas Government Code, §§531.02011 and 531.02013, the functions performed by the DFPS APS PI Program were transferred to HHSC. The adopted rules address investigations of allegations of abuse, neglect, and exploitation conducted by HHSC for an individual in the DBMD Program and describe requirements for the DBMD program provider to protect an individual from abuse, neglect, and exploitation and help ensure the health, safety, and welfare of an individual who is abused, neglected, or exploited.

The adopted rules also include the current requirements in 40 TAC §49.310, Abuse, Neglect, and Exploitation Allegations, that apply to a DBMD program provider. Rules in 40 TAC Chapter 49, Contracting for Community Services, are being adopted in this issue of the *Texas Register*, to exclude the DBMD program provider from §49.310. These rules are adopted in Chapter 42 to use terminology specific to the DBMD Program, add specificity to the current requirements of §49.310, and add new requirements for a DBMD program provider. For example, the adopted rules require a DBMD program provider to (1) conduct training of program directors, service providers, staff persons, and volunteers related to abuse, neglect, and exploitation according to specified time frames; (2) ensure that the persons who are trained are knowledgeable about signs and symptoms of abuse, neglect, and exploitation; and (3) educate an individual and legally authorized representative (LAR) or person actively involved with the individual about protecting the individual from abuse, neglect, and exploitation.

The adopted rules require a DBMD program provider to report critical incidents to HHSC to address the CMS requirement that HHSC have an incident management system in place to help ensure an individual's health and welfare.

In response to direction from CMS to help meet the requirement in the Code of Federal Regulations, Title 42 (42 CFR), §441.302(b) regarding financial accountability, the adopted rules require a program provider to ensure that, after a DBMD case manager or other program service provider completes an HHSC Documentation of Services Delivered form, a staff person other than the case manager or service provider who completed the form signs and dates the form as a timekeeper as verification of the accuracy of the information on the form.

In response to direction from CMS to meet the requirement in 42 CFR §441.302(c)(2), regarding reevaluations of an individual's level of care (LOC), and §441.301(c)(3) regarding reviews

of an individual's service plan, the adopted rules require a DBMD program provider to have and implement written policies and procedures to ensure the case manager complies with the requirement to submit to HHSC, at least 30 calendar days before the expiration of an individual's individual plan of care (IPC) period, the documentation HHSC needs to determine whether an individual continues to meet the required LOC and whether the individual's IPC will be authorized. The adopted rules require a program provider's written policies and procedures to include using a written or electronic tracking system that alerts the provider to activities that must occur for the provider to timely submit the documentation to HHSC. The adopted rules also replace "diagnostic eligibility" with "LOC VIII" throughout the chapter to conform with the terms used in the eligibility criteria for the DMBD Program described in 40 TAC §9.239.

The adopted rules address a CMS requirement that, if an individual's LOC VIII expires before HHSC determines whether the individual meets the LOC VIII criteria or an individual's IPC period expires before HHSC authorizes a proposed renewal IPC, the DBMD program provider must continue to provide services to the individual until HHSC authorizes the proposed renewal IPC to ensure continuity of care and prevent the individual's health and welfare from being jeopardized.

In response to direction from CMS to meet the requirement in 42 CFR §441.302(d), the adopted rules require a DBMD program provider to, at least annually after enrollment, obtain the signature of the individual or LAR on a Waiver Program Verification of Freedom of Choice form documenting the individual's or LAR's choice of the DBMD Program over the ICF/IID Program.

The adopted rules require a service provider of CFC personal assistance services/habilitation (PAS/HAB) to have certification in cardiopulmonary resuscitation (CPR), first aid, and choking prevention so that the service provider is prepared and qualified to assist an individual who needs CPR.

The adopted rules require a DBMD program provider to electronically access the Medicaid Eligibility Service Authorization Verification (MESAV) system to determine if the information on an individual's enrollment IPC, revision IPC, or renewal IPC authorized by HHSC is consistent with the information in MESAV and, if inconsistent, to notify HHSC of the inconsistency. The purpose of this requirement is to help prevent billing discrepancies and payment adjustments that result from inaccurate information being entered into MESAV.

The adopted rules also update agency names and replace specific website addresses.

#### COMMENTS

The 30-day comment period ended March 31, 2019.

During the comment period, HHSC received comments submitted by a representative on behalf of the Texas Council for Developmental Disabilities and Disability Rights Texas. The comments were made with specific reference to rules in 40 TAC Chapter 9, Intellectual Disability Services""Medicaid State Operating Agency Responsibilities, that were also proposed in the *Texas Register* on March 1, 2019. However, the commenter requested that HHSC interpret the specific references to Chapter 9 rules as an example and apply the comments to all pertinent programs and services that HHSC provides or regulates for rules that were proposed in the *Texas Register* on March 1, 2019.

On that basis, where a comment addresses a proposed rule in Chapter 9 for which Chapter 42 contains a parallel or largely par-

allel rule provision, HHSC includes and responds to the comment in the summary below as if it specifically referred to the parallel provision in Chapter 42. If Chapter 42 does not have a proposed rule provision that parallels a proposed rule provision in Chapter 9 addressed by a comment, HHSC does not include or respond to the comment.

A summary of the comments relating to the rules and HHSC's responses follows.

Comment: Regarding proposed §42.212(c)(1)(G), a commenter recommended adding the contact information for the Protection and Advocacy System, Disability Rights Texas, to the other entities listed for submission of complaints.

Response: The requested change is outside the scope of this rule project and, therefore, HHSC declines to make the change. HHSC will consider the comment for future rulemaking.

Comment: Regarding proposed §42.403(b), the commenter stated that the rule does not specify when the training must occur and recommended that the rule require training before a program director, service provider, staff person, or volunteer assumes job duties and annually thereafter.

Response: HHSC disagrees that the rule does not specify when the training must occur. Proposed §42.403(b)(2), required a program provider to train a program director, staff person, service provider, or volunteer on issues related to abuse, neglect, and exploitation, if hired on or after September 1, 2018, before assuming job duties and at least annually thereafter; or if hired before September 1, 2018, within one year after the person's most recent training on abuse, neglect, and exploitation and annually thereafter. In §42.403(b)(2)(A) and (B), "September 1, 2018" was changed to "July 1, 2019" as explained below after the responses to comments.

Comment: Regarding proposed §42.403(i)(1)(A) and (B), the commenter requested removing the dates related to training requirements for staff who participate in development of an individual program plan for Community First Choice personal assistance services/habilitation because the dates in these rules have passed.

Response: The requested change is outside the scope of this rule project and, therefore, HHSC declines to make the change. HHSC will consider the comment for future rulemaking.

Comment: Regarding proposed §42.406(b)(1), the commenter recommended that program providers' review of all final investigative reports from HHSC be performed on a quarterly basis for it to be meaningful and proactive in preventing the re-occurrence of allegations of abuse, neglect, or exploitation. The commenter also stated that the review should include looking at the source of the complaints as well as the details of the allegation and any policies or practices that might have contributed to the allegation.

Response: HHSC disagrees with the recommendation to require program providers to review all final investigative reports on a quarterly basis and declines to make this change. Requiring program providers to conduct an annual review allows them to review data covering a sufficient period of time to be able to effectively identify trends and implement process improvements. HHSC will consider the comment for future rulemaking.

Comment: The commenter stated that while the requirements in §42.411(a) and (b) clarify the obligation to obtain medical or psychological services and delineate internal processes for en-

uring the care and safety of the alleged victim, the commenter requested that the rule require these processes to be performed in such a way that they do not compromise the evidence to be collected during the HHSC investigation or other investigation or result in further trauma to the individual. The commenter also recommended that instruction be provided as to how assessments should be carried out without further trauma to the victim or contaminating evidence.

Response: HHSC agrees with the importance of a program provider preserving and protecting evidence and not compromising an investigation or further traumatizing the individual and revised §42.411(a) and (b) to include this requirement. HHSC will provide information to help program providers avoid compromising an investigation or further traumatizing the individual.

Comment: Regarding proposed §42.411(b)(2), the commenter recommended that the rule require separating the alleged perpetrator from the alleged victim and other individuals receiving services in all situations.

Response: HHSC disagrees that separating an alleged perpetrator from an alleged victim and other individuals is necessary in all situations to secure the individual's safety and declines to make the requested change. HHSC will consider the comment for future rulemaking.

Comment: Regarding proposed §42.411(b)(4)(A) and (B), the commenter noted that the rule allows up to 24 hours to notify the individual and LAR of the allegation report and related matters and recommended that the notification be required no later than one hour after the program provider reports or is notified of the allegation.

Response: HHSC declines to make the suggested changes at this time. HHSC will consider the comments for future rulemaking. Proposed §42.411(b)(4) requires a program provider to notify the individual, the LAR, and the case manager of the allegation report "as soon as possible." While "as soon as possible" could require notification in a matter of minutes, there may be circumstances in which the program provider needs additional time to determine the actions required by proposed §42.411(b)(4)(B). HHSC considers 24 hours the outside limit to provide notification "as soon as possible" and expects providers to provide notification in the shortest timeframe possible.

Comment: Regarding proposed §42.411(c), which requires a program provider to cooperate with the HHSC investigation, the commenter recommended that the rule be broadened to include other investigations, such as by law enforcement.

Response: Section 42.411, as proposed, only addresses HHSC investigations of alleged abuse, neglect, or exploitation. HHSC disagrees with the recommendation to broaden the scope of the rule at adoption to address other investigations. Therefore, HHSC declines to make the recommended change.

Comment: Regarding proposed §42.411(d)(1)(B), the commenter recommended that the rule require that disciplinary action be taken by the program provider after receiving a final investigative report from HHSC that includes a confirmed finding. Additionally, the commenter recommended that language be added to require that disciplinary action be taken if a service provider or staff person fails to cooperate with the investigation or if it is determined that the service provider or staff person impeded the investigation or was dishonest in evidence provided in the investigation.

Response: HHSC agrees with the recommendation to require a program provider to take disciplinary action against a service provider, staff person, or volunteer confirmed to have committed abuse, neglect, or exploitation. HHSC makes the recommended change by striking "appropriate" and "when warranted" in §42.411(d)(1)(B). However, HHSC disagrees with the recommendation to require disciplinary action if a service provider or staff person fails to cooperate with, or impedes, the HHSC investigation. Section 42.411(c)(3) requires a program provider to ensure that service providers, staff persons, volunteers, and controlling persons comply with §42.411(c)(1) and (2). Therefore, HHSC declines to require a program provider to take disciplinary action for failure of a service provider, staff person, volunteer, or controlling person to comply with the rule. Non-compliance could range in type and severity, and a program provider is generally in the best position to determine if disciplinary action is appropriate. HHSC will consider the comment for future rulemaking.

Comment: Regarding proposed §42.411(d)(3), the commenter questioned the delay of five calendar days for the program provider to notify the individual, the LAR, and the case manager of the outcome of the investigation. The commenter recommended adding language requiring that the notification be made as quickly as possible.

Response: HHSC disagrees with the recommendation to require notification be made as quickly as possible after the program provider receives the final investigative report and declines to make this change. Proposed §42.411(d)(3) requires a program provider to notify the individual, the LAR, and the case manager of the investigation finding "immediately." However, there may be circumstances in which the program provider needs additional time to take the action required by subsection (d)(1) and (2) of the rule. HHSC considers five calendar days a reasonable outside limit to give the notification. HHSC will consider the comment for future rulemaking.

Comment: Regarding proposed §42.411(e)(1) and (2), the commenter recommended including language that specifically prohibits retaliation related to the report of the inappropriate use of restraint or the use of seclusion. This prohibition is shown as stricken in the proposed amendment to §42.406.

Response: HHSC agrees with the recommendation and made changes in §42.411(e)(1) and (2) to clarify that abuse includes the use of seclusion and the use of a restraint not in compliance with federal and state laws, rules, and regulations.

In §42.103(25); §42.201(a)(5); §42.212(b)(3), (g)(1), and (i)(1); §42.223(a)(1); and §42.401(d), "DBMD Provider Manual" was changed to "DBMD Program Manual" to correct the name of the manual.

In §42.103(64), a reference to Chapter 92 was removed and the term "ALF" used instead because "ALF" is defined in §42.103.

In §42.103(65), a reference to Chapter 97 was removed and the term "HCSSA" used instead because "HCSSA" is defined in §42.103.

In §42.103(89), "§97.2 of this title" was changed to "26 TAC §558.2" to correct the reference.

In §42.212(c)(1)(G), "Consumer Rights and Services" was changed to "Complaint and Incident Intake" to correct the name of the HHSC division that handles complaints related to DBMD program providers.

In §42.223(a)(5)(B)(v), the reference to §46.602 was changed to §42.602 to correct the rule reference.

In §42.223(b)(3)(l), the reference to paragraph (2)(A)(iii)(l) was changed to paragraph (2)(A)(vi)(l) to correct the rule reference.

In §42.301(2), "Chapter 97 of this title" was changed to "26 TAC Chapter 558" to correct the reference.

In §42.301(3) and §42.410(1), "Chapter 92 of this title" was changed to "26 TAC Chapter 553" to correct the references.

In §42.403(b)(2)(A) and (B), "September 1, 2018" was changed to "July 1, 2019" to be consistent with the DBMD Program Manual.

In §42.403(d)(1)(A) and (B), "September 1, 2018" was changed to "October 1, 2019" to be consistent with the effective date of the rule.

In §42.405(c)(3), changes were made to add subsection (c)(4) to clarify that the requirement for a program provider to ensure an individual's record includes the original Intellectual Disability/Related Conditions (ID/RC) Assessment or the original level of care form in use before the ID/RC Assessment only applies to the program provider that was the individual's program provider when the individual enrolled in the DBMD Program. The remaining paragraphs are renumbered due to the addition.

In §42.411(e)(2), the phrase "possible abuse, neglect, or exploitation of the individual" was changed to "possible abuse, neglect, or exploitation of an individual" to ensure a broader application of the prohibition of retaliation and to be consistent with other HHSC rules adopted in 40 TAC related to abuse, neglect, and exploitation and published in this issue of the *Texas Register*.

## SUBCHAPTER A. INTRODUCTION

### 40 TAC §42.103

#### STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendment implements Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

#### §42.103. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

(1) Abuse--

- (A) physical abuse;
- (B) sexual abuse; or
- (C) verbal or emotional abuse.

(2) Actively involved--Significant, ongoing, and supportive involvement with an individual by a person, as determined by the individual's service planning team, based on the person's:

- (A) interactions with the individual;

(B) availability to the individual for assistance or support when needed; and

(C) knowledge of, sensitivity to, and advocacy for the individual's needs, preferences, values, and beliefs.

(3) Activities of daily living. Basic personal everyday activities, including tasks such as eating, toileting, grooming, dressing, bathing, and transferring.

(4) Adaptive aid--An item or service (including a medically necessary supply or device) that enables an individual to retain or increase the ability to:

(A) perform activities of daily living; or

(B) perceive, control, or communicate with the environment in which the individual lives.

(5) Adaptive behavior--The effectiveness with or degree to which an individual meets the standards of personal independence and social responsibility expected of the individual's age and cultural group as assessed by a standardized measure.

(6) Adaptive behavior level--The categorization of an individual's functioning level based on a standardized measure of adaptive behavior. There are four adaptive behavior levels ranging from mild limitations in adaptive skills (I) through profound limitations in adaptive skills (IV).

(7) Adaptive behavior screening assessment--A standardized assessment used to determine an individual's adaptive behavior level, and conducted using the current version of one of the following assessment instruments:

(A) American Association of Intellectual and Developmental Disabilities (AAIDD) Adaptive Behavior Scales (ABS);

(B) Inventory for Client and Agency Planning (ICAP);

(C) Scales of Independent Behavior; or

(D) Vineland Adaptive Behavior Scales.

(8) Alarm call--A signal transmitted from an individual's CFC ERS equipment to the CFC ERS response center indicating that the individual needs immediate assistance.

(9) ALF--Assisted living facility. An entity required to be licensed under THSC, Chapter 247, Assisted Living Facilities.

(10) Alleged perpetrator--A person alleged to have committed an act of abuse, neglect, or exploitation of an individual.

(11) Behavioral emergency--A situation in which an individual is acting in an aggressive, destructive, violent, or self-injurious manner that poses a risk of death or serious bodily harm to the individual or others.

(12) Behavioral support--Formerly referred to as "behavior communication," a service that provides specialized interventions that assist an individual to increase adaptive behaviors to replace or modify challenging or socially unacceptable behaviors that prevent or interfere with the individual's inclusion in home and family life or community life, with a particular emphasis on communication as it affects behavior.

(13) Business day--Any day except a Saturday, a Sunday, or a national or state holiday listed in Texas Government Code §662.003(a) or (b).

(14) Calendar day--Any day, including weekends and holidays.



(15) Case management--Services that assist an individual to gain access to needed waiver and other state plan services, as well as needed medical, social, education, and other services, regardless of the funding source for the services.

(16) Case manager--A service provider who is responsible for the overall coordination and monitoring of DBMD Program services and CFC services provided to an individual.

(17) CDS option--Consumer directed services option. A service delivery option as defined in §41.103 of this title (relating to Definitions).

(18) Chemical restraint--A medication used to control an individual's behavior or to restrict the individual's freedom of movement that is not a standard treatment for the individual's medical or psychological condition.

(19) CFC--Community First Choice.

(20) CFC ERS--CFC emergency response services. Backup systems and supports used to ensure continuity of services and supports. CFC ERS includes electronic devices and an array of available technology, personal emergency response systems, and other mobile communication devices.

(21) CFC ERS provider--The entity directly providing CFC ERS to an individual, which may be the program provider or a contractor of the program provider.

(22) CFC FMS--The term used for FMS on the IPC of an individual if the individual receives only CFC PAS/HAB through the CDS option.

(23) CFC PAS/HAB--CFC personal assistance services/habilitation. A service:

(A) that consists of:

(i) personal assistance services that provide assistance to an individual in performing activities of daily living and instrumental activities of daily living based on the individual's person-centered service plan, including:

(I) non-skilled assistance with the performance of the ADLs and IADLs;

(II) household chores necessary to maintain the home in a clean, sanitary, and safe environment;

(III) escort services, which consist of accompanying and assisting an individual to access services or activities in the community, but do not include transporting an individual; and

(IV) assistance with health-related tasks; and

(ii) habilitation that provides assistance to an individual in acquiring, retaining, and improving self-help, socialization, and daily living skills and training the individual on ADLs, IADLs, and health-related tasks, such as:

(I) self-care;

(II) personal hygiene;

(III) household tasks;

(IV) mobility;

(V) money management;

(VI) community integration, including how to get around in the community;

(VII) use of adaptive equipment;

(VIII) personal decision making;

(IX) reduction of challenging behaviors to allow individuals to accomplish ADLs, IADLs, and health-related tasks; and

(X) self-administration of medication; and

(B) does not include transporting the individual, which means driving the individual from one location to another.

(24) CFC support consultation--The term used for support consultation on the IPC of an individual if the individual receives only CFC PAS/HAB through the CDS option.

(25) CFC support management--Training regarding how to select, manage, and dismiss an unlicensed service provider of CFC PAS/HAB, as described in the *DBMD Program Manual*.

(26) Chore services--Services, other than CFC PAS/HAB household chores, needed to maintain a clean, sanitary, and safe environment in an individual's home that consist of heavy household chores, such as washing floors, windows and walls, securing loose rugs and tiles, and moving heavy items or furniture.

(27) CMS--The Centers for Medicare & Medicaid Services. The federal agency within the United States Department of Health and Human Services that administers the Medicare and Medicaid programs.

(28) Competitive employment--Employment that pays an individual at least minimum wage if the individual is not self-employed.

(29) Contract--A provisional contract that HHSC enters into in accordance with §49.208 of this chapter (relating to Provisional Contract Application Approval) that has a stated expiration date or a standard contract that HHSC enters into in accordance with §49.209 of this chapter (relating to Standard Contract) that does not have a stated expiration date.

(30) Controlling person--A person who:

(A) has an ownership interest in a program provider;

(B) is an officer or director of a corporation that is a program provider;

(C) is a partner in a partnership that is a program provider;

(D) is a member or manager in a limited liability company that is a program provider;

(E) is a trustee or trust manager of a trust that is a program provider; or

(F) because of a personal, familial, or other relationship with a program provider, is in a position of actual control or authority with respect to the program provider, regardless of the person's title.

(31) DADS--HHSC.

(32) DAHS--Day Activity and Health Services. Day activity and health services as defined in §98.2 of this title (relating to Definitions).

(33) DBMD Program--The Deaf Blind with Multiple Disabilities Waiver Program.

(34) DBMD Program specialist--An HHSC employee who is the primary contact for the DBMD Program.

(35) Deafblindness--A chronic condition in which a person:

(A) has deafness, which is a hearing impairment severe enough that most speech cannot be understood with amplification; and

(B) has legal blindness, which results from a central visual acuity of 20/200 or less in the person's better eye, with correction, or a visual field of 20 degrees or less.

(36) Denial--An HHSC action that disallows:

(A) an individual's request for enrollment in the DBMD Program;

(B) a DBMD Program service or a CFC service requested on an IPC that was not authorized on the prior IPC; or

(C) a portion of the amount or level of a DBMD Program service or a CFC service requested on an IPC that was not authorized on the prior IPC.

(37) Dental treatment--A service that provides the following services, as described in Appendix C of the DBMD Program waiver application available on the HHSC website:

(A) therapeutic, orthodontic, routine preventive, and emergency treatment; and

(B) sedation.

(38) Developmental disability--As defined in the Developmental Disabilities Assistance and Bill of Rights Act of 2000, Section 102(8), a severe, chronic disability of an individual five years of age or older that:

(A) is attributable to a mental or physical impairment or combination of mental and physical impairments;

(B) is manifested before the individual attains 22 years of age;

(C) is likely to continue indefinitely;

(D) results in substantial functional limitations in three or more of the following areas of major life activity:

(i) self-care;

(ii) receptive and expressive language;

(iii) learning;

(iv) mobility;

(v) self-direction;

(vi) capacity for independent living; and

(vii) economic self-sufficiency.

(39) DFPS--Department of Family and Protective Services.

(40) Dietary services--A therapy service that:

(A) assists an individual to meet basic or special therapeutic nutritional needs through the development of individual meal plans; and

(B) is provided by a person licensed in accordance with Texas Occupations Code, Chapter 701, Dietitians.

(41) Employment assistance--Assistance provided to an individual to help the individual locate competitive employment in the community.

(42) Exploitation--The illegal or improper act or process of using, or attempting to use, an individual or the resources of an individual for monetary or personal benefit, profit, or gain.

(43) FMS--Financial management services. Services, as defined in §41.103 of this title provided to an individual participating in the CDS option.

(44) FMSA--Financial management services agency. An entity, as defined in §41.103 of this title, that provides FMS to an individual participating in the CDS option.

(45) Former military member--A person who served in the United States Army, Navy, Air Force, Marine Corps, or Coast Guard:

(A) who declared and maintained Texas as the person's state of legal residence in the manner provided by the applicable military branch while on active duty; and

(B) who was killed in action or died while in service, or whose active duty otherwise ended.

(46) Functions as a person with deafblindness--Situation in which a person is determined:

(A) to have a progressive medical condition, manifested before 22 years of age, that will result in the person having deafblindness; or

(B) before attaining 22 years of age, to have limited hearing or vision due to protracted inadequate use of either or both of these senses.

(47) Good cause--As determined by HHSC, a reason outside the control of the CFC ERS provider.

(48) HCSSA (Home and community support services agency)--An entity required to be licensed under THSC, Chapter 142, Home and Community Support Services.

(49) Health-related tasks--Specific tasks related to the needs of an individual, which can be delegated or assigned by licensed health-care professionals under State law to be performed by a service provider of CFC PAS/HAB. These include tasks delegated by an RN; health maintenance activities, as defined in 22 TAC §225.4 (relating to Definitions), that may not require delegation; and activities assigned to a service provider of CFC PAS/HAB by a licensed physical therapist, occupational therapist, or speech-language pathologist.

(50) HHSC--The Texas Health and Human Services Commission.

(51) Instrumental activities of daily living. Activities related to living independently in the community, including meal planning and preparation; managing finances; shopping for food, clothing, and other essential items; performing essential household chores; communicating by phone or other media; and traveling around and participating in the community.

(52) ICF/IID--Intermediate care facility for individuals with an intellectual disability or related conditions. An ICF/IID is a facility in which ICF/IID Program services are provided and that is:

(A) licensed or subject to being licensed in accordance with Texas Health and Safety Code, Chapter 252; or

(B) certified by HHSC, including a state supported living center.

(53) ICF/IID Program--The Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions Program that provides Medicaid-funded residential services to individuals with an intellectual disability or related conditions.

(54) ID/RC Assessment--Intellectual Disability/Related Conditions Assessment. A form used by HHSC to determine if an individual meets the requirements described in §42.201(a)(2) and (3)

of this chapter (relating to Eligibility Criteria for DBMD Program Services and CFC Services).

(55) Impairment to independent functioning--An adaptive behavior level of II, III, or IV.

(56) Individual--A person seeking to enroll or who is enrolled in the DBMD Program.

(57) Institutional services--Services provided in an ICF/IID or a nursing facility.

(58) Intellectual disability--Significant sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and originating during the developmental period.

(59) Intervener--A service provider with specialized training and skills in deafblindness who, working with one individual at a time, serves as a facilitator to involve an individual in home and community services and activities, and who is classified as an "Intervener", "Intervener I", "Intervener II", or "Intervener III" in accordance with Texas Government Code, §531.0973.

(60) IPC--Individual Plan of Care. A written plan developed by an individual's service planning team using person-centered planning and documented on an HHSC form that:

(A) meets:

(i) the criteria in §42.201(a)(4) of this chapter; and

(ii) the requirements described in §42.214(a)(1) and (b)(1) - (6) of this chapter (relating to Development of Enrollment Individual Plan of Care (IPC)); and

(B) is authorized by HHSC in accordance with Subchapter B of this chapter (relating to Eligibility, Enrollment, and Review).

(61) IPP--Individual Program Plan. A written plan documented on an HHSC form and completed by an individual's case manager that describes the goals and outcomes for each DBMD Program service and CFC service, other than CFC support management, included on the individual's IPC.

(62) IPC period--The effective period of an IPC as follows:

(A) for an enrollment IPC, the period of time from the effective date of the enrollment IPC approved by HHSC until the first calendar day of the same month of the effective date in the following year; and

(B) for a renewal IPC, a 12-month period of time starting on the effective date of a renewal IPC.

(63) LAR--Legally authorized representative. A person authorized by law to act on behalf of an individual with regard to a matter described in this chapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(64) Licensed assisted living--A service provided by a program provider in an ALF that is owned by the program provider.

(65) Licensed home health assisted living--A service provided by a program provider that is a HCSSA in a residence for no more than three individuals, at least one of whom owns or leases the residence.

(66) LOC--Level of care. A determination given to an individual as part of the eligibility determination process based on data on the ID/RC Assessment.

(67) LVN--Licensed vocational nurse. A person licensed to provide vocational nursing in accordance with Texas Occupations Code, Chapter 301, Nurses.

(68) Managed care organization--This term has the meaning set forth in Texas Government Code, §536.001.

(69) MAO Medicaid--Medical Assistance Only Medicaid. A type of Medicaid by which an individual qualifies financially for Medicaid assistance but does not receive Supplemental Security Income (SSI) benefits.

(70) Mechanical restraint--A mechanical device, material, or equipment used to control an individual's behavior by restricting the ability of the individual to freely move part or all of the individual's body. The term does not include a protective device.

(71) Medicaid--A program funded jointly by the states and the federal government that provides medical benefits to groups of low-income people, some who may have no medical insurance or inadequate medical insurance.

(72) Medicaid waiver program--A service delivery model authorized under §1915(c) of the Social Security Act in which certain Medicaid statutory provisions are waived by CMS.

(73) MESAV--Medicaid Eligibility Service Authorization Verification. The automated system that contains information regarding an individual's Medicaid eligibility and service authorizations.

(74) Military family member--A person who is the spouse or child (regardless of age) of:

(A) a military member; or

(B) a former military member.

(75) Military member--A member of the United States military serving in the Army, Navy, Air Force, Marine Corps, or Coast Guard on active duty who has declared and maintains Texas as the member's state of legal residence in the manner provided by the applicable military branch.

(76) Minor home modifications--Physical adaptation to an individual's residence necessary to address the individual's specific needs and enable the individual to function with greater independence or control the residence's environment.

(77) Natural supports--Unpaid persons, including family members, volunteers, neighbors, and friends, who assist and sustain an individual.

(78) Neglect--A negligent act or omission that caused physical or emotional injury or death to an individual or placed an individual at risk of physical or emotional injury or death.

(79) Nursing--Treatments and health care procedures provided by an RN or LVN that are:

(A) ordered by a physician; and

(B) provided in compliance with:

(i) Texas Occupations Code, Chapter 301, Nurses; and

(ii) rules at Texas Board of Nursing at Texas Administrative Code (TAC), Title 22, Part 11, Texas Board of Nursing.

(80) Nursing facility--A facility that is licensed in accordance with the Texas Health and Safety Code, Chapter 242.

(81) Occupational therapy--Services that:

(A) address physical, cognitive, psychosocial, sensory, and other aspects of performance to support an individual's engagement in everyday life activities that affect health, wellbeing, and quality of life; and

(B) are provided by a person licensed in accordance with Texas Occupations Code, Chapter 454, Occupational Therapists.

(82) Orientation and mobility--Service that assists an individual to acquire independent travel skills that enable the individual to negotiate safely and efficiently between locations at home, school, work, and in the community.

(83) Person-centered planning--A process that empowers the individual (and the LAR on the individual's behalf) to direct the development of an IPC that meets the individual's outcomes. The process:

(A) identifies existing supports and services necessary to achieve the individual's outcomes;

(B) identifies natural supports available to the individual and negotiates needed services and supports;

(C) occurs with the support of a group of people chosen by the individual (and the LAR on the individual's behalf); and

(D) accommodates the individual's style of interaction and preferences regarding time and setting.

(84) Personal funds--The funds that belong to an individual, including earned income, social security benefits, gifts, and inheritances.

(85) Personal leave day--A continuous 24-hour period, measured from midnight to midnight, when an individual who resides in a residence in which licensed assisted living or licensed home health assisted living is provided is absent from the residence for personal reasons.

(86) Physical abuse--Any of the following:

(A) an act or failure to act performed knowingly, recklessly, or intentionally, including incitement to act, that caused physical injury or death to an individual or placed an individual at risk of physical injury or death;

(B) an act of inappropriate or excessive force or corporal punishment, regardless of whether the act results in a physical injury to an individual;

(C) the use of a restraint on an individual not in compliance with federal and state laws, rules, and regulations; or

(D) seclusion.

(87) Physical restraint--Any manual method used to control an individual's behavior, except for physical guidance or prompting of brief duration that an individual does not resist, that restricts:

(A) the free movement or normal functioning of all or a part of the individual's body; or

(B) normal access by an individual to a portion of the individual's body.

(88) Physical therapy--Services that:

(A) prevent, identify, correct, or alleviate acute or prolonged movement dysfunction or pain of anatomic or physiologic origin; and

(B) are provided by a person licensed in accordance with Texas Occupations Code, Chapter 453, Physical Therapists.

(89) Physician--As defined in 26 TAC §558.2 (relating to Definitions), a person who is:

(A) licensed in Texas to practice medicine or osteopathy in accordance with Texas Occupations Code, Chapter 155;

(B) licensed in Arkansas, Louisiana, New Mexico, or Oklahoma to practice medicine, who is the treating physician of a client and orders home health or hospice services for the client, in accordance with the Texas Occupations Code, §151.056(b)(4); or

(C) a commissioned or contract physician or surgeon who serves in the United States uniformed services or Public Health Service if the person is not engaged in private practice, in accordance with the Texas Occupations Code, §151.052(a)(8).

(90) Program provider--A person, as defined in §49.102 of this title (relating to Definitions), that has a contract with HHSC to provide DBMD Program services, excluding an FMSA.

(91) Protective device--An item or device, such as a safety vest, lap belt, bed rail, safety padding, adaptation to furniture, or helmet, if:

(A) used only:

(i) to protect an individual from injury; or

(ii) for body positioning of the individual to ensure health and safety; and

(B) not used to modify or control behavior.

(92) Public emergency personnel--Personnel of a sheriff's department, police department, emergency medical service, or fire department.

(93) Reduction--An HHSC action taken as a result of a review of a revision or renewal IPC that decreases the amount or level of a service authorized by HHSC on the prior IPC.

(94) Related condition--As defined in the Code of Federal Regulations (CFR), Title 42, §435.1010, a severe and chronic disability that:

(A) is attributed to:

(i) cerebral palsy or epilepsy; or

(ii) any other condition, other than mental illness, found to be closely related to an intellectual disability because the condition results in impairment of general intellectual functioning or adaptive behavior similar to that of individuals with an intellectual disability, and requires treatment or services similar to those required for individuals with an intellectual disability;

(B) is manifested before the individual reaches 22 years of age;

(C) is likely to continue indefinitely; and

(D) results in substantial functional limitation in at least three of the following areas of major life activity:

(i) self-care;

(ii) understanding and use of language;

(iii) learning;

(iv) mobility;

(v) self-direction; and

(vi) capacity for independent living.

(95) Respite--Services provided on a short-term basis to an individual because of the absence or need for relief of an individual's unpaid caregiver.

(96) Responder--A person designated to respond to an alarm call activated by an individual.

(97) Restraint--Any of the following:

- (A) a physical restraint;
- (B) a mechanical restraint; or
- (C) a chemical restraint.

(98) Restrictive intervention--An action or procedure that limits an individual's movement, access to other individuals, locations or activities, or restricts an individual's rights, including a restraint, a protective device, and seclusion.

(99) RN--Registered nurse. A person licensed to provide professional nursing in accordance with Texas Occupations Code, Chapter 301, Nurses.

(100) Seclusion--A restrictive intervention that is the involuntary placement of an individual alone in an area from which the individual is prevented from leaving.

(101) Service planning team--A team convened and facilitated by a DBMD Program case manager for the purpose of developing, reviewing, and revising an individual's IPC. The team consists of:

- (A) the individual;
- (B) if applicable, the individual's LAR or an actively involved person;
- (C) the DBMD Program case manager;
- (D) except as described in subparagraph (E) of this paragraph, the program director or a RN designated by the program provider;
- (E) if the DBMD Program case manager and program director are the same person, a RN designated by the program provider, in addition to the DBMD Program case manager;
- (F) other persons whose inclusion is requested by the individual, LAR, or actively involved person; and
- (G) other persons selected by the program provider who are:
  - (i) professionally qualified by certification or licensure and have special training and experience in the diagnosis and habilitation of persons with the individual's related condition; or
  - (ii) directly involved in the delivery of services and supports to the individual.

(102) Service provider--A person who provides a DBMD Program service or a CFC service directly to an individual and who is an employee or contractor of a program provider.

(103) Sexual abuse--Any of the following:

- (A) sexual exploitation of an individual;
- (B) non-consensual or unwelcomed sexual activity with an individual; or
- (C) consensual sexual activity between an individual and a service provider, staff person, volunteer, or controlling person, unless a consensual sexual relationship with an adult individual existed before the service provider, staff person, volunteer, or controlling person

became a service provider, staff person, volunteer, or controlling person.

(104) Sexual activity--An activity that is sexual in nature, including kissing, hugging, stroking, or fondling with sexual intent.

(105) Sexual exploitation--A pattern, practice, or scheme of conduct against an individual that can reasonably be construed as being for the purposes of sexual arousal or gratification of any person:

- (A) which may include sexual contact; and
- (B) does not include obtaining information about an individual's sexual history within standard accepted clinical practice.

(106) Significant subaverage general intellectual functioning--Consistent with THSC, §591.003, measured intelligence on standardized general intelligence tests of two or more standard deviations (not including standard error of measurement adjustments) below the age-group mean for the tests used.

(107) Speech, language, audiology therapy--Services that:

- (A) address the development and disorders of communication, including speech, voice, language, oral pharyngeal function, or cognitive processes; and
- (B) are provided by a person licensed in accordance with Texas Occupations Code, Chapter 401, Speech-Language Pathologists and Audiologists.

(108) Specialized nursing--Nursing provided to an individual who has a tracheostomy or is dependent on a ventilator.

(109) Staff person--A full-time or part-time employee of a program provider, other than a service provider.

(110) SSA--Social Security Administration.

(111) SSI--Supplemental Security Income.

(112) State supported living center--A state-supported and structured residential facility operated by HHSC to provide to persons with an intellectual disability a variety of services, including medical treatment, specialized therapy, and training in the acquisition of personal, social, and vocational skills, but does not include a community-based facility owned by HHSC.

(113) Support consultation--A service, as defined in §41.103 of this title, that may be chosen by an individual who chooses to participate in the CDS option.

(114) Supported employment--Assistance provided, in order to sustain competitive employment, to an individual who, because of a disability, requires intensive, ongoing support to be self-employed, work from home, or perform in a work setting at which individuals without disabilities are employed.

(115) System check--A test of the CFC ERS equipment to determine if:

- (A) the individual can successfully activate an alarm call; and
- (B) the equipment is working properly.

(116) TAC--Texas Administrative Code.

(117) TAS--Transition Assistance Services. Services provided to a Medicaid-eligible person receiving institutional services in Texas to assist with setting up a household when transitioning from institutional services into the DBMD Program.

(118) THSC--Texas Health and Safety Code.

(119) TMHP--Texas Medicaid & Healthcare Partnership. The Texas Medicaid program claims administrator.

(120) Transfer--The movement of an individual from a DBMD Program provider or a FMSA to a different DBMD Program provider or FMSA.

(121) Transportation plan--A written plan, based on person-centered planning and developed with an applicant or individual using the HHSC Individual Transportation Plan form found on the HHSC website. A transportation plan is used to document how transportation will be delivered to support an individual's desired goals and objectives for transportation identified in the IPP.

(122) Trust fund account--An account at a financial institution that contains an individual's personal funds and is under the program provider's control.

(123) Verbal or emotional abuse--Any act or use of verbal or other communication, including gestures:

(A) to:

(i) harass, intimidate, humiliate, or degrade an individual; or

(ii) threaten an individual with physical or emotional harm; and

(B) that:

(i) results in observable distress or harm to the individual; or

(ii) is of such a serious nature that a reasonable person would consider it harmful or a cause of distress.

(124) Volunteer--A person who works for a program provider without compensation, other than reimbursement for actual expenses.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER B. ELIGIBILITY, ENROLLMENT, AND REVIEW

### DIVISION 1. ELIGIBILITY

#### 40 TAC §42.201

#### STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct

the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendment implements Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

§42.201. *Eligibility Criteria for DBMD Program Services and CFC Services.*

(a) An individual is eligible for DBMD Program services if:

(1) the individual meets the financial eligibility criteria as described in Appendix B of the DBMD Program waiver application approved by CMS and found on the HHSC website;

(2) the individual is determined by HHSC to meet the LOC VIII criteria described in §9.239 of this title (relating to ICF/MR Level of Care VIII Criteria);

(3) the individual, as documented on an ID/RC Assessment:

(A) has one or more diagnosed related conditions and, as a result:

(i) has deafblindness;

(ii) has been determined to have a progressive medical condition that will result in deafblindness; or

(iii) functions as a person with deafblindness; and

(B) has one or more additional disabilities that result in impairment to independent functioning;

(4) the individual has an IPC with a cost for DBMD Program services at or below \$114,736.07;

(5) the individual is not enrolled in another waiver program or receiving a service that may not be received if the individual is enrolled in the DBMD Program, as identified in the Mutually Exclusive Services table in Appendix V of the *DBMD Program Manual*;

(6) the individual does not reside in:

(A) an ICF/IID;

(B) a nursing facility licensed or subject to being licensed in accordance with Texas Health and Safety Code, Chapter 242, Convalescent and Nursing Facilities and related Institutions;

(C) an ALF, unless it provides licensed assisted living in the DBMD Program;

(D) a residential child-care operation licensed or subject to being licensed by DFPS unless it is a foster family home or a foster group home;

(E) a facility licensed or subject to being licensed by the Department of State Health Services (DSHS);

(F) a residential facility operated by the Texas Youth Commission; or

(G) a jail or prison;

(7) at least one program provider is willing to provide DBMD Program services to the individual;

(8) the individual resides or moves to reside in a county served by a program provider; and

(9) the individual requires the provision of:

(A) at least one DBMD Program Service per month or monthly monitoring; and

(B) at least one DBMD Program Service during an IPC period.

(b) Except as provided in subsection (c) of this section, an individual is eligible for a CFC service under this chapter if the individual:

(1) meets the criteria described in subsection (a) of this section;

(2) requires the provision of the CFC service; and

(3) is not receiving licensed assisted living or licensed home health assisted living.

(c) To be eligible for a CFC service under this chapter, an individual receiving MAO Medicaid must, in addition to meeting the eligibility criteria described in subsection (b) of this section, receive a DBMD Program service at least monthly, as required by 42 CFR §441.510(d).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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For further information, please call: (512) 438-3078



## DIVISION 2. ENROLLMENT PROCESS

### 40 TAC §§42.211, 42.212, 42.216

#### STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendments implement Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

#### §42.212. *Process for Enrollment of an Individual.*

(a) A program provider, after notification by HHSC that an individual designated the program provider on a completed Documentation of Provider Choice form, must assign a case manager to the individual.

(b) The program provider must ensure that the assigned case manager contacts the individual or LAR within five business days after the program provider receives the HHSC notification. During the initial contact, the case manager must:

(1) verify that the individual resides in a county for which the program provider has a contract;

(2) determine if the individual is currently enrolled in Medicaid;

(3) determine if the individual is currently enrolled in another waiver program or receiving a service that may not be received if the individual is enrolled in the DBMD Program, as identified in the Mutually Exclusive Services table in Appendix V of the *DBMD Program Manual* available on the HHSC website; and

(4) arrange with the individual and LAR for an initial face-to-face, in-home visit to occur as soon as possible but no later than 30 calendar days after the program provider receives the HHSC notification.

(c) During the initial face-to-face, in-home visit, the case manager must:

(1) provide an oral and written explanation to the individual or LAR:

(A) of the DBMD Program services described in §42.104(d) of this chapter (relating to Description of Deaf Blind with Multiple Disabilities (DBMD) Waiver Program and CFC), including TAS if the individual is receiving institutional services;

(B) of the CFC services described in §42.104(f) of this chapter;

(C) of the eligibility requirements for:

(i) DBMD Program services as described in §42.201(a) of this subchapter (relating to Eligibility Criteria for DBMD Program Services and CFC Services);

(ii) CFC services as described in §42.201(b) of this subchapter to individuals who do not receive MAO Medicaid; and

(iii) CFC services as described in §42.201(c) of this subchapter to individuals who receive MAO Medicaid;

(D) of the reasons DBMD Program services and CFC services may be terminated as described in §§42.244 - 42.247 of this chapter (relating to Termination of DBMD Program Services and CFC Services With Advance Notice Due to Ineligibility or Leave from the State, Termination of DBMD Program Services and CFC Services With Advance Notice Due to Non-compliance with Mandatory Participation Requirements, Termination of DBMD Program Services and CFC Services Without Advance Notice, and Termination of DBMD Program Services and CFC Services Without Advance Notice Due to Behavior Causing Immediate Jeopardy);

(E) of the individual's rights and responsibilities, including the right to request a Medicaid Fair Hearing as described in §42.251 of this chapter (relating to Individual's Right to a Fair Hearing);

(F) of the mandatory participation requirements as described in §42.252 of this chapter (relating to Mandatory Participation Requirements of an Individual);

(G) of the procedures for an individual or LAR to file a complaint regarding a DBMD Program provider as required by §49.309 of this title (relating to Complaint Process) and that the HHSC Complaint and Incident Intake toll-free telephone number at 1-800-458-9858 may be used to file a complaint;

(H) of the CDS option as described in §42.217 of this division (relating to Consumer Directed Services (CDS) Option);

(I) of the voter registration process, if the individual is 18 years of age or older;

(J) of how to contact the program provider, the case manager, and the RN;

(K) that the individual or LAR may request the provision of residential habilitation, case management, nursing, out-of-home respite in a camp, adaptive aids, intervener services, or CFC PAS/HAB while the individual is temporarily staying at a location outside the contracted service delivery area but within the state of Texas during a period of no more than 60 consecutive days; and

(L) that the individual or LAR may report an allegation of abuse, neglect, and exploitation to DFPS by calling the toll-free telephone number at 1-800-252-5400;

(2) educate the individual and LAR about protecting the individual from abuse, neglect, and exploitation;

(3) if possible:

(A) complete an adaptive behavior screening assessment or ensure an appropriate professional completes the adaptive behavior screening assessment;

(B) complete a Related Conditions Eligibility Screening Instrument or ensure an RN completes a Related Conditions Eligibility Screening Instrument; and

(C) ensure an RN completes a nursing assessment using the HHSC CLASS/DBMD Nursing Assessment form;

(4) complete the ID/RC Assessment form; and

(5) obtain the signature of the individual or LAR on the Waiver Program Verification of Freedom of Choice form documenting the individual's or LAR's choice of the DBMD Program over the ICF/IID Program.

(d) If any of the assessments described in subsection (c)(3)(A) - (C) of this section is not completed during the initial face-to-face, in-home visit, the case manager must ensure that the assessment is completed within 10 business days after the date of the initial face-to-face, in-home visit.

(e) If an individual is Medicaid eligible, is receiving institutional services, and anticipates needing TAS, the case manager must determine whether the individual meets the following criteria:

(1) the individual is being discharged from a nursing facility or an ICF/IID;

(2) the individual has not previously received TAS as described in §62.5(e) of this title (relating to Service Description);

(3) the individual's proposed enrollment IPC does not include licensed assisted living or licensed home health assisted living; and

(4) the individual anticipates needing TAS as described in §62.5(e) of this title.

(f) If the case manager determines that an individual meets the criteria described in subsection (e) of this section, the case manager must:

(1) provide the individual or LAR with a list of TAS providers in the service delivery area in which the individual will reside;

(2) complete, with the individual or LAR, the Transition Assistance Services (TAS) Assessment and Authorization form found on the HHSC website in accordance with the form's instructions, which includes:

(A) identifying the TAS the individual needs as described in §62.5(e) of this title; and

(B) estimating the monetary amount for each TAS identified, which must be within the service limit described in §62.5(d) of this title;

(3) submit the completed form to HHSC for authorization;

(4) send the form authorized by HHSC to the selected TAS provider; and

(5) include the TAS and the monetary amount authorized by HHSC on the individual's enrollment IPC as described in §42.214 of this division (relating to Development of Enrollment Individual Plan of Care (IPC)).

(g) The program provider must:

(1) gather and maintain the information necessary to process the individual's request for enrollment in the DBMD Program using forms prescribed by HHSC in the *DBMD Program Manual*;

(2) assist the individual who does not have Medicaid financial eligibility or the individual's LAR to:

(A) complete an application for Medicaid financial eligibility; and

(B) submit the completed application to HHSC within 30 calendar days after the case manager's initial face-to-face, in-home visit;

(3) document in the individual's record any problems or barriers the individual or LAR encounters that may inhibit progress towards completing:

(A) the application for Medicaid financial eligibility; and

(B) enrollment in the DBMD Program; and

(4) assist the individual or LAR to overcome problems or barriers documented as described in paragraph (3) of this subsection.

(h) If an individual or LAR does not submit a completed Medicaid application to HHSC as described in subsection (g)(2)(B) of this section as a result of problems or barriers documented in accordance with subsection (g)(3) of this section but is making progress in collecting the documentation necessary for an application, the program provider may grant one or more 30 calendar day extensions.

(1) The program provider must ensure the case manager documents the rationale for an extension in the individual's record.

(2) The program provider must not issue an extension that will cause the period of Medicaid application preparation to exceed 12 months after the date of the case manager's initial face-to-face, in-home visit.

(3) The program provider must notify a DBMD program specialist in writing if the individual or LAR:

(A) fails to submit a completed Medicaid application to HHSC within 12 months after the date of the case manager's initial face-to-face, in-home visit; or

(B) does not cooperate with the case manager in completing the enrollment process described in this section.

(i) A program provider must ensure that:

(1) the related conditions documented on the ID/RC Assessment form for the individual are on the HHSC Approved Diag-



nostic Codes for Persons with Related Conditions list contained in the *DBMD Program Manual*;

(2) the ID/RC Assessment is submitted to a physician for review; and

(3) if the individual or LAR requests dental services other than an initial dental exam, a dentist completes the HHSC Prior Authorization for Dental Services form.

(j) After receiving the signed and dated ID/RC Assessment from the physician establishing that the individual meets the requirements described in §42.201(a)(2) and (3) of this subchapter, the case manager must:

(1) convene a service planning team meeting within 10 business days after receipt of the signed and dated ID/RC Assessment; and

(2) if an HHSC Prior Authorization for Dental Services form was completed by a dentist as described in subsection (i)(3) of this section, ensure that the completed form is available for the service planning team to review.

(k) During the service planning team meeting, the case manager must ensure:

(1) the service planning team:

(A) reviews the CLASS/DBMD Nursing Assessment form completed by the RN;

(B) addresses any information included in Addendum E of the CLASS/DBMD Nursing Assessment form, Recommendations/Coordination of Care, to ensure the individual's needs are met; and

(C) documents on the CLASS/DBMD Coordination of Care form how the information in Addendum E was addressed; and

(2) an enrollment IPC is developed as described in §42.214 of this division and, if the enrollment IPC:

(A) includes transportation as a residential habilitation activity or as an adaptive aid, that the service planning team develops a transportation plan; or

(B) includes residential habilitation, nursing, specialized nursing, or CFC PAS/HAB, that the service planning team develops a service backup plan if required by §42.407 of this chapter (relating to Service Backup Plans).

(l) Within ten business days after the service planning team meeting, the case manager must:

(1) complete an enrollment IPP as described in §42.215 of this division (relating to Development of Enrollment Individual Program Plan (IPP));

(2) submit a request for enrollment to HHSC for review as described in §42.216 of this division (relating to HHSC's Review of Request for Enrollment) that includes the following:

(A) a copy of the completed enrollment IPC;

(B) a copy of the ID/RC Assessment signed by a physician;

(C) a copy of the completed enrollment IPP;

(D) a copy of the adaptive behavior screening assessment;

(E) a copy of the Related Conditions Eligibility Screening Instrument form;

(F) a copy of the HHSC DBMD Summary of Services Delivered form that documents pre-assessment services, with supporting documentation;

(G) a copy of the Waiver Program Verification of Freedom of Choice form;

(H) a copy of the Non-Waiver Services form;

(I) a copy of the Documentation of Provider Choice form;

(J) a copy of the HHSC CLASS/DBMD Nursing Assessment form;

(K) a Prior Authorization for Dental Services form, if required by §42.624 of this chapter (relating to Dental Treatment);

(L) a Rationale for Adaptive Aids, Medical Supplies, and Minor Home Modifications form, if required by §42.602 of this chapter (relating to Requirements For Authorization to Purchase or Lease an Adaptive Aid), §42.613 of this chapter (relating to Requesting Authorization to Purchase a Minor Home Modification that Costs Less than \$1,000), or §42.614 of this chapter (relating to Requesting Authorization to Purchase a Minor Home Modification that Costs \$1,000 or More);

(M) a Provider Agency Model Service Backup Plan form, if required by §42.407 of this chapter;

(N) a Specialized Nursing Certification form, if required by §42.628 of this chapter (relating to Nursing);

(O) copies of letters of denial from non-waiver resources, if any;

(P) a Transition Assistance Services (TAS) Assessment and Authorization form, if required by subsection (f)(2) of this section; and

(Q) a copy of the transportation plan, if required by subsection (k)(2)(A) of this section; and

(3) if the individual will receive a service through the CDS option, send a copy of the proposed enrollment IPC, the enrollment IPP, and if completed, the transportation plan to the FMSA.

(m) Within five business days after receiving a written notice from HHSC approving or denying the individual's request for enrollment, the program provider must notify the individual or LAR of HHSC's decision. If HHSC:

(1) approves the request for enrollment, the program provider must initiate DBMD Program services and CFC services as described on the IPC; or

(2) denies the request for enrollment, the program provider must send the individual or LAR a copy of HHSC's written notice of denial.

(n) The program provider must not provide DBMD Program services or CFC services to an individual until notified by HHSC that the individual's request for enrollment is approved. If a program provider provides DBMD Program services or CFC services to an individual before the effective date of service approved by HHSC, HHSC does not reimburse the program provider for those services.

(o) If HHSC notifies a program provider that an individual's request for enrollment is approved, the case manager must comply with §42.216(d)(2) of this subchapter (relating to HHSC's Review of Request for Enrollment).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## DIVISION 3. REVIEW

### 40 TAC §§42.220, 42.221, 42.223

#### STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendments and new section implement Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

#### §42.223. *Renewal and Revision of an IPC and IPP.*

##### (a) Case manager's review.

(1) Beginning the effective date of service of an individual's IPC, as determined in accordance with §42.216(j) of this subchapter (relating to HHSC's Review of Request for Enrollment), a case manager must, in accordance with the schedule in the *DBMD Program Manual*, meet face-to-face with the individual or LAR at a time and place acceptable to the individual or LAR to:

(A) review whether the DBMD Program services and CFC services are being provided as outlined in the IPC and IPP;

(B) review the individual's progress toward achieving the goals and objectives described in the IPP for each DBMD Program service and CFC service;

(C) determine if the services are meeting the individual's needs;

(D) determine if the individual's needs have changed;

(E) review assessments, evaluations, and progress notes prepared by service providers since the previous review;

(F) if the individual's IPC includes residential habilitation, nursing, specialized nursing, or CFC PAS/HAB, and none of these services are identified as critical to the individual's health and safety, discuss with the individual or LAR whether any of these services may now be critical to the individual's health and safety and needs a service backup plan; and

(G) if a service backup plan for residential habilitation, nursing, specialized nursing services, or CFC PAS/HAB has been im-

plemented, discuss the implementation of the service backup plan with the individual or LAR to determine if the plan was effective.

##### (2) A case manager must:

(A) document the results of the review in the individual's record using the IPP review form;

(B) document on the IPP review form for an individual who has a service backup plan if the service backup plan was:

(i) implemented;

(ii) effective; and

(iii) revised by the service planning team to address any problems or concerns regarding implementation of the service backup plan; and

(C) provide a copy of the completed IPP review form to the individual or LAR within 10 business days after the date of the review.

(3) A case manager must convene a service planning team meeting within five business days after the date of a meeting described in paragraph (1) of this subsection if the case manager:

(A) identifies needed changes in the individual's services; or

(B) determines that residential habilitation, nursing, specialized nursing, or CFC PAS/HAB services may now be critical to the individual's health and safety, as described in paragraph (1)(F) of this subsection, or that the service backup plan was ineffective, as described in paragraph (1)(G) of this subsection.

(4) During a service planning team meeting described in paragraph (3) of this subsection, a case manager must:

(A) develop a revision IPC that meets the requirements described in §42.214(b)(1) - (6) of this subchapter (relating to Development of Enrollment Individual Plan of Care (IPC));

(B) develop a revision IPP that meets the requirements described in §42.215(2)(A) - (D) and (3)(A) - (G) of this subchapter (relating to Development of Enrollment Individual Program Plan (IPP)); and

(C) if:

(i) the revision IPC includes transportation as a residential habilitation activity or as an adaptive aid, develop a transportation plan; and

(ii) the revision IPC includes residential habilitation, nursing, specialized nursing, or CFC PAS/HAB services, ensure compliance with §42.407 of this chapter (relating to Service Backup Plans).

##### (5) A case manager must:

(A) ensure the revision IPC is signed and dated by each member of the service planning team; and

(B) within 10 business days after the date of the service planning meeting, submit to HHSC:

(i) a copy of the completed revision IPC;

(ii) a copy of the revision IPP;

(iii) a transportation plan, if required by paragraph (4)(C)(i) of this subsection;

(iv) a Provider Agency Model Service Backup Plan form, if required by §42.407 of this chapter;

(v) a Rationale for Adaptive Aids, Medical Supplies, and Minor Home Modifications form, if required by §42.602 of this chapter (relating to Requirements For Authorization to Purchase or Lease an Adaptive Aid), §42.613 of this chapter (relating to Requesting Authorization to Purchase a Minor Home Modification that Costs Less than \$1,000), or §42.614 of this chapter (relating to Requesting Authorization to Purchase a Minor Home Modification that Costs \$1,000 or More);

(vi) a Specifications for Minor Home Modifications form, if required by §42.615 of this chapter (relating to Specifications for a Minor Home Modification);

(vii) a Prior Authorization for Dental Services form, if required by §42.624 of this chapter (relating to Dental Treatment); and

(viii) a Specialized Nursing Certification form, if required by §42.628 of this chapter (relating to Nursing).

(b) Annual review by the service planning team.

(1) Within 90 calendar days before the end of an IPC period:

(A) an individual's case manager must convene a service planning team meeting, with the individual present, at a location chosen by the individual or LAR to review the IPC and IPP;

(B) an RN must complete an annual nursing assessment of the individual using the HHSC CLASS/DBMD Nursing Assessment form; and

(C) an RN or a case manager must complete a Related Conditions Eligibility Screening Instrument.

(2) During the service planning team meeting:

(A) the service planning team must:

(i) review the CLASS/DBMD Nursing Assessment form completed by the RN;

(ii) address any information included in Addendum E of the CLASS/DBMD Nursing Assessment form, Recommendations/Coordination of Care, to ensure the individual's needs are met;

(iii) document on the CLASS/DBMD Coordination of Care form how the information in Addendum E of the CLASS/DBMD Nursing Assessment form was addressed;

(iv) develop a renewal IPC in accordance with §42.214(b)(1) - (6) of this subchapter and renewal IPP in accordance with §42.215(2)(A) - (D) and (3)(A) - (G) of this subchapter;

(v) complete a renewal ID/RC Assessment;

(vi) if the renewal IPC:

(I) includes transportation as a residential habilitation activity or as an adaptive aid, develop a transportation plan; or

(II) includes residential habilitation, nursing, specialized nursing, or CFC PAS/HAB, develop a service backup plan if required by §42.407 of this chapter (relating to Service Backup Plans); and

(vii) ensure the renewal IPC is signed and dated by each member of the service planning team; and

(B) the case manager must:

(i) provide an oral and written explanation of the topics described in §42.212(c)(1)(A) - (L) of this subchapter (relating to Process for Enrollment of an Individual) to the individual or LAR;

(ii) educate the individual and LAR about protecting the individual from abuse, neglect, and exploitation;

(iii) provide an oral explanation to the individual or LAR that the individual may transfer to a different program provider;

(iv) give the individual or LAR a Documentation of Provider Choice form and have the individual or LAR designate the selection of a DBMD program provider on the form;

(v) if the individual or LAR selects a different DBMD program provider on the Documentation of Provider Choice form, coordinate the individual's transfer in accordance with §42.231 of this subchapter (relating to Coordination of Transfers);

(vi) give the individual or LAR the HHSC Waiver Program Verification of Freedom of Choice form documenting the individual's or LAR's choice of the DBMD Program over the ICF/IID Program;

(vii) orally explain that the individual or LAR may request the provision of residential habilitation, case management, nursing, out-of-home respite in a camp, adaptive aids, intervener services, or CFC PAS/HAB while the individual is temporarily staying at a location outside the contracted service delivery area but within the state of Texas during a period of no more than 60 consecutive days; and

(viii) have documentation that the activities required under clauses (i) - (vii) of this subparagraph were performed.

(3) A case manager must, within 10 business days after the date of the service planning team meeting, but at least 30 calendar days before the end of the current IPC period, submit to HHSC:

(A) a copy of the completed renewal IPC;

(B) a copy of the renewal IPP;

(C) a copy of the renewal ID/RC Assessment;

(D) the results of an adaptive behavior screening assessment, which must be completed by an appropriate professional:

(i) at least every five years after completion of the most current assessment; and

(ii) if significant changes occur in the individual's functioning;

(E) a copy of the Related Conditions Eligibility Screening Instrument;

(F) a copy of the Non-Waiver Services form;

(G) a copy of the:

(i) Documentation of Provider Choice form; and

(ii) Waiver Program Verification of Freedom of Choice form;

(H) a copy of the HHSC CLASS/DBMD Nursing Assessment form;

(I) a transportation plan, if required by paragraph (2)(A)(vi)(I) of this subsection; and

(J) the documentation described in subsection (a)(5)(B)(iv) - (viii) of this section.

(c) Review and revision in an emergency. If a program provider delivers a DBMD Program service or CFC PAS/HAB to an individual in an emergency to ensure the individual's health and

welfare and the service is not on the IPC and IPP or exceeds the amount on the IPP, a case manager must:

(1) within five business days after providing the service, convene a service planning team meeting to review and revise the IPC in accordance with §42.214(b)(1) - (6) of this subchapter and a revision IPP in accordance with §42.215(2)(A) - (D) and (3)(A) - (G) of this subchapter and include on the revision IPP, documentation of how the requested services addressed the emergency;

(2) if the revision IPC includes residential habilitation, nursing, specialized nursing, or CFC PAS/HAB services, ensure compliance with §42.407 of this chapter;

(3) ensure the revision IPC is signed and dated by each member of the service planning team; and

(4) within 10 business days after the service planning meeting, submit to HHSC:

(A) a copy of the completed revision IPC;

(B) a copy of the revision IPP; and

(C) the documentation described in subsection (a)(5)(B)(iv) - (viii) of this section.

(d) Review and revision other than the reviews described in subsections (a) - (c) of this section. If a program provider becomes aware at any time during an individual's IPC period that changes to the individual's services may be necessary, the individual's case manager must:

(1) within five business days after becoming aware that changes to the individual's services may be necessary, convene a service planning team meeting to review and, if determined necessary, revise an IPC in accordance with §42.214(b)(1) - (6) of this subchapter and IPP in accordance with §42.215(2)(A) - (D) and (3)(A) - (G) of this subchapter;

(2) if the revision IPC:

(A) includes transportation as a residential habilitation activity or as an adaptive aid, develop a transportation plan; or

(B) includes residential habilitation, nursing, specialized nursing, or CFC PAS/HAB services:

(i) determine whether the individual requires a service backup plan in accordance with §42.407 of this chapter; and

(ii) develop a service backup plan if needed;

(3) ensure the revised IPC is signed and dated by each member of the service planning team; and

(4) within 10 business days after the date of the service planning meeting, submit the following to HHSC:

(A) a copy of the completed revision IPC;

(B) a copy of the revision IPP;

(C) a transportation plan, if required by paragraph (2)(A) of this subsection; and

(D) the documentation described in subsection (a)(5)(B)(iv) - (viii) of this section.

(e) Determination by HHSC of whether an individual meets LOC VIII and additional criteria.

(1) HHSC reviews the documentation described in subsection (b)(3)(C) - (E) of this section to determine whether an individual meets the LOC VIII and additional criteria required by §42.201(a)(2)

and (3) of this subchapter (relating to Eligibility Criteria for DBMD Program Services and CFC Services).

(2) HHSC may request additional assessments and supporting documentation related to an individual's LOC VIII and additional criteria. If HHSC makes such a request, a case manager must submit the information to HHSC within 10 calendar days after the date of the request.

(3) HHSC notifies a program provider, in writing, of whether or not an individual meets the LOC VIII and additional criteria. If HHSC determines that an individual meets the LOC VIII and additional criteria, the LOC VIII and additional criteria are effective:

(A) on a date determined by HHSC; and

(B) through the last calendar day of the IPC period.

(4) If an individual's LOC VIII and additional criteria expires before HHSC determines whether the individual meets the LOC VIII and additional criteria, as described in paragraphs (1) - (3) of this subsection:

(A) a program provider must continue to provide services to the individual until HHSC authorizes a proposed renewal IPC to ensure continuity of care and prevent the individual's health and welfare from being jeopardized; and

(B) if HHSC determines that the individual meets the LOC VIII and additional criteria, and the individual is otherwise eligible for the DBMD Program, HHSC will reimburse the program provider for services provided, as required by subparagraph (A) of this paragraph, for a period of not more than 180 calendar days before the date HHSC receives the documentation described in subsection (b)(3)(C) - (E) of this section.

(f) HHSC's review of an IPC.

(1) HHSC reviews a revision IPC or a renewal IPC to determine if the IPC meets the requirement described in §42.201(a)(4) of this subchapter and if the DBMD Program services and CFC services specified in the IPC meet the requirements described in §42.214(a)(1) and (b)(1) - (6) of this subchapter.

(2) At HHSC's request, a case manager must submit additional documentation supporting a revision IPC or a renewal IPC within 10 calendar days after the date of the request.

(3) If HHSC determines that a revision IPC or a renewal IPC meets the requirements:

(A) HHSC notifies the program provider, in writing, of its determination; and

(B) within ten business days after receiving the written notice, the case manager must:

(i) provide to the individual or LAR a copy of the renewal IPC and renewal IPP, and if required by §42.407 of this chapter (relating to Service Backup Plans), any new or revised service backup plan; and

(ii) if the individual will receive a service through the CDS option, send to the FMSA a copy of the renewal IPC, the renewal IPP, and if required by this section, the transportation plan.

(g) If an individual's IPC period expires before HHSC authorizes a renewal IPC:

(1) a program provider must continue to provide services to the individual until HHSC authorizes the renewal IPC to ensure continuity of care and prevent the individual's health and welfare from being jeopardized; and

(2) if HHSC authorizes the renewal IPC as described in subsection (f) of this section, HHSC will reimburse the program provider for services provided, as required by paragraph (1) of this subsection, for a period of not more than 180 calendar days before the date HHSC receives the documentation described in subsection (b)(3) of this section.

(h) Verifying the IPC and MESAV are consistent. A program provider must:

(1) electronically access MESAV to determine if the information on a revision IPC or a renewal IPC is consistent with the information in MESAV; and

(2) if the information on the revision IPC or renewal IPC is inconsistent with the information in MESAV, notify HHSC of the inconsistency.

(i) Process to terminate, deny, or reduce program services. The process by which an individual's DBMD program services or CFC services are terminated or a DBMD Program service or CFC service is denied or reduced, based on HHSC's review of a revision IPC or a renewal IPC, is described in §42.221(c) - (e) of this division (relating to Utilization Review of an IPC by HHSC).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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Karen Ray

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Department of Aging and Disability Services

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#### 40 TAC §42.222

##### STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The repeal implements Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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#### SUBCHAPTER C. PROGRAM PROVIDER ENROLLMENT

##### 40 TAC §42.301

##### STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendment implements Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

*§42.301. Program Provider Compliance With Rules.*

A program provider must comply with:

- (1) this chapter;
- (2) 26 TAC Chapter 558 (relating to Licensing Standards for Home and Community Support Services Agencies);
- (3) if providing licensed assisted living, 26 TAC Chapter 553 (relating to Licensing Standards for Assisted Living Facilities);
- (4) Chapter 41 of this title (relating to Consumer Directed Services Option); and
- (5) Chapter 49 of this title (relating to Contracting for Community Services).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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#### SUBCHAPTER D. ADDITIONAL PROGRAM PROVIDER PROVISIONS

##### 40 TAC §§42.401, 42.403, 42.405, 42.406, 42.410, 42.411

##### STATUTORY AUTHORITY

The amendments and new rules are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendments implement Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

§42.401. *Protection of Individual.*

(a) The program provider must have and implement written policies and procedures that safeguard an individual against:

- (1) infectious and communicable diseases;
- (2) conflicts of interest with a service provider, staff person, volunteer, or controlling person;
- (3) abuse, neglect, and exploitation;
- (4) acts of financial impropriety by a service provider, staff person, volunteer, or controlling person; and
- (5) deliberate damage of personal possessions by a service provider, staff person, volunteer, or controlling person.

(b) A program provider must not use seclusion.

(c) A program provider must notify HHSC in writing of an individual's death within 24 hours after learning of the death.

(d) A program provider, in accordance with the *DBMD Program Manual*, must report critical incidents to HHSC using the CLASS/DBMD Notification of Critical Incidents form.

(e) A program provider must ensure a program director who receives a copy of an HHSC initial intake report or a final investigative report from an FMSA, in accordance with §41.702 of this title (relating to Requirements Related to HHSC Investigations When an Alleged Perpetrator is a Service Provider) or §41.703 of this title (relating to Requirements Related to HHSC Investigations When an Alleged Perpetrator is a Staff Person or a Controlling Person of an FMSA), sends a copy of the report to the individual's case manager.

§42.403. *Training.*

(a) General orientation training. A program provider must ensure that a program director and a service provider complete a general orientation curriculum before assuming job duties and annually thereafter.

(1) The general orientation curriculum must include training on:

- (A) the rights of an individual;
- (B) confidentiality;
- (C) the program provider's complaint process; and
- (D) the DBMD Program and CFC, including the requirements of this chapter and the DBMD Program services and CFC services specified in §42.104 of this chapter (relating to Description of Deaf Blind with Multiple Disabilities (DBMD) Waiver Program and CFC).

(2) A program provider must document:

(A) the name of the person who received the training required by this subsection;

(B) the date the training was conducted; and

(C) the name of the person who conducted the training.

(b) Abuse, neglect, and exploitation training. A program provider must:

(1) ensure that a program director, service provider, staff person, and volunteer:

(A) are trained on and knowledgeable of:

(i) acts that constitute abuse, neglect, and exploitation;

(ii) signs and symptoms of abuse, neglect, and exploitation; and

(iii) methods to prevent abuse, neglect, and exploitation;

(B) are instructed to report an allegation of abuse, neglect, or exploitation of an individual as described in §42.410 of this chapter (relating to Reporting Allegations of Abuse, Neglect, or Exploitation of an Individual); and

(C) are provided with the instructions described in subparagraph (B) of this paragraph in writing;

(2) conduct the activities described in paragraph (1)(A) - (C) of this subsection:

(A) within one year after the person's most recent training on abuse, neglect, and exploitation and annually thereafter, if the program director, service provider, staff person, or volunteer was hired before July 1, 2019; or

(B) before assuming job duties and annually thereafter, if the program director, service provider, staff person, or volunteer is hired on or after July 1, 2019; and

(3) document:

(A) the name of the person who received the training required by this subsection;

(B) the date the training was conducted; and

(C) the name of the person who conducted the training.

(c) Cardiopulmonary resuscitation, first aid, and choking prevention training. A program provider must ensure training on cardiopulmonary resuscitation, first aid, and choking prevention in accordance with this subsection.

(1) A program provider must ensure that a program director, a case manager, an intervener, and a service provider of licensed assisted living, licensed home health assisted living, day habilitation, employment assistance, residential habilitation, respite, supported employment, and CFC PAS/HAB have current certification in:

(A) cardiopulmonary resuscitation;

(B) basic first aid; and

(C) choking prevention.

(2) The training received to obtain the certification must include an in-person evaluation by a qualified instructor of the trainee's ability to perform the actions listed in paragraph (1)(A) - (C) of this subsection.

(3) A program provider must ensure that:

(A) a program director, a case manager, an intervener, and a service provider of licensed assisted living, licensed home health

assisted living, day habilitation, employment assistance, residential habilitation, respite, and supported employment have the certification described in paragraph (1) of this subsection before assuming job duties; and

(B) a CFC PAS/HAB service provider has the certification described in paragraph (1) of this subsection:

(i) within 90 calendar days after the original effective date of this section, if the CFC PAS/HAB service provider was hired on or before the original effective date of this section; or

(ii) before assuming job duties, if the CFC PAS/HAB service provider is hired after the original effective date of this section.

(4) A program provider must maintain a copy of the certification required by paragraph (1) of this subsection. The certification must be issued by the organization granting the certification.

(d) HHSC DBMD Computer Based Training.

(1) A program provider must ensure that a program director and case manager complete the HHSC Deaf Blind with Multiple Disabilities Waiver Computer Based Training and receive a score of at least 80 percent on the examination included in the training:

(A) within 90 days after October 1, 2019, and annually thereafter, if the program director or case manager was hired before October 1, 2019; or

(B) within 90 days after assuming job duties and annually thereafter, if the program director or case manager is hired on or after October 1, 2019.

(2) A program provider must maintain a copy of the certification from the training required by this subsection, issued by HHSC, showing that the person successfully completed the training.

(e) DBMD Program Case Management Training.

(1) A program provider must ensure that a program director and case manager complete, within six months after assuming job duties, the DBMD Program Case Management Training provided by HHSC or training developed by the program provider. A program provider that develops and conducts its own training must ensure that:

(A) the training addresses the following elements from the HHSC DBMD Program Case Management Training:

(i) the DBMD Program service delivery model, which includes:

(I) the role of the case manager and DBMD Program provider;

(II) the role of the service planning team;

(III) person-centered planning; and

(IV) the CDS option;

(ii) DBMD Program services, including how these services:

(I) complement other Medicaid services;

(II) supplement family supports and non-waiver services available in the individual's community; and

(III) prevent institutionalization;

(iii) DBMD Program process and procedures for:

(I) eligibility and enrollment;

(II) service planning, service authorization, and program plans;

(III) access to non-waiver resources; and

(IV) complaint procedures and the fair hearing process; and

(iv) rules, policies, and procedures about:

(I) prevention of abuse, neglect, and exploitation of an individual;

(II) reporting abuse, neglect, and exploitation to local and state authorities; and

(III) financial improprieties involving an individual; and

(B) the staff person who develops and conducts the training successfully completes the DBMD Program Case Management Training provided by HHSC before developing or conducting training.

(2) A program provider must:

(A) for the training required by this subsection that is provided by HHSC, maintain a copy of the certificate issued by HHSC that the person completed the training; or

(B) for the training required by this subsection that is developed and conducted by the program provider, maintain a copy of a certificate or form letter issued by the program provider that includes:

(i) the name of the person who received the training;

(ii) the date the training was conducted; and

(iii) the name of the person conducting the training.

(f) DBMD Program Service Provider Training.

(1) A program provider must ensure that:

(A) a case manager, within six months after assuming job duties, completes the DBMD Program Service Provider Training as described in paragraph (2) of this subsection;

(B) a program director, if providing intervener, licensed assisted living, licensed home health assisted living, case management, day habilitation, employment assistance, nursing, specialized nursing, residential habilitation, respite, supported employment, or CFC PAS/HAB to an individual, completes, within six months after assuming job duties, the DBMD Program Service Provider Training as described in paragraph (2) of this subsection;

(C) an intervener and a service provider of licensed assisted living, licensed home health assisted living, day habilitation, employment assistance, nursing, specialized nursing, residential habilitation, respite, or supported employment, within 90 calendar days after assuming job duties, complete the DBMD Program Service Provider Training as described in paragraph (2) of this subsection; and

(D) a CFC PAS/HAB service provider completes the DBMD Program Service Provider Training:

(i) within 90 days after the original effective date of this section, if the CFC PAS/HAB service provider was hired on or before the original effective date of this section; or

(ii) within 90 calendar days after assuming job duties, if the CFC PAS/HAB service provider is hired after the original effective date of this section.

(2) The DBMD Program Service Provider Training is provided by HHSC or developed by a program provider. If the training is developed by the program provider, the training must address the following elements from the HHSC DBMD Program Service Provider Training curriculum:

- (A) methods and strategies for communication;
- (B) active participation in home and community life;
- (C) orientation and mobility;
- (D) behavior as communication;
- (E) causes and origins of deafblindness; and
- (F) vision, hearing, and the functional implications of deafblindness.

(3) A program provider that develops and conducts its own training, as described in paragraph (2) of this subsection, must ensure that the staff person who develops and conducts the training successfully completes the DBMD Program Service Provider Training provided by HHSC before developing or conducting training.

(4) A program provider must:

(A) for the training required by this subsection that is provided by HHSC, maintain a copy of the certificate issued by HHSC that the person completed the training; or

(B) for the training required by this subsection that is developed and conducted by the program provider, maintain a copy of a certificate or form letter issued by the program provider that includes:

- (i) the name of the person who received the training;
- (ii) the date the training was conducted; and
- (iii) the name of the person conducting the training.

(g) Training on needs of an individual.

(1) Except as provided in paragraph (3) of this subsection, a program provider must ensure an intervener and a service provider of licensed assisted living, licensed home health assisted living, day habilitation, employment assistance, residential habilitation, respite, supported employment, and CFC PAS/HAB, complete training on the needs of an individual:

- (A) before providing services to the individual;
- (B) at least annually; and
- (C) if the individual's needs change.

(2) Training on the needs of an individual must include:

(A) the special needs of the individual, including the individual's:

- (i) methods of communication;
- (ii) specific visual and audiological loss; and
- (iii) adaptive aids;

(B) managing challenging behavior, including training in:

- (i) prevention of aggressive behavior; and
- (ii) de-escalation techniques; and

(C) instruction in the individual's home with full participation by the individual, LAR, or other involved persons, as appropriate, concerning the specific tasks to be performed.

(3) A program provider must ensure that a CFC PAS/HAB service provider hired before the original effective date of this section receives the training required by this subsection within 90 days after the original effective date of this section, annually thereafter, and if the individual's needs change.

(4) A program provider must document:

(A) the name of the person who received the training required by this subsection;

(B) the date the training was conducted;

(C) the name of the individual;

(D) the topic of the training; and

(E) the name of the person who conducted the training.

(h) Training on delegated tasks.

(1) A program provider must ensure a service provider performing a delegated task is:

(A) trained to perform the delegated task in accordance with state law and rules:

(i) before providing services to an individual;

(ii) annually thereafter; and

(iii) if the individual's needs change; and

(B) supervised by a physician or nurse in accordance with state law and rules.

(2) A program provider must document:

(A) the name of the person who received the training required by this subsection;

(B) the date the training was conducted;

(C) the name of the individual;

(D) the topic of the training; and

(E) the name of the person who conducted the training.

(i) Person-centered service planning training.

(1) A program provider must ensure that a service provider who is responsible for developing the IPP for CFC PAS/HAB completes person-centered service planning training approved by HHSC:

(A) by June 1, 2017, if the service provider was hired on or before June 1, 2015; or

(B) within two years after hire, if the service provider is hired after June 1, 2015.

(2) A program provider must maintain documentation issued by the organization conducting the training required by this subsection that includes:

(A) the name of the person who received the training;

(B) the date the training was conducted; and

(C) the name of the person or organization that conducted the training.

(j) Training requested for a CFC PAS/HAB service provider. If requested by an individual or LAR, a program provider must:

(1) allow the individual or LAR to:

(A) train a CFC PAS/HAB service provider in the specific assistance needed by the individual; and



(B) have the service provider perform CFC PAS/HAB in a manner that comports with the individual's personal, cultural, or religious preferences; and

(2) ensure that a CFC PAS/HAB service provider attends training by HHSC so the service provider meets any additional qualifications desired by the individual or LAR.

(k) Training on protective devices. A program provider must ensure compliance with the training and training documentation requirements described in §42.408(c)(8) and (9) of this subchapter (relating to Protective Devices).

(l) Training on restraints. A program provider must ensure compliance with the training and documentation requirements described in §42.409(d)(3) of this subchapter (relating to Restraints).

*§42.405. Documentation of Services Delivered and Recordkeeping.*

(a) A program provider must ensure that for each service provided, except adaptive aids, dental treatment, minor home modifications, CFC ERS, and CFC support management, a service provider:

(1) documents:

(A) the type of service provided;

(B) the date and the time the service begins and ends;

(C) the type of contact (phone or face-to-face);

(D) the name of the person with whom the contact occurred;

(E) a description of the service activity performed, unless the activity is a non-delegated task provided by an unlicensed service provider that is documented on the IPP; and

(F) the signature and title of the service provider; and

(2) completes an HHSC DBMD Summary of Services Delivered form to document the provision of a service that is supported by the documentation required in paragraph (1)(A) - (F) of this subsection.

(b) A program provider must ensure that, after a service provider makes the last entry on an HHSC DBMD Summary of Services Delivered form, a staff person other than the service provider signs and dates the form as a timekeeper as verification of the accuracy of the information on the form.

(c) A program provider must ensure that an individual's record includes the following:

(1) the individual's current IPC and any other IPC authorized for the current IPC period;

(2) the individual's current IPP and any other IPP developed for the current IPC period;

(3) the individual's current ID/RC Assessment;

(4) if the program provider was the individual's program provider when the individual enrolled in the DBMD Program:

(A) the original ID/RC Assessment signed by a physician; or

(B) the original level of care form signed by a physician that was in use before the ID/RC Assessment;

(5) current adaptive behavior screening assessment;

(6) current Related Conditions Eligibility Screening Instrument;

(7) the documentation required by subsection (a)(1) of this section;

(8) the completed HHSC Summary of Services Delivered forms signed and dated by a timekeeper as required by subsection (b) of this section;

(9) any other relevant documentation concerning the individual;

(10) documentation of the progress or lack of progress in achieving a goal or outcome in the individual's IPP in observable, measurable terms that directly relate to the specific goal or outcome addressed, including:

(A) assessments, evaluations, and progress notes prepared by a service provider for review by a case manager in accordance with §42.223(a)(1)(E) of this chapter (relating to Renewal and Revision of an IPC and IPP);

(B) the IPP reviews for the current IPC period prepared by a case manager in accordance with §42.223(a)(2) of this chapter; and

(C) for day habilitation, residential habilitation, and CFC PAS/HAB, the individual's progress or lack of progress in achieving the following outcomes:

(i) the ability to effectively communicate the individual's wants and needs to a day habilitation, residential habilitation, or CFC PAS/HAB service provider;

(ii) the ability to actively participate in activities of daily living to the extent of the individual's ability;

(iii) the ability to implement the individual's choices;

(iv) the ability to access and participate in community activities; and

(v) the ability to move safely and efficiently within the day habilitation, residential habilitation, or CFC PAS/HAB setting;

(11) the individual's current Verification of Freedom of Choice form documenting the individual's or LAR's choice of the DBMD Program over the ICF/IID Program;

(12) the individual's current Documentation of Provider Choice form documenting the individual's or LAR's choice of a program provider;

(13) if required by §42.407 of this subchapter (relating to Service Backup Plans), any new or revised Provider Agency Model Service Backup Plan form for residential habilitation, nursing, specialized nursing, or CFC/PAS HAB for the current IPC period;

(14) if the IPC includes transportation as a residential habilitation activity or as an adaptive aid, a copy of the individual's transportation plan;

(15) if a protective device is used, the documentation required by §42.408 of this subchapter (relating to Protective Devices); and

(16) if a restraint is used, the documentation required by §42.409 of this subchapter (relating to Restraints).

*§42.410. Reporting Allegations of Abuse, Neglect, or Exploitation of an Individual.*

If a program provider, service provider, staff person, volunteer, or controlling person knows or suspects that an individual is being or has been abused, neglected, or exploited, the program provider must re-

port or ensure that the person with knowledge or suspicion reports the allegation of abuse, neglect, or exploitation:

(1) for an individual receiving licensed assisted living, in accordance with 26 TAC Chapter 553 (relating to Licensing Standards for Assisted Living Facilities); or

(2) for an individual who is not receiving licensed assisted living, to DFPS immediately, but not later than 24 hours, after having knowledge or suspicion by:

(A) calling the DFPS Abuse Hotline toll-free telephone number, 1-800-252-5400; or

(B) using the DFPS Abuse Hotline website.

*§42.411. Requirements Related to the Abuse, Neglect, and Exploitation of an Individual.*

(a) If a report required by §42.410 of this subchapter (relating to Reporting Allegations of Abuse, Neglect, or Exploitation of an Individual) alleges abuse, neglect, or exploitation by a person who is not a service provider, staff person, volunteer, or controlling person, a program provider must:

(1) as necessary:

(A) obtain immediate medical or psychological services for the individual; and

(B) assist in obtaining ongoing medical or psychological services for the individual;

(2) discuss with the individual or LAR alternative residential settings and additional services that may help ensure the individual's safety;

(3) when taking the actions described in paragraphs (1) and (2) of this subsection, avoid compromising the investigation or further traumatizing the individual; and

(4) preserve and protect evidence related to the allegation.

(b) If a report required by §42.410 of this subchapter alleges abuse, neglect, or exploitation by a service provider, staff person, volunteer, or controlling person; or if a program provider is notified by HHSC of an allegation of abuse, neglect, or exploitation by a service provider, staff person, volunteer, or controlling person, the program provider must:

(1) as necessary:

(A) obtain immediate medical or psychological services for the individual; and

(B) assist in obtaining ongoing medical or psychological services for the individual;

(2) take actions to secure the safety of the individual, including if necessary, ensuring that the alleged perpetrator does not have contact with the individual or any other individual until HHSC completes the investigation;

(3) when taking the actions described in paragraphs (1) and (2) of this subsection, avoid compromising the investigation or further traumatizing the individual;

(4) preserve and protect evidence related to the allegation; and

(5) as soon as possible, but no later than 24 hours, after the program provider reports or is notified of the allegation, notify the individual, the LAR, and the case manager of:

(A) the allegation report; and

(B) the actions the program provider has taken or will take based on the allegation, the condition of the individual, and the nature and severity of any harm to the individual, including the actions required by paragraph (2) of this subsection.

(c) During an HHSC investigation of an alleged perpetrator who is a service provider, staff person, volunteer, or controlling person, a program provider must:

(1) cooperate with the investigation as requested by HHSC, including providing documentation and participating in an interview;

(2) provide HHSC access to:

(A) sites owned, operated, or controlled by the program provider;

(B) individuals, service providers, staff persons, volunteers, and controlling persons; and

(C) records pertinent to the investigation of the allegation; and

(3) ensure that service providers, staff persons, volunteers, and controlling persons comply with paragraphs (1) and (2) of this subsection.

(d) After a program provider receives a final investigative report from HHSC for an investigation described in subsection (c) of this section, the program provider must:

(1) if the allegation of abuse, neglect, or exploitation is confirmed or substantiated by HHSC:

(A) review the report, including any concerns and recommendations by HHSC; and

(B) take action within the program provider's authority to prevent the reoccurrence of abuse, neglect or exploitation, including disciplinary action against the service provider, staff person, or volunteer confirmed to have committed abuse, neglect, or exploitation;

(2) if the allegation of abuse, neglect, or exploitation is unconfirmed, inconclusive, or unfounded:

(A) review the report, including any concerns and recommendations by HHSC; and

(B) take appropriate action within the program provider's authority, as necessary; and

(3) immediately, but not later than five calendar days after the date the program provider receives the HHSC final investigative report, notify the individual, the LAR, and the case manager of:

(A) the investigation finding; and

(B) the action taken by the program provider in response to the HHSC investigation as required by paragraphs (1) and (2) of this subsection.

(e) A program provider must not retaliate against:

(1) a staff person, service provider, individual, or other person who files a complaint, presents a grievance, or otherwise provides good faith information relating to the possible abuse, neglect, or exploitation of an individual, including:

(A) the use of seclusion; and

(B) the use of a restraint not in compliance with federal and state laws, rules, and regulations; and

(2) an individual because a person on behalf of the individual files a complaint, presents a grievance, or otherwise provides good

faith information relating to the possible abuse, neglect, or exploitation of an individual, including:

(A) the use of seclusion; and

(B) the use of a restraint not in compliance with federal and state laws, rules, and regulations.

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#### 40 TAC §42.403

##### STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The repeal implements Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

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## SUBCHAPTER F. SERVICE DESCRIPTIONS AND REQUIREMENTS

### DIVISION 2. MINOR HOME MODIFICATIONS

#### 40 TAC §§42.613, 42.614, 42.617

##### STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Govern-

ment Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendments implement Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

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### DIVISION 3. REQUIREMENTS FOR OTHER DBMD PROGRAM SERVICES

#### 40 TAC §42.623, §42.632

##### STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendments implement Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

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### DIVISION 4. ADDITIONAL REQUIREMENTS

#### 40 TAC §42.641

##### STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendment implements Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

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## CHAPTER 44. CONSUMER MANAGED PERSONAL ATTENDANT SERVICES

As required by Texas Government Code §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Texas Health and Human Services Commission (HHSC) in accordance with Texas Government Code §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1, govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation of and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, the Executive Commissioner of HHSC adopts amendments to §§44.102, 44.202, 44.302, 44.306 - 44.308, 44.402, 44.421, 44.422, 44.441, 44.442, 44.502, 44.504, and 44.505; and new §§44.310, 44.311, 44.443, and 44.444 in Title 40, Part 1, Chapter 44, Consumer Managed Personal Attendant Services.

The amendments to §§44.102, 44.302, 44.306, 44.402, 44.421, 44.422, 44.441, 44.442, 44.502, and 44.504; and new §§44.311, 44.443, and 44.444 are adopted with changes to the proposed text as published in the March 1, 2019, issue of the *Texas Register* (44 TexReg 1031). The amendments to §§44.202, 44.307, 44.308, and 44.505, and new §44.310 are adopted without changes to the proposed text as published in the March 1, 2019, issue of the *Texas Register* (44 TexReg 1031), and therefore will not be republished.

### BACKGROUND AND JUSTIFICATION

The adopted rules include requirements in Chapter 44 related to abuse, neglect, and exploitation of an individual in the Consumer Managed Personal Attendant Services (CMPAS) Program. The CMPAS Program is a non-Medicaid Program in which an individual may receive services in one of three service delivery options: the traditional service option; the block grant option; or the consumer directed services (CDS) option. In the CDS option, an individual is the employer of the attendants who provide CMPAS services, while a provider provides financial management services to the individual and completes HHSC training to function as a financial management services agency. In the traditional services option, a provider is the employer of the attendants who provide personal attendant services to an individual. In the block grant option, an individual is the employer of the attendant and a provider is the employer of the substitute attendant. In all three options, a provider is required to provide case management to an individual.

The purpose of the adopted rules is to address changes in the investigatory process for abuse, neglect, and exploitation resulting from amendments to Texas Human Resources Code, Chapter 48. The statutory amendments gave the Department of Family and Protective Services (DFPS) Adult Protective Services (APS) Provider Investigation (PI) Program the authority to investigate an allegation of abuse, neglect or exploitation of an individual receiving CMPAS Program services through the CDS option when the alleged perpetrator is a "provider," as defined for the CDS option under Texas Human Resources Code, Chapter 48. As further specified in the adopted rules, this includes when the alleged perpetrator is an employee of the individual or a staff person or controlling person of the provider.

Effective September 1, 2017, in accordance with Texas Government Code, §531.02011 and §531.02013, the functions performed by the DFPS APS PI Program were transferred to HHSC. Therefore, the adopted rules address investigations of allegations of abuse, neglect, and exploitation conducted by HHSC for an individual receiving CMPAS Program services through the CDS option, and describe requirements for the individual and provider to protect an individual from abuse, neglect, and exploitation and secure the safety of an individual who may have been abused, neglected, or exploited.

The adopted rules also include the current requirements in Texas Administrative Code, Title 40, (40 TAC) §49.310, Abuse, Neglect, and Exploitation Allegations, that apply to a CMPAS provider. Those rules, as adopted in Chapter 44, use terminology specific to the CMPAS Program, add specificity to the current requirements of §49.310, and add new requirements. For example, the adopted rules require a provider to: (1) conduct training of staff persons on abuse, neglect, and exploitation before the staff persons assume job duties and annually thereafter; (2) ensure such persons are trained about signs and symptoms of abuse, neglect, or exploitation; (3) educate an individual and representative about protecting the individual from abuse, neglect, and exploitation; and (4) give written information to staff on how to report abuse, neglect, or exploitation. Rules adopted in 40 TAC Chapter 49, Contracting for Community Services, to exclude a CMPAS provider from the requirement to comply with §49.310, are also being published in this issue of the *Texas Register*.

The adopted rules define "abuse," "exploitation," "neglect," and other terms related to abuse, neglect, and exploitation to clarify the terms when used in 40 TAC Chapter 44. In addition, the adopted rules define the terms "chemical restraint," "mechanical

restraint," "physical restraint," "restraint," and "seclusion." They also define "physical abuse" to include the use of restraint or seclusion because restraint and seclusion are prohibited by the adopted CMPAS rules. This is consistent with DFPS rules, which provide that the use of restraint or seclusion that is not in compliance with rules constitutes physical abuse.

The adopted rules also make changes to clarify and update provider requirements for interdisciplinary team meetings; development and maintenance of records; attendant time sheets; and billing. The adopted rules also clarify terminology and rules that apply to an individual's legally authorized representative.

## COMMENTS

The 30-day comment period ended March 31, 2019.

During the comment period, HHSC received comments submitted on behalf of the Texas Council for Developmental Disabilities and Disability Rights Texas ("the commenter"). The comments were made with specific reference to rules in 40 TAC Chapter 9, Intellectual Disability Services—Medicaid State Operating Agency Responsibilities, that were also proposed in the *Texas Register* on March 1, 2019. However, the joint comments requested that HHSC interpret the specific references to Chapter 9 rules as an example only, and apply the comments to all pertinent programs and services that HHSC provides or regulates for which rules were proposed in the *Texas Register* on March 1, 2019.

On that basis, where a comment addresses a proposed rule in Chapter 9 for which Chapter 44 contains a parallel or largely parallel rule provision, HHSC includes and responds to the comment in the summary below as if it specifically referred to the parallel provision in Chapter 44. If Chapter 44 does not have a proposed rule provision that parallels a proposed rule provision in Chapter 9 that the commenter addressed, HHSC does not include or respond to the comment.

A summary of the comments relating to the rules and HHSC's responses follows.

Comment: Regarding proposed §44.311(b), the commenter stated that the rule does not specify when the training must occur and recommended that the rule require training before a staff person assumes job duties, and annually thereafter.

Response: HHSC disagrees that the rule does not specify when the training must occur. Proposed §44.311(b) included the explicit requirement for a provider to train a staff person on issues related to abuse, neglect, and exploitation before the staff person assumes job duties, and on an annual basis. However, for consistency with the other HHSC rules adopted in 40 TAC related to abuse, neglect, and exploitation and published in this same issue of the *Texas Register*, §44.311(b), as adopted, adds "at least" to the annual training requirement. Section 44.311(b) is also rephrased to improve clarity.

Comment: Regarding proposed §44.311(d)(2), the commenter noted that the rule allows up to 24 hours to notify the individual or legally authorized representative (LAR) of the allegation report and related matters and recommended that the notification be required no later than one hour after the provider reports, or is notified of, the allegation.

Response: HHSC declines to make the suggested changes at this time. HHSC will consider the comments for future rulemaking. Section 44.311(d)(2) requires a provider to notify the individual or LAR of the allegation report "as soon as possible." While

"as soon as possible" could require notification in a matter of minutes, there may be circumstances in which the provider needs additional time to determine the actions required by proposed §44.311(d)(2)(B). HHSC considers 24 hours the outside limit to provide notification "as soon as possible" and expects providers to provide notification in the shortest timeframe possible.

Comment: Regarding proposed §44.311(f), the commenter recommended that providers' review of all final investigative reports from HHSC be performed on a quarterly basis for it to be meaningful and proactive in preventing the re-occurrence of allegations of abuse, neglect, or exploitation. The commenter also stated that the review should include looking at the source of the complaints as well as the details of the allegation and any policies or practices that might have contributed to the allegation.

Response: HHSC disagrees with the recommendation and declines to make this change. Requiring providers to conduct a review on an annual basis allows them to review data covering a sufficient period of time to be able to effectively identify trends and implement process improvements. However, HHSC did add the phrase "at least" before the annual requirement in §44.311(f), both to clarify that the annual review requirement is a minimum requirement, and for consistency with other HHSC rules related to abuse, neglect, and exploitation being adopted in 40 TAC in this same issue of the *Texas Register*. HHSC will consider the comments for future rulemaking.

Comment: Regarding proposed §44.442(b)(2) and (3), and §44.443(b)(1) and (2), the commenter recommended that, in addition to clarifying the obligation to obtain medical or psychological services and delineating processes for ensuring the care and safety of the alleged victim, the rules require that these processes be performed in such a way that they do not compromise the evidence to be collected during the HHSC investigation or other investigation or result in further trauma to the individual. The commenter also recommends that instruction be provided for avoiding further trauma to the victim or the contamination of evidence.

Response: HHSC agrees with the importance of an individual preserving and protecting evidence and not compromising an investigation or further traumatizing the individual and added new paragraphs (4) and (5) to §44.442(b), and a new paragraph (3) to §44.443(b), to make these requirements explicit. HHSC will provide information to providers to help them assist individuals to avoid compromising an investigation or further traumatizing themselves.

Comment: Regarding proposed §44.443(b)(2) and §44.444(b)(1), the commenter recommended the rule require separating the alleged perpetrator from the alleged victim and other individuals receiving services in all situations.

Response: HHSC disagrees that separating an alleged perpetrator from an alleged victim and other individuals is necessary in all situations to secure the individual's safety and declines to make this change. However, HHSC will consider the comments for future rulemaking.

Comment: Regarding proposed §44.443(b)(4), renumbered as paragraph (5) in the adopted rule, proposed §44.443(c)(2), and §44.444(c)(1)(A) and (c)(2)(A), which each require an individual or a provider to cooperate with the HHSC investigation, a commenter recommended that the rules be broadened to include other investigations, such as by law enforcement.

Response: Sections 44.443 and 44.444, as proposed, only address HHSC investigations of abuse, neglect, or exploitation. HHSC disagrees with the recommendation to broaden the scope of the rule at adoption to address other investigations. Therefore, HHSC declines to make the recommended change.

Comment: Regarding proposed §44.444(e)(3), the commenter recommended that the rule require that disciplinary action be taken by the provider after receiving a final investigative report from HHSC that includes a confirmed finding. Additionally, the commenter recommended that language be added to require that disciplinary action be taken if a staff person fails to cooperate with the investigation or if it is determined that the staff person impeded the investigation or was dishonest in evidence provided in the investigation.

Response: HHSC agrees with the recommendation to require a provider to take disciplinary action against a staff person confirmed to have committed abuse, neglect, or exploitation. HHSC makes the recommended change by omitting "when warranted" from adopted §44.444(e)(3).

However, HHSC disagrees with the recommendation to require disciplinary action if a staff person fails to cooperate with, or impedes, the HHSC investigation. Section 44.444(c)(1)(C) requires a provider to ensure that staff persons and controlling persons comply with §44.444(c)(1)(A) and (B). Therefore, HHSC declines to require a provider to take disciplinary action for failure of a staff person to comply with the rules. Non-compliance could range in type and severity, and a provider is generally in the best position to determine if disciplinary action is appropriate. However, HHSC will consider the comments for future rulemaking.

The adopted rules also make additions or corrections to punctuation in §§44.102(25); 44.306(3); 44.311(e)(2); 44.421(3); 44.422(3)(A); 44.441(9); 44.442(a)(3) and (b)(3); 44.443(b)(1), (d)(3), and (e)(3); and 44.502(b)(1)(A), and omit an extra word erroneously included at the end of §44.311(e)(2).

Adopted §44.302(1) and (2) corrects references to 40 TAC Chapter 97, which transferred to Texas Administrative Code, Title 26, Chapter 558.

Adopted §44.311(a)(2) and §44.402(13) rephrase and re-order the rule text to improve clarity.

Adopted §44.311(e)(1) and (2) adds "including the use of restraint or seclusion" to stress that the defined term "abuse" used in those paragraphs includes the use of a restraint or seclusion. This change is consistent with the rules adopted in 40 TAC §9.178(s)(1) and (2) and 40 TAC §42.411(e)(1) and (2), which are also published in this issue of the *Texas Register*. For further consistency with §44.311(e)(1) and other HHSC rules adopted in 40 TAC related to abuse, neglect, and exploitation and published in this issue of the *Texas Register*, §44.311(e)(2) replaces the word "the" with "an" before the word "individual."

Adopted §44.443(b)(3) and (c)(1), and §44.504(b)(1)(D) corrects the word "timesheets" to "time sheets."

Adopted §44.443(b)(4), proposed as paragraph (3), §44.443(c)(1), and §44.444(b)(2), omit the word "any" as unnecessary.

## SUBCHAPTER A. INTRODUCTION

### 40 TAC §44.102

#### STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services to persons served by the health and human services system, and authorizes the Executive Commissioner to adopt rules governing the delivery of services to persons served by the health and human services system.

#### §44.102. Definitions.

The following words and terms have the following meanings when used in this chapter, unless the context clearly indicates otherwise:

- (1) Abuse--Any of the following:
  - (A) physical abuse;
  - (B) sexual abuse; or
  - (C) verbal or emotional abuse.
- (2) Alleged perpetrator--A person alleged to have committed an act of abuse, neglect, or exploitation of an individual.
- (3) Applicant--A Texas resident who requests services under the CMPAS Program.
- (4) Assessor of need--A provider employee responsible for determining an applicant's or individual's need for CMPAS.
- (5) Attendant--A person who provides direct care to an individual.
- (6) Block grant option--One of three CMPAS Program service delivery and payment options. In the block grant option, the individual is the employer of record of an attendant and the provider is the employer of record of a substitute attendant.
- (7) CDS option--Consumer directed services option. One of three CMPAS Program service delivery and payment options. In the CDS option, the individual is the employer of record of the attendant and substitute attendant.
- (8) Chemical restraint--A medication used to control an individual's behavior or to restrict the individual's freedom of movement that is not a standard treatment for the individual's medical or psychological condition.
- (9) CMPAS Program--Consumer Managed Personal Attendant Services Program. An HHSC program for personal attendant services in which individuals manage their attendant services to varying degrees.
- (10) Contract--The written agreement between HHSC and a provider to provide services to individuals eligible under this chapter in exchange for payment.
- (11) Contract manager--An HHSC employee who is responsible for the overall management of a contract.
- (12) Controlling person--A person who:
  - (A) has an ownership interest in a provider;
  - (B) is an officer or director of a corporation that is a provider;
  - (C) is a partner in a partnership that is a provider;
  - (D) is a member or manager in a limited liability company that is a provider;
  - (E) is a trustee or trust manager of a trust that is a provider; or

(F) because of a personal, familial, or other relationship with a provider, is in a position of actual control or authority with respect to the provider, regardless of the person's title.

(13) DADS--HHSC.

(14) DADS region--HHSC region. A region of Texas designated by HHSC in which the CMPAS Program is available.

(15) DADS regional designee--An HHSC employee appointed by the HHSC regional director of an HHSC region.

(16) Day--A calendar day, including weekends and holidays.

(17) DFPS--The Department of Family and Protective Services.

(18) Exploitation--

(A) in the traditional service option and the block grant option, exploitation means the illegal or improper act or process of using, or attempting to use, an individual or the resources of an individual for monetary or personal benefit, profit, or gain, including theft as defined in Chapter 31 of the Texas Penal Code; and

(B) in the CDS option, exploitation means the illegal or improper act or process of using, or attempting to use, an individual or the resources of an individual for monetary or personal benefit, profit, or gain.

(19) Family member--A person who has a duty under state law to provide care for an individual.

(20) FMSA--Financial management services agency. An entity that contracts with HHSC to provide financial management services, as defined in §41.103 of this title (relating to Definitions).

(21) Former military member--A person who served in the United States Army, Navy, Air Force, Marine Corps, or Coast Guard:

(A) who declared and maintained Texas as the person's state of legal residence in the manner provided by the applicable military branch while on active duty; and

(B) who was killed in action or died while in service, or whose active duty otherwise ended.

(22) Health-related task--An activity of daily living, a health maintenance task, or a nursing task, as described in 22 TAC Chapter 225.

(23) HHSC--The Texas Health and Human Services Commission.

(24) Home and community support services agency--An agency licensed under Texas Health and Safety Code, Chapter 142.

(25) IDT--Interdisciplinary team. A designated group of persons, as described in §44.502(a) of this chapter (relating to Convening an IDT).

(26) Individual--A person enrolled in the CMPAS Program. A reference in this chapter to "individual" includes the individual's LAR, unless the context indicates otherwise.

(27) LAR--Legally authorized representative. A person authorized by law to act on behalf of an individual with regard to a matter described in this chapter, including the guardian of an adult.

(28) Mechanical restraint--A mechanical device, material, or equipment used to control an individual's behavior by restricting the ability of the individual to freely move part or all of the individual's body.

(29) Military family member--A person who is the spouse or child (regardless of age) of:

(A) a military member; or

(B) a former military member.

(30) Military member--A member of the United States military serving in the Army, Navy, Air Force, Marine Corps, or Coast Guard on active duty who has declared and maintains Texas as the member's state of legal residence in the manner provided by the applicable military branch.

(31) Neglect--A negligent act or omission that caused physical or emotional injury or death to an individual or placed an individual at risk of physical or emotional injury or death.

(32) Physical abuse--Any of the following:

(A) an act or failure to act performed knowingly, recklessly, or intentionally, including incitement to act, that caused physical injury or death to an individual or placed an individual at risk of physical injury or death;

(B) an act of inappropriate or excessive force or corporal punishment, regardless of whether the act results in a physical injury to an individual; or

(C) the use of a restraint or seclusion.

(33) Physical restraint--Any manual method used to control an individual's behavior, except for physical guidance or prompting of brief duration that an individual does not resist, that restricts:

(A) the free movement or normal functioning of all or a part of the individual's body; or

(B) normal access by an individual to a portion of the individual's body.

(34) Practitioner--A physician currently licensed in Texas, Louisiana, Arkansas, Oklahoma, or New Mexico; a physician assistant currently licensed in Texas; or an advanced practice registered nurse licensed by the Texas Board of Nursing.

(35) Practitioner's statement--The HHSC Practitioner's Statement of Medical Need form.

(36) Provider--A home and community support services agency that contracts with HHSC to provide services under the CMPAS Program.

(37) Restraint--Any of the following:

(A) a chemical restraint;

(B) a mechanical restraint; or

(C) a physical restraint.

(38) Representative--An adult designated by an individual, such as the individual's spouse, relative, or friend, who volunteers to assist the individual with a responsibility of the individual described in this chapter.

(39) Seclusion--The involuntary placement of an individual alone in an area from which the individual is prevented from leaving.

(40) Section 1915(c)--A section of the Social Security Act that allows states to establish, by waiver of certain Medicaid requirements, alternative community-based services for individuals who qualify for institutional services.

(41) Service plan--A document that lists the service tasks and states the hours of services agreed to by the individual and assessor of need.

(42) Sexual abuse--Any of the following:

(A) sexual exploitation of an individual;

(B) non-consensual or unwelcomed sexual activity with an individual; or

(C) consensual sexual activity between an individual and an attendant, staff person, or controlling person, unless a consensual sexual relationship with an adult individual existed before the attendant, staff person, or controlling person became an attendant, staff person, or controlling person.

(43) Sexual activity--An activity that is sexual in nature, including kissing, hugging, stroking, or fondling with sexual intent.

(44) Sexual exploitation--A pattern, practice, or scheme of conduct against an individual that can reasonably be construed as being for the purposes of sexual arousal or gratification of any person:

(A) which may include sexual contact; and

(B) does not include obtaining information about an individual's sexual history within standard accepted clinical practice.

(45) Staff person--An employee, contractor, or volunteer of a provider.

(46) State mental health facility--A Texas state hospital or a state center with an inpatient psychiatric component.

(47) Substitute attendant--A person who, on a temporary basis and in place of an attendant, provides services to an individual.

(48) Traditional service option--One of three CMPAS Program service delivery and payment options. In the traditional service option, the provider is the employer of record of the attendant and substitute attendant.

(49) Verbal or emotional abuse--Any act or use of verbal or other communication, including gestures:

(A) to:

(i) harass, intimidate, humiliate, or degrade an individual; or

(ii) threaten an individual with physical or emotional harm; and

(B) that:

(i) results in observable distress or harm to the individual; or

(ii) is of such a serious nature that a reasonable person would consider it harmful or a cause of distress.

(50) Working day--Any day except a Saturday, Sunday, or national or state holiday listed in Texas Government Code §662.003(a) or (b).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 29, 2019.  
TRD-201903017

Karen Ray  
Chief Counsel  
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Proposal publication date: March 1, 2019  
For further information, please call: (512) 438-5645

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**SUBCHAPTER B. ELIGIBILITY AND SERVICE PLANS**

**40 TAC §44.202**

**STATUTORY AUTHORITY**

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services to persons served by the health and human services system, and authorizes the Executive Commissioner to adopt rules governing the delivery of services to persons served by the health and human services system.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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**SUBCHAPTER C. SERVICE DELIVERY IN ALL CMPAS OPTIONS**

**40 TAC §§44.302, 44.306 - 44.308, 44.310, 44.311**

**STATUTORY AUTHORITY**

The amendments and new section are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services to persons served by the health and human services system, and authorizes the Executive Commissioner to adopt rules governing the delivery of services to persons served by the health and human services system.

*§44.302. Provider Qualifications and Responsibilities in All CMPAS Service Delivery Options.*

To participate as a provider in the CMPAS Program, the provider must:

(1) maintain a license from HHSC under 26 TAC Chapter 558 (relating to Licensing Standards for Home and Community Support Services Agencies) in one or more of the following categories of licensure:

- (A) personal assistance services;
- (B) licensed home health services; or
- (C) licensed and certified home health services;



- (2) comply with the requirements of 26 TAC Chapter 558;
- (3) comply with Chapter 49 of this title (relating to Contracting for Community Services);
- (4) obtain required training to function as an FMSA for those individuals who choose the CDS option for CMPAS services;
- (5) comply with the requirements described in this chapter;
- (6) have contract compliance monitored by an HHSC contract manager;
- (7) be able to provide services under all three service delivery options; and
- (8) provide case management services, including:
  - (A) determining applicant eligibility and co-payment amount;
  - (B) preparing individual registration data entry forms;
  - (C) assessing and reassessing individual needs using the HHSC Assessment Questionnaire and Task/Hour Guide; and
  - (D) developing a service plan.

*§44.306. Individual Training by a Provider.*

Before providing services to an individual, a provider must educate and train the individual in:

- (1) rights and responsibilities of the individual;
- (2) skills for recruiting, selecting, instructing, supervising, and dismissing attendants, if desired by the individual;
- (3) procedures for preparing attendant time sheets, as described in §44.504(b)(1) of this chapter (relating to Records);
- (4) procedures for the CMPAS Program service delivery option that the individual chooses; and
- (5) rights and responsibilities of the attendant and the substitute attendant.

*§44.311. Provider Responsibilities Related to the Abuse, Neglect, and Exploitation of an Individual in All CMPAS Service Delivery Options.*

(a) A provider, before providing services to an individual and on an annual basis, must:

- (1) inform the individual and representative of how to report allegations of abuse, neglect, or exploitation to DFPS and provide the individual with the DFPS Abuse Hotline toll-free telephone number, 1-800-252-5400, in writing; and
- (2) educate the individual and representative about how to protect the individual from abuse, neglect, and exploitation.

(b) Before a staff person assumes job duties, and on at least an annual basis, a provider must:

- (1) train a staff person:
  - (A) about acts that constitute abuse, neglect, and exploitation;
  - (B) about signs and symptoms of abuse, neglect, and exploitation;
  - (C) about methods to prevent abuse, neglect, and exploitation; and
  - (D) to report to DFPS immediately, but not later than 24 hours, after the staff person has knowledge or suspects that an individual is being or has been abused, neglected, or exploited by:

(i) calling the DFPS Abuse Hotline toll-free telephone number, 1-800-252-5400; or

(ii) using the DFPS Abuse Hotline website; and

(2) provide the staff person with the reporting requirements described in paragraph (1)(D) of this subsection in writing.

(c) If a provider, staff person, or controlling person knows or suspects that an individual is being or has been abused, neglected, or exploited, the provider must report, or ensure that the person with knowledge or suspicion reports, the allegation of abuse, neglect, or exploitation to DFPS immediately, but not later than 24 hours, after having knowledge or suspicion by:

(1) calling the DFPS Abuse Hotline toll-free telephone number, 1-800-252-5400; or

(2) using the DFPS Abuse Hotline website.

(d) If a report required by subsection (c) of this section alleges abuse, neglect, or exploitation of an individual, or if the provider is notified of an allegation of abuse, neglect, or exploitation, the provider must:

(1) take necessary actions to secure the safety of the individual; and

(2) as soon as possible, but no later than 24 hours, after the provider reports or is notified of the allegation, notify the individual or LAR of:

(A) the allegation report; and

(B) the actions the provider has taken or will take based on the allegation, the condition of the individual, and the nature and severity of any harm to the individual, including the actions required under this subsection.

(e) A provider must not retaliate against:

(1) a staff person, individual, or other person who files a complaint, presents a grievance, or otherwise provides good faith information relating to the possible abuse, neglect, or exploitation of an individual, including the use of restraint or seclusion; or

(2) an individual because a person on behalf of the individual files a complaint, presents a grievance, or otherwise provides good faith information relating to the possible abuse, neglect, or exploitation of an individual, including the use of restraint or seclusion.

(f) A provider, on at least an annual basis, must:

(1) review all reports of abuse, neglect, or exploitation of an individual of which the provider is notified and all final investigative reports received from HHSC for an investigation described in §44.443 of this chapter (relating to Provider and Individual Responsibilities in the CDS Option Related to HHSC Investigations When an Alleged Perpetrator is an Attendant or Substitute Attendant) and §44.444 of this chapter (relating to Provider and Individual Responsibilities in the CDS Option Related to HHSC Investigations When an Alleged Perpetrator is a Staff Person or a Controlling Person of a Provider); and

(2) based on the review, identify program process improvements that help prevent the occurrence of abuse, neglect, and exploitation and improve the delivery of services.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 29, 2019.



**SUBCHAPTER D. SERVICE DELIVERY  
OPTIONS  
DIVISION 1. TRADITIONAL SERVICE  
OPTION**

**40 TAC §44.402**

**STATUTORY AUTHORITY**

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services to persons served by the health and human services system, and authorizes the Executive Commissioner to adopt rules governing the delivery of services to persons served by the health and human services system.

*§44.402. Provider Responsibilities in the Traditional Service Option.*

In the traditional service option, a provider must:

- (1) comply with the requirements of §44.302 of this chapter (relating to Provider Qualifications and Responsibilities in All CMPAS Service Delivery Options);
- (2) maintain and supervise a pool of substitute attendants to provide attendant services upon the individual's request;
- (3) refer prospective attendants to the individual until the individual selects an attendant;
- (4) hire an attendant who meets the qualifications of §44.303 of this chapter (relating to Attendant Qualifications) and whom the individual agrees to supervise;
- (5) if an individual has not selected a prospective attendant within seven days after the date the assessor of need determined the individual to be eligible for services:
  - (A) confer with the individual;
  - (B) identify the reasons the individual has not selected an attendant; and
  - (C) provide training when necessary to enable the individual to select an attendant;
- (6) provide to an attendant an initial orientation training before the attendant provides services to an individual that includes the following topics:
  - (A) basic interpersonal skills;
  - (B) needs of persons with disabilities;
  - (C) first aid;
  - (D) universal safety precautions;
  - (E) safety and emergency procedures;
  - (F) proper completion of required forms;

- (G) explanation of the individual's role as supervisor;
  - (H) explanation of the provider's responsibilities to attendants;
  - (I) attendant rights and responsibilities;
  - (J) specific information needed to provide tasks to the individual;
  - (K) reporting changes in the individual's condition to the provider; and
  - (L) instructions to provide only authorized tasks according to the service plan, unless the individual pays for additional time with the individual's own funds;
- (7) assume all responsibility for paying and filing attendant income and unemployment taxes and associated paperwork;
  - (8) assume liability for attendant work-related injuries to the same extent as any employer;
  - (9) prepare payroll and distribute payroll checks to attendants as required by state and federal law;
  - (10) actively intervene to resolve problems between an individual and the individual's attendant when they cannot resolve problems on their own;
  - (11) determine the salary and benefit package of an attendant;
  - (12) not discriminate against an attendant or applicant in violation of law;
  - (13) accept responsibility for acts of an attendant, to the same extent as any employer would be responsible for the acts of an employee, while the attendant performs services for the individual; and
  - (14) conduct on-site visits in addition to those described in §44.203 of this chapter (relating to Assessment and Eligibility Determination) and §44.204 of this chapter (relating to Reassessments), based on the specific needs of the individual or attendant, but at least annually, to assess and document whether the:
    - (A) individual's service plan is adequate;
    - (B) individual continues to need the services;
    - (C) individual needs a service plan change;
    - (D) attendant remains competent to perform the allowable tasks; and
    - (E) attendant is performing the allowable tasks.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 29, 2019.



**DIVISION 2. BLOCK GRANT OPTION**

## 40 TAC §44.421, §44.422

### STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services to persons served by the health and human services system, and authorizes the Executive Commissioner to adopt rules governing the delivery of services to persons served by the health and human services system.

#### §44.421. *Provider Responsibilities in the Block Grant Option.*

In the block grant option, a provider must:

(1) comply with the requirements of §44.302 of this chapter (relating to Provider Qualifications and Responsibilities in All CMPAS Service Delivery Options);

(2) reimburse the individual for attendant wages and employment taxes paid by the individual;

(3) negotiate with the individual and agree on an amount that the provider will retain from reimbursements made under §44.505 of this chapter (relating to Reimbursement) to compensate the provider for its services to the individual, based on the provider's actual cost of providing services to the individual, which may include:

(A) the cost of providing substitute attendants;

(B) the cost of providing administrative services;

(C) the history of the individual's use of substitute attendants; and

(D) the need for provider intervention;

(4) maintain and supervise a pool of substitute attendants to provide attendant services at the individual's request;

(5) provide each substitute attendant an initial orientation before the attendant provides services to the individual that includes the following topics:

(A) basic interpersonal skills;

(B) needs of persons with disabilities;

(C) first aid;

(D) universal safety precautions;

(E) safety and emergency procedures;

(F) proper completion of required forms;

(G) explanation of the individual's role as supervisor;

(H) explanation of the provider agency's responsibilities to attendants;

(I) attendant rights and responsibilities;

(J) specific information needed to provide tasks to the individual;

(K) reporting changes in the individual's condition to the provider; and

(L) instructions to provide only authorized tasks in accordance to the service plan, unless the individual pays for additional time with the individual's own funds;

(6) send a substitute attendant at the individual's request; and

(7) for an individual the provider learns is failing to fully perform a duty the individual is required to perform as the attendant's employer of record:

(A) counsel the individual regarding the consequences of noncompliance;

(B) offer the individual the choice of the traditional services option; and

(C) consider suspending services as provided by §44.308 of this chapter (relating to Suspension of Services) if the individual does not choose the traditional service option and does not perform the duties as the employer of record.

#### §44.422. *Individual Responsibilities in the Block Grant Option.*

In the block grant option, an individual must:

(1) comply with the requirements of §44.307 of this chapter (relating to Individual Responsibilities in All CMPAS Service Delivery Options);

(2) select, hire, and pay the individual's attendants as the employer of record;

(3) before the individual's attendant provides a service and on an annual basis:

(A) train an attendant regarding abuse, neglect, and exploitation, as described in HHSC Form 1732, Management and Training of Service Provider;

(B) sign and date Form 1732 and have the attendant sign and date the form to document completion of the training; and

(C) send a copy of the signed form to the provider within 30 days after the date the form is signed by the individual and the attendant;

(4) resolve any employment-related problems or disagreements directly with the attendant;

(5) not discriminate against an attendant or applicant in violation of law;

(6) assume liability for work-related attendant injuries and responsibility for work-related attendant conduct to the same extent as any employer would assume liability for injuries and responsibility for conduct of an employee;

(7) spend funds received from the provider that were reimbursed under §44.505 of this chapter (relating to Reimbursement) on attendant wages, employment-related tax payments, and employee benefits;

(8) prepare and sign an agreement with the attendant that includes:

(A) the tasks the attendant is to perform for the individual;

(B) the schedule the attendant will work for the individual;

(C) the hourly rate, at or above the minimum wage required by law, the individual will pay the attendant;

(D) the schedule the individual will use to pay the attendant (at least twice per month);

(E) the reasons the individual may terminate the attendant's employment; and

(F) a requirement that the attendant provide the individual at least 24 hours advance notice if unable to work a scheduled shift;

(9) supervise the attendant's recording of hours worked, including signing, dating, and submitting the attendant's time sheet to the provider on or after the last day of the reporting period during which services were provided; and

(10) submit to the provider, within 30 days after filing, copies of any employment-related government forms the individual files for the attendant as the employer of record, including all required Internal Revenue Service obligations and required reports to the Texas Workforce Commission.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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### DIVISION 3. CONSUMER DIRECTED OPTION

#### 40 TAC §§44.441 - 44.444

#### STATUTORY AUTHORITY

The amendment and new section are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services to persons served by the health and human services system, and authorizes the Executive Commissioner to adopt rules governing the delivery of services to persons served by the health and human services system.

#### §44.441. *Provider Responsibilities in the CDS Option.*

In the CDS option, a provider must:

(1) comply with the requirements of §44.302 of this chapter (relating to Provider Qualifications and Responsibilities in All CMPAS Service Delivery Options);

(2) function as an FMSA to provide financial management services to an individual;

(3) approve and monitor a budget for services delivered through the CDS option;

(4) manage payroll, including calculating employee withholdings and employer contributions and depositing the funds with the appropriate agencies;

(5) comply with applicable government regulations concerning employee withholding, garnishments, mandated withholding, and benefits;

(6) prepare and file required tax forms and reports;

(7) pay allowable expenses incurred by the individual;

(8) obtain employer-agent status with the Internal Revenue Service, the Texas Workforce Commission, and any other appropriate government agencies within the time frame established by each agency;

(9) perform all employer-agent responsibilities required by government agencies that regulate the relationship between the em-

ployer-agent and the individual acting as the employer of record, and maintain an original or a copy of each form required to document compliance; and

(10) attend, at least annually, HHSC's training for FMSAs.

#### §44.442. *Individual Responsibilities in the CDS Option.*

(a) In the CDS option, an individual must:

(1) comply with the requirements in §44.307 of this chapter (relating to Individual Responsibilities in All CMPAS Service Delivery Options);

(2) perform the employer responsibilities described in Chapter 41 of this title (relating to Consumer Directed Services Option), with the exception of the responsibilities described in Chapter 41, Subchapter G of this title (relating to Allegations of Abuse, Neglect and Exploitation);

(3) train each attendant and substitute attendant, during the initial orientation and on an annual basis, regarding abuse, neglect, and exploitation, as described in HHSC Form 1732, Management and Training of Service Provider;

(4) sign and date Form 1732 and have the attendant or substitute attendant sign and date the form to document completion of the training; and

(5) send a copy of the signed form to the provider within 30 days after the date the form is signed by the individual and the attendant or substitute attendant.

(b) In the CDS option, if an individual knows or suspects that the individual is being or has been abused, neglected, or exploited, the individual must:

(1) report the abuse, neglect, or exploitation to DFPS immediately, but not later than 24 hours, after the abuse, neglect, or exploitation occurred by:

(A) calling the DFPS Abuse Hotline toll-free telephone number, 1-800-252-5400; or

(B) using the DFPS Abuse Hotline website;

(2) take actions to secure the individual's safety;

(3) obtain immediate and ongoing medical or psychological services, as necessary;

(4) when taking the actions described in paragraphs (2) and (3) of this subsection, avoid compromising the investigation or causing further trauma to the individual;

(5) preserve and protect evidence related to the allegation; and

(6) ensure an attendant or substitute attendant who knows or suspects that the individual is being or has been abused, neglected, or exploited, reports the allegation of abuse, neglect, or exploitation to DFPS immediately, but not later than 24 hours, after having knowledge or suspicion by:

(A) calling the DFPS Abuse Hotline toll-free telephone number, 1-800-252-5400; or

(B) using the DFPS Abuse Hotline website.

#### §44.443. *Provider and Individual Responsibilities in the CDS Option Related to HHSC Investigations When an Alleged Perpetrator is an Attendant or Substitute Attendant.*

(a) This section applies in the CDS option to alleged abuse, neglect, or exploitation by an attendant or substitute attendant:

(1) when an allegation is reported as required by §44.311(c) of this chapter (relating to Provider Responsibilities Related to the Abuse, Neglect, and Exploitation of an Individual in All CMPAS Service Delivery Options);

(2) when an allegation is reported as required by §44.442 of this division (relating to Individual Responsibilities in the CDS Option); or

(3) if a provider or individual is notified by HHSC of an allegation.

(b) An individual must:

(1) obtain immediate and ongoing medical or psychological services, as necessary;

(2) take actions to secure the individual's safety, including if necessary, ensuring that the individual does not have contact with the alleged perpetrator until HHSC completes the investigation;

(3) when taking the actions described in paragraphs (1) and (2) of this subsection, avoid compromising the investigation or causing further trauma to the individual;

(4) preserve and protect evidence related to the allegation, including time sheets and other employee-related documentation;

(5) cooperate with the investigation as requested by HHSC, including providing documentation and participating in an interview; and

(6) ensure that attendants or substitute attendants comply with paragraphs (4) and (5) of this subsection.

(c) A provider must:

(1) preserve and protect evidence related to the allegation, including time sheets and other employee-related documentation;

(2) cooperate with the investigation as requested by HHSC, including providing documentation and participating in an interview; and

(3) ensure that staff persons and controlling persons comply with paragraphs (1) and (2) of this subsection.

(d) A provider who receives an initial intake report for an allegation of abuse, neglect, or exploitation described in subsection (a) of this section, must:

(1) within four working days after receiving the report, convene an IDT meeting in person or by phone to review the report and discuss the actions the individual has taken or will take to protect the individual during the HHSC investigation, which may include having an attendant or substitute attendant other than the alleged perpetrator provide services;

(2) document in writing any actions that have been or will be taken as a result of the allegation; and

(3) if appropriate, offer the individual the choice of receiving services through the traditional service option and consider a suspension of services as described in §44.308 of this chapter (relating to Suspension of Services), if the individual does not choose the traditional service option.

(e) After a provider receives the final investigative report from HHSC for an allegation of abuse, neglect, or exploitation described in subsection (a) of this section, the provider must:

(1) within four working days after receiving the report, if the report confirms the allegation, contains an inconclusive finding, or includes concerns and recommendations by HHSC:

(A) convene an IDT meeting in person or by phone to discuss the content of the report, including any concerns and recommendations by HHSC; and

(B) document in writing any actions that have been or will be taken by the individual as a result of the findings in the report or the concerns and recommendations by HHSC;

(2) within five working days after receiving the report:

(A) use the report to complete Form 1719, Notification of Investigatory Findings; and

(B) send the completed form to the alleged perpetrator; and

(3) if appropriate, offer the individual the choice of receiving services through the traditional service option and consider a suspension of services, as described in §44.308 of this chapter, if the individual does not choose the traditional service option.

(f) A provider must maintain in an individual's record an initial intake report and a final investigative report received from HHSC and a completed Form 1719.

*§44.444. Provider and Individual Responsibilities in the CDS Option Related to HHSC Investigations When an Alleged Perpetrator is a Staff Person or a Controlling Person of a Provider.*

(a) This section applies in the CDS option to an allegation of abuse, neglect, or exploitation by a staff person or a controlling person:

(1) when the allegation is reported as required by §44.311(c) of this chapter (relating to Provider Responsibilities Related to the Abuse, Neglect, and Exploitation of an Individual in All CMPAS Service Delivery Options);

(2) when the allegation is reported as required by §44.442 of this division (relating to Individual Responsibilities in the CDS Option); or

(3) if a provider or individual is notified by HHSC of an allegation.

(b) A provider must:

(1) take actions to secure the safety of the individual, including if necessary, ensuring that the alleged perpetrator does not have contact with the individual or any other individual receiving services from the provider until HHSC completes the investigation; and

(2) preserve and protect evidence related to the allegation.

(c) During an HHSC investigation of an alleged perpetrator who is a staff person or controlling person:

(1) a provider must:

(A) cooperate with the investigation as requested by HHSC, including providing documentation and participating in an interview;

(B) provide HHSC access to:

(i) sites owned, operated, or controlled by the provider;

(ii) individuals, staff persons, and controlling persons; and

(iii) records pertinent to the investigation of the allegation; and

(C) ensure that staff persons and controlling persons comply with subparagraphs (A) and (B) of this paragraph; and

(2) an individual must:

(A) cooperate with the investigation as requested by HHSC, including providing documentation and participating in an interview;

(B) provide HHSC access to:

- (i) attendants and substitute attendants; and
- (ii) records pertinent to the investigation of the allegation; and

(C) ensure that attendants and substitute attendants comply with subparagraph (A) of this paragraph.

(d) Within four working days after receiving an initial intake report for an allegation described in subsection (a) of this section, a provider must:

(1) convene an IDT meeting in person or by phone to discuss the report and the actions the individual has taken or will take to protect the individual during the HHSC investigation; and

(2) document in writing any actions that have been or will be taken as a result of the allegation.

(e) After a provider receives a final investigative report from HHSC for an investigation described in subsection (a) of this section, the provider must:

(1) within four working days after receiving the report, if the report confirms the allegation, contains an inconclusive finding, or includes concerns and recommendations by HHSC:

(A) convene an IDT meeting in person or by phone to discuss the content of the report, including any concerns and recommendations by HHSC; and

(B) document in writing any actions that have been or will be taken by the individual as a result of the findings in the report or the concerns and recommendations by HHSC; and

(2) within five working days after receipt of the report:

(A) use the report to complete Form 1719, Notification of Investigatory Findings; and

(B) send the completed form to the alleged perpetrator; and

(3) take appropriate action within the provider's authority in response to the HHSC investigation, including disciplinary action against a staff person confirmed to have committed abuse, neglect, or exploitation.

(f) A provider must maintain in an individual's record an initial intake report and a final investigative report received from HHSC and a completed Form 1719.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER E. ADDITIONAL PROGRAM REQUIREMENTS

**40 TAC §§44.502, 44.504, 44.505**

### STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services to persons served by the health and human services system, and authorizes the Executive Commissioner to adopt rules governing the delivery of services to persons served by the health and human services system.

#### *§44.502. Convening an IDT.*

(a) An IDT must include:

- (1) the individual;
- (2) a provider representative; and
- (3) other persons as requested by the individual.

(b) A provider must convene an IDT meeting:

(1) within five working days after:

(A) an individual accepts the provider's offer for an informal dispute resolution process due to a service plan or co-payment disagreement, as described in §44.206 of this chapter (relating to Service Plan and Co-payment Disagreements);

(B) the provider determines it cannot provide services to an individual for any of the health and safety reasons described in §44.301(c)(2) - (4) of this chapter (relating to Initiation of Services); or

(C) the provider identifies the need to discuss with the individual a service delivery issue that prevents the provider from carrying out a provider responsibility described in this chapter;

(2) as described in §44.308(e) of this chapter (relating to Suspension of Services); or

(3) as described in §44.443 of this chapter (relating to Provider and Individual Responsibilities in the CDS Option Related to HHSC Investigations When an Alleged Perpetrator is an Attendant or Substitute Attendant) and §44.444 of this chapter (relating to Provider and Individual Responsibilities in the CDS Option Related to HHSC Investigations When an Alleged Perpetrator is a Staff Person or a Controlling Person of a Provider).

(c) If a provider is unable to convene an IDT meeting with all the members described in subsection (a) of this section, the provider must:

- (1) convene the IDT meeting with the available members;
- (2) send documentation of the IDT meeting to the individual; and

(3) document in the individual's record the provider's efforts to convene an IDT meeting with all the members described in subsection (a) of this section.

(d) The IDT must:

- (1) meet by telephone conference call or in person;
- (2) discuss the specific reason for conducting the IDT meeting;

(3) identify any possible solutions to resolve the specific reason for the meeting; and

(4) make recommendations to the provider and the individual.

(e) Within two working days after an IDT meeting, a provider must:

(1) document:

(A) the specific reason for calling the IDT meeting;

(B) the names of the IDT members attending the meeting;

(C) the recommendations of the IDT to the provider and the individual; and

(D) the actions to be taken or that have been taken by the provider or the individual;

(2) provide a written copy of the documentation to the individual; and

(3) notify the individual of the right to request a fair hearing, as provided by §44.503 of this subchapter (relating to Fair Hearing), if an action to be taken or that has been taken by the provider denies, reduces, or terminates the individual's services.

*§44.504. Records.*

(a) General requirements. A provider must develop and maintain records in accordance with:

(1) this chapter; and

(2) Chapter 49, Subchapter C, of this title (relating to Requirements of a Contractor).

(b) Service delivery documentation. A provider must develop and maintain service delivery records as described in this subsection.

(1) A provider must:

(A) maintain for each individual the attendant time sheets an individual submits to the provider as required in §44.307(5) of this chapter (relating to Individual Responsibilities in All CMPAS Service Delivery Options);

(B) ensure that each attendant time sheet is a single document that contains:

(i) the name of the individual;

(ii) the name of the attendant who provided services to the individual;

(iii) the beginning and ending dates of the service delivery period;

(iv) the specific days and times the attendant worked;

(v) the signature of the attendant, or another person designated by the attendant, and the date signed; and

(vi) the signature of the individual, representative, or another person designated by the individual or representative, and the date signed to certify the time worked and verify the services performed by the attendant as documented on the time sheet;

(C) ensure that if another person signs and dates an attendant's time sheet for the attendant, the provider documents the reason the attendant is unable to complete or sign the time sheet and the name of the person the attendant authorized to sign the time sheet for the attendant; and

(D) ensure that if another person signs and dates an attendant's time sheet for an individual or representative, the provider documents the reason the individual or representative was unable to sign the time sheet and the name of the person the individual or representative authorized to sign the time sheet for the individual or representative.

(2) A provider must develop and maintain records to demonstrate the provider's compliance with:

(A) §44.203 of this subchapter (relating to Assessment and Eligibility Determination);

(B) §44.206 of this chapter (relating to Service Plan and Co-payment Disagreements);

(C) §44.308 of this chapter (relating to Suspension of Services);

(D) §44.309 of this chapter (relating to Termination of Services);

(E) §44.501 of this subchapter (relating to Determining an Individual's Co-Payment); and

(F) §44.502 of this subchapter (relating to Convening an IDT).

(c) Financial records. A provider must, in accordance with generally accepted accounting principles (GAAP) and HHSC requirements, document and maintain financial records:

(1) to support claims submitted to HHSC and payments received from HHSC; and

(2) to support each individual's co-payment as calculated by the provider in accordance with §44.501 of this subchapter (relating to Determining an Individual's Co-payment), including documentation to support income, exclusions and deductions.

(d) Required financial records. A provider's financial records must include:

(1) the amount of payments received from HHSC, including:

(A) the voucher number;

(B) the warrant number;

(C) the date of receipt; and

(D) any other information necessary to trace deposits of payments received and payments made from the payments received in the provider's accounting system;

(2) deposit slips, bank statements, cancelled checks, and receipts;

(3) purchase orders;

(4) invoices;

(5) journals and ledgers;

(6) time sheets, payroll, and tax records;

(7) Internal Revenue Service, Department of Labor, and other required governmental financial records

(8) records of insurance coverage, claims, and payments, including medical, liability, fire and casualty, and workers' compensation records;

(9) equipment inventory records;

- (10) records of the provider's internal accounting procedures;
- (11) a chart of accounts, as defined by GAAP; and
- (12) records of company policies.

(e) Subcontractor records. If a provider uses a subcontractor, the provider must maintain records of the subcontractor's activities in accordance with §49.308 of this title (relating to Subcontracts). The provider must maintain records to support subcontractor claims.

(f) Failure to maintain records. If a provider fails to maintain records in accordance with this section, HHSC may initiate a corrective action plan and pursue any appropriate sanction against the provider.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## CHAPTER 45. COMMUNITY LIVING ASSISTANCE AND SUPPORT SERVICES AND COMMUNITY FIRST CHOICE (CFC) SERVICES

As required by Texas Government Code §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Texas Health and Human Services Commission (HHSC) in accordance with Texas Government Code §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation of and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, the Executive Commissioner of HHSC adopts amendments to §45.103, §45.201, §§45.212-§45.214, §45.216, §45.221, §45.223, §45.225, §45.403, §45.405, §45.406, §45.702, §45.704, §45.707, §45.802, §45.804, and §45.807; new §45.226, §45.227, §45.706, §45.708, §45.709, §45.810, and §45.811; and the repeal of §45.706, in Title 40, Part 1, Chapter 45, Community Living Assistance and Support Services and Community First Choice (CFC) Services.

The amendments to §45.103, §45.212, §45.405, §45.704, §45.804, and §45.807, and new §45.709 and §45.811, are adopted with changes to the proposed text as published in the March 1, 2019, issue of the *Texas Register* (44 TexReg 1048). The amendments to §45.201, §45.213, §45.214, §45.216, §45.221, §45.223, §45.225, §45.403, §45.406, §45.702, §45.707, and §45.802, new §45.226, §45.227, §45.706, §45.708, and §45.810, and the repeal of §45.706, are adopted

without changes to the proposed text as published in the March 1, 2019, issue of the *Texas Register* (44 TexReg 1048), and therefore will not be republished.

### BACKGROUND AND JUSTIFICATION

Chapter 45, Community Living Assistance and Support Services and Community First Choice (CFC) Services, governs the Community Living Assistance and Support Services (CLASS) Program. The CLASS Program is a Medicaid waiver program approved by the Centers for Medicare & Medicaid Services (CMS) under §1915(c) of the Social Security Act. It provides community-based services and supports to an eligible individual as an alternative to services provided in an institutional setting through the Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions (ICF/IID) Program. "Direct services," as defined in Chapter 45, are provided by a CLASS direct services agency (DSA) that contracts with HHSC and holds a home and community support services agency (HCSSA) license. Case management services are provided by a CLASS case management agency (CMA) that contracts with HHSC.

One of the purposes of the adopted rules is to address adjustments to the investigatory process for abuse, neglect, and exploitation as a result of amendments to Texas Human Resources Code, Chapter 48, and Texas Family Code, Chapter 261, effective September 1, 2015. The amendments gave the Department of Family and Protective Services (DFPS) Adult Protective Services (APS) Provider Investigation (PI) Program the authority to investigate an allegation of abuse, neglect or exploitation of an individual in the CLASS Program when the alleged perpetrator is a staff person, service provider, volunteer, or controlling person of a CMA or DSA. Effective September 1, 2017, in accordance with Texas Government Code, §§531.02011 and 531.02013, the functions performed by the DFPS APS PI Program were transferred to HHSC. The adopted rules address investigations of allegations of abuse, neglect, and exploitation conducted by HHSC for an individual in the CLASS Program and describe requirements for the CMA and DSA to protect an individual from abuse, neglect, and exploitation and help ensure the health, safety, and welfare of an individual who is abused, neglected, or exploited.

The adopted rules also include the current requirements in Texas Administrative Code, Title 40, (40 TAC) §49.310, Abuse, Neglect, and Exploitation Allegations, that apply to a CMA and DSA. Rules in 40 TAC Chapter 49, Contracting for Community Services, are adopted for amendment in this issue of the *Texas Register*, to exclude the CLASS Program from §49.310. Those rules are adopted in Chapter 45 to use terminology specific to the CLASS Program, add specificity to the current requirements of §49.310, and add new requirements for a CMA and DSA. For example, the adopted rules require a CMA and DSA to (1) conduct training of staff persons, service providers, and volunteers related to abuse, neglect, and exploitation according to specified time frames; (2) ensure that the persons who are trained are knowledgeable about signs and symptoms of abuse, neglect, and exploitation; and (3) educate an individual and legally authorized representative (LAR) or person actively involved with the individual about protecting the individual from abuse, neglect, and exploitation.

The adopted rules require a CMA and DSA to report critical incidents to HHSC to address the CMS requirement that HHSC have an incident management system in place to help ensure an individual's health and welfare.



In response to direction from CMS to help meet the requirement in the Code of Federal Regulations, Title 42 (42 CFR), §441.302(b) regarding financial accountability, the adopted rules require a CMA and DSA to ensure that, after a CMA case manager or a DSA service provider completes an HHSC Documentation of Services Delivered form, that a staff person other than the case manager or service provider who completed the form signs and dates the form as a timekeeper as verification of the accuracy of the information on the form.

In response to direction from CMS to meet the requirement in 42 CFR §441.302(c)(2), regarding reevaluations of an individual's level of care (LOC), the adopted rules require a DSA to have and implement written policies and procedures to ensure the DSA complies with the requirement to submit to HHSC, at least 60 calendar days before the expiration of an individual's individual plan of care (IPC) period, the documentation HHSC needs to determine whether an individual continues to meet the required LOC. The adopted rules require a DSA's written policies and procedures to include using a written or electronic tracking system that alerts the DSA to activities that must occur for the DSA to timely submit the documentation to HHSC. The adopted rules also replace "diagnostic eligibility" with "LOC VIII" throughout the chapter to conform with the terms used in the eligibility criteria for the CLASS Program described in 40 TAC §9.239.

In response to direction from CMS to meet the requirement in 42 CFR §441.301(c)(3), regarding reviews of an individual's service plan, the adopted rules require a CMA to have and implement written policies and procedures to ensure the CMA complies with the requirement to submit to HHSC, at least 30 calendar days before the end of the individual's IPC period, the documentation HHSC needs to determine whether the individual's IPC will be authorized. The adopted rules also require a CMA's written policies and procedures to include using a written or electronic tracking system that alerts the CMA to activities that must occur for the CMA to timely submit the documentation to HHSC.

The adopted rules address a CMS requirement that, if an individual's LOC VIII expires before HHSC determines whether the individual meets the LOC VIII criteria, or an individual's IPC period expires before HHSC authorizes a proposed renewal IPC, the CMA and the DSA must continue to provide services to the individual until HHSC authorizes the proposed renewal IPC to ensure continuity of care and prevent the individual's health and welfare from being jeopardized.

In response to direction from CMS to meet the requirement in 42 CFR, §441.302(d), the adopted rules require a CMA to at least annually after enrollment, obtain the signature of the individual or LAR on a Waiver Program Verification of Freedom of Choice form documenting the individual's or LAR's choice of the CLASS Program over the ICF/IID Program.

The adopted rules require a service provider of CFC personal assistance services/habilitation (PAS/HAB) to have training in cardiopulmonary resuscitation (CPR) and choking prevention so that the service provider is prepared and qualified to assist an individual who needs CPR.

The adopted rules require a CMA and DSA to electronically access the Medicaid Eligibility Service Authorization Verification (MESAV) system to determine if the information on an individual's enrollment IPC, revision IPC, or renewal IPC authorized by HHSC is consistent with the information in MESAV and, if inconsistent, to notify HHSC of the inconsistency. The purpose of

this requirement is to help prevent billing discrepancies and payment adjustments that result from inaccurate information being entered into MESAV.

The adopted rules also update agency names and replace specific website addresses.

#### COMMENTS

The 30-day comment period ended March 31, 2019.

During the comment period, HHSC received comments submitted by a representative on behalf of the Texas Council for Developmental Disabilities (TCDD) and Disability Rights Texas (DRTx) and one individual. The comments submitted on behalf of TCDD and DRTx were made with specific reference to rules in 40 TAC Chapter 9, Intellectual Disability Services--Medicaid State Operating Agency Responsibilities, that were also proposed in the *Texas Register* on March 1, 2019. However, the commenter requested that HHSC interpret the specific references to Chapter 9 rules as an example and apply the comments to all pertinent programs and services that HHSC provides or regulates for rules that were proposed in the *Texas Register* on March 1, 2019.

On that basis, where a comment addresses a proposed rule in Chapter 9 for which Chapter 45 contains a parallel or largely parallel rule provision, HHSC includes and responds to the comment in the summary below as if it specifically referred to the parallel provision in Chapter 45. If Chapter 45 does not have a proposed rule provision that parallels a proposed rule provision in Chapter 9 addressed by a comment, HHSC does not include or respond to the comment.

A summary of the comments relating to the rules and HHSC's responses follows.

Comment: Regarding proposed §45.212(a)(2)(A)(ix) and (h)(1)(A)(ii), a commenter recommended adding the contact information for the Protection and Advocacy System, Disability Rights Texas, to the other entities listed for submission of complaints.

Response: The requested change is outside the scope of this rule project and, therefore, HHSC declines to make the change. HHSC will take the comment under consideration for a future rule amendment.

Comment: Regarding proposed §45.223(i)(3), a commenter stated that it is unnecessary to require a CMA and DSA to access MESAV at renewal or revision of an IPC to ensure that information in MESAV and the IPC is consistent. Specifically, the commenter stated that data entry errors in MESAV can be corrected by reviewing limited information in MESAV twice a month or when a billing issue arises. The commenter stated it would have to hire a full-time employee to comply with the new requirement.

Response: HHSC disagrees with the commenter and declines to amend or remove the requirement in §45.223(i)(3). The requirement for a CMA and DSA to review information in MESAV at renewal and revision of an IPC will help ensure that accurate information is consistently in MESAV and will help prevent billing errors or readily correct billing errors that have occurred.

Comment: Regarding proposed §45.704(a)(3)(A) and (B) and §45.804(a)(2)(A) and (B), a commenter requested removing the dates related to CMA and DSA staff persons who must complete person-centered service planning training because the dates in these rules have passed.

Response: The requested change is outside the scope of this rule project and, therefore, HHSC declines to make the change. HHSC will take the comment under consideration for a future rule amendment.

Comment: Regarding proposed §45.704(b)(2)(A) and (B) and §45.804(e)(2)(A) and (B), a commenter stated that the rules do not specify when the training must occur and recommended that the rule require training before a CMA staff person or volunteer, and a DSA service provider, staff person, or volunteer, assumes job duties and annually thereafter.

Response: HHSC disagrees that the rules do not specify when the training must occur. Proposed §45.704(b)(2)(A) and (B) and §45.804(e)(2)(A) and (B), required a CMA and DSA to provide training on issues related to abuse, neglect, and exploitation, if hired on or after September 1, 2018, before assuming job duties and at least annually thereafter; or if hired before September 1, 2018, within one year after the person's most recent training on abuse, neglect, and exploitation and annually thereafter. In §45.704(b)(2)(A) and (B) and §45.804(e)(2)(A) and (B), "September 1, 2018" was changed to "July 1, 2019" as explained below after the responses to comments.

Comment: Regarding proposed §45.707(c)(1) and §45.811(f)(1), a commenter recommended that a CMA's and DSA's review of all final investigative reports from HHSC be performed on a quarterly basis for it to be meaningful and proactive in preventing the re-occurrence of allegations of abuse, neglect, or exploitation. The commenter also stated that the review should include looking at the source of the complaints as well as the details of the allegation and any policies or practices that might have contributed to the allegation.

Response: HHSC disagrees with the recommendation to require CMAs and DSAs to review all final investigative reports on a quarterly basis and declines to make this change. Requiring CMAs and DSAs to conduct an annual review allows them to review data covering a sufficient period of time to be able to effectively identify trends and implement process improvements. HHSC will consider the comment for future rulemaking.

Comment: A commenter stated that while the requirements in §45.709(a) and (b) and §45.811(a) and (b) clarify the obligation to obtain medical or psychological services and delineate internal processes for ensuring the care and safety of the alleged victim, the commenter requested that the rules require these processes to be performed in such a way that they do not compromise the evidence to be collected during the HHSC or other investigation or result in further trauma to the individual. The commenter also recommended that instruction be provided as to how assessments should be carried out without further trauma to the victim or contaminating evidence.

Response: HHSC agrees with the importance of a CMA and DSA preserving and protecting evidence and not compromising an investigation or further traumatizing the individual and revised §45.709(a) and (b) and §45.811(a) and (b) to include these requirements. HHSC will provide information to help CMAs and DSAs avoid compromising an investigation or further traumatizing the individual.

Comment: Regarding proposed §45.709(b)(2) and §45.811(b)(2), a commenter recommended that the rule require separating the alleged perpetrator from the alleged victim and other individuals receiving services in all situations.

Response: HHSC disagrees that separating an alleged perpetrator from an alleged victim and other individuals is necessary in all situations to secure the individual's safety and declines to make the requested change. HHSC will consider the comment for future rulemaking.

Comment: Regarding proposed §45.709(b)(4)(A) and (B) and §45.811(b)(4)(A) and (B), a commenter noted that the rules allow up to 24 hours to notify the individual and the LAR of the allegation report and related matters and recommended that the notification be required no later than one hour after the CMA or DSA reports or is notified of the allegation.

Response: HHSC declines to make the suggested changes at this time. HHSC will consider the comments for future rulemaking. Proposed §45.709(b)(4) and §45.811(b)(4) require the CMA to notify the individual, the LAR, and the DSA and the DSA to notify the individual, the LAR, and the case manager of the allegation report "as soon as possible." While "as soon as possible" could require notification in a matter of minutes, there may be circumstances in which the CMA or DSA needs additional time to determine the actions required by proposed §45.709(b)(4)(B) for the CMA and §45.811(b)(4)(B) for the DSA. HHSC considers 24 hours the outside limit to provide notification "as soon as possible" and expects program providers to provide notification in the shortest timeframe possible.

Comment: Regarding proposed §45.709(c) and §45.811(c), which requires a CMA and DSA to cooperate with the HHSC investigation, a commenter recommended that the rules be broadened to include other investigations, such as by law enforcement.

Response: Sections 45.709 and 45.811, as proposed, only address HHSC investigations of alleged abuse, neglect, or exploitation. HHSC disagrees with the recommendation to broaden the scope of the rules at adoption to address other investigations. Therefore, HHSC declines to make the recommended change.

Comment: Regarding proposed §45.709(d)(1)(B) and §45.811(d)(1)(B), a commenter recommended that the rules require that disciplinary action be taken by a CMA or DSA after receiving a final investigative report from HHSC that includes a confirmed finding. Additionally, the commenter recommended that language be added to require that disciplinary action be taken if a staff person or service provider of the DSA or CMA fails to cooperate with the investigation or if it is determined that the staff person or service provider impeded the investigation or was dishonest in evidence provided in the investigation.

Response: HHSC agrees with the recommendation to require a CMA and DSA to take disciplinary action against a staff person or volunteer of the CMA or a service provider, staff person, or volunteer of the DSA confirmed to have committed abuse, neglect, or exploitation. HHSC makes the recommended change by striking "appropriate" and "when warranted" in §45.709(d)(1)(B) and §45.811(d)(1)(B). However, HHSC disagrees with the recommendation to require disciplinary action if a staff person or service provider fails to cooperate with, or impedes, the HHSC investigation. Section 45.709(c)(3) and §45.811(c)(3) require a CMA or DSA to ensure that staff persons, service providers, volunteers, and controlling persons comply with §45.709(c)(1) and (2) and §45.811(c)(1) and (2). Therefore, HHSC declines to require a CMA or DSA to take disciplinary action for failure of a staff person, service provider, or volunteer to comply with the rules. Non-compliance could range in type and severity, and a CMA or

DSA is generally in the best position to determine if disciplinary action is appropriate. HHSC will consider the comment for future rulemaking.

Comment: Regarding proposed §45.709(d)(3) and §45.811(d)(3), a commenter questioned the delay of five calendar days for the CMA or DSA to notify the individual and LAR of the outcome of the investigation. The commenter recommended adding language requiring that the notification be made as quickly as possible.

Response: HHSC disagrees with the recommendation to require notification be made as quickly as possible after the CMA or DSA receives the final investigative report and declines to make this change. Proposed §45.709(d)(3) requires a CMA to notify the individual and the LAR of the investigation finding "immediately." Proposed §45.811(d)(3) requires a DSA to notify the individual, the LAR, and the case manager of the investigation finding "immediately." However, there may be circumstances in which the CMA or DSA needs additional time to take the action required by §45.709(d)(1) and (2) and §45.811(d)(1) and (2). HHSC considers five calendar days a reasonable outside limit to give the notification. HHSC will consider the comment for future rulemaking.

In §45.103, a definition for "calendar day" was added for clarification. The remaining subsections were re-lettered due to this addition.

In §45.103, the definitions for "DFPS" and "dietary services" were placed in the correct alphabetical order.

In §45.103(89), in the definition for "physician," a minor editorial change was made and "§97.2 of this title" was changed to "26 TAC §558.2" to correct the reference.

In §45.212(h)(1)(A)(ii), "Consumer Rights and Services" was changed to "Complaint and Incident Intake" to correct the name of the HHSC division that handles complaints related to a CLASS DSA.

In §45.405(b), a minor editorial change was made to delete an extra period at the end of the rule.

In §45.704(b)(2)(A) and (B) and §45.804(e)(2)(A) and (B), "September 1, 2018" was changed to "July 1, 2019" to be consistent with the CLASS Provider Manual.

In §45.709(e)(1) and (2) and §45.811(e)(1) and (2), changes were made to clarify that abuse includes the use of seclusion and the use of restraint not in compliance with federal and state laws, rules, and regulations consistent with the changes made in 40 TAC §9.178(s)(1) and (2) and 40 TAC §42.411(e)(1) and (2) in this same issue of the *Texas Register*.

In §45.709(e)(2) and §45.811(e)(2), the phrase "possible abuse, neglect, of exploitation of the individual" was changed to "possible abuse, neglect, or exploitation of an individual" to ensure a broader application of the prohibition of retaliation and to be consistent with other HHSC rules adopted in 40 TAC related to abuse, neglect, and exploitation and published in this issue of the *Texas Register*.

In §45.807(c)(5), changes were made to clarify that the requirement for a DSA to ensure an individual's record includes the original Intellectual Disability/Related Conditions (ID/RC) Assessment or the original level of care form in use before the ID/RC Assessment, only applies to the DSA that was the individual's DSA when the individual enrolled in the CLASS Program.

## SUBCHAPTER A. GENERAL PROVISIONS

### 40 TAC §45.103

#### STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendment implements Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

#### §45.103. Definitions.

The following words and terms, when used in this chapter, have the following meanings, unless the context clearly indicates otherwise:

- (1) Abuse--
  - (A) physical abuse;
  - (B) sexual abuse; or
  - (C) verbal or emotional abuse.
- (2) Actively involved--Significant, ongoing, and supportive involvement with an individual by a person, as determined by the individual, based on the person's:
  - (A) interactions with the individual;
  - (B) availability to the individual for assistance or support when needed; and
  - (C) knowledge of, sensitivity to, and advocacy for the individual's needs, preferences, values, and beliefs.
- (3) Adaptive aid--An item or service that enables an individual to retain or increase the ability to perform ADLs or perceive, control, or communicate with the environment in which the individual lives, and:
  - (A) is included in the list of adaptive aids in the *CLASS Provider Manual*; or
  - (B) is the repair and maintenance of an adaptive aid on such list that is not covered by a warranty.
- (4) Adaptive behavior--The effectiveness with or degree to which an individual meets the standards of personal independence and social responsibility expected of the individual's age and cultural group as assessed by a standardized measure.
- (5) Adaptive behavior level--The categorization of an individual's functioning level based on a standardized measure of adaptive behavior. There are four adaptive behavior levels ranging from mild limitations in adaptive skills (I) through profound limitations in adaptive skills (IV).
- (6) Adaptive behavior screening assessment--A standardized assessment used to determine an individual's adaptive behavior level, and conducted using the current version of one of the following assessment instruments:
  - (A) American Association of Intellectual and Developmental Disabilities (AAIDD) Adaptive Behavior Scales (ABS);
  - (B) Inventory for Client and Agency Planning (ICAP);

(C) Scales of Independent Behavior; or

(D) Vineland Adaptive Behavior Scales.

(7) ADLs--Activities of daily living. Basic personal everyday activities, including tasks such as eating, toileting, grooming, dressing, bathing, and transferring.

(8) Alarm call--A signal transmitted from an individual's CFC ERS equipment to the CFC ERS response center indicating that the individual needs immediate assistance.

(9) Alleged perpetrator--A person alleged to have committed an act of abuse, neglect, or exploitation of an individual.

(10) Aquatic therapy--A service that involves a low-risk exercise method done in water to improve an individual's range of motion, flexibility, muscular strengthening and toning, cardiovascular endurance, fitness, and mobility.

(11) Auditory integration training/auditory enhancement training--Specialized training that assists an individual to cope with hearing dysfunction or over-sensitivity to certain frequency ranges of sound by facilitating auditory processing skills and exercising the middle ear and auditory nervous system.

(12) Behavior support plan--A comprehensive, individualized written plan based on a current functional behavior assessment that includes specific objectives and behavioral techniques designed to teach or increase adaptive skills and decrease or eliminate target behaviors.

(13) Behavioral support--Specialized interventions that assist an individual in increasing adaptive behaviors and replacing or modifying challenging or socially unacceptable behaviors that prevent or interfere with the individual's inclusion in the community and which consist of the following activities:

(A) conducting a functional behavior assessment;

(B) developing an individualized behavior support plan;

(C) training of and consultation with an individual, family member, or other persons involved in the individual's care regarding the implementation of the behavior support plan;

(D) monitoring and evaluation of the effectiveness of the behavior support plan;

(E) modifying, as necessary, the behavior support plan based on monitoring and evaluation of the plan's effectiveness; and

(F) counseling with and educating an individual, family members, or other persons involved in the individual's care about the techniques to use in assisting the individual to control challenging or socially unacceptable behaviors.

(14) Business day--Any day except a Saturday, a Sunday, or a national or state holiday listed in Texas Government Code §662.003(a) or (b).

(15) Calendar day--Any day, including weekends and holidays.

(16) Case management--A service that assists an individual in the following:

(A) assessing the individual's needs;

(B) enrolling into the CLASS Program;

(C) developing the individual's IPC;

(D) coordinating the provision of CLASS Program services and CFC services;

(E) monitoring the effectiveness of the CLASS Program services and CFC services and the individual's progress toward achieving the outcomes identified for the individual;

(F) revising the individual's IPC, as appropriate;

(G) accessing non-CLASS Program services and non-CFC services;

(H) resolving a crisis that occurs regarding the individual; and

(I) advocating for the individual's needs.

(17) Catchment area--As determined by HHSC, a geographic area composed of multiple Texas counties.

(18) CDS option--Consumer directed services option. A service delivery option as defined in §41.103 of this title (relating to Definitions).

(19) CDSA--FMSA.

(20) CFC--Community First Choice.

(21) CFC ERS--CFC emergency response services. Backup systems and supports used to ensure continuity of services and supports. CFC ERS includes electronic devices and an array of available technology, personal emergency response systems, and other mobile communication devices.

(22) CFC ERS provider--The entity directly providing CFC ERS to an individual, which may be the DSA or a contractor of the DSA.

(23) CFC FMS--The term used for FMS on the IPC of an individual if the individual receives only CFC PAS/HAB through the CDS option.

(24) CFC PAS/HAB--CFC personal assistance services/habilitation. A service:

(A) that consists of:

(i) personal assistance services that provide assistance to an individual in performing ADLs and IADLs based on the individual's person-centered service plan, including:

(I) non-skilled assistance with the performance of the ADLs and IADLs;

(II) household chores necessary to maintain the home in a clean, sanitary, and safe environment;

(III) escort services, which consist of accompanying and assisting an individual to access services or activities in the community, but do not include transporting an individual; and

(IV) assistance with health-related tasks; and

(ii) habilitation that provides assistance to an individual in acquiring, retaining, and improving self-help, socialization, and daily living skills and training the individual on ADLs, IADLs, and health-related tasks, such as:

(I) self-care;

(II) personal hygiene;

(III) household tasks;

(IV) mobility;

(V) money management;

(VI) community integration, including how to get around in the community;

(VII) use of adaptive equipment;

(VIII) personal decision making;

(IX) reduction of challenging behaviors to allow individuals to accomplish ADLs, IADLs, and health-related tasks; and

(X) self-administration of medication; and

(B) does not include transporting the individual, which means driving the individual from one location to another.

(25) CFC support consultation--The term used for support consultation on the IPC of an individual if the individual receives only CFC PAS/HAB through the CDS option.

(26) CFC support management--Training on how to select, manage, and dismiss an unlicensed service provider of CFC PAS/HAB as described in the *CLASS Provider Manual*.

(27) CLASS Program--The Community Living Assistance and Support Services Program.

(28) CMA--Case management agency. A program provider that has a contract with HHSC to provide case management.

(29) CMS--The Centers for Medicare & Medicaid Services. CMS is the agency within the United States Department of Health and Human Services that administers Medicare and Medicaid programs.

(30) Cognitive rehabilitation therapy--A service that:

(A) assists an individual in learning or relearning cognitive skills that have been lost or altered as a result of damage to brain cells or brain chemistry in order to enable the individual to compensate for lost cognitive functions; and

(B) includes reinforcing, strengthening, or reestablishing previously learned patterns of behavior, or establishing new patterns of cognitive activity or compensatory mechanisms for impaired neurological systems.

(31) Competitive employment--Employment that pays an individual at least the minimum wage if the individual is not self-employed.

(32) Continued family services--Services provided to an individual 18 years of age or older who resides with a support family, as described in §45.531 of this chapter (relating to Support Family Requirements), that allow the individual to reside successfully in a community setting by training the individual to acquire, retain, and improve self-help, socialization, and daily living skills or assisting the individual with ADLs. The individual must be receiving support family services immediately before receiving continued family services. Continued family services consist of services described in §45.533 of this chapter (relating to Support Family Duties).

(33) Contract--A provisional contract that HHSC enters into in accordance with §49.208 of this chapter (relating to Provisional Contract Application Approval) that has a stated expiration date or a standard contract that HHSC enters into in accordance with §49.209 of this chapter (relating to Standard Contract) that does not have a stated expiration date.

(34) Controlling person--A person who:

(A) has an ownership interest in a program provider;

(B) is an officer or director of a corporation that is a program provider;

(C) is a partner in a partnership that is a program provider;

(D) is a member or manager in a limited liability company that is a program provider;

(E) is a trustee or trust manager of a trust that is a program provider; or

(F) because of a personal, familial, or other relationship with a program provider, is in a position of actual control or authority with respect to the program provider, regardless of the person's title.

(35) DADS--HHSC.

(36) Denial--An action taken by HHSC that:

(A) rejects an individual's request for enrollment into the CLASS Program;

(B) disallows a CLASS Program service or a CFC service requested on an IPC that was not authorized on the prior IPC; or

(C) disallows a portion of the amount or level of a CLASS Program service or a CFC service requested on an IPC that was not authorized on the prior IPC.

(37) Dental treatment--A service that:

(A) consists of the following:

(i) emergency dental treatment, which is procedures necessary to control bleeding, relieve pain, and eliminate acute infection; operative procedures that are required to prevent the imminent loss of teeth; and treatment of injuries to the teeth or supporting structures;

(ii) routine preventative dental treatment, which is examinations, x-rays, cleanings, sealants, oral prophylaxes, and topical fluoride applications;

(iii) therapeutic dental treatment, which includes fillings, scaling, extractions, crowns, pulp therapy for permanent and primary teeth; restoration of carious permanent and primary teeth; maintenance of space; and limited provision of removable prostheses when masticatory function is impaired, when an existing prosthesis is unserviceable, or when aesthetic considerations interfere with employment or social development;

(iv) orthodontic dental treatment, which is procedures that include treatment of retained deciduous teeth; cross-bite therapy; facial accidents involving severe traumatic deviations; cleft palates with gross malocclusion that will benefit from early treatment; and severe, handicapping malocclusions affecting permanent dentition with a minimum score of 26 as measured on the Handicapping Labio-lingual Deviation Index; and

(v) dental sedation, which is sedation necessary to perform dental treatment including non-routine anesthesia, (for example, intravenous sedation, general anesthesia, or sedative therapy prior to routine procedures) but not including administration of routine local anesthesia only; and

(B) does not include cosmetic orthodontia.

(38) Department of Assistive and Rehabilitative Services--The Texas Workforce Commission.

(39) DFPS--The Department of Family and Protective Services.

(40) Dietary services--The provision of nutrition services, as defined in Texas Occupations Code, Chapter 701.

(41) Direct services--The following services:

(A) CLASS Program services other than case management, FMS, support consultation, support family services, continued family services, and transition assistance services; and

(B) CFC PAS/HAB, CFC ERS, and CFC support management.

(42) DSA--Direct services agency. A program provider that has a contract with HHSC to provide direct services.

(43) Employment assistance--Assistance provided to an individual to help the individual locate competitive employment in the community.

(44) Enrollment IPC--The first IPC developed for an individual upon enrollment into the CLASS Program.

(45) Exploitation--The illegal or improper act or process of using, or attempting to use, an individual or the resources of an individual for monetary or personal benefit, profit, or gain.

(46) FMS--Financial management services. A service, as defined in §41.103 of this title, that is provided to an individual participating in the CDS option.

(47) FMSA--Financial management services agency. An entity, as defined in §41.103 of this title, that provides FMS.

(48) Former military member--A person who served in the United States Army, Navy, Air Force, Marine Corps, or Coast Guard:

(A) who declared and maintained Texas as the person's state of legal residence in the manner provided by the applicable military branch while on active duty; and

(B) who was killed in action or died while in service, or whose active duty otherwise ended.

(49) Functional behavior assessment--An evaluation that is used to determine the underlying function or purpose of an individual's behavior, so an effective behavior support plan can be developed.

(50) Good cause--As determined by HHSC, a reason outside the control of the CFC ERS provider.

(51) Habilitation--A service that allows an individual to reside successfully in a community setting by training the individual to acquire, retain, and improve self-help, socialization, and daily living skills or assisting the individual with ADLs. Habilitation services consist of the following:

(A) habilitation training, which is interacting face-to-face with an individual who is awake to train the individual in the following activities:

- (i) self-care;
- (ii) personal hygiene;
- (iii) household tasks;
- (iv) mobility;
- (v) money management;
- (vi) community integration;
- (vii) use of adaptive equipment;
- (viii) management of caregivers;
- (ix) personal decision making;
- (x) interpersonal communication;

(xi) reduction of challenging behaviors;

(xii) socialization and the development of relationships;

(xiii) participating in leisure and recreational activities;

(xiv) use of natural supports and typical community services available to the public;

(xv) self-administration of medication; and

(xvi) strategies to restore or compensate for reduced cognitive skills;

(B) habilitation ADLs, which are:

(i) interacting face-to-face with an individual who is awake to assist the individual in the following activities:

(I) self-care;

(II) personal hygiene;

(III) ambulation and mobility;

(IV) money management;

(V) community integration;

(VI) use of adaptive equipment;

(VII) self-administration of medication;

(VIII) reinforce any therapeutic goal of the individual;

(IX) provide transportation to the individual; and

(X) protect the individual's health, safety and security;

(ii) interacting face-to-face or by telephone with an individual or an involved person regarding an incident that directly affects the individual's health or safety; and

(iii) performing one of the following activities that does not involve interacting face-to-face with an individual:

(I) shopping for the individual;

(II) planning or preparing meals for the individual;

(III) housekeeping for the individual;

(IV) procuring or preparing the individual's medication; or

(V) arranging transportation for the individual;

and

(C) habilitation delegated, which is tasks delegated by a registered nurse to a service provider of habilitation in accordance with 22 TAC Chapter 224 (relating to Delegation of Nursing Tasks By Registered Professional Nurses to Unlicensed Personnel For Clients With Acute Conditions Or In Acute Care Environments) or Chapter 225 (relating to RN Delegation to Unlicensed Personnel and Tasks Not Requiring Delegations In Independent Living Environments For Clients With Stable and Predictable Conditions).

(52) Health-related tasks--Specific tasks related to the needs of an individual, which can be delegated or assigned by licensed health care professionals under state law to be performed by a service provider of CFC PAS/HAB. These include tasks delegated by an RN, health maintenance activities, as defined in 22 TAC §225.4 (relating to

Definitions), that may not require delegation, and activities assigned to a service provider of CFC PAS/HAB by a licensed physical therapist, occupational therapist, or speech-language pathologist.

(53) HHSC--The Texas Health and Human Services Commission.

(54) Hippotherapy--The provision of therapy that:

(A) involves an individual interacting with and riding on horses;

(B) is designed to improve the balance, coordination, focus, independence, confidence, and motor and social skills of the individual; and

(C) is provided by two service providers at the same time, as described in §45.803(d)(11) of this chapter (relating to Qualifications of DSA Staff Persons).

(55) IADLs--Instrumental activities of daily living. Activities related to living independently in the community, including meal planning and preparation; managing finances; shopping for food, clothing, and other essential items; performing essential household chores; communicating by phone or other media; and traveling around and participating in the community.

(56) ICF/IID--Intermediate care facility for individuals with an intellectual disability or related conditions. An ICF/IID is a facility in which ICF/IID Program services are provided and that is:

(A) licensed or subject to being licensed in accordance with Texas Health and Safety Code, Chapter 252; or

(B) certified by HHSC, including a state supported living center.

(57) ICF/IID Program--The Intermediate Care Facilities for Individuals with an Intellectual Disability or Related Conditions Program, which provides Medicaid-funded residential services to individuals with an intellectual disability or related conditions.

(58) ID/RC Assessment--Intellectual Disability/Related Conditions Assessment. A form used by HHSC to determine the LOC for an individual.

(59) Individual--A person seeking to enroll or who is enrolled in the CLASS Program.

(60) Institutional services--Medicaid-funded services provided in a nursing facility licensed in accordance with Texas Health and Safety Code, Chapter 242, or in an ICF/IID.

(61) Intellectual disability--Consistent with Texas Health and Safety Code, §591.003, significantly sub-average general intellectual functioning existing concurrently with deficits in adaptive behavior and originating during the developmental period (0-18 years of age).

(62) IPC--Individual plan of care. A written plan developed by an individual's service planning team using person-centered planning and documented on an HHSC form that:

(A) meets:

(i) the requirement described in §45.201(a)(4) of this chapter (relating to Eligibility Criteria for CLASS Program Services and CFC Services); and

(ii) the requirements described in §45.214(a)(1)(E) and (b) of this chapter (relating to Development of Enrollment IPC); and

(B) is authorized by HHSC in accordance with Subchapter B of this chapter (relating to Eligibility, Enrollment, and Review).

(63) IPC cost--The estimated annual cost of CLASS Program services on an IPC.

(64) IPC period--The effective period of an enrollment IPC and a renewal IPC as follows:

(A) for an enrollment IPC, the period of time from the effective date of an enrollment IPC, as described in §45.214(g) of this chapter, until the first calendar day of the same month of the effective date in the following year; and

(B) for a renewal IPC, a 12-month period of time starting on the effective date of a renewal IPC as described in §45.222(b) of this chapter (relating to Renewal IPC and Requirement for Authorization to Continue Services).

(65) IPP--Individual program plan. A written plan documented on an HHSC form that describes the goals and objectives to be met by the provision of each CLASS Program service and CFC service, other than CFC support management, on an individual's IPC that:

(A) are supported by justifications;

(B) are measurable; and

(C) have timelines.

(66) LAR--Legally authorized representative. A person authorized by law to act on behalf of an individual with regard to a matter described in this chapter, and may include a parent, guardian, or managing conservator of a minor, or the guardian of an adult.

(67) Licensed vocational nurse--A person licensed to provide vocational nursing in accordance with Texas Occupations Code, Chapter 301.

(68) Licensed vocational nursing--The provision of vocational nursing, as defined in Texas Occupations Code, Chapter 301.

(69) LOC--Level of care. A determination given to an individual as part of the eligibility determination process based on data on the ID/RC Assessment.

(70) Managed care organization--This term has the meaning set forth in Texas Government Code, §536.001.

(71) MAO Medicaid--Medical Assistance Only Medicaid. A type of Medicaid by which an individual qualifies financially for Medicaid assistance but does not receive Supplemental Security Income (SSI) benefits.

(72) Massage therapy--The provision of massage therapy as defined in Texas Occupations Code, Chapter 455.

(73) Medicaid--A program administered by CMS and funded jointly by the states and the federal government that pays for health care to eligible groups of low-income people.

(74) Medicaid waiver program--A service delivery model authorized under §1915(c) of the Social Security Act in which certain Medicaid statutory provisions are waived by CMS.

(75) MESAV--Medicaid Eligibility Service Authorization Verification. The automated system that contains information regarding an individual's Medicaid eligibility and service authorizations.

(76) Military family member--A person who is the spouse or child (regardless of age) of:

(A) a military member; or

(B) a former military member.

(77) Military member--A member of the United States military serving in the Army, Navy, Air Force, Marine Corps, or Coast Guard on active duty who has declared and maintains Texas as the member's state of legal residence in the manner provided by the applicable military branch.

(78) Minor home modification--A physical adaptation to an individual's residence that is necessary to address the individual's specific needs and that enables the individual to function with greater independence in the individual's residence or to control his or her environment and:

(A) is included on the list of minor home modifications in the *CLASS Provider Manual*; or

(B) except as provided by §45.618(c) of this chapter (relating to Repair or Replacement of Minor Home Modification), is the repair and maintenance of a minor home modification purchased through the CLASS Program that is needed after one year has elapsed from the date the minor home modification is complete and that is not covered by a warranty.

(79) Music therapy--The use of musical or rhythmic interventions to restore, maintain, or improve an individual's social or emotional functioning, mental processing, or physical health.

(80) Natural supports--Unpaid persons, including family members, volunteers, neighbors, and friends, who assist and sustain an individual.

(81) Neglect--A negligent act or omission that caused physical or emotional injury or death to an individual or placed an individual at risk of physical or emotional injury or death.

(82) Nursing facility--A facility that is licensed in accordance with Texas Health and Safety Code, Chapter 242.

(83) Occupational therapy--The provision of occupational therapy, as described in Texas Occupations Code, Chapter 454.

(84) Own home or family home--A residence that is not:

(A) an ICF/IID;

(B) a nursing facility licensed or subject to being licensed in accordance with Texas Health and Safety Code, Chapter 242;

(C) an assisted living facility licensed or subject to being licensed in accordance with Texas Health and Safety Code, Chapter 247;

(D) a residential child-care operation licensed or subject to being licensed by DFPS unless it is a foster family home or a foster group home;

(E) a facility licensed or subject to being licensed by the Department of State Health Services;

(F) a residential facility operated by the Texas Workforce Commission;

(G) a residential facility operated by the Texas Juvenile Justice Department, a jail, or prison; or

(H) a setting in which two or more dwellings, including units in a duplex or apartment complex, single family homes, or facilities listed in subparagraphs (A) - (G) of this paragraph, but excluding supportive housing under Section 811 of the National Affordable Housing Act of 1990, meet all of the following criteria:

(i) the dwellings create a residential area distinguishable from other areas primarily occupied by persons who do not require routine support services because of a disability;

(ii) most of the residents of the dwellings are individuals with an intellectual disability, a related condition, or a physical disability; and

(iii) the residents of the dwellings are provided routine support services through personnel, equipment, or service facilities shared with the residents of the other dwellings.

(85) PAS/HAB plan--Personal Assistance Services (PAS)/Habilitation (HAB) Plan. A written plan developed by an individual's service planning team and documented on an HHSC form that describes the type and frequency of CFC PAS/HAB activities to be performed by a service provider.

(86) Person-centered planning--A process that empowers the individual (and the LAR on the individual's behalf) to direct the development of an IPC that meets the individual's outcomes. The process:

(A) identifies existing supports and services necessary to achieve the individual's outcomes;

(B) identifies natural supports available to the individual and negotiates needed services and supports;

(C) occurs with the support of a group of people chosen by the individual (and the LAR on the individual's behalf); and

(D) accommodates the individual's style of interaction and preferences regarding time and setting.

(87) Physical abuse--Any of the following:

(A) an act or failure to act performed knowingly, recklessly, or intentionally, including incitement to act, that caused physical injury or death to an individual or placed an individual at risk of physical injury or death;

(B) an act of inappropriate or excessive force or corporal punishment, regardless of whether the act results in a physical injury to an individual;

(C) the use of a restraint on an individual not in compliance with federal and state laws, rules, and regulations; or

(D) seclusion.

(88) Physical therapy--The provision of physical therapy, as defined in Texas Occupations Code, Chapter 453.

(89) Physician--As defined in 26 TAC §558.2 (relating to Definitions), a person who:

(A) is licensed in Texas to practice medicine or osteopathy in accordance with Texas Occupations Code, Chapter 155;

(B) is licensed in Arkansas, Louisiana, New Mexico, or Oklahoma to practice medicine, who is the treating physician of an individual, and orders home health for the individual in accordance with the Texas Occupations Code, §151.056(b)(4); or

(C) is a commissioned or contract physician or surgeon who serves in the United States uniformed services or Public Health Service if the person is not engaged in private practice, in accordance with the Texas Occupations Code, §151.052(a)(8).

(90) Prevocational services--Services that are not job-task oriented and are provided to an individual who the service planning team does not expect to be employed (without receiving supported employment) within one year after prevocational services are to begin, to



prepare the individual for employment. Prevocational services consist of:

(A) assessment of vocational skills an individual needs to develop or improve upon;

(B) individual and group instruction regarding barriers to employment;

(C) training in skills:

(i) that are not job-task oriented;

(ii) that are related to goals identified in the individual's PAS/HAB plan;

(iii) that are essential to obtaining and retaining employment, such as the effective use of community resources, transportation, and mobility training; and

(iv) for which an individual is not compensated more than 50 percent of the federal minimum wage or industry standard, whichever is greater;

(D) training in the use of adaptive equipment necessary to obtain and retain employment; and

(E) transportation between the individual's place of residence and prevocational services work site when other forms of transportation are unavailable or inaccessible.

(91) Program provider--A DSA or a CMA.

(92) Public emergency personnel--Personnel of a sheriff's department, police department, emergency medical service, or fire department.

(93) Recreational therapy--Recreational or leisure activities that assist an individual to restore, remediate, or habilitate the individual's level of functioning and independence in life activities, promote health and wellness, and reduce or eliminate the activity limitations caused by an illness or disabling condition.

(94) Reduction--An action taken by HHSC as a result of a review of a revised IPC or renewal IPC that decreases the amount or level of a service authorized by HHSC on the prior IPC.

(95) Registered nurse--A person licensed to provide professional nursing in accordance with Texas Occupations Code, Chapter 301.

(96) Registered nursing--The provision of professional nursing, as defined in Texas Occupations Code, Chapter 301.

(97) Related condition--As defined in the Code of Federal Regulations (CFR), Title 42, §435.1010, a severe and chronic disability that:

(A) is attributed to:

(i) cerebral palsy or epilepsy; or

(ii) any other condition, other than mental illness, found to be closely related to an intellectual disability because the condition results in impairment of general intellectual functioning or adaptive behavior similar to that of individuals with an intellectual disability, and requires treatment or services similar to those required for individuals with an intellectual disability;

(B) is manifested before the individual reaches 22 years of age;

(C) is likely to continue indefinitely; and

(D) results in substantial functional limitation in at least three of the following areas of major life activity:

(i) self-care;

(ii) understanding and use of language;

(iii) learning;

(iv) mobility;

(v) self-direction; and

(vi) capacity for independent living.

(98) Relative--A person related to another person within the fourth degree of consanguinity or within the second degree of affinity. A more detailed explanation of this term is included in the *CLASS Provider Manual*.

(99) Renewal IPC--An IPC developed for an individual in accordance with §45.223 of this chapter (relating to Renewal and Revision of an IPC) because the IPC will expire within 90 calendar days.

(100) Respite--The temporary assistance with an individual's ADLs if the individual has the same residence as a person who routinely provides such assistance and support to the individual, and the person is temporarily unavailable to provide such assistance and support.

(A) If the person who routinely provides assistance and support, resides with the individual, and is temporarily unavailable to provide assistance and support, is a service provider of habilitation or CFC PAS/HAB or an employee in the CDS option of habilitation or CFC PAS/HAB, HHSC does not authorize respite unless:

(i) the service provider or employee routinely provides unpaid assistance and support with ADLs to the individual;

(ii) the amount of respite does not exceed the amount of unpaid assistance and support routinely provided; and

(iii) the service provider of respite or employee in the CDS option of respite does not have the same residence as the individual.

(B) If the person who routinely provides assistance and support, resides with the individual, and is temporarily unavailable to provide assistance and support, is a service provider of support family services or continued family services, HHSC does not authorize respite unless:

(i) for an individual receiving support family services, the individual does not receive respite on the same day the individual receives support family services;

(ii) for an individual receiving continued family services, the individual does not receive respite on the same day the individual receives continued family services; and

(iii) the service provider of respite or employee in the CDS option of respite does not have the same residence as the individual.

(C) Respite services consist of the following:

(i) interacting face-to-face with an individual who is awake to assist the individual in the following activities:

(I) self-care;

(II) personal hygiene;

(III) ambulation and mobility;

(IV) money management;

(V) community integration;

(VI) use of adaptive equipment;

(VII) self-administration of medication;

(VIII) reinforce any therapeutic goal of the individual;

(IX) provide transportation to the individual; and

(X) protect the individual's health, safety, and security;

(ii) interacting face-to-face or by telephone with an individual or an involved person regarding an incident that directly affects the individual's health or safety; and

(iii) performing one of the following activities that do not involve interacting face-to-face with an individual:

(I) shopping for the individual;

(II) planning or preparing meals for the individual;

(III) housekeeping for the individual;

(IV) procuring or preparing the individual's medication;

(V) arranging transportation for the individual;

or

(VI) protecting the individual's health, safety, and security while the individual is asleep.

(101) Responder--A person designated to respond to an alarm call activated by an individual.

(102) Revised IPC--An enrollment IPC or a renewal IPC that is revised during an IPC period in accordance with §45.223 of this chapter to add a new CLASS Program service or CFC service or change the amount of an existing service.

(103) Seclusion--The involuntary placement of an individual alone in an area from which the individual is prevented from leaving.

(104) Service planning team--A planning team convened and facilitated by a CLASS Program case manager consisting of the following persons:

- (A) the individual;
- (B) if applicable, the individual's LAR;
- (C) the case manager;
- (D) a representative of the DSA;
- (E) other persons whose inclusion is requested by the individual or LAR and who agree to participate; and
- (F) a person selected by the DSA, with the approval of the individual or LAR, who is:

(i) professionally qualified by certification or licensure and has special training and experience in the diagnosis and habilitation of persons with the individual's related condition; or

(ii) directly involved in the delivery of services and supports to the individual.

(105) Service provider--A person who is an employee or contractor of a DSA who provides a direct service.

(106) Sexual abuse-- Any of the following:

- (A) sexual exploitation of an individual;
- (B) non-consensual or unwelcomed sexual activity with an individual; or
- (C) consensual sexual activity between an individual and a service provider, staff person, volunteer, or controlling person, unless a consensual sexual relationship with an adult individual existed before the service provider, staff person, volunteer, or controlling person became a service provider, staff person, volunteer, or controlling person.

(107) Sexual activity--An activity that is sexual in nature, including kissing, hugging, stroking, or fondling with sexual intent.

(108) Sexual exploitation--A pattern, practice, or scheme of conduct against an individual that can reasonably be construed as being for the purposes of sexual arousal or gratification of any person:

- (A) which may include sexual contact; and
- (B) does not include obtaining information about an individual's sexual history within standard accepted clinical practice.

(109) Specialized licensed vocational nursing--The provision of licensed vocational nursing to an individual who has a tracheostomy or is dependent on a ventilator.

(110) Specialized registered nursing--The provision of registered nursing to an individual who has a tracheostomy or is dependent on a ventilator.

(111) Specialized therapies--Services to promote skills development, maintain skills, decrease inappropriate behaviors, facilitate emotional well-being, create opportunities for socialization, or improve physical and medical status that consist of the following:

- (A) aquatic therapy;
- (B) hippotherapy;
- (C) massage therapy;
- (D) music therapy;
- (E) recreational therapy; and
- (F) therapeutic horseback riding.

(112) Speech and language pathology--The provision of speech-language pathology, as defined in Texas Occupations Code, Chapter 401.

(113) Staff person--A full-time or part-time employee of the program provider.

(114) State supported living center--A state-supported and structured residential facility operated by HHSC to provide to persons with an intellectual disability a variety of services, including medical treatment, specialized therapy, and training in the acquisition of personal, social, and vocational skills, but does not include a community-based facility owned by HHSC.

(115) Support consultation--A service, as defined in §41.103 of this title, that may be provided to an individual who chooses to participate in the CDS option.

(116) Support family services--Services provided to an individual under 18 years of age who resides with a support family, as described in §45.531 of this chapter, that allow the individual to reside successfully in a community setting by supporting the individual to acquire, maintain, and improve self-help, socialization, and daily living skills or assisting the individual with ADLs. Support family services consist of the services described in §45.533 of this chapter.

(117) Supported employment--Assistance provided to sustain competitive employment to an individual who, because of a disability, requires intensive, ongoing support to be self-employed, work from home, or perform in a work setting at which individuals without disabilities are employed.

(118) System check--A test of the CFC ERS equipment to determine if:

- (A) the individual can successfully activate an alarm call; and
- (B) the equipment is working properly.

(119) Target behavior--A behavior identified in a behavior support plan for reduction or elimination.

(120) Temporary admission--Being admitted for 180 consecutive calendar days or less.

(121) Therapeutic horseback riding--The provision of therapy that:

- (A) involves an individual interacting with and riding on horses; and
- (B) is designed to improve the balance, coordination, focus, independence, confidence, and motor and social skills of the individual.

(122) Transition assistance services--In accordance with Chapter 62 of this title (relating to Transition Assistance Services), services provided to an individual who is receiving institutional services and is eligible for and enrolling into the CLASS Program.

(123) Transportation plan--A written plan, based on person-centered planning and developed with an individual using the HHSC Individual Transportation Plan form found on the HHSC website. A transportation plan is used to document how transportation will be delivered to support an individual's desired goals and objectives for transportation as identified in the IPP.

(124) Verbal or emotional abuse--Any act or use of verbal or other communication, including gestures:

- (A) to:
  - (i) harass, intimidate, humiliate, or degrade an individual; or
  - (ii) threaten an individual with physical or emotional harm; and
- (B) that:
  - (i) results in observable distress or harm to the individual; or
  - (ii) is of such a serious nature that a reasonable person would consider it harmful or a cause of distress.

(125) Volunteer--A person who works for a program provider without compensation, other than reimbursement for actual expenses.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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**SUBCHAPTER B. ELIGIBILITY,  
ENROLLMENT, AND REVIEW  
DIVISION 1. ELIGIBILITY AND  
MAINTENANCE OF INTEREST LIST  
40 TAC §45.201**

**STATUTORY AUTHORITY**

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendment implements Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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**DIVISION 2. ENROLLMENT PROCESS  
40 TAC §§45.212 - 45.214, 45.216**

**STATUTORY AUTHORITY**

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendments implement Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

§45.212. *Process for Enrollment of an Individual.*

(a) After notification by HHSC that an individual selected a CMA as a program provider, the CMA must assign a case manager to perform the following functions within 14 calendar days after HHSC's notification to the CMA:

(1) verify that the individual resides in the catchment area for which the individual's selected CMA and DSA have a contract;

(2) conduct an initial face-to-face, in-home visit with the individual and LAR or person actively involved with the individual to:

(A) provide an oral and written explanation of the following to the individual and LAR or person actively involved with the individual:

(i) CLASS Program services, including transition assistance services if the individual is receiving institutional services;

(ii) CFC services;

(iii) the eligibility requirements for:

(I) CLASS Program services as described in §45.201(a) of this subchapter (relating to Eligibility Criteria for CLASS Program Services and CFC Services);

(II) CFC services as described in §45.201(c) of this subchapter to individuals who do not receive MAO Medicaid; and

(III) CFC services as described in §45.201(d) of this subchapter to individuals who receive MAO Medicaid;

(iv) the mandatory participation requirements of an individual as described in §45.302 of this chapter (relating to Mandatory Participation Requirements of an Individual);

(v) the CDS option as described in §45.217 of this division (relating to CDS Option);

(vi) that CLASS Program services or CFC services may be terminated as described in §§45.406 - 45.409 of this chapter (relating to Termination of CLASS Program Services and CFC Services With Advance Notice Because of Ineligibility or Leave from the State or Because DSAs Cannot Ensure Health and Safety, Termination of CLASS Program Services and CFC Services With Advance Notice Because of Non-compliance With Mandatory Participation Requirements, Termination of CLASS Program Services and CFC Services Without Advance Notice, and Termination of CLASS Program Services and CFC Services Without Advance Notice Because of Behavior Causing Immediate Jeopardy);

(vii) the right to request a fair hearing in accordance with §45.301 of this chapter (relating to Individual's Right to a Fair Hearing);

(viii) that the individual and LAR or person actively involved with the individual may report an allegation of abuse, neglect, or exploitation to DFPS by calling the toll-free telephone number at 1-800-252-5400;

(ix) the process by which the individual and LAR or person actively involved with the individual may file a complaint regarding case management as required by §49.309 of this title (relating to Complaint Process), and that the HHSC Office of the Ombudsman toll-free telephone number at 1-877-787-8999 may be used to file a complaint;

(x) voter registration, if the individual is 18 years of age or older; and

(xi) that while the individual is temporarily staying at a location outside the catchment area in which the individual resides,

but within the state of Texas during a period of no more than 60 consecutive days, the individual and LAR or person actively involved with the individual may request that the DSA provide:

(I) habilitation;

(II) out-of-home respite in a camp described in §45.806(b)(2)(D) of this chapter (relating to Respite and Dental Treatment);

(III) adaptive aids;

(IV) nursing; or

(V) CFC PAS/HAB; and

(B) educate the individual and LAR or person actively involved with the individual about protecting the individual from abuse, neglect, and exploitation; and

(3) obtain the signature of the individual or LAR on a Waiver Program Verification of Freedom of Choice form documenting the individual's or LAR's choice of the CLASS Program over the ICF/IID Program.

(b) The CMA must:

(1) within two business days of the case manager's face-to-face, in-home visit required by subsection (a)(2) of this section:

(A) collect and maintain the information necessary for the CMA and DSA to process the individual's request for enrollment into the CLASS Program in accordance with the *CLASS Provider Manual*; and

(B) provide the individual's selected DSA with the collected information required by subparagraph (A) of this paragraph;

(2) assist the individual or LAR in completing and submitting an application for Medicaid financial eligibility as required by §45.302(1) of this chapter (relating to Mandatory Participation Requirements of an Individual); and

(3) ensure that the case manager documents in the individual's record the progress toward completing a Medicaid application and enrollment into CLASS Program services.

(c) If an individual or LAR does not submit a Medicaid application to HHSC within 30 calendar days of the case manager's initial face-to-face, in-home visit as required by §45.302(1) of this chapter, but is making good faith efforts to complete the application, the CMA may extend, in 30-calendar day increments, the time frame in which the application must be submitted to HHSC, except as provided in paragraph (1) of this subsection.

(1) The CMA may not grant an extension that results in a time period of more than 365 calendar days from the date of the case manager's initial face-to-face, in-home visit.

(2) The CMA must ensure that the case manager documents each extension in the individual's record.

(d) If an individual or LAR does not submit a Medicaid application to HHSC as required by §45.302(1) of this chapter and is not making good faith efforts to complete the application, the CMA must request, in writing, that HHSC withdraw the offer of a program vacancy made to the individual in accordance with §45.211(d)(3) of this division (relating to Written Offer of CLASS Program Services).

(e) If DSAs serving the catchment area in which the individual resides are not willing to provide CLASS Program services or CFC services to an individual because they have determined that they cannot ensure the individual's health and safety, the CMA must provide to

HHSC, in writing, the specific reasons the DSAs have determined that they cannot ensure the individual's health and safety.

(f) The case manager must determine whether an individual meets the following criteria:

(1) the individual is being discharged from a nursing facility or an ICF/IID;

(2) the individual has not previously received transition assistance services as described in §62.5(e) of this title (relating to Service Description);

(3) the individual's proposed enrollment IPC does not include support family services or continued family services; and

(4) the individual anticipates needing transition assistance services as described in §62.5(e) of this title.

(g) If the case manager determines that an individual meets the criteria described in subsection (f) of this section, the case manager must:

(1) provide the individual or LAR with a list of transition assistance services providers in the catchment area in which the individual will reside;

(2) complete, with the individual or LAR, the Transition Assistance Services (TAS) Assessment and Authorization form found on the HHSC website in accordance with the form's instructions, which includes:

(A) identifying the transition assistance services the individual needs as described in §62.5(e) of this title;

(B) estimating the monetary amount for each transition assistance service identified, which must be within the service limit described in §45.218(a)(4) of this division (relating to Service Limits); and

(C) documenting the individual's or LAR's choice of transition assistance services provider;

(3) submit the completed form to HHSC for authorization;

(4) send the form authorized by HHSC to the selected transition assistance services provider; and

(5) include the transition assistance services and the monetary amount authorized by HHSC on the individual's proposed enrollment IPC.

(h) After notification by HHSC that an individual selected the DSA as a program provider, the DSA must ensure that the following functions are performed during a face-to-face in-home visit within 14 calendar days after the CMA provides information to the DSA as required by subsection (b)(1)(B) of this section:

(1) a DSA staff person:

(A) informs the individual and LAR or person actively involved with the individual, orally and in writing:

(i) that the individual, LAR, or person actively involved with the individual may report an allegation of abuse, neglect, or exploitation to DFPS by calling the toll-free telephone number at 1-800-252-5400; and

(ii) the process by which the individual, LAR, or person actively involved with the individual may file a complaint regarding CLASS Program services or CFC services provided by the DSA as required by §49.309 of this title, and that the HHSC Complaint and Incident Intake toll-free telephone number at 1-800-458-9858 may be used to file a complaint; and

(B) educates the individual and LAR or person actively involved with the individual about protecting the individual from abuse, neglect, and exploitation;

(2) an appropriate professional completes an adaptive behavior screening assessment in accordance with the assessment instructions; and

(3) a registered nurse, in accordance with the CLASS Provider Manual, completes:

(A) a nursing assessment using the HHSC CLASS/DBMD Nursing Assessment form;

(B) the HHSC Related Conditions Eligibility Screening Instrument; and

(C) the ID/RC Assessment.

(i) A DSA must:

(1) ensure that the primary diagnosis of the individual documented on the ID/RC Assessment is authorized by a physician;

(2) submit to HHSC for HHSC's decision regarding whether the individual meets the LOC VIII criteria required by §45.201(a)(2) of this subchapter (relating to Eligibility Criteria for CLASS Program Services and CFC Services):

(A) the completed adaptive behavior screening assessment;

(B) the completed HHSC Related Conditions Eligibility Screening Instrument; and

(C) the completed ID/RC Assessment; and

(3) send the completed HHSC CLASS/DBMD Nursing Assessment form described in subsection (h)(3)(A) of this section to the CMA.

(j) In accordance with §45.213 of this division (relating to Determination by HHSC of Whether an Individual Meets LOC VIII Criteria), HHSC reviews the documentation described in subsection (i)(2) of this section.

(k) If a DSA receives written notice from HHSC that the individual meets the LOC VIII criteria required by §45.201(a)(2) of this subchapter, the DSA must notify the individual's CMA of HHSC's decision within one business day after receiving the notice from HHSC.

(l) If HHSC determines that an individual does not meet the LOC VIII criteria required by §45.201(a)(2) of this subchapter, HHSC sends written notice to the individual or LAR of the denial of the individual's request for enrollment into the CLASS Program in accordance with §45.402(b) of this chapter (relating to Denial of a Request for Enrollment into the CLASS Program).

(m) If the CMA receives notice from the DSA that HHSC determined that an individual meets the LOC VIII criteria required by §45.201(a)(2) of this subchapter, the CMA must comply with this subsection.

(1) The CMA must ensure that the service planning team develops:

(A) a proposed enrollment IPC, PAS/HAB plan, and IPPs for the individual in accordance with §45.214 of this division (relating to Development of Enrollment IPC); and

(B) a transportation plan, if transportation as a habilitation activity or as an adaptive aid is included on the IPC.

(2) The CMA must submit the documents described in paragraph (1)(A) and (B) of this subsection to HHSC for review in accordance with §45.214 of this division.

(n) HHSC reviews a proposed enrollment IPC in accordance with §45.216 of this division (relating to HHSC's Review of an Enrollment IPC) to determine if:

(1) the IPC meets the eligibility criterion described in §45.201(a)(4) of this subchapter (relating to Eligibility Criteria for CLASS Program Services and CFC Services); and

(2) the CLASS Program services and CFC services specified in the IPC meet the requirements described in §45.214(a)(1)(E)(iii) or (iv) and §45.214(b) of this division.

(o) The CMA and DSA must not provide CLASS Program services or CFC services to an individual until notified by HHSC that the individual's request for enrollment into the CLASS Program has been approved.

(p) If HHSC notifies the CMA, in accordance with §45.216(c)(1) of this division, that the individual's request for enrollment is approved:

(1) the CMA must ensure the case manager complies with §45.216(c)(2)(A) - (C) of this division; and

(2) the CMA and DSA must:

(A) electronically access MESAV to determine if the information on the enrollment IPC is consistent with the information in MESAV;

(B) if the information on the enrollment IPC is inconsistent with the information in MESAV, notify HHSC of the inconsistency; and

(C) initiate CLASS Program services and CFC services for the individual in accordance with the individual's enrollment IPC within seven calendar days after the CMA receives HHSC's notification.

(q) If HHSC notifies the CMA that the individual's request for enrollment into the CLASS Program is approved but action is being taken to deny a CLASS Program service or CFC service as described in §45.216(e) of this division, including modifying the individual's proposed enrollment IPC:

(1) the CMA must comply with §45.216(f) of this division; and

(2) the CMA and DSA must comply with §45.216(g) of this division.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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### DIVISION 3. REVIEWS

### 40 TAC §§45.221, 45.223, 45.225 - 45.227

#### STATUTORY AUTHORITY

The amendments and new sections are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendments and new sections implement Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

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### SUBCHAPTER D. TRANSFER, DENIAL, SUSPENSION, REDUCTION, AND TERMINATION OF SERVICES

### 40 TAC §§45.403, 45.405, 45.406

#### STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendments implement Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

§45.405. *Reduction of a CLASS Program Service or CFC Service.*

(a) HHSC reduces a CLASS Program service or CFC service on an individual's IPC, based on a review described in §45.223 of this chapter (relating to Renewal and Revision of an IPC) or §45.225 of this chapter (relating to Utilization Review of an IPC by HHSC), if HHSC determines that the CLASS Program service or CFC service on the IPC does not meet the requirements described in §45.214(a)(1)(E)(iii) or (iv) and §45.214(b) of this chapter (relating to Development of Enrollment IPC).

(b) If HHSC proposes to reduce a CLASS Program service or CFC service on the individual's IPC, HHSC modifies the IPC and notifies the individual's CMA, in writing, of the proposed reduction.

(c) Upon receipt of a written notice from HHSC proposing to reduce a CLASS Program service or CFC service, the CMA must:

(1) send a copy of the modified IPC to the DSA and, if the individual receives a service through the CDS option, to the FMSA;

(2) in accordance with the *CLASS Provider Manual*, send written notice to the individual or LAR of the proposal to reduce the service, copying the individual's DSA and, if selected, FMSA; and

(3) include in the notice the individual's right to request a fair hearing in accordance with §45.301 of this chapter (relating to Individual's Right to a Fair Hearing).

(d) If the individual or LAR requests a fair hearing before the effective date of the reduction of a CLASS Program service or CFC service, as specified in the written notice, the modified IPC described in subsection (b) of this section may not be implemented and the DSA must provide the service to the individual in the amount authorized in the prior IPC while the appeal is pending.

(e) If the individual or LAR does not request a fair hearing before the effective date of the reduction of a CLASS Program service or CFC service, a CMA and DSA must:

(1) electronically access MESAV to determine if the information on the modified IPC is consistent with the information in MESAV;

(2) if the information on the modified IPC is inconsistent with the information in MESAV, notify HHSC of the inconsistency; and

(3) implement the modified IPC.

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## SUBCHAPTER G. ADDITIONAL CMA REQUIREMENTS

### 40 TAC §§45.702, 45.704, 45.706 - 45.709

#### STATUTORY AUTHORITY

The amendments and new sections are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendments implement Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

#### §45.704. *Training of CMA Staff Persons and Volunteers.*

(a) A CMA must ensure that:

(1) a CMA staff person completes training as described in the *CLASS Provider Manual*;

(2) a CMA staff person completes training on the CLASS Program and CFC, including the requirements of this chapter and the CLASS Program services and CFC services described in §45.104 of this chapter (relating to Description of the CLASS Program and CFC Option); and

(3) a CMA staff person who is responsible for completing the IPP completes person-centered service planning training approved by HHSC:

(A) by June 1, 2017, if the staff person was hired on or before June 1, 2015; or

(B) within two years after the hire date, if the staff person was hired after June 1, 2015.

(b) A CMA must:

(1) ensure that each CMA staff person and volunteer:

(A) is trained on and knowledgeable of:

(i) acts that constitute abuse, neglect, and exploitation;

(ii) signs and symptoms of abuse, neglect, and exploitation; and

(iii) methods to prevent abuse, neglect, and exploitation;

(B) is instructed to report to DFPS immediately, but not later than 24 hours, after having knowledge or suspicion that an individual has been or is being abused, neglected, or exploited, by:

(i) calling the DFPS Abuse Hotline toll-free telephone number, 1-800-252-5400; or

(ii) using the DFPS Abuse Hotline website; and

(C) is provided with the instructions described in subparagraph (B) of this paragraph in writing;

(2) conduct the activities described in paragraph (1)(A) - (C) of this subsection:

(A) within one year after the person's most recent training on abuse, neglect, and exploitation and annually thereafter, if the CMA staff person or volunteer was hired before July 1, 2019; or

(B) before assuming job duties and annually thereafter, if the CMA staff person or volunteer is hired on or after July 1, 2019; and

(3) document:

(A) the name of the person who received the training required by this subsection;

(B) the date the training was conducted; and

(C) the name of the person who conducted the training.

#### §45.709. *CMA: Requirements Related to the Abuse, Neglect, and Exploitation of an Individual.*

(a) If a report required by §45.708 of this subchapter (relating to CMA: Reporting Allegations of Abuse, Neglect, or Exploitation of an Individual) alleges abuse, neglect, or exploitation by a person who is not a staff person, volunteer, or controlling person of a CMA, the CMA must:

(1) as necessary:

(A) obtain immediate medical or psychological services for the individual; and

(B) assist in obtaining ongoing medical or psychological services for the individual;

(2) discuss with the individual or LAR alternative residential settings and additional services that may help ensure the individual's safety;

(3) when taking the actions described in paragraphs (1) and (2) of this subsection, avoid compromising the investigation or further traumatizing the individual; and

(4) preserve and protect evidence related to the allegation.

(b) If a report required by §45.708 of this subchapter alleges abuse, neglect, or exploitation of an individual by a staff person, volunteer, or controlling person of a CMA; or if the CMA is notified by HHSC of an allegation of abuse, neglect, or exploitation by a staff person, volunteer, or controlling person of the CMA, the CMA must:

(1) as necessary:

(A) obtain immediate medical or psychological services for the individual; and

(B) assist in obtaining ongoing medical or psychological services for the individual;

(2) take actions to secure the safety of the individual, including if necessary, ensuring that the alleged perpetrator of the abuse, neglect, or exploitation does not have contact with the individual or any other individual until HHSC completes the investigation;

(3) when taking the actions described in paragraphs (1) and (2) of this subsection, avoid compromising the investigation or further traumatizing the individual;

(4) preserve and protect evidence related to the allegation; and

(5) as soon as possible, but no later than 24 hours, after the CMA reports or is notified of the allegation, notify the individual, the LAR, and the DSA of:

(A) the allegation report; and

(B) the actions the CMA has taken or will take based on the allegation, the condition of the individual, and the nature and severity of any harm to the individual, including the actions required by paragraph (2) of this subsection.

(c) During an HHSC investigation of an alleged perpetrator who is a staff person, volunteer, or controlling person of a CMA, the CMA must:

(1) cooperate with the investigation as requested by HHSC, including providing documentation and participating in an interview;

(2) provide HHSC access to:

(A) sites owned, operated, or controlled by the CMA;

(B) individuals, staff persons, volunteers, and controlling persons; and

(C) records pertinent to the investigation of the allegation; and

(3) ensure that staff persons, volunteers, and controlling persons of the CMA comply with paragraphs (1) and (2) of this subsection.

(d) After a CMA receives a final investigative report from HHSC for an investigation described in subsection (c) of this section, the CMA must:

(1) if the allegation of abuse, neglect, or exploitation is confirmed by HHSC:

(A) review the report, including any concerns and recommendations by HHSC; and

(B) take action within the CMA's authority to prevent the reoccurrence of abuse, neglect or exploitation, including disciplinary action against a staff person or volunteer of the CMA confirmed to have committed abuse, neglect, or exploitation;

(2) if the allegation of abuse, neglect, or exploitation is unconfirmed, inconclusive, or unfounded:

(A) review the report, including any concerns and recommendations by HHSC; and

(B) take appropriate action within the CMA's authority, as necessary; and

(3) immediately, but not later than five calendar days after the date the CMA receives the HHSC final investigative report, notify the individual and the LAR of:

(A) the investigation finding; and

(B) the action taken by the CMA in response to the HHSC investigation as required by paragraphs (1) and (2) of this subsection.

(e) A CMA must not retaliate against:

(1) a staff person, individual, or other person who files a complaint, presents a grievance, or otherwise provides good faith information relating to the possible abuse, neglect, or exploitation of an individual, including:

(A) the use of seclusion; and

(B) the use of a restraint not in compliance with federal and state laws, rules, and regulations; and

(2) an individual because a person on behalf of the individual files a complaint, presents a grievance, or otherwise provides good faith information relating to the possible abuse, neglect, or exploitation of an individual, including:

(A) the use of seclusion; and

(B) the use of a restraint not in compliance with federal and state laws, rules, and regulations.

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**40 TAC §45.706**



## STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The repeal implements Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

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## SUBCHAPTER H. ADDITIONAL DSA REQUIREMENTS

### 40 TAC §§45.802, 45.804, 45.807, 45.810, 45.811

#### STATUTORY AUTHORITY

The amendments and new sections are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendments and new sections implement Texas Government Code, §531.0055, §531.021, and Texas Human Resources Code, §32.021.

*§45.804. Training of DSA Staff Persons, Service Providers, and Volunteers.*

(a) A DSA must ensure:

(1) that a DSA staff person who has direct contact with an individual completes training as described in the *CLASS Provider Manual*; and

(2) that a DSA staff person who is responsible for developing the PAS/HAB plan completes person-centered service planning training approved by HHSC:

(A) by June 1, 2017, if the staff person was hired on or before June 1, 2015; or

(B) within two years after the hire date, if the staff person was hired after June 1, 2015.

(b) A DSA must ensure that, before providing services to an individual:

(1) a service provider of habilitation completes:

(A) two hours of orientation covering the following:

(i) an overview of related conditions; and

(ii) an explanation of commonly performed tasks regarding habilitation;

(B) training in cardiopulmonary resuscitation and choking prevention that includes an in-person evaluation by a qualified instructor of the service provider's ability to perform these actions; and

(C) training in the habilitation activities necessary to meet the needs and characteristics of the individual to whom the service provider is assigned, in accordance with the *CLASS Provider Manual*, with training to occur in the individual's home with full participation from the individual, if possible; and

(2) a service provider of CFC PAS/HAB completes:

(A) two hours of orientation covering the following:

(i) an overview of related conditions; and

(ii) an explanation of commonly performed CFC PAS/HAB activities;

(B) training in cardiopulmonary resuscitation and choking prevention that includes an in-person evaluation by a qualified instructor of the service provider's ability to perform these actions; and

(C) training in the CFC PAS/HAB activities necessary to meet the needs and characteristics of the individual to whom the service provider is assigned, in accordance with the *CLASS Provider Manual*, with training to occur in the individual's home with full participation from the individual, if possible.

(c) A DSA must, if requested by the individual or LAR:

(1) allow the individual or LAR to train a CFC PAS/HAB service provider in the specific assistance needed by the individual and to have the service provider perform CFC PAS/HAB in a manner that comports with the individual's personal, cultural, or religious preferences; and

(2) ensure that a CFC PAS/HAB service provider attends training by HHSC so the service provider meets any additional qualifications desired by the individual or LAR.

(d) The supervisor of a service provider of habilitation or CFC PAS/HAB must, in accordance with the *CLASS Provider Manual*, evaluate the performance of the service provider, in person, to ensure the needs of the individual are being met. The evaluation must occur annually.

(e) A DSA must:

(1) ensure that each service provider, staff person, and volunteer of the DSA:

(A) are trained on and knowledgeable of:

(i) acts that constitute abuse, neglect, and exploitation of an individual;

(ii) signs and symptoms of abuse, neglect, and exploitation; and

(iii) methods to prevent abuse, neglect, and exploitation;

(B) are instructed to report to DFPS immediately, but not later than 24 hours, after having knowledge or suspicion that an individual has been or is being abused, neglected, or exploited, by:

(i) calling the DFPS Abuse Hotline toll-free telephone number, 1-800-252-5400; or

(ii) using the DFPS Abuse Hotline website; and

(C) are provided with the instructions described in subparagraph (B) of this paragraph in writing;

(2) conduct the activities described in paragraph (1)(A) - (C) of this subsection:

(A) within one year after the person's most recent training on abuse, neglect, and exploitation and annually thereafter, if the service provider, staff person, or volunteer of the DSA was hired before July 1, 2019; or

(B) before assuming job duties and annually thereafter, if the service provider, staff person, or volunteer of the DSA is hired on or after July 1, 2019; and

(3) document:

(A) the name of the person who received the training required by this subsection;

(B) the date the training was conducted; and

(C) the name of the person who conducted the training.

*§45.807. DSA: Documentation of Services Delivered and Record-keeping.*

(a) A DSA must ensure that for each direct service provided, except adaptive aids, dental treatment, minor home modifications, CFC ERS, CFC support management, and a direct service that is documented through an electronic visit verification system as defined in §68.102 of this title (relating to Definitions), a service provider:

(1) documents:

(A) the type of service provided;

(B) the date and the time the service begins and ends;

(C) the type of contact (phone or face-to-face);

(D) the name of the person with whom the contact occurred;

(E) a description of the activity performed, unless the activity is a non-delegated task that is provided by an unlicensed service provider and is documented on the IPP;

(F) the signature and title of the service provider; and

(G) the progress or lack of progress in achieving a goal or objective in the individual's IPP in observable, measurable terms that directly relate to the specific goal or objective; and

(2) completes an HHSC Documentation of Services Delivered form to document the provision of a direct service that is supported by the documentation required in paragraph (1)(A)-(G) of this subsection.

(b) A DSA must ensure that, after a service provider makes the last entry on an HHSC Documentation of Services Delivered form, a staff person other than the service provider signs and dates the form as a timekeeper as verification of the accuracy of the information on the form.

(c) A DSA must maintain a separate record for each individual receiving CLASS Program services and CFC services from the DSA. The individual's record must include:

(1) a copy of the individual's current IPC and any other IPC authorized for the current IPC period;

(2) a copy of the individual's current IPP and any other IPP developed for the current IPC period;

(3) a copy of the individual's current PAS/HAB plan;

(4) if transportation is included on the IPC as a habilitation activity or as an adaptive aid, a copy of the individual's transportation plan;

(5) a copy of the individual's current ID/RC Assessment;

(6) if the DSA was the individual's DSA at the time the individual enrolled in the CLASS Program:

(A) the original ID/RC Assessment signed by a physician; or

(B) the original level of care form in use before the ID/RC Assessment signed by a physician;

(7) a copy of the current adaptive behavior screening assessment;

(8) a copy of the current HHSC CLASS/DBMD Nursing Assessment form;

(9) a copy of the current Related Conditions Eligibility Screening Instrument;

(10) any new or revised HHSC Provider Agency Model Service Backup Plan form for the current IPC period;

(11) the documentation required by subsection (a)(1) of this section;

(12) the completed HHSC Documentation of Services Delivered forms signed and dated by a timekeeper as required by subsection (b) of this section; and

(13) any other relevant documentation concerning the individual.

*§45.811. DSA: Requirements Related to the Abuse, Neglect, and Exploitation of an Individual.*

(a) If a report required by §45.810 of this subchapter (relating to DSA: Reporting Allegations of Abuse, Neglect, or Exploitation of an Individual) alleges abuse, neglect, or exploitation by a person who is not a service provider, staff person, volunteer, or controlling person of a DSA, the DSA must:

(1) as necessary:

(A) obtain immediate medical or psychological services for the individual; and

(B) assist in obtaining ongoing medical or psychological services for the individual;

(2) discuss with the individual or LAR alternative residential settings and additional services that may help ensure the individual's safety;

(3) when taking the actions described in paragraphs (1) and (2) of this subsection, avoid compromising the investigation or further traumatizing the individual; and

(4) preserve and protect evidence related to the allegation.

(b) If a report required by §45.810 of this subchapter alleges abuse, neglect, or exploitation by a service provider, staff person, volunteer, or controlling person of a DSA; or if the DSA is notified by HHSC of an allegation of abuse, neglect, or exploitation by a service provider, staff person, volunteer, or controlling person of the DSA, the DSA must:

(1) as necessary:

(A) obtain immediate medical or psychological services for the individual; and

(B) assist in obtaining ongoing medical or psychological services for the individual;

(2) take actions to secure the safety of the individual, including if necessary, ensuring that the alleged perpetrator does not have contact with the individual or any other individual until HHSC completes the investigation;

(3) when taking the actions described in paragraphs (1) and (2) of this subsection, avoid compromising the investigation or further traumatizing the individual;

(4) preserve and protect evidence related to the allegation; and

(5) as soon as possible, but no later than 24 hours, after the DSA reports or is notified of the allegation, notify the individual, the LAR, and the case manager of:

(A) the allegation report; and

(B) the actions the DSA has taken or will take based on the allegation, the condition of the individual, and the nature and severity of any harm to the individual, including the actions required by paragraph (2) of this subsection.

(c) During an HHSC investigation of an alleged perpetrator who is a service provider, staff person, volunteer, or controlling person of the DSA, a DSA must:

(1) cooperate with the investigation as requested by HHSC, including providing documentation and participating in an interview;

(2) provide HHSC access to:

(A) sites owned, operated, or controlled by the DSA;

(B) individuals, service providers, staff persons, volunteers, and controlling persons; and

(C) records pertinent to the investigation of the allegation; and

(3) ensure that service providers, staff persons, volunteers, and controlling persons of the DSA comply with paragraphs (1) and (2) of this subsection.

(d) After a DSA receives a final investigative report from HHSC for an investigation described in subsection (c) of this section, the DSA must:

(1) if the allegation of abuse, neglect, or exploitation is confirmed by HHSC:

(A) review the report, including any concerns and recommendations by HHSC; and

(B) take action within the DSA's authority to prevent the reoccurrence of abuse, neglect or exploitation, including disciplinary action against the service provider, staff person, or volunteer of the DSA confirmed to have committed abuse, neglect, or exploitation;

(2) if the allegation of abuse, neglect, or exploitation is unconfirmed, inconclusive, or unfounded:

(A) review the report, including any concerns and recommendations by HHSC; and

(B) take appropriate action within the DSA's authority, as necessary; and

(3) immediately, but not later than five calendar days after the date the DSA receives the HHSC final investigative report, notify the individual, the LAR, and the case manager of:

(A) the investigation finding; and

(B) the action taken by the DSA in response to the HHSC investigation as required by paragraphs (1) and (2) of this subsection.

(e) A DSA must not retaliate against:

(1) a service provider, staff person, individual, or other person who files a complaint, presents a grievance, or otherwise provides good faith information relating to the possible abuse, neglect, or exploitation of an individual, including:

(A) the use of seclusion; and

(B) the use of a restraint not in compliance with federal and state laws, rules, and regulations; and

(2) an individual because a person on behalf of the individual files a complaint, presents a grievance, or otherwise provides good faith information relating to the possible abuse, neglect, or exploitation of an individual, including:

(A) the use of seclusion; and

(B) the use of a restraint not in compliance with federal and state laws, rules, and regulations.

(f) At least annually, a DSA must:

(1) review all final investigative reports from HHSC for investigations described in subsection (c) of this section and, based on the review, identify program process improvements that help prevent the occurrence of abuse, neglect, and exploitation and improve the delivery of services; and

(2) evaluate critical incident data reported in accordance with §45.802(c) of this subchapter (relating to DSA: Protection of Individuals and Annual Explanations) and identify program process improvements that help prevent the occurrence of critical incidents and improve service delivery.

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## CHAPTER 47. PRIMARY HOME CARE, COMMUNITY ATTENDANT SERVICES, AND FAMILY CARE PROGRAMS

As required by Texas Government Code §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Texas Health and Human Services Commission (HHSC) in accordance with Texas Government Code §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1, govern functions previously performed by DADS that have transferred to HHSC. Texas Government Code §531.0055 requires the Executive Commissioner of HHSC to adopt rules for the operation of and provision of services by the health and human services system, including rules in Title 40, Part 1.

Therefore, the Executive Commissioner of HHSC adopts amendments to §47.1, §47.3, §47.21, §47.23, §47.25, §47.41, §47.45, §47.47, §47.49, §47.57, §47.61, §47.63, §47.67, §47.69, §47.71, §47.73, §47.81, §47.83, §47.85, §47.89, and §47.91, new §47.43, §47.74, §47.101, and §47.103, and the repeal of §47.43, §47.59, and §47.72 in Title 40, Part 1, Chapter 47, Contracting to Provide Primary Home Care.

The amendments to §47.3, §47.21, §47.23, §47.25, §47.41, and §47.57, and new §47.101 and §47.103 are adopted with changes to the proposed text as published in the March 1, 2019, issue of the *Texas Register* (44 TexReg 1080). The amendments to §47.1, §47.45, §47.47, §47.49, §47.61, §47.63, §47.67, §47.69, §47.71, §47.73, §47.81, §47.83, §47.85, §47.89, and §47.91, new §47.43 and §47.74, and the repeal of §47.43, §47.59, and §47.72 are adopted without changes to the proposed text as published in the March 1, 2019, issue of the *Texas Register* (44 TexReg 1080), and therefore will not be republished.

### BACKGROUND AND JUSTIFICATION

The adopted rules add requirements in Texas Administrative Code, Title 40 (40 TAC), Chapter 47 related to abuse, neglect, and exploitation of an individual receiving personal attendant services in the Primary Home Care (PHC) Program, Community Attendant Services (CAS) Program, or Family Care (FC) Program from a provider that is required to be licensed in accordance with 26 TAC Chapter 558, Licensing Standards for Home and Community Support Services Agencies. In the PHC, CAS, and FC Programs an individual may receive services through the provider option as described in 40 TAC Chapter 47; the service responsibility option (SRO) as described in 40 TAC Chapter 43, Service Responsibility Option; or the consumer directed services (CDS) option, as described in 40 TAC Chapter 41, Consumer Directed Services Option. Rules in Chapter 41 related to abuse, neglect, and exploitation of an individual receiving services through the CDS option are adopted elsewhere in this issue of the *Texas Register*.

The primary purpose of the adopted rules is to address changes in the investigatory process for abuse, neglect, and exploitation as a result of amendments to Texas Human Resources Code, Chapter 48, and Texas Family Code, Chapter 261, effective September 1, 2015. The amendments gave the Department of Family and Protective Services (DFPS) Adult Protective Services (APS) Provider Investigation (PI) Program the authority

to investigate an allegation of abuse, neglect, or exploitation of an individual receiving Medicaid state plan services in the PHC and CAS Programs when the alleged perpetrator is a staff person or controlling person of a provider. Because the FC Program is not a Medicaid program, the amendments to state law did not change the investigatory process for abuse, neglect, and exploitation in the FC Program. Investigations in the FC Program remain under the authority of the DFPS APS In-Home Program when the alleged perpetrator is a staff person or controlling person of a provider.

Effective September 1, 2017, in accordance with Texas Government Code, §531.02011 and §531.02013, the functions performed by the DFPS APS PI Program were transferred to HHSC. Therefore, the adopted rules address investigations of allegations of abuse, neglect, and exploitation conducted by HHSC for an individual receiving services in the PHC and CAS Programs through the provider option and the SRO. The adopted rules also describe requirements for the provider to protect an individual from abuse, neglect, and exploitation and help ensure the health, safety, and welfare of an individual who is abused, neglected, or exploited.

The adopted rules also include the current requirements in 40 TAC §49.310, Abuse, Neglect, and Exploitation Allegations, that apply to a provider that contracts with HHSC to provide services in the PHC, CAS, and FC Programs. Rules in 40 TAC Chapter 49, Contracting for Community Services, are adopted in this issue of the *Texas Register* to exclude a provider providing services governed by Chapter 47 from complying with §49.310. These rules are adopted in Chapter 47 to use terminology specific to these programs; add specificity to the current requirements of §49.310; add new requirements; provide protections from abuse, neglect, and exploitation; and help ensure the health, safety, and welfare of an individual who is receiving services in each of these programs and who is abused, neglected, or exploited. The adopted rules require a provider to: (1) train staff persons on abuse, neglect, and exploitation before they assume job duties and at least annually; (2) ensure staff persons are trained and knowledgeable about signs and symptoms of abuse, neglect, and exploitation; (3) educate an individual and his or her representative about protecting the individual from abuse, neglect, and exploitation; and (4) give written information to each staff person on how to report abuse, neglect, and exploitation.

The adopted rules also define "abuse," "exploitation," "neglect," and other terms related to abuse, neglect, and exploitation to clarify the terms when used in this chapter. In addition, the adopted rules define the terms "chemical restraint," "mechanical restraint," "physical restraint," "restraint," and "seclusion." They also define "physical abuse" to include the use of a restraint or seclusion because the adopted rules prohibit the use of restraint or seclusion on an individual. This is consistent with DFPS rules, which provide that the use of restraint or seclusion not in compliance with rules constitutes physical abuse.

The adopted rules also make changes in the title and throughout Chapter 47 to clarify that Chapter 47 governs personal attendant services provided to an individual receiving services in the PHC Program, CAS Program, and FC Program. The adopted rules replace references to the PHC Program as consisting of PHC services, CAS, and FC services. The adopted rules also clarify the requirements that apply to each program or programs. The adopted rules change "DHS" and "DADS" to "HHSC" throughout Chapter 47 to reflect that DHS and DADS have both been

abolished and functions have transferred to HHSC. The adopted rules also change "case manager" to "case worker" throughout Chapter 47. The term "case worker" more accurately reflects the duties of this type of HHSC employee.

#### COMMENTS

The 30-day comment period ended March 31, 2019.

During the comment period, HHSC received comments submitted on behalf of the Texas Council for Developmental Disabilities (TCDD), Disability Rights Texas (DRTx), and AccentCare. The comments submitted on behalf of TCDD and DRTx were made with specific reference to rules in 40 TAC Chapter 9, Intellectual Disability Services--Medicaid State Operating Agency Responsibilities, that were also proposed in the *Texas Register* on March 1, 2019. However, the commenter requested that HHSC interpret the specific references to Chapter 9 rules as examples only and apply the comments to all pertinent programs and services for which rules were proposed in the *Texas Register* on March 1, 2019.

On that basis, where a comment addresses a proposed rule in Chapter 9 for which Chapter 47 contains a parallel or largely parallel rule provision, the HHSC Chapter 47 responses to comments treat the comment as if it specifically referred to the parallel provision in Chapter 47. If Chapter 47 does not have a proposed rule provision that parallels a proposed rule provision in Chapter 9 that the commenter addressed, HHSC has not responded to the comment in its Chapter 47 responses to comments.

A summary of the comments relating to the rules and HHSC's responses follows.

Comment: Regarding proposed §47.101(a)(2), commenters recommended adding language to require the training for a staff person to occur upon employment, prior to assumption of duties, and annually thereafter.

Response: HHSC disagrees that the rule does not specify when the training must occur. Proposed §47.101(a)(3) requires a provider to train a staff person on issues related to abuse, neglect, and exploitation before the staff person assumes job duties and at least annually.

Comment: Regarding proposed §47.101(c)(1) and §47.103(b)(2), a commenter stated that as a provider that is a personal assistance services agency, the provider can call DFPS and the police if warranted, make appropriate referrals, and suspend an employee. However, beyond that, the commenter is not sure how the agency can secure the safety of the individual and believes this is the responsibility of protective agencies. At a minimum, the commenter states that §47.101(c)(1) needs to be much more specific and include exactly what steps are expected of the provider.

Response: HHSC declines to revise the rule as suggested. The requirement in §47.101(c)(1) has been a requirement since September 1, 2014, for PHC, CAS, and FC providers. This requirement is currently in 40 TAC §49.310(5)(A). Amendments in 40 TAC Chapter 49, Contracting for Community Services, are being adopted in this issue of the *Texas Register* to exclude PHC, CAS, and FC providers from the requirement to comply with §49.310. Accordingly, this requirement needs to be incorporated into 40 TAC Chapter 47.

Comment: Regarding proposed §47.101(c)(2) and §47.103(b)(4), commenters noted that the rules allow 24 hours

to notify the individual or representative of the allegation report and related matters and recommended that the notification be required no later than one hour after the provider reports or is notified of the allegation. Regarding proposed §47.103(b)(4), another commenter agreed with notifying the case worker of the allegation report and related matters, but recommended reconsideration of the 24-hour time frame so a provider can initially focus on the individual's needs, required reporting, and employee suspension.

Response: HHSC declines to make the suggested changes at this time. HHSC will consider the comments for future rulemaking. Section 47.101(c)(2) requires a provider to notify the individual or representative, and §47.103(b)(4) requires a provider to notify the individual, the representative, and the case worker, of the allegation report "as soon as possible." While "as soon as possible" could require notification in a matter of minutes, there may be circumstances in which the provider needs additional time to determine the actions required by §47.101(c)(1) or §47.103(b)(2). HHSC considers 24 hours the outside limit to provide notification "as soon as possible" and expects providers to provide notification in the shortest timeframe possible.

Comment: Regarding proposed §47.101(e), commenters recommended that a provider's review of all final investigative reports from HHSC be performed on a quarterly basis to be meaningful and proactive in preventing the re-occurrence of allegations of abuse, neglect, or exploitation. Commenters also stated that the review should include looking at the source of the complaints as well as the details of the allegation and any policies or practices that might have contributed to the allegation.

Response: HHSC disagrees with the recommendation to require providers to review all final investigative reports on a quarterly basis and declines to make this change. Requiring providers to conduct an annual review allows them to review data covering a sufficient period of time to be able to effectively identify trends and implement process improvements. HHSC will consider the comments for future rulemaking.

Comment: Regarding proposed §47.103, a commenter stated the rule refers to a provider notifying the individual of an allegation of abuse, neglect, or exploitation, but most allegations are received from the individual. The commenter asked to change the rule to indicate that notifications to the individual are only required when the allegation is received from an entity who is not the individual so that the provider is not required to notify the individual of information the individual already knows.

Response: HHSC declines to revise §47.103 as suggested. The rule requires a provider to notify the individual, the representative, and the case worker that the provider has made a report to DFPS, or has been notified by HHSC of a report made to DFPS, alleging the abuse, neglect, or exploitation of the individual by a staff person or controlling person of the provider. An individual who makes an allegation needs to be informed that the allegation has been reported to DFPS.

Comment: Commenters stated that while the requirement in §47.103(b)(1) clarifies the obligation to obtain medical or psychological services and delineate internal processes for ensuring the care and safety of the alleged victim, the commenters requested that the rule require these processes to be performed in such a way that they do not compromise the evidence to be collected during the subsequent HHSC or other investigation. The commenters also recommended that instruction be provided as

to how such assessments should be carried out without further trauma to the victim or contaminating evidence.

Response: HHSC agrees with the importance of a provider preserving and protecting evidence and not compromising an investigation or further traumatizing the individual and revised §47.103(b) to include this requirement. HHSC will provide information to help providers avoid compromising an investigation or further traumatizing the individual.

Comment: A commenter stated that obtaining immediate medical or psychological services for an individual is beyond the scope of services provided by a personal assistance services (PAS) agency. The commenter also noted that, most the time, the individual refuses medical attention.

Response: HHSC disagrees it is beyond the scope of a home and community support services agency (HCSSA) with the PAS category of licensure to obtain, as necessary, immediate medical or psychological services and to assist in obtaining ongoing medical or psychological services for the individual. A HCSSA is required by 26 TAC §558.243(b), to have an administrator and an alternate administrator to administratively supervise the provision of all services to individuals on a day-to-day basis. A HCSSA is also required to provide for the supervision of personnel in accordance with 26 TAC §558.404(g)(1) and (2). If necessary, calling 911 and notifying the individual's physician are two examples of what a provider might do to address an individual's need for immediate medical or psychological services. HHSC acknowledges that an individual has the right to refuse medical attention even if the provider thinks it is necessary.

Comment: Regarding proposed §47.103(b)(2), commenters recommended that the rule require separating the alleged perpetrator from the alleged victim and other individuals receiving services in all situations. Another commenter stated that requiring the provider to ensure the alleged perpetrator does not have contact with the individual or any other individual receiving services from the provider until HHSC completes the investigation could mean suspending the alleged perpetrator for three or four months. This would be true even if the alleged victim later recants the allegations. The commenter also noted a good employee may seek other employment during the suspension. The commenter wanted to ensure that HHSC considered these facts.

Response: HHSC disagrees that separating an alleged perpetrator from an alleged victim and other individuals is necessary in all situations to secure the individual's safety and declines to make the requested change. HHSC also notes that it did consider the facts presented by the second commenter. HHSC will consider the comments for future rulemaking.

Comment: Regarding proposed §47.103(b)(3), a commenter stated that a provider can preserve and protect evidence in the way of witness statements the provider obtains, but otherwise, the provider does not have or keep evidence. The commenter believes this is the responsibility of the investigative agency.

Response: HHSC disagrees that a provider would not have or cannot keep evidence related to an allegation of abuse, neglect, or exploitation of an individual by a staff person or controlling person other than witness statements. In addition, the rule at 26 TAC §711.201(a)(2) already requires a provider to preserve and protect any evidence related to an allegation.

Comment: Regarding proposed §47.103(c), which requires a provider to cooperate with the HHSC investigation, commenters

recommended that the rule be broadened to include other investigations, such as by law enforcement.

Response: Section 47.103 only addresses HHSC investigations of abuse, neglect, and exploitation. HHSC disagrees with the recommendation to broaden the scope of the rule at adoption to address other investigations. Therefore, HHSC declines to make the recommended change.

Comment: Regarding proposed §47.103(d)(1)(B), commenters recommended that the rule require a provider to take disciplinary action after receiving a final investigative report from HHSC that includes a confirmed finding. Additionally, the commenters recommended that language be added to require a provider to take disciplinary action if a staff member fails to cooperate with the investigation, impedes the investigation, or was dishonest in evidence provided in the investigation.

Response: HHSC agrees with the recommendation to require a provider to take disciplinary action against a staff person confirmed to have committed abuse, neglect, or exploitation. HHSC makes the recommended change by striking "appropriate" and "when warranted" in §47.103(d)(1)(B). However, HHSC disagrees with the recommendation to require disciplinary action if a staff person fails to cooperate with, or impedes, the HHSC investigation. Section 47.103(c)(3) requires a provider to ensure that a staff person and controlling person complies with §47.103(c)(1) and (2). Therefore, HHSC declines to require a provider to take disciplinary action for failure of a staff person to comply with the rule. Non-compliance could range in type and severity, and a provider is generally in the best position to determine if disciplinary action is appropriate. HHSC will consider the comments for future rulemaking.

Comment: Regarding proposed §47.103(d)(3), a commenter questioned the delay of five calendar days for the provider to notify the individual and representative of the outcome of the investigation. The commenter recommended adding language requiring that the notification be made as quickly as possible.

Response: HHSC disagrees with the recommendation to require notification be made as quickly as possible after the provider receives the final investigative report and declines to make this change. Proposed §47.103(d)(3) requires a provider to notify the individual, the representative, and the case worker of the investigation finding "immediately." However, the provider may need additional time to take the action required by subsection (d)(1) and (2) of the rule under certain circumstances. HHSC considers five calendar days a reasonable outside limit to give the notification. HHSC will consider the comments for future rulemaking.

Comment: Regarding proposed §47.103(d)(3)(A), a commenter stated it is more feasible and appropriate for HHSC to notify the individual and the case worker of the investigation finding. The commenter stated requiring the provider to notify the individual and case worker makes the provider a messenger who is unable to answer any questions related to the investigation. As the investigative agency, HHSC could answer questions about the investigation.

Response: HHSC disagrees that §47.103(d)(3)(A) should be amended to require HHSC to notify the individual, the representative, and the case worker of the investigation finding in the final investigative report. For an investigation alleging the abuse, neglect, or exploitation of the individual by a staff person or controlling person of the provider, the provider receives the final investigative report from HHSC and should be able to use it to answer some questions. In addition, the rule at 26 TAC §711.611(2) re-

quires the HHSC investigator to notify the victim or alleged victim, guardian, or parent of the finding of the investigation and the method to appeal the finding within 5 business days following the date the investigation report was signed and dated by the investigator.

Changes were made in §47.3(48)(C), §47.21(a), §47.23(1), §47.25(a), §47.25(b)(1)(B)(i), §47.41(1)(H), §47.57(2)(E), and §47.57(3)(F) to correct references to 40 TAC Chapter 97 and Chapter 97 rules that transferred to Texas Administrative Code, Title 26.

A formatting change was made in §47.41(1)(J)(iii) to add "and" between subparagraphs (J) and (K).

Changes were made in §47.101(d)(1) and (2) to clarify that abuse includes the use of a restraint or seclusion by the provider. The changes are consistent with changes made in 40 TAC Chapter 9, Subchapter D, §9.178(s)(1) and (2), and 40 TAC Chapter 42, Subchapter D, §42.411(e)(1) and (2), as published in this issue of the *Texas Register*.

Changes were made in §47.103(b)(4) to omit, as unnecessary, the word "any," which was included when the rule was proposed as paragraph (3).

## SUBCHAPTER A. INTRODUCTION

### 40 TAC §47.1, §47.3

#### STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

#### §47.3. Definitions.

The following words, terms, and phrases have the following meanings when used in this chapter, unless the context clearly indicates otherwise:

- (1) Abuse--
  - (A) physical abuse;
  - (B) sexual abuse; or
  - (C) verbal or emotional abuse.
- (2) ADL--Activity of daily living. An activity that is essential to daily self-care. An ADL does not include a service that must be provided or supervised by licensed personnel.
- (3) Alleged perpetrator--A person alleged to have committed an act of abuse, neglect, or exploitation of an individual.
- (4) Attendant--A person who provides authorized tasks to an individual.
- (5) CAS Program--Community Attendant Services Program. A Medicaid state plan program authorized under Title XIX, §1929(b) of the Social Security Act that provides personal attendant services to an eligible individual.
- (6) Case worker--An HHSC employee who is responsible for case authorization and management activities.

(7) Chemical restraint--A medication used to control an individual's behavior or to restrict the individual's freedom of movement that is not a standard treatment for the individual's medical or psychological condition.

(8) Contract manager--An HHSC employee who is responsible for the overall management of the contract with the provider.

(9) Controlling person--A person who:

- (A) has an ownership interest in a provider;
- (B) is an officer or director of a corporation that is a provider;
- (C) is a partner in a partnership that is a provider;
- (D) is a member or manager in a limited liability company that is a provider;
- (E) is a trustee or trust manager of a trust that is a provider; or
- (F) because of a personal, familial, or other relationship with a provider, is in a position of actual control or authority with respect to the provider, regardless of the person's title.

(10) Days--Any reference to days means calendar days, unless otherwise specified in the text. Calendar days include weekends and holidays.

(11) DFPS--The Department of Family and Protective Services.

(12) Expedited referral--In the PHC Program or CAS Program, an oral request from a case worker to a provider when the case worker determines that an individual's needs require that pre-initiation activities be completed in less than 14 days.

(13) Exploitation--The illegal or improper act or process of using, or attempting to use, an individual or the resources of an individual for monetary or personal benefit, profit, or gain. In the FC Program, if services are not provided through the CDS option, exploitation includes theft as defined in Chapter 31 of the Texas Penal Code.

(14) FC Program--Family Care Program. A program authorized under Title XX, Subtitle A, of the Social Security Act that provides personal attendant services to an eligible individual.

(15) Financial management services--A service, as defined in §41.103 of this title (relating to Definitions), that is provided to an individual participating in the consumer directed services option.

(16) FMSA--Financial management services agency. As defined in §41.103 of this title, an entity that provides financial management services to an individual participating in the consumer directed services option.

(17) Functional limitation--An individual's requirement for assistance with one or more ADLs caused by a physical limitation or disability.

(18) HHSC--The Texas Health and Human Services Commission.

(19) IADL--Instrumental activities of daily living. Activities related to living independently in the community.

(20) Imminent danger--An immediate or real threat.

(21) Individual--A person who is enrolled in the PHC Program, CAS Program, or FC Program and, unless the context indicates otherwise, the person's representative.

(22) Mechanical restraint--A mechanical device, material, or equipment used to control an individual's behavior by restricting the ability of the individual to freely move part or all of the individual's body.

(23) Medical need--A medical diagnosis that results in a functional limitation.

(24) Neglect--A negligent act or omission that caused physical or emotional injury or death to an individual or placed an individual at risk of physical or emotional injury or death.

(25) Non-priority--The eligibility status for service delivery as determined by the case worker for an individual who does not meet the criteria described in §48.2918(d) of this title (relating to Primary Home Care or Community Attendant Services). Services delivered to such an individual may be referred to as non-priority services, and an attendant who serves such an individual may be referred to as a non-priority attendant.

(26) Notice--Includes oral, fax, secure email, and other forms of written notice.

(27) Oral notice--Directly speaking with a person. Oral notice does not include a message left by voice mail.

(28) PHC Program--Primary Home Care Program. A Medicaid state plan program authorized under Title XIX, §1902(a)(10)(A) of the Social Security Act that provides personal attendant services to an eligible individual.

(29) Physical abuse--Any of the following:

(A) an act or failure to act performed knowingly, recklessly, or intentionally, including incitement to act, that caused physical injury or death to an individual or placed an individual at risk of physical injury or death;

(B) an act of inappropriate or excessive force or corporal punishment, regardless of whether the act results in a physical injury to an individual; or

(C) the use of a restraint or seclusion.

(30) Physical restraint--Any manual method used to control an individual's behavior, except for physical guidance or prompting of brief duration that an individual does not resist, that restricts:

(A) the free movement or normal functioning of all or a part of the individual's body; or

(B) normal access by an individual to a portion of the individual's body.

(31) Practitioner--A person who holds a doctor of medicine or doctor of osteopathy degree and is currently licensed in Texas, Louisiana, Arkansas, Oklahoma or New Mexico; a physician assistant currently licensed in Texas; or a registered nurse approved by the Texas Board of Nursing to practice as an advanced practice registered nurse.

(32) Practitioner's statement--The HHSC Practitioner's Statement of Medical Need form.

(33) Priority--The eligibility status for service delivery as determined by the case worker for an individual who meets the criteria described in §48.2918(d) of this title. Services delivered to such an individual may be referred to as priority services, and an attendant who serves such an individual may be referred to as a priority attendant.

(34) Provider--A licensed home and community support services agency that has a contract with HHSC to provide PHC Program, CAS Program, and FC Program services.

(35) Reckless behavior--Acting with conscious indifference to the consequences.

(36) Regional nurse--An HHSC employee who is responsible for authorizing the CAS Program for an individual.

(37) Representative--An individual's spouse, other responsible party, designated representative, or legally authorized representative.

(38) Restraint--Any of the following:

(A) a chemical restraint;

(B) a mechanical restraint; or

(C) a physical restraint.

(39) Routine referral--In the PHC Program or CAS Program, a written request from the case worker to a provider to evaluate an individual for service delivery when the case worker determines that the individual's needs do not require an expedited referral.

(40) Seclusion--The involuntary placement of an individual alone in an area from which the individual is prevented from leaving.

(41) Secure email--Electronic mail that uses sufficient precautions to protect the privacy and security of identifying information in compliance with the requirements of the Health Insurance Portability and Accountability Act of 1996.

(42) Service delivery plan--A single document that is agreed upon and signed by an individual and a provider containing the elements described in §47.45(a)(2) of this chapter (relating to Pre-Initiation Activities). A single document may be more than one page.

(43) Service schedule--A schedule for delivering attendant services containing the elements described in §47.45(a)(2)(C)(iii) of this chapter.

(44) Sexual abuse--Any of the following:

(A) sexual exploitation of an individual;

(B) non-consensual or unwelcomed sexual activity with an individual; or

(C) consensual sexual activity between an individual and a staff person or controlling person, unless a consensual sexual relationship with an adult individual existed before the staff person or controlling person became a staff person or controlling person.

(45) Sexual activity--An activity that is sexual in nature, including kissing, hugging, stroking, or fondling with sexual intent.

(46) Sexual exploitation--A pattern, practice, or scheme of conduct against an individual that can reasonably be construed as being for the purposes of sexual arousal or gratification of any person:

(A) which may include sexual contact; and

(B) does not include obtaining information about an individual's sexual history within standard accepted clinical practice.

(47) Staff person--An employee, contractor, or volunteer of a provider.

(48) Supervisor--A provider employee who:

(A) coordinates the delivery of services in an individual's service delivery plan;

(B) supervises attendants; and



(C) meets the requirements for a supervisor in accordance with 26 TAC §558.404 (relating to Standards Specific to Agencies Licensed to Provide Personal Assistance Services).

(49) Verbal or emotional abuse--Any act or use of verbal or other communication, including gestures:

(A) to:

(i) harass, intimidate, humiliate, or degrade an individual; or

(ii) threaten an individual with physical or emotional harm; and

(B) that:

(i) results in observable distress or harm to the individual; or

(ii) is of such a serious nature that a reasonable person would consider it harmful or a cause of distress.

(50) Volunteer--A person who works for a provider without compensation, other than reimbursement for actual expenses.

(51) Working day--Any day except a Saturday, Sunday, or national or state holiday listed in Texas Government Code §662.003(a) or (b).

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 29, 2019.

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For further information, please call: (512) 438-5645



## SUBCHAPTER C. STAFF REQUIREMENTS

### 40 TAC §§47.21, 47.23, 47.25

#### STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

#### §47.21. Supervisor Training Requirements.

(a) General training. A provider must train a supervisor as described in 26 TAC §558.245 (relating to Staffing Policies).

(b) Program-specific training. The provider must ensure the supervisor understands the applicable rules and procedures of the PHC Program, CAS Program, and FC Program.

#### §47.23. Attendant Qualifications.

An attendant must:

(1) meet the requirements described in 26 TAC §558.404(c) (relating to Standards Specific to Agencies Licensed to Provide Personal Assistance Services);

(2) not be a legal parent, foster parent, or spouse of a parent of a minor who receives services in the CAS Program;

(3) not be the spouse of the individual who receives the service, except for services in the FC Program; and

(4) not be designated by an HHSC case worker on HHSC's Authorization for Community Care Services form as "Do not hire."

#### §47.25. Attendant Orientation.

(a) Orientation. In addition to the requirements described in this section, a provider must ensure each attendant is oriented as described in 26 TAC Chapter 558, Subchapter C, (relating to Minimum Standards for All Home and Community Support Services Agencies) and 26 TAC §558.404 (relating to Standards Specific to Agencies Licensed to Provide Personal Assistance Services). Orientation is not required for a supervisor when providing personal assistance services.

(b) Method of orientation.

(1) A supervisor must determine the method of attendant orientation, which may be conducted:

(A) in person, with the participation of the individual; or

(B) by telephone or in person at any location without the participation of the individual at the discretion of the supervisor, if the attendant:

(i) meets the requirements described in 26 TAC §558.701 (relating to Home Health Aides);

(ii) has six continuous months of experience in delivering attendant care;

(iii) has been oriented to the individual and there are service delivery plan changes; or

(iv) has previously provided services to the individual.

(2) The supervisor may use discretion to determine if the attendant needs to be oriented if:

(A) the attendant previously provided services to the individual; and

(B) the service delivery plan has not changed since the attendant provided services to the individual.

(c) Due dates. The supervisor must orient each attendant on or before the time the attendant begins to provide attendant services.

(d) Documentation of attendant orientation.

(1) The supervisor must record the attendant orientation on a single document that includes:

(A) the individual's name and number assigned to the individual by HHSC;

(B) the attendant's name;

(C) the date of the attendant orientation;

(D) if the orientation was conducted in person with the individual or without the participation of the individual;

(E) information about how the individual's condition affects the performance of tasks;

- (F) the tasks to be performed;
- (G) the service schedule;
- (H) the number of hours of service the attendant is to provide;
- (I) the total number of hours of service the individual is authorized to receive;
- (J) safety and emergency procedures, including universal precautions;
- (K) specific situations about which the attendant must notify the provider, including:
  - (i) changes in the individual's needs;
  - (ii) incidents that affect the individual's condition;
  - (iii) hospitalization of the individual;
  - (iv) the individual's absence or relocation from home; and
  - (v) the attendant's inability to work; and
- (L) the signature of:
  - (i) the supervisor who conducts the orientation;
  - (ii) the attendant who is oriented, if present; and
  - (iii) the individual, if present.

(2) The provider must maintain documentation of the attendant orientation in the individual's file.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER D. SERVICE PLAN DEVELOPMENT

### 40 TAC §§47.41, 47.43, 47.45, 47.47, 47.49

#### STATUTORY AUTHORITY

The amendments and new section are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

#### §47.41. Allowable Tasks.

The PHC Program, CAS Program, and FC Program include the following tasks:

- (1) assistance with ADLs, including:
  - (A) bathing, which is:
    - (i) drawing water in sink, basin, or tub;
    - (ii) hauling or heating water;
    - (iii) laying out supplies;
    - (iv) assisting in or out of tub or shower;
    - (v) sponge bathing and drying;
    - (vi) bed bathing and drying;
    - (vii) tub bathing and drying; and
    - (viii) providing standby assistance for safety;
  - (B) dressing, which is:
    - (i) dressing the individual;
    - (ii) undressing the individual; and
    - (iii) laying out clothes;
  - (C) meal preparation, which is:
    - (i) cooking a full meal;
    - (ii) warming up prepared food;
    - (iii) planning meals;
    - (iv) helping prepare meals; and
    - (v) cutting an individual's food for eating;
  - (D) feeding/eating, which is:
    - (i) spoon-feeding;
    - (ii) bottle-feeding;
    - (iii) assisting with using eating and drinking utensils and adaptive devices, not including tube feeding; and
    - (iv) providing standby assistance or encouragement;
  - (E) exercise, which is walking with the individual;
  - (F) grooming, shaving, or oral care, which is:
    - (i) shaving;
    - (ii) brushing teeth;
    - (iii) shaving underarms and legs, when requested;
    - (iv) caring for nails; and
    - (v) laying out supplies;
  - (G) routine hair or skin care, which is:
    - (i) washing hair;
    - (ii) drying hair;
    - (iii) assisting with setting, rolling, or braiding hair, not including cutting or chemical processing of hair;
    - (iv) combing or brushing hair;
    - (v) applying nonprescription lotion to skin;
    - (vi) washing hands and face;
    - (vii) applying makeup; and
    - (viii) laying out supplies;

(H) assistance with self-administration of medication as defined in 26 TAC §558.2 (relating to Definitions);

(I) toileting, which is:

- (i) changing diapers;
- (ii) changing colostomy bag or emptying catheter bag;
- (iii) assisting on or off bedpan;
- (iv) assisting with the use of a urinal;
- (v) assisting with feminine hygiene needs;
- (vi) assisting with clothing during toileting;
- (vii) assisting with toilet hygiene, including the use of toilet paper and washing hands;
- (viii) changing external catheter;
- (ix) preparing toileting supplies and equipment, not including preparing catheter equipment; and
- (x) providing standby assistance;

(J) transfer, which is:

- (i) non-ambulatory movement from one stationary position to another, not including carrying;
- (ii) adjusting or changing the individual's position in a bed or chair (positioning); and
- (iii) assisting in rising from a sitting to a standing position; and

(K) ambulation, which is:

- (i) assisting in positioning for use of a walking apparatus;
- (ii) assisting with putting on and removing leg braces and prostheses for ambulation;
- (iii) assisting with ambulation or using steps;
- (iv) assisting with wheelchair ambulation; and
- (v) providing standby assistance; and

(2) assistance with IADLs, including:

(A) cleaning, including:

- (i) cleaning up after the individual's ADLs;
- (ii) emptying and cleaning the individual's bedside commode;
- (iii) cleaning the individual's bathroom;
- (iv) changing the individual's bed linens and making the individual's bed;
- (v) cleaning floor of living areas used by the individual;
- (vi) dusting areas used by the individual;
- (vii) carrying out the trash and setting out garbage for pick up;
- (viii) cleaning stovetop and counters;
- (ix) washing the individual's dishes; and
- (x) cleaning refrigerator and stove;

(B) laundry, including:

- (i) doing hand wash;
- (ii) gathering and sorting;
- (iii) loading and unloading machines in residence;
- (iv) using laundromat machines;
- (v) hanging clothes to dry;
- (vi) folding and putting away clothes; and

(C) shopping, including:

- (i) preparing a shopping list;
- (ii) going to the store and purchasing or picking up items;
- (iii) picking up medication; and
- (iv) storing the individual's purchased items; and

(D) escorting, including:

- (i) accompanying the individual outside the home to support the individual in living in the community;
- (ii) arranging for transportation, not including direct individual transportation;
- (iii) accompanying the individual to a clinic, doctor's office, or location for medical diagnosis or treatment; and
- (iv) waiting in the doctor's office or clinic with an individual if necessary due to client's condition or distance from home.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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#### 40 TAC §47.43

#### STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

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## SUBCHAPTER E. SERVICE REQUIREMENTS

### 40 TAC §§47.57, 47.61, 47.63, 47.67, 47.69, 47.71, 47.73, 47.74

#### STATUTORY AUTHORITY

The new section and amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

#### §47.57. *Service Delivery Options.*

An individual receiving services in the PHC Program, CAS Program, or FC Program may choose one of the following three service delivery options.

(1) Agency option. In the agency option:

(A) the provider is responsible for personnel decisions, such as selecting, supervising, and dismissing the attendant who provides services to the individual, with input from the individual;

(B) the provider is responsible for:

(i) recruitment of attendants and substitute attendants, a responsibility the individual may share;

(ii) payroll for attendants and substitute attendants; and

(iii) filing tax-related reports of attendants and substitute attendants;

(C) the provider is the employer of record of attendants and substitute attendants; and

(D) the provider is responsible for providing substitute attendants.

(2) Consumer directed services (CDS) option. In the CDS option, as described in Chapter 41 of this title (relating to Consumer Directed Services Option):

(A) the individual recruits, hires, manages, and fires attendants;

(B) the individual is the employer of record of his or her attendant and substitute attendant;

(C) the individual is responsible for providing substitute attendants; and

(D) the FMSA is responsible for financial management services, including:

(i) registering as the individual's employer-agent with the Internal Revenue Service and the Texas Workforce Commission;

(ii) managing payroll for attendants and substitute attendants, including filing tax-related reports;

(iii) tracking expenditures; and

(iv) submitting quarterly expenditure reports to the employer and case worker; and

(E) the FMSA is not required to be licensed under 26 TAC Chapter 558 (relating to Licensing Standards for Home and Community Support Services Agencies) when performing the functions described in subparagraph (D) of this paragraph.

(3) Service responsibility option (SRO). In the SRO, as described in Chapter 43 of this title (relating to Service Responsibility Option):

(A) the individual selects, manages, supervises, and dismisses attendants;

(B) the provider is the employer of record for the attendant and substitute attendant;

(C) the provider is responsible for:

(i) providing substitute attendants if necessary;

(ii) managing payroll for attendants and substitute attendants; and

(iii) filing tax-related reports of attendants and substitute attendants;

(D) the individual and supervisor must negotiate the frequency of supervisory visits;

(E) the individual is responsible for the new attendant orientation; and

(F) the provider is required to be licensed under 26 TAC Chapter 558 if performing the functions described in subparagraph (C) of this paragraph.

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### 40 TAC §47.59, §47.72

#### STATUTORY AUTHORITY

The repeals are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

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## SUBCHAPTER F. CLAIMS PAYMENT AND DOCUMENTATION

**40 TAC §§47.81, 47.83, 47.85, 47.89**

### STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

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## SUBCHAPTER G. UTILIZATION REVIEW

**40 TAC §47.91**

### STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

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## SUBCHAPTER H. ALLEGATIONS OF ABUSE, NEGLECT, AND EXPLOITATION

**40 TAC §47.101, §47.103**

### STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program; and Texas Human Resources Code §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

*§47.101. Requirements for Providers Related to the Abuse, Neglect, or Exploitation of an Individual.*

(a) A provider must:

(1) ensure that an individual and representative are, before or at the time the individual begins receiving services and at least once every 12 months thereafter:

(A) informed of how to report allegations of abuse, neglect, or exploitation to DFPS and are provided with the Abuse Hotline toll-free telephone number, 1-800-252-5400, in writing; and

(B) educated about protecting the individual from abuse, neglect, and exploitation;

(2) ensure that each staff person is:

(A) trained and knowledgeable of:

(i) acts that constitute abuse, neglect, and exploitation;

(ii) signs and symptoms of abuse, neglect, and exploitation; and

(iii) methods to prevent the occurrence of abuse, neglect, and exploitation;

(B) instructed to report to DFPS immediately, but not later than 24 hours, after having knowledge or suspicion that an individual is being or has been abused, neglected, or exploited by:

(i) calling the DFPS Abuse Hotline toll-free telephone number, 1-800-252-5400; or

(ii) using the DFPS Abuse Hotline website; and

(C) provided with the instructions described in subparagraph (B) of this paragraph in writing; and

(3) conduct the activities described in paragraph (2) of this subsection before a staff person assumes job duties and at least annually.

(b) If a provider, staff person, or controlling person knows or suspects that an individual is being or has been abused, neglected, or exploited, the provider must report or ensure that the person with knowledge or suspicion reports the allegation of abuse, neglect, or exploitation to DFPS immediately, but not later than 24 hours, after having knowledge or suspicion by:

(1) calling the DFPS Abuse Hotline toll-free telephone number, 1-800-252-5400; or

(2) using the DFPS Abuse Hotline website.

(c) If a report required by subsection (b) of this section alleges abuse, neglect, or exploitation of an individual, or if the provider is notified of an allegation of abuse, neglect, or exploitation, the provider must:

(1) take necessary actions to secure the safety of the individual; and

(2) notify the individual or representative as soon as possible, but no later than 24 hours, after the provider reports or is notified of the allegation:

(A) of the allegation report; and

(B) the actions the provider has taken or will take based on the allegation, the condition of the individual, and the nature and severity of any harm to the individual.

(d) A provider must not retaliate against:

(1) a staff person, individual, or other person who files a complaint, presents a grievance, or otherwise provides good faith information relating to the possible abuse, neglect, or exploitation of an individual, including the use of a restraint or seclusion; or

(2) an individual because a person on behalf of the individual files a complaint, presents a grievance, or otherwise provides good faith information relating to the possible abuse, neglect, or exploitation of the individual, including the use of a restraint or seclusion.

(e) At least annually, a provider must review all reports of abuse, neglect, or exploitation of an individual of which the provider is notified, and all final investigative reports received from HHSC for investigations described in §47.103 of this subchapter (relating to Requirements for Providers Related to the Abuse, Neglect, and Exploitation of an Individual Receiving Services in the PHC Program and CAS Program Through the Agency Option or the Service Responsibility Option) and, based on the review, identify program process improvements that help prevent the occurrence of abuse, neglect, and exploitation and improve the delivery of services.

*§47.103. Requirements for Providers Related to the Abuse, Neglect, and Exploitation of an Individual Receiving Services in the PHC Program and CAS Program Through the Agency Option or the Service Responsibility Option.*

(a) This section applies only when an individual is receiving services in the PHC Program or CAS Program through the agency option or the service responsibility option.

(b) If a report required by §47.101(b) of this subchapter (relating to Requirements for Providers Related to the Abuse, Neglect, or Exploitation of an Individual) alleges abuse, neglect, or exploitation of an individual by a staff person or controlling person or if a provider is notified by HHSC of an allegation of abuse, neglect, or exploitation of an individual by a staff person or controlling person, the provider must:

(1) as necessary:

(A) obtain immediate medical or psychological services for the individual; and

(B) assist in obtaining ongoing medical or psychological services for the individual;

(2) take actions to secure the safety of the individual, including if necessary, ensuring that the alleged perpetrator does not have contact with the individual or any other individual receiving services from the provider until HHSC completes the investigation;

(3) when taking the actions described in paragraphs (1) and (2) of this subsection, avoid compromising the investigation or further traumatizing the individual;

(4) preserve and protect evidence related to the allegation; and

(5) as soon as possible, but no later than 24 hours, after the provider reports or is notified of an allegation, notify the individual, the representative, and the case worker of:

(A) the allegation report; and

(B) the actions the provider has taken or will take based on the allegation, the condition of the individual, and the nature and severity of any harm to the individual, including the actions required by paragraph (2) of this subsection.

(c) During an HHSC investigation of an alleged perpetrator who is a staff person or controlling person, a provider must:

(1) cooperate with the investigation as requested by HHSC, including providing documentation and participating in interviews;

(2) provide HHSC access to:

(A) sites owned, operated, or controlled by the provider;

(B) individuals, staff persons, and controlling persons; and

(C) records pertinent to the investigation of the allegation; and

(3) ensure that a staff person or controlling person complies with paragraphs (1) and (2) of this subsection.

(d) After a provider receives a final investigative report from HHSC for an investigation described in subsection (c) of this section, the provider must:

(1) if the allegation of abuse, neglect, or exploitation is confirmed by HHSC:

(A) review the report, including any concerns and recommendations by HHSC; and

(B) take action within the provider's authority to prevent the reoccurrence of abuse, neglect, or exploitation, including disciplinary action against the staff person confirmed to have committed abuse, neglect, or exploitation;

(2) if the allegation of abuse, neglect, or exploitation is unconfirmed, inconclusive, or unfounded:

(A) review the report, including any concerns and recommendations by HHSC; and

(B) take appropriate action within the provider's authority, as necessary; and

(3) immediately, but not later than five calendar days after the date the provider receives the HHSC final investigative report, notify the individual, the representative, and the case worker of:

(A) the investigation finding; and

(B) the action taken by the provider in response to the HHSC investigation as required by paragraphs (1) and (2) of this subsection.

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## CHAPTER 49. CONTRACTING FOR COMMUNITY SERVICES

As required by Texas Government Code §531.0202(b), the Department of Aging and Disability Services (DADS) was abolished effective September 1, 2017, after all of its functions were transferred to the Texas Health and Human Services Commission (HHSC) in accordance with Texas Government Code §531.0201 and §531.02011. Rules of the former DADS are codified in Title 40, Part 1, and will be repealed or administratively transferred to Title 26, Health and Human Services, as appropriate. Until such action is taken, the rules in Title 40, Part 1 govern functions previously performed by DADS that have transferred to HHSC.

Texas Government Code §531.0055, requires the Executive Commissioner of HHSC to adopt rules for the operation of and provision of services by the health and human services system, including rules in Title 40, Part 1. Therefore, the Executive Commissioner of HHSC adopts amendments to §49.101, §49.102, §49.201, §49.205, §49.309, and §49.701; new §49.301; and the repeal of §49.301; in Title 40, Part 1, Chapter 49, Contracting for Community Services.

The amendments to §49.205 and §49.309 are adopted with changes to the proposed text as published in the March 1, 2019, issue of the *Texas Register* (44 TexReg 1102). These rules will be republished. The amendments to §49.101, §49.102, §49.201, and §49.701; new §49.301; and the repeal of §49.301 are adopted without changes to the proposed text as published in the March 1, 2019, issue of the *Texas Register* (44 TexReg 1102), and therefore will not be republished.

### BACKGROUND AND JUSTIFICATION

Chapter 49, Contracting for Community Services, governs contracting with HHSC to provide community-based services. The adopted rules provide that §49.310, which relates to abuse, neglect, and exploitation allegations, does not apply to a contractor for any of the following services or programs: a direct services agency in the Community Living Assistance and Support Services (CLASS) Program; a case management agency in the CLASS Program; the Deaf-Blind with Multiple Disabilities (DBMD) Program; the Home and Community-based Services (HCS) Program; the Texas Home Living (TxHmL) Program; the Primary Home Care (PHC) Program; the Community Attendant Services (CAS) Program; the Family Care (FC) Program; the Consumer Managed Personal Attendant Services (CMPAS)

Program; a financial management services agency (FMSA) for CLASS, DBMD, HCS, or TxHmL; or an FMSA for PHC, CAS, and FC.

HHSC is adopting rules in Title 40, Chapters 9, 41, 42, 44, 45, and 47, in this issue of the *Texas Register* to add the requirements in §49.310 related to abuse, neglect, and exploitation to the specific rules that govern those programs and services. Those adopted rules will make the application of §49.310 unnecessary for those programs and services.

### COMMENTS

The 30-day comment period ended March 31, 2019.

During this period, HHSC did not receive any comments regarding the proposed rules.

In §49.205, "Chapter 97 of this title" was changed to "26 TAC Chapter 558" and "Chapter 92 of this title" was changed to "26 TAC Chapter 553" to correct rule references.

In §49.309, "Consumer Rights and Services" was changed to "Complaint and Incident Intake" to correct the title of the HHSC division that handles complaints related to the contractors listed in the rule.

## SUBCHAPTER A. APPLICATION AND DEFINITIONS

### 40 TAC §49.101, §49.102

#### STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code §32.021.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

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## SUBCHAPTER B. CONTRACTOR ENROLLMENT

### 40 TAC §49.201, §49.205

#### STATUTORY AUTHORITY

The amendments are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendments affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code §32.021.

*§49.205. License, Certification, Accreditation, and Other Requirements.*

(a) To be a contractor, an applicant must have a license, certification, accreditation, or other document as follows:

(1) CLASS-CFS and CLASS-SFS require:

(A) a permit to operate a child-placing agency issued by HHSC in accordance with Chapter 745 of this title (relating to Licensing); or

(B) a HCSSA license issued by HHSC in accordance with 26 TAC Chapter 558 (relating to Licensing Standards for Home and Community Support Services Agencies) with:

(i) the licensed home health services (LHHS) category; or

(ii) the licensed and certified home health services (L&CHHS) category;

(2) CLASS-DSA requires a HCSSA license issued by HHSC in accordance with 26 TAC Chapter 558 with:

(A) the LHHS category; or

(B) the L&CHHS category;

(3) the DBMD Program requires:

(A) a HCSSA license issued by HHSC in accordance with 26 TAC Chapter 558 with:

(i) the LHHS category; or

(ii) the L&CHHS category; and

(B) for a contractor that provides residential services to four to six individuals, an assisted living facility license Type A or Type B issued by HHSC in accordance with 26 TAC Chapter 553 (relating to Licensing Standards for Assisted Living Facilities);

(4) TAS requires:

(A) written documentation from HHSC or the Administration for Community Living of the United States Department of Health and Human Services that the applicant is a center for independent living, as defined by 29 United States Code §796a;

(B) a contract other than the TAS contract; or

(C) written designation by HHSC as an area agency on aging;

(5) Medicaid hospice requires:

(A) a HCSSA license for hospice issued by HHSC in accordance with 26 TAC Chapter 558; and

(B) a written notification from the Centers for Medicare & Medicaid Services that the applicant is certified to participate as a hospice agency in the Medicare Program;

(6) the PHC Program, CAS Program, and FC Program require a HCSSA license issued by HHSC in accordance with 26 TAC Chapter 558 with:

(A) the LHHS category;

(B) the L&CHHS category; or

(C) the PAS category;

(7) DAHS requires a DAHS facility license issued by HHSC in accordance with Chapter 98 of this title (relating to Day Activity and Health Services Requirements);

(8) Title XX AFC requires for an AFC home serving four to eight individuals, an assisted living facility license Type A or Type B issued by HHSC in accordance with 26 TAC Chapter 553; and

(9) Title XX RC requires an assisted living facility license Type A or Type B issued by HHSC in accordance with 26 TAC Chapter 553.

(b) The license, certification, accreditation, or other document required by subsection (a) of this section must be valid in the service or catchment area:

(1) in which the applicant is seeking to provide services; or

(2) covered under the contractor's contract.

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## SUBCHAPTER C. REQUIREMENTS OF A CONTRACTOR

### 40 TAC §49.301

#### STATUTORY AUTHORITY

The repeal is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The repeal affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code §32.021.



The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 29, 2019.

TRD-201902977

Karen Ray

Chief Counsel

Department of Aging and Disability Services

Effective date: October 1, 2019

Proposal publication date: March 1, 2019

For further information, please call: (512) 438-3385



#### 40 TAC §49.301, §49.309

#### STATUTORY AUTHORITY

The amendment and new section are adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendment and new section affect Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code §32.021.

#### §49.309. Complaint Process.

(a) A contractor must develop and implement written procedures for investigating and resolving a complaint about services provided under a contract, other than an allegation of abuse, neglect, or exploitation, that:

(1) allow a complaint to be submitted to the contractor:

- (A) either orally or in writing; and
- (B) anonymously; and

(2) require the contractor to:

- (A) request, but not require disclosure of, the name, mailing address, and telephone number of a complainant;
- (B) investigate and resolve a complaint within 30 days after the complaint is received by the contractor;
- (C) document the name of the person who conducted the investigation;
- (D) document the name of persons contacted during an investigation;
- (E) obtain written statements from persons contacted during an investigation or document conversations with those persons; and
- (F) provide the following information to the complainant within 30 days after a complaint is received by the contractor, unless the complainant did not provide a mailing address or phone number:

- (i) the findings of the investigation;
- (ii) the contractor's resolution of the complaint;

(iii) the telephone number of:

(I) HHSC Complaint and Incident Intake (1-800-458-9858), if the contractor has a contract for:

- (-a-) CLASS-CFS;
- (-b-) CLASS-DSA;
- (-c-) CLASS-SFS;
- (-d-) the DBMD Program;
- (-e-) the HCS Program;
- (-f-) the TxHmL Program;
- (-g-) hospice;
- (-h-) the PHC Program;
- (-i-) the CAS Program;
- (-j-) DAHS;
- (-k-) Title XX AFC and services are provided in an AFC home serving four to eight people;
- (-l-) Title XX RC;
- (-m-) the CMPAS Program;
- (-n-) the FC Program;
- (-o-) SSPD and services are provided in a DAHS facility; or

DAHS facility; or

(-p-) SSPD-24-hour shared attendant care; or

(II) the HHSC Office of the Ombudsman (1-877-787-8999), if the contractor has a contract for:

- (-a-) CLASS-CMA;
- (-b-) TAS;
- (-c-) Title XX AFC and services are provided in an AFC home serving fewer than four people;
- (-d-) emergency response services;
- (-e-) the HDM Program;
- (-f-) SSPD and services are not provided in a DAHS facility;

DAHS facility;

- (-g-) FMSA-CLASS;
- (-h-) FMSA-DBMD;
- (-i-) FMSA-HCS;
- (-j-) FMSA-PHC/CAS/FC; or
- (-k-) FMSA-TxHmL; and

(iv) an explanation that the telephone number may be used if the complainant is not satisfied with the contractor's resolution of the complaint.

(b) The contractor must give the information described in subsection (a)(2)(F) of this section as follows:

- (1) in person, if the complainant is the individual receiving services; or
- (2) if the complainant is not the individual receiving services:

(A) by mail, if the contractor knows the complainant's mailing address; or

(B) by telephone, if the contractor does not know the complainant's mailing address, but knows the complainant's telephone number.

(c) A contractor must maintain a written log that contains the following information:

- (1) the date the contractor received a complaint;
- (2) a description of the complaint;
- (3) the findings of the investigation;
- (4) the contractor's resolution of the complaint and the date of resolution; and

(5) the date the contractor provided information to the complainant in accordance with subsection (b) of this section.

(d) A contractor must provide the following information to an individual and LAR:

- (1) a description of the contractor's complaint process;
- (2) the telephone number of:

(A) HHSC Complaint and Incident Intake (1-800-458-9858), if the contractor has a contract for:

- (i) CLASS-CFS;
- (ii) CLASS-DSA;
- (iii) CLASS-SFS;
- (iv) the DBMD Program;
- (v) the HCS Program;
- (vi) the TxHmL Program;
- (vii) hospice;
- (viii) the PHC Program;
- (ix) the CAS Program;
- (x) DAHS;

(xi) Title XX AFC and services are provided in an AFC home serving four to eight people;

- (xii) Title XX RC;
- (xiii) the CMPAS Program;
- (xiv) the FC Program;
- (xv) SSPD and services are provided in a DAHS facility; or

(xvi) SSPD-24-hour shared attendant care; or

(B) the HHSC Office of the Ombudsman (1-877-787-8999), if the contractor has a contract for:

- (i) CLASS-CMA;
- (ii) TAS;
- (iii) Title XX AFC and services are provided in an AFC home serving fewer than four people;
- (iv) emergency response services;
- (v) the HDM Program;
- (vi) SSPD and services are not provided in a DAHS facility;
- (vii) FMSA-CLASS;
- (viii) FMSA-DBMD;
- (ix) FMSA-HCS;
- (x) FMSA-PHC/CAS/FC; or
- (xi) FMSA-TxHmL; and

(3) an explanation that the telephone number may be used to file a complaint with HHSC.

(e) A contractor must provide the information described in subsection (d) of this section orally and in writing, as follows:

- (1) before or at the time the individual begins receiving program services from the contractor; and
- (2) at least once every 12 months thereafter.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 29, 2019.  
TRD-201902978  
Karen Ray  
Chief Counsel  
Department of Aging and Disability Services  
Effective date: October 1, 2019  
Proposal publication date: March 1, 2019  
For further information, please call: (512) 438-3385



## SUBCHAPTER G. APPLICATION DENIAL PERIOD

### 40 TAC §49.701

#### STATUTORY AUTHORITY

The amendment is adopted under Texas Government Code §531.0055, which provides that the Executive Commissioner of HHSC shall adopt rules for the operation of and provision of services by the health and human services system; Texas Government Code, §531.021, which provides HHSC with the authority to administer federal funds and plan and direct the Medicaid program in each agency that operates a portion of the Medicaid program; and Texas Human Resources Code, §32.021, which provides that HHSC shall adopt necessary rules for the proper and efficient operation of the Medicaid program.

The amendment affects Texas Government Code, §531.0055 and §531.021, and Texas Human Resources Code §32.021.

The agency certifies that legal counsel has reviewed the adoption and found it to be a valid exercise of the agency's legal authority.

Filed with the Office of the Secretary of State on August 29, 2019.  
TRD-201902979  
Karen Ray  
Chief Counsel  
Department of Aging and Disability Services  
Effective date: October 1, 2019  
Proposal publication date: March 1, 2019  
For further information, please call: (512) 438-3385



# REVIEW OF AGENCY RULES

This section contains notices of state agency rules review as directed by the Texas Government Code, §2001.039. Included here are (1) notices of *plan to review*; (2)

notices of *intention to review*, which invite public comment to specified rules; and (3) notices of *readoption*, which summarize public comment to specified rules. The complete text of an agency's *plan to review* is available after it is filed with the Secretary of State on the Secretary of State's web site (<http://www.sos.state.tx.us/texreg>). The complete text of an agency's rule being reviewed and considered for *readoption* is available in the *Texas Administrative Code* on the web site (<http://www.sos.state.tx.us/tac>).

For questions about the content and subject matter of rules, please contact the state agency that is reviewing the rules. Questions about the web site and printed copies of these notices may be directed to the *Texas Register* office.

## Proposed Rule Reviews

Texas Board of Nursing

### Title 22, Part 11

In accordance with Government Code §2001.039, the Texas Board of Nursing (Board) files this notice of intention to review and consider for re-adoption, re-adoption with amendments, or repeal, the following chapters contained in Title 22, Part 11, of the Texas Administrative Code, pursuant to the 2019 rule review plan adopted by the Board at its July 2018 meeting.

Chapter 211. General Provisions, §§211.1 - 211.10

Chapter 217. Licensure, Peer Assistance, and Practice, §§217.1 - 217.24

Chapter 219. Advanced Practice Nurse Education, §§219.1 - 219.13

In conducting its review, the Board will assess whether the reasons for originally adopting these chapters continue to exist. Each section of these chapters will be reviewed to determine whether it is obsolete, whether it reflects current legal and policy considerations and current procedures and practices of the Board, and whether it is in compliance with Chapter 2001 of the Government Code (Administrative Procedure Act).

The public has thirty (30) days from the publication of this rule review in the *Texas Register* to comment and submit any response or suggestions. Written comments may be submitted to Dusty Johnston, General Counsel, Texas Board of Nursing, 333 Guadalupe, Suite 3-460, Austin, Texas 78701, by email to [dusty.johnston@bon.texas.gov](mailto:dusty.johnston@bon.texas.gov), or by fax to Dusty Johnston at (512) 305-8101. Any proposed changes to these chapters as a result of this review will be published separately in the Proposed Rules section of the *Texas Register* and will be open for an additional comment period prior to the final adoption or repeal by the Board.

TRD-201902961

Jena Abel

Deputy General Counsel

Texas Board of Nursing

Filed: August 28, 2019



Texas Commission on Environmental Quality

### Title 30, Part 1

The Texas Commission on Environmental Quality (commission) files this Notice of Intention to Review 30 TAC Chapter 36, Suspension

or Adjustment of Water Rights During Drought or Emergency Water Shortage.

This proposal is *limited* to the review in accordance with the requirements of Texas Government Code, §2001.039, which requires a state agency to review and consider its rules for readoption, readoption with amendments, or repeal every four years. During this review, the commission will assess whether the reasons for initially adopting the rules in Chapter 36 continue to exist.

Comments regarding suggested changes to the rules in Chapter 36 may be submitted but will not be considered for rule amendments as part of this review. Any such comments may be considered in a future rule-making action by the commission.

#### Submittal of Comments

The commission invites public comment on this preliminary review of the rules in Chapter 36. Written comments may be submitted to Ms. Kris Hogan, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <https://www6.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Non-Rule Project Number 2018-046-036-LS. Comments must be received by October 14, 2019. For further information, please contact Robin Smith, Environmental Law Division, at (512) 239-0463.

TRD-201903064

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Filed: September 3, 2019



The Texas Commission on Environmental Quality (commission) files this Notice of Intention to Review 30 TAC Chapter 210, Use of Reclaimed Water.

This proposal is *limited* to the review in accordance with the requirements of Texas Government Code, §2001.039, which requires a state agency to review and consider its rules for readoption, readoption with amendments, or repeal every four years. During this review, the commission will assess whether the reasons for initially adopting the rules in Chapter 210 continue to exist.

Comments regarding suggested changes to the rules in Chapter 210 may be submitted, but will not be considered for rule amendments as part of this review. Any such comments may be considered in a future rulemaking action by the commission.

## Submittal of Comments

The commission invites public comment on this preliminary review of the rules in Chapter 210. Written comments may be submitted to Andreea Vasile, MC 205, Office of Legal Services, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087, or faxed to (512) 239-4808. Electronic comments may be submitted at: <https://www6.tceq.texas.gov/rules/ecomments/>. File size restrictions may apply to comments being submitted via the eComments system. All comments should reference Non-Rule Project Number 2019-037-210-OW. Comments must be received by October 14, 2019. For further information, please contact Laurie Fleet, Water Quality Division at (512) 239-5445.

TRD-201903059

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Filed: September 3, 2019



## Comptroller of Public Accounts

### Title 34, Part 1

The Comptroller of Public Accounts proposes to review Texas Administrative Code, Title 34, Part 1, Chapter 1, concerning Central Administration; Chapter 4, concerning Treasury Administration; Chapter 5, concerning Funds Management (Fiscal Affairs); and Chapter 6, concerning Investment Management. This review is being conducted in accordance with Government Code, §2001.039. The review will include, at the minimum, whether the reasons for readopting continue to exist.

The comptroller will accept comments regarding the review. The comment period will last for 30 days following the publication of this notice in the *Texas Register*.

Comments pertaining to this review may be directed accordingly.

#### Chapter 1, Central Administration.

#### Subchapter F; Negotiation and Mediation of Contract Disputes.

Jason Frizzell, Deputy Chief Counsel for Contracts

Operations & Support Legal Services

P.O. Box 13528, Austin, Texas 78711-3528

#### Chapter 4, Treasury Administration.

Lynda Cantu, Manager

Treasury Operations Division

P.O. Box 13528, Austin, Texas 78711-3528

#### Chapter 5, Funds Management (Fiscal Affairs).

Rob Coleman, Director

Fiscal Management - Statewide Fiscal Services

P.O. Box 13528, Austin, Texas 78711-3528

#### Chapter 6, Investment Management.

Piper Montemayor, Public Finance Manager

Treasury Operations Division

P.O. Box 13528, Austin, Texas 78711-3528

TRD-201903073

William Hamner

Special Counsel for Tax Administration

Comptroller of Public Accounts

Filed: September 4, 2019



## Texas Forensic Science Commission

### Title 37, Part 15

The Texas Forensic Science Commission (Commission) files this notice of its intent to review 37 TAC Chapter 651, DNA, CODIS, FORENSIC ANALYSIS AND CRIME LABORATORIES. The review is conducted in accordance with Government Code §2001.039, which requires a state agency to review and consider its rules for re adoption, re adoption with amendments, or repeal every four years. During the review, the Commission will assess whether the reasons for initially adopting the rules continue to exist.

For 30 days following the publication of this notice, the Commission will accept public comments regarding the review. Comments should be directed to Leigh Savage, Associate General Counsel, Texas Forensic Science Commission, 1700 North Congress Avenue, Suite 445, Austin, Texas 78701, [Leigh.Savage@fsc.texas.gov](mailto:Leigh.Savage@fsc.texas.gov).

Any proposed changes to these rules as a result of the review will be published in the Proposed Rules section of the *Texas Register* and will be open for an additional 30-day public comment period prior to final adoption.

TRD-201902997

Leigh Savage

Associate General Counsel

Texas Forensic Science Commission

Filed: August 29, 2019



## Adopted Rule Reviews

### State Board for Educator Certification

#### Title 19, Part 7

The State Board for Educator Certification (SBEC) adopts the review of Title 19, Texas Administrative Code (TAC), Chapter 233, Categories of Classroom Teaching Certificates, pursuant to the Texas Government Code (TGC), §2001.039. The SBEC proposed the review of 19 TAC Chapter 233 in the May 31, 2019 issue of the *Texas Register* (44 TexReg 2733).

Relating to the review of 19 TAC Chapter 233, the SBEC finds that the reasons for the adoption continue to exist and readopts the rules. No public comments were received.

This concludes the review of 19 TAC Chapter 233.

TRD-201903080

Cristina De La Fuente-Valadez

Director, Rulemaking

State Board of Educator Certification

Filed: September 4, 2019



The State Board for Educator Certification (SBEC) adopts the review of Title 19, Texas Administrative Code (TAC), Chapter 244, Certificate of Completion of Training for Appraisers, pursuant to the Texas Government Code (TGC), §2001.039. The SBEC proposed the review of

19 TAC Chapter 244 in the May 31, 2019, issue of the *Texas Register* (44 TexReg 2733).

Relating to the review of 19 TAC Chapter 244, the SBEC finds that the reasons for the adoption continue to exist and readopts the rules. No public comments were received.

This concludes the review of 19 TAC Chapter 244.

TRD-201903079

Cristina De La Fuente-Valadez

Director, Rulemaking

State Board for Educator Certification

Filed: September 4, 2019



Texas Commission on Environmental Quality

**Title 30, Part 1**

The Texas Commission on Environmental Quality (commission) has completed its Rule Review of 30 TAC Chapter 5, Advisory Committees and Groups, as required by Texas Government Code, §2001.039. Texas Government Code, §2001.039, requires a state agency to review and consider for re adoption, re adoption with amendments, or repeal each of its rules every four years. The commission published its Notice of Intent to Review these rules in the March 15, 2019, issue of the *Texas Register* (44 TexReg 1449).

The review assessed whether the initial reasons for adopting the rules continue to exist and the commission has determined that those reasons exist. The rules in Chapter 5 are required because Chapter 5 provides the authority and procedures for the commission, executive director, and staff for creating advisory committees and groups for the purpose of receiving advice on specific matters. The chapter establishes requirements, procedures, and policies relating to the creation, duties, operation, and duration of advisory committees and groups.

The chapter is divided into three subchapters. Subchapter A establishes a common purpose and definitions for the other two subchapters. The subchapter includes a definition for "balanced representation" which, by statute, the commission, executive director, and staff are required to make reasonable attempts to achieve in the creation of advisory committees and groups. Subchapter B addresses advisory committees, which for the purposes of this subchapter are those committees created by the commission or by state law for the purpose of providing advice to the commission. Subchapter C addresses advisory groups.

The rules are needed to implement requirements of Texas Water Code (TWC), §5.107, relating to Advisory Committees, Work Groups, and Task Forces, and particularly the additional authority and requirements added to TWC, §5.107 by House Bill (HB) 2912, §1.10, 77th Legislature, 2001. TWC, §5.107 authorizes the commission or the executive director to create and consult with advisory committees, work groups, or task forces, including committees, work groups, or task forces for the environment, for public information, or for any other matter that the commission or the executive director may consider appropriate.

The rules are also needed to implement requirements of Texas Government Code, Chapter 2110, relating to Agency Advisory Committees, including clarifications that were provided by HB 2914, Article 45, 77th Legislature, 2001. Texas Government Code, Chapter 2110, establishes requirements for the creation, composition, evaluation, and duration of advisory committees.

**Public Comment**

The public comment period closed on April 15, 2019. The commission did not receive comments on the rules review of this chapter.

As a result of the review the commission finds that the reasons for adopting the rules in 30 TAC Chapter 5 continue to exist and readopts these sections in accordance with the requirements of Texas Government Code, §2001.039.

TRD-201903026

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Filed: August 30, 2019



The Texas Commission on Environmental Quality (commission) has completed its Rule Review of 30 TAC Chapter 118, Control of Air Pollution Episodes, as required by Texas Government Code, §2001.039. Texas Government Code, §2001.039, requires a state agency to review and consider for re adoption, re adoption with amendments, or repeal each of its rules every four years. The commission published its Notice of Intent to Review these rules in the March 15, 2019, issue of the *Texas Register* (44 TexReg 1450).

The review assessed whether the initial reasons for adopting the rules continue to exist and the commission has determined that those reasons exist. The rules in Chapter 118 are required because Chapter 118 was developed to implement state law regarding air pollution episodes. Specifically, the chapter establishes the actions and corresponding procedures necessary for the commission to take in response to generalized or localized air pollution episodes for the protection of human health or safety. Chapter 118 requires owners or operators of major stationary sources in El Paso, Galveston, Harris, Jefferson, and Orange Counties that emit 100 tons or more of any specified pollutant to prepare and maintain an emission reduction plan. In addition, the chapter requires the commission to prepare an air pollution episode contingency plan with detailed procedures for notification to the public and public officials, actions required by the commission and local air pollution control personnel, and transmission of information to contiguous states as may be necessary.

In addition to implementing state law, the rules in Chapter 118 are needed for compliance with federal law, specifically Federal Clean Air Act, §110(a)(2)(G) and 40 Code of Federal Regulations Part 51, Subpart H, relating to the requirements for a contingency plan regarding air pollution emergency episodes.

**Public Comment**

The public comment period closed on April 15, 2019. The commission did not receive comments on the rules review of this chapter.

As a result of the review the commission finds that the reasons for adopting the rules in 30 TAC Chapter 118 continue to exist and readopts these sections in accordance with the requirements of Texas Government Code, §2001.039.

TRD-201903027

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Filed: August 30, 2019



The Texas Commission on Environmental Quality (commission) has completed its Rule Review of 30 TAC Chapter 291, Utility Regulations, as required by Texas Government Code, §2001.039. Texas Government Code, §2001.039, requires a state agency to review and consider for re adoption, re adoption with amendments, or repeal each of its rules every four years. The commission published its Notice of Intent

to Review these rules in the March 15, 2019, issue of the *Texas Register* (44 TexReg 1450).

The review assessed whether the initial reasons for adopting the rules continue to exist and the commission has determined that those reasons exist. The rules in Chapter 291 are required because the rules implement the procedures and powers provided to the commission relating to water and sewer utility regulations under Texas Water Code, §§11.036 - 11.041 and Chapter 13. Chapter 291 provides the commission's rules regarding the regulation of water and sewer utilities. The rules are necessary to assure water and sewer operations and services comply with commission requirements. Chapter 291 is divided into Subchapters A, D, F, G, I, J, L, and M, which set forth provisions related to general administration; records and reports; quality of service; certificates of convenience and necessity; wholesale water petitions; enforcement, supervision, and receivership; standards of emergency operations; and water shortage reports.

#### Public Comment

The public comment period closed on April 15, 2019. The commission did not receive comments on the rules review of this chapter.

As a result of the review the commission finds that the reasons for adopting the rules in 30 TAC Chapter 291 continue to exist and readopts these sections in accordance with the requirements of Texas Government Code, §2001.039.

TRD-201903024

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Filed: August 30, 2019



The Texas Commission on Environmental Quality (commission) has completed its Rule Review of 30 TAC Chapter 304, Watermaster Operations, as required by Texas Government Code, §2001.039. Texas Government Code, §2001.039, requires a state agency to review and consider for readoption, readoption with amendments, or repeal each of its rules every four years. The commission published its Notice of Intent to Review these rules in the March 15, 2019, issue of the *Texas Register* (44 TexReg 1450).

The review assessed whether the initial reasons for adopting the rules continue to exist and the commission has determined that those reasons exist. The rules in Chapter 304 are required because the rules implement the duties and responsibilities of watermaster operations in Texas Water Code (TWC), Chapter 11, including TWC, §§11.325 - 11.458 and §§11.551 - 11.561. Chapter 304 provides the rules concerning watermaster operations for each water division other than the Rio Grande Water Division. The rules include the regulation of the use of state water or watercourses, allocation of available waters, enforcement regarding watermaster operations, the administration of watermaster operations, appeal of watermaster actions, and financing watermaster operations.

#### Public Comment

The public comment period closed on April 15, 2019. The commission did not receive comments on the rules review of this chapter.

As a result of the review the commission finds that the reasons for adopting the rules in 30 TAC Chapter 304 continue to exist and readopts

these sections in accordance with the requirements of Texas Government Code, §2001.039.

TRD-201903025

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Filed: August 30, 2019



The Texas Commission on Environmental Quality (commission) has completed its Rule Review of 30 TAC Chapter 315, Pretreatment Regulations for Existing and New Sources of Pollution, as required by Texas Government Code, §2001.039. Texas Government Code, §2001.039, requires a state agency to review and consider for readoption, readoption with amendments, or repeal each of its rules every four years. The commission published its Notice of Intent to Review these rules in the March 15, 2019, issue of the *Texas Register* (44 TexReg 1451).

The review assessed whether the initial reasons for adopting the rules continue to exist and the commission has determined that those reasons exist. The rules in Chapter 315 are required because Chapter 315 implements provisions of the Texas Water Code (TWC), §26.047 (Permit Conditions and Pretreatment Standards Concerning Publicly Owned Treatment Works) and TWC, §26.1211 (Pretreatment Effluent Standards).

Additionally, Chapter 315 adopts by reference pretreatment regulations from 40 Code of Federal Regulations (CFR) Part 403, except 40 CFR §403.16, and Appendices A - E. The federal pretreatment regulations establish standards to control pollutants which pass through or interfere with wastewater treatment processes in publicly owned treatment works (POTWs). The federal rules describe the objectives of the pretreatment program regulations and provide for requirements no less stringent than those found in the Clean Water Act and TWC. The federal rules also set forth the requirements for development of pretreatment programs by POTWs, which include the POTWs' legal authority, enforcement response plan, standard operating procedures, and technically based local limits.

Chapter 315 is necessary to maintain Texas Pollutant Discharge Elimination System delegation authority and to implement the TWC, Chapter 26.

#### Public Comment

The public comment period closed on April 15, 2019. The commission did not receive comments on the rules review of this chapter.

As a result of the review the commission finds that the reasons for adopting the rules in 30 TAC Chapter 315 continue to exist and readopts these sections in accordance with the requirements of Texas Government Code, §2001.039.

TRD-201903028

Robert Martinez

Director, Environmental Law Division

Texas Commission on Environmental Quality

Filed: August 30, 2019



# TABLES & GRAPHICS

Graphic images included in rules are published separately in this tables and graphics section. Graphic images are arranged in this section in the following order: Title Number, Part Number, Chapter Number and Section Number.

Graphic images are indicated in the text of the emergency, proposed, and adopted rules by the following tag: the word "Figure" followed by the TAC citation, rule number, and the appropriate subsection, paragraph, subparagraph, and so on.

Figure: 25 TAC §265.166(d)

Disinfectant Level	Minimum	Ideal	Maximum
Free Chlorine	1.0 ppm	2.0 – 3.0 ppm	8.0 ppm
Bromine	2.5 ppm	3.0 – 5.0 ppm	8.0 ppm
Combined Chlorine	None	None	None
pH	Not less than 7.0	7.2 – 7.6	7.8
Cyanuric Acid	None	10.0 – 30.0 ppm	50.0 ppm
ORP	600mV	650 – 750mV	900mV
Alkalinity	50 ppm		180 ppm
Calcium Hardness	150 ppm		1000 ppm
Algae	None	None	None

Figure: 25 TAC §265.172(f)(2)

Fixture Schedule	Females	Males
Water Closets	1/50	1/100 <sup>1</sup>
Urinals	NA	1/100 <sup>1</sup>
Lavatories	1/150	1/150
Cleansing showers <sup>2</sup>	1/100	1/100
Baby Changing Table	1 per sanitary facility	1 per sanitary facility

<sup>1</sup>Where urinals are provided, one water closet less than the number specified may be provided for each urinal installed except the number of water closets shall not be reduced to less than one-half of the minimum specified.

<sup>2</sup>Where tower rinsing showers are provided at the entry or exit into the lagoon, one shower less than the number specified may be provided for each tower rinsing shower except the number of conventional showers shall not be reduced to less than one-half of the minimum specified. Tower rinsing showers are not required to provide heated water.

Figure: 25 TAC §265.172(g)(3)

Fixture Schedule	Females	Males
Water Closets	1/50	1/100 <sup>1</sup>
Urinals	NA	1/100 <sup>1</sup>
Lavatories <sup>2</sup>	1/150	1/150
Rinsing showers <sup>3</sup>	1/200	1/200
Baby Changing Table	1 per sanitary facility	1 per sanitary facility

<sup>1</sup> Where urinals are provided, one water closet less than the number specified may be provided for each urinal installed except the number of water closets shall not be reduced to less than one-half of the minimum specified.

<sup>2</sup> Lavatories shall be provided with hot and cold running water.

<sup>3</sup> Rinsing showers can be tower showers or single showers without heated water, or individual showers with hot and cold running water.



Figure: 37 TAC §445.7(c)

REFERENCE	MINOR VIOLATIONS	PENALTY
	GENERAL	\$250 to \$500
419.046/435.15	Failure to provide compliant SOP for operating at emergency incidents.	\$250 to \$500
435.17	Failure to provide compliant SOP for 2-In/2-Out.	\$250 to \$500
435.21	Failure to provide compliant SOP for Wellness/Fitness	\$250 to \$500
449	Failure to apply for Head of Department certification.	\$250 to \$500
421.9(c)	Failure to provide a list of all personnel.	\$250 to \$500
421.9(c)	Failure to provide accurate duty appointments for current job positions in FIDO.	\$250 to \$500
435.23	Failure of organization utilizing FIDO to report Firefighter Injuries.	\$250 to \$500
435.29	Failure to complete Federal Highway Administration Traffic Incident Management Course by the close of business December 31, 2020.	\$250 to \$500
435.25	Failure to complete "Courage to Be Safe" training within 1 year of appointment.	\$250 to \$500
419.040/435.1 /NFPA 1851	PROTECTIVE CLOTHING	
4.2.3	Failure to provide a letter of approval, from PPE manufacturer, for non-compliant aftermarket accessories.	\$250 to \$500
	Records	
4.3.1	Failure to compile and maintain applicable records of maintenance and use of PPE.	\$250 to \$500
4.3.2	Failure to compile and maintain applicable records of maintenance and use of rental PPE.	\$250 to \$500
4.3.3	Failure to provide a record tracking system for each PPE ensemble element as listed below:	\$250 to \$500
4.3.3(1)	Failure to provide a record of person to whom element is issued.	\$250 to \$500
4.3.3(2)	Failure to provide a record of date and condition when issued.	\$250 to \$500
4.3.3(3)	Failure to provide a record of manufacturer and model name or design.	\$250 to \$500
4.3.3(4)	Failure to provide a record of manufacturer's identification number, lot number, serial number, or unique identifier.	\$250 to \$500
4.3.3(5)	Failure to provide a record of month and year of manufacture.	\$250 to \$500
4.3.3(6)	Failure to provide a record of dates and results of advanced inspections.	\$250 to \$500
4.3.3(7)	Failure to provide a record of dates and results of advanced cleaning or decontamination	\$250 to \$500
4.3.3(8)	Failure to provide a record of the reason for advanced cleaning or decontamination and who performed cleaning or decontamination	\$250 to \$500
4.3.3(9)	Failure to provide a record of the dates of repairs, who performed repairs, and brief description of repairs.	\$250 to \$500
4.3.3(10)	Failure to provide a record of the date of retirement.	\$250 to \$500
4.3.3(11)	Failure to provide a record of the date and method of disposal.	\$250 to \$500
4.3.4	Failure to provide a record of the CBRN records, if applicable.	\$250 to \$500
4.4.1	Failure to provide personnel with manufacturer's instructions regarding the care, use, and maintenance of the protective ensembles.	\$250 to \$500
4.4.2	Failure to follow manufacturer's instructions for care, use and maintenance of PPE.	\$250 to \$500
4.4.3	Failure to provide organization and maintain and make available a copy of manufacturer instructions accessible to all personnel.	\$250 to \$500
	Protecting the Public and Personnel from Contamination	
4.2.4.3/11.1.1.4	Failure to provide a record of the verification certificate, from the Independent Service Provider, that performs all inspections, cleanings and repairs.	\$250 to \$500

4.2.4.6	Failure to provide a record of the certificates for training, within organization, for members of the organization that perform inspections, cleanings and repairs.	\$250 to \$500
4.5.1	Failure to provide written standard operating guidelines minimize the public's and the fire department personnel's exposure to soiled or contaminated PPE	\$250 to \$500
4.6	Failure to report PPE health and safety concerns and/or failures, to manufacturer.	\$250 to \$500
	Selection	
5.1.1/435.1	Failure to provide a written PPE Risk Assessment.	\$250 to \$500
5.1.2	Failure to perform a Risk Assessment that includes:	\$250 to \$500
5.1.2(1)	Failure to identify type of duties performed.	\$250 to \$500
5.1.2(2)	Failure to identify frequency of use of ensemble elements.	\$250 to \$500
5.1.2(3)	Failure to identify organization's experiences.	\$250 to \$500
5.1.2(4)	Failure to identify incident operations.	\$250 to \$500
5.1.2(5)	Failure to identify geographic location and climate.	\$250 to \$500
5.1.2(6)	Failure to identify specific physical area of operation.	\$250 to \$500
5.1.2(7)	Failure to identify likelihood of or response to CBRN terrorism incident.	\$250 to \$500
5.1.4	Failure to provide PPE that is compliant to current edition of NFPA 1971.	\$250 to \$500
	Inspection	
6.1.1	Failure to follow universal precautions, as appropriate.	\$250 to \$500
6.1.2	Failure to clean soiled or contaminated PPE before inspection.	\$250 to \$500
6.1.3	Failure to follow established guidelines to determine when PPE is soiled, if cleaning required and level of cleaning required.	\$250 to \$500
6.1.4	Failure to follow guidelines established when PPE requires cleaning, decontamination or repair.	\$250 to \$500
6.2.1	Failure of member of organization to conduct routine inspection of PPE, upon issue or after each use.	\$250 to \$500
6.2.2	Failure to follow routine inspection criteria, according to organization's guidelines, for each ensemble element.	\$250 to \$500
6.3.3.1	Failure to properly store PPE that has received an Advanced Inspection.	\$250 to \$500
6.3.4	Failure to document results of Advance Inspection.	\$250 to \$500
6.3.5	Failure to follow Advanced Inspection criteria, according to organizations guidelines.	\$250 to \$500
6.4.3	Failure to provide complete liner inspections after 3 years in service, then annually.	\$250 to \$500
6.4.3.1	Failure to provide complete liner inspections, every 2 years and annually, after moisture barrier replacement.	\$250 to \$500
6.4.4	Failure to document results of liner inspections.	\$250 to \$500
	Cleaning and Decontamination	
7.1.6	Failure to provide written procedures for decontamination and/or cleaning of PPE contaminated with body fluids.	\$250 to \$500
7.2	Failure to provide written Routine Cleaning instructions for each listed ensemble element.	\$250 to \$500
7.3	Failure to provide written Advanced Cleaning and decontamination instructions for each listed ensemble element.	\$250 to \$500
7.3.2	Failure to provide Advanced Cleaning for soiled PPE.	\$250 to \$500
7.3.5	Failure to provide Advanced Cleaning, in accordance with manufacturer instructions.	\$250 to \$500
7.3.15	Failure to provide optional CBRN cleaning requirements.	\$250 to \$500
	Retirement, Disposition, and Special Incident Procedures	
10.1.1	Failure to develop specific criteria for removal/retirement of PPE from service.	\$250 to \$500

10.3.2	Failure to provide procedures that shall include minimum:	\$250 to \$500
10.3.2 (1)	Failure to provide guidelines the immediate removal from service and preservation of all PPE utilized by the injured or deceased fire fighter.	\$250 to \$500
10.3.2 (2)	Failure to maintain custody of PPE ensembles and ensemble elements, at a secure location with controlled, documented access.	\$250 to \$500
10.3.2 (3)	Failure to nondestructively tag and store PPE in paper or cardboard containers.	\$250 to \$500
10.3.2 (4)	Failure to provide examination of PPE by qualified members of the organization or by outside experts.	\$250 to \$500
10.3.3	Failure of the organization to determine a specific period of time for retaining custody of PPE.	\$250 to \$500
419.041/435.3/ NFPA 1852	SELF CONTAINED BREATHING APPARATUS	
435.3(2)	Failure of SCBA to comply with the most current edition of NFPA 1981, at the time of contract for purchase.	\$250 to \$500
	Adverse Conditions	
4.2.1	Failure to provide an SOG for SCBA failure, near-failure or degradation, from normal use	\$250 to \$500
4.2.2	Failure to include at minimum:	\$250 to \$500
4.2.2 (1)	Failure to remove SCBA from service including mask, cylinder or frame assembly.	\$250 to \$500
4.2.2 (2)	Failure to secure SCBA with restricted access	\$250 to \$500
4.2.2 (3)	Failure to provide documentation of chain of custody	\$250 to \$500
4.2.3	Failure to provide a letter of approval, from SCBA manufacturer, for non-compliant aftermarket accessories.	\$250 to \$500
4.2.3.1	Failure to provide manufacture with data log, video, photo of condition failure	\$250 to \$500
4.2.3.2	Failure to provide written procedure for notifying manufacture in SOP	\$250 to \$500
4.2.4	Failure to provide a copy of notification to SCBA testing approval organizations.	\$250 to \$500
	Selection, Care and Maintenance	
4.3.1	Failure to provide written guidelines that includes roles, responsibilities of the organization. and organizations members.	\$250 to \$500
4.3.2.1	Failure to provide written guidelines that define criteria for SCBA that is contaminated beyond ability to clean/disinfect.	\$250 to \$500
4.3.2.2	Failure to provide guidelines for proper disposal of contaminated SCBA	\$250 to \$500
4.3.2.3	Failure to place SCBA out of service that is known to be contaminated.	\$250 to \$500
4.3.5.1	Failure to provide written SCBA testing procedures if performed by the agency:	\$250 to \$500
4.3.5.2	Failure to provide written SCBA administrative testing procedures.	\$250 to \$500
4.3.5.2 (1)	Failure to provide written SCBA testing protocol.	\$250 to \$500
4.3.5.2 (2)	Failure to provide written procedures for training in use of testing machines.	\$250 to \$500
4.3.5.2 (3)	Failure to provide written procedure for calibration of testing machine.	\$250 to \$500
4.3.5.2 (4)	Failure to provide written procedure for authorization for technicians to conduct tests.	\$250 to \$500
4.3.5.2 (5)	Failure to provide written procedure for record keeping.	\$250 to \$500
4.3.5.2 (6)	Failure to provide written procedure for testing schedule.	\$250 to \$500
4.3.5.2 (7)	Failure to provide written procedure for evaluation of effectiveness of the program.	\$250 to \$500
4.3.5.3	Failure to provide procedure that indicates frequency of technician's inspection and testing	\$250 to \$500
4.3.6	Failure to provide written procedure that prevents a member of an organization from altering the form, fit or function of any of the organization's SCBA.	\$250 to \$500

	Manufactures Instructions	N/A
4.6.1	Failure of the organization to provide users with manufacturer's instructions, when issuing new SCBAs.	\$250 to \$500
	Quality Assurance	
4.8.1	Failure to establish and maintain a written quality assurance plan.	\$250 to \$500
	Technical Authorization	
4.9.2	Failure to provide a written procedure for selection and qualification of personnel training and authorization.	\$250 to \$500
4.9.3	Failure to provide training credentials of technicians by Manufacturer.	\$250 to \$500
	Selection	
5.1.1.1	Failure to provide a written Risk Assessment as required.	\$250 to \$500
5.1.1.2	Failure to identify expected hazards for the types of duties performed	\$250 to \$500
5.1.1.2	Failure to identify frequency of use.	\$250 to \$500
5.1.1.2	Failure to identify an organization's experience.	\$250 to \$500
5.1.1.2	Failure to identify geographic location and climate.	\$250 to \$500
	Acceptance	
5.2.3	Provide a written procedure for returning unsatisfactory products, to the manufacturer.	\$250 to \$500
	Storage	
6.3.7.3	Failure to purge SCBA cylinders with stored air for greater than 12 months.	\$250 to \$500
7.3.6	Failure to provide current records of the DOT Requalification permit letter for the ISP performing hydro testing of SCBA cylinders.	\$250 to \$500
	Testing	
7.5.1	Failure to provide SCBA Annual Full-Function Test Records.	\$250 to \$500
7.5.4	Failure to have testing equipment calibrated by manufacturer.	\$250 to \$500
7.5.4.1	Failure to provide annual calibration of testing equipment.	\$250 to \$500
7.5.4.2	Failure to exhibit current calibration label on machine. Failure to exhibit date on calibration label. Failure to exhibit date of next scheduled calibration.	\$250 to \$500
7.5.4.3	Failure to maintain calibration test records kept on site.	\$250 to \$500
5.7.3	Failure to post signage, for current air quality test reports, within six feet of machine.	\$250 to \$500
	Compressed Breathing Air Systems	
7.1.3	Failure to post signage that indicates the location of fresh air intake.	\$250 to \$500
419.042/435.9 / NFPA 1982	PERSONAL ALERT SAFETY SYSTEM	
435.9(2)	Failure to select a PASS device that complies with NFPA 1982	\$250 to \$500
435.9(4)	Failure to properly maintain PASS device.	\$250 to \$500
419.044/435.11 / NFPA 1561	INCIDENT MANAGEMENT SYSTEM	
435.11(a)	Failure to develop and maintain an IMS	\$250 to \$500
435.11(b)	Failure in the IMS procedure to include:	\$250 to \$500
435.11(b)(3)	Failure to provide written requirements for operations to be conducted in a manner that recognizes hazards and assists in the prevention of accidents and injuries	\$250 to \$500
435.11(b)(5)	Failure to provide written requirements that the IMS be applied to all drills, exercises and all other situations that involve hazards similar to those encountered at an actual emergency.	\$250 to \$500
435.11(c)	Failure to provide written requirements that meet applicable sections of NFPA 1561.	\$250 to \$500

4.4.3	Failure to provide written requirements that IMS be defined and documented in writing.	\$250 to \$500
4.4.4	Failure to provide written requirements includes implementation and describes options according to needs	\$250 to \$500
4.4.5	Failure to provide written requirements for addressing requirements for anticipated incidents	\$250 to \$500
4.4.6	Failure to provide written requirements that addresses both routine and unusual incidents, standard procedures, supervisory assignments	\$250 to \$500
4.4.9	Failure to provide written requirements that require that the IMS be applied to all drills, exercises and all other situations that involve hazards similar to those encountered at an actual emergency.	\$250 to \$500
4.4.10	Failure to provide written requirements for operations to be conducted in a manner that recognizes hazards and assists in the prevention of accidents and injuries.	\$250 to \$500
4.5.12	Failure to provide written requirements for evacuation of responders if imminent hazard condition exists.	\$250 to \$500
4.5.13	Failure to provide written requirements to indicate method used to notify all responders of evacuation.	\$250 to \$500
4.6	Failure to provide written requirements for procedures for incident scene rehabilitation	\$250 to \$500
5.1.11	Failure to provide written requirements for the scope of authority for each supervisor outlined in the procedure.	\$250 to \$500
5.3.4	Failure to provide written requirements that provide for one individual to be the Incident Commander from beginning of operations.	\$250 to \$500
5.3.5	Failure to provide written requirements that provide for transfer of command.	\$250 to \$500
5.3.6	Failure to provide written requirements that outline the transfer of command.	\$250 to \$500
5.9.2	Failure to provide written requirements defining roles & responsibilities	\$250 to \$500
5.9.6.2	Failure to provide written requirements defining criteria for appointment of safety officer	\$250 to \$500
6.2.1	Failure to provide written requirements for radio communications	\$250 to \$500
6.2.2/6.3.3	Failure to provide written requirements for clear text and plain language to be used.	\$250 to \$500
6.3.3	Failure to provide written requirements for emergency traffic and Mayday distress calls.	\$250 to \$500
6.4.1	Failure to provide written requirements for telecommunicator support	\$250 to \$500
7.3.2	Failure to provide written requirements for call in roster	\$250 to \$500
419.045/435.13 / NFPA 1561	SECTION 6.1 ~ Personnel Accountability System	
435.13(d)	Failure to provide written requirements that meet applicable sections of NFPA 1561.	\$250 to \$500
4.5.3	Failure to provide written requirements and procedures for establishing the system, components, and means to ID and keep track of responders.	\$250 to \$500
435.13(b)(3),4.5.9	Failure to provide written requirements that all fire protection personnel at emergency incidents actively participate.	\$250 to \$500
4.5.12 – 4.5.13	Failure to provide written requirements emergency evacuation and method of rapid accounting.	\$250 to \$500
4.5.14	Failure to provide written requirements for rapid accounting.	\$250 to \$500
435.13(b)(4) 5.3.10	Failure to provide written requirements that Incident Commander is responsible for accountability.	\$250 to \$500
435.17	Interior Structural Fire Fighting (2-In/2-Out Rule)	
435.17(a)	Failure to provide written requirements and procedure complying with OSHA 29 CFR 1910.134(g)(4)	\$250 to \$500

435.17(1)	Failure to provide written requirements that at least four personnel on scene before interior operations begin.	\$250 to \$500
435.17(8)(b)	Failure to provide written requirements for the exceptions for imminent life threats.	\$250 to \$500
435.15	Operating at Emergency Incidents	
435.15(b)(1)	Failure to provide written requirements that specify the adequate number of personnel to safely conduct emergency scene operations.	\$250 to \$500
435.15(b)(2)	Failure to provide written requirements that limit operations to those that can be safely performed by personnel at scene.	\$250 to \$500
435.15(b)(3)	Failure to provide written requirements for all personnel to be trained in and use the standard operating procedures.	\$250 to \$500
435.27 / NFPA 1403	LIVE FIRE TRAINING	
435.27	Failure to provide written requirements that establishes NFPA 1403 used as a guide.	\$250 to \$500
	TRAINING FACILITY	
427.307	Failure of the Chief Training Officer to hold Instructor III certification	\$250 to \$500
427.9	Failure to provide written documentation that required equipment for each discipline certified to teach is owned by organization.	\$250 to \$500
427.1(f)	Failure to provide written documentation for equipment is not owned, a provide letter of commitment from the department(s) who own the equipment.	\$250 to \$500
427.13/427.203(b)	Failure to provide written documentation of records from certification courses delivered in the past 3 years	\$250 to \$500
427.11	Failure to provide written reference material required for each discipline in which the organization holds certification.	\$250 to \$500
427.203(a)(3)	Failure to provide written documents to substantiate test scores to include performance testing.	\$250 to \$500
427.203(c)	Failure to provide written master copies of examinations that are maintained for a minimum of three years.	\$250 to \$500
439.205	Failure to provide letters of assurance are on file, when skills are not evaluated in the immediate presence of a field examiner.	\$250 to \$500

Figure 37 TAC §445.7(d)

RULE NUMBERS	GENERAL	PENALTY
419.032	Failure to appoint TCFP certified fire protection personnel to perform fire protection duties.	\$500 TO \$1,000
435.25	Failure to provide Courage to Be Safe training.	\$500 TO \$1,000
435.1 /NFPA 1851	PROTECTIVE CLOTHING	
435.1	Failure to purchase, provide and maintain PPE in accordance to most current edition of NFPA 1851.	\$500 TO \$1,000
435.1	Failure of fire protection personnel to utilize approved PPE in the course of performing fire-fighting operations.	\$500 TO \$1,000
4.2.4	Failure to utilize a: Manufacturer trained individual or, Verified organization or, Verified independent service provider (ISP), to perform advanced cleaning, advanced inspections, and repair services of PPE and PPE elements.	\$500 TO \$1,000
	Records	
4.5.2	Wearing or storing of contaminated PPE in living or public areas.	\$500 TO \$1,000
4.5.3	Exposure of the public to contaminated PPE.	\$500 TO \$1,000
4.5.4	Soiled or potentially contaminated PPE brought into a home or, washed in a home laundry, or washed in a public laundry.	\$500 TO \$1,000
6.3.3	Failure to provide Advance Inspections every 12 months or when routine inspection indicates	\$500 TO \$1,000
	Cleaning and Decontamination	
7.1.1	Failure to provide means for PPE to be cleaned and or decontamination	\$500 TO \$1,000
7.1.2	Failure of wearer to evaluate PPE for appropriate cleaning level after each use	\$500 TO \$1,000
7.1.4	Failure to evaluate contaminated PPE at an incident scene to determine if isolation is required.	\$500 TO \$1,000
7.3.2	Failure to provide Advance Cleaning of soiled PPE prior to reuse.	\$500 TO \$1,000
7.3.3	Failure to provide Advanced Cleaning, as required, at least every 12 months, for issued PPE.	\$500 TO \$1,000
7.3.6	Failure to perform PPE Advanced Cleaning in machine, unless prohibited.	\$500 TO \$1,000
7.3.7	Failure to provide criteria for Advanced Cleaning, as required by NFPA Standard 1851.	\$500 TO \$1,000
7.4	Failure to provide criteria for drying procedures, as required by NFPA Standard 1851.	\$500 TO \$1,000
	Repair	
8.1.3	Failure to immediately retire PPE contaminated with CBRN agents.	\$500 TO \$1,000
8.2.1	Failure to perform repairs and/or alterations with materials approved by manufacturer.	\$500 TO \$1,000
8.2.6.2	Failure to perform repairs according to NFPA Standard 1971.	\$500 TO \$1,000
	Storage	
9.1.1	Failure to properly store PPE while not being worn.	\$500 TO \$1,000
9.1.2	Failure to properly clean and dry PPE before storage.	\$500 TO \$1,000
9.1.3	Storage of PPE in air tight containers, unless new and unissued.	\$500 TO \$1,000
9.1.4	Failure to store PPE in an ambient temperature between 25°F and 180°F.	\$500 TO \$1,000
9.1.5	Failure to prevent damage to PPE during storage for transportation.	\$500 TO \$1,000
9.1.6	Failure to store soiled PPE in a protective case or bag when being transported in a vehicle and/or stored in a living area.	\$500 TO \$1,000

9.1.8	Failure to store Proximity PPE by hanging.	\$500 TO \$1,000
9.1.9	Failure to provide a PPE storage that is clean, dry and well ventilated.	\$500 TO \$1,000
	Retirement, Disposition, and Special Incident Procedures	
10.1.2 & 10.1.3	Failure to retire structural and proximity PPE after ten years from date of manufacture.	\$500 TO \$1,000
10.1.3.1	Failure to retire proximity radiant reflective outer shell after five years.	\$500 TO \$1,000
10.1.4	Failure to retire damaged and/or non-repairable PPE.	\$500 TO \$1,000
10.2.1	Failure to ensure that retired is not used in live fire events.	\$500 TO \$1,000
10.1.8/10.2.2	Use of retired PPE for live fire events.	\$500 TO \$1,000
10.3.1	Failure to provide written procedures for handling and/or custody of PPE where serious injury and/or death has occurred	\$500 TO \$1,000
419.041/435.3/ NFPA 1852	SELF CONTAINED BREATHING APPARATUS	
435.3(5)	Failure to provide written procedures for when SCBA is to be used.	\$500 TO \$1,000
435.3(2)	Failure of SCBA to comply with NFPA Standard 1981, at the time of contract of purchase.	\$500 TO \$1,000
	General	
4.1.1	Failure to provide written procedures for addressing respiratory protection.	\$500 TO \$1,000
	Selection, Care and Maintenance	\$500 TO \$1,000
4.3.2	Failure to minimize exposure to contaminated SCBA.	\$500 TO \$1,000
4.3.2.4	Failure to follow written procedures for minimizing public risk of exposure to contaminated SCBA	\$500 TO \$1,000
	Upgrades and Retirement	
4.4.1	Failure of SCBA that are currently in service to comply with the most current edition of NFPA 1981, Chapter 4.4, "SCBA Compliance – Upgrades and Retirement"	\$500 TO \$1,000
	Records	
4.5.8	Failure of the organization to create, maintain, and disseminate all documents and/or records as required.	\$500 TO \$1,000
	Retirement and Disposal	
4.7.3	Failure to retire defective or obsolete SCBA and/or render incapable of operation.	\$500 TO \$1,000
5.2.1	Failure to conduct Function Tests on SCBA prior to placing the SCBA in service.	\$500 TO \$1,000
	Care	
6.1 – 6.2	Failure to follow written procedures for care, cleaning, disinfecting and decontamination of SCBA.	\$500 TO \$1,000
	Storage	
6.3.7	Failure to store SCBA cylinders fully charged.	\$500 TO \$1,000
	Maintenance	
7.1.1.1	Failure of assigned SCBA user to conduct inspection at beginning of duty period.	\$500 TO \$1,000
7.1.1.2	Failure to inspect unassigned SCBA once per duty period.	\$500 TO \$1,000
7.1.1.3	Failure to inspect unassigned SCBA weekly	\$500 TO \$1,000
7.1.1.4	Failure to conduct weekly interval inspections for unassigned SCBAs.	\$500 TO \$1,000
7.1.2.1	Failure to inspect all the points of the duty period inspection as required.	\$500 TO \$1,000
	Technical Maintenance	
7.2.1.3	Failure to conduct function tests at least annually or according to manufactures instruction.	\$500 TO \$1,000



7.2.1.5	Failure to conduct function tests, by purchasing organization, prior to placing in service.	\$500 TO \$1,000
7.2.3.1	Failure to conduct service and/or repairs by individuals authorized by manufacturer.	\$500 TO \$1,000
7.2.3.7	Failure to provide documentation of full function flow test after repair according to manufacture instructions	\$500 TO \$1,000
	Breathing Air Cylinder Filling	
7.3.1	Failure to conduct cylinder pre-fill inspection as required.	\$500 TO \$1,000
	Breathing Air Cylinder Requalification	
7.4.1	Failure to provide current DOT Permit Letter from hydrotest service vendor.	\$500 TO \$1,000
435.3(3) / NFPA 1989	Breathing Air	
4.1.1	Failure to conduct quarterly air quality testing	\$500 TO \$1,000
	Air Quality Requirements	\$500 TO \$1,000
5.1.1	Failure to conduct quarterly (90 days) air sample tests no more $\pm$ 5 days of each other	\$500 TO \$1,000
5.1.2	Failure to take air samples if contamination is suspected.	\$500 TO \$1,000
5.1.4	Failure to maintain quarterly air quality test reports for five years.	\$500 TO \$1,000
	Special Testing and Procedures for Maintenance Conditions	
5.2.1	Failure to provide air sample records after maintenance, alterations, repairs and/or relocation of unit.	\$500 TO \$1,000
5.2.1	Failure to place air compressor out of service when breathing air test samples fail test.	\$500 TO \$1,000
5.2.1.1	Failure to provide air sample test results before and after filter changes, within one week of each test.	\$500 TO \$1,000
5.2.1.1.1	Failure to place compressor out of service when pre-filter air tests did not occur.	\$500 TO \$1,000
5.2.3/5.4.5	Failure to maintain air quality test results and records for five years.	\$500 TO \$1,000
	Special Testing and Procedures for Contaminated Compressed Breathing Air	
5.4.1	Failure to place breathing air system out of service when air sample test fails.	\$500 TO \$1,000
5.4.1.1	Failure to replace stored breathing air filled from failed unit.	\$500 TO \$1,000
5.4.2	Failure to pass air sample before putting back in service	\$500 TO \$1,000
5.5.2.2	Failure to collect air sample for test at correct location.	\$500 TO \$1,000
	Compressed Breathing Air Systems	
7.1.2	Failure to locate air intake to minimize contamination	\$500 TO \$1,000
	Maintenance	
7.5.3	Failure to empty and refill compressed air in steel cylinders annually.	\$500 TO \$1,000
	Records	
7.6.1	Failure to provide test records has name of testing lab.	\$500 TO \$1,000
7.6.2	Failure to provide records required for installation, maintenance, purification component changes, operation, trouble reports, corrective actions taken	\$500 TO \$1,000
7.6.3	Failure to provide air quality records on any air source	\$500 TO \$1,000
7.6.4	Failure to provide records of refills for all SCBA cylinders and storage cylinders	\$500 TO \$1,000
7.6.4.1	Failure to provide date of fill, person filling, cylinder serial #, air source, final cylinder pressure, hydro date on refill records.	\$500 TO \$1,000
7.6.4.2	Failure to maintain SCBA cylinder fill records for five years.	\$500 TO \$1,000

435.9 / NFPA 1982	PERSONAL ALERT SAFETY SYSTEM	
435.9(3)	Failure to describe a duty period inspection	\$500 TO \$1,000
435.9(4)	Failure to provide procedure of when to be used.	\$500 TO \$1,000
435.11 / NFPA 1561	INCIDENT MANAGEMENT SYSTEM	
435.11(b)(1)	Failure to provide a written SOP	\$500 TO \$1,000
435.11(b)(2)	Failure to require IMS be used at all emergency incidents	\$500 TO \$1,000
435.11(b)(4)	Failure to require that all fire protection personnel be trained in the use of the IMS	\$500 TO \$1,000
4.4.1	Failure to adopt NIMS as required.	\$500 TO \$1,000
4.4.7	Failure to require IMS be used at all emergency incidents	\$500 TO \$1,000
4.4.8	Failure to require that all fire protection personnel be trained in the use of the IMS	\$500 TO \$1,000
435.13 / NFPA 1561	Personnel Accountability System	
435.13, 4.5.1	Failure to develop, maintain, apply accountability system	\$500 TO \$1,000
435.13(b) (1-4)	Failure to provide an accountability system as required.	\$500 TO \$1,000
435.17	Interior Structural Fire Fighting (2 In/2 Out Rule)	
435.17	Failure to follow interior structural firefighting procedures as required.	\$500 TO \$1,000
435.27 / NFPA 1403	Live Fire Training	
435.27(8)(A), 4.9.6	Failure to provide a PASS device for all participating in live fire training as required.	\$500 TO \$1,000
435.27 (8)(B), 4.7.10	Failure to provide a Personnel Accountability System as required.	\$500 TO \$1,000
435.27(8)(C)	Failure to utilize an Incident Management System as required.	\$500 TO \$1,000
435.27(8)(D), 4.7.9, 4.9.1, 4.9.2, 4.9.7	Failure to use personal protective clothing and self-contained breathing apparatus as required.	\$500 TO \$1,000
435.27(8)(E), 4.10.2	Failure to establish an evacuation signal and procedure.	\$500 TO \$1,000
435.27(8)(F)	Failure to provide pre-burn, burn and post-burn procedures.	\$500 TO \$1,000
	Continuing Education Records	
441.5, 7, 9, 11, 13, 15, 17, 19, 21, 23	Failure to obtain CE for appointed positions as required.	\$500 TO \$1,000
NFPA 1561 4.8.1, 4.8.2	Failure to provide IMS training and qualification for initial and/or annual refresher	\$500 TO \$1,000

### Statement of Resident Rights

You, the resident, do not give up any rights when you enter a nursing facility. The facility must encourage and assist you to fully exercise your rights. Any violation of these rights is against the law. It is against the law for any nursing facility employee to threaten, coerce, intimidate or retaliate against you for exercising your rights.

If anyone hurts you, threatens to hurt you, neglects your care, takes your property, or violates your dignity, you have the right to file a complaint with the facility administrator or with the Texas Health and Human Services Commission [~~Texas Department of Human Services~~] by calling 1-800-458-9858.

You have a right to:

- (1) all care necessary for you to have the highest possible level of health;
- (2) safe, decent and clean conditions;
- (3) be free from abuse, neglect, and exploitation;
- (4) be treated with courtesy, consideration, and respect;
- (5) be free from discrimination based on age, race, religion, sex, nationality, or disability and to practice your own religious beliefs;
- (6) privacy, including privacy during visits and telephone calls;
- (7) complain about the facility and to organize or participate in any program that presents residents' concerns to the administrator of the facility;
- (8) have facility information about you maintained as confidential;
- (9) retain the services of a physician of your choice, at your own expense or through a health care plan, and to have a physician explain to you, in language you understand, your complete medical condition, the recommended treatment, and the expected results of the treatment, including reasonably expected effects, side effects, and risks associated with psychoactive medications;
- (10) participate in developing a care plan [~~plan of care~~], to refuse treatment, and to refuse to participate in experimental research;
- (11) a written statement or admission agreement describing the services provided by the facility and the related charges;
- (12) manage your own finances or to delegate that responsibility to another

person;

(13) access money and property you have deposited with the facility and to an accounting of your money and property that are deposited with the facility and of all financial transactions made with or on behalf of you;

(14) keep and use personal property, secure from theft or loss;

(15) not be relocated within the facility, except in accordance with nursing facility regulations;

(16) receive visitors;

(17) receive unopened mail and to receive assistance in reading or writing correspondence;

(18) participate in activities inside and outside the facility;

(19) wear your own clothes;

(20) discharge yourself from the facility unless a court finds that you lack this capacity [~~you have been adjudicated mentally incompetent~~];

(21) not be discharged from the facility, except as provided in the nursing facility regulations;

(22) be free from any physical or chemical restraints imposed for the purposes of discipline or convenience and not required to treat your medical symptoms;

(23) receive information about prescribed psychoactive medication from the person who prescribes the medication or that person's designee, to have any psychoactive medications prescribed and administered in a responsible manner, as mandated by the Texas Health and Safety Code, §242.505, and to refuse to consent to the prescription of psychoactive medications; and

(24) place an electronic monitoring device in your room that is owned and operated by you or provided by your guardian or legal representative.

Your rights may be restricted only to the extent necessary to protect you or another person from danger or harm or to protect a right of another resident, particularly those relating to privacy and confidentiality.

# IN ADDITION

The *Texas Register* is required by statute to publish certain documents, including applications to purchase control of state banks, notices of rate ceilings issued by the Office of Consumer Credit Commissioner, and consultant proposal requests and awards. State agencies also may publish other notices of general interest as space permits.

## Office of the Attorney General

### Settlement of Claims for Clean Water Act and Texas Water Code Violations

Notice is hereby given by the State of Texas of the proposed resolution of claims under the Clean Water Act and the Texas Water Code. The Attorney General will consider any written comments and may withdraw or withhold consent to the proposed consent decree if the comments disclose facts or considerations that indicate that the consent is inappropriate, improper, inadequate, or inconsistent with the requirements of applicable laws.

Case Title and Court: *United States and State of Texas v. City of Houston, Texas*, Cause No. 4:18-cv-03368, in the United States District Court for the Southern District of Texas.

Nature of Defendant's Operations: The City of Houston owns and operates a publicly owned wastewater treatment works comprising at least 40 wastewater treatment plants and associated wastewater collection systems. The United States and the State of Texas filed a joint Complaint against the City pursuant to Section 309(b) and (d) of the Clean Water Act, 33 U.S.C. §1319(b) and (d), and provisions of the Texas Water Code. In the joint Complaint, the United States and the State of Texas allege that sanitary sewer overflows from the City's wastewater collection and transmission system are unpermitted and in violation of the Clean Water Act; and that the discharged pollutants from Defendant's wastewater treatment plants exceed the effluent limits established in state-issued permits and are in violation of the Texas Water Code.

Nature of Settlement: The lawsuit will be settled by a consent decree in federal court.

Proposed Settlement: The proposed settlement agreement orders the City to pay \$4.4 million in civil penalties, to be equally divided between United States and the State of Texas; and \$200,000 in attorney's fees to the State of Texas. In addition, the settlement requires the City to implement significant and comprehensive improvements to the operation and maintenance of its sewer system, as well as to the system's infrastructure.

For a complete description of the proposed settlement, the complete proposed consent decree should be reviewed. The complete consent decree may be examined and downloaded at this Justice Department website: <https://www.justice.gov/enrd/consent-decrees>. Requests for additional information and written comments on the proposed settlement should be directed to Phillip Ledbetter, Assistant Attorney General, Office of the Texas Attorney General, P.O. Box 12548, Austin, Texas 78711-2548, (512) 463-2012, facsimile (512) 320-0911. Written comments must be received within 30 days of publication of this notice to be considered.

TRD-201903068

Ryan L. Bangert

Deputy Attorney General for Legal Counsel

Office of the Attorney General

Filed: September 3, 2019

## Comptroller of Public Accounts

### Certification of the Average Closing Price of Gas and Oil - July 2019

The Comptroller of Public Accounts, administering agency for the collection of the Oil Production Tax, has determined, as required by Tax Code, §202.058, that the average taxable price of oil for reporting period July 2019 is \$44.52 per barrel for the three-month period beginning on April 1, 2019, and ending June 30, 2019. Therefore, pursuant to Tax Code, §202.058, oil produced during the month of July 2019, from a qualified low-producing oil lease, is not eligible for a credit on the oil production tax imposed by Tax Code, Chapter 202.

The Comptroller of Public Accounts, administering agency for the collection of the Natural Gas Production Tax, has determined, as required by Tax Code, §201.059, that the average taxable price of gas for reporting period July 2019 is \$1.58 per mcf for the three-month period beginning on April 1, 2019, and ending June 30, 2019. Therefore, pursuant to Tax Code, §201.059, gas produced during the month of July 2019, from a qualified low-producing well, is eligible for a 100% credit on the natural gas production tax imposed by Tax Code, Chapter 201.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of West Texas Intermediate crude oil for the month of July 2019 is \$57.55 per barrel. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall not exclude total revenue received from oil produced during the month of July 2019, from a qualified low-producing oil well.

The Comptroller of Public Accounts, administering agency for the collection of the Franchise Tax, has determined, as required by Tax Code, §171.1011(s), that the average closing price of gas for the month of July 2019 is \$2.30 per MMBtu. Therefore, pursuant to Tax Code, §171.1011(r), a taxable entity shall exclude total revenue received from gas produced during the month of July 2019, from a qualified low-producing gas well.

Inquiries should be submitted to Teresa G. Bostick, Director, Tax Policy Division, P.O. Box 13528, Austin, Texas 78711-3528.

This agency hereby certifies that legal counsel has reviewed this notice and found it to be within the agency's authority to publish.

TRD-201902964

William Hamner

Special Counsel for Tax Administration

Comptroller of Public Accounts

Filed: August 28, 2019

## Revised Public Notice of Court Costs and Fees

Government Code, §51.607, requires the comptroller to publish a list of all court costs and fees imposed or changed during the most recent regular session of the Legislature. This section also provides generally that, notwithstanding the effective date of the law imposing or changing

the amount of a court cost or fee, the imposition or change does not take effect until January 1 following the effective date of the law.

The listing of court costs and fees to be identified and published as required by Government Code, §51.607 are as follows:

#### House Bill 1399

##### Creation and Storage of DNA Records

HB 1399 is effective January 1, 2020. House Bill 1399 creates and stores DNA records for a person arrested for certain felony offenses. Previously, the requirement to pay a fee for DNA testing applied to persons who were indicted or waived indictment. This bill expands the requirement to include persons who are arrested for certain felony offenses.

#### House Bill 1631

##### Prohibiting the Use of Photographic Traffic Signal Enforcement Systems

HB 1631 is effective January 1, 2020. Local Government Code, §133.004 is amended. The bill eliminates the filing fee for the judicial fund imposed in district court, statutory county court, and county court regarding the enforcement of compliance with the instructions of a traffic control signal. Transportation Code, §542.406(c-1) and §707.008(a-1), are removed pertaining to the portion of the civil or administrative penalty that was imposed by a local authority.

#### House Bill 3361

##### Court Reporter Service Fees in Certain Counties

HB 3361 is effective January 1, 2020. Government Code, §51.601(a-1) is amended. This bill amends which counties are eligible to collect a court reporter service fee of \$30 as a court cost for each civil case filed. Statute previously required that a court reporter serving a county that was located in a municipality with a population of 500,000 or more and along the Texas-Mexico border could impose this fee (El Paso County). The amended bill expands the number of persons subject to this fee by making the fee applicable in a county with a population of 750,000 or more located on the Texas-Mexico border (Hidalgo County and El Paso County).

#### Senate Bill 346

##### Court Costs

SB 346 is effective January 1, 2020. Senate Bill 346 relates to the consolidation, allocation, classification, and repeal of certain criminal court costs and other court-related costs, fines, and fees; increases the current consolidated fee on conviction and adds a new consolidated fee; and to the decrease of certain other fees by repealing the state's portion of the fees.

The bill amends the Local Government Code to increase the consolidated fee on conviction from \$133 to \$185 for felony convictions, from \$83 to \$147 for Class A and B misdemeanor convictions, and from \$40 to \$62 for non-jailable misdemeanor convictions, including criminal violations of a municipal ordinance, other than a conviction of an offense relating to a pedestrian or the parking of a motor vehicle.

The bill creates a local consolidated fee on conviction in the amount of \$105 for a felony conviction, \$123 for a Class A or B misdemeanor conviction, and \$14 for a conviction of a non-jailable offense, including a criminal violation of a municipal ordinance. The fee is charged on conviction and in addition to the state consolidated fee on conviction and any other fee or cost authorized by law, including the fees and costs reclassified by the bill as reimbursement fees or fines. The bill requires the county or municipal treasurer to allocate money received for the cost to designated accounts in the county or municipal treasury.

#### Senate Bill 562

##### Mental Health of Defendants

SB 562 is effective immediately. Senate Bill 562 relates to criminal or juvenile procedures regarding persons who are or may be persons with a mental illness or intellectual disability and the operation and effects of successful completion of a mental health court program.

The bill amends Code of Criminal Procedure, Article 102.006, and applies to the fees charged or costs assessed for an expunction order entered on or after the effective date of this Act, regardless of whether the underlying arrest occurred before, on, or after the effective date of this Act.

This bill waives the fees for an expunction order if the petitioner has successfully completed a veterans treatment court program created under Government Code, Chapter 124, or former law; or under Article 55.01(a)(2)(A)(ii)(b) after successful completion of a mental health court program created under Government Code, Chapter 125, or former law.

TRD-201903081

Victoria North

Chief Counsel for Fiscal Matters

Comptroller of Public Accounts

Filed: September 4, 2019

## Office of Consumer Credit Commissioner

### Notice of Rate Ceilings

The Consumer Credit Commissioner of Texas has ascertained the following rate ceilings by use of the formulas and methods described in §§303.003, 303.005 and 303.009, Texas Finance Code.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 09/09/19 - 09/15/19 is 18% for Consumer<sup>1</sup>/Agricultural/Commercial<sup>2</sup> credit through \$250,000.

The weekly ceiling as prescribed by §303.003 and §303.009 for the period of 09/09/19 - 09/15/19 is 18% for Commercial over \$250,000.

The monthly ceiling as prescribed by §303.005 and §303.009<sup>3</sup> for the period of 09/01/19 - 09/30/19 is 18% or Consumer/Agricultural/Commercial credit through \$250,000.

The monthly ceiling as prescribed by §303.005 and §303.009 for the period of 09/01/19 - 09/30/19 is 18% for Commercial over \$250,000.

<sup>1</sup> Credit for personal, family or household use.

<sup>2</sup> Credit for business, commercial, investment or other similar purpose.

<sup>3</sup> For variable rate commercial transactions only.

TRD-201903065

Leslie Pettijohn

Commissioner

Office of Consumer Credit Commissioner

Filed: September 3, 2019

## Texas Education Agency

Request for Application Concerning the 2020-2022 Grow Your Own Grant Program, Cycle 3

Filing Date. September 4, 2019

Filing Authority. The availability of grant funds under Request for Applications (RFA) #701-180-106 is authorized by the General Appropriations Act, Article III, Rider 41, 86th Texas Legislature, 2019.

Eligible Applicants. The Texas Education Agency (TEA) is requesting applications under RFA #701-18-106 from eligible applicants, which include local educational agencies (LEAs) and fully accredited educator preparation programs (EPPs). Education service centers (ESCs) may apply as fiscal agents. Specific eligibility of applicants depends on the Pathway chosen.

Description. The Grow Your Own Grant program is a competitive grant designed to facilitate increased entry of qualified, diverse candidates into the teaching profession, particularly in rural and small school settings. The program also aims to elevate the perception of the teaching profession through the development and facilitation of high-quality Education and Training courses at the high school level and to address challenges Texas currently faces in terms of recruiting and retaining teacher candidates. Applicants may select one or more of three pathways to achieve this goal. Pathway 1 focuses on the recruitment of future educators by offering Education and Training courses, including those offered for dual credit, to current high school students. Pathway 2 focuses on the recruitment and support of paraprofessionals, instructional aides, and long-term substitutes currently employed by the LEA to transition to certified, full-time teaching roles within the LEA. Pathway 3 focuses on developing well-qualified teacher candidates through a year-long clinical teaching assignment or an intensive preservice teacher training program. Please see the Program Guidelines for additional information about the Pathways, including eligibility, funding, and grant dates for each. The Program Guidelines will be posted on the TEA Grant Opportunities web page at <http://tea4avoswald.tea.state.tx.us/GrantOpportunities/forms/Grant-ProgramSearch.aspx>. In the "Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view and download all documents that pertain to this RFA.

Dates of Project. The 2020-2022 Grow Your Own Grant Program will be implemented primarily during the 2019-2020 through 2021-2022 school years. Applicants should plan for a starting date of no earlier than February 1, 2020, and an ending date of no later than June 30, 2022, contingent on the continued availability of funds.

Project Amount. Approximately \$2,750,000 is available for funding the 2020-2022 Grow Your Own Grant Program, Cycle 3. It is anticipated that approximately 30 grants will be awarded ranging in amounts from \$13,500-\$499,999, depending on the Pathway. This project is funded 100 percent with state funds.

Selection Criteria. Applications will be selected based on the ability of each applicant to carry out all requirements contained in the RFA. Reviewers will evaluate applications based on the overall quality and validity of the proposed grant programs and the extent to which the applications address the primary objectives and intent of the project. Applications must address each requirement as specified in the RFA to be considered for funding. TEA reserves the right to select from the highest-ranking applications those that address all requirements in the RFA.

TEA is not obligated to approve an application, provide funds, or endorse any application submitted in response to this RFA. This RFA does not commit TEA to pay any costs before an application is approved. The issuance of this RFA does not obligate TEA to award a grant or pay any costs incurred in preparing a response.

Applicants' Conference. A recorded webinar will be posted on the TEA Grants Opportunities page on September 27, 2019. Webinar details are included in the Program Guidelines. In the "Search Options" box, se-

lect the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view and download all documents that pertain to this RFA. Questions addressed during the webinar relevant to the RFA may be emailed to the TEA contact person identified in the program guidelines of the RFA no later than September 23, 2019. These questions, along with other information, will be addressed during the webinar. The applicants' conference webinar will be available to all potential applicants and will provide general and clarifying information about the grant program and RFA.

Requesting the Application. The complete RFA will be posted on the TEA Grant Opportunities web page at <http://tea4avoswald.tea.state.tx.us/GrantOpportunities/forms/Grant-ProgramSearch.aspx> for viewing and downloading. In the "Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view and download all documents that pertain to this RFA.

Further Information. In order to make sure that no prospective applicant obtains a competitive advantage because of acquisition of information unknown to other prospective applicants, any and all questions must be submitted in writing to the TEA contact persons identified in the Program Guidelines of the RFA no later than Friday, October 11, 2019. All questions and the written answers thereto will be posted on the TEA Grant Opportunities web page in the format of Frequently Asked Questions (FAQs) by Monday, October 21, 2019. In the "Search Options" box, select the name of the RFA from the drop-down list. Scroll down to the "Application and Support Information" section to view all documents that pertain to this RFA.

Deadline for Receipt of Applications. Applications must be received in the TEA Document Control Center by 5:00 p.m. (Central Time), Friday, November 15, 2019, to be eligible to be considered for funding. TEA will not accept applications by email. Applications may be delivered to the TEA visitors' reception area on the second floor of the William B. Travis Building, 1701 North Congress Avenue (at 17th Street and North Congress, two blocks north of the Capitol), Austin, Texas 78701 or mailed to Document Control Center, Grants Administration Division, Texas Education Agency, 1701 North Congress Avenue, Austin, Texas 78701-1494.

TRD-201903078

Cristina De La Fuente-Valadez

Director, Rulemaking

Texas Education Agency

Filed: September 4, 2019

## Texas Commission on Environmental Quality

### Agreed Orders

The Texas Commission on Environmental Quality (TCEQ, agency, or commission) staff is providing an opportunity for written public comment on the listed Agreed Orders (AOs) in accordance with Texas Water Code (TWC), §7.075. TWC, §7.075, requires that before the commission may approve the AOs, the commission shall allow the public an opportunity to submit written comments on the proposed AOs. TWC, §7.075, requires that notice of the proposed orders and the opportunity to comment must be published in the *Texas Register* no later than the 30th day before the date on which the public comment period closes, which in this case is **October 14, 2019**. TWC, §7.075, also requires that the commission promptly consider any written comments received and that the commission may withdraw or withhold approval of an AO if a comment discloses facts or considerations that indicate that consent is inappropriate, improper, inadequate, or inconsistent with the requirements of the statutes and rules within the com-

mission's jurisdiction or the commission's orders and permits issued in accordance with the commission's regulatory authority. Additional notice of changes to a proposed AO is not required to be published if those changes are made in response to written comments.

A copy of each proposed AO is available for public inspection at both the commission's central office, located at 12100 Park 35 Circle, Building C, 1st Floor, Austin, Texas 78753, (512) 239-2545 and at the applicable regional office listed as follows. Written comments about an AO should be sent to the enforcement coordinator designated for each AO at the commission's central office at P.O. Box 13087, Austin, Texas 78711-3087 and must be received by 5:00 p.m. on **October 14, 2019**. Written comments may also be sent by facsimile machine to the enforcement coordinator at (512) 239-2550. The commission's enforcement coordinators are available to discuss the AOs and/or the comment procedure at the listed phone numbers; however, TWC, §7.075, provides that comments on the AOs shall be submitted to the commission in writing.

(1) COMPANY: AK MOMIN ENTERPRISES, INCORPORATED dba Express Drive Inn; DOCKET NUMBER: 2019-0555-PST-E; IDENTIFIER: RN102229911; LOCATION: San Antonio, Bexar County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.48(a), by failing to ensure the underground storage tank system is operated, maintained, and managed in a manner that will prevent releases of regulated substances; 30 TAC §334.72, by failing to report suspected releases of regulated substances to the agency within 24 hours of discovery; and 30 TAC §334.74, by failing to investigate suspected releases of regulated substances within 30 days of discovery; PENALTY: \$22,188; ENFORCEMENT COORDINATOR: Berenice Munoz, (915) 834-4976; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(2) COMPANY: AMN Business Group Incorporated dba AAA 2; DOCKET NUMBER: 2019-0213-PST-E; IDENTIFIER: RN102280138; LOCATION: Kaufman, Kaufman County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.7(d)(1)(B) and (3), by failing to notify the agency of any change or additional information regarding the underground storage tanks (USTs) within 30 days from the date of the occurrence of the change or addition; 30 TAC §334.10(b), by failing to assure that all UST recordkeeping requirements are met; 30 TAC §334.49(c)(2)(C) and TWC, §26.3475(d), by failing to inspect the impressed current corrosion protection system at least once every 60 days to ensure the rectifier and other system components are operating properly; and 30 TAC §334.50(b)(2) and TWC, §26.3475(a), by failing to provide release detection for the pressurized piping associated with the UST system; PENALTY: \$5,537; ENFORCEMENT COORDINATOR: Hailey Johnson, (512) 239-1756; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(3) COMPANY: Austin Super Retail, LLC dba Cash Corner; DOCKET NUMBER: 2019-0682-PST-E; IDENTIFIER: RN101444131; LOCATION: Austin, Travis County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(a) and (c)(1), by failing to monitor the underground storage tanks (USTs) in a manner which will detect a release at a frequency of at least once every 30 days, and failing to provide release detection for the pressurized piping associated with the UST system; PENALTY: \$4,532; ENFORCEMENT COORDINATOR: Carlos Molina, (512) 239-2557; REGIONAL OFFICE: P.O. Box 13087, Austin, Texas 78711-3087, (512) 339-2929.

(4) COMPANY: Barry W. Blanton dba Thorp Springs Water; DOCKET NUMBER: 2019-0527-PWS-E; IDENTIFIER: RN102681640; LOCATION: Granbury, Hood County; TYPE OF FACILITY: public

water supply; RULES VIOLATED: 30 TAC §290.41(c)(3)(K), by failing to ensure that wellheads and pump bases are sealed by a gasket or sealing compound and properly vented to prevent the possibility of contaminating the well water; 30 TAC §290.45(b)(1)(B)(iii) and Texas Health and Safety Code, §341.0315(c), by failing to provide two or more service pumps having a total capacity of 2.0 gallons per minute per connection; 30 TAC §290.46(f)(2) and (3)(D)(ii), by failing to maintain water works operation and maintenance records and make them available for review to the executive director during the investigation; 30 TAC §290.46(n)(2), by failing to provide an accurate and up-to-date map of the distribution system so that valves and mains can be easily located during emergencies; 30 TAC §290.46(v), by failing to ensure that all electrical wiring is securely installed in compliance with a local or national electrical code; and 30 TAC §290.110(d)(1), by failing to use a color comparator that has current reagents, an unfaded and clear color comparator, and a sample cell that is not discolored or stained; PENALTY: \$437; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 403-4077; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(5) COMPANY: Timothy J. Bean; DOCKET NUMBER: 2019-1057-WOC-E; IDENTIFIER: RN109715979; LOCATION: Huntington, Angelina County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: \$175; ENFORCEMENT COORDINATOR: Ronica Rodriguez, (361) 825-3425; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(6) COMPANY: CASTILLO FUEL STOP INC dba Garrett Stop; DOCKET NUMBER: 2019-0670-PST-E; IDENTIFIER: RN102253465; LOCATION: Ennis, Ellis County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and TWC, §26.3475(c)(1), by failing to monitor the underground storage tanks for releases in a manner which will detect a release at a frequency of at least once every 30 days; PENALTY: \$3,750; ENFORCEMENT COORDINATOR: John Fennell, (512) 239-2616; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(7) COMPANY: City of Aransas Pass; DOCKET NUMBER: 2019-0286-PWS-E; IDENTIFIER: RN102315173; LOCATION: Aransas Pass, San Patricio County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.46(q)(1) and (2), by failing to issue a boil water notification to customers of the facility within 24 hours of a loss of pressure using the prescribed notification format specified in 30 TAC §290.47(e); PENALTY: \$231; ENFORCEMENT COORDINATOR: Ronica Rodriguez, (361) 825-3425; REGIONAL OFFICE: 6300 Ocean Drive, Suite 1200, Corpus Christi, Texas 78412-5839, (361) 825-3100.

(8) COMPANY: City of Forney; DOCKET NUMBER: 2019-0794-PWS-E; IDENTIFIER: RN101391811; LOCATION: Forney, Kaufman County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.117(e)(2), (h), and (i)(3), by failing to conduct water quality parameter sampling at each of the facility's entry points and the required distribution sample sites, have the samples analyzed, and report the results to the executive director (ED) for the June 1, 2018 - November 30, 2018, monitoring period; 30 TAC §290.117(f)(3)(A), by failing to submit a recommendation to the ED for optimal corrosion control treatment within six months after the end of the January 1, 2018 - December 31, 2018, monitoring period, during which the lead action level was exceeded; 30 TAC §290.117(g)(2)(A), by failing to submit a recommendation to the ED for source water treatment within 180 days after the end of the January 1, 2018 - December 31, 2018, monitoring period, during which the lead action level was exceeded; and 30 TAC §290.122(c)(2)(A) and (f), by failing to provide public notification and



submit a copy of the public notification, accompanied with a signed Certificate of Delivery, to the ED regarding the failure to timely report lead and copper tap sample results for the January 1, 2017 - December 31, 2017, monitoring period; PENALTY: \$862; ENFORCEMENT COORDINATOR: Julianne Dewar, (512) 239-1001; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(9) COMPANY: City of White Oak; DOCKET NUMBER: 2019-0754-PWS-E; IDENTIFIER: RN101390441; LOCATION: White Oak, Gregg County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.46(q)(1) and (2), by failing to issue a boil water notification to customers of the facility within 24 hours of water outage using the prescribed notification format as specified in 30 TAC §290.47(c); PENALTY: \$300; ENFORCEMENT COORDINATOR: Marla Waters, (512) 239-4712; REGIONAL OFFICE: 2916 Teague Drive, Tyler, Texas 75701-3734, (903) 535-5100.

(10) COMPANY: COMBINE RETAIL LLC dba Beaumont Chevron; DOCKET NUMBER: 2019-0573-PST-E; IDENTIFIER: RN106186349; LOCATION: Beaumont, Jefferson County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.8(c)(5)(C), by failing to have all tanks labeled in accordance with the registration using permanently affixed labels; 30 TAC §334.42(i) and TWC, §26.3475(c)(2), by failing to inspect overspill containers or catchment basins associated with an underground storage tank (UST) system at least every 60 days to assure that their sides, bottoms, and any penetration points are maintained liquid tight; 30 TAC §334.45(d)(1)(E)(iii) and §334.50(b)(1)(B), and TWC, §26.3475(c)(1), by failing to monitor the UST which was installed after 2009, in a manner which will detect a release at a frequency of at least once every 30 days by using interstitial monitoring; 30 TAC §334.48(c) and TWC, §26.3475(c)(1), by failing to conduct effective inventory control procedures for all USTs involved in the retail sale of petroleum substances used as motor fuel; and 30 TAC §334.49(a)(4) and TWC, §26.3475(d), by failing to provide corrosion protection to all underground metal components of the UST system; PENALTY: \$13,178; ENFORCEMENT COORDINATOR: Amanda Scott, (512) 239-2558; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(11) COMPANY: CW-MHP, Ltd.; DOCKET NUMBER: 2019-0562-PWS-E; IDENTIFIER: RN101284826; LOCATION: Humble, Harris County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.41(c)(1)(F), by failing to obtain sanitary control easements that cover the land within 150 feet of the facility's Well Numbers 1 and 2; 30 TAC §290.42(e)(5), by failing to house the hypochlorination solution containers and pumps in a secure enclosure to protect them from adverse weather conditions and vandalism; 30 TAC §290.43(d)(1), by failing to provide a pressure tank of 1,000 gallons or larger that meets the American Society of Mechanical Engineers Section VIII, Division 1 Codes and Construction Regulations and has an access port for periodic inspections; 30 TAC §290.43(d)(3), by failing to provide a device to readily determine air-water-volume for all pressure tanks greater than 1,000 gallons in capacity; 30 TAC §290.45(h)(1), by failing to provide sufficient power to meet the capacity requirements in accordance with the affected utility's approved Emergency Preparedness Plan; 30 TAC §290.46(m), by failing to initiate maintenance and housekeeping practices to ensure the good working condition and general appearance of the system's facilities and equipment; 30 TAC §290.46(n)(3), by failing to keep on file copies of well completion data as defined in 30 TAC §290.41(c)(3)(A) for as long as the well remains in service; and 30 TAC §290.46(v), by failing to ensure that the electrical wiring is securely installed in compliance with a local or national electrical code; PENALTY: \$1,772; ENFORCEMENT COORDINATOR: Steven Hall, (512)

239-2569; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(12) COMPANY: Elmo Water Supply Corporation; DOCKET NUMBER: 2019-0590-PWS-E; IDENTIFIER: RN101208775; LOCATION: Terrell, Kaufman County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.117(f)(1)(A)(ii) and (i)(7) and §290.122(b)(2)(A) and (f), by failing to perform and submit a corrosion control study to identify optimal corrosion control treatment for the system within 12 months after the end of the January 1, 2017 - December 31, 2017, monitoring period, in which the system first exceeded the copper action level, and failing to provide public notification and submit a copy of the public notification, accompanied with a signed Certificate of Delivery, to the executive director (ED) regarding the failure to perform and submit a corrosion control study; 30 TAC §290.117(i)(6) and (j), by failing to provide a consumer notification of lead tap water monitoring results to persons served at the sites (taps) that were tested, and failing to mail a copy of the consumer notification of tap results to the ED along with certification that the consumer notification was distributed in a manner consistent with the TCEQ requirements for the January 1, 2018 - June 30, 2018, monitoring period; 30 TAC §290.122(b)(2)(A) and (f), by failing to provide public notification and submit a copy of the public notification, accompanied with a signed Certificate of Delivery, to the ED regarding the failure to submit a recommendation to the ED for source water treatment within 180 days after the end of the January 1, 2017 - December 31, 2017, monitoring period, during which the copper action level was exceeded, and failing to submit a recommendation to the ED for optimal corrosion control treatment within six months after the end of the January 1, 2017 - December 31, 2017, monitoring period, during which the copper action level was exceeded; and 30 TAC §290.122(c)(2)(A) and (f), by failing to provide public notification and submit a copy of the public notification, accompanied with a signed Certificate of Delivery, to the ED regarding the failure to timely report the results of lead and copper tap sampling to the ED for the January 1, 2017 - December 31, 2017, monitoring period, and failing to conduct water quality parameter sampling at each of the facility's entry points and the required distribution sample sites, have the samples analyzed, and report the results to the ED for the June 1, 2017 - November 30, 2017, monitoring period; PENALTY: \$438; ENFORCEMENT COORDINATOR: James Knittel, (512) 239-2518; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(13) COMPANY: Enterprise Products Operating LLC; DOCKET NUMBER: 2018-1669-AIR-E; IDENTIFIER: RN102323268; LOCATION: Mont Belvieu, Chambers County; TYPE OF FACILITY: natural gas processing plant; RULES VIOLATED: 30 TAC §§101.20(3), 116.115(c), and 122.143(4), New Source Review (NSR) Permit Numbers 19930, PSDTX797M1, and PSDTX790, Special Conditions (SC) Number 1, NSR Permit Numbers 76070 and PSDTX1057, SC Number 1, Federal Operating Permit (FOP) Number O1641, General Terms and Conditions (GTC) and Special Terms and Conditions (STC) Number 19, and Texas Health and Safety Code (THSC), §382.085(b), by failing to prevent unauthorized emissions; and 30 TAC §116.115(c) and §122.143(4), NSR Permit Number 6798, SC Number 1, FOP Number O1641, GTC and STC Number 19, and THSC, §382.085(b), by failing to prevent unauthorized emissions; PENALTY: \$13,126; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: \$5,250; ENFORCEMENT COORDINATOR: Richard Garza, (512) 239-2697; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(14) COMPANY: KOLKHORST PETROLEUM COMPANY; DOCKET NUMBER: 2019-0819-PST-E; IDENTIFIER: RN102010899; LOCATION: Navasota, Grimes County; TYPE OF FACILITY: common carrier; RULES VIOLATED: 30 TAC

§334.5(b)(1)(A) and TWC, §26.3467(d), by failing to deposit a regulated substance into a regulated underground storage tank system that was covered by a valid, current TCEQ delivery certificate; PENALTY: \$3,021; ENFORCEMENT COORDINATOR: Carlos Molina, (512) 239-2557; REGIONAL OFFICE: 1804 West Jefferson Avenue, Harlingen, Texas 78550-5247, (956) 425-6010.

(15) COMPANY: LAKEVIEW GROCERY, INCORPORATED; DOCKET NUMBER: 2019-0604-PWS-E; IDENTIFIER: RN102462330; LOCATION: Vidor, Orange County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.42(b)(1) and (e)(3), by failing to provide disinfection facilities for the groundwater supply for the purpose of microbiological control and distribution protection; and 30 TAC §290.46(n)(1), by failing to maintain at the public water system accurate and up-to-date detailed as-built plans or record drawings and specifications for each treatment plant, pump station, and storage tank until the facility is decommissioned; PENALTY: \$455; ENFORCEMENT COORDINATOR: Ryan Byer, (512) 239-2571; REGIONAL OFFICE: 3870 Eastex Freeway, Beaumont, Texas 77703-1830, (409) 898-3838.

(16) COMPANY: MANCHACA BAPTIST CHURCH, INCORPORATED; DOCKET NUMBER: 2018-1531-PWS-E; IDENTIFIER: RN101252757; LOCATION: Manchaca, Travis County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.110(e)(4)(A) and (f)(3), by failing to submit a Disinfectant Level Operating Report (DLQOR) to the executive director (ED) by the tenth day of the month following the end of each quarter for the third quarter of 2017 through the second quarter of 2018; 30 TAC §290.117(i)(6) and (j), by failing to provide a consumer notification of lead tap water monitoring results to persons served at the sites (taps) that were tested, and failing to mail a copy of the consumer notification of tap results to the ED along with certification that the consumer notification has been distributed in a manner consistent with TCEQ requirements for the January 1, 2017 - December 31, 2017, monitoring period; and 30 TAC §290.122(c)(2)(A) and (f), by failing to issue public notification and submit a copy of the public notification to the ED regarding the failure to collect lead and copper tap samples for the January 1, 2015 - December 31, 2015, and January 1, 2016 - December 31, 2016, monitoring periods, and submit a DLQOR each quarter for the third and fourth quarters of 2015; PENALTY: \$517; ENFORCEMENT COORDINATOR: Ronica Rodriguez, (361) 825-3425; REGIONAL OFFICE: P.O. Box 13087, Austin, Texas 78711-3087, (512) 339-2929.

(17) COMPANY: Michael Gerald Barron; DOCKET NUMBER: 2019-1127-WOC-E; IDENTIFIER: RN110778313; LOCATION: Barnhart, Irion County; TYPE OF FACILITY: on-site sewage facility; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: \$175; ENFORCEMENT COORDINATOR: Abigail Lindsey, (512) 239-2576; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(18) COMPANY: Phillips 66 Company; DOCKET NUMBER: 2019-0067-AIR-E; IDENTIFIER: RN101619179; LOCATION: Old Ocean, Brazoria County; TYPE OF FACILITY: oil and gas refinery; RULES VIOLATED: 30 TAC §§101.20(3), 111.111(a)(1)(B), 116.115(c), and 122.143(4), New Source Review Permit Numbers 5920A and PSDTX103M4, Special Conditions Number 1, Federal Operating Permit Number O1626, General Terms and Conditions and Special Terms and Conditions Number 29, and Texas Health and Safety Code, §382.085(b), by failing to prevent unauthorized emissions and excess opacity; PENALTY: \$6,300; SUPPLEMENTAL ENVIRONMENTAL PROJECT OFFSET AMOUNT: \$2,520; ENFORCEMENT COORDINATOR: Richard Garza, (512) 239-2697; REGIONAL OFFICE: 5425 Polk Street, Suite H, Houston, Texas 77023-1452, (713) 767-3500.

(19) COMPANY: R B B AND DOCK INVESTMENTS, LLC; DOCKET NUMBER: 2019-0648-PWS-E; IDENTIFIER: RN101209112; LOCATION: Alpine, Brewster County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.41(c)(3)(B), by failing to extend the well casing a minimum of 18 inches above the elevation of the finished floor of the pump room or natural ground surface and a minimum of one inch above the sealing block or pump motor foundation block when provided; 30 TAC §290.41(c)(3)(K), by failing to seal the wellheads and pump bases by a gasket or sealing compound and to properly vent wellheads and pump bases to prevent the possibility of contaminating the well water; 30 TAC §290.41(c)(3)(N), by failing to provide a flow-measuring device for the well to measure production yields and provide for the accumulation of water production data; 30 TAC §290.42(j), by failing to ensure that all chemicals used in treatment of water supplied by public water systems conform to American National Standards Institute/National Sanitation Foundation Standard 60 for Drinking Water Treatment Chemicals; 30 TAC §290.43(c)(1), by failing to equip the vents on the facility's two ground storage tanks (GSTs) with approved screens to prevent entry of animals, birds, insects, and heavy air contaminants; 30 TAC §290.43(c)(3), by failing to cover the facility's two GSTs' overflow discharge openings with gravity-hinged and weighted covers, elastomeric duckbill valves, or other approved devices to prevent the entrance of insects and other nuisances, which close automatically and fit tightly with no gap over 1/16 inches; 30 TAC §290.43(c)(4), by failing to provide the facility's two GSTs with liquid level indicators located at the tank sites; 30 TAC §290.43(d)(2), by failing to provide the pressure tank with a pressure release device; 30 TAC §290.43(e), by failing to install the facility's pressure maintenance facilities in a lockable building that is designed to prevent intruder access or enclose the facility's pressure maintenance facilities by an intruder-resistant fence with lockable gates; 30 TAC §290.44(a)(4), by failing to locate the top of the waterline between the well and the primary GST below the frost line and in no case less than 24 inches below ground surface; 30 TAC §290.45(c)(1)(B)(iii) and Texas Health and Safety Code, §341.0315(c), by failing to provide two or more service pumps which have a total capacity of 1.0 gallons per minute per unit; 30 TAC §290.46(n)(3), by failing to keep on file copies of well completion data as defined in 30 TAC §290.41(c)(3)(A) for as long as the well remains in service; and 30 TAC §290.46(v), by failing to securely install all water system electrical wiring in compliance with a local or national electrical code; PENALTY: \$2,202; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3421; REGIONAL OFFICE: 401 East Franklin Avenue, Suite 560, El Paso, Texas 79901-1212, (915) 834-4949.

(20) COMPANY: Richland Fuel Interests, LLC dba Charge Up 32; DOCKET NUMBER: 2019-0644-PST-E; IDENTIFIER: RN100535368; LOCATION: Duncanville, Dallas County; TYPE OF FACILITY: convenience store with retail sales of gasoline; RULES VIOLATED: 30 TAC §334.50(b)(1)(A) and (2) and TWC, §26.3475(a) and (c)(1), by failing to monitor the underground storage tanks (USTs) in a manner which will detect a release at a frequency of at least once every 30 days, and failing to provide release detection for the pressurized piping associated with the UST system; PENALTY: \$5,332; ENFORCEMENT COORDINATOR: Hailey Johnson, (512) 239-1756; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(21) COMPANY: RL Signor Barnhart, LLC; DOCKET NUMBER: 2019-0768-PWS-E; IDENTIFIER: RN107316143; LOCATION: Barnhart, Irion County; TYPE OF FACILITY: public water supply; RULES VIOLATED: 30 TAC §290.39(j), by failing to receive an approval prior to making any significant change or addition to the system's production, treatment, storage, pressure maintenance, or

distribution facilities; 30 TAC §290.42(l), by failing to maintain a thorough and up-to-date plant operations manual for operator review and reference; 30 TAC §290.43(e), by failing to ensure that the facility's potable water storage tanks and pressure maintenance facilities are enclosed by an intruder-resistant fence with lockable gates; 30 TAC §290.45(f)(4) and Texas Health and Safety Code, §341.0315(c), by failing to provide a water purchase contract that authorizes a maximum daily purchase rate or a uniform purchase rate to meet a minimum production capacity of 0.6 gallons per minute per connection; and 30 TAC §290.46(m), by failing to initiate maintenance and housekeeping practices to ensure the good working condition and general appearance of the system's facilities and equipment; PENALTY: \$760; ENFORCEMENT COORDINATOR: Yuliya Dunaway, (210) 403-4077; REGIONAL OFFICE: 622 South Oakes, Suite K, San Angelo, Texas 76903-7035, (325) 655-9479.

(22) COMPANY: Sanger Circle Property, LP; DOCKET NUMBER: 2018-1652-MLM-E; IDENTIFIER: RN110516309; LOCATION: Sanger, Denton County; TYPE OF FACILITY: construction site; RULES VIOLATED: 30 TAC §281.25(a)(4), TWC, §26.121, and 40 Code of Federal Regulations §122.26(c), by failing to obtain authorization to discharge stormwater associated with construction activities under Texas Pollutant Discharge Elimination System General Permit Number TXR150000; and 30 TAC §297.11 and TWC, §11.081 and §11.121, by failing to obtain authorization prior to diverting, impounding, storing, taking, or using state water; PENALTY: \$2,750; ENFORCEMENT COORDINATOR: Steven Van Landingham, (512) 239-5717; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(23) COMPANY: Select Energy Services, LLC; DOCKET NUMBER: 2019-1119-WR-E; IDENTIFIER: RN110779113; LOCATION: Panna Maria, Karnes County; TYPE OF FACILITY: construction site; RULES VIOLATED: 30 TAC §303.35(d) and §304.34(d), by failing to not divert, use, or transport without a watermaster approved declaration of intent or certification, and failing to submit a late pump operation report; PENALTY: \$400; ENFORCEMENT COORDINATOR: Austin Henck, (512) 239-6155; REGIONAL OFFICE: 14250 Judson Road, San Antonio, Texas 78233-4480, (210) 490-3096.

(24) COMPANY: Targa Midstream Services LLC; DOCKET NUMBER: 2019-0752-AIR-E; IDENTIFIER: RN102977311; LOCATION: Decatur, Wise County; TYPE OF FACILITY: compressor station; RULES VIOLATED: 30 TAC §§116.115(c), 116.615(2), 117.405(b)(2)(A), and 122.143(4), Standard Permit Registration Number 108761, Air Quality Standard Permit for Oil and Gas Handling and Production Facilities, Special Conditions Number (e)(3), Federal Operating Permit Number O2689/General Operating Permit Number 511, Site-wide Requirements Number (b)(9)(E)(ii), and Texas Health and Safety Code, §382.085(b), by failing to comply with the emissions limit; PENALTY: \$7,050; ENFORCEMENT COORDINATOR: Margarita Dennis, (817) 588-5892; REGIONAL OFFICE: 2309 Gravel Drive, Fort Worth, Texas 76118-6951, (817) 588-5800.

(25) COMPANY: Robert W. Tweed; DOCKET NUMBER: 2019-1103-WOC-E; IDENTIFIER: RN104861745; LOCATION: Henrietta, Clay County; TYPE OF FACILITY: public water supply; RULE VIOLATED: 30 TAC §30.5(a), by failing to obtain a required occupational license; PENALTY: \$175; ENFORCEMENT COORDINATOR: Epifanio Villarreal, (361) 825-3421; REGIONAL OFFICE: 1977 Industrial Boulevard, Abilene, Texas 79602-7833, (325) 698-9674.

TRD-201903058

Charmaine Backens  
Director, Litigation Division  
Texas Commission on Environmental Quality  
Filed: September 3, 2019



#### Enforcement Orders

An agreed order was adopted regarding Kuraray America, Inc., Docket No. 2017-1539-AIR-E on September 3, 2019, assessing \$7,500 in administrative penalties with \$1,500 deferred. Information concerning any aspect of this order may be obtained by contacting Raime Hayes-Falero, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding LANDMARK INDUSTRIES dba Timewise Food Store 040 00, Docket No. 2018-0860-PST-E on September 3, 2019, assessing \$7,359 in administrative penalties with \$1,471 deferred. Information concerning any aspect of this order may be obtained by contacting Marla Waters, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding NZ LLC dba Jeffrey's Food Mart, Docket No. 2018-0928-PST-E on September 3, 2019, assessing \$4,500 in administrative penalties with \$900 deferred. Information concerning any aspect of this order may be obtained by contacting Tyler Richardson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding PARMAR ENTERPRISE INC. dba Time Mart, Docket No. 2018-0989-PST-E on September 3, 2019, assessing \$5,438 in administrative penalties with \$1,087 deferred. Information concerning any aspect of this order may be obtained by contacting Hailey Johnson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding City of Milford, Docket No. 2018-1205-MWD-E on September 3, 2019, assessing \$3,938 in administrative penalties with \$787 deferred. Information concerning any aspect of this order may be obtained by contacting Steven Van Landingham, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding A.R.W. BUSINESS, INC. dba Mr. Beegs, Docket No. 2018-1256-PST-E on September 3, 2019, assessing \$6,876 in administrative penalties with \$1,375 deferred. Information concerning any aspect of this order may be obtained by contacting Ken Moller, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Texas Department of Transportation, Docket No. 2018-1261-MWD-E on September 3, 2019, assessing \$6,500 in administrative penalties with \$1,300 deferred. Information concerning any aspect of this order may be obtained by contacting Harley Hobson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding General Cable Texas Operations L.P., Docket No. 2018-1271-AIR-E on September 3, 2019, assessing \$4,125 in administrative penalties with \$825 deferred. Information concerning any aspect of this order may be obtained by contacting Abigail Lindsey, Enforcement Coordinator at (512) 239-2545,

Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding FAIRDALE ENTERPRISES, INC. dba Westen Food Mart, Docket No. 2018-1319-PST-E on September 3, 2019, assessing \$7,413 in administrative penalties with \$1,482 deferred. Information concerning any aspect of this order may be obtained by contacting Stephanie McCurley, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Lyondell Chemical Company, Docket No. 2018-1321-AIR-E on September 3, 2019, assessing \$6,525 in administrative penalties with \$1,305 deferred. Information concerning any aspect of this order may be obtained by contacting Stephanie McCurley, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Chevron Phillips Chemical Company LP, Docket No. 2018-1424-AIR-E on September 3, 2019, assessing \$3,063 in administrative penalties with \$612 deferred. Information concerning any aspect of this order may be obtained by contacting Robyn Babyak, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Lake Pointe Operating Company, L.L.C., Docket No. 2018-1598-PST-E on September 3, 2019, assessing \$3,375 in administrative penalties with \$675 deferred. Information concerning any aspect of this order may be obtained by contacting Tyler Richardson, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding SYNTECH CHEMICALS INC., Docket No. 2018-1748-AIR-E on September 3, 2019, assessing \$2,750 in administrative penalties with \$550 deferred. Information concerning any aspect of this order may be obtained by contacting Soraya Bun, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

An agreed order was adopted regarding Caddo Mills Independent School District, Docket No. 2018-1753-PST-E on September 3, 2019, assessing \$3,563 in administrative penalties with \$712 deferred. Information concerning any aspect of this order may be obtained by contacting Aaron Vincent, Enforcement Coordinator at (512) 239-2545, Texas Commission on Environmental Quality, P.O. Box 13087, Austin, Texas 78711-3087.

TRD-201903072

Bridget C. Bohac

Chief Clerk

Texas Commission on Environmental Quality

Filed: September 3, 2019



#### Notice and Comment Hearing: Draft Permit No. O1381

This is a notice for a notice and comment hearing on Federal Operating Permit Number O1381. During the notice and comment hearing, informal questions on the Federal Operating Permit will be answered and formal comments will be received. The Texas Commission on Environmental Quality (TCEQ) has scheduled the notice and comment hearing regarding this application and draft permit as follows:

**Tuesday, October 8, 2019 at 7:00 p.m.**

#### Hartman Park Community Center

9311 East Avenue P

Houston, Texas 77012

Phone: (713) 928-4803

**Application and Draft Permit.** Valero Refining-Texas, L.P., 9701 Manchester St, Houston, Texas 77012-2408, has applied to the TCEQ for a renewal of Federal Operating Permit (herein referred to as Permit) No. O1381, Application No. 24377, to authorize operation of the Houston Refinery, a Petroleum Refineries facility. The area addressed by the application is located at 9701 Manchester Avenue in Houston, Harris County, Texas 77012. This link to an electronic map of the site or facility's general location is provided as a public courtesy and not part of the application or notice. For exact location, refer to the application. You can find an electronic map of the facility at: <http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=29.72222&lng=-95.255&zoom=13&type=r>.

The purpose of a federal operating permit is to improve overall compliance with the rules governing air pollution control by clearly listing all applicable requirements, as defined in Title 30 Texas Administrative Code §122.10 (30 TAC §122.10). The draft permit, if approved, will codify the conditions under which the area must operate. The permit will not authorize new construction. The executive director has completed the technical review of the application and has made a preliminary decision to prepare a draft permit for public comment and review. The executive director recommends issuance of this draft permit. The permit application, statement of basis, and draft permit will be available for viewing and copying at the TCEQ Central Office, 12100 Park 35 Circle, Building E, First Floor, Austin, Texas 78753; the TCEQ Houston Regional Office, 5425 Polk St Ste H, Houston, Texas 77023-1452; and the Park Place Regional Library, 8145 Park Place Blvd, Houston, Texas 77017-3032. The draft permit and statement of basis are available at the TCEQ Website: [www.tceq.texas.gov/goto/tvnotice](http://www.tceq.texas.gov/goto/tvnotice)

At the TCEQ central and regional offices, relevant supporting materials for the draft permit, as well as the New Source Review permits which have been incorporated by reference, may be reviewed and copied. Any person with difficulties obtaining these materials due to travel constraints may contact the TCEQ central office file room at (512) 239-2900.

**Notice and Comment Hearing.** A public hearing will be held and will consist of two parts, an Informal Discussion Period and a Formal Comment Period. A public hearing is not a contested case hearing under the Administrative Procedure Act. During the Informal Discussion Period, the public will be encouraged to ask questions of the applicant and TCEQ staff concerning the permit application. The comments and questions submitted orally during the Informal Discussion Period will not be considered before a decision is reached on the permit application, and no formal response will be made. Responses will be provided orally during the Informal Discussion Period. During the Formal Comment Period on the permit application, members of the public may state their formal comments orally into the official record. At the conclusion of the comment period, all formal comments will be considered before a decision is reached on the permit application. A written response to all formal comments will be prepared by the executive director and will be sent to each person who submits a formal comment or who requested to be on the mailing list for this permit application and provides a mailing address. The purpose of this hearing will be to receive formal public comment which the TCEQ will consider in determining whether to revise and/or issue the permit and in determining the accuracy and completeness of the permit. Any person may attend this hearing and submit written or oral comments. The hearing will be conducted in ac-

cordance with the Texas Clean Air Act §382.0561, as codified in the Texas Health and Safety Code, and 30 TAC §122.340.

Persons who have special communication or other accommodation needs who are planning to attend the hearing should contact the TCEQ Public Education Program toll free at (800) 687-4040 or (800) RELAY-TX (TDD), at least one week prior to the hearing.

**Any person may also submit written comments before the hearing to the Texas Commission on Environmental Quality, Office of Chief Clerk, MC-105, P.O. Box 13087, Austin, Texas 78711-3087, or electronically at <http://www14.tceq.texas.gov/epic/eComment/>.** Written comments should include (1) your name, address, and daytime telephone number, and (2) the draft permit number found at the top of this notice.

**A notice of proposed final action that includes a response to comments and identification of any changes to the draft permit will be mailed to everyone who submitted public comments, a hearing request, or requested to be on the mailing list for this application.** This mailing will also provide instructions for public petitions to the U.S. Environmental Protection Agency (EPA) to request that the EPA object to the issuance of the proposed permit. After receiving a petition, the EPA may only object to the issuance of a permit which is not in compliance with the applicable requirements or the requirements of 30 TAC Chapter 122.

**Mailing List.** In addition to submitting public comments, a person may ask to be placed on a mailing list for this application by sending a request to the Office of the Chief Clerk at the address above. Those on the mailing list will receive copies of future public notices (if any) mailed by the Chief Clerk for this application.

**Information.** For additional information about this permit application or the permitting process, please contact the Texas Commission on Environmental Quality, Public Education Program, MC-108, P.O. Box 13087, Austin, Texas 78711-3087 or toll free at (800) 687-4040. Si desea información en español, puede llamar al (800) 687-4040.

Further information may also be obtained for Valero Refining-Texas, L.P. by calling Mr. Matthew Lindquist at (713) 923-3300.

Notice Issuance Date: August 26, 2019

TRD-201903071

Bridget C. Bohac

Chief Clerk

Texas Commission on Environmental Quality

Filed: September 3, 2019



Notice of Application and Public Hearing for an Air Quality Standard Permit for a Concrete Batch Plant with Enhanced Controls: Proposed Air Quality Registration Number 157413

**APPLICATION.** TXI Operations, LP, 1503 LBJ Freeway Suite 400, Dallas, Texas 75234-6007 has applied to the Texas Commission on Environmental Quality (TCEQ) for an Air Quality Standard Permit for a Concrete Batch Plant with Enhanced Controls Registration Number 157413 to authorize the operation of a permanent concrete batch plant. The facility is proposed to be located 0.41 mile north on County Road 653 from its intersection with State Highway 380, Farmersville, Collin County, Texas 75442. This link to an electronic map of the site or facility's general location is provided as a public courtesy and not part of the application or notice. For exact location, refer to application. <http://www.tceq.texas.gov/assets/public/hb610/index.html?lat=33.161624&lng=-96.326943&zoom=13&type=r>. This application was submitted to the TCEQ on June 25, 2019. The primary

function of this plant is to manufacture concrete by mixing materials including (but not limited to) sand, aggregate, cement and water. The executive director has determined the application was technically complete on August 30, 2019.

**PUBLIC COMMENT / PUBLIC HEARING.** Public written comments about this application may be submitted at any time during the public comment period. The public comment period begins on the first date notice is published and extends to the close of the public hearing. Public comments may be submitted either in writing to the Texas Commission on Environmental Quality, Office of the Chief Clerk, MC-105, P.O. Box 13087, Austin, Texas 78711-3087, or electronically at [www14.tceq.texas.gov/epic/eComment/](http://www14.tceq.texas.gov/epic/eComment/). Please be aware that any contact information you provide, including your name, phone number, email address and physical address will become part of the agency's public record.

A public hearing has been scheduled, that will consist of two parts, an informal discussion period and a formal comment period. During the informal discussion period, the public is encouraged to ask questions of the applicant and TCEQ staff concerning the application, but comments made during the informal period will not be considered by the executive director before reaching a decision on the permit, and no formal response will be made to the informal comments. During the formal comment period, members of the public may state their comments into the official record. **Written comments about this application may also be submitted at any time during the hearing.** The purpose of a public hearing is to provide the opportunity to submit written comments or an oral statement about the application. **The public hearing is not an evidentiary proceeding.**

**The Public Hearing is to be held:**

**Monday, October 14, 2019, at 7:00 p.m.**

**RSVP Farmersville**

**101B Candy Street**

**Farmersville, Texas 75442**

**RESPONSE TO COMMENTS.** A written response to all formal comments will be prepared by the executive director after the comment period closes. The response, along with the executive director's decision on the application, will be mailed to everyone who submitted public comments and the response to comments will be posted in the permit file for viewing.

The executive director shall approve or deny the application not later than 35 days after the date of the public hearing, considering all comments received within the comment period, and base this decision on whether the application meets the requirements of the standard permit.

**CENTRAL/REGIONAL OFFICE.** The application will be available for viewing and copying at the TCEQ Central Office and the TCEQ Dallas/Fort Worth Regional Office, located at 2309 Gravel Dr, Fort Worth, Texas 76118-6951, during the hours of 8:00 a.m. to 5:00 p.m., Monday through Friday, beginning the first day of publication of this notice.

**INFORMATION. If you need more information about this permit application or the permitting process, please call the Public Education Program toll free at (800) 687-4040. Si desea información en español, puede llamar al (800) 687-4040.**

Further information may also be obtained from TXI Operations, LP, 1503 LBJ Freeway Suite 400, Dallas, Texas 75234-6007, or by calling Mr. Jesse Martindale, Environmental Engineer II at (972) 647-3742.

Notice Issuance Date: August 30, 2019

TRD-201903070  
Bridget C. Bohac  
Chief Clerk  
Texas Commission on Environmental Quality  
Filed: September 3, 2019



### Notice of Correction to Agreed Order Number 2

In the August 24, 2018, issue of the *Texas Register* (43 TexReg 5572), the Texas Commission on Environmental Quality (commission) published notice of Agreed Orders, specifically Item Number 2, for AKN, LLC dba Hwy 190 Food Mart. The error is as submitted by the commission.

The reference to the company should be corrected to read: "Faiza H. Malik dba AKN, LLC."

For questions concerning these errors, please contact Michael Parrish at (512) 239-2548.

TRD-201903057  
Charmaine Backens  
Director, Litigation Division  
Texas Commission on Environmental Quality  
Filed: September 3, 2019



### Notice of Costs to Administer the Voluntary Cleanup Program and the Innocent Owner/Operator Program

In accordance with Texas Health and Safety Code, §361.613 (pertaining to the Voluntary Cleanup Program (VCP)) and 30 Texas Administrative Code §333.43 (pertaining to the Innocent Owner/Operator Program (IOP)), the executive director of the Texas Commission on Environmental Quality (TCEQ or commission) annually shall calculate the commission's costs to administer the VCP and the IOP and shall publish in the *Texas Register* the rates established for the purposes of identifying the costs recoverable by the commission. The TCEQ has calculated and is publishing the bill rate for both the VCP and the IOP as \$115 per hour for the commission's Fiscal Year 2020.

The VCP and the IOP are implemented by the same TCEQ staff. Therefore, a single hourly bill rate for both programs is appropriate. The hourly bill rate is determined based upon current projections for staff salaries for the Fiscal Year 2020, including the fringe benefit rate and the indirect cost rate, minus federal funding that the commission anticipates it will receive, and then divided by the estimated number of staff hours necessary to complete the program tasks. Fringe benefits include retirement, social security, and insurance expenses and are calculated at a set rate for the entire agency. The current fringe benefit rate is 38.65% of the budgeted salaries. Indirect costs include allowable overhead expenses and also are calculated at a set rate for the entire agency. The current indirect cost rate is 33.25% of the budgeted salary. The hourly bill rate was calculated and then rounded to the nearest whole dollar amount. The commission will use an hourly bill rate of \$115 for both the VCP and the IOP for the Fiscal Year 2020. After an applicant's initial \$1,000 application fee has been depleted for the VCP or the IOP review and oversight costs, invoices will be sent monthly to the applicant, or designee, for payment.

The commission anticipates receiving federal funding during Fiscal Year 2020 for the continued development and enhancement of the VCP and the IOP. If the federal funding anticipated for Fiscal Year 2020 does not become available, the commission may calculate and publish a new

hourly bill rate. Federal funding of the VCP and the IOP should occur prior to October 1, 2019.

For more information, please contact Ms. Merrie Smith, P.G., VCP-CA Section, Remediation Division, Texas Commission on Environmental Quality, MC 221, 12100 Park 35 Circle, Austin, Texas 78753, or call (512) 239-5051, or email [merrie.smith@tceq.texas.gov](mailto:merrie.smith@tceq.texas.gov).

TRD-201903063  
Charmaine Backens  
Director, Litigation Division  
Texas Commission on Environmental Quality  
Filed: September 3, 2019



### Notice of Public Hearing on Assessment of Administrative Penalties and Requiring Certain Actions of Sherry Wilkinson: SOAH Docket No. 582-19-6875; TCEQ Docket No. 2017-1522-PST-E

The Texas Commission on Environmental Quality (TCEQ or the Commission) has referred this matter to the State Office of Administrative Hearings (SOAH). An Administrative Law Judge with the State Office of Administrative Hearings will conduct a public hearing at:

**10:00 a.m. - October 3, 2019**

**William P. Clements Building**

**300 West 15th Street, 4th Floor**

**Austin, Texas 78701**

The purpose of the hearing will be to consider the Executive Director's Preliminary Report and Petition mailed February 16, 2018, concerning assessing administrative penalties against and requiring certain actions of Sherry Wilkinson, for violations in Wilbarger County, Texas, of: 30 Texas Administrative Code §334.47(a)(2).

The hearing will allow Sherry Wilkinson, the Executive Director, and the Commission's Public Interest Counsel to present evidence on whether a violation has occurred, whether an administrative penalty should be assessed, and the amount of such penalty, if any. The first convened session of the hearing will be to establish jurisdiction, afford Sherry Wilkinson, the Executive Director of the Commission, and the Commission's Public Interest Counsel an opportunity to negotiate and to establish a discovery and procedural schedule for an evidentiary hearing. Unless agreed to by all parties in attendance at the preliminary hearing, an evidentiary hearing will not be held on the date of this preliminary hearing. **Upon failure of Sherry Wilkinson to appear at the preliminary hearing or evidentiary hearing, the factual allegations in the notice will be deemed admitted as true, and the relief sought in the notice of hearing may be granted by default. The specific allegations included in the notice are those set forth in the Executive Director's Preliminary Report and Petition, attached hereto and incorporated herein for all purposes.** Sherry Wilkinson, the Executive Director of the Commission, and the Commission's Public Interest Counsel are the only designated parties to this proceeding.

Legal Authority: Tex. Water Code §7.054, Tex. Water Code chs. 7 and 26, and 30 Texas Administrative Code chs. 70 and 334; Tex. Water Code §7.058, and the Rules of Procedure of the Texas Commission on Environmental Quality and the State Office of Administrative Hearings, including 30 Texas Administrative Code §70.108 and §70.109 and ch. 80, and 1 Texas Administrative Code ch. 155.

Further information regarding this hearing may be obtained by contacting Logan Harrell, Staff Attorney, Texas Commission on Environ-

mental Quality, Litigation Division, Mail Code 175, P.O. Box 13087, Austin, Texas 78711-3087, telephone (512) 239-3400. Information concerning your participation in this hearing may be obtained by contacting Vic McWherter, Public Interest Counsel, Mail Code 103, at the same P.O. Box address given above, or by telephone at (512) 239-6363.

**Any document filed prior to the hearing must be filed with TCEQ's Office of the Chief Clerk and SOAH. Documents filed with the Office of the Chief Clerk may be filed electronically at [www.tceq.texas.gov/goto/efilings](http://www.tceq.texas.gov/goto/efilings) or sent to the following address: TCEQ Office of the Chief Clerk, Mail Code 105, P.O. Box 13087, Austin, Texas 78711-3087. Documents filed with SOAH may be filed via fax at (512) 322-2061 or sent to the following address: SOAH, 300 West 15th Street, Suite 504, Austin, Texas 78701. When contacting the Commission or SOAH regarding this matter, reference the SOAH docket number given at the top of this notice.**

**In accordance with 1 Texas Administrative Code §155.401(a), Notice of Hearing, "Parties that are not represented by an attorney may obtain information regarding contested case hearings on the public website of the State Office of Administrative Hearings at [www.soah.texas.gov](http://www.soah.texas.gov), or in printed format upon request to SOAH."**

Persons who need special accommodations at the hearing should call the SOAH Docketing Department at (512) 475-3445, at least one week before the hearing.

Issued: September 3, 2019

TRD-201903069

Bridget C. Bohac

Chief Clerk

Texas Commission on Environmental Quality

Filed: September 3, 2019



## Texas Health and Human Services Commission

Notice of Public Hearing on Payment Rates for Deaf-Blind Multiple Disabilities Waiver Consumer Directed Services Residential Habilitation

**Hearing.** The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on September 23, 2019, at 9:00 a.m., to receive comment on proposed payment rate increases for Deaf-Blind Multiple Disabilities Waiver (DBMD) Consumer Directed Services (CDS) Residential Habilitation.

HHSC will also receive comments on proposed proxy rates for the following managed care attendant services:

STAR Kids services, specifically:

Adult Day Care;

Personal Care Services (PCS) Habilitation Community First Choice (CFC) Service Responsibility Option (SRO);

PCS Attendant Care CFC SRO;

PCS SRO;

PCS Behavioral Health (BH) Condition SRO;

In Home Respite Attendant CDS and SRO;

In Home Respite Attendant with Registered Nurse (RN) Delegation CDS and SRO;

Flexible Family Support Attendant SRO; and

Flexible Family Support Attendant with RN Delegation CDS and SRO.

STAR+PLUS services, specifically:

Day Activities and Health Services (DAHS) Home and Community-based Services (HCBS) and Non-HCBS;

In-Home Respite CDS and SRO HCBS;

Personal Assistance Services (PAS) Agency Model HCBS, CDS HCBS, and SRO HCBS;

PAS Agency Model HCBS CFC, CDS HCBS CFC and SRO HCBS CFC;

PAS Agency model Non-HCBS, CDS Non-HCBS and SRO Non-HCBS;

PAS Agency model Non-HCBS CFC, CDS Non-HCBS and SRO Non-HCBS;

CFC PAS Protective Supervision Agency Model HCBS, CDS HCBS and SRO HCBS;

Habilitation (HAB) services Agency Model HCBS CFC, CDS HCBS CFC and SRO HCBS CFC; and

HAB services Agency Model Non-HCBS CFC, CDS Non-HCBS CFC, and SRO Non-HCBS CFC.

The public hearing will be held in HHSC's Public Hearing Room at the Brown-Heatly Building, located at 4900 North Lamar Boulevard, Austin, Texas. Entry is through Security at the main entrance of the building, which faces Lamar Boulevard. HHSC will broadcast the public hearing. Persons watching remotely can submit written comments. The broadcast can be accessed at <https://hhs.texas.gov/about-hhs/communications-events/live-archived-meetings>, and it will be archived for access on demand at the same website. The public hearing will be held in compliance with Texas Human Resources Code §32.0282, which requires public notice of and hearings on proposed Medicaid reimbursements.

**Proposal.** HHSC proposes to increase the payment rate for DBMD CDS Residential Habilitation in accordance with 2020-21 General Appropriations Act (GAA), House Bill (H.B.) 1, 86th Legislature, Regular Session, 2019 (Article II, HHSC, Rider 44). HHSC proposes to increase the attendant base wage to \$8.11 for the attendant cost component for all other attendant services listed above in accordance with the 2020-21 GAA (Article II, HHSC, Rider 45). These payment rates are proposed to be effective September 1, 2019.

**Methodology and Justification.** The proposed rates were calculated in accordance with Title 1 of the Texas Administrative Code:

§355.513, concerning Texas Deaf Blind Multiple Disabilities Waiver (DBMD);

§355.112, concerning Attendant Compensation Rate Enhancement;

§355.9090, concerning Community First Choice; and

§355.507, concerning the Reimbursement Methodology for the Medically Dependent Children Program.

**Briefing Package.** A briefing package describing the proposed payment rates will be available at <http://rad.hhs.texas.gov/rate-packets> on September 13, 2019. Interested parties may obtain a copy of the briefing package before the hearing by contacting the HHSC Rate Analysis Department by telephone at (512) 424-6637; by fax at (512) 730-7475; or by e-mail at [RAD-LTSS@hhs.state.tx.us](mailto:RAD-LTSS@hhs.state.tx.us). The briefing package will also will be available at the public hearing.

**Written Comments.** Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments

may be sent by U.S. mail to the Texas Health and Human Services Commission, Attention: Rate Analysis, Mail Code H-400, P.O. Box 149030, Austin, Texas 78714-9030; by fax to Rate Analysis at (512) 730-7475; or by e-mail to [RAD-LTSS@hhsc.state.tx.us](mailto:RAD-LTSS@hhsc.state.tx.us). In addition, written comments may be sent by overnight mail or hand delivered to Texas Health and Human Services Commission, Attention: Rate Analysis, Mail Code H-400, Brown-Heatly Building, 4900 North Lamar Blvd., Austin, Texas 78751.

*Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 424-6637 at least 72 hours prior to the hearing so appropriate arrangements can be made.*

TRD-201903085

Karen Ray

Chief Counsel

Texas Health and Human Services Commission

Filed: September 4, 2019



### Notice of Public Hearing on Proposed Medicaid Payment Rates for the Medicaid Calendar Fee Review of Physician-Administered Drugs and Vaccines

**Hearing.** The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on September 20, 2019, at 9:00 a.m., to receive comment on proposed Medicaid payment rates for the Medicaid Calendar Fee Review of Physician-Administered Drugs and Vaccines.

The public hearing will be held in the HHSC Public Hearing Room at the Brown-Heatly Building, located at 4900 North Lamar Blvd., Austin, Texas. Entry is through security at the main entrance of the building, which faces Lamar Boulevard. HHSC will broadcast the public hearing; the broadcast can be accessed at <https://hhs.texas.gov/about-hhs/communications-events/live-archived-meetings>. The broadcast will be archived and can be accessed on demand at the same website. The hearing will be held in compliance with Texas Human Resources Code §32.0282, which requires public notice of and hearings on proposed Medicaid reimbursements.

**Proposal.** The payment rates for the Medicaid Calendar Fee Review of Physician-Administered Drugs and Vaccines are proposed to be effective November 1, 2019.

**Methodology and Justification.** The proposed payment rates were calculated in accordance with Title 1 of the Texas Administrative Code:

--§355.8085, which addresses the reimbursement methodology for physicians and other practitioners; and

--§355.8441, which addresses the reimbursement methodologies for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) services (known in Texas as Texas Health Steps).

**Briefing Packet.** A briefing packet describing the proposed coding updates will be available at <https://rad.hhs.texas.gov/rate-packets> on or after September 6, 2019. Interested parties may obtain a copy of the briefing packet prior to the hearing by contacting Rate Analysis by telephone at (512) 730-7401; by fax at (512) 730-7475; or by email at [RADAcuteCare@hhsc.state.tx.us](mailto:RADAcuteCare@hhsc.state.tx.us). The briefing packet will also be available at the public hearing.

**Written Comments.** Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the Texas Health and Human Services Commission, Attention: Rate Analysis, Mail Code H-400, P.O. Box 149030,

Austin, Texas 78714-9030; by fax to Rate Analysis at (512) 730-7475; or by email to [RADAcuteCare@hhsc.state.tx.us](mailto:RADAcuteCare@hhsc.state.tx.us). In addition, written comments may be sent by overnight mail or hand delivered to Texas Health and Human Services Commission, Attention: Rate Analysis, Mail Code H-400, Brown-Heatly Building, 4900 North Lamar Blvd, Austin, Texas 78751.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 730-7401 at least 72 hours before the hearing so appropriate arrangements can be made.

TRD-201903083

Karen Ray

Chief Counsel

Texas Health and Human Services Commission

Filed: August 4, 2019



### Notice of Public Hearing on Proposed Medicaid Payment Rates for the Quarterly Healthcare Common Procedure Coding System (HCPCS) Updates

**Hearing.** The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on September 20, 2019, at 9:00 a.m., to receive comment on proposed Medicaid payment rates for the Quarterly HCPCS Updates.

The public hearing will be held in the HHSC Public Hearing Room, Brown-Heatly Building, located at 4900 North Lamar Blvd., Austin, Texas. Entry is through security at the main entrance of the building, which faces Lamar Boulevard. HHSC will broadcast the public hearing; the broadcast can be accessed at <https://hhs.texas.gov/about-hhs/communications-events/live-archived-meetings>. The broadcast will be archived and can be accessed on demand at the same website. The hearing will be held in compliance with Texas Human Resources Code §32.0282, which requires public notice of and hearings on proposed Medicaid reimbursements.

**Proposal.** The payment rates for Quarterly HCPCS Updates of Physician-Administered Drugs, Outpatient Imaging (Acute Care Services), Outpatient Imaging (Hospital Services), and Clinical Laboratory Services are proposed to be effective November 1, 2019.

**Methodology and Justification.** The proposed payment rates were calculated in accordance with Title 1 of the Texas Administrative Code:

--§355.8061, which addresses outpatient hospital reimbursement;

--§355.8085, which addresses the reimbursement methodology for physicians and other practitioners;

--§355.8441, which addresses the reimbursement methodologies for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) services (known in Texas as Texas Health Steps); and

§355.8610, which addresses reimbursement for clinical laboratory services.

**Briefing Packet.** A briefing packet describing the proposed coding updates will be available at <https://rad.hhs.texas.gov/rate-packets> on or after September 6, 2019. Interested parties may obtain a copy of the briefing packet prior to the hearing by contacting Rate Analysis by telephone at (512) 730-7401; by fax at (512) 730-7475; or by e-mail at [RADAcuteCare@hhsc.state.tx.us](mailto:RADAcuteCare@hhsc.state.tx.us). The briefing packet will also be available at the public hearing.

**Written Comments.** Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testi-



mony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the Texas Health and Human Services Commission, Attention: Rate Analysis, Mail Code H-400, P.O. Box 149030, Austin, Texas 78714-9030; by fax to Rate Analysis at (512) 730-7475; or by e-mail to [RADAcuteCare@hhsc.state.tx.us](mailto:RADAcuteCare@hhsc.state.tx.us). In addition, written comments may be sent by overnight mail or hand delivered to Texas Health and Human Services Commission, Attention: Rate Analysis, Mail Code H-400, Brown-Heatly Building, 4900 North Lamar Blvd, Austin, Texas 78751.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 730-7401 at least 72 hours before the hearing so appropriate arrangements can be made.

TRD-201903082  
Karen Ray  
Chief Counsel  
Texas Health and Human Services Commission  
Filed: September 4, 2019



### Substance Use Disorder Services - Update to Billing Procedure Code for Buprenorphine

**Hearing.** The Texas Health and Human Services Commission (HHSC) will conduct a public hearing on September 20, 2019, at 9:00 a.m., to receive to receive public comment on the proposed update to the billing procedure code for buprenorphine.

The public hearing will be held in the HHSC Public Hearing Room at the Brown-Heatly Building, located at 4900 North Lamar Blvd., Austin, Texas. Entry is through security at the main entrance of the building, which faces Lamar Boulevard. HHSC will broadcast the public hearing; the broadcast can be accessed at <https://hhs.texas.gov/about-hhs/communications-events/live-archived-meetings>. The broadcast will be archived and can be accessed on demand at the same website. The hearing will be held in compliance with Texas Human Resources Code §32.0282, which requires public notice of and hearings on proposed Medicaid reimbursements.

**Proposal.** The update to the billing procedure code for buprenorphine is proposed to be effective November 1, 2019.

**Methodology and Justification.** The proposed payment rates were calculated in accordance with Title 1 of the Texas Administrative Code:

--§355.8085, which addresses the reimbursement methodology for physicians and other practitioners;

--§355.8241, which addresses the reimbursement methodology for chemical dependency treatment facilities; and

--§355.8441, which addresses the reimbursement methodologies for Early and Periodic Screening, Diagnosis, and Treatment (EPSDT) services (known in Texas as Texas Health Steps).

**Briefing Packet.** A briefing packet describing the proposed coding updates will be available at <https://rad.hhs.texas.gov/rate-packets> on or after September 6, 2019. Interested parties may obtain a copy of the briefing packet prior to the hearing by contacting Rate Analysis by telephone at (512) 730-7401; by fax at (512) 730-7475; or by e-mail at [RADAcuteCare@hhsc.state.tx.us](mailto:RADAcuteCare@hhsc.state.tx.us). The briefing packet will also be available at the public hearing.

**Written Comments.** Written comments regarding the proposed payment rates may be submitted in lieu of, or in addition to, oral testimony until 5:00 p.m. the day of the hearing. Written comments may be sent by U.S. mail to the Texas Health and Human Services Commis-

sion, Attention: Rate Analysis, Mail Code H-400, P.O. Box 149030, Austin, Texas 78714-9030; by fax to Rate Analysis at (512) 730-7475; or by e-mail to [RADAcuteCare@hhsc.state.tx.us](mailto:RADAcuteCare@hhsc.state.tx.us). In addition, written comments may be sent by overnight mail or hand delivered to Texas Health and Human Services Commission, Attention: Rate Analysis, Mail Code H-400, Brown-Heatly Building, 4900 North Lamar Blvd, Austin, Texas 78751.

Persons with disabilities who wish to attend the hearing and require auxiliary aids or services should contact Rate Analysis at (512) 730-7401 at least 72 hours before the hearing so appropriate arrangements can be made.

TRD-201903084  
Karen Ray  
Chief Counsel  
Texas Health and Human Services Commission  
Filed: September 4, 2019



## Department of State Health Services

### Correction of Error

The Executive Commissioner of the Texas Health and Human Services Commission (HHSC), on behalf of the Department of State Health Services (DSHS), published a proposal for new §1.81, concerning Recognition of Out-of-State License of Military Spouse in the August 30, 2019, issue of the *Texas Register* (44 TexReg 4657).

The email address for receiving public comments was incorrectly published. The correct email address for receiving public comments is [CPDRuleComments@dshs.texas.gov](mailto:CPDRuleComments@dshs.texas.gov).

TRD-201903062  
Barbara Klein  
General Counsel  
Department of State Health Services  
Filed: September 3, 2019



### Order Temporarily Placing N-Ethylhexedrone, alpha-PHP, 4-MEAP, MPHP, PV8, and 4-Chloro-alpha-PVP into Schedule I

The Acting Administrator of the Drug Enforcement Administration issued a temporary scheduling order placing the synthetic cathinones N-ethylhexedrone (Other name: 2-(ethylamino)-1-phenylhexan-1-one); alpha-pyrrolidinohexanophenone (Other names: alpha-PHP, alpha-pyrrolidinohexiophenone, 1-phenyl-2-(pyrrolidin-1-yl)hexan-1-one); 4-Methyl-alpha-ethylaminopentiophenone (Other names: 4-MEAP, 2-(ethylamino)-1-(4-methylphenyl)pentan-1-one); 4'-Methyl-alpha-pyrrolidinohexiophenone (Other names: MPHP; 4'-methyl-alpha-pyrrolidinohexanophenone, 1-(4-methylphenyl)-2-(pyrrolidin-1-yl)hexan-1-one); alpha-Pyrrolidinoheptaphenone, its optical, positional, and geometric isomers, salts and salts of isomers (Other names: PV8, 1-phenyl-2-(pyrrolidin-1-yl)heptan-1-one); and, 4'-Chloro-alpha-pyrrolidinovalerophenone, its optical, positional, and geometric isomers, salts and salts of isomers (Other names: 4-chloro-alpha-PVP; 4'-chloro-alpha-pyrrolidinopentiophenone; 1-(4-chlorophenyl)-2-(pyrrolidin-1-yl)pentan-1-one) and their optical, positional, and geometric isomers, salts, and salts of isomers into schedule I of the Controlled Substances Act, effective July 18, 2019. This temporary amendment was published in the Federal Register, Volume 84, Number 138, pages 34291-34297.

This scheduling action was based on the following:

1. N-ethylhexedrone, alpha-PHP, 4-MEAP, MPHP, PV8, and 4-chloro-alpha-PVP pose an imminent hazard to the public safety;
2. There are no currently accepted medical uses for N-ethylhexedrone, alpha-PHP, 4-MEAP, MPHP, PV8, and 4-chloro-alpha-PVP in the United States;
3. N-ethylhexedrone, alpha-PHP, 4-MEAP, MPHP, PV8, and 4-chloro-alpha-PVP in the United States have a high potential for abuse; and,
4. N-ethylhexedrone, alpha-PHP, 4-MEAP, MPHP, PV8, and 4-chloro-alpha-PVP in the United States lack accepted safety for use under medical supervision.

Pursuant to Section 481.034(g), as amended by the 75th legislature, of the Texas Controlled Substances Act, Health and Safety Code, Chapter 481, at least thirty-one days have expired since notice of the above referenced actions were published in the *Federal Register*. In the capacity as Commissioner of the Texas Department of State Health Services, John Hellerstedt, M.D., does hereby order that the substances N-ethylhexedrone, alpha-PHP, 4-MEAP, MPHP, PV8, and 4-chloro-alpha-PVP be placed temporarily into schedule I.

- Schedule I temporarily listed substances subject to emergency scheduling by the United States Drug Enforcement Administration.

Unless specifically excepted or unless listed in another schedule, a material, compound, mixture, or preparation that contains any quantity of the following substances or that contains any of the substance's salts; isomers; optical, positional, and geometric isomers; esters; ethers; and salts of isomers, esters and ethers if the existence of the salts, isomers, and salts of isomers is possible within the specific chemical designation.

- (1) N-[1-[2-hydroxy-2-(thiophen-2-yl)ethyl]piperidin-4-yl]-N-phenylpropionamide, also known as N-[1-[2-hydroxy-2-(2-thienyl)ethyl]-4-piperidinyl]-N-phenylpropanamide (Other name: beta-hydroxythiofentanyl);
- (2) methyl 2-(1-(5-fluoropentyl)-1H-indazole-3-carboxamido)-3,3-dimethylbutanoate (Other names: 5F-ADB, 5F-MDMB-PINACA);
- (3) methyl 2-(1-(5-fluoropentyl)-1H-indazole-3-carboxamido)-3-methylbutanoate (Other names: 5F-AMB);
- (4) N-(adamantan-1-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide (Other names: 5F-APINACA, 5F-AKB48);
- (5) N-(1-amino-3,3-dimethyl-1-oxobutan-2-yl)-1-(4-fluorobenzyl)-1H-indazole-3-carboxamide (Other names: ADB-FUBINACA);
- (6) methyl 2-(1-(cyclohexylmethyl)-1H-indole-3-carboxamido)-3,3-dimethylbutanoate (Other names: MDMB-CHMICA, MMB-CHMINACA);
- (7) methyl 2-(1-(4-fluorobenzyl)-1H-indazole-3-carboxamido)-3,3-dimethylbutanoate (Other names: MDMB-FUBINACA);
- (8) methyl 2-(1-(4-fluorobenzyl)-1H-indazole-3-carboxamido)-3-methylbutanoate (Other names: FUB-AMB, MMB-FUBINACA, AMB-FUBINACA);
- (9) N-(2-fluorophenyl)-N-(1-phenethylpiperidin-4-yl)propionamide (Other names: ortho-fluorofentanyl, 2-fluorofentanyl);
- (10) 2-methoxy-N-(1-phenethylpiperidin-4-yl)-N-phenylacetamide (Other name: methoxyacetyl fentanyl);
- (11) N-(1-phenethylpiperidin-4-yl)-N-phenylcyclopropanecarboxamide (Other name: cyclopropyl fentanyl);
- (12) N-(1-phenethylpiperidin-4-yl)-N-phenylpentanamide (Other name: valeryl fentanyl);

- (13) N-(4-fluorophenyl)-N-(1-phenethylpiperidin-4-yl)butyramide (Other name: para-fluorobutyryl fentanyl);
- (14) N-(4-methoxyphenyl)-N-(1-phenethylpiperidin-4-yl)butyramide (Other name: para-methoxybutyryl fentanyl);
- (15) N-(4-chlorophenyl)-N-(1-phenethylpiperidin-4-yl)isobutyramide (Other name: para-chloroisobutyryl fentanyl);
- (16) N-(1-phenethylpiperidin-4-yl)-N-phenylisobutyramide (Other name: isobutyryl fentanyl);
- (17) N-(1-phenethylpiperidin-4-yl)-N-phenylcyclopentanecarboxamide (Other name: cyclopentyl fentanyl);
- (18) Fentanyl-related substances.

(18-1) Fentanyl-related substance means any substance not otherwise listed under another Administration Controlled Substance Code Number, and for which no exemption or approval is in effect under section 505 of the Federal Food, Drug, and Cosmetic Act (21 U.S.C. 355), that is structurally related to fentanyl by one or more of the following modifications:

- (18-1-1) Replacement of the phenyl portion of the phenethyl group by any monocycle, whether or not further substituted in or on the monocycle;
- (18-1-2) Substitution in or on the phenethyl group with alkyl, alkenyl, alkoxy, hydroxyl, halo, haloalkyl, amino or nitro groups;
- (18-1-3) Substitution in or on the piperidine ring with alkyl, alkenyl, alkoxy, ester, ether, hydroxyl, halo, haloalkyl, amino or nitro groups;
- (18-1-4) Replacement of the aniline ring with any aromatic monocycle whether or not further substituted in or on the aromatic monocycle; and/or
- (18-1-5) Replacement of the N-propionyl group by another acyl group;
- (18-2) This definition includes, but is not limited to, the following substances:
  - (18-2-1) N-(1-(2-fluorophenethyl)piperidin-4-yl)-N-(2-fluorophenyl)propionamide (2'-fluoro ortho-fluorofentanyl);
  - (18-2-2) N-(2-methylphenyl)-N-(1-phenethylpiperidin-4-yl)acetamide (ortho-methyl acetyl fentanyl);
  - (18-2-3) N-(1-phenethylpiperidin-4-yl)-N,3-diphenylpropanamide (beta'-phenyl fentanyl, hydrocinnamoyl fentanyl);
  - (18-2-4) N-(1-phenethylpiperidin-4-yl)-N-phenylthiophene-2-carboxamide (thiofuranyl fentanyl);
  - (18-2-5) (E)-N-(1-phenethylpiperidin-4-yl)-N-phenylbut-2-enamide (crotonyl fentanyl);
- (19) Naphthalen-1-yl 1-(5-fluoropentyl)-1H-indole-3-carboxylate (other name: NM2201, CBL2201);
- (20) N-(1-amino-3-methyl-1-oxobutan-2-yl)-1-(5-fluoropentyl)-1H-indazole-3-carboxamide (other name: 5F-AB-PINACA);
- (21) 1-(4-cyanobutyl)-N-(2-phenylpropan-2-yl)-1H-indazole-3-carboxamide (other names: 4-CN-CUMYL-BUTINACA, 4-cyano-CUMYL-BUTINACA, 4-CN-CUMYL BINACA, CUMYL-4CN-BINACA; SGT-78);
- (22) methyl 2-(1-(cyclohexylmethyl)-1H-indole-3-carboxamido)-3-methylbutanoate (other names: MMB-CHMICA, AMB-CHMICA);
- (23) 1-(5-fluoropentyl)-N-(2-phenylpropan-2-yl)-1H-pyrrolo[2,3-b]pyridine-3-carboxamide (other name: 5F-CUMYL-P7AICA);

(24) N-ethylpentylone (Other names: ephylone; 1-(1,3-benzodioxil-5-yl)-2-(ethylamino)-pentan-1-one);

(25) ethyl 2-(1-(5-fluoropentyl)-1H-indazole-3-carboxamido)-3,3-dimethylbutanoate (Other names: 5FEDMB-PINACA);

(26) methyl 2-(1-(5-fluoropentyl)-1H-indole-3-carboxamido)-3,3-dimethylbutanoate (Other names: 5F-MDMB-PICA);

(27) N-(adamantan-1-yl)-1-(4-fluorobenzyl)-1H-indazole-3-carboxamide (Other names: FUB-AKB48, FUB-APINACA), AKB48 N-(4-FLUOROBENZYL));

(28) 1-(5-fluoropentyl)-N-(2-phenylpropan-2-yl)-1H-indazole-3-carboxamide (Other names: 5F-CUMYL-PINACA; SGT-25);

(29) (1-(4-fluorobenzyl)-1H-indol-3-yl)(2,2,3,3-tetramethylcyclopropyl)methanone (Other name: FUB-144);

\*(30) N-ethylhexedrone (Other name: 2-(ethylamino)-1-phenylhexan-1-one);

\*(31) alpha-pyrrolidinohexanophenone (Other names: alpha-PHP, alpha-pyrrolidinohexiophenone, 1-phenyl-2-(pyrrolidin-1-yl)hexan-1-one);

\*(32) 4-Methyl-alpha-ethylaminopentiophenone (Other names: 4-MEAP, 2-(ethylamino)-1-(4-methylphenyl)pentan-1-one);

\*(33) 4-Methyl-alpha-pyrrolidinohexiophenone (Other names: MPHP;

4'-methyl-alpha-pyrrolidinohexanophenone, 1-(4-methylphenyl)-2-(pyrrolidin-1-yl)hexan-1-one);

\*(34) alpha-Pyrrolidinoheptaphenone (Other names: PV8, 1-phenyl-2-(pyrrolidin-1-yl)heptan-1-one); and

\*(35) 4-Chloro-alpha-pyrrolidinovalerophenone (Other names: 4-chloro-alpha-PVP, 4-chloro-alpha-pyrrolidinopentiophenone, 1-(4-chlorophenyl)-2-(pyrrolidin-1-yl)pentan-1-one).

Changes indicated by an \*

TRD-201903086

Barbara L. Klein

General Counsel

Department of State Health Services

Filed: September 4, 2019

◆ ◆ ◆

## Texas Lottery Commission

Scratch Ticket Game Number 2195 "MONOPOLY™ 50X"

1.0 Name and Style of Scratch Ticket Game.

A. The name of Scratch Ticket Game No. 2195 is "MONOPOLY™ 50X". The play style is "key number match".

1.1 Price of Scratch Ticket Game.

A. The price for Scratch Ticket Game No. 2195 shall be \$5.00 per Scratch Ticket.

1.2 Definitions in Scratch Ticket Game No. 2195.

A. Display Printing - That area of the Scratch Ticket outside of the area where the overprint and Play Symbols appear.

B. Latex Overprint - The removable scratch-off covering over the Play Symbols on the front of the Scratch Ticket.

C. Play Symbol - The printed data under the latex on the front of the Scratch Ticket that is used to determine eligibility for a prize. Each Play Symbol is printed in Symbol font in black ink in positive except for dual-image games. The possible black Play Symbols are: 01, 02, 03, 04, 05, 06, 07, 08, 09, 11, 12, 13, 14, 15, 16, 17, 18, 19, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 10X SYMBOL, 20X SYMBOL, 50X SYMBOL, \$5.00, \$10.00, \$20.00, \$25.00, \$50.00, \$100, \$250, \$500, \$1,000, \$5,000 and \$200,000.

D. Play Symbol Caption - The printed material appearing below each Play Symbol which explains the Play Symbol. One caption appears under each Play Symbol and is printed in caption font in black ink in positive. The Play Symbol Caption which corresponds with and verifies each Play Symbol is as follows:

Figure 1: GAME NO. 2195 - 1.2D

PLAY SYMBOL	CAPTION
01	ONE
02	TWO
03	THR
04	FOR
05	FIV
06	SIX
07	SVN
08	EGT
09	NIN
11	ELV
12	TLV
13	TRN
14	FTN
15	FFN
16	SXN
17	SVT
18	ETN
19	NTN
21	TWON
22	TWTO
23	TWTH
24	TWFR
25	TWFV
26	TWSX
27	TWSV
28	TWET
29	TWNI
30	TRTY
31	TRON
32	TRTO
33	TRTH
34	TRFR
35	TRFV
36	TRSX
37	TRSV
38	TRET
39	TRNI

40	FRTY
10X SYMBOL	WINX10
20X SYMBOL	WINX20
50X SYMBOL	WINX50
\$5.00	FIV\$
\$10.00	TEN\$
\$20.00	TWY\$
\$25.00	TWV\$
\$50.00	FFTY\$
\$100	ONHN
\$250	TOFF
\$500	FVHN
\$1,000	ONTH
\$5,000	FVTH
\$200,000	200TH

E. Serial Number - A unique 13 (thirteen) digit number appearing under the latex scratch-off covering on the front of the Scratch Ticket. The Serial Number is for validation purposes and cannot be used to play the game. The format will be: 0000000000000.

F. Bar Code - A 24 (twenty-four) character interleaved two (2) of five (5) Bar Code which will include a four (4) digit game ID, the seven (7) digit Pack number, the three (3) digit Ticket number and the ten (10) digit Validation Number. The Bar Code appears on the back of the Scratch Ticket.

G. Game-Pack-Ticket Number - A 14 (fourteen) digit number consisting of the four (4) digit game number (2195), a seven (7) digit Pack number, and a three (3) digit Ticket number. Ticket numbers start with 001 and end with 075 within each Pack. The format will be: 2195-0000001-001.

H. Pack - A Pack of the "MONOPOLY™ 50X" Scratch Ticket Game contains 075 Tickets, packed in plastic shrink-wrapping and fanfolded in pages of one (1). The Packs will alternate. One will show the front of Ticket 001 and back of 075 while the other fold will show the back of Ticket 001 and front of 075.

I. Non-Winning Scratch Ticket - A Scratch Ticket which is not programmed to be a winning Scratch Ticket or a Scratch Ticket that does not meet all of the requirements of these Game Procedures, the State Lottery Act (Texas Government Code, Chapter 466), and applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401.

J. Scratch Ticket Game, Scratch Ticket or Ticket - Texas Lottery "MONOPOLY™ 50X" Scratch Ticket Game No. 2195.

2.0 Determination of Prize Winners. The determination of prize winners is subject to the general Scratch Ticket validation requirements set forth in Texas Lottery Rule 401.302, Scratch Ticket Game Rules, these Game Procedures, and the requirements set out on the back of each Scratch Ticket. A prize winner in the "MONOPOLY™ 50X" Scratch Ticket Game is determined once the latex on the Scratch Ticket is scratched off to expose forty-five (45) Play Symbols. If a player matches any of the YOUR NUMBERS Play Symbols to any of the

WINNING NUMBERS Play Symbols, the player wins the prize for that number. If the player reveals a "10X" Play Symbol, the player wins 10 TIMES the prize for that symbol. If the player reveals a "20X" Play Symbol, the player wins 20 TIMES the prize for that symbol. If the player reveals a "50X" Play Symbol, the player wins 50 TIMES the prize for that symbol. No portion of the Display Printing nor any extraneous matter whatsoever shall be usable or playable as a part of the Scratch Ticket.

2.1 Scratch Ticket Validation Requirements.

A. To be a valid Scratch Ticket, all of the following requirements must be met:

1. Exactly forty-five (45) Play Symbols must appear under the Latex Overprint on the front portion of the Scratch Ticket;
2. Each of the Play Symbols must have a Play Symbol Caption underneath, unless specified, and each Play Symbol must agree with its Play Symbol Caption;
3. Each of the Play Symbols must be present in its entirety and be fully legible;
4. Each of the Play Symbols must be printed in black ink except for dual image games;
5. The Scratch Ticket shall be intact;
6. The Serial Number and Game-Pack-Ticket Number must be present in their entirety and be fully legible;
7. The Serial Number must correspond, using the Texas Lottery's codes, to the Play Symbols on the Scratch Ticket;
8. The Scratch Ticket must not have a hole punched through it, be mutilated, altered, unreadable, reconstituted or tampered with in any manner;
9. The Scratch Ticket must not be counterfeit in whole or in part;
10. The Scratch Ticket must have been issued by the Texas Lottery in an authorized manner;

11. The Scratch Ticket must not have been stolen, nor appear on any list of omitted Scratch Tickets or non-activated Scratch Tickets on file at the Texas Lottery;

12. The Play Symbols, Serial Number and Game-Pack-Ticket Number must be right side up and not reversed in any manner;

13. The Scratch Ticket must be complete and not miscut, and have exactly forty-five (45) Play Symbols under the Latex Overprint on the front portion of the Scratch Ticket, exactly one Serial Number and exactly one Game-Pack-Ticket Number on the Scratch Ticket;

14. The Serial Number of an apparent winning Scratch Ticket shall correspond with the Texas Lottery's Serial Numbers for winning Scratch Tickets, and a Scratch Ticket with that Serial Number shall not have been paid previously;

15. The Scratch Ticket must not be blank or partially blank, misregistered, defective or printed or produced in error;

16. Each of the forty-five (45) Play Symbols must be exactly one of those described in Section 1.2.C of these Game Procedures;

17. Each of the forty-five (45) Play Symbols on the Scratch Ticket must be printed in the Symbol font and must correspond precisely to the artwork on file at the Texas Lottery; the Scratch Ticket Serial Numbers must be printed in the Serial font and must correspond precisely to the artwork on file at the Texas Lottery; and the Game-Pack-Ticket Number must be printed in the Game-Pack-Ticket Number font and must correspond precisely to the artwork on file at the Texas Lottery;

18. The Display Printing on the Scratch Ticket must be regular in every respect and correspond precisely to the artwork on file at the Texas Lottery; and

19. The Scratch Ticket must have been received by the Texas Lottery by applicable deadlines.

B. The Scratch Ticket must pass all additional validation tests provided for in these Game Procedures, the Texas Lottery's Rules governing the award of prizes of the amount to be validated, and any confidential validation and security tests of the Texas Lottery.

C. Any Scratch Ticket not passing all of the validation requirements is void and ineligible for any prize and shall not be paid. However, the Executive Director may, solely at the Executive Director's discretion, refund the retail sales price of the Scratch Ticket. In the event a defective Scratch Ticket is purchased, the only responsibility or liability of the Texas Lottery shall be to replace the defective Scratch Ticket with another unplayed Scratch Ticket in that Scratch Ticket Game (or a Scratch Ticket of equivalent sales price from any other current Texas Lottery Scratch Ticket Game) or refund the retail sales price of the Scratch Ticket, solely at the Executive Director's discretion.

## 2.2 Programmed Game Parameters.

A. GENERAL: Consecutive Non-Winning Tickets within a Pack will not have matching patterns, in the same order, of either Play Symbols or Prize Symbols.

B. GENERAL: The top Prize Symbol will appear on every Ticket, unless restricted by other parameters, play action or prize structure.

C. KEY NUMBER MATCH: No prize amount in a non-winning spot will correspond with the YOUR NUMBERS Play Symbol (i.e., 05 and \$5).

D. KEY NUMBER MATCH: No matching non-winning YOUR NUMBERS Play Symbols on a Ticket, unless restricted by other parameters, play action or prize structure.

E. KEY NUMBER MATCH: No matching WINNING NUMBERS Play Symbols on a Ticket, unless restricted by other parameters, play action or prize structure.

F. KEY NUMBER MATCH: A non-winning Prize Symbol will never match a winning Prize Symbol.

G. KEY NUMBER MATCH: A Ticket may have up to three (3) matching non-winning Prize Symbols, unless restricted by other parameters, play action or prize structure.

H. KEY NUMBER MATCH: The "10X" (WINX10) Play Symbol will only appear on intended winning Tickets, as dictated by the prize structure.

I. KEY NUMBER MATCH: The "20X" (WINX20) Play Symbol will only appear on intended winning Tickets, as dictated by the prize structure.

J. KEY NUMBER MATCH: The "50X" (WINX50) Play Symbol will only appear on intended winning Tickets, as dictated by the prize structure.

## 2.3 Procedure for Claiming Prizes.

A. To claim a "MONOPOLY™ 50X" Scratch Ticket Game prize of \$5.00, \$10.00, \$20.00, \$25.00, \$50.00, \$100, \$250 or \$500, a claimant shall sign the back of the Scratch Ticket in the space designated on the Scratch Ticket and present the winning Scratch Ticket to any Texas Lottery Retailer. The Texas Lottery Retailer shall verify the claim and, if valid, and upon presentation of proper identification, if appropriate, make payment of the amount due the claimant and physically void the Scratch Ticket; provided that the Texas Lottery Retailer may, but is not required, to pay a \$25.00, \$50.00, \$100, \$250 or \$500 Scratch Ticket Game. In the event the Texas Lottery Retailer cannot verify the claim, the Texas Lottery Retailer shall provide the claimant with a claim form and instruct the claimant on how to file a claim with the Texas Lottery. If the claim is validated by the Texas Lottery, a check shall be forwarded to the claimant in the amount due. In the event the claim is not validated, the claim shall be denied and the claimant shall be notified promptly. A claimant may also claim any of the above prizes under the procedure described in Section 2.3.B and Section 2.3.C of these Game Procedures.

B. To claim a "MONOPOLY™ 50X" Scratch Ticket Game prize of \$1,000, \$5,000 or \$200,000, the claimant must sign the winning Scratch Ticket and present it at one of the Texas Lottery's Claim Centers. If the claim is validated by the Texas Lottery, payment will be made to the bearer of the validated winning Scratch Ticket for that prize upon presentation of proper identification. When paying a prize of \$600 or more, the Texas Lottery shall file the appropriate income reporting form with the Internal Revenue Service (IRS) and shall withhold federal income tax at a rate set by the IRS if required. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

C. As an alternative method of claiming a "MONOPOLY™ 50X" Scratch Ticket Game prize, the claimant must sign the winning Scratch Ticket, thoroughly complete a claim form, and mail both to: Texas Lottery Commission, P.O. Box 16600, Austin, Texas 78761-6600. The Texas Lottery is not responsible for Scratch Tickets lost in the mail. In the event that the claim is not validated by the Texas Lottery, the claim shall be denied and the claimant shall be notified promptly.

D. Prior to payment by the Texas Lottery of any prize, the Texas Lottery shall deduct the amount of a delinquent tax or other money from the winnings of a prize winner who has been finally determined to be:

1. delinquent in the payment of a tax or other money to a state agency and that delinquency is reported to the Comptroller under Government Code §403.055;

2. in default on a loan made under Chapter 52, Education Code;

3. in default on a loan guaranteed under Chapter 57, Education Code; or

4. delinquent in child support payments in the amount determined by a court or a Title IV-D agency under Chapter 231, Family Code.

E. If a person is indebted or owes delinquent taxes to the State, other than those specified in the preceding paragraph, the winnings of a person shall be withheld until the debt or taxes are paid.

F. If a person is indebted or owes delinquent taxes to the State, and is selected as a winner in a promotional second-chance drawing, the debt to the State must be paid within 30 days of notification or the prize will be awarded to an Alternate.

2.4 Allowance for Delay of Payment. The Texas Lottery may delay payment of the prize pending a final determination by the Executive Director, under any of the following circumstances:

A. if a dispute occurs, or it appears likely that a dispute may occur, regarding the prize;

B. if there is any question regarding the identity of the claimant;

C. if there is any question regarding the validity of the Scratch Ticket presented for payment; or

D. if the claim is subject to any deduction from the payment otherwise due, as described in Section 2.3.D of these Game Procedures. No liability for interest for any delay shall accrue to the benefit of the claimant pending payment of the claim.

2.5 Payment of Prizes to Persons Under 18. If a person under the age of 18 years is entitled to a cash prize under \$600 from the "MONOPOLY™ 50X" Scratch Ticket Game, the Texas Lottery shall deliver to an adult member of the minor's family or the minor's guardian a check or warrant in the amount of the prize payable to the order of the minor.

2.6 If a person under the age of 18 years is entitled to a cash prize of \$600 or more from the "MONOPOLY™ 50X" Scratch Ticket Game, the Texas Lottery shall deposit the amount of the prize in a custodial bank account, with an adult member of the minor's family or the minor's guardian serving as custodian for the minor.

2.7 Scratch Ticket Claim Period. All Scratch Ticket prizes must be claimed within 180 days following the end of the Scratch Ticket Game or within the applicable time period for certain eligible military personnel as set forth in Texas Government Code §466.408. Any rights to a prize that is not claimed within that period, and in the manner specified in these Game Procedures and on the back of each Scratch Ticket, shall be forfeited.

2.8 Disclaimer. The number of prizes in a game is approximate based on the number of Scratch Tickets ordered. The number of actual prizes available in a game may vary based on number of Scratch Tickets manufactured, testing, distribution, sales and number of prizes claimed. A Scratch Ticket Game may continue to be sold even when all the top prizes have been claimed.

2.9 Promotional Second-Chance Drawings. Any Non-Winning "MONOPOLY™ 50X" Scratch Ticket may be entered into one (1) of five (5) promotional drawings for a chance to win a promotional second-chance drawing prize. See instructions of the back of the Scratch Ticket for information on eligibility and entry requirements.

3.0 Scratch Ticket Ownership.

A. Until such time as a signature is placed upon the back portion of a Scratch Ticket in the space designated, a Scratch Ticket shall be owned by the physical possessor of said Scratch Ticket. When a signature is placed on the back of the Scratch Ticket in the space designated, the player whose signature appears in that area shall be the owner of the Scratch Ticket and shall be entitled to any prize attributable thereto. Notwithstanding any name or names submitted on a claim form, the Executive Director shall make payment to the player whose signature appears on the back of the Scratch Ticket in the space designated. If more than one name appears on the back of the Scratch Ticket, the Executive Director will require that one of those players whose name appears thereon be designated by such players to receive payment.

B. The Texas Lottery shall not be responsible for lost or stolen Scratch Tickets and shall not be required to pay on a lost or stolen Scratch Ticket.

4.0 Number and Value of Scratch Prizes. There will be approximately 20,040,000 Scratch Tickets in Scratch Ticket Game No. 2195. The approximate number and value of prizes in the game are as follows:

Figure 2: GAME NO. 2195 - 4.0

Prize Amount	Approximate Number of Winners*	Approximate Odds are 1 in **
\$5	2,271,200	8.82
\$10	1,603,200	12.50
\$20	400,800	50.00
\$25	400,800	50.00
\$50	200,400	100.00
\$100	54,275	369.23
\$250	8,350	2,400.00
\$500	4,175	4,800.00
\$1,000	180	111,333.33
\$5,000	15	1,336,000.00
\$200,000	9	2,226,666.67

\*The number of prizes in a game is approximate based on the number of tickets ordered. The number of actual prizes available in a game may vary based on number of tickets manufactured, testing, distribution, sales and number of prizes claimed.

\*\*The overall odds of winning a prize are 1 in 4.05. The individual odds of winning for a particular prize level may vary based on sales, distribution, testing, and number of prizes claimed.

A. The actual number of Scratch Tickets in the game may be increased or decreased at the sole discretion of the Texas Lottery Commission.

5.0 End of the Scratch Ticket Game. The Executive Director may, at any time, announce a closing date (end date) for the Scratch Ticket Game No. 2195 without advance notice, at which point no further Scratch Tickets in that game may be sold. The determination of the closing date and reasons for closing will be made in accordance with the Scratch Ticket closing procedures and the Scratch Ticket Game Rules. See 16 TAC §401.302(j).

6.0 Governing Law. In purchasing a Scratch Ticket, the player agrees to comply with, and abide by, these Game Procedures for Scratch Ticket Game No. 2195, the State Lottery Act (Texas Government Code, Chapter 466), applicable rules adopted by the Texas Lottery pursuant to the State Lottery Act and referenced in 16 TAC, Chapter 401, and all final decisions of the Executive Director.

TRD-201903066  
 Bob Biard  
 General Counsel  
 Texas Lottery Commission  
 Filed: September 3, 2019

◆ ◆ ◆  
**Motor Vehicle Crime Prevention Authority**

**Extension of Comment Period**

The Automobile Burglary and Theft Prevention Authority proposed amendments to Title 43, Part 3, Chapter 57, Automobile Burglary and Theft Prevention Authority. The proposed changes to the rules were published in the August 30, 2019, issue of the *Texas Register* (44 TexReg 4663) with a comment period ending September 23, 2019.

**The comment period for the proposed changes will be accepted through 5:00 p.m. on September 30, 2019.**

Written comments on the proposed amendments may be submitted to David Richards, General Counsel, Motor Vehicle Crime Prevention Authority, 4000 Jackson Avenue, Austin, Texas 78731, or by email to [rules@txdmv.gov](mailto:rules@txdmv.gov).

TRD-201903077  
 David Richards  
 General Counsel  
 Motor Vehicle Crime Prevention Authority  
 Filed: September 4, 2019

◆ ◆ ◆  
**Public Utility Commission of Texas**

Public Notice of Strawman Proposing New 16 Texas Administrative Code §24.238 and Amendments to 16 Texas Administrative Code §§24.41, 24.239, and 24.245, and New and Revised Forms Related to Fair Market Value, and Request for Comments

The staff of the Public Utility Commission of Texas (commission) requests comments on a strawman rule to implement Senate Bill 2272, relating to the procedure for amending a water or sewer certificate of public convenience and necessity through expedited release or streamlined expedited release, and HB 3542, establishing a fair market valuation process to be used by a class A or class B water or sewer utility that is acquiring another utility or the facilities of another utility. The strawman proposes new 16 Texas Administrative Code (TAC) §24.238, outlining the fair market valuation process, and conforming amendments to 16 TAC §24.41 and 24.239, which describe the components of a util-



ity's cost of service and set forth the sale, transfer, merger process used to obtain commission approval of an acquisition of a utility or utility facilities. The strawman also proposes amendments to 16 TAC §24.245 relating to the process used to determine the amount of monetary compensation the commission may order following the amendment of a utility's certificate of convenience and necessity through expedited release and streamlined expedited release. In addition to the strawman, staff is proposing a new form to be submitted as part of the fair market valuation process and revisions to the existing Application for Sale, Transfer, or Merger of a Retail Public Utility.

The proposed strawman rule and new and revised forms will be filed with the commission on September 19, 2019, and can be accessed through the commission's website homepage under "Filings," using Control Number 49813. Written comments on the strawman rule and forms may be filed by submitting 16 copies to the commission's Filing Clerk, Public Utility Commission of Texas, 1701 North Congress Avenue, P.O. Box 13326, Austin, Texas 78711-3326 within 21 days of the date of publication of this notice. Comments should be organized in a manner consistent with the organization of the new rule and amendments and the forms. All responses should reference Project Number 49813.

TRD-201903076  
Andrea Gonzalez  
Rules Coordinator  
Public Utility Commission of Texas  
Filed: September 4, 2019

## Texas Department of Transportation

### Aviation Division - Request for Qualifications (RFQ) for Professional Engineering Services

The City of Weslaco, through its agent, the Texas Department of Transportation (TxDOT), intends to engage a professional engineering firm for services pursuant to Chapter 2254, Subchapter A, of the Government Code. TxDOT Aviation Division will solicit and receive qualification statements for the current aviation project as described below.

**Current Project:** Mid Valley Municipal Airport; City of Weslaco; TxDOT CSJ No.: 1921WESLA. The TxDOT Project Manager is Ed Mayle.

Scope: Provide engineering and design services, including construction administration, to:

1. Partially replace Runway 14/32 medium intensity runway lights.
2. Replace PAPI on Runway 32.

The Agent, in accordance with the provisions of Title VI of the Civil Rights Act of 1964 (78 Stat. 252, 42 U.S.C. §§2000d to 2000d-4) and the Regulations, hereby notifies all respondents that it will affirmatively ensure that for any contract entered into pursuant to this advertisement, disadvantaged business enterprises will be afforded full and fair opportunity to submit in response to this solicitation and will not be discriminated against on the grounds of race, color, or national origin in consideration for an award.

The proposed contract is subject to 49 CFR Part 26 concerning the participation of Disadvantaged Business Enterprises (DBE).

The DBE goal for the design phase of the current project is 4%. The goal will be re-set for the construction phase.

To assist in your qualification statement preparation, the criteria, project diagram, and most recent Airport Layout Plan are available online at <http://www.dot.state.tx.us/avn/avninfo/notice/consult/in->

[dex.htm](#) by selecting "Mid Valley Municipal Airport." The qualification statement should address a technical approach for the current scope only. Firms shall use page 4, Recent Airport Experience, to list relevant past projects.

### AVN-550 Preparation Instructions:

Interested firms shall utilize the latest version of Form AVN-550, titled "Qualifications for Aviation Architectural/Engineering Services." The form may be requested from TxDOT, Aviation Division, 125 E. 11th Street, Austin, Texas 78701-2483, phone number, 1 (800) 68-PILOT (74568). The form may be emailed by request or downloaded from the TxDOT website at <http://www.txdot.gov/inside-txdot/division/aviation/projects.html>. The form may not be altered in any way.

Firms must carefully follow the instructions provided on each page of the form. Qualifications shall not exceed the number of pages in the AVN-550 template. The AVN-550 consists of eight pages of data plus one optional illustration page. A prime provider may only submit one AVN-550. If a prime provider submits more than one AVN-550, or submits a cover letter with the AVN-550, that provider will be disqualified. Responses to this solicitation WILL NOT BE ACCEPTED IN ANY OTHER FORMAT.

**ATTENTION:** To ensure utilization of the latest version of Form AVN-550, firms are encouraged to download Form AVN-550 from the TxDOT website as addressed above. Utilization of Form AVN-550 from a previous download may not be the exact same format. Form AVN-550 is a PDF Template.

The completed Form AVN-550 must be received in the TxDOT Aviation eGrants system no later than October 8, 2019, 11:59 p.m. (CDST). Electronic facsimiles or forms sent by email or regular/overnight mail will not be accepted.

Firms that wish to submit a response to this solicitation must be a user in the TxDOT Aviation eGrants system no later than one business day before the solicitation due date. To request access to eGrants, please complete the Contact Us web form located at <http://txdot.gov/government/funding/egrants-2016/aviation.html>.

An instructional video on how to respond to a solicitation in eGrants is available at <http://txdot.gov/government/funding/egrants-2016/aviation.html>.

Step by step instructions on how to respond to a solicitation in eGrants will also be posted in the RFQ packet at <http://www.dot.state.tx.us/avn/avninfo/notice/consult/index.htm>.

The consultant selection committee will be composed of local government representatives. The final selection by the committee will generally be made following the completion of review of AVN-550s. The committee will review all AVN-550s and rate and rank each. The Evaluation Criteria for Engineering Qualifications can be found at <http://www.txdot.gov/inside-txdot/division/aviation/projects.html> under Information for Consultants. All firms will be notified and the top rated firm will be contacted to begin fee negotiations for the design and bidding phases. The selection committee does, however, reserve the right to conduct interviews for the top rated firms if the committee deems it necessary. If interviews are conducted, selection will be made following interviews.

Please contact TxDOT Aviation for any technical or procedural questions at 1 (800) 68-PILOT (74568). For procedural questions, please contact Sheri Quinlan, Grant Manager. For technical questions, please contact Ed Mayle, Project Manager.

For questions regarding responding to this solicitation in eGrants, please contact the TxDOT Aviation help desk at 1 (800) 687-4568 or [avn-egrantshelp@txdot.gov](mailto:avn-egrantshelp@txdot.gov).

TRD-201902992  
Becky Blewett  
Deputy General Counsel  
Texas Department of Transportation  
Filed: August 29, 2019



## How to Use the Texas Register

**Information Available:** The sections of the *Texas Register* represent various facets of state government. Documents contained within them include:

**Governor** - Appointments, executive orders, and proclamations.

**Attorney General** - summaries of requests for opinions, opinions, and open records decisions.

**Texas Ethics Commission** - summaries of requests for opinions and opinions.

**Emergency Rules** - sections adopted by state agencies on an emergency basis.

**Proposed Rules** - sections proposed for adoption.

**Withdrawn Rules** - sections withdrawn by state agencies from consideration for adoption, or automatically withdrawn by the Texas Register six months after the proposal publication date.

**Adopted Rules** - sections adopted following public comment period.

**Texas Department of Insurance Exempt Filings** - notices of actions taken by the Texas Department of Insurance pursuant to Chapter 5, Subchapter L of the Insurance Code.

**Review of Agency Rules** - notices of state agency rules review.

**Tables and Graphics** - graphic material from the proposed, emergency and adopted sections.

**Transferred Rules** - notice that the Legislature has transferred rules within the *Texas Administrative Code* from one state agency to another, or directed the Secretary of State to remove the rules of an abolished agency.

**In Addition** - miscellaneous information required to be published by statute or provided as a public service.

Specific explanation on the contents of each section can be found on the beginning page of the section. The division also publishes cumulative quarterly and annual indexes to aid in researching material published.

**How to Cite:** Material published in the *Texas Register* is referenced by citing the volume in which the document appears, the words "TexReg" and the beginning page number on which that document was published. For example, a document published on page 2402 of Volume 43 (2018) is cited as follows: 43 TexReg 2402.

In order that readers may cite material more easily, page numbers are now written as citations. Example: on page 2 in the lower-left hand corner of the page, would be written "43 TexReg 2 issue date," while on the opposite page, page 3, in the lower right-hand corner, would be written "issue date 43 TexReg 3."

**How to Research:** The public is invited to research rules and information of interest between 8 a.m. and 5 p.m. weekdays at the *Texas Register* office, James Earl Rudder Building, 1019 Brazos, Austin. Material can be found using *Texas Register* indexes, the *Texas Administrative Code* section numbers, or TRD number.

Both the *Texas Register* and the *Texas Administrative Code* are available online at: <http://www.sos.state.tx.us>. The *Texas Register* is available in an .html version as well as a .pdf version through the internet. For website information, call the Texas Register at (512) 463-5561.

## Texas Administrative Code

The *Texas Administrative Code (TAC)* is the compilation of all final state agency rules published in the *Texas Register*. Following its effective date, a rule is entered into the *Texas Administrative Code*. Emergency rules, which may be adopted by an agency on an interim basis, are not codified within the *TAC*.

The *TAC* volumes are arranged into Titles and Parts (using Arabic numerals). The Titles are broad subject categories into which the agencies are grouped as a matter of convenience. Each Part represents an individual state agency.

The complete *TAC* is available through the Secretary of State's website at <http://www.sos.state.tx.us/tac>.

The Titles of the *TAC*, and their respective Title numbers are:

1. Administration
4. Agriculture
7. Banking and Securities
10. Community Development
13. Cultural Resources
16. Economic Regulation
19. Education
22. Examining Boards
25. Health Services
26. Health and Human Services
28. Insurance
30. Environmental Quality
31. Natural Resources and Conservation
34. Public Finance
37. Public Safety and Corrections
40. Social Services and Assistance
43. Transportation

**How to Cite:** Under the *TAC* scheme, each section is designated by a *TAC* number. For example in the citation 1 TAC §27.15: 1 indicates the title under which the agency appears in the *Texas Administrative Code*; *TAC* stands for the *Texas Administrative Code*; §27.15 is the section number of the rule (27 indicates that the section is under Chapter 27 of Title 1; 15 represents the individual section within the chapter).

**How to Update:** To find out if a rule has changed since the publication of the current supplement to the *Texas Administrative Code*, please look at the *Index of Rules*.

The *Index of Rules* is published cumulatively in the blue-cover quarterly indexes to the *Texas Register*.

If a rule has changed during the time period covered by the table, the rule's *TAC* number will be printed with the *Texas Register* page number and a notation indicating the type of filing (emergency, proposed, withdrawn, or adopted) as shown in the following example.

### TITLE 1. ADMINISTRATION Part 4. Office of the Secretary of State Chapter 91. Texas Register

1 TAC §91.1.....950 (P)

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